ARTICLE VII

EDUCATION
THE PUBLIC FREE SCHOOLS

Sec. 1. SUPPORT AND MAINTENANCE OF SYSTEM OF PUBLIC FREE SCHOOLS. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

History

The constitutional command to provide a system of publicly financed schools can be traced to the 1827 Constitution of the State of Coahuila and Texas, wherein all towns were directed to establish primary schools to teach "reading, writing, and arithmetic, catechism of the Christian religion, a brief and simple explanation of the constitution . . . and whatever else may conduce to the better education of youth." (As quoted in Lane, *History of Education in Texas* (Washington, D.C.: Government Printing Office, 1903), p. 23.) Under that mandate various decrees and enabling acts were passed to establish and fund local schools, but the Mexican population in Texas for the most part was too poor to participate in or contribute to a public school system, and the non-Mexican settlers had their own differing views on education. As a result of poverty, conflicting cultural patterns, and other factors, the local public school concept for the most part never materialized. (Texas State Teachers Ass'n, *100 Years of Progress in Texas Education* (Austin, 1954), p. 6.) The failure to establish a system of public education was expressly cited among the grievances against the Mexican government in the Texas Declaration of Independence, which proclaimed that an educated populace was essential to effective self-government. The indictment of Mexico on that ground was probably unwarranted and perhaps not even made in good faith, for the public schools fared no better under the Republic than they had under Mexico. (See Casteneda, *The Mexican Side of the Texas Revolution* (Dallas: P. L. Turner and Co., 1928), p. 347; Evans, *The Story of Texas Schools* (Austin: The Steck Co., 1955), pp. 44-45.)

The Constitution of 1836 contained a rather indefinite provision directing the congress "as soon as circumstances will permit to provide by law a general system of education." (General Provisions, Sec. 5.) At that time most Anglo settlers adamantly opposed school taxes except to pay tuition of indigent children, and the Republic passed no legislation to enable the creation of a state-supported school system, though it did provide liberal land grants to counties for the establishment of public schools. (See the *History* of Art. VII, Sec. 6.) But land was abundant and inexpensive, so public schools could not subsist on land alone, and only one school was established under the Republic's land grant policy. (*100 Years of Progress in Texas Education*, p. 7.) During that period private schools, which also received sizable public land grants, carried the burden of education in Texas. Beginning in the 1840s a caldron of discordant views on education alternately simmered and bubbled in Texas, influencing the shape of the public education system throughout the remainder of the century.

The education article in the Constitution of 1845 reflected an attempt to accommodate the various philosophies of education, some irreconcilable, held by the new Texas-Americans. One camp, which included German immigrants, felt that the state should provide free public education for all. Southern aristocrats believed that, except for aid to indigents, education was an entirely private function, while many other Anglos adhered to the Puritan concept under which both church and state shared responsibility for education. Such conceptual diversity accounted for the rather puzzling provision for two types of schools, "public" and "free." Article X,

Section 1, of the 1845 Constitution was similar to the present Section 1, directing the legislature to "make suitable provision for the support and maintenance of public schools." Section 2, however, commanded the legislature to establish "free schools throughout the State" to be supported by property taxes. Consistent with the prevailing attitude that education ought to be privately controlled, Section 1 was read to authorize public assistance to private schools, and Section 2 was limited to state tuition payments for orphaned and indigent children.

Provisions for education in the 1861 and 1866 Constitutions were identical with the 1845 document, but the Civil War devastated Texas education, leaving confusion and uncertainty in its wake.

The Reconstruction Constitution of 1869 was explicit in its mandate to the legislature to establish "a system of public free schools for the gratuitous instruction of all the inhabitants of this State, between the ages of six and eighteen years." (Art. IX, Secs. 1 and 4.) The education system envisaged under the 1869 Constitution, though idealistic, was a radical departure from the traditional private, voluntary system that had characterized Texas education up to that point. It was based upon the contemporary Northern model with compulsory attendance, centralized administration, and school taxes—all anathema to most Texans of the period, who viewed this Republican-inspired and -administered program as a tyrannical invasion of their cherished liberty. This first attempt to provide a comprehensive free public school system proved financially ruinous for a Texas struggling to recover from the ravages of war, and by 1875 the state had accumulated a school debt of over $4 million. By that year the democrats had regained control of the legislature and set about to correct the evils perpetrated by the republican regime. (See *100 Years of Progress in Texas Education,* pp. 8-9.)

The wrath that had been steadily mounting against the education system imposed under Reconstruction reached its peak in the Convention of 1875. Delegates represented the many and varied views of education that had gained support among diverse elements of the frontier society, and no part of the Constitution of 1876 was debated more bitterly or thoroughly than Article VII. A minority report favoring the old system of state-subsidized private schools was rejected in favor of "an efficient system of public free schools" (Sec. 1), but with constitutional limitations on taxing and administrative authority. (*Seven Decades,* pp. 98-105.) In reality the education article was not a mandate to establish an efficient public free school system at all but was intended, rather, as a restrictive document to prevent establishing an elaborate and expensive system like the one devised by the hated Republicans. (Texas Education Agency, *Centennial Handbook—Texas Public Schools 1854-1954* (Austin, 1954), p. 50.) Even the positive innovations of the 1869 plan were discarded, and soon after 1876 Texas education reverted to the conditions of the 1850s.

The decade following the adoption of the Constitution of 1876 marked a period of confusion and ambivalence with respect to the meaning and direction of public education in Texas, as finances were woefully inadequate, central guidance nonexistent, and a continuing strong urge to follow the pattern of the past lingered. (*100 Years of Progress in Texas Education,* p. 10.) But the old system soon led to a crisis in education, and public sentiment began to shift in favor of "public free" education. The mid-1880s saw the beginning of a period of what has been described as "slow progress" toward achieving a comprehensive and effective system of public education in Texas. (*Centennial Handbook—Texas Public Schools 1854-1954,* pp. 47-48.)

Explanation

Section 1 grants no new powers to the legislature, since constitutional silence on

this subject would certainly not foreclose the legislature from establishing a public school system. Rather, this section affirmatively imposes a mandatory duty upon the legislature to provide for a "public free" school system. (*Webb County v. Board of School Trustees of Laredo,* 95 Tex. 131, 65 S.W. 878 (1901); *Wilson v. Abilene I.S.D.,* 190 S.W.2d 406 (Tex. Civ. App.–Eastland 1945, *writ ref'd w.o.m.*).) The mandate does not, however, override other constitutional limitations on the legislature. (See, for example, *Kimbrough v. Barnett,* 93 Tex. 301, 55 S.W. 120 (1900) (legislature could not fix term of school board members at longer than the two years then prescribed by Sec. 30 of Art. XVI).) The mandate does require that the legislature make "suitable" provision for the support and maintenance of the school system, that the system be "efficient," and that it be "public" and "free."

If the paucity of cases on the topic can be taken as an indication, Texas, unlike some other states, has had little difficulty concerning the meaning of the terms "public" and "free." Moreover, whether a provision is "suitable" is left up to the legislature and will not be reviewed by the courts so long as the act has a "real relation to the subject and object of the Constitution." (*Mumme v. Marrs,* 120 Tex. 383, 396, 40 S.W.2d 31, 36 (1931).) The court went on to say that "suitable" was an elastic term comprehending the needs of changing times and that, accordingly, an act granting aid from general revenue to financially weak schools was a "suitable" provision within the authorization of Section 1. Similarly, what is "efficient" within the meaning of this section will be left to the determination of the legislature (*Glass v. Pool,* 106 Tex. 266, 166 S.W. 375 (1914)), or to the school boards (*Wilson v. Abilene I.S.D.,* above), and the courts will let the law stand unless it violates an express constitutional provision or is arbitrary and unreasonable. Not one case was found that nullified an education statute or school board regulation on the basis that it contravened the "efficiency" or "suitability" standards of Section 1, and challenges on that ground are now rare.

The courts have consistently given the legislature wide latitude to carry out the command of Section 1 (see, *e.g., Eldorado I.S.D. v. Tisdale,* 3 S.W.2d 420 (Tex. Comm'n App. 1928, *jdgmt adopted*)) and have recognized the legislature's authority to delegate the power to operate the school system to local school boards. (*Austin I.S.D. v. City of Sunset Valley,* 502 S.W.2d 670 (Tex. 1973); *Webb County v. School Trustees,* above.) Of course the school boards, too, have broad authority to establish rules and regulations. (*E.g., Moseley v. City of Dallas,* 17 S.W.2d 36 (Tex. Comm'n App. 1929, *jdgmt adopted*); *Passel v. Fort Worth I.S.D.,* 453 S.W.2d 888 (Tex. Civ. App.–Fort Worth 1970, *writ ref'd n.r.e.*), *appeal dism'd and cert. denied,* 402 U.S. 968 (1971).)

Section 1 does not, standing alone, impliedly give the legislature the power to levy taxes in school districts for the support and maintenance of schools, as it was long ago held in *City of Fort Worth v. Davis* (57 Tex. 225 (1882)) that the power to levy school taxes must be expressly granted in the constitution and cannot be inferred. (The Texas Supreme Court had to back up a bit 80 years later to hold that the ad valorem tax for "school districts" authorized under Art. VII, Sec. 3, included junior college districts. (*Shepherd v. San Jacinto Jr. College Dist.,* 363 S.W.2d 742 (Tex. 1962). See also the *Explanation* and *Author's Comment* for Sec. 3.)) School districts do have power to spend local funds on projects considered necessary to accomplish the purposes of Section 1, so long as there is statutory authority to do so. (*Adams v. Miles,* 35 S.W.2d 123 (Tex. Comm'n App. 1931, *holding approved*).) In a recent opinion the attorney general approved a 1966 ruling of the commissioner of education to the effect that Section 1 precludes school districts from collecting compulsory "supply fees" without specific statutory authority. The attorney general went on to rule that, on the basis of that 1966 ruling and language in *Mumme v. Marrs* (cited above), and in the absence of express "legislative sanction," a school district

may not impose tuition fees for driver-ed courses; supply, instruction, or lab fees for "normal" instructional functions; or fees for certain extracurricular activities. (Tex. Att'y Gen. Op. No. H-702 (1975).) In view of the already strained budgets of many school districts, this opinion is almost certain to be challenged.

