ARTICLE VI

SUFFRAGE

Sec. 1. CLASSES OF PERSONS NOT ALLOWED TO VOTE. The following classes of persons shall not be allowed to vote in this State, to wit:

First: Persons under twenty-one (21) years of age.

Second: Idoits and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

History

Three of the five voter disqualifications originally written into Section 1, as adopted in 1876, had appeared in previous Texas constitutions. Prohibiting certain classes of criminals from voting dates back to the Constitution of 1836, which disqualified "those who shall hereafter be convicted of bribery, perjury, or other high crimes and misdemeanors." (General Provisions, Sec. 1.) The language was slightly altered in the first state constitution (1845) to "those . . . convicted of bribery, perjury, forgery, or other high crimes" (Art. VII, Sec. 4), and this same phraseology was carried forth in the Constitutions of 1861 (Art. VII, Sec. 4), 1866 (Art. VII, Sec. 4), and 1869 (Art. XII, Sec. 2). Curiously, the suffrage article of the Constitution of 1869 disqualified *all* felons as well. (Art. VI, Sec. 1.) The first disqualification of the mentally incompetent was also contained in the 1869 document, which along with felons disqualified any person confined in prison, kept in an asylum, or "of unsound mind." (Art. VI, Sec. 1.) Disfranchisement of United States Army and Navy personnel began with the Statehood Constitution (Art. III, Sec. 1) and was retained in every subsequent constitution, including that of 1876, in substantially the same language.

Several delegates to the Convention of 1875 expressed concern over what crimes ought to constitute a suffrage disqualification, and some argued against disfranchising persons who had paid society's penalty for violating the law. (*Debates,* pp. 258-62.) The felony disqualification was retained, but with allowance for exceptions made by the legislature. In addition to felons, mental incompetents ("idiots and lunatics"), and soldiers and sailors, the 1876 version of Section 1 introduced two more classes of persons disqualified from voting: persons under 21 and "all paupers supported by any county." Treatment of age as both a disqualification (Sec. 1) and a qualification (Sec. 2) is a redundancy peculiar to the Constitution of 1876; in all earlier Texas constitutions age was considered a matter of qualification. (See the *History* of Sec. 2.) It has been suggested that the disfranchisement of United States Army and Navy personnel reflected a reaction to military rule during Reconstruction (W. Benton, *The Constitution of Texas (With Its 140 Patches): Suffrage and Elections* (Dallas: Southern Methodist Univ., 1960), p. 7), but this is an unlikely explanation in view of the appearance of that provision in every Texas state constitution including the Reconstruction Constitution of 1869 (Art. III, Sec. 1).

Section 1 has been amended only twice, and both amendments concerned the fifth disqualification relating to soldiers and sailors. The clause was clarified in 1932 to allow Texas National Guardsmen, reservists, and retired resident servicemen to vote. By amendment in 1954 the absolute disqualification of United States military personnel was removed from Section 1, and Section 2 was modified to allow members of the armed forces who were Texas residents upon entering the service to vote. (See also the *History* of Sec. 2 and 2a.)

Art. VI, § 1

Explanation

Sections 1 and 2 set forth the general rules of eligibility for voting in Texas; Section 1 bars four categories of persons from voting, and Section 2 prescribes eligibility qualifications for the class of persons not disqualified under Section 1. These constitutionally prescribed voter-eligibility provisions are exclusive in the sense that they may not be altered or added to by the legislature or by a home-rule city. (*Koy v. Schneider,* 110 Tex. 369, 221 S.W. 880 (1920); *Texas Power & Light Co. v. Brownwood Public Service Co.,* 111 S.W.2d 1225 (Tex. Civ. App. – Austin 1937, *writ ref'd*).)

Attacks on the constitutional validity of various state voter qualifications have increased in recent years, and close scrutiny of state franchise restrictions by the federal courts has had an unsettling effect on this area. The tendency has been to narrow the range of the constitutionally permissible restrictions on suffrage that may be imposed by the states. The Texas Supreme Court has said that "[t]he right to vote is so fundamental in our form of government that it should be as zealously safeguarded as are our natural rights." (*Thomas v. Groebl,* 147 Tex. 70, 78, 212 S.W.2d 625, 630 (1948).) Historically, though, Texas courts have often viewed questions involving franchise restrictions through the age-frosted lens of the "vested privilege theory" of voting.

Uncertainty regarding the constitutional validity of state voting age qualifications ended in 1971 with ratification of the Twenty-sixth Amendment to the federal constitution, which reads: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." Accordingly, the 21-year voting age requirement of Sections 1 and 2 is inoperative. (See Tex. Att'y Gen. Op. No. M-1139 (1972).)

There is no reported court opinion interpreting the "idiot and lunatic" disqualification, although the Texas Supreme Court has hinted that at least an adjudication of insanity is a necessary prerequisite to disfranchisement. (*White v. White,* 108 Tex. 570, 578, 196 S.W. 508, 511 (1917).) Until recently the Election Code (art. 5.01(2)) merely restated the language of the constitution, but a 1971 amendment (Election Code art. 5.18 (c) (2)) provides that once a month the clerk of each county court must inform the county voter registrar of each resident "finally adjudged mentally incompetent" and that the registrar is to cancel the registration of any such person. According to the attorney general, a person committed to an institution upon being adjudged "of unsound mind" is not entitled to vote. (Tex. Att'y Gen. Op. No. 0-6112 (1944).) Whether this disqualification disfranchises any one other than those institutionalized has not been officially determined, however. Similarly, the disqualification of "paupers" has received no judicial attention in Texas, though the attorney general once ruled that inmates of a city-county sanitarium for tubercular indigents are disqualified as electors. (Tex. Att'y Gen. Op. No. 0-1809 (1940).) In any event, this provision has been inoperative since *Harper v. Virginia State Board of Elections* (383 U.S. 663 (1966)), in which the Supreme Court struck down voter qualifications based on wealth.

The dispute over whether the Fourteenth Amendment prohibits the states from denying suffrage to convicted felons was finally settled by the United States Supreme Court in *Richardson v. Ramirez* (418 U.S. 24 (1974)). In the decade preceding *Ramirez* the question had been widely debated, and courts that had addressed the issue, at both federal and state levels, were split. (Compare, for example, *Green v. Board of Elections,* 380 F.2d 445 (2d Cir. 1967), with *Stephens v. Yeomans,* 327 F. Supp. 1182 (D.N.J. 1970); see also *Otsuka v. Hite,* 51 Cal.2d

284, 414 P.2d 412 (1966).) Detailing the legislative history of the Fourteenth Amendment and recounting subsequent judicial interpretations of its applicability to disfranchisement of criminals by the states, the court in *Ramirez* concluded that disfranchisement of convicted felons who had served their sentences does not violate the amendment. The Texas felony disfranchisement provision had earlier been upheld in *Hayes v. Williams* (341 F. Supp. 182 (S.D. Tex. 1972)). Noting that there were no Texas cases on what constitutes a "felony conviction" for disfranchisement purposes, the court in *Hayes* interpreted the Texas provision to apply to "final" convictions in both federal and state courts. The court went on to determine that a trial court judgment of conviction from which the defendant chose not to appeal constitutes a final conviction within the meaning of Article VI, Section 1.

Disfranchisement of convicted felons under Section 1 is "subject to such exceptions as the Legislature may make." The only present exception is that found in Article 5.01(4) of the Election Code: "those restored to full citizenship and right of suffrage or pardoned." No statutory procedure exists under which a convicted felon can be "restored to full citizenship" except the expunging procedure provided by Code of Criminal Procedure art. 42.12(7), which by its terms applies only to persons who have been granted probation. Whether a convicted felon is pardoned is a matter of executive clemency in the discretion of the governor. (See the *Explanation* of Art. IV, Sec. 11.) Similar to mental incompetents, the Election Code (art. 5.18(c)(3)) requires the district court clerk each month to report all final felony convictions to the voter registrar.

Comparative Analysis

Most states set the minimum voting age at 21. Since the Twenty-sixth Amendment to the United States Constitution makes this requirement inoperative, states revising their constitutions hereafter will undoubtedly change "21" to "18." (See, for example, Sec. 10 of Art. I of the 1975 Louisiana Constitution.)

Approximately three-fourths of the states disqualify voters on the basis of mental incompetency. Although most states exclude the "insane," the terms used to identify the mental condition vary, and numerous states still use the archaic "idiot" or "lunatic" terminology.

