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

only leased "for a term not exceeding twenty years." (Art. X, Sec. 3.) Counties organized after the last grant in 1840 and prior to annexation were also given four leagues. (Art. X, Sec. 4.) The Constitution of 1861 simply repeated the language of the 1845 Constitution.

The 1866 Constitution ratified previous grants to counties but gave the legislature control over the lands. However, the power to sell, which was vested in the legislature, was compromised by inclusion of a proviso that gave counties veto power over any sale. (Art. X, Sec. 6.) By virtue of an act passed in 1866 the principal realized from a sale was deposited in the state public school fund, while interest paid by the purchaser was appropriated to pay tuition of the white scholastics of each county. Two years later another act suspended the selling of these lands and nullified all sales that had been made under the 1866 act. (Lang, *Financial History of Public Lands in Texas* (Waco: Baylor University, 1932), pp. 124-25.) The Reconstruction Constitution of 1869 continued legislative control of county school lands, providing that all proceeds from sales be added to the state public school fund (Art. IX, Sec. 8), but the provision was held not to divest the counties of their school lands, which the court said the counties still owned in fee. (*Galveston County v. Tankersley,* 39 Tex. 652 (1873).)

The issue of control of county school lands was permanently settled with the adoption of Section 6 in 1876. This section provides that land patented to a county for educational purposes is the property of the county, and the power to administer and sell the lands is vested in the county commissioners court, not the legislature. The 1876 version required proceeds from sales to be invested in Texas or United States government bonds with the interest "to be expended annually." An 1883 amendment authorized investment in county bonds and other securities as provided by law and declared the revenue from investments to constitute an "available fund".

In 1881 and 1883 additional reservations of more than two million acres of the public domain were made for the benefit of unorganized counties and counties that had not received their portion. Fifteen counties were organized after the public domain had been exhausted; some of these never received their allotted four leagues, thus losing their constitutional birthright. (Lang, p. 126.) The total amount of public land given the counties is estimated by the General Land Office at about four and one-fourth million acres.

Explanation

This section establishes another trust fund for the benefit of public schools, the *county* permanent school fund, with the income derived from permanent fund investment dedicated to the county available school fund. While not expressly stated, it is the county commissioners court that has authority to invest county permanent fund monies under this section, though the legislature is expressly reserved the power to prescribe "restrictions" by law. (*Boydstun v. Rockwall County,* 86 Tex. 234, 24 S.W. 272 (1893).) The county commissioners court is made responsible for management of both funds by statute. (See Education Code secs. 17.81-17.84.) The corpus of the permanent fund must remain intact except for appropriations to reduce bonded indebtedness or make capital improvements (uses permitted by adoption of Sec. 6b in 1972), while the available fund may be expended annually.

In the past much of the litigation involving Section 6 concerned some aspect of the disposition of county school lands. Since only a few counties remain that have not sold off all their school lands, cases involving Section 6 now seldom arise.

Unlike Sections 4 and 12, which mandate sale of state permanent school and

university fund lands, this section only authorizes ("Each county *may* sell or dispose . . .") disposition. The power to "dispose" includes the power to lease. (*Falls County v. DeLaney,* 73 Tex. 463, 11 S.W. 492 (1889). Compare Secs. 4 and 12, which provide only for the power to sell.)

The courts have generally construed Section 6 to confer on the commissioners court broad authority to dispose of the lands and at the same time have judiciously worked to protect the beneficiary—the public schools. For example, after saying that the commissioners had "absolute authority" to sell and provide for the manner of sale, the Texas Supreme Court held that "proceeds" of a sale within the meaning of Section 6 meant all the proceeds, not merely the net proceeds, and expenses of a sale must therefore be paid out of nonschool funds. (*Dallas County v. Club Land & Cattle Co.,* 95 Tex. 200, 66 S.W. 294 (1902).) Under the proceeds rule a county cannot use any of its royalties from mineral leases of county school lands to pay for the cost of bringing the minerals to the surface. (*Ehlinger v. Clark,* 117 Tex. 547, 8 S.W.2d 666 (1928).)

Title to county school lands is vested in the counties as trustee for the benefit of public schools. (*Webb County v. Board of School Trustees of Laredo,* 95 Tex. 131, 65 S.W. 878 (1901); *Delta County v. Blackburn,* 100 Tex. 51, 93 S.W. 419 (1906).) Though not expressly prohibited from "granting relief to purchasers" (see Sec. 4), the courts have generally taken a dim view of attempts by the commissioners courts to do so. Thus, a commissioners court may not violate the trust established under this section by transferring county school lands without sufficient consideration. (*Slaughter v. Hardeman,* 139 S.W. 662 (Tex. Civ. App.—Fort Worth 1911, *writ ref'd).)* Similarly, once a sale is made, a commissioners court may not later reduce the contracted rate of interest. (*Delta County v. Blackburn,* cited above.) The courts also have closely scrutinized attempts by the commissioners court to delegate its authority as trustee. Holding that the commissioners court, as trustee, could not hire an agent to sell its school lands, the court said that "manner" in Section 6 referred to the mode of operation and did not authorize a delegation of the discretionary authority to sell. (*Logan v. Stephens County,* 98 Tex. 283, 83 S.W. 365 (1904).) Similarly, in the *Ehlinger* case the court voided a contract for an oil and gas lease that gave the lessee the right to sublet as the county's agent. Nor does the commissioners court have the authority to grant an option to purchase county school fund lands. (*Potter County v. Slaughter Cattle Co.,* 254 S.W. 775 (Tex. Comm'n App. 1923, *jdgmt adopted*).)

To be entitled to the preference granted to "actual settlers," a claimant must be the one who actually settled the land and actually resided on it at the time of making the claim; the "settlement" may encompass more than just the land improved. (*Baker v. Millman,* 77 Tex. 46, 13 S.W. 618 (1890); *Perkins v. Miller,* 60 Tex. 61 (1883); *Baker v. Burroughs,* 21 S.W. 295 (Tex. Civ. App. 1893, *no writ*).) The provision does not grant or vest title to the land in settlers but rather grants them the first opportunity to buy land they have settled under terms fixed by the county. (*Clay County Land & Cattle Co. v. Wood,* 71 Tex. 460, 9 S.W. 340 (1888).) Once a claimant qualifies for the preference as an actual settler, he may assign that prior right of purchase to another (*Baker v. Millman,* 21 S.W. 297 (Tex. Civ. App. 1893, *no writ*)), and the fact that the settler moves off the settlement after he has assigned his preference does not defeat the prior right of purchase granted by this section. (*Best v. Baker,* 22 S.W. 1067 (Tex. Civ. App. 1893, *no writ*), *rehearing denied,* 24 S.W. 679 (1893).) Furthermore, the priority is not limited to settlers who own no other land. (*Best v. Baker* (cited above); *Baker v. Burroughs* (cited above).) Persons who purchase county school land take subject to an actual settler's prior right of purchase. (*Perego v. White,* 77 Tex. 196, 13 S.W. 974 (1890).)

