Art. III, § 49-e

Author's Comment

See the *Author's Comment* on Article III, Section 49-c.

Sec. 49-e. TEXAS PARK DEVELOPMENT FUND. The Parks and Wildlife Department, or its successor vested with the powers, duties, and authority which deals with the operation, maintenance, and improvement of State Parks, shall have the authority to provide for, issue and sell general obligation bonds of the State of Texas in an amount not to exceed Seventy-Five Million Dollars ($75,000,000). The bonds authorized herein shall be called "Texas Park Development Bonds," shall be executed in such form, denominations, and upon such terms as may be prescribed by law, provided, however, that the bonds shall bear a rate or rates of interest as may be fixed by the Parks and Wildlife Department or its successor, but the weighted average annual interest rate, as that phrase is commonly and ordinarily used and understood in the municipal bond market, of all the bonds issued and sold in any installment of any bonds, shall not exceed four and one-half percent (4 1/2%) interest per annum; they may be issued in such installments as said Parks and Wildlife Department, or its said successor, finds feasible and practical in accomplishing the purpose set forth herein.

All moneys received from the sale of said bonds shall be deposited in a fund hereby created with the State Treasurer to be known as the Texas Park Development Fund to be administered (without further appropriation) by the said Parks and Wildlife Department, or its said successor, in such manner as prescribed by law.

Such fund shall be used by said Parks and Wildlife Department, or its said successor, under such provisions as the Legislature may prescribe by general law, for the purposes of acquiring lands from the United States, or any governmental agency thereof, from any governmental agency of the State of Texas, or from any person, firm, or corporation, for State Park Sites and for developing said sites as State Parks.

While any of the bonds authorized by this provision, or any interest on any such bonds, is outstanding and unpaid, there is hereby appropriated out of the first moneys coming into the Treasury in each fiscal year, not otherwise appropriated by this Constitution, an amount which is sufficient to pay the principal and interest on such bonds that mature or become due during such fiscal year, less the amount in the interest and sinking fund at the close of the prior fisccal year, which includes any receipts derived during the prior fiscal year by said Parks and Wildlife Department, or its said successor, from admission charges to State Parks, as the Legislature may prescribe by general law.

The Legislature may provide for the investment of moneys available in the Texas Park Development Fund and the interest and sinking fund established for the payment of bonds issued by said Parks and Wildlife Department, or its said successor. Income from such investment shall be used for the purposes prescribed by the Legislature.

From the moneys received by said Parks and Wildlife Department, or its said successor, from the sale of the bonds issued hereunder, there shall be deposited in the interest and sinking fund for the bonds authorized by this section sufficient moneys to pay the interest to become due during the State fiscal year in which the bonds were issued. After all bonds have been fully paid with interest, or after there are on deposit in the interest and sinking fund sufficient moneys to pay all future maturities of principal and interest, additional moneys received from admission charges to State Parks shall be deposited to the State Parks Fund, or any successor fund which may be established by the Legislature as a depository for Park revenue earned by said Parks and Wildlife Department, or its said successor.

All bonds issued hereunder shall after approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under the Constitution of Texas.

Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such Acts shall not be void by reason of their anticipatory nature.

History

This section was added by amendment adopted on November 11, 1967. There have been no subsequent amendments to it.

Explanation

The section is one of a series of exceptions to the limitation on creating state debt imposed by Article III, Section 49. (Some of the other exceptions in this article are found in Secs. 49-b, 49-c, and 50b.)

In 1967 the legislature perceived a need to begin a program of land acquisition and development for park purposes, but funds from general revenue were not available. Enabling legislation that was passed at the same session as the proposed amendment provides for admission charges to state parks, which income is to be applied to pay the interest and create the sinking fund for redemption of the park development bonds issued under this section. (See Texas Legislative Council, *An Analysis of Constitutional Amendments for Election November 11, 1967* (Austin, 1967).)

A 1971 statute earmarked a portion of the state's cigarette tax revenue for use by the Parks and Wildlife Department to acquire and develop additional parks. (See Tex. Tax-Gen. Ann. art. 7.06(3).) It is unclear whether the earmarked taxes may be used to retire park bonds, but probably they are not needed since the development fund created by this section is given first crack at the state's revenue to pay off the bonds. (For discussion of this first-in-line-at-the-treasury device, see the *History* of Sec. 49-c of this article.)

Comparative Analysis

Missouri's Constitution requires an annual appropriation for acquisition, development, and maintenance of state parks. Florida authorizes special recreational districts to issue revenue bonds but requires the legislature to earmark revenue or tax sources to repay bonded indebtedness. The *Model State Constitution* is silent on this topic.

Author's Comment

Since parks will be enjoyed by taxpayers for many years, the use of bonds for their acquisition and development is a prudent use of the state's credit. Whether this kind of exception should be retained depends on what kind of debt limitation is included in any revised constitution. See the *Author's Comment* on Article III, Sections 49 and 49-b.

Sec. 50. LOAN OR PLEDGE OF CREDIT OF STATE. The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.

History

This section first appeared in 1876. The wording is unchanged from the draft as first presented to the 1875 Convention by the Committee on the Legislative Department. (*Journal,* at 164.) An amendment of the section was proposed in 1919 but was voted down. It would have permitted the use of the state's credit to assist people in acquiring or improving their homes. (Compare Sec. 49-b of this article, concerning veterans' land. See also the lettered sections following Sec. 50. They are in part "amendments" of the section.)

Explanation

Section 50 states that the legislature may not "give" the credit of the state to anybody, "lend" the credit of the state to anybody, or "pledge" the credit of the state for anybody. (See the following *Author's Comment* concerning the drafting of this section.) This is an involved and somewhat imprecise way of saying that the state may not aid anybody by lending him money; by providing him land, goods, or services on credit; or by guaranteeing payment to a third party who aids anybody by lending him money or providing him land, goods, or services on credit.

It has been said that Section 50 "is closely associated with and complements Section 49" because it prohibits creating debt indirectly. (2 *Constitutional Revision,* p. 260.) This is true only insofar as pledging credit is concerned, for that would create a contingent debt. Section 50 is more important as a complement to Section 51, which prohibits grants of money. It could be argued, for example, that a scholarship loan is not a "grant of public money," but it obviously is a giving of credit.

The second element of Section 50—prohibiting the extension of credit by deferring payment—has provided the only significant interpretation of this section. In 1937, the attorney general ruled that the treasurer could not send out cigarette, beer and liquor, or documentary stamps on consignment because that would be "lending the credit of the State" contrary to Section 50. (Tex. Att'y Gen. Op. No. 2996 (1937).) But in 1970, a court of civil appeals upheld a statute that permits a distributor to take up to 15 days to pay for cigarette tax stamps. The treasurer, presumably relying on the foregoing attorney general's opinion, had demanded cash on delivery. The court pointed out that even after 15 days the distributor was actually paying the tax in advance, for the ultimate consumer is the real taxpayer. Since the state was getting its money in advance anyway, the 15 days could hardly be called an extension of credit. (*McCarty v. James,* 453 S.W.2d 220 (Tex. Civ. App.—Austin 1970, *writ ref'd n.r.e.*).)

Other cases have cited Section 50, but, as noted in discussing Section 49 of this article, the situation is normally one where any Section 50 argument is subordinate to another constitutional infirmity. A case in point is *Terrell v. Middleton,* a leading and hard-fought case. (187 S.W. 367 (Tex. Civ. App.—San Antonio 1916), *writ ref'd per curiam,* 108 Tex. 14, 191 S.W. 1138; *rehearing denied,* 108 Tex. 14, 193 S.W. 139 (1917). This is also known as the "chicken salad" case.) This was a taxpayer's suit to enjoin the comptroller of public accounts from paying certain bills incurred by the governor in running the executive mansion and subsequently covered by a deficiency appropriation. The court concluded that the deficiency appropriation was a subterfuge to increase the governor's annual salary, which at that time was frozen at "$4,000, and no more." (See *History* of Sec. 5 of Art. IV.) In anticipation of this conclusion the comptroller argued that an appropriation to pay the governor more money would be additional compensation, but picking up the tab later was not. The court replied that in that event the state would be lending its credit in violation of Section 50. Although the *Middleton* case is cited for the proposition that the appropriation to pay the governor's bill was a violation of this section, this is true only because the appropriation was otherwise unconstitutional.

If the current interpretation of Section 51 of this article as set forth in the *Explanation* of that section is correct, it follows that today Section 50 is applicable only if the credit is for a private purpose.

Art. III, § 50a

Comparative Analysis

Most states have a prohibition on extending state credit to private groups. The prohibitions normally include corporations but usually do not include "municipal" or "public" as part of the characterization of corporation. (The *Index Digest* is not always clear on this point and it may be that there are more states that include municipal corporations than the *Index* shows. Moreover, there may be states where the courts have construed "corporation" to include municipal and other public corporations.) Many states have made exceptions to the prohibition in order to meet a public problem—housing, agricultural development, education, and welfare, for example. Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

As noted in the *History,* Section 50 is unchanged from the wording first presented to the 1875 Convention. This indicates that no one noticed the misplaced comma that makes the sentence ungrammatical. The second comma belongs after, not before "of." (The third comma should be omitted or another comma inserted after "or to.") There is no apparent reason for distinguishing between the power of the legislature to act directly or to authorize action. If somebody feared that a denial of power to lend would permit the legislature to authorize the treasurer to lend, the section could have been redrafted to start out: "the credit of the State shall not be given, lent, or pledged. . . ." This would have simplified the sentence and also avoided the omission of a prohibition against authorizing the pledging of credit. The structure of the sentence as it stands limits the denial of power to authorize to "giving or lending," but not to pledging.

One final puzzle in the drafting of Section 50 is why the forbidden recipients are called in the first half "any person, association or corporation, whether municipal or other," but in the second half are called "any individual, association of individuals, municipal or other corporation whatsoever."

Apart from all this close analysis of poor draftsmanship, one may raise the broad question as to why municipal corporations were included in the lending prohibition. The basic reason for Section 50 was to prevent the government from aiding private parties in their grandiose schemes to build railroads and other internal improvements. Section 52 stops municipal corporations from doing this. Thus, there was no occasion to forbid the state to bail out profligate municipalities that might underwrite internal improvements. But, someone might argue, municipal corporations might go wildly into debt if they did not know that the state could not bail them out. This will not wash, however, for the original limitations on municipal taxing power under Sections 4 and 5 of Article XI, combined with the practical limitation on going into debt contained in Section 7 of that article, made wild borrowing well-nigh impossible. One can only conclude that some draftsman in the 1875 Convention was so intent on ending government profligacy that he blindly included everything he could think of. The pity of the blindness is that it gave rise to the ridiculous social security flap that necessitated Section 51g of this article.

For a discussion of the advisability of a provision like Section 50, see the *Author's Comment* on Section 51.

Sec. 50a. STATE MEDICAL EDUCATION BOARD; STATE MEDICAL EDUCATION FUND; PURPOSE. The Legislature shall create a State Medical Education Board to be composed of not more than six (6) members whose qualifications, duties and terms of office shall be prescribed by law. The Legislature shall also establish a State Medical Education Fund and make adequate appropriations therefor to be used by the State Medical Education Board to provide grants, loans or scholarships to students desiring to study medicine and agreeing to practice in the rural areas of this State, upon such terms and conditions as shall be prescribed by law. The term "rural areas" as used in this Section shall be defined by law.

History

This section was added by amendment adopted in November 1952.

Explanation

Apparently this section was added as an exception to the several prohibitions against appropriations to private individuals. (See, *e.g.*, Art. III, Sec. 51; Art. XVI, Sec. 6.) The amendment was designed to provide incentives for doctors to practice in the rural areas of the state, but the State Medical Education Board was not created until 1973. (See Tex. Rev. Civ. Stat. Ann. art. 4498b.) Almost 20 years after the original section was added, the attorney general approved a statute authorizing tuition equalization grants to students in private colleges and universities (Tex. Att'y Gen. Op. No. M-861 (1971).)