Seven states in addition to Texas disqualify "paupers," and one state disfranchises persons convicted of vagrancy. Two states, Missouri and Oklahoma, disfranchise inmates of any charitable institution unless they happen to be war veterans.

The constitutions of almost every state impose some voting restriction on persons who have engaged in criminal activity. More than two-fifths of the states disqualify convicted felons. Many of these same states, as well as others with no felony disqualification, also disfranchise those convicted of "infamous" crimes, while others enumerate the particular offenses that result in disqualification. Some provisions are self-executing, others are in the form of a mandate to the legislature, and still others grant the legislature authority to provide for disqualification of criminals by law.

The United States Constitution has no provision comparable to Section 1. (For the text of the *Model State Constitution* voting qualifications provision, see the *Comparative Analysis* of Sec. 2.)

Author's Comment

In 1876 and for succeeding decades the states had almost *carte blanche* to impose limitations and conditions on the voting franchise, being restrained only by the

Fifteenth Amendment's prohibition against denial of the franchise on account of race—and impose they did. About the only franchise-limiting device that Texas has not at some time employed is the literacy test. When viewed against the long-prevailing attitude that the United States Constitution "does not confer the right of suffrage upon anyone" (*Pope v. Williams,* 193 U.S. 621, 633 (1904)), the expansion of the franchise to a point approaching political equality for all, beginning in 1919 with suffrage for women and accelerating from the 1960s into the 1970s, is nothing short of spectacular.

Three of the five original disqualifications of Section 1—under 21, paupers, and military personnel—are invalid under the federal constitution. The state is now precluded by the Twenth-sixth Amendment from setting the voting age at older than 18, and poverty is no longer a constitutionally acceptable basis for denying the right to vote. As stated by Justice Douglas for the court in *Harper* (at p. 666), ". . .a state violates the equal protection clause of the Fourteenth Amendment whenever it makes the affluence of the voter . . . an electoral standard. Voter qualifications have no relation to wealth." Exclusion of members of the armed forces went out with *Carrington v. Rash* (380 U.S. 89 (1965); see the *History* of Sec. 2 for further discussion).

A particular mode of criminality is not by its inherent nature classifiable as either a "felony" or a "misdemeanor." These terms are simply labels used to distinguish crimes that the legislature has determined are punishable by imprisonment or death from those punishable by jailing or fine. It is questionable, then, whether the felony-misdemeanor dichotomy is a sound basis for determining competency to vote. This is demonstrated by the fact that many of the criminal offenses that pose a threat to the governmental process itself are only misdemeanors. (For example, the offense of coercing a voter (Penal Code sec. 36.03), official oppression (Penal Code sec. 39.02), and unlawful voting in primary elections or unlawful participation in party conventions (Election Code arts. 13.01a(8) and 15.49).) Accordingly, one may question whether it is desirable to spell out in a constitution what criminal activity (felony or otherwise) is cause for disqualification. It is necessary, though, to give the legislature the power to provide for disfranchisement for engaging in criminal activity if that is desired. This approach is used in the *Model State Constitution,* as well as by several states, for the disqualification of both criminals and mental incompetents. (See the *Comparative Analysis* of Sec. 2 for the text of the *Model* provision. Note that the *Model* does restrict disfranchisement for criminal behavior to felony offenses only.) An affirmative statement of the right of persons who have been restored to competency and citizenship to vote might also be desirable.

For further discussion of suffrage qualifications and requirements, see the *Author's Comment* on Section 2.

Sec. 2. QUALIFIED ELECTOR; REGISTRATION; ABSENTEE VOTING. Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States and who shall have resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote, shall be deemed a qualified elector; provided, however, that before offering to vote at an election a voter shall have registered annually, but such requirement for registration shall not be considered a qualification for an elector within the meaning of the term "qualified elector" as used in any other Article of this Constitution in respect to any matter except qualification and eligibility to vote at an election. Any legislation enacted in anticipation of the adoption of this Amendment shall not be invalid because of its anticipatory nature. The Legislature may authorize absentee voting. And this provision of the Constitution shall be self-enacting without the necessity of further legislation.

Art. VI, § 2

History

All Texas constitutions have set the minimum age qualification for voting at 21. All constitutions have also required citizenship, although the Reconstruction Constitution permitted aliens who had formally declared their intention to become citizens of the United States to vote. Since most immigrants to Texas tended to join the predominant political party of the area in which they had settled, there was no reason for the Democrats, who by 1875 had regained control of the state, to change the provision allowing aliens to vote. Thus, it was retained in the 1876 version of Section 2 and qualified by an 1895 amendment that required an alien to declare his citizenship intent at least six months prior to voting. Interestingly, alien suffrage in Texas was abolished by the same amendment that authorized suffrage for women in 1921.

The residency qualification prescribed by the Constitution of the Republic required simply six months within the district or county where the election was held (Art. VI, Sec. 11), but the Statehood Constitution altered this requirement to one-year residency in the state and six months in the district, county, city, or town in which the elector wished to vote. (Art. III, Sec. 1.) The one-year state and six-month local residency requirement was retained in all subsequent state constitutions. (A puzzling contradiction appears in the Reconstruction Constitution: in Art. III, Sec. 1, county residency of six months is specified, while in Art. VI, Sec. 1, the county residency requirement is 60 days.)

Constitutionally imposed qualifications based on race and sex have characterized past suffrage provisions. Women were not denied suffrage by the Constitution of 1836 but "Africans, the descendants of Africans and Indians" were denied citizenship and, hence, the right to vote. (General Provisions, Sec. 10.) The 1845, 1861, and 1866 Constitutions, however, limited voting to "free males" and expressly disqualified "Indians not taxed, Africans and descendants of Africans." Constitutional voting barriers based on race were eliminated in the 1869 and 1876 Constitutions, but official and unofficial efforts to impede black participation in electoral politics persisted well into the 20th century. (See, *e.g.*, Doty, "The Texas Voter Registration Law and the Due Process Clauses," 7 *Hous. L. Rev.* 163, 164-65 (1969), for a concise review of efforts to exclude Negroes from the Democratic Party.) Unsuccessful efforts to extend the franchise to women were made in both the conventions of 1868 and 1875, and several subsequent attempts to propose a female suffrage amendment failed in the legislature. Finally, in 1919, without a dissenting vote, the legislature proposed an amendment to Section 2 abolishing sex as a qualification for voting, but it was defeated at the polls by a vote of 141,773 to 166,893. (This proposal also sought to impose payment of a poll tax as a condition to voting.) The Nineteenth Amendment to the federal constitution, providing for female suffrage, was ratified by the Texas Legislature in 1919 and had become part of the supreme law of the land before the prohibition against women voting was deleted from Section 2 by amendment in 1921.

Prior to 1875 the poll tax had been used in Texas, as in other states, as a revenue-raising measure; it was not until the turn of the century that it came to be used generally as a device to limit the electorate in the South. By 1875 there was mounting public support for using the poll tax as a prerequisite to voting in Texas, particularly in the eastern part of the state with its large Negro population, where the race theme played loud and clear: "Must the low, groveling, equal-before-the-law, lazy, purchasable Negro, who pays no taxes, have the privilege of neutralizing the vote of a good citizen taxpayer?" (*Houston Telegraph,* October 10, 1875.) Debate on the poll tax clause occupied the 1875 Convention for several days, and all three attempts to require a voter to have a poll tax receipt failed because of solid

opposition from the Grangers and the Republicans. (See *Seven Decades,* pp. 96-97.) The 1876 Constitution did provide, however, for poll taxes for revenue purposes. (See Art. VII, Sec. 3, and Art. VIII, Sec. 1.)

By 1901 the movement to make payment of the poll tax a voting requirement had become so strong that the legislature proposed the amendment, and it was adopted in 1902 by an overwhelming majority. No single factor can account for the success of the poll tax voting requirement movement; the issue had been constantly pressed upon the public consciousness for years, and over that period various circumstances and developments eventually led segments of the population to favor it. At least three important elements were involved. First, there was the desire to "purify" the ballot, which was one of the reasons most often advanced by supporters of the 1902 amendment who felt vote-buying and other fraudulent election practices could be reduced by adding to the cost of voting and by more carefully regulating election administration. Second, many saw the poll tax as a means to legally disfranchise the Negro. (See Strong, "The Rise of Negro Voting in Texas," 42 *American Political Science Review* 510 (1948).) Third, the successes of the Populist movement in the late 19th century threatened the entrenched Democratic Party and led to a desire to disfranchise the poor farmers and laborers who formed the backbone of the radical Populist Party. (Martin, *The People's Party in Texas* (Austin: The University of Texas Press, 1933), pp. 46-50); see also Strong, "The Poll Tax: The Case of Texas," 38 *American Political Science Review* 693 (1944).)