Comparative Analysis

Only two states, Arizona and North Carolina, were found to provide a county school fund distinct from the state school fund. The Arizona county school fund includes the county's apportioned share of the state school fund. The Georgia Constitution provides that a county may accept grants and donations of land for use in its education system. The *Model State Constitution* contains no similar provision.

Author's Comment

As with the state permanent school fund, there is no impelling necessity to retain the county school fund in the constitution; legislation could provide the same protection for county lands and securities held for education. If the county school fund is retained in the constitution, Section 6 should be combined with Section 6b.

Sec. 6a. COUNTY AGRICULTURAL OR GRAZING SCHOOL LAND SUBJECT TO TAX. All agriculture or grazing school land mentioned in Section 6 of this article owned by any county shall be subject to taxation except for State purposes to the same extent as lands privately owned.

History

Section 6a was added by amendment in 1926 to avoid the Texas Supreme Court's decision in *Daugherty v. Thompson,* 71 Tex. 192, 9 S.W. 99 (1888). The court, interpreting Article XI, Section 9 (which exempts from taxation land owned by counties and held for "public purposes"), held that when county school lands were leased to raise revenue for the county's available school fund, the lessee was not subject to property taxes on the land regardless of the use to which the lessee put the land. Under this section, the lands specified are expressly made subject to taxation "except for State purposes," in effect creating an exception to Article XI, Section 9, as interpreted by the courts. (Geppert, "A Discussion of Tax Exempt Property in the State of Texas," 11 *Baylor L. Rev.* 133 (1959).)

Explanation

The leading case concerning this section is *Childress County v. State* (127 Tex. 343, 92 S.W.2d 1011 (1936)), which involved state taxes on public free school land that the state had conveyed to Childress County. In 1910 that county's commissioners court contracted to sell the land to a private individual but cancelled the contract in 1933 and nullified the sale because the buyer failed to pay interest installments when due. The land had been assessed for state taxes for 1931 and 1932 in the name of the buyer, and when the taxes became delinquent, the state recovered judgment against the buyer for the amount of taxes for those two years. The lower court declared the state tax lien superior to the county's lien, and it was foreclosed against both the buyer and county. Answering questions certified from the civil appeals court, the Texas Supreme Court held that when title reverted to Childress County upon nullification of the sale, the state's tax lien "merged" with the county's ownership of the land and, since the land was dedicated to the county exclusively for a public purpose, it could not be burdened with the state taxes that had accrued during the time the land had been privately owned.

Enabling legislation provides that a county owning land subject to taxation under this section may pay the taxes out of revenue derived from the land to the

extent possible, with any balance to be paid from the county's general fund. (Education Code sec. 17.84.)

According to the attorney general, all governmental agencies with taxing power are authorized by Section 6a to tax county school land classified as "agricultural or grazing" land. (Tex. Att'y Gen. Op. No. 0-6693 (1946).) Land classified as timberland is not considered agricultural or grazing land for purposes of this section. (*Childress v. Morton I.S.D.*, 95 S.W.2d 1031 (Tex. Civ. App.–Amarillo 1936, *no writ*).)

Comparative Analysis

No other state constitution contains a comparable provision.

Author's Comment

Whether retention of this section in a revised constitution would be necessary to preserve the policy that fostered its adoption in 1926 would depend upon what other taxation provisions were adopted. (See the *Introductory Comment* to Art. VIII.) If taxation is left to the legislature, the substance of this provision can be preserved by statute. If, however, the tax exemption granted by Article XI, Section 9, is retained in the constitution, this exception will also have to be retained.

Sec. 6b. REDUCTION OF COUNTY PERMANENT SCHOOL FUND; DISTRIBUTION. Notwithstanding the provisions of Section 6, Article VII, Constitution of the State of Texas, any county, acting through the commissioners court, may reduce the county permanent school fund of that county and may distribute the amount of the reduction to the independent and common school districts of the county on a per scholastic basis to be used solely for the purpose of reducing bonded indebtedness of those districts or for making permanent improvements. The commissioners court shall, however, retain a sufficient amount of the corpus of the county permanent school fund to pay ad valorem taxes on school lands or royalty interests owned at the time of the distribution. Nothing in this Section affects financial aid to any school district by the state.

History

Section 6b was adopted by amendment in 1972 in an effort to give the counties more flexibility in the financial administration of their schools. Many school districts are caught in a financial pinch, with expanding educational demands on the system far outstripping the resources available to satisfy them. Recent years have produced a spate of unsuccessful school bond proposals, the voters balking at the included tax increase, while other school districts have bonded indebtedness up to statutory limits. This section was adopted in the hope that the financial strain would be eased somewhat by allowing counties to utilize a portion of their permanent school funds for reducing bonded indebtedness and making capital improvements.

Explanation

To date the only reported interpretation of Section 6b comes from the attorney general. The attorney general ruled that, notwithstanding Educational Code section 15.01, which defines "scholastic population" in terms of average daily pupil attendance, the term "scholastic" in this section means "a person of scholastic age residing in the school district, whether attending school therein or not." To adopt

the Education Code definition, the opinion says, would contradict the "trust concept" of the county school fund annunciated in the decision of *Love v. City of Dallas.* (120 Tex. 351, 20 S.W.2d 20 (1931). This case is discussed in the *Explanation* of Sec. 3.) The opinion goes on to say that, under this section, county distributions to school districts located partly in the allocating county and partly in another county should be made "pro rata . . . for each 'scholastic' residing in the part of the district within . . . [the distributing county]." Finally, the opinion notes that under the last sentence of Section 6b, distributions of corpus are not to be used in determining the amount of state appropriation to a school district. (Tex. Att'y Gen. Op. No. H-47 (1973).)

Comparative Analysis

No other state constitution contains a comparable provision.

Author's Comment

Section 6b is a stop-gap measure to help stem the tide of rising education costs in some counties. This authorization for invasion of the corpus of the county permanent school funds should be incorporated into Section 6, if the county school fund is preserved in a revised constitution. If the funds are not preserved, then, of course, the desired objective could be accomplished by legislation.

Sec. 8, STATE BOARD OF EDUCATION. The Legislature shall provide by law for a State Board of Education, whose members shall be appointed or elected in such manner and by such authority and shall serve for such terms as the Legislature shall prescribe not to exceed six years. The said board shall perform such duties as may be prescribed by law.

History

None of the Texas constitutions before that of 1866 mentioned a state administrative agency for public education. Under that constitution, the governor, comptroller, and superintendent of public education, who was appointed by the governor with the advice and consent of the senate to a four-year term, comprised the State Board of Education. (Art. X, Sec. 10.) With its emphasis on strong, centralized control of education, the Constitution of 1869 vested administrative and supervisory authority in one office, the superintendent of public education, an elected position with a four-year term. (Art. IX, Secs. 2 and 3.) The Constitution of 1876 abolished that office and reestablished a three-party board of education consisting of the governor, comptroller, and secretary of state. Section 8 was amended in 1928 to give the legislature the power to establish a State Board of Education by law, limiting the term of each member to no more than six years. Until 1949 the board consisted of nine members appointed by the governor with senate approval for six-year staggered terms.