Comparative Analysis

The Georgia Constitution has a similar but more detailed provision.

Author's Comment

Clearly no constitutional authorization is needed to establish a rural medical education board. Providing scholarsips, grants, or loans to medical students who agree to practice in the rural areas of the state is just as clearly a public purpose, so the entire section could be deleted.

Sec. 50b. STUDENT LOANS. (a) The Legislature may provide that the Coordinating Board, Texas College and University System, or its successor or successors, shall have the authority to provide for, issue and sell general obligation bonds of the State of Texas in an amount not to exceed Eighty-five Million Dollars ($85,000,000). The bonds authorized herein shall be called "Texas College Student Loan Bonds," shall be executed in such form, denominations and upon such terms as may be prescribed by law, provided, however, that the bonds shall not bear more than four per cent (4%) interest per annum; they may be issued in such installments as the Board finds feasible and practical in accomplishing the purposes of this Section.

(b) All moneys received from the sale of such bonds shall be deposited in a fund hereby created in the State Treasury to be known as the Texas Opportunity Plan Fund to be administered by the Coordinating Board, Texas College and University System, or its successor or successors to make loans to students who have been admitted to attend any institution of higher education within the State of Texas, public or private, including Junior Colleges, which are recognized or accredited under terms and conditions prescribed by the Legislature, and to pay interest and principal on such bonds and provide a sinking fund therefor under such conditions as the Legislature may prescribe.

(c) While any of the bonds, or interest on said bonds authorized by this Section is outstanding and unpaid, there is hereby appropriated out of the first moneys coming into the Treasury in each fiscal year, not otherwise appropriated by this Constitution, an amount sufficient to pay the principal and interest on such bonds that mature or become due during such fiscal year, less the amount in the sinking fund at the close of the prior fiscal year.

(d) The Legislature may provide for the investment of moneys available in the Texas Opportunity Plan Fund, and the interest and sinking funds established for the payment of bonds issued by the Coordinating Board, Texas College and University System, or its successor or successors. Income from such investment shall be used for the purposes prescribed by the Legislature.

(e) All bonds issued hereunder shall, after approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under this Constitution.

(f) Should the Legislature enact enabling laws in anticipation of the adoption of this Amendment, such acts shall not be void because of their anticipatory nature.

History

Section 50b was adopted in 1965, 50 years after the first and only other attempt to establish a loan fund for Texas students. The 1915 proposal provided for loans to both public school and college students and would have financed a loan fund with ad valorem taxes rather than bond sales, which perhaps explains its defeat at the polls. The creation of the State Medical Education Fund in 1952 (Art. III, Sec. 50a), to provide loans and scholarships to medical students, did, however, establish a precedent for a student loan program in Texas.

Explanation

Section 50b is necessitated not only by Article III, Section 49, prohibiting state debt, but perhaps also by Sections 50 and 51, forbidding state grants and loans to individuals. The section establishes the Texas Opportunity Plan Fund, from which loans are made to Texas students attending public and private institutions of higher education (including junior colleges), and authorizes the sale of $85 million in general obligation bonds to finance the loan program. The loan program is administered by the Coordinating Board, Texas College and University System, in accordance with implementing legislation. (Education Code ch. 52.) Section 50b also includes an "automatic" appropriation feature similar to that provided in Section 49-c for water development bonds. Interest was limited to 4 percent, but Section 50b-1, adopted subsequently, supersedes this limitation. (See the *Explanation* of Sec. 50b-1.)

The Opportunity Plan Fund (together with the sinking fund) has assets totaling about $156 million. To date more than $150 million in student loans have been made, and $171.5 million of the $285 million in bonds authorized by Sections 50b and 50b-1 have been issued. ("Official Notice of Sale, Series 1975 Loan Bonds" (Dallas: First Southwest Co., Investment Bankers, 1975), pp. 4, 9, 11.)

Comparative Analysis

No other state constitution was found to contain a provision comparable to Section 50b, and of course the *Model State Constitution* is silent on the subject. At the time of the adoption of the Texas Opportunity Plan, no other state provided direct, state-financed loans to students.

Author's Comment

As with the previous constitutional bond authorizations (Secs. 49b, 49-c, 49-d, 49-d-1, and 49e of this article), even without revision of the debt and spending limitations, Sections 50b and 50b-1 can be substantially simplified by eliminating all the unnecessary statutory verbiage. Once again, the special Opportunity Plan Fund is unnecessary, and the object of these two sections can be accomplished by merely authorizing the bonds and stating their purpose. (See the *Author's Comment* on Secs. 49-b and 49-c.)

Sec. 50b-1. ADDITIONAL STUDENT LOANS. (a) The Legislature may provide that the Coordinating Board, Texas College and University System, or its successor or successors, shall have authority to provide for, issue and sell general obligation bonds of the State of Texas in amount not to exceed Two Hundred Million Dollars ($200,000,000) in addition to those heretofore authorized to be issued pursuant to Section 50b of the Constitution. The bonds authorized herein shall be executed in such form, upon such terms and be in such denomination as may be prescribed by law and shall bear interest, and be issued in such installments as shall be prescribed by the Board provided that the maximum net effective interest rate to be borne by such bonds may be fixed by law.

(b) The moneys received from the sale of such bonds shall be deposited to the credit of the Texas Opportunity Plan Fund created by Section 50b of the Constitution and shall otherwise be handled as provided in Section 50b of the Constitution and the laws enacted pursuant thereto.

(c) The said bonds shall be general obligations of the state and shall be payable in the same manner and from the same sources as bonds heretofore authorized pursuant to Section 50b.

(d) All bonds issued hereunder shall, after approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under this Constitution.

(e) Should the Legislature enact enabling laws in anticipation of the adoption of this Amendment such acts shall not be void because of their anticipatory nature.

History

At the time Section 50b-1 was added in 1969, there remained available for issuance some $46 million of the original $85 million authorized by Section 50b, and projections indicated that the $46 million would be sufficient to carry the student loan program only through 1971.

Explanation

An additional $200 million in bonds was authorized, but, unlike Section 50b, which limited the interest rate to 4 percent, this section is more realistic in that it permits the coordinating board and legislature to set interest rates for the new bonds. (See also the *Explanation* of Art. III, Sec. 65.)

Comparative Analysis

No other state constitution contains a provision resembling this section.

Author's Comment

See the *Author's Comment* on Section 50b.

Sec. 51. GRANTS OF PUBLIC MONEY PROHIBITED; EXCEPTIONS. The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided, however, the Legislature may grant aid to indigent and disabled Confederate soldiers and sailors under such regulations and limitations as may be deemed by the Legislature as expedient, and to their widows in indigent circumstances under such regulations and limitations as may be deemed by the

Legislature as expedient; provided that the provisions of this Section shall not be construed so as to prevent the grant of aid in cases of public calamity.

History

This grants prohibition dates from the 1875 Convention. (But see the *History* of Sec. 6 of Art. XVI for a related prohibition in earlier constitutions.) The section as originally adopted consisted of the words up to the first semicolon plus the proviso at the end concerning public calamities.

The original 1876 Constitution contained an exception to the grants prohibition in the form of a section authorizing the legislature to provide small pensions to indigent soldiers who fought for independence from Mexico, to indigent signers of the Declaration of Independence of Texas, and to their widows remaining unmarried. (This was Sec. 55 of Art. XVI which was repealed for obvious reasons in 1969.) In 1894, the first of many welfare amendments was adopted. It provided that the legislature could "grant aid to the establishment and maintenance of a home for indigent and disabled Confederate soldiers or sailors who are or may be bona fide residents. . . ." No more than $100,000 a year could be granted for this purpose. (See the following *Author's Comment* for a discussion of this curious provision.)

Four years later a second Confederate amendment was adopted. Without a great deal of historical research it is not possible to be sure what was happening, but one can speculate that the Confederate home was inadequate and that Confederate veterans were moving to Texas to get into the home. The amendment limited aid to indigent and disabled Confederate soldiers and sailors "who came to Texas prior to January 1st, 1880." The amendment also authorized direct "aid" to individuals in addition to "aid" for establishment of a home, but, naturally, "no inmate of said home" could receive any other aid from the state. Various other restrictions showed up. Direct grants were not to exceed $8 a month. Covered under these grants were veterans "who are either over sixty years of age, or whose disability is the proximate result of actual service in the Confederate army for a period of at least three months." Widows also were covered for direct aid but only if (a) "in indigent circumstances," (b) "never re-married," (c) bona fide residents prior to March 1, 1880, and (d) married to such soldiers or sailors "anterior" (!) to March 1, 1866. The amendment put an annual ceiling of $250,000 for the "purpose hereinbefore specified," but went on to include a ceiling of $100,000 for the veterans' home. It is not clear whether the $100,000 was included in the $250,000 or was in addition to it.

This new grant program lasted for six years. In 1904 another amendment was adopted. This one increased the maximum from $250,000 to $500,000 but preserved the $100,000 for the veterans' home in the same ambiguous wording. A new group of widows was allowed in. The magic marriage date was changed from March 1, 1866 to March 1, 1880, the same date as the residency cut-off.

Three years later an effort was made to get wives, widows, and "women who aided in the Confederacy" into the veterans' home. Although the words "under such regulations and limitations as may be provided by law" were retained, somebody thought it necessary or appropriate specifically to authorize the legislature to "provide for husband and wife to remain together in the home." The amendment increased the annual maximum from $100,000 to $150,000. (This change leads one to believe that the ceiling amount was in addition to the ceiling for the "purpose hereinbefore specified" since no change was made in that ceiling.) The amendment lost by the close vote of 41,079 to 43,732. This was a special election at which four other amendments were voted upon, all defeated by margins of three to one or greater. This was obviously a "coat-tail" phenomenon, for three years later the same amendment was adopted by a vote of 113,549 to 28,534. This was at a general election at which no other amendments were considered. (See Marburger, p. 16.)

This new deal lasted only two years. In 1912 a new amendment was adopted. This one removed the ceilings and the $8 a month maximum and substituted the power to levy a property tax, "in addition to all other taxes heretofore permitted by the Constitution of Texas," not exceeding 5¢ on the $100 valuation for the purpose of creating a "special fund for the payment of pensions." (This would seem to mean that the special fund was not to be used to maintain the veterans' home and that there was no limit on how much could be spent on the home. But at this late date, who knows what the amendment meant?) The amendment changed the date of arrival in Texas from January 1, 1880 for men and March 1, 1880 for widows to January 1, 1900 for both sexes. The magic marriage date was also moved to "anterior" to January 1, 1900, but young widows were excluded—no one born "since 1861" could qualify as a widow. (Any widow under age 50, therefore, was considered "young.") The amendment also expanded the definition of soldier to include those who for at least six months during the War between the States either served in the Texas militia or in "organizations" for the protection of the frontier against Indian raids or Mexican marauders. The minimum pension age of 60 and the definition of "disabled" were dropped. Finally, for no apparent reason, the public calamity proviso was dropped.

Things remained unchanged until 1924, but only because amendments went down to defeat in 1919 and again in 1921. The two defeated amendments and the successful one in 1924 were identical except for one date—the 1917 proposal would not have let a widow be born after 1866 whereas the other two retained the original "after 1861." (There were idiosyncratic variations among the three versions in the usual bad punctuation of Texas amendments.) There were four substantive changes: (1) the residency and marriage date was moved from 1900 to 1910; (2) the minimum six months' service requirement in the militia and frontier organizations was dropped; (3) the levy was made 7¢ instead of 5¢ and changed from an authorization to a direct levy with legislative power to decrease the tax; and (4) the public calamity proviso was reinstated.