Just as those who favored the poll tax for voters were dissatisfied with the decision of 1876 and continued to agitate for amendment, those in opposition began actively seeking its repeal in 1902. In 1949 the legislature finally proposed repeal of the poll tax as a qualification of an elector together with the institution of an annual voter registration system. This amendment met resounding defeat at the polls, and a subsequent attempt was also defeated in 1963. The attack shifted to the federal courts, which responded by declaring the poll tax requirement unconstitutional under the Fourteenth Amendment. (*United States v. Texas,* 252 F. Supp. 234 (W.D. Tex.), *aff'd* 384 U.S. 155 (1966); *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966).) In 1966, shortly after the *Harper* decision, the poll tax was repealed; in its place a stepchild, annual voter registration, was adopted.

The federal courts also inspired another, separate amendment to Section 2 in 1966: repeal of the prior-residency requirement for members of the armed forces. The 1954 amendment to Article VI abolished the military disqualification of Section 1 (see the *History* of that section) but provided in Section 2 that only military personnel who were Texas residents upon entering the military were eligible to vote. The United States Supreme Court in *Carrington v. Rash* (330 U.S. 89 (1965)), held that Texas could not deny the vote to a person who was a member of the armed forces if, except for that status, he would be a Texas resident and qualified elector. (See also *Mabry v. Davis,* 232 F. Supp. 930 (W.D. Tex. 1964), *aff'd,* 380 U.S. 251 (1965).)

All earlier Texas state constitutions provided that a qualified elector could vote anywhere in the state in an election for statewide office and anywhere in his home county for a "district officer." But Section 2, as adopted in 1876, required that "all electors . . . vote in the election precinct of their residence" in all elections. This requirement was deleted by the 1921 amendment that also authorized absentee voting but was later inserted in Section 3a adopted in 1932. (See the *Explanation* of Sec. 3a concerning the present efficacy of the residence-precinct voting requirement.) Following World War I, growing public pressure for adoption of an absentee voting system culminated in the 1921 amendment. Apparently, a constitutional amendment was thought necessary because of the provision in Section 2 requiring electors to vote in their home precincts. But for some obscure reason the drafters of

the 1921 amendment not only authorized the legislature to establish absentee voting but also took out the provision they thought made the absentee-voting authorization necessary in the first place. What resulted was a naked grant of power to the legislature to do something it could have done had the drafters simply removed the residence-precinct requirement.

Explanation

The three voting qualifications prescribed by Section 2 (and restated in Election Code art. 5.02)—age, citizenship, and residency—are traditional in this country. (For discussion of the age requirement, see the *Explanation* of Sec. 1.) Texas was among those midwest states that briefly experimented with allowing certain aliens to vote in an attempt to attract immigrants, but the citizenship requirement was reinstated in 1921. It is probably safe to say that a state may continue to require citizenship as a minimal qualification for voting. (See Kirby, "The Constitutional Right to Vote," 45 *New York Univ. L. Rev.* 995, 996-98 (1970).) A disclaimer of citizenship on record with the Selective Service Board has been held as grounds to disqualify an elector on the basis of citizenship. (*Fuentes v. Howard,* 423 S.W.2d 420 (Tex. Civ. App.—El Paso 1967, *writ dism'd*).)

The residency requirement of Section 2 is actually twofold: first, a prospective elector must establish a "residence" and, second, he must maintain that residence for the prescribed minimum period of time. Although the legislature and courts have long struggled to devise a concrete operational definition of "residence," its meaning remains illusory. The shadowy concept is reflected in the ambiguities and technical minutiae that characterize the statute defining the term. For example, in one place residence is referred to as "one's home and fixed place of habitation to which he intends to return after temporary absence" and in another simply as "where such person usually sleeps at night," a definition often used by the courts. (Election Code art. 5.08(a) and (e).) Uncertainty is compounded because in determining the issue of residency the courts sometimes merge both phases of the inquiry (*i.e.*, the fact of residence and the duration of residency) and are apt to give great weight to the subjective intent of the voter. As expressed in *Mills v. Bartlett* (377 S.W.2d 636, 637 (Tex. 1964)), for example:

> The term "residence" is an elastic one and is extremely difficult to define. 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.

The smallest territorial unit for residency under Section 2 is the county, since the word "district" has been read out of the section by the courts. (*Cramer v. Graham,* 264 S.W.2d 135 (Tex. Civ. App.—San Antonio 1954, *writ ref'd*).)

The residency riddle has been simplified to some degree by the United States Supreme Court, inasmuch as its decision in *Dunn v. Blumstein* (405 U.S.330 (1972)) disposes of the durational element of the residency equation. The court held that a requirement that a voter must have lived in the state for one year and in the county of registration for three months as a condition to exercising the franchise violates the Equal Protection Clause. The court said that states may continue to require bona fide residence as a voting qualification but cannot rely on the blunderbuss of durational residency requirements to insulate the election process from fraud. The opinion further indicated that a 30-day registration-cutoff period prior to an election to allow administrators to check for voter fraud would be constitutionally acceptable. Later opinions approved a 50-day period. (See *Marston v. Lewis,* 410 U.S. 679 (1973); *Burns v. Fortson,* 410 U.S. 686 (1973).)

In accordance with *Blumstein,* the attorney general modified the durational

residency qualification of Section 2 to require only a 30-day buffer period for registration. (See Tex. Att'y Gen. Op. No. M-1139 (1972).) The legislature followed suit in 1975 when the Election Code was amended to eliminate the durational aspect of the residency requirement and to establish a 30-day waiting period before a new resident's voter registration becomes effective. (Election Code arts. 5.03 and 5.14a.)

The annual voter registration requirement, adopted in 1966 in the wake of the poll tax demise, also failed to pass constitutional muster. (*Beare v. Smith,* 321 F. Supp. 1100 (S.D. Tex. 1971), *aff'd,* 498 F.2d 244 (5th Cir. 1974).) The court found that the annual registration system (implemented by Election Code art. 5.11a), which operated to disqualify over a million Texans who would otherwise have been eligible to vote, was not necessary to promote a compelling state interest and consequently violated equal protection. After the federal district court's decision in *Beare,* the legislature amended the Election Code in 1971 to provide a three-year period of registration with automatic renewal for successive three-year periods, so long as the registrant voted at least once in the preceding three-year period. But the legislature left the door open to an annual registration system by providing in the 1971 law that the new three-year system was "enacted as a temporary law" to become permanent in the event the trial court in *Beare* was upheld on appeal. (Tex. Laws 1971, Ch. 827, Sec. 23.) When the state's appeal failed, the legislature closed the door in 1975 by again amending the Election Code, this time to provide a system of permanent voter registration. (Tex. Laws 1975, Ch. 296.)

Among the qualifications for the offices of state senator and state representative prescribed by Sections 6 and 7 of Article III is the requirement that to hold office the person must be "a qualified elector of this State." On proposing the 1966 amendment instituting annual voter registration, the legislature wanted to make certain that the requirement of annual voter registration would not also become a qualification for office under those sections. To foreclose any doubt on the matter, the 1966 amendment included the clause "but such requirement for registration shall not be considered a qualification of an elector . . . except qualification and eligibility to vote . . . ." Whether this limiting clause applies to the new, permanent voter-registration system has yet to be determined. Article 5.02 of the Election Code defines a "qualified voter" as one who, among other things, "has complied with the registration requirements of this code . . . ."

The absentee voting authorization is implemented by article 5.05 of the Election Code.

Comparative Analysis

Only one state, New Hampshire, appears to have no constitutional citizenship requirement, and all 50 states require residency within the state, ranging from 90 days to two years to qualify to vote. Like Texas, the vast majority of states require state residency of one year. Almost four-fifths of the states also have county-residency requirements. Here, too, the duration specified varies, ranging from six months (the most common) to 30 days. These residency requirements have, of course, been superseded by the *Blumstein* case discussed earlier. (For qualification based on age, see the *Comparative Analysis* of Sec. 1.)