After World War II the movement for education reform in Texas intensified, as mounting costs and inequalities in the school tax system brought vociferous demands for a general reorganization. In 1947 the legislature authorized appointment of a committee to make a thorough investigation and submit recommendations for improvement of the public school system; the study became known as the Gilmer-Aikin Survey. One result of this survey was a 1949 act that provided for a State Board of Education consisting of 21 elected members, one from each of the state's congressional districts. (See Evans, *The Story of Texas Schools* (Austin: The Steck Co., 1955), pp. 237-43.)

Explanation

The State Board of Education constitutes one of the four units of the Central Education Agency (Education Code sec. 11.01) and is the highest policymaking authority in the state's elementary and secondary school-system administration. The composition, powers, and duties of the board are defined by the Education Code. (See sec. 11.21 *et seq.*) The board members also comprise the State Board of Vocational Education, another unit of the Central Education Agency. (Education Code sec. 11.41.)

Prior to the 1928 amendment to Section 8, the final authority to distribute state available school funds was reposed in the Board of Education. (See *American Book Company v. Marrs,* 113 Tex. 291, 253 S.W. 817 (1923).) The amendment gave the legislature power to define the authority and responsibility of the board, however, and since 1928 state available school funds have been legislatively appropriated.

Comparative Analysis

State school boards are constitutionally established in about two-fifths of the states, with the expected variety in the qualifications, number, selection process, terms of office, and duties of the members. Many states provide for an appointive superintendent of public education instead of an elective board. The *Model State Constitution* contains no similar provision.

Author's Comment

A provision such as Section 8 is appropriate if there is a desire to guarantee to some degree that administrative control over the school system is insulated from the normal political process. The present section, though in the form of a mandate, limits the legislature's flexibility in implementing the state's public education administrative structure. Thus, in directing the legislature to provide for a board of education and granting it the power to determine the number of members, manner of selection, term of office, and powers and duties, the legislature is prevented, for example, from creating a single commissioner of education with cabinet status in the executive department, as many states have done.

Sec. 9. LANDS FOR BENEFIT OF ASYLUMS; PERMANENT FUND; SALE AND INVESTMENT OF PROCEEDS. All lands heretofore granted for the benefit of the Lunatic, Blind, Deaf and Dumb, and Orphan Asylums, together with such donations as may have been or may hereafter be made to either of them, respectively, as indicated in the several grants, are hereby set apart to provide a permanent fund for the support, maintenance and improvement of said Asylums. And the Legislature may provide for the sale of the lands and the investment of the proceeds in manner as provided for the sale and investment of school lands in Section 4 of this Article.

History

Following the policy of using the public domain as an endowment for desirable social institutions, the legislature in 1856 established the State Insane Asylum, the State Orphan Home, the State Deaf and Dumb Institute, and the State Institution for the Blind, allotting each about 100,000 acres. The Constitution of 1866 (Art. X, Sec. 9) recognized and preserved these grants and provided for a fund in much the same terms as the present section. The eleemosynary lands were first offered for sale in 1874 and by 1912 had all been sold. In 1941, 160 acres located in Eastland County were recovered by the state because of default in the purchase contract; this land is currently leased for grazing.

Art. VII, § 10

Explanation

Section 9 preserves the state's endowment to its institutions for the handicapped and disadvantaged as a permanent fund and limits the legislature in its powers of sale and investment of fund assets according to the restrictions of Article VII, Section 4. (See the *Explanation* of that section.)

The schools for the deaf and blind are under the jurisdiction of the Central Education Agency (Education Code secs. 11.03-11.101), the children's homes are under the supervision of the Texas Youth Council (Tex. Rev. Civ. Stat. Ann. art. 5143d), and the mental institutions are administered by the Texas Department of Mental Health and Mental Retardation (Tex. Rev. Civ. Stat. Ann. art. 5547-202). Leasing of the state's eleemosynary lands is under the authority of the Board for the Lease of Eleemosynary and State Memorial Lands (Tex. Rev. Civ. Stat. Ann. art. 3183a).

Comparative Analysis

Constitutional mandates to provide for the education and maintenance of certain classes of the disadvantaged, particularly the blind, deaf, orphaned, and mentally incapacitated, appear in approximately two-fifths of the constitutions of other states. Only two other states, Utah and New Mexico, appear to provide a trust fund for the benefit of such institutions similar to the Texas provision. The *Model State Constitution* has nothing similar.

Author's Comment

An audit of the fund in 1972 disclosed cash and bonds aggregating slightly more than $600,000. The land was not appraised. The fund earned less than $25,000 in interest during fiscal 1972, thus contributing little to the social services it was designed to support. The fund should be abolished and its assets either transferred to the state permanent school fund or sold with the proceeds deposited in the state's general revenue fund. (See Office of the State Auditor, *Audit Report: Permanent Available Funds of the Blind, Deaf and Dumb, Lunatic and Orphan Asylums* (Austin, 1972), exhibits A and B.)

Sec. 10. ESTABLISHMENT OF UNIVERSITY; AGRICULTURAL AND MECHANICAL DEPARTMENT. The legislature shall as soon as practicable establish, organize and provide for the maintenance, support and direction of a University of the first class, to be located by a vote of the people of this State, and styled, "The University of Texas," for the promotion of literature, and the arts and sciences, including an Agricultural, and Mechanical department.

History

There is no mention of a state university in any constitution prior to that of 1866, perhaps because a state-supported institution of higher learning was considered a part of the public school system, thus not requiring special constitutional designation. (See Lane, *History of Education in Texas* (Washington, D.C.: Government Printing Office, 1903), pp. 133-35.) The first recorded suggestion of a state university for Texas was "An Act to Establish the University of Texas," which died in the Texas Congress in 1838. The following year the congress made the original endowment of 50 leagues of land for the establishment of two state colleges, one in the eastern and the other in the western part of the state. The issue of whether to have one or two institutions sparked a debate that was not finally resolved until 1876. Other than providing the endowment, nothing further was

done to promote a state university under the Republic.

The great expense of financing higher education was the chief cause of opposition to the early establishment of a state university, many lawmakers favoring the creation of a sound primary school system first. But there were also ideological objections voiced from diverse quarters, such as that a university was an "antidemocratic" special class institution, that "it would surely set itself up as a secret malignant enemy of the people," and that such institutions "were generally hotbeds of vice and immorality." (Lane, pp. 129, 131.) But by the 1850s there was considerable public sentiment in favor of the establishment of a state university, as many saw the need to counteract the exodus of Texas students (and money) to Northern schools. Thus in 1858 the legislature passed an act creating "The University of Texas" with financial and administrative provisions and the lavish "tenth-section railroad survey" land endowment, which by 1876 would have amounted to more than 1,750,000 acres. (Estimate by Land Commissioner Walsh as reported by Lane, pp. 143-44. See also the *History* of Sec. 15.) Due to secession and the Civil War the 1858 act was not carried out. (For further discussion of the railroad survey grant, see the *History* of Secs. 11 and 15.)

The Constitution of 1866 directed the legislature to organize the university "at an early day" (Art. X, Sec. 8), but the 1869 Constitution omitted any reference to a state university.