Section 1 makes the matter of public education a governmental, as distinguished from a proprietary, function. Hence, school districts are relieved of tort liability on account of negligent acts of their agents or employees in the absence of a statute abolishing this immunity. (*Braun v. Victoria I.S.D.*, 114 S.W.2d 947 (Tex. Civ. App.—San Antonio 1938, *writ ref'd*).) The Texas Tort Claims Act has abolished this immunity in a limited manner. (See *Author's Comment* on Sec. 59 of Art. III.)

Comparative Analysis

Provisions substantially the same as Section 1 appear in the constitutions of about three-fifths of the states, though some go into more detail concerning the structure of the public school system. In these states, however, there are significant differences in interpretation of what is required by a constitutional provision calling for a "free public school system." The only provision on education in the *Model State Constitution* is intended to accomplish the same objective in modern language:

> Sec. 9.01. FREE PUBLIC SCHOOLS; SUPPORT OF HIGHER EDUCATION. The legislature shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public educational institutions, including public institutions of higher learning, as may be desirable.

Author's Comment

Public education is not considered a "core" or fundamental element in a state constitution, but the command to educate children is a generally accepted "good government" provision. As noted earlier in the *Explanation,* the inclusion of an affirmation such as Section 1 does not mean that the matter of education can be regulated only by the constitution, for it can be, and is in some jurisdictions, adequately provided for exclusively by legislation. Rather, this constitutional expression is largely hortatory, reflecting a desire to give some direction and moral guidance in an area deemed preeminently important to the public welfare.

Section 1 should be retained, though the language might be modernized. Adding the words "open to all children of the state" after "public free schools" at the end of the section would clarify the principle of the universality of public education. ("Children" would, of course, be defined by statute just as "scholastic population" in Sec. 5 is presently defined in Sec. 15.01(c) of the Education Code.) Though no special constitutional authorization is needed, the section might also make reference to higher education. (See the *Author's Comment* on Art. VII, Sec. 10.)

> Sec. 2. PERPETUAL SCHOOL FUND. All funds, lands and other property heretofore set apart and appropriated for the support of public schools; all the alternate sections of land reserved by the State out of grants heretofore made or that may hereafter be made to railroads or other corporations of any nature whatsoever; one half of the public domain of the State; and all sums of money that may come to the State from the sale of any portion of the same, shall constitute a perpetual public school fund.

History

The idea of creating a permanent fund from the vast public domain to provide a perpetual source of revenue that would eliminate the need for tax support of schools

was conceived during the Republic. This notion stubbornly inhibited development of public education in Texas until the late 19th century. The idea was expressed by President Lamar in 1838:

> A liberal endowment which will be adequate to the general diffusion of good rudimental education in every district of the Republic . . . can now be effected without the expenditure of a single dollar. Postpone it a few years and millions will be necessary to accomplish the great design.

(As quoted in Evans, *The Story of Texas Schools* (Austin: The Steck Co., 1955), p. 47.) The Texas congress did not wait, granting more than four million acres in 1839 and 1840 to counties for establishment of a primary school system. (See the *History* of Sec. 6 of this article.)

The first state constitution in 1845 set aside 10 percent of the state's annual revenue as "a perpetual fund" for "the support of free public schools. . . ." (Art. X, Sec. 2.) The fund was used to pay tuition of orphans and children of indigent parents and was generally viewed as a necessary charitable enterprise, even by those who opposed state aid to education. (*100 Years of Progress in Texas Education* (Austin: Texas State Teachers Ass'n, 1954), p. 7.) The 1861 Constitution tracked the 1845 language verbatim.

The forerunner of the present state public school fund is found in Article X, Section 2, of the Constitution of 1866. All lands, funds, and other property that had been or would be appropriated "for the support and maintenance of public schools" were declared to "constitute the public school fund." The fund and its income were to be called "a perpetual fund," which was to be used "exclusively for the education of all the white scholastic inhabitants of this State." The 1866 school fund also included the alternate sections of land reserved for schools from 1854 grants to railroads and other corporations as well as one-half of the proceeds from the sale of public lands. The 1845 provision adding tax revenue to the school fund was deleted from the 1866 document, however. Fiscal exigencies resulting from the Civil War led to a diversion of over $1.25 million in state school money to the general revenue, nearly depleting the school fund. (Lang, *Financial History of the Public Lands in Texas* (Waco: Baylor University, 1932), p. 129.) The Reconstruction Constitution enlarged the public school fund to include all the proceeds from the sale of the public domain and provided that the fund, its income, together with one-fourth of the annual general tax revenue and a one-dollar poll tax "shall be a perpetual fund to be applied . . . exclusively to the education of all the scholastic inhabitants of the State. . . ." (Art. IX, Sec. 6.)

The policy of reserving public lands as a trust fund for education was continued in Section 2 of the present constitution, which reserved all property previously appropriated, the alternate sections of the railroad survey grants. (Similar grants made to higher education in 1858 were expressly excluded by the 1876 Constitution; see the *History* of Secs. 11 and 15), and one-half of the public domain to "a perpetual public school fund." Over the years the public domain fell victim to the rapacious appetites of land speculators. Legislative mismanagement was compounded by outright fraud, and by 1885 Texas found its vast state land holdings virtually exhausted. In 1898, a deficiency of over five million acres was discovered in the state school fund, and the Texas Supreme Court barred further homesteading on the public domain. (*Hogue v. Baker*, 92 Tex. 58, 45 S.W. 1004 (1898).) The legislature in 1900 granted to the state school fund 4,444,197 acres (the recorded amount of land in the unappropriated public domain at the time) "or all of the unappropriated Texas public domain of whatever character" and a cash settlement of $17,180.27 to compensate for the shortage of approximately 1.5 million acres. (Tex. Laws 1900,

Ch. XI, 11 *Gammel's Laws,* p. 29.) The total amount of land appropriated to the state school fund is estimated at 45 million acres, slightly more than 26 percent of the total area of the state. (Lang, p. 131.)

Explanation

Sections 2 and 5 establish a "perpetual" trust fund for the benefit of public education. The terminology used to designate the fund is somewhat confusing: Section 2 refers to it as the "perpetual school fund" and "perpetual public school fund," Section 4 calls it the "public free school fund," and Section 5 labels it the "permanent school fund." The Texas Supreme Court long ago opted for the appellation of Section 4, saying Sections 2 and 5 provided that certain funds and property constituted a "public free school fund." (*Webb County v. Board of School Trustees of Laredo,* 95 Tex. 131, 65 S.W. 878 (1901).) The endowment has been enlarged from time to time by statute, which designates it the "permanent school fund." (Education Code sec. 15.01.)

Confusion as to what "one-half of the public domain" comprehended continued some 20 years after the adoption of the constitution, and, as noted in the *History,* by the time the extent of the grant was clarified by the Texas Supreme Court in the *Hogue* case, there was no public domain left with which to make restitution to the school fund. In 1889 the court had said that Section 2 did not grant one-half of all the unappropriated public domain existing at the time the Constitution of 1876 was adopted (*Galveston H. & S.A. Ry. Co. v. State,* 77 Tex. 367, 12 S.W. 988 (1889)), but later in *Hogue* the court held unequivocally that it did. The section does not appropriate beds and channels of navigable streams to the school fund, however. (*State v. Bradford,* 121 Tex. 515, 50 S.W.2d 1065 (1932).)

For a more extensive discussion of the operation of the permanent state school fund, see the *Explanation* of Section 5.

Comparative Analysis

Approximately three-fifths of the states have a constitutionally recognized and protected trust fund for the benefit of public education. As would be expected, there is considerable variation in detail. The *Model State Constitution* contains no analogous provision.

Author's Comment

The perpetual or permanent state school fund is one of the several dedicated trust funds established or recognized by the constitution; it is also one of some 50 constitutional and statutory funds financing education. Income from the fund, earmarked for education, is channeled into the available fund, which is subject to legislative appropriation. It is no secret that the complex fund structure together with earmarking has resulted in budgeting and accounting difficulties, and the rigidity imposed by constitutional fund and earmarking provisions only exacerbates the problem.

With general acceptance of the need for good public schools (reflected in the state's yearly education budget appropriating more money to that function than any other), there is no longer an impelling reason to retain the permanent school fund, at least as a constitutional entity. In any event, the framers' dream of a tax-free educational system was laid to rest long ago. But if for the sake of continuity the fund is retained, the essential elements of Sections 2, 4, and 5 could be combined, eliminating the restrictions that are simply no longer necessary to preserve and protect the fiscal integrity of the school system. The consolidated section really need

say little more than that the corpus of the permanent school fund must be preserved intact and the income used solely for public education. (See also the *Author's Comment* on Secs. 4 and 5.)

Sec. 3. TAXES FOR BENEFIT OF SCHOOLS; SCHOOL DISTRICTS. One-fourth of the revenue derived from the State occupation taxes and poll tax of one dollar on every inhabitant of the State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and in addition thereto, there shall be levied and collected an annual ad valorem State tax of such an amount not to exceed thirty-five cents on the one hundred ($100.00) dollars valuation, as with the available school fund arising from all other sources, will be sufficient to maintain and support the public schools of this State for a period of not less than six months in each year, and it shall be the duty of the State Board of Education to set aside a sufficient amount out of the said tax to provide free text books for the use of children attending the public free schools of this State; provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the formation of school district by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one ($1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.