The next amendment was adopted in 1928. It simply dropped the residency and marriage dates and deleted the prohibition against pensions for "young" widows. A 20-year-old woman could now marry an 80-year-old veteran and feel secure that she could qualify for a pension—if she were in indigent circumstances, of course. Things remained the same in Section 51 until 1968, but only in the sense that the words of the section remained unchanged. Evidently, the special Confederate fund grew too large. For five years beginning in 1943, the levy was reduced from 7¢ to 2¢. (See Anderson and McMillan, *Financing State Government in Texas,* at p. 54.) In 1947, Section 17 of Article VII was adopted. The first paragraph thereof "amended" Section 51 by levying a 2¢ tax but with legislative authority to reduce the tax.

Evidently, the Confederate fund still continued to generate too much money, for in 1954 Section 51-b of this article was added. It "amended" Section 51 by killing off the special fund, in effect, but directed that the pensions continue to be paid. (See *Explanation* of Sec. 51-b.)

In 1958, Section 66 of Article XVI was added. It "amended" Section 17 of Article VII by directing payment of Texas Ranger pensions from the special Confederate fund. (This appears inconsistent with killing off the fund in the preceding paragraph. Presumably the drafter forgot that the "fund" as such had been abolished.)

In 1968, the current version of Section 51 was adopted. Simultaneously, Section 1-e of Article VIII was adopted. It "amended" both Section 51 and Section 17 of Article VII. Among other things, Section 1-e kills the 2¢ tax as of December 31, 1976, and directs that, if in the meantime the legislature establishes a new trust fund for Confederate veterans, Texas Rangers, and their widows, the 2¢ tax is to be dropped forthwith.

Explanation

Section 51 is three things and at one time was four things. First, and principally, it is a limitation on the power of the state, acting through the legislature, to dispense money. Second and third, the section contains two exceptions to that limitation—Confederate pensions and aid in case of a public calamity. Fourth, from 1912 to 1947, the section contained an operative exception to a different limitation—the power of the state to raise money by levying a tax on property. (This is all very confusing. Section 51 contained the words of the exception until the 1968 amendment, but Section 17 of Article VII took over the tax in 1947.)

Prohibitions on grants and loans for private purposes came into state constitutions in the 19th century as a reaction principally against giving away the public domain to builders of railroads, canals, and other "internal improvements." These giveaways had usually been obtained by gross corruption of legislatures. The reaction to this was so strong that the resulting prohibitions were frequently cast in extremely restrictive language. This was the case in 1875; the convention not only used harsh language, it kept saying the same thing over and over again. (In addition to Sec. 51, there are Secs. 50 and 52 of this article, Sec. 3 of Art. VIII, Sec. 3 of Art. XI, and Sec. 6 of Art. XVI. Moreover, Secs. 44, 53, 54, and 55 of this article are analogous prohibitions flowing from this same reaction.) The problem with these extreme formulations is that they soon get in the way of all sorts of governmental action that is arguably for a public purpose but looks like a "grant." The Texas story of these sections over the last hundred years has been one of extreme rigidity in some areas, considerable inconsistency in others, and general confusion across the board. Fortunately, over the past 20 years the courts have been pointing the way toward clearing up the confusion by a simple rule: if the grant is for a public purpose the grant is constitutional. Although this is now the principal controlling rule, it is appropriate to discuss another rule that has been used to avoid the prohibition and can continue to be used.

The thrust of the new rule is to say that there are "good" grants, those for a public purpose, and "bad" grants, those for a private purpose. Another approach is to distinguish between a grant and what appears to be but really is not a grant. The formal rule is that a grant is not a grant if the state receives a "quid pro quo." This can be easily illustrated if, as in some state constitutions, the word "gift" is substituted for "grant." If one says "You're a nice person, I'll give you ten dollars," one has made a gift. But if one says "You're a nice person, I'll give you ten dollars if you'll whitewash the fence," one has made a promise that is enforceable if the person whitewashes the fence. Although the verb "give" is used in both cases, the verb has distinct meanings. Likewise, there is a difference between a statute that "grants" a pension to veterans because they served in the armed forces and a statute that promises to "grant" a pension to employees who work for the state for a specified minimum number of years. If the "grant" is announced in advance and requires something in return, there is a quid pro quo and the "grant" has become something else.

The only clear instance of judicial reliance on this "quid pro quo" rule is the landmark pension case of *Byrd v. City of Dallas* discussed in the *Explanation* of

Section 48a of this article. There the commission of appeals made it clear that a pension plan announced in advance is part of the employee's compensation. There are other cases that can be brought under either the "quid pro quo" or the "public purpose" rule, but only because of the fuzzy way in which the court discussed the issue. Consider, for example, *Weaver v. Scurry* (28 S.W. 836 Tex. Civ. App. 1894, *no writ*). A state law authorized counties to pay cash bounties for the killing of predatory animals. The court upheld the statute against an attack based on Sections 51 and 52, stating that the bounty was a proper means "by which the public calamity wrought by these animals is to be averted." This is to say that there is no "grant" because the government got something in return. (It should be noted that this one-page opinion succeeded in confusing everything. Note the words "public calamity" in the quotation, presumably a reference to the public calamity exception in Sec. 51. Moreover, the court cited Sec. 23 of Art. XVI as bringing "the enactment within the scope of legislative powers." This might imply that Sec. 23 created an exception to Secs. 51 and 52.)

An even more obscure case is *Housing Authority v. Higginbotham* (135 Tex. 158, 143 S.W.2d 79 (1940)). This case involved an attack, on multiple constitutional grounds, on a state statute authorizing subsidized housing for the poor. The court set out at length the legislative declaration of necessity and relied upon the declaration's assertion that slum clearance would cut down disease and crime and in other ways benefit the entire state. This declaration was used to support the "public use" necessary to justify exercising the power of eminent domain. Later in the opinion the court disposed of the grants-and-loans argument thus: "It necessarily follows from the above holding that the law is not violative of Sections 52 and 53. . . ." (135 Tex. at 168, 143 S.W.2d at 86. Presumably the court meant Secs. 51 and 52.) There is no way of telling whether the court meant that the benefits to the state were a quid pro quo or that a grant is not a grant if it is for a public purpose.

At first blush this appears to be logic chopping of the worst sort. What difference does it make whether a general benefit to the state is called a "quid pro quo" that takes a grant out of the "giveaway" class or is called a "public purpose" and thereby makes the grant constitutional because it is not for a private purpose? In a practical sense there is no difference. As a matter of logical constitutional interpretation there is a profound difference. Sections 3 of Article VII and 6 of Article XVI prohibit spending for a private purpose. If one follows the standard rule that drafters of legal documents mean what they say, Sections 51 and 52 prohibit grants to private individuals whether for a private or a public purpose. Otherwise, the sections are redundant. The "quid pro quo" rule permits one to use the public purpose as if it were consideration for the grant, thus making the action analogous to a contract and taking it out of the giveaway category.

Be all this as it may, Sections 50, 51, and 52 are now to be applied as if they read: "No grant or loan may be made to any person, etc., for a private purpose." There is a line of cases that permits one to reach this conclusion. The first is *Bexar County v. Linden,* a case which has only the remotest rational connection with Section 51. (The case is discussed in the *Explanation* of Sec. 1 of Art. XI.) In the course of the opinion the supreme court said: "The giving away of public money, its application to other than strictly governmental purposes, is what the provision is intended to guard against" (110 Tex. 339, 344, 220 S.W. 761, 762 (1920)).

The next significant case was, paradoxically, the clear-cut "quid pro quo" pension case of *Byrd v. City of Dallas.* In the course of developing the argument that a pension plan is part of compensation, the court said: ". . . , if it is a part of the compensation of such employee for services rendered to the city, *or if it be for a public purpose,* then clearly it is a valid exercise of the legislative power." (118

Tex. 28, 36, 6 S.W.2d 738, 740 (1928) (emphasis added).) Subsequent cases that seem to support this new "public purpose" rule include *Davis v. City of Lubbock* (160 Tex. 38, 326 S.W.2d 699 (1959)); *State v. City of Austin* (160 Tex. 348, 331 S.W.2d 737 (1960)); and *Harris County v. Dowlearn* (489 S.W.2d 140 (Tex. Civ. App.—Houston [14th Dist.] 1972, *writ ref'd n.r.e.*)).

Actually, the attorney general is principally responsible for taking the cited cases and drawing the new rule from them. In one recent letter advisory, he said: "Expenditures for a true public purpose do not violate Article III, Section 51 of the Constitution. . . , even when a private agency is used to achieve the purpose" (Tex. Att'y Gen. Letter Advisory No. 6 (1973)). And again: ". . . Section 52 does not prohibit the grant of funds or property or credit for a public purpose" (Tex. Att'y Gen. Letter Advisory No. 9 (1973)). (See also Tex. Att'y Gen. Op. Nos. H-120 (1973); M-391 (1969); C-584 (1966); C-530 (1965).)

Under the new rule, the question is, of course, whether the grant or loan is for a public purpose. In a sense this is no more than asking whether the public benefit is too remote, indirect, or general to serve as a "quid pro quo." In 1973 the attorney general refused to approve an issue of revenue bonds by the City of McAllen for the purchase of land to be used for industrial development. (In 1968 an amendment permitting this had been defeated. See the *History* of Sec. 52.) The city sought leave to file a mandamus action to compel approval of the bonds, but the supreme court overruled the city's motion (*City of McAllen v. Hill,* No. B-4315, 17 Tex. Sup. Ct. J. 128). In a 1974 opinion on an analogous proposal, the attorney general discussed his earlier refusal to approve the McAllen revenue bonds and concluded: ". . . it is not considered a public purpose within this legal context, when municipal credit is used to obtain for the community and its citizens the general benefits resulting from the operation of a private industry." (See Tex. Att'y Gen. Op. No. H-357 (1974).) The question raised in Opinion No. H-357 was whether a city could give a promissory note to the United States for surplus land under terms that precluded the city from ever being liable on the note. The note was to be paid off out of rents received for the use of, or proceeds from sales of, the land. As in the case of McAllen, the land would be used for industrial purposes. The attorney general's conclusion was: "It is not constitutionally permissible for a city to purchase land for future industrial development by means of a promissory note to be paid out of revenues generated by the land without recourse to the city when the benefit to the public from such a purchase is such benefit as may be derived from the attraction of new industry."

It is fair to speculate whether opinions such as this would be forthcoming if the constitution contained no "grants and loans" prohibition. Would it be so clear that a lending of municipal credit in order to further the general well-being of the community and to increase the city's tax base was not for a public purpose if the constitution were silent about whom the credit was extended to? Obviously, what is a public purpose is a matter of judgment. Even under the new rule that any grant or lending of credit is constitutional if the grant or loan is for a public purpose, it seems likely that Sections 50, 51, and 52 will have some influence on the person trying to make a judgment about whether a public purpose is involved.

To put it another way, old habits are hard to break; people frequently look at problems the same way that they always did. Consider, for example, the attorney general's advice concerning a bill that would indemnify members, officers, and employees of the legislature against financial loss arising out of a claim based on negligence or other acts resulting from the maintenance of order in the legislature. The attorney general said: " Our Constitution prohibits grants of public moneys to an individual in Sec. 51 of Article III. If the state itself is liable for the loss, indemnification would be valid but if there is no liability upon the part of the State as where a claim is barred by governmental immunity, the use of public money to pay a claim owed by an individual is a gift or donation in violation of the Constitution." (Tex. Att'y Gen. Letter Advisory No. 33 (1973). See also Tex. Att'y Gen. Op. No. H-70 (1973).) This sounds like the workmen's compensation problem all over again. (See the *History* of Sec. 59 of this article.) Indemnification becomes a grant because the state may assert the common law rule of sovereign immunity. (See the following *Author's Comment.*)

But the real problem is that the attorney general apparently forgot his earlier statement: "Expenditures for a true public purpose do not violate Article III, Sec. 51 of the Constitution." It can certainly be argued convincingly that a public purpose is served if the state tells its employees that they may carry out their duties without fear of financial loss. The public interest is not served if employees are afraid to do their job for fear that they will be sued and that their employer will not pick up the tab. (See also Tex. Att'y Gen. Op. No. H-15 (1973) where the attorney general implies that a death benefit payable to the beneficiaries of a deceased county employee would be a prohibited grant under Sec. 52. There is no discussion of public purpose.)