Three-fifths of the state constitutions require voter registration, and nearly all of these authorize or command the legislature to enact implementing laws. Texas is the only state (either by constitution or statute) that requires annual voter registration; most other states have a permanent registration system.

About one-half of the states authorize the legislature to provide for absentee voting. Presumably, these provisions exist only because of some other provision

thought to prohibit absentee voting. (See the preceding *History* concerning the 1921 amendment.)

The United States Constitution has no affirmative suffrage qualifications as such but does prohibit denial of suffrage "on account of race, color, or previous condition of servitude" (Fifteenth Amendment), "on account of sex" (Nineteenth Amendment), in federal elections "by reason of failure to pay any poll tax or other tax" (Twenty-fourth Amendment), and for those 18 years of age or older "on account of age" (Twenty-sixth Amendment). The suffrage and elections article of the *Model State Constitution* reads as follows:

> Sec. 3.01. QUALIFICATIONS FOR VOTING. Every citizen of the age of xx years and a resident of the state for three months shall have the right to vote in the election of all officers that may be elected by the people and upon all questions that may be submitted to the voters; but the legislature may by law establish: (1) Minimum periods of local residence not exceeding three months, (2) reasonable requirements to determine literacy in English or in another language predominantly used in the classrooms of any public or private school accredited by any state or territory of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, and (3) disqualifications for voting for mental incompetency or conviction of felony.
>
> Sec. 3.02. LEGISLATURE TO PRESCRIBE FOR EXERCISE OF SUFFRAGE. The legislature shall by law define residence for voting purposes, insure secrecy in voting and provide for the registration of voters, absentee voting, the administration of elections and the nomination of candidates.

Author's Comment

The history of voting rights in the United States is a saga of struggle against voter inequality and unjust voting qualifications. Texas is, of course, no exception; a review of the suffrage movement in this state reveals a restrictive attitude toward the franchise. (See generally the *History* and *Explanation* of Secs. 1 and 2.) Progress toward equal suffrage was gradual and uneven until the early 1960s, when *Baker v. Carr* (369 U.S. 186 (1962)) signaled a dramatic reversal of past judicial attitudes.

Over the past decade campaigns have been waged against restrictive franchise qualifications, as well as electoral systems and procedures, in the march for voter equality. The notion that all who are subject to government should be able to participate in its electoral process has always had an instinctive appeal to most Americans, but it was not until the development of a new weapon, the "compelling state interest" test, applied through the Equal Protection Clause of the Fourteenth Amendment, that the tide really turned in the war against restrictive franchise qualifications. Put succinctly, the current constitutional test generally applicable to voter qualifications (exceptions are qualifications based on criminal conduct and property requirements in "special-interest" elections—see the *Explanation* of Secs. 1 and 3a) is that:

> Once a state has determined that a decision is to be made by popular vote, [equal protection requires that] it may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose. (*Hall v. Beals,* 396 U.S. 45, 52 (1969) (Marshall, J., dissenting).)

Thus, poll tax requirements, property ownership requirements in school board and revenue bond elections, disfranchisement of military personnel, and durational residency requirements have all fallen to the sword of equal protection.

The comment to the *Model State Constitution's* suffrage article states, "[t]his

section is based on the assumption that the broadest possible participation in the electoral process is good and that voter qualification requirements should be kept to a minimum." (p. 39.) The United States Supreme Court has told us that we can depart from the ideal of permitting everyone to vote on an equal basis only for compelling reasons. Accordingly, any new suffrage article for Texas ought to accomplish three things: first, establish basic qualifications for voting that exclude only those who pose a substantial threat to the integrity of the governmental process; second, guarantee the right to vote to all qualified electors; and third, provide for the fair and efficient administration of elections.

The viable qualifications of Sections 1 and 2—age (now no older than 18 years), residency (now bona fide residency with a reasonable voter-registration cutoff period), and citizenship—can be consolidated into one section. The section should also include disqualifications by reason of final criminal conviction and adjudication of mental incompetency, as suggested in the *Author's Comment* on Section 1.

Ideally, the function of a voter registration system is ". . . to render service to the voting public rather than to impose unnecessary burdens because of obsolete procedures." (National Municipal League, *Model Voter Registration System* (4th ed., part. rev., 1957), p. 17.) It is regrettable that imposition rather than service more accurately describes the Texas experience with voter registration (see generally Doty, "The Texas Voter Registration Law and the Due Process Clause," 7 *Hous. L. Rev.* 163 (1969)), although the system recently has been revised in response to the successful constitutional challenge in *Beare*. *Beare* does not prevent the state from requiring voter registration—only from requiring it in a manner inconsistent with equal protection. The constitution should not be concerned with the details of a registration system, such as the period of registration, since this is clearly a legislative matter. Registration requirements are not "voter qualifications" in the strict sense because they do not "bear a reasonable relation to the intelligent exercise of the ballot." (*United States v. Alabama,* 252 F. Supp. 95, 106 (M.D. Ala. 1966) (Johnson, J., concurring).) Rather, registration is an administrative requirement that enables the state to prepare a list of those who are eligible to vote; as such, it is clearly within the legislative power to provide and obviously will be provided. Hence, registration need not even be mentioned in the constitution.

Sec. 2a. VOTING FOR PRESIDENTIAL AND VICE-PRESIDENTIAL ELECTORS AND STATEWIDE OFFICES; QUALIFIED PERSONS EXCEPT FOR RESIDENCE REQUIREMENTS.

(a) Notwithstanding any other provision of this Constitution, the Legislature may enact laws and provide a method of registration, including the time of such registration, permitting any person who is qualified to vote in this State except for the residence requirements within a county or district, as set forth in Section 2 of this Article, to vote for (1) electors for President and Vice President of the United States and (2) all offices, questions or propositions to be voted on by all electors throughout this State.

(b) Notwithstanding any other provision of this Constitution, the Legislature may enact laws and provide for a method of registration, including the time for such registration, permitting any person (1) who is qualified to vote in this State except for the residence requirements of Section 2 of this Article, and (2) who shall have resided anywhere within this State at least thirty (30) days next preceding a General Election in a presidential election year, and (3) who shall have been a qualified elector in another state immediately prior to his removal to this State or would have been eligible to vote in such other state had he remained there until such election, to vote for electors for President and Vice President of the United States in that election.

(c) Notwithstanding any other provision of this Constitution, the Legislature may enact laws and provide for a method of registration, including the time for such

registration, permitting absentee voting for electors for President and Vice President of the United States in this State by former residents of this State (1) who have removed to another state, and (2) who meet all qualifications, except residence requirements, for voting for electors for President and Vice President in this State at the time of the election, but the privileges of suffrage so granted shall be only for such period of time as would permit a former resident of this State to meet the residence requirements for voting in his new state of residence, and in no case for more than twenty-four (24) months.

History

The section originally numbered 2a, added by amendment in 1945, waived payment of the poll tax for Texas citizens who had served in the armed forces within 18 months prior to the election in which they wished to vote; that section was repealed in 1954 by the same amendment that repealed the military disqualification in Section 1 and added the prior-resident military clause to Section 2. (See also the *History* of Secs. 1 and 2.)

The present Section 2a was added by amendment in 1966 in response to an attorney general's ruling to the effect that a voter must comply with both the six months (in district or county) and one year (in state) durational residency requirements of Section 2 to vote in elections for national and statewide offices as well as for local offices. (Tex. Att'y Gen. Op. No. WW-952 (1960).) Not all counties followed the attorney general's ruling, however, some allowing persons who had not satisfied the six-month requirement to vote for statewide offices. (Texas Industrial Conference, *Analysis of Proposed Amendments* (Dallas, 1966), p. 17.)

Explanation

In 1967 Election Code arts. 5.05a-5.05d were enacted to implement Section 2a. Parts of the 1967 legislation were invalidated by enactment of the federal Voting Rights Act Amendments of 1970 and by *Dunn v. Blumstein* (405 U.S. 330 (1972)).

