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include intervening and mediating with the other branches of government on behalf of constituents; informing the public of the issues of the day through speeches outside the chamber and reports distributed to the public at large; overseeing operation of the executive and judicial branches? If so—and I have always assumed these roles are fundamental components of the legislative function—then the speech-or-debate section ought to shield their performance by both legislators and their staff.

Assuming the shield is expanded to command this broad protection, may one depend on the Texas courts to obey the command? One method of guaranteeing obedience is to exempt legislators and their staffs from all criminal statutes applicable to misconduct in performing the legislative function. This remedy is proposed by Professor Cella for members of congress and their staffs; he argues that a legislative body's power to discipline its own members for misconduct (see the Annotations of Secs. 11 and 15 of this article) is adequate to the purpose and that legislators are better qualified than courts to judge their colleagues' alleged misdeeds. (Cella, "The Doctrine of Legislative Privilege of Speech or Debate; The New Interpretation as a Threat to Legislative Coequality," 8 *Suffolk U. L. Rev.* 1019 (1974); cf. *United States v. Brewster*, 408 U.S. 501, 543-44 (1972) (Brennan, J., dissenting).) Cella believes such drastic action is warranted at the national level because of the harshly antilegislativ trend he detects in the recent trio of Supreme Court decisions.

The Texas Legislature probably is not so seriously threatened. The court of criminal appeals opinion in *Mutscher* cannot be labeled antilegislativ, at least not on the basis of its perfunctory discussion of the speech-or-debate section of the Texas Constitution. The court instead appeared to ground its no-privilege holding on the defendants' waiver by nonassertion and on a section of the constitution (Art. XVI, Sec. 41) expressly defining legislative bribery; it reasoned that Section 41's specific provision controlled over the "general" privilege statement of Section 21. Only then, apparently as an afterthought, did the court quote a few sentences from the *Brewster* opinion to buttress its earlier conclusion.

Whatever the trend in Texas case law, it is desirable to elaborate the scope of the speech-or-debate privilege and enumerate its beneficiaries—but by *statute*, not in the constitution. Clearly the Texas Legislature has power to do so (see the Annotation of Sec. 1 of this article), and a comprehensive, clearly drafted statute would no doubt inspire a liberal interpretation by the courts. Any attempt to elaborate the privilege in the constitution itself is doomed to failure, however, because of the impossibility of anticipating the infinite variety of factual applications better adjudicated case-by-case under the detailed guidance of a statute.

Sec. 22. DISCLOSURE OF PRIVATE INTEREST IN MEASURE OR BILL; NOT TO VOTE. A member who has a personal or private interest in any measure or bill, proposed, or pending before the Legislature, shall disclose the fact to the House, of which he is a member, and shall not vote thereon.

History

This section first appeared in the present constitution and has remained unchanged since 1876. McKay's summarized *Debates* of the 1875 Convention do not mention it, but one may speculate that the section was a response to the widespread corruption in the Reconstruction legislatures.

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Explanation

No authoritative interpretation of this section was found, probably because, in practice, it is considered a prohibition "with which each Member is left to comply according to his own judgment as to what constitutes a personal or private interest." (Tex. H. Rule 12, sec. 2, comment p. 67 (1973).) No remedy is provided in the constitution (or in the statutes for the act of voting) for violating the section. For a related conflict-of-interest prohibition, see the Annotation of Section 18 of this article.

Comparative Analysis

About a dozen state constitutions contain a prohibition similar to Section 22. Neither the United States Constitution nor the *Model State Constitution* has anything comparable.

Author's Comment

Section 22 is unenforceable as presently worded and should be deleted. Moreover, efforts to define conflict of interest in the constitution are doomed from the beginning because of the infinite variety of conflicts possible and the corresponding need for flexible and discrete definition, definition best achieved by statute fleshed out by administrative rule and case-by-case adjudication.

The legislature in 1973 began the difficult task of definition in two laws effective January 1, 1974. Article 6252—9b of the civil statutes requires financial reports of executive-level public servants and sets out standards of conduct to guide their official behavior. The new Penal Code contains an entire chapter proscribing bribery and corrupt influence of public servants, with two sections (36.07 and 36.08) directly applicable to influence peddling in the legislature. In combination the two laws will require disclosure by legislators of potential conflicts of interest, for their constituents' comparison with their voting records, and punish severely, by imprisonment up to a year in jail and a \$2,000 fine, conduct constituting conflict of interest. The two laws are not perfect—conflict of interest is a complex subject—but they are vastly more precise in definition than Section 22 and they are enforceable.

Sec. 23. REMOVAL FROM DISTRICT OR COUNTY FROM WHICH ELECTED. If any Senator or Representative remove his residence from the district or county for which he was elected, his office shall thereby become vacant, and the vacancy shall be filled as provided in section 13 of this article.

History

This provision first appeared in the present constitution. Its historical origin is obscure because the *Debates* make no mention of the circumstances surrounding its adoption.

Explanation

Section 23 duplicates Article XVI, Section 14, the general residence requirement, and this may explain why Section 23 is rarely mentioned. The only mention found, in fact, was in an attorney general's opinion ruling that a representative who moved from one county to another in his multicounty district did not vacate his office because, obviously, he never left his district. (Tex. Att'y Gen. Op. No. 0-1250 (1939).)

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Not so obvious is the meaning of "residence," an elastic term very difficult to define according to the Texas Supreme Court: "The meaning that must be given to it depends upon the circumstances surrounding the person involved and largely depends upon the present intention of the individual." (*Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex. 1964). See also the *Explanation* of Art. VI, Sec. 2.)

Article XVI, Section 9, provides that an officeholder's absence on official business does not forfeit his residency, and Sections 6 and 7 of this article prescribe pre-election residence requirements for senators and representatives.

Comparative Analysis

About one-fourth of the states provide that if a legislator moves his residence from the district, he thereby vacates his seat. Florida's new constitution, for example, states that a permanent change of residence vacates the seat. A similar but more forceful provision in the Louisiana Constitution provides that a move from the district vacates the office, even in the face of a declaration of retention of domicile to the contrary.

Under the United States Constitution residency is required only as of the time of election. The *Model State Constitution* requires a legislator to be a voter and a voter must have a minimum of three months' residence in the state and can be required by law to have resided locally at least three months.

Author's Comment

Section 23 should be deleted as unnecessary.

Sec. 23-a. JOHN TARLETON CONTRACT VALIDATED. The Legislature is authorized to appropriate so much money as may be necessary, not to exceed Seventy-five Thousand (\$75,000.00) Dollars, to pay claims incurred by John Tarleton Agricultural College for the Construction of a building on the campus of such college pursuant to deficiency authorization by the Governor of Texas on Aug. 31, 1937.

History

The general appropriation bill for the biennium beginning September 1, 1937, contained an item of \$75,000 for construction of a science building at John Tarleton College. The item was removed in conference. On August 31, 1937, Governor Allred issued a deficiency warrant for \$75,000 to pay for the building. The building went up.

In 1939, the "pre-existing law" requirement of Section 44 of Article III reared its ugly head. By law the Board of Directors of Texas A&M was authorized to enter into construction contracts. but, unfortunately, it was the dean of the college who had applied for the deficiency warrant. The chairman of the Appropriations Committee of the Texas House of Representatives requested an opinion whether the legislature could appropriate \$75,000 to honor the warrant. The attorney general said "No." (Tex. Att'y Gen. Op. No. 0-733 (1939).) His opinion is ambiguous. It is not clear whether the error was that the wrong official asked for the warrant or that the Board of Directors could not act because of a proviso limiting its contracting power: ". . . provided that the State of Texas incurs no indebtedness under the contract."

At the next biennial session, a constitutional amendment worded as above was proposed. At the general election held in 1942 the voters rejected the amendment by a vote of 84,013 to 85,868.