There remains the question of the meaning of the new "public purpose" rule as it applies to grants to municipal corporations—a term which, in effect, means any local government. In the normal sense of the term, a grant by the state to a county, a city, a school district, or any other political subdivision could hardly be for a "private purpose." Presumably, the new statement of the rule equates "public purpose" with "state purpose." In other words, the state can grant money to a local government engaged in activity of interest to the state, but not for activity of interest only to the local government. For example, a grant to a city for a sewage treatment plant might be for a state public purpose whereas a grant to the same city to buy a privately owned public utility might be considered a "private" purpose. (But see the following *Author's Comment.*)

Finally, this new equating of Section 51 with public purposes leaves the public calamity exception out in left field. Since a public calamity is a public purpose par excellence, the exception has withered away. But then the exception apparently is really only an exception to Section 6 of Article VIII, which limits appropriations to two years. In *Dallas County v. McCombs,* the supreme court disallowed a five-year state grant of state ad valorem taxes to counties during the Great Depression. The ground was the violation of Section 6 of Article VIII. Other instances of long-term grants of such taxes were distinguished because they were for real public calamities whereas in the case before the court the legislative declaration of calamities was too general to qualify under Section 51. (135 Tex. 272, 140 S.W.2d 1109 (1940).)

Comparative Analysis

About half the states have a grants and loans prohibition. Some of the states have added exceptions, usually in terms of aiding the poor. Two of the newest constitutions, Illinois and Montana, omit the earlier restrictions, both of which were aimed directly at aid to railroads. The new Louisiana Constitution preserves the prohibition with a typical set of exceptions. Neither the *Model State Constitution* nor the United States Constitution has a comparable provision.

Author's Comment

One wonders whether the 1894 amendment mentioned above is the first Critz theory amendment. (See *Author's Comment* on Sec. 62 of Art. XVI.) In the light of Section 2 of Article XI calling for the establishment of county poor houses and farms, there could hardly have been any doubt that the state had the power to operate a poor house for Confederate veterans. One can only conclude that the amendment was a device to get public approval of the program. Once the unnecessary provision got into the constitution, every change would naturally follow the same route.

It was suggested earlier that a grant to a municipal corporation to buy a private public utility might be considered for a "private purpose." Actually, the problem of grants to municipal corporations should be considered a problem of general versus local laws. If the state offered grants to any and all municipalities that wished to carry out some local "proprietary" function, there would be no need to argue that a private purpose was involved. (For "proprietary functions," see *Explanation* of Sec. 1 of Art. XI.) If the grant were only to cities with populations between 192,567 and 192,569, the better approach would be to strike down the law as local rather than say that it was a grant for a private purpose. In any event, revenue sharing is now "in." A Section 51 prohibiting grants to local governments is a restriction whose time has gone.

It was also suggested that, notwithstanding the new "public purpose" broom, the "grants and loans" muddle has not been wholly swept away. The recent letter advisory discussed earlier (Tex. Att'y Gen. Letter Advisory No. 33) demonstrated that the sovereign immunity doctrine is stronger than "public purpose." If the state abandoned sovereign immunity there would be no Section 51 problem. To indemnify a public officer or employee for acts for which his employer, the government, is not liable would be spending money for a "private" purpose. But a law that indemnifies the officer or employee for acts for which the government would be liable if it were to waive its immunity is in effect an indirect waiver of immunity and an expenditure for a public purpose.

It must be conceded that an agency of the state has no authority to carry liability insurance to cover a tort which is not covered by the Tort Claims Act, for that would be thwarting the legislative policy not to waive immunity. But even here, it is not appropriate to rely on Section 51. The vice is not a grant for a private purpose but an unauthorized administrative act. On this basis the attorney general's opinion cited previously (Tex. Att'y Gen. Op. No. H-70 (1973)) is undoubtedly correct; his reliance on Sections 51 and 52 is subject to question. If the legislature specifically authorizes liability insurance for an act for which the government could be held liable absent sovereign immunity, Sections 51 and 52 are red herrings diverting attention from the real issue of indirect waiver of sovereign immunity. (See also the *Author's Comments* on Sec. 59 of this article and Sec. 1 of Art. XI.)

Assuming that today Section 51 means simply that money can be spent only for a public purpose, then the section should be dropped. A requirement that public money be spent for public purposes is reasonable. It is not reasonable to state the requirement several different ways, especially if one of the ways is literally saying something else. (For an exposition of the more traditional distinction between "public purpose" and "grants and loans," see Willatt, "Constitutional Restrictions on Use of Public Money and Public Credit," 38 *Texas Bar J.* 413 (1975).)

Sec. 51-a. ASSISTANCE GRANTS AND MEDICAL CARE FOR NEEDY AGED, DISABLED AND BLIND PERSONS, AND NEEDY CHILDREN; FEDERAL FUNDS; SUPPLEMENTAL APPROPRIATIONS. The Legislature shall have the power, by General Laws, to provide, subject to limitations herein contained, and such other limitations, restrictions and regulations as may by the Legislature be deemed expedient, for assistance grants to and/or medical care for, and for rehabilitation and any other services included in the federal laws as they now read or as they may hereafter be amended, providing matching funds to help such families and individuals attain or retain capability for independence or self-care, and for the payment of assistance grants to and/or medical care for, and for rehabilitation and other services to or on behalf of:

(1) Needy aged persons who are citizens of the United States or noncitizens who shall have resided within the boundaries of the United States for at least twenty-five (25) years;

(2) Needy individuals who are totally and permanently disabled by reason of a mental or physical handicap or a combination of physical and mental handicaps;

(3) Needy blind persons;

(4) Needy dependent children and the caretakers of such children.

The Legislature may prescribe such other eligibility requirements for participation in these programs as it deems appropriate.

The Legislature shall have authority to enact appropriate legislation which will enable the State of Texas to cooperate with the Government of the United States in providing assistance to and/or medical care on behalf of needy persons, in providing rehabilitation and any other services included in the federal laws making matching funds available to help such families and individuals attain or retain capability for independence or self-care, to accept and expend funds from the Government of the United States for such purposes in accordance with the laws of the United States as they now are or as they may hereafter be amended, and to make appropriations out of state funds for such purposes; provided that the maximum amount paid out of state funds to or on behalf of any needy person shall not exceed the amount that is matchable out of federal funds; provided that the total amount of such assistance payments only out of state funds on behalf of such individuals shall not exceed the amount of Eighty Million Dollars ($80,000,000) during any fiscal year.

Supplementing legislative appropriations for assistance payments authorized by this Section, the following sums are allocated out of the Omnibus Tax Clearance Fund and are appropriated to the State Department of Public Welfare for the period beginning September 1, 1969 and ending August 31, 1971: Three Million, Six Hundred Thousand Dollars ($3,600,000) for Old Age Assistance, Two Million, Five Hundred Thousand Dollars ($2,500,000) for Aid to the Permanently and Totally Disabled, and Twenty-Three Million, Nine Hundred Thousand Dollars ($23,900,000) for Aid to Families with Dependent Children. Such allocations and appropriations shall be made available on the basis of equal monthly installments and otherwise shall be subject to the provisions of currently existing laws making allocations and appropriations for these purposes.

Provided further, that if the limitations and restrictions herein contained are found to be in conflict with the provisions of appropriate federal statutes as they now are or as they may be amended to the extent that federal matching money is not available to the state for these purposes, then and in that event the Legislature is specifically authorized and empowered to prescribe such limitations and restrictions and enact such laws as may be necessary in order that such federal matching money will be available for assistance and/or medical care for or on behalf of needy persons.

Nothing in this Section shall be construed to amend, modify or repeal Section 31 of Article XVI of this Constitution; provided further, however, that such medical care, services or assistance shall also include the employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer nor to prescribe any drug or physical treatment whatsoever, unless such optometrist is a regularly licensed physician or surgeon under the laws of this state.

History

The first Section 51-a (then designated "51a") was adopted in 1933. It authorized ten-year bonds in the amount of not more than $20 million with a proviso that the interest and principal should be paid "from some source other than a tax on real property and the indebtedness as evidenced by such bonds shall never become a charge against or lien upon any property, real or personal, within this State." The proceeds from these less than full faith and credit bonds were for welfare as set out in a nonsentence: "The proceeds of the sale of such bonds to be used in furnishing relief and work relief to needy and distressed people and in relieving the hardships resulting from unemployment, . . ."

That original section, it should be noted, did not authorize the legislature to provide a system of welfare grants. The legislature could authorize the distribution of up to $20 million to the needy. When the money had been distributed, the legislature's power would end.

In 1935, a Section 51-b was added. It permitted cash grants not to exceed $15 a month to actual bona fide citizens of Texas over 65 years of age, residents of the state for five of the nine years preceding the date of application and continuously for the year preceding such application, but not to habitual criminals, habitual drunkards while habitual drunkards, or inmates of state-supported institutions while inmates. The section also authorized the legislature to accept financial aid for old-age assistance from the United States "not inconsistent with the restrictions hereinbefore provided."

In 1937, a Section 51-c was added. It permitted cash grants not exceeding $15 a month to needy blind persons over 21 years of age who were actual bona fide citizens of Texas. The residence requirements set out earlier were repeated as were the exclusions except that habitual drunkards were excluded absolutely and not just while habitual drunkards. The authority to accept federal money was repeated.

A Section 51d was added at the same time. It permitted cash grants to destitute children under 14 years of age not exceeding $8 a month for one child or $12 a month for a single family with more than one child. The section differed from Sections 51-b and 51-c in two important respects. The legislature was given the power to determine all restrictions and limitations, including residence requirements, other than the $8 and $12 maximums. The section also included an annual aggregate ceiling on child assistance of $1.5 million. The authority to accept federal money was repeated.

In 1945, "Sections 51a, 51b, 51c and 51d" were amended "so that the same shall hereafter consist of one section to be numbered 51a." (Obviously, the reference to "51b" and "51c" meant "51-b" and "51-c.") Apart from the economy of words, the consolidation effected several other changes:

(1) Habitual criminals and habitual drunkards were dropped from the exclusions;

(2) The legislature's power to set restrictions and limitations was made applicable to all three categories—old-age, blind, and children—and the power to set residence requirements for destitute children was withdrawn;

(3) The residence requirement for "needy" (formerly "destitute") children under 16 (formerly 14) was set at one continuous year for all children except those under one-year-old in which case one continuous year was required of the mother;

(4) The maximum for old-age assistance was increased from $15 to a maximum payable out of state funds of $20 and the $15 maximum for the needy blind and the $8 and $12 maximums for children were removed altogether;

(5) The maximum aggregate of $1.5 million a year for children was replaced by an aggregate maximum of $35 million for all three categories; and

(6) The authority to accept federal funds was qualified by a proviso that the amount payable to any person out of state funds could not exceed the amount received from the United States for such person.

In 1951, a new Section 51a was proposed but was defeated at the polls. There were two monetary changes in the proposal: an increase in the old-age assistance from a maximum of $20 to $30 a month and an increase in the annual aggregate from $35 million to $42 million. There were three other proposed changes. One turned the residence requirements upside down. Instead of stating that no payment could be made unless the minimum residence requirement was met, the proposal stated that no payment could be denied to a person who met the residence requirement. This would have changed the residence requirement from a minimum that the legislature might have been able to make longer to an absolute minimum that the legislature could not touch. In the course of drafting this change the qualification of "actual bona fide citizen of Texas" was dropped. A second proposed change was a long paragraph concerning the eligibility of old people who owned property but disposed of it for less than fair market value. The third change proposed to lower the minimum age for assistance to the needy blind from over 21 to over 16.