At the time of the 1875 Convention there was still no University of Texas, although an Agricultural and Mechanical College had been established in 1871. (See the *History* of Art. VII, Sec. 13.) Through the years there had been considerable controversy over the location of the university, and some delegates felt that squabbles over its location were at least partly to blame for its nonexistence. (See *Debates,* pp. 452-53.) When a delegate moved to change the site from Austin to one "located by a vote of the people," another delegate retorted that they "might as well write the obituary of the University of Texas for the public press." (Delegate Whitfield as reported in *Debates,* p. 452.) Nevertheless, once again the legislature was given a constitutional mandate to establish the university, and Austin was selected as the site by statewide election in 1881. Also in that year an act was passed providing for the organizational structure of the University of Texas, which finally became operational in 1883, almost 45 years after the original endowment.

Explanation

Section 10 is the same kind of provision as Section 1, neither granting nor limiting power but rather commanding the legislature to provide a higher education system for the state. (See the *Explanation* of Sec. 1.) The University of Texas organized under Section 10 is now in reality a university "system"—actually there are two Texas university systems and several "branches"; (see the *Explanation* of Sections 11, 13 and 14) and is but one component of a complex of institutions known loosely as the Texas College and University System. (Education Code sec. 61.003.) This "super-system" also includes the Texas A&M System, the State Senior College System, some 14 other colleges and universities, and the "Non-Baccalaureate System."

This section is seldom a subject of litigation, though it was predictably construed to permit the legislature to delegate its administrative authority to a governing board. (*Foley v. Benedict,* 122 Tex. 193, 55 S.W.2d 805 (1932).)

Comparative Analysis

The constitutions of 17 states are silent on higher education, while two others,

Ohio and Oregon, make indirect reference to higher education in provisions dealing with other subjects. Some 23 state constitutions establish or recognize a state university or other public institution of higher education, and seven more recognize higher education by providing for establishment of a state governing board. One state, Connecticut, simply directs the legislature to provide for a higher education system. Only two states provide for the inclusion of an agricultural or mechanical department. The *Model State Constitution* requires the legislature to establish and support such "public institutions of higher learning as may be desirable."

Author's Comment

In one sense the phraseology of this section is obsolete—its command having been obeyed—and it is hardly likely that the state today would refuse to assume the task of maintaining the university in the absence of a constitutional directive. If constitutional recognition of the state's function to provide for higher education is desired, such an affirmation could be included in Section 1 in the language of the *Model State Constitution.*

Under the present higher education financing system Section 10 is more than an exhortation to build a "first class" university–as pointed out in the *Explanation* of Section 11, Section 10, in effect, establishes which institutions of higher learning are entitled to share in permanent university fund income. In any revision of the constitution that preserves the permanent university fund, the section preserving the fund should explicitly identify those schools entitled to share in the income so as to eliminate the present confusion. See the *Author's Comment* on Section 11 for further discussion.

Sec. 11. PERMANENT UNIVERSITY FUND; INVESTMENT; ALTERNATE SECTIONS OF RAILROAD GRANT. In order to enable the Legislature to perform the duties set forth in the foregoing Section, it is hereby declared all lands and other property heretofore set apart and appropriated for the establishment and maintenance of the University of Texas, together with all the proceeds of sales of the same, heretofore made or hereafter to be made, and all grants, donations and appropriations that may hereafter be made by the State of Texas, or from any other source, except donations limited to specific purposes, shall constitute and become a Permanent University Fund. And the same as realized and received into the Treasury of the State (together with such sums belonging to the Fund, as may now be in the Treasury), shall be invested in bonds of the United States, the State of Texas, or counties of said State, or in School Bonds or municipalities, or in bonds of any city of this State, or in bonds issued under and by virtue of the Federal Farm Loan Act approved by the President of the United States, July 17, 1916, and amendments thereto; and the interest accruing thereon shall be subject to appropriation by the Legislature to accomplish the purpose declared in the foregoing Section; provided, that the one-tenth of the alternate Section of the lands granted to railroads, reserved by the State, which were set apart and appropriated to the establishment of the University of Texas, by an Act of the Legislature of February 11, 1858, entitled, "An Act to establish the University of Texas," shall not be included in, or constitute a part of, the Permanent University Fund.

History

The Constitution of 1866 was the first to establish "a special fund for the maintenance of [a university]" (Art. X, Sec. 8), confirming land grants that had previously been made to the university, but the 1869 Constitution was silent on the subject of a university system. Land endowments to higher education in Texas can

be traced to the Republic, when the congress in 1839 appropriated 50 leagues of public land to the endowment of two state colleges or universities. When the legislature established the University of Texas in 1858, the 50-league grant of the Republic was accepted and set apart. The 1858 law also provided that certain land reserved for other purposes be appropriated for the university; this land consisted of one in every ten sections surveyed for education under 1854 acts granting land to railroads and the Brazos Navigation Company. Finally, the 1858 act granted $100,000 in United States bonds remaining from the $10 million paid to Texas in the Compromise of 1850.

As in the Constitution of 1866, the Constitution of 1876 in this section confirmed the earlier grants made to the university. However, the one-in-ten section grant that had been reserved in 1858 was expressly excepted, and in its place the 1875 Convention substituted one million acres of the unappropriated public domain. (See the *History* of Sec. 15.) At that time the West Texas lands comprising the substitute grant were substantially less valuable than lands along a railroad right-of-way. The question of whether to continue the policy of state land grants to aid the development of railroads prompted considerable debate among the convention delegates. (See *Debates,* pp. 400-15.) Many supporters of higher education were adamant in their claim that the convention had short-changed the university, and their demands for restitution to the university were recognized by the legislature in 1883, when an additional one million acres was appropriated to the University of Texas.

There have been five attempts to amend Section 11; three have failed. As adopted in 1876 Section 11 provided that the permanent university fund was to be invested ". . . in Bonds of the State of Texas, if the same can be obtained, if not, then in United States bonds . . . ."—an investment policy even more restrictive than that imposed by the Constitution of 1866. An amendment proposed in 1887 would have removed the restriction pertaining to purchase of Texas bonds first and expanded authority to invest in other securities under legislative standards; the amendment failed at the polls, however. This object was partially accomplished some 40 years later by an amendment adopted in 1930, removing the Texas-bonds-first requirement and enumerating several other classes of securities that could be purchased. The section was amended again in 1932, removing authorization to invest in obligations and pledges issued by the board of regents (which had just been added by the 1930 amendment) and providing for special gifts and donations to the university apart from the permanent university fund.

Two amendments relating to the reorganization of The University of Texas System, which would have made changes in Section 11, were defeated in 1915 and 1919.