History

The Constitution of 1845 commanded the legislature to furnish means for the support of free schools "by taxation on property." (Art. X, Sec. 2.) This command was part of the section that started the permanent school fund. No change was made in 1861, but the 1866 Constitution made a great many changes concerning the school fund, in the course of which the command became a permission: "The Legislature may provide for the levying of a tax for educational purposes: . . . ." (Art. X, Sec. 7.)

The Reconstruction Constitution went all out for free public education. (See the *History* of Sec. 1.) Section 6 of Article IX, in addition to continuing the permanent school fund, provided: "And the Legislature shall set apart, for the benefit of public schools, one-fourth of the annual revenue derivable from general taxation; and shall also cause to be levied and collected, an annual poll tax of one dollar, on all male persons in this State, between the ages of twenty-one and sixty years, for the benefit of public schools." Section 7 of that article also commanded the legislature, "if necessary," to "provide for the raising of such amount of taxation, in the several school districts in the State, as will be necessary to provide the necessary school houses in each district, and insure the education of all the scholastic inhabitants of the several districts." The only comparable provision in the 1876 Constitution was Section 10 of Article XI, discussed below.

As already noted in the *History* of Section 1, education was a bitterly fought-over

subject in the 1875 Convention. The original Section 3 represented a compromise between those who wished to continue the educational system promoted by both the 1869 Constitution and the Reconstruction government and those who wished either to cut back on spending for education or to provide free education only for the poor. The section read: "There shall be set apart annually not more than one-fourth of the general revenue of the State, and a poll tax of one dollar on all male inhabitants in this State between the ages of twenty-one and sixty years, for the benefit of the public free schools." It can be seen at once that the purpose of Section 3 was simply to stop the legislature from providing any more state money for education than the amount mandated under the Reconstruction Constitution.

Not long after the constitution was adopted, the supreme court read Section 3 and other sections of the constitution as prohibiting the levy of any other tax for public schools except by a city or town that constituted a separate school district. (*City of Fort Worth v. Davis,* 57 Tex. 225 (1882).) The exception flowed from Section 10 of Article XI, a section that was repealed in 1969. It permitted those cities and towns to levy unlimited school taxes if approved by two-thirds of the taxpayers.

As a result of the *Davis* opinion, Section 3 was amended almost immediately. What had been a simple statement suddenly became a confused mish-mash, a condition that exists to this day. The amendment, adopted in 1883, left unchanged only the dollar poll tax. Instead of a limitation of not more than one-fourth of general revenue for education, the section dedicated one-fourth of state occupation taxes to education and mandated a state property tax of not more than 20¢ on the $100 to add to all other moneys in order to provide a sum sufficient to support the schools for not less than six months in each year.

There then appeared a semicolon in the 1883 amendment. This was presumably to alert the reader that a totally new subject was coming up. Having made appropriate changes in the state's obligation to support education, the drafters of the amendment turned to the problem created by the *Davis* case. The legislature was given power to create school districts "within all or any of the counties of this State, by general or special law," and to authorize the districts to levy a property tax. But, as usual, there were limitations: no tax could exceed 20¢ on the $100, and two-thirds of the taxpaying voters of the district voting at an election had to approve. The amendment carefully left city and town school districts created under Section 10 of Article XI free to levy unlimited taxes. (The legislature could, of course, impose a limit.)

The section remained unchanged until 1908 when an amendment was adopted increasing the maximum tax from 20¢ to 50¢ and decreasing the vote required to approve the tax from two-thirds to a majority.

At about the same time that the 1908 amendment was adopted, the Supreme Court held that the words "within all or any of the counties" quoted earlier did not permit school districts to cross county lines. (*Parks v. West,* 102 Tex. 11, 111 S.W. 726 (1908).) The legislature quickly proposed another amendment to Section 3, which was adopted in 1909. This amendment dropped the words "within all or any of the counties" and went on to nail down the correction by providing that the legislature could pass laws concerning school districts, "whether such districts are composed of territory wholly within a county or in parts of two or more counties," and that districts, "heretofore formed or hereafter formed," could levy property taxes. A companion amendment, Section 3a, validated everything that had been done by those districts knocked out by the *Parks* case. Section 3a was repealed in 1969 as obsolete.

In 1915 and 1916 two proposed amendments were defeated. The 1915 proposal would have added a Section 3b. It would have permitted a commissioners court with the approval of a majority of the voters to create a student loan fund to enable

students to borrow money in order to graduate from the public schools and continue their education after graduation. (This, of course, is more appropriately an amendment of Sec. 52 of Art. III.) The proposal also would have permitted the legislature to authorize a county property tax not exceeding 20¢ for the student loan fund, but the tax would have had to be approved by a majority of the taxpaying voters. The 1916 proposal would have permitted the legislature to authorize a county school tax of up to 50¢ subject, naturally, to taxpaying voter approval. The proposal also would have increased the school district maximum from the 50¢ rate adopted in 1908 to $1.

In 1918 another amendment was proposed. This one was successful. It increased the mandated state property tax from 20¢ to 35¢. The amendment also added the words still in the section telling the State Board of Education to provide free textbooks, and the words, also still in the section, that "grant" to the legislature the power to use general state funds to meet educational needs. In 1920 still another proposed amendment was adopted. This one removed the word "male" from the poll tax provision. This was in response to the Nineteenth Amendment of the United States Constitution, which extended the franchise to women. Actually, payment of the poll tax of $1 was not a requirement for voting until 1902, but the suffrage article requirement of 1902 was tied to the "poll tax," which was the tax levied by Section 3. If "male" were left in, women could vote without having to pay a poll tax.

The 1920 amendment made two other changes which, together, made less than complete sense. The maximum school district tax was increased from 50¢ to $1 but the concluding part, which, since 1883, had excepted city and town school districts from the maximum rate, was amended to add "independent or common school districts created by general or special law." Since all school districts were apparently now included in the exception to the maximum rate, it is mystifying why an inoperative maximum was increased. (See the *Explanation* below for further discussion.)

The present version was adopted in 1926. The only changes were the elimination of the legislature's power to create school districts by special law and the discontinuance of the experiment first tried in 1909 of making Section 3 into three sentences. (It should be noted, however, that the second and third sentences began with "And." See the *Author's Comment* on this section.) Section 3 was "amended" in 1968 when Section 1-e of Article VIII was adopted. (See the *History* and *Explanation* of Sec. 1-e.)

Explanation

Taxes. From the beginning Section 3 has been a tax section of the constitution. The original section as quoted above was principally a limitation on how much state tax money could be used for public schools, but specifying a poll tax of $1 had the effect of directly levying a tax which Section 1 of Article VIII simply mentions as a permissible tax. As the *History* shows, the original Section 3 was probably not intended to be a direct constitutional levy of a poll tax but rather a continuing dedication to education of the then existing $1 poll tax. Whatever the original intent, it is settled that the $1 poll tax is directly levied by the constitution and that the legislature cannot exempt anyone from paying it. (See *Tondre v. Hensley,* 223 S.W.2d 671 (Tex. Civ. App.—San Antonio 1949, *no writ*); *Solon v. State,* 54 Tex. Crim. 261, 114 S.W. 359 (1908); Tex. Att'y Gen. Op. No. O-6236 (1944).) The irony of all this is that the tax is still levied but apparently nobody pays it. Every resident of Texas between the ages of 21 and 60 violates the constitution once every year by failing to pay the poll tax. (Perhaps somebody pays his poll tax. The report of the

comptroller of public accounts for fiscal 1972, however, showed no poll tax receipts.) Actually, the tax is $1.50, but disabled persons and others are exempt from the 50¢ portion. A county may levy a fee of not more than 25¢ for collecting the poll tax, but presumably it is not unlawful to fail to pay that fee if one simply unlawfully fails to pay the tax itself. (See Tex. Tax.-Gen. Ann. art. 2.01.)

This anomaly comes about because most people think that the poll tax has something to do with voting and that the United States Supreme Court held the poll tax unconstitutional. This is a half-truth. The requirement that a person pay a poll tax as a prerequisite to voting is what is unconstitutional, not the tax itself. (Incidentally, "poll tax" means "head tax"; "poll" in this context has nothing to do with going to the polls.)

Texas has had a poll tax since 1837. (See Miller, *A Financial History of Texas* (Austin: The University of Texas Press, 1916), pp. 45, 113, 141, 171.) Not until 1902 was payment of the tax made a requirement for voting. Miller notes that there has always been widespread evasion of the poll tax. In 1910, he estimated, about 60 percent of those liable paid their tax. "The percentage was higher in 1910 than in either 1900 or 1890, and this was without doubt due to the requirement of the payment of the tax in order to vote. But this requirement has not cured evasion, and the condition exists in this state that only owners of real property are sure to be reached." (Miller, pp. 317-18.) Obviously, even owners of real property no longer pay the tax.

In addition to the state poll tax, Section 3 has directly levied a state property tax since the 1883 amendment. Since Section 1-e of Article VIII was adopted in 1968, this direct levy has been dying away. For 1973 only 10¢ was left; for 1974 the state tax was 5¢. Since January 1, 1975, the Section 3 property tax has been dead.

Section 3 also dedicates one-fourth of state occupation taxes to education. This is not, however, the only dedication of tax money to education. Section 7-a of Article VIII also dedicates one-fourth of state-levied motor fuel taxes to education. This is simply an embodiment in the constitution of a confused situation existing prior to the adoption of Section 7-a. (See the *Explanation* of Sec. 7-a.)

Finally, Section 3 provides the "grant" of power to the legislature to create local school districts for the purpose of raising money locally. The quotation marks are used to emphasize the peculiar nature of this part of the section. The legislature has always had the power to create school districts; Section 3 is an unnecessary "grant" for this purpose. (This grant is further discussed below under "School Districts.") The *Davis* case, discussed earlier, held that the legislature had been denied the power to authorize school districts to levy property taxes; Section 3 was amended to authorize property taxes. Unfortunately, the 1883 amendment was badly drafted, which resulted in a muddle that continues to this day. (This is discussed in the *Author's Comment* on this section.)