The federal act (42 U.S.C.A. 1973aa-1 (1970)) abolished state durational residency requirements for presidential elections but allowed the imposition of a 30-day registration cutoff period prior to an election; the act was upheld in *Oregon v. Mitchell* (400 U.S. 112 (1970)). Consequently, the 60-day period prescribed by former Election Code article 5.05a became inoperative; article 5.05a was recently repealed. (Tex. Laws, 1975, Ch. 682, Sec. 28.) Likewise, Election Code articles 5.05b (which implemented Subs. (c) of Sec. 2a) and 5.05c (which implemented Subs. (a) of Sec. 2a) were recently amended for consistency with the federal act and the *Blumstein* opinion. (Tex. Laws, 1975, Ch. 682, Sec. 12 and Ch. 296, Sec. 14.)

Comparative Analysis

No other state constitution appears to prescribe special residency requirements for electors in presidential or statewide elections. The special absentee voting provision of Section 2a(c) is also unique to the Texas Constitution.

Author's Comment

The federal Voting Rights Act Amendments of 1970 supersede Section 2a with respect to voting in presidential elections, and the *Blumstein* decision invalidated durational residency requirements. This section is therefore unnecessary and could be omitted without loss.

Sec. 3. MUNICIPAL ELECTIONS; QUALIFICATIONS OF VOTERS. All qualified electors of the State, as herein described, who shall have resided for six months

immediately preceding an election, within the limits of any city or corporate town, shall have the right to vote for Mayor and all other elective officers; but in all elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town; provided, that no poll tax for the payment of debts thus incurred, shall be levied upon the persons debarred from voting in relation thereto.

History

This section, providing special residency requirements for municipal elections and restricting the local franchise to property owners in tax and bond elections, has no antecedent in any earlier Texas constitution. The text has not been altered since 1876, although Section 3a was added by amendment in 1932 to enlarge the restriction and provide technical elaboration. (See the *History* and *Explanation* of Sec. 3a.)

The issue of suffrage generated considerable debate among the delegates to the Convention of 1875. A sizeable faction apparently held the view that suffrage was a natural, absolute right of free men, which should be unfettered by government control. This faction opposed a poll tax and voter-registration requirements. But there was also concern over the issue of local finances, as expressed by one delegate: ". . . the cities and towns should be protected in some manner or other . . . the men who owned property in the cities were the men he proposed to stand by . . . ." (Delegate Robertson, as reported in *Debates,* p. 193.) The natural-right philosophy gave way to economic protectionism, and Section 3 was adopted by a vote of 57 to 19. Since property taxes were the primary source of revenue, the rationale underlying the restriction was the notion that in the long run it was the property owners who were responsible for paying any municipal debt incurred and consequently should be privileged to determine whether the debt was necessary or desirable.

Explanation

To say that the law with respect to the constitutional requirements for voting in local elections is confused and uncertain is to engage in understatement. Several factors contribute to this confusion: the provisions in Article VI, Sections 2 and 3a, that overlap matters also covered in Section 3; numerous recent state and federal court decisions ruling on the constitutionality of various local suffrage restrictions; the existence of certain issues on which there is simply no definitive statement; and uncertainty among local and state election officials charged with responsibility for enforcing the election laws. Because the disfranchisement-of-nonproperty-owners portion of Section 3 has been superseded, in effect, and expanded by Section 3a, discussion of that restriction appears in Section 3a.

The special six-month-in-city residency requirement provided in Section 3 has been a constitutional enigma. The question was whether Section 3 (requiring six months in city) imposed a residency requirement in addition to the general residency qualification of Section 2 (six months in county) in municipal elections other than those for city offices, particularly elections on fiscal matters referred to in the second clause of Section 3.

As recently as 1973, some municipalities reported that they were enforcing the six-month-in-city residency requirement in local elections on financial propositions as well as for local officers. The legal advisory committee for the *Texas Municipal Election Manual,* supported by an imposing list of municipal authorities, adopted the view that six months' residence in the city was a prerequisite for voting in *any* city election, including elections on charter amendments, bond elections, annexation elections, as well as elections for city officers. (Wall, *Texas Municipal Election Law*

Administrative Manual for Municipal Clerks and Secretaries 66 (1971).) That interpretation apparently rested on the ground that Section 3 by implication was intended to cover all elections held by a city, or at least those involving the expenditure of money and assumption of debt in addition to elections for city officers. However, the view taken by most attorneys specializing in municipal finance was that *Duncan v. Willis* (157 Tex. 316, 302 S.W.2d 627 (1957)), holding that the only residency requirement for an elector in a school bond election is 12 months in the state and six months in the county (*i.e.*, six months in the school district was *not* required), was controlling on residency requirements for city bond elections as well. This contention was predicated on the proposition that the six-month residency requirement of Section 3 is expressly limited to election of city officers and that there is no implication that it was intended to cover other kinds of city elections. (See Morrow, "Financing of Capital Improvements by Texas Counties and Cities," 25 *Sw. L. J.* 373, 417-18 (1971).) Clearly, not *all* city elections were covered by the Section 3 durational residency requirement; for example, the residency qualifications of Article VI, Section 2, define the electorate in a city dissolution election. (*City of LaGrulla v. Rodriguez,* 415 S.W.2d 701 (Tex. Civ. App.—San Antonio 1967, *writ ref'd n.r.e.*).) The attorney general ruled to the same effect for city liquor elections (Tex. Att'y Gen. Op. No. M-254 (1968)), but there has never been an appellate decision directly on the question of whether the Section 3 residency requirement applies to "[municipal] elections to determine the expenditure of money or assumption of debt."

In light of *Dunn v. Blumstein* (405 U.S. 330 (1972)) and other recent federal court decisions striking down durational residency requirements, the residency requirement prescribed by Section 3, like those of Section 2, is now inoperative. The legislature officially recognized that fact by amending the Election Code to eliminate all durational residency requirements. (Tex. Laws, 1975, Ch. 682, Secs. 4 and 28.)

For discussion of the meaning of "residence," see the *Explanation* of Section 2.

Comparative Analysis

Over the past ten years durational residence requirements have been changed in many states through constitutional amendment as well as by court decision. At this time approximately 17 states have special residency requirements for municipal elections. There is wide variation in the time requirement (*e.g.*, Washington requires 30 days while Mississippi requires one year), and three states—Colorado, Montana, and Ohio—allow the period to be fixed by law. As can be expected, there is also variation with respect to the applicability of a particular residence requirement to different kinds of elections. Several states demand a definite period of residence in the election precinct or ward. (Of course, what other states provide is a little irrelevant in the light of the *Blumstein* case.)

The *Model State Constitution* provides that the legislature may by law establish minimum periods of local residence not to exceed three months. (Sec. 3.01.)

For discussion of the property qualification portion of Section 3, see the *Comparative Analysis* of Section 3a.

Author's Comment

For discussion of durational residency requirements, see the *Author's Comment* on Section 2, and for discussion of the property qualification provision of Section 3, see the *Author's Comment* on Section 3a.

Sec. 3a. BOND ISSUES; LOANS OF CREDIT; EXPENDITURES; ASSUMPTION OF DEBTS; QUALIFICATIONS OF VOTERS. When an election is held by any county, or any number of counties, or any political subdivision of the State, or any political subdivision of a county, or any defined district now or hereafter to be described and defined within the State and which may or may not include towns, villages or municipal corporations, or any city, town or village, for the purpose of issuing bonds or otherwise lending credit or expending money or assuming any debt, only qualified electors who own taxable property in the State, county, political sub-division, district, city, town or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence.

History

Section 3a, unchanged since its adoption in 1932, should be read in conjunction with Section 3. Section 3a was added to extend and clarify the scope of nonpropertyowner disfranchisement, but the section also altered the applicability of this special voter qualification in a technical sense. Instead of limiting the right to vote on financial questions to "those . . . who pay taxes on property" (Sec. 3), Section 3a qualifies only those "electors who own taxable property . . . and who have duly rendered same for taxation." Commentators suggest that this change in language was adopted to circumvent an early court decision holding that one "who pays taxes" within the meaning of Article VI, Section 3, is a taxpayer, and a "taxpayer" is one who owns property within the city subject to taxation. (*Hillsman v. Faison,* 57 S.W. 920 (Tex. Civ. App. 1900, *no writ*).) Thus, a voter need not necessarily have paid his property taxes in order to vote. Section 3a changed this rule by requiring that the property actually appear on the tax roll of the governmental subdivision before a voter can legally cast his ballot on a financial question. (See 2 *Interpretive Commentary,* p. 359.)