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Another try was made in 1945. This time the voters accepted the section at the 1946 general election, 266,124 to 74,031. In 1947 the legislature appropriated \$74,933.11 to pay the 1937 deficiency warrant. After almost a decade the contractor was paid. How much it cost the contractor in legal and lobbying expenses is not known.

Explanation

This section was fully executed as soon as the 1947 appropriation act was passed. This is presumably the reason that most copies of the constitution do not print the section and the reason that the 1969 amendment repealing constitutional deadwood omitted the section. But, executed or not, Section 23-a is a part of the Texas Constitution. (The section is known as "23-a" because the Texas Laws of 1947, at page XXXIII, said that the amendment is "to precede Sec. 24." It will be found in *Vernon's Annotated Constitution* as a historical note to Sec. 17 of Art. VII.)

The problem of the Tarleton College building started when Governor Allred issued a deficiency warrant. This practice arises from the exception to pay-as-you-go found in Section 49 of this Article. This allows incurring debt not exceeding \$200,000 to "supply casual deficiencies of revenue." This is a bit confusing, for, as noted in the *Explanation* of Section 49, a failure of revenues to meet appropriations does not create "debt." The \$200,000 exception has come to mean an authorization to incur obligations in excess of appropriations. Subsequent to the Tarleton College situation where the appropriation item was deleted in conference, the attorney general ruled that deficiency warrants may be issued only for "casual" deficiencies, that is, unforeseen requirements in excess of an appropriation. (Tex. Att'y Gen. Op. No. 0-2118 (1940).) Thus, the Tarleton deficiency warrant could not be authorized since the legislature had specifically failed to appropriate money for the building. Why the attorney general did not use the "casual deficiency" reasoning in the Tarleton College case is not clear. It would have avoided the ambiguity noted in the preceding *History*.

Comparative Analysis

Some state at some time may have amended its constitution to enable payment of a just debt. To try to find a comparable provision would be looking for a needle in a haystack.

Author's Comment

Prior to the recent brouhaha in Washington it would never have occurred to anyone to note that Governor Allred's issuance of the deficiency warrant was the opposite of impounding appropriated funds. If it is not proper for the president to refuse to spend money and thereby defeat congressional policy, it was not proper for the governor to permit Tarleton College to build a building after the legislature had refused to appropriate money for it.

But this is not the real problem. The strictures about pre-existing law in Section 44 prevented payment for the building in any event. Without doubt the legislature in 1939 would have honored the governor's commitment. Or maybe the legislature would not have because its policy decision had been bypassed. At the very least the legislature ought to have had a choice in the matter—other than by a constitutional amendment. (See also *Author's Comment* on Sec. 44.)

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Sec. 24. COMPENSATION AND EXPENSES OF MEMBERS OF LEGISLATURE; DURATION OF SESSIONS. Members of the Legislature shall receive from the Public Treasury a salary of Six Hundred Dollars (\$600) per month. Each member shall also receive a per diem of Thirty Dollars (\$30) for each day during each Regular and Special Session of the Legislature. No Regular Session shall be of longer duration than one hundred and forty (140) days.

In addition to the per diem the Members of each House shall be entitled to mileage at the same rate as prescribed by law for employees of the State of Texas. This amendment takes effect on April 22, 1975.

History

All but the statehood constitution permitted the legislature to set its members' compensation by law, usually with the proviso that no increase could take effect until the session after the one at which it was voted. (The Congressional Reconstruction Constitution of 1869 set initial compensation and the mileage allowance at \$8 a day and \$8 for every 25 miles, but the legislature was authorized to change both by law.)

The 1875 delegates returned to the statehood version by fixing compensation as a per diem of \$5 for the first 60 days of a session and \$2 thereafter; they also authorized a mileage allowance of 20¢ a mile for traveling to and from the capital. This allowance was subject to a back-to-back session prohibition that was the last clause of Section 24 until its most recent amendment.

Compensation and allowances for legislators apparently aroused little debate during the convention. One delegate did propose that the per diem be raised to \$6, but this invoked the retort that "if \$5 a day was not enough for members they should stay at home." (*Debates*, p. 97.)

Since 1881 legislators have attempted to increase their compensation on 20 occasions, but the voters have approved only four raises.

An amendment approved in 1930 raised the per diem to \$10 for the first 120 days of a session. If the legislature continued to meet thereafter, the pay was cut to \$5 a day for the remainder of the session. The amendment also decreased the mileage allowance to 10¢ a mile.

By an amendment adopted in November 1954, this section boosted the pay of legislators to \$25 a day for the first 120 days of each session; no pay was allowed after 120 days, however.

The 1960 amendment to this section for the first time provided an annual salary, not to exceed \$4,800; it also reduced the per diem to \$12, but applied it to special sessions as well as to regular sessions. The 1960 amendment also limited regular sessions to 140 days. It did not change the mileage allowance.

In 1972 Texas voters defeated an amendment to increase legislative pay to \$8,400 a year and that of the lieutenant governor and speaker to \$22,500. In November 1973 about 15 percent of the state's registered voters defeated a pay raise to \$15,000 a year for all legislators; the vote was 338,759 to 267,141. (This amendment also would have mandated annual sessions; see the Annotation of Sec. 5 of this article.)

Most recently, on April 22, 1975, 313,516 of the state's voters increased legislators' annual salary to \$7,200 and their per diem to \$30 for the full regular session and any special session; 227,786 voted against the increase. The 140-day limit on regular sessions was retained—Section 40 limits special sessions to 30 days—but the back-to-back special session prohibition was eliminated; per diem was made payable for an entire regular session, not just the first 120 days; and the members' mileage allowance was tied to that for state employees prescribed in the general appropriations act.

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Explanation

Representatives' and senators' compensation—\$7,200 a year plus \$30 a day during regular and special sessions—is fixed exclusively by this section. (*Terrell v. King*, 118 Tex. 237, 14 S.W.2d 786 (1929).) Expense allowance (now including mileage) and fringe benefits may be prescribed by law, however. For example, the legislature may appropriate funds to rent electric typewriters and dictating equipment for legislator's offices, both in the capitol and in their home districts (Tex. Att'y Gen. Op. No. M-101 (1967)), and to pay premiums on their (group) health, life, and accident insurance policies. (Tex. Att'y Gen. Op. No. M-408 (1969).) Legislators have been members of the state employees retirement system since its inception. (See Tex. Rev. Civ. Stat. Ann. art. 6228a.)

Section 21 of the Legislative Reorganization Act of 1961 (Tex. Rev. Civ. Stat. Ann. art. 5429f) authorizes the legislature by appropriation "to provide for the contingent expenses of its members for the entire term of office for which they have been elected . . ." For the 1974-75 biennium, the general appropriations act appropriated nearly \$11 million to the senate and about \$15.5 million to the house. (*General and Special Laws of the State of Texas*, 63d Legislature, 1973, ch. 659, 2220.) The appropriations were earmarked for members' salaries, travel, and office expenses; committee operations; and staff salaries and expenses. (Both appropriations also included a total of \$2 million for 1974 Convention expenses.)

Both houses limit members' expenditures by resolution and monitor them through their respective administration committees. House Simple Resolution No. 214 of the 63d Legislature (1973), for example, budgeted for each house member a monthly contingent expense allowance of \$875, plus up to \$120 a month for "communication expenses." House members could spend up to \$1,225 a month on staff salaries, and senators up to \$2,800. (See S.R. No. 930, 63d Leg., 1973.) The house resolution limited staff salaries by job category (*e.g.*, an administrative assistant could not be paid more than \$1,000 a month, a secretary not more than \$550) and the senate tied its staff salaries to the state's merit classification plan. Interim committees of both houses must submit operating budgets to their respective administration committees, whose chairmen must approve all expense and payroll vouchers—not only for committees but for every other category of expenditure as well.