As of today there is little of constitutional significance left in this part of Section 3, notwithstanding all the words. With two exceptions, the entire range of taxing activity by school districts is subject to statutory control. One exception is that the voters must approve the property tax levy. (Whether a property-taxpayer restriction on voting is still valid is discussed in the *Explanation* of Sec. 3a of Art. VI.) This exception created problems in the past whenever district boundaries were changed, but Section 3b, as amended in 1966, solved those problems. The other exception is that any school district that is neither common nor independent cannot be authorized to levy a property tax in excess of $1 on $100. This is applicable to community college districts. (See *Sawyer v. Board of Regents of Clarendon Junior College*, 393 S.W.2d 391 (Tex. Civ. App.—Amarillo 1965, *no writ*). But see also the *Author's Comment* on this section.)

One interesting sidelight on the confusion of Section 3 is *Allen v. Channelview I.S.D.* (347 S.W.2d 27 (Tex. Civ. App.—Waco 1961, *writ ref'd*)). School districts are authorized by statute to issue time warrants maturing up to five years after issue. (Education Code sec. 20.43(a).) An attack on the constitutionality of this exception to pay-as-you-go failed because the court of civil appeals could find nothing in the wording of Section 3 that prohibited time warrants.

School Districts. A school district can be described as a political subdivision of the state created for the purpose of local administration of the state's public school system. School districts have been characterized as "quasi-municipal corporations" and, as such, derive their governmental authority through delegation by the state. (See *Love v. City of Dallas,* 120 Tex. 351, 40 S.W.2d 20 (1931).)

The Section 3 language ". . . and the Legislature may also provide for the formation of school district by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws . . . for the management and control of the public school or schools of such districts . . ." on its face appears to be superfluous, since it does not confer any power the legislature does not already have. The courts had long regarded the legislature as having "plenary power" under Section 3 to create and regulate school districts (see, *e.g., Love v. City of Dallas,* above; *State v. Brownson,* 94 Tex. 436, 61 S.W. 114 (1901); *Board of Angelina County v. Homer C.S.D.*, 291 S.W. 268 (Tex. Civ. App.—Beaumont 1927, *no writ*)), but a 1926 amendment rescinded the express authorization to establish school districts by local (special) law, which had been added in 1883. (See the *History* of this section.) Although it must have been the intent of the 1926 amendment to prevent creation of school districts by local law, poor drafting forced a strained interpretation to produce this conclusion:

> It is clear that by eliminating from the Constitution the provision that school districts could be formed by special laws, it was intended that such districts be created only by general laws.
>
> Furthermore, the Constitution now provides a specific manner in which school districts may be formed, that is, by general law. This would exclude the formation of school districts in any other manner than that expressly provided in the Constitution. (*Fritter v. West,* 65 S.W.2d 414, 416 (Tex. Civ. App.—San Antonio 1933, *writ ref'd*).)

Thus, the language is now read as a limitation on the legislature's power to establish school districts by local law. (See also Art. III, Sec. 56, which prohibits "local or special" laws "regulating the affairs of . . . school districts" and "creating offices, or prescribing the powers and duties of officers, in . . . school districts.")

Quoting from earlier cases, the court in *Fritter v. West* defined a local or special law as "one the operation of which is confined to a fixed part of the territory of the state" and also as one "which designates a particular city or county by name . . . and whose operation is limited to such city or county. . . ." (65 S.W.2d, at 415). This issue of whether an act is a local law violating Section 3 does not seem to have caused much difficulty for many years, but two cases following *Fritter* did consider the question and left confusion as to what standard is used to resolve it. In 1938 an act creating countywide equalization school districts in counties within certain population and property valuation limits was challenged as a local law on the ground that by its practical effect the act applied only to Rusk County even though there existed other counties similarly situated. Sidestepping the issue the court simply said, "[w]e pretermit a further discussion, the majority of this court having concluded the act to be a general law." (*Watson v. Sabine Royalty Corp.*, 120 S.W.2d 938, 943 (Tex. Civ. App.—Texarkana 1938, *writ ref'd*).) The dissenting

judge felt that the legislature had purposefully drafted the act so as to single out Rusk County and suggested that a different result would have been reached had the court followed the generally accepted rule in making its decision:

> It is well recognized that in determining whether a law is public, general, special or local, the courts will look to its substance and practical operation rather than to its title, form and phraseology, because otherwise prohibitions of fundamental law against special legislation would be nugatory. (120 S.W.2d, at 945.)

One year later a law directing counties within defined area and population limits to rearrange their school districts was attacked on the same basis. This time the court struck down the law saying,

> It is sufficient to say here that when we look to the practical operation of the act, we are led to the conclusion that beyond a doubt it was the purpose of the legislature to single out Presidio County and make the act applicable to that county alone . . . . For that reason the act is a local act and one which it is beyond power of the legislature to enact . . . . (*Wood v. Marfa I.S.D.*, 123 S.W.2d 429, 432 (Tex. Civ. App.—El Paso 1939), *rev'd on other grounds,* 135 Tex. 223, 141 S.W.2d 590 (1940).)

The supreme court left the matter unsettled saying, "[f]or purposes of this discussion we shall assume (without deciding) that the Act . . . was a special Act and was unconstitutional . . . . We are of the opinion that even though said Act was void . . . ." The conflict between these two cases has not yet been resolved.

Another limitation on the legislature's power to create school districts was conjured up by an appeals court in invalidating an act that authorized formation of stateline school districts including territory in Texas and New Mexico. This ill-reasoned opinion, which appears to be the only decision on the point, declared that "[n]owhere does the Texas Constitution authorize the State Legislature to form or create school districts embracing parts of two or more states." Referring to *Parks v. West* (discussed in the *History* of this section), the court concluded:

> Certainly, if the former provision of Article VII, Section 3, did not authorize the formation of countyline school districts embracing territory in two or more counties, the provision as amended and as it has since existed does not authorize the formation of stateline school districts embracing territory in two or more states. (*Texas-New Mexico School Dist. No. 1 v. Farwell I.S.D.*, 184 S.W.2d 642, 645 (Tex. Civ. App.—Amarillo 1944, *no writ*).)

The local law and stateline-district prohibitions are the only specific limitations imposed under Section 3 on the legislature's otherwise very broad powers to create or change the boundaries of school districts. (See, *e.g., County School Trustees v. North C.S.D.*, 195 S.W.2d 436 (Tex. Civ. App.—San Antonio), *aff'd,* 145 Tex. 251, 199 S.W.2d 764 (1946); *Prosper I.S.D. v. County School Trustees,* 58 S.W.2d 5 (Tex. Comm'n App. 1933, *jdgmt adopted); West Orange-Cove Consol. I.S.D. v County School Trustees,* 430 S.W.2d 65 (Tex. Civ. App.–Beaumont 1968, *writ ref'd n.r.e.*).) But implicit in Section 3 are two limitations on the legislature's authority to control the affairs of existing school districts. The first stems from the kind of system contemplated by the section—each individual school district is responsible for raising taxes for the education of the students within the district. "[T]he Legislature cannot compel one district to construct buildings and levy taxes for the education of nonresident pupils" and, therefore, may not require a school district to accept a student who resides in another district "without just compensation." (*Love v. City of Dallas,* 120 Tex. 351, 373, 40 S.W.2d 20, 27 (1931).) The

second limitation flows from the "quasi-municipal" corporate nature of a school district. The court in *Love,* citing Cooley's *Constitutional Limitations* and other sources, held that, like the property of a municipality, property held by a school district is held in public trust for the people of the district for educational purposes. The legislature may not dispose of school district property in contravention of that trust. The trust includes all property of a school district, including lands, buildings, local tax revenue, county school funds, and allotments from the state available school fund. (See the *Explanation* of Sec. 6b in regard to a recent attorney general opinion following the public trust concept announced in *Love.*)

The school district structure in Texas, with more than a dozen types, is quite complex. Most fall within two broad classifications: common and independent. In general the former is maintained and administered under county auspices (see generally Education Code ch. 22), while the latter is a special district that is distinct from the county governmental unit and its boundaries (see generally Education Code ch. 23). In addition to these two major classifications there are numerous subclassifications, such as common consolidated (Education Code sec. 19.235), countywide (Education Code secs. 19.031-19.070), countyline (Education Code secs. 19.101-19.106), and rural high school districts (Education Code secs. 19.131-19.136) to name only a few. The "incorporated cities or towns constituting separate and independent school districts" referred to in Section 3 are now labeled "municipal school districts" and classified as independent school districts. (See generally Education Code secs. 19.161 *et seq.* and ch. 24.)

Adding to the complexity are three types of districts that fall outside the independent-common dichotomy: junior college districts (Education Code ch. 130), rehabilitation districts (Education Code ch. 26), and county industrial training school districts (Education Code ch. 27). These three "special" school districts, like other school districts, have been given the power to levy and collect taxes. Such authority was sanctioned with respect to junior college districts by a sharply divided court, holding that Section 3 supported the tax. (*Shepherd v. San Jacinto Jr. College Dist.,* 363 S.W.2d 742 (Tex. 1963). See also the *Author's Comment* on this section.) Final mention should be made of the countywide vocational school district, which is not actually a district, but rather a special authority responsible for distributing vocational school taxes among the various school districts of the county. (Education Code ch. 28.)

Spending. The main limitations on spending the state available school fund are contained in Article VII, Section 5, and are discussed in the annotation of that section. However, Section 3 does require the Board of Education "to set aside a sufficient amount" of the state property tax levied by the section to provide free textbooks for public school students; the cost of the textbook program, including administrative expenses, must be covered by the available school fund. (See Tex. Att'y Gen. Op. Nos. O-1356 (1939) and O-1671 (1939).) With the phasing out of the state property tax under Section 1-e of Article VIII, this provision is now obsolete. Section 1-e expressly continues the requirement that the available school fund be used to finance free textbooks for the public schools.