In 1954 another new Section 51a was proposed and, this time, was accepted by the voters. The amendment reverted to the 1945 version in every respect except for an increase in the aggregate from $35 million to $42 million.

The next amendment was a Section 51-b added in 1956. This amendment covered the "totally and permanently disabled" in much the same manner as the other categories of welfare grants. The only change was from "actual bona fide citizens of Texas" to "citizens of the United States." The amendment included a proviso that no one could receive disability assistance who was also receiving old-age assistance, aid to the blind, or aid to dependent children. The amendment also contained a maximum aggregate of $1.5 million that could be paid annually from state funds for disability assistance.

In 1957, Section 51a itself was amended, principally to increase the monthly old-age maximum from state funds from $20 to $25 and to increase the annual aggregate maximum for all Section 51a categories from $42 million to $47 million. In the course of increasing the monthly maximum from $20 to $25, a proviso was added: "No payment in excess of Twenty-one Dollars ($21) shall be paid out of state funds to an individual until and unless such additional amounts are matched by the Federal Government." (See the following *Explanation* concerning this proviso.)

The 1957 amendment also contained a command to the legislature to "enact appropriate laws to make lists of the recipients of aid hereunder available for inspection." A final paragraph of the amendment was a supplemental appropriation for welfare for the 1957-59 biennium to take advantage of the increase in the annual aggregate maximum authorized by the amendment. (Note that this bypassed Sec. 49a of this article.)

In 1958, Section 51a-1 was added. This amendment authorized payments for medical care to people who were receiving assistance under any of the categories covered by Sections 51a and 51-b. This was a relatively short provision since there was no need to put in the usual qualifications of age, citizenship, residence, and the like. There was also a variation on the usual proviso that individual state payments could not exceed individual federal amounts. In this case, the aggregate amount paid from state funds could not exceed the federal aggregate.

Another revised Section 51a was adopted in 1962. The principal purpose of the amended version was to increase the annual aggregate from $47 million to $52 million. The only other changes were to drop the appropriation act included in 1957 and to add to the command to enact laws concerning publicity of recipients the words "under such limitations and restrictions as may be deemed appropriate by the Legislature."

Section 51-b was also amended in 1962. (It was redesignated Sec. 51-b-1 because when adopted originally as Sec. 51-b in 1956, there was an existing Sec. 51-b, State Building Commission, which had been added in 1954.) The only change was to increase the annual aggregate from $1.5 million to $2.5 million.

One year later, 1963, a new Section 51a, now for the first time designated "51-a," was adopted. This new section combined the old Sections 51a and 51-b-1, both of which had been amended in 1962. (Sec. 51-a-1 remained untouched for the moment.) The new Section 51-a increased as usual the annual aggregate, this time from $54.5 million ($52 million in Sec. 51a and $2.5 million in Sec. 51-b-1) to $60 million. The new section made a number of other changes:

(1) It eliminated the individual monthly maximum of $25 for the aged and $20 for the permanently disabled and substituted "shall not exceed the amount that is matchable out of Federal funds." The same wording was repeated for the categories of the blind and dependent children.

(2) In each of the four categories it was provided for the first time that "the total amount of such assistance payments out of state funds on behalf of such recipients shall not exceed the amount that is matchable out of Federal funds."

(3) All minimum residency periods were removed and the legislature was commanded to prescribe residence requirements. The difference in citizenship language between Section 51a and Section 51-b-1 was preserved, however, so that the aged, blind, and children had to be "actual bona fide citizens of Texas" whereas the permanently disabled had to be "citizens of the United States."

(4) The command to enact laws concerning publicity of recipients was changed to a permission to enact such laws.

One year later, 1964, Section 51-a was again amended, this time by an addition of Section 51a-2. Section 51a-1, it will be recalled, provided for payments for medical assistance to the four welfare categories. Section 51a-2 added needy old people not receiving old-age assistance to the medical assistance categories. In general, the amendment tracked the other welfare provisions in calling for matching federal funds and the like but had one interesting omission. The amendment covered "needy individuals," without specifying either that they had to be "actual bona fide citizens of Texas," "citizens of the United States," or even residents. The amendment also added what is now the proviso in the first sentence of the curious final paragraph of the current Section 51-a.

One year later, 1965, Sections 51-a, 51a-1, and 51a-2 were combined into a new Section 51-a. This is the last amendment adopted prior to the adoption in 1969 of the current version set out at the beginning of this section. The principal reason for the 1965 version was to make changes necessary to preserve eligibility for federal matching funds. For example, the minimum age for the needy blind was reduced from 21 years to 18 years and the maximum age for dependent children was increased from under 16 years to under 20 years. Likewise, the coverage for medical assistance was broadened. Also, the 1965 amendment for the first time included a grant of power to the legislature to rewrite the section in order to remain eligible for federal grants. (The wording was similar to the next to the last paragraph of the current Sec. 51-a.)

In 1968, an amendment which proposed no change except to increase the annual aggregate maximum from $60 million to $75 million was defeated. In 1969, the current version of Section 51-a was proposed and adopted. In 1971, the voters rejected an amendment that would have retained the annual aggregate maximum only for the category of aid to families with dependent children and would have set that maximum at $55 million. The defeated amendment also would have deleted that supplemental appropriation for the 1969-71 biennium that comprises the fourth paragraph of the current section.

Explanation

The current version of Section 51-a is the 16th amendment on welfare and the sixth version of a comprehensive welfare amendment. In the almost 40 years involved there does not appear to have been a single court interpretation of any of the provisions. There have been a number of attorney general opinions, but only one or two of the older ones would appear to have any current applicability. In one opinion it was stated that administrative expenses are not to be included as part of the maximum annual aggregate. (Tex. Att'y Gen. Op. No. O-4812 (1942).) A second opinion forbade payment of burial expenses out of old-age assistance monies. (Tex. Att'y Gen. Op. No. O-570 (1939).) Under the current version of Section 51-a, this opinion may be applicable only so long as the United States does not match burial money.

There are two recent opinions of current significance. One opinion concerned the relationship of new Texas acts reducing the age of majority from 21 to 18 to the Aid to Families with Dependent Children program (AFDC) whereby the United States provides matching funds for children under 18 years of age and for children over 17 but under 21 years of age who are attending school or college. In effect the attorney general ruled that the legislature, in lowering the age of majority, did not intend to cut off a federal grant for "children" who now happen to be "adults" under Texas law. The other recent opinion is discussed later.

Section 51-a in all its versions has always been an exception to the grant prohibition of Section 51. Section 51 does not prohibit caring for the aged, the blind, the disabled, and the destitute. Only the handing out of cash is prohibited. Indeed, Section 2 of Article XI and Section 8 of Article XVI refer specifically to poor houses and farms. (There is an attorney general's opinion that argues that these grants of power to counties deny state legislative power to assist the poor (Tex. Att'y Gen. Op. No. O-2578 (1940). The argument is a make-weight not necessary for the opinion's conclusion.) Except for veterans' pensions, which are really welfare payments disguised as supplemental rewards for patriotic service, the regular payment of cash to the needy in Texas dates from the original Social Security Act of 1935.

Most of the welfare amendments adopted since the original "bread bonds" Section 51a of 1933 have been tied to the federal system of grants to the states. The earlier amendments were either designed to get aboard the federal system or to stay aboard after the United States made changes that conflicted with the Texas constitutional limitations. The current version of Section 51-a attempts to end the necessity for constant amendment to meet changing federal regulations.

Before analyzing the current version of Section 51-a, a comment about the word "match" is in order. As noted earlier, the amendment of 1957 had a proviso prohibiting payments in excess of $21 a month "until and unless such additional amounts are matched by the Federal Government." This is the first time the term "match" appeared. Beginning with the amendment adopted in 1963, the term has been used regularly. To "match" funds does not necessarily mean a one-for-one match. A grant by a foundation to a college, for example, can be $1 for every dollar raised by the college, for every $2 raised, or for every 50¢ raised. All three are "matching" grants.

In 1957 when the language quoted above first appeared, the federal grant for old-age assistance was four-fifths of the first $30 plus 50 percent of each dollar above $30 up to a maximum payable to the recipient of $60 a month. Under the $20 a month maximum out of state funds in effect preceding the 1957 amendment, therefore, a recipient could have received only $58 a month. The increase to $21 in the 1957 amendment meant that a recipient could receive $60, which was the federal maximum. Thus, the strange proviso quoted above was in anticipation of an increase in the federal maximum.

Interestingly enough the current version of Section 51-a is obsolete in part because of amendments to the federal welfare statutes enacted in 1972 (Public Law 92-603). These were principally changes that in general relieved the states of any need to participate in grants to the aged, the blind, or the disabled; the United States in general took over responsibility for these three categories. Consequently, the "grants"—as opposed to medical care—part of Section 51-a now applies only to "needy dependent children and the caretakers of such children," which, as noted earlier, is "AFDC." The only Texas constitutional significance of this change in the federal welfare system is that the limitation of $80 million in annual state assistance payments now limits only AFDC payments. Since, as the preceding *History* shows, there was a need from time to time to increase the amount of the limitation, the federal takeover of three of the categories eased the pressure on the Texas "ceiling." (Note the irony of this in the light of the amendment defeated in 1971. See the last paragraph of the preceding *History*.)

For a variety of reasons AFDC is the most controversial of the several welfare programs. In the case of the aged, the blind, and the disabled there is a physical factor contributing to poverty; in the case of AFDC, there is not. Instead, there is frequently a moral factor involved—the dependent children are illegitimate, or the father has disappeared, or the mother is incompetent or has abandoned the children. Moreover, of the several forms of cash welfare grants, AFDC has long required the largest aggregate pay-outs. (Medicaid, discussed later, is also expensive but for different reasons.) All of this has produced a political resistance to AFDC. Section 51-a has become an element in the continuing political battle over AFDC.

The significant battle words in Section 51-a are: "the maximum amount paid out of state funds to or on behalf of any needy person shall not exceed the amount that is matchable out of federal funds." This restriction has an "independent" ambiguity in it and a "dependent" ambiguity that may arise, depending upon the resolution of the independent ambiguity. The independent ambiguity is in the meaning of the word "matchable." The traditional dictionary definition is that "to match" is "to equal." But as noted earlier, in the world of "matching funds," "to match" means only that the matcher will provide funds according to a formula—so much for every dollar raised or every dollar spent, for example.

Thus, the first question is whether the restrictive language quoted above means that the maximum amount of state funds for AFDC may not exceed the total amount that the United States will contribute. This is the "equal to" meaning of "matchable." In the context of the constitutional restriction, this would mean that the legislature could authorize additional state payments under any federal formula that provided more than 50 percent of a state contribution up to a point and less than 50 percent above that point so long as the state total did not exceed the federal total. For example, one federal formula provides that the United States will reimburse the state for five-sixths of the first $18 of a monthly payment, approximately 60 percent of the next $14, and nothing for a payment above $32. Under this formula the United States will reimburse Texas $23.40 towards the $32, leaving Texas paying only $8.60. If "matchable" means "equal to," Texas can add $14.80 to its contribution so that the dependent child receives $46.80. That is, the United States would be "matching," fifty-fifty, what the state contributes.

But there is the possibility that "matchable out of federal funds" in Section 51-a means that the state may use its money only so long as an additional dollar of state money brings forth some federal money. To use the same formula discussed earlier, under this meaning of "matchable" the state would have to stop at $8.60 because additional dollars would not be "matched." If the first ambiguity is resolved this way, the second ambiguity arises. If the United States has more than one formula for matching, does Section 51-a permit the use of either formula where one formula permits a much larger state expenditure? That is, are the words of Section 51-a designed to restrict the state to the amount that produces the largest percentage of federal matching or may the state use a formula that requires more state money but brings in more federal money? For example, under the formula discussed earlier the state's $8.60 is 26.87 percent and the federal $23.40 is 73.13 percent of the matchable $32.00. There is another federal formula, however, that simply authorizes the use of the Medicaid percentage for AFDC purposes. In the case of Texas, this would produce a federal matching of approximately 63.5 percent of whatever the state grants for aid to children. Thus, if the state paid $100 a month for a dependent child, the United States would reimburse the state approximately $63.50, leaving the state to contribute approximately $36.50. (It should be noted that the federal statutes are complicated and that the various percentages used in this example change from time to time. For purposes of considering the meaning of Section 51-a, the examples are illustrative only.)