The limited duration of regular legislative sessions is discussed in the Annotation of Section 5; see also the Annotation of Section 40, which discusses the duration of special sessions. It should be noted here, however, that the 140 days refers to calendar, not legislative, days. (A "legislative day" is a parliamentary device used to circumvent the three-readings-of-bills requirement of Sec. 32 of this article and is discussed in the *Explanation* of that section.) Thus, the 63d Texas Legislature convened in regular session on January 9 and adjourned 140 calendar days later on May 28, 1973.

Comparative Analysis

The trend toward more frequent meetings of legislatures has been accompanied by a move toward paying legislators an annual salary rather than a per diem. Today 37 states pay annual salaries to their lawmakers compared with 24 states in 1947. Arkansas, like Texas, utilizes a combination of daily session pay and annual salary. Legislators in annual session states usually are better compensated than lawmakers in biennial session states.

During 1970-71, Illinois increased its annual salary for legislators from \$12,000 to \$17,500; Maryland from \$2,400 to \$11,000; Mississippi from \$5,000 a biennium to \$10,000. In Oregon, salaries were to rise gradually from \$3,000 to \$4,800

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annually by 1973. In Utah, a constitutional amendment was adopted changing compensation from \$500 a year to \$1,500 for regular sessions, \$500 for budget sessions, and \$750 for special sessions. In Nevada, salary was increased from \$40 to \$60 a day. As of 1971 California paid the highest biennial salary to its legislators, \$48,950; the mean biennial salary of state legislators was \$13,733.

Increasingly, legislative leaders, major committee chairmen, and others performing additional duties receive additional compensation, as high as \$6,000 annually.

Traditionally, legislative compensation has been set by statute or constitution or both. However, the last few years have introduced a new procedure—the special commission. The legislature usually is given power to reject the compensation set by commission, but in most cases only by an extraordinary majority.

At the November 1970 general elections, compensation commissions were created in Arizona, Maryland, and West Virginia but defeated in Nebraska, New Hampshire, and North Dakota. The Maryland General Assembly Compensation Commission submits salary, expense allowance, travel, and retirement proposals to the general assembly, which may reduce or reject the submission. The West Virginia Citizens Legislative Compensation Commission submits its recommendations on salary and expense allowance; here also the legislature may reduce but not increase the recommendations. The Arizona commission diverges from the general pattern; recommendations made for increase in legislative compensation must be submitted at the next general election for voter consideration. (See Council of State Governments, *The Book Of The States, 1971-72* (Lexington, 1972), pp. 53-54.)

Whether by constitutional provision or by statute, all states directly or indirectly reimburse legislators for travel expenses, usually on a flat mileage rate, but in some 11 states for only one round trip per session. Almost three-fourths of the states provide a per diem living allowance, and a few states also provide a flat allowance large enough to cover living expenses.

The United States Constitution provides that compensation shall be “ascertained by law.” It is of interest to note that the original batch of amendments to the federal constitution, which produced the first ten, commonly known as the Bill of Rights, also included two that were not ratified. One of the two that failed provided that no law changing compensation “shall take effect, until an election of Representatives shall have intervened.” The *Model State Constitution* provides that the legislature determine its own salaries and allowances, “but any increase or decrease in the amount thereof shall not apply to the legislature which enacted the same.” (Sec. 4.07.)

Author's Comment

The constitutional specification of legislative (and other) salaries has been thoroughly discredited by experience. There is no respectable body of opinion that today advocates a continuation of this practice. If the states are to raise the quality of their legislative action, they must first raise the quality of their legislative personnel. The latter requires facing up to the inadequacies of legislative salaries in the majority of states. The abandonment of constitutional prescription will not, of course, guarantee the forthcoming of adequate compensation. It seems the first formal step to be taken, however. . . . (Wirt, “The Legislature,” in *Salient Issues of Constitutional Revision*, ed. John P. Wheeler (New York, National Municipal League, 1961), p. 79. For the same recommendation see American Political Science Association, Belle Zeller, ed., *American State Legislatures* (New York, Crowell, 1954), p. 88; John Burns, *The Sometime Governments* (New York: Citizens Conference on State Legislatures (Bantam), 1971), p. 160.)

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Ideally, any new Texas Constitution, as the federal constitution always has and the *Model State Constitution* recommends, should provide that the legislature may fix the compensation and allowances of its members by law. The reality may be otherwise, however, and delegates to any future constitutional convention may well be wary of proposing to the people that legislators set their own pay. Given this reality, the recently adopted Arizona scheme, which combines a commission to recommend legislative pay and allowances with an automatic referendum on the recommendation, may be the most practicable solution. (See Ariz. Const. Art. V, Sec. 13.) As an added safeguard, the legislature could be empowered itself to reject a commission recommendation, as the congress may do. Although unwieldy, the Arizona scheme is neither so inflexible nor demeaning as the present requirement for the legislature to go hat in hand to the people every time the cost of living index jumps significantly.

Sec. 25. SENATORIAL DISTRICTS. The State shall be divided into Senatorial Districts of contiguous territory according to the number of qualified electors, as nearly as may be, and each district shall be entitled to elect one Senator; and no single county shall be entitled to more than one Senator.

History

The Constitution of the Republic provided that senators were to be chosen by districts, "as nearly equal in free population (free negroes and Indians excepted), as practicable"; each district was entitled to only one senator.

The 1845 Constitution apportioned the number of senators "among the several districts to be established by law, according to the number of qualified electors," and limited the number of senators to no more than 33 and no fewer than 19. It additionally specified that "[w]hen a Senatorial district shall be composed of two or more counties, it shall not be separated by any county belonging to another district"—the first requirement of contiguity.

No further change occurred until the Constitution of 1876 adopted the present provision.

In 1965 Texas voters defeated an amendment that would have required apportionment of the senate strictly according to population.

Explanation

Of course senatorial apportionment must now be solely according to population, the United States Supreme Court having decided in 1964 that the Equal Protection Clause of the Fourteenth Amendment required apportionment of members of *both* houses of state legislatures on that basis (*Reynolds v. Sims*, 377 U.S. 533 (1964)). The 1961 Texas Senate apportionment was declared unconstitutional under *Reynolds* in *Kilgarlin v. Martin* (252 F. Supp. 404 (S.D. Tex. 1966), *rev'd on other grounds sub nom. Kilgarlin v. Hill*, 387 U.S. 120 (1967)). That court also voided the one-senator-per-county minimum of this section.

The requirements that senatorial districts be single member and composed of contiguous territory (*i.e.*, share a common boundary, see Tex. Att'y Gen. Op. No. WW-1041 (1961)) are still operative.

So, theoretically, is the "qualified electors" population base requirement, which presumably refers to the Article VI, Section 2, definition of qualified voter, because the United States Supreme Court has held that states are not committed to using total state population as their apportionment base. (*Burns v. Richardson*,

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384 U.S. 73 (1966).) The Texas Legislature did so for both houses in the 1965 and 1971 reapportionments, however, primarily because gross population data is easier to use.

The current (1971) senatorial apportionment has withstood constitutional attack and thus will probably govern until the 1980 census. (The plan was prepared by the Legislative Redistricting Board and is on file with the secretary of state. It was upheld in *Graves v. Barnes* (343 F. Supp. 704 (W.D. Tex.), *aff'd sub nom. Archer v. Smith*, 409 U.S. 808 (1972).)

The history of reapportionment litigation in Texas is surveyed in the *Explanation* of Section 26, because the house plans prepared under that section (and 26a) have fared less well in the courts than the senate plans.

Comparative Analysis

See the *Comparative Analysis* of Section 26.

Author's Comment

In an effort to prevent gerrymandering in drawing district lines, it has been suggested that no representative district boundary be allowed to cross a senatorial district boundary. The "pod" plan, as it is called, would make it easier for voters to identify their legislators, and if all election district boundaries were required to follow traditional political subdivision boundaries (except where crossing is essential to ensure districts of substantially equal population), voters would probably be a lot less confused about who is representing them at all levels of government.