Following the textbook clause is found the clause "provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the state . . . ." Although there is no direct holding on the point, this clause does not limit general fund appropriations for the public schools to covering yearly operating deficits but rather (unnecessarily) authorizes such appropriations. Thus, the clause was no impediment to a plan appropriating money from general revenue for rural school aid. (See *Mumme v. Marrs,* 120 Tex. 383, 40 S.W.2d 31 (1931).) Today, a substantial part of the

Minimum Foundation School Program, which was adopted on the recommendation of the Gilmer-Aiken Survey to ameliorate interdistrict disparities in wealth (see also the *History* of Sec. 8), is financed from state general revenue. This program calls for state and local contributions to a fund earmarked for teacher salaries, operating expenses, and transportation costs and apportions it among the school districts under a formula designed to reflect each district's relative taxpaying ability. (See generally Texas Research League, *Public School Finance Problems in Texas,* Interim Report (Austin, 1972).)

Section 3 provides that local school district taxes "be levied and collected . . . for the further maintenance of public free schools, and for the erection and equipment of school buildings therein. . . ." These are two distinct and exclusive purposes for which local school tax revenues must be spent; thus, "maintenance" means current operating expenses and does not include capital expenditures, and a tax approved by school-district voters for "support and maintenance of the public free schools" may not be collected to pay off the district's bonded indebtedness or for other capital purposes. (*Madely v. Conroe I.S.D.*, 130 S.W.2d 929 (Tex. Civ. App.—Beaumont 1939, *writ dism'd jdgmt cor.*); *Love v. Rockwell I.S.D.*, 194 S.W. 659 (Tex. Civ. App.—Dallas 1917, *writ ref'd*).) However, in the (now unlikely) event that a school district's "maintenance tax" (see Education Code sec. 20.02) produces more revenue than is required for current operating expenses, the surplus "becomes a constitutional fund and not a statutory fund, and may be used for . . . constitutional purposes . . . [including] the erection and equipment of school buildings within the district." (*Madely,* at 934.)

Since 1883, when Section 3 was amended to provide for the creation of school districts empowered to levy local ad valorem taxes, the financing of public education has been a joint responsibility of state and local authorities. Local school district taxation accounts yearly for approximately 41 percent of all public school funds, the balance being supplied by the state Minimum Foundation Program and state available school fund (48 percent) and federal funds (11 percent). (See the Texas Research League, cited above, p. 9.) Even with the Minimum Foundation Program, wide disparity in per-pupil spending exists among the various school districts because assessed property value is so much greater in some districts than in others. Such disparity, largely attributable to differences in the amount of local school tax revenue, led to a constitutional challenge of the public school financing system. A divided United States Supreme Court held that, while concededly imperfect, the system did not violate the Equal Protection Clause of the Fourteenth Amendment. (*San Antonio I.S.D. v. Rodriguez,* 411 U.S. 7 (1973).)

Comparative Analysis

Obviously, no state has a single provision remotely comparable to Section 3. There are, however, many constitutional provisions concerning taxation for education and the creation of school districts. The various provisions are summarized below.

Taxation. About 19 states have a constitutional provision either mandating or authorizing a poll tax. Eleven of those states dedicate some or all of the poll tax to education. All except one of the 11 are southern or border states. All of the other poll tax states are northern or border states.

Approximately 11 states have a constitutional provision either mandating or authorizing state taxes for the support of public education, frequently in the context of supplementing the school fund. Only one state besides Texas has a specific state ad valorem tax for support of the public schools.

About 16 states have a provision authorizing the levy of local taxes for education, frequently with a maximum amount specified. Only four states besides Texas require approval by the local voters. Naturally, the absence of a provision does not mean local governments lack the power to levy taxes for education.

School Districts. Fewer than ten state constitutions contain an explicit authorization or command to create school districts, though many more do have some provision regulating the affairs of school districts. Likewise, fewer than ten contain prohibitions against local legislation concerning school districts. About one-fifth of the states limit the amount or purpose of debt that can be incurred by a school district, and two states forbid a school district to lend its credit. (Of course, many states have a blanket prohibition against lending credit. See *Comparative Analysis* of Sec. 52 of Art. III.) Nine states including Texas were found to require a minimum operating school year, ranging from three to eight months, and some five of these conditioned a school district's right to share in school funds on maintaining classes the required period of time.

Spending. Fewer than 10 states limit the purposes for which local school taxes may be spent, but most of those that do use terminology similar to that in Section 3, referring to "maintenance" or "support" of schools and the erection of buildings. Only one other state, Delaware, appears to guarantee free textbooks.

Author's Comment

The Texas Constitution has ample examples of how not to write a constitution. Section 3 is one of those examples. First, it would be bad enough as one sentence if all the ideas were related; actually, the section deals with a number of subjects related to each other only under the broad term "education," a term that also covers the whole of Article VII. Section 3, in one sentence, no less, does all of the following:

1. Levies a state poll tax;
2. Levies a state property tax;
3. Dedicates those taxes to education;
4. Dedicates one-fourth of state occupation taxes to education;
5. Expresses the hope that the foregoing plus the available school fund will support the schools for six months out of each year;
6. Tells the legislature that it may appropriate more money, if necessary;
7. Commands the State Board of Education to provide free textbooks;
8. Authorizes the creation of school districts;
9. Notes that school districts may embrace parts of two or more counties;
10. Authorizes the legislature to pass laws for the assessment and collection of taxes and management and control of schools in school districts;
11. Notes that those laws may cover school districts whether in one county or more than one county;
12. Authorizes the legislature to permit school districts to levy property taxes;
13. Requires voter approval of any local property tax;
14. Limits the tax to $1 on the $100; and
15. Exempts from the tax limit (a) cities and towns constituting separate and independent school districts and (b) all independent and common school districts created by law.

Second, much of the first half of the section belongs in Article VIII, an anomaly obvious since 1883 when the original state ad valorem tax was dropped into the section and an amendment of Section 9 of Article VIII cross-referenced the tax. Today, of course, Section 1-e of Article VIII has taken over the tax. Some of the

second half of the section also belongs in Article VIII, but this is not too significant since there are tax provisions scattered throughout the constitution.

Third, apparently every time someone drafted an amendment to solve a problem, a new problem was created. The 1883 amendment was required to create taxing power for school districts. If the drafter of the amendment had been content to do only that, all would have been fine. Unfortunately, the drafter went to the unnecessary trouble of granting the legislature the power to create school districts "within all or any of the counties." When a countyline district was created, the supreme court turned the unnecessary grant into a limitation that prevented such districts. Another amendment was necessary. Unfortunately, instead of removing the unnecessary grant of power, the drafter of the 1909 amendment "overruled" the supreme court by specifying that school districts can embrace parts of two or more counties. This created a problem when a junior college district was formed covering *all* of three counties. In *Williams v. White* (223 S.W.2d 278 (Tex. Civ. App.—San Antonio 1949, *writ ref'd*)) the court of civil appeals suggested that the wording of Section 3 created no problem because colleges were not covered by Section 3. If this was true, everything was back at square one, because the *Davis* case discussed earlier had held that there was no power to create districts that could raise taxes for schools, and only Section 3, as amended after *Davis,* created taxing power.

This incredible constitutional confusion finally was sorted out by the supreme court in *Shepherd v. San Jacinto Junior College District* (363 S.W.2d 742 (Tex. 1963)). A majority of the court concluded that a junior college district has the power to levy property taxes, but the only convincing reason for this conclusion is the court's reluctance to upset the applecart. "With the sale of every bond issue and the collection of each tax levied, an opportunity was presented to challenge the constitutional tax basis of the junior college districts. For years no such attack was made with the result that the junior colleges became an essential and desirable element in the Texas scheme of public education. Any impairment in the efficiency of their functions and service capacities at the present time could lead only to undesirable results from the standpoint of the citizenry as a whole." (363 S.W.2d, at 752.)

In dissent Chief Justice Calvert rendered a rueful opinion that completely demolished every argument offered in support of the constitutionality of junior college districts. He recognized, indeed agonized over, the practical consequences of a declaration of unconstitutionality but opted for intellectual integrity. The beauty of the dissent is that it demonstrates the bind that government gets into when it attempts to carry on under an overly restrictive constitution. Only by judicial winking can the constitutional crisis be avoided.

The last word on Section 3 is Justice Norvell's characterization of it in the development of his majority opinion:

> . . . Article 7, Section 3 of the Constitution is a rather patched up and overly cobbled enactment. In order to meet situations deemed undesirable by the people of Texas, which were pointed up by the decisions of this Court, amendments have been adopted which in turn led to further unwanted and perhaps unforeseen results. (363 S.W.2d, at 744.)

Sec. 3-b. INDEPENDENT SCHOOL DISTRICTS AND JUNIOR COLLEGE DISTRICTS; TAXES AND BONDS; CHANGES IN BOUNDARIES. No tax for the maintenance of public free schools voted in any independent school district and no tax for the maintenance of a junior college voted by a junior college district, nor any bonds voted in any such district, but unissued, shall be abrogated, cancelled or

invalidated by change of any kind in the boundaries thereof. After any change in boundaries, the governing body of any such district, without the necessity of an additional election, shall have the power to assess, levy and collect ad valorem taxes on all taxable property within the boundaries of the district as changed, for the purposes of the maintenance of public free schools or the maintenance of a junior college, as the case may be, and the payment of principal of and interest on all bonded indebtedness outstanding against, or attributable, adjusted or allocated to, such district or any territory therein, in the amount, at the rate, or not to exceed the rate, and in the manner authorized in the district prior to the change in its boundaries, and further in accordance with the laws under which all such bonds, respectively, were voted; and such governing body also shall have the power, without the necessity of an additional election, to sell and deliver any unissued bonds voted in the district prior to any such change in boundaries, and to assess, levy and collect ad valorem taxes on all taxable property in the district as changed, for the payment of principal of and interest on such bonds in the manner permitted by the laws under which such bonds were voted. In those instances where the boundaries of any such independent school district are changed by the annexation of, or consolidation with, one or more whole school districts, the taxes to be levied for the purposes hereinabove authorized may be in the amount or at not to exceed the rate theretofore voted in the district having at the time of such change the greatest scholastic population according to the latest scholastic census and only the unissued bonds of such district voted prior to such change, may be subsequently sold and delivered and any voted, but unissued, bonds of other school districts involved in such annexation or consolidation shall not thereafter be issued.