The attorney general recently addressed the issue of the meaning of "maximum amount paid out of state funds . . . shall not exceed the amount that is matchable out of federal funds." (See Tex. Att'y Gen. Op. No. H-437 (1974).) It is a curious opinion, for it apparently assumes that "matchable" means "equal to." In part the summary states: "The Legislature has the authority to enact welfare legislation which utilizes a formula of matching dollar for dollar all federal funds available for individual grants to recipients of Aid to Families with Dependent Children." This clearly implies that "matchable" means "equal to."

The interesting thing about this opinion is that, by assuming that "matching" means "equal to," the "dependent" ambiguity in Section 51-a disappears. If the drafters of Section 51-a were trying to minimize the amount of state money that could be devoted to welfare, this opinion pretty well destroys the effort. So long as the United States uses a matching formula of 50 percent or higher, Section 51-a imposes no limit, except, of course, for the $80 million maximum. Indeed, under the Medicaid percentage formula, there is no way to get to a dollar for dollar match; the United States contributes approximately 63.5 percent of whatever is granted.

An interesting question would arise if the United States changed its policy and reimbursed states at a rate less than 50 percent. The implication of the attorney general's opinion is that Section 51-a would prohibit any aid to dependent children, for the "maximum amount paid out of state funds" would have to be zero since no amount would be "matchable out of federal funds" if "matchable" means "dollar for dollar." It is highly unlikely that the United States will move in this direction. It is also unlikely that the attorney general meant what his opinion implies.

Although the opinion does not give any background concerning the reason for the request, which came from the chairman of the Committee on Human Resources of the House of Representatives, there is reason to believe that some people had been reading Section 51-a to mean that the state is limited to the amount that produces the maximum federal percentage of reimbursement. Prior to the request for an opinion, the welfare commissioner was reported to have said that "increases in state payments would not be matched by increases from the federal government, which would appear to make increased state aid unconstitutional." (See *The Houston Post*, 25 June 1974, page 3/A.) Even this statement is ambiguous. The statement is accurate if the state uses the regular AFDC formula discussed earlier, for federal matching stops when the grant reaches $32; but if the alternative Medicaid formula is used, the federal matching continues no matter how large the grant is. Texas operates under the regular formula, but this can be constitutionally necessary only if Section 51-a is to be read to mean that state contributions must be kept to the minimum necessary to obtain the maximum federal percentage of the total grant.

For the present, the attorney general's opinion solves the problem. Whether the implied reliance on "matching" as meaning "equal to" will create a problem in the future is doubtful. As noted earlier, the United States is likely to continue matching at least to the extent of 50 percent. Moreover, the attorney general may be able to avoid the "fifty-fifty" implication if that becomes necessary, by noting that he was asked only whether the legislature *could* go fifty-fifty and that his affirmative answer does not preclude his affirmatively answering a different question—whether the state may use state funds so long as each additional state dollar is "matched" to some extent by the United States.

The preceding discussion deals with assistance to needy persons. Section 51-a also covers medical care for needy persons. This is what is known as "Medicaid." (Medicare is available to retired persons under Social Security.) Medicaid under Section 51-a differs in three significant respects from assistance. First, the United States has not taken over medical care for the needy aged, blind, or disabled as it has in the case of assistance. Second, the $80 million limitation does not apply to medical care. Third, the statute implementing the Medicaid program permits the coverage of "such other groups as are found to be financially unable to meet the cost of medical services" (Tex. Rev. Civ. Stat. Ann. art. 695j-1, sec. 5). In other words, all needy persons can be covered, not just the aged, blind, disabled, and dependent children.

How one finds constitutional authority for this extension to all needy persons is a little difficult. The obvious fact is that the constitution was amended in 1965 to take advantage of the federal Medicaid program. But the wording of Section 51-a is so muddled that one is hard put to find the right words on which to hang "all" needy persons. The first paragraph appears to try to authorize the legislature to provide grants to anybody in need for whom the federal government provides matching grants. There is a difficult problem of construction here, however, because it can be argued that the broad language of authority is limited to those needy who come under one of the four numbered categories following the colon. One particularly confusing thing is the reference to "such families and individuals." There is nothing for "such" to refer back to—except perhaps something in the mind of the drafter which he forgot to spell out. Under the rules of grammar "such" cannot refer forward, but if the drafter thought it did, there are still problems because there is no reference to "families" in the four categories, only "persons," "individuals," "children," and "caretakers."

The confusion is increased by the third paragraph of the section. Here the broad authority is repeated but the coverage is simply "needy persons" without regard to the four categories. Again, there is the reference to "such families and individuals." This time there is a possible reference back to "needy persons." This is still not accurate but at least is not meaningless. If this third paragraph is read to override the first paragraph, then the four numbered categories do not limit the term "needy persons." The trouble with this interpretation is that it leaves the section's second paragraph dangling. That paragraph refers to "these programs," which would seem to be limited to the preceding numbered categories.

On top of all this confusion, the next to the last paragraph of Section 51-a appears to authorize the legislature to amend the section by statute. (See forthcoming *Author's Comment.*) Such an unusual authorization may be used, however, only to prevent the loss of federal grants. Since the authority to amend the section is "for or on behalf of needy persons," it would appear that the four numbered categories can be ignored in favor of any federal matching grants for any needy persons.

In any event, the statute authorizes medical care for all needy persons. But the care to be provided is limited to whatever the United States provides "matching" funds for: "provided, however, that no groups and no medical services may be included for which Federal matching funds are not available." (Tex. Rev. Civ. Stat. Ann. art. 695j-1, sec. 5.) This, of course, is simply a statutory equivalent of the proviso that was construed in the attorney general opinion discussed earlier. Fortunately, there is no problem at the moment concerning "matchable out of federal funds," for the federal "match" for any state is at least 50 percent. (The Texas "match" is approximately 63.5 percent federal reimbursement for each dollar paid out.) If, however, the United States changed the formula to reimburse less than 50 percent, the position taken by the attorney general would appear to be applicable.

The fourth paragraph is obsolete. It was a direct statutory supplemental appropriation to take advantage of the increase in the annual maximum aggregate from $60 million to $80 million, assuming that the 1969 amendment was adopted. The amount appropriated for two years was only $30 million, however, thus using up only three-quarters of the constitutional annual increase.

The final paragraph of Section 51-a is part and parcel of the incredible confusion over Section 31 of Article XVI.

In the course of describing the many changes in Section 51-a and its complementary sections, there were many references to citizenship and residence requirements. All except one have been eliminated. The remaining one is the limitation of old-age assistance to aliens who have resided in the United States for at least 25 years. This is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (*Graham v. Richardson,* 403 U.S. 365 (1971).) Although Section 51-a is now silent as to any other citizenship or residence requirements, the legislature is given the power to prescribe eligibility requirements for assistance. No such requirements based on citizenship or length of residence can be imposed. (*Shapiro v. Thompson,* 394 U.S. 618 (1969).)

Comparative Analysis

No other state appears to have a comparable provision. A good many states have the equivalent of Section 51 and have had to make an exception for welfare grants. (See the *Comparative Analysis* of Sec. 51.) California once had a detailed welfare article (Art. XXVII), but it was repealed in 1962. It appears to be the only other constitutional provision that expressly tied a state program to the federal program. Neither the United States Constitution nor the *Model State Constitution* has anything remotely resembling Section 51-a.

Author's Comment

Sixteen amendments, plus three rejected proposals, on one subject in less than 40 years would seem to be proof enough that this is no way to run a railroad—or a welfare program. If more proof is needed, consider the next to the last paragraph of Section 51-a. Something is surely wrong with a constitutional provision if it has to provide that the legislature may amend it from time to time. The paragraph states in effect that any restrictions in Section 51-a that stand in the way of obtaining federal grants for the needy may be repealed by statute. This legislative power to amend the constitution by statute may very well be unique.

Everybody agrees that the welfare problem in the United States is a mess. It follows that an attempt to control the welfare problem by a constitutional provision will make a mess of the constitution. Even though three proposed welfare amendments were defeated, it is doubtful that the voters have had any real control over the welfare mess by virtue of their control over constitutional amendments.

Consider, for example, the proposed amendment defeated in 1968. All that it would have accomplished was an increase in the maximum annual grant from $60 million to $75 million. The Department of Public Welfare's operating budget for the fiscal year ending August 31, 1973 is $852,451,213, toward meeting which the state appropriation is $227,069,973. Who is kidding whom? That "Eighty Million Dollars ($80,000,000)" maximum in Section 51-a may be a security blanket for the taxpayer or a rallying cry for "workfare not welfare" but definitely is not a significant limit on spending.

The real question is whether a constitution should say anything about welfare. It has already been suggested that a prohibition on grants to individuals is a mistake. (See the *Author's Comment* on Sec. 51.) But if such a provision remains, there ought to be a blanket exception for any and all grants for welfare purposes. It makes no sense to have to amend a constitution to change the definition of who is needy, or what kind of need is to be met, or how much is to be spent. The people end up not with any real control over the problem but with the nuisance of running to the polls every other year or so to cope with a new crisis. To repeat, 19 proposed constitutional amendments on one subject in less than 40 years is no way to run a government.

Sec. 51-b. STATE BUILDING COMMISSION; STATE BUILDING FUND. (a) The State Building Commission is hereby created. Its membership shall consist of the Governor, the Attorney General and the Chairman of the Board of Control. The Legislature may provide by law for some other State official to be a member of this Commission in lieu of the Chairman of the Board of Control, and in the event said State official has not already been confirmed by the Senate as such State official he shall be so confirmed as a member of the State Building Commission in the same manner that other State officials are confirmed.

(b) The State Building Fund is hereby created. On or before the first day of January following the adoption of this amendment, and each year thereafter, the Comptroller of Public Accounts shall certify to the State Treasurer the amount of money necessary to pay Confederate pensions for the ensuing calendar year as provided by the constitution and laws of this State. Thereupon each year the State Treasurer shall transfer forthwith from the Confederate Pension Fund to the State Building Fund all money except that needed to pay the Confederate pensions as certified by the Comptroller. This provision is self-enacting. The State Building Fund shall be expended by the Commission upon appropriation by the Legislature for the uses and purposes set forth in subdivision (c) hereof.

(c) Under such terms and conditions as are now or may be hereafter provided by law, the Commission may acquire necessary real and personal property, salvage and dispose of property unsuitable for State purposes, modernize, remodel, build and equip buildings for State purposes, and negotiate and make contracts necessary to carry out and effectuate the purposes herein mentioned.

The first major structure erected from the State Building Fund shall be known and designated as a memorial to the Texans who served in the Armed Forces of the Confederate States of America and shall be devoted to the use and occupancy of the Supreme Court and such other courts and State agencies as may be provided by law. The second major structure erected from the State Building Fund shall be a State office building and shall be used by whatever State agencies as may be provided by law.

Under such terms and conditions as are now or may hereafter be provided by law, the State Building Commission may expend not exceeding five (5%) percent of the moneys available to it in any one year, for the purpose of erecting memorials to the Texans who served in the Armed Forces of the Confederate States of America. Said memorials may be upon battlefields or other suitable places within or without the boundaries of this State. The authorization for expenditures for memorials herein mentioned shall cease as of December 31, 1965.