For a discussion of the gerrymandering problem in more detail, as well as recommendations for revising the reapportionment sections generally, see the Annotations of Sections 26 and 28 of this article.

Sec. 26. APPORTIONMENT OF MEMBERS OF HOUSE OF REPRESENTATIVES. The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed: provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

History

The Constitution of the Republic specified 24 to 40 representatives for a population under 100,000 and 40 to 100 representatives for a population in excess of 100,000; it also gave each county at least one representative.

The 1845 Constitution specified a minimum number of representatives for each county. The numbers ranged from one to four and could not be changed until the first enumeration and apportionment.

The Constitution of 1861 authorized the legislature to take a census "of all the free inhabitants (Indians, not taxed, Africans and descendants of Africans excepted)" and apportioned the representatives according to the free population in

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each county, city, or town. It limited the number of representatives to no more than 90 and no fewer than 45.

The Constitution of 1866 required a census every ten years and authorized the legislature to fix the number of representatives and to apportion them according to the “white” population of each county, city, and town. This constitution retained the 1861 Constitution’s limitation on the number of representatives.

The 1869 Constitution provided for 100 representatives with from two to four to be apportioned to each district.

A constitutional amendment, adopted in 1936 as Section 26a of this article, limited to seven the number of representatives from any one county unless its population exceeded 700,000, in which event one additional representative was allowed for every 100,000 persons.

Explanation

A three-judge federal district court in January 1965 began the ongoing Texas reapportionment struggle by holding unconstitutional the state’s 1961 legislative reapportionment statutes.

(Reapportionment is the traditional term for mapping legislative election districts and allotting seats among them. Redistricting is also a common term for the process, however, and some argue that the one-man, one-vote requirement of population equality among districts denies legislatures their traditional discretion to apportion, thus making “redistrict” the only accurate term. As elaborated later, legislative discretion to apportion has been increased by recent United States Supreme Court decisions, but in any event, the traditional term “reapportion” is used in this Annotation.)

The 59th Legislature, which had just convened, proceeded to enact new reapportionments, but the same court a year later determined that the house plan still did not measure up because it contained 11 flatorial districts that egregiously violated the one-man, one-vote principle. (A “flatorial” district shares a legislator with another district. For example, under the 1965 house plan in question Nueces County (Corpus Christi), with 221,573 persons according to the 1960 census, was allotted three representatives in its own right; it was also joined with Kleberg County (1960 population of 30,052) in a flatorial district with a total population of 251,265 that elected one representative. The court had no difficulty concluding that the flatorial district diluted the weight of each Kleberg County resident’s vote by more than 25 percent.) The court found the legislature had acted in good faith in attempting to meet the one-man, one-vote challenge (pointing out, for example, that flatorial districts had been used since 1848) and allowed the 1966 elections to proceed under the 1965 plans. (The senate plan was sustained by the district court and its holding not appealed.) The court warned, however, that if the legislature failed to eliminate the flatorial districts from the house plan by August 1967, they would automatically be restructured as multimember districts—with, for example, Nueces and Kleberg counties electing four representatives as a single district (*Kilgarlin v. Martin*, 252 F. Supp. 404 (S.D. Tex. 1966), *rev’d on other grounds sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967).)

Both sides appealed the district court’s judgment to the United States Supreme Court. In January 1967 that court handed down its opinion in *Kilgarlin v. Hill* (386 U.S. 120 (1967)). (John Hill had been appointed secretary of state in the meantime and was substituted for his predecessor, Crawford Martin.) In a per curiam (by the court, not an individual justice) opinion, the Supreme Court affirmed invalidation of the 11 flatorial districts and the district court’s decision to allow conducting the 1966 elections under the faulty plan. However, it reversed that court’s approval of

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population disparities in the plan (other than those attributable to the flatorial districts) and sent the case back for action not inconsistent with its opinion.

At this point it may be helpful to outline the measures of population equality employed by the courts in testing legislative reapportionment plans against the one-man, one-vote standard. So far the tests have focused largely on numerical equality with a variety of arithmetical measures used to compare a given legislative district's population with the population of the "ideal" district, a population calculated by dividing the number of legislative seats into the apportionment base, usually a state's total population ascertained from the most recent decennial census. Thus in evaluating the 1965 Texas House plan, the Supreme Court calculated that the "ideal" representative district contained 63,864 persons (the state's 1960 population, 9,979,677, divided by the total number of house seats to be apportioned, 150) and then proceeded to compare populations of the various districts with this ideal. It noted that the least populous district was about 14 percent smaller than the ideal and the most populous about 12 percent larger; this added up to a maximum deviation of about 26 percent, which was too large to satisfy the one-man, one-vote standard. It also noted that the populations of the most and least populous districts varied as 1.31 to 1, and that 67 representatives would be elected from districts that were more than 6 percent over- or under-populated. (Another measure sometimes used is the minimum percentage of a state's population necessary to elect a majority of members to the house whose plan is challenged; the farther either way from 51 percent, the less "equal" the plan. See, e.g., *Burns v. Richardson*, 384 U.S. 73 (1966).) The total percentage deviation between most and least populous districts remains the standard measure of reapportionment equality, however.

The 60th Legislature that convened in January 1967 believed it had more pressing problems than to reapportion its lower house, so the district court's judgment restructuring the flatorial districts was allowed to take effect in August of that year and the 1968 house elections were conducted under the 1965 plan, as modified by the district court. The next legislature, the 61st convening in 1969, made a few changes in the house plan to eliminate the more egregious population disparities (see *General and Special Laws of the State of Texas*, 61st Legislature, 1969, ch. 733, at 2128, and ch. 808, at 2403), and the 1970 elections were conducted under the amended plan. During these closing years of the 1960s the antagonists were marking time for the next round, which began with the 1970 census.

The 62nd Legislature convened in January 1971 knowing it faced a major reapportionment task. House, senate, and congressional seats all had to be reapportioned, and from the start it was clear that the multitude of competing interests would not be reconciled short of the United States Supreme Court. As explained more fully in the *Explanation* of Section 28, both the Texas Supreme Court and the Legislative Redistricting Board, the latter functioning for the first time since its 1948 creation, also played major roles in the reapportionment drama.

The legislature succeeded in enacting statutes reapportioning the house and congressional seats, but the senate could not agree on a plan. The Texas Supreme Court then entered the picture, striking down the house plan as violative of this Section 26 because it cut too many county boundaries (*Smith v. Craddick*, 471 S.W.2d 375 (Tex. 1971)). That court next ordered the redistricting board to reapportion the house, which it accomplished (along with the senate reapportionment) in October 1971 (*Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570 (Tex. 1971)). Then it was the turn of the federal judiciary.

Various individuals (e.g., blacks, Republicans, liberal Democrats), unhappy with both the house and the senate plans as prepared by the redistricting board, filed suit in federal district court alleging unconstitutional population disparities

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and gerrymandering. (The legislature's congressional reapportionment plan was also attacked, and found wanting, in *White v. Weiser*, 412 U.S. 783 (1973).) The district court sustained both attacks on the house plan, holding excessive the 9.9 percent population deviation from the ideal district and finding that the large multimember districts in Bexar (San Antonio) and Dallas counties invidiously discriminated against the substantial Mexican-American and Black populations in those areas. (*Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972).) The court itself divided those counties' multimember districts into single-member districts and, as modified, allowed conduct of the 1972 elections under the house plan after warning the legislature that if it did not constitutionally reapportion the house by July 1973 the court would do so. (The senate plan was approved by the district court and the approval not appealed.)

Naturally the state appealed this decision, and in June 1973 the Supreme Court reversed in part and affirmed in part the district court's judgment. The high court found the population deviations not excessive, absent proof by the challengers of invidious discrimination produced by the deviations, but agreed with the district court's factual conclusions that the plan's countywide, at-large elections of representatives from Bexar and Dallas counties unconstitutionally discriminated against the ethnic minorities there. (*White v. Regester*, 412 U.S. 755 (1973).)