History

Over the past 40 years, there has occurred an evolution in the organizational pattern of the public school system in Texas. Consolidation, either by means of annexation of districts or uniting of two or more districts, has greatly reduced the number of operating school districts in Texas. (In 1929 there were 7,840 school districts; in 1949, 4,474; and in 1969, 1,244.) This reduction came about almost entirely at the expense of common school districts, while the number of independent school districts remained stable at slightly over 1,000. (*Texas Almanac 1974*, p. 79.) The consolidation came about largely in order to make school districts of sufficient size and scholastic population to enable them to be fiscally and administratively more efficient and to improve curricula. (See Hankerson, "Special Governmental Districts," 35 *Texas L. Rev.* 1004 (1957).) Such consolidation, however, encountered a bothersome problem: before any tax could be levied in the newly acquired territory, Section 3 required approval of the tax by a majority of the "qualified taxpaying voters" of the territory affected by the boundary change. (*Crabb v. Celeste I.S.D.*, 105 Tex. 194, 146 S.W. 528 (1912).)

Section 3-b was designed to facilitate the process of consolidation by eliminating the costly elections, but the version originally adopted in 1962 applied strictly to ". . . any independent school district, the major portion of which is located in Dallas County. . . ." (At that time Dallas County had one common and 19 independent school districts.) Just why the legislature chose to restrict application of this amendment to Dallas County is a mystery. (See generally Bedichek, *The Texas Constitutional Amendments of 1962* (Austin: Institute of Public Affairs, The University of Texas, 1962), p. 40.)

Section 3-b was made applicable to any independent school district in the state by amendment in 1966, which also expanded its coverage to junior college districts.

Explanation

As indicated in the preceding *History*, Section 3-b is essentially an exception to

the requirement in Section 3 that the voters of a school district approve any taxes levied by the district. The creation, consolidation, and abolition of school districts in general are governed by chapter 19 of the Education Code.

No case interpreting this section has been reported since its adoption. According to the attorney general, Section 3-b means that when a boundary change occurs in an independent school district "there is no requirement that an election be held to assume the outstanding bond or other indebtedness of the district as it existed prior to the consolidation or annexation, nor is there any requirement that a bond maintenance tax be voted." Further, "this same rule" applies to consolidation of dormant school districts under the Texas Education Code (sec. 16.80(a)) if the result is an independent school district. However, if the consolidated district is other than independent, an election is still required. The opinion also noted that Section 3-b supersedes Education Code sections 19.243(a) (election required in consolidated district to assume debt) and 19.461 (authority or district trustees to adjust bonded indebtedness after consolidation) to the extent there is conflict. (Tex. Att'y Gen. Op. No. M-677 (1970).)

Comparative Analysis

No other state has a provision comparable to Section 3-b.

Author's Comment

Article VII is replete with statutory detail of which Section 3-b is but one example. The essense of the section could be preserved in a few succinct sentences.

Sec. 4. SALE OF LANDS; INVESTMENT OF PROCEEDS. The lands herein set apart to the Public Free School fund, shall be sold under such regulations, at such times, and on such terms as may be prescribed by law; and the Legislature shall not have power to grant any relief to purchasers thereof. The Comptroller shall invest the proceeds of such sales, and of those heretofore made, as may be directed by the Board of Education herein provided for, in the bonds of the United States, the State of Texas, or counties in said State, or in such other securities, and under such restrictions as may be prescribed by law; and the State shall be responsible for all investments.

History

The Constitutions of 1845 and 1861 provided that public school lands could not be sold but only leased for a term of not more than 20 years. Neither document prescribed regulations for investment of the principal of the school fund. The legislature was directed to provide for the sale of both state and county school lands by the Constitution of 1866 (Art. X, Secs. 4 and 6) and was vested with broad authority to determine the time and terms of sale. That constitution also limited investment of the state school fund to Texas and United States bonds and bonds guaranteed by the state. The Reconstruction Constitution of 1869 did not expressly mandate the sale of state school lands but did authorize the legislature to sell county school lands. (Art. IX, Sec. 8; see the *History* of Sec. 6.) Investment under the 1869 Constitution was limited to "bonds of the United States Government and in no other security." (Art. IX, Sec. 9.)

Prior to 1876 the legislature had repeatedly passed acts granting relief to purchasers of school and university lands; some of these acts merely extended the time for interest payments, but others cancelled the existing obligation of the buyer and allowed repurchase at the original price without payment of accrued interest. Thus, the state was deprived of large sums of interest and valuable state

lands were resold at prices far below market value to purchasers who had defaulted on their original contracts. (See Lane, *History of Education in Texas* (Washington, D.C.: Government Printing Office, 1903), p. 35, and the statement of Land Commissioner Walsh reported at 143.) The first clause forbidding relief to purchasers of school lands appeared in the Constitution of 1866. (Art. X, Sec. 4.) Such a limitation was not included in the 1869 Constitution but was revived in Section 4 of the present constitution.

As adopted in 1876, Section 4 required investment in Texas bonds, or if unavailable, then in United States bonds. Investment authority was expanded to include county bonds and "such other securities, and under such restrictions as may be prescribed by law" by amendment in 1883.

Explanation

Although this section has long been referred to as a mandate to sell the state school lands, the courts have generally allowed the legislature broad discretion to carry out the command. For example, in approving an act giving purchase preferences to lessees of school lands, the Texas Supreme Court stated that "[w]hen and to whom the lands are sold is a question [that] belongs to the political department." (*Glasgow v. Terrell,* 100 Tex. 581, 585, 102 S.W. 98, 100 (1907).) In holding that the legislature's power includes authority to grant easements on public school land, the Texas Supreme Court said, "it seems to us settled . . . that the Legislature has power to deal with the public school lands in any manner not inconsistent with the express denial of the Constitution." (*Imperial Irr. Co. v. Jayne,* 104 Tex. 395, 411, 138 S.W. 575, 583 (1911).)

The power to sell also comprehends "the power to authorize such leasing . . . as will not interfere with the right of the state to sell [the lands] whenever the legislature may deem it proper." (*Smissen v. State,* 71 Tex. 222, 235, 9 S.W. 112, 117 (1888); see also *Ketner v. Rogan,* 95 Tex. 559, 68 S.W. 774 (1902).) Mineral leases, however, are considered sales for purposes of this section and thus are not subject to the judicially imposed restriction on the leasing power, which forbids withholding the land from sale "for an unreasonable length of time." (*Short v. Carter,* 133 Tex. 202, 126 S.W.2d 953 (1938), *appeal dism'd,* 308 U.S. 513 (1939); *Greene v. Robinson,* 117 Tex. 516, 8 S.W.2d 655 (1928).) The sale and lease of public school lands are controlled by statute (Tex. Rev. Civ. Stat. Ann. art. 5306 *et seq.*), and surface leases are limited to a term of not more than five years. (Tex. Rev. Civ. Stat. Ann. art. 5331.)

Investment of the permanent fund is regulated under the Education Code (secs. 15.02-15.08), which gives the State Board of Education authority to invest the fund in a varied portfolio including corporate securities and real estate mortgages.

No clear-cut test for determining whether an act grants "relief to purchasers" in contravention of this section can be constructed from the cases addressing the issue. In upholding a statute that granted purchasers of school lands a five-month extension for payment of interest, an early opinion alluded to "times of great financial depression [and] cases of public calamity, affecting a part or the whole of the state" and said that "in such cases it might be to the interest of the state and the school fund to suspend for a time the right to forfeit school lands." (*Barker v. Torrey,* 69 Tex. 7, 12, 4 S.W. 646, 649 (1887).) The best interest of the school fund was again cited in upholding a later statute providing the same extension. The court reasoned that since the underlying purpose of the limitation ". . . was to prevent the impairment of the school fund," the act in question was valid because it induced the purchaser to carry out his contract and thus ". . . had the effect to protect and secure the fund." (*Island City Savings Bank v. Dowlearn,* 94 Tex. 383,

389, 60 S.W. 754, 756 (1901).) The test applied in approving a statute that authorized buyers of public school lands that had been forfeited for nonpayment of interest to repurchase at a reappraised price was "whether [the statute's] necessary operation is to enable the previous owner to reacquire the land at a less price than he was obligated to pay under his former purchase." (*Judkins v. Robison,* 109 Tex. 6, 9, 160 S.W. 955, 957 (1913).) The court finally put its foot down when it considered the constitutionality of a 1931 act that purported to cancel the obligation to pay a bonus owing the state by purchasers (actually lessees) of oil and gas who had executed their leases under the Relinquishment Act of 1919. (See the *Explanation* of Sec. 5 for further discussion of the implications of this act.) In voiding the 1931 act, the court noted that the rights and duties of the parties at the time they executed the lease in 1927 were fixed by the Relinquishment Act, and the legislature could not thereafter undertake to change the original conditions of the transaction. The court concluded that the 1931 act granted relief to purchasers which was "plainly contrary" to Section 4. (*Empire Gas and Fuel Co. v. State,* 121 Tex. 138, 47 S.W.2d 265 (1932). See also the *Explanation* of Art. III, Sec. 55.)