Explanation

Time and technology have vindicated those who replaced the university's railroad lands with portions of the vast and vacant West Texas prairie. The discovery of oil and gas on university lands has resulted in the accumulation of a massive permanent university fund (market value of almost $528 million at the end of fiscal year 1974), the proceeds from oil and gas leases on such lands having been assigned to that fund instead of to the available fund. (*State v. Hatcher,* 115 Tex. 332, 281 S.W. 192 (1926).) Section 11 provides that "donations limited to specific purposes" do not become part of the permanent university fund, enabling benefactors to make special gifts to the medical school, law school, and other particular branches of the university. (See *Hull v. Calvert,* 469 S.W.2d 277, 284 (Tex. Civ. App.—Austin 1971), *rev'd on other grounds,* 475 S.W.2d 907 (Tex. 1972).)

Both this section and Section 11a permit the legislature to control the use of the income from the permanent university fund by appropriation; this income constitutes the "available university fund," as defined by Education Code section 66.02. Unlike the available school fund, which may be used to pay operating expenses (see the *Explanation* of Sec. 5), until 1971 the available university fund could be expended only for capital improvements, with one-third going to Texas A&M University and the balance to The University of Texas each year. (Tex. Laws 1931, Ch. 42 repealed by Tex. Laws 1971, Ch. 1024, art. 1, sec. 3.) Restricting use of the available fund to capital improvements was long thought to be sound policy because of the limitation in Section 14 proscribing any tax levy or general revenue appropriation for the erection of buildings at The University of Texas. Under the present statute the available university fund is still apportioned between the two schools on a one-third/two-thirds basis, but expenditures are no longer limited to capital improvements. The statute provides that the boards of directors of the "Texas A&M University System" and "The University of Texas System" each "shall expend" their shares of the available fund.

Education Code section 66.03 does *not* mean that all schools included within The University of Texas and Texas A&M Systems are entitled to share in the available university fund. (If that is not confusing enough, consider that there are, in effect, two University of Texas systems—a constitutional system defined by Section 18 and a larger administrative system that incorporates schools added by statute, such as The University of Texas of the Permian Basin.) It is not readily apparent from either the constitution or the Education Code which institutions are legally eligible to use the available university fund.

The available university fund is subject to legislative appropriation, in the words of Section 11 "to accomplish the purpose declared in the foregoing Section . . . ." (Sec. 11a says "to accomplish the purposes declared in Section 10 of Article VII . . . .") The attorney general ruled that this "purpose" means expenditure for the benefit of three specific institutions of higher education only. (Tex. Att'y Gen. Op. No. V-818 (1949).) That opinion first quotes Chief Justice Cureton in the case of *Mumme v. Marrs* (120 Tex. 383, 40 S.W.2d 31 (1931)): " 'Three institutions of higher learning were expressly provided for . . . .' ", and then goes on to say:

> The three institutions of higher learning expressly provided for and specifically required by constitutional law, as referred to in Chief Justice Cureton's opinion, are the constitutional branches of The University of Texas: the Main University at Austin, the Medical Department at Galveston, and the Agricultural and Mechanical College at Bryan.

What the attorney general by ellipsis omitted from Chief Justice Cureton's passage was: "These express requirements of the Constitution [Art. VII, Secs. 10-15] have been met by the creation and maintenance of the University of Texas, the Agricultural and Mechanical College, and the Prairie View Normal." The attorney general had included the Medical Department on the ground that it was established as a department of The University of Texas by the same act that established the "Main University," and its location at Galveston was established by popular election as required by Section 10. Why Prairie View was omitted is not discussed, though probably it was because Justice Cureton was mistaken in characterizing Prairie View as the college established pursuant to Section 14. (See the *History* and *Explanation* of that section.) In any event, the 1949 opinion was approved in a later opinion as follows:

[T]here is no reason to question the validity of Attorney General's Opinion V-818 (1949) insofar as it holds that the Available University Fund may not be used for the support and maintenance of any institutions except the three "constitutional branches" of the University of Texas, namely, the Main University at Austin, the Medical Branch at Galveston and the Agricultural and Mechanical College at Bryan. (Tex. Att'y Gen. Op. No. WW-783 (1960).)

This rule is modified somewhat by Section 18 adopted in 1947. Section 18 together with the third paragraph of Section 11a operate to put a first call on the available university fund to the extent necessary to service capital debt incurred to finance permanent improvements at the schools enumerated in Section 18. (See the *Explanation* of that section.) However, Section 18 is construed not to redefine "constitutional branch" for purposes of sharing in that portion of the available fund remaining after Section 18 debt service requirements are met. (Tex. Att'y Gen. Op. No. WW-783 (1960).)

The restrictive permanent fund investment limitations imposed by this section are liberalized by Section 11a. (Education Code sec. 66.03.)

Comparative Analysis

Recognition or establishment of a trust fund for higher education is expressed in the constitutions of more than one-fourth of the states; however, Texas is the only one with constitutionally imposed restrictions on the investment of fund assets. The other states leave investment policy to the legislature or university governing board. One state, Utah, directs that fund moneys be "safely" invested. No analogous provision appears in the *Model State Constitution.*

Author's Comment

A crucial issue in the area of higher education is whether to perpetuate the preferential treatment accorded The University of Texas and Texas A&M Systems to participate in the permanent university fund. This complex issue is laden with political and emotional overtones that tend to obscure rational consideration, and no attempt at resolution will be made here. (See also the *Author's Comment* on Sec. 17.)

If the present policy is to be continued indefinitely, the fundamental elements of Sections 11, 11a, 12, and 15 could be reduced to a few words and combined into one concise section, recognizing the permanent university fund, limiting use of fund income to the support of the two university systems as appropriated by the legislature, and directing the legislature to provide for management of the fund by law. See the *Author's Comment* on Section 11a for discussion of university fund investment provisions.

Sec. 11a. INVESTMENT OF PERMANENT UNIVERSITY FUND. In addition to the bonds enumerated in Section 11 of Article VII of the Constitution of the State of Texas, the Board of Regents of The University of Texas may invest the Permanent University Fund in securities, bonds or other obligations issued, insured, or guaranteed in any manner by the United States Government, or any of its agencies, and in such bonds, debentures, or obligations, and preferred and common stocks issued by corporations, associations, or other institutions as the Board of Regents of The University of Texas System may deem to be proper investments for said funds; provided, however, that not more than one per cent (1%) of said fund shall be invested in the securities of any one (1) corporation, nor shall more than five per cent (5%) of the voting stock of any one (1) corporation be owned: provided, further, that stocks eligible for purchase shall be restricted to stocks of companies incorporated within the United States

which have paid dividends for five (5) consecutive years or longer immediately prior to the date of purchase and which, except for bank stocks and insurance stocks, are listed upon an exchange registered with the Securities and Exchange Commission or its successors.

In making each and all of such investments said Board of Regents shall exercise the judgment and care under the circumstances then prevailing which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as the probable safety of their capital.

The interest, dividends and other income accruing from the investments of the Permanent University Fund, except the portion thereof which is appropriated by the operation of Section 18 of Article VII for the payment of principal and interest on bonds or notes issued thereunder, shall be subject to appropriation by the Legislature to accomplish the purposes declared in Section 10 of Article VII of this Constitution.

This amendment shall be self-enacting, and shall become effective upon its adoption, provided, however, that the Legislature shall provide by law for full disclosure of all details concerning the investments in corporate stocks and bonds and other investments authorized herein.