Explanation

Introduction: In addition to those general qualifications and requirements prescribed by Sections 1 and 2 of Article VI, Sections 3 and 3a impose an additional qualification on electors voting on certain fiscal questions—that is, the franchise in such elections is limited to property owners. Several other provisions sprinkled throughout the Texas Consitution also limit the franchise to "qualified property taxpaying voters" in special circumstances. (See Art. III, Secs. 52 and 52e (1968); Art. VIII, Secs. 3 and 8; Art. IX, Secs. 4-12; and Art. XVI, Sec. 59.) In recent years the United States Supreme Court has handed down a succession of cases dealing with the constitutionality of voter qualifications based on property. As a result, Section 3a has been considerably diminished in scope, if not rendered entirely inoperative.

Property Qualification: Background: Texas courts that have dealt with the disfranchisement of nonproperty owners often considered Sections 3 and 3a together, harmonizing their mandate so that the net effect is that Section 3a supersedes Section 3. For example, in *City of Richmond v. Allred* (123 Tex. 365, 366, 71 S.W.2d 233, 234 (1934)), the court said:

> These two sections in plain language prescribe property ownership as an essential qualification for those who vote in any election held in a city for the purpose of determining whether an expenditure of money shall be made by the city. The inclusive phrase, "all elections to determine the expenditure of money," used in Section 3, is not restrained by any qualification or limited by any exception. The more explicit language of Section 3a makes it clear that the qualification prescribed is not intended to have

application solely to elections held for the expenditure of money procured by taxation, or which may result in an increase in the tax burden.

Section 3a extends the disfranchisement to voters of all political subdivisions of the state in addition to cities and towns; it also clarifies the scope of the restriction by expressly including elections held "for the purpose of issuing bonds or otherwise lending credit." Both Sections 3 and 3a require that a voter be an otherwise qualified elector, which meant satisfying the requirements of Section 2. (See *Sweeny Hospital Dist. v. Carr,* 378 S.W.2d 40 (Tex. 1964), wherein "qualified property taxpaying elector" was interpreted to mean a person qualified to vote under Art. VI, Secs. 2 and 3a.)

Section 3a also changed the language of the mandate of Section 3 to require an elector to "duly render" his property for taxation. (See the *History* of this section.) Accordingly, property is deemed duly rendered when it is on the tax roll and the owner is liable for the taxes assessed (Tex. Att'y. Gen. Op. No. 0-3350 (1944)). The property can be placed on the roll by the tax assessor instead of the owner himself, or by someone acting on the owner's behalf, and the fact that the rendition is made for the purpose of qualifying as a voter does not affect its validity. (See *Montgomery I.S.D. v. Martin,* 464 S.W.2d 638 (Tex. 1971).) Rendition immediately before an election, even though untimely under the rendition statute, qualifies a voter under Section 3a. (*Markowsky v. Newman,* 134 Tex. 440, 136 S.W.2d 808 (1940).) Where voters are not given adequate opportunity to render property by the political subdivision holding the election, noncompliance with the Section 3a rendering requirement does not invalidate the election. (*Hanson v. Jordan,* 145 Tex. 320, 198 S.W.2d 262 (1946); *Green v. Stienke,* 321 S.W.2d 95 (Tex. Civ. App.—Texarkana 1959, *no writ*).) The property may be personal or real (*Public Utilities Corp. v. Holland,* 123 S.W.2d 1028 (Tex. Civ. App.—Fort Worth 1938, *writ dism'd)), and* the amount or value of the property rendered is immaterial. (*Montgomery,* cited earlier; *Handy v. Holman,* 281 S.W.2d 356 (Tex. Civ. App.—Galveston 1955, *no writ*).)

Texas courts have had to wrestle with the issue of whether Sections 3 and 3a, or Section 2 identify the qualified voters in various kinds of elections. Generally, the courts have strictly construed Sections 3 and 3a—that is, they have imposed the additional voter restrictions only in elections in which the proposition *directly* authorizes debt or spending. For example, the additional requirements of Section 3a are not applicable when an election is held to abolish the corporate existence of a city (*City of LaGrulla v. Rodriguez,* 415 S.W.2d 701 (Tex. Civ. App.—San Antonio 1967, *writ ref'd n.r.e.*)); to pass on annexation of territory by a home-rule city (*Winship v. City of Corpus Christi,* 373 S.W.2d 844 (Tex. Civ. App.—Corpus Christi 1963, *writ ref'd n.r.e.*), *appeal dism'd and cert. denied,* 379 U.S. 646 (1965)); or to determine whether a certain law will apply (*King v. Carlton I.S.D.,* 156 Tex. 365, 295 S.W.2d 408 (1956)), unless its application *automatically* authorizes the issuance of bonds or the expenditure of money (*Martin v. Richter,* 161 Tex. 323, 342 S.W.2d 1 (1960)). Several older cases indicate that property ownership is not a prerequisite to voting in municipal elections on charter amendments and ordinances, even though the amendment or ordinance concerns fiscal matters. Thus, Sections 3 and 3a do not apply to an election on a city charter amendment that would grant the power to levy a special tax to advertise the city (*Moreland v. City of San Antonio,* 116 S.W.2d 823 (Tex. Civ. App.—San Antonio 1938, *writ ref'd*)), to a charter amendment election to authorize a municipal tax increase (*Garitty v. Halbert,* 235 S.W. 231 (Tex. Civ. App.—Dallas 1921, *writ dism'd*)), or to a referendum on an ordinance to establish a minimum wage for city workers (*Taxpayers' Ass'n v. City of Houston,* 129 Tex. 627, 105 S.W.2d 655 (1937)).

The attorney general has confirmed what is fairly apparent on the face of Sections 3 and 3a, that the property qualifications of these two sections apply only to local elections. (Tex. Att'y Gen. Op. No. 0-547 (1939).)

Property Qualification: Recent Developments: The United States Supreme Court announced its disenchantment with economic-status voter qualifications in *Harper v. Virginia State Board of Elections* (383 U.S. 663 (1966)), in which the Virginia poll tax was invalidated. The court equated voter qualifications based on wealth to those based on race, creed, or color and held all unconstitutional as "invidious discriminations" running afoul of the Equal Protection Clause. (See also *United States v. Texas,* 252 F. Supp. 234 (W.D. Tex.), *aff'd,* 384 U.S. 155 (1966), invalidating the Texas poll tax.) Then in *Kramer v. Union Free School District* (395 U.S. 621 (1969)), the court invalidated a New York statute that restricted voting in school bond elections to only those qualified electors who owned or leased taxable real property within the district or were parents of children enrolled in the district.

The court's most far-reaching statement regarding property-based franchise limitations occurs in *City of Phoenix v. Kolodziejski* (399 U.S. 204 (1970)). That case concerned Arizona constitutional and statutory provisions allowing only real property owners to vote in local general obligation bond elections. ("General obligation bonds" are debts secured by the general taxing power of the issuing government.) The court struck down the exclusion of nonproperty-owning voters, basing its decision on essentially three factors: first, all residents, whether or not real property owners, had a substantial interest in the public facilities and services to be provided by the bonds; second, although Arizona law called for a levy of real property taxes to service general obligation bonds, other revenue was legally available; and third, a significant part of the ultimate burden of each year's property tax fell on tenants rather than landlords.

Until recently in Texas, elections on both general obligation and revenue bonds (revenue bonds are paid only from revenue derived from the operation of the project or utility they are issued to fund and not from taxes) have been restricted to voters who qualify under the property ownership requirements of Sections 3 and 3a. (*City of Richmond v. Allred* (123 Tex. 365, 71 S.W.2d 233 (1934)).) However, the Supreme Court in *Cipriano v. City of Houma* (395 U.S. 701 (1969)) held that a Louisiana constitutional provision and statute that restricted the franchise in utility revenue bond elections to "property taxpayers" was invalid. The court reasoned that since all residents were affected by operation of utilities and paid utility bills and since utility rates were affected by the amount of revenue bonds outstanding, the benefits and burdens of the bond issue fell indiscriminately on property owners and nonproperty owners alike.