That Section 4 precludes the state from disposing of the public school lands by gift was established in *State v. Post* (169 S.W. 401 (Tex. Civ. App.—Austin 1913), *certified question answered,* 106 Tex. 468, 169 S.W. 407 (1914). See also *Wheeler v. Stanolind Oil & Gas Co.,* 151 Tex. 418, 252 S.W.2d 149 (1952).)

The state-responsibility-for-investments clause seems to have escaped judicial attention.

Comparative Analysis

The constitutions of about one-third of the states include provisions authorizing the sale of disposition of school lands. Only two states were found that couched the authority in terms of a duty to sell similar to Section 4. A few states, notably Utah and Washington, go into considerable detail concerning the conditions, terms, and procedures for sale and lease. The majority simply grant the authority to dispose of the land according to law, and one state, Kansas, permits sale only upon a public referendum.

Provisions controlling the investment of school funds also appear in approximately one-third of the state constitutions. These vary from the very restrictive provisons of states like North and South Dakota, Nevada, West Virginia, and Washington, limiting investments to specified interest-bearing securities, to the admonitions of Colorado, Idaho, and Rhode Island to the effect that the funds be "securely" or "profitably" invested. Several states, like Texas, leave investment policy to the legislature and state school board.

Besides Texas, Colorado and Wyoming are the only states that expressly forbid relief to purchasers, but another half-dozen guarantee the fund against loss.

The *Model State Constitution* contains no similar provision.

Author's Comment

Whether the delegates in 1875 really intended to command the legislature to sell the school lands or whether the mandate was read into Section 4 by an overly literal court is uncertain, but if there ever was good reason to command sale, it does not exist today. Moreover subsequent judicial opinion and just plain practical application have reduced the mandate to little more than an exhortation. Any revision of the constitution ought simply to grant authority to dispose of (not "sell") permanent school fund lands according to law. Similarly, in order to ensure administration of investments by the State Board of Education, the constitution

should continue expressly to vest that authority in the board, subject to legislative regulation.

The prohibition against granting relief to purchasers and the requirement of state responsibility for investments reflect, like so many other provisions in the 1876 document, the lack of confidence the framers had in their legislature. (Another special limitation similar to the relief-to-purchasers prohibition appears in Sec. 55 of Art. III.) Such a provision will probably be retained so long as the voters distrust their legislators.

Sec. 5. PERMANENT SCHOOL FUND; AVAILABLE SCHOOL FUND; USE OF FUNDS; DISTRIBUTION OF AVAILABLE SCHOOL FUND. The principal of all bonds and other funds, and the principal arising from the sale of the lands hereinbefore set apart to said school fund, shall be the permanent school fund, and all the interest derivable therefrom and the taxes herein authorized and levied shall be the available school fund. The available school fund shall be applied annually to the support of the public free schools. And no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same, or any part thereof ever be appropriated or used for the support of any sectarian school; and the available school fund herein provided shall be distributed to the several counties according to their scholastic population and applied in such manner as may be provided by law.

History

Antecedents of the permanent school fund can be found in all previous Texas constitutions except that of 1836. The statehood constitution in Article X, Section 2, set aside "not less than one-tenth of the annual revenue of the State" derived from taxation as a "perpetual . . . free common school fund" for the support of "free public schools" and provided against diversion to other uses. The 1861 provision was identical to that of 1845, and each successive constitution expressly prohibited diversion of the fund to any purpose other than education. The "perpetual" school fund was preserved in the 1866 and 1869 constitutions, the latter enlarging it. (See the *History* of Sec. 2.) No constitution prior to that of 1876 proscribed public aid to sectarian educational institutions, reflecting the reality of that early period in which education in Texas was largely in the hands of denominational and private organizations that secured financial subsidies and land endowments from the state. (See the *History* of Sec. 1.) Among the many issues concerning education debated at the 1875 Convention was the question of private versus public control. As recounted in the *History* of Sec. 1, a sizable faction favored measures that would promote and preserve the sectarian and private school system, but after arduous debate a majority ultimately favored a free public school system. To ensure the separation of public and sectarian educational systems, the provision expressly forbidding use of the school fund for support of sectarian schools was included in Section 5. (See also Art. I, Sec. 7, prohibiting public appropriations for sectarian purposes.) An attempt to qualify the prohibition of public support was made in 1935, when a proposed amendment that would have permitted the state to furnish free textbooks to private as well as public school children was defeated by the voters.

It was in the hope that the state would not have to rely primarily on taxes to finance its system of public education that the permanent school fund was originally created (see the *History* of Sec. 2); the interest therefrom, supplemented by the general revenue appropriations and poll tax authorized by Section 3, were to have provided all necessary operating funds under the scheme of the constitu-

tion as adopted in 1876. (The 1876 Constitution was the first to designate interest from the permanent funds as a separate, distinct "available school fund"; the Constitutions of 1866 and 1869 had simply earmarked the permanent fund "and the income derived therefrom" for education.) However, it soon became apparent that reliance upon the permanent school fund income rather than upon taxation to operate the public schools resulted in numerous deficiencies in the available school fund. Commentators also place part of the blame on poor management of the permanent and available funds. (See generally E. Miller, *Financial History of Texas* (Austin: The University of Texas Press, 1916), pp. 329-51.) While some increase in taxes for education was provided in 1883 by amendment to Article VII, Section 3 (authorizing for the first time the levy of local taxes for schools), by the late 1880s it was felt that still another source of money was needed. That source was the corpus of the school fund according to the "Jester Amendment" of 1891, which authorized the legislature to transfer annually to the available school fund not more than 1 percent of the permanent school fund. But the annual transfer did not solve the financial problem, as large yearly deficits in the available fund continued, while the permanent fund had been diminished by over $1.3 million by 1899. (See Miller, p. 370.) In that year the legislature repealed the statute which implemented the transfer, and other means to solve the financial crisis in the public education system were sought.

It was not until 1963 that the constitutional authorization to transfer funds contained in Section 5 was repealed by amendment, which left the section virtually identical with that originally adopted in 1876.

Explanation

Special funds of constitutional stature are popular in Texas, and Section 5 establishes two more: the "permanent school fund" and the *state* "available school fund" (as distinguished from the *county* available school fund; see the *Explanation* of Sec. 6.) The system of financing public education in Texas is complicated, and income from the permanent school fund is but one of several general sources of support for the public schools. Others include one-fourth of the revenue from state occupation and motor fuel taxes (see Sec. 3 of this article and Sec. 7-a of Article VIII), local ad valorem school taxes, and regular legislative appropriations. There are also numerous special sources such as federal-to-state-to-local intergovernmental transfers, revenue derived from sale of county school lands, and debt capital raised locally through school-district bond sales. Section 5 provides that the "principal of all bonds and other funds" together with the principal from the sale of public school lands (see Sec. 2) comprise the permanent school fund. The fund has been enlarged by statute to include escheated lands and proceeds from their sale or lease, all of the unappropriated public domain, and various other money. (Tex. Rev. Civ. Stat. Ann. art. 3281; Education Code sec. 15.01.) Investment of the permanent school fund is administered by the State Board of Education, which invests the fund in a varied portfolio that includes government securities and certain preferred and common stocks.

The state available school fund, as defined by Section 5, consists of the "interest" from the permanent school fund and the taxes dedicated to it and is augmented by statute to include "all other appropriations to the available school fund as made . . . by the legislature for public free school purposes." (See Education Code sec. 15.01(b)(8).) "Interest" is not interpreted literally but rather means income from the permanent fund. (See *Webb County v. Board of School Trustees of Laredo,* 95 Tex. 131, 65 S.W. 878 (1901).) Section 5 requires that the available school fund "be applied annually" to support the public free schools and

that it be distributed to the counties "according to their scholastic population" in the manner provided by law. The definition of "scholastic population" for purposes of this section was judicially recognized as "those who under statute have a right to attend public schools and receive benefits of the public school fund." (*Love v. City of Dallas,* 120 Tex. 351, 361, 40 S.W.2d 20, 24 (1931).) That definition is narrowed by the Education Code, which defines "scholastic population" in terms of "average daily attendance" of pupils actually enrolled in school. (Education Code sec. 15.01(a). In a recent opinion interpreting the word "scholastic" under Art. VII, Sec. 6b, the attorney general indicated that the Sec. 15.01 definition might run afoul of the *Love* case. See the *Explanation* of Sec. 6b.)

The mechanics of distribution of the available fund are outlined by the Texas Education Code (see generally ch. 15). As provided in Section 15.10, the commissioner of education certifies the amount to be received by each school district to the comptroller of public accounts, who in turn draws warrants on the treasury payable to the treasurer of each school district. Before the turn of the century, the Texas Supreme Court held that the comptroller could not condition distribution of the amount apportioned to a county upon that county's first repaying its debt to the state, notwithstanding a statute that imposed that duty on the comptroller. Stating that "[t]he legislature cannot do by indirection what it cannot do directly," the court found that the comptroller's action would divert available fund money to purposes other than support of the public schools in contravention of Section 5. (*Jernigan v. Finley,* 90 Tex. 205, 213, 38 S.W. 24, 26 (1896).) Similarly, the attorney general ruled unconstitutional a statute that purported to give the state superintendent power to withhold distribution of available fund shares under certain circumstances. (Tex. Att'y Gen. Op. No. 0-306 (1939).)

Disbursements of state money to school districts need not always comply with the mandate of Section 5, because in spending for elementary and secondary public education, the legislature is not restricted to appropriations solely to the available school fund. The Texas Supreme Court held that the legislature can make appropriations out of general revenue for specific public educational purposes (in this case special aid to rural school districts), and that the appropriation need not be made to the available school fund, thus avoiding the Section 5 requirement of distribution according to scholastic population. The court also held that the special appropriation to the class of poor rural schools does not deny due process or equal protection of the law to the excluded school districts. (*Mumme v. Marrs,* 120 Tex. 383, 40 S.W.2d 31 (1931).)