Under such terms and conditions as are now or may hereafter be permitted by law, the State Building Commission may expend not exceeding Thirty Thousand ($30,000.00) Dollars in the aggregate for the purpose of erecting memorials to the Texans who served in the Armed Forces of the Republic in the Texas War for Independence. Said memorials may be erected upon battlefields, in cemeteries, or other suitable places within or without the boundaries of this State. The authorization for expenditures for memorials herein mentioned shall cease as of December 31, 1965.

(d) The State ad valorem tax on property of Two (2¢) Cents on the One Hundred ($100.00) Dollars valuation now levied under Section 51 of Article III of the Constitution as amended by Section 17, of Article VII (adopted in 1947) is hereby specifically levied for the purposes of continuing the payment of Confederate pensions as provided under Article III, Section 51, and for the establishment and continued maintenance of the State Building Fund hereby created.

(e) Should the 53rd Legislature enact a law or laws in anticipation of the adoption of this amendment, such shall not be invalid by reason of their anticipatory character.

History

This section was added by amendment in 1954. In 1970 a proposed amendment to Subsection (a) was defeated. The amendment would have lengthened to six years the terms of members appointed by the governor. (Art. XVI, Sec. 30, limits their terms to two years.)

Explanation

In the late 1940s and early 1950s state government was in need of additional office space. The prohibition against appropriation for a term longer than two years (Art. VIII, Sec. 6) made it difficult to appropriate enough money out of current general revenue to construct the needed buildings. Since the needs of the Confederate Pension Fund were decreasing and would soon terminate, this section tapped the state ad valorem tax dedicated to payment of Confederate pensions by Article VII, Section 17. However, that tax was abolished by Article VIII, Section 1-e, effective January 1, 1976.

Comparative Analysis

No comparable provision was found in the *Model State Constitution* or in the constitution of any other state.

Author's Comment

Clearly no authorization is necessary to create a State Building Commission and doing so in the constitution further burdens a top-heavy executive branch. A better solution to the state's recurring need for funds to make capital improvements is flexible borrowing authority, perhaps conditioned on statewide referendum approval, not a dedicated tax and not, emphatically, a constitutional amendment for each bond issue. (See the *Author's Comment* on Sec. 49 of this article.)

Sec. 51-c. AID OR COMPENSATION TO PERSONS IMPROPERLY FINED OR IMPRISONED. The Legislature may grant aid and compensation to any person who has heretofore paid a fine or served a sentence in prison, or who may hereafter pay a fine or serve a sentence in prison, under the laws of this State for any offense for which he or she is not guilty, under such regulations and limitations as the Legislature may deem expedient.

History

This section was adopted in 1956.

Explanation

This is another exception to the no-grants-to-individuals prohibition of Section

51. The section is not self-executing, however, and a resolution by the legislature authorizing suit against the state for wrongful imprisonment does not trigger its application. (*State v. Clements,* 319 S.W.2d 450 (Tex. Civ. App.—Texarkana 1958, *writ ref'd*).)

Enabling legislation was enacted in 1965 (Penal Code art. 1176a) and requires that a claimant establish four facts to become entitled to compensation:

(1) the claimant has served time in prison;

(2) the claimant pleaded "not guilty" to the charge for which he was convicted and imprisoned;

(3) the claimant is not guilty of the crime for which he was sentenced; and

(4) the claimant has received a full pardon for the crime and punishment for which he was sentenced.

Recovery under the statute is limited to $25,000 for pain and suffering and $25,000 for all reasonable and necessary medical expenses incurred as a proximate result of the erroneous conviction and imprisonment.

So far only two claims under this section have reached the appellate courts. (*State v. Vargas,* 419 S.W.2d 926 (Tex. Civ. App.—San Antonio 1967), *writ ref'd n.r.e. per curiam,* 424 S.W.2d 416 (Tex. 1968); *Ashford v. State,* 515 S.W.2d 758 (Tex. Civ. App.—Waco 1974, *no writ*).) In the first case, Vargas had won a judgment in the trial court and submitted a claim to the legislature, which made an appropriation to pay it. The governor vetoed the appropriation because the attorney general decided to appeal the case, but Vargas eventually recovered more than $22,000. The second case went off on a procedural technicality.

Comparative Analysis

This section appears to be unique to the Texas Constitution.

Author's Comment

Compensating citizens illegally punished by the state is not only a public purpose but a noble one as well. Since it is now provided for by statute, there is no longer any need (if there ever was) for Section 51-c.

Sec. 51-d. PAYMENT OF ASSISTANCE TO SURVIVORS OF LAW ENFORCEMENT OFFICERS. The Legislature shall have the power, by general law, to provide for the payment of assistance by the State of Texas to the surviving spouse and minor children of officers, employees, and agents, including members of organized volunteer fire departments and members of organized police reserve or auxiliary units with authority to make an arrest, of the state or of any city, county, district, or other political subdivision who, because of the hazardous nature of their duties, suffer death in the course of the performance of those official duties. Should the Legislature enact any enabling laws in anticipation of this amendment, no such law shall be void by reason of its anticipatory nature.

History

This section was added in 1966. In its original wording, it covered survivors of "law enforcement officers, custodial personnel of the Texas Department of Corrections or full-paid firemen who suffer violent death." In 1967, in response to a request for an opinion on the scope of the amendment, the attorney general ruled that the legislature could not cover survivors of volunteer firemen or of custodial employees of state institutions housing the criminally insane. (Tex. Att'y Gen. Op. No. M-28 (1967).) The current version was proposed promptly and adopted in 1969.

In addition to broadening the coverage, the 1969 amendment changed the cause of death from "violent death" to "because of the hazardous nature of their duties, suffer death." The final sentence, added in 1969, is a common provision in the Texas Constitution—there are at least 16 such—but in this case the attorney general's opinion was an important reason for including the sentence because he had ruled that no assistance could be given to survivors of officers who died after the adoption of the original section but before an implementing statute became effective.

Explanation

This is one of the many constitutional provisions required, or assumed to be required, by the prohibition in Section 51 against cash grants to people. There do not appear to have been any official interpretations since the 1969 amendment was adopted. The section appears to be self-explanatory except for the new wording of cause of death. The new wording permits payments in cases of heart attacks and in cases of firemen, perhaps lung cancer. In other words, the new wording appears to add illness to injury as a justification for assistance. The legislature has recognized this change. The operative definition originally covered "loss of life by external means." The statutory amendment to accompany the 1969 amendment of Section 51-d dropped the words "by external means." (Tex. Laws 1969, ch. 456, sec. 1, at 1513; Tex. Rev. Civ. Stat. Ann. art. 6228f (1970).)

It should be noted that the assistance authorized by this section is in addition to any death benefit a spouse and surviving children might receive under a state or local pension plan, under workmen's compensation, and under social security.

Comparative Analysis

Louisiana adopted a comparable provision in 1966. No other state appears to provide constitutionally for special payments to survivors of policemen and firemen who die in the course of their work. Other states have similar programs but presumably do not have to amend their constitutions to get around crabbed interpretations of a cash grant provision like Section 51. Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

This would be an unnecessary provision except for the prohibition in Section 51 against cash grants and may be unnecessary anyway. It has been pointed out that Section 51 would not prevent a state pension system because a pension plan is part of compensation. By the same argument an announcement of special death benefits in a hazardous occupation is additional compensation.

Section 51-d is one of many examples of the legislative approach to a constitutional problem. Something is obviously wrong if a provision has to be amended in less than three years. Even with the revision of 1969, one can easily point out an unnecessary restriction in Section 51-d. It is not uncommon to continue assistance payments to children for some period after majority is reached if the children are full-time students. Section 51-d does not permit this. (Compare *Cook v. Employees' Retirement System,* 514 S.W.2d 329 (Tex. Civ. App.—Texarkana 1974, *writ ref'd n.r.e.*), where the court held that the legislative reduction of minority from 21 years to 18 years cut off assistance payments.)

In the drafting of a statute one usually wishes to be precise and complete so that those affected by the statute know what is and what is not permitted. It seems ironic to draft a constitutional amendment granting power to the legislature in the same precise and complete way, for the legislature is supposed to be a policymaking body and the restrictions on its policymaking power ought to be broadly, not precisely, stated. A broad grant—to assist the families of government personnel in hazardous occupations who lose their lives—would have given the legislature the necessary flexibility to make decisions on whom to cover and how to provide assistance. (As noted earlier, it should not be necessary to grant such power in the first place.)

Sec. 51-e. MUNICIPAL RETIREMENT SYSTEMS AND DISABILITY PENSIONS. Each incorporated city and town in this State shall have the power and authority to provide a system of retirement and disability pensions for its appointive officers and employees who have become disabled as a direct and proximate result of the performance of their duties, or have passed their sixty-fifth birthday, or have been employed by such city or town for more than twenty-five (25) years and have passed their sixtieth birthday, when and if, but only when and if, such system has been approved at an election by the qualified voters of such city or town entitled to vote on the question of issuance of tax supported bonds; provided that no city or town shall contribute more than the equivalent of seven and one half (7 1/2) per centum of salaries and wages of the officers and employees entitled to participate in its pension system, and that said officers and employees shall contribute a like amount; and this Amendment shall not reduce the authority nor duty of any city or town otherwise existing. (Repealed April 25, 1975. See Sec. 67 of Art. XVI.)

History

This section was added by amendment in 1944. No amendment of the section has ever been submitted to the voters. (But see the discussion below of Art. XVI, Sec. 62, Subs. (c).) Section 51-e has been superseded by Section 67 of Article XVI.

Explanation

The most interesting point about this section is why it was adopted at all. As noted earlier in discussing Section 48a, the constitutionality of municipal pension plans had been upheld in 1928 and a State Firemen's Relief and Retirement Fund had been created in 1937. One possibility is that once one group, the teachers, obtained constitutional status for their pension system, other groups wanted the same status. Another possibility is that municipal governments felt that a constitutional amendment was preferable to an enabling statute since the legislature could repeal the latter but only the voters could repeal the former. A third possibility is that municipal employees wanted constitutional protection for their pension rights. Again, as noted earlier, the protection afforded is probably limited to anything that is in the pension fund and does not prevent a municipality from discontinuing further contributions to the pension plan.

The second most interesting point about this section is that it appears to give all incorporated cities and towns more home-rule power over pensions than the Home Rule Amendment gives to home-rule cities. (See the *Explanations* of Art. XI, Secs. 4 and 5.) This is demonstrated by the fate of Article 6243i, enacted in 1949, providing for a policemen's pension plan for cities with a population between 175,000 and 240,000—namely, Fort Worth. (See the *Explanation* of and the *Author's Comment* on Sec. 56 of this article concerning "local" laws like this one.) The act provided, among other things, that the policemen's pro rata share of any municipal employees' pension fund in any city with a population between 175,000 and 240,000—that is, Fort Worth—should be turned over to the new trustees. It turned out, obviously by the merest coincidence, that Fort Worth had a municipal employees' pension plan adopted pursuant to the "power and authority" granted in Section 51-e. Fort Worth refused to cooperate and litigation ensued.

The court of civil appeals held that the legislature had always had the power to create pension plans and that Section 51-e did not take away any power of the legislature. Therefore, Article 6243i was constitutional. (*Howerton v. City of Fort Worth,* 231 S.W.2d 993 (Tex. Civ. App.—Fort Worth 1950).) On appeal the supreme court reversed the court of civil appeals in an opinion that both ignored the lower court's reasoning and left the issue of power ambiguous. (*City of Fort Worth v. Howerton,* 149 Tex. 614, 236 S.W.2d 615 (1951).) The supreme court noted that there were substantial differences between the Article 6243i plan and the Section 51-e plan and then said:

> The system created under Article 6243i undertakes to affect the rights and obligations accrued under the system adopted by the City of Fort Worth under a constitutional provision. Clearly this creates a conflict and the rights accrued under the constitutional provision must prevail. The provisions of the Constitution were adopted by the people, while statutes are enacted by the Legislature; and the Legislature may enact, repeal, or amend statutes, but it does not have the power to repeal or amend the provisions of the Constitution. That power rests exclusively with the people. (149 Tex. at 619; 236 S.W.2d at 618.)