The district court devoted nearly seven pages of its opinion to discussing the possible constitutional infirmities of multimember districts. These ranged from obvious racial overtones to the excessive cost of campaigning in a multimember as compared with a single-member district to obvious discrimination in giving Harris County (Houston) single-member districts and all the other metropolitan counties multimember districts; this last disparity was if anything aggravated by the court's restructuring Bexar and Dallas counties into single-member districts. (See 343 F. Supp., at pp. 719-24. See also *Chapman v. Meier*, 420 U.S. 1 (1975), in which the court disapproved of multimember districts in judicially ordered reapportionments.) Thus the Supreme Court's June decision was barely published before attacks were launched against the remaining metropolitan multimember house districts in El Paso, Galveston, Hidalgo (McAllen), Jefferson (Beaumont-Port Arthur), McLennan (Waco), Nueces (Corpus Christi), Tarrant (Fort Worth), and Travis (Austin) counties. The same district court that struck down the multimember districts in Bexar and Dallas counties in 1972 invalidated all the remaining multimember districts but that in Hidalgo County. The court also restructured these districts (except Galveston's) into single-member districts, but its judgment was stayed by the Supreme Court so that the 1974 house elections in those counties could be conducted in the multimember districts. (*Graves v. Barnes*, 378 F. Supp. 640 (W.D. Tex. 1974).) The state also appealed the *Barnes II* decision and in June 1975 the Supreme Court returned the case to the district court, noting that the 64th Legislature converted the multimember house districts in issue into single-member districts, and directed the lower court to determine whether this action made the case moot. (422 U.S. 935 (1975).) As this is written still another court challenge in the state's continuing reapportionment saga may be brewing, but for now the focus of controversy has shifted to the federal Voting Rights Act of 1965, which was extended in 1975 to cover Texas. (42 U.S.C.A. 1973 *et seq.*) Under the extension, before any change made in voting qualifications or procedures since 1964 can be enforced, the change must be approved by the United States Attorney General or the federal district court for the District of Columbia. Changes in school district and precinct boundaries, from at-large to single-member municipal election districts, and from multimember to single-member legislative districts have all been disapproved under the extension, with disapprovals to date totaling 21.

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The reapportionment issues of the current decade are provocatively and intelligently discussed in a collection of essays edited by Professor Nelson W. Polsby, a political scientist at the University of California, Berkeley; the collection is titled *Reapportionment in the 1970s* (Berkeley: University of California Press, 1971). A standard work on the subject is Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* (New York: Oxford University Press, 1968).

Comparative Analysis

The one-man, one-vote decision in *Reynolds v. Sims*, coupled with the 1970 census, required a substantial change in the pattern of representation in state legislatures.

During 1971 the Council of State Governments published a series of monthly reports on reapportionment. As of November of that year, 28 states had completed legislative reapportionment. The percentages reflecting over- and underrepresentation of districts ranged from a high of +41.2 and -45.5 in the Wyoming House to a low of +1 and -1 or less in seven states. Eight states did not divide counties in reapportioning at least one of their houses. Most other states crossed county lines on some occasions to establish district boundaries.

Oklahoma and Indiana disregarded county, city, and town boundaries where necessary to achieve population equality. In those instances where county lines were disregarded, at least two states, Idaho and New Mexico, used voter precincts as the building blocks for districts, while Wyoming used townships and South Dakota used townships and census enumeration districts. Arizona, Illinois, Indiana, Iowa, Louisiana, New Hampshire, Oklahoma, and Texas used census tracts, enumeration districts, and block tracts in drawing district lines.

The states passing reapportionment laws utilized all types of districts from single-member in both houses to a combination of single-member and multi-member in both houses. Twenty-seven states used at least some multimember districts. Nine states used single-member districts exclusively for both houses; ten states used single-member districts exclusively for one house.

Lawsuits attacking existing apportionments were filed in 16 states and reapportionment plans were awaiting approval by the governor in two states. The Montana and New Jersey plans were ruled unconstitutional because of population disparities exceeding 10 percent in each house. Both states were told to redraw their district boundaries and disregard county lines if necessary to obtain more equal districts. New Jersey has appealed the decision. In a special session of its legislature, Montana succeeded in redrawing district lines.

A U.S. district court in Kentucky declared that state's plan unconstitutional on the ground that it contained substantial population inequalities that could have been eliminated but were not.

When it was submitted to him for approval, the Louisiana attorney general objected to that state's reapportionment plan; subsequently it was held unconstitutional by a U.S. district court. A new redistricting plan has since been accepted.

A U.S. district court in Mississippi ruled that state's plan unconstitutional and redrew district boundaries for 52 senate and 122 house seats. The United States Supreme Court upheld the district court's decision but required it to subdivide the largest multimember district into single-member districts. The Supreme Court also affirmed the district court's holding that the requirements of the 1965 Voting Rights Act did not apply to a court-drawn redistricting plan.

A court challenge to the use of multimember districts was rejected in Montana because of the United States Supreme Court's decision in *Whitcomb v. Chavis* (403

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U.S. 124 (1971)), which is discussed in the *Author's Comment* on this section.

The United States Constitution apportions representatives among the several states on the basis of population with the requirement that every state is entitled to at least one representative. (There are six states with only one representative.) Each state also gets two senators. Until the 1920 Census, congress regularly increased the size of the house of representatives as the country's population increased. Since then, the practice has been to retain the size of the house at 435 and to reapportion after each census. Since 1930, reapportionment has been automatic under a permanent statutory formula.

Nineteen states had completed their congressional reapportionments by November 1971. The 1970 census showed that the New Mexico and Nebraska congressional districts did not deviate by an appreciable amount and therefore district boundaries were not changed. Another six states have only one congressman and will not have to reapportion. The greatest percentages of over- and underrepresentation of districts were +7 and -5.4 in four states. Congressional district populations in the remaining states deviated 1 percent or less from the ideal. Ten states crossed county lines to draw their congressional district boundaries.

Most state and territorial legislatures that had not completed reapportionment by November 1971 scheduled special sessions restricted to that topic or planned to act at their next regular sessions.

The United States Constitution provides for two senators from each state. Thus, districts are statewide and multimember, but, because senatorial terms are staggered, senators are in effect elected from a single-member district coterminous with the boundaries of the state.

The *Model State Constitution's* recommendation for districting is that:

... Each ... district shall consist of compact and contiguous territory. All districts shall be so nearly equal in population that the population of the largest district shall not exceed that of the smallest district by more than ___ percent. In determining the population of each district, inmates of such public or private institutions as prisons or other places of correction, hospitals for the insane or other institutions housing persons who are disqualified from voting by law shall not be counted.

In the comment to this section a maximum population variation not to exceed 10 percent is recommended to fill the blank. (See Sec. 4.04 and comment at p. 48.)

Author's Comment

In devising lasting standards for reapportioning the Texas House and Senate, the task is complicated not only because the political stakes are so high for legislators but also because the United States Supreme Court apparently is redirecting its scrutiny from the "sixth grade math" of numerical equality to the political briar patch of "fair and effective representation." *Gaffney v. Cummings* (412 U.S. 735 (1973)), decided the same day as *White v. Regester* (412 U.S. 755 (1973)), makes clear, for example, that population deviations heretofore suspect are now acceptable (unless a challenger can meet the almost impossible burden of proof and show specific invidious discrimination resulting from the deviations), with one justice flatly asserting in a separate opinion that a total deviation up to 10 percent is de minimis. On the other hand, the court for the first time has shown more than passing interest in how *representative* a reapportionment plan is. One need only compare the court's opinion in *Wright v. Rockefeller* (376 U.S. 52 (1964)), in which all the justices ignored the obvious partisan gerrymander that snaked large

numbers of Black and Puerto Rican voters into Adam Clayton Powell's New York congressional district, with the later opinion in *Whitcomb v. Chavis* (403 U.S. 124 (1971)), in which the court seriously considered but ultimately rejected the probability analysis techniques demonstrating that multimember district voters had more electoral clout than their counterparts in single-member districts but that, conversely, the winner-take-all nature of multimember district elections submerged substantial minority interests. One need only read these two opinions side by side to suspect that another eye has been focused on reapportionment. And if one then considers the court's *holding* in *White v. Regester*, invalidating Bexar and Dallas counties' multimember house districts because they denied fair and effective representation to significant minority interests, one is almost tempted to predict a constitutional revolution. Certainly the challengers of the rest of Texas' metropolitan multimember districts made that necessary leap of faith.