History

As previously noted, the version of Section 11 adopted in 1876 was extremely restrictive and inflexible with respect to the financial administration of the permanent university fund. As time passed, it became apparent that such built-in rigidity obstructed effective management, hence the 1930 amendment. (See the *History* of Sec. 11.) Since converting from a wartime to a peace-time economy in the 1940s, the purchasing power of the dollar has been steadily eroded by inflation. In an inflationary economy the value of bonds generally declines, while the value of stocks generally increases, and up until 1956 the constitution precluded investing the permanent university fund in anything but government bonds. The thinking behind Section 11a, then, was to give the regents enough flexibility to take advantage of an inflationary economy.

The first attempt to provide such flexibility came in 1951 with a proposal to add Section 11a to the constitution. The 1951 proposal would have allowed investment of the permanent university fund in corporate stocks but was defeated at the polls. In 1956 the second attempt to add Section 11a was successful, significantly expanding the scope of the regents' fiscal management powers. The 1956 measure authorized investment in real estate mortgages guaranteed by the United States as well as in corporate securities, with the limitation that no more than 50 percent of the fund be invested in corporate securities at any given time. Further, in addition to various other limitations, Section 11a expressly subjected the regents to the "prudent man standard" of investment.

An amendment adopted in 1967 granted even greater latitude, allowing investment in any securities guaranteed by the United States and reducing to five years the requirement that a stock must have paid dividends for at least ten consecutive years prior to purchase. Also the limitation prohibiting investment of more than 50 percent of the fund in corporate securities was deleted by the 1967 amendment. The elimination of the 50 percent restriction made possible permanent fund management policies more consistent with investment policies accepted and practiced by most of the other large college and university funds.

Explanation

Section 11a is a "constitutional statute" that modifies the restrictive permanent university fund management rules imposed under Section 11. The first two

paragraphs prescribe explicit investment regulations and spell out the prudent-man standard for fiduciaries. The first paragraph seems to be a long-winded way of saying that the fund may legally be invested in just about any kind of security except stock in companies incorporated outside the United States. The third paragraph elaborates on the Section 11 provision making permanent fund income subject to legislative appropriation in order to harmonize the provision with Section 18. To date the courts have not been called on to construe this section.

A remarkable feature of this section, from a constitutional standpoint, is that it directly empowers the Board of Regents of The University of Texas to invest the fund, thereby limiting the power of the legislature to repose this authority elsewhere and "constitutionalizing" the board of regents. Section 11 says only that the fund "shall be invested" without specifying by whom. (Other direct grants to college governing boards appear in Secs. 17 and 18 of this article.)

Comparative Analysis

See the *Comparative Analysis* of Section 11.

Author's Comment

Section 11a is a prime example of legislation by constitutional amendment. Inclusion of permanent university fund investment regulations in the constitution serves no purpose and, as experience has shown, can seriously impede effective fund management. To attempt to regulate by a constitutional provision something as mercurial as investment policy only invites amendment. Of course, if continuation of constitutional investment authority in the regents is desired, an explicit grant to that effect must be included. "Constitutionalization" of the board of regents can be avoided by referring to the "governing board" rather than "board of regents." Once a decision is made to grant some authority to this or that governmental agency, there is generally a concomitant inclination to tack on limits to the power granted, hence the detailed investment provisions in this section. It would be far simpler and more flexible to make governing-board investments subject to regulation by law.

Sec. 12. SALE OF LANDS. The lands herein set apart to the University fund shall be sold under such regulations, at such times, and on such terms as may be provided by law; and the Legislature shall provide for the prompt collection, at maturity, of all debts due on account of University lands, heretofore sold, or that may hereafter be sold, and shall in neither event have the power to grant relief to the purchasers.

History

The first authorization to sell lands held by the state for higher education was an act passed by the legislature in 1856 (Tex. Laws 1856, Ch. 144, 4 *Gammel's Laws* p. 489); this law provided for surveying the original 50 leagues granted The University of Texas in 1839 as well as for the sale of alternate sections in lots of 160 acres. Sales were to be by public auction at a minimum price of $3 an acre, the proceeds going to the permanent university fund, but sales were few, apparently because of the high asking price. (See Lang, *Financial History of the Public Lands in Texas* (Waco: Baylor University, 1932), p. 185.)

The Constitution of 1866 authorized the legislature to sell university lands (Art. X, Secs. 4, 5, and 8), and in 1866 a law was enacted providing for the sale of such university lands as the governor might direct in lots no larger than 320 acres at the same minimum price of $3 an acre. The last legislation authorizing the sale of university lands before adoption of the present constitution was enacted in 1874,

amending the acts of 1856 and 1866. This law authorized the governor to ". . . sell, alienate, and convey all lands heretofore granted for the endowment of one or more universities by the Congress of the Republic of Texas." The governor was directed to appoint three commissioners in each county wherein the land was situated, who were to value the land, but in no event at less than $1.50 an acre. (Lang, pp. 185-86.)

Between 1876 and 1895 control of university lands was in the General Land Office, but in 1895 management authority was transferred to the university's board of regents.

See the *History* of Section 4 concerning the derivation of the "relief to purchasers" clause.

Explanation

Section 12 parallels Section 4, affirming broad powers in the legislature to sell university fund lands. The Texas Supreme Court in 1928 had no trouble construing the command to sell to include the authority to sever the mineral and surface estates and execute oil and gas leases. In *Theisen v. Robinson*, 117 Tex. 489, 506, 8 S.W.2d 646, 649 (1928), the court declared:

> At the date of adoption of the Constitution and for prior centuries minerals were usually converted into money by sales working a severance of the mineral estate, consummated by means of writings commonly called leases. . . .

Accordingly, the court held that the mandate to the legislature "to sell" university lands included the power to provide for such sale in the manner in which minerals always had been sold, by means of a "lease" for stipulated royalties. To date there have been no outright sales of university fund lands.

The scope of authority to manage university lands is defined by statute, in which authority to lease is made explicit. (See Education Code secs. 65.39, 66.41-66.44, 66.61.) That this authority permits leasing surface lands (*e.g.*, for cattle grazing) as well as minerals seems to have been assumed by the board of regents and the legislature, although the *Theisen* decision does not speak to surface leases. It was noted in *Becton v. Dublin* (163 S.W.2d 907 (Tex. Civ. App.—El Paso 1942, *writ ref'd w.o.m.*)) that the statute delegating power to The University of Texas regents to execute grazing leases had been unquestioned for 45 years, but that court declined to rule on its constitutionality. Of course, "temporary leasing" of public school lands under Section 4 has been long sanctioned (see the *Explanation* of Sec. 4.), and "grazing leases" of university lands are similarly limited in duration by statute to ten years. (Education Code sec. 65.39.)

For discussion of the limitation on granting relief to purchasers, see the *Explanation* of Section 4.

Comparative Analysis

In addition to Texas, approximately five states have provisions affirmatively authorizing the sale of university fund lands. Idaho and North Dakota forbid any such sale for less than $2 an acre.