Following the *Kolodziejski* and *Cipriano* cases, the Texas attorney general issued "policy statements" to local election officials to the effect that despite these cases he would comply with Texas constitutional and statutory restrictions on general obligation bond elections. *Kolodziejski* was distinguished on the ground that the Arizona law limited the vote to real property owners, while Texas law limits it to real *and* personal property owners. However, to ensure the validity of local bonds, whatever the final outcome in the federal courts, a new election procedure was initiated. In accordance with *Cipriano,* revenue bond issues would be submitted to *all* otherwise qualified electors, whereas tax bond issues would be submitted simultaneously to a vote of the electors who owned taxable real or personal property and to a vote of all other electors; only those bonds voted by a majority of the property owners *and* by the aggregate of property owners and other electors would be approved by the attorney general for issuance. (The attorney general presumably assumed that there would be no instance when property owners

would favor a bond issue but nonproperty owners would be overwhelmingly opposed. This seems reasonable.) Notwithstanding the attorney general's policy concerning revenue bond elections, many attorneys working in the field of municipal finance opted to provide separate voting boxes for revenue bond elections as well as for elections on general obligation bonds. (See Morrow, "Financing Capital improvements by Texas Counties and Cities," *25 Sw. L. J.* 373, 419 (1971).)

The practice of holding two separate elections for local bond issues led to a decision by the Texas Supreme Court on the validity of the disfranchisement provision of Section 3a. (*Montgomery I.S.D. v. Martin,* 464 S.W.2d 638 (Tex. 1971).) When a proposed school bond issue failed to get a majority of the property owners' support but did carry a separate election in which all otherwise qualified electors could vote, the attorney general refused to approve the bonds and was sued to compel approval. The court ruled that Texas constitutional and statutory franchise restrictions were distinguishable from similar restrictions in other states invalidated by the United States Supreme Court. *Cipriano* was distinguished because it concerned revenue bonds. *Kramer* and *Kolodziejski* were distinguished because the laws at issue in those cases limited the franchise to real property owners, whereas Texas law extends the franchise to owners of personal property as well. Noting that the absence of any minimum amount or value requirement made the class of voters so broad that any otherwise qualified elector who wished to vote could qualify, the court emphasized the ethical obligation of a voter to render his own property if he sought to burden others. The difficulty of discovering personal property for taxation and the benefit to the state of securing its disclosure in this manner were also mentioned, with the court concluding that by enforcing responsibility of citizenship the Texas disfranchisement provisions strengthen rather than violate equal protection of the laws.

In 1972 a similar challenge to the property-owner restriction of Section 3 was filed in federal court after a final judgment in the case had been rendered by a state court from which no appeal was taken. The United States Court of Appeals for the Fifth Circuit ruled that it had no jurisdiction to hear the case but took note of the *Montgomery* decision and the cases decided by the United States Supreme Court. The Fifth Circuit Court said that although the parties then before it were out of court, its lack of jurisdiction did "not foreclose the right of others to file an appropriate action in the federal system if the occasion should arise." (*Carter v. City of Fort Worth,* 456 F.2d 572, 576, *cert. denied,* 409 U.S. 877 (1972).)

The occasion arose two years later when Fort Worth plaintiffs again challenged the validity of the property restrictions of Sections 3 and 3a. (*Stone v. Stovall,* 377 F Supp. 1016 (N.D. Tex. 1974).) The three-judge panel held that requiring voters to "render" property as a condition to exercising their franchise violated equal protection in that the rendering requirement is not a sufficient compelling state interest. In affirming the district court, the United States Supreme Court, after reviewing the *Kramer, Cipriano,* and *Kolodziejski* cases, said:

> The basic principle expressed in these cases is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or state can demonstrate that the classification serves a compelling state interest. (*Hill v. Stone,* 95 S. Ct. 1637, 1643 (1975).)

The "special interest" exception referred to had been applied in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.* (410 U.S. 719 (1973)). That case involved

a California statute that limited voting for directors of a water-storage district to persons who owned land in the district and that weighted the votes in proportion to the value of land held by the voter. The Supreme Court did not apply the now-familiar compelling state interest test in upholding the California law. Instead, the *Salyer* opinion developed a two-stage analysis: first, the local district must be a special-purpose rather than general-purpose governmental unit (*i.e.*, one that does not exercise "normal governmental authority" (at p. 729)) whose "actions disproportionately affect landowners" (*ibid.*); second, there must be a rational basis for the voting infringement. (See also *Assoc. Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973), to the same effect.)

Whether Section 3a retains any vitality under *Salyer* is not clear. The phrase "any defined district now or hereafter to be described and defined within the State" might be construed to mean special-purpose governmental units under the first stage of the *Salyer* formula, but it is questionable that the rendering requirement, as presently interpreted by the Texas courts (see *Montgomery I.S.D. v. Martin* and other related cases discussed earlier in this *Explanation*), can stand scrutiny under even the less-rigorous rational basis test. For the present, at least, it appears that the property qualification provisions of Sections 3 and 3a are inoperative. The Attorney General's Office recently informed Texas bond attorneys that in light of *Hill v. Stone* all otherwise qualified voters are now eligible to vote in all local bond elections without complying with the rendition requirement and that, accordingly, the dual-box voting system is no longer necessary. (Letter sent to "All Bond Attorneys," Attorney General of Texas, Sept. 24, 1975.)

Residence-Election-Precinct Requirement: The constitutional requirement that electors vote in the precinct of their residence originally appeared in Section 2 of this article but was deleted by the same 1921 amendment that provided for absentee voting. (See the *History* of Sec. 2.) The home-precinct requirement resurfaced in 1932 with the adoption of Section 3a.

In considering the present efficacy of the Section 3a residence-precinct requirement, two questions are posed: First, is the requirement still viable after *Hill v. Stone?* To this there is no authoritative answer. Since the policy underlying the provision—to promote efficient and honest administration of elections (see Ex parte *White,* 33 Tex. Crim. 594, 28 S.W. 542 (1894), for an early discussion of the policy underpinning of the original Sec. 2 residence-precinct requirement)—is distinct from the rationale behind the rendering requirement invalidated in *Stone,* there would appear adequate justification for treating the requirement as severable and of continuing force and effect. This leads to the second question: Assuming that it is still in effect, does the residence-precinct requirement apply to all elections or just to those kinds of elections referred to in Section 3a? Again, there is no authoritative answer on the point. The original Section 2 requirement applied to all elections. Indeed, if the requirement is to be given constitutional status, it is hard to imagine a cogent reason for limiting it only to fiscal propositions. Be that as it may, the syntax and context of the Section 3a requirement suggest the limited scope. The legislature seems to have read the requirement restrictively in that a statute permitting an elector to vote in his former precinct for a period of 30 days after having moved to a new precinct within the same county explicitly excluded those elections specified in Section 3a. (Election Code art. 5.18a, subd. 2, as it existed before amendment in 1975. Curiously, the 1975 amended version of art. 5.18a (Tex. Laws 1975, Ch. 296, Sec. 10) omits the provision excluding Section 3a-type elections. A possible explanation is that the legislature considered Sec. 3a wholly inoperative as a result of *Hill v. Stone.*) The restrictive interpretation is also given some support by language in *Wilkinson v. Self* (191 S.W.2d 756, 762 (Tex. Civ.

App.—San Antonio 1945, *no writ*)), though the court's assumption that Section 3a applied to annexation elections is doubtful. (See *Winship v. City of Corpus Christi* cited earlier in the *Explanation* of this section.) As a practical matter, the general requirement that electors vote in the precinct of their residence in all elections obtains by virtue of statutory structure—Election Code art. 2.06—unrelated to the constitutional requirement of Section 3a. The statutory mandate dates back to 1881 (9 H. Gammel, *Laws of Texas* 189) and has been part of the state's election law ever since.

The general rule is that if a voter does not comply with the constitutional mandate to vote in his residence precinct, his vote will not be counted. (*McCormick v. Jester,* 115 S.W. 278 (Tex. Civ. App. 1909, *writ dism'd w.o.j.*), referring to the original Section 2 requirement; see also *Harrison v. Jay,* 153 Tex. 460, 271 S.W. 2d 388 (1954), citing *McCormick* in construing Election Code art. 2.06 to the same effect.) Where the governmental unit holding the election is not divided into election precincts, the entire unit constitutes the election precinct for purposes of Section 3a. (*Anderson v. Crow,* 260 S.W.2d 227 (Tex. Civ. App.—Austin 1953, *mand. overr.*); Tex. Att'y Gen. Op. No. 0-1303 (1939).)