The commentators view the court's apparent directional shift with both elation and dismay. Elation because in their opinion the court has too long played the numbers game of equal representation, exalting numerical equality while mostly ignoring its invitation to gerrymander by using computer wizardry to create districts whose populations miss the "ideal" by only fractions of a percent, whose shapes are aesthetically compact and contiguous (but of course bear no relation to political-subdivision shapes or boundaries), and whose voters can be counted on to return to power the interest group who prepared the plan. The commentators are dismayed by their perception of the enormous difficulty of defining representativeness and then translating that definition into judicially manageable standards for review of reapportionment plans. And there is finally the suggestion that the court in its new quest for fairness will repeat the error of the last decade by launching a holy war against demon gerrymander in this. (See Dixon, "The Court, the People, and 'One Man, One Vote,'" and Baker, "Gerrymandering: Privileged Sanctuary or Next Judicial Target?" in *Reapportionment in the 1970s*, ed. Polsby, pp. 7, 121.)

Despite the present uncertainty about appropriate reapportionment standards, a few benchmarks may be discerned from experience and prognostication to guide delegates to a new constitutional convention.

First, the use of multimember districts should be abandoned. Their winner-take-all, rigid majoritarianism is objectionable to many from all points on the political spectrum and since *White v. Regester* they act as magnets for constitutional challenge.

Second, legislative district lines should follow traditional political boundaries unless deviations are essential to ensure districts of substantially equal population (and remember that substantial under *Gaffney v. Cummings* is more "substantial" than it used to be). The requirement of following traditional political boundaries in mapping districts is a better defense against partisan gerrymandering than the traditional requirements of compactness and contiguity because the computerized gerrymander bears absolutely no resemblance to his serpentine ancestor. Drawing district lines along county boundaries is traditional in Texas—it has been constitutionally required for house districts since 1876 and for senate districts since 1845—and the Texas Supreme Court has shown that it will enforce the requirement. District lines inside counties (*i.e.*, in metropolitan areas) should follow commissioners and voting precinct boundaries and, if necessary for discrete identification, school and other special-purpose governmental district boundaries. If a voter and his neighbor are all in the same voting precinct, as well as the same representative, senatorial, and congressional districts, they will find it much easier to learn who is representing them. (In this connection see the description of the "pod" senatorial district concept in the *Author's Comment* on Sec. 25.)

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Third, any new constitution should mandate legislative districts of “substantially equal population” and let it go at that. Rotten boroughs are extinct and the risk of their resurrection small. Moreover, most now recognize that reapportionment should serve important values in addition to numerical equality. The magic number is unknown at present and probably unknowable. And though one is tempted to recognize the 10 percent figure in the salamander’s entrails, the trouble with any de minimis rule is that it quickly becomes the beginning rather than the end of the search for substantial population equality.

Finally, the Legislative Redistricting Board should be preserved and strengthened—as recommended in more detail in the *Author’s Comment* on Section 28.

Sec. 26a. COUNTIES WITH MORE THAN SEVEN REPRESENTATIVES. Provided however, that no county shall be entitled to or have under any apportionment more than seven (7) Representatives unless the population of such county shall exceed seven hundred thousand (700,000) people as ascertained by the most recent United States Census, in which event such county shall be entitled to one additional Representative for each one hundred thousand (100,000) population in excess of seven hundred thousand (700,000) population as shown by the latest United States Census; nor shall any district be created which would permit any county to have more than seven (7) Representatives except under the conditions set forth above.

History

Added to the constitution in 1936, this section amended Article III, Section 26. (See the *History* and *Explanation* of that section.)

Explanation

The section represented the first active retreat from the mandate of Section 26 that representative districts be apportioned solely on the basis of population. It had the effect, as it was no doubt intended to have, of guaranteeing underrepresentation for the state’s metropolitan areas in the house. It was also an early casualty of the one-man, one-vote assault in Texas, being declared unconstitutional by the three-judge federal court in *Kilgarlin v. Martin* (252 F. Supp. 404 (S.D. Tex. 1966)), *rev’d on other grounds sub nom. Kilgarlin v. Hill* (386 U.S. 120 (1967)).

Comparative Analysis

See the *Comparative Analysis* of Section 26 of this article.

Author’s Comment

Section 26a is gone with the wind.

Sec. 27. ELECTIONS. Elections for Senators and Representatives shall be general throughout the State, and shall be regulated by law.

History

The Constitution of the Republic specified that house members were to be elected “on the first Monday of September each year, until Congress shall otherwise provide by law.” Senators were to be elected on the same day, every three years, but congress apparently had no power to change their election date. The

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present language of Section 27 originated in the statehood constitution and has remained unchanged since then.

Explanation

All elections for the legislature are conducted statewide, on the same date, which is the first Tuesday after the first Monday in November of every even-numbered year, the date fixed by law. (See Election Code art. 2.01.) This does not mean, of course, that every legislative seat is up for election at every general election. Every house seat is, but senators are elected for four-year staggered terms, so only approximately one-half of the senate seats are up for election in every even-numbered year. (See the *Explanation* of Secs. 3 and 4 of this article.)

Comparative Analysis

A fairly large number of states set a specific day for election of members of the legislature, a few states set the day but permit the legislature to change it, and two states simply provide that the date shall be set by law. About a third of the states evidently cover the matter in a general provision on elections, for the *Index Digest* has entries for time of election for the legislature of only 32 states.

The United States Constitution leaves the time of congressional and presidential elections to the several states but reserves to congress power to prescribe it. The traditional first Tuesday after the first Monday in November of even-numbered years was first adopted by congress in 1845 as the day for presidential elections. Congress in 1872 set the same day for congressional elections, first effective in 1876.

The *Model State Constitution* provides that members of the legislature shall be elected "at the regular election in each odd-numbered year." This term is not defined. Presumably, however, it is covered in the Suffrage and Elections article by the command to the legislature to "provide [by law] for . . . the administration of elections. . . ." (Secs. 4.05, 3.02.)

Author's Comment

Section 27 should be eliminated, counting on the legislature to preserve the general election practice and recognizing that it has already regulated elections (with all doubters referred to the voluminous Election Code). If retained, the section should be consolidated with Section 13, relating to special elections, and both sections then relocated with Sections 3 and 4 so that all election and term details are in one place.

Sec. 28. TIME FOR APPORTIONMENT; APPORTIONMENT BY LEGISLATIVE REDISTRICTING BOARD. The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provisions of Section 25, 26, and 26-a of this Article. In the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislative Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative

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districts, as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more of the members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have force and effect of law. Such apportionment shall become effective at the next succeeding state-wide general election. The Supreme Court of Texas shall have jurisdiction to compel such Commission to perform its duties in accordance with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law. The Legislature shall provide necessary funds for clerical and technical aid and for other expenses incidental to the work of the Board, and the Lieutenant Governor and the Speaker of the House of Representatives shall be entitled to receive per diem and travel expense during the Board's session in the same manner and amount as they would receive while attending a special session of the Legislature. This amendment shall become effective January 1, 1951.

History

The Constitutions of 1845 and 1861 provided for reapportionment every eight years following a required enumeration of all free inhabitants.