Author's Comment

This section would be unnecessary if the legislature were simply directed to provide for management of the permanent university fund by law, as suggested in the *Author's Comment* on Section 11. It should be noted that under the present

system the authority to invest the permanent university fund is granted directly to the board of regents (Sec. 11a), while authority to dispose of university fund land is retained by the legislature under this section. Reserving the ultimate power to dispose of such a valuable public asset as permanent university fund land in the people's elected representatives has an appeal to democratic instincts, though the permanent university fund traditionally has its enemies in the legislature. Of course a provision continuing this power ought not be phrased as a mandate to sell, as is done in the present section.

Sec. 13. AGRICULTURAL AND MECHANICAL COLLEGE. The Agricultural and Mechanical College of Texas, established by an Act of the Legislature passed April 17th, 1871, located in the county of Brazos, is hereby made, and constituted a Branch of the University of Texas, for instruction in Agriculture, the Mechanic Arts, and the Natural Sciences connected therewith. And the Legislature shall at its next session, make an appropriation, not to exceed forty thousand dollars, for the construction and completion of the buildings and improvements, and for providing the furniture necessary to put said College in immediate and successful operation.

History

The origin of Texas A&M University harks back to a national movement in education that had gained prominence by the mid-19th century. By that time there were widespread demands to adapt the traditional classical and professional curricula of most universities to the needs of pioneer people. In 1862 the United States Congress passed the Morrill Land Grant Act, which provided for the donation of federal lands to each state and territory that would establish a college of agriculture and mechanical arts. The Texas legislature accepted a gift of 180,000 acres of federal land for this purpose in 1866. The deadline for the establishment of the college under the terms of the Morrill Act had almost expired when the Texas legislature founded an Agricultural and Mechanical College in 1871, designating it as a branch of the then nonexistent University of Texas and placing it under control of the latter's governing board. By 1876 the college was operational.

At a special session to ratify the 1876 Constitution the sum of $40,000 called for under Section 13 was appropriated by the legislature. (Lane, *History of Education in Texas* (Washington, D.C.: Government Printing Office, 1903), p. 269.)

Explanation

Although this section designates Texas A&M as a "branch" of The University of Texas, the A&M System has always been governed as a separate institution by its own board of directors. (See Education Code sec. 85.01 *et seq.*) It is under this section, though, that Texas A&M laid claim to a share of the income of the permanent university fund (*i.e.,* the available university fund). Prior to 1931 only The University of Texas received appropriation of the available university fund. (Tex. Laws 1925, Ch. 175.) After discovery of oil on university fund land, Texas A&M authorities began clamoring for their constitutional birthright, and in 1931 the legislature passed a law apportioning one-third to A&M and two-thirds to The University of Texas. (Tex. Laws 1931, Ch. 42.) Essentially the same formula applies today. (Education Code sec. 66.03.)

Tagging Texas A&M as a "branch" of The University of Texas is now significant only in that it enables the former school to share in the available university fund. (See the *Explanation* of Sec. 11.) Section 18 of this article recognizes the reality of a separate and distinct Texas A&M University System.

Comparative Analysis

Provisions establishing or recognizing an agricultural or agricultural and mechanical college appear in the constitutions of some five other states. The *Model State Constitution* is silent on the subject.

Author's Comment

This section serves no real purpose today and therefore could be eliminated without loss. Of course, if Texas A&M, together with The University of Texas, is to continue to enjoy exclusive use of part of the available university fund, then that arrangement would be spelled out in the section preserving the permanent university fund. (See also the *Author's Comment* on Secs. 10 and 11.)

Sec. 14. COLLEGE OR BRANCH UNIVERSITY FOR COLORED YOUTHS; TAXES AND APPROPRIATIONS. The Legislature shall also when deemed practicable, establish and provide for the maintenance of a College or Branch University for the instruction of the colored youths of the State, to be located by a vote of the people: Provided, that no tax shall be levied, and no money appropriated, out of the general revenue, either for this purpose or for the establishment, and erection of the buildings of the University of Texas.

History

The Constitution of 1866 was the first to make specific reference to education for Negroes, providing for exclusive use of the perpetual public school fund for the "white scholastic inhabitants" (Art. X, Sec. 2), authorizing an additional tax on "Africans or Persons of African descent" for a public school system for "Africans and their children," and directing the legislature to "encourage schools among these people" (Art. X, Sec. 7). The Reconstruction Constitution of 1869 omitted any reference to separate schools or higher education and contained no discriminatory phraseology. The 1876 document reverted to separate school systems but was the first expressly to provide for some degree of higher educational opportunity for blacks. One convention delegate moved to provide that the Negro institution be given its fair proportion of the permanent university fund so as "to place the colored university on the same footing as the others" but encountered resistance and withdrew his motion. (See *Debates,* p. 452.) From that inauspicious start in 1875 until the successes of the desegregation movement beginning in the late 1940s spurred grudging legislative moves to pump more money into the Negro system, Negro higher education in Texas rode the backseat of the appropriations bus.

In 1876 the legislature authorized the establishment of the state's first Negro college, the Agricultural and Mechanical College of Texas for the Benefit of Colored Youths. That school was never operational, so in 1879 the legislature organized the Normal School for Negroes at Prairie View (now Prairie View Agricultural and Mechanical College of Texas, a part of the Texas A&M University System under Sec. 18). Some appropriations from the available university fund were made to Prairie View Normal before 1882, but in that year the legislature recognized that that school was not the "colored branch" mandated by Section 14 and called for an election to establish the location of the main campus of The University of Texas, the medical branch, and the Negro branch. (Tex. Laws 1882, Ch. 19.) Although that election in 1882 designated Austin as the site for the Negro branch of The University of Texas, the several attempts to establish that institution in accordance with Section 14 were unsuccessful. In 1897 the legislature authorized a

survey of 100,000 acres as an endowment for the branch (Tex. Laws 1897, Ch. 109), but the unappropriated public domain had been exhausted by that time. (See generally Tex. Att'y Gen. Op. No. V-31 (1947) for a brief legal history of Negro colleges in Texas.)

To overcome the Section 14 prohibition of a tax levy or use of general revenue for the establishment of the Negro branch, two attempts were made to amend the constitution in order to allow Prairie View and other state schools to share in the permanent university fund; each was defeated, in 1915 and 1919. Impelled, no doubt, by Herman Sweatt's application for admission to The University of Texas School of Law in 1946 and his subsequent court challenge of his rejection (see *Sweatt v. Painter,* 339 U.S. 629 (1950)), the legislature attempted again in 1947 to make the separate equal. The legislature said that it could not effectively establish an equivalent branch university as called for in Section 14; instead it provided for two separate institutions, Prairie View A&M and the Texas State University for Negroes (now Texas Southern University), to offer "courses of higher learning . . . equivalent to those offered at the University of Texas." The law provided express authority to use taxes and general revenue to establish and maintain the two schools, including the erection of buildings. (Tex. Laws 1947, Ch. 29, repealed by Tex. Laws 1971, Ch. 1024.) Approving this plan, the attorney general said that Section 14 does not operate as a limitation on the power of the legislature to establish a "separate and different statutory university for Negroes" apart from the branch of The University of Texas contemplated by Section 14. (Tex. Att'y Gen. Op. No. V-31 (1947).)