Comparative Analysis

While more than two-thirds of the states have no property qualifications on the franchise, the constitutions of several states still restrict the franchise to property taxpayers in particular situations or for certain kinds of elections, usually general obligation bond elections. A number of states including Texas have several provisions relating to different political subdivisions or different kinds of indebtedness. For example, New Mexico has separate provisions regarding county, school district, and municipal indebtedness.

Only one other state, Rhode Island, was found to use the broad language of Sections 3 and 3a, extending disfranchisement to almost all elections involving propositions of a fiscal nature.

Several states expressly reject property ownership as a qualification on the right to vote. The *Model State Constitution* contains no property qualifications of any kind on voting.

A few states, such as Oregon, leave to the legislature the question of whether voters in tax and bond elections should be property taxpayers.

In light of the *Salyer* case discussed previously, which arguably involved a retreat from the earlier cases striking down property qualifications, one must say that, although most of the provisions in other states are still inoperable, the United States Supreme Court may retreat further and revive some inoperable provisions.

Author's Comment

In considering whether to continue general disfranchisement of nonproperty owners (or, more accurately, those who have not rendered property for taxation) in certain elections on fiscal matters, anyone interested in constitutional revision ought to become well acquainted with the constitutional test invoked by the United States Supreme Court in the *Kramer, Cipriano,* and *Kolodziejski* cases; except for "special-purpose" elections (*e.g., Salyer,* discussed in the *Explanation* of this section) and criminal conduct disqualifications (see the *Explanation* of Sec. 1), a state is prohibited from restricting the franchise to a particular class of voter unless there is a clear showing by the state of a *compelling* (not merely important) state interest in so doing. Furthermore, since the fundamental right of voting is involved, the restriction placed on the electorate must be *necessary* to promote the state's compelling interest. It is doubtful that any scheme of disfranchisement based on

property in a "general-purpose" election would be sustainable under this test.

If one wishes to continue property qualifications to the extent permissible in "special-purpose" elections, continuation of the rendering requirement, as that requirement has been applied in Texas, would only defeat the purpose of imposing a property qualification—to limit the election to those voters with a financial stake in the outcome, This is true because a Texas voter qualifies as an elector under Section 3a by rendering *any* amount of property immediately prior to an election. What the foregoing suggests is that if a property qualification is to be imposed, it should be drafted in a way that leaves the legislature free to prescribe the administrative details.

Sec. 4. ELECTIONS BY BALLOT; NUMBERING, FRAUD AND PURITY OF ELECTIONS; REGISTRATION OF VOTERS. In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.

History

All previous Texas constitutions provided for election "by ballot;" but the clause directing the legislature to preserve the "purity of the ballot box" first appeared in the Constitution of 1876.

The first provision for voter registration in Texas was contained in the Constitution of 1869 (Art. III, Secs. 1 and 14). Under the Reconstruction voter registration system, registrars were appointed by the governor and given broad discretionary power to reject applicants. Abuses were common, and sentiment among the delegates to the 1875 Convention was predictably antiregistration. Moves to allow voter registration in larger cities were rejected, and Section 4, as originally drafted, provided "no law shall ever be enacted requiring a registration of the voters of this State." (See *Debates*, pp. 191-93; Thomas and Thomas, "The Texas Constitution of 1876," 35 *Texas L. Rev.* 907, 912 (1957).) An amendment proposed in 1887 that would have allowed the legislature to provide for voter registration in cities of over 10,000 population and in such counties as it deemed advisable was rejected by the voters. Four years later the same amendment, without the authorization pertaining to counties, was approved. Until 1966, except for the poll tax, from which several classes of persons were exempt, there was no statewide voter registration in Texas. But with the demise of the poll tax, Section 4 was amended in 1966 to command the legislature to enact voter registration legislation. (See the *History* of Sec. 2.)

Explanation

The purpose of this section is basically to promote the integrity of the election process, and Texas courts have generally allowed the legislature wide berth to carry out its mandate. Implementing legislation appears in both the Election and Penal Codes.

In upholding the use of voting machines, the Texas Supreme Court announced that the main purpose of the requirement of election "by ballot" is to maintain secrecy in voting; thus, the command implicitly requires a secret ballot. (*Wood v. State,* 133 Tex. 110, 126 S.W.2d 4 (1939); see also *Reynolds v. Dallas County,* 203 S.W.2d 320 (Tex. Civ. App.—Amarillo 1947, *no writ*).) The *Wood* decision also held that the requirement of numbered "tickets" means numbered ballots.

The tension between the provisions guaranteeing secret ballots on the one hand and commanding the legislature to "make such other regulations as may be

necessary to detect and punish fraud and preserve the purity of the ballot box" on the other hand has spawned several lawsuits. While it has been said that "[t]o protect the secrecy of the ballot is a high duty of the courts" (*Sewell v. Chambers,* 209 S.W.2d 363, 368 (Tex. Civ. App.—Fort Worth 1948, *no writ*)), the right to a secret ballot is by no means absolute. Stating that "[a]lthough the right to a secret ballot obtains in this State, there are certain 'public interests which outweigh the individual's right to have his ballot kept secret' " (*Oliphint v. Christy,* 299 S.W.2d 933, 939 (Tex. 1957), quoting from *Sewell,* cited above), the Texas Supreme Court upheld a law requiring a voter who is determined to have voted illegally to testify as to how he voted. To hold otherwise, the court pointed out, would nullify the constitutional mandate to detect fraud in elections. Similarly, the Texas Stub Ballot Law (Election Code art. 8.15) has been upheld as "well within the constitutional limits" of the legislature's authority under the purity mandate of Section 4. (*Bagley v. Holt,* 430 S.W.2d 817, 820 (Tex. Civ. App.—Texarkana 1968, *writ ref'd n.r.e.*).)

Voter registration is discussed in the *Explanation* of Section 2.

Comparative Analysis

Election by ballot is required by the constitutions of about two-thirds of the states, and approximately one-third contain an express requirement of secrecy. About 12 state constitutions authorize use of voting machines. Only three states other than Texas provide for numbering ballots. Six states direct the legislature to protect against fraud and about 15 to preserve or secure "purity." (See the *Comparative Analysis* of Sec. 2 concerning voter registration.)

The United States Constitution provides that the "times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." (Art. I, Sec. 4.) The *Model State Constitution* (Sec. 3.02) instructs the legislature by law to "insure secrecy in voting" and to provide for "the administration of elections." (See the *Comparative Analysis* of Sec. 2 for the text.)

Author's Comment

Section 4 resembles Section 3.02 of the *Model State Constitution.* (See the *Comparative Analysis* of Sec. 2 for the text of this section.) The purpose of such an affirmative pronouncement of public policy is to encourage the enactment of a basic statutory framework essential for a proper electoral system. The legislature of course has power to legislate on all of these matters and in fact long ago did so in the Election and Penal Codes. The *Model* concedes this power but notes that "narrow interpretations of constitutional provisions in this area have served to prevent the legislature from acting in regard to some of these matters, particularly as to absentee voting." (*Model State Constitution,* p. 41.) Texas courts have not so inhibited the legislature, however, and Section 4 of Article VI could be eliminated without danger.

Sec. 5. PRIVILEGE OF VOTERS FROM ARREST. Voters shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning therefrom.

History

A parallel provision has appeared in all Texas state constitutions. Its purpose was to protect against abuses of the arresting power by authorities who might have sought to influence elections.

Explanation

This section is repeated in the Election Code (art. 8.26), and the only interpretation appears to be an attorney general opinion to the effect that an on-duty election clerk is not privileged from arrest. (Tex. Att'y Gen. Op. No. 0-509 (1939).) "Breach of the peace" would cover most crimes other than felonies, so the privilege would seem to extend primarily to arrests in civil suits—once a fairly common practice but almost unheard of now.

Comparative Analysis

This same provision can be found in the constitutions of approximately one-half of the states, with several more containing variations, such as limiting the privilege to civil process. Most of the newer constitutions omit the privilege, and neither the United States Constitution nor the *Model State Constitution* grants it.

Author's Comment

Whatever privilege this section confers, if any, it is not so fundamental as to require constitutional statement. (See the *Author's Comment* on Art. III, Sec. 14, which extends the same privilege to legislators in session.) On the other hand, guardians of the electoral process may breathe easier if they can point to the privilege in the constitution, and some may wish to retain it for cosmetic purposes.