The 1866 Constitution called for an enumeration of all inhabitants every ten years and reapportionment according to the white population.

The Constitution of 1869 provided for reapportionment of representatives and senators "by the first Legislature in session after the official publication of the United States Census, every 10 years."

As originally adopted in 1876, this section read:

The Legislature shall, at its first session after the publication of each United States decennial census, apportion the State into Senatorial and Representative districts, agreeably to the provisions of Sections 25 and 26 of this Article; and until the next decennial census, when the first apportionment shall be made by the Legislature, the State shall be, and it is hereby divided into Senatorial and Representative districts as provided by an ordinance of the Convention on that subject.

An amendment in 1948 added the present provisions for apportionment by a Legislative Redistricting Board, omitted the reference to division by an ordinance of the convention, required apportionment by the legislature at "its first regular session," instead of "its first session," after the publication of each decennial census, and included the reference to Section 26a in the clause reading, "agreeably to the provisions of Sections 25, 26 and 26-a of this Article."

Explanation

Prods from both the federal and state judiciary proved necessary to make the Legislative Redistricting Board do its duty. The board never met between 1948 and 1971, although one irate taxpayer, with more ingenuity than the courts were willing to accept, attempted to cut off its members' compensation until they met and legally reapportioned both houses of the legislature. (*Miller v. James*, 366 S.W.2d 118 (Tex. Civ. App.—Austin 1963, *no writ*).)

Not until the 62nd Texas Senate failed to agree on a reapportionment plan, in 1971, did the Legislative Redistricting Board take action. (As noted in the *Explanation* of Sec. 25, the board's senate plan is still in effect, having withstood constitutional attack all the way to the United States Supreme Court.) The house did agree on a plan, which was duly enacted in 1971, but the Texas Supreme Court found it wanting (*Smith v. Craddick*, 471 S.W.2d 375 (Tex. 1971)). Whereupon the board washed its hands of the unrewarding task, requiring still another lawsuit to convince its members that they had a duty to reapportion legislative districts in

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response to an unconstitutional reapportionment as well as to no reapportionment at all (*Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570 (Tex. 1971)). The board's house plan was also attacked (in federal court) and two of the multi-member districts it created were found wanting. (See the *Explanation* of Sec. 26.)

Section 28 by its terms limits the legislature's reapportionment activities to regular sessions. (See Tex. Att'y Gen. Op. No. M-881 (1971).)

Comparative Analysis

Traditionally, reapportionment has been exclusively a legislative duty, and, in many instances, the job did not get done. Even before the United States Supreme Court opened the door to judicial enforcement of the duty, however, some states began experimenting with ways to accomplish redistricting in the face of the legislature's obvious reluctance to act. Indeed, Section 28 was adopted a good many years before the breakthrough in *Baker v. Carr* (369 U.S. 186 (1962)). Now, as state after state undertakes the task of reapportionment in a constitutional manner, attention is increasingly focused on alternative procedures to ensure reapportionment in case the legislature fails or refuses to act.

There are at least 23 states besides Texas that provide an alternative procedure for redistricting. The new Illinois Constitution, for example, provides that if the legislature fails to reapportion, then a commission appointed by the house and senate leaders will do so. Colorado, on the other hand, sanctions failure to reapportion by withholding the legislators' compensation and making them ineligible for reelection until reapportionment is accomplished. (See National Municipal League, *State Constitutional Provisions on Apportionment and Districting* (New York, 1971).)

The United States Constitution is silent on the mechanics of reapportionment, but since 1930 a statutory formula has redistributed the 435 house seats automatically following each decennial census.

The *Model State Constitution* recommends bypassing the legislature completely by requiring the governor to appoint a board of qualified voters to make reapportionment recommendations that the governor must publish; the governor may also submit his own plan, but must explain why it differs from the board's recommendations. Original jurisdiction is conferred on the highest court for judicial review, including power to promulgate a revised plan or an original plan if the governor fails to act. (Sec. 4.04.)

Author's Comment

The redistricting board concept is sound, and we now know it works in Texas, if creakingly. The Texas model could be improved in two ways, however.

First, its membership should be expanded to include a number of private citizens who would introduce both the voters' perspective and more disinterest into the immensely complicated, primarily political process that is reapportionment. Provision should also be made for proportional partisan representation on the board; Texas will not always be a one-party state and excluding one major party or the other from the reapportionment decision will simply invite litigation.

Second, the entire reapportionment task should be advanced to ensure adequate time for judicial review. For example, although the 62nd Legislature adjourned its regular session May 31, 1971, without enacting a senatorial reapportionment, the board did not convene until August 24 and did not file its senate plan until October 15. The enacted house plan was invalidated on September 16 and the board filed its house reapportionment on October 22. Both of the board's plans were then attacked in federal court, which approved the senate plan but

struck down the house plan on January 28, 1972. The court's decision on both plans was of course appealed to the United States Supreme Court, which didn't decide on the house plan until June 19, 1973. Fortunately for the state's legislative election process, the federal trial court allowed conducting the 1972 legislative elections under the board's plans, but Texas is courting disaster if it continues to rely on federal judicial forbearance.

To begin, the legislature ought to be allowed to reapportion itself in special session. A revision of Section 28 ought not specify any session, of course, but simply direct the legislature to reapportion when necessary and at least every ten years. The other dimension of the time problem—how to ensure timely board action in default of legislative action—is more difficult to solve because it requires moving back the beginning of the state's entire election cycle.

At present a candidate for the legislature must file early in February of the year in which the seat he seeks is up for election. The first primary is held in May and the second (if a runoff is necessary) in June; the general election is of course held in November.

The 62nd Legislature had the 1970 census data necessary to reapportion itself by mid-February 1971, and even with the present limitation on regular session duration the house was able to complete its own reapportionment by April 29. The senate also had time to prepare several senatorial reapportionments, but as noted the senators could not agree on a plan.

Section 28 does not require the Legislative Redistricting Board to meet until three months after a regular session adjourns, and the nearly three months that actually elapsed before the board met the first time on August 24 were sorely missed when both state and federal courts proceeded (with commendable dispatch under the circumstances) to review the reapportionment plans. By the time the courts finished, the November 1972 general election was history and, had not the federal trial court permitted the November 1972 house elections to be conducted under a reapportionment it held unconstitutional in January of that year, house members might have been forced to run at-large, statewide, as a federal district court once required in Illinois.

The Legislative Redistricting Board should be required to convene by June 1 of the year following a decennial census if the legislature has not reapportioned both houses by then, or within ten days following entry of a final court judgment invalidating the reapportionment of either house. It should then be required to complete reapportionment within 30 days after convening. Because judicial review will probably require several months, the various election deadlines must also be moved forward so that, for example, ballot applications are required in July and the first and second primaries are conducted in September and October. This timetable will give the courts nearly a year to review reapportionment plans before legislative candidates need to pick their districts and get on the ballot. (A much shorter election cycle has other advantages to commend it—less cost for and wear-and-tear on candidates being the principal ones—but evaluation of its merits is beyond the scope of this *Author's Comment*.) The various election deadlines are of course prescribed by statute, and no constitutional action is required to change them.

Sec. 29. ENACTING CLAUSE OF LAWS. The enacting clause of all laws shall be: "Be it enacted by the Legislature of the State of Texas."

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History

From earliest times it has been customary to prefix written law with a declaration stating what body is exercising the governmental power of making law. This prefix provides notice that what follows is the law and that it is the command of the sovereign. Today this prefix is called the “enacting clause.”

The enacting clause used by American colonial assemblies stated that their statutes were enacted by or with the consent of the King of England, the statement being patterned after that prefixing Acts of Parliament: “Be it enacted by the King’s most Excellent Majesty, and by and with the advice and consent of the Lords, Spiritual and Temporal, and by the Commons, in this present Parliament assembled, and by the authority of the same.” After the Revolution this form became inappropriate, and most states adopted an enacting clause similar to that contained in Section 29.