Until the establishment of Texas Southern in 1947, Prairie View was the only state college open to black students in Texas, and until then no training in the professions was available at all.

The proviso added to Section 14 by the "retrenchment" delegates (forbidding levy of taxes or appropriations of general revenue for the construction of university buildings or establishment of a branch for "colored youths") hampered establishment of both institutions, though The University of Texas was finally organized in 1883.

Explanation

As pointed out in the *History,* the Section 14 mandate to establish a Negro college or branch of The University of Texas was never carried out. In fact, Section 14 was held not to be a mandate at all but rather an "authorization to the legislature" to establish such a branch "when that body deems it practicable." (*Givens v. Woodward,* 207 S.W.2d 234 (Tex. Civ. App.—Austin 1947, *writ dism'd w.o.j.*).) Indeed, as reported in the *History,* in setting up the two black schools distinct from The University of Texas System in 1947, the legislature expressly admitted that it would never be "practicable." (Tex. Laws 1947, Ch. 29, sec. 1, repealed by Tex. Laws 1971, Ch. 1024.) The reason, no doubt, was that by the terms of Section 14 *all* money for the establishment *and maintenance* of such an institution would have to come from the available university fund, which was already overburdened.

A reorganization in 1965-66 placed Prairie View A&M within the Texas A&M University System (Sec. 18), and Texas Southern University was allowed to share in the State College Building Program (Sec. 17) by constitutional amendment in 1965.

The prohibition in Section 14 against using taxes or general funds for construction of The University of Texas buildings has been interpreted by the attorney general to apply only to "constitutional branches" of the university (the main campus at Austin, the medical branch at Galveston, and Texas A&M at Bryan) and not to institutions established as part of The University of Texas System

under separate statutory authority. (Tex. Att'y Gen. Op. Nos. V-818 (1949), V-31 (1947), and O-551 (1939).) A similar but broader limitation now appears in Section 18, making this provision constitutionally insignificant. Section 17 carries this prohibition over to many of the state's other colleges and universities as well.

Comparative Analysis

Only two states, Texas and South Carolina, constitutionally provide for a separate institution of higher learning for blacks. No other state was found to have a limitation on spending and taxing for university buildings such as that in Section 14.

Author's Comment

Since a branch university located by a vote of the people has never been established, the first part of Section 14 serves no purpose. The second part of the section pertaining to tax levies and general revenue fund appropriations for university buildings has been readopted and expanded by the 1966 amendment to Section 18. (A similar prohibition applicable to other specified colleges and universities also appears in Sec. 17.) A major infirmity that has plagued the 1876 Constitution since its inception has been the inflexibility resulting from excessive financial limitations. Whatever justification the 1875 Convention delegates had for including these limitations, the delegates to future conventions should carefully weigh the matter before perpetuating such a rigid limitation on the spending and taxing power.

Sec. 15. GRANT OF ADDITIONAL LANDS TO UNIVERSITY. In addition to the lands heretofore granted to the University of Texas, there is hereby set apart, and appropriated, for the endowment maintenance, and support of said University and its branches, one million acres of the unappropriated public domain of the State, to be designated, and surveyed as may be provided by law; and said lands shall be sold under the same regulations, and the proceeds invested in the same manner, as is provided for the sale and investment of the permanent University fund; and the Legislature shall not have power to grant any relief to the purchasers of said lands.

History

In 1854 the state provided a land subsidy to railroads and directed that for every 16 sections surveyed for the railroads an additional section be surveyed and appropriated for the common schools. In 1858 the legislature further provided that every tenth section so surveyed for education be set aside for the university. This grant to the university amounted to about 1,000 acres per mile of track. (Lane, *History of Education in Texas* (Washington, D. C.: Government Printing Office, 1903), p. 143.) The 1866 Constitution confirmed the university land grants, but the Constitution of 1869 was silent on the subject.

The Convention of 1875 stripped the university of its magnificent railroad-survey endowment of 1858 and substituted one million acres of much less valuable semi-arid West Texas land. Land Commissioner Walsh estimated that by the turn of the century under the 1858 grant the university would have been entitled to over three million acres (see *Seven Decades,* p. 125; Lane, p. 29), though this calculation is disputed by some as being grossly inflated. (Lang, *Financial History of the Public Lands in Texas* (Waco: Baylor University, 1932), pp. 133-37.) The antiuniversity sentiment of many of the convention delegates was reflected in the comment of General Darnell, a prominent member of the Convention, that "a million acres was

enough for any such kid-glove institution." (As reported by Lane, p. 128.) Others derided the university as a rich man's school, providing no service to the poor children of Texas. Of course, with the later discovery of oil on these lands, the substitute grant of Section 15 turned out to be a boon for higher education in Texas.

Explanation

The oil-rich university fund lands are administered by the Board of Regents of The University of Texas System (Education Code sec. 65.39), and royalties from oil and gas production are part of the permanent university fund. (*Empire Gas and Fuel Co. v. State,* 121 Tex. 138, 47 S.W.2d 265 (1932); *State v. Hatcher,* 115 Tex. 332, 281 S.W. 192 (1926).)

For further discussion of the permanent university fund refer to the *Explanation* of Secs. 11, 11a, and 12.

Comparative Analysis

This section is unique to the Texas Constitution.

Author's Comment

The section preserving the permanent university fund can easily be drafted to encompass the grant of Section 15; in fact, Section 11 as presently written includes this grant. Therefore, Section 15 is unnecessary and can be deleted.

Sec. 16. TERMS OF OFFICE. The Legislature shall fix by law the terms of all offices of the public school system and of the State institutions of higher education, inclusive, and the terms of members of the respective boards, not to exceed six years.

History

This section was added in 1928.

Explanation

The original Constitution of 1876 provided in Article XVI, Section 30, that the term of any office created by statute (and of any created by the constitution if no term was fixed) could not exceed two years. (See *Kimbrough v. Barnett,* 93 Tex. 301, 309, 55 S.W. 120, 123 (1900), and the annotation of Art. XVI, Sec. 30.) An exception to the restrictions of that constitutional provision, adopted in 1912 as Article XVI, Section 30a, authorized six-year terms for multimember boards if the terms of one-third of the members expired every two years. The courts held that Article XVI, Section 30a, applied only to state boards and not to local boards, including boards of school trustees. (See *San Antonio I.S.D. v. State,* 173 S.W. 525 (Tex. Civ. App.—San Antonio 1915, *writ ref'd*).) The terms of members of the boards of regents of state educational institutions could be extended under Section 30a, but those of local boards of trustees and other officers of the public education system (including state officers who were not members of a board) could be no longer than two years.

When this Section 16 was adopted in 1928, the Article XVI, Section 30, limit on terms of office for local school officials was removed; any term up to six years may now be fixed. Presumably, Section 16 also removed the restrictions of Article XVI, Section 30a, on boards of regents and other state boards concerned with the public school system or higher education so that their members' terms may be four years, for example, and the boards need not consist of a number of members divisible by three.