In defining the authorized uses of the permanent and available school funds, Section 5 provides three rules: (1) the available fund must be applied annually to "support . . . public free schools," (2) neither fund may be used for any other purpose, and (3) neither fund may be used to support a "sectarian school." The language of the constitution is general, but statutory strictures are precise in prescribing the use of the available fund, primarily for payment of teacher salaries. (Education Code sec. 20.48; see *Austin I.S.D. v. Marrs,* 121 Tex. 72, 41 S.W.2d 9 (1931).)

The question of whether there has been an appropriation of the permanent or available fund in contravention of Section 5 occasionally arises with respect to a statute that might grant some benefit or right affecting the funds. Such a case arose in connection with the Relinquishment Act of 1919. That act was passed to secure the active cooperation of those owners of public school land (the land having been purchased subject to the reservation of minerals by the state) in developing the state's oil and gas reserves. The act purported to vest title in the landowner to

15/16ths of the oil and gas under his land. In order to overcome the objection that the act constituted a donation to the owner of a part of the permanent school fund (*i.e.,* the minerals in place) in violation of Article VII, Sections 2, 4, and 5, the Texas Supreme Court held that title to all the oil and gas remains in the school fund, but that the landowner is merely the state's agent for the purpose of executing oil and gas leases. (*Greene v. Robinson,* 117 Tex. 516, 8 S.W.2d 655 (1928).)

The prohibition in Section 5 against using the school funds "for the support of any sectarian school" poses basically two issues: (1) the problem of religion in the public schools and (2) the problem of public aid to parochial schools. With incorporation of the "establishment of religion" clause of the First Amendment to the United States Constitution into the Fourteenth Amendment (*Everson v. Board of Education,* 330 U.S. 1 (1947)), most of the law with regard to constitutional limitations on state participation in and support of religion has been written by the federal courts.

The leading (and indeed only) Texas case involving the sectarian-schools-appropriation limitation in Section 5 is *Church v. Bullock.* (104 Tex. 1, 109 S.W. 115 (1908).) Parents of public school children contended in *Church* that "opening exercises" conducted in the school violated this Section 5 limitation, as well as Sections 6 and 7 of the Texas Bill of Rights. The exercises consisted of voluntary group recital of the Lord's Prayer and short readings from the Bible by some of the teachers. The court ruled that the "school was not rendered sectarian within the meaning of the Constitution" by virtue of conducting the exercises because they were not shown to be "in the interest of or forwarding the views of any one denomination of people" (at 117). (A more extensive discourse on the meaning of "sectarian" under Section 5 is contained in the civil appeals court opinion affirmed by the supreme court in *Church,* 100 S.W. 1025, 1027 (Tex. Civ. App. 1907).)

The attorney general has confronted the Section 5 sectarian-school clause on several occasions and, like the court in *Church,* often considered its impact together with that of Section 7 of the Texas Bill of Rights. These two sections, as well as Bill of Right Section 6, were cited in ruling that denominational religious instruction in public schools is prohibited (Tex. Att'y Gen. Op. No. 0-5037 (1943)), and that nonsectarian Bible courses are not disqualified from statutory allotments of state money in aid of junior colleges. (Tex. Att'y Gen. Op. No. 0-5643 (1943).) However, neither of these opinions explicitly addressed the issue of whether "any part of the permanent or available school fund . . . [was] appropriated or used for the support of any sectarian school" in violation of Section 5. The appropriation issue was spoken to in an opinion ruling that parochial school students may not be transported by public school bus, notwithstanding the facts that no extra stops or runs are made and that the bus is not overloaded. The attorney general said that transporting parochial students by public school bus constituted using the school fund "in aid of or for the benefit of any sectarian school" in violation of Section 5 and Article I, Section 7. (Tex. Att'y Gen. Op. No. 0-4220 (1941); followed in Tex. Att'y Gen. Op. No. 0-7128 (1946).) The attorney general recently indicated that these busing rulings are of dubious validity today. (Tex. Att'y Gen. Letter Advisory No. 105 (1975).) Leasing a public school house to a church during the summer for religious instruction was approved on the ground that, since the school district received a consideration, the lease was not an "appropriation" within the meaning of Section 5 or Article I, Section 7. (Tex. Att'y Gen. Op. No. 0-5354 (1943).) In advising the legislature that a bill providing free, secular textbooks to private schools would probably not violate Section 7 of the Bill of Rights, the attorney general carefully noted that the program was not to be financed out of the permanent or available school funds,

thus, presumably avoiding conflict with Section 5. (Tex. Att'y Gen. Letter Advisory No. 105 (1975).) It seems fair to infer from the more recent writing by the attorney general that Section 5 is not implicated in state-church fiscal relations unless actual (as opposed to indirect) use of the permanent or available school funds is involved. Accordingly, most problems involving constitutional validity of state aid to churches and religion in the public schools are now decided under Section 7 of Article I and, as indicated above, the first amendment to the federal constitution. (See generally the annotation of Article I, Section 7.)

Comparative Analysis

About three-fifths of the states have provisions that establish or recognize a special trust fund for the benefit of public schools; and a majority of those expressly restrict the use of the fund and its income to the support of public schools. Along with Texas about one-fifth of the states direct that income from a permanent school fund be apportioned to school districts or counties on the basis of student population, while another 16 states leave the manner of distribution to state law or a board of education. Only two states provide a separate fund comparable to the available school fund of Texas: the "current school fund" of New Mexico and the "uniform school fund" of Utah.

Provisions precluding public aid to sectarian or private schools appear in the constitutions of over one-half of the states. Several states expressly prohibit aid to sectarian colleges and universities as well. The *Model State Constitution* contains no comparable provision, although the prohibition against "establishment" of religion in its bill of rights could be applied in some circumstances as the First Amendment to the United States Constitution has been applied through the Fourteenth Amendment.

Author's Comment

The public school fund structure established by Sections 2, 4, and 5 is cumbersome and unnecessarily detailed. As suggested in the *Author's Comment* on Section 2, if the permanent fund were to be retained in a revised constitution, a brief declaration of that fact would be sufficient.

Even if the permanent school fund is to be preserved in the constitution, there is serious question whether the available school fund should be preserved. As noted in the *Comparative Analysis* to this section, only two other states have opted for the creation of a special fund for the income of the permanent or original school fund. Of course, under the Texas scheme not only permanent fund income but also certain tax revenue is funneled into the available fund. As a matter of sound constitution drafting, it is unwise to clutter the constitution when an objective can be achieved without doing so. Dedicating tax revenue solely to public education can be accomplished through legislation authorizing the tax itself, if that is considered necessary. (See the *Author's Comment* on Sec. 3.) A simple limitation to the effect that permanent fund income "may be used only for public education as provided by law" would obviate the unwieldly available school fund with its attendant complexities and at the same time provide protection from misallocation of school funds. A different but equally unnecessary kind of clutter is the proscription in Section 5 against diverting the school funds to other purposes or spending them to support sectarian education. Since school funds are dedicated "to the support of public free schools," those who administer the fund are charged with the duty of observing that constitutional mandate and may not spend the money for other purposes. Thus, the "no other purpose" restriction is unnecessary. (See also the *Explanation* of Art. VIII, Sec. 7.) The sectarian school

provision is superfluous because of the broader limitations in Sections 6 and 7 of the Texas Bill of Rights.

The problem of financing the public schools has haunted state and local governments since the general acceptance of the tenet of public education itself. While the Texas school-financing system has survived the scrutiny of the United States Supreme Court *(San Antonio I.S.D. v. Rodriguez,* 411 U.S. 1 (1973)), the task of providing quality public education in Texas and other states is becoming increasingly more difficult to accomplish, baffling state officials, politicians, and the public alike. In these times of rising costs and demands on the public school system it would seem wise to leave the legislature free of any except the most essential restraints, so that more efficient and equitable methods of financing the system can be explored. Limitations such as that in Section 5 requiring distribution of the available fund to counties according to scholastic population should be carefully considered before retention, because they tend to impede legislative solutions to problems as they arise while at the same time changing societal conditions render the limitations archaic in terms of their original purpose. The kind of difficulty is well illustrated by the *Mumme* case (discussed in the *Explanation*), in which the court had to do some fancy stepping to hold that an appropriation to rural school districts only did not violate this reqirement in Section 5. Whether or not the available fund itself is retained, the advantages of leaving the terms of distribution to statute (perhaps under Texas Education Agency administration), as is done by the majority of state constitutions speaking to the issue, ought to be seriously weighed.

Sec. 6. COUNTY SCHOOL LANDS; PROCEEDS OF SALES; INVESTMENT; AVAILABLE SCHOOL FUND. All lands heretofore, or hereafter granted to the several counties of this State for educational purposes, are of right the property of said counties respectively, to which they were granted, and title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell or dispose of its lands in whole or in part, in manner to be provided by the Commissioners' Court of the county. Actual settlers residing on said lands, shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed one hundred and sixty acres, at the price fixed by said court, which price shall not include the value of existing improvements made thereon by such settlers. Said lands, and the proceeds thereof, when sold, shall be held by said counties alone as a trust for the benefit of public schools therein; said proceeds to be invested in bonds of the United States, the State of Texas, or counties in said State, or in such other securities, and under such restrictions as may be prescribed by law; and the counties shall be responsible for all investments; the interest thereon, and other revenue, except the principal shall be available fund.

History

The first public land endowments for education in Texas were made to the counties by the Congress of the Republic, and by 1840 each existing county had been granted four leagues for the establishment of a primary school or academy. (A "league" is a measure of distance equal to three miles.) The policy of making such grants to counties eventually led to a dual system of dedicated public school lands in Texas consisting of county school lands and state school lands. (Sec. 2 dedicates land to the state public school fund; see the *History* of that section.) The power to sell and administer county school lands was vested by statute in a board of school commissioners in each county. The Constitution of 1845 acknowledged the county endowments made by the Republic and the policy of county administration was continued, with the reservation that the lands could not be sold outright but