The Constitution of the Texas Republic provided that “The style of the laws of the Republic shall be, ‘Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled.’” Subsequent state constitutions specified that “The Style of the laws shall be, ‘Be it enacted by the Legislature of the State of Texas.’” The present constitution substituted “The enacting clause of all laws” for “The Style of the laws,” while preserving the wording of the clause itself.

Explanation

There are dicta in several cases to the effect that an enacting clause in the exact language of this section is necessary to the validity of a law. (*E.g.*, *American Indemnity Co. v. City of Austin*, 112 Tex. 239, 246 S.W. 1019 (1922); *Texas & Miss. Canal & Nav. Co. v. County Court of Galveston County*, 45 Tex. 272 (1876). For a discussion of legislative resolutions, and their difference from laws, see the *Explanation* of Sec. 30.) This is the majority rule in the country, and it is therefore foolish to experiment with the wording of the clause. (See C. Dallas Sands, *Sutherland Statutory Construction*, 4th ed. (Chicago: Callaghan & Co., 1972), vol. 1A, Sec. 19.02.)

Legislative resolutions do not require an enacting clause, and obviously one in the language of Section 29 would be inappropriate. (See *National Biscuit Co. v. State*, 134 Tex. 293, 135 S.W.2d 687 (1940).) Resolutions of the Texas Legislature usually contain a counterpart to the enacting clause, called the “resolving clause,” with that for a concurrent resolution stating, for example, “BE IT RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, That. . .”

Comparative Analysis

An enacting clause section is found in about 45 state constitutions. Most of the clauses speak only in the name of the legislature, a few include the people, and a few enact in the name of the people only. Three of the five constitutions that have no enacting clause section—those of California, Pennsylvania, and Virginia—do have a requirement that laws be enacted only by bill. The other two states—Delaware and Georgia—have no such requirement. Curiously, the United States Constitution has neither an enacting clause section nor a requirement for enacting laws by bill only. The *Model State Constitution* has no enacting clause section but does have a “law by bill only” requirement.

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Author's Comment

The enacting clause requirement is obeyed almost automatically in drafting bills for the Texas Legislature. Nevertheless, it should be preserved in the constitution to distinguish bills from other legislative documents, thus triggering application of the various safeguards imposed by this article on the enactment process, and to provide notice that it is a proposed law the legislature is considering.

Sec. 30. LAWS PASSED BY BILL; AMENDMENTS CHANGING PURPOSE.
No law shall be passed, except by bill, and no bill shall be so amended in its passage through either House, as to change its original purpose.

History

This section originated in the Constitution of 1876 and has remained unaltered since then. Its absence from earlier constitutions led one commentator to suggest that laws could be enacted in the form of concurrent and joint resolutions before 1876. (Comment, "Legislative Resolutions: Their Function and Effect," 31 *Texas L. Rev.* 417, 423 (1953).)

Explanation

Law by Bill. It is clear today that laws may be enacted only in the form of bills. (See, e.g., *City of Hutchins v. Prasifka*, 450 S.W.2d 829 (Tex. 1970); *Caples v. Cole*, 129 Tex. 370, 102 S.W.2d 173 (1937).) This is an important distinction, between bills and other legislative documents such as resolutions, because other sections of this article apply a variety of procedural safeguards to bills to encourage their deliberate consideration. Thus bills but not resolutions must contain an enacting clause (Sec. 29), are limited to a single subject that must be expressed in a title (Sec. 35), must be referred to a committee (Sec. 37), and do not take effect (except in emergencies) until 90 days after the session adjourns. (Sec. 39.) (For the form of bills and resolutions, see Texas Legislative Council, *Drafting Manual* (Austin, 1966), ch. 1; Tex. J. Rules 22-24 (1973).)

Legislative resolutions, of which there are three types used in Texas, serve a variety of functions. Joint resolutions are used most often to propose amendments to the constitution (see Art. XVII, Sec. 1); they are also employed to call constitutional conventions (see Art. XVII, Sec. 2), and to ratify amendments to the United States Constitution. Concurrent resolutions, which like joint resolutions require the approval of both houses, are used to declare joint legislative opinion, adopt joint legislative rules, recall a bill from the governor, create joint committees, and confer permission to sue the state. Simple resolutions, which express the will of a single house, are used to memorialize distinguished citizens, direct the expenditure of contingent expense funds, create interim committees, and adopt the rules of the house. (See Dick Smith, *How Bills Become Laws in Texas*, 4th ed. (Austin: The University of Texas at Austin, 1972), pp. 16-17, for a description of the procedure for adopting resolutions.)

Although denying them the effect of law, Texas courts have nevertheless upheld the use of resolutions as an appropriate device for carrying on the legislature's business. Thus in *Terrell v. King* (118 Tex. 237, 14 S.W.2d 786 (1929)), the supreme court upheld a concurrent resolution, creating a joint investigating committee and directing the payment of its expenses, against the argument that money could only be appropriated by law, the court pointing out that

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the money had been appropriated by law to the legislature and that a resolution was the appropriate vehicle for directing its expenditure. A court of civil appeals held that a concurrent resolution setting aside a room in the Capitol for the display of Confederate memorabilia prevailed over a general statute vesting the state superintendent of buildings and grounds with general control over that building (*Conley v. Daughters of the Confederacy*, 164 S.W. 24 (Tex. Civ. App.—Austin 1913, writ *ref'd*)). But a concurrent resolution declaring state policy as favoring equal accommodations for all races did not repeal the common law rule that a private amusement business may exclude whomever it wishes, and the attempt to amend a statute by concurrent resolution also failed. (*Terrell Wells Swimming Pool v. Rodriguez*, 182 S.W.2d 824 (Tex. Civ. App.—San Antonio 1945, no writ); *Caples v. Cole*, 129 Tex. 370, 102 S.W.2d 173 (1937).)

Germaneness. Section 30 also contains what is usually called the “germaneness rule”: a bill may not be amended during its legislative journey so as to change its original purpose. The rule is said to prevent confusion and surprise, but it is not enforceable by the courts because the enrolled bill doctrine shields its noncompliance from judicial review. (See, e.g., *Parshall v. State*, 62 Tex. Crim. 177, 138 S.W. 759 (1911); see generally the *Explanation* of Sec. 12 of this article.) A nongermane amendment to a bill is subject to point of order objection, however, and the rules of both houses contain several pages digesting rulings on this slippery question. (Tex. H. Rule 20, sec. 7, comment at pp. 146-56 (1973); Tex. S. Rule 72, comment at pp. 530-57 (1973).)

Comparative Analysis

About 22 states, including Texas, provide that laws shall be passed by bill only. Maryland requires all laws to be passed by original bill. North Dakota specifies that no law may be passed except by bill adopted by both houses. And in Rhode Island the concurrence of both houses is made necessary in the enactment of laws.

Approximately 12 states, including Texas, provide that no bill may be altered or amended in its passage through either house so as to change its original purpose. One state prohibits any amendment which changes the scope or object of a bill.

The United States Constitution is silent on both requirements. The *Model State Constitution* contains the law-only-by-bill requirement but not the germaneness rule.

Author's Comment

The requirement that a proposed law be offered in a unique form triggers application of the various safeguards surrounding the enactment process. If the more important of these safeguards are preserved, then of course the law-only-by-bill requirement of this section ought to be also.

The germaneness rule, on the other hand, ought to be deleted from the constitution. It is most difficult to enforce, as the parliamentary rulings evidence, with asserted distinctions between the germane and nongermane sometimes approaching the theological. More important, since the rules of both houses require the printing and distribution of all proposed amendments to bills before they are considered, the rule is not necessary to avoid surprise and confusion. In any event, the members are fully capable of enforcing the rule, and it is their sole responsibility under the enrolled bill doctrine.