

ARTICLE X

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RAILROADS

Sec. 2. PUBLIC HIGHWAYS; COMMON CARRIERS; REGULATION OF TARIFFS, CORRECTION OF ABUSES AND PREVENTION OF DISCRIMINATION AND EXTORTION; MEANS AND AGENCIES. Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies, common carriers. The Legislature shall pass laws to regulate railroad, freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties; and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable.

History

Article X originally contained eight sections regulating the affairs of railroads. At the time of the Convention of 1875 and for many years thereafter, railroads were rapidly expanding in Texas and were the subject of controversy. Farmers, particularly those belonging to the Grange, were especially insistent that railroads be subject to regulation in the public interest.

A review of the Convention debates reveals that a considerable portion of the Convention was devoted to often heated discussion of the subject. The following sarcastic remarks refer to the frequency of delegates' attacks on the railroads.

Judge Reagan said railroads were a great outrage and should be prohibited, and it should be made a criminal offense to encourage their construction. He suggested that the delegate from Wood had a chance to immortalize himself. Whatever question might be argued before the House, something was sure to be said about railroad monopolies. There were only forty or fifty millions of dollars invested in railroads in the State, which gave the citizens faster transportation for themselves or their products; but they had the right to return to the mule or ox-wagon and give up travel at 5 cents a mile on the railroads. The policy of the people had been all wrong for the past twenty-five or thirty years; or at least anyone believing that should indict them as a nuisance, or for a misdemeanor. He could not make the motion himself, but suggested that someone who desired to immortalize and cover himself with glory should make that motion. (*Debates*, p. 317.)

(Judge Reagan, it should be noted, became the first chairman of the Railroad Commission appointed by Governor Hogg.)

In discussing Section 2 specifically, the delegates agreed that the designation of railroads as "public highways" subjected them to governmental control for the public interest and invoked a large body of regulatory jurisprudence. One delegate proposed that the regulation of rates and tariffs be limited to the laws creating railroad companies or authorizing construction of railroads. He said that capitalists would not invest money in railroads if their profits were subject to control by subsequent acts of the legislature, but his amendment was defeated. (*Debates*, pp. 387-89.)

The last clause of Section 2 was added by amendment in 1890. Between the 1875 Convention and the adoption of this amendment authorizing the creation of the Railroad Commission, the power of the railroads grew and laws regulating rates proved largely ineffective. "Robber barons" of the period, such as Hill, Harriman, and Fisk, had concentrated their wealth and power through their control of the railroads. In Texas, Jay Gould, head of the Texas Traffic Association, a combination of nine railroad companies operating in Texas, was an object of special concern. (See Norvell, "The Railroad Commission of Texas: Its Origin and Relation to the

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Oil and Gas Industry," 40 *Texas L. Rev.* 230 (1961).) As attorney general, Jim Hogg attempted vigorously to eliminate discrimination and abuses in railroad rates but concluded that an administrative agency was needed to regulate the railroads.

In *Mercantile Trust Co. v. Texas & Pacific Railway Co.* (51 F. 529, 532 (W.D. Tex. 1892)), Judge McCormick briefly recited the history of the amendment to Section 2:

One most eminent lawyer, who commanded universal respect, who had at a venerable age, retired to a chair in the law school of the state university, doubted the power of the legislature, under our existing constitution, to establish such a commission. Yielding to this authority, the legislature proposed an amendment to the constitution which was intended to confer that power. Its adoption was at once made a party test by the controlling political party in the state. Candidates for the legislature and for all the state offices were nominated and conducted their canvass with reference to it. Its adoption, and its immediate subsequent enforcement, was the issue which overshadowed all other issues.

Hogg was elected governor on the same day the amendment was adopted, and the Railroad Commission was created in 1891.

The Texas Legislative Council, in its report to the 57th Legislature in 1960, recommended the deletion of all of Article X on the ground that numerous United States Supreme Court decisions and state and federal laws, regulating corporations generally and railroads in particular, rendered it obsolete. The "deadwood" amendment of 1969 accordingly repealed all of Article X except Section 2.

Explanation

The first railroads were more like public highways in that privately owned carriages were mounted on the rails and pulled by horses. With the development of locomotives and heavy rolling stock, however, privately owned vehicles were excluded, but tracks were generally open to use by locomotives and cars of other companies and the common law provided that railroads must serve any member of the public.

There was apparently some doubt in 1875 about the power of the state to regulate privately owned railroads, but this doubt was resolved the following year by the United States Supreme Court decision in *Munn v. Illinois* (94 U.S. 113 (1876)), in which the court clearly enunciated the doctrine that when privately owned property is used in a manner that substantially affects the public, its use may be regulated by the public for the common good. The legislature may fix a maximum rate above which public utilities may not charge. Later, in the *Railroad Commission Cases* (116 U.S. 307 (1886)), the court upheld the right of state railroad commissions to regulate rates despite earlier state-granted charters giving the railroads power to establish their own rates. In *Reagan v. Farmers' Loan & Trust Co.* (154 U.S. 362 (1894)), the constitutionality of the Texas Railroad Commission Act was upheld although the initial rates set by the commission were enjoined as unjust and unreasonable.

Section 2 does not mandate laws preventing all discrimination in rates but only "unjust" discrimination. Thus, for example, freight contracts which set very low rates during a "price war" could not be voided by the railroads as discriminatory. (*Houston & T.C. Ry. Co. v. Rust & Dinkins*, 58 Tex. 98 (1882).)

The designation of railroads as common carriers prohibits them from limiting their liability for negligence or varying the common law standard of care applicable to all common carriers. (*Missouri Pacific Ry. Co. v. Harris*, 1 White & W. 1257 (Tex. Ct. App. 1882).)

In *Lo-Vaca Gathering Co. v. M.K. & T. RR Co.*, 476 S.W.2d 732, 735 (Tex. Civ. App.—Austin 1972, writ *ref'd n.r.e.*), the court rejected the contention of a gas pipeline company that it could lay pipes on a railroad right-of-way since such rights-of-way were “public.”

It seems clear from the debates in the Constitutional Convention of 1875 that the designation of railroads as public highways was incorporated for the limited purpose of devoting such property to limited public use in the hands of common carriers, and to guarantee to the public the right to travel as passengers and to ship goods by rail without discrimination and to subject the rail companies and their roads to control by the state to that end In making the railroads public highways the railroad companies were not denied the right of private property in the railroads and the lands they occupy.

Comparative Analysis

Sixteen other states declare railroads to be public highways. Twelve of these states also designate railroads as common carriers. Two states designate railroads as common carriers but not public highways.

Thirteen other states have constitutional provisions authorizing the legislature to regulate rates to prevent abuses and discrimination. New Mexico, South Carolina, and Maryland have provisions relating to the power of railroad commissions, and numerous other state constitutions authorize regulation of all public utilities (including, of course, railroads) by commissions. The *Model State Constitution* is silent on the subject of railroads.

Author's Comment

The power of the legislature to regulate railroads as public utilities is unquestioned today and there is no need for constitutional authorization. In fact, with the United States Supreme Court decision in the Shreveport Case (*Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914)) and the expansion of the definition of interstate commerce, most regulation of railroads is now under federal law and the Interstate Commerce Commission. The Texas Railroad Commission, on the other hand, is today concerned primarily with regulation of the oil and gas industry, and there is no question about a state's authority to do that either. Why Section 2 was excepted from the 1969 deadwood repeal is thus conjecture, but there is no conjecture about the need for the section: There is none.

ARTICLE XI

MUNICIPAL CORPORATIONS

Sec. 1. COUNTIES AS LEGAL SUBDIVISIONS. The several counties of this State are hereby recognized as legal subdivisions of the State.

History

Counties have existed as such since the Republic was formed and each of the early constitutions recognized counties. (See *History* of Sec. 1 of Art. IX.) This section was added in 1876. There is nothing to indicate why the Committee on Municipal Corporations rather than the Committee on Counties and County Lands of the 1875 Convention proposed the section. Nor is there any indication why anyone thought the section was necessary. (It has been argued that Sec. 1 was essential to preserve the validity of existing counties in the event that some had been created invalidly under prior constitutions. (See 3 *Constitutional Revision*, pp. 162-63.) If this was the reason for Sec. 1, it seems likely that the section would have simply recognized existing counties and that the recognition would have been part of Sec. 1 of Art. IX.)

Explanation

Section 1 states a truism. A political subdivision is a legal subdivision whether the constitution says so or not. The legislature can endow a political subdivision with any number of legal powers and duties unless the constitution states otherwise. This being so, one wonders why Section 1 was inserted.

One possibility is that Section 1 was designed to make counties "municipal corporations." That the section is in Article XI supports this argument. Section 3 also might support this because it starts out "No county, city, or other municipal corporation," but "other" in this context can as easily be a reference to "city" only as to "county" and "city" both. (The same ambiguity in the word "other" will be found in Sec. 55 of Art. III.) This leads one to ask, however, why Section 1 does not say that counties are hereby declared to be municipal corporations.

The most likely answer to all such speculation is that no one in the Convention of 1875 gave any thought to the question of the significance of the words "municipal corporations." There is a well-developed body of law concerning municipal corporations, particularly in the distinction between governmental and proprietary functions. (See *History* of Sec. 61 (1952) of Art. III.) It is certainly unlikely that the drafters of Section 1 meant to make this body of law applicable to counties.

If the 1875 Convention was imprecise in their terminology, the courts have been even more so. There has always been a statute that makes a county "a body corporate and politic." (Tex. Rev. Civ. Stat. Ann. art. 1572.) Early cases relied on the statute, not Section 1, in ruling, for example, that a county could sue and be sued. (See *Comanche County v. Burks*, 166 S.W. 470, 472 (Tex. Civ. App.—Fort Worth 1914, *writ ref'd*, and cases cited therein.)

In *Bexar County v. Linden* (110 Tex. 339, 220 S.W. 761 (1920)), things began to get confused. At issue was a statute that required district attorneys to turn excess fees into the county treasury. It was claimed that the statute violated Section 51 of Article III because the payment of excess fees amounted to a grant of public money to a municipal corporation. The supreme court stated that Section 51 covered counties, "whether considered as public corporations or only quasi-corporations." But then the court went on to hold specifically that counties are not municipal corporations; they are:

. . . essentially instrumentalities of the State.

They possess some corporate attributes, but they are, at best, only quasi-corporations Primarily, they are political subdivisions—agencies for purely governmental administration. They are endowed with corporate character only to better enable them to perform their public duties as auxiliaries of the State.

Since the duties which the counties perform are State duties and the powers they exercise are State powers, an apportionment to them of State funds, as the payment into their treasuries of the excess fees of District Attorneys under this statute, for the carrying out of those duties, is manifestly not a grant of public monëy. (110 Tex. 339, 347, 220 S.W. 761, 763-64 (1920).)

The net result of *Linden* was to deny that counties are municipal corporations but to affirm that they do come within the class defined by Section 51 as “individual, association of individuals, municipal or other corporations whatsoever.”

Within three years a court of civil appeals said: “The Constitution of Texas recognizes counties as municipal corporations along with cities and towns.” (*Brite v. Atascosa County*, 247 S.W. 878, 880 (San Antonio, 1923, writ *dism'd*.) A year later another court of civil appeals seemed to say much the same thing:

A municipal corporation, county or city, is, for many purposes, but a department of the state organized for the more convenient administration of certain powers belonging to the state. Counties are legal subdivisions of the state. (Tex. Const. Ann. Art. 11, Sec. 1.) A municipal corporation has, in some cases, the authority to maintain an action for the purpose of preserving the rights of the public, and a judgment for or against such county becomes binding on the public affected. (*City of Palestine v. City of Houston*, 262 S.W. 215, 224 (Texarkana 1924, writ *dism'd w.o.j.*.)

The attorney general has gone along with this characterization of counties as municipal corporations. In an opinion holding unconstitutional a proposed bill that would have required the state to pay local taxes on state prison farmlands, Section 51 was quoted, followed by “and a county being a municipal corporation,” with the conclusion that such payments would be grants contrary to the section. (Tex. Att’y Gen. Op. No. V-161 (1947).)

The only significant distinction between a “real” municipal corporation and a different kind of public corporation is that the former engages in governmental functions on behalf of the state and proprietary functions on behalf of the residents of the corporation. The principal traditional significance of the distinction has been that a municipal corporation is liable in tort when engaging in proprietary functions but not when engaging in governmental functions. It must be conceded that the courts, whatever their confused talk about municipal corporations, have steadfastly limited tort liability to the proprietary functions of real municipal corporations—that is, incorporated cities and towns. Indeed, the courts have consistently held that special districts that actually carry out only “proprietary” functions are not to be classed with municipal corporations for tort liability purposes. (See *Smith v. Harris County—Houston Ship Channel Nav. Dist.*, 330 S.W.2d 672, 674 (Tex. Civ. App.—Fort Worth 1959, *no writ*), and cases cited therein.)

Even so, complex arguments can be made about the activities of counties. The discussion above concerning the county as an instrumentality of the state supports the argument that a county carries out only governmental functions. Therefore, if a proposed activity is proprietary, the argument would run, counties cannot engage in it. This assertion was made by the attorney general in refusing to approve revenue bonds for a county park. The supreme court expressed some confusion over the argument. If a county may maintain a park, the court said, it is irrelevant

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whether the bonds are payable from revenue or taxes. "The distinction between a proprietary and a governmental function while important in determining the tort liability of a city, town or village, is largely beside the point in determining the question now before us." (*County of Cameron v. Wilson*, 160 Tex. 25, 33, 326 S.W.2d 162, 168 (1959).)

Comparative Analysis

Half a dozen states specify that counties are corporate bodies. About a dozen states specify that existing counties are recognized.

The *Model State Constitution's* "Local Government" article begins:

The legislature shall provide by general law for the government of counties, cities and other civil divisions and for methods and procedures of incorporating, . . . such civil divisions (Sec. 8.01.)

(In this case "other" is not ambiguous. The ambiguity discussed earlier arises because counties traditionally have not been considered municipal corporations. Here the *Model* uses "civil division," a term containing no built-in ambiguity.)

Author's Comment

Almost all the confusion discussed above is nonconstitutional. The legislature—or the courts—can abolish the common law rule of sovereign immunity. If that is done, the governmental/proprietary distinction in municipal corporation law loses much of its force. Thus, the moral concerning Section 1 is that constitution drafters would do well to avoid using terms loaded with technical meaning lest the constitution inhibit legislative and judicial freedom to work with the applicable body of nonconstitutional law.

In fairness to the Committee on Municipal Corporations of the 1875 Convention, it must be conceded that most of the difficulty arose later because "municipal corporations" were included in Sections 50 and 51 of Article III.

There is a question, however, of the effect of this judicial history concerning counties if a revised constitution grants to counties the power to adopt home-rule charters. In ordinary circumstances the existence of a "charter" implies incorporation. (Note that the portion of the *Model State Constitution* quoted above covers this problem.) Any continuation of confusion, however, will likely be in the context of sovereign immunity. And even that confusion will be of constitutional significance only if grants and loans prohibitions are retained or if courts retain the old distinctions by denying that indemnification, liability insurance, or workmen's compensation is for a public purpose. This is discussed in the *Author's Comment* on Section 51 of Article III.

Sec. 2. JAILS, COURT-HOUSES, BRIDGES AND ROADS. The construction of jails, court-houses and bridges and the establishment of county poor houses and farms, and the laying out, construction and repairing of county roads shall be provided for by general laws.

History

In 1846 the first regular session of the Texas Legislature, in "An Act Organizing County Courts," gave counties power to build and maintain public roads and highways, courthouses, jails, and other necessary public buildings. (Tex. Laws 1846, 2 *Gammel's Laws* p. 1639.)

No previous constitution mandated general laws on these subjects. The section

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as reported by the Committee on Municipal Corporations of the 1875 Convention included “the removal of county seats” in the list of subjects, but the phrase was removed on second reading. (See *Journal* pp. 693, 790.)

Explanation

At first glance this section appears merely to reinforce Article III, Section 56, which prohibits special or local laws on the subjects listed. (See the *Explanation* of Sec. 56.) In *Smith v. Grayson County* (44 S.W. 921 (Tex. Civ. App. 1897, writ *ref'd*)), for example, the county challenged the constitutionality of a local statute authorizing road improvements on the ground that it violated both this section and Section 56 of Article III. The court rejected the challenge, however, citing Article VIII, Section 9, which expressly authorizes “local laws for the maintenance of the public roads and highways, without the local notice required for special or local laws [by Article III, Section 56].” (See the *Explanation* of Art. VIII, Sec. 9.) In 1921 another court of civil appeals upheld a local law creating offices for a road improvement district, citing *Grayson County*, but was reversed by the commission of appeals, which held that the quoted authorization in Article VIII, Section 9, was inapplicable. (*Commissioners Court of Limestone County v. Garrett*, 236 S.W. 970 (Tex. Comm’n App. 1922, *judgmt adopted*.)

In *Collingsworth County v. Allred*, 120 Tex. 473, 40 S.W.2d 13 (1931), the court relied on Section 2 to sustain an issue of county courthouse bonds not approved by the two-thirds vote required by what is now Article III, Section 52(b). The Legislative Council study argues from this case that Section 2 should be preserved as an exception to the antiborrowing provision of Article III, Section 52. (3 *Constitutional Revision* 165.) The two cases cited by the *Collingsworth* court to support its holding, *Robertson v. Breedlove* (61 Tex. 316 (1884)) and *Mitchell County v. City National Bank* (91 Tex. 361, 43 S.W. 880 (1898)), did not rely on Section 2 but simply mentioned the section in passing, focusing on its general law requirement, and did not cite Article III, Section 52, at all. More recent interpretations of Section 52 have read it as prohibiting gifts of public credit (see, e.g., *Seydler v. Border*, 115 S.W.2d 702 (Tex. Civ. App.—Galveston 1938, writ *ref'd*)), so Section 2 is not necessary to authorize financing public works. Nor is it necessary to prevent local or special legislation since Article III, Section 56, accomplishes that prohibition generally.

Comparative Analysis

Michigan has a provision almost identical with Section 2 and Mississippi, a comparable provision. Many state constitutions of course specify general laws in cases where special or local laws are prohibited. The *Model State Constitution* has nothing comparable to Section 2 but does prohibit a special or local law where a general law can be made applicable.

Author’s Comment

As indicated in the *Explanation*, is it difficult to fathom the need for this section. As reinforcement for the special and local law prohibition of Article III, Section 56, it is unnecessary; and as authorization for using public funds and credit for the obvious public purposes of road and courthouse building it is superfluous. As Davis and Oden conclude, “Article XI, Section 2, is another example of duplication and confusion in the Texas Constitution.” (James Davis and W. Oden, *The Constitution of Texas (With its 144 Patches): Municipal and County Government*, (Dallas: Southern Methodist University, Arnold Foundation Monograph No. 8, 1961), p. 9.)

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Sec. 3. SUBSCRIPTIONS TO CORPORATE CAPITAL; DONATIONS; LOAN OF CREDIT. No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law.

History

Section 3 dates from 1876. It was part of the original report to the 1875 Convention by the Committee on Municipal Corporations. There was no effort to amend the section as reported. This is an interesting fact for two reasons. First, the reported section referred to "capital stock." The word "stock" disappeared overnight presumably as a result of editing by the Committee on Style and Arrangement. (Action on Art. XI was taken on November 23. The Convention adopted the entire document on November 24 and adjourned.) This is a change from a restricted category to a broader category, a rare event in the detail-prone 1875 Convention.

Second, Section 3 duplicates Section 52 of Article III. At the time Article XI came before the convention, Article III had long since been debated and passed. In the absence of verbatim debates of the convention it is not possible to know whether anyone raised the question of duplication. The most likely explanation is that the convention happily embraced the idea twice.

Explanation

The flat statement above that Section 3 duplicates Section 52 is not strictly true. Section 52 covers grants and loans to individuals whereas Section 3 does not. Both sections cover counties and cities; Section 52 adds towns and other political corporations and subdivisions whereas Section 3 adds only other municipal corporations. Section 3 is a direct limitation on the power of local governments whereas Section 52 limits the power of the legislature to permit local governments to make grants and loans. But this seems to be a distinction without a difference because local governments derive their power from the state. It was once argued, however, that Section 3 might be operative when Section 52 was not. "Where, however, as in the case of home rule cities and some other types of municipal corporations, they might derive their powers directly or, at least, in part directly from the Constitution, then the specific provisions of this section appear to have vitality and act independently of Section 52 of Article 3." (3 *Constitutional Revision* 168.) In support of that statement, the case of *Moore v. Meyers*, (282 S. W.2d 94 (Tex. Civ. App.—Fort Worth 1955, writ *ref'd n.r.e.*)), is cited. Nothing in the case appears to support the argument. Certainly, no municipal corporation except a home-rule city can possibly have any power not derived from the legislature. In the case of home-rule cities, they can exercise any power that the legislature could exercise. (See *Explanation* of Sec. 5.) Obviously, Sections 50 and 51 deny grants and loan powers to the legislature. Or if, as home-rule power is sometimes expressed, a city may exercise any power that the legislature could delegate to it, then Section 52 is operative, for it denies the power to delegate authority to make grants and loans or to acquire stock.

In the *Explanation* of Section 52, it was noted that grants and loans would be covered there and that stock ownership would be covered here. There appear to have been only two questions concerning acquiring stock, as it is put in Section 52, or subscribing to capital, as it is put in Section 3. One was the question whether a pension fund could acquire stock. The answer was "yes" on the ground that the

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board of trustees was not a county, city, town, municipal corporation or political subdivision. (See *Bolen v. Board of Firemen, Policemen & Fire Alarm Operators' Trustees of San Antonio*, 308 S.W.2d 904 (Tex. Civ. App. – San Antonio 1957, writ *ref'd*.) The result in this case is satisfactory but the ground given leaves much to be desired. It would be better to ground the decision on the purpose for which the prohibition exists—to prevent local governments from assisting private corporations. Investing pension funds in blue chips traded on a national stock exchange is not within the purpose of the prohibition. That approach would cover investments of any capital fund directly held by a political subdivision. (Note that Sec. 6 of Art. VII specifically authorizes investment in securities.)

In the case of the other question, the courts reached a ridiculous conclusion for the very reason that they failed to base their decisions on the true purpose of Section 52 and Section 3. The question was whether a municipal corporation could purchase an insurance policy from a mutual insurance company. The answer was “no” because a policyholder in a mutual company is like a stockholder in an ordinary corporation.

This confused story began in the area of workmen's compensation. In concluding that the original workmen's compensation act did not cover municipal corporations, the commission of appeals noted that the state had created a mutual insurance company to provide insurance for Texas businesses and suggested that for a municipal corporation to be a policyholder in a mutual insurance company would violate Section 52 and Section 3. (*City of Tyler v. Texas Employers' Ins. Ass'n.*, 288 S.W. 409 (Tex. Comm'n App. 1926, *holding approved*), *rehearing denied*, 294 S.W. 195 (1927).) The attorney general subsequently ruled that the prohibition ran to mutual fire insurance companies. (Tex. Att'y Gen. Op. No. O-924 (1939).)

This ruling was contested in an action that distinguished between the lending of credit argument concerning mutual companies and the stockholder argument. Since the policyholders are the owners of a mutual company there is the possibility that they might be assessed to pay claims of the company. This, it can be argued, would be a lending of credit contrary to Section 52 and Section 3. In *Lewis v. I.S.D. of Austin*, the court of civil appeals found no violation because the policy in question was specifically made nonassessable. (147 S.W.2d 298 (Beaumont 1941).) The supreme court reversed, however, on the ground that even though the policy was nonassessable, the school district was a “stockholder” in the mutual company because policyholders had a right to vote for officers. (139 Tex. 83, 161 S.W.2d 450 (1942).) Interestingly enough, the supreme court did not mention Section 3. This may have been because that section refers to subscribing to capital, which the school district did not do, whereas Section 52 refers to becoming a stockholder, which is what the district was said to be. Or it could have been because Section 3 covers municipal corporations, which a school district is not, whereas Section 52 covers a political corporation or subdivision, which a school district is. (But see *Harlingen I.S.D. v. C. H. Page & Bros.*, 48 S.W.2d 983 (Tex. Comm'n App. 1932, *judgmt adopted*)(school district is a “municipality,” the word used in Sec. 53 of Art. VI).)

Comparative Analysis

Approximately 16 states have a comparable provision. Illinois and Montana removed their provisions in 1970 and 1972, respectively.

Author's Comment

A constitution which simply requires that public funds and credit be used for a

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public purpose avoids such ridiculous situations as prohibiting purchase of insurance in mutual companies or buying stocks and bonds for investment purposes.

Sec. 4. CITIES AND TOWNS WITH POPULATION OF 5,000 OR LESS; CHARTERED BY GENERAL LAW; TAXES; FINES, FORFEITURES AND PENALTIES. Cities and towns having a population of five thousand or less may be chartered alone by general law. They may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful for any one year which shall exceed one and one-half per cent of the taxable property of such city; and all taxes shall be collectible only in current money, and all licenses and occupation taxes levied, and all fines, forfeitures and penalties accruing to said cities and towns shall be collectible only in current money.

History

This section first appeared in the 1876 Constitution. All prior constitutions were silent concerning municipal government. The custom during the Republic and after was to provide municipal charters by local laws. In 1858 the first general law for incorporation of cities and towns was passed, but it appears that local laws continued to be used.

Section 4 was in part a reinforcement of the prohibition against local legislation set forth in Section 56 of Article III. The original wording differed in substance from the present section only in setting the cut-off for population at 10,000 instead of 5,000 and in setting the maximum allowable property tax at 25¢ on \$100. The population change was made by amendment in 1909, matching a reciprocal population change in Section 5. The increase in the maximum permissible property tax rate from 25¢ to \$1.50 was accomplished by an amendment adopted in 1920. The 1920 amendment also changed the wording of the grant of power to raise taxes. Originally, the section read: "They may levy, assess and collect an annual tax to defray the current expenses of their local government, but such tax shall never exceed,"

Explanation

In combination Sections 4 and 5 give rise to conceptual confusion. Everybody knows that a corporation has a charter. In the case of private corporations it is customary for the incorporators to draft their own charter and submit it to the appropriate government agency for approval. The general corporation law prescribes the requirements for a charter; approval is forthcoming if the charter meets the prescribed requirements.

One would think that a general law for chartering cities and towns having a population of 5,000 or less would be the same. Those who proposed to incorporate would submit a charter to an appropriate state agency for approval within the prescribed requirements. Not so. A group of citizens in a given geographical area follow a prescribed procedure that results in incorporation. A municipal corporation exists, but it has no charter.

There is no constitutional theory that precludes a general incorporation act for municipalities that would operate somewhat like a corporation law for private corporations. Indeed, the city council of a general-law city by ordinance can make changes in the powers and duties of most of the officers of the city and can determine which shall be elected and which appointed. (See Tex. Rev. Civ. Stat. Ann. art. 977.) In short, nothing stops the legislature from providing a range of alternatives for a general-law city, including alternative forms of government—aldermanic, commission, or council-manager.

Presumably, the municipal corporation without a charter is an historical

accident. Prior to the 1876 Constitution, a charter could be obtained by a local act. (In many states in the 19th century private corporations also could obtain their charters by a special act.) The 1876 Constitution limited special charters to cities over 10,000. It must have seemed logical then to equate "charter" with a local law. Thus, as of 1876 there were cities and towns that had charters and geographical areas that were not incorporated. After 1876, these geographical areas could obtain their own charters if they included more than 10,000 people, otherwise they incorporated, but without their own charter.

A strange fall-out from all this was the way in which municipalities with charters were treated. Those over 10,000 had no problem; Section 5 permitted amendment by local laws. Other "cities and towns" and "towns and villages," two distinct groups notwithstanding the duplication of the word "town," could rely on statutes that permitted them to amend their local law charters. For some unknown reason the statute covering "cities and towns" disappeared in the statutory revision of 1879; the statute covering "towns and villages" was passed in 1881 and remains on the books. (See Tex. Rev. Civ. Stat. Ann. art. 1153.) Towns and villages with local law charters antedating 1876 may amend their charters by resolution of the board of aldermen and a "two-thirds vote of the voters at an election held therefor." Cities and towns with local law charters in need of change can do nothing except opt to become a general-law city or town. (The principal differences between a "city or town" and a "town or village" are: (1) that the former must have at least 600 inhabitants or contain at least one manufacturing establishment and the latter only 200 inhabitants; and (2) the former can levy an ad valorem tax of \$1.50 on the \$100, but the latter is limited to 25¢.)

The most interesting thing about article 1153, which allows towns and villages with ancient local law charters to amend them, is that any amendment is valid if it is not "in conflict with the constitution of this State or the Revised Statutes." This is home rule as broad as that afforded by Section 5. It is also interesting that any amendment must be approved by the attorney general before it takes effect. This begins to look like the procedure followed in the chartering of private corporations. Nevertheless, the coexistence of Sections 4 and 5 and the need for a piece of paper called a "charter" seem to preclude legislation that would turn general-law cities and towns into home-rule cities and towns.

Beyond this conceptual confusion arising from Sections 4 and 5, there is little of constitutional significance in Section 4. One item of importance is who can incorporate as a city or town. The answer is not any appropriate number of inhabitants of a geographical area who opt to incorporate; the requirement is that an appropriate number of inhabitants must be living in an unincorporated "city" or "town" before they can band together to "incorporate." This means that the courts have to have a definition of a "city" or a "town" which they can use in determining whether a given area may incorporate. For an example, see *Rogers v. Raines* (512 S.W.2d 725 (Tex. Civ. App. - Tyler 1974, writ *ref'd n.r.e.*), where the court quoted several definitions, reviewed the factual situation before the court, and concluded that the delineated area did not constitute a "town" or a "village." The court observed that "the purpose of the incorporation statutes is not to create towns and villages, but to allow those already in existence to incorporate" (at 730).

Actions taken by a general-law city must be within the power granted in the general law. Thus, general-law cities operate according to the Dillon Rule. (See *Author's Comment* on Sec. 5.) Litigation concerning the powers of general-law cities almost always is a matter of statutory interpretation.

Prior to the 1920 amendment increasing the constitutional tax limit to \$1.50 and eliminating the purpose for which taxes could be raised, there was considerable litigation over taxes, particularly over the relationship between Section 4 and

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Section 9 of Article VIII. No relationship problem exists today. Even the requirement that taxes be paid in "current money" does not appear to be a problem anymore. One assumes that the problem in 1875 was that there were scrip, warrants, and bonds floating around at a discount and that taxpayers would turn them in in payment of taxes. Early in the convention a delegate offered the following resolution:

Resolved, That all State and county taxes shall be collected in lawful money of the United States only, and that no bonds or scrip of any kind are receivable therefor. (*Journal*, p. 48.)

Interestingly enough, Section 5 does not require payment of taxes in "current money." This was actually a significant point in a lawsuit many years ago. (See *City of Houston v. Stewart*, 99 Tex. 67, 87 S.W.663 (1905).)

Comparative Analysis

State constitutions generally provide for incorporation of cities and towns by general law either by requiring it or by prohibiting incorporation by local law. No other state appears to have a population division between general-law cities and home-rule cities in the precise manner of Sections 4 and 5. Some of the states that provide for home rule reach the same result by setting a minimum population requirement for home-rule status. The *Model State Constitution's* provision is set out in the *Comparative Analysis* of Section 5. On tax rate limits see the *Comparative Analysis* of Section 9 of Article VIII.

Author's Comment

It is arguable that no minimum population should be required before a city or town may take wing and fly free as a home-rule government. It is equally arguable that no city or town should be forced to do-it-yourself. There should be a general incorporation law that permits a community of people in a given geographical area to create a municipal corporation without the necessity of drafting a charter. The one thing that should be avoided is incorporation by local law.

For reasons set forth elsewhere, absolute tax limits are not advisable. (See the *Author's Comment* on Sec. 9 of Art. VIII.)

Sec. 5. CITIES OF 5000 OR MORE POPULATION; ADOPTION OR AMENDMENT OF CHARTERS; TAXES; DEBT RESTRICTIONS. Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon; and provided further, that no city charter shall be altered, amended or repealed oftener than every two years.

History

This section first appeared in the 1876 Constitution. In its original form it provided that cities over 10,000 "may have their charters granted or amended by

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special act of the Legislature.” The tax and debt limitations were substantially the same as in the present section. In 1909 the section was amended to cover towns as well as cities and to lower the minimum required population to over 5,000. It has been suggested that this change was to give smaller cities the opportunity to obtain special act charters that could be tailored to desired individual differences. (See Keith, *City and County Home Rule in Texas* (Austin: Institute of Public Affairs, University of Texas Press, 1951), p. 19. Hereafter cited simply as “Keith.”) It seems more likely that the reason was to get the 5,000 to 10,000 cities and towns out from under the property tax limit of 25¢ on \$100 assessed valuation then in effect under Section 4. This increase in the number of municipal governments that could importune the legislature to provide special act charters was probably an important factor in the adoption in 1912 of the current version of Section 5, known as the “Home Rule Amendment.”

In November 1934 the voters rejected an amendment that would have changed the final proviso concerning frequency of charter changes to no more often than once a year. The vote was 86,000 for to 236,000 against.

On November 6, 1973, the voters rejected a proposed Section “5(a).” (This would have added a new variation on the confused numbering system of sections of the constitution. See *Citizens’ Guide*, p. 3.) The purpose of the proposed section was the same as the 1968 recommendation discussed at length in the following *Explanation*. Unfortunately, the 1973 proposal was most confusing in its wording. The section both granted ad valorem taxing power to municipalities and commanded them to levy taxes to pay the interest and principal on future bonds except, by inference, revenue bonds. These taxes could be in addition to the limit set forth in Section 5 (and Sec. 4). Thus, the ad valorem limit in Section 5 would cover only “operating” expenses. The normal constitutional approach of limiting power was not used except by a “provided that” that gave the legislature power to set a debt limit by “general or special laws.” As an afterthought—the next to the last sentence began “However,”—the existing statutory limit on the amount of bonds that an independent school district could issue was made applicable until the legislature decreed otherwise. This made it appropriate to end Section “5(a)” with the words: “This amendment is self enacting.” (There are two different statutory limits on school district debt. See Education Code, Sec. 20.04. Since Sec. “5(a)” was defeated there is no need to worry about which limit was intended. Although Sec. “5(a)” used the term “independent school district,” Sec. 20.04 applies to common school districts and rural high school districts.)

The 1968 proposal discussed below would have covered only home-rule cities and towns. Section “5(a)” was all-inclusive: “each incorporated city, town, and village . . . regardless of population.” Interestingly enough, Section “5(a)” covered home-rule cities with a vengeance, for it “repealed” every inconsistent home-rule charter provision. Had Section “5(a)” been adopted, a home-rule city apparently would not have had the power to deny itself the power to borrow money. Indeed, it is not clear, for example, that a charter provision requiring a two-third’s vote on bond issues would have continued to be valid. (A majority vote requirement would remain, but this is mandated by statute. *Tex. Rev. Civ. Stat. Ann.* art. 1175, item 10. Section “5(a)” did not “repeal” any statutes.)

Explanation

It was just noted above that the 1909 amendment reducing the minimum population of Section 5 to 5,000 probably hastened the adoption of a home-rule amendment. It seems likely that the delegates in 1875 thought that Section 5 would be a minor exception to the prohibition against local laws regulating the affairs of cities

(Sec. 56 of Art. III). In 1870 there were only two cities with a population in excess of 10,000—Galveston and San Antonio—and only one close to 10,000—Houston, with a population of 9,382. By 1880 the number had grown only to five with the addition of Austin and Dallas. It seems fair to surmise that the drafters of Sections 4 and 5 believed that most cities and towns should have the same form of government but realized that large cities would have special problems that a standard form of government could not adequately handle. Even in 1900 the number of cities permitted to seek local law charters had risen only to 11; but by 1910 the number over 10,000 had jumped to 20 with another 19 cities between 5,000 and 10,000 covered by the 1909 amendment. To continue to handle city charters by local laws would have meant a constantly increasing legislative burden.

In this situation the logical move was to free the legislature by giving cities the power to amend or adopt their own charters. There was historical precedent for this. In 1874, the legislature had granted cities the power to amend their charters, but this law disappeared in the revision of the statutes in 1879. (See Keith, p. 25.) Presumably the statute was dropped because it was thought to be inconsistent with Section 4. (See the *Explanation* of Sec. 4.) Whatever the reason for the 1912 wording of Section 5, it seems likely that its drafters stumbled into a broad home-rule grant of power without fully realizing what they had done.

The actions of the legislature following the adoption of the 1912 amendment are the best indication of the confusion over the breadth of the amendment. At the regular session in 1913 an enabling act was passed, one section of which is a comprehensive laundry list of powers granted to home-rule cities (Tex. Rev. Civ. Stat. Ann. art. 1175). This meant that the legislature thought either that the new Section 5 was not a grant of power or that power should be granted just in case. Less understandable is the legislature's continued granting and amending of city charters. Keith lists ten such local laws passed between 1913 and 1921. (Keith, p. 34, n. 14. This practice was stopped by the commission of appeals in 1921. *Vincent v. State*, 235 S.W. 1084 (Tex. Comm'n App. 1921, *jdgmt adopted*). But see discussion of art. 1175c below.)

Part of the confusion probably arose because the Home Rule Amendment was a patch-work amendment of an already mixed-up system. Apparently no one thought that the legislature could delegate home-rule powers by a general law enacted under Section 4. There apparently was a belief that chartering municipal corporations by general law precluded any system for individuality in charters. Moreover, there must have been a realization that if the power to grant local law charters was to be abandoned, it would not be possible to continue using local laws to amend existing charters. (If this seems inconsistent with the post-1912 passage of local laws as mentioned above, one can only observe (a) that frequently the legislative right hand does not watch what the legislative left hand does, particularly on the consent calendar; and (b) that legislative memories are short but habits are strong.) If an accommodation was to be made to permit cities with local charters to amend them, it would be necessary politically to keep the door open for future eligible cities. This, presumably, is why the words "adopt and amend their charters" were used.

What turned Section 5 into a significant home-rule provision were the court decisions that held that the quoted words transferred to a home-rule city any power that the legislature could exercise. A corollary rule is that one must look only to see if an asserted home-rule charter provision or ordinance conflicts with the general laws. (Sec. 5 also prohibits conflict with the constitution. This is probably redundant but advisable so that no one can argue that the 1912 amendment overrode anything else in the constitution at that time.) Although no one seems to have said so clearly, a second corollary is that "subject to such limitations as may be prescribed by the

Legislature” refers to the procedural aspects of adopting and amending a charter and not to the substance of charters and ordinances.

In 1916, not long after adoption of home rule, two cases set forth the foregoing rules. (See *Xydias Amusement Co. v. City of Houston*, 185 S.W. 415 (Tex. Civ. App.—Galveston 1916, *writ ref’d*); *Le Gois v. State*, 80 Tex. Crim. 356, 190 S.W. 724 (1916).) There followed several cases which appeared to undermine the home-rule grant of power. These later cases talked about the two types of local power—governmental and municipal (also called “proprietary”)—and seemed to say that only municipal powers were delegated by Section 5. (See *City of Amarillo v. Tutor*, 267 S.W. 697 (Tex. Comm’n App. 1924, *jdgmt. adopted*); *Yett v. Cook*, 115 Tex. 205, 281 S.W. 837 (1926); *City of Arlington v. Lillard*, 116 Tex. 446, 294 S.W. 829 (1927) (plus three companion cases).) Two of these cases actually had alternative grounds that adequately covered the holding. In *Tutor*, the question was whether Amarillo could abolish all tort liability. The commission of appeals said that as to proprietary activities, the city’s action ran counter to Sections 13—remedy for an injury—and 17—eminent domain—of Article I. The commission of appeals also held that the enabling act was unconstitutional insofar as it purported to permit cities to relieve themselves of tort liability. (See Tex. Rev. Civ. Stat. Ann. art. 1175, item 6.) The point is that the governmental versus municipal distinction was relevant only in terms of traditional tort liability. The *Yett* case is even more beside the point. All that the supreme court held was that a citizen in his own name could not mandamus city officials; the action had to be brought in the name of the state. The opinion contained a lot of talk about municipalities as agents of the state, but in substance the issue was a limited one of the use of an extraordinary judicial writ. The *Lillard* case was the only one that really threatened home rule. This case is discussed in the *Author’s Comment* below.

Ten years later the courts began to turn back to the original *Xydias* and *Le Gois* cases and have never deviated since. (See *Yellow Cab Transit Co. v. Tuck*, 115 S.W.2d 455 (Tex. Civ. App.—Dallas 1938, *writ ref’d*); *Forwood v. City of Taylor*, 147 Tex. 161, 214 S.W.2d 282 (1948); *Dallas County Water Control & Imp. Dist. No. 3 v. City of Dallas*, 149 Tex. 362, 233 S.W.2d 291 (1950); *State v. City of LaPorte*, 386 S.W.2d 782 (Tex. 1965); *Burch v. City of San Antonio*, 518 S.W.2d 540 (Tex. 1975); *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975).) In all these cases the courts affirm that home-rule cities have all legislative power not withdrawn. But in almost all cases, the courts also note that whatever the city purported to do was within one of the powers delegated by the enabling act. In the *Forwood* case, however, the court did not rely upon the enabling act. The question was whether a home-rule city could determine the number of members of its board of equalization. Article 1048 of the revised statutes sets the number at three for general-law cities. The court said:

Since there is nothing in the Enabling Act, *supra*, limiting the power of the City of Taylor, as a home rule city, to prescribe the number of members to constitute its board of equalization, and since Art. 1048, *supra*, does not apply to such a city, neither the charter provision nor the ordinance passed thereunder offends against the direction of Art. XI, Sec. 5, of the Constitution, that they shall not be inconsistent with the general laws. (147 Tex., at 168; 214 S.W.2d, at 286-87.)

Actually, the enabling act grants the power “to provide for the mode and method of assessing taxes,” a grant that clearly covers the creation of a board of equalization. (See Tex. Rev. Civ. Stat. Ann. art. 1175, item 8.) Nevertheless, it would be difficult to repudiate *Forwood* in a case in which there was no enumerated power in the enabling act to which a charter or ordinance could be tied.

The cited 1975 *San Marcos* case goes further than the *Forwood* case in nailing down the inherent power granted to home-rule cities. In *San Marcos*, the court stated: "A home rule city derives its power not from the Legislature but from Article XI, Section 5, of the Texas Constitution" (at 643). The court went on to quote *Forwood* to the effect that home-rule cities have "full power of self-government, that is, full authority to do anything the legislature could theretofore have authorized them to do. The result is that now it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers" (*Id.*) Finally, the court noted that article 1176 precludes reliance on the laundry list of enumerated powers in article 1175 as "an implied limitation on the exercise by a home rule city of all powers incident to the enjoyment of local self-government" (at 644). Article 1176, part of the original enabling act, provides: "The enumeration of powers hereinabove made shall never be construed to preclude, by implication or otherwise, any such city from exercising the powers incident to the enjoyment of local self-government, provided that such powers shall not be inhibited by the State Constitution." It should be noted, however, that not all courts—or, perhaps, the lawyers who file briefs—seem to be cognizant of these "well-settled" rules. In an opinion handed down less than six months before *San Marcos*, a court of civil appeals, in the course of reaching a normal conclusion that a home-rule city does not have extraterritorial powers, made a series of statements totally inconsistent with the Texas home-rule concept and, in particular, cited and quoted from the *Lillard* case, referred to earlier as the only case that really threatened home rule. (See *City of Nassau Bay v. Nassau Bay Telephone Co., Inc.*, 517 S.W.2d 613 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ *ref'd n.r.e.*.) Interestingly enough, a month earlier the same court handed down an opinion on the same issue but reached the same result on the limited ground of no extraterritoriality. (See *City of Alvin v. Southwestern Bell Telephone Co.*, 517 S.W.2d 689 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ *ref'd n.r.e.*.)

In *San Marcos* the court noted that the laundry list of powers in the enabling act is usable if a specific grant of power contains a built-in limitation on the use of the power. This final element is the significant point of the *Burch* case, the other 1975 case cited earlier. There the question was whether a city could delegate its eminent domain power to a subordinate agency. The court denied the power of delegation because the grant of power in the enabling act and two other applicable statutes was to the "governing authority." The implication is that in granting eminent domain power to the "governing authority" of a home-rule city, the legislature was trying to confine the eminent domain power to the local legislative body.

Thus, the *constitutional* rule is clear: a home-rule city is relatively "sovereign" within its territory but the state may override this "sovereignty." Whether the state has done this in a given instance is a matter of legislative intent. This is a nonconstitutional matter of great complexity. For reasons that are set forth in the *Author's Comment* on this section, it is fruitless to try to generalize from the cases.

There are other elements of Section 5 that should be mentioned briefly. First, a city with a population over 5,000 does not have to be a home-rule city. Any incorporated city may elect to be a general-law city. As of the end of May 1973, there were 31 cities with a 1970 census population in excess of 5,000 that had not become home-rule cities. Second, an unincorporated community with a population over 5,000 would have to incorporate first as a general-law city, following which it could turn itself into a home-rule city. In other words, the enabling act covers incorporated cities and the only way to become incorporated is to proceed under the "general-law cities" statute.

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Third, since Section 5 states that cities may “adopt or amend” their charters, any city over 5,000 which had a local law charter in 1912 can continue to operate under it simply by amending it from time to time in accordance with the enabling act. This, it turns out, can be significant. Article 1183 of the *Texas Revised Civil Statutes Annotated* states that “all cities situated along or upon navigable streams in this State, and acting under special charters, may. . . .” Houston operates under a local law charter passed in 1905 and amended more than ten times under Section 5 and the enabling act. Had Houston adopted a whole new charter it would not be able to utilize article 1183. The normal coverage of statutory power grants is “any city in this State, whether organized and operating under general law or under special charter granted by the legislature of the State of Texas or under charter adopted or amended under Section 5. . . .” (See *e.g.*, Tex. Rev. Civ. Stat. Ann. arts. 1187a and 1187b. Why “any incorporated city” would not do just as well is not clear.)

Fourth, the magic figure of 5,000 for population is not a census figure. Any city may make its own determination that its population exceeds 5,000. In *State v. City of La Porte*, the supreme court stated that “when the governing body once ascertained the fact that La Porte had a population of more than 5,000 at the time of the adoption of its Home-Rule Charter, such ascertainment is presumed to have been validly exercised in the absence of allegations and of proof of fraud, bad faith or abuse of discretion” (386 S.W.2d 782, 785 (Tex. 1965)). The charter was adopted on March 22, 1949. Census figures for La Porte are: 1940—3,072; 1950—4,957; 1960—4,512; 1970—7,149. Once a home-rule city, always a home-rule city. In 1951 there were 11 home-rule cities, including La Porte, which had a population below 5,000 according to the 1950 census. (See Keith, p. 31. According to the 1970 census, seven of the cities listed by Keith still have populations below 5,000.) Presumably, a home-rule city, whether above or below 5,000 population, could abandon its charter by following the procedure for accepting the provisions of title 28, the statutes governing general-law cities.

Fifth, adoption of amendment is “by a majority vote of the qualified voters of said city, at an election held for that purpose.” Does this mean a majority of all the voters, of those voting at the election, or of those voting on a single question? Does the election have to be a special election? The enabling act settles this for adoption of a charter: It must be a special election and the majority is of those voting at the election. (See Tex. Rev. Civ. Stat. Ann. arts. 1167 and 1169.) No one appears to have questioned these statutory answers. The enabling act permits multiple amendments to be submitted both at a special election and, under certain circumstances, at a general election. But the words “majority of the qualified voters voting at said election” are used. (Tex. Rev. Civ. Stat. Ann. art. 1170.) This simply preserves the ambiguity of Section 5. The courts settled the issue by ruling that the majority required is that of those voting on a question. (See *Shaw v. Lindsley*, 195 S.W. 338, 340 (Tex. Civ. App. — Dallas 1917, *no writ*); *Ladd v. Yett*, 273 S.W. 1006, 1013 (Tex. Civ. App. — Austin 1925, *writ dismissed*.)

Sixth, the legislature theoretically cannot interfere with the government of home-rule cities because Section 56 of Article III forbids local laws regulating the affairs of cities. Everyone knows, however, that the legislature does meddle in local affairs by the device of population-bracket bills. Consider, for example, article 1175c passed in 1945. That statute amended the local law charter of Houston. From the wording of the statute one deduces that the existing charter did not provide for quickly filling a vacancy in a particular elective office, that it would take too long to amend the charter under the requirements of the enabling act, and that the legislature bailed out the city. The legislature also told Houston to fix up its charter: “Provided, however, that whenever any such city holds an election to vote upon proposed amendments to its charter, it shall at such time submit a proposed

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amendment thereto providing a method for filling any vacancy to elective offices which are not now provided for in said charter." Naturally, article 1175c does not mention Houston. The law is generally applicable to any city with a population of 384,000 or more which has a defect in its charter concerning filling a vacancy in any elective office. According to the 1940 census, the population of Houston was 384,514; without further checking, everybody would know that no other city was covered in 1940. Today, of course, Dallas, Fort Worth, and San Antonio may utilize article 1175c if they have the same defect in their charters. (See further discussion of local laws in the *Author's Comment* below.)

The final operative portion of Section 5 is the tax and debt provision. The section permits cities to levy "such taxes as may be authorized by law or by their charters." This is ambiguous. When the home-rule amendment was drafted the words "or by their charters" were dropped into the authorization as it had existed previously. This presumably means that any statute authorizing the levy of a tax may be used by a home-rule city whether or not its charter authorizes the levy. Presumably, also, a home-rule city could provide in its charter for any tax which the legislature could authorize. Thus, a city would appear to have the power by charter to levy an income tax. (Of course, the legislature can provide that no city may levy an income tax.) The foregoing is an assumption; there does not appear to have been any litigation involving a novel tax. There are, of course, arguments about whether a license fee is an occupation tax. Since Section 1 of Article VIII permits a city to levy an occupation tax only if the state levies a tax on the same occupation, a home-rule city must be careful when imposing a license fee. If the amount of the fee is unreasonably large in relation to the costs of regulating the licensed occupation, the fee may suddenly become an occupation tax. (See *Producers Ass'n of San Antonio v. City of San Antonio*, 326 S.W.2d 222 (Tex. Civ. App.—San Antonio 1959, writ *ref'd n.r.e.*.)

Section 5 also limits "said cities" to a maximum property tax of 2-1/2 percent of the "taxable property of said city." In the context of the section, "said cities" are cities with a population in excess of 5,000. That is, a general-law city with a requisite population may have a \$2.50 tax rate rather than the \$1.50 rate under Section 4. (See Tex. Rev. Civ. Stat. Ann. art. 1028; Tex. Att'y Gen. Op. No. O-7392 (1946).) But "said cities" also are home-rule cities with a population below 5,000. For example, in 1971, Gorman with a 1970 census population of 1,236, DeLeon with 2,170, and Eastland with 3,178 all had tax rates of \$2.50. (See "Texas Municipal Taxation & Debt, 1961-1971," *Texas Town & City*, (February 1972) 22, 24.)

Section 5 on its face has no limit on the amount of debt that may be incurred by a home-rule city. But the enabling act requires the approval of the attorney general (Tex. Rev. Civ. Stat. Ann. art 1175, item 10) and this is not forthcoming if he finds that the total tax and other resources of a city will not support the additional burden of paying interest and retiring the bonds. (See *City of Houston v. McCraw*, 131 Tex. 127, 113 S.W.2d 1215 (1938).) In the proposed revision of the constitution submitted to the legislature in 1968 the only significant change to the home-rule provision was to eliminate the 2-1/2 percent tax limitation and substitute "but no tax shall ever be lawful for any one fiscal year to pay principal and interest on tax supported bonded indebtedness in any amount of such indebtedness which is in excess of ten percent of the assessed valuation of the taxable property of such city." (Texas Constitutional Revision Commission, *Report and Recommended Revised Constitution* (Austin 1965), p. 159.) The reason given for this change was that "it is felt there is no need for a limit on the city tax for operating expenses and that the voters of the city can be expected to keep such tax within reasonable limits consistent with the revenue needs and services demanded of the municipality

As to the increase in the maximum tax rate for bonded indebtedness, the present limit works to reduce the acceptability of the bonds of our cities and it is estimated that this causes our municipal bonds to carry an interest rate as much as one-quarter of one percent higher than would otherwise be necessary." (*Id.*, p. 160.) This explanation is somewhat disingenuous and not wholly accurate. The proposed revision was not an "increase in the maximum tax rate for bonded indebtedness." There is no constitutional maximum now. There is a practical maximum enforced initially by the attorney general and ultimately by the bond market. With a maximum allowable property tax rate of 2-1/2 percent for all purposes, the amount available for incurring bonded indebtedness is more or less whatever is left over after covering operating expenses. The proposed revision would have created a "maximum tax rate for bonded indebtedness" only by derivation from the maximum allowable aggregate debt of 10 percent of assessed valuation. But the key step was to propose to eliminate any maximum for operating expenses. This was done not so much because the voters "can be expected to keep such tax within reasonable limits" as in part because a 2-1/2 percent rate to cover both operating expenses and debt was unrealistically low and in part because bond underwriters will give a higher credit rating to a city that has no absolute ceiling on its property tax rate.

There are a great many cases dealing with the taxing power of home-rule cities but they are almost all examples of the basic problem of whether a city's charter or ordinance contains "any provision inconsistent with . . . the general laws." This basic problem is discussed in the *Author's Comment* on this section.

Comparative Analysis

There are at least 30 states that have a general provision for municipal home rule. Most of these are actual grants of home-rule power comparable to Section 5. There are three or four states which authorize the legislature to provide for home rule and a couple of states which command the legislature to act. Some states have a minimum population for home-rule eligibility; most do not. Many of the provisions are self-executing, some with much detail; others are similar to the Texas provision—that is, the grant is made subject to legislative implementation. This is different from a command to the legislature to grant home rule. Two recent constitutions, Montana and Pennsylvania, have provisions that command the legislature to provide for home rule but that authorize local initiative if the legislature fails to act.

The 1970 Illinois Constitution contains novel provisions designed to inhibit legislative interference with home rule. As the following excerpts demonstrate, it gets a little complicated:

Section 6. Powers of Home Rule Units

(a) . . . Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt. . . .

(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (l) of this section.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (l) of this Section.

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(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive. . . .

(l) The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment . . . or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas . . . (Art. VII)

This Illinois experiment is discussed in the *Author's Comment* that follows.
The *Model State Constitution* provides:

Sec. 8.01. ORGANIZATION OF LOCAL GOVERNMENT. The legislature shall provide by general law for the government of counties, cities and other civil divisions and for methods and procedures of incorporating, merging, consolidating and dissolving such civil divisions and of altering their boundaries, including provisions:

(1) For such classification of civil divisions as may be necessary, on the basis of population or on any other reasonable basis related to the purpose of the classification;

(2) For optional plans of municipal organization and government so as to enable a county, city or other civil division to adopt or abandon an authorized optional charter by a majority vote of the qualified voters voting thereon;

(3) For the adoption or amendment of charters by any county or city for its own government, by a majority vote of the qualified voters of the city or county voting thereon, for methods and procedures for the selection of charter commissions, and for framing, publishing, disseminating and adopting such charters or charter amendments and for meeting the expenses connected therewith.

Sec. 8.02. POWERS OF COUNTIES AND CITIES. A county or city may exercise any legislative power or perform any function which is not denied to it by its charter, is not denied to counties or cities generally, or to counties or cities of its class, and is within such limitations as the legislature may establish by general law . . . (Art. VIII. There are alternative sections for self-executing home rule. These are quoted in the *Comparative Analysis* of Sec. 18 of Art. V.)

Author's Comment

Notwithstanding the various ambiguities in the home-rule part of Section 5, its success tempts one to suggest leaving it alone. After all, as sections of the Texas Constitution go, Section 5 is one of the more intelligibly drafted. (It is ironic that this section, probably the best in the constitution, has been severely criticized for its ambiguities. Keith notes: "Almost every word in the amendment has been subjected to the scholarly whiplash." (p. 29.) He follows with an extended review of the criticisms. (pp. 30-44.) But good draftsmanship is the better part of valor; Section 5 can surely be improved upon even without changes in substance.

Notwithstanding this praise for Section 5, home rule is not unconditionally and fully guaranteed to Texas cities. Essentially, the section as interpreted by the courts guarantees only that cities may act without affirmative permission of the legislature. This is no minor matter, for the traditional standard is the Dillon Rule—a municipal corporation possesses only those powers expressly granted; those necessarily or fairly implied in, or incident to, granted powers; and those essential to the accomplishment of the declared objectives and purposes of the corporation. Put another way, the Dillon Rule puts the burden on municipalities to get the legislature to grant powers, whereas Section 5 puts the burden on the legislature to take away municipal power.

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Under Section 5 the legislature retains power to control municipal government. For reasons discussed below, it is not appropriate to give municipalities sovereign power not subject to legislative oversight. (If a state has no tradition of home rule it may be appropriate to have a self-executing constitutional home-rule provision, but this is a different matter from an irrevocable grant of home-rule powers. For a discussion of a self-executing provision see the *Author's Comment* on Sec. 18 of Art. V.) But there are two kinds of legislative oversight—protection of the state's interests and meddling in local matters. The key to preserving the former while preventing the latter is to control local legislation.

In the *Author's Comment* on Section 56 of Article III it was proposed that the section should be rewritten to make it clear that (a) local laws are really out and (b) the courts are expected to enforce the prohibition. This approach places the people's trust in the courts. Such trust recognizes that a "general" law does not have to treat every municipal corporation or other political subdivision exactly the same. The quoted provision from the *Model State Constitution* set out above both recognizes this and assumes that the courts will prevent abuse of classification through interpreting "as may be necessary" and "reasonable basis related to the purpose of the classification." If, however, the fear is that the legislature will not stop passing local laws disguised as general laws and that the courts cannot be depended upon to act forcefully, an intermediate position can be taken. To a classification provision such as the one quoted from the *Model State Constitution* could be added: "but no general law may divide civil divisions into more than three (or four or five or some other number) classes and no single class may contain fewer than two (or three or four or some other number) civil divisions."

This intermediate position is not good constitutional theory. Rigidities, particularly in absolute numbers, are to be avoided; they unnecessarily inhibit the flexibility needed by responsible policymakers and they represent a signal to the legislature and the courts that neither is trusted to be responsible. An unfortunate corollary of this rigidity is that it tends to encourage irresponsibility. That is, if four classes are allowed, the legislature may create four classes when none or one or two would be appropriate. This is a variation on the erroneous idea that if something is constitutional it is good. Considering the Texas habit of passing local laws at the drop of a hat, any revisers of the 1876 Constitution have a delicate problem of deciding whether to spell out rules of classification of laws affecting local governments.

Many proponents of home rule, in addition to opposing the meddling in local affairs that is represented by local laws, also oppose legislative control over local affairs generally. This is not realistic. It is one thing to object if a group of people in City A cannot get what it wants from the city council and rushes to the capital to get a local law; it is an entirely different matter if groups of people from many cities convince the legislature that a particular program should be a matter of state policy. The former is clearly ill-advised; the latter is difficult to object to. For one thing, who is to say that something which the legislature makes applicable to all cities or most cities is not a matter of state interest? In any event, it is almost impossible to draft a constitutional provision that properly precludes the state from ever legislating on a particular local subject matter.

The case of *City of Arlington v. Lillard*, cited in the previous *Explanation*, is an example of the conceptual difficulties in dividing power. Lillard operated a bus line between Fort Worth and Dallas through Arlington. Arlington adopted an ordinance prohibiting bus companies from using two named streets. (Reading between the lines, one guesses that there were trolley lines along the forbidden streets; at least the bus company stated that it would agree not to pick up intracity passengers, a normal method of handling long-haul and short-haul franchises over the same

route.) One of the streets was part of a state highway and the two streets were alleged to be the only routes through Arlington. The supreme court's problem was to answer the argument that Arlington, as a home-rule city, could act so long as its ordinance was not inconsistent with the general laws of the state. The court's technique was to hark back to the traditional distinction between governmental and municipal powers. Under the former, a municipality is deemed to be the agent of the state in carrying out the general police power; under the latter, the municipality is taking care of its citizens by providing street lights, garbage collection, and the like. The court argued that the broad approach to home rule applied to municipal powers and not to governmental powers and that the use of a state highway was a general power of the state not delegated to municipalities.

The court also toyed with the idea that perhaps the ordinance was inconsistent with the general laws of the state but failed to make that a definite holding. Had the court done so by quoting whatever parts of the state highway law seemed usable, the result would have been the same. This would have been preferable for the following reasons: (a) It would have preserved the home-rule theory of Section 5; (b) it would have avoided a conceptual division of power; and (c) it would have left problems of home-rule power to be decided on a case-by-case consideration of whether the legislature had preempted a particular power.

The principal reason for avoiding a conceptual division of power is that, with the witting or unwitting aid of the courts, a no-man's-land can be created and exploited by private interests. If an attempt is made to give certain powers exclusively to the state and certain other powers exclusively to local governments, private groups may argue that whichever government acts is unconstitutionally using a power that belongs to the one which has not acted. The beauty of the rule as it now exists under Section 5 is that either government can act—there is never a no-man's-land.

The rule of Section 5 does not end litigation by any means. In the *Lillard* situation, there would have been no problem if the state highway law had specifically prohibited ordinances like Arlington's. More often than not, it does not occur to the legislature to spell out what is to be considered inconsistent with its legislation. Courts will forever be dealing with the intent of legislation where the words are not specific. (The same problem exists in cases of conflicts between federal laws and state statutes. See Braden, "Umpire to the Federal System," 10 *U. of Chicago L. Rev.* 27 (1942).)

There is, of course, one way in which a no-man's-land can be created to the detriment of local governments. This occurs if the legislature simply prohibits local exercise of a governmental power without itself exercising the power. For example, under Section 5 a home-rule city could regulate fortune tellers. If the state comes along and regulates them, the city may be unhappy but at least there is some regulation. But if the state prohibits any regulation of fortune tellers, the city is helpless. In the *Comparative Analysis* above, the novel Illinois provision was extracted to show the effort made to deal with this situation. Subsection (g) requires a three-fifths vote to pass a law prohibiting local governments from acting in an area not covered by state law.

The Illinois provision—Subsections (h) and (i)—also tries to tilt home-rule power in favor of local government by demanding that any withdrawal of power by state preemption be "specific." In the *Lillard* situation, for example, the Illinois provision would have produced a decision in favor of Arlington unless there was a fairly clear prohibition against inhibiting use of state highways by local regulations. It is too early to pass judgment on this Illinois experiment; it will take a decade of legislation and litigation to see how the experiment fares. At the very least, it is an interesting effort to strengthen home-rule powers without denying state power to protect the state's interest.

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Sec. 6. TAXES TO PAY INTEREST AND CREATE SINKING FUND TO SATISFY INDEBTEDNESS. Counties, cities and towns are authorized in such mode as may now or may hereafter be provided by law, to levy, assess and collect the taxes necessary to pay the interest and provide a sinking fund to satisfy any indebtedness heretofore legally made and undertaken; but all such taxes shall be assessed and collected separately from that levied, assessed and collected for current expenses of municipal government and shall when levied specify in the act of levying the purpose therefor, and such taxes may be paid in the coupons, bonds or other indebtedness for the payment of which such tax may have been levied.

History

This section dates from 1876.

Explanation

Prior constitutions contained no limitations on local taxation or on local debt. To accompany the severe limitations on county taxation in Section 9 of Article VIII and on city and town taxation in that section and in Sections 4 and 5 of this article, it was appropriate to include an escape hatch for counties, cities, and towns which were heavily in debt at the time of the adoption of the 1876 Constitution. Otherwise, some local governments might have found themselves using all their taxing power to pay off their old debts with nothing left over for current operations.

From time to time courts have referred to this section as if it had some continuing significance. It is clear, however, that the section deals only with debt existing on the day that the 1876 Constitution went into effect. It seems highly unlikely that there is any such debt still outstanding. Accordingly, the section can be considered obsolete.

One interesting sidelight on this section is the concluding "sentence" that authorizes payment of taxes by use of interest coupons, bonds, or other evidence of debt. This is undoubtedly what the requirement of payment in "current money" in Section 4 was designed to prohibit as to current expenses of local government.

Comparative Analysis

Except for a schedule provision in the Oklahoma Constitution, there does not appear to be a specific authorization for a special tax to pay off preexisting debt. It is likely, however, that other states reach a comparable result through interrelating constitutional provisions. In any event a comparable section will be found only in a constitution which, when adopted, greatly curtailed local taxing power.

Author's Comment

In the unlikely event that some local government is still levying a special tax to pay off a debt incurred prior to 1876, a revised constitution should preserve the power granted by Section 6, if still needed, only by a schedule provision that can be dropped once the debt is extinguished.

Sec. 7. COUNTIES AND CITIES ON GULF OF MEXICO; TAX FOR SEA WALLS, BREAKWATERS AND SANITATION; BONDS; CONDEMNATION OF RIGHT OF WAY. All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized upon a vote of the majority of the resident property taxpayers voting thereon at an election called for such purpose to levy and collect such tax for construction of sea walls, breakwaters, or sanitary purposes, as may now or may hereafter be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent

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(2%) as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for.

History

The part of this section referring to the Gulf of Mexico dates from 1876. The section as proposed, as printed in the *Journal*, and, therefore, as adopted, did not contain the glaring grammatical error in the present section. The authorized tax was "for construction of sea walls, breakwaters, or for sanitary purposes." (See *Journal*, P. 694.) Whether the "for" was dropped purposefully or inadvertently is not clear. (If the original draftsman had written "for construction of sea walls or breakwaters or for sanitary purposes," a reviewing draftsman would probably not have eliminated the second "for.")

This part of the section was amended in 1932. In its original form the section required a "vote of two-thirds of the taxpayers therein (to be ascertained as may be authorized by law)." The 1932 amendment changed this so that those who fail to vote are not counted as "no" votes. As part of the 1932 amendment "as may be authorized by law" was changed to read "as may now or may hereafter be authorized by law." (The significance, if any, of this change is discussed below.)

The second sentence of Section 7 down to the semicolon is one of the more obscure provisions dating from 1876. On the one hand, the section as proposed to the 1875 Convention by the Committee on Municipal Corporations was all one sentence. Since the second part of what became the second sentence refers back to "such works" and thus covers only seawalls, breakwaters and sanitary purposes, logical construction would seem to limit the first part of the second sentence to seawalls, breakwaters and sanitary purposes. Moreover, Section 5, which originally covered cities over 10,000, also contains an interest and 2 percent sinking fund requirement.

On the other hand, the words "any purpose" in the second sentence seem unrelated to seawalls, breakwaters and sanitary purposes. Likewise, "any city or county" seems broader than "all counties and cities bordering on the coast." Moreover, the Constitution of 1869 provided: "It shall be the duty of the Legislature to provide by law, in all cases where State or county debt is created, adequate means for the payment of the current interest, and two per cent, as a sinking fund for the redemption of the principal; . . ." (Art. XII, Sec. 23.) It seems clear that the Committee on Municipal Corporations meant to require all local governments to levy adequate taxes to retire debt. It will never be known why this requirement was inserted in a section dealing with public works along the Gulf Coast. (But see the *Explanation* below.)

For the record it may be noted that in 1913 the legislature proposed a Section 7a. The section, containing about 6,000 words, was so badly drafted that it is not at all clear what was intended. A hasty reading of the proposal, which is all that it deserves, indicates that it was a scheme to build seawalls, reclaim the land inside the walls, sell lots to people, and pay for the scheme by such sales—in short, a Dutch-dike program. The voters would not have been particularly enlightened by the ballot, which called for a vote for or against an amendment "providing for authorizing counties bordering on the Gulf of Mexico to build sea-walls." Perhaps it was because Section 7 already authorized seawalls that the voters rejected the amendment.

On November 6, 1973, the voters approved an amendment which changed the voter approval requirement. Formerly it was two-thirds of those voting on the question; now it is a simple majority.

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Explanation

Seawalls. The first point that must be made about the first sentence is that it is not a self-executing grant of power. Of course, the sentence starts out by stating that counties and cities “are hereby authorized,” but later on appear the words “as may now or may hereafter be authorized by law.” It is normally difficult to parse sentences in the Texas Constitution; this sentence is no exception. It may be that “authorized by law” refers only to “such tax.” This makes sense, for it was only the limitations placed on county and city taxing power by the Constitutional Convention of 1875 that necessitated giving an additional power to tax to counties and cities that would have an extra burden because they bordered on the Gulf of Mexico. But parsed this way, the power to create a debt becomes a direct grant since the granting words come after “authorized by law.” (This might explain the first part of the second sentence. The drafter of the original section may have realized that he had just granted an unlimited power to incur debt and hastened to limit the power by requiring an adequate tax to pay off the debt. This does not explain why the limitation was so worded that it covers all local debt and not just seawall debt.) In any event, there has been statutory authorization at least since 1881. (The applicable law is Title 118 of the *Texas Revised Civil Statutes Annotated*. Art. 6833 derives from an act of 1881.)

Article 6830 is the authorization for a Section 7 tax. The limit is 50¢ on the \$100. It was suggested in the preceding *History* that the amendment of 1932 may have frozen this authorization. Since the amendment states “as may now” be authorized by law and article 6830 was on the books in 1932, it is arguable that the 50¢ authorization can only be increased, not decreased or repealed. But then this is undoubtedly a nonproblem; constitutionally limited as taxing power is, no legislature is likely to withdraw any power permitted by the constitution.

It should be noted that Section 7 is not an exclusive source of taxing power for seawalls and the like. A county or city bordering on the Gulf of Mexico can levy a property tax for a purpose specified in Section 7 without a vote if the tax is levied under some other constitutional grant. (*Holman v. Broadway Improvement Co.*, 300 S.W. 15 Tex. Comm’n App. 1927, *judgmt adopted*) (county tax under Sec. 9 of Art. VIII); Tex. Att’y Gen. Op. No. M-50 (1967) (county tax under Sec. 1-a of Art. VIII). In the case of Sec. 1-a, the difference at the time was the size of the vote required—two-thirds under Sec. 7; a majority under Art. 7048a, the implementing statute.)

An interesting question can arise under the section as amended in 1973. It now calls for a majority vote but articles 6834 and 6835 still call for a two-thirds vote. Are these requirements superseded? Nobody has added the words “This section shall be self-enacting.” The “as may now” be authorized by law is still there. The only tax now authorized by law is one approved by a two-thirds vote. (One may speculate whether the legislature could leave the 50¢ tax as is and authorize only a 30¢ tax if approved by a majority of less than two-thirds.)

The concluding portion of the second sentence of Section 7 is of no constitutional significance. The legislature could grant the power of condemnation without the hortatory words of Section 7. (Art. 6832 grants the power.)

Sinking fund. This part of the second sentence of Section 7 also appears in Section 5 of this article. (Naturally it would not occur to anyone to word the two provisions the same or simply to leave the words out of Sec. 5 since Sec. 7 is all-inclusive. Or is it? It does not apply to school districts (*Allen v. Channelview I.S.D.*, 347 S.W.2d 27 (Tex. Civ. App.—Waco 1961, *writ ref’d*)).) Some special district sections of the constitution refer to paying interest and retiring bonds; some do not. In the *Explanation* of Section 5 the significance of a property tax limit as a control

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over debt was discussed at length. Since general-law cities and counties have limits on the property taxes that they may levy, their power to incur debt is limited in the same manner.

Except for Section 52 of Article III—and, vicariously, Section 52e (1968) of that article—there is no constitutional debt limit on local government. The debt limit derives from the tax limitations. From this one might assume that the interest and sinking fund requirement is part and parcel of the derived debt limit. This is partly true. As noted in the *Explanation* of Section 5, bonds do not receive the approval of the attorney general unless there is adequate capacity to pay interest and retire debt. But without his veto, counties and cities would still be unable to float bonds unless they agreed to provide adequately for payment of interest and retirement of the bonds. In reality, the procedure involving the attorney general is a means for securing a determination of the validity of a bond issue. The attorney general will not approve if there is any conceivable legal doubt. A mandamus action in the supreme court settles the issue. This saves the bond attorneys the nuisance of working up a friendly lawsuit to get a determination of validity. In short, the interest and sinking fund requirement of Section 7 is a useful adjunct to the system for validation but is not a significant constitutional means of assuring the payment of debt.

The requirement is, however, a significant constitutional provision in the wrong way for the wrong reasons. The true purpose of the requirement can be stated thus: Don't borrow money without providing for repayment. This has been twisted into: Anything you sign up for that is not covered by current appropriations or money in the bank or something is a debt; show me the levy of a sufficient tax to pay it off.

The supreme court has defined "debt," as used in this section and Section 5, to be "any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation." (*McNeal v. City of Waco*, 89 Tex. 83, 33 S.W. 322, 324 (1895).) Relying upon this definition, the commission of appeals found invalid a \$3,000 retainer agreement between a county and two attorneys who were to seek to recover moneys due the county. The problem was that \$1,000 was to be paid at once, \$1,000 the next budget year, and the final \$1,000 when all lawsuits were concluded. (*Stevenson v. Blake*, 113 S.W.2d 525 (1938).) This was soon followed by *Texas & N. O. R. R. v. Galveston County* where the same court held invalid an indemnity agreement entered into in 1905, thus refusing to permit the railroad to recover \$5,302.59 from the county in connection with an accident occurring in 1936. Galveston County had failed in 1905 to make provision for a sufficient tax to pay the interest and to provide a sinking fund to pay the debt that would arise three decades later. (169 S.W.2d 713 (1943).)

That this is all a little ludicrous is demonstrated by the indemnity agreement entered into between the United States and Jefferson County whereby it agreed to: "Hold and save the United States free from damages that may result from construction of the project." The commissioners court of Jefferson County adopted a resolution in which the foregoing agreement was quoted, followed by:

During each year while there is any liability by reason of the agreement contained in this subsection of this resolution, including the calendar year 1965, the Commissioners' Court of said County shall compute and ascertain the rate and amount of ad valorem tax, based on the latest approved tax rolls of said County, with full allowances being made for tax delinquencies and costs of tax collection, which will be sufficient to raise and produce the money required to pay any sums which may be or become due during any such year, in no instance to be less than two (2%) per cent of such obligation, together with all

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interest thereon, because of the obligation herein assumed. Said rate and amount of ad valorem tax is hereby ordered to be levied against all taxable property in said County for each year while any liability exists by reason of the obligation undertaken by this subsection of this resolution, and said ad valorem tax shall be assessed and collected each such year until all of the obligations herein incurred shall have been discharged and all liability hereunder discharged.

The supreme court held that this resolution got Jefferson County out from under the *Galveston County* case. (*Brown v. Jefferson County*, 406 S.W.2d 185 (1966) (two justices dissenting).) It was argued, naturally, that the commissioners court could not know that the tax ordered to be levied would be “sufficient” since the county’s taxing power is limited by Section 9 of Article VIII. The court briskly observed that “legitimate county contracts should not be declared void upon possibilities . . . it should be stricken down only when . . . the limited tax resources of the municipality are insufficient at such time to discharge the obligation.” (At 190.) The dissent observed: “The attempted distinctions between this case and the *Galveston County* case are neither logical nor valid.” One can accept the dissenters’ comment but conclude that the court should simply have overruled the *Galveston County* case and, for that matter, the *Blake* case and any other case that relied on the sinking fund provision in an unrealistic situation. But the lesson of the *Brown* case is that a constitutional requirement is misguided if a few well-chosen words can sink it.

Comparative Analysis

No other state appears to have a provision comparable to the first sentence. About a dozen states enjoin the local government to levy a tax to service the debt. A majority of those states specify a maximum life of the debt ranging from 20 to 50 years. The *Model State Constitution* has no comparable provision.

Author’s Comment

A section like this is required only so long as there is an unduly restrictive limitation on the power to tax to meet local needs.

A requirement that provision be made for retiring debt is obviously not necessary in order to be able to market bonds. This being so, it would seem advisable not to have such a provision. This would avoid the technical violations discussed above.

Sec. 8. DONATION OF PORTION OF PUBLIC DOMAIN TO AID IN CONSTRUCTION OF SEA WALLS OR BREAKWATERS. The counties and cities on the Gulf Coast being subject to calamitous overflows, and a very large proportion of the general revenue being derived from those otherwise prosperous localities, the Legislature is especially authorized to aid by donation of such portion of the public domain as may be deemed proper, and in such mode as may be provided by law, the construction of sea walls, or breakwaters, such aid to be proportioned to the extent and value of the works constructed, or to be constructed, in any locality.

History

The Committee on Municipal Corporations reported this section in its present form to the 1875 Convention (*Journal*, pp. 694-95). On second reading a motion to strike the section lost (*Journal*, p. 790). An amendment was offered to add after “Gulf Coast” the words “Red River, Sulphur, Caddo Lake and its tributaries.” An amendment to this amendment was offered to insert “and all other rivers and lakes in the State.” Both lost. (*Journal*, p. 791.) On third reading an amendment was offered to add “provided, such appropriation shall only be made by two-thirds vote

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of both houses of the Legislature.” It too lost. (*Journal*, p. 792.)

The section has remained untouched since 1876.

Explanation

Section 8 has been construed to authorize aid by means other than donation of the public domain. By the time any action was taken by the legislature to subsidize the construction of seawalls, the public domain had been exhausted. In the case of *City of Aransas Pass v. Keeling* (112 Tex. 339, 247 S.W. 818 (1923)), however, the supreme court approved legislation which donated eight-ninths of state ad valorem taxes collected on property in San Patricio County (which includes Aransas Pass) for a period of 20 years. These taxes were to supplement city taxes and were dedicated to paying off bonds issued to build seawalls and breakwaters. The attorney general refused to approve the bonds, contending that the legislation violated the various grants and loans prohibitions of the constitution (*e.g.*, Art. III, Secs. 50 and 51). The court sustained the legislation, citing Section 8 for the proposition that the legislature was authorized to aid Gulf Coast cities and counties for seawall construction by grant of the public domain or anything else.

In *City of Port Lavaca v. Bauer* (243 S.W.2d 424 (Tex. Civ. App.—El Paso 1951, writ *ref'd n.r.e.*)), the court upheld a proposed expenditure of funds for storm drains financed by a state tax remission similar to that approved in *Aransas Pass*. To taxpayer Bauer's complaint that the storm drains were not integrally related to Port Lavaca's seawalls, the court replied that the storm drains were designed to alleviate the “calamitous overflows” resulting from sea spray and torrential rains associated with hurricanes and therefore came within the purpose of Section 8.

Comparative Analysis

Apparently this provision is unique to Texas.

Author's Comment

The 1875 Convention's real intent in including Section 8 is lost in time, and the court's obscure opinion in *Aransas Pass*, in which it equated the phrase “in such mode as may be provided by law” with “by any other grant device dreamed up by the legislature,” does not impart confidence that it will ever be found. The court did opine that grants of public money for seawall construction served a public purpose, and although this eminently correct statement has never been relied on by another Texas court, the statement (coupled with current meaning of the public purpose doctrine) makes it clear that Section 8 is no longer needed. (See the annotation of Art. III, Secs. 44, 50, and 51 for discussion of the public purpose doctrine.)

Sec. 9. PROPERTY EXEMPT FROM FORCED SALE AND FROM TAXATION. The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefor, fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds and all other property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation, provided, nothing herein shall prevent the enforcement of the vendors lien, the mechanics or builders lien, or other liens now existing.

History

The Report of the Committee on Municipal Corporations of the 1875 Convention presented Section 9 as a prohibition solely against forced sale of public property. That is, the section read, as it does now, through the words “from forced

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sale.” Two floor amendments were offered and adopted by voice vote. The first added the words “and from taxation,” thereby laying the groundwork for two confusing supreme court decisions handed down many years later. (These are the *Fertitta* and *Chemical Bank* cases discussed in the *Explanation*. See also the *Author’s Comment*.) The second amendment added the “provided” clause.

In the absence of verbatim debates it is not possible to know why these changes were made. As noted below, no other state appears to have a comparable forced sale provision. This leads to the belief that something unusual had happened; a unique constitutional provision is normally explained by something out of the ordinary that, within the memory of the delegates, had created a significant constitutional problem. Support for this speculation is found in the wording of the proviso added by floor amendment; it seems to be a transitional provision applying only to liens existing at the time. (But see the *Explanation*.)

Even more mystifying is the floor amendment adding “and from taxation.” This was one of two amendments to Article XI offered by the chairman of the Committee on Style and Arrangement. One of his amendments removed from another section an inconsistency with a previously adopted article. The other, “and from taxation,” created confusion with Section 2 of Article VIII, which purports to cover the same subject. Why this delegate of all people would perpetrate this sort of confusion is particularly mystifying. (See the *Author’s Comment* for a speculative answer.)

Explanation

Forced sale. Whatever the reason for a prohibition on forced sale, this part of the section has been of little significance. The legislature has enacted the forced sale substance of the section (Tex. Rev. Civ. Stat. Ann. art. 3837) and provided the same exemptions in other cases: for example, public libraries (art. 3838); property of housing authorities (art. 1269k, sec. 20); and urban renewal property (art. 1269l-3, sec. 12). The last two of these statutory exemptions are not applicable, however, to foreclosure of a mortgage. Nor does Section 9 itself protect public property against foreclosure of a lien voluntarily created. (See *City of Dayton v. Allred*, 123 Tex. 60, 68 S.W.2d 172 (1934).) In short, the law is presumably what it would have been absent the forced sale provision.

It was suggested in the *History* above that the mechanics’ lien proviso reads as if it applied only to liens existing at the time of adoption of the constitution. But if this is correct, then the proposer of the proviso must have feared that without the proviso those existing liens would no longer be enforceable. Or it may be that the proposer feared that any legislative substitute for a lien enforceable by foreclosure and forced sale could not be retroactive to cover preexisting liens.

Actually, Section 37 of Article XVI creates a constitutional mechanics’ and materialmen’s lien. But the supreme court long ago held that that section does not create such a lien on public property. (See *Atascosa County v. Angus*, 83 Tex. 202, 18 S.W. 563 (1892); *City of Dallas v. Loonie*, 83 Tex. 291, 18 S.W. 726 (1892).) This makes good sense, for the purpose of the lien is to help the laborer and vendor secure payment, and the government can easily provide aid by statute short of foreclosure and sale of public property. The solution is to require performance bonds, provide for retention of final payment until all laborers and vendors have been paid, and the like. (See Tex. Rev. Civ. Stat. Ann. arts. 5160, 5472a, 5472b, and 5472b-1.)

Taxes. “Hard cases make bad law” usually refers to a situation such as a poor widow winning her case because the judge does not want to let the richest man in town win. The saying also applies to complex cases in which almost irrelevant propositions suddenly become key issues. This is especially significant if the

proposition concerns a major constitutional policy but the complex case does not. *City of Beaumont v. Fertitta* (415 S.W.2d 902 (Tex. 1967)) is such a case.

In 1929 Beaumont entered into a 99-year lease with Fertitta for some city-owned property. The lease provided for a fixed rent for the first ten years, to be adjusted every ten years thereafter according to the then appraised value of the property. The lease noted Fertitta's contention that the property was not taxable but provided that he would pay an amount equal to the city tax that would be levied if the property were taxable and would pay any state or county taxes levied against the property. The Great Depression came, the rent was too high, and a lease amendment was entered into. (There were two amendments, 1933 and 1935. Only the 1935 amendment is considered here.) The amendment decreased the rent, dropped the formula for recalculating the rent every ten years, and substituted a rent certain that would run until 1968. The great increase in property values after the second world war then made the rent too low. Beaumont sued to invalidate the amendment and reinstate the original rent formula, including payment of an amount equal to city taxes.

One of Beaumont's arguments against the validity of the amendment was that it purported to exempt Fertitta from paying taxes, something Beaumont had no power to do. The tax which Beaumont relied upon is the statutory requirement that property held under a long-term lease is taxable to the lessee if the property is exempt from taxation in the hands of the owner. (See Tex. Rev. Civ. Stat. Ann. art. 7173.) Fertitta's responding argument was that either the property was not exempt from taxation, or if it was exempt the exemption flowed from Section 9 and was a total exemption even if leased.

At this point the court made an error that has created a great deal of confusion over the constitutional status of tax exemption of municipal property. The error was to rebut Fertitta's constitutional argument when the rebuttal was irrelevant. This was true because in the end the court held as a matter of contract law that the 1935 amendment did not represent an agreement to exempt Fertitta from paying the leasehold tax. This being so, it was not necessary to a decision of the case to decide whether article 7173 was applicable, which in turn made it unnecessary to decide whether the property itself was exempt. (Three justices dissented. They disagreed both with the majority's reasoning in rebutting the constitutional argument and the majority's construction of the contract and its amendment.)

Even though the constitutional portion of the opinion appears to have been unnecessary, the court did not write as if that were the case. Thus, *Fertitta* stands for the proposition that the constitution does not require the taxation of any property owned by a municipal corporation. (This comes from Sec. 1 of Art. VIII. See *Explanation* of that section.) Therefore, the legislature may exempt municipal property from taxation whether or not the property is used for a public purpose. This effectively makes a dead letter of the permissible exemption in Section 2 of Article VIII. (See *Explanation* of that section.) Section 9 remains effective as a mandatory exemption of municipal property used only for public purposes.

If one plods through the confusion of the majority and dissenting opinions, the real difference between them seems to be that under the majority opinion the state, county, applicable special districts, and the city of Beaumont can levy a tax upon Fertitta's leasehold but nobody can tax the property as such, whereas under the dissenters' view, all taxing jurisdictions except the city of Beaumont could levy a tax upon the property itself and the city of Beaumont by virtue of its contract could not even tax the leasehold.

Perhaps the most interesting example of the confusion about the meaning of Section 9 is a 1945 case involving a district created under Section 59 of Article XVI. Although Section 9 seems to speak to the "property of counties, cities and towns,"

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the words “all other property devoted exclusively to the use and benefit of the public” were construed to refer to property owned by other political subdivisions. In *Lower Colorado River Authority v. Chemical Bank & Trust Co.*, the supreme court held that the quoted words of Section 9 invalidated a statute that required Section 59 districts and authorities to make payments in lieu of taxes for any property which, at the time of acquisition, was subject to taxation and was used in the generation, transmission, or distribution of electric power. (144 Tex. 326, 190 S.W.2d 48 (1945).) This case also produced a strong dissent. Again, the argument was that the construction given to Section 9 made a dead letter of Section 2 of Article VIII. Note, however, that it was a different letter that went dead. Whereas *Fertitta* removed the limitation in Section 2 restricting tax exemption to public property used for a public purpose, the *Chemical Bank* case took away the legislature’s power *not* to exempt public property. It should be noted, however, that the dissenters did not rely upon the words “counties, cities and towns”; their argument was that “all other property” referred to the class enumerated—“such as public buildings, fire engines and the furniture thereof, . . . [and] public grounds.” (No one seems ever to have speculated about what furniture a fire engine has.) The dissenters were relying upon the doctrine of *ejusdem generis*—that is, a general term following particular and specific words covers only objects within the class described by the specific words. Apparently, they did not recognize that *ejusdem generis* is applicable only if the entire sentence is read as dealing with the property of counties, cities and towns. The sentence can be read to cover two classes: (1) property owned by counties, cities, and towns and (2) property devoted exclusively to the use and benefit of the public no matter who owns it. Nobody has ever read the sentence this way, a construction that would create still more dead letters in Section 2.

Any way one reads Section 9, the addition of the words “and from taxation” created a great many problems for the courts. (Both the *Fertitta* and *Chemical Bank* cases discuss earlier cases that struggled with the problem of reconciling the permissible exemption of Sec. 2 with the mandatory words of Sec. 9.)

One final technical point should be made. It has been held that a special assessment for paving a street is not enforceable against a school district. (*City of Garland v. Garland I.S.D.*, 468 S.W.2d 110 (Tex. Civ. App.—Dallas 1971, *writ ref’d n.r.e.*.)) But if the assessment is in the nature of a charge for benefits received, Section 9 offers no protection. (See *Wichita County Water Imp. Dist. No. 2 v. City of Wichita Falls*, 323 S.W.2d 298 (Tex. Civ. App.—Fort Worth 1959, *writ ref’d n.r.e.*) (*using irrigation services*); *Bexar County v. City of San Antonio*, 352 S.W.2d 905 (Tex. Civ. App.—San Antonio 1961, *writ dismissed*) (charge for sewer service).) The distinction seems a narrow one. The controlling point apparently is that the school district may have benefited from the street paving but did not ask to receive the benefit.

Comparative Analysis

No other state constitution appears to have a comparable provision concerning forced sale. For tax exemption of public property see the *Comparative Analysis* of Section 2 of Article VIII.

Author’s Comment

As indicated above this section was in bad shape as originally drafted. Dropping in the words “and from taxation” was really disastrous. That this happened on the next to the last day of the Convention of 1875 leads one to suspect that a number of delegates had had second thoughts about leaving tax exemption of public property in the permissive status set out in Section 2 and that the Chairman of the Committee

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on Style and Arrangement was taking care of these second thoughts in the only manner he could think of so late in the day. The moral is obvious: Don't move proposals through a constitutional convention in a manner that requires last-minute tinkering.

Sec. 11. MAXIMUM FOUR YEAR TERMS OF OFFICE FOR ELECTIVE AND APPOINTIVE CITY OFFICIALS AUTHORIZED. A Home Rule City may provide by charter or charter amendment, and a city, town or village operating under the general laws may provide by majority vote of the qualified voters voting at an election called for that purpose, for a longer term of office than two (2) years for its officers, either elective or appointive, or both, but not to exceed four (4) years; provided, however, that tenure under Civil Service shall not be affected hereby.

Provided, however, if any of such officers, elective or appointive, shall announce their candidacy, or shall in fact become a candidate, in any general, special or primary election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.

A municipality so providing a term exceeding two (2) years but not exceeding four (4) years for any of its non-civil service officers must elect all of the members of its governing body by majority vote of the qualified voters in such municipality, and any vacancy or vacancies occurring on such governing body shall not be filled by appointment but must be filled by majority vote of the qualified voters at a special election called for such purpose within one hundred and twenty (120) days after such vacancy or vacancies occur.

History

This section was adopted in 1958. At the same election, Article XVI, Section 65, was also amended to provide for automatic vacation of the office of a county, district, or precinct officer who becomes a candidate for another office with more than one year remaining in his present term. (See the *Explanation* of that section.)

Explanation

This section permits cities, towns, and villages by majority vote of their residents to extend the terms of their elective or appointive officers from two years to up to four years.

Section 30 of Article XVI would otherwise limit these terms to two years. (See the *Explanation* of Sec. 30.)

When a city votes for longer terms this section has three consequences:

(1) An official who becomes a candidate for another office with more than one year remaining in his unexpired term automatically vacates his present office;

(2) All members of a city's governing body must be elected by a majority vote (rather than by plurality as many charters permit); and

(3) Vacancies on the governing body must be filled by election (rather than appointment) within 120 days after the vacancy occurs.

This is one of a series of amendments permitting longer terms of office for government officials. In 1894 the railroad commissioners were given six-year terms. (See Art. XVI, Sec. 30.) In 1928 six-year terms were authorized for school board trustees and members of the State Board of Education. (See Art. VII, Secs. 8 and 16.) In 1954 numerous articles were amended to increase from two to four years the terms of county, district, and precinct-level officials. In 1972, Sections 4, 22, and 23 of Article IV were amended to lengthen to four years the terms of the governor, attorney general, comptroller, treasurer, and land commissioner.

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Nationally, the most frequently specified term of office for city councilmen in cities over 5,000 population is four years, whereas, in Texas as of 1971 two years was still the more favored term. Longer terms for city officials (or other officials) relieves them from the burden of frequent campaigning, gives them more time to plan and develop comprehensive programs, and permits emphasis on long-range goals and results. Job security of appointive officials is increased, resulting in more efficient, capable government administration. Two of the three requirements listed above for a city which chooses longer terms are intended to meet the objection that officeholders with longer terms become unresponsive to the majority will. The requirement of automatic resignation recognizes that one campaigning for another office may neglect his duties to the office he holds. (The pros and cons of longer terms for municipal officials are drawn from J. Phillips, *Municipal Government and Administration in America* (New York: MacMillan, 1960). The data on Texas cities come from a survey conducted by the Texas Municipal League in November 1971.)

The attorney general has ruled that the automatic vacancy provision of Section 11 does not apply to city officers whose terms have not been extended beyond two years. (Tex. Att'y Gen. Op. No. M-586 (1970).)

Comparative Analysis

Kentucky, Missouri, Virginia, and Ohio have constitutional provisions limiting to four years the terms of city officials. Colorado prescribes two-year limits for city officials not otherwise covered in its constitution. The *Model State Constitution* is silent on municipal terms of office.

Author's Comment

The length of terms of city offices, whether they are elective or appointive, and methods for filling vacancies are matters best left to local determination. Whether the city of Austin desires two, three, or four-year terms for its councilmen, for example, is a matter of little or no concern outside Austin. At most the state legitimately might require that local governments be representative in form, but this requirement could as easily be statutory.

Provisions discouraging local government officials from running for another office while a year or more remains in their present term perhaps stand on a different footing. One may conclude, for example, that campaigning for the new office leads to neglecting the duties of the old, and that preventing this neglect is important enough to merit inclusion in the constitution. If this is so, however, one may wonder why the governor, attorney general, and other statewide elected officials were not subjected to the same constitutional discouragement when their terms were increased to four years in 1972. Perhaps, as with members of the legislature, congressmen, and U.S. Senators, certain of whom have been known to use their office to run for another, these officials are capable of performing well in two jobs at once.