This seems to mean that if a city first adopts a Section 51-e plan, the legislature may not supersede the plan, but does the opinion mean that if the legislature adopts a statewide pension system pursuant to Section 51-f, cities and towns without a pension plan can be required to opt for the statewide system if they want any plan at all? By ignoring the lower court's opinion and limiting itself to the conflict between the two Fort Worth plans, the supreme court left the issue up in the air.

To confuse this even more, it may be noted that home-rule cities have all powers not denied by the constitution or by statute. As already noted, the courts have long since upheld the constitutionality of pension plans even without a constitutional grant of power. Therefore, it can be argued, a home-rule city can amend its charter to provide a pension plan that is not in accord with the "power and authority" granted by Section 51-e, for example, a noncontributory plan. This argument is bolstered by the final words of Section 51-e: "and this Amendment shall not reduce the authority nor [*sic*] duty of any city or town otherwise existing." (Obviously, "otherwise existing" modifies "authority" and "duty" rather than "city or town." But the misplacing of "otherwise existing" makes no difference for the phrase adds nothing to the rest of the "sentence.") But then the question arises whether the legislature can command home-rule cities to adopt pension plans only pursuant to their "power and authority" under Section 51-e and not pursuant to their inherent power as home-rule cities.

To complete the confusion, Subsection (c) of Section 62 of Article XVI, added in 1966, appears to offer a third route to municipal employees. The subsection authorizes the legislature to provide a pension plan "for all the officers and employees of a county or other political subdivision of the state. . . ." Cities and towns are "political subdivisions of the state." (The legislature probably did not mean to include cities and towns, but they said what they said.)

This extended discussion is not an exercise in logic chopping. There are significant differences involved. For example, Sections 51-e and 51-f include only "appointive officers and employees" whereas Subsection (c) permits the legislature to include "all the officers and employees." Section 51-e limits the employer's contribution to no more than 7-1/2 percent of salaries and wages, Subsection (c) has no limit, and Section 51-f is silent about contributions. (Interestingly enough, the supreme court in the *Howerton* case noted that "Fort

Worth is obligated to contribute not only an amount equal to that contributed by the employee, but also a substantial amount in recognition of prior service." (149 Tex., at 618; 236 S.W.2d, at 617 (1950).) This would seem to be invalid under the "like amount" restriction of Section 51-e.) Home-rule cities, if they can act under their inherent powers, can ignore all the limitations of Section 51-e.

Section 51-e has been repealed. Whether the extended discussion is now wholly moot is a good question. Section 67 of Article XVI, the replacement for Section 51-e and the other sections discussed earlier, states that general laws in existence remain in effect. Where does that leave the *Howerton* case? After all, that case upheld a local pension plan as against a "general" law. Does a pension plan adopted under Section 51-e, now repealed, retain its status in the face of Section 67? (For further discussion see the *Explanation* of Sec. 67 of Art. XVI.)

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. 51-f. STATE-WIDE RETIREMENT AND DISABILITY SYSTEM FOR MUNICIPAL OFFICERS AND EMPLOYEES. The Legislature of this State shall have the authority to provide for a system of retirement and disability pensions for appointive officers and employees of cities and towns to operate State-wide or by districts under such a plan and program as the Legislature shall direct and shall provide that participation therein by cities and towns shall be voluntary; provided that the Legislature shall never make an appropriation to pay any of the cost of any system authorized by this Section. (Repealed April 22, 1975. See Sec. 67 of Art. XVI.)

History

This section was a companion to Section 51-e. Both were submitted to the voters and adopted at the same time, 1944. Presumably, the legislature drafted separate amendments on the theory that the voters might accept local power to set up pensions but would not approve a single statewide system. (Sec. 51-e passed by a margin of 61 percent to 39 percent and 51-f by 59 percent to 41 percent.) It probably did not occur to the legislature that the voters might approve "f" and turn down "e." It can be argued, of course, that the legislature simply wanted to permit large cities to have their own pensions systems, but at the same time to provide a statewide system that small cities and towns would prefer to join in order to avoid the headache of administering a small fund. The argument is valid in general but not to the question of why two separate sections were to be voted upon separately. The section has been superseded by Section 67 of Article XVI.

Explanation

The part of the *Explanation* of Section 51-e concerning why the section was adopted at all and concerning Subsection (c) of Section 62 of Article XVI is equally applicable to Section 51-f.

It should be noted that Section 51-f gives the legislature the *power* to create a statewide system that would be noncontributory, something that neither Section 51-e nor Subsection (c) of Section 62 permits. The implementing statute requires the customary fifty-fifty contribution plus an additional employer contribution for prior service credits, if any. (Tex. Rev. Civ. Stat. Ann. art. 6243h, sec. IV (2) (a)

(1970).) Note also that Section 51-f and Subsection (c) do not require the legislature to require a referendum by the voters of any city or town opting to participate in the statewide system whereas Section 51-e does require a referendum. Under the implementing statute, the governing body or a city or town may join the system, or the voters by initiative petition can call for a referendum which, if successful, forces the municipality to participate. (Tex. Rev. Civ. Stat. Ann. art. 6243h, sec. III (1) (d) (1970).)

The only judicial interpretation of this section stated in effect that the requirement that a city or town's participation must be voluntary extends to subsequent statutory amendments. The case involved a municipal employee who had enough retirement credits if employment in two different cities were cumulated. At the time of employment, cumulation was not authorized. The court of civil appeals held that the subsequent legislative authorization for cumulation did not bind a city retroactively until and unless it took some affirmative action to be bound. (*Texas Municipal Retirement System v. Roark*, 401 S.W.2d 913 (Tex. Civ. App.—Austin 1966, *writ ref'd n.r.e.*).)

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. 51g. SOCIAL SECURITY COVERAGE OF PROPRIETARY EMPLOYEES OF POLITICAL SUBDIVISIONS. The Legislature shall have the power to pass such laws as may be necessary to enable the State to enter into agreements with the Federal Government to obtain for proprietary employees of its political subdivisions coverage under the old-age and survivors insurance provisions of Title II of the Federal Social Security Act as amended. The Legislature shall have the power to make appropriations and authorize all obligations necessary to the establishment of such Social Security coverage program.

History

Under the original social security system established by congress in 1935, state and local government employees were specifically excluded. In 1950, congress amended the Social Security Act to permit coverage of state and local employees not covered by a retirement plan. (Congress subsequently amended the act to permit coverage of state and local employees already under a retirement plan.) Texas acted to take advantage of the change enacted by congress.

Unfortunately, the loans prohibition of Section 50 reared its ugly head. (Why this is Sec. "51g" instead of Sec. 50 plus a letter is an interesting question.) Getting from social security coverage of proprietary employees of political subdivisions to the prohibition on state lending of credit is not at all obvious, but the attorney general succeeded, thus bringing about Section 51g.

The attorney general's tortuous argument ran thus:

1. In order for state and local government employees and their employers to become eligible to pay social security taxes, the United States required an agreement with the state government.

2. Under that agreement, the state was required to remit social security taxes on state and local government employees and employers. If the state failed to remit on time, 6 percent interest was added. The United States could offset any

taxes due against any moneys due the state under any other social security programs, which would include all the matching grants under Section 51-a.

3. Since such an agreement meant that the state would be stuck with the bill if a municipality failed to remit its social security taxes to the state for forwarding to the United States, this would be lending or giving the state's credit in violation of Section 50.

4. But Section 50 does not apply when the state is lending or giving its credit for *state* purposes. Counties and other political subdivisions are acting for the state when engaged in governmental activities. Political subdivisions also engage in proprietary activities. They are then not acting for the state.

5. Therefore, Section 50 does not prevent agreement with the United States so long as proprietary employees of political subdivisions are excluded from coverage. (See Tex. Att'y Gen. Op. Nos. S-19 (1953), V-1198 (1951).)

In 1951, the legislature authorized counties and incorporated municipalities to join the social security system but excluded proprietary employees. In 1953, an opinion was requested whether a proposed bill extending authorization to other political subdivisions could include proprietary employees. The attorney general said no. Thus, Section 51g was proposed and adopted at the general election in November 1954 by a vote of 324,612 to 162,219. (It is interesting to speculate about what went through the minds of the 162,219 who voted no.)

Explanation

This section needs no explanation. All it does is wipe out two attorney general opinions. It is not even necessary to explain who are proprietary employees and who are government employees since Section 51g obliterates the distinction for purposes of social security taxes. (Policemen and firemen are governmental employees; waterworks engineers and street cleaners are proprietary employees. See the *History* of Sec. 61 (1952) of this article.) In effect, Section 51g is fully executed but not obsolete since repeal might revive those attorney general opinions. (In 1960, the Legislative Council provided the legislature with a section-by-section analysis of the constitution. It is interesting to note that there is no analysis of Sec. 51g.)

Comparative Analysis

Georgia has a provision, added in 1952, authorizing the legislature to enact such legislation as is necessary for state and local employees to participate in the social security program. (Art. VII, Sec. II, para. I, subpara. 7-A.) No other state appears to have a comparable provision. Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

One must always remember that a constitution has many uses. One use is to support an argument against some proposed course of action. A legislator may argue that a bill should be defeated because it would be unconstitutional. Those favoring the bill may try to get an authoritative opinion that the bill is constitutional. Without a great deal of historical research it is not possible to determine whether the 1951 opinion of the attorney general was designed to meet a constitutional argument against joining the social security system. Unless there was some complicated maneuvering involved, the attorney general's opinion is hard to explain.

There are several ways in which the exclusion of proprietary employees could have been avoided. The attorney general could have taken the broad approach. The purpose of Section 50 was "to put an end to the use of the credit of the State in fostering private business, a practice which prevailed in the early days of the history of most states." (Tex. Att'y Gen. Op. No. V-1198 (1951).) It makes no sense to distort Section 50 from this purpose by ruling that it prohibits the state from entering into an agreement with the United States whereby state and local employees participate in the social security system.

The attorney general could have taken a technical approach. Nobody is lending his credit to anybody. The state agrees with the United States to pay over the appropriate amount of social security taxes. The legislature requires local governments to collect the tax from employees, add the appropriate amount for the employer, and remit to the state. If a local government fails to remit, the state can bring suit and obtain a judgment. (This is particularly true in the case of proprietary activities.) Only if the local government is judgment proof does the state end up paying the United States more than was collected. There is no credit transaction here anywhere.

The attorney general could have taken a theoretical approach. He could have pointed out that the events just described could arise only if local officials failed to carry out the duties legally imposed upon them. It is not good constitutional theory to say that a statute is unconstitutional because a government official acts unconstitutionally by violating the statute. By the same token the legislature would not violate Section 50 by authorizing an agreement with the United States whereunder the state might be left holding the bag because some local official failed to remit what the law commanded him to remit.

Section 51g is just one of many examples of two Texas legal habits, proclivities, customs, call them what you will. One is the tendency to read constitutional provisions literally rather than practically in the light of their purpose. True, the literal-minded drafters of 1875 make it hard not to continue in their footsteps, but this is simply to call for more imagination and creativity. The other habit is to rush to the constitutional amendment drawing board. True, easy amendment facilitates this approach, but the end result is abominable constitutional clutter.

It has already been suggested that the sensible way to avoid sections like 51g is to get rid of the basic cause—Sections 50, 51, and 52.

Sec. 52. COUNTIES, CITIES, TOWNS OR OTHER POLITICAL CORPORATIONS OR SUBDIVISIONS; LENDING CREDIT; GRANTS. (a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company.

(b) Under Legislative provision, any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the State, or any defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include, towns, villages or municipal corporations, upon a vote of two-thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purposes to wit: