THE CONSTITUTION OF THE STATE OF TEXAS:

An Annotated and Comparative Analysis

THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS

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Participating Agencies:

Texas Constitutional Revision Commission of 1973

Constitutional Convention of 1974

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Texas Advisory Commission on Intergovernmental Relations

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Our constitution is the basic contract between the people of Texas and their government; it is essential that we all understand the terms of that contract.

W. Page Keeton
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FOREWORD

Initial research on this study began in 1972. The purpose was to provide information to aid the constitutional revision process that was started by a vote of the people of Texas in that year. The results of that research are preserved in this two-volume document entitled *The Constitution of the State of Texas: An Annotated and Comparative Analysis*, referred to hereafter as the *Annotation*. (The text of the constitution contained in these volumes is current through the constitutional amendment election of April 22, 1975.)

The *Annotation* consists of two types of information. First, there is a factual presentation of the origins, historical development, and contemporary meaning of each section of the Texas Constitution. This explanatory material is of continuing value to legal scholars or anyone else interested in understanding more about any part of the constitution. Making this information available to the public is the principal reason for publication of the *Annotation*.

The *Annotation* also contains interpretive comments on each section by the authors, who were extended the freedom of expression necessary to comment on the utility of each provision so long as these judgments were expressed in a separate paragraph clearly labeled "Author's Comment." The authors' comments were included in this publication to preserve the historical integrity of the draft versions of the *Annotation* used during the revision process. The "Author's Comment" sections are the views of the individual authors alone, and they do not in any way represent positions of the participating organizations.

George D. Braden is the primary author and also the editor-in-chief of this annotated presentation of the Texas Constitution. A former Associate Professor of Law at Yale University and a distinguished legal scholar, Mr. Braden is recognized nationally as an authority on constitutional law. His *The Illinois Constitution: An Annotated and Comparative Analysis*, coauthored by Rubin G. Cohn, has been acclaimed a unique contribution to the understanding of state constitutions.

To assist in this endeavor, Mr. Braden assembled a most competent group of coauthors. The team of authors takes the reader through an article-by-article review of the constitution in a style that is appropriate to its purposes of assisting the legal scholar and enlightening the interested citizen or governmental practitioner. To their credit, the authors enliven the text with bits of the wit and humor that occasionally adorn the political process.

Management of the finances and work flow of the project and responsibility for maintaining the good spirits of the authors through five years of labor have rested with Katherine Bennett. She was assisted first by Steve Bickerstaff, then John Potter of the Texas Legislative Council and by Glen Provost of the University of Houston. Others who assisted with various phases of the management of the project include Philip Barnes, Lorraine Camp, Brenda Lee, and Louise Winecup. John Bebout, formerly of the University of Houston, was first to recognize the value of the work and was inspirational in his continuous support of the project.

The participating organizations are pleased to make this information available to the people of Texas.

Austin, Texas
August 1977

James F. Ray
Texas Advisory Commission on
Intergovernmental Relations

PREFACE

I began work on this project in January 1972. Now, over five years later, the project is finished. This requires a bit of explanation. The original assumption was that the *Annotation* could be completed and published in time to provide copies to the delegates to the 1974 Constitutional Convention when it convened in January of that year. (I even thought I could do it all myself; that pipe dream went the way of six, now seven, coauthors.) When the convention convened, we were able to provide the delegates with a loose-leaf computer printout of a draft of the *Annotation.* After the convention ended, work began on revision and final editing. Unfortunately, there was now no absolute deadline and the work slowed. (Procrastination is an occupational hazard of lawyers; strict deadlines are a must.) Moreover, enough time kept passing to require significant rewriting and updating.

This project, an annotated and comparative analysis of the Texas Constitution, was designed to be a research tool for the delegates to the Constitutional Convention. There were, therefore, certain ground rules to be followed. First, every effort was made to make the *Annotation* understandable to the layman. Second, in addition to the normal purpose of an annotation—to explain the meaning of the constitution as it has evolved—the authors were charged with providing an appropriate historical background for each section, with comparing the section with provisions in other state constitutions, and with providing any general comments that the author thought might be useful to the delegates. Third, the *Annotation* was not to be the exhaustive, comprehensive coverage of all possible constitutional issues with all relevant citations that a practicing lawyer might expect. As revised, these volumes remain what they were originally designed to be—a research tool for a layman or lawyer who wants a general, albeit accurate, understanding of a particular constitutional provision.

Had the constitutional revision effort succeeded, this *Annotation* would be of little more than historical interest. As it is, the authors are confident that the layman will find the *Annotation* a useful explication of the fundamental charter of Texas and that the practicing lawyer will find the *Annotation* an adequate first source for whatever research is called for concerning a Texas constitutional question.

For the benefit of my coauthors and myself, I must include a caveat to protect us from the inevitable "nit-pickers": There is no uniform cut-off date for the "Explanation" of the sections annotated. The several authors finished their revisions at different times. Thus, in some instances a court case handed down in the middle of 1976 may be cited while in other instances nothing that occurred after 1974 is discussed. This is particularly a problem with the Bill of Rights because the United States Supreme Court tends to say something new every hour on the hour. (It is not true that we authors planned it this way so that we would have a perfect alibi if someone spotted a failure to discuss a recent case.) In general, the *Annotation* is complete through 1973. For developments after that date, the reader is given no more guarantee than any author writing about a fast-moving legal subject can give his reader as of the day the presses begin to roll.

I should also point out that it was decided that we would not include new material related to the constitutional revision effort itself. In general, the only updating is concerned with the judicial or other gloss on the several constitutional provisions. (There are exceptions, of course. Section 67 of Article XVI, for example, is a new section added in 1975. Likewise, Section 24 of Article III was amended in 1975.) The point is that the authors resisted the temptation to comment on what the revisionists did; the authors' comments are based on what was in 1973, not also on what might have been. (There is one exception. In commenting on Section 67 of Article XVI, the section added in 1975, I do

comment on what might have been.)

At this point I have to stop prefacing things. There are eight authors of this *Annotation*; obviously, we would have had a terrible time trying to produce a collegiate preface. Therefore, two things that normally appear in a preface are set forth separately. One is a table specifying who wrote and revised what. The other is a table of acknowledgements by each author of those who assisted, consoled, or otherwise enabled him to finish the job. Having just written this, I must make an exception and set forth those acknowledgements that are common to all authors: To John E. Bebout, formerly with the Institute for Urban Studies of the University of Houston, who conceived, nurtured, and pushed this project until there was enough momentum to carry it along; to James F. Ray, who added to John's momentum whatever was needed to keep the project from faltering; to Katherine S. Bennett, who patiently and carefully directed the momentum; to Louise H. Winecup, who joined Katherine toward the end in directing the momentum from manuscript to printed page; to Lorraine Camp who assisted with technical editing in the effort to give the work of eight authors some degree of stylistic consistency; to William P. Braden and Stephen T. Scott, who checked the citations, the most thankless job in the preparation of a legal publication; and to Susan Reid, who prepared the index, the most thankless job in the preparation of any publication.

George D. Braden

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By George D. Braden: To the staffs of the Texas Advisory Commission on Intergovernmental Relations and the Institute for Urban Studies of the University of Houston, who, over the years, cheerfully supplied esoteric and other information not readily available outside of Texas; to James W. McGrew of the Texas Research League, who was of invaluable assistance in guidance through the minefields of the Texas tax system; and to Janet Hulsopple, who probably spent more years typing away about Texas government than any other non-Texan typist.

By David A. Anderson: To Sarah Bennett and Paula Phillips for their many hours of assistance in researching sections in Articles V and XVI. The project benefited not only from their able minds, but also from their endurance and good humor.

By R. Stephen Bickerstaff: To Judy Hemme for her invaluable assistance.

By Darrell Blakeway: To George Braden for his guidance and patience.

By Seth S. Searcy III: To Marilyn Goode and H. Phillip Campbell who, while both students of the University of Texas School of Law, helped with the considerable library research.

TABLE OF CONTENTS
VOLUMES 1 AND 2

TABLE OF CONTENTS, VOLUMES 1 AND 2, Continued

TABLE OF CONTENTS, VOLUMES 1 AND 2, Continued

*Through error two sections were given the same number.

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ARTICLE V—JUDICIAL DEPARTMENT

ARTICLE VI—SUFFRAGE

ARTICLE VII—EDUCATION—THE PUBLIC FREE SCHOOLS

*Through error two sections were given the same number.

*Through error two sections were given the same number.

ARTICLE XI—MUNICIPAL CORPORATIONS

ARTICLE XII—PRIVATE CORPORATIONS

ARTICLE XIII—*Repealed August 5, 1969*

ARTICLE XIV—PUBLIC LANDS AND LAND OFFICE

ARTICLE XV—IMPEACHMENT

ARTICLE XVI—GENERAL PROVISIONS

TABLE OF CONTENTS, VOLUMES 1 AND 2, Continued

AUTHORS' BIOGRAPHICAL DATA

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Mr. Anderson's publications include: "Libel and Press Self-Censorship," 53 *Texas Law Review* 422 (1975); "The Issue Is Control of Press Power," 54 *Texas Law Review* 271 (1976); "The Selective Impact of Libel Law," *Columbia Journalism Review,* May-June 1975.

R. Stephen Bickerstaff, who received both his undergraduate and law degrees from The University of Texas, serves as Chief of the State and County Affairs Division, Office of the Attorney General of Texas. Mr. Bickerstaff's professional experience includes First Lieutenant in the United States Air Force (1971-1972); President and General Manager, Permian Pontiac, Inc. (1972-1973); Research Associate for the Texas Constitutional Revision Commission (1973); Staff Director for the Finance Committee of the Texas Constitutional Convention (1974); Parliamentarian of the Texas Senate (1975); and Director of the Office of Constitutional Research for the Texas Legislative Council (1974-1975).

Mr. Bickerstaff's publications include: "The Proposed Constitution for Texas," 28 *Southwestern Law Journal* 477 (1975) (coauthor); "Multi-Amendment Revision of the Texas Constitution," 38 *Texas Bar Journal* 705 (1975) (coauthor); "State and Local Finance Implications of the Proposed Constitution," *Public Policy Notes,* Institute for Urban Studies, University of Houston (September 1975).

Darrell Blakeway, who received both his undergraduate and law degrees from the University of Texas, is an attorney engaged in the private practice of law in Austin, Texas in the firm Blakeway, Howell, and Gronquist. Mr. Blakeway's professional experience includes Researcher and Legal Draftsman for the Texas Legislative Council (1969-1970) assigned to the Penal Code Revision Project; Assistant Staff Director of the Texas Penal Code Revision Project (1970-1971); and Legislative Counsel for the Texas Criminal Defense Lawyers Association (1972-1973), where he worked on drafting and passage of the Penal Code and Controlled Substances Act.

George D. Braden, a graduate of Swarthmore College and the Yale Law School, currently serves as Corporation Counsel of the City of Schenectady, New York. Mr. Braden's professional experience includes serving as Assistant and Associate Professor of Law, Yale University (1946-1951); Project Director, Constitution Project, Connecticut Commission on Government Organization (1949-1950); Executive Director, Committee of the Legislature, New York Constitutional Convention (1967); Special Consultant, Illinois Constitutional Convention (1970); and Style and Drafting Consultant, Texas Constitutional Convention (1974).

Mr. Braden is the author of several books and articles relating to constitutional law including: *The Illinois Constitution: An Annotated and Comparative Analysis* (with Rubin G. Cohn) (1969); *Citizens' Guide to the Texas Constitution* (1972); *Citizens' Guide to the Proposed New Texas Constitution* (1975); "A New Consti-

tution for Connecticut" (with Fred V. Cahill) published in the *Connecticut Bar Journal* (1950); and "The Search for Objectivity in Constitutional Law," *Yale Law Journal* (1948).

Ron Patterson, who received both his undergraduate and law degrees from The University of Texas, is an attorney on the staff of the Texas Legislative Council. Mr. Patterson is the coauthor of the "Practice Commentary" to the Texas Penal Code in *Vernon's Texas Penal Code Annotated* (1974) and *The Texas Constitution: A Reorganization and Simplification Without Substantive Change* (1973). Most recently, he directed the Legislative Council's Property Tax Code Project, which prepared a proposed Property Tax Code for submission to the legislature in 1977.

Seth S. Searcy III, who received both his undergraduate and law degrees from The University of Texas, is an attorney with broad experience in the public law area and has particular expertise in law revision. Mr. Searcy's professional experience includes five years on the staff of the Texas Legislative Council (1965-1970), where he directed preparation of the Business & Commerce Code, the first of 26 projected recodifications of Texas statutory law; Staff Director of the Texas Penal Code Revision Project (1967-1971); lecturer at the Lyndon B. Johnson School of Public Affairs, The University of Texas at Austin (1971-1973); and President of Law Research Corporation of Texas, an Austin-based consulting firm specializing in legally oriented research and publications (1973-1975).

Mr. Searcy has authored and coauthored several legal books and articles, including: *The Texas Constitution: A Reorganization and Simplification Without Substantive Change* (1973); "Practice Commentary," *Vernon's Texas Penal Code Annotated* (1974); and *Privacy and Public Records,* a background paper prepared for the Texas Advisory Commission on Intergovernmental Relations.

Thornton C. Sinclair, a graduate of Columbia Law School who also holds a doctorate in government from Harvard University, is Professor Emeritus and former chairman of the Political Science Department at the University of Houston.

Dr. Sinclair has written extensively on the Texas Constitution and the Texas system of criminal justice. His publications include monographs entitled *Personal Rights and Liberties* (1960); *The Selection of Judges in Texas* (1965); *The Criminal Justice System in Texas* (1971); and several articles published in the *Houston Law Review* on the Supreme Court of Texas and the selection of judges in Texas.

Richard A. Yahr, a graduate of The University of Texas School of Law, is an attorney with the Texas Legislative Council. Mr. Yahr has engaged in the private practice of law (1970-1973) and served as assistant city attorney for the city of Dallas (1973-1975). His professional experience also includes serving as staff attorney for the State Bar of Texas Committee on Revision of the Penal Code (1969-1970), style and drafting consultant for the 1974 Texas Constitutional Convention, and legal counsel to the House Committee on Constitutional Revision during the 64th legislative session.

ARTICLE AND SECTION AUTHORSHIP

Article	Sections	Author
Preamble	———	Thornton C. Sinclair
I. Bill of Rights	All except:	George D. Braden (Revision) Thornton Sinclair (Original Draft)
	9 & 10	Seth S. Searcy III (Revision)
II. The Powers of Government	All	R. Stephen Bickerstaff (Revision) Thornton Sinclair (Original Draft)
III. Legislative Department	All except:	Seth S. Searcy III
	23a, 44, 48a-49b, 50, 51, 51a, 51d-52, 52d-53, 55-57, 59-61 (1952), & 62-65	George D. Braden
	45	David A. Anderson
	47, 49e, 50a, 51b, 51c, 52b, 54, & 58	Darrell Blakeway
	49c-49d—1, 50b, & 50b—1	Richard A. Yahr
	61 (1954)	Ron Patterson
IV. Executive Department	All except:	Ron Patterson
	11a	David A. Anderson
	26	George D. Braden
V. Judicial Department	All except:	David A. Anderson
	Portions of 18 (other than "acting as a court")	George D. Braden
	20, & 21, 23 & 24	Darrell Blakeway
VI. Suffrage	All	Richard A. Yahr
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	Portions of 3 (other than "school districts" & "spending") & 17 (other than "the tax proceeds")	George D. Braden
	16 (1928)	Ron Patterson
VIII. Taxation & Revenue	All	George D. Braden
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XI.	Municipal Corporations	All except: 2, 8, & 11	George D. Braden Darrell Blakeway
XII.	Private Corporations	All	Darrell Blakeway
XIII.	Spanish & Mexican Land Titles	Repealed	———
XIV.	Public Lands & Land Office	All	Ron Patterson
XV.	Impeachment & Address	All except: 8	Darrell Blakeway Ron Patterson (Revision) Darrell Blakeway (Original Draft)
XVI.	General Provisions	All except: 6, 21-23, 25, 26, 41, 48, 53, & 59 30-30b 44 62, 63, 66, & 67	David A. Anderson Darrell Blakeway Ron Patterson Seth S. Searcy III George D. Braden
XVII.	Mode of Amending the Constitution of the State	1 2	Richard A. Yahr R. Stephen Bickerstaff (Revision) Richard A. Yahr (Original Draft)

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Author	Article	Sections
George D. Braden	I. Bill of Rights (Revision)	All except 9 & 10
	III. Legislative Department	23a, 44, 48a-49b, 50, 51, 51a, 51d-52, 52d-53, 55-57, 59-61 (1952), & 62-65
	IV. Executive Department	26
	V. Judicial Department	Portions of 18 (except "acting as a court," "immunity from civil liability," and "review of decisions of commissioners court"), 20, & 21
	VII. Education	Portions of 3 (except "school districts" & "spending") & 17 (except "the tax proceeds")
	VIII. Taxation & Revenue	All
	XI. Municipal Corporations	All except 2, 8, & 11
	XVI. General Provisions	62, 63, 66, & 67
David A. Anderson	III. Legislative Department	45
	IV. Executive Department	11a
	V. Judicial Department	All except 18 (other than "acting as a court") 20, 21, 23, & 24
	XVI. General Provisions	1, 2, 5, 8-12, 14-20, 24, 27, 28, 31, 33, 37, 39, 40, 43, 47, 49-52, 56, 61, 64, & 65
R. Stephen Bickerstaff	II. The Powers of Government	Revision of all
	XVII. Mode of Amending the Constitution of the State	Revision of 2
Darrell Blakeway	III. Legislative Department	47, 49e, 50a, 51b, 51c, 52b, 54, & 58
	V. Judicial Department	23 & 24
	IX. Counties	All
	X. Railroads	All

Author	Article	Sections
Darrell Blakeway	XI. Municipal Corporations	2, 8, & 11
	XII. Private Corporations	All
	XV. Impeachment & Address	All except revision of 8
	XVI. General Provisions	6, 21-23, 25, 26, 41, 48, 53, & 59
Ron Patterson	III. Legislative Department	61 (1954)
	IV. Executive Department	All except 11a & 26
	VII. Education	16 (1928)
	XIV. Public Lands & Land Office	All
	XV. Impeachment & Address	Revision of 8
	XVI. General Provisions	30-30b
Seth S. Searcy III	I. Bill of Rights	Revision of 9 & 10
	III. Legislative Department	All except 23a & 44-65
	XVI. General Provisions	44
Thornton Sinclair	Preamble	All
	I. Bill of Rights	Original draft of all
	II. The Powers of Government	Original draft of all
Richard A. Yahr	III. Legislative Department	Original draft of 49c-49d—1, 50b, & 50b—1
	VI. Suffrage	All
	VII. Education	All except 3 (other than "school districts" & "spending"), 16 (1928), & 17 (other than "the tax proceeds")
	XVII. Mode of Amending the Constitution of the State	Original draft of 1 & 2

ABBREVIATIONS FOR PRIMARY REFERENCE SOURCES*

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*Frequently used reference sources. Sources referenced only occasionally are cited in detail in the text and indexed in *Secondary Sources,* beginning on page 861.

REPEALED (OR VACANT) ARTICLE AND SECTIONS

Art. III,	Sec. 42.	*Repealed August 5, 1969*
	Sec. 46.	*Repealed August 5, 1969*
	Sec. 48.	*Repealed August 5, 1969*
	Secs. 48a, 48b.	*Repealed April 22, 1975*
	Sec. 48c.	*Vacant*
	Secs. 51-e, 51-f.	*Repealed April 22, 1975*
	Sec. 52-a.	*Vacant*
	Sec. 52-c.	*Vacant*
Art. VII,	Sec. 3a.	*Repealed August 5, 1969*
	Sec. 7.	*Repealed August 5, 1969*
Art. VIII,	Sec. 12.	*Repealed August 5, 1969*
Art. IX,	Sec. 3.	*Repealed August 5, 1969*
	Sec. 10.	*Vacant*
Art. X,	Sec. 1.	*Repealed August 5, 1969*
	Secs. 3-9.	*Repealed August 5, 1969*
Art. XI,	Sec. 10.	*Repealed August 5, 1969*
Art. XII,	Secs. 3-5.	*Repealed August 5, 1969*
	Sec. 7.	*Repealed August 5, 1969*
Art. XIII		*Repealed August 5, 1969*
Art. XIV,	Secs. 2-8.	*Repealed August 5, 1969*
Art. XVI,	Secs. 3, 4.	*Repealed August 5, 1969*
	Sec. 7.	*Repealed August 5, 1969*
	Sec. 13.	*Repealed August 5, 1969*
	Sec. 29.	*Repealed August 5, 1969*
	Sec. 32.	*Repealed August 5, 1969*
	Secs. 34-36.	*Repealed August 5, 1969*
	Sec. 38.	*Repealed August 5, 1969*
	Sec. 42.	*Repealed August 5, 1969*
	Secs. 45, 46.	*Repealed August 5, 1969*
	Secs. 54, 55.	*Repealed August 5, 1969*
	Secs. 57, 58.	*Repealed August 5, 1969*
	Sec. 60.	*Repealed August 5, 1969*
	Secs. 62, 63.	*Repealed April 22, 1975*

THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS

PREAMBLE

Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution.

History

Each Texas State Constitution has been preceded by a brief preamble. Until 1876 the wording was essentially that of 1845 if we subtract the transitional clause (in brackets below) which refers to the admission of Texas to the federal union. The 1845 preamble read: "We The People of the Republic of Texas, acknowledging with gratitude the grace and beneficence of God, in permitting us to make choice of our form of government, [do in accordance with the provisions of the Joint Resolutions for annexing Texas to the United States, approved March 1st, one thousand eight hundred and forty-five,] ordain and establish this Constitution." In 1861 the "State" was substituted for "Republic" but thereafter constitution makers settled for "people of Texas" until "State" reappeared in the present preamble. Although the 1875 wording differs somewhat from that of earlier preambles the purpose seems to be the same, *i.e.*, a reference or appeal to God.

Explanation

No Texas cases refer to or construe the preamble. We do know from references to the longer preamble of the United States Constitution that a preamble is not a part of the constitution. Literally it goes before. Hence a preamble cannot be an independent source of power although it may help in the definition and interpretation of powers found in the body of the constitution. Chief Justice Marshall used the preamble to the United States Constitution as primary textual proof that, in the federal union, the powers of the national government came not from the states but from the people, the same source which the states acknowledged as the origin of their own governmental powers (*McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819)).

The Texas preamble also recognizes the people as the source of state power but the reference is not judicially significant because the fact was never in doubt. Section 2 of the Bill of Rights recognizes popular sovereignty in more explicit terms.

Comparative Analysis

Almost without exception state constitutions are preceded by preambles. They are not the source of great controversy.

Author's Comment

The Texas preamble is succinct and modest. Considering the lack of judicial interest in the past and the limited interest in preambles elsewhere the chance that courts in the future may ascribe some significance to the preamble is minimal. For persons disturbed by the growing secularization prescribed by the United States Supreme Court in church-state relationships this reference to the diety may furnish some solace. Perhaps some parts of the Bill of Rights, which are simply statements of political faith or theory, would fit more appropriately in the preamble.

Article I

BILL OF RIGHTS

Introductory Comment

The bill of rights in a state constitution differs from other parts of the constitution. Typically it appears at the very beginning of the constitution, setting the stage in a sense for what is to come. It may recognize the people as the source of the power that succeeding articles entrust to government. When it expresses basic premises upon which government rests it may sound like an extension of the preamble. The main thrust of the bill, however, is to limit government by recognizing certain rights of the individual which government may not infringe. In the Texas Bill of Rights, the sections, with some exceptions, fall in three main categories: (1) statements of political theory regarding the nature of government and its relationship to the governed or to the federal government; (2) enunciations of substantive rights to liberty and property; and (3) enumeration of procedural rights which are partly civil but mainly involved in criminal proceedings and their preliminaries.

History

Every Texas constitution has contained a bill of rights. A 17-section Declaration of Rights appended to the Constitution of 1836 sets forth most of the guarantees found in the present bill. The Constitution of 1845 began with a 21-section Bill of Rights that has served as a more exact model for the subsequent constitutions of 1861, 1866, 1869, and 1876. Although each of these constitutions reflected the political temper of the time—*i.e.*, secession, the outcome of the Civil War, Reconstruction, and victory over the Reconstruction forces—the bill of rights changed very little through that period. Article I of the present constitution did, however, expand to 29 sections. The 1875 Convention changed the emphasis in Section 1 of the 1869 version from federal supremacy to states' rights and dropped the new 1869 sections on equality and slavery. The Bill of Rights was expanded further through the splitting of several sections as well as by the addition of Section 21 on corruption of the blood, forfeitures, and suicide and of Section 22 on treason. Several old guarantees were elaborated or qualified. On several occasions since 1876 the Bill of Rights has been altered by narrow statute-like amendments, once in 1918, once in 1935, and twice in 1956. In 1972 the voters approved a broadly worded equal protection amendment as an addition to the present Section 3.

Philosophical Sources

The principal philosophical sources of our bills of rights are found in the ramifications of the social contract philosophy. To justify resistance to rulers and to the theory that kingship was of divine origin and hence that kings ruled by divine right, various writers constructed a radically different theory to explain the origin and present status of government. According to this theory, people lived at one time in a state of nature without government. In the state of nature, people were subject to natural law which in turn gave them natural rights. For one reason or another people wished to escape from this state of nature. Hence they entered into a contract to form a society and set up a government. In the contract they gave up some of their natural rights to a government which in turn agreed to govern them justly, but the people retained their other natural rights and these rights were beyond the powers of any government. If a government nevertheless ruled unjustly and infringed these rights it had broken the contract. When it nevertheless

persisted, the government ceased to be legitimate and became tyrannical. Hence the people had a right to overthrow it and substitute another.

However artificial this social contract theory may seem today, it was the common intellectual currency of those people in the western world of the 18th century who opposed oppressive government. American leaders knew this philosophy principally through the writings of John Locke. Thomas Jefferson stated the theory in the Declaration of Independence:

> . . . . We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . .
>
> The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.

Although theorists might talk grandly about natural or unalienable rights, saying precisely what they were presented a more difficult and practical problem. Here Englishmen tied the theory to another tradition, that of the historic rights of Englishmen. These, they said, were natural rights. In fact these rights were recognized in English charters of liberty and in the common law. When the colonists came to North America various colonial charters stated that the colonists brought with them the rights of Englishmen. Hence, when, after the Declaration of Independence, the new states began to draw up constitutions it was not surprising that these constitutions frequently contained bills of rights and that the rights listed turned out to be the historic rights of Englishmen. Nor is it surprising that when the new Constitution of the United States was submitted to the people without a formal bill of rights, opponents made this omission their main argument against ratification of the new document. In the ensuing bargain for ratification struck by proponents and opponents of the new United States Constitution, it was agreed that a bill of rights would be added. When we inspect the resulting federal Bill of Rights we find that it, too, consists to a considerable extent of the historic rights of Englishmen at common law. Fearing that some rights might have been omitted from the list, Congress included the Ninth Amendment, a little cited natural law amendment, which says that the preceding Bill of Rights may not be complete and that other rights, too, are retained by the people.

The concept of natural rights presents us with some difficulties. If such rights are simply moral precepts to be discovered by man's reason then obviously everyone can have his own list. A bill of rights, it has turned out, however, is not simply educational or a moral guide. Rather, it consists of individual rights which can be enforced in a court of law against government itself. For this purpose rights have to be fairly specific, and not simply references to some vague unspecified rights which may have existed in the philosophers' construct of a state of nature.

Nevertheless, the quaint words in parts of Sections 2 and 3 of the Texas Bill of Rights about the social contract remind us of the basic premise that government is limited and that individual rights are precious. Judicial attempts to implement the natural rights theory would of course give judges tremendous powers. Although at one time judicial references to the social contract and natural rights were not infrequent, today we experience only rare throwbacks to such language. A conspicuous example is the dissenting opinion of Justice Smith in 1957 (*State v. Richards*, 157 Tex. 166, 180, 301 S.W.2d 597, 608):

Art. I, Introduction

To secure their property was one of the great ends for which men entered society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty—an expression of his freedom as guaranteed inviolate by every American Bill of Rights.

The Federal Problem

How does the Bill of Rights in the United States Constitution affect state government and state bills of rights? John Marshall answered the question in 1833 in the case of *Barron v. Baltimore* (32 U.S. (7 Pet.) 243). The United States Bill of Rights, he said, operated as a limitation upon only the United States government. This has all been changed through judicial interpretation of the Due Process Clause of the Fourteenth Amendment: "No *state* shall deprive any person of life, liberty or property without due process of law." Here is a national guarantee, ultimately enforceable by the United States Supreme Court, of the individual's rights against his own state government. By writing these limitations the framers of the Fourteenth Amendment signaled a radical shift in the intergovernmental relations within the federal system. How radical the shift would be in practice depended upon what specific limitations upon state activity the United States Supreme Court found within the vague contours of "due process of law."

Answers to this question were slow in coming at first but during the last 50 years and particularly during the years of the Warren Court judicial responses have been increasingly rapid and expansive. They have worked a revolution in judicial endorsement of individual rights against state government, shifting the burden of leadership and definition from the states to the United States Supreme Court. Leaders in the doctrinal conflict regarding the meaning of due process in the Fourteenth Amendment were Justices Frankfurter and Black. For the former, due process had no fixed meaning; rather it represented the evolving fundamental concepts of liberty, justice, and fairness essential to our society. Because judicial guidelines for such determination were necessarily vague, he believed that the court should show deference to the states in their application of these concepts. Justice Black, however, discovered to his own satisfaction that those who adopted the Fourteenth Amendment intended to reverse *Barron v. Baltimore* (32 U.S. (7 Pet.) 243 (1833)) and to make the first eight amendments of the Bill of Rights applicable to the states. Hence Black needed only to look at the first eight amendments, discover the meaning which the federal courts had given to them, and apply that meaning to the states. This was called the "doctrine of total incorporation."

In fact, the United States Supreme Court has not opted entirely for either point of view. While some controversy continues, the present answer is mainly that of selective incorporation. As determined from case to case, nearly all of the guarantees in the United States Bill of Rights now apply to the states with the same meaning and form as they apply to the United States government. However, the door remains open to apply less than the full set of federal interpretations regarding a clause of the Bill of Rights or conversely to discover new rights implied from those specifically listed in the first eight amendments. Thus some of the vagueness in the Frankfurter test persists. Indeed, in *Griswold v. Connecticut* (381 U.S. 479 (1965)), a majority of the justices found a right of marital privacy implied in the special guarantees of the first eight amendments and thus applicable to the states. Some of the justices found partial support for this idea of implied rights in the Ninth Amendment, the natural rights character of which has been previously noted. At present, however, the idea of implied federally protected rights against state action is more interesting for its speculative potential than for practical effect. Nevertheless, when the Supreme Court declared the Texas abortion law unconsti-

tutional recently, Justice Blackmun did not close the door on Ninth Amendment arguments. (See *Roe v. Wade,* 410 U.S. 113, 152-53 (1973).)

The doctrine of widespread selective incorporation has presented state courts with special problems. Litigants rely upon similar federal and state guarantees, cite both, and indeed the federal and state guarantees overlap to a very considerable extent. If the state court interprets the state guarantee to mean less than the similar "incorporated" federal guarantee, the result is meaningless, for the litigant must triumph under the federal right because of federal supremacy (U.S. Constitution, Art. VI). Of course, a state court can find greater protection in the state bill of rights, but with an exception to be noted later, state courts have tended to be less generous. Hence not surprisingly state courts have followed the leader, the United States Supreme Court.

There are many reasons why state courts have applied federal interpretations to provisions in state bills of rights similar in wording to the provisions in the United States Bill of Rights. There is the well-established principle of federal supremacy. In addition, the United States Supreme Court is to a considerable extent a constitutional court which year after year during the past generation has spent a considerable part of its energies elaborating the constitutional law of the Bill of Rights. State courts deal with a broad array of subjects in which the law of their bills of rights is a very minor part. Indeed, state courts are often criticized for not even being innovative in the areas of law which they monopolize. One answer is the pressure of time. Thus, following federal interpretation avoids conflict and conserves energy. In recent years the United States Supreme Court has led the way in expanding individual protection against government and the greater conservatism of state courts has left little room for them to outdo their federal counterpart. In Texas, accepting the federal standard has the added advantage of avoiding conflicting interpretations of the state's two highest courts, the Supreme Court of Texas and the Court of Criminal Appeals. Furthermore, it is harder on another score for state courts to develop an independent body of constitutional law. Since state courts are closer to their coordinate branches of government and to their state politics, they may not have the independence that the United States Supreme Court has developed over the years. Any decision may set off a reaction in the state legislature where "corrective" legislation may be passed or a constitutional amendment proposed easily and swiftly. An interpretation of the United States Constitution, so rarely amended, is almost completely immune from reversal by amendment. In contrast, Texas presents a conspicuous example of easy and frequent change by amendment.

Education itself undergirds federal leadership in constitutional interpretation. Of course, there is general talk about states' rights and state independence. Educational specifics, however, focus on the federal example. In the law schools themselves future lawyers and judges typically study United States constitutional law. They learn how great and lesser justices of the United States Supreme Court have interpreted the United States Constitution and they dip into the great mass of literature which deals with these subjects. But where are the courses in state constitutional law, where are the twentieth century treatises on state constitutions, and where are the articles explaining them? The answer is that, with very rare exception, they simply do not exist.

Recent Texas Developments

A review of recent court of criminal appeals decisions reveals an interesting phenomenon in federal/state constitutional relations. In cases of criminal procedural due process the court frequently fails to refer to the appropriate section of

the Texas Bill of Rights; case after case turns on the appropriate amendment of the United States Constitution as interpreted by the United States Supreme Court. In some instances it seems probable that neither the attorneys involved nor the court considered the Texas Constitution. This is surely the case in questions of obscenity versus freedom of the press. (See, for example, *Goodwin v. State,* 514 S.W.2d 942 (Tex. Crim. App. 1974); *West v. State,* 514 S.W.2d 433 (Tex. Crim. App. 1974); *Soto v. State,* 513 S.W.2d 931 (Tex. Crim. App. 1974). See also *Locke v. State,* 516 S.W.2d 949 (Tex. Civ. App.–Texarkana 1974, *no writ*).) None of these cited cases mentions the Texas Constitution.

In some cases it is unclear whether the court of criminal appeals is using federal cases as examples of the interpretation to be given to the applicable Texas provision or is simply following the United States Supreme Court. (See, for example, *McDaniel v. State,* 524 S.W.2d 68 (Tex. Crim. App. 1975) (self-incrimination); *Jones v. State,* 514 S.W.2d 255 (Tex. Crim. App. 1974) (double jeopardy); Ex parte *Scelles,* 511 S.W.2d 300 (Tex. Crim. App. 1974) (same).)

On occasion, the court of criminal appeals carefully distinguishes between the procedural requirements of the United States Constitution and the requirements of the Texas Constitution. In *Abron v. State* (523 S.W.2d 405 (Tex. Crim. App. 1975)), the question was whether a defendant's attorney must be allowed to inquire of prospective jurors whether they were prejudiced against a particular race. The state contended that the trial judge had met the requirements imposed by the United States Supreme Court, but the court of criminal appeals observed that, "even if the State's contention is valid . . . , there remains the issue of whether our constitutional and statutory standards were met" (p. 408). The court held for the defendant.

The significance of carefully distinguishing between the constitutional protections imposed by the United States Constitution as interpreted by the United States Supreme Court and the protections guaranteed by a state constitution has recently been stressed by Mr. Justice Marshall. In *Texas v. White* (423 U.S. 67), decided on December 1, 1975, the Supreme Court reversed a Fourth Amendment search and seizure holding by the court of criminal appeals because the latter had misunderstood an opinion of the former. Mr. Justice Marshall concluded his dissent by observing that "it should be clear to the court below that nothing this Court does today precludes it from reaching the result it did under applicable state law." (p. 72. Note that the state petitioned for certiorari in this case. This aspect of the case is discussed in the *Explanation* of Sec. 26 of Art. V, which prohibits state appeals in criminal cases.) Justice Marshall is saying, in effect, that if the United States Supreme Court drops the torch of freedom, state courts are free to pick it up and carry it forward. Interestingly enough, Mr. Justice Brennan made the same plea a week later. ". . . it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution." (See *Michigan v. Mosley,* 423 U.S. 96 (dissenting).) Justice Klingeman of the court of civil appeals in San Antonio recently made a similar observation in a case involving a juvenile offender certified as an adult for trial in a criminal district court. The state relied on the due process requirements of In re *Gault* (387 U.S. 1 (1967)). Justice Klingeman held for the juvenile, observing: "While *Gault* establishes a rudimentary floor of due process guarantees with respect to adequate and proper notice, it in no way restricts the legislature from going beyond this and achieving a higher plane by enacting additional notice requirements aimed at further protecting a juvenile's due process rights." (See *R———— K———— M———— v. State,* 520 S.W.2d 878,880 (Tex. Civ. App.–San Antonio 1975) (footnote omitted) *aff'd,* 535

S.W.2d 676 (Tex. 1976). It is to be noted, of course, that Justice Klingeman spoke only of the legislature's power; whether he would have gone beyond *Gault* in the name of the Texas Bill of Rights is another question.

The foregoing discussion has been limited to cases involving "procedural" due process. This is where the action is these days in the United States Supreme Court. What is known as "substantive" due process is different. Forty years ago the Supreme Court abandoned substantive due process in the area of economic regulation. Here state courts pretty much have to rely on a state due process clause if they wish to hold economic regulation invalid. (See the *Explanation* of Sec. 19 of Art. I.)

Options Open

What then should be done about the Texas Bill of Rights? Both the recent Constitutional Revision Commission and the Constitutional Convention of 1974 adhered so strictly to the constitutional command—"The Bill of Rights of the present Texas Constitution shall be retained in full."—that not a comma was changed. Any further revision effort should exclude this command or at least express the sentiment in a more flexible formulation. The experience of recent constitutional conventions in the United States demonstrates that there is no danger that the Bill of Rights will be weakened. (Dropping provisions like Secs. 20 and 21 would hardly be considered weakening the Bill of Rights.) The normal revision effort in other states has produced a stronger bill of rights.

If, in the course of a new revision effort, the Bill of Rights is to be subjected to the same scrutiny as any other article of the constitution, there are several options open to the drafters:

(1) *Eliminate the Bill of Rights.* Since the protection of fundamental individual rights has been nationalized by the doctrine of incorporation, it is argued, a state bill or rights has become unnecessary. Several responses are in order. As the tide of constitutional adjudication has recently brought ever increasing federal protection of individual rights and liberties so the tide might recede. If the United States chose to protect fewer rights on a national basis, the Texas courts might wish to continue the protection at the state level. Indeed, the United States Supreme Court, which protected economic interests on a large scale before 1937, has left this function to other branches of the government unhindered by national judicial interference. Texas courts, however, have continued to exercise some judicial review in these areas. Furthermore, not every guarantee in the Texas Bill of Rights has an incorporated federal counterpart.

(2) *Rewrite the Texas Bill of Rights in exactly the same language as the federal Bill of Rights.* This proposal involves a number of considerations. It would reinforce the tendency to treat state guarantees, even though drawn in different language, the same as the federal guarantees. It would eliminate neglected differences in language which might be seized upon by persuasive litigants and open the door to unexpected and unwanted judicial decisions. It would improve style by substituting the concise language of the federal bill for the often rambling, overlapping, and sometimes unclear wording of the Texas bill. It would remedy the results of past Texas practice, which has seemed to be: add to the Bill of Rights if you wish but never eliminate a section or a word. If the state courts have attached their own special interpretations, as that of protecting property rights, to different language in the Texas bill they could continue such interpretation under the new wording. Such rewriting would eliminate narrow, statute-like sections and make it easier to

avoid overlap with other parts of the constitution in such areas as taxation and jury guarantees.

Some arguments run against this change. Although the opportunity has apparently been neglected in Texas, a state bill of rights different from the federal bill has educational value. The opportunity to teach these special values and their history might be lost if the state language were repealed. Moreover, making the state bill the same might increase the tendency of state courts to follow the United States Supreme Court. In some areas and at some future time the Texas courts might be encouraged to strike out for themselves if the old language were retained. Then, too, as we have noted, the Texas bill does guarantee some values not covered by the federal bill. These might be lost, although using federal language would not preclude additional articles.

(3) *Improve style.* Under this option the reviser would retain the substance of the present Bill of Rights but rewrite and rearrange it. This would mean shifting to the preamble statements of general purpose or theory which are or should be no more than aids to construction. It would also mean the elimination of overlap between different sections within the Bill of Rights and between the bill and other articles of the constitution. Certainly the substance of many rights could be stated in simpler and more understandable terms. A reviser might consider whether phrases or sentences which have not been construed by Texas courts as protections for litigants in a hundred or more years are redundancies or anachronisms. If words of the Bill of Rights do not mean something specific and independent to the reviser, their retention is an invitation to future judges and lawyers to invent their own meaning. Fears that elimination of language might wash out valuable substance can be adequately met by using committee reports to make a clear record that no substantive change is intended.

(4) *Do nothing.* This is always easy although it may be shirking responsibility. Certainly rearrangement and stylistic changes would improve the quality of the bill but political caution may lead one to shy away from change. One may argue that the bill expresses rights so basic that even though society changes, the rights remain the same. Still, some rights seem to be more basic than others and when inspecting each guarantee one might ask whether its words and interpretation contribute to the success of our society as we wish it to be today and in the future.

(5) *Make additions.* Whatever the decision on the Bill of Rights as it stands, consideration should be given to additions in light of the changes in Texas during the century which has elapsed under the present constitution. A Bill of Rights, it may be argued, suffers because it deals more with the past than present controversies. One kind of argument would note that in the simple society of 1876 as in that of 1790, people were interested in protection *against* government and the guarantees in the constitution are designed to offer that protection. In our present highly interdependent society a convention might wish to consider guarantees *from* government, *i.e.*, guarantees of positive governmental action rather than previous guarantees of governmental nonaction. New guarantees might take the form of a right to a certain amount of educational opportunity or to a job. Beyond guarantees vis á vis government, some recent constitution-makers have considered limitations upon private action, *e.g.*, certain types of private discrimination.

In addition, changes in society present new problems which might call for new guarantees against government. These might include such invasions of privacy as electronic surveillance, data collection, or psychological surveillance.

Art. I, § 1

Sec. 1. FREEDOM AND SOVEREIGNTY OF STATE. Texas is a free and independent State, subject only to the Constitution of the United States, and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the States.

History

Section 1 of the Constitution of 1845 was similar to the present Section 2. Only later, when Texas joined the other states of the Confederacy in asserting a right of secession, did an elaboration of federal-state relationships appear in the Bill of Rights. This the Constitution of 1861 did by adding the following words to the then Section 1: "no government or authority can exist or exercise power within the state of Texas, without the consent of the people thereof previously given; nor after that consent be withdrawn." With the failure of secession, the Constitution of 1866 simply omitted these words and reverted to the form of 1845.

That change did not satisfy Reconstruction politicians when they drafted the Constitution of 1869. Thus, they began the Bill of Rights with the following preface and inserted a new Section 1 which stressed federal supremacy in sweeping terms. They said:

> That the heresies of nulification and secession which brought the country to grief, may be eliminated from future political discussion; that public order may be restored; private property and human life protected, and the great principles of liberty and equality secured to us and our posterity, We declare that:
>
> Section 1. The Constitution of the United States, and the laws and treaties made, and to be made, in pursuance thereof, are acknowledged to be supreme law; that this Constitution is framed in harmony with and in subordination thereto; and that the fundamental principles embodied therein can only be changed, subject to the national authority.

This sweeping denunciation of secession and assertion of federal supremacy served as an obvious target for the constitution drafters of 1875. They celebrated their victory over Reconstruction by deleting the introduction to the Bill of Rights and writing the present Section 1 with its states' rights overtones.

Explanation

Section 1 has been infrequently cited and no significant judicial interpretation has been based upon it. The reason is obvious. The United States Constitution in Article VI, Section 2, established the principle of federal supremacy so far as the constitution, laws, and treaties of the United States reach. Specifically, the clause says:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

It is the business of the federal courts to say ultimately what the constitution, laws, and treaties of the United States mean. If state law conflicts, the authority of the United States is supreme and state judges are bound by oath to uphold it. Of course, the Tenth Amendment to the United States Constitution recognizes that national powers are enumerated and state powers residual when it says "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Still, it is for the federal courts to say what is granted and with the early establishment of the doctrine of implied powers in *McCulloch v. Maryland* (17 U.S. (4 Wheat.) 316

(1819)), the assertion of federal power has been an expansive one. Mr. Justice Stone added in 1941 that the Tenth Amendment is not a limitation on the United States government but merely states "a truism that all is retained which has not been surrendered" (*United States v. Darby,* 312 U.S. 100, 124). Of course, large areas of activity remain for the states. As Chief Justice Chase said in *Texas v. White,* "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states" (74 U.S. (7 Wall.) 700, 725 (1869)).

Nevertheless, Section 1 did not entirely escape judicial attention. In fact, shortly after the turn of the century, Texas courts became embroiled in the same controversy which had raged between the famous Judges Dillon and Cooley. Cooley had urged a right of self-government for municipalities amounting to a sort of federal system within the states while Dillon insisted upon legislative supremacy (See Ruud, "Legislative Jurisdiction of Texas Home Rule Cities" 37 *Texas L. Rev.* 682 (1959)). When, after the Galveston disaster, the Texas Legislature provided Galveston with a government by gubernatorial appointment, the court of criminal appeals found that the legislation instituting such a government violated the right of local self-government set out in Section 1. Hence, all ordinances passed by the Galveston government were invalid and criminal prosecutions under them had to fail. (Ex parte *Lewis,* 45 Tex. Crim. 1, 73 S.W. 811 (1903).) Soon after this decision, the court of criminal appeals was even more emphatic when it commented on the position taken by the Texas Supreme Court as follows:

> The rule of omnipotence announced in *Brown v. Galveston* . . .was never intended, nor could it be true if intended, to authorize the Legislature to destroy the right of self-government, or the idea of a republican form of government, nor can it take from the people the power of control over local affairs, and centralize the power in the general government, or some central authority created by the Legislature. The application of the rule of *Brown v. Galveston,* supra, carried to its legitimate effect, would absolutely centralize the authority at Austin over all municipal and subordinate divisions of the state, and destroy the idea of decentralization and representative democracy, which permeates the entire fabric of American constitutional law, and erect instead a highly centralized government (Ex parte *Anderson,* 46 Tex. Crim. 372, 380, 81 S.W. 973, 976 (1904)).

The Texas Supreme Court, following Judge Dillon, had emphatically disagreed with the court of criminal appeals in *Brown v. City of Galveston* (97 Tex. 1, 15, 75 S.W. 488, 495 (1903)), remarking "in Section 2, it is said that 'all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit.' This is a true declaration of the principles of republican state governments; however, it does not mean that political power is inherent in a part of the people of a state, but in the body, who have the right to control by proper legislation the entire State and all its parts."

Despite its spirited rejoinder, the court of criminal appeals soon began to backtrack and any survival of the controversy between the highest courts ended in 1912 when Section 5 of Article IX, the Home Rule Amendment, provided for legislative supremacy. The section provides 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; . . ."

Comparative Analysis

Few state constitutions contain state sovereignty provisions. These few include the Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784, both of which predate the supremacy clause of the United States Consti-

tution. State sovereignty clauses also are found in the constitutions of New Mexico (1911) and Missouri (1945).

Author's Comment

Section 1 serves no useful purpose. As previously noted, intergovernmental relationships in the federal system are regulated by the United States Constitution. A desire to strike back at the Reconstruction government was understandable, but now, a century later, rhetoric regarding "states' rights" only confuses the issue of state power. There is an overwhelming amount for the states to do but only within the framework of the federal system. Any principle of popular self-government which, in the future, could be found by the courts to inhere in Section 1 could certainly be based better upon some other section of the Bill of Rights, such as Section 2.

Sec. 2. INHERENT POLITICAL POWER; REPUBLICAN FORM OF GOVERNMENT. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

History

As noted in the discussion of the previous section, Section 2 of the Constitution of 1876 was the opening section in the Bill of Rights of 1845. Issues involved in Secession and Reconstruction resulted in an elaboration of the principles stated in Section 1 of the 1845 Bill and the eventual insertion of a new Section 1. The basic ideas expressed in Section 2 derive from a political tradition current in colonial America, a tradition eventually expressed in the Declaration of Independence and carried on in whole or in part in early American constitutions. The *Introductory Comment* offers further background.

Explanation

Section 2 states three basic principles of American government: (1) popular sovereignty, *i.e.*, the people are the source of all legitimate governmental power and hence government exists for their benefit; (2) the derivative right to change or replace existing government (even by revolution according to some statements, including that in the Declaration of Independence); and (3) *republicanism*, which strictly speaking is representative, nonmonarchical government.

However important these principles may be, they have not been explained or applied in many cases. Cases which do cite Section 2 frequently couple it with other sections. Extrajudicially, Section 2 has been cited to prove that Texas may call a constitutional convention to revise the constitution although the constitution says nothing on the subject of revision. Indeed, the Convention of 1875 seems to have agreed. The debates in the Constitutional Convention of 1875 (*Debates,* pp. 140-141) contain the following interchange:

President Pickett moved to strike out Section 1, and supported his motion with a speech. The effect of the section was to provide the means of calling a convention by two-thirds of the Legislature voting for such a call. This was the only mode of calling one. He denied the right of the Convention to bind the people of Texas, or to take from them the liberty to alter, amend, or abolish their Constitution.

Mr. McCormick offered the following as a substitute for the Section: "The people

of this State may call a constitutional convention at any time and in any manner in which the majority of them may express by their voice at the ballot box, and no law shall be passed curtailing or preventing the exercise of this great and inalienable right."

President Pickett accepted the substitute.

Mr. Flournoy offered a substitute providing that the question of convention or no convention should be submitted to the people once in every ten years, the mode of ascertaining their will to be in such a manner as prescribed by law, but the foregoing not to be construed as interfering with the right of the people to assemble in convention whenever they so will it.

Mr. Martin, of Navarro, moved as an amendment to the above to strike out "ten years" and insert "twenty years."

Judge Reagan followed with an able speech in support of the amendment of President Pickett. He said it was the inalienable right of the people to meet in assembly or convention whenever they so desired, and that it was not within the power of any Legislature to limit them in this right.

Mr. Nunn opposed striking out Section 1 . . .

Mr. Asa Holt, of Van Zandt, called for the previous question, which was ordered.

Mr. Martin's amendment was lost.

Mr. Flournoy's substitute was lost.

Mr. McCormick withdrew his substitute by leave.

President Pickett's motion to strike out the section carried by a vote of 49 to 24.

The earliest judicial controversy involving Section 2 turned on the issue of municipal self-government. It involved ideas of the people as the source of power, the republican form of government, and the specific local self-government statement in Section 1. That controversy and its outcome which negated the Bill of Rights claims are discussed in the *Explanation* of Section 1.

Later another controversy between the two highest courts of Texas arose on the subject of direct democracy and the republican form of government. Since Article IV, Section 4, of the United States Constitution guarantees to every state a republican form of government, a Texas equivalent would seem to be pure surplusage. The outcome of the two sections, however, has been different. In the early case of *Luther v. Borden*, (48 U.S. (7 How.) 1 (1849)), the United States Supreme Court refused to decide whether Rhode Island had a republican form of government. The court held that the political branches of government were better equipped to make these decisions. Later, in *Pacific States Tel. & Tel. Co. v. Oregon* (223 U.S. 118 (1912)), the United States Supreme Court refused to decide whether the Oregon initiative and referendum as an expression of direct democracy rendered the state government nonrepublican. The issue was political and hence nonjusticiable.

Prior to the *Pacific States* case, the court of criminal appeals had determined that initiative and referendum violated Section 2 because it was "directly subversive of our constitutional form of government." The court explained, "Ours is also a representative democracy; that is, it is republican in form of government as contra-distinguished from a social or pure democracy on the one hand, and a government by the minority on the other, and excludes all others save and except one by the people through their selected representatives." (Ex parte *Farnsworth*, 61 Tex. Crim. 342, 347, 135 S.W. 535, 537 (1911).) Soon afterwards the Texas Supreme Court disagreed when it found that popular recall did not change the republican form of government. The court quoted from Jefferson regarding republican form as follows: " 'I would say purely and simply it means a government by its citizens in mass, acting directly and not personally, according to rules established by the majority; and that every other government is more or less republican in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens.' " (*Bonner v. Belsterling* (104 Tex. 432, 437, 138 S.W. 571,

574 (1911).) Although the court of criminal appeals seemed prepared to strike down state initiative and referendum even if adopted as a constitutional amendment, the Home Rule Amendment adopted in 1912 presumably settled the issue of municipal direct democracy along the line taken by the supreme court. (State initiative and referendum was proposed as an amendment to the constitution; it was voted down in November 1914.)

In some recent election cases the litigants have cited Section 2 but the cases have been disposed of on other grounds. A dictum in *Lydick v. Chairman of Dallas County Republican Executive Committee* (456 S.W.2d 740 (Tex. Civ. App.—Dallas 1970, *no writ*)) upheld against a challenge under Section 2 and other related sections of the Bill of Rights, a statute which prohibits write-in votes at a primary election for offices other than county chairman and precinct chairman.

Comparative Analysis

All 50 states guarantee popular sovereignty. Thirty-nine states recognize the right of the people to alter their governments but only a minority, those with older bills of rights, speak in such strong language as Section 2.

Author's Comment

Section 2 is essentially a statement of political theory. As such it would operate best as a guide to the interpretation of other constitutional provisions rather than the basis for decision making itself. Hence it might appear more appropriately in the preamble.

Sec. 3. EQUAL RIGHTS. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

History

Couched in language reminiscent of the United States Declaration of Independence, Section 3 is the natural-rights section of the Texas Bill of Rights. The framers of the Constitution of 1836 placed this section first in the Declaration of Rights. In the 1845 version the statement of equality shifted from "all men" to "all freemen" and the final phrase was added to note that the prohibition against exclusive public privilege or emolument did not preclude compensation for *public* services. While the section continued substantially unchanged in subsequent constitutions, the final phrase disappeared in 1869 and reappeared in 1876. In the present constitution "freemen" becomes "free men."

Explanation

This amendment seems to express at least two ideas: (1) that equal rights are based upon natural law and (2) that since these natural rights have been carried over into government, government shall not discriminate between men.

Texas courts wisely have not used the social compact phraseology of Section 3 as the basis of independent constitutional limitations. In fact the courts have been at pains to label Section 3 an "equal rights" clause and to treat concluding statements regarding separate public emoluments and privileges as illustrative of these "equal rights," in which there can be no governmental discrimination. Hence, Texas courts have considered Section 3 to be the Texas expression of these words in the Fourteenth Amendment to the United States Constitution: "no state shall deny to any person within its jurisdiction the equal protection of the laws." Frequently the

two constitutional guarantees are cited together and federal cases are treated as dispositive of both constitutional claims.

This homogenization process has a certain appeal. Since the state may not violate the Equal Protection Clause of the Fourteenth Amendment anyway, why not treat the apparently narrower equal rights clause of the Texas Constitution as the same thing and let the federal courts work out the construction? In the process of making the federal and state provisions mean the same thing, Texas courts have cleared what might have seemed to be an insurmountable hurdle. Long ago the United States Supreme Court performed a considerable feat of construction in finding that corporations are "persons" within the meaning of the Equal Protection Clause. (See *Santa Clara County v. Southern Pacific RR.*, 118 U.S. 394, 396 (1886) (statement by Chief Justice Waite speaking for the court at oral argument).) Section 3, however, does not refer to "persons" but to "men." Nevertheless, corporations are covered by Section 3. "It is well settled that a corporation is a 'person' within the meaning of section 3, art. 1, of the Constitution of this state and of section 1 of the fourteenth amendment of the Constitution of the United States." (*Beaumont Traction Co. v. State,* 122 S.W. 615, 616 (Tex. Civ. App. 1909, *no writ*).) Note, however, that this is only a matter of definition. A corporation may be covered but still treated differently from "natural" persons. Likewise, aliens, or nonresidents, are obviously "men," or "persons," but may sometimes be treated differently from citizens. (See *Pintor v. Martinez,* 202 S.W.2d 333, 335 (Tex. Civ. App.—Austin 1947, *writ ref'd n.r.e.*).) In both instances the question will be the reasonableness of differences in treatment as discussed below.

Thus, both the Equal Protection Clause and Section 3 forbid the denial of equal protection whether to citizen or alien, resident or nonresident, or natural person or corporation or other legal entity. (Except a governmental entity. A government is not a "person" under either provision. See *Harris County v. Dowlearn,* 489 S.W.2d 140, 145 (Tex. Civ. App.—Houston (14th Dist.) 1972, *writ ref'd n.r.e.*).) Yet the homogenization is not total. A state law that is unconstitutional under the Equal Protection Clause cannot be enforced in Texas notwithstanding a Texas court's opinion that the law does not violate Section 3. But a Texas court may find that a law is invalid under Section 3, in which case it is irrelevant whether the United States Supreme Court would invalidate the law under the Equal Protection Clause. Thus, a Texas court may control the meaning of Section 3 by relying only on the Equal Protection Clause if a statute is invalid under the Fourteenth Amendment but, in the Texas court's eyes, ought not to be invalid under Section 3 and by relying only on Section 3 when the Texas court thinks the statute ought to be invalid no matter what the United States Supreme Court thinks.

Until about 40 years ago homogenization was complete in theory simply because the rule of equal protection/equal rights was deceptively simple in the abstract: equality was not required but unequal treatment had to be reasonable. This rule is frequently cast in terms of "classification." For example, if a law regulating hours of work provides that men may work no more than twelve hours a day and women no more than eight hours, working people have been divided into two classes, each treated differently. If the classification is reasonable, Section 3 is satisfied. (Note that whether a law may regulate hours of work at all is a different question. This is a matter of substantive due process of law that is dealt with under Sec. 19. Note also that reasonableness of classification of governments is a constitutional issue but only in connection with general and local laws. This is dealt with under Sec. 56 of Art. III.)

The traditional rule of equal protection may be simple, but there is a catch in it. What is one man's "reason" is another man's "insanity." "Reasonable" is one of those accordion words of the law that permit a great range of different results in

different factual situations. In the constitutional world of days past, there seemed to be a subtle transference of "reasonable" and "unreasonable" into "good" and "bad." If judges thought a particular law involving unequal treatment was a bad idea, they found the unequal treatment unreasonable. Or at least this was what critics of the courts argued. Dissenting judges also argued this way frequently; naturally, the majority always denied it.

All this seemed to be true notwithstanding the rule that a law is presumed to be constitutional, which is to say that one who attacks a statute has the burden of proof. Moreover, the presumption of constitutionality traditionally has meant that unequal treatment is permissible—or a classification valid—if "there is any basis for the classification which could have seemed reasonable to the Legislature." (*San Antonio Retail Grocers, Inc. v. Lafferty,* 156 Tex. 574, 577, 297 S.W.2d 813, 815 (1957).) Taken literally, this rule erects an almost insuperable burden of proof, for one must prove that there is no reasonable argument in support of the law. Actually, as the subsequent discussion shows, the courts do not apply the rule literally.

Until about 40 years ago the rule of reasonable classification applied universally in the sense that it made no difference whether classification dealt with race, voting, education, the regulation of business, or any other subject. But, as mentioned above, critics of the court maintained that the rule was not followed, that the courts were acting as a superlegislature by finding no reasonable classification when, in the courts' eyes, the classification was not fair. This criticism was aimed principally at judicial invalidation of legislation regulating business. (It must be noted that the Due Process Clause of the Fourteenth Amendment was used more frequently than the Equal Protection Clause. See Sec. 19.) Beginning in 1934 the United States Supreme Court began to retreat from invalidating statutes regulating business. The court simply took the presumption of constitutionality literally. The retreat has been so complete that since about 1940 only one economic regulation has been invalidated under the Equal Protection Clause. In *Morey v. Doud,* the court struck down an Illinois licensing statute because it exempted the American Express Co. by name (354 U.S. 457 (1957) three justices dissenting).

This retreat created a problem for the court because it simultaneously began to strike down statutes in the areas of civil and social rights. In many cases a specific right—freedom of speech or press, peaceable assembly, double jeopardy, self-incrimination, right to counsel, for example—could be carried into the Fourteenth Amendment and protected without regard to the presumption of constitutionality simply because the right was specific. But in other cases there was nothing more specific to rely upon than the Equal Protection Clause. In order to avoid the consequences of the presumption of constitutionality, the court created a classification system of its own, so to speak. The principal device was to single out certain classifications as "suspect" and to shift the burden of proof by requiring the state to justify the classification. The most significant suspect classification is race. Indeed, the Fourteenth Amendment was adopted as one of the devices to wipe out any vestiges of the unequal racial treatment that was slavery. But as early as 1886 the Supreme Court extended the Equal Protection Clause to Chinese laundrymen who were discriminated against solely because they were Chinese (*Yick Wo v. Hopkins,* 118 U.S. 356). Classifications based on citizenship and residency are also suspect though perhaps not to the same degree as race.

The United States Supreme Court has also indicated that some things are more "fundamental" than others and that unequal treatment in a fundamental area is suspect. Voting is an example. The court looks closely at statutes that make it harder for some people to vote than for others or that make it more difficult for some people to run for office than for others. (For two examples arising out of

Texas, see *Carrington v. Rash*, 380 U.S. 89 (1965) (right to vote of military personnel stationed in Texas), and *Bullock v. Carter*, 405 U.S. 134 (1972) (high filing fees for running in a primary).)

In many areas, the "fundamental rights" cases are closely related to poverty. In many instances a governmental requirement results in unequal treatment only because poor people are at a disadvantage under the requirement. This was the significant point about requiring payment of a poll tax in order to vote. (A poll tax as such is not unconstitutional. See Art. VII, Sec. 3, *Explanation*, Taxes.) This was also the point of *Tate v. Short* (401 U.S. 395 (1971)), holding unconstitutional the Texas requirement that an indigent person unable to pay a fine could be jailed for a period not exceeding one day for every $5 of unpaid fine. Likewise, equal protection may demand that the state provide free some of the rights guaranteed to those accused of committing crimes. For example, it does an indigent little good to be guaranteed a right to have a lawyer represent him if he has to pay the lawyer.

In the field of education the court came within one vote of finding a denial of equal protection under a system of financing that favored wealthy school districts. (The famous *Rodriguez* case (*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)) is discussed elsewhere. See *Explanation*, Sec. 1, Art. VII.) Obviously, the court will never reach the point of requiring absolute equality regardless of wealth. But it is equally obvious that legislation that puts the poor at a disadvantage is suspect, especially if the purpose of the legislation appears to be discrimination against the poor. Under the traditional presumption of constitutionality, the true purpose of—or the motivation for—legislation is irrelevant, for any reason that could have motivated the legislature is adequate to support the legislation. But once the classification becomes "suspect," the burden shifts to the state to justify the classification. (In this context, of course, treating rich and poor alike is a "classification" for equal protection purposes.)

These are seminal days in the United States Supreme Court. It is neither easy nor wise to predict the future development of cases under the Equal Protection Clause. In any event, an exhaustive review would be out of place in this limited Annotation. Moreover, the United States Supreme Court has recently revived substantive due process (See *Explanation*, Sec. 19), which may mean that the court will use that clause in some instances that, in earlier days, would have been shoved under equal protection.

At the beginning of this *Explanation* it was noted that Texas courts have to follow the United States Supreme Court in invalidating laws but need not stop there. Under Section 3 a Texas court can find invalid laws that the United States Supreme Court would not invalidate under the Fourteenth Amendment. A study of recent Texas cases indicates that the Texas courts use Section 3 in cases involving economic regulation, the area that the United States Supreme Court has walked away from. In the areas where that court is active, the Texas courts appear to do only what they are forced to do. That is, they do not independently consider Section 3. For example, in *Gonzalez v. Texas Employers Ins. Ass'n*, (509 S.W.2d 423 (Tex. Civ. App.—Dallas 1974, *writ ref'd n.r.e.*)), the question was whether an illegitimate child could receive a death benefit under the workmen's compensation law. The decision was in favor of the child but only because of a United States Supreme Court ruling in an analogous situation arising in Louisiana (*Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972)). One may assume that the Texas court would not have so held except for the *Weber* case because no mention was made of Section 3.

Economic regulation is a different matter. Consider the case of *Humble Oil and Refining Co. v. City of Georgetown* (428 S.W.2d 405 (Tex. Civ. App.—Austin 1968, *no writ*)). Georgetown adopted an ordinance restricting to 1,400 gallons the

capacity of trucks delivering gasoline to filling stations. The probable reason for adopting the ordinance was to protect the business of local commission agents who would receive large shipments for storage and then deliver the gasoline to filling stations. Humble alleged that this was the purpose of the ordinance, Georgetown denied it, and the court never talked about it. The court accepted the standard rule that the ordinance was to be sustained if the city council could have had any reasonable basis for the restriction. (The discussion was cast in terms of "classification" because Humble proposed to deliver gasoline to its filling stations from an 8,000 gallon truck, the size truck that it would use to deliver to the commission agent's storage tanks.) The court could find no reasonable basis for the classification and invalidated the ordinance. The way in which this was done was to ignore the real reason for the ordinance and to concentrate on Georgetown's argument that the ordinance was to promote safety by decreasing the hazard of fire. On this basis the ordinance was not defensible because for a variety of technical reasons the larger trucks were safer and because, obviously, there would be less transportation and dispensing of gasoline if larger trucks were used.

In the old days the United States Supreme Court might very well have held the same way under the Fourteenth Amendment. Today the court would probably say that it would not concern itself with the validity of the reasons given for adopting the ordinance. Recently, the Oregon Supreme Court upheld a comparable city ordinance notwithstanding many cited state cases like the *Georgetown* case. "We believe that the reason for our disagreement with them is that we have felt bound, under the more recent decisions of the United States Supreme Court interpreting and applying the Due Process and Equal Protection Clause of the Fourteenth Amendment, to accord a wider latitude to the discretion of state legislative bodies in determining the propriety of measures deemed necessary to promote the safety, health and welfare of the community, than might have been considered permissible 30 or 40 years ago." (*Leathers v. City of Burns,* 251 Ore. 206, 213, 444 P.2d 1010, 1019 (1968).) Interestingly enough, the Oregon Supreme Court did not refer to the Oregon Constitution. Its Bill of Rights does not have a due process clause but does have a section comparable to Section 3. The court of civil appeals, by way of contrast, cited no United States Supreme Court cases and referred to the Fourteenth Amendment only when stating the grounds of attack put forth by Humble Oil.

A key to the difference in approach between the United States Supreme Court and state courts is the concept of the police power. In the area of economic regulation, the United States Supreme Court is content if the legislature had a rational basis for classification. "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." (*Ferguson v. Skrupa,* 372 U.S. 726, 732 (1963).) State courts tend to say that the classification must be a reasonable exercise of the police power—that is, a regulation to promote the health, safety, or morals of the public. (Sometimes, "welfare" is substituted for "morals" as in the quotation from the *Leathers* case set out earlier.) This means that an economic regulation designed to help one segment of the business community at the expense of another cannot stand unless a rational argument can be made in the name of health, safety, or morals. Although the court of civil appeals in the *Georgetown* case did not reason this way explicitly, its approach to the ordinance was implicitly based on this theory of the police power.

Yet this explanation of the difference in approach between the United States Supreme Court and state courts should not be overly relied upon. Consider the matter of statutes prohibiting sales below cost. They are designed to protect the small, independent retailers against the competition of the large chain stores. The United States Supreme Court unanimously upheld such an Oklahoma statute

(*Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n,* 360 U.S. 334 (1959)), whereas the Texas Supreme Court unanimously struck down a comparable Texas statute (*San Antonio Retail Grocers, Inc. v. Lafferty,* 156 Tex. 574, 297 S.W.2d 813 (1957)). In neither case was the police power mentioned. In the Oklahoma case the court was content to observe that it would "not interpose its own economic views or guesses when the State has made its choice" (p. 341) and that it was "not concerned with the soundness of the distinctions drawn" (p. 342). In the Texas case the court started with the standard rule quoted earlier (156 Tex. at 578, 297 S.W.2d at 816), but then found that there was no reasonable basis for limiting the statute to "grocery stores." In support of its finding the court noted that a "grocery store" was assumed to be any store that sold groceries and that a department store with a grocery department would come under the statute for all its departments whereas other department stores would not. The court further noted that a regular grocery store sells things also sold at drug stores and other places which would not be covered by the statute. It is not clear whether the Texas Supreme Court would have gone the same way as the United States Supreme Court had the Texas statute applied to all kinds of stores as in Oklahoma. Nor is it clear whether a carefully limited definition of "grocery store" would have saved the statute. It seems likely, however, that in the long run the Texas courts will move away from the concept of regulatory power limited to the health, safety, morals, or welfare of the public. (But see *Explanation,* Sec. 19.)

It must be conceded that generalizations are most dangerous when talking about broad, vague constitutional provisions like equal protection and due process. The recent case of *Texas Optometry Board v. Lee Vision Center, Inc.* (515 S.W.2d 380 (Tex. Civ. App.—Eastland 1974, *writ ref'd n.r.e.*).) seems to go as far as the United States Supreme Court does in upholding economic regualtions against an attack under equal protection and due process. In the course of its opinion the court stated that "Texas courts when confronted with questions involving the Due Course of Law and Equal Rights Clause of the Texas Constitution consistently apply the reasoning and rationale announced by the United States Supreme Court on questions of due process and equal protection" (p. 386).

The discussion so far—and in connection with due process—has flatly contradicted the court's observation. It has also been argued that in noneconomic matters Texas courts tend to follow the United States Supreme Court only to the extent required. Yet in 1967 the court of civil appeals in El Paso struck down Section 8 of Article 46a of the Revised Civil Statutes which provided: "No white child can be adopted by a negro person, nor can a negro child be adopted by a white person." (In re *Adoption of Gomez,* 424 S.W.2d 656 (Tex. Civ. App.—El Paso 1967, *no writ*).) The court did not do this because the United States Supreme Court had struck down a comparable statute but because the Texas statute was inconsistent with the trend of United States cases in matters of racial discrimination. Even more startling is the fact that the appealing party argued only that the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment. The court agreed but went on specifically to hold that the statute violated Section 3.

In sum, then, one can only say that equal protection in Texas is at least what the United States Supreme Court requires under the Equal Protection Clause in the areas of "suspect" classifications and fundamental rights. In the area of economic matters, Section 3 may or may not require more justification for discriminatory treatment than the United States Supreme Court requires under the Fourteenth Amendment. The rules set out earlier are clear enough. How courts will apply them in all situations is neither clear nor predictable.

Art. I, § 3a

Comparative Analysis

Nine states have an equal protection clause as such. (The *Model State Constitution* also has one.) Most of these are constitutions adopted or revised in the last two decades. Another 22 states have an equal rights section comparable to Section 3. There is no reason to believe that the courts in the other 19 states rely only upon the Fourteenth Amendment; some appropriate state constitutional provision is undoubtedly used to provide equal protection. For example, in Illinois prior to the adoption of its new constitution, equal protection was provided through the section prohibiting special laws on the theory that an unreasonable classification turned a "general" law into a "special" law. Note also that the United States Supreme Court uses the Due Process Clause of the Fifth Amendment to enforce equal protection in the District of Columbia and under acts of congress. The Equal Protection Clause as such applies only to the states.

Author's Comment

In the light of judicial equating of Section 3 and the Equal Protection Clause, it would seem sensible to rewrite Sections 3 and 3a along these lines:

No person may be denied the equal protection of the laws or discriminated against by law because of sex, race, color, creed, or national origin.

> Sec. 3a. EQUALITY UNDER THE LAW. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

History

Section 3a was added in 1972. It was one of 14 amendments voted upon at the general election. Of the 11 that passed, Section 3a received the largest majority—2,156,536 to 548,422.

Explanation

It is arguable that this section adds little or nothing to Section 3 construed as the Texas equivalent of the Equal Protection Clause. (It is obvious that the word "men" in Section 3 means "men" and "women"—and "children," for that matter.) But it is equally arguable that Section 3 means only what the courts say it means and that they might or might not continue to read it as broadly as they now do. (The same argument applies to the proposed Equal Rights Amendment. See *Comparative Analysis* following.) Moreover, even the present breadth of Section 3 is obscured by the overriding Equal Protection Clause of the Fourteenth Amendment. As noted in the *Introductory Comment*, Texas courts frequently decide cases on the basis of the Fourteenth Amendment without indicating how they would read the Texas Bill of Rights. Of course, Section 3a also means what the courts say it means, but the area for judicial maneuver is more restricted than under Section 3. At the very least a court can hardly come out and say that equality may be denied on the basis of sex, race, color, creed, or national origin whereas under the vague "equal protection of the laws" rubric a court can rationally permit inequalities.

In any event, there have been no Texas cases finding a violation of Section 3a. The section has been invoked, of course, but the argument has been far-fetched and unsuccessful. (For a recent example, see *Friedman v. Friedman*, 521 S.W.2d 111 (Tex. Civ. App.—Houston (14th Dist.) 1975, *no writ*).) It is likely that future equal protection cases will invoke the Equal Protection Clause of the Fourteenth Amendment, Section 3, and Section 3a. If the case involves sex, race, color, creed,

or national origin and if the court does not rely on the Fourteenth Amendment, the case will surely be decided on the basis of Section 3a and not Section 3.

Comparative Analysis

Approximately 14 states have an equal protection provision that speaks to one or more of the bases of discrimination enumerated in Section 3a. With the exceptions of Arkansas and Wyoming, these provisions have been adopted within the last quarter century. The 1874 Arkansas Constitution prohibits discrimination on the basis of race, color, or previous condition of servitude. The 1890 Wyoming Constitution provides that laws affecting political rights and privileges are to "be without distinction of race, color, sex, or any circumstance of condition whatsoever other than individual incompetence, or unworthiness duly ascertained by a court of competent jurisdiction." (Art. I, Sec. 3. It should be remembered that when Wyoming became a state in 1890, it made history by providing that the right to vote and hold office "shall not be denied or abridged on account of sex." Art. VI, Sec. 1.)

Most of the recent provisions cover only race, color, and religion; a few add national origin. Hawaii, Montana, and Virginia add sex. (Virginia provides further that "the mere separation of the sexes shall not be considered discrimination." Art. I, Sec. 11.) The 1970 Illinois Constitution prohibits discrimination in employment and housing on the basis of race, color, creed, national ancestry, or sex (Art. I, Sec. 17) and also provides that equal protection is not to be denied or abridged on account of sex (Sec. 18). Colorado has the same sex equality provision; New York has a similar provision concerning discrimination in employment but not housing and not including sex.

The first section of the proposed "Equal Rights Amendment" to the United States Constitution reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." As with Section 3a, it is arguable that this amendment adds nothing to the Equal Protection Clause of the Fourteenth Amendment. But it is equally arguable that the United States Supreme Court, which has read the Equal Protection Clause to prohibit discrimination on account of sex, could hardly overrule that line of cases in the face of an Equal Rights Amendment.

Author's Comment

The genius of "judicial supremacy" in our constitutional system has been the ease with which change can be accommodated. There is a danger in using the amending process to express disapproval of a single judicial ruling or even a line of cases. Section 3a is not an example of the danger. But it is an example of specifying detailed meaning in place of a general principle. Caution is advisable in getting too specific in a bill of rights. A democratic society survives only if there is a consensus on overriding general principles and if some relatively detached arbiter protects those principles. Hasty and emotional tampering with the details flowing from those principles can easily undermine a delicate consensus.

Sec. 4. RELIGIOUS TESTS. No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.

History

Freedom from religious test oaths for office is part of the American tradition of

religious freedom. At one time such oaths had been instruments for the oppression of dissenters. Thus Article VI of the United States Constitution, prohibiting test oaths for federal officers in language identical to the first part of Section 4, betrays the origin of this section. All Texas bills of rights prior to 1876 repeated the guarantee against religious test oaths in identical form until, in 1875, the framers added the words of Section 4 after the semicolon.

Explanation

Very few cases refer to Section 4. Obviously public officials have not been required to take religious test oaths, hence there has been no ground for litigation. Section 4 has been cited, along with succeeding sections dealing with religion, in some child custody cases. Conceivably the award of child custody is a public trust within the meaning of this section but those seeking such awards are not required to take religious oaths. Indeed the courts steer clear of any inquiry into the applicant's religious beliefs.

When in 1876 Section 4 grew from a simple prohibition to include the proviso regarding belief in a Supreme Being, the guarantee was weakened. In fact, a bill was introduced in the Fifty-sixth Legislature requiring public school teachers to swear that they believed in a Supreme Being. The proviso seemed to authorize this mild test oath. While the bill was under consideration the United States Supreme Court handed down a decision declaring the Maryland test oath for public officers unconstitutional when it was applied to an atheist (*Torcaso v. Watkins,* 367 U.S. 488 (1961)). This and subsequent decisions indicate that the Supreme Being proviso violates the religious liberties guarantees embodied in the Fourteenth Amendment and is unconstitutional.

Comparative Analysis

A total of 26 states prohibit religious tests for public office. Only two states other than Texas contain the proviso that tests not be required so long as a belief in a Supreme Being is acknowledged. Recent constitutions have not included sections on these subjects.

Author's Comment

Protection against religious test oaths for public offices or public trusts is a basic protection which might be invaded by zealous pressure groups. Since the addendum of 1876 to Section 4 does seem to dilute the broad guarantee and presumably violates the United States Constitution, it should be deleted.

Sec. 5. WITNESSES NOT DISQUALIFIED BY RELIGIOUS BELIEFS; OATHS AND AFFIRMATIONS. No person shall be disqualified to give evidence in any of the Courts of this State on account of his religious opinions, or for the want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.

History

The common law required a witness to take an oath which would bind him to tell the truth for fear of supernatural punishment. Hence persons without the requisite religious beliefs could not serve as witnesses. Section 5, which has no predecessor in previous Texas constitutions, permits such persons to testify and hence it represents a departure from the common law rule. Presumably "reference

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to the 'pains and penalties of perjury' was intended to allay any fear that abolition of the religious test for witnesses might result in the admission of untrustworthy evidence" (Fritz and Roberts, "The New Juvenile Delinquency Act," in Comments, 23 *Texas L. Rev.* 165, 171-72 (1945)).

Explanation

The right to testify is important to judicial protection of other rights; thus Section 5 furnishes religious protection of some significance. The section has been cited in an appreciable number of cases although it is certainly not one of the much litigated parts of the Bill of Rights. In several instances the court of criminal appeals had to correct clear violations of Section 5 by lower courts (*Riddles v. State,* 47 Tex. Crim. 69, 46 S.W. 1058 (1898); *Ramirez v. State,* 159 Tex. Crim. 410, 264 S.W.2d 99 (1953)). In other cases Section 5 was simply lumped together with Sections 4 and 6 to vindicate freedom of religion or separation of church and state. In fact, however, Section 5 is limited to judicial proceedings including the swearing of jurors and does not extend to other oaths or subjects (*Campbell v. State,* 43 Tex. Crim. 602, 68 S.W. 513 (1902)).

Judicial construction of Section 5 has had some unfortunate consequences. It requires that false oaths within its scope must be punishable as perjury. Thus, in 1904, the court of criminal appeals decided that a child of seven, even if otherwise qualified, could not testify because a statute exempted children of her age from punishment for perjury. (*Frazier v. State,* 47 Tex. Crim. 24, 84 S.W. 360 (1904)). Judge Brooks, dissenting, noted that children of this age had been permitted to testify at common law without being subject to the "pains and penalties of perjury." Narrow construction by the majority, he charged, had turned what was presumably intended to be an expansion of individual liberty into a requirement that a penalty be enforced against the weakest members of society. Short of a constitutional amendment, the legislature did what it could; it amended a humanitarian statute exempting children under nine from criminal prosecution to make them liable for perjury (*Moore v. State,* 49 Tex. Crim. 449, 96 S.W. 327 (1906); 23 *Texas L. Rev.* 165 (1945)). If young children are ineligible to testify, their helplessness regarding crimes committed against them increases. Nevertheless, narrow interpretation of Section 5 continued to hamper the state when it sought to deal with children under the Delinquent Child Act. In 1944 the court of criminal appeals declared unconstitutional a section of the act which provided, "nor shall any child be charged with or convicted of a crime in any court" because the law failed to make children punishable for perjury (*Santillian v. State,* 147 Tex. Crim. 554, 557, 182 S.W.2d 812, 815 (1944); *Head v. State,* 147 Tex. Crim. 594, 183 S.W.2d 570 (1944)).

Another legal tangle surrounded Section 5. The form of oath prescribed by the legislature for jurors ended with the words, "so help me God." In 1920 the court of criminal appeals set aside several guilty verdicts because the jurors involved had not used these words when being sworn. In 1972 this requirement was challenged on the ground that the prescribed form of oath violated Section 5 by disqualifying atheists and agnostics from jury service. The court of criminal appeals responded by overruling the earlier cases. The term "oath," it noted, referring to the Code of Criminal Procedure, is to be construed as including affirmation. The purpose of Section 5 was to permit affirmation and to rely upon the prospect of punishment for perjury as a sanction to enforce truthfulness instead of religious fears of future punishment alone. The challenged statutes, said the court, contained no requirement of an expressed belief in a Supreme Being (*Craig v. State,* 480 S.W.2d 680 (Tex. Crim. App. 1972)).

Art. I, § 6

Comparative Analysis

A total of 21 states provide that there shall be no religious tests for witnesses. Five specifically prescribe that testimony shall be by oath or affirmation.

Author's Comment

The religious protection in Section 5 is fairly narrow. Its construction has at times frustrated legitimate legislative objectives although it may also have saved some defendants from religious discrimination. However, the latter might presumably have been protected equally well under some other religious guarantee in the Texas Bill of Rights or under the Fourteenth Amendment.

> Sec. 6. FREEDOM OF WORSHIP. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

History

The Constitution of 1836 contained a much shorter statement of religious freedom and of the separation of church and state. However, the present wording is found in the Constitution of 1845 and it was retained substantially unchanged in each succeeding constitution. This section had a special meaning for Texans. They shared not only the Anglo-American tradition of those struggles which resulted in the religious guarantees of state and national constitutions but in addition they had their own special religious problems as citizens of Mexico. As Justice Brown put it, "Prior to the Revolution of 1836, the Catholic was the established religion of the Republic of Mexico, and all citizens of Texas were required to conform to the teachings of that church. It was supported by the government, and, by taxation, the citizens were compelled to contribute thereto. One of the charges made against the Republic of Mexico in the Declaration of Independence was, 'it denies us the right of worshipping the Almighty according to the dictates of our own conscience by the support of a national religion, calculated to promote the temporal interest of its human functionaries rather than the glory of the true and living God . . .'." (*Church v. Bullock,* 104 Tex. 1, 6, 109 S.W. 115, 117 (1908)).

Explanation

Section 6 guarantees freedom of religion; prohibits religious discrimination, religious compulsion, or interference with the practice of religion; and enjoins the legislature to protect all religions. In the first interpretation of this section the supreme court upheld a Sunday closing ordinance, noting specifically the constitutional injunction to protect religion (*Gabel v. Houston,* 29 Tex. 336 (1867)). After considerable explanation, the supreme court later decided that Bible reading and recitation of the Lord's Prayer in public schools did not violate Section 6. Justice Brown explained as follows:

> The primary purpose of that provision of the Constitution was to prevent the Legislature from in any way compelling the attendance of any person upon the worship

of a particular church, or in any manner, by taxation or otherwise, cause any citizen to contribute to the support of "any place of worship." As used in the Constitution the phrase "place of worship" specifically means a place where a number of persons meet together for the purpose of worshipping God . . . . To hold the offerings of prayers, either by the repetition of the Lord's Prayer or otherwise, the singing of songs, whether devotional or not, and the reading of the Bible, make the place where such is done a place of worship, would produce intolerable results. The House of Representatives and the Senate of the state Legislature each elect a chaplain, who, during the session, daily offers prayers to Almighty God in behalf of the state, and in the most express manner invokes the supervision and oversight of God for the lawmakers. In the chapel of the State University building, a religious service; consisting of singing songs, reading portions of the Bible, with prayers and addresses by ministers and others, is held each day. The Young Men's Christian Association hold their services in that building each Lord's Day; and the Young Women's Christian Association has a like service in another public building. At the Blind Institute on each Lord's Day prayers are offered, songs are sung, Sunday School is taught, and addresses made to the children with regard to religious matters. Devout persons visit our prisons and offer prayers for those who are confined. An annual appropriation is made for a chaplain for the penitentiary; in fact, Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the Constitution prohibits reading the Bible, offering prayers, or singing songs of a religious character in any public buildings of the government, would produce a condition bordering on moral anarchy (*Church v. Bullock,* 104 Tex. 1, 7, 109 S.W. 115, 118 (1908)).

Eventually the United States Supreme Court caught up with Justice Brown's decision regarding Bible reading and recitation of the Lord's Prayer as well as some of his reasoning. Recognizing the growing religious pluralism in our society and the increased willingness of religious minorities to challenge public religious practices offensive to them, the United States Supreme Court in *Abbington School District v. Schemp* (374 U.S. 203 (1963)) struck down, as contrary to the establishment clause of the First Amendment, reading of the Bible or recitation of the Lord's Prayer as part of religious observances in the public schools. The implication of these cases was that while study about religion or of the Bible as literature is constitutional, any governmental support of religious observances is a violation of the constitutionally guaranteed separation of church and state. On the other hand Sunday closing laws are constitutional because even though they may originally have been enacted for religious purposes, they have in fact come to serve an overriding secular purpose, *i.e.*, providing a common day of rest (*McGowan v. Maryland,* 366 U.S. 420 (1961)).

Texas courts have construed Section 6 in relatively few cases. In two, the state police power survived religious objections to compulsory vaccination (*City of New Braunfels v. Waldschmidt,* 109 Tex. 302, 207 S.W. 303 (1918)) and to prohibition of the sale of liquor (*Sweeney v. Webb,* 97 Tex. 250, 76 S.W. 766 (1903)). By the time of the Jehovah's Witnesses cases, Texas courts were following the guidelines of the United States Supreme Court. Thus, in divorce and child custody cases, Texas courts disclaimed any right to refer to or take into account the religion of one party, though that of the other might be fanatical or highly unpopular, because "secular judges possess no religious powers and enforce no religious preferences." (*Bevan v. Bevan,* 283 S.W.2d 305, 310 (Tex. Civ. App.–San Antonio 1955, *writ ref'd n.r.e.*); *Salvaggio v. Barnett,* 248 S.W.2d 244 (Tex. Civ. App.–Galveston, *writ ref'd n.r.e.*) *cert. denied* 344 U.S. 879 (1952)). Thus, also, Texas courts have upheld the rights of religious groups to sell religious literature on city streets contrary to local vending ordinances (*Pool v. State,* 154 Tex. Crim. 270, 226 S.W.2d 868 (1950)), to take up religious collections on city streets (*Hoover v. State,* 161 Tex. Crim. 642, 279 S.W.2d 859 (1955)), and to enter private property in

violation of a local ordinance (Ex parte *Luehr*, 159 Tex. Crim. 566, 266 S.W.2d 375 (1954)).

Some cases pit assertions of religious freedom against attempts to restrict the use of land. In *Congregation Committee v. City Council* (287 S.W.2d 700 (Tex. Civ. App.—Fort Worth 1956, *no writ*)), the city council, acting as a zoning board, had denied two Jehovah's Witnesses a permit to build a church on their land. The court upset the council's decision on the ground that the freedom of worship of Jehovah's Witnesses had outweighed minor traffic difficulties and inconvenience to neighbors. However, a general deed restriction limiting construction to single family houses and thus prohibiting the construction of churches withstood attack because it "applied equally to churches of all denominations and faiths" (*Ireland v. Bible Baptist Church*, 480 S.W.2d 467 (Tex. Civ. App.—Beaumont (1972) *cert. denied* 93 S. Ct. 1529 (1973)). The court went on to reject a contention based on the rationale of *Shelly v. Kraemer* (334 U.S. 1 (1948)), that by enforcing the private covenant the state court was violating religious freedom.

Comparative Analysis

All 50 states protect freedom of religion in their bills of rights but they do not necessarily use so many words to do so. The First Amendment of the United States Constitution provides that congress may not enact a law "respecting an establishment of religion, or prohibiting the free exercise thereof." The *Model State Constitution* uses the same wording.

Author's Comment

By consensus, religious guarantees are a fundamental part of the American heritage. The trend of decision making in the United States Supreme Court, reflecting presumably the growing pluralism of our society, has been to protect religious diversity and to discourage governmental intervention in any religious matters.

Sec. 7. APPROPRIATIONS FOR SECTARIAN PURPOSES. No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.

History

Section 7 first appeared in the Constitution of 1876 and represents a victory for the advocates of public education, who had been very active in the constitutional convention. By this section, they sought to stop the previous practice of extending occasional state aid for sectarian education.

Explanation

Section 7 is a rare example of a state bill of right's provision that is stricter than the Bill of Rights of the United States Constitution. In a recent opinion the attorney general observed that Section 7 "is more restrictive than the federal charter . . . and will not tolerate, in our opinion, any aid to *sects* or sectarian schools." (Tex. Att'y Gen. Op. No. H-66 (1973). Emphasis in original. This opinion is discussed further below.) The reason for this is that whereas the First Amendment speaks to "establishment of religion" in a general sense, Section 7 zeroes in on appropriating public money.

Over the past 30 years the United States Supreme Court has struggled with the

relationship between "establishment of religion" and public moneys. Within the past decade the number of cases has increased substantially. The reason for this is the increasing cost of education and the concomitant difficulty that faces religious denominations that maintain sectarian schools and colleges. Legislatures and congress have had to face not only the pleas for assistance but the prospect that the public cost of education goes up if private schools and colleges go under. The result has been a battle between the United States Supreme Court and various legislatures trying to see how far they can go in helping denominational schools and colleges without running afoul of the establishment prohibition.

An analysis of the state of a field of law can focus on what is and what is not permitted or on the reasoning behind the distinctions. An interesting aspect of the cases in this area is that the court has gone to considerable lengths to explain the reasoning behind its distinctions.

What is and is not permitted can be summarized quickly. A state may provide transportation to and from sectarian schools; may provide free the same textbooks used in public schools; may provide free lunches and public health services; and may grant money or credit for construction of buildings to be used solely for secular purposes. This last permission is limited to colleges and universities. A state may not provide teaching materials; may not supplement the pay of teachers; and may not make direct or indirect grants to parents to help pay the cost of sectarian elementary or secondary education.

There are three rules that, taken together, explain the distinctions drawn. First, the purpose must be secular. Second, the primary effect must neither advance nor inhibit religion. Third, the program must not get the government entangled with religion. This third rule is the key to the close distinctions drawn. (Most of the Supreme Court cases in this area are decided by close votes and all by divided votes.) What the court seeks to avoid is a continuing battle over whether the law is properly followed. For example, free textbooks do not involve an enforcement problem, but teaching materials and salary supplements do. The law may say that the publicly supplied materials may not be used for teaching religion, but a state might have to send inspectors around to check up on the use of the materials. A salary supplement restriction to teachers teaching only secular subjects could easily be evaded. (*Meek v. Pittenger*, 421 U.S. 412 (1975), and cases cited give the details summarized above.)

The attorney general opinion mentioned at the beginning of this *Explanation* concerned tuition equalization grants authorized by Article 2654h of the *Texas Revised Civil Statutes Annotated*. This permits grants to needy residents attending Texas private colleges and universities. (This is not to be confused with student loans authorized by Sec. 50b of Art. III.) After reviewing the United States Supreme Court cases, the attorney general concluded that, properly administered, Article 2654h would not run afoul the establishment clause. He noted, for example, that grants could not be made to students attending seminaries or divinity schools. He also stressed the significance of Section 7. Following the sentence quoted earlier, the opinion continued:

> Denominational schools are not necessarily sectarian in that sense, and some schools with sectarian programs may be able to effectively separate their secular programs from the sectarian remainder so that the use of funds for the one does not have the effect of subsidizing or furthering the other. The dividing lines are delicate but must be sharply drawn so that public funds are not put to sectarian uses. (Tex. Att'y Gen. Op. No. H-66 (1973).)

It is fair to note that, strict as these rules may be, they are not absolutes. Any

financial assistance, no matter how carefully restricted, "aids" religion. A free bus ride or free textbook eases the financial burden on a religion and its supporters. The line-drawing process under the three rules set out above retains an element of common sense. For example, in *Walz v. Tax Commission* (397 U.S. 664 (1970)), the court upheld the granting of tax exemptions for religious property. The court conceded that a tax exemption is an indirect subsidy but, on the basis of history and common sense, drew a line. Subsidies no, tax exemptions yes.

Comparative Analysis

Some 25 states specifically prohibit appropriations or expenditures for religious purposes. However, as the recent United States Supreme Court decisions show, such prohibitions may inhere in more general statements on the separation of church and state. Other state constitutions prohibit appropriations favoring a particular group or religious denomination.

Author's Comment

Despite the paucity of state litigation on the potential subject matter of Section 7, the section deals with a subject of considerable interest. This interest is reflected in the inquiries to the attorney general, answers to which, of course, do not finally settle the questions asked. The interest is demonstrated most convincingly by financially hard-pressed supporters of sectarian schools who have formed powerful lobbies in some states. In Texas, the thrust has been in higher education. A convention might wish to review present "tuition equalization grants" and to determine basic policy by clarifying Section 7. It would note the partial overlap of Section 7 with Article VII, Section 5, which commands that no part of the permanent or available school fund shall "ever be appropriated or used for the support of any sectarian school."

Sec. 8. FREEDOM OF SPEECH AND PRESS; LIBEL. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

History

Freedom of expression has been considered one of the most basic American freedoms. With the British heritage of struggle against licensing, the American states, led by Virginia in 1776, wrote guarantees of free expression into their early constitutions. The United States Bill of Rights opens with the words: "Congress shall make no law . . . abridging the freedom of speech or of the press."

Beginning with the Fourth Section in the Declaration of Rights of the Texas Constitution of 1836, freedom of speech and the press have always been guaranteed by fundamental law in Texas. Subsequent constitutions expanded the language of Section 4 and divided it into two sections. They in turn were drawn together again to make the present Section 8.

Art. I, § 8

Explanation

Freedom of expression has often been considered the matrix of our other liberties. Without freedom of expression neither the people nor their representatives can play their roles in a functioning democracy. Indeed, well before democratic ideas were accepted, Englishmen and Americans were struggling to assert and protect this precious liberty.

Early and restricted views of free expression accepted a ban on censorship as the essence of this guarantee. Thus, Section 8 begins in these terms with words reminiscent of Blackstone, "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; . . .". As Blackstone defined it, this responsibility was great, but the American constitutions opted for greater protection for the privilege. Hence the opening sentence quoted from Section 8 continues with the essential protection extended by the Texas Constitution: "and no law shall ever be passed curtailing the liberty of speech or of the press." This is the parallel of the federal guarantee. As Justice Garwood remarked in rebuffing an attempt to use the "responsibility" proviso to limit the legislative power to set up investigative bodies, "no decisions appear to have ever applied this particular language of the constitution" (Ex parte *Jimenez,* 159 Tex. 183, 189, 317 S.W.2d 189, 194 (1958)). Thus "responsibility" must be measured simply by the limits of guaranteed freedom of expression and the first part of the opening sentence of Section 8 adds no more than emphasis to the latter part of the sentence. This emphasis is upon the unconstitutionality of censorship.

In 1920 Chief Justice Phillips wrote eloquently upon prior restraint and the underlying rationale of Section 8. Officers of a union were enjoined from "vilifying, abusing or using opprobrious epithets to or concerning" certain persons. In rejecting this assertion of judicial power, the Chief Justice said:

> Punishment for abuse of the right [of free expression], not prevention of its exercise, is what the provision contemplates. There can be no liberty in the individual to speak, without the unhindered right to speak. It cannot co-exist with a power to compel his silence or fashion the form of his speech. . . .
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> The theory of the provision is that no man or set of men are to be found, so infallible in mind and character as to be clothed with an absolute authority of determining what other men may think, speak, write or publish; that freedom of speech is essential to the nature of a free state; that the ills suffered from its abuse are less than would be those imposed by its suppression; and therefore that every person shall be left at liberty to speak his mind on all subjects, and for the abuse of the privilege to be responsible in civil damages and subject to the penalties of the criminal law . . . .
>
> Equity will protect the exercise of natural and contractual rights from interference by attempts at intimidation or coercion. Verbal or written threats may assume that character. When they do, they amount to conduct, or threatened conduct, and for that reason may properly be restrained. Cases of that sort, or of analogous character are not to be confused with this one. (Ex parte *Tucker,* 110 Tex. 335, 337, 220 S.W. 75, 76, (1920).)

In 1937 the court of civil appeals in Galveston did uphold an injunction against the libel of a financial institution as "essential to the preservation of property interests" but this decision has not been followed (*Gibraltar Savings & Building Ass'n v. Isbell,* 101 S.W.2d 1029). Rather Ex parte *Tucker* remains the leading case in harmony with federal decisions. (See *Amalgamated Meat Cutters v. Carl's Meat and Provision Co.,* 475 S.W.2d 300 (Tex. Civ. App.—Beaumont 1971, *writ dism'd*).) As a recent picketing case put it, the state may regulate the time, place

and manner of expression but it can do little about the content (*Geissler v. Coussoulis,* 424 S.W.2d 709 (Tex. Civ. App.—San Antonio 1967, *writ ref'd n.r.e.*)). Coercion, the United States Supreme Court has noted recently, cannot justify an injunction against peaceful distribution of handbills by an association which exposes a real estate broker's business practices in an effort to force him to abandon them (*Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971). The "Austin" involved is a neighborhood in Chicago.)

Texas courts have recently distinguished situations involving the unauthorized practice of law and medicine. When a nonlawyer advertised and sold, together with a set of definitions, blank will forms to be filled in by the purchaser, the seller was engaged in the unauthorized practice of law and could be enjoined. Said the court, freedom to publish is not absolute and courts "are entitled to strike a balance between fundamental freedom and the state's interest in the welfare of its citizens." (*Palmer v. Unauthorized Practice Committee of State Bar,* 438 S.W.2d 374, 377 (Tex. Civ. App.—Houston (14th Dist.) 1969, *no writ*)). Two years before a New York court had found that it could not enjoin publication of a book *How to Avoid Probate* which, in addition to forms, contained some 55 pages of comment expressing in part views regarding the high cost of probate and other beliefs (*New York County Lawyers' Ass'n v. Dacey,* 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967)). When a Texas dentist began to practice medicine, he, too, published a book or pamphlet entitled "One Answer to Cancer." The court enjoined both the practice of medicine and the book, which was found to be a means used by the defendant to advertise himself and practice medicine. In answer to freedom of expression claims, the court asserted its right to balance fundamental freedoms in the "interest of the state and the welfare of its citizens" (*Kelley v. State Board of Medical Examiners,* 467 S.W.2d 539, 546 (Tex. Civ. App.–Fort Worth 1971, *writ ref'd n.r.e.*) *cert. denied* 405 U.S. 1073 (1972)).

As previously noted Texas developed important case law before federal case law regarding freedom of expression became controlling. Although *Gitlow v. New York* (268 U.S. 652 (1925)) decided that the First Amendment guarantees of free expression were a part of the fundamental liberty protected against state action in the Fourteenth Amendment, the Texas Supreme Court had already expressed itself in terms similar to those of the more advanced minority of the United States Supreme Court, Justices Holmes and Brandeis. Texas courts have continued to hear a large volume of cases under Section 8 but gradually federal standards have become decisive. This is hardly surprising considering the widespread "incorporation" *into* the Fourteenth Amendment of guarantees in the federal Bill of Rights. Furthermore, the United States Supreme Court has been continually preoccupied with First Amendment rights. Not only has it struggled with theories of clear and present danger, preferred rights, absolutes, and balancing but it has developed a great body of case law in broad and expanding areas of free expression. Thus, Texas state action has been found to fall short of federal guarantees in such instances as contempt of court proceedings against a newspaperman (*Craig v. Harney,* 331 U.S. 367 (1947)); a legislative loyalty oath which, by proscribing memberships in certain organizations without requiring specific intent to further the illegal aims of these organizations, enacted guilt by association (*Gilmore v. James,* 274 F. Supp. 76 (N.D. Tex. 1967)); and a Dallas ordinance too vaguely authorizing a Motion Picture Classification Board to classify films as "not suitable for young persons" and enjoining their exhibition except under prescribed restrictions (*Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676 (1968)). Similarly, a Texas statute which required labor organizers to obtain an organizer's card from the state before soliciting union membership violated free speech (*Thomas v. Collins,* 323 U.S. 516 (1945)).

Over the past 40 years the courts have come fairly close to making freedom of speech and the press absolute. This means that one can say, write, or print almost anything one wants to without fear of government interference. But note the qualifying "almost." It is still not permissible to shout "fire!" in a crowded theater when the shouter knows there is no fire. That is, one cannot use this "absolute" freedom as a shield to protect oneself from the consequences of the words used. In this context, freedom of speech and press can never be absolute. An editorial that suggested that Texas would be better off if the legislature never met is different from an editorial that called on the public to surround the Capitol to keep the legislature from meeting. And both editorials are vastly different from one that advocated assassinating all legislators to prevent their meeting. Yet even within this narrow area, the problem of line drawing will remain with us forever.

The law of libel is another area of line drawing that will remain with us forever. The problem here is principally the indirect effect of libel law on press freedom. (Technically, slander is the legal term in the case of speech; libel governs the printed word. For purposes of this discussion only "libel" will be used.) Neither the common law of libel nor any statute prevents a person from writing or publishing anything. But the threat of a suit for libel may deter someone from speaking or writing. Within the last decade the United States Supreme Court has struggled with the problem of the effect of libel laws on free speech and press. The initial approach was to focus on the person who was written or spoken about. Under most circumstances truth is a defense unless the true statement was made with malice. (Note the second sentence of Sec. 8. The sentence is related to criminal libel discussed below.) The Supreme Court has ruled that things said or written about public figures are not libelous even if false unless there is malice, deliberate lying, or a reckless disregard of the truth (*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). This differentiation was extended to people who are not "public figures" but who get involved in public events (*Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971)).

Recently the Supreme Court has tried a new tack. In the case of nonpublic figures who get involved with public events, the court has withdrawn the protection afforded false statements by the *Sullivan* case. In *Gertz v. Welch* (418 U.S. 323 (1974)), the court all but overruled the *Rosenbloom* case. The rule of *Gertz* is twofold. First, a plaintiff must establish some degree of negligence in publishing a defamatory falsehood. (Traditionally, the fact of publication established liability for a defamatory statement, thus shifting the burden of proof to the publisher to establish the truth of the statement.) Second, the plaintiff has the burden of proving the monetary value of the effect on his reputation by negligent publication of a defamatory falsehood. (Traditionally, there was no significant limit on the amount of damages that a jury could award.)

Here, then, is an excellent example of the balancing act that courts engage in when dealing with fundamental freedoms. On the one hand, the First Amendment's protection of freedom of speech and press is "chilled," as they say, if the speaker or publisher has to worry too much about the eventual monetary consequences. (In *Gertz, supra,* two justices dissented because they thought that the new rule would still have a "chilling effect.") On the other hand, there is a need to protect nonpublic figures from irresponsible defamatory statements that cannot be shown to be malicious or uttered with reckless disregard for the truth. (Two members of the court dissented because they feared that the new rule went too far in restricting the common law of libel.)

There is one final point to be made about the libel part of Section 8. The last sentence is an historical anachronism of no significance today. Under the 18th century common law of criminal libel the only function of the jury was to decide

the fact of publication of the alleged seditious statement. Whether the statement was seditious was a question of law for the judge. The last sentence of Section 8 was the device used to give the jury the opportunity to decide whether the statement was seditious. The assumption was that judges were likely to be part of the "establishment" but that the jury might be sympathetic to a pamphleteer who was fighting the "establishment." (See generally Levy, *Legacy of Suppression*, Cambridge: Harvard University Press, 1960. Incidentally, Professor Levy convincingly demonstrates that at the time of the adoption of the Bill of Rights, the general view was that freedom of speech and the press did not include the freedom to make seditious statements about the government. Today's theory—that one of the most important purposes of the First Amendment is to permit criticism of the government—developed slowly.) In any event, the last sentence of Section 8 does not mean that the jury takes over the usual function of a judge. As the court of criminal appeals put it, "The jury is required to take the law from the court and be bound thereby." (See *Alridge v. State,* 170 Tex. Crim. 502, 507, 342 S.W.2d 104, 108 (1961).)

In one area, obscenity, the United States Supreme Court has struggled and struggled to draw lines but has gotten nowhere. That is, the court has been unable to find a line that is basically clear. Consider, for example, the court of criminal appeals' disposition of *West v. State* (514 S.W.2d 433 (Tex. Crim. App. 1974)) on remand from the United States Supreme Court. Upon reconsideration in the light of the latest Supreme Court decisions, the court of criminal appeals unanimously reaffirmed its original decision that West was properly convicted under a valid obscenity statute. On motion for rehearing, the original conclusion was adhered to but with a new analysis of the Supreme Court decisions. The author of the original analysis filed a concurring opinion asserting that the new analysis was erroneous. The result was a three-to-two decision on what the United States Supreme Court meant in its several five-to-four decisions.

The principal reason that the court has trouble with pornography and obscenity is that, instead of drawing lines based on a balancing of freedom of the press to publish pornography against some overriding "clear and present danger" to the public interest, the court holds that obscenity is not protected by the First Amendment. Thus, the line drawing exercise is definitional—that is, what is obscene?

The latest, and therefore current, definition is set forth in *Miller v. California* (413 U.S. 15 (1973)):

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (At p. 24.)

How long this definition will last is anybody's guess. At one time most of the justices took the definitional route. Today, three justices who formerly took that route now argue for the balancing route. It seems likely that the law will remain confused until a majority agrees that obscenity as such is not outside the pale and limits the power to regulate the publication and dissemination of obscene matter as in other First Amendment situations.

Comparative Analysis

All of the states seek to safeguard freedom of expression in one manner or another. Many are able to do so in briefer compass than Section 8.

Art. I, § 9

Author's Comment

The essence of Section 8 is found in the words "no law shall ever be passed curtailing the liberty of speech or of the press." Certainly this is one of the most basic ingredients of a free and democratic government. That the other words of Section 8 really add anything of current constitutional significance is doubtful. In any case, federal standards presently applicable to the states now define the practical boundaries of free expression.

Sec. 9. SEARCHES AND SEIZURES. The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

History

Section 9 tracks the Fourth Amendment to the United States Constitution. In 1959 the United States Supreme Court reexamined the historical origins of that amendment:

> The history of the constitutional protection against official invasion of the citizen's home makes explicit the human concerns which it was meant to respect. In years prior to the Revolution leading voices in England and the Colonies protested against the ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods. The vivid memory by the newly independent Americans of these abuses produced the Fourth Amendment as a safeguard against such arbitrary official action by officers of the new Union, as like provisions had already found their way into State Constitutions.
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> In 1765, in England, what is properly called the great case of *Entick v. Carrington*, 19 Howell's State Trials, col. 1029, announced the principle of English law which became part of the Bill of Rights and whose basic protection has become imbedded in the concept of due process of law. It was there decided that English law did not allow officers of the Crown to break into a citizen's home, under cover of a general executive warrant, to search for evidence of the utterance of libel. Among the reasons given for that decision were these:
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> > It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.' *Id.*, at col. 1073.
>
> These were not novel pronouncements to the colonists. A few years earlier, in Boston, revenue officers had been authorized to use Writs of Assistance, empowering them to search suspected places, including private houses for smuggled goods. In 1761 the validity of the use of the Writs was contested in the historic proceedings in Boston. James Otis attacked the Writ of Assistance because its use placed 'the liberty of every man in the hands of every petty officer.' His powerful argument so impressed itself first on his audience and later on the people of all the Colonies that President Adams was in retrospect moved to say that 'American Independence was then and there born.' Many years later this Court, in *Boyd v. United States*, 116 U.S. 616, carefully reviewed this history and pointed out, as did Lord Camden in *Entick v. Carrington*, that
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> > . . . the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against

himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.' 116 U.S., at 633.

Against this background two protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property. . . .

. . . While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogues in state constitutions, the application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are of course not restricted within these historic bounds. (*Frank v. Maryland,* 359 U.S. 360, 363-66 (1959) (footnotes omitted).)

The *Frank* case was overruled by *Camara v. Municipal Court,* 387 U.S. 523 (1967), but its historical interpretation of the Fourth Amendment remains authoritative.

Section 9 has appeared in substantially the same form in every Texas constitution.

Explanation

Most search and seizure litigation in Texas, as elsewhere, is factual: was the affidavit of probable cause sufficient, were the place to be searched and property to be seized specifically described, was the patdown of defendent's clothing reasonable? This has not spared the court of criminal appeals from deciding search and seizure cases—their digests currently fill 54 closely printed pages following Section 9 in the annotated Texas Constitution—but the broad outline of the section's guarantees was long ago settled in Texas and it remained only to apply the section to the myriad fact situations arising from the day-to-day operation of the criminal justice system.

Innovation in search and seizure law over the past decade and a half has come from the federal courts, spearheaded, of course, by the United States Supreme Court. In 1949 that court applied the protections of the Fourth Amendment against the states through the Fourteenth Amendment (*Wolf v. Colorado,* 338 U.S. 25 (1949)), and in 1961 held that the exclusionary rule, which bars illegally seized evidence from criminal trials, also applied to the states (*Mapp v. Ohio,* 367 U.S. 643 (1961)). (Interestingly, Texas has applied the exclusionary rule by *statute,* now Code of Criminal Procedure art. 38.23, since 1925.) Finally, in 1963 the Supreme Court imposed the federal standards of reasonableness on the states for deciding search and seizure questions (*Ker v. California,* 374 U.S. 23 (1963)). In practice this has equated Section 9 with the Fourth Amendment, although it is still open to Texas courts to define the guarantees of Section 9 more generously than the federal courts define those of the Fourth Amendment.

Federal search and seizure law is still evolving, which makes it hazardous to attempt a synthesis. All search and seizure law is heavily influenced by the factual setting in which it is applied, which increases the risk that a general description will be both incomplete and oversimplified. Despite these known hazards and risks, however, what follows is offered as a reasonably accurate statement of the present law of search and seizure. (For an excellent summing up of Fourth Amendment

decision making by the Supreme Court, on which the following draws heavily, see Amsterdam, "Perspectives on the Fourth Amendment," the 1974 Oliver Wendell Holmes Lecture, 58 *Minn. L. Rev.* 349 (1974).)

Search, Seizure. Search of a person includes any physical touching of the body or clothing that reveals hidden objects—for example, rummaging through pockets, extracting blood with a hypodermic needle, or patting down. It is not a search to look at an individual's observable characteristics, as in a police lineup, nor is it a search to compel by legal process the furnishing of handwriting specimens or voice exemplars. Search of a house or other private place includes any physical entry by a person or intrusion of a surveillance device into the house. Looking into premises, as through an open window, is not a search, but the use of a device to accomplish the observation or detection may now constitute a search, even though the device never physically intrudes into the premises. See, for example, *Katz v. United States* (389 U.S. 347 (1967)), in which the court held that electronic bugging of a telephone booth constituted a search. Search of papers and effects (possessions) includes opening or any handling that discloses their content or nature.

Arrest constitutes a *seizure* of the person, as does stop-and-frisk and any other detention against the person's will. Papers and effects are seized when gathered up or carried away.

Scope. Since *Katz*, the Fourth Amendment has been interpreted in terms of protecting individual privacy from governmental intrusion. An earlier interpretation read the amendment to apply to the flexible concept of "a constitutionally protected area"—for example, clothing as well as the person and apartments and garages as well as houses. The earlier formulation may still be applicable, however, because the court in *Katz* said the amendment's protections "often have nothing to do with privacy at all."

Reasonableness. It is only unreasonable searches and seizures that are forbidden. As a practical matter the Supreme Court has equated reasonableness with issuance of a specific warrant upon probable cause by a disinterested judicial officer. There are three categories of exception to this rule of thumb, and if a search or seizure fits any one of them it is legal despite the absence of a warrant. The first category is consent; if the suspect agrees to the search or seizure, it is lawful. The second exception category includes border searches, searches of premises licensed to sell liquor and firearms, and perhaps stopping vehicles for license and safety checks. The third exception category covers emergency situations—for example, search incident to lawful arrest, seizure of unwholesome food, search of a vehicle likely to be driven away, and the protective frisk. The reasonableness requirement is pervasive, however, and all searches and seizures, whether authorized by warrant or one of the three exception categories, must be carried out reasonably.

Exclusionary rule. The product of an illegal search and seizure is not admissible in evidence. This is known as the exclusionary rule and is designed to enforce the Fourth Amendment against the government by denying the use of illegally obtained evidence in a criminal trial. The exclusionary rule also bars derivative evidence—"the fruit of the poisonous tree"—that is, evidence tainted by the illegal search and seizure.

Comparative Analysis

All 50 state constitutions prohibit unreasonable searches and seizures, usually in the same language as the Fourth Amendment. The *Model State Constitution*

includes the standard prohibition and adds a prohibition against wiretapping and electronic surveillance as well as the exclusionary rule.

Author's Comment

Judicial application of the search and seizure guarantees demonstrates the great strength of broad-gauged constitutional language. Vague terms like "search," "seizure," and "unreasonable" have been given concrete meaning over the years to implement the guarantees in a variety of everchanging factual contexts. Although written and adopted in response to governmental abuses of nearly two centuries ago, the Fourth Amendment today applies to electronic surveillance, a current manifestation of the general warrants so feared and hated by our colonial ancestors. One hopes the year 2000 will likewise find the courts manning this barrier against whatever form unreasonable governmental intrusion then takes.

Application of the search and seizure guarantees also highlights the permanent tension between individual liberty and collective security. The slogan "Must the criminal escape because the constable blundered?" captures this tension, and congressional efforts to permit no-knock searches and to repeal the exclusionary rule are simply its most recent manifestations.

It is also significant that much of our search and seizure law has emerged from attempts to detect victimless crime. When the policeman is the only complainant it is not surprising that he is tempted to kick in the door on a suspected pot party, tap a suspected gambler's telephone, and prowl around restrooms looking for homosexuals. It is expecting too much of the search and seizure guarantees to compensate for the overreach of our criminal law. And it is truly astonishing that the resulting tension has not yet destroyed the guarantees.

As for Section 9, it should remain as the important bulwark against unreasonable governmental intrusion that it is.

Sec. 10. RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

History

Section 10 itemizes many of the rights extended to persons accused of crimes. As such they comprise the most basic of the traditional guarantees deemed necessary to ensure a fair trial. In part, they repeat the rights of Englishmen at common law but some represent considerably more favorable treatment than the common law allowed. However, these advances appeared earlier in the Fifth and Sixth Amendments to the United States Constitution. Indeed, the similarity between these amendments and Section 10 is striking. Thus, it is not surprising that most of the Section 10 rights have appeared in all Texas constitutions in substantially the same form.

There are, however, some variations among the sections as they appeared in the several constitutions. The most significant is the "right to demand the nature and cause of the accusation against him." This right was granted in the Constitution of the Republic, but was omitted from the Constitution of 1845 and all subsequent constitutions until 1875. Section 10, as presented to the convention, was the same as the present section less the 1918 amendment discussed below. This indicates that the Committee on the Bill of Rights went back to 1836 for its model. This indication is reinforced by the exception of impeachment from the requirement of an indictment, an exception included in the 1836 Constitution but dropped in 1845.

In all other matters of substance Section 10 was unchanged from 1836 to the Convention of 1875. Beyond these two additions taken from the Constitution of the Republic, the convention made one other change from prior constitutions. Beginning with the 1845 Constitution a charge could be made by "indictment or information." (The 1836 Constitution used "presentment" instead of "information.") The 1875 Convention limited the use of the information to cases "in which the punishment is by fine or imprisonment, other than in the penitentiary."

One of the few amendments to the Texas Bill of Rights was adopted in 1918 when the requirement of the physical presence of witnesses at the trial was relaxed in state prosecutions for violation of state antitrust laws. The amendment added the "except" clause to the first part of the last sentence. A search of historical records failed to turn up any clear reason for the amendment. The joint resolution as originally proposed in the house and reported out of committee cut down the defendant's right to compulsory process to the county of the alleged crime and the county in which trial was to take place. To offset this limitation the proposal provided for either the state or the defendant to obtain evidence by deposition from out-of-state witnesses and authorized the legislature to permit depositions from out-of-county witnesses and even in-county people who were ill or disabled. The proposal was amended on the floor of the house to limit depositions to out-of-state witnesses in criminal antitrust trials. The senate then proceeded to knock out the original limitation on the right to compulsory process, thus leaving only the antitrust exception now in the section.

Without this legislative history one would have assumed that the state had been stymied in some important antitrust case. This may have been the case, but the story of changes outlined above indicates that the original purpose was something else. One can only assume that various legislators recognized the serious curtailment of the rights to have compulsory process and to be confronted by witnesses against an accused embodied in the original proposal, but one is left puzzled by the appearance of the antitrust exception as the resolution moved through the legislature and even more puzzled that anyone thought that this limited exception was important enough to justify a constitutional amendment.

Explanation

Section 10 lists the major components of a fair criminal trial. They are copied, often verbatim, from the Fifth and Sixth Amendments to the United States Constitution, and all but two—grand jury indictment and impartial jury—have been incorporated into the Fourteenth Amendment and thus apply against the states under the same standards applied to the federal government. Each component is discussed separately in the following pages.

The list in Section 10 does not exhaust the components of a fair trial. Some are found in other sections of this article (*e.g.*, the jury trial guarantee in Sec. 15), but the bulk are found in the Due Process Clause of the Fourteenth Amendment. For

example, the United States Supreme Court has held it violative of due process to try a mentally incompetent defendant (*Pate v. Robinson,* 383 U.S. 375 (1966)), to convict before a biased judge (*Tumey v. Ohio,* 273 U.S. 510 (1927)), for a prosecutor to suppress exculpatory evidence (*Brady v. Maryland,* 373 U.S. 83 (1963)), to deny a change of venue to permit the impartial trial of a misdemeanor (*Groppi v. Wisconsin,* 400 U.S. 505 (1971)), and to adjudicate juvenile delinquency under a proof burden of less than beyond a reasonable doubt (In re *Winship,* 397 U.S. 358 (1970).) Due process is a flexible concept (see the *Explanation* of Sec. 19) and it is likely that the Supreme Court, while insisting on the presence of the seven incorporated components, will also continue measuring state criminal proceedings against the evolving standards of that process which is the due of defendants in criminal trials.

Speedy trial. The right to a speedy criminal trial was recognized in the Magna Carta and appeared in the first American colonial bill of rights, that of Virginia of 1776. Although originally developed to protect the accused from an oppressive government, a speedy trial also benefits society by clearing crowded court dockets, deterring future criminality by the example of condemnation swiftly following offense, and moving the guilty defendant from unproductive pretrial confinement to rehabilitation in a penal institution. Not surprisingly the accused often does not want a speedy trial, preferring to remain at large on bail, hoping the prosecution's witnesses will forget or become unavailable. Nevertheless, the speedy trial right of the Sixth Amendment has been incorporated into the Fourteenth Amendment and thus binds the states as well as the federal government (*Klopfer v. North Carolina,* 386 U.S. 213 (1967)). For a comprehensive discussion of the values protected by this right, see *Barker v. Wingo* (407 U.S. 514 (1972)).

Following the lead of *Barker,* the Texas Court of Criminal Appeals examines four factors when faced with a claim of denial of a speedy trial: the length of the delay, the reason for it, whether the defendant demanded a speedy trial, and whether prejudice resulted from the delay. Thus a year's delay between indictment and trial was held acceptable, although defendant was in jail the entire period, because it was not shown to be intentional and defendant did not demand a speedy trial during the year (*Davison v. State,* 510 S.W.2d 316 (Tex. Crim. App. 1974)).

The ultimate sanction for violation of the accused's right to a speedy trial is dismissal of the charges. This is a harsh remedy and courts are naturally reluctant to exercise it. As an alternative the Texas Supreme Court has expressed willingness to order (by writ of mandamus) the immediate commencement of trial when defendant shows his entitlement to it (*Wilson v. Bowman,* 381 S.W.2d 320 (Tex. 1964)). Denial of a motion for speedy trial in the trial court is not appealable, however, until after trial and conviction (*Williams v. State,* 464 S.W.2d 842 (Tex. Crim. App. 1971)).

Because of the competing values that the speedy-trial right is intended to protect, and because the concept itself is ambiguous—trials must be deliberate as well as speedy—a few jurisdictions have enacted standards to guide the prosecution and courts in bringing the accused to trial with reasonable dispatch. The standards approach was pioneered by the American Bar Association's Minimum Standards for Criminal Justice, which recommend a tough minded try-or-dismiss approach. (See *Standards Relating to Speedy Trial* (1967).)

Public trial/impartial jury. Although minted by different processes, these rights are two sides of the same coin. A public criminal trial safeguards against use of the courts as instruments of persecution, educates the public on the quality of judicial performance, publicizes the condemnation of malefactors, and occasionally turns up unknown witnesses for both the accused and state. The distaste for secret trials,

with their connotation of the Spanish Inquisition and English Court of Star Chamber, is part of our heritage. If a criminal trial becomes too public, however, it ceases to be a trial, for, in Mr. Justice Black's words, "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper" (*Bridges v. California*, 314 U.S. 252, 271 (1941)). Today these rights are seen in conflict, necessitating what Justice Black called in *Bridges* the "trying task" of choosing between a fair trial and a free press.

Texas courts in the last century recognized both rights and implemented them along traditional lines. The court of appeals discussed the public trial right in *Grimmett v. State* (22 Tex. Ct. App. 36, 2 S.W. 631 (1886)), noting that it is not absolute while upholding a trial judge's expulsion of rowdy spectators. (See also *Kugadt v. State*, 38 Tex. Crim. 681, 44 S.W. 989 (1898) (insufficient seats); *Price v. State*, 496 S.W.2d 103 (Tex. Crim. App. 1973) (embarassing testimony by prosecutrix in rape case).) The conviction of a black man for raping a white woman was overturned in *Massey v. State* (31 Tex. Crim. 371, 20 S.W. 758 (1892)) because of the presence of a howling lynch mob outside the courtroom during the trial. On the other hand, a newspaperman's fine for contempt in publishing trial testimony contrary to the judge's restrictive order was set aside in Ex parte *McCormick* (129 Tex. Crim. 457, 88 S.W.2d 104 (1935)), as violative of the free press guarantee.

The United States Supreme Court categorized the public trial right as an element of due process in In re *Oliver* (333 U.S. 257 (1948)). In *Estes v. Texas* (381 U.S. 532 (1965)), Mr. Justice Clark writing for the court assumed *Oliver* had incorporated the Sixth Amendment guarantee of a public trial into the Fourteenth Amendment. Thirteen years after *Oliver* the court for the first time reversed a conviction because of prejudicial pretrial publicity (*Irvin v. Dowd*, 366 U.S. 717 (1961)). It was the trial of Dr. Sam Sheppard, however, that generated the clash of values, captured by the slogan fair trial versus free press, reverberating today.

Sheppard was convicted of murdering his pregnant wife during what one Ohio appellate court judge called a "Roman holiday" for the news media. His conviction was ultimately reversed by a unanimous Supreme Court, and in the course of his opinion Mr. Justice Clark remarked, "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent . . . . " (*Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).) The facts of *Sheppard* lent emphasis to the American Bar Association's Reardon Report, the product of a study begun in 1964 in response to the massive publicity following the assassination of President Kennedy. The Reardon committee's report identified the critical stages and participants in publicizing criminal trials, considered and found wanting traditional solutions such as *voir dire* examination of prospective jurors, change of venue and continuance, and sequestration of trial jurors, and recommended a series of specific remedies designed to accommodate the public's right to know with the defendant's right to an impartial trial. (American Bar Association Standards for Criminal Justice, *Fair Trial and Free Press* (1968).) Like most compromises this one failed to satisfy the extremists on either side, but most states nevertheless adopted the bulk of the recommendations.

Since *Sheppard* representatives of the news media have viewed with alarm the increasing restrictions (popularly called "gag orders") imposed on the reporting of criminal trials. The Reporters Committee for Freedom of the Press claims that, between 1966 and 1975, 174 such orders have been issued. Although usually directed at counsel and law enforcement, some have named newsmen, and at least one reporter has been jailed for contempt for violating a gag order.

The Supreme Court recently struck down a gag order entered in a sensational

mass-murder trial, the majority concluding "that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact." (*Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 570 (1976).)

Notice. The right of a defendant "to demand the nature and cause of the accusation against him, and to have a copy thereof," serves several important objectives. It furnishes notice of the exact charge against him, thus permitting preparation of a specific defense. It protects him from prosecution under an unreasonably vague penal statute. And it helps implement the double jeopardy bar by fixing the identity of the offense to prevent subsequent prosecution for the same offense. (See the *Explanation* of double jeopardy under Sec. 14.) The right to notice is a clearly established principle of procedural due process under the Fourteenth Amendment (*Cole v. Arkansas,* 333 U.S. 196 (1948)), and later cases have treated this Sixth Amendment right as incorporated in the Fourteenth Amendment.

The wording of the Texas notice right—defendant must demand a copy of the accusation to get it—persuaded the court of criminal appeals in an early case that failure to make timely demand waived the right. (*Albrigo v. State,* 29 Tex. Crim. 143, 15 S.W. 408 (1890).) The current statute (C.C.P. ch. 25) reflects this holding, but as a practical matter counsel invariably obtains the necessary copy and litigation in this area involves the sufficiency of the indictment or information or the adequacy of preparation time allowed before trial and seldom whether defendant or his counsel received notice of the accusation.

A few Texas courts have cited the notice requirement as the basis for the void-for-vagueness doctrine. For example, the court in Ex parte *Meadows* (131 Tex. Crim. 592, 100 S.W. 702 (1937)) struck down as unconstitutionally vague a traffic ordinance punishing driving "in such a manner as to indicate a willful and wanton disregard for the safety of persons and property . . . ." The United States Supreme Court found similar support for the doctrine in the Sixth Amendment's parallel phrase in *United States v. L. Cohen Grocery Co.* (255 U.S. 81 (1921)), but application of the void-for-vagueness doctrine against state law rests on the Due Process Clause of the Fourteenth Amendment. (See, *e.g., Winters v. New York,* 333 U.S. 507 (1948); *Lanzetta v. New Jersey,* 306 U.S. 451 (1939).)

Self-incrimination. Wigmore traces the origins of the self-incrimination privilege to "two distinct and parallel lines of development" in English history. The first was the jurisdictional struggle between ecclesiastical and common law courts, a struggle begun in the reign of William the Conqueror and illustrated by opposition to Elizabeth's High Commission in Causes Ecclesiastical and Court of Star Chamber, both of which employed the *ex officio* oath procedure to compel an accused to incriminate himself. John Lilburn's famous sedition trial before the Court of Star Chamber in 1637 focused Puritan opposition on the *ex officio* oath and led to the Long Parliament's abolition of the Chamber in 1641. The second line of development—opposition to pretrial examination of the accused, usually in secret, by the prosecution in the common law courts—is harder to trace, but it did not begin until the middle of the 17th century, perhaps as a fallout from the *ex officio* oath opposition, and the self-incrimination privilege was not included in the English Declaration of Rights of 1689. (8 Wigmore, *Evidence* § 2250 (McNaughton rev., 1949).) The privilege did appear in the constitutions of seven American colonies before 1789, but this is explained as reaction to procedure in the royal prerogative courts of the colonies rather than as an inheritance from England (Pittman, "The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America," 21 *Va. L. Rev.* 763 (1935)). The privilege against self-

incrimination was included in the Constitution of the Republic of Texas and has appeared in every constitution since.

Mr. Justice Goldberg, writing for the court in *Murphy et al v. Waterfront Commission of New York Harbor* (378 U.S. 52 (1964)), concluded that the privilege against self-incrimination was founded "on a complex of values." These include the frustration of anti-belief laws and the fishing expeditions and the third-degree methods often employed to enforce them—policies grounded in the privilege's history—together with a principal tenet of American political philosophy, traceable to John Locke and other 17th and 18th century thinkers, that government should leave the individual alone until there is good cause—not supplied by the individual, however—to intervene in his affairs.

Texas courts developed the case law of the self-incrimination privilege along traditional lines. The privilege is available to both accused and witness in both criminal and civil proceedings. It also extends to certain pretrial proceedings—the grand jury investigation, for example, Ex parte *Muncy* (72 Tex. Crim. 541, 163 S.W. 29 (1914))—and to legislative investigations, *Ferrantello v. State* (158 Tex. Crim. 471, 256 S.W.2d 587 (1952)). The privilege is personal to the claimant—it cannot be asserted by another in his behalf, *Duncan v. State* (40 Tex. Crim. 591, 51 S.W. 372 (1899))—and can be waived, *Pyland v. State* (33 Tex. Crim. 382, 26 S.W. 621 (1894)). The privilege is unavailable if immunity from prosecution has been granted, limitations bars prosecution, or if the claimant has been acquitted of the offense. (Ex parte *Copeland*, 91 Tex. Crim. 549, 240 S.W. 314 (1922); Ex parte *Muncy*, 72 Tex. Crim. 541, 163 S.W. 29 (1913).)

In 1964 the United States Supreme Court federalized the privilege against self-incrimination, holding in *Malloy v. Hogan* (378 U.S. 1) that the Fourteenth Amendment's Due Process Clause incorporated the Fifth Amendment privilege and applied it against the states. Since then federal rather than state judge-made law has defined the scope and application of the privilege. For example, although many states permitted their prosecutors to comment on a defendant's failure to take the stand and testify in his own defense, this had long been forbidden in federal courts and in *Griffin v. California* (380 U.S. 609 (1965)), the Supreme Court held it detrimental to exercise of the privilege in state courts. In a series of cases decided in 1966 and 1967 the court also made it clear that the privilege is testimonial only and does not prohibit compulsory extraction of physical evidence. (See *Schmerber v. California*, 384 U.S. 757 (1966) (blood sample); *United States v. Wade*, 388 U.S. 218 (1967) (voice exemplar); *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplar).)

The McCarthy congressional investigations of the 1950s seriously challenged the value of the self-incrimination privilege. (For a sturdy defense of the privilege in the face of this challenge, by Harvard Law School dean and later United States Solicitor General Erwin N. Griswold, see *The 5th Amendment Today* (Cambridge: Harvard Univ. Press, 1955).) The privilege survived, however, to be vindicated by the Supreme Court in *Miranda v. Arizona* (384 U.S. 436 (1966)), its high-water mark to date that imposed elaborate safeguards on custodial interrogation by the police. But the controversy continues as law enforcement in Texas, to cite a recent manifestation, seeks the free admissibility of oral confessions, admissibility long denied by statute to further that "complex of values" protected by the privilege against self-incrimination.

Counsel. "Representation by counsel is crucial to the effectuation of all the other procedural protections which the legal system offers to the defendant. If those protections are to be meaningful and not merely a sham, it is essential that each defendant have legal assistance to realize their intended benefits." (American

Bar Association Project on Minimum Standards for Criminal Justice, *Providing Defense Services*, p. 13 (1967).) Although this seems a truism today, counsel was not allowed (much less furnished) Englishmen in all felony trials until Parliament so provided by statute in 1836.

The plight of the indigent defendant unable to retain counsel led to the federalization and extensive elaboration of this right. The process began in *Powell v. Alabama* (287 U.S. 45 (1932)), in which the court held that failure to furnish counsel to the Scottsboro boys, young blacks accused of raping two white women, violated the Due Process Clause of the Fourteenth Amendment. It continued through the "special circumstances" test of *Betts v. Brady* (316 U.S. 455 (1942)) to the landmark decision in *Gideon v. Wainwright* (372 U.S. 335 (1963)), holding that the Sixth Amendment's right to counsel applied to the states through the Fourteenth Amendment and that counsel must be furnished indigents in all felony prosecutions. Most recently, in *Argersinger v. Hamlin* (407 U.S. 25 (1972)), the court extended the right to forbid imprisonment of an indigent defendant not furnished counsel in his misdemeanor trial. (The Texas right has been somewhat broadened by statute: if imprisonment is a permissible punishment, whether or not actually imposed, counsel must be furnished. Code of Criminal Procedure art. 26.04.)

In elaborating the right to counsel the United States Supreme Court has relied on three different constitutional bases. *Powell*, as noted, was bottomed on due process, while in *Gideon* the court incorporated the Sixth Amendment's express guarantee (originally applicable to the federal government alone) into the Fourteenth to apply it against the states. In *Douglas v. California* (372 U.S. 353 (1963)), the court read the Equal Protection Clause to require furnishing counsel to an indigent for his matter-of-right appeal from conviction; the court reasoned that since solvent defendants could retain counsel for their appeals the state, to avoid discriminating on the basis of wealth, had to furnish counsel for indigents. (The equal protection base has fallen into disuse in recent years. See *Ross v. Moffitt*, 417 U.S. 600 (1974).) The court has also used the right-to-counsel guarantee to vindicate other rights—for example, self-incrimination (*Miranda v. Arizona*, 384 U.S. 486 (1966)) and confrontation (*United States v. Wade*, 388 U.S. 218 (1967)).

In addition to the trial proper, the court has identified various "critical stages" of the criminal process at which counsel must be furnished the indigent. These include the initial appearance and preliminary hearing before a magistrate (*White v. Maryland*, 373 U.S. 59 (1963); *Coleman v. Alabama*, 399 U.S. 1 (1970)), arraignment before the trial judge (*Hamilton v. Alabama*, 368 U.S. 52 (1961)), sentencing (*Mempa v. Rhay*, 389 U.S. 128 (1967)), and, as noted, the appeal of right (*Douglas v. California*). Finally, the court has continued its due process review of the counsel issue, requiring its furnishing when necessary to ensure fundamental fairness, as in parole and probation revocation hearings (*Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)), and quasi-criminal proceedings like juvenile delinquency adjudications (In re *Gault*, 387 U.S. 1 (1967)).

Although the right to counsel may be waived, proof of waiver must be clear and convincing, and in fact there is a presumption against waiver. (See, *e.g.*, *Johnson v. Zerbst*, 304 U.S. 458 (1938); Ex parte *Bird*, 457 S.W.2d 559 (Tex. Crim. App. 1970).) Curiously, the Texas Constitution is one of the few whose wording makes clear that a defendant is entitled to represent himself without counsel. The Supreme Court recently accorded this right of self-representation federal constitutional status, with the dissenters noting, not a little ironically, that the circle since *Powell v. Alabama* (287 U.S. 45 (1932)) has run full course (*Faretta v. California*, 422 U.S. 806 (1975)).

The right to counsel is the right to effective counsel, and the court of criminal appeals early held, for example, that allowing counsel inadequate time to prepare a defense violated this right (*Turner v. State,* 91 Tex. Crim. 627, 241 S.W. 162 (1922)). More recent litigation has questioned the competence of counsel in a particular case, with both state and federal courts on occasion reversing a conviction because of gross incompetence in representing the defendant. (See Craig, "Ineffective Counsel in Texas and the Federal Courts," 1 *Am. J. Crim. L.* 60 (1972).)

The obligation to furnish counsel for indigents in criminal prosecutions has considerably strained state and local government treasuries. Two systems presently compete: assigned counsel, in which lawyers are chosen from a roster, usually by the trial judge to defend or appeal a particular case, and compensated according to a fee schedule like Code of Criminal Procedure art. 26.05; and public defender, in which lawyers are employed full-time by state or local government, much as the district attorney and his assistants, but to defend rather than to prosecute. The Criminal Justice Act of 1964, an innovator in this area, mandated that each federal judicial district establish one or the other system and at present federal courts in Texas are opting for the public defender.

Confrontation and compulsory process. The right of a defendant to confront the witnesses against him was well established at common law. Stephen recounts the 1603 treason trial of Sir Walter Raleigh, in which the Crown's principal witness was not called to testify although he had earlier retracted the written accusation admitted in evidence, as an example of abuse leading to development of the right. (1 Sir James Stephen, *A History of the Criminal Law of England,* pp. 333-36 (London: Macmillan, 1883).) Texas courts recognized the common law origin of the right, *Garcia v. State* (151 Tex. Crim. 593, 210 S.W.2d 574 (1948)), several years before it was held specifically incorporated in the Fourteenth Amendment's Due Process Clause. (See *Pointer v. Texas,* 380 U.S. 400 (1965).)

The confrontation right includes by implication the right of the defendant to be present at the trial so he can observe the demeanor of and cross examine his accusers (*Cason v. State,* 52 Tex. Crim. 220, 106 S.W. 337 (1907); *Kemper v. State,* 63 Tex. Crim. 1, 138 S.W. 1025 (1911)). It follows therefore that the confrontation right is denied if defendant cannot understand the witness or is unconscious when the witness testifies (*Garcia v. State supra* (Spanish-speaking defendant); *Reid v. State,* 138 Tex. Crim. 34, 133 S.W.2d 979 (1939) (epileptic)). The right is not absolute, however, so that a trial judge's expulsion of a disruptive defendant after repeated warnings did not violate it (*Illinois v. Allen,* 397 U.S. 337 (1970)), and the well-recognized common law exceptions, such as those admitting dying and spontaneous declarations, are part of it. (See *Burrell v. State,* 18 Tex. 713 (1857); *Tezeno v. State,* 484 S.W.2d 374 (Tex. Crim. App. 1972); see also *Carver v. State,* 510 S.W.2d 349 (Tex. Crim. App. 1974).) The curious Texas exception for antitrust prosecutions, whose historical origins are obscure, has never been litigated but is probably subject to federal constitutional objection under cases like *Pointer* and *Barber v. Page* (390 U.S. 719 (1968)).

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense." This right, set out in the Sixth Amendment, was held incorporated in the Fourteenth, and thus applicable against the states, in *Washington v. Texas* (388 U.S. 14, 19 (1967)), which struck down a state law barring a defendant's use of his coparty to testify in his defense. A defendant is entitled to have his witnesses appear in court, and an admission from the prosecution that they would testify as defendant asserts is no substitute for the effect of their presence before the jury (*DeWarren v. State,* 29

Tex. 465 (1867)). In fact, the court of criminal appeals has asserted (in dictum) that courts have inherent power to compel the attendance of witnesses to protect this right. (See *Bludworth v. State,* 168 Tex. Crim. 549, 330 S.W.2d 436, 4 (1959).) Most states, including Texas, have adopted the Uniform Act to Secure Attendance of Witnesses from Without State, and the legislature recently increased nonresident witness fees, with the state taking over their payment (C.C.P. arts. 24.28, 35.27).

Indictment by grand jury. Historians disagree about the precise origin of the grand jury. Maitland saw it as a Norman innovation, growing out of the frankpledge system introduced by William the Conqueror, under which lesser freemen were formed into groups of ten and made collectively responsible for one another's conduct. More recent studies have traced the grand jury to a Saxon institution, accusation by the 12 leading thanes (knights) of the county, codified in the Laws of Ethelred. All agree, however, that it was the Assize (Royal Ordinance) of Clarendon of 1166 that formalized the pactice of choosing 12 representatives of each hundred (parish) in every county to "present" to the authorities all those suspected of committing offenses. (See Sir Geoffrey Cross and C. D. G. Hall, *The English Legal System,* pp. 34-37 (London: Butterworths, 4th ed., 1964).)

Although the right to grand jury indictment is detailed in the Fifth Amendment to the United States Constitution, the Constitution of the Texas Republic did not—uncharacteristically—copy its phraseology. Perhaps this was because the right was so well established at common law, a body of law the early Texans eagerly substituted for the many abuses they attributed to Spanish and Mexican law. Be that as it may, grand jury indictment for felonies was the invariable practice long before the present constitution detailed the right in its traditional wording and the court of appeals found the presentment of a valid indictment essential to the jurisdiction of the district court (*Rainey v. State,* 19 Tex. Ct. App. 479 (1885)).

Of all the fair trial components listed in Section 10 the grand jury has been most often and heavily criticized—as a dilatory anachronism surviving today merely as a publicity tool and rubber stamp of the prosecutor. Its defenders counter, on the other hand, that the grand jury stands between a potentially oppressive government and its citizens. Several states have abolished the grand jury (England did so in 1948), substituting an information presented by the prosecutor to commence a felony trial. (The Supreme Court held in *Hurtado v. California,* 110 U.S. 516 (1884), that grand jury indictment was not an element of the Fourteenth Amendment due process applicable to the states.) In response to the delay the grand jury process often entails, the Texas Legislature in 1971 enacted a statute permitting a waiver of indictment in noncapital felonies. (See C.C.P. art. 1.141.) This statute was upheld in *King v. State* (473 S.W.2d 43 (Tex. Crim. App. 1971)).

Comparative Analysis

Except for the grand jury indictment requirement, most state constitutions, and the *Model State Constitution,* duplicate the fair trial components listed in Section 10. A tabulation of state constitutional provisions matched to the components follows: Speedy trial—44; public trial—44; impartial jury—44; notice—47; self-incrimination—48; counsel—49; confrontation—49; compulsory process—47; grand jury indictment—25 (of which nine permit the legislature to limit the types of offenses to which it applies).

Author's Comment

Again with the exception of the grand jury indictment requirement, most agree that the fair trial components of this section, deeply rooted as they are in our

political and legal heritage, are worth preserving. Perhaps a somewhat fewer number are content with the judiciary's (especially at the federal level) interpretation and application of the components in specific cases, but that process, too, is at the heart of our constitutional and federal system of government, with its inevitable tension between society's rights and those of the individual, and between the state and federal governments, and that tension is a price most people willingly pay to live in a free society.

The tension between fair trial and law and order (to use the current slogan) regularly changes focus and intensity. In the 1950s the self-incrimination privilege was under serious attack, to emerge stronger than ever as an incorporated component of Fourteenth Amendment due process. The following decade witnessed, through the instrument of the Warren court, a great intensification of interest in the procedural rights of criminal defendants. Today the focus has shifted to a confrontation between free press and fair trial. Certainly the future will produce new clashes between competing values. As a nation we can reflect with pride on our past resolution of these clashes. Anchored in this past we can tackle the challenges of the future with considerably more confidence.

Sec. 11. BAIL. All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law.

Sec. 11a. MULTIPLE CONVICTIONS; DENIAL OF BAIL. Any person accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor may, after a hearing, and upon evidence substantially showing the guilt of the accused, be denied bail pending trial, by any judge of a court of record or magistrate in this State; provided, however, that if the accused is not accorded a trial upon the accusation within sixty (60) days from the time of his incarceration upon such charge, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder.

History

Section 11 enlarges common law provisions regarding bail. The Constitution of 1836 protected the right to bail with substantially the same exceptions as the present Section 11 and intervening variations are not of contemporary significance. Section 11a, adopted in 1956, serves as a limitation upon the right of the accused in the interest of protecting society.

Explanation

Bail in criminal cases is "delivery or bailment of a person to his sureties on their giving, together with himself, sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to jail," (8 *Corpus Juris Secundum* 48, relying on *Blackstone*). Bail serves two main purposes: (1) it prevents innocent persons from being jailed and thus in effect punished, for defendants are presumed innocent until proven guilty; (2) it secures the presence of the accused at the proceedings against him. To protect the right in Section 11, Section 13 prohibits excessive bail. The constitutional right to bail does not

political and legal heritage, are worth preserving. Perhaps a somewhat fewer number are content with the judiciary's (especially at the federal level) interpretation and application of the components in specific cases, but that process, too, is at the heart of our constitutional and federal system of government, with its inevitable tension between society's rights and those of the individual, and between the state and federal governments, and that tension is a price most people willingly pay to live in a free society.

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extend to every situation. Section 11 itself states that bail may be denied in capital cases "when the proof is evident." The burden is upon the state to establish that proof, which is "that the accused, with cool and deliberate mind and formed design, maliciously killed the deceased and that, upon a hearing of the facts before the court, a dispassionate jury would, upon such evidence, not only convict but would assess the death penalty" (Ex parte *Colbert,* 452 S.W.2d 454, 455 (Tex. Crim. App. 1970)). Obviously, this dictum must be adjusted to the decision of the United States Supreme Court that the death penalty as it presently operates is unconstitutional (*Furman v. Georgia,* 408 U.S. 238 (1972)). The constitutional right to bail does not reach one held for extradition (Ex parte *Erwin,* 7 Tex. Crim. 288 (1879)); one who has been convicted and is appealing his case (Ex parte *Ezell,* 40 Tex. 451 (1874)); or one held for hearing on revocation of probation (*Valdez v. State,* 508 S.W.2d 842 (Tex. Crim. App. 1973)).

Section 11a responds to the fear that persons out on bail will continue to commit crimes while awaiting trial, and thus in the interest of society the section diminishes the individual's right to freedom. In the only reported case under Section 11a, the court of criminal appeals upheld a denial of bail to an accused with two felony convictions less than capital (Ex parte *Miles,* 474 S.W.2d 224 (Tex. Crim. App. 1971)). In response to the complaint that Section 11a discriminates and hence presumably violates equal protection, the court held the classification in Section 11a to be reasonable.

Comparative Analysis

Some 49 states prohibit excessive bail and 41 provide generally for bail in all but capital cases. The Eighth Amendment to the United States Constitution prohibits excessive bail, but it has never been settled whether this means that congress must authorize bail or only that if congress does authorize bail it may not be excessive. No other state has anything resembling Section 11a.

Author's Comment

The long established right to reasonable bail is an essential ingredient of our system of justice in which the individual is presumed innocent until proven guilty. Society may conclude that under certain circumstances it is so endangered by the freedom of a suspect that he cannot be released. Obviously such exceptions should be made with the greatest caution.

In recent years much dissatisfaction with the operation of bail systems has been expressed. This criticism is directed, it is submitted, not at the basic right to bail but at the way courts grant bail, the administration of the system, and the operations of bondsmen.

If there is any substance to the frequently made argument that constitutions should be drawn in general terms then Section 11a is a horror of horrors. The draftsmen faced the difficult task of making their point without undermining the rights of bail for ordinary defendants. This result suffers from statutory rigidity in the worst sense. Constitutions drawn like this cannot long endure.

Sec. 12. HABEAS CORPUS. The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual.

History

The writ of habeas corpus has been said to antedate the Magna Carta. It was

strengthened against judicial qualification by the famous Habeas Corpus Act of 31 Car. II (1697). The United States Constitution recognized the writ and limited its suspension (Art. I, Sec. 9). Similarly, the Texas Constitution of 1836 stated that the "privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion the public safety may require it." (Declaration of Rights, Tenth Section.) This guarantee appeared in substantially the same form until 1876 when the "privilege" became a "right" subject to no exceptions. The changes were a reaction to arbitrary denials of the writ by the Reconstruction government and to suspension of the writ as well. Thus in the Convention of 1875 members argued for no suspension. Mr. Stockdale said if the provision were not adopted, the writ of habeas corpus "would be suspended by arbitrary power as they had seen it in too many instances during the last fifteen years" (*Debates*, p. 237). Mr. DeMorse added,

> It was the only security remaining for the liberty of the citizen, and he hoped never again to see upon the continent of America such action as was taken during Mr. Lincoln's administration, when men were picked up from the streets and immured in dungeons without knowledge of the offense with which they were charged, and continued in prison without intimation to their families or their friends as to their whereabouts or the crime until released at the pleasure of the authorities (P. 294).

Explanation

The law of habeas corpus is essentially uncomplicated but, in the last three or four decades, has become controversial in the area of constitutional review of criminal convictions. In essence, the writ of habeas corpus is a command by a judge to someone holding a person in custody to produce that person in court in order to establish by what legal authority the person is held. Thus, the writ is available to prevent the sort of wholly unlawful detention discussed in the 1875 Convention. The writ is also a means for contesting denial of bail, excessive bail, the validity of an extradition warrant, and any wholly illegal action which brought about detention.

The writ is not the means for raising legal questions appropriately raised elsewhere. To take an extreme example, a person convicted in a regular trial cannot immediately obtain a writ of habeas corpus on the grounds that there were fatal errors in the trial. Rather, the convicted person must appeal to a higher court. In the technical terminology of the law, one cannot mount a collateral attack—here the writ—when a direct attack is available—here an appeal. A less extreme example is a claim of double jeopardy. A person who claims that he is in custody for an offense for which he has already been tried cannot rely on the writ; he must raise the point in defense in proceedings in the new case. (But note the exception discussed below.)

It is in the area of collateral versus direct attack that use of the writ has become controversial. The controversy arose because the United States Supreme Court began to allow the use of the writ in United States courts to attack convictions in state courts allegedly obtained unconstitutionally. This course could be followed even when, in the course of the direct attack by appeal, the convicted person had tried to get a hearing by the United States Supreme Court and had been turned down. There is nothing wrong with the theory; a person unconstitutionally held in custody is obviously entitled to release on a writ of habeas corpus. (A different theoretical question arises when a new rule of law is announced; are all those in custody entitled to release even if their cases were completed prior to the announcement of the new rule? For an extended discussion of the problem, see *Linkletter v. Walker*, 381 U.S. 618 (1965).) The practical problem is that persons in prisons have

flooded the courts, federal and state, with applications for writs of habeas corpus. The principal means of coping with this problem is to turn aside applications that are frivolous, no different from earlier applications, or otherwise without merit. (For a recent example, see Ex parte *Carr*, 511 S.W.2d 523 (Tex. Crim. App. 1974).) Nevertheless, the courts recognize the importance of the writ and are willing to cut through technicalities to do justice. In a recent case the court of criminal appeals held in favor of a prisoner who, representing himself, argued that one of his guilty pleas entered several years earlier should be set aside on grounds of double jeopardy (Ex parte *Scelles*, 511 S.W.2d 300 (Tex. Crim. App. 1974)).

Comparative Analysis

Nine other states absolutely prohibit suspension of the writ. All other states contain an exception that is the same as or similar to the exception contained in the United States Constitution. (See the preceding *History*.)

Author's Comment

The writ of habeas corpus, a basic writ of English liberty, may still occasionally serve as a shield against political oppression. At least the salutary history of its protective influence in the past is reassuring. Although many statutes and constitutional rules serve to protect the citizen from illegal detention, the writ of habeas corpus is still available to protect him from such detention whether through oversight or willful abuse of authority.

Sec. 13. EXCESSIVE BAIL OR FINES; CRUEL AND UNUSUAL PUNISHMENT; REMEDY BY DUE COURSE OF LAW. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

History

Except for a change of "or" to "nor" in 1845 and thereafter, the words of Section 13 have appeared unchanged in every Texas constitution. The first sentence of Section 13 almost exactly repeats the wording of the Eighth Amendment to the United States Constitution. (The Eighth Amendment says "cruel *and* unusual.") The second sentence may be traced to the Magna Carta.

Explanation

Section 13 sets out five guarantees: (1) freedom from excessive bail, (2) freedom from excessive fines, (3) freedom from cruel and unusual punishments, (4) the guarantee of open courts, and (5) the right to remedy by due course of law. The Fourteenth Amendment, it would seem, may extend federal protection in each of these categories, the first three through incorporation of the Eighth Amendment and the last two directly through the Due Process Clause.

(1) *Freedom from Excessive Bail.* If bail is excessive then the right to bail extended by Section 11 is effectively nullified. On principle, bail should be sufficient only to assure the appearance of the accused at his trial. To guide in meeting constitutional requirements, the legislature has enacted the following rules:

(1) The bail must be sufficiently high to give reasonable assurance that the undertaking will be complied with.

(2) The power to require bail is not to be so used as to make it an instrument of oppression.
(3) The nature of the offense and the circumstances under which it was committed are to be considered.
(4) The ability to make bail is to be considered, and proof may be taken upon this point. (C.C.P. art. 17.15)

The reasonableness of bail depends upon all of the circumstances. For an indigent, very little bail may be excessive. Thus the Code of Criminal Procedure provides that persons may be released upon their promise to appear at trial. For them, as on the issue of excessiveness generally, family and community ties and whether the individual has a job weigh heavily. The nature of the crime or crimes charged and the punishment that may be assessed affect the limit of reasonableness (Ex parte *Alba,* 469 S.W.2d 188 (Tex. Crim. App. 1971)). Hence the ability of the accused to make bail is not the sole criterion of setting the amount, although before he will be heard to apply for a reduction he must try to make bond at the original amount (Ex parte *De Leon,* 455 S.W.2d 260 (Tex. Crim. App. 1970); Ex parte *Roberts,* 468 S.W.2d 410 (Tex. Crim. App. 1971)).

(2) *Freedom from Excessive Fines.* This provision has seldom protected persons upon whom fines were levied. In ordinary criminal prosecutions the court is obviously limited by the maximum fine fixed by law but this is a matter of statutory authority and does not involve Section 13. The constitutional rule was stated by the supreme court: "Prescribing fines and other punishment which may be imposed upon violators of the law is a matter peculiarly within the power and discretion of the Legislature, and courts have no right to control or restrain that discretion, except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind" (*State v. Laredo Ice Co.,* 96 Tex. 461, 467, 73 S.W. 951, 953 (1903)). This proviso sounds like Justice Frankfurter's "shock the conscience" test for due process violations. (See *Rochin v. California,* 342 U.S. 165, 172 (1952).)

Apparently in no instance have fines imposed in ordinary criminal prosecutions been held constitutionally excessive. However, litigants, opposing statutory penalties attached to the violation of tax or regulatory acts, derived some comfort from several cases which applied Section 13 (*State v. Galveston H. & S. A. Ry. Co.,* 100 Tex. 153, 97 S.W. 71 (1906) (tax penalty); *Gulf Union Oil v. Isbell,* 205 S.W.2d 105 (Tex. Civ. App.—Austin 1947), *rev'd on other grounds* 209 S.W.2d 762 (Tex. 1948) (possible penalty payable before revival of a forfeited corporate charter)). Use of Section 13 to protect such private pecuniary interests rather than personal interests seems questionable. In any case judicial interest in this aspect of Section 13 was always slight and in recent years it seems to have faded away.

(3) *Freedom from Cruel or Unusual Punishment.* A study of English history reveals ample examples of cruel and unusual punishments. Most of these barbarous practices have long since been discontinued. The question today is what is cruel and unusual under current moral standards. An early Texas opinion cited Cooley's dictum with approval:

> Probably any punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual, in the constitutional sense; and probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of a similar nature. But those degrading punishments which in any state have become obsolete before its existing constitution was adopted. we think, may well be held forbidden by it, as cruel and unusual. (*Martin v. Johnston,* 33 S.W. 306, 309 (Tex. Civ. App. 1895, *no writ*)).

Until fairly recently claims of cruel or unusual punishment were unsuccessful. (The one exception was a 1910 case invalidating a Philippine statute prescribing 10 to 20 years imprisonment for making a false entry in a public record, a much harsher penalty than that imposed for other more serious crimes (*Weems v. United States*, 217 U.S. 349)). This is not surprising, since the general trend in society has been toward less harsh punishments. In Texas there was a period when juries imposed ridiculous terms of imprisonment under statutes setting no maximum limit. For example, the term imposed in *Rodriguez v. State* was 1500 years (509 S.W.2d 625 (Tex. Crim. App. 1974)). The opinion in that case noted that these sentences had always been upheld simply because a prisoner is eligible for parole after serving one-third of the sentence or 20 years, whichever comes first. Moreover, the court noted that this nonsense has been ended by the new Texas Penal Code, which limits terms to a maximum of 99 years (sec. 12.32).

The United States Supreme Court has led the way in finding cruel and unusual punishment in areas not covered by the traditional statement previously quoted. A harbinger of things to come was *Francis v. Resweber* (329 U.S. 459 (1947)), where the court held five-to-four that it was not cruel and unusual punishment to re-order electrocution after the first attempt failed through an accidental failure of the equipment. Since then the court has held that punishment for being a drug addict is cruel and unusual (*Robinson v. California*, 370 U.S. 660 (1962)), and that depriving a native-born citizen of citizenship as part of punishment for desertion in time of war is cruel and unusual (*Trop v. Dulles*, 356 U.S. 86 (1958)). And, of course, there were the capital punishment cases, *Furman v. Georgia* and *Branch v. Texas* (408 U.S. 238 (1972)), holding that, under the circumstances in those instances, execution would have been cruel and unusual punishment. Since the court divided five-to-four with nine separate opinions, the constitutional status of capital punishment remained unclear.

In those cases only three of the majority justices were prepared to outlaw capital punishment per se. Two of the majority argued that the system in question permitted arbitrary and capricious imposition of the death penalty. In the light of this "swing" vote, many states undertook revisions of criminal statutes in order to eliminate arbitrariness. One approach was to make the death penalty mandatory for certain crimes, thereby making it "impossible" for a jury or a judge to act arbitrarily or capriciously. Another approach was to separate determination of guilt from the determination of the penalty and to establish standards for deciding whether, under the circumstances, the death penalty is justified. Texas took the second approach. In *Jurek v. State*, the court of criminal appeals upheld the statute (522 S.W.2d 934 (1975)). Not surprisingly, the court had difficulty threading a path through the nine opinions in the *Furman* case and disagreed among themselves whether the Texas approach would satisfy the United States Supreme Court.

On July 2, 1976, that court settled the matter in a batch of cases from five states, including the *Jurek* case from Texas. (See *Gregg v. Georgia*, 428 U.S. 153; *Proffitt v. Florida*, 428 U.S. 242; *Jurek v. Texas*, 428 U.S. 262; *Woodson v. North Carolina*, 428 U.S. 280; and *Roberts v. Louisiana*, 428 U.S. 325.) Again, there was a plethora of opinions, but again essentially only three positions among the justices. Four members of the court were prepared to let the states pretty much make their own rules about capital punishment; two justices adhered to their earlier view that no form of capital punishment is permissible; and three justices controlled the results by holding that the discretionary approach adopted by Texas, and with variations by Georgia and Florida, is permissible but that the mandatory penalty, adopted by Louisiana and North Carolina, is not permissible.

It seems likely that capital punishment will continue to be litigated in one way

or another for a long time to come. It is an emotional issue, in some respects a racial issue, in some respects a rich-against-poor issue, and in all respects a judicial versus legislative power issue.

Notwithstanding these new developments under the United States Constitution, there is no indication that Texas courts intend to vary from the interpretation of Section 13 set forth in the quotation above. There has, however, been a successful invocation of the Eighth Amendment as incorporated in the Fourteenth Amendment in the case of juveniles confined in institutions of the Texas Youth Council. But this was a case in the U.S. district court; no mention was made of Section 13. (See *Morales v. Turman,* 364 F. Supp. 166 (E.D. Tex. 1973).) In passing, it should be noted that there is apparently no significance in the difference between Section 13's "cruel *or* unusual" and the Eighth Amendment's "cruel *and* unusual."

(4) *Open Courts.* The requirement that all courts be open is significant in two respects. In the first place, along with Section 24, it limits the governor respecting martial law. As Judge Hutcheson put it, "Martial law, the law of war, in territory where courts are open and civil processes run, is totally incompatible with . . . article I, Bill of Rights of the Texas Constitution" (*Constantin v. Smith,* 57 F. 2d 227, 237 (E. D. Tex. 1932)). He went on to observe that pertinent parts of the Constitution of 1876, as the English Bill of Rights of 1689, emerged from suppression when the needs for these guarantees were very real. In calling out the troops, the governor is a civil officer. He may not close the courts or interfere with their processes. As concerns the governor and militia, "Their powers and duties are derived from, they must be found in, the civil law. At no time and under no conditions are their actions above court inquiry or court review" (P. 238). The open court provision also requires the courts to be open to supply redress of grievances but in this respect is the same as the next requirement to be discussed.

(5) *Due Course of Law.* Both Sections 13 and 19 contain due course of law provisions. Although they are frequently coupled together and applied without discussion, their meaning seems to be different. Section 13 guarantees that the courts will be open so that the individual may seek a remedy according to due course of law. Section 19, on the other hand protects the individual from being treated by the state under any circumstances without due course of law. Both are "due process" clauses. Properly, however, Section 13 deals only with access to the courts and hence is the lesser due process provision while Section 19 roughly parallels the due process clauses in the Fifth and Fourteenth Amendments.

Statutes denying access to the courts to redress a grievance may violate Section 13 (*Clem v. Evans,* 291 S.W. 1871 (Tex. Comm'n App. 1927, *holding approved*)). "The right to a day in court and the privilege of being heard before judgment is a constitutional guaranty, the very essence of due process of law" (*Johnson v. Williams,* 109 S.W.2d 213, 214 (Tex. Civ. App.—Dallas 1937, *no writ*)). Thus "due course of law in a case tried in a District Court," said an early supreme court opinion, "means a trial according to the settled rules of law in that court . . ." (*Dillingham v. Putnam,* 109 Tex. 1, 3, 14 S.W. 303, 304 (1890)).

Although Section 13 denies a governmental right to close the courts to redress of any intentional wrong done to the person of a defendant, it does not create a vested right to the continuance of particular rules of law (*Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556 (1916)). An ordinance which absolved the city from all damages arising from grading and public improvements violated Section 13 because it prohibits "legislative bodies from arbitrarily withdrawing all legal remedies from one having a cause of action well established and well defined in the common law" (*Lebohm v. City of Galveston,* 154 Tex. 192, 196,

275 S.W.2d 951, 954 (1955)). On the other hand substitution of new and different remedies for those at common law in workmen's compensation cases is constitutional (154 Tex. at 196, 275 S.W.2d at p. 954).

Comparative Analysis

Substantially all of the states prohibit excessive bail. Thirty-eight states require that civil courts be open to all persons and 45 states have due process clauses. "Cruel and unusual punishments" are prohibited by 47 states while 49 states prohibit excessive fines. It is unimportant but interesting to note that 21 states use "and," 19 states use "or," and six states only "cruel" punishments. The 1974 Louisiana Constitution prohibits "cruel, excessive or unusual punishments." The preceding Louisiana constitution belonged in the "and" category. The *Model State Constitution* is in the "or" category.

In 1972 the California Supreme Court held capital punishment unconstitutional under the state constitution (*People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 162). Later that year an initiative constitutional amendment was adopted overruling the decision. This means that the California courts now cannot go beyond the rule laid down by the United States Supreme Court.

Author's Comment

The guarantees in Section 13 all represent the basic consensus in our society as to how government should act. Since they do reflect this agreement these provisions have not been extensively litigated. Questions may arise as to the extent of the rights listed and this has been particularly true in regard to cruel and unusual punishments where extension beyond traditional definitions has seemed possible.

Sec. 14. DOUBLE JEOPARDY. No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.

History

The guarantee against double jeopardy was a part of the common law of England long before the American revolution (*Benton v. Maryland*, 395 U.S. 784, 795 (1969)). It was recited in *Blackstone* and appeared in the Fifth Amendment to the United States Constitution. In substantially the same terms, the Texas Declaration of Rights of 1836 provides, "No person for the same offense, shall be twice put in jeopardy of life and limbs." The Constitution of 1845 repeated these words less the "s" on limbs and added "nor shall a person be again put upon trial for the same offense after a verdict of not guilty." The Constitution of 1869 omitted "limb" while that of 1876 inserted "or liberty" and added to the second clause the words "in a court of competent jurisdiction."

Explanation

Section 14 applies to three situations: (1) former acquittal, (2) former conviction, and (3) former jeopardy. A defendant, when put on trial, is in jeopardy considerably before he is properly acquitted or convicted and thus in a general sense the guarantee against former jeopardy includes the other two. Nevertheless the courts talk in terms of all three situations. The "underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing

state of anxiety and insecurity, as well as enhancing the possibilities that even though innocent he may be found guilty" (*Green v. United States,* 355 U.S. 184, 187-88 (1957)). The right is to be liberally construed; hence it extends to misdemeanors as well as felonies (*Grisham v. State,* 19 Tex. Ct. App. 504 (1885)), and to juveniles in delinquency proceedings (*State v. Marshall,* 503 S.W.2d 875 (Tex. Civ. App.—Houston (1st Dist.) 1973, *no writ*)).

When does jeopardy arise? An early case stated the traditional rule as follows: "A person is in legal jeopardy when he is put on trial before a court of competent jurisdiction upon an indictment or information sufficient in form and substance to sustain a conviction and a jury has been empaneled and sworn to try the case" (*Powell v. State,* 17 Tex. Ct. App. 345, 363 (1884)). This meaning was well established long before the adoption of the first Texas constitution (*Thomas v. State,* 40 Tex. 36 (1874)). Texas goes beyond the traditional rule, however, by requiring also that following swearing of the jury the accused enter his plea before jeopardy attaches (*Lockridge v. State,* 522 S.W.2d 526 (Tex. Crim. App. 1975); *Steen v. State,* 92 Tex. Crim. 99, 242 S.W. 1047 (1922); see *Steele,* "The Doctrine of Multiple Prosecution in Texas," 22 *Sw. L. J.* 567 (1968)). Jeopardy may cease "where the defendant, by a motion made, has claimed surprise and asked for a continuance, or where he has asked for and been granted a new trial, or has appealed the case and secured a reversal thereof, or in any instance where, on his motion, the case has been postponed and withdrawn from the consideration of the jury" (*Johnson v. State,* 73 Tex. Crim. 133, 136, 164 S.W. 833, 834 (1914)). To this list must be added sickness of the participants, acts of God, and a hung jury (*Powell v. State, supra; Murphy v. State,* 149 Tex. Crim. 624, 198 S.W.2d 98 (1946)).

Special problems arise in cases of previous acquittal or conviction for the same offense. In pleas of previous acquittal not only must the offense or transaction be the same but the evidence necessary for a conviction must also be the same. On the other hand, to sustain a plea of previous conviction, in theory only the transactions must be identical. Steele, whose article is referred to above, discusses both the difficulties in applying the rule of previous conviction and the liberality of Texas courts to the defendant in such cases.

In 1968 the United States Supreme Court first decided that the double jeopardy provision of the Fifth Amendment applied to the states (*Benton v. Maryland,* 395 U.S. 784). This means, the court noted, that federal rules regarding double jeopardy apply. It is still possible, however, for the federal and state governments each to prosecute a defendant for crimes arising out of the same transaction, as robbery of a federally insured bank. This is true because the same act constitutes separate offenses against two different sovereigns (*Bartkus v. Illinois,* 359 U.S. 121 (1959); *Breedlove v. State,* 470 S.W.2d 880 (Tex. Crim. App. 1971), *cert. denied* 405 U.S. 1074 (1972)). Of course this separate-sovereigns idea does not apply within a single state and hence a conviction in a municipal court must be accepted in a state court on a double jeopardy plea (*Waller v. Florida,* 397 U.S. 387 (1970)).

Comparative Analysis

Double jeopardy clauses appear in 45 state constitutions.

Author's Comment

Although not the oldest of the common law protections to appear in the federal and state bills of rights, the guarantee against double jeopardy is well established and universally enforced. It reflects the fear of oppression. The problem in modern criminal justice is that of apprehending wrongdoers and prosecuting them

promptly. The attack upon this problem will not be seriously embarrassed by the inability to try some offenders twice. It does not seem likely that the recent application of federal minimum standards to Texas will make much difference in this area. It may be of some interest that the federal courts have managed to find adequate protection against double jeopardy in the briefer and more quaintly worded clause in the Fifth Amendment. Texas courts do not seem to have made much use of the specific words found in Section 14 but rather seem to decide on the history and the general concept of double jeopardy.

Sec. 15. RIGHT OF TRIAL BY JURY. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury.

Sec. 15a. COMMITMENT OF PERSONS OF UNSOUND MIND. No person shall be committed as a person of unsound mind except on competent medical or psychiatric testimony. The Legislature may enact all laws necessary to provide for the trial, adjudication of insanity and commitment of persons of unsound mind and to provide for a method of appeal from judgments rendered in such cases. Such laws may provide for a waiver of trial by jury, in cases where the person under inquiry has not been charged with the commission of a criminal offense, by the concurrence of the person under inquiry, or his next of kin, and an attorney ad litem appointed by a judge of either the County or Probate Court of the county where the trial is being held, and shall provide for a method of service of notice of such trial upon the person under inquiry and of his right to demand a trial by jury.

History

Development of the jury reaches far back in English history. Gradually, through a process of differentiation, the grand-jury and the petit or trial jury emerged. Originally, jurors operated on their own knowledge of events; gradually, the system developed so that jurors acted only upon testimony presented to them. Acceptance of the jury system as an inalienable right was also gradual. Both the United States and Texas Declarations of Independence denounced the responsible authorities for denial or partial denial of the right to trial by jury. (Markham, "The Reception of the Common Law of England in Texas and the Judicial Attitude Toward that Reception, 1840-1859," 29 *Texas L. Rev.* 904 (1951).)

Actually the struggle for jury trial in Texas began before independence was won from Mexico and Section 192 of the Constitution of Coahuila and Texas provided for its gradual introduction. Thus Texas constitutions do not purport to create the right to trial by jury but only to recognize and safeguard the pre-existing right. Accordingly the opening sentence of Section 15, "the right to trial by jury shall remain inviolate," sufficed for all previous Texas constitutions. The present Section 15 adds a directive to the legislature that it pass laws for the regulation, purity, and efficiency of jury trial. To deal with problems involved in commitment of the mentally ill, the proviso was added to Section 15 in 1935 and a new Section 15a adopted in 1956.

Explanation

Sections 15 and 15a do not stand alone in guaranteeing a jury trial. As previously noted, Section 10 guarantees a jury trial in criminal cases. Article V

contains additional jury clauses. (See Secs. 10, 13, and 17 of Art. V. See also Sec. 19 of Art. XVI.) These sections overlap and their redundancy has led to some judicial confusion. Section 10 of Article I opens with the words, "In all criminal prosecutions the accused shall have a speedy trial by an impartial jury." One might assume then by a process of exclusion that Section 15 extends only to civil cases but in fact Section 15 is a blanket guarantee, coupled in previous constitutions with the guarantee against double jeopardy, which of course applies in criminal prosecutions only. At times the courts have said Sections 10 and 15 are to be read together (*Moore v. State,* 22 Tex. Ct. App. 117, 2 S.W. 634 (1886)). When Professor Whitney R. Harris analyzed judicial application of Article I, Section 15, and Article V, Section 10, in civil cases he encountered some confusion. "In most cases," he wrote, "consideration has not been given to the different scope and effect of these sections, which their terminology seems to require. Sometimes an exception has been justified on the ground that one does not apply, without regard to possible right of jury trial under the other section; sometimes both sections have been construed as one" (Harris, "Jury Trial in Civil Cases—A Problem in Constitutional Interpretation," 7 *Sw. L. J.* 1, 7 (1953)). In any case the Texas Constitution does guarantee jury trial in both civil and criminal cases on a very broad basis.

In explaining the provisions of the Texas Bill of Rights it has been noted again and again that the United States Constitution as interpreted by the United States Supreme Court is controlling and in many instances has clearly overridden the meaning that the Texas courts would probably give to the Texas counterpart. In the case of the right to trial by jury, the story is different. In several respects the right is broader than the United States Supreme Court requires under the Fourteenth Amendment. Yet, paradoxically, the strong Texas provision has spawned amendments to Section 15, discussed below, that would not have been necessary under the flexible rules recently laid down by the United States Supreme Court. And yet, doubly paradoxically, the right to a jury trial in cases of commitment of the mentally ill, the subject of the amendments, is vicariously in the current stream of thought on the necessity for protecting the allegedly mentally ill from what amounts to imprisonment. This mix of paradoxes is sorted out below.

The key words in Section 15 are "shall remain inviolate." This has always been construed by the Texas courts to mean that the jury system as it existed at the time of the adoption of the 1876 Bill of Rights cannot be changed by statute. (See *White v. White,* 108 Tex. 570, 196 S.W. 508 (1917), and cases cited. The *White* case is discussed below.) For many years the United States Supreme Court held a comparable view—that the right to a jury trial in criminal cases guaranteed by the Sixth Amendment and the right in civil cases guaranteed by the Seventh Amendment meant the jury system as it existed in the English common law at the time of the adoption of those amendments. But for many years this judicial view was applicable only to the federal judicial system.

Relatively recently the United States Supreme Court has altered its view at least in the context of "incorporation" of the Sixth Amendment into the Fourteenth Amendment. That is, the court does not require states to preserve the common law criminal jury trial as it existed in 1791. (See *Williams v. Florida,* 399 U.S. 78 (1970) (jury of fewer than 12); *Apodaca v. Oregon,* 406 U.S. 404 (1972) (less than unanimous verdict).) For Texas this means that Section 15 can be amended directly or indirectly to change the jury system but until that is done the words "shall remain inviolate" preserve the traditional system. Of course, the Texas Constitution already authorizes juries of fewer than 12 (Sec. 17 of Art. V) and less than unanimous verdicts (Sec. 13 of Art. V). It should be noted that the foregoing discussion is limited to criminal trials. The United States Supreme Court

has not "incorporated" the Seventh Amendment into the Fourteenth Amendment and, it seems fairly certain, never will do so. (It is also not clear how far the court will go in permitting congress to change the jury system in either criminal or civil trials in federal courts, but that is not a problem under the Texas Constitution.)

So far as criminal trials are concerned, the words "shall remain inviolate" guarantee a jury trial "in all criminal prosecutions." (The second quotation is from Sec. 10.) Except for trials in county courts, municipal courts, and justice courts, this means a jury of 12. The other juries have six persons. For county courts this is set by Section 17 of Article V; for justice courts, the size apparently predates 1876; and for municipal courts the size was apparently chosen by analogy to justice courts. (As for the requirement of unanimity, see the *Explanation* of Sec. 13 of Art. V.)

The general rule in criminal trials is that a jury finds the facts and the judge instructs the jury on the law upon the basis of which the jury is supposed to find a person guilty or not guilty of the offenses charged. In some states, including Texas, juries may be given some power to fix the punishment. This jury power is not, however, a part of the constitutional right to a jury trial (*Emerson v. State,* 476 S.W.2d 686 (Tex. Crim. App. 1972)). Likewise, the privilege of waiving one's right to a jury trial is not constitutionally protected. The state can insist that a jury determine guilt. At the present time Texas insists upon this only in capital cases (C.C.P. art. 1.13).

In criminal cases, the right is to trial by an "impartial" jury (Sec. 10). Section 15 does not refer to impartiality, but the right is equally a part of the jury system in civil cases. In practice, impartiality is assured by the process known as *voir dire* whereby jurors are questioned as to their biases, prejudices, relationship or close friendship with the parties and their lawyers, and the like. Following this the judge excuses some people, either on his own or because one side or the other challenges a person for cause. As a final step each side has a specified number of peremptory challenges, which helps each side get rid of people who might be partial to the other side or, paradoxically, permits each side to try to get less impartial jurors. In all this process there is little of constitutional stature except in the relatively rare instance when the judge does not carry out his duty to assure an adequate search for impartiality.

There are two issues related to jury trials that concen impartiality but are considered in a different constitutional context. One is the problem of racial discrimination in the drawing of jury panels. Although the basic issue is impartiality, the constitutional issue has traditionally been considered in terms of a denial of the equal protection of the laws. (See *Explanation* of Sec. 3.) The other problem is that of undue publicity in advance of a jury trial. Again, the basic issue is the ability of jurors to be impartial, but the constitutional issue has been cast in terms of the due process requirement of a fair trial. (See *Explanation* of Sec. 10.)

The words "shall remain inviolate" are much more significant in the case of civil trials than in criminal matters. This is in part the case because Section 10 guarantees a jury trial but principally because at common law there were many situations in which there was no right to a jury trial. Interestingly enough, Texas is not bound by the most significant dichotomy in the traditional common law system—the distinction between law and equity. In a suit at law a jury was normal; in a suit in equity there was no jury or at most a jury that advised the judge. But in Texas, beginning with the Constitution of 1845, a right to a jury trial was guaranteed in "all causes in equity." (See *History* of Sec. 10 of Art. V.) This, of course, grants a right that is much broader than the Seventh Amendment of the United States Constitution, which excludes equity bases from the right to a jury trial.

Even though the important category of equity is within the jury system, there

are matters which are not within the jury trial guarantee. Professor Harris listed the following as "illustrative categories of action" in which district courts denied jury trial: "(1) election contests; (2) contempt proceedings; (3) proceedings for child custody; (4) adoption proceedings; (5) review of administrative decisions" (7 *Sw. L. J.* at 8). Other lists of exceptions are available (*Walsh v. Spencer,* 275 S.W.2d 220, 233 (Tex. Civ. App.—San Antonio 1954, *no writ*)). Although Article V, Section 10, provides for jury trial in district courts in "all causes," the exceptions are apparently not causes within the meaning of that section. The interesting explanation in *Texas Jurisprudence* is that "although the proceeding is technically a cause, there is still no right to a jury trial unless such a trial was customarily had in a cause of the particular kind" (26 *Tex. Jur.* 577).

The oddest thing about "shall remain inviolate" is that Texas requires a jury trial under circumstances that are not considered worthy of a jury trial in most states. For example, a lawyer is entitled to a jury trial in a disbarment proceeding. (Only two other states, Georgia and North Carolina, give an accused lawyer the same right.) A reason given for the Texas practice is that a statute so provided at the time of the 1875 Convention and so "shall remain inviolate." This was forcefully answered some years ago:

> . . . it should be pointed out that the language used in the Constitution of 1876 is precisely the same as that found in the Constitution of 1845 and the modifications of that instrument made in 1861, 1866, and 1869. Article I, Section 12 of the first Constitution adopted by the State of Texas declares, as does that of 1876, that 'the right of trial by jury shall remain inviolate.'
>
> It seems quite unlikely that the makers of the Constitution of 1876 in copying these words from the earlier document meant anything different from what the fathers of 1845 meant by the same words. To assume that the fathers of 1876 consciously intended to include in the clause quoted something new and different requires a degree of credulity not usually possessed by lawyers and courts. And, then, to develop this assumption into a restriction upon the useful powers of the legislature, in direct disregard of the well established rule of constitutional construction that the legislature of a state may exercise all legislative powers not granted to the Federal government nor denied to it by either the Federal or the state constitution, is to make a fetter of our constitution and not a safeguard of the liberties of the people.
>
> In the opinion of the present writer, all that the fathers of 1845 and 1876 meant by the clause quoted was to perpetuate the 'system of trial by jury' in its large outlines as understood and applied generally in English-speaking countries. It was not sought to perpetuate any particular experimental use of it that might have been tried either in Texas or elsewhere. That this is the true meaning of the clause is indicated by the next sentence in the existing Constitution which declares that 'the Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency,' thus giving the legislature the power to supervise and adjust the system to the changing needs of the passing years. (Potts, "Trial by Jury in Disbarment Proceedings," 11 *Texas L. Rev.* 28, 50-51, (1932) (footnote omitted).)

Much the same argument can be made about *White v. White* (108 Tex. 570, 196 S.W. 508 (1917), the case that is responsible for the 1935 amendment of Section 15 and for Section 15a. Prior to 1876, the statutory scheme for commitment of the mentally ill required a jury finding that a person was of unsound mind. This was amended in 1913 to substitute a commission of six persons, some or all of whom could be physicians. (Since the proceeding was in county court, which, under Sec. 17 of Art. V, provides for a jury of six, that was the magic number.) The supreme court held the amended statute unconstitutional, relying in large part on "shall remain inviolate."

Apparently the state was able to get along for some time with the jury system of

committing the mentally ill, for the first change in the system did not come for almost 20 years. The 1935 amendment added the "non-sentence" that permitted the legislature to provide for a temporary commitment without the use of a jury. The basic requirement of a jury trial for a permanent commitment remained, however, and was severely criticized. (See Weihofen and Overholzer, "Commitment of the Mentally Ill," 24 *Texas L. Rev.* 307, 321-22 (1945). They pointed out at that time that only in Texas and Mississippi was a jury trial mandatory.)

Section 15a, added in 1956, did not take away the jury trial altogether. A careful reading of the section leads one to surmise that the Texas devotion to the jury was too great to permit a grant of complete freedom to the legislature. Yet, obviously, there was a recognition that something was wrong with the jury system. The first sentence of Section 15a expresses a belief that a lay jury is not competent to commit a person as mentally ill. That is, the jury must be presented with *competent* expert testimony. (The balance of Sec. 15a is probably unnecessary; even "shall remain inviolate" would not prevent any of the legislation authorized by these two sentences.)

In a way the Texas requirement for a jury trial in commitment cases, once attacked as not appropriate for what was considered essentially a medical problem, is in the latest "mainstream" of reaction to a procedure that seems to be overlooking the civil rights of the mentally ill. In the last few years the United States Supreme Court has been solicitous of the rights of people who were carted off to mental hospitals and, so to speak, forgotten. (See, for example, *O'Connor v. Donaldson,* 422 U.S. 563 (1975); *McNeil v. Director, Patuxent Institution,* 407 U.S. 245 (1972); *Jackson v. Indiana,* 406 U.S. 715 (1972); *Humphrey v. Cady,* 405 U.S. 504 (1972).) It may be that a couple of generations ago a lay jury would ship off to the "insane asylum" any strange character and that the need then was for expert medical opinion to prevent injustices. Today, it may be that the experts are too quick to commit people and that a lay jury may serve a useful purpose in tempering the expert's certainty with a little doubt. If this is what happens, Sections 15 and 15a have become unusually strong protectors of civil rights.

Comparative Analysis

All states guarantee the right to jury trial in criminal cases. Almost without exception they guarantee the jury in civil cases as well.

Author's Comment

The jury has played an essential role in the American system of justice. Hardly anyone would suggest that the jury be abolished but the extent and manner of jury use is another question. Emotional appeals to tradition should not preclude examination of this question or consideration of a more flexible jury provision which would leave more leeway for experimentation. In the best scientific study of juries in operation, Kalven and Zeisel, *The American Jury* (Boston, 1966), found that juries worked pretty well, but their study was not designed to deal with other aspects of the problem. For example, as high as 90 percent of criminal cases are settled by plea bargaining and not by the theoretically standard jury trials. In civil cases, one suspects that jury trials are frequently requested not because this method of trial is preferred but as an element of delay to gain advantage in the bargaining which will lead to an ultimate settlement of the case even after a jury is empanelled. Much is sometimes made of the fact that jury service is one of the few instances where the ordinary layman may perform a public service and there is something to the argument. On the other hand the time of many laymen may be wasted in helping private parties settle a private issue through the courts. The jury right is the only

right which imposes a duty of service upon fellow citizens whose time and interests should also be weighed in the balance of utility and justice. Use of the jury, particularly in civil cases, has declined sharply in England, the country of its origin. A decision to preserve the Texas jury system exactly as it has existed in the past should not be made without considering the realities of the present and the prospects for reform in the settlement of litigation.

Incidentally, from the point of view of drafting, it is interesting to note that it takes six times as much space in the constitution to take care of commitment of the mentally ill as to deal with the jury rights of the rest of us.

Sec. 16. BILLS OF ATTAINDER; EX POST FACTO OR RETROACTIVE LAWS; IMPAIRING OBLIGATION OF CONTRACTS. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

History

The guarantees of Section 16 have appeared in substantially the same form but in different contexts in all Texas constitutions. After a sentence on treason, Section 16 of the Declaration of Rights of 1836 stated, "No retrospective or ex post facto law, or laws impairing the obligation of contract, shall be made." There was no statement regarding bills of attainder. In subsequent bills of rights, the section read exactly the same as the present Section 16 except that each of the earlier sections also contained a short version of the eminent domain provision now found in Section 17. The Constitution of 1869 added the further words "nor shall any law be passed depriving a party of any remedy for the enforcement of a contract, which existed when the contract was made." The 1875 Convention deleted these words and, of course, redid eminent domain.

Three prohibitions of Section 16, those regarding bills of attainder, ex post facto laws, and laws impairing the obligation of contract, are repetitions of prohibitions upon state action contained in Section 10 of Article I of the United States Constitution. The other provision in Section 16, the prohibition of "retroactive laws," is found neither in the United States Constitution nor in most of the state constitutions.

Attainder under English law was analogous to a bill of pains and penalties and was originally intended for those who fled from justice. In fact, attainder in its earliest form could only be used against fugitives from justice charged with felony because accused persons could not be tried in their absence. The final degradation of the process of attainder came through the work of Cromwell and the timid judges of Henry VII. But Cromwell was the first to perish by an act of attainder which was hurried through parliament and deprived him of a trial.

The federal prohibitions against ex post facto laws and laws impairing the obligation of contracts were probably influenced by certain very early acts of the state legislatures. For example, the dishonesty of the "pine-barren law" of South Carolina and the paper-money acts of Rhode Island probably affected the ex post facto provision. Long after the convention, Madison wrote that early acts of internal state administration explained the inclusion of the contract clause. He cited paper tender, installment laws, and unjust actions by the courts.

The other prohibition concerning "retroactive laws" seems to spring from a general suspicion regarding all retroactive laws of which the three mentioned were notorious examples. Early judicial restriction of the scope of ex post facto laws to retroactive criminal laws may have prompted a desire to re-establish the broader sweep, which the prohibition had in the minds of some people, by general condemnation of retroactive laws.

Explanation

Section 16, it has been noted. prohibits four things: (1) bills of attainder; (2) ex post facto laws; (3) laws impairing the obligation of contract; and (4) retroactive laws. Although the first two prohibitions deal with criminal law, the third with civil law, and the fourth potentially with both, a certain element of unity runs through them all. In a sense all deal with retroactivity. The first three prohibitions simply repeat specific limitations upon the states recited in Section 10 of Article I of the United States Constitution. State judges are bound by oath to enforce these federal prohibitions and the United States Supreme Court interpretation of them of course prevails. (Note, however, that a Texas court can invalidate a Texas law under Sec. 16 without regard to whether the United States Supreme Court would invalidate the law under Sec. 10 of Art. I.) No important and continuing conflicts between state and federal interpretation appear to have arisen. State judicial use of Section 16, once rather considerable, seems to have declined.

(1) A bill of attainder is a legislative conviction of a person or group of persons (usually for treason) without judicial trial. At times in English history such bills were used as notorious devices for dealing with political enemies. They were employed for the same purpose in America around the time of the Revolution. Bills of attainder were adopted according to no fixed rule of law and they might work corruption or attainder of the blood (Ex parte *Garland,* 71 U.S. (4 Wall.) 333 (1867)). Historically, bills of attainder resulted in capital punishment while bills of pains and penalties were used for lesser punishments but as used in the United States Constitution the term "bill of attainder" includes bills of pains and penalties.

Few federal cases have involved bills of attainder. After the Civil War the United States Supreme Court extended the concept to strike down test oaths disqualifying some persons from exercising their former professions (Ex parte *Garland, supra; Cummings v. Missouri,* 71 U.S. (4 Wall.) 277 (1867)). In more recent times, some of the justices, particularly Justice Black, sought, with limited success, to extend the prohibition to other legislative disqualifications of persons or groups. In *United States v. Lovett* (328 U.S. 303 (1946)), a congressional provision which denied three named public employees payment of salary was found to violate the prohibition. Later in *United States v. Brown* (381 U.S. 437 (1965)), the United States Supreme Court held unconstitutional a section of the Labor-Management Reporting and Disclosure Act of 1959 which made it a crime, with certain exceptions, for a member of the Communist Party to serve as an officer or employee of a labor union. This, said the court, singles out a particular group for criminal liability. The "Bill of Attainder Clause," continued Chief Justice Warren, "was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply—trial by legislature" (p. 442). It "reflected the Framer's belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons" (p. 445).

Although this case opens the door for a broad definition of bills of attainder, cases on the subject are so infrequent that it is difficult to predict what the United States Supreme Court might do under different circumstances at a different time. Apparently no Texas case has turned upon the bill of attainder provision although a few litigants have tried unsuccessfully to use it.

(2) An ex post facto law is a retroactive criminal law which operates to the detriment of the accused. In 1798 Justice Chase gave what has become the classic definition of the term. It consists of "1st. Every law that makes an action done

before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense in order to convict the offender" (*Calder v. Bull,* 3 U.S. (3 Dall.) 386, 390). This definition has been repeated almost verbatim by Texas courts (*Hill v. State,* 146 Tex. Crim. 334, 335, 171 S.W.2d 880, 883 (1943)).

Texas attorneys have made considerable use of the prohibition, sometimes with success. The legislature may change or mitigate the punishment for a crime without infringing upon the guarantee (Ex parte *Tate,* 471 S.W.2d 404 (Tex. Crim. App. 1971)). Enhancement statutes also are not prohibited ex post facto laws. Thus the legislature could constitutionally provide greater punishment for a criminal repeater even if the first offense was committed before the enhancement statute passed the legislature. The statute did not inflict greater punishment for the first offense but rather imposed a heavier penalty for repeated criminal conduct (*Vasquez v. State,* 477 S.W.2d 629 (Tex. Crim. App. 1972)).

Some state actions have constituted ex post facto laws. Thus, enforcement of an ordinance against "locating" a billboard was an ex post facto law for a defendant who had located his billboard before the ordinance was passed (*Cain v. State,* 105 Tex. Crim. 204, 287 S.W. 262 (1926)). A statute which lowered the rate for working off a fine from $1 to 50¢ a day after the defendant had begun serving was an ex post facto law (Ex parte *Hunt,* 28 Tex. Ct. App. 362, 13 S.W. 145 (1890)). A law accepting the uncorroborated testimony of purchasers of bootleg liquor while at the time of sale such evidence could not stand alone under the accomplices law was invalid because it authorized conviction on less evidence (*Plachy v. State,* 91 Tex. Crim. 405, 239 S.W. 979 (1922)). Further, a law which increased from 15 to 20 years the period before which a person serving a life term could be considered for parole was invalid for a defendant already serving. Said the court, the prohibition applies to "any change in the law, whether by legislative amendment, judicial construction, or administrative re-interpretation" (Ex parte *Alegria,* 464 S.W.2d 868, 874 (Tex. Crim. App. 1971)). "Any law is an ex post facto which inflicts a greater punishment than the law annexed to the crime when committed, or which alters the situation of the accused to his disadvantage" (p. 872).

(3) Laws impairing the obligation of contract may undermine the value of vested rights. The federal prohibition upon such state laws was a response to conditions in the period of the Articles of Confederation. Some state legislatures had tried to relieve debtors from the hardships of depression by reducing the burden of their debts. This could no longer be done.

In the early years of the Republic, when individuals sought federal court aid to protect their vested property interests from state action, their eyes fell upon the contract clause. The United States Supreme Court responded by broad construction in favor of creditors. Thus in *Fletcher v. Peck* (10 U.S. (6 Cranch) 87 (1810)), the court applied the prohibition in cases where the state itself was a party to the contract. Soon after, state charters granted to corporations were held to be protected contracts (*Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518 (1819)). By the time of the Taney Court, however, the idea prevailed that the contract clause did not offer complete protection to vested rights but rather states might affect them through the exercise of their police power (*Charles River Bridge v. Warren Bridge,* 36 U.S. (11 Pet.) 420 (1837)). Furthermore, there were some basic powers which the state could not bargain away (*New Jersey v. Wilson,* 11 U.S. (7 Cranch) 164 (1812)). In any case, the contract clause, however

construed, was not a sufficiently broad shield to protect property interests on the scale which the United States Supreme Court for a time was willing to protect. Hence, as the concept of substantive due process of law emerged, use of the contract clause declined. It revived briefly during the great depression and then lapsed into relative disuse.

Texas courts have, in general, followed federal construction of the contract clause with one notable exception. In *Home Building and Loan Association v. Blaisdell* (290 U.S. 398 (1934)), the United States Supreme Court held in a 5-4 decision that the Minnesota mortgage moratorium law did not violate the contract clause. Minnesota had tried to protect mortgage debtors, caught by declining land values during the depression, from the strict letter of their obligations while also safeguarding creditors. In the same year, the Texas Supreme Court struck down a similar Texas mortgage moratorium law (*Traveler's Insurance Co. v. Marshall,* 124 Tex. 45, 76 S.W.2d 1007 (1934)). Accepting as it had to, the correctness of federal interpretation of Article I, Section 10, the court asserted that the Texas contract clause meant something else. Its meaning was fixed in 1876 when the constitution went into effect and that meaning was reenforced by the rule of Section 29. The court accepted federal case law to 1876 but not after. (See the *Explanation* of Sec. 29 of Art. I.)

Litigants, seeking to protect property, seem to have found other sections of the Bill of Rights more promising and thus there are few recent Texas cases which rely on the contract clause. Judicial response is no longer uncompromising. The courts recognize the right to regulate professions despite the contract clause because the effects of such regulation upon existing contracts are indirect (*Davalina v. Albert,* 409 S.W.2d 616 (Tex. Civ. App.—Amarillo 1966, *no writ*)). Zoning ordinances "are valid exercises of the police power, and no person can by voluntary act acquire any right which would impair the right of government to exercise such power" (*Biddle v. Board of Adjustment,* 316 S.W.2d 437, 441 (Tex. Civ. App.—Houston 1958, *writ ref'd n.r.e.*)). Furthermore, the limitation on contracts applies only to an act of the legislature and not to a decision by a court (*Amalgamated Transit Union, Local Div. 1338 v. Dallas Public Transit Bd.,* 430 S.W.2d 107 (Tex. Civ. App.—Dallas 1968, *writ ref'd n.r.e.*), *cert. denied* 396 U.S. 838 (1969)).

(4) The prohibition on retroactive laws in Section 16 raises difficult problems. Since the preceding prohibitions in the section also deal with retroactive laws, the term "retroactive," urged Justice Stayton in an early case, must mean something other than the preceding specific constitutional limitations (*Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249 (1887)). His argument excluded not only the specific guarantees of Section 16 but the due course of law limitation as well. Although he perceived the growing scope of due process of law at the time of his opinion, Justice Stayton could not have foreseen its remarkable subsequent development. The prohibition upon the passage of retroactive laws has been limited to civil laws and, contrary to Justice Stayton, it appearantly extends ony to those subjects covered by the contract and due process clauses. Thus, it has been said that laws are retroactive in the sense of Section 16 only when they contravene another specific prohibition of the Constitution (*Keith v. Guedry,* 114 S.W. 392, 396 (Tex. Civ. App. 1908), *rev'd on other grounds,* 103 Tex. 160, 122 S.W. 17 (1909)).

Although Section 16 seems to prohibit retroactive laws in unqualified terms, such laws are frequenlty both beneficial and constitutional. Thus, only when retroactive laws "destroy or impair" vested rights are they unconstitutional (*Deacon v. City of Euless,* 405 S.W.2d 59, 62 (Tex. 1966)). The legislature may alter remedies and procedures so long as these changes do not disturb vested rights (*City of Fort Worth v. Morrow,* 284 S.W. 275 (Tex. Civ. App.—Fort Worth 1926, *writ ref'd*)).

These general statements are deceptively simple and do not really explain the cases. In fact the statements have been contradicted at times in the cases and the main standby, "vested rights," represents little more than a conclusion: those rights which the court decides should be protected. Such were the views Bryant Smith expressed in two perceptive law review articles ("Retroactive Laws and Vested Rights," 5 *Texas L. Rev.* 231 (1927); 6 *Texas L. Rev.* 409 (1928)). Only a few states, he noted, prohibit retroactive laws in specific terms. In the others, the legal question remains basically the same: is the law so arbitrary that it violates the due process standard? The situations presented by retroactive laws are so diverse that cases which apply in one type of factual situation should not be cited as authority for others. Rather, urged Smith, the law should be worked out for each narrow category by "balancing and discrimination" among the arguments and not by mechanical use of decisions involving the same constitutional provision but other facts. He found the law to have been stated fairly well in regard to alteration of the statute of limitations and revival or limitation of claims.

Comparative Analysis

The score for state constitutions prohibiting ex post facto laws is 43; impairment of the obligation of contract, 37; and bills of attainder, 31. The number of states which specifically prohibit retroactive laws is negligible.

Author's Comment

Certainly public policy against bills of attainder, ex post facto laws, and laws impairing the obligation of contracts is well settled. One may, however, question the utility of repeating these prohibitions in the Texas Constitution when they are specifically detailed in the same words as limitations upon the states in Article I, Section 10, of the United States Constitution. Considering the historical record, there seems no danger that these prohibitions will be deleted from the United States Constitution. The situation is very different from recent applications of sections of the United States Bill of Rights to the states by the incorporation doctrine, for these federal guarantees are only as firm limitations upon the states as are the decisions of the United States Supreme Court. Texas judges are bound by oath to enforce Section 10 anyway. Of course, if Texas judges wish to diverge from federal interpretation, separate state provisions may help. However, in the instance where this happened under Section 16, the result was questionable in the light of subsequent history. Furthermore, the same independent course might have been taken anyway and based upon another section of the Texas Bill of Rights.

The prohibition on retroactive laws is difficult to defend. Apparently, as construed, it prohibits only what is prohibited by other sections of the Bill of Rights. Professor Smith found that it covered only due process questions. Then why not deal with these questions under a "due course of law" provision and eliminate this vague, redundant generality?

Sec. 17. TAKING, DAMAGING OR DESTROYING PROPERTY FOR PUBLIC USE; SPECIAL PRIVILEGES AND IMMUNITIES; CONTROL OF PRIVILEGES AND FRANCHISES. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

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Art. I, § 17

History

Limitation upon the power of eminent domain is an historic right recognized in all Texas constitutions but in different forms. While the Fifth Amendment to the United States Constitution disposes of the matter succinctly by the words "nor shall private property be taken for public use without just compensation," the Constitution of 1836 provided more cumbrously, "No person's particular services shall be demanded, nor property taken or applied to public use, unless by consent of himself or his representative, without just compensation being made therefor according to law." The next three constitutions stated more simply, "No person's property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person." In the Constitution of 1869, "adequate" became "just" compensation and the following addendum appeared, "nor shall any law be passed depriving a party of any remedy for the enforcement of a contract, which existed when the contract was made."

Considerable change occurred in the present constitution. Once again "adequate" appeared instead of "just" compensation. The addendum of 1869 disappeared but others replaced it. Before 1876 the courts had sometimes enjoined a taking by private groups, to whom the power of eminent domain had been delegated, when satisfactory provision had not been made for prompt payment. It was the growing taking of property by such users which probably caused the Constitutional Convention of 1875 to convert the judicial rule into a constitutional requirement while excepting the state and its subdivisions which were presumed to be both just and always financially responsive (*Travis County v. Trogden,* 88 Tex. 302, 31 S.W. 358 (1895)). In addition, although the term "taking" might include damaging and destroying, Section 17 now provided specifically for all of these situations. There was a requirement for previous compensation or security in cases where the taking was not for the state. Finally, Section 17 concluded with a new but not clearly relevant provision forbidding the grant of special privileges, immunities, and franchises. Speculating on the reasons for this part of Section 17, the supreme court suggested the following: (1) a desire to avoid some of the "pernicious and evil consequences" of the decision in *Dartmouth College v. Woodward* (17 U.S. (4 Wheat.) 518 (1817)) that a corporate charter is a contract, (2) "the great jealousy of corporate powers and franchises" displayed by the framers, and (3) the "celebrated subsidy to the International and Great Northern Railway Company" (*Mayor v. Houston Street Railway Co.*, 83 Tex. 548, 556-7, 19 S.W. 127, 130 (1892)).

Explanation

Section 17 is not a grant of the power of eminent domain; rather the section is a limitation on the exercise of the power. In fact, "the power of eminent domain is an inherent attribute of sovereignty and exists independently of the Constitution" (*City of San Antonio v. Congregation of Sisters of Charity,* 404 S.W.2d 333, 334 (Tex. Civ. App.—San Antonio 1966, *no writ*)). The state in turn has delegated some of its power to its political subdivisions and to public utilities. In these cases, the extent of the delegated power is determined by the granting statute subject, of course, to the limitations of Section 17.

Federal impact upon Texas eminent domain law has not been extensive. True, the United States Supreme Court decided in 1897 that if a state took property without compensation such a taking was a deprivation of property without due process of law in violation of the Fourteenth Amendment (*Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226). Furthermore, there have been a few cases in which the United States Supreme Court has blazed a trail as in those regarding the taking

of air easements in the air space near airports by landing and departing airplanes (*United States v. Causby,* 328 U.S. 256 (1946); *Griggs v. Allegheny County,* 369 U.S. 84 (1962)). Nevertheless, state courts have been zealous in protecting property owners against the use of the power of eminent domain and in Texas a very large body of law developed by Texas courts has grown up around the subject. This development may be characterized as generally one in which individual rights were scrupulously protected but also one in which these strict rules were eventually somewhat relaxed to recognize social interests more adequately.

Under certain circumstances. it should be stated at the outset, property can be taken by government without any compensation. This may be done under the state's police power, roughly defined as the power to protect the public health, safety, and morals. Thus, zoning ordinances may have an adverse effect upon property values yet no compensation need be made. After some hesitancy Texas courts upheld the constitutionality of zoning ordinances as a legitimate exercise of the police power (*Lombardo v. Dallas,* 124 Tex. 1, 73 S.W.2d 475 (1934)). The forfeiture of an automobile innocently loaned by the owner to one who used it in the transportation of narcotics was within the police power (*State v. Richards,* 157 Tex. 166, 301 S.W.2d 597 (1957)). Further, when a city built a viaduct to promote safety this was a legitimate exercise of the police power and an adjacent landowner, the value of whose property was impaired, had no right to compensation (*City of Waco v. Archenhold Automobile Supply Co.,* 386 S.W.2d 174 (Tex. Civ. App.—Waco 1965), *aff'd,* 396 S.W.2d 111 (Tex. 1965)). Nevertheless, the police power must be exercised in a reasonable manner and where reasonableness ends in public taking of property the rule of Section 17 applied because the taking was after all an exercise of the power of eminent domain (*City of Corpus Christi v. Allen,* 152 Tex. 137, 254 S.W.2d 759 (1953)).

These cases are only illustrative. They do not define when the police power ends and the exercise of eminent domain begins. "The shadowy boundary of the police power is the great 'Serbonian bog . . . Where armies whole have sunk.' " (See *Brazos River Authority v. City of Graham,* 335 S.W.2d, 247, 251 (Tex. Civ. App.—Fort Worth 1960), *aff'd in part, rev'd in part,* 354 S.W.2d 99 (Tex. 1961).) For those who wish to enter the bog, John T. Cabaniss is recommended as a guide. He concludes after his own journey, that "for all practical purposes, the supreme court has now rejected the 'police power'—'eminent domain' distinction as the controlling method of determining whether a landowner seeking damages in an inverse-condemnation action is entitled to recover" and instead "has construed the constitutional eminent domain provision to require a balancing of interests of the private individual and the public . . ." (Cabaniss, "Inverse Condemnation in Texas—Exploring the Serbonian Bog," 44 *Texas L. Rev.* 1584, 1603 (1966). "Inverse condemnation" concerns instances where a property owner sues for compensation and the government defends by claiming that it did not take, damage, or destroy property within the constitutional meaning of Sec. 17.)

Issues regarding eminent domain turn traditionally on three points: (a) there must be a taking (damaging or destroying), (b) the taking must be for public use, and (c) the taker must respond with adequate compensation. Taking, damaging, or destroying may occur although there is no direct physical invasion of property. Indeed the words "damaged" and "destroyed" were added in the Constitution of 1876 in order to obviate the injustice which might arise if actual physical invasion were required to constitute a "taking." The property which may be the subject of eminent domain "means not only the thing owned, but also every right which accompanies ownership and is its incident" and damages mean " 'every loss or diminution of what is a man's own, occasioned by the fault of another,' whether this results directly to the thing owned, or be but an interference with the right

which the owner has to the legal and proper use of his own" (*DuPuy v. City of Waco*, 396 S.W.2d 103, 108 (Tex. 1965)).

In defining public use, Texas courts early rejected a broad definition of public benefit or public advantage in favor of the narrow concept of use by the public. This choice presented a considerable barrier to social reform. It was difficult to see how property taken by utilities was taken literally for use by the public. In a helpful article, Daniel B. Benbow describes the continuing attempt by Texas courts to reconcile the "narrow traditional construction" of public use with the legitimate demands of social welfare ("Public Use as a Limitation on the Power to Eminent Domain in Texas," 44 *Texas L. Rev.* 1499 (1966)). Texas courts, he finds, have refused formally to abandon narrower tests when in fact they have departed from them. Each case requires "primary reliance upon subjective balancing of the changing concepts of public welfare against resultant encroachment upon private property rights" (p. 1515). The primary decision as to what is public use is made by the legislature. Although the ultimate decision is judicial, the courts will accord great deference to the legislative determination and upset it only if it is arbitrary (*Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699 (1959)). Hence, the Texas Supreme Court had no difficulty in upholding the Texas Urban Renewal Law. Slum clearance and redevelopment by private enterprise did not violate Section 17. There was, the court observed, no hard and fast rule of definition for public use but rather each case had to be decided on its own facts. Land taken under the act was not simply resold for private use but it was sold subject to restrictions that renewal be carried out and that "slum conditions would not recur within the foreseeable future" (160 Tex. at 51, 326 S.W. at 706).

Adequate compensation is measured by the market value of the land taken. (Roy Rutland, Jr. discusses some of the problems regarding market value in 17 *Baylor L. Rev.* 168 (1965).) When the property has been damaged then the test is the market value of the land before and after the damaging (*Willcockson v. Colorado River Municipal Water District*, 436 S.W.2d 203 (Tex. Civ. App.—Austin 1968, *writ ref'd n.r.e.*)). If part of a piece of property is taken for a project, benefits to the remainder cannot be offset against the amount to be paid for the portion taken but can be offset only against damages to the remainder. (*Buffalo Bayou, B. & C.R.R. v. Ferris*, 26 Tex. 588 (1863)). (For a comprehensive discussion of this general rule, see Peacock, "The Offset of Benefits against Losses in Eminent Domain Cases in Texas: A Critical Appraisal," 44 *Texas L. Rev.* 1564 (1966).)

The concluding words of Section 17—"no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof"—have nothing to do with eminent domain. As noted in the preceding *History*, the prohibition was designed to avoid the *Dartmouth College* rule that a franchise once given and accepted might become irrevocable under the Contracts Clause of the United States Constitution. Actually, the Texas courts have paid comparatively little attention to these words of Section 17. In an 1892 case dealing with a street railway, the supreme court discussed the section at some length but ended up really cutting down the significance of the reservation of power to the legislature (*Mayor, etc., of City of Houston v. Houston St. Ry. Co.*, 83 Tex. 548, 19 S.W. 127). The court said that Section 17 did not give the legislature the power to revoke franchises willy nilly. Indeed, the court argued that the general policy reflected in the constitution was to encourage the development of public utilities, an unlikely development if Section 17 were to permit casual revocation. Thus, the court said that this part of Section 17 is to be read in conjunction with the due process of law limitation contained in Section 19. Hence,

"this particular clause of the constitution was intended to prohibit the legislature from granting any 'special privilege or immunity' in such way, or of such character, as that it could not be subsequently annulled or declared forfeited for such cause as might be defined by the law, or condemned in the exercise of eminent domain, . . . and it was further intended that 'all privileges and franchises' granted by the legislature, or under its authority, should at all times remain subject to legislative control and regulation" (83 Tex. at 558, 19 S.W. at 131). The *Houston* case was recently cited and quoted from at length in a case that upheld a due process objection to a change in the status of a franchise holder. (See *Texas Power & Light Company v. City of Garland*, 431 S.W.2d 511 (Tex. 1968), discussed at length in the *Explanation* of Sec. 19.)

Comparative Analysis

A total of 45 states provide specifically for compensation when private property is taken for public purpose.

Author's Comment

The preceding analysis reflects a trend in judicial interpretation from the strictest insistence upon individual property rights to some recognition of social need. This trend seems to parallel changes in our civilization or, more accurately, to follow them reluctantly but at a distance. The growth of population and the rise of great cities have occurred while the amount of land has remained constant. Not surprisingly, present congestion and the appalling prospects for the future have stimulated thought about social planning of land use. In this planning, insistence upon all the attributes of landownership and speculative rise in land values must be balanced against the interests of society generally. Furthermore, we have long since abandoned the idea that one can use his property without regard to his neighbors. Careful thought should be given to land use which affects the environment and the quality of living in our society. In the framework of such thinking the future of the police power and the law of eminent domain should be shaped.

Sec. 18. IMPRISONMENT FOR DEBT. No person shall ever be imprisoned for debt.

History

At one time imprisonment for debt was common practice in England, and in colonial America such practice continued. Changing social values produced a reaction against this counter-productive practice. Hence, the Constitution of 1836 provided, "No person shall be imprisoned for debt in consequence of inability to pay." The Constitution of 1845 changed this to the unqualified words of the present Section 18, which has appeared unchanged in all subsequent Texas constitutions.

Explanation

The general policy of Section 18 has been well accepted. Hence, few cases have construed this guarantee and those have tended to explore the limits of Section 18 protection. As the Texas Supreme Court said in an early case, the words "imprisonment for debt" had a "well defined and well known meaning" (*Dixon v. State*, 2 Tex. 481, 482 (1847)). Obviously, Section 18 does not prevent the state from making it a crime to engage in activity the purpose of which is to avoid paying a debt. For example, a statute making it a crime for a person to depart a hotel without paying does not violate Section 18 because the punishment is not for non-

payment of the debt but for departure with intent not to pay (*Rhodes v. State,* 441 S.W.2d 197 (Tex. Crim. App. 1969)). Nor is imprisonment for failure to pay a fine considered imprisonment for debt (*Colin v. State,* 145 Tex. Crim. 371, 168 S.W.2d 500 (1943); *South v. State,* 72 Tex. Crim. 381, 162 S.W. 510 (1914)). Recently, however, the Equal Protection Clause of the Fourteenth Amendment has created a problem in this area. The case of *Tate v. Short* (401 U.S. 395 (1971)) holds that a person cannot automatically be jailed for failure to pay a fine if the person is indigent and unable to pay. (See also the discussion of this case in the *Explanation* of Sec. 3.)

There are other situations where failure to pay money may result in imprisonment. These are instances of civil contempt for failure to make payments in a divorce settlement or for child support. As the supreme court put it, "The Courts of this state have long since put to rest the contention that a husband and father may not be imprisoned for failure to pay alimony or child support" (Ex parte *Preston,* 162 Tex. 379, 384, 347 S.W.2d 938, 941 (1961)). Nevertheless, Section 18 forces the courts to make distinctions. When a husband was ordered to pay the notes on an automobile awarded to the wife, his failure to do so could not be enforced by imprisonment for civil contempt because this violated Section 18 (Ex parte *Duncan,* 462 S.W.2d 336 (Tex. Civ. App—Houston (1st Dist.) 1970, *no writ*)). The same result was reached when a husband was ordered to meet a series of notes to the wife from money he would earn (Ex parte *Yates,* 387 S.W.2d 377 (Tex. 1965)). On the other hand, where the order was to pay into the court money already at hand from the sale of community assets, failure to do so was punishable as contempt. The husband was acting "constructively as trustee" and not as debtor even though the court directed that he could purge himself of contempt by making payment to the wife (Ex parte *Preston, supra.*).

Comparative Analysis

Forty state constitutions forbid imprisonment for debt.

Author's Comment

Section 18 is a model of brevity and clarity. Society, it seems clear, will no longer tolerate imprisonment for debt and hence the section is mainly one of historical interest. Of course, the power of courts to imprison in certain instances for civil contempt upon nonpayment of money is itself something of an anomaly explainable mainly in the history of the power of courts of equity. Perhaps this exception should be examined to find a better remedy which does not clash with the spirit of Section 18.

Sec. 19 DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

History

A "due course of law" provision has been a part of every Texas bill of rights. In 1836 the wording was, "No citizen shall be deprived of privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land." In 1845 the provision was expanded to say, "No citizen of this State shall be deprived of life, liberty, property or privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land." Thereafter the wording

remained identical until the words "outlawed" and "exiled" were transferred to the new Section 20 and "privileges" were expanded to "privileges and immunities."

The right to "due course of law," or "due process of law" as the United States Constitution puts it, is a modern reaffirmation of the Magna Carta, chapter 39, which declared, "No freeman shall be taken or imprisoned, or diseised or outlawed, or exiled, or anyways destroyed; nor will we go upon him, unless by the lawful judgment of his peers, or by the law of the land." In other words government was to act according to the law of the land. Historically this meant procedural due process of law. The concept of substantive due process of law, *i.e.*, that the law of the land itself might be so arbitrary that it is invalid, was only emerging when the Constitution of 1876 was drafted.

Explanation

At first glance one might expect that Section 19 would be the subject of interesting and important interpretation by Texas courts. The number of cases annotated under Section 19 in *Vernon's Annotated Constitution* or listed in *Shepard's Citations* testifies to the importance of this section. Further, divergences in wording from the federal counterpart might seem to open the way for differences in interpretation. By its words Section 19 is limited to citizens but, in subject matter, it extends to "privileges and immunities" and "disfranchisement."

Actually, an extensive sampling of the cases reveals no great independent Texas development nor indeed any extensive elaboration of the principles behind the section. It is true that some early cases relied on Cooley. Thus in 1894 the Texas Supreme Court wrote, "Mr. Cooley, in his work on Constitutional Limitations adopts, as the best definition, that given by Mr. Webster in the Dartmouth College Case, of the term 'due course of the law of the land' which is 'By law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial' " (*Union Central Life Ins. Co. v. Chowning*, 86 Tex. 654, 658, 26 S.W. 982, 984 (1894)). Before this case, moreover, the Texas Supreme Court had demonstrated its willingness to follow federal precedent regarding the subject matter of Section 19. Said Justice Stayton, "it must be held that the people intended by that clause of the constitution, in so far as it is identical with the fourteenth amendment, to place thereby just such restrictions on the powers of the legislature as the highest court in the nation has declared is the true construction of like language made a part of the constitution of the United States for the purpose of placing a limitation on the power of the legislatures of the several states" (*Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 253 (1887)).

Texas courts and lawyers have demonstrated a remarkable willingness to disregard differences in wordings between Section 19 and the Due Process Clause of the Fourteenth Amendment. Whether the phrase be "due course of law" or "due process of law" they both have a common origin in the "law of the land" expression of the Magna Carta and a common history. Hence they cover the same thing and are typically referred to as the due process clauses of the federal and state constitutions. The Fourteenth Amendment commands that no state shall deprive any person of life, liberty, or property without due process of law.

Due process inquiries then must shift primarily to the decisions of the United States Supreme Court. Whatever the United States Supreme Court determines is a denial of due process of law is binding upon the Texas courts. The Texas courts are free, however, to determine that something is a denial of due process under Section 19 no matter what the Fourteenth Amendment means. For purposes of

understanding due process, therefore, it is necessary to review briefly what the Fourteenth Amendment's Due Process Clause requires of Texas. To this will be added whatever the Texas courts appear to require beyond the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment is many things. First, as discussed earlier in the *Introductory Comment,* it is a vehicle used by the United States Supreme Court to impose on the states some of the specific restrictions imposed on the United States by the Bill of Rights of the United States Constitution. But there is a Texas equivalent for each of these specific restrictions. Thus, whatever the Fourteenth Amendment requires in a specific area—free speech, freedom of religion, double jeopardy, for example—overrides the Texas equivalent but leaves the Texas courts free to go beyond what the Fourteenth Amendment requires. If the United States Supreme Court had said that the Fourteenth Amendment incorporates the Bill of Rights as such, one could dismiss the Due Process Clause from further consideration, for it would have served its limited purpose as a vehicle for incorporation. (Since "due process of law" is covered in the Fifth Amendment, that amendment, if incorporated, would have governed true due process issues.) But the court has not gone that route. Technically, therefore, most traditional Bill of Rights protections are matters of due process of law. (Or equal protection. See the *Explanation* of Sec. 3.) Nevertheless, the Fourteenth Amendment requirements of free speech, freedom of religion, and the like are discussed as part of the applicable Texas section. Obviously, those are the sections controlling Texas government; Section 19 is limited to traditional issues of due process.

In American constitutional law two kinds of due process evolved: procedural and substantive. Procedural due process is the direct descendant of the Magna Carta provision quoted earlier. Originally, this meant only that individuals could not exercise the power of government arbitrarily; there had to be a basis in law for the action taken. Procedural due process originally concerned only how the government exercised its power; due process did not concern what power the government had. For example, the Bill of Rights provisions concerning fair criminal trials are specific definitions of elements of procedural due process. In this procedural sense, a due process clause is a catch-all to secure fair procedure in situations not otherwise specified.

There is an important distinction between the traditional procedural due process flowing from Magna Carta and procedural due process as it developed in American constitutional law. Since our written constitutions impose limitations on the power of government, courts do not hesitate to invalidate statutes which the courts find to be procedurally unfair. (In England an Act of Parliament is "the law of the land" in the words of the Magna Carta.)

The principal procedural requirement of due process is that a person have recourse to the courts for the protection of his life, liberty, or property. (Sec. 13 in effect duplicates this aspect of procedural due process.) This is a logical imperative, for if the purpose of procedural due process is to require the agents of government to follow the law of the land, only the courts can enforce the requirement. (For a recent statement of this requirement, see *Board of Firemen's Relief and Retirement Fund Trustees of Texarkana v. Hamilton,* 386 S.W.2d 754, 755 (Tex. 1965).)

Closely allied to the right to recourse to the courts are the right to a full day in court and the right to due notice. A "full day in court" simply means that once inside, a party to a lawsuit must be given the opportunity to present his case. (See *Turcotte v. Trevino,* 499 S.W.2d 705, 723 (Tex. Civ. App.—Corpus Christi 1973, *writ ref'd n.r.e.*).) "Due notice" means that one must receive adequate

notice that he has been sued or otherwise has an interest in the litigation. Normally the law requires personal service; constitutional issues arise when something is substituted for personal service. The rules are technical and can only be summarized. Generally, substituted service is permissible only when personal service is not possible. Common examples are unclaimed bank deposits and actions to clear up a title to land. (For a recent example see *City of Houston v. Fore*, 401 S.W.2d 921 (Tex. Civ. App.—Waco 1966), *aff'd*, 412 S.W.2d 35 (Tex. 1967).)

In recent years the United States Supreme Court has broadened procedural due process in a substantive sense, so to speak. This has taken the form of rulings that it is a denial of procedural due process to permit a creditor in effect to collect his money before he wins his suit. In *Sniadach v. Family Finance Corp.* (395 U.S. 337 (1969)), the court struck down a statute that permitted garnishment of wages without notice or hearing and prior to judgment. This was soon followed by *Fuentes v. Shevin* (407 U.S. 67 (1972)), in which the court struck down statutes that allow the seller to repossess goods sold under an installment contract, again without notice or hearing and prior to judgment. Although these new rules are not limited to poor people (see *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975)), there is no doubt that the court has been influenced by the normal inequality in bargaining power between the seller and buyer. This is especially the case when the contract of sale itself requires the buyer to agree to summary repossession. See, for example, *Gonzales v. County of Hidalgo* (489 F.2d 1043 (5th Cir. 1973)), which involved seizure of household goods for nonpayment of rent, again without notice or hearing. The lease provided that the landlord could do this, but the court was not satisfied that the tenant understood that he was signing away a constitutional right.

There is another area in which the distinction between procedural and substantive due process is blurred. This concerns statutory presumptions. For many years the courts have held that due process is denied if a statute creates an unreasonable presumption or a presumption that unreasonably shifts the burden of proof in litigation. The leading case is *Western & Atlantic R.R. v. Henderson* (279 U.S. 639 (1929)), which struck down a statute creating a presumption of railroad negligence in a fatal grade-crossing accident. The crucial vice in the presumption was that a jury could weigh the presumed fact against evidence of due care by the railroad employees. Generally, there is no objection to a presumption that operates only in the absence of evidence because the presumption disappears as soon as the party against whom the presumption runs introduces evidence contrary to the presumption. The Texas courts have construed Section 19 to provide the same protection against unreasonable presumptions. (See *Prideaux v. Roark*, 291 S.W. 868 (Tex. Comm'n App. 1927, *jdgmt adopted*) and *Rawdon v. Garvie*, 227 S.W.2d 261 (Tex. Civ. App.—Dallas 1950, *no writ*).)

A recent United States Supreme Court case demonstrates how easy it is to rely on the procedural rule of presumptions to reach what is a matter of substantive due process. Connecticut, like Texas, charges nonresidents higher tuition at state universities than is charged residents. Connecticut defined a nonresident as one who was not a resident when he applied for admission. Thus, once a nonresident always a nonresident until education was completed. This, the court held, was an unconstitutional presumption under the Fourteenth Amendment because a student was not permitted to show that after admission he became a bona fide resident (*Vlandis v. Kline*, 412 U.S. 441 (1973)). A dissenting opinion convincingly demonstrated that the court was simply making a substantive decision that a state could not exercise control over the ease with which young out-of-state college students could turn themselves into "residents" in order to save money. A

concurring opinion objected to this characterization but really confirmed it by analogizing the situation to the equal protection cases that forbade discrimination between residents and nonresidents. It has already been noted that the Supreme Court began sometime ago to use the Equal Protection Clause in a manner reminiscent of substantive due process. (See the *Explanation* of Sec. 3.)

There is good reason for the Supreme Court's hemming and hawing about whether it has revived substantive due process under other guises. For the first third of this century the court was roundly and consistently criticized for acting as a superlegislature in striking down legislation in the name of the Due Process Clause. (There is a story, possibly apocryphal, that Chief Justice Taft once returned from conference, tossed the record and briefs in a case on his law clerk's desk, and said: "We just decided this is a denial of due process. Figure out why.") In almost all instances the invalidated legislation represented efforts by legislatures to regulate economic behavior, normally for the benefit of the small businessman, the employee, or the consumer. In the middle of the 1930s the court began to retreat from this substantive use of due process. By 1963 Justice Black could assert for the court that substantive due process was dead. (See *Ferguson v. Skrupa*, 372 U.S. 726, 730-31. Justice Harlan carefully concurred in the result on the grounds that the legislation in question bore "a rational relation to a constitutionally permissible objective" (p. 733). This is "due process" language.)

It has already been noted that the justices were able to find substitutes for substantive due process by relying upon specific rights in the Bill of Rights, by expanding the concept of equal protection, and by stretching procedural due process. Yet two years after *Ferguson*, the court found itself unable to rely upon substitutes and had to revive substantive due process. This was the case of *Griswold v. Connecticut* (381 U.S. 479 (1965)), in which the court struck down a law prohibiting the use of contraceptives. Although there were only two dissenting justices, the court erupted with six opinions, all arguing over whether the right to be protected was a matter of substantive due process. The landmark abortion decision (*Roe v. Wade*, 410 U.S. 113 (1973)), fairly well settled the issue. Today, the Due Process Clause of the Fourteenth Amendment forbids some substantive state action that is not covered by any of the specific protections elsewhere enumerated in a Bill of Rights.

Part of this judicial thrashing around is a matter of semantics. "Substantive" due process, as noted above, is the term used to describe the judicial gloss that many people argued was designed to impose a laissez-faire economic system. In that sense, substantive due process is still dead. What the court appears to be doing now is to abandon efforts to invalidate legislation by stretching other concepts such as equal protection, freedom of speech, and the like. Instead, the court accepts some rights as "fundamental" and requires the state to justify interfering with them. What these rights are is no easier to describe than it was to describe what a state could do in the days of substantive due process. Now, as then, there is a general philosophical base upon which the court relies. In some respects the fundamental right protected by the court is that of privacy, but this is an oversimplification. A more sophisticated guess is that the court tries to preserve the essence of a *free* society against the encroachments that seem to flow from an increasingly complex society.

There is no indication that the Texas courts are engaged in such complicated philosophical considerations of the constitutional limitations imposed by the Texas Bill of Rights. This is probably a result of the relative scarcity of significant constitutional issues compared with the volume reaching the United States Supreme Court. In any event, Section 19 appears to be construed in the traditional manner discussed earlier in the *Explanation* of Section 3.

> It is well settled that under our plan of government the police power extends only to those regulations which are reasonably necessary and appropriate to the protection of the public health, safety and morals. Attempted regulations which extend beyond this legitimate scope of operation of the police power run afoul of the due process of law requirements of both the State and Federal Constitutions. (*Falfurrias Creamery Co. v. City of Laredo*, 276 S.W.2d 351, 353 (Tex. Civ. App.—San Antonio 1955, *writ ref'd n.r.e.*).)

This is a narrower general statement than the one used these days by the United States Supreme Court:

> It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. (*Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955).)

A relatively recent Texas Supreme Court case demonstrates the continued vitality of substantive due process under Section 19. The city of Garland operates a municipal electric plant and also has franchised Texas Power & Light Co. to provide electric service. By ordinance Garland required city council permission before Texas Power & Light could extend its lines to serve new customers. The company requested permission to extend its lines 1500 feet to provide service for a 118-unit apartment complex. The city could have provided service to the same apartment complex without extending its lines. Permission was denied. The court held parts of the ordinance invalid and required the issuance of the permit (*Texas Power & Light Co. v. City of Garland*, 431 S.W.2d 511 (1968) (two justices dissenting)). The court's opinion is complex and confusing and its reasoning obscure, but its conclusion is clear enough. "Two competitors were seeking to serve an undeveloped area, and the customer preferred the Company's service. We see no reason to allow the municipally owned corporation a competitive advantage over the privately owned corporation in this situation" (p. 519). The dissenting opinion is a masterful analysis of the confusion and obscurity of the majority opinion and comes close to asserting that the only basis for the decision was the court's economic theory of competition. "I can see no need to strike down section 10(b), and no basis for doing so except that we cannot find any other theory which will support a judgment for the Company" (p. 525).

The dissent pointed out that the purpose of the ordinance was to protect the city's investment in a municipal power plant and not to give the city a competitive advantage. "Surely, achievement of [this end] is for the general welfare of the inhabitants of the City and is a legitimate concern of government, and provisions of an ordinance designed to achieve such purposes is a reasonable exercise of the City's police power" (p. 526).

Obviously, one cannot draw a valid, generalized conclusion from one case. It is fair to conclude, however, that Section 19 retains some elements of substantive due process and that the Texas Supreme Court will use the section to strike down an ordinance "regulatory of business"—because it is "unwise, improvident, or out of harmony with a particular school of thought." Nevertheless, the trend in American constitutional law is away from this sort of "superlegislature" activity in the area of economic regulation; the *Garland* case may be in the nature of a last gasp of old-style judicial activism. The main point is that, barring a 180-degree shift in the course of Fourteenth Amendment decisions, the United States Supreme Court is likely to control the meaning of due process of law in all areas except economic regulation and that only in that limited area will state courts have to use a state due process clause to strike down state laws.

Art. I, § 20

Comparative Analysis

Almost two-thirds of the states have a due process clause in substantially the traditional wording. Most of the rest of the states have a provision that can easily be read to be the equivalent of a due process clause.

Author's Comment

Broad bill-of-rights provisions like a due process clause do not get construed literally. Hence there is little to be gained from redrafting Section 19. For example, no one is likely to maintain that a resident alien has no rights under the section because it speaks only of citizens. By the same token nothing would be lost if Section 19 were redrafted to read simply: No person may be deprived of life, liberty, or property without due process of law.

Sec. 20. OUTLAWRY OR TRANSPORTATION FOR OFFENSE. No citizen shall be outlawed, nor shall any person be transported out of the State for any offense committed within the same.

History

In all previous constitutions the due course of law section contained in its list of prohibitions the statement that no person should be "outlawed" or "exiled" without due course of law. The Convention of 1875 expanded these two words to what is Section 20 of the present constitution. It flatly prohibits outlawry and transportation, while before the stated limitation said only that they could not occur without due course of law.

Explanation

Outlawry, according to the English common law, was a process by which the courts could deprive persons of all their legal rights, including that of protection by the law. More specificially outlawry was used by the courts in contempt proceedings against persons, in both civil and criminal cases, who refused to appear when summoned before court and against fugitives from justice. In instances of treason or felony, outlawry amounted to conviction and attainder of blood. Transportation, once practiced by England, involved sending a person from his own country to another, typically to a penal colony there.

Section 20 prohibits both these practices. Only a handful of cases have referred to Section 20 and in none of them has a defendant's contention been sustained because the prohibited practices simply do not exist. It was not a form of outlawry for the legislature to authorize courts to dismiss pending appeals when the appellant escaped from jail nor could these appeals be heard at a future time. (*Brown v. State*, 5 Tex. Ct. App. 126 (1878)). Obviously, Section 20 does not prohibit legislative authorization of a trial of an offense in a county other than that in which it was committed (*Francis v. State*, 7 Tex. Ct. App. 501 (1880)). When a defendant was convicted in a federal court in Texas for a federal offense and sent to a federal prison in Oklahoma, a Texas statute tolling the running of the statute of limitations regarding his debts did not violate Section 20 (*Robin v. Ely & Walker Dry Goods Co.*, 137 S.W.2d 164 (Tex. Civ. App.—Austin 1940, *writ ref'd*)).

Comparative Analysis

Fewer than ten states contain similar provisions. There is no federal parallel.

Author's Comment

Certainly Section 20 seems unnecessary today. It appears to have protected no one and presumably punishment which would come clearly within its confines would violate other guarantees of the constitution. It might be cruel and unusual punishment or a denial of due process of law. Where, one may ask, could Texas "transport" a convicted person in the unlikely event the state wanted to? Section 20 deals with ancient wrongs which apparently have not existed in the United States. No wonder, despite the caution of constitution writers, few states have included such a provision.

Sec. 21. CORRUPTION OF BLOOD; FORFEITURE OF ESTATE; DESCENT IN CASE OF SUICIDES. No conviction shall work corruption of blood, or forfeiture or estate, and the estates of those who destroy their own lives shall descend or vest as in case of natural death.

History

The content of Section 21 seems to have appeared in the Bill of Rights for the first time in 1876. It was probably added to prevent any possibility that certain rules of the English common law might be invoked.

Explanation

Under English common law when a person was convicted of any felony he was then in a state of attainder. Attainder caused forfeiture, corruption of the blood, and extinction of civil rights, which amounted to civil death. Corruption of the blood rendered the attainted person incapable of inheriting property, retaining property, or transmitting it to an heir. Rather, by attainder the estate was transmitted to the Crown. (See *Hendrick v. Marshall,* 282 S.W. 289, 291 (Tex. Civ. App.—Dallas 1926, *no writ*).) Furthermore, under common law, suicide was a felony which involved forfeiture of estate.

Only a very few cases have construed Section 21. In one of these cases the court decided, not surprisingly, that an indicted and jailed defendant was not civilly dead and hence he could marry the girl whom he had been charged with seducing (*Hendrick v. Marshall, supra*). In another case, a defendant had been convicted of a capital offense and sentenced to hang. Under Section 21 the proceeds of his uncontestable life insurance policy could still go to the beneficiary (*American National Insurance Co. v. Coates,* 246 S.W. 356 (Tex. Comm'n App. 1923, *opinion adopted*)). Conviction of a defendant for a life sentence did not mean that his land descended to his heirs but rather Section 21 supported the opposite result (*Davis v. Laning,* 85 Tex. 39, 19 S.W. 846 (1892)).

Several cases involved the right of a beneficiary to the proceeds of an insurance policy when the beneficiary was wrongfully involved. A recent case summarizes the development of the law:

> Early decisions construed the constitutional provision and the statute literally and held that a willful murderer who was an heir of his victim did not forfeit his right but would inherit his part of the property of the deceased . . . . However, later decisions hold that without contravening or circumventing the constitutional and statutory provisions a way is provided through equity to compel a murderer to surrender the profits of his crime and thus prevent his unjust enrichment. This result is accomplished by imposing a constructive trust on the murderer's portion of the inheritance in favor of the heirs other than the murderer. (*Mitchell v. Akers,* 401 S.W.2d 907, 911 (Tex. 1966).)

The rule, however, did not apply where the beneficiary was only contributorily negligent in the death.

An opinion of the Attorney General declared unconstitutional a section of the Firemen's Pension Law which provided that whenever a person receiving a pension was convicted of a felony, payment was to be made to his dependents as in the case of death. This statute ordered a forfeiture contrary to Section 21 (Tex. Att'y Gen. Op. No. C-446 (1965)).

Comparative Analysis

A total of 28 states prohibit corruption of the blood.

Author's Comment

Section 21 was aimed at ancient evils. This subject matter, it would seem, could be entrusted to the legislature. Certainly the few cases decided under Section 21 do not in fact protect very important interests.

Sec. 22. TREASON. Treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort; and no person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on confession in open court.

History

In the Declaration of Rights appended to the Constitution of 1836 the definition of treason appeared in essentially the same form as that in the United States Constitution but the requirement of proof was omitted. The constitution makers of 1845 added the rest of the federal provision and the wording became that of the present Section 22, substantially the same as in the United States Constitution. However, the treason clause appeared as Article VII, Section 2, in the Constitutions of 1845, 1861 and 1866, only to be omitted entirely from the Constitution of 1869.

Explanation

Since there is no reported case dealing with Section 22 one must turn to interpretation of its model in the United States Constitution. Here too there are few cases. The framers of the United States Constitution knew that loose treason laws could serve as instruments of oppression. They were also aware that they "almost to a man had themselves been guilty of treason under any interpretation of British law" (*Cramer v. United States*, 325 U.S. 1, 14 (1945)). Hence, they "adopted every limitation that the practice of governments had evolved or that politico-legal philosophy to that time had advanced" (pp. 23-24). They sought in drafting the treason clause to guard against "(1) perversion by established authority to repress peaceful political opposition; and (2) conviction of the innocent as a result of perjury, passion, or inadequate evidence" (p. 27).

Treason may take two forms only: (1) that of levying war against the United States and (2) adhering to their enemies, giving them aid and comfort. To convict on the first, said Chief Justice Marshall, war must actually be levied or troops assembled and no conspiracy suffices (Ex parte *Bollman*, 8 U.S. (4 Cranch) 75 (1807)). For conviction on the second, the prosecution must prove not only that the defendant (a) adhered to the enemies of the United States but also (b) gave them aid and comfort. Furthermore, the overt act must be established by two witnesses. In 1947 the Supreme Court sustaining a conviction of treason for the first time in its

history, ruled that once a substantial overt act had been proved under the two witnesses rule, further evidence might be permitted under less stringent requirements (*Haupt v. United States*, 330 U.S. 631 (1947)).

Comparative Analysis

Over 30 states' constitutions contain treason provisions.

Author's Comment

The Texas treason provision, adopted presumably as its prototype to guard against unjust prosecutions for treason, has been phenomenally successful. Judging from the reported case record, no prosecution for treason has occurred. The protection, however, is somewhat illusory. Persons can be prosecuted for violating statutes forbidding disloyal acts under other labels as, for example, under sedition and espionage legislation. Government must be able to protect itself from some dangers to its continued existence, but other constitutional protections may be called into play to insure fairness in prosecutions for offenses less than treason.

Sec. 23. RIGHT TO KEEP AND BEAR ARMS. Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.

History

The right of citizens to have arms for their defense was included, subject to qualifications, in the English Bill of Rights of 1689. A different version appeared as the Second Amendment to the United States Constitution. Here the emphasis was upon the militia: "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." When the Texas Constitution of 1836 was written, it left out the militia introduction and stated simply, "Every citizen shall have the right to bear arms in defense of himself and the Republic." State constitutions inserted "lawful" before defense and added the right to "keep" as well as "bear" arms. In 1869 these qualifying words were added, "under such regulations as the Legislature may prescribe." The 1875 Convention changed this to the more specific and limited qualification in the present Section 23, which gives the legislature power to regulate "the wearing of arms."

Explanation

An early Texas statute prohibiting the carrying of "pistols, dirks, daggers, slingshots, swordcanes, spears, brass-knuckles and bowie knives" was upheld under the Second Amendment to the United States Constitution on the ground that the individual right to bear arms applied only to weapons suitable for the militia. Secondarily, the court observed that "arms" in the Texas Constitution have the same meaning as in the United States Constitution (*English v. State*, 35 Tex. 473, 474 (1871)). Of course the Second Amendment to the United States Constitution did not apply to the states (*United States v. Cruikshank*, 92 U.S. 542 (1876)), and it has not been incorporated in the Fourteenth Amendment since. In 1875 the Texas Supreme Court corrected the early decision applying the Second Amendment to Texas but agreed that the statute was constitutional as a proper regulation of the right to bear arms. The word "arms," however, was not to be construed so narrowly because the Texas guarantee did not refer to a militia.

Hence, in Texas, the reference "must be to such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the state" (*State v. Duke,* 42 Tex. 455, 458 (1875)).

Notwithstanding Section 23 as construed in the *Duke* case, there is considerable legislative power to regulate firearms. Many years ago a statute imposed on occupation tax of 50 percent on gross receipts from the sale of pistols and other firearms. The tax was upheld in an opinion that cited the *Duke* case but gave short shrift to reliance on Section 23: "The present act does not infringe or attempt to infringe the right on the part of the citizen to keep or bear arms; nor does it prohibit a dealer in this state from selling them; and, even if it did, we think the act in question would not be violative of this provision" (*Caswell & Smith v. State,* 148 S.W. 1159, 1163 (Tex. Civ. App.—Austin 1912, *writ ref'd*)). Much later, a statute making it a crime to possess a machine gun was held constitutional because it was "not a weapon commonly kept, according to the customs of the people, and appropriate for open and manly use in self defense" (*Morrison v. State,* 170 Tex. Crim. 218, 220, 339 S.W.2d 529, 531 (1960)). Over the years many cases have upheld statutes prohibiting the carrying of pistols. The latest is *Collins v. State* (501 S.W.2d 876 (Tex. Crim. App. 1973)).

Comparative Analysis

The right to bear arms is guaranteed by 35 states. Twelve include a right to regulate the bearing of arms.

Author's Comment

The court of criminal appeals seems clearly to recognize an individual right to keep and bear some sorts of firearms. This right was established over a hundred years ago when "many of the original settlers of Austin's Colony and those who fought at the battle of San Jacinto were still living. Buffalo still roamed our prairies, and Indian raids were still a danger" (Stout, "Criminal Procedure and Crime Prevention," 38 *Texas L. Rev.* 821, 833 (1960)). Today Texas is a populous industrial urban state facing all the problems of urban crime and the ready availability of firearms. The hazards of ordinary citizens and peace officers continue to grow. Reason, it seems, calls for drastic limitation on the availability of firearms for criminal use. Section 23 as interpreted might present a barrier to far-reaching regulation. Is it really asking too much for the hunters and gun collectors to forego a constitutional right to their weapons and trust the legislature to exempt them from drastic gun control legislation to prevent crime? It seems not, but unfortunately the issue is a highly emotional one.

Sec. 24. MILITARY SUBORDINATE TO CIVIL AUTHORITY. The military shall at all times be subordinate to the civil authority.

History

"The military shall at all times and in all cases be subordinate to the civil power," said the Declaration of Rights in the Constitution of 1836. Minus "and in all cases," this assurance has continued in the same form in every Texas constitution. Fear of standing armies and unbridled military power was a part of the American tradition when the Constitution of 1836 was adopted. The people who drafted that constitution approached it with fresh memories of the powers exercised by military commanders stationed among them. For subsequent constitution makers, experiences with armed forces during the Civil War and Reconstruction served to keep alive fears of oppression by military commanders.

Art. I, § 25

Explanation

Aside from several passing references to Section 24, there is only one reported Texas case in which the supremacy of civil authority over military power was involved. In *State v. Sparks* (27 Tex. 627 (1864)), several persons arrested by the Confederate military authorities came into the hands of a sheriff on habeas corpus proceedings. While these proceedings were in progress the military forces again seized control of the prisoners. The supreme court vigorously asserted civil judicial supremacy without specifically citing the constitutional guarantee then in force. It referred to the offending general as a criminal in contempt of court but because of the military situation, the court contented itself with levying fines on the general and his military subordinate and sending a protest along with a statement of the proceedings to the governor. "It is the civil government alone that stands for the state," said the court, "and the military is only an instrument that it uses as its judgment requires" (p. 633).

If and only if the civil authority ceases to operate—that is, the courts are closed—can the military authorities assume control and govern through martial law (Ex parte *Milligan*, 71 U.S. (4 Wall.) 2 (1866)). Consider the famous case of *Sterling v. Constantin* involving an attempt by Governor Ross Sterling to use martial law to enforce curtailment of oil production in Texas. The United States Supreme Court upheld the oil producers' claims that their property was being taken without due process of law. Governor Sterling's attempt to insulate regulation of oil production by a declaration of martial law was unsuccessful. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions" (287 U.S. 378, 401 (1932)). Thus, "civil authority" includes the judiciary; the governor, when he exercises his military power, in effect ceases to be the civil authority to which the military is subordinate.

Comparative Analysis

Nearly all of the states provide for supremacy of the civil over the military authority.

Author's Comment

Section 24 states one of the basic conditions necessary for the survival of civil government. The principle is so well established that a challenge of it seems very unlikely.

Sec. 25. QUARTERING SOLDIERS IN HOUSES. No soldier shall in time of peace be quartered in the house of any citizen without the consent of the owner, nor in time of war but in a manner prescribed by law.

History

In his struggle with Parliament, Charles I tried for a time to govern without new grants of money. One economy device to which he resorted was that of shifting some costs for the upkeep of his troops by billeting or quartering them with communities or individuals. Parliament listed this as a complaint in the Petition of Right (1628) in the following words, "great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and to suffer them sojurn, against the laws and customs of this realm, and to the great grievance and vexation of the people."

The Constitution of 1836 did not mention this subject. The Constitution of 1845 prohibited quartering in the house and also "within the enclosure of" any individual. This remained unchanged until the present wording was adopted in 1875.

Explanation

Neither Section 25 nor its predecessors appear to have been discussed in any reported case.

Comparative Analysis

Forty-three states prohibit the quartering of troops. The Third Amendment to the United States Constitution contains the same prohibition.

Author's Comment

This prohibition seems to be of historical or symbolic importance only. Perhaps it expressed old fears of standing armies and continuing desires of the individual to preserve the privacy of his home. Presumably the needs of modern armies do not include scattering soldiers about in private homes.

Sec. 26. PERPETUITIES AND MONOPOLIES; PRIMOGENITURE OR ENTAILMENTS. Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.

History

This provision first appeared as Section 17 of the Declaration of Rights in the Constitution of 1836. It has reappeared unchanged in each subsequent constitution.

Explanation

Section 26 expressed a policy against public favors through monopoly and against private restrictions upon inherited property which would too greatly restrict its alienation by future generations. Such restrictions might curtail the trade in land and hence its social utility. They might support the rise of an aristocracy and therefore they were "contrary to the genius of a free government." We shall consider separately the prohibitions on (1) monopoly, (2) perpetuities, (3) primogeniture or entailment. The discussion will be very general with no attempt to explore the nuances of property law in Texas.

(1) *Monopoly.* English kings not infrequently granted monopolies to court favorites. Nevertheless, monopolies were considered contrary to the spirit of the common law. In America, monopolies ran counter to the ideas of equality emphasized by Jacksonian democracy. Section 26 prohibits those monopolies granted by government as distinguished from those created by private persons or corporations. Although there is some dictum that privately created monopolies violate Section 26 (*After Hours, Inc. v. Sherrard,* 456 S.W.2d 227 (Tex. Civ. App.—Austin 1970), *rev'd on other grounds,* 464 S.W.2d 87 (Tex. 1971)), they are more properly regulated by Texas antitrust laws and therefore not considered here.

In the early case of *City of Brenham v. Brenham Water Co.* (67 Tex. 542, 4 S.W. 143 (1887)), Justice Stayton found that a grant by the city to the company of a right to lay pipes and supply the city and its residents with water, the former in return for an agreed sum, was an exclusive grant and hence a monopoly prohibited by Section 26. Since that decision Texas courts have kept busy construing grants to public utilities in order to save them from Section 26. A state may agree to buy water or rent fire hydrants for a set fee during a definite period of time but it may not obligate itself to the exclusive use of such water or fire hydrants during the time

of the franchise (*City of Memphis v. Browder,* 12 S.W.2d 160 (Tex. Comm'n App. 1929, *holding approved*)). When considering grants to utilities the court will construe them strictly in favor of the public and not find the grant to be exclusive unless it is so provided in express terms or by the clearest implication. Although it may be proper to contract with only one utility company, the legal possibility of buying from others must remain open. When a landowner reserved to himself the exclusive right to erect and maintain electric wires for service in the streets and then subdivided and sold the land, this reservation was not binding upon the city which subsequently grew up upon the land because the reservation provided for a monopoly. The landowner's action was held to have the same effect as if it were a monopoly granted to him by the government (*Jones v. Carter,* 101 S.W. 514 (Tex. Ct. App. 1907, *writ ref'd*)). On the other hand where the state acts in its proprietary capacity it can grant exclusive rights. Examples are a lease by a municipality to a private country club of water sites which involved fishing rights (*Henrietta Country Club v. Jacobs,* 269 S.W. 137 (Tex. Civ. App.–Fort Worth 1924, *no writ*)), and a grant by a school board of exclusive rights to broadcast play-by-play accounts of football games (*Southwestern Broadcasting Co. v. Oil Center Broadcasting Co.*, 210 S.W.2d 230 (Tex. Civ. App. – El Paso 1947, *writ ref'd n.r.e.*)).

(2) *Perpetuities.* Although the Mexican law which operated in Texas before the Revolution was more hostile to perpetuities than the common law, Section 26 gives constitutional status only to the common law rule against perpetuities. This rule renders "invalid any will attempting to create an estate or future interest which by possibility may not become vested within a life or lives in being at the time of testator's death and twenty-one years thereafter, and when necessary the period of gestation" (*Zweig v. Zweig,* 275 S.W.2d 201, 202-03 (Tex. Civ. App.—San Antonio 1955, *writ ref'd n.r.e.*)). (In technical terms, property cannot be disposed of until it has "vested." Thus, the rule limits the period during which the property is "unvested.") The rule was developed by English judges to limit attempts by landowners to tie up land by preventing its sale for generations. Public policy favors easier disposition of property. A different public policy excepts charitable trusts from the rule against perpetuities (*Rissman v. Lanning,* 276 S.W.2d 356 (Tex. Civ. App.—Austin 1955, *writ ref'd n.r.e.*)).

Although in practice most applications of the rule have been made in cases involving wills, it may be applied to property transactions *inter vivos.* For example, an agreement that after minerals from a piece of land were sold in the amount of the purchase price, the property would revert to joint ownership by plaintiff and defendant was unenforceable as a violation of the rule against perpetuities because this event would not necessarily occur within the technical period of time permitted by the rule (*Coffield v. Sorrells,* 183 S.W.2d 223 (Tex. Civ. App.—Fort Worth 1944), *aff'd,* 187 S.W.2d 980 (Tex. 1945)).

Conceding that the rule against perpetuities in Section 26 has caused some confusion, Professor Lennart V. Larson after extensive consideration concluded that "in general, the Texas decisions may be said to come to correct conclusions in applying the rule." Furthermore, he adds, "No one disputes the wisdom and policy of the Rule against Perpetuities. Some principle must be stated restricting the creation of future interests, which are permitted in such variety by Anglo-American law" ("Perpetuities in Texas," 28 *Texas L. Rev.* 519, 551 (1950)). When Professor Larson reexamined the rule in 1967 he found no striking new developments but "an important trend toward less strict applications" ("Perpetuities in Texas, 1950-1967," 21 *Sw.L.J.* 751 (1967)).

(3) *Primogeniture and Entailment.* By these devices the general laws of inheritance could be defeated. The rule of primogeniture limited inheritance to the

oldest son and thus cut out younger sons and females. It seems to have been related in feudal times to the obligation of military service. Estates tail were granted to a man "and the heirs of his body" or to a man and wife "and the heirs of their bodies." Thus where heirs failed the property would revert to the donor or his heirs. This simplistic statement of complicated property rules at least indicates the sort of devices which Section 26 sought to prohibit. These devices set up estates less than fee simple and in so doing restricted the easy transfer of real property. Such restriction might also lead to the concentration of property in fewer hands and promote the growth of a landed aristocracy.

Actually the policy of American law was already against such estates. Furthermore the early law which prevailed in Texas between 1821 and the Revolution effectively outlawed perpetuities, primogeniture, and entailment. (See *Hancock v. Butler,* 21 Tex. 804 (1858).)

Comparative Analysis

Only a handful of states forbid monopolies in words such as in Section 26. Many states reach the same end by prohibiting "irrevocable privileges." (See *Comparative Analysis* of Sec. 17.) Some states have an "antitrust" type of monopoly provision.

Roughly the same handful of states forbid perpetuities. Only half a handful of states forbid primogeniture and entailments.

Author's Comment

There will be little quarrel with policies limiting monopoly and restraints upon easy transfer of property. Nor will there be arguments against discouraging the concentration of wealth in a few hands. The real question is whether these objectives could not be achieved better through general and more flexible statutes. The prohibition on monopolies is a potential troublemaker. Prohibition of perpetuities, primogeniture, and entailment are unlike other parts of the Bill of Rights, which act as limitations upon government. Except for telling the state not to grant monopolies, Section 26 prohibits private action, a subject usually left to the legislature.

Sec. 27. RIGHT OF ASSEMBLY; PETITION FOR REDRESS OF GRIEVANCES. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

History

The rights to assembly and petition appear in each Texas state bill of rights in identical form. In a briefer federal counterpart the First Amendment concludes with the words that congress make no law abridging "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Both guarantees spring from our English heritage. In rudimentary form they may be found in chapter 61 of the Magna Carta while the full version consists of these words in the English Bill of Rights (1689): "That it is the right of the subjects to petition the king and all commitments and prosecutions for such petitioning are illegal."

Explanation

Federal courts have led the way in construction of the rights of assembly and

petition. Although these rights appeared separately from freedom of expression in the English Bill of Rights, the United States Supreme Court said of the First Amendment:

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of people peaceably to assemble and to petition for a redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf *DeJonge v. Oregon*, 299 U.S. 353, 364, and therefore are united in the First Article's assurance. (*Thomas v. Collins* 323 U.S. 516, 530 (1945))

Because these rights are fundamental they are a part of the liberty guaranteed to people in the states, as a federal right, by the Fourteenth Amendment. The interrelationship of these rights in the First Amendment is paralleled by their interrelationship in fact. People assemble to speak; petitions are also exercises of freedom of expression. Hence the mass of case law on freedom of expression referred to under Section 8 of the Texas Bill of Rights applies here. So does the fact expounded there that these rights are peculiarly important to the operation of democratic government. It was this feature of First Amendment rights which prompted some judges to claim a preferred position for them in our constitutional system.

"Preferred" or not, the right to assemble is not absolute. Obviously, there is no right to assemble on the purely private property of another. (See *Savoy v. Graham Memorial Auditorium, Inc.*, 329 S.W.2d 352 (Tex. Civ. App.—Fort Worth 1959, *no writ*).) Public property may also be declared off limits under appropriate circumstances. For example, the state may prohibit assembling on jail grounds (*Adderley v. Florida*, 385 U.S. 39 (1966)).

The traditional places of assembly are streets and parks, "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague v. C.I.O.*, 307 U.S. 496, 515 (1939)). The principal battleground these days is the shopping center that is used by the general public but has a pedestrian mall, frequently totally enclosed, that is private property. In *Lloyd Corp., Ltd. v. Tanner* (407 U.S. 551 (1972)), the United States Supreme Court divided five-to-four over the question of whether the owners of a shopping center could prohibit the distribution of handbills within the mall. The majority held that the rights of private property embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments overrode the rights of freedom of expression embodied in the First Amendment. (Although the majority opinion posed the issue this way, it does not necessarily follow that a statute or ordinance cannot require a shopping center owner to permit distribution of handbills. It is most unlikely that the courts would ever exalt property rights over a reasonable regulation designed to increase freedom of expression.)

The right to assemble may also lose its "preferred" status if the danger of violence is too great. Some years ago the United States Supreme Court unanimously upheld a conviction for breach of the peace where a speaker used "fighting words" (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). Since then there have been many cases attempting to draw a line between the rights of free speech and assembly and the right of the government to preserve the peace. With a few exceptions the court has opted to protect speech and assembly. (See particularly *Gregory v. City of Chicago*, 394 U.S. 111 (1969), and *Edwards v. South Carolina*, 372 U.S. 229 (1963), both involving assemblages which aroused hostility from bystanders.) In essence the courts tilt for freedom of speech, petition, and assembly by requiring the government to expend the effort to protect the freedom

from hostile attack rather than tilt for easy preservation of law and order by permitting the government to remove the object of hostility.

The right to petition has not been plagued with judicial "balancing" difficulties. Indeed, so long as the right is exercised to petition the government, the right is as nearly as absolute as a political right is likely ever to be. For example, a petition to the governor for a pardon was protected by Section 27 even though some of the statements made in it were libelous. This same absolute shield, the court added, protects the pleadings in judicial proceedings (*Connellee v. Blanton*, 163 S.W. 404 (Tex. Civ. App.—Fort Worth 1913, *no writ*)). However, the publication of "petitions" seeking no official action or remedy is not protected by Section 27 (*Koehler v. Dubose*, 200 S.W. 238 (Tex. Civ. App.—San Antonio 1918, *writ ref'd*)).

Lobbying is probably the most important form of petitioning legislatures these days. In attempting to curb improper practices by lobbyists, therefore, legislatures must walk a tightrope so that they do not infringe the constitutional right of petition.

Comparative Analysis

Forty-four state constitutions specifically protect freedom of assembly and forty-eight the right of petition. Federal protection in the First Amendment has already been mentioned.

Author's Comment

Since the rights of assembly and petition are essential to a democratic system of government they constitute essential parts of a bill of rights. However, these rights would appear more appropriately in combination with the cognate right to free expression. When compared with the wording in the First Amendment to the United States Constitution, Section 27 seems unnecessarily verbose.

Sec. 28. SUSPENSION OF LAWS. No power of suspending laws in this State shall be exercised except by the Legislature.

History

First among the "ancient rights and liberties" declared in the English Bill of Rights of 1689 was the following: "That the pretended power of suspending laws or the execution of laws by regal authority without consent of parliament is illegal." No echo of this declaration is found in the United States Constitution but the Texas bills of rights from 1845 through 1869 did provide: "No power of suspending laws in this State shall be exercised, except by the Legislature, or its authority." The last three words became a source of difficulty. Although Reconstruction had ended officially in Texas on March 30, 1870 when President Grant approved the Texas Reconstruction Act, Governor E. J. Davis asked for and received from the Texas Legislature the power "to declare . . . counties under martial law and to suspend the laws therein until the legislature shall convene . . ." (Charles W. Ramsdell, *Reconstruction in Texas* (1910), p. 296). Governor Davis used these powers to try quarantine offenders by court martial in Houston, to declare martial law in Hill and Walker counties in 1871, and later the same year to deal with "election disorders" in Limestone and Freestone counties. When the Democrats won control of the legislature they proceeded in early 1873 to strip the governor of special powers conferred upon him by their predecessors. They also proposed a constitutional amendment, ratified on December 2, 1873 which deleted the words

"or its authority" from the suspension section and gave it the exact wording of Section 28 today. Against this background the courts have subsequently held this deletion to mean that legislative power to delegate its authority to suspend laws has been withdrawn (*McDonald v. Denton*, 132 S.W. 823 (Tex. Ct. App. 1910, *no writ*)).

Explanation

Occasionally some authority may violate Section 28 by independent action. This occurred, for example, when the governor declared martial law to control production in the East Texas oil field. His action violated both Sections 24 and 28 (*Constantin v. Smith*, 57 F.2d 227 (1932)). In another example local authorities tried to suspend a general law against bawdy houses by restricting them to a specified district of town (*Brown Cracker and Candy Co. v. City of Dallas*, 104 Tex. 290, 137 S.W. 342 (1911)).

Typical cases deal with attempted delegation of power by the legislature. Briefly the rule laid down by the courts is that subordinate bodies may not suspend state laws but they may make factual determinations as to applicability within the jurisdictions or boundaries of these subordinate bodies. In fact a majority of the statutes and ordinances which have been challenged in Texas courts have been upheld as valid delegations of power because they involved situations of a fact finding or administrative nature Only where clear contraventions of state policy were involved did the courts find Section 28 to be violated. Thus the commissioner of agriculture could make exceptions to the Pink Bollworm Act, which prohibited the growing of cotton in regulated zones (*Williams v. State*, 145 Tex. Crim. 285, 176 S.W.2d 177 (1943)), and the State Highway Commission could exercise its authority to make exceptions to weight and size limitations upon vehicles operating on the public highways (*Sproles v. Binford*, 286 U.S. 374 (1932)).

In enforcing Section 28 the courts must watch their own conduct, for that section "is an express denial to the judicial branch of government of any power to suspend any valid statute. Not only may judges and courts not suspend a statute, but neither may they supervise and direct the manner and method of its enforcement by the officers of the executive department of government charged with the duty of enforcing same" (*State v. Ferguson*, 133 Tex. 60, 66, 125 S.W.2d 272, 276 (1939)). Actually, this reliance on Section 28 is a make-weight. All that the quoted statement means is that a judge who erroneously enjoins the enforcement of statute has "suspended" a law. If a judge properly enjoins enforcement he has not "suspended" a law; rather, he has prevented unconstitutional enforcement of a valid law or enforcement of an invalid law. In short, decisions would be the same even if there were no Section 28. (In addition to the *Ferguson* case, see *Crouch v. Craik*, 369 S.W.2d 311 (Tex. 1963) and *City of Baytown v. Angel*, 469 S.W.2d 923 (Tex. Civ. App.—Houston [14th Dist.] 1971, *writ ref'd n.r.e.*). Compare *City of Houston v. Adams*, 326 S.W.2d 627 (Tex. Civ. App.—Houston 1959, *writ ref'd n.r.e.*), where the court did not find Section 28 to be a bar to an injunction.)

Section 28 leaves the legislature free to suspend laws. Indeed, such action involves nothing more than passing a new statute. If the "suspending" statute is attacked, some other section must be invoked.

Comparative Analysis

In thirty-one states there are specific constitutional guarantees against suspension of laws except by the legislature.

Author's Comment

Public authorities other than the legislature have no business suspending laws because this action is part of the law-making power. Hence prohibitions on suspension partially restate the principle of separation of powers and for this reason the prohibition presumably also operates in those jurisdictions which do not have a specific suspension section. Complex modern government and principles of local self-government do require considerable flexibility in the enforcement and applicability of general laws. So long as courts do not hamper this natural development by over technical interpretations of Section 28, the section will do no harm. It does state a basic though obvious principle of government.

Sec. 29. PROVISIONS OF BILL OF RIGHTS EXCEPTED FROM POWERS OF GOVERNMENT; TO FOREVER REMAIN INVIOLATE. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

History

The subject matter of Section 29 first appeared as the concluding section of the Bill of Rights in the Constitution of 1845. It has reappeared in the same position in every subsequent constitution.

Explanation

Presumably Section 29 was designed as a closing flourish to emphasize the importance of the Bill of Rights. Unfortunately it is not clear just what it means and one is left with the suspicion that despite the apparently strong language it means nothing at all. Section 29 has been cited in relatively few cases and in them the decision typically turned on another section of the Bill of Rights cited with Section 29.

The reference to "the high powers herein delegated" one must assume is to the rest of the Texas Constitution, but the word "delegated" may be misleading. The United States government is one of delegated powers while state powers are not delegated but residual. Indeed the Texas Supreme Court asserted, "A state constitution, unlike the federal constitution, is in no sense a grant of power but operates solely as a limitation of power. 'All power which is not limited by the constitution inheres in the people, and an act of a state legislature is legal when the Constitution contains no prohibition against it' " (*Shepherd v. San Jacinto Junior College District,* 363 S.W.2d 742, 743 (1962), quoting from *Watts v. Mann,* 187 S.W.2d 917 (Tex. Civ. App.—Austin 1945, *writ ref'd*)).

It might seem that Section 29 supports a particularly rigid interpretation of the Bill of Rights. Certainly Texas courts have said that constitutional provisions mean exactly what the people who wrote them intended and judges are without authority to deviate from this meaning. This contrasts with concepts of the expanding or unfolding meaning of constitutional provisions advanced by some federal judges, presumably not totally without effect upon their Texas counterparts. The case which seems to draw Section 29 into the conflict between these views is the Texas mortgage moratorium act case in which the Texas Supreme Court construed the Texas obligation of contract clause in Section 16 at odds with the interpretation given to the federal clause by Chief Justice Hughes in *Home Building and Loan Association v. Blaisdell* (290 U.S. 398 (1934)). As Chief Justice Cureton explained,

"the *Blaisdell Case* seems to be based upon the proposition that, although the contract clause in the Federal Constitution prohibits the impairment of contracts by state legislation, still a wide range of police control may be exercised by the states, varying with different conditions, even to the extent of impairing previously existing contracts. It is quite obvious the same rule of interpretation cannot be applied to the contract clause in our State Constitution, for the reason that, unlike the Federal Constitution, the rights guaranteed by that clause are by Section 29 of the Bill of Rights 'excepted out of the general powers of government, . . . and all laws contrary thereto . . . shall be void' " (*Travelers' Insurance Co. v. Marshall,* 124 Tex. 45, 53, 76 S.W.2d 1007, 1011 (1934)).

"The meaning which a constitutional provision had when adopted," added the Chief Justice several paragraphs later, "it has today; its intent does not change with time or conditions; while it operates upon new subjects and changed conditions, it operates with the same meaning and intent which it had when formulated and adopted" (124 Tex. at 53, 76 S.W.2d at 1011). For this proposition, however, the Chief Justice cited Cooley and not Section 29.

One may well wonder whether Chief Justice Hughes would not have agreed with this rule but have observed that in applying it he reached another result. In any case the rule does not seem to spring from Section 29. Then what did Chief Justice Cureton cite Section 29 for? Apparently he has asserted no more than the power of the courts to declare unconstitutional legislation passed in violation of the Bill of Rights or any other part of the constitution. This, however, merely restates the power of judicial review enunciated by John Marshall in *Marbury v. Madison* (5 U.S. (1 Cranch) 137 (1803)) and well established before the Texas Constitution of 1845 was drafted.

Comparative Analysis

Texas is one of only four states with constitutional provisions of this sort.

Author's Comment

As the foregoing *Explanation* attempts to establish, Section 29 seems to be a meaningless provision of the Bill of Rights. It is not even the aid to rigid construction which it might appear to be. Differing views of the judicial role in constitutional construction and reliance upon the intent of the framers of constitutions have thrived in jurisdictions which have no provisions similar to Section 29.

Author's Concluding Comment

Looking back at the history and construction of Article I, it is difficult to accept the limitation in Section (g) of the resolution which provided for the Constitutional Convention of 1974. Providing that the "Bill of Rights of the present Texas Constitution shall be retained in full" may have been politically expedient. Certainly, however, Article I cannot escape revision on its own merits.

With rare exceptions changes in the Texas Bill of Rights have been additions and not deletions. Article I today is redundant, confusing, partially obsolete and in places highly technical. In its present form its justification is history not logic. No one who respects American political tradition would sweep away the Bill of Rights for these reasons. These rights have been adopted as a bulwark against unfair or oppressive government. Still a full reexamination beginning with basic questions does not seem too much to ask. What do we want from our government today? What do we realistically fear from government today? Presumably we want a government which is strong enough to cope with problems of the present yet

subject to some realistic limitations in favor of individual freedom. One must face the issue of how many 17th, 18th. and 19th century solutions serve the needs of the 20th and 21st centuries.

Were it not for judicial construction, this reexamination could not have been deferred so long. The United States Supreme Court, as previously noted, has taken the lead in protecting the basic rights and liberties of the individual against interference by state government. Texas courts have followed this lead to the point of disregarding significant differences in the wording of Texas constitutional guarantees. These courts have seldom outbid federal courts in protection except to safeguard some property rights. Nor have the Texas courts developed disparate constitutional theories. Rather the typical opinions state conclusions rather than the reasons for these conclusions. Although some cases turned on technical wording in the Texas Bill of Rights, the very real danger of highly technical interpretation remains more a threat than a reality. Nevertheless the courts cannot always produce satisfactory results from the clutter of the constitution.

The Texas Bill of Rights has not served much if any educational purpose. Indeed if it were revised and put in understandable form it might be more available for this purpose. Subjecting the bill to the same sort of demanding scrutiny which was recently given to the rest of the Texas Constitution might produce changes along the following lines.

(1) Move general statements of political theory or purpose to the preamble where rephrased they would serve simply as aids to construction. This would eliminate Sections 1 and 2.

(2) Eliminate specific prohibitions which parallel prohibitions upon the states in the United States Constitution. This list would include the guarantee of a republican form of government in Section 2, and all of Section 16 except the apparently meaningless and not useful prohibition on retroactive laws.

(3) Eliminate prohibitions upon ancient wrongs which are not likely to occur and might be struck down under a due process provision anyway. To be considered for deletion on this basis are Sections 20, 21, and 25.

(4) Eliminate meaningless or otherwise unnecessary provisions. Section 29 seems to be meaningless as construed. The treason provision of the United States Constitution renders Section 22 unnecessary because treason against Texas, a part of the United States, must be treason against the United States. Section 28 against suspension of laws really repeats the division of powers rule in Article II. Sections 18 and 26 deal with subjects better regulated by statute.

(5) Streamline and restate the guarantees of basic liberties in the same words as the First Amendment to the United States Constitution, changing of course the word "congress." With this single statement Sections 4, 5, 6, 7, 8, and 27 could be dropped. The rule regarding witnesses in Section 5 could be dealt with by statute.

(6) Adopt the language regarding due process of law and equal protection of the laws from the Fourteenth Amendment to the United States Constitution while expanding equal protection to include the substance of Section 3a. These changes should then serve in place of Sections 3 and 3a as well as the due course of laws provisions in Sections 13 and 19.

(7) Re-examine the procedural guarantees, mostly to persons accused of crime, in Sections 9, 10, 11, 11a, 12, 13, 14, 15, and 15a. Not only is one guarantee of jury trial sufficient, but the new statement might well give the legislature greater leeway to experiment with nonjury settlements, particularly in civil cases. Room should be left too for legislative settlement of fair rules for commitment of the mentally ill. Since some states have curtailed or limited the grand jury, this procedure might also be left for legislative determination.

The other guarantees in these sections and the rigidity of their protections

might depend upon how innovatively the state proposes to deal with the prevention and control of criminal conduct. Certainly Section 11a on bail is a legislative type solution and the guarantee of bail should be stated in such terms as to permit legislative determination.

(8) Finally, the remaining sections in the Bill of Rights might be disposed of as follows:

(a) Section 24 which is simply stated might be retained.

(b) Section 23, in the interest of crime control, should be repealed in favor of legislative regulation.

(c) Section 17 might be replaced with a simple statement that just compensation is due when private property is taken for public use (as in the Fifth Amendment to the United States Constitution). The details could be left for legislative regulation

ARTICLE II

THE POWERS OF GOVERNMENT

Sec. 1. DIVISION OF POWERS; THREE SEPARATE DEPARTMENTS; EXERCISE OF POWER PROPERLY ATTACHED TO OTHER DEPARTMENTS. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

History

Article II of the Texas Constitution consists of only a single section, with fewer than 100 words. Yet, the principle it establishes, that the powers of government are divided among three separate and distinct branches or departments of government, is one of the most basic to Texas government and has had a significant impact on the remainder of the state constitution and on the structure and operation of government in Texas.

The separation-of-powers concept in Texas is traceable to both Anglo and Mexican influences. The importance of the concept in the history of government in the United States is well known, but both the Mexican National Constitution of 1824 (Art. II, Sec. 1, para. 3) and the Coahuila Constitution of 1827 (Sec. 29) contained specific separation-of-powers statements similar to the one that appeared in Article I, Section 1, of the 1836 Constitution of the Republic of Texas. A separation-of-powers provision has been present, with only minor changes, in every Texas constitution since that first one.

The United States Constitution also establishes a federal government generally organized into three separate branches, but does so without a specific separation-of-powers statement. Instead, the separation is accomplished by the constitution's assignment of certain duties and powers to each branch. So strong was the fear that political power might be concentrated in one or a few hands and so pervasive was the belief that separation of powers was the remedy against abuse of power that Madison, writing in the *Federalist*, found it necessary to defend the constitution against those who charged neglect of this principle. "No political truth," he wrote, "is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is based. The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny" (The *Federalist*, No. 47).

The separation-of-powers statement in the 1836 Constitution of the Republic of Texas was a simple one:

> The powers of this government shall be divided into three departments, viz: legislative, executive, and judicial, which shall remain forever separate and distinct. (Art. I, Sec. 1.)

In the 1845 Constitution, the provision was moved to Article II and was altered to appear as it does today. The major change occurring with the 1845 version was recognition that the doctrine of separation, however rigid in principle, was subject to exceptions "expressly provided" in the constitution. Only minor changes in punctuation have occurred as the provision has been carried forward as Section 1 of Article II in each subsequent Texas constitution.

Art. II, § 1

Explanation

The importance of Article II is not in its precise language but in the general concept of government it announces—a concept that in turn pervades the remainder of the Texas Constitution and has been vigorously developed by the courts and attorneys general in application to government at both the state and local level. The principle has basically two facets. The first is obvious from a reading of Article II--that no member of one branch or "department" of government may exercise powers that are confided to another. The second is present by implication from the first—that those powers constitutionally confided to one body of government cannot be delegated to another body, agency, or level of government. Yet, as indicated by both court decisions and attorney general opinions, neither the concept nor its basic facets are rigid. Each has evolved as the nature and role of government has changed and as legal opinions have more precisely defined the lines between what is permissible and what is not.

Article II must be read in conjunction with many other sections of the constitution. Article II indicates that the powers of government are divided among three named departments, but it fails to define what powers are legislative, executive, or judicial in nature and properly assigned to each department. Therefore, the first effect of other sections of the constitution granting specific powers to a department or a member of a department is to define generally what constitutes legislative, executive. or judicial powers within the separation concept. For example, if the power to pass laws is confided to the legislature, the power is legislative in nature. Article II also indicates that no person "being of" one department may exercise any power properly attached to another department, but it fails to provide a list of those persons constituting each department. Again, other sections and articles of the constitution provide at least some indication as to constitutional officers. For example, Section 1 of Article IV prescribes officers of the executive department. However, as discussed elsewhere, efforts to extend the separation downward and to segregate all state and local government officers and employees into their appropriate departments of government has proven difficult and generally unsuccessful.

In determining those powers "properly attached" to a department, it is necessary to go beyond those set out in the constitution. Generally, it is said that the duty of the legislature is to enact laws; the duty of the executive is to enforce them; and the duty of the judiciary is to construe, interpret, and uphold them. Specific determinations are more difficult. Whereas the powers of the legislature are plenary, limited only by restrictions contained in or necessarily arising from the constitution, the executive and judiciary have only those powers granted by law or the constitution. See *Government Services Insurance Underwriters v. Jones,* 368 S.W.2d 560 (Tex. 1963) (plenary power of the legislature); In re *House Bill No. 537 of the Thirty-eighth Legislature,* 113 Tex. 367, 256 S.W. 573 (1923) (judiciary). However, powers may be within the general constrictions of being executive or judicial in nature without being expressly set out in the constitution either because "inherently" within or properly "inferred" from powers or jurisdiction directly granted by the constitution. (See Ex parte *Hughes,* 133 Tex. 505, 129 S.W.2d 270 (1939).) Therefore, another effect of express grants of authority in the constitution is to provide those instances in which one department of government may exercise a power that is either granted elsewhere in the constitution to another department of government or is intrinsically within the powers of another department without express mention in the constitution. For example, Section 59 of Article XVI was adopted in part to serve as an exception to the separation concept. See *Corzelius v. Harrell,* 143 Tex. 509, 186 S.W.2d 961 (1945).

Few writers or courts have taken time specifically to construe the wording of Article II. As a result, several aspects of the article have gone virtually unnoticed. For example, although the doctrine of separation of powers is usually described as being between "branches" of government, Article II speaks in terms of "departments" of government. The use of "department" is carried forward in each of the articles of the 1876 Texas Constitution creating the three separate repositories of authority—Legislative Department, Article III; Executive Department, Article IV; Judicial Department, Article V. Section 1 of Article IV goes so far as to specify those officers who constitute the "Executive Department."

A second aspect of the significance of the wording of Article II is that the separation required is that of "powers." It is also possible to speak of "functions" of government. (Some states have distinguished between powers and functions in determining separation issues.) If one were to use this distinction, many separation issues arising under the Texas Constitution could be solved easily. Article II distributes powers among three departments; each of these departments is "closed" by definition. That is, Section 1 of Article III makes the senate and the house the legislative department; Section 1 of Article IV names certain officers as constituting the executive department; and Section 1 of Article V names the courts that constitute the judicial department. (This is a bit oversimplified; the drafters of the 1876 Constitution were not so precise in their terminology.) If the officers named in these three sections were considered the only ones "being of one" department and forbidden to exercise powers belonging to another department, the way would be open to treat differently constitutional or statutory officers not designated as part of one of the three "departments." Instead, they could be characterized as not "being of" or exercising the "powers" of a particular department but, rather, carrying out a "function" of government under authority established by law. However, apparently neither the Texas courts nor attorneys general have utilized this approach to the separation dilemma.

A third aspect of the wording of Article II that has gone virtually unnoticed is that it permits only those exceptions to the separation-of-powers principle that are "expressly" permitted elsewhere in the constitution, suggesting that the mere presence of another constitutional provision is not necessarily adequate to establish an exception.

Development in Texas of the concept of the separation of powers is discussed in four areas: (1) administrative agencies; (2) separation of legislative-executive powers; (3) separation of legislative-judicial powers; and (4) separation of executive-judicial powers.

Administrative agencies. The work of government today is done largely through administrative agencies. Estimates of the number of existing state agencies in Texas have run as high as 200, with at least 70 performing major legislative, executive, or judicial functions. Texas courts, like those in other states, have had to reconcile the appearance and growth of this "fourth branch" of government with the constitutionally ordered system of a separation of powers among three branches. Agencies created under specific constitutional authority or direction are more easily accommodated in the system because if not strictly in compliance with the separation principle, they become an "exception" as authorized in Article II. (*E.g.,* Board of Pardons and Paroles, which is created in Art. IV, Sec. 11.) However, the great majority of agencies are created by statute and must function under the separation requirement, thus compelling Texas courts to establish parameters for application of the separation principle to the myriad of different statutory agencies and circumstances.

To understand the nature of a state agency in regard to the separation

doctrine, it is important to bear in mind that, unless constitutional in origin, an agency derives its authority solely from the legislature. But the legislature cannot grant an agency power that the legislature itself does not have. Since the power of the state legislature is plenary, limited only by express or implied restrictions necessarily contained in or necessarily arising from the constitution, the power that potentially may be entrusted by the legislature to an agency is considerable. However, the legislature cannot grant an agency powers that properly are purely "legislative," "judicial," or "executive" in nature unless authorized to do so by the constitution. (See *Board of Water Engineers v. McKnight,* 111 Tex. 82, 229 S.W. 301 (1921).) In the instance of "judicial" powers, the distinction as enunciated by the court in *Scott v. Texas State Board of Medical Examiners* (384 S.W.2d 686, 690-691 (Tex. 1964)), is whether the legislative authorization "involves public policy or is policy-making in effect, or whether the action concerns only the parties who are immediately affected." The former may be granted to an agency; the latter, being judicial, cannot.

An initial issue affecting state agencies and arising under the separation-of-powers doctrine is the extent of authority, and the discretion in the exercise of that authority, that an agency may be delegated by law. Conceptually, governmental policy is to be decided by the legislature, with agencies merely charged with making rules in furtherance of the policy. However, the realities of government are decidedly different. Appointed or civil service administrators greatly outnumber elected officers and are by necessity making important day-to-day decisions. The administrators are not performing merely ministerial tasks; they are making and effecting policy. The greater the discretion they have under their operating statute, the greater the opportunity they have for determining policy.

Texas courts continue to enunciate the rule that a delegation of legislative authority is valid only if there are sufficient statutory standards, but the adequacy of such standards is determined on a case-by-case basis. Apparently no Texas court has declared a statute unconstitutional as an invalid delegation of authority to a state agency because it lacked adequate standards. But see Tex. Att'y Gen. Op. Nos. M-1264, M-1191, M-1190 (1972). Instead, Texas courts have upheld various statutes by either denying that the delegation exists; finding that the powers involved were only quasi-legislative, quasi-executive, or quasi-judicial in nature; or concluding that the statutory standard was sufficient. See Ray, "Delegation of Power to State Administrative Agencies in Texas," 16 *Texas L. Rev.* 20 (1937); Harris, "The Administrative Law in Texas," 29 *Texas L. Rev.* 213 (1951).

In recent cases Texas courts have upheld agency authority under very general legislative standards. For example, the Texas Supreme Court in *Jordan v. State Board of Insurance* (160 Tex. 506, 334 S.W.2d 278 (1960)) upheld an order applying a statutory standard requiring that officers and directors of a proposed insurance company be "worthy of public confidence." In 1972, the court upheld a statute providing for revocation of a license for the practice of medicine on the basis of "grossly unprofessional or dishonorable conduct, or of a character which in the opinion of the Board is likely to deceive or defraud the public." (*Martinez v. State Board of Medical Examiners,* 476 S.W.2d 400 (Tex. 1972).) The standard applied in recent cases has been that the legislature may delegate such authority to establish rules, regulations, or minimum standards as may be reasonably necessary to carry out the expressed purpose of the Act. (*Beall Medical Surgical Clinic and Hospital v. Texas Board of Health,* 364 S.W.2d 755 (Tex. Civ. App.—Dallas 1963, *no writ*); *Williams v. State,* 514 S.W.2d 772 (Tex. Civ. App.—Beaumont 1974, *writ ref'd n.r.e.*).)

A second issue arising under Article II and affecting state agencies is the scope of judicial review of agency decisions. The threshold question is whether a person

may obtain admission to the judicial system for review of agency decisions. Texas courts have recognized that except in the presence of a statutory provision for appeal or review agency decisions are not reviewable unless they affect the constitutional or property rights of the individual making the appeal. (*Brazosport Savings and Loan Ass'n v. American Savings and Loan Ass'n,* 161 Tex. 543, 342 S.W.2d 747 (1961); *City of Amarillo v. Hancock,* 150 Tex. 231, 239 S.W.2d 788 (1951).) Decisions affecting privileges are not automatically reviewable. (See *White Top Cab Co. v. City of Houston,* 440 S.W.2d 732 (Tex. Civ. App.—Houston [14th Dist.] 1969, *no writ*).) Recent practice in Texas and elsewhere has been to provide by statute for appeals by "persons aggrieved," "interested in," or "affected" by particular agency decisions. (See *Scott v. Board of Adjustment,* 405 S.W.2d 55 (Tex. 1966).) In 1975, the Texas Legislature enacted an Administrative Procedure and Register Act (APA) (Tex. Rev. Civ. Stat. Ann. art. 6252-13a), which provides an appeal for "persons aggrieved" by final agency decisions. To what extent the law will change prior practice of Texas courts with regard to the availability of review must await judicial construction of the act.

Once a person seeking review of an agency decision obtains access to the judicial system, the question becomes the extent to which the court will hear and decide the matter anew. The Texas Legislature and Texas courts have butted heads over whether the courts should review agency decisions de novo. Perhaps because of a distrust of the agency decision-making process, the Texas Legislature has tried repeatedly to provide courts with authority to hear the matter de novo, but the courts have refused. Finding that a statute requiring a completely new trial and decision would result in an indirect delegation of powers that could not be directly delegated to the courts because violative of Article II, Texas courts have preferred to review agency decisions on the basis of whether, as a matter of law, there is "substantial evidence" to support the agency action. Cases illustrating the courts' attitude include *Gerst v. Nixon* (411 S.W.2d 350 (Tex. 1967)), in which the court refused to follow the statute's requirement that courts review decisions of the savings and loan commissioner on the basis of a preponderance of evidence; *Chemical Bank & Trust Co. v. Falkner* (369 S.W.2d 427 (Tex. 1963)), in which the court refused to follow statutory provisions requiring that it determine what constituted "public necessity" for a new bank charter; and *Bradley v. Texas Liquor Control Board* (108 S.W.2d 300 (Tex. Civ. App.—Austin 1937, *no writ*)), in which the court refused de novo review of board action as an invalid effort to confer administrative power on the court. The most recent opinion evidencing this attitude is *Texas Vending Commission v. Headquarters Corp.* (505 S.W.2d 402 (Tex. Civ. App.—Austin 1974, *writ ref'd n.r.e.*)), in which the court found the function of vending machine licensing to be legislative in nature and therefore one not susceptible to judicial determination.

This rule against de novo review is applicable except in that circumstance in which the authority being exercised by the agency is judicial, rather than legislative or administrative in nature. (See *Scott v. Texas State Board of Medical Examiners,* 384 S.W.2d 686 (Tex. 1964) (agency exercised power to "revoke" medical license, a power "traditionally" committed to the courts); *Chemical Bank & Trust Co. v. Faulkner, supra* at 433 (Calvert, J., dissenting).) However, as discussed previously, the right of an agency to exercise "judicial" powers is limited to those instances authorized in the constitution.

The legislature's solution to the roadblock constructed by state courts has been to attempt to amend the Texas Constitution to permit de novo review. An amendment submitted in 1961 that would have permitted such review was defeated by the voters of the state.

As a result of the controversy over de novo review and in the absence in the

past of a state administrative procedure act to provide uniformity in appeals, the result has been "a hodge-podge of judicially created principles and inconsistent statutory provisions." (Guinn, "Judicial Review of Administrative Orders in Texas," 23 *Baylor L. Rev.* 34, 37 (1971).) Although pure de novo review is not possible except in the limited circumstance mentioned above, no fewer than five separate "types" of "substantial evidence" review have developed in Texas, each depending on the presence of certain statutory language. (See Reavley, "Substantial Evidence and Insubstantial Review in Texas," 23 *Sw. L. J.* 239 (1969).) The newly enacted Administrative Procedure and Register Act (Tex. Rev. Civ. Stat. Ann. art. 6252-13a) sets out a procedure for courts to follow in determining substantial evidence appeals, but there remains a question of whether the act will supersede other acts and bring uniformity to appeal procedures and court review in Texas. The applicable provision, Section 19, states that the review is "cumulative of other means of redress provided by statute." The act became effective on January 1, 1976, and as yet no Texas court has decided whether the APA "review" will bring a procedural sameness to the variant standards currently applied by Texas courts.

Legislative-Judicial. The entire de novo controversy discussed above is illustrative of the hesitation of Texas courts to accept responsibility for apparent "policy" determinations even when expressly authorized to do so by law. (See *Davis v. City of Lubbock,* 160 Tex. 38, 326 S.W.2d 699 (1959).) Unlike some courts, particularly certain federal courts acting in the areas of redistricting, penal system operation, and educational desegregation, Texas courts have continued to apply a rather stern doctrine of judicial restraint. Such elements of this doctrine as the presumption of a statute's constitutionality, the refusal to provide "advisory" opinions, and deference to the policy pronouncements of legislative and administrative bodies at both the state and local level remain present and virulent judicial principles in Texas. (See generally, *Dick v. Kazen,* 156 Tex. 122, 292 S.W.2d 913 (1956); *Trapp v. Shell Oil Co.,* 145 Tex. 323, 198 S.W.2d 424 (1946); *State v. Hogg,* 123 Tex. 568, 70 S.W.2d 699, *aff'd on rehearing,* 72 S.W.2d 593 (1934); *State v. Margolis,* 493 S.W.2d 695 (Tex. Civ. App.—Austin 1969, *writ ref'd n.r.e.*).)

In those instances in which the constitution provides the legislature with authority to act in areas otherwise within the auspices of the judicial branch, the courts also have been hesitant to overturn legislative enactments. One of these areas is with regard to rules of judicial procedure. (See Annotation of Sec. 25 of Art. V.) In *Government Services Insurance Underwriters v. Jones* (368 S.W.2d 560 (Tex. 1963)), the Supreme Court indicated that it would be reversible error for a court to fail to grant a continuance when the legislative continuance act (Tex. Rev. Civ. Stat. Ann. art. 2168a) provided for one because a legislator was acting as attorney. In this regard, however, the court has emphasized that the legislature's power is limited by other provisions in the constitution and does not extend to interference with a court's power to enforce its judgments. (See *Schwartz v. Jefferson,* 520 S.W.2d 881 (Tex. 1975); *Langever v. Miller,* 124 Tex. 80, 76 S.W.2d 1025 (1934).)

Perhaps the most extraordinary example of a legislature's exercise of judicial powers is in the impeachment process. (See Secs. 1-5 of Art. XV and Tex. Rev. Civ. Stat. Ann. arts. 5961-63.) On three occasions in the 20th century the Texas Senate has convened as a court of impeachment for the trial of a state official. The first trial occurred in 1917 and resulted in removal from office and disqualification from holding future public office of Governor James E. Ferguson. (Senate Journal, 35th Legislature, 2nd Called Session (1917).) The second resulted in acquittal for District Judge J. B. Price in 1931. (Senate Journal, 42nd Legislature, 2nd Called

Session (1931).) The third was in 1975-1976 and resulted in the removal and disqualification of District Judge O. P. Carrillo. Texas courts have clearly indicated that the senate's authority to "try" impeachment charges is judicial in nature and possibly only as a constitutionally authorized exception to the separation doctrine. (*Ferguson v. Maddox,* 114 Tex. 85, 94, 263 S.W. 888, 890 (1924).) In reality, the process itself is a strange blend of legislative and judicial procedures, with the senate providing its own procedures and constituting the "court of original, exclusive, and final jurisdiction." (114 Tex. at 100, 263 S.W. at 894.) Once the legislature has sat in a judicial capacity and exercised its constitutionally granted judicial power, it cannot return in its legislative capacity and reverse its actions. (*Ferguson v. Wilcox,* 119 Tex. 280, 28 S.W.2d 526 (1930).)

A recent Texas Supreme Court decision reflects the narrow line walked by courts in determining whether the remedy sought by a plaintiff is one the court can grant because it requires the exercise of judicial powers or one which the court cannot grant because it requires the exercise of legislative powers. In *Southwestern Bell Telephone Co. v. State* (523 S.W.2d 67 (Tex. Civ. App.—Austin 1975)), the court of civil appeals denied the effort of the attorney general to enjoin the "unreasonable" rates of the defendant telephone company because "rate-making is a legislative power which the judiciary cannot exercise" (*Id.* at 69). The court pointed out that, although it was not being directly asked to set rates, the practical effect was otherwise (*Id.* at 70). The supreme court reversed, noting that, in the absence of regulation by governmental agencies, public utilities are held by common law to a standard of reasonableness in their rates and that such a standard is enforceable in a court. (*State v. Southwestern Bell Telephone Co.,* 526 S.W.2d 526 (Tex. 1975).)

Another recent case depicts an irony in the position taken by Texas courts with regard to authority delegated to them by the legislature. Whereas the supreme court long ago announced that courts are limited to powers strictly judicial in nature (In re *House Bill No. 537 of the Thirty-eighth Legislature,* 113 Tex. 367, 256 S.W. 573 (1923)), and Texas courts have refused to accept de novo review of agency decisions despite persistent efforts of the Texas Legislature to grant them such authority, the Texas Supreme Court in *Commissioners Court of Lubbock County v. Martin* (471 S.W.2d 100 (Tex. 1971) upheld a statute giving district judges broad authority for carrying out local probation programs. The authority included the power to appoint and set the salaries of probation officers, subject only to an undefined "consent" required of the commissioners court of the county. The court went so far as to indicate in dictum that even absent the specific statute in question, "We have no doubt that a district judge has the implied power to appoint probation personnel and to set their compensation in the event such action is essential to the continuing effective administration of the business of the court" (*Id.* at 110). Apparently the standard for determining whether any particular action is "essential" would be whether the action of the judge is so unreasonable, arbitrary, or capricious as to amount to an abuse of discretion. This suggests that, despite holdings to the effect that a court lacks "inherent" powers, a court's "implied" powers may be extensive within the general purpose of "effective adminstration of the business of the court." (See Ex parte *Hughes,* 133 Tex. 505, 129 S.W.2d 270 (1939).)

Legislative-Executive. The greatest occasion for conflict over legislative and executive powers has been with regard to fiscal matters. Conceptually, the legislature is charged with appropriating state funds and the executive department or agencies with executing the appropriation. Unless the legislature appropriates funds from the state treasury for the purpose in question, the administrative or

executive officer is without authority to spend funds for that purpose. In *Bullock v. Calvert* (480 S.W.2d 367 (1972)). the Texas Supreme Court denied the secretary of state authority to use money in his hands to defray costs of the state primary when the primary filing fee system was declared unconstitutional. On the other hand, the inability to obtain money unless appropriated may be removed by the constitution itself. (See *Lightfoot v. Lane,* 104 Tex. 447, 140 S.W. 89 (1911).) The *Lightfoot* case involved the refusal of the comptroller to pay the salary of the attorney general because there was no appropriation. The court held that an appropriation was unnecessary when the constitution provided that the officer was to receive a specific salary. The case does not answer the question whether the legislature could refuse to appropriate funds for a constitutional officer of another department if the constitution fails to require a specific amount.

The governor's fiscal or budget powers lie in his authority to submit a budget at the commencement of each regular session of the legislature (Art. IV, Sec. 4) and his authority to veto items of appropriation (Art. IV, Sec. 14). The latter power is the important one and, as indicated in *Fulmore v. Lane* (104 Tex. 499, 140 S.W. 405 (1911)), is actually a legislative power and thus the governor must be strictly held to only that power which is granted to him in the constitution. Therefore, as held in *Pickle v. McCall* (86 Tex. 212, 24 S.W. 265 (1893)), once the governor has exercised his veto powers and returned the bill to the legislature, he loses control over it and cannot veto further items when the legislature is no longer in session.

The controversial interface on fiscal matters has occurred over the control of the expenditure of state funds by agencies or officers after the funds are appropriated. In 1971, the legislature attempted to create a State Budget Committee consisting of both legislative and executive officers to exercise some authority over the approval of agency expenditures. The attorney general ruled the attempt unconstitutional as granting executive powers to legislative officers (Tex. Att'y Gen. Op. No. M-824 (1971)). In 1973, the attorney general advised that a bill giving the governor broad budgetary authority was also unconstitutional because:

> It is our opinion that the Legislature may not invest the Governor with supervisory authority over any agencies or offices whose functions and duties could not have been assigned originally to the Governor's office by statute; . . . it cannot subordinate to his office any other executive office of constitutional rank except as the Constitution allows; and . . . it cannot confer upon him either strict legislative or strict judicial powers. Where, however, the Legislature has created agencies whose only functions are those which originally might have been conferred upon the Governor had the Legislature so chosen, we think the Legislature may restructure the agencies to make them answerable to the Governor . . . , without violating the principle of separation of powers.
>
> Only the Legislature may designate the purposes and uses to which public moneys may be devoted. The veto power of the Governor is a negative instrument assigned to him by the Constitution as a check upon the legislative branch of government. It is the only constitutional means by which the Governor can control the legislative power . . . and the Legislature is constitutionally incapable of delegating to him a larger legislative role. (Letter Advisory No. 2 (1973).)

The governor presently possesses certain expenditure control authority under a 1972 statute (Tex. Rev. Civ. Stat. Ann. art. 689a-4b), which permits the legislature to make the expenditure of appropriated funds contingent on a finding by the governor that a particular event has occurred. (See Tex. Att'y Gen. Op. No. H-207 (1974).) Theoretically the governor may have no discretion in the matter, but as indicated by the failure of Governor Dolph Briscoe to release certain funds in 1976 even after the attorney general indicated that the requisite "fact" had been

determined, the governor, at least as a practical matter, can make policy an element of the decision to release funds under the statute. (See Tex. Att'y Gen. Op. No. H-822 (1976).) Neither the relevant court decisions nor attorney general opinions clearly or conclusively answer the issues affecting who can or should control expenditures.

Executive-Judicial. The issue of the separation of executive and judicial powers has largely arisen with regard to state agencies and judicial review of the decisions of such agencies or officers. The hesitancy of state courts to review such decisions is discussed elsewhere and need not be repeated here.

Another area is the separation doctrine as applied to prevent an officer in one department from serving as an officer in another department. This has been of particular significance to judicial and executive officers because of the number of such constitutional officers named in Articles IV and V and assumed therefore to be a member "of" the respective department. Attorneys general have attempted in various opinions to identify the particular department into which each state or local official falls. Attorneys general have also extended the separation doctrine to include "employees" as well as officers. (See Tex. Att'y Gen. Op. No. H-7 (1973).) The effect has been a needless and confusing series of opinions, resulting recently in a decision that, unless authorized by the constitution, a university professor could not serve as a county commissioner because as an employee of the "executive" department, he could not exercise the powers of the "judicial" department (Tex. Att'y Gen. Op. No. H-6 (1973)). Such results fail to serve any apparent purpose under the separation-of-powers concept and spawn amendments to the constitution to authorize such dual officeholding. (See Sec. 40 of Art. XVI.) In the opinion of this writer, such opinions reflect an inaccurate reading of Article II and the separation concept.

In 1973, the Texas Court of Criminal Appeals considered a law, the Texas Controlled Substances Act (Tex. Rev. Civ. Stat. Ann. art. 4476-15 § 6.01(c), which provided that in criminal actions pending and on appeal when the act became effective, defendants could elect to be sentenced or resentenced under the less severe penalty provisions of the new act. The court held that the resentencing portion of the act was violative of separation of powers because it conflicted with Section 11 of Article IV, which grants clemency powers to the governor. (Ex parte *Giles*, 502 S.W.2d 774 (Tex. Crim. App. 1973).)

Comparative Analysis

Approximately 40 state constitutions have separation-of-powers provisions similar to the one in Texas. The general principles applied in the several states are basically the same. However, court or attorney general decisions on particular types of programs may vary considerably between states according to other provisions in each state's constitution or to the historical development of the separation concept. Presumably the 10 states without specific separation-of-powers provisions derive their separation doctrine from the presence of specific grants of authority in the constitution, just as occurs under the United States Constitution.

Author's Comment

Few sections of the Texas Constitution are as basic to the structure and functioning of government in Texas as Article II. The principle of separation remains legally viable today, although the boundaries of each department are not clear and Texas courts have not been completely consistent in deciding when one

department may obtain by law powers otherwise exercisable by another. However, such a result is not surprising or undesirable. As the court in *State Board of Insurance v. Betts,* 158 Tex. 83, 90, 308 S.W.2d 846, 852 (1958), stated:

> Co-ordination or co-operation of two or more branches or departments of government in solution of certain problems is both the usual and the expected thing . . . . The system of checks and balances running throughout the governmental structure of both general and state organizations, while designed to prevent excesses, is not intended to make effective action impossible

The separation principle is not and cannot be rigid.

Several areas of future controversy with regard to separation can reasonably be predicted. One, the issue of the scope of judicial review of administrative decisions, has been present for some time and is likely to continue. Unless a future constitutional amendment provides for de novo review, there appears to be little likelihood that Texas courts will reconsider their refusal to accept statutorily authorized de novo jurisdiction. Development in the area of judicial review is likely to come through judicial construction and legislative amendment of the Administrative Procedure and Register Act (Tex. Rev. Civ. Stat. Ann. 6252-13a).

A second area of controversy is likely to be the control of state expenditures. As indicated earlier, prior court holdings and attorney general opinions in this area are not clear or conclusive. Concern over the growth of the cost of state government is likely to generate new and varied approaches to ways to supervise expenditures and to prevent wasteful spending of appropriated funds. The variety in approaches will be affected by conflicts between the governor and the legislature over who should possess the supervisory authority.

A third area may be in the exercise of supervisory authority over the rule-making and regulatory activities of state agencies. Several states have attempted to empower legislative committees to review and suspend agency rules. Such attempts have been upheld in some states, while being denied in others because violative of the separation of powers. In 1975, House Bill 1209 was introduced, but not passed, which would have provided that no state agency rule, regulation, or change or repeal of a state agency rule or regulation could take effect until approved by a legislative committee. The appropriate committee was to be designated by the speaker of the house and the lieutenant governor. Whether such legislative supervision or a less broad form of such supervision can be sustained under the Texas Constitution awaits attorney general or court action.

As noted by James Madison in his defense of the United States Constitution, a complete separation of powers would be self-defeating. Since the three branches are unequal, the more powerful might soon dominate the others. Therefore, each branch must be given weapons of defense against the others in order to retain the bulk of its allotted power. These weapons of defense might consist, for example as they do in Texas, of extraneous powers such as the veto, a legislative power entrusted by the constitution to the executive, or the right to confirm appointments, an executive power entrusted to the legislature. It is the judiciary, through interpretation of the laws and the constitution, that finally has responsibility for protecting the integrity of each department. Although certain anachronisms are identifiable among the holdings of Texas courts, generally they reflect a reasonable approach to a difficult and ill-defined concept.

ARTICLE III

LEGISLATIVE DEPARTMENT

Sec. 1. SENATE AND HOUSE OF REPRESENTATIVES. The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled "The Legislature of the State of Texas."

History

The present language has been unchanged since 1876 and closely resembles that contained in the Constitution of 1836. The only significant difference between the two is the name given to the senate and house of representatives. The Constitution of 1836 labeled these two bodies the "Congress of the Republic of Texas," whereas the present constitution of course describes them as "The Legislature of the State of Texas."

Curiously, constitutions after 1836 changed "legislative power" to "legislative powers." The Constitution of 1869 restored the singular, however. From 1845 to 1876 the legislative power provision of each constitution contained the requirement that "The Style of the laws shall be, 'Be it enacted by the Legislature of the State of Texas,' " a requirement now located in Section 29.

Explanation

Section 1 does three things: It vests the lawmaking power in the legislature, although by no means exclusively. It commits Texas to a two-house, or bicameral, legislature. It names each house or chamber of the legislature. The last provision is of little significance—some states call their lower houses "assemblies," a distinction without a difference—but the issues of who may exercise the lawmaking power and bicameralism versus unicameralism are still vital.

Legislative Power

Other parts of the constitution itself make clear that the legislature is not the sole repository of lawmaking power. For example, home-rule cities are authorized to enact laws (Art. XI, Sec. 5), the governor is given veto power over acts of the legislature (Art. IV, Secs. 14 and 15), and the people must approve legislatively initiated amendments to the constitution (Art. XVII, Sec. 1). The doctrine of judicial review, under which the courts may nullify legislation because it is contrary to some higher law, vests lawmaking power in the courts but of course is not mentioned in the constitution. Finally, some constitutional theorists argue that the people, through declarations of the social compact theory like Article I, Section 2, of the Texas Constitution, have reserved some residuum of lawmaking power to themselves. (See Robert B. Dishman, *State Constitutions: The Shape of the Document,* rev. ed. (National Municipal League, 1968), pp. 15-24.)

Limiting Instrument. Although obscured by the fact that it contains so many express limitations on the exercise of legislative power, the Texas Constitution has always been interpreted to authorize the legislature to do anything neither it nor the United States Constitution forbids. This is a general principle of state constitutions—they are limiting instruments—and in theory contrasts with the United States Constitution, which *delegates* to congress power to legislate only on the subjects enumerated in Article I. As stated by the Supreme Court of Texas, in opinions more than 50 years apart,

> This language [Article III, Section 1] vests in the Legislature all legislative power which the people possessed, unless limited by some other provision of the Constitution. . . .

> There can be no dispute but that in this State the provisions of the Constitution serve only as a limitation on the power of the Legislature, and not as a grant of power. . . . (*Brown v. City of Galveston,* 97 Tex. 1, 9, 75 S.W. 488, 492 (1903); *Bexar County Hosp. Dist. v. Crosby,* 160 Tex. 116, 120, 327 S.W.2d 445, 447 (1959).)

Delegation of Legislative Power. The rule is universally stated by the courts that the legislature may not delegate its power to make law. This rule rarely has determined the result in concrete cases, however, at least during the last five decades, because the courts usually have upheld lawmaking under statutory authorization by administrative agencies and local governments. The nondelegation rule has been interred by the federal courts, and Professor Kenneth Culp Davis, the leading administrative law scholar, asserts that state courts are celebrating its wake. (*Administrative Law: Cases—Text—Problems,* 5th ed. (St. Paul: West Publishing Co., 1973), ch. 2.)

The threshold question of delegation has not been of much concern in Texas. In the early case of *Kinney v. Zimpleman* (36 Tex. 554 (1872)), for example, the court upheld against nondelegation attack a statute directing the State Board of Education to district the state for educational purposes, remarking that the maxim *delegata potestas non potest delegari* (a delegated power cannot be delegated) did not apply. (See also *Housing Authority v. Higginbotham,* 135 Tex. 158, 143 S.W.2d 79 (1940), for a useful categorization of cases sustaining legislative delegations.) Early courts had trouble with local option legislation, however, and their reasoning may be relevant today on the issue of whether the legislature without constitutional authorization may authorize statewide initiative and referendum.

In *State v. Swisher* (17 Tex. 441 (1856)), the defendant appealed his conviction for selling liquor in a dry area. Before his appeal was considered, the local option law under which he was convicted was repealed. The court noted this fact and dismissed the appeal because of an inadequate record, but in its opinion chose to label the law unconstitutional because it violated the separation of powers and nondelegation doctrines. In 1915 the supreme court relied on *Swisher* to invalidate a local option pool hall law, despite a dissent pointing out that the constitutional discussion in that case was dicta (language not necessary to the court's decision) and thus not authoritative. (Ex parte *Mitchell,* 109 Tex. 11, 177 S.W. 953 (1915).) The court in *Mitchell* did not cite *Stanfield v. State* (83 Tex. 317, 18 S.W. 577 (1892)), or *Werner v. City of Galveston* (72 Tex. 22, 7 S.W. 726 (1888)), which upheld statutes authorizing the commissioners court to abolish the office of county school superintendent and thereby permit municipalities to manage their schools. Not until 1920 did the supreme court distinguish away *Swisher* and its progeny, in upholding a local option statute for municipal street improvement, holding that a statute whose complete execution and application to the subject matter is made to depend on the assent of some other body is not an unconstitutional delegation of legislative power. (*Spears v. City of San Antonio,* 110 Tex. 618, 223 S.W. 166 (1920).) Today the validity of local option legislation is firmly established and of course in the case of liquor regulation expressly authorized by Article XVI, Section 20. (See generally C. Dallas Sands, *Sutherland Statutory Construction,* 4th ed. (Chicago: Callaghan & Co., 1972), vol. 1, pp. 87-89.)

Standardless Delegation. "Generally, a legislative delegation of rule-making authority must fix standards in order to be valid." (*Southwestern Savings & Loan Ass'n of Houston v. Falkner,* 160 Tex. 417, 422, 331 S.W.2d 917, 921 (1960).) This statement represents the majority rule in state courts today, but it is a rule embattled. Professor Davis asserts that the federal courts have abandoned the rule as impracticable and that its application by state courts is "ritualistic." (Davis, pp.

34-42.) As the quotation from the *Southwestern* opinion indicates, however, Texas courts still intone the rule while upholding such standards as "public convenience and advantage" (*Southwestern*), "prevent waste" (*Railroad Comm'n v. Shell Oil Co.*, 139 Tex. 66, 161 S.W.2d 1022 (1942), and "decent, safe and sanitary urban or rural dwellings" (*Housing Authority v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79 (1940)).

Professor Davis recommends reforming, not abolishing, the nondelegation rule.

> The non-delegation doctrine has often been altered. During various stages of its development, the doctrine has at least to a considerable extent (1) prohibited the delegation of legislative power, (2) allowed such delegation with meaningful standards, (3) relaxed the requirement that standards be meaningful so that vague standards will suffice, and (4) added to the requirement of standards the requirement of safeguards. What other alterations might make the doctrine effective and useful?
>
> (1) The purpose of the doctrine could be shifted to the broader and deeper one, perhaps with a due process base, of protecting against unnecessary and uncontrolled discretionary power; the purpose could be nothing less than the grand purpose of minimizing injustice to private parties from official action. (2) The emphasis on safeguards could be further strengthened. (3) The requirement of statutory standards, which has so often failed because of legislative inability or unwillingness to comply with it, could be supplanted with a requirement of either statutory or administrative standards and safeguards. Administrative standards and safeguards, provided by administrative rulemaking, can be as effective as requirements laid down by legislative bodies, and administrators are more likely than legislators to comply with judicial requirements. (4) The doctrine could gradually grow into a broad requirement, perhaps with a due process base, that officers with discretionary power must do about as much as feasible to structure their discretion through such safeguards as open findings, open reasons, and open precedents, to guide their discretion through administrative standards which are as clear and definite as are feasible in the circumstances, and to turn the administrative standards into principles and rules as rapidly as feasible. (5) The protection could be extended so as to reach not only delegated power but also such undelegated power as that of selective enforcement, which is now generally uncontrolled. (Davis, p. 45.)

Initiative and Referendum. Initiative and referendum allow the people to participate directly in the lawmaking process. Initiative involves circulating a petition to place some matter on the ballot for popular vote; if the petition must first go through the legislature, the process is labeled "indirect initiative"; if it goes directly to a vote, it is labeled "direct initiative." Referendum also involves a direct vote of the people, but after the fact, that is, on a law already passed by the lawmaking body. Initiative and referendum are used alike for legislation and constitutional amendment—the Texas citizens' right to vote on proposed constitutional amendments is an example of the latter referendum practice—but discussion here is limited to initiating and approving/disapproving legislation.

Direct legislation is hardly a new idea. The classical Greek assembly and its American counterpart, the legendary New England town meeting, produced direct legislation, in the sense that every member of the electorate could propose and vote on it, but the initiative and referendum were given the form we know today by the Progressive movement in American politics around the turn of the century. (For a flavor of the reformist zeal of that period, see the September 1912 issue of the *Annals of the American Political Science Association*, vol. 43, which was devoted to proselytizing direct legislation.) This movement produced effects in Texas, where in 1913 a constitutional amendment was unsuccessfully proposed to give the people "the power to propose laws at the polls, and to approve or reject at

the polls any Act of the Legislature." (S.J.R. 12, Tex. Laws 1913, p. 464.) The Progressives' success in reforming municipal government was greater, however, and one result is that most Texas cities today permit direct legislation. (See, *e.g.*, Austin Charter, art. IV; Fort Worth Charter, chs. 21 & 22; Houston Charter, art. VIIb.)

Absent constitutional authorization, it is the general rule in this country that direct legislation violates the grant of lawmaking power to the legislature and thus is not permitted. (*Sutherland,* vol. 1, p. 84.) Judging from the Texas courts' early hostility to local option legislation, this is no doubt the rule here, too, although no case considering the question was found.

Bicameralism

The single-house or unicameral legislature is of Scottish origin, and Oliver Cromwell experimented briefly with a unicameral Parliament in England. Three colonial legislatures, for what are now the states of Delaware, Georgia, and Pennsylvania, were unicameral, as was the Congress of the Confederation (1777-1789). Even after the United States Constitution enshrined bicameralism, three states remained unicameral, Vermont until 1836. (For an excellent if brief history of unicameralism, see O. Douglas Weeks, *Two Legislative Houses or One* (Dallas: Southern Methodist University, Arnold Foundation Studies in Public Affairs, 1938).)

In this country unicameralism was another swirl in the Progressive tide of reform; it did not reach flood stage until the 1930s, however, when unicameral proposals were submitted in most states only to be rejected everywhere but Nebraska. In Texas unicameral amendments were proposed in both houses in 1937, but neither survived the legislature. (For a summary of the first 20 years of Nebraska's unicameral experience, see American Political Science Association, *American State Legislatures,* ed. Belle Zeller (New York: Crowell, 1954), pp. 240-55.) Again the reformists had better luck at the local government level, as virtually all local government legislative bodies in this country are unicameral today. Not surprisingly, the National Municipal League has recommended a unicameral state legislature since publication of its first *Model State Constitution* in 1921.

Comparative Analysis

In all states except Nebraska the legislature consists of two houses, one of which invariably is called "the senate," the other of which usually is called either "the house of representatives" or "the assembly." The single house in Nebraska is called "the senate." Although Nebraska instituted its unicameral legislature in 1934, no noticeable movement toward unicameralism sprung up until quite recently. In 1972 two states, Montana and North Dakota, voted on new constitutions and each included unicameralism as an option for the voters. North Dakota voted down its new constitution and turned down the unicameral option by a wider margin than the unfavorable vote on the constitution as a whole. Montana approved its new constitution but voted down the unicameral option by a ratio of six to five. It has been suggested that a trend to unicameralism may be beginning since the one-man, one-vote cases have killed the principal justification for two houses—that is, one house based strictly on population and one wholly or partly based on geography. (See *Citizens' Guide,* p. 29. For discussion of the one-man, one-vote cases in Texas, see the *Explanation* of Art. III, Sec. 26.) The *Model State Constitution* of course recommends a unicameral legislature in Section 4.02.

The constitutions of slightly more than one-third of the states authorize some form of direct legislation. Illinois' new constitution authorizes the people to initiate amendments to the legislative article, with the legislature retaining the general

initiative for constitutional amendments. (Art. XIV, Sec. 3.) The *Model State Constitution* includes an appendix authorizing legislative initiative and referendum (pp. 117-18).

Author's Comment

Article III, Section 1, is a typical (if ungrammatical: "shall be vested" is a false imperative) statement of the legislative power grant. It is also clear, as pointed out in the *Explanation*, that the legislature's lawmaking power is plenary, limited only by prohibitions elsewhere in the constitution. Nevertheless, because the 1876 document contained so many limitations on legislative power, and the exceptions to these limitations over the years added so many of their own, one contemplating a new constitution may wish to consider a cautionary statement, located in the transition schedule, something like the following (which derives from Article II of the *Model State Constitution*):

> The enumeration in this constitution of specified powers and functions does not grant or limit the power of state government, but state government has all power not denied by this constitution or the constitution of the United States. The absence in this constitution of a grant of power contained in the Constitution of 1876, as amended, does not limit the power of state government.

The nature of state constitutions aside, there are two other basic issues: (1) Should the authorization for direct legislation be expanded? (Recall that the people already vote on proposed constitutional amendments.) (2) Should the Texas Legislature contain one house or two?

The traditional arguments for and against direct legislation will not be rehearsed; they are well stated, and evaluated from the perspective of a half-century's experience, in Lapalombara & Hagan, "Direct Legislation: An Appraisal and a Suggestion," (45 *American Political Science Review* 400 (1951)). The observer instead should rely mainly on the Texas experience with direct legislation, particularly the long and complicated constitutional amendment ballots the people have endured in recent years. Recent experience with direct legislation in other states should not be overlooked, especially the unfortunate racial context surrounding referenda on open and public housing. (See, *e.g.*, *Reitman v. Mulkey*, 387 U.S. 369 (1967); *James v. Valtierra*, 402 U.S. 137 (1971).) In the end, perhaps heaviest weight should be accorded one's theory of representative government: if the legislature is to represent us, direct legislation should be evaluated together with the many other express constitutional limitations that have burdened the Texas Legislature since 1876.

Bicameralism versus unicameralism, on the other hand, is a less vital issue. Even in 1938, writing during the flood of the unicameralism movement in this country, Professor Weeks saw this. "Important though the present issue between unicameralism and bicameralism may be, it is decidedly of secondary importance in relation to some other aspects of the subject of legislatures and representative government," those other aspects being, today, more time and resources to do the job of legislating properly. (Weeks, p. 20.)

Sec. 2. MEMBERSHIP OF SENATE AND HOUSE OF REPRESENTATIVES. The Senate shall consist of thirty-one members, and shall never be increased above this number. The House of Representatives shall consist of ninety-three members until the first apportionment after the adoption of this Constitution, when or at any apportionment thereafter, the number of Representatives may be increased by the Legislature, upon the ratio of not more than one Representative for every fifteen thousand

inhabitants; provided, the number of Representatives shall never exceed one hundred and fifty.

History

The first state legislature, created by the Constitution of 1845, was composed of a senate of from 19 to 33 members and a house of representatives of from 45 to 90 members. This organization continued until the Constitution of 1869, which provided for a house of 90 members and a senate of 30 members. The present constitution, which has remained unchanged in this respect, provides for a 31-member senate and a house beginning with 93 members and increasing with population until the membership reached the constitutional maximum of 150 when the state's population first reached 1.5 million according to the 1880 decennial census.

Explanation

The only modern significance of this section is in the context of the one-man, one-vote struggle, which is reviewed in the *Explanation* of Section 26 of this article.

Comparative Analysis

Currently state legislatures range in size from Nebraska's unicameral body of 49 members to Delaware's two houses with a total of 58. New Hampshire has the largest bicameral body with 424 members.

State senates range in size from Delaware's 19 to Minnesota's 67; the median senate membership is 38. Only 19 states specify constitutionally the exact number of senators, however. The others set maximums and minimums or prescribe other criteria such as a ratio of state population.

Delaware with 39 members has the smallest lower house and New Hampshire with 400 members has the largest. The median lower house membership is 100.

The United States Constitution provides for two senators from each state, elected for six-year terms. Approximately one-third of the senate is elected every two years, producing, of course, staggered terms in each state.

Representatives are apportioned among the several states on the basis of population with the stipulation that every state is entitled to at least one representative. (There are six states with only one representative.) Until the 1920 census, congress regularly increased the size of the house of representatives as the country's population increased. Since then, the practice has been to retain the size of the house at 435 and to reapportion after each census. Since 1930 reapportionment has been automatic under a statutory formula. Congress can, of course, change the formula at any time.

The *Model State Constitution* recommends a unicameral legislature consisting of senators elected for two-year terms from single-member districts, with a constitutional maximum and minimum number of districts, but with the numbers left blank. An alternative recommendation for a bicameral legislature provides for the number of senators provided by law, but not exceeding one-third the number of assemblymen, elected from single-member districts for six-year staggered terms. The number of assemblymen is likewise to be provided by law, within a constitutional maximum and minimum, and assemblymen are elected from single-member districts for two-year terms. (Secs. 4.02 and 4.03.)

Author's Comment

Many observers of Texas legislative process claim that the Texas House with

150 members is unwieldy. A 1973 study of its operations undertaken by the Citizens Conference on State Legislatures—now The Center for Legislative Improvement—recommends a reduction to 100 members, for example. (*A New Order of Business: Recommendations for the Organization and Operation of the Texas House of Representatives* (Sept. 1973), p. 23; see also Weeks, "Toward a More Effective Legislature," 35 *Texas L. Rev.* 926 (1957).) A smaller house, it is claimed, would permit reducing committee membership, make the provision of staff and facilities easier, and generally bring about more orderly procedure for consideration and debate of legislation.

On the other hand, the state's large and diverse population may require a lower house of 150 or more members to represent it adequately. Certainly there is no magic in any given number of seats, although the *Model Constitution's* recommended ratio of three to one for house to senate size seems tidy.

Sec. 3. ELECTION AND TERM OF OFFICE OF SENATORS. The Senators shall be chosen by the qualified electors for the term of four years; but a new Senate shall be chosen after every apportionment, and the Senators elected after each apportionment shall be divided by lot into two classes. The seats of the Senators of the first class shall be vacated at the expiration of the first two years, and those of the second class at the expiration of four years, so that one half of the Senators shall be chosen biennially thereafter. Senators shall take office following their election, on the day set by law for the convening of the Regular Session of the Legislature, and shall serve thereafter for the full term of years to which elected and until their successors shall have been elected and qualified.

History

The 1836 Constitution called for three-year terms for senators "chosen by districts, as nearly equal in free population (free negroes and Indians excepted), as practicable."

The 1845 Constitution provided for four-year terms and the division by lot of the senators into two equal classes. The seats of senators of the first class were to be vacated at the expiration of the first two years and those of the second class at the expiration of four years, so that one-half of the senators were chosen biennially.

No further change occurred until the 1869 Constitution, which provided for a senatorial term of six years and for one-third of the senators to be chosen biennially.

The Constitutional Convention of 1875 arrived at the present senatorial term of four years only after some debate. One delegate suggested, for example, that the senatorial term should be two years; he saw no reason why a senator's term should be longer than that of a member of the popular branch, the house of representatives. (*Debates*, p. 95.) Tradition was against the minority, however, and in the end four-year terms prevailed.

Section 3 was amended in 1966 to add the last sentence.

Explanation

Section 3 staggers the terms (and elections) of senators by dividing them into two classes. The 1845 Constitution provided for division into two classes "as nearly equal as can be," a clause omitted from the present section. Despite its omission, however, the Senate in practice awards four-year terms to 16 of its members, and two-year terms to 15, following each reapportionment.

A senatorial reapportionment has the effect of reducing to two years the terms

of senators elected for four years before the reapportionment took effect. (*Spears v. Davis*, 398 S.W.2d 921 (Tex. 1966).) Senators elected from the reapportioned districts then draw lots to see which 16 get four-year terms and which 15 get two-year terms. Senators elected at the second and subsequent general elections following a reapportionment get full four-year-terms.

The 1966 amendment to this section added the third sentence to specify when senatorial terms of office begin. (They begin when newly elected senators qualify by taking the oath of office on the second Tuesday of January in odd-numbered years, the date prescribed by statute for convening the legislature in regular session. See the *Explanation* of Section 5 of this article.) This beginning date was traditional—or so thought the senators until the Texas Supreme Court held otherwise in *Spears v. Davis*.

At issue in *Spears* was whether a senator elected in November 1962 was eligible under Section 18 of this article to run for the office of attorney general, an office whose salary was increased by the legislature of which the senator was a member. (Section 18 is a conflict-of-interest provision and among other things makes a legislator ineligible during his elected term to run for any office created or for which salary was increased by the legislature of which he was a member.) If the senator's term did not begin until the legislature following his election convened (on January 9, 1967), it would overlap the beginning of the attorney general's term (January 1, 1967), thus making the senator ineligible for that office. The court held that a senator's term begins when he is elected (which is either the general election date or the date the returns are canvassed, the court never decided which); thus the senator's term expired November 23, 1966, at the latest, four years after his election, and there was no overlap with the attorney general's term. As to the asserted tradition, the court simply denied its existence, despite the existence of a 1962 attorney general's opinion relying on the tradition to rule that newly elected senators became entitled to salary only when their terms began, *i.e.*, when the legislature convened in regular session. (Tex. Att'y Gen. Op. No. WW-1481 (1962).) The legislature had the last word, however, by amending this section in 1966, only to find some of its members confronted with the same eligibility bar under Section 18 urged against Senator Spears, thus requiring, two years later, an amendment to that section. (See the *Explanation* of Sec. 18.)

Comparative Analysis

Texas is one of a large majority of 38 states setting four-year terms for senators. This includes unicameral Nebraska, which calls its single house members "senators." The remaining 12 states have two-year terms. Most of the four-year-term states stagger senatorial elections as Texas does. A few states have four-year terms for both houses.

The United States Constitution provides for two senators from each state, elected for six-year terms. Approximately one-third of the United States Senate is elected every two years, and, as a result, the terms are staggered in each state.

The *Model State Constitution* recommends two-year terms for senators in states with a unicameral legislature. An alternative recommendation is six-year staggered terms in states with a bicameral legislature. (Sec. 4.03.)

Author's Comment

Giving senators longer terms than representatives reflects the historical bases of representation in the congress (equality of states in the United States Senate and of population in the House), bases themselves the product of compromise necessary to pass the United States Constitution but of little if any relevance to

state legislatures. Longer terms are the overwhelming tradition, however, and barring a new movement to unicameralism Texas and most other states are probably stuck with a second house whose members enjoy longer terms. Perhaps, with the beginning of four-year terms for the governor and other principal executive-branch officers, four-year terms for senators in Texas will assume new relevance.

There was practical logic in the supreme court's *Spears* decision to begin and end legislative terms on the general election date. A newly elected legislator's constituents would no longer be saddled with two-plus months of "lame duckism." Senators- and representatives-elect could officially participate in presession organization; in fact, as Texas inevitably moves toward a full-time legislature, the gap between election and taking office will appear more and more anachronistic. On the other hand, beginning and ending legislative terms on election day would bar many other officeholders from seeking legislative office under Section 19 of this article. Section 19 makes most officeholders ineligible for the legislature during their terms of office, which usually end in December, two months *after* the proposed November beginning of legislative terms. (See the *Explanations* of Sec. 19 of this article and Sec. 12 of Art. XVI.) A legislator's eligibility for other office under Section 18 of this article would not be affected by beginning and ending legislative terms on election day, however, because the terms of most other offices begin January 1.

As a matter of sound draftsmanship, the holdover language in the third sentence of this section should be omitted because it is redundant with Article XVI, Section 17, which requires all officers to hold over until their successors take office. Before Section 3 of this article is amended again, moreover, the draftsman ought to consider carefully any proposed amendment's effect on other provisions of the constitution—Section 18 of this article being the favorite example.

Sec. 4. ELECTION AND TERM OF MEMBERS OF HOUSE OF REPRESENTATIVES. The Members of the House of Representatives shall be chosen by the qualified electors for the term of two years. Representatives shall take office following their election, on the day set by law for the convening of the Regular Session of the Legislature, and shall serve thereafter for the full term of years to which elected and until their successors shall have been elected and qualified.

History

All state constitutions of Texas have incorporated two-year terms for representatives. The Constitution of the Republic provided for one-year terms.

In 1965 Texas voters defeated an amendment which would have increased the terms of house members from two to four years. Under the amendment, members would have been divided into two classes so that one-half of the membership would stand for election every two years. This is the same procedure now in effect for election of members to the senate.

A provision was included in the proposed amendment to prohibit a house member with more than one year of his term remaining from becoming a candidate for any other legislative office. (*Cf.* Art. XI, Sec. 11; Art. XVI, Sec. 65.) This would have prevented a member of the house from running for the senate while he still had at least a year of his house term remaining.

The same amendment adopted in 1966 that specified the beginning date for terms of senators also amended this section to cover representatives.

Art. III, § 5

Explanation

The 1966 amendment was not necessary to clarify when representative terms began. Before the amendment the section provided that "their term of office shall be two years from the day of their election," and the attorney general long ago ruled that the phrase meant what it said. (See Tex. Att'y Gen. Op. No. WW-1476 (1962) for a survey of opinions.) In fact, the supreme court in the *Spears* case in effect read this phrase from Section 4 into Section 3 to hold that senatorial terms began at the same time. (See the *Explanation* of Sec. 3.) The terms of both still begin at the same time, under the 1966 amendment, but the time has been moved forward to the second Tuesday in January following their election, which is the date the legislature convenes in regular session.

Comparative Analysis

All states except Alabama, Louisiana, Maryland, and Mississippi have two-year terms for representatives. Those four states have four-year terms for members of both houses. (Nebraska, of course, has no lower house.)

The United States Constitution provides for two-year terms for representatives.

The *Model State Constitution* recommends two-year terms for representatives, regardless of whether the legislature is unicameral or bicameral. (Sec. 4.03.)

Author's Comment

See the *Author's Comment* on Section 3 of this article.

Sec. 5. MEETINGS; ORDER OF BUSINESS. The Legislature shall meet every two years at such time as may be provided by law and at other times when convened by the Governor. When convened in regular Session, the first thirty days thereof shall be devoted to the introduction of bills and resolutions, acting upon emergency appropriations, passing upon the confirmation of the recess appointees of the Governor and such emergency matters as may be submitted by the Governor in special messages to the Legislature; provided that during the succeeding thirty days of the regular session of the Legislature the various committees of each House shall hold hearings to consider all bills and resolutions and other matters then pending; and such emergency matters as may be submitted by the Governor; provided further that during the following sixty days the Legislature shall act upon such bills and resolutions as may be then pending and upon such emergency matters as may be submitted by the Governor in special messages to the Legislature; provided, however, either House may otherwise determine its order of business by an affirmative vote of four-fifths of its membership.

History

All state constitutions have provided for biennial sessions of the legislature except for the Constitution of 1869, which provided for annual sessions. The Constitution of the Republic was silent on the frequency and duration of congressional sessions, but the first congress before adjourning in 1837 provided by concurrent resolution for annual sessions beginning the first day of each November. (A Resolution Regulating the Meeting of Congress, 1 *Gammel's Laws*, p. 1335.)

At the Convention of 1875 one delegate proposed quadrennial sessions instead of biennial sessions of the legislature. Another moved to insert after Section 5 an additional section containing the following oath to be taken by members of the legislature:

> And I have not since my election received, and will not during the continuance of my term of office receive, any free ticket, gift, accomodation [*sic*] or compensation

from any railroad or other corporate company, other than shall be extended to citizens of the State generally; nor any unusual accomodation [*sic*] or compensation from any private individual.

After considerable discussion a motion was made to add to this oath "or use a free pass, or try to borrow one," which was adopted. The entire amendment, however, lost by a vote of 41 to 36. (*Debates*, p. 95.) Its consideration may explain the mislocation of this section among those dealing with terms and qualifications of legislators.

All state constitutions also have authorized special sessions for emergency matters at the call of the governor when necessary. In 1930 Section 5 was amended to provide for the order of business during regular sessions.

An unsuccessful 1973 amendment would have provided for regular annual sessions not to exceed 180 days in each odd-numbered year or 60 days in each even-numbered year. During sessions in even-numbered years only fiscal matters and emergency submissions by the governor could be considered. The governor could extend the 60-day session for an additional 30 days. The present language for convening special sessions was retained but the order of business sentence deleted. The proposition lost 338,759 to 267,141, with only about 15 percent of the state's registered voters casting ballots.

Explanation

Other sections of the constitution fix the maximum length of regular sessions at 140 days (Sec. 24 of this article; the obvious conflict with the 120 days provided in this section has largely gone unnoticed) and of special sessions at 30 days (Sec. 40); Article IV, Section 8, empowers the governor to call special sessions. The civil statutes provide for convening each regular session of the legislature at noon on the second Tuesday in January of every odd-numbered year (Tex. Rev. Civ. Stat. Ann. art. 5422).

May the legislature convene itself in special session? The supreme court answered "no" when the senate did so to consider interim gubernatorial appointments, but the vote was 5-4 and the presiding chief justice wrote an angry dissent. (*Walker v. Baker*, 145 Tex. 121, 196 S.W.2d 324 (1946).) At the heart of the minority's position was the court's earlier decision in *Ferguson v. Maddox* (114 Tex. 85, 263 S.W. 888 (1924)). There the court upheld the trial and conviction on impeachment charges of Governor James E. Ferguson by the senate over the span of two special sessions. Ferguson's lawyers argued that their client's trial, begun during the second special session, ended with that session. The court in rejecting the argument compared the senate while trying impeachment charges to a court, and at one point stated flatly: "From the inception to the conclusion of impeachment proceedings the House and Senate, as to that matter, are not limited or restricted by legislative sessions." (114 Tex., at 95, 263 S.W., at 891. For discussion of the impeachment power see the *Explanation* of Art. XV.) The senate's confirmation responsibility is not legislative in nature either, argued the minority in *Walker*, so by analogy to the *Ferguson* holding the senate ought likewise to be empowered under the constitution to convene itself to consider gubernatorial appointments. Be that as it may, no appellate decision has considered whether the legislature (or one of its houses) may convene itself in *legislative* session, and it is reasonably clear that it may not.

The last sentence (and bulk) of Section 5 was designed to ensure a more orderly flow of business through the legislature by means of the so-called split session provision. It failed, as it had to because of the 140-day limitation on the length of regular sessions, and the legislature routinely suspends the order of business

requirement, as the section allows by four-fifths vote, and the traditional logjam regularly recurs in the last days of each session. So inured to the logjam have legislators become, in fact, that the parliamentary comment to the House Rules actually defends the common practice of setting the chamber's clock back in the waning hours to save the "principal work of a session." (Tex. H. Rule 19, Sec. 11, comment, at p. 115 (1973).)

Comparative Analysis

As a result of amendments adopted during the last decade, a large majority (38) of state legislatures for the first time in this century may meet in annual sessions. Of the 38 states with annual sessions, 21 have general sessions with no limitation on length, 12 have limitations, and five alternate general sessions with sessions limited to fiscal matters, but in four of these five the length of both the general and the budget session is limited. A majority of the states with biennial sessions also have limitations on their length. It is worth noting that in the many states with limitations on session length, only one has a required adjournment date later than June 30. Both the *Model State Constitution* and the United States Constitution call for annual sessions with no limitation on length.

Approximately three-fourths of the states specify in their constitutions the date for convening the session, usually a day early in January. Only about 12 include a specific hour, usually noon, but in a couple of states 10 a.m. is the magic hour. Another half dozen or so states set the time of convening but permit the time to be changed by law. Three states appear to leave the whole business up to the legislature. The *Model State Constitution* does the same. The United States Constitution calls for congress to convene at noon on the third day of January, "unless they shall by law appoint a different day."

Author's Comment

As noted in the *Comparative Analysis*, most state legislatures today may meet annually, and the trend toward permitting annual sessions of at least limited duration seems unstoppable.

Most of the inadequacies in operation of the Texas Legislature can be traced to the limited duration of its regular sessions, 140 days every two years. In that four and a half months the representatives of the fourth most populous state in the nation are expected to recruit and train a session staff; consider and act on a budget of billions of dollars to be spent beginning three months after adjournment over a 24-month period; deliberate on requests for more than 1,000 amendatory and new laws; oversee operations of the executive and judicial branches; and answer volumes of constituent mail—to mention only their more important responsibilities. Small wonder that the number of special sessions has increased over the past 20 years, so that only two legislatures during those two decades, the 52nd in 1951 and the 58th in 1963, did not require them. (The 62nd in 1971 with four special sessions nearly rivaled the record of five set by the 41st in 1929-30.)

A compromise increasingly accepted by proponents of unlimited annual sessions is to limit one of the sessions to a fixed period, usually three to six months, and restrict the topics considered during it, usually to fiscal matters. As noted, the unsuccessful 1973 amendment to this section would have provided for a 60- to 90-day session in even-numbered years but restricted the legislature to dealing with fiscal matters (and emergency submissions by the governor) during it. This compromise has not worked particularly well in practice because, in the words of a legislator from a budget session state, " 'Much of our time at the fiscal session is wasted arguing and debating over what is fiscal and what is non-fiscal. . . . I have

serious doubt that one of the annual sessions should be restricted to fiscal matters.' " (Quoted by Wirt, "The Legislature," in John P. Wheeler, Jr., ed., *Salient Issues of Constitutional Revision* (New York: National Municipal League, 1961), p. 75.)

Whatever the decision on number, type, and duration of sessions, the order of business provision of Section 5 should be deleted. This will not change the legislature's practice, which is as it should be to prescribe its own order of business by rule.

Section 5 should also be combined with those portions of Sections 24 and 40 of this article, and Section 8 of Article IV, that deal with legislative sessions.

Sec. 6. QUALIFICATIONS OF SENATORS. No person shall be a Senator, unless he be a citizen of the United States, and, at the time of his election a qualified elector of this State, and shall have been a resident of this State five years next preceding his election, and the last year thereof a resident of the district for which he shall be chosen, and shall have attained the age of twenty-six years.

History

The various constitutions of Texas have all prescribed qualifications for senators somewhat similar to those set forth in the present section. They differed, however, as to the length of time a senator must have been an inhabitant of the state prior to his election, the constitutions of 1845, 1861, and 1869 requiring a three-year period rather than the five-year period required by the Constitution of 1866 and the present constitution.

All the constitutions have required a senator to be a resident of his district for the year preceding his election.

The age limit has varied for senators. Prior to the Constitution of 1869 it was set at 30. By the terms of the latter, however, it was reduced to 25, then increased to 26 in the present section.

The Constitution of 1866 required a senator to be a white citizen of the United States. The Constitution of 1869, drafted by the Reconstruction Convention, eliminated this requirement.

Section 6 emerged from the 1875 Convention a product of compromise. Proposed two- and three-year residency requirements yielded to five years and suggested minimum ages for senators of 21, 24, 25, 26, and 30 finally produced the present 26. (*Debates*, pp. 95-97.)

Explanation

The qualifications for election to the senate prescribed by this section are exclusive, unless modified elsewhere in the constitution, and the legislature is powerless to add to or subtract from them. (*Dickson v. Strickland,* 114 Tex. 176, 265 S.W. 1012 (1924).) For example, a statute making resignation from county office a prerequisite to eligibility for election to the Senate was invalidated by the court because violative of Section 6, but the candidate was held ineligible anyway under Section 19 of this article because the latter section forbids election to one office while holding another. (*Burroughs v. Lyles,* 142 Tex. 704, 181 S.W.2d 570 (1944).)

A candidate for the senate (or the house) apparently must meet the qualifications of Section 6 (or Section 7) as of the date of the general or special election, not as of the primary date or date of taking office. This interpretation results from

reading the phrase "at the time of his election" to modify all the qualifications that follow, a reading impliedly approved by the supreme court in *Luna v. Blanton* (478 S.W.2d 76 (Tex. 1974)). (See also Election Code art. 1.05.)

Comparative Analysis

About 13 states prescribe a minimum age for senators of 21, which is the youngest, and two a minimum of 30, which is the oldest. The median age requirement is 25.

The United States Constitution sets a minimum age of 30 for United States Senators. The *Model State Constitution* leaves a blank space for age but does recommend in its alternative provision for a bicameral legislature that the minimum age requirement be the same for both houses. At least 18 states have the same minimum age for both houses. These are the 13 states with a minimum age of 21 for the senate, Idaho (22 for both house and senate), and four states with a 25-year minimum for the house.

There appear to be only 26 states that explicitly require senators to be United States citizens. It is likely that most of the other states in fact require United States citizenship, however. In some states, for example, a senator must be a voter and a voter must be a citizen. In others, a senator must be a citizen of the state and it is assumed that that means citizen of the United States. The United States Constitution requires nine years' citizenship for senators. The *Model State Constitution* requires senators to be voters and requires voters to be "citizens."

All states have a residency requirement, but not all constitutions spell it out in the section on qualifications of senators. Connecticut, for example, requires a senator to be an elector (voter) residing in his district, but to be an elector he must have resided in a town for at least six months. In New Hampshire, Massachusetts, and Vermont residency in the district is not required prior to the election date.

Under the United States Constitution, as is well known from the case of the late Senator Robert F. Kennedy, the residency requirement must be met as of the date of election, not as of the date of taking office. The *Model State Constitution* requires a senator to be a voter and a voter must have resided for a minimum of three months in the state.

Author's Comment

The citizenship requirement phrase in this section is superfluous because the next phrase requires a candidate to be a qualified voter and a qualified voter must be a citizen. (See Art. VI, Sec. 2.) The more important issue, however, is whether such lengthy residency requirements, especially five years in the state, are justified. As noted, the *Model State Constitution* requires but three months' residency in the district, and although this may be too brief a period to become familiar with a particular district's needs, five years' residence in the state clearly is too long.

Another issue, both here and under Section 7, which prescribes the qualifications for representatives, is the minimum age requirement. The legislature in 1973 reduced the age of majority to 18 across the board. (Tex. Rev. Civ. Stat. Ann. art. 5923b.) If 18 is old enough to vote, serve on juries, contract, etc., perhaps it is also old enough to hold district office.

A senator (or representative) faces an extra burden in seeking reelection if his district boundaries have been changed as a result of reapportionment. The *Model State Constitution* minimizes the difficulty by requiring only three months' residency in the (new) district before election, but perhaps a more realistic solution, given the tradition of this state's more stringent residency requirements, is that of

the proposed New York Constitution of 1967:

> . . . If, however, any redistricting plan for senate or assembly has been certified . . . since the last general election for the legislature, he shall have been domiciled for the twelve months preceding his election in a county in which all or part of the new district is located or in a county contiguous to such district if such district be composed of a whole county and all or parts of another county or counties.

Sec. 7. QUALIFICATIONS OF REPRESENTATIVES. No person shall be a Representative, unless he be a citizen of the United States, and, at the time of his election, a qualified elector of this State, and shall have been a resident of this State two years next preceding his election, the last year thereof a resident of the district for which he shall be chosen, and shall have attained the age of twenty-one years.

History

All Texas constitutions except that of 1866 have imposed identical age and residence requirements for representatives; the Constitution of 1866, as in the case of senators, increased the state residence requirement to five years and also specified that a representative be a white citizen.

This section apparently caused very little debate in the Convention of 1875. The only alternative proposal, applicable to both senators and representatives, required five years' residence in the state, one year in the district, and a minimum age of 21. The convention defeated this proposal by a vote of 59 to 21. (*Debates*, p. 96.)

Explanation

See the *Explanation* of Section 6.

Comparative Analysis

Except for the variations noted below, the *Comparative Analysis* for Section 6 (qualifications for senators) applies to this section as well.

About 39 states set a minimum age of 21 for representatives; nine states prescribe minimums ranging from 22 to 25; and two states have no minimum age requirement.

The United States Constitution sets a minimum age of 25 for membership in the house of representatives.

About five states require a one-year residence in the state, four require two years, seven require three years, and one requires four years.

Approximately 22 states require a one-year residence in the representative district, two require two years, and a few states require less than a year. One state, New Hampshire, does not specify any length of residency in the district before the election date.

Author's Comment

See the *Author's Comment* on Section 6.

Sec. 8. EACH HOUSE JUDGE OF QUALIFICATIONS AND ELECTION; CONTESTS. Each House shall be the judge of the qualifications and election of its

own members; but contested elections shall be determined in such manner as shall be provided by law.

History

The present section resembles that in the Constitution of the Republic, except that the latter also provided for the house to judge the "returns" of its own members. The 1845 Constitution deleted "returns" and added the clause that "contested elections shall be determined in such manner as shall be directed by law." Subsequent constitutions have used essentially the same language.

Explanation

A 19th century constitutional law scholar asserted that sections like 8 were "essential to enable [the legislature] to enter upon and proceed with its legislative functions without liability to interruption and confusion [resulting from contested elections of its members] . . . ." (Walter Carrington, *Cooley's Constitutional Limitations,* 8th ed. (Boston: Little, Brown, and Co., 1927), vol. 1, p. 270.) In reality, it is difficult to imagine anything more disruptive of legislative business than an election contest, and many years ago the Texas Legislature wisely devised statutory procedures to keep ineligible candidates for election to that body off the ballot in the first place. (See Election Code art. 1.05.) Naturally a candidate so kept off challenged the statutory procedure as unconstitutional because of usurping the legislature's prerogative to judge the qualifications of its members, but the supreme court had little difficulty in sustaining the procedure. (*Burroughs v. Lyles,* 142 Tex. 704, 181 S.W.2d 570 (1944); accord, *Kirk v. Gordon,* 376 S.W.2d 560 (Tex. 1964).) Thus in practice qualification for the legislature is determined before the first primary election, and the legislature is spared the unrewarding task of determining who is and who is not qualified to be seated.

State constitutional provisions like Section 8 are not dead-letter, however, as a recent decision of the United States Supreme Court demonstrates. In *Bond v. Floyd* (385 U.S. 116 (1966)), the Georgia Legislature asserted that its power to determine its members' qualifications was exclusive and thus shielded from judicial review. The court disagreed, holding that no state law infringing a federal constitutional right (here freedom of speech) was shielded from review. (*Cf. Powell v. McCormack,* 395 U.S. 486 (1969) (court may review congressional refusal to seat house member).)

Curiously, the Texas Legislature has not taken full advantage of the second clause of Section 8 that allows it to provide by law for settling contested elections. It has provided by law all right (see Election Code arts. 9.20-9.26), but the statute gives the job to the legislature concurrently with the courts as to contested primary elections (see art. 13.30) and arguably as to general elections as well. (Art. 9.20 of the Election Code, which is the first of the series of seven articles dealing with contested legislative elections cited above, begins: "A candidate for State Senator or Representative *may* initiate election contest proceedings [by filing notice, etc.] . . . ." (Emphasis supplied.) Article V, Section 8, of the constitution gives the district court original jurisdiction "of election contests." Article 9.01 of the Election Code gives the district court *exclusive* original jurisdiction of election contests for all offices except legislative and a few in the executive branch. No judicial or attorney general opinion resolving this ambiguity was found, probably because most contests are taken to court to avoid waiting until the legislature convenes for disposition.)

Comparative Analysis

All 50 state constitutions have some provision for deciding contested elections or determining the qualifications of legislators, but several variations exist. Thirty-four states give the house concerned the power to judge the "election and returns" of its members. Twelve states speak only to "elections," and four states refer to "election returns." The United States Constitution speaks of "Elections, Returns and Qualifications," while the *Model State Constitution* deletes the word "returns."

The last clause of Section 8 requires that contested elections be determined as provided by law, an exception that permits the legislature to place election contests before the courts. This exception exists in only a few constitutions.

Author's Comment

Traditionalists will no doubt urge retention of Section 8, but it is difficult to justify in face of the fact that qualification for the legislature is determined initially by party officials (and ultimately by the courts in case of disagreement) months before the legislature convenes. This is as it should be: the courts are designed to adjudicate this kind of dispute and, to turn around Judge Cooley, the legislature should "proceed with its legislative functions without liability to interruption and confusion."

Sec. 9. PRESIDENT PRO TEMPORE OF SENATE; SPEAKER OF HOUSE OF REPRESENTATIVES. The Senate shall, at the beginning and close of each session, and at such other times as may be necessary, elect one of its members President pro tempore, who shall perform the duties of the Lieutenant Governor in any case of absence or disability of that officer, and whenever the said office of Lieutenant Governor shall be vacant. The House of Representatives shall, when it first assembles, organize temporarily, and thereupon proceed to the election of a Speaker from its own members; and each House shall choose its other officers.

History

The Constitution of the Republic contained a comparable provision, but it applied only to the senate and provided only for a president pro tempore (for the time being) in the absence of the vice-president. The 1845 Constitution added a similar provision for electing the house speaker.

From 1861 to 1869, Texas constitutions specified that "The House of Representatives, when assembled, shall elect a Speaker and its other officers, and the Senate shall choose a President for the time being, and its other officers."

The present constitution added the requirement that the senate at the beginning and close of each session, and at such other times as may be necessary, choose a president pro tempore to perform the duties of the lieutenant governor in case of his absence or disability or when the office of lieutenant governor is vacant. The summarized *Debates* do not reveal the reason for this addition.

Explanation

The house rules authorize the speaker to appoint a speaker pro tempore, and most speakers have done so in recent times. Unlike the president pro tempore of the senate, however, the speaker pro tempore is not a constitutional officer, and probably it was for this reason that he was not named in the Executive Succession Act, which, incidentally, ranks the president pro tempore ahead of the speaker in succession order for the governorship. (Tex. Rev. Civ. Stat. Ann. art. 6252—10.)

The other "officers" (who are actually employees) of the legislature are

identified in the *Explanation* of Section 41; suffice it here to note that these other "officers" need not be elected (although the senate does so) but may be hired like any other employee.

In response to abuses occurring during recent speakership campaigns, the legislature in 1973 enacted a separate statute requiring each speaker candidate to report his campaign contributions and expenditures. (Tex. Rev. Civ. Stat. Ann. art. 5428a.) The statute is similar to the general campaign financing act (Election Code ch. 14) and comprehensively regulates speakership campaign financing by limiting categories and amounts of campaign expenditures, barring contributions from certain individuals and entities, etc.

Articles 5423-5429 of the civil statutes provide for organizing each new legislature. The secretary of state presides while the clerk calls the role of newly elected and returning legislators. the former of whom present their certificates of election and take the oath of office. Once a quorum of members has qualified or answered present, article 5428 provides that the house shall elect a speaker; after the speaker takes the chair, article 5429 directs the further organization of the house and the selection of other necessary "officers." There are no comparable statutes for the senate, but as noted in the *Explanation* of Section 41 that body's rules provide for electing a president pro tempore and other "officers."

Comparative Analysis

Most state constitutions direct each house to choose its own officers. In two states the provision is drafted with precision by stating that such officers shall be so chosen except as otherwise provided in the constitution. This takes care of the fact that normally a senate does not choose its presiding officer. Some states specify what officers must be chosen. In one state, Minnesota, it is provided that each house shall choose its own officers as prescribed by law, a formulation that theoretically permits the governor to participate in the process of creating legislative offices.

The United States Constitution states that the house of representatives shall choose "their Speaker and other officers"; and that the senate shall choose "their other officers, and also a President pro tempore." The *Model State Constitution* states that the unicameral legislature shall choose "its presiding officer from among its members and it shall employ a secretary to serve for an indefinite term. . . . The secretary of the legislature shall be its chief fiscal, administrative and personnel officer and shall perform such duties as the legislature may prescribe." (Sec. 4.09.) The comment on this section states:

> The only novel feature of section 4.09 is the reference to a "secretary of the legislature" who is to be employed for an indefinite term to manage fiscal and personnel matters. The purpose is to fill the need for better housekeeping in the legislative branch with its increased career staffs in legislative reference, bill-drafting and other services. The need for improved personnel and fiscal administration has become evident. It might be added that reference to the secretary of the legislature is not a constitutional necessity, for such an office could be established by a legislature entirely without such express authorization. Its inclusion, however, may prove useful. (p. 53.)

Twenty-eight states besides Texas require that the senate elect a president pro tem to preside in the absence of the lieutenant governor. In those states that have a lieutenant governor but do not provide specifically for a president pro tem there still will be such an officer elected pursuant to the usual provision that each house of the legislature shall choose its own officers.

Art. III, § 10

Author's Comment

Each house of the legislature would have power to elect its officers and employ staff without Section 9. Because two of the officers mentioned are traditionally picked for gubernatorial succession, it may be desirable to preserve the names of the president pro tempore and speaker in the constitution. If so, the much simpler 1845 version should be further simplified and substituted for the present text: "When organized the House shall elect a speaker, and the Senate a president pro tempore, from its membership."

Sec. 10. QUORUM; ADJOURNMENTS FROM DAY TO DAY; COMPELLING ATTENDANCE. Two-thirds of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each House may provide.

History

The present wording has remained virtually unchanged since the Constitution of the Republic, with the 1845 Constitution merely adding the concluding phrase "in such manner and under such penalties as each House may provide."

Explanation

A quorum of the house is 100 members, and of the senate 21, unless either house does not have its full complement of members because of vacancy, failure to qualify, etc. In the latter event two-thirds of the members holding office constitute a quorum, so that, for example, at a time when only 30 senators had qualified, the president ruled that 20 senators constituted a quorum. (See Tex. S. Rule 1, comment at p. 2 (1973).)

A house without a quorum may not conduct any business other than that necessary to secure a quorum. This usually takes the form of sending out the sergeant-at-arms to bring in absent members, and the house rules make clear that he may arrest them for this purpose.

Each house calls the roll of its membership at the start of a legislative day. Thereafter a call of the house or senate may be moved (by 16 representatives or 6 senators, respectively) to ascertain whether a quorum is present. If the motion carries by a majority vote the doorkeeper bars all exits from the chamber and the roll is called. If there is no quorum, the absent members are sought and the house may recess until a roll call discloses the presence of a quorum. (See Tex. H. Rule 16 (1973); Tex. S. Rules 1-4 (1973).)

Comparative Analysis

Forty-four states set the quorum at a majority of all the members and four states set it at two-thirds. Vermont requires a majority except on bills raising taxes, in which case two-thirds of the members of the lower house must be present. New Hampshire requires a majority for a quorum, but if fewer than two-thirds of the members are present, then a measure must receive a two-thirds vote to pass. A majority constitutes a quorum in congress and under the *Model State Constitution.*

Forty-three states provide that fewer members than a quorum may adjourn from day to day and compel the attendance of absent members. Both the United States Constitution and the *Model State Constitution* also contain this authorization.

Author's Comment

As pointed out in the *Comparative Analysis,* the Texas Legislature is one of only four subject to the two-thirds quorum requirement. One scholar suggests the two-thirds requirement reflects distrust of the legislature, a distrust not arising from the Reconstruction experience as one might assume, but traceable to the Republic and its constitution. (See 1 *Interpretive Commentary,* pp. 571-72.) One may only speculate about the abuses real or imagined in the minds of the 1836 delegates that led them to reject their well-worn model, the United States Constitution, and require a two-thirds quorum. Whatever their reasons, however, our longstanding acceptance of and commitment to majority rule suggest that a majority is also adequate for a quorum.

Sec. 11. RULES OF PROCEDURE; EXPULSION OF MEMBER. Each House may determine the rules of its own proceedings, punish members for disorderly conduct, and, with the consent of two-thirds, expel a member, but not a second time for the same offence.

History

The present section resembles that in the Constitution of the Republic, except that the latter prohibited disorderly "behavior" instead of "conduct."

The 1845 Constitution changed "behavior" to "conduct," while the Constitution of 1869 restored the earlier wording, except for the phrase "but not a second time for the same offence." The Constitution of 1876 reincorporated this phrase, so that the wording is as it reads today.

Explanation

Legislative Rules. Every deliberative body needs rules of procedure to ensure the orderly conduct of its business. Each house of the Texas Legislature has had such rules from the beginning, and they have recently become available in loose-leaf form periodically updated by the Texas Legislative Council. (Legislative rules should be distinguished from the various constitutional procedural rules, such as those specifying the enacting clause of bills and requiring their reading on three separate days (see the Annotations of Secs. 29 and 32 of this article), and from a more recent phenomenon, standing committee rules (see the *Explanation* of Sec. 37)). Legislative rules of the two houses deal with everything from order of business and the traditional parliamentary maneuvers to decorum and housekeeping to selection of honorary mascots. There are also joint rules, governing relations between the two houses such as the creation and operation of conference committees. When the rules are silent on a point, or when their application is unclear, resort is had to the rules of congress, interpretations of those rules collected in *Hinds' Precedents of the House of Representatives* and *Cannon's Procedure in the House of Representatives,* and to interpretative commentary such as Paul Mason, *Mason's Manual of Legislative Procedure* (New York: McGraw-Hill Book Co., 1953).

Traditionally in Texas each house has adopted its rules by simple resolution each biennium at the beginning of the regular session. (Joint rules are adopted by concurrent resolution.) The house rules may be amended by majority vote but amendment of the senate rules requires a two-thirds vote; suspension of the rules in either house requires a two-thirds vote. (See Tex. H. Rules 23, 31 (1973); Tex. S. Rule 32 (1973).) Each house employs a parliamentarian to help interpret the rules, but parliamentary rulings by the presiding officer are appealable to the members who may vote to overrule him.

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Discipline of Members. Mr. Mason asserts that a legislative assembly's power to discipline its members is both inherent and, subject to the customary two-thirds vote requirement for expulsion, absolute. (Paul Mason, *Mason's Manual of Legislative Procedure* (New York: McGraw-Hill Book Co., 1953), Secs. 561-63.) Section 11 of course confers this power expressly, and from time to time both houses of the Texas Legislature have exercised it in a variety of forms such as arrest and restraint (to compel attendance), denial of privileges, and verbal or written censure.

Expulsion of a member, the ultimate sanction, should be distinguished from exclusion. Section 8 vests each house with power to judge the qualifications and elections of its members, and in exercise of this power a house by majority vote may refuse to seat (exclude) a member. Expulsion, on the other hand, requires a two-thirds vote of the entire membership—100 representatives or 21 senators—or so the senate rules have interpreted the phrase "with the consent of two-thirds." (See Tex. S. Rule 31(a) (5) (1973). For a recent case in which the distinction between expulsion and exclusion proved vital, see *Powell v. McCormack,* 395 U.S. 486 (1969).)

Expulsion may not be imposed a second time for the same conduct. This safeguard, which superficially resembles the double jeopardy prohibition applicable to criminal prosecutions, derives from the belief that an expelled member's reelection expiates his misconduct.

Comparative Analysis

Legislative Rules. The constitutions of all states except Georgia and North Carolina authorize each house to determine its own rules, and the United States Constitution and the *Model State Constitution* contain this customary provision.

According to the Council of State Governments, legislative rules underwent widespread revision during 1971 and 1972 as many states sought to streamline their legislative process. Widely utilized as an aid was *Key Points in Legislative Procedure,* a publication of the Rules Committee of the National Legislative Conference. Both houses of the Minnesota Legislature, for example, replaced *Jefferson's Manual* with the more modern *Mason's Manual* for parliamentary guidance. Florida made extensive changes in the rules for introduction and consideration of bills. In addition to its new procedure for prefiling bills, Kentucky required 24-hour prefiling and distribution to each member of floor amendments offered on third reading and reference of all bills with fiscal impact to the appropriations committee for review and approval. Pennsylvania added to this the requirement that a fiscal note be provided before first reading, and, in the case of amendments to fiscal legislation, that no vote be taken until the day following distribution of the appropriately modified fiscal note. Wisconsin initiated the practice of specifying by joint resolution the complete session schedule. Finally, rules studies were commenced by the Senate Rules Committee in Georgia, with special emphasis on the standing committee system, and by the Joint Committee on Legislative Process in Indiana.

Discipline of Members. Authorization to discipline and expel a member is found in 26 state constitutions, the United States Constitution, and the *Model State Constitution.* Variations exist, however, in the wording of this authorization. Seventeen states, including Texas, and the United States Constitution appear to require for expulsion the concurrence of two-thirds of the members *present* of the house concerned. (Tex. S. Rule 61 (1973) interprets this language to require two-thirds of the total membership, *i.e.*, 21 senators.) Six of the 26 states and the *Model*

State Constitution express the vote requirement as concurrence of two-thirds of the total *membership* of the house. Mississippi has an exception to the general rule: a member may be expelled a second time for the same offense if it was for theft, bribery, or corruption. The United States Constitution does not bar a second expulsion for the same offense. In Michigan the reasons for expulsion must be entered in the journal with the names of the members voting and their vote.

Author's Comment

Undoubtedly each house would have power to prescribe its procedural rules without this section, and to discipline its members as well. The section's limitations on exercise of the disciplinary power are desirable, however, and preserving the section intact may be justified because it is traditional. (If preserved, the rules statement ought to be separated from the discipline statement and relocated with sections like 8 and 9 of this article dealing with organization and procedure of the legislature.)

The rules of each house and the joint rules could be accorded more permanence by a statutory (*not* constitutional) statement that they continue in effect from legislature to legislature unless repealed or amended. Such permanence would have avoided the consequences for the 62nd Legislature of the failure of the two houses to agree on joint rules. The Legislative Reorganization Act of 1961 accorded this kind of status to the standing committees of each house and could be amended to do the same for the rules. (See Tex. Rev. Civ. Stat. Ann. art. 5429f, secs. 2, 5.)

Mr. Mason to the contrary, it is unlikely that the legislature's power to discipline its members is unreviewable by the judiciary. Clearly Texas courts would enforce the two limitations in Section 11, and if recent decisions by the United States Supreme Court are any guide, they would also measure an expulsion proceeding against the requirements of procedural due process. (*Cf. Groppi v. Leslie,* 404 U.S. 496 (1972); *Bond v. Floyd,* 385 U.S. 116 (1966).)

Sec. 12. JOURNALS OF PROCEEDINGS; ENTERING YEAS AND NAYS. Each House shall keep a journal of its proceedings, and publish the same; and the yeas and nays of the members of either House on any question shall, at the desire of any three members present, be entered on the journals.

History

This section originated in the Constitution of the Republic and has remained unchanged except for a clause, which derived from the United States Constitution, permitting each house to withhold publication of "such parts [of its journal] as in its judgment require secrecy." The 1845 Constitution deleted this clause as well as a sentence in another section guaranteeing members the right to record in the journal their protest against "any act or resolution."

It was suggested in the Constitutional Convention of 1875 that nine members instead of three be required to demand recording the yeas and nays. In opposition one delegate said that "the rule would be an arbitrary one, enforced to throttle the minority of Republicans on the floor. . . ." He thought that "if members were afraid of the yeas and nays they must be afraid to have their records go before the people." The sponsor of the proposal retorted that "He had only desired to prevent the encumbrance of the records by two or three of the opposition." (*Debates,* pp. 98-99.) The resolution failed as did an amendment to it requiring six members to demand the yeas and nays. (*Debates,* p. 151.)

Art. III, § 12

Explanation

The journal of each house is its official record of proceedings. Roll calls, motions, the text of bills, committee reports, votes, recesses, and adjournments are all recorded in the journals. (See Tex. S. Rule 46 (1973) for a description of journal content.) The journals do not record debate, either in committee or on the floor, so they are not as comprehensive as the *Congressional Record.* Journals are published daily, approved by each house (with corrections if necessary), and distributed to the members; the daily editions are permanently bound following each session and bound copies automatically are furnished the members, the governor, the State Library, and heads of state agencies. (See Tex. Rev. Civ. Stat. Ann. arts. 5429d, 5442.)

Because they do not record debate, the journals are not very helpful as legislative history of a statute. Sometimes they supply clues to legislative intent, however, and when relevant, courts will judicially notice the journals for this purpose. (See, for example, *Red River Nat'l Bank v. Ferguson,* 192 S.W. 1088 (Tex. Civ. App.—Texarkana), *aff'd,* 109 Tex. 287, 206 S.W. 923 (1917).) And of course they are always the best evidence of what the legislature did—subject to the enrolled bill doctrine discussed below—or did not do. (*Denison v. State,* 61 S.W.2d 1017 (Tex. Civ. App.—Austin, *writ ref'd per curium,* 122 Tex. 459, 61 S.W.2d 1022 (1933) (senate confirmation vote).)

The journals may not be used to contradict an enrolled bill, which the courts have defined as an act regular on its face, signed by the presiding officers of each house, authenticated by their respective clerks, and either signed by the governor or allowed to become law without his signature. (*Williams v. Taylor,* 83 Tex. 667, 19 S.W. 156 (1892).) The enrolled bill is also the exclusive source of the text of a statute, and in case of conflict between it and the printed text, the enrolled version prevails. (*A., T. & S.F. Ry. v. Hix,* 291 S.W. 281 (Tex. Civ. App.–El Paso 1927, *no writ*); *Central Ry. Co. v. Hearne,* 32 Tex. 547 (1870) (dictum).) Technically, the doctrine should be called "the enrolled *act* doctrine" because it is an act and not a bill after it becomes law. In parliamentary procedure a bill is engrossed for third and final consideration by one house and enrolled after final passage by that house for transmittal to the other; a bill is also enrolled after final passage by both houses for transmittal to the governor. The doctrine has traditionally been called "the enrolled bill doctrine," however. This doctrine (which is a variety of the best evidence rule) has been the settled law of Texas since 1892, at least in civil cases, and it is the majority rule in this country.

In the landmark case settling on the doctrine, *Williams v. Taylor,* the supreme court pointed out that the separation of powers principle should make courts reluctant to review compliance by a coequal branch of government with constitutional requirements of a procedural nature and that the journals were no more reliable evidence of what happened than the enrolled bill itself. The most persuasive justification for the doctrine, according to the court, was the need for finality and certainty in our statute law. Modern policy is to declare law by statute, with maximum publicity, and "to stamp upon each statute evidence of unquestioned authority. That evidence at common law was the enrolled bill, and behind it the courts were not permitted to go. . . ." (83 Tex. at 672, 19 S.W. at 157). Thus the court in *Williams* refused to invalidate a statute on the ground that the journals showed that the bill had not been reported out of committee within three days of final adjournment, in violation of Article III, Section 32, holding that the bill was conclusively presumed to have been enacted in accordance with the constitution.

Since *Williams,* Texas courts have applied the enrolled bill doctrine to reject challenges, for example, that a bill was not within the governor's special session

call (*City of Houston v. Allred,* 123 Tex. 334, 71 S.W.2d 251 (1934) (Art. III, Sec. 40)), that a bill was not signed by the speaker in the house's presence (*James v. Gulf Ins. Co.,* 179 S.W.2d 397 (Tex. Civ. App.—Austin 1944), *rev'd on other grounds,* 143 Tex. 424, 185 S.W.2d 966 (1945) (Art. III, Sec. 38)), that a bill was not read on three separate days (*El Paso & S.W. Ry. Co. v. Foth,* 100 S.W. 171 (Tex. Civ. App.), *rev'd on other grounds,* 101 Tex. 133, 105 S.W. 322 (1907) (Art. III, Sec. 32)), and that the senate had not in fact passed a bill (*Ellison v. Texas Liquor Control Bd.,* 154 S.W.2d 322 (Tex. Civ. App.—Austin 1941, *writ ref'd*).) The enrolled bill doctrine does not mask the journals in every instance in which a statute is questioned, however. For example, the supreme court resorted to the senate journal in *Ewing v. Duncan* (81 Tex. 230, 16 S.W. 1000 (1891)) to ascertain the effective date of an act (*i.e.,* whether it received the two-thirds vote necessary under Art. III, Sec. 39, to take effect immediately) because the senate secretary's certificate on the enrolled bill recited the vote as 24 to 24. (See also *Holman v. Pabst,* 27 S.W.2d 340 (Tex. Civ. App.—Galveston 1930, *writ ref'd*) (absence from enrolled bill of speaker's signature fatal); *Nueces County v. King,* 350 S.W.2d 385 (Tex. Civ. App.—San Antonio 1961, *writ ref'd*); and the *Explanation* of Sec. 35 of this article.) The point is that the journals may not be used to contradict an enrolled bill.

A number of states apply the "journal entry rule" to test legislative compliance with constitutional procedural rules. If the constitution mandates a particular procedure, this rule provides, there must be an entry in the journal reflecting its performance or the noncomplying statute is void. The Texas Court of Criminal Appeals followed this rule for many years. (*E.g., Hunt v. State,* 22 Tex. Ct. App. 396, 3 S.W. 233 (1866); *Parshall v. State,* 62 Tex. Crim. 177, 138 S.W. 759 (1911).) Not until 1971 did that court partly disavow it, by overruling cases like *Hunt* that permitted going behind the enrolled bill to ascertain if a statute enacted at a special session was within the governor's call, while leaving undecided whether true journal-entry rule cases like *Parshall* are still the law. (*Maldonado v. State,* 473 S.W.2d 26 (Tex. Crim. App. 1971).) For discussion of the enrolled bill doctrine and its competitors, see C. Dallas Sands, *Sutherland Statutory Construction,* 4th ed. (Chicago: Callaghan, 1972), vol. 1, ch. 15.)

As noted, other sections of this article require recording various information in the journals, and Section 12 itself requires a record vote on a question if any three members demand it. What *may* be recorded in the journals, as distinguished from what must be, is determined by legislative rule. (See Tex. H. Rules 12, secs. 1, 5, 7; 26, sec. 7 (1973); Tex. S. Rules 22, 46 (1973).) Interestingly, the protest guarantee of the 1836 Constitution, mentioned in the *History,* has been preserved in the rules by permitting any member to record in the journal his reasons for a vote and personal privilege statements. (See, *e.g.,* Tex. S. Rule 22 (1973); Tex. H. Rule 10 (1973).)

Comparative Analysis

All states except Massachusetts appear to require that a journal be kept and almost all require that it be published. A good many states have a secrecy exception. The United States Constitution requires that a journal be kept and that it be published from time to time, except such parts as may require secrecy. The *Model State Constitution* calls for a journal which shall be published "from day to day."

Thirty-one states require the entry of the yeas and nays upon final passage, and 13 of these specifically require that the name of each member and his vote be entered. In all except four states a demand can be made for the yeas and nays on any question. Three of those four exceptions are among the thirty-one states that

require entry upon final passage, so it either is mandated or possible, with a demand by the requisite number of members, to record a yea and nay vote on final passage in the journal in 49 states.

The United States Constitution provides for recording any vote upon demand of one-fifth of those present and requires the entry, with the names of those voting, of any vote to override a veto. The *Model State Constitution* has no provision for yeas and nays upon final passage but does provide for a record vote on any question if demanded by one-fifth of the members present.

Author's Comment

As state legislatures become more professional, the proponents of recording committee hearings and debate can be expected to intensify their efforts. There is much to be said in their favor—the courts in particular would welcome this type of legislative history—but there is nothing to be said in favor of including the recording requirement in the constitution. Legislative rule making is a much more flexible method of handling the requirement, and in fact the 1973 Rules of the house provided for recording both committee hearings and debate and those of the senate for recording committee hearings. (Tex. H. Rule 8, secs. 11, 14 (1973); Tex. S. Rule 104 (1973). Curiously, both house rules deny public access to the recordings, a denial inconsistent with the recently-enacted freedom of information act (Tex. Rev. Civ. Stat. Ann. art. 6252-17a). The senate rule provides that its recordings "shall be a matter of public record.")

Although the enrolled bill doctrine has not escaped criticism (see *Sutherland*, vol. 1, pp. 410-12), its prevention of spurious challenges to legislation (*i.e.*, challenges to the merits disguised as challenges to procedural irregularity) makes the doctrine superior to any of its competitors.

Sec. 13. VACANCIES; WRITS OF ELECTION. When vacancies occur in either House, the Governor, or the person exercising the power of the Governor, shall issue writs of election to fill such vacancies; and should the Governor fail to issue a writ of election to fill any such vacancy within twenty days after it occurs, the returning officer of the district in which such vacancy may have happened, shall be authorized to order an election for that purpose.

History

The Constitutions of 1845 and 1861 contained the first clause of the present section; the Constitution of 1866 added the second. No further change occurred until the Constitution of 1876, which substituted "the returning officer of the district in which such vacancy may have happened" for the earlier language "the returning officer for the district or county." Also added was a time period within which the governor was required to fill vacancies. One delegate to the Convention of 1875 suggested that the governor issue writs of election to fill vacancies within two days after their occurrence, but the 20-day period won out. (*Debates*, p. 48.)

Explanation

This section was designed to ensure that no legislative district went long unrepresented because of vacancy in legislative office. The attorney general has ruled, however, that neither the governor nor the county judge (whom Election Code art. 4.12, subd. 2, designates as the "returning officer") may be compelled to issue a writ of election (*i.e.*, order an election) within the 20-day period specified.

(Tex. Att'y Gen. Op. No. WW-728 (1959).) Both must do so within a "reasonable time" after the vacancy occurs, according to the same attorney general, but that standard is difficult to apply.

Once a special election is ordered to fill a legislative vacancy, the Election Code supplies precise dates and times for conducting it. If the legislature is in session with more than 25 days remaining before adjournment, or if the vacancy occurs within 60 days of convening a session, the special election must be held within 21 days after the date of the order (art. 4.12, subd. 4). In all other situations, the election must be held within 20 to 90 days after the order date (art. 4.09, sec. 1).

Who determines the existence of a vacancy? Deaths and resignations are easy, for the Election Code provides that the county judge certifies the former (art. 1.04) and the governor accepts the latter (art. 4.09, sec. 7). What about physical or mental disability, nonresidency, dual officeholding, and other, less clearcut circumstances that produce vacancies? The law is silent on this aspect of the question, but the governor as a practical matter must determine the existence of a vacancy in order to call an election to fill it.

Comparative Analysis

Almost half the states provide for a special election to fill legislative vacancies. In most of these the governor has the power to choose the time of election. In several states the manner of filling vacancies is to be fixed by law. In a few states the vacancy is filled by appointment, usually by the governor. In many of the appointment provisions the appointing power is required to preserve existing party alignment either by the terms of the provision or by accepting the recommendation of an appropriate party committee.

The United States Constitution requires special elections to fill vacancies but in the case of senators permits a "temporary" appointment by the governor pending an election. The *Model State Constitution* simply says that vacancies "shall be filled as provided by law." (Sec. 4.06.)

Author's Comment

Conceding that Section 13 is imperfectly worded, its *History* nevertheless makes clear that the governor is required to order a special election within 20 days after a legislative vacancy occurs, and this is so whether or not the district's election officer has a backup duty and deadline. The 1875 Convention apparently believed the governor could not be compelled by legal process to order a special election. (It is clear today, since the 1891 amendment of Article V, Section 3, that he cannot; see Tex. Rev. Civ. Stat. Ann. art. 1735.) One delegate, it will be recalled, wanted the governor to act within two days after the vacancy; 20 days was finally chosen as a more reasonable period, but the very fact that a deadline was added to Section 13 makes clear the convention's intent to treat the governor's 20-day deadline as mandatory.

There is evidence in the attorney general's opinion cited in the *Explanation* that its author was overinfluenced by the unavailability of compulsory legal process against the governor. Since the governor cannot be mandamused to order the election within 20 days, the opinion writer appeared to reason, the deadline in Section 13 must be meaningless. Putting aside comment on the theory of constitutional interpretation this reasoning seems to represent, surely it is unreasonable to premise a conclusion on the assumption that the state's chief executive officer will violate the constitution. And surely the opinion writer knew, as a reality of partisan politics, that Texas governors in the past have timed special legislative

vacancy elections not to reduce the period of unrepresentation to a minimum but to secure partisan advantage.

Following the lead of the *Model State Constitution,* all details regarding special legislative elections should be relocated in the Election Code, with the counterpart of present Section 13 merely providing that such vacancies are filled by election. The counterpart should also be combined with Section 27 of this article (if the latter section is retained) so that all legislative election provisions will be in a single place.

The Election Code (but *not* a new constitution) should also specify how and by whom vacancies in elective office (for executive and judicial branch officers as well as legislative) are determined. The existence of a vacancy is sometimes hotly disputed, especially when alleged to result from disability or dual officeholding, for example, and comprehensive standards ought to be legislated to ensure a prompt and fair determination.

Sec. 14. PRIVILEGED FROM ARREST. Senators and Representatives shall, except in cases of treason, felony, or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same, allowing one day for every twenty miles such member may reside from the place at which the Legislature is convened.

History

This section substantially resembles a comparable provision in the Constitution of the Republic. The Constitution of 1845 made the only change in this section to date when it added the phrase "allowing one day for every twenty miles such member may reside from the place at which the Legislature is convened."

Explanation

Congressman Williamson was convicted of conspiracy to suborn perjury. At his presentencing hearing he argued that the model for this section in the United States Constitution forbade his imprisonment during the session of congress he was attending. The trial court sentenced him anyway, to 10 months in jail, and he appealed directly to the United States Supreme Court. That court reversed his conviction, for error in the charge to the jury, but unanimously rejected his privilege argument.

The court first noted that the clause appeared in the Articles of Confederation and was carried over intact and without debate into the constitution. This meant that the clause had a fixed and well-understood meaning, a meaning derived from English parliamentary law and practice. Under that law and practice it was clear that members of Parliament were privileged only from *civil* arrest, the court citing an example from the 18th century of the arrest of an MP at his bench in the Commons following his escape from prison. "Breach of the peace" in the exception to the privilege thus covered all crimes, whether felony or misdemeanor, as they were all considered breaches of the king's peace by the common-law courts, and Congressman Williamson was not shielded from arrest or incarceration for his offense. (*Williamson v. United States,* 207 U.S. 425 (1908).)

No Texas case applying the Section 14 privilege was discovered, but an early decision of our supreme court noted that the practice of civil arrest, which grew out of the "common law manner of commencing civil actions by an arrest of the body of the defendant," had been abolished in Texas. The court went on to hold

legislators subject to service of process in civil suits, contrary to the claim that Section 14 shielded them. (*Gentry v. Griffith,* 27 Tex. 461 (1864); accord, *Long v. Ansell,* 293 U.S. 76 (1934).)

Comparative Analysis

Some 40 states besides Texas provide legislators some protection against arrest. Some 13 states grant immunity from civil process and four states grant only this immunity. The new Michigan Constitution has a unique provision protecting against "civil arrest and civil process." This presumably was done to conform to In re *Wilkowski* (270 Mich. 687, 259 N.W. 658 (1935)), which construed "treason, felony or breach of the peace" to except arrest for any offense from the privilege, just as the United States Supreme Court had done in the *Williamson* case.

The United States Constitution provides the same type of privilege as Section 14, but the *Model State Constitution* has nothing comparable.

Author's Comment

Unless one assumes the Texas courts will construe the privilege more expansively than have the courts in other jurisdictions, Section 14 is meaningless. Nor should it be amended to expand the privilege. Sanctuary from legal process and the consequences of criminal conduct is foreign to our concept of government under law.

Sec. 15. DISRESPECTFUL OR DISORDERLY CONDUCT; OBSTRUCTION OF PROCEEDINGS. Each House may punish, by imprisonment, during its sessions, any person not a member, for disrespectful or disorderly conduct in its presence, or for obstructing any of its proceedings; provided, such imprisonment shall not, at any one time, exceed forty-eight hours.

History

Professor C.S. Potts surveyed the origins and history of the legislative contempt power and concluded: (1) The English House of Commons first asserted the power in the 16th century and it was well-established by the end of the 17th. (2) American colonial assemblies, modeled after the Commons, asserted the same power. (3) The Continental Congress and revolutionary state legislatures claimed it. (4) The delegates to the Constitutional Convention of 1787 assumed the power was inherent in legislative assemblies and thus did not bother to express it in the federal constitution. ("Power of Legislative Bodies to Punish for Contempt," 74 *U. Pa. L. Rev.* 691 (1926).) Nevertheless, the Constitution of the Texas Republic provided that "Each House may punish, by imprisonment, during the session, any person not a member, who shall be guilty of any disrespect to the House, by any disorderly conduct in their presence."

The 1845 Statehood Constitution preserved the power and added a limitation: "such imprisonment shall not, at any one time, exceed forty-eight hours." No further change in substance or wording has occurred since then.

Explanation

Although the United States Supreme Court early held the legislative contempt power inherent in congress (*Anderson v. Dunn,* 19 U.S. (6 Wheat.) 204 (1821)), the Texas Court of Criminal Appeals has experienced great difficulty with the Texas Legislature's exercise of the power.

The first two reported cases reviewing legislative contempt proceedings involved witnesses before house and senate special committees investigating

alleged voting frauds in the 1911 statewide prohibition election. (For a description of this and the other wet v. dry battles, see the *History* of Art. XVI, Sec. 20.) The witnesses, who were leaders of the antiprohibitionist forces, refused to answer various questions about their campaign activities and were imprisoned in the county jail for contempt. Both applied for release by writ of habeas corpus directly to the court of criminal appeals whose three members proceeded to write a total of eight opinions before granting the writs. Two of the judges agreed that (1) the contempt power is not inherent so that the language of Section 15, vesting it in each *house,* together with the separation of powers doctrine, prohibited delegating the power to a committee; and (2) the legislature during a special session could not create committees to investigate election irregularities because that subject was not included in the governor's call (Ex parte *Wolters,* 64 Tex. Crim. 238, 114 S.W. 531 (1912)). The two judges voting to grant the writ were considerably influenced by the United States Supreme Court's decision in *Kilbourn v. Thompson* (103 U.S. 168 (1880)), which had frustrated early congressional attempts to exercise the contempt power. The second rationale for their decision, however—the special session limitation—has never again been relied on and, as pointed out in the *Explanation* of Section 40, the legislature is free to do anything except enact unsubmitted legislation during a special session.

Twelve years later the court reviewed another contempt proceeding in Ex parte *Youngblood* (94 Tex. Crim. 330, 251 S.W. 509 (1923)). Youngblood was also a witness before an investigating committee, this one a joint body created during a regular session. Youngblood refused to answer questions and was jailed for 20 days under a statute specifying penalties for legislative contempt. Youngblood was also released, all three judges reasoning that the separation of powers doctrine prohibited delegation of the contempt power to a committee; one judge also reasoned that the 48-hour limitation of Section 15 made the statute, which authorized longer imprisonment, unconstitutional, but his colleague argued that imprisonment for consecutive 48-hour periods was permissible under Section 15 if necessary to purge contempt. The opinion for the court distinguished In re *Chapman* (166 U.S. 661 (1897)), in which the Supreme Court upheld against the nondelegation argument a statute making contempt of congress a crime. Judge Morrow argued that *Chapman* did not involve the power of a congressional committee, which was true, but he did not meet head-on the Supreme Court's response to the nondelegation argument, which was that that statute aided but did not supplant congress's contempt power.

All of which doctrinal exegesis sets the scene for *Ferrantello v. State* (158 Tex. Crim. 471, 256 S.W.2d 587 (1952)), the last reported Texas case on the legislative contempt power. Ferrantello was prosecuted and convicted in district court under a 1937 statute making legislative contempt a misdemeanor; he was sentenced to a year in jail and a $1,000 fine for refusing to answer questions asked by members of the House Crime Investigating Committee of the 52nd Legislature. (The statute, Tex. Rev. Civ. Stat. Ann. art. 5429a, was copied verbatim from the federal act, now 2 U.S.C. 192, upheld in the *Chapman* case.) His conviction was affirmed by a unanimous court of criminal appeals. As for the *Youngblood* decision, the court said:

> The fundamental distinction between the Youngblood case and the case at bar lies in the identity of the tribunal assessing the punishment. In the Youngblood case, the Legislature sought to impose the punishment, while in the case at bar the court set the punishment upon a verdict of the jury following a trial for the substantive offense of refusing to answer questions propounded by a legislative committee. (158 Tex. Crim. at 475, 256 S.W.2d at 590).

The *Ferrantello* court did not discuss the *Youngblood* court's unanimous holding that the contempt power could not be delegated, nor did it cite In re *Chapman* or any other authority on legislative contempt.

Article 5429a was incorporated in the Legislative Reorganization Act of 1961 without change. (See Tex. Rev. Civ. Stat. Ann. art. 5429f, secs. 13-15.) Legislative contempt thus remains a statutory crime, defined as failure to appear or produce tangible evidence in response to a legislative subpoena or refusal to answer questions of a legislative committee and punishable by imprisonment up to a year and/or a fine up to $1,000. Under the statute an alleged contempt is described in writing and the statement forwarded to the speaker or president who certifies it to the district attorney of Travis County (Austin). The district attorney then takes it before a grand jury, which must indict the alleged contemner before he may be prosecuted in district court. A contempt indictment is then tried like any other.

Most legislative contempts have involved a witness's refusal to answer committee questions or produce tangible evidence in response to a subpoena. Courts reviewing contempt convictions in recent years, especially those resulting from congressional investigations, have closely examined both the committee's jurisdiction of the subject matter under inquiry and the pertinence to that subject of the question asked or of the tangible evidence subpoenaed. Thus in *Ferrantello* the appellant argued that the questions about bookmaking that he refused to answer were not pertinent to the committee's investigation, but the court without difficulty dismissed this argument, pointing out that the resolution which created the committee authorized a "sweeping investigation" into alleged organized crime in the state. In addition, the court concluded that the statute's immunity grant (now Tex. Rev. Civ. Stat. Ann. art. 5429f, sec. 13), which barred prosecution for any criminal conduct revealed in answering the committee's questions, was adequate to protect Ferrantello's privilege against self-incrimination.

Federal courts have been somewhat less expansive in reviewing congressional contempt convictions, no doubt in reaction to the excesses of the McCarthy Era investigations, but the *power* of legislative assemblies to punish for contempt of their proceedings is no longer challenged. (The federal cases are surveyed in Annots., 3 L.Ed.2d 1647 (1959). 10 L.Ed.2d 1329 (1964).)

Comparative Analysis

Almost every state has a provision prohibiting disorderly conduct in the legislature. Punishment generally includes imprisonment but the maximum length varies. Some states limit the duration of imprisonment to 24 hours, others to 10 days, some to 30 days, and some to a period not extending beyond the session. A few states provide for a fine or imprisonment or both.

Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

Section 15 today serves only to limit the legislature's power to punish contempt itself. Legislative assemblies probably have inherent power to punish for contempt, but in any event a state legislature may punish contempt by statute without constitutional authorization. The Texas Legislature has done so, by delegating the enforcement power to the executive and judiciary, leaving Section 15 solely as a vehicle to impose summary punishment for direct contempt. The section is not necessary for this purpose, however, because the new Penal Code comprehensively proscribes contemptuous conduct (see secs. 42.01-42.05), nor is it adequate in light of the United States Supreme Court's recent decision

imposing some of the requirements of procedural due process applicable to criminal trials generally on the exercise of the legislative contempt power, thereby making summary contempt a lot less summary. (*Groppi v. Leslie,* 404 U.S. 496 (1972) (alleged contemner must be given notice of charge and opportunity to respond before punishment assessed).) Existing statute law is adequate to protect the Texas Legislature, therefore, and its use is a good deal safer as well.

Sec. 16. OPEN SESSIONS. The sessions of each House shall be open, except the Senate when in Executive session.

History

Earlier constitutions provided that "The doors of each House shall be kept open." The Constitution of 1869 retained the earlier wording but added "except upon a call of either House, and when there is an executive session of the Senate." The present section resembles that of 1869, except that it substituted "sessions" for "doors" and deleted "upon a call of either House."

Explanation

Plenary sessions of the Texas House and Senate have always been open to the public. Each chamber has a gallery for visitors, and the public is free to come and go as it pleases. Admission to the floor of each chamber is restricted, on the other hand, to prevent disruption of proceedings; the rules of each house specify who may be admitted, with admission generally limited to members and former members, their staff members who have business there, and representatives of the news media who traditionally have been assigned a press table in each chamber. (See Tex. H. Rule 29 (1973); Tex. S. Rule 64 (1973).)

The traditional exception for executive sessions of the senate is designed to permit nonpublic consideration—thus encouraging frank discussion of qualifications—of gubernatorial nominees for executive office who are subject to senate confirmation. The exception is not mandatory, with the senate rules permitting public consideration on two-thirds vote and requiring that voting on nominees be public and that each senator's vote be recorded in the journal. (Tex. S. Rule 41 (1973).)

Both houses by rule require their committees and subcommittees to meet publicly on a regularly scheduled basis pursuant to advance notice of meeting time and place. (Tex. H. Rule 8, sec. 13 (1973); Tex. S. Rule 105 (1973).) This requirement was reinforced in 1973 by amendments to the state's Open Meeting Act that included legislative committees in the definition of governmental bodies subject to the act and declared that the legislature was exercising its rule-making power in the act "to prohibit secret meetings of the Legislature, its committees, or any other bodies associated with the Legislature, except as otherwise specifically permitted by the Constitution." (Tex. Rev. Civ. Stat. Ann. art. 6252—17, secs. 1(c), 2(b).)

Comparative Analysis

Approximately three-fourths of the states call for open sessions of the legislature, but almost all of them also contain an appropriate exception for secrecy. Neither the United States Constitution nor the *Model State Constitution* specifies public sessions.

Art. III, § 17

Author's Comment

Despite the current push for open consideration and decision making by government, and at the risk of being accused of favoring secret government, a good case can be made for permitting nonpublic working meetings of legislative committees. The late Congressman Robert Luce, an authority on legislative procedure, states the case succinctly:

> . . . [T]he ignorance of the public about [what occurs in nonpublic meetings] is one of the causes of its usefulness. Behind closed doors nobody can talk to the galleries or the newspaper reporters. . . . Another reason is that publicity would lessen the chances for concessions, the compromises, without which wise legislation cannot in practice be secured. (Robert Luce, *Congress—An Explanation* (Cambridge: Harvard University Press, 1926), pp. 12-13.)

Closed meetings should be permitted solely for committee *work* sessions—not to hear witnesses or vote—the distinction being that committee members ought to be able to let their hair down in private at some point during the consideration of legislation but that each bill and resolution ought to have a public committee hearing and vote. Of course the proponents of open government will argue that secret work sessions will produce ritual hearings and predetermined votes: after making up their minds, and making their deals, committee members will nod through a parade of witnesses and then cast their agreed votes. Certainly this risk is present, but it is offset not only by the greater benefit resulting from closed committee work sessions but also by the fact that legislators are sworn to abide by the law and are answerable to the people who elected them if they refuse to do so.

A neat compromise, currently used by the federal house, creates a presumption of open committee meetings. A committee may meet in closed session, but it must first convene in open session and its members vote on the record to exclude the public. (See Eckhardt, "The Presumption of Committee Openness Under House Rules," 11 *Harv. J. Legis.* 279 (1974).)

If secret sessions are considered desirable, they should not be authorized in the constitution; a statute or rule is sufficient (if Section 16 is reworded to permit closed sessions when authorized by law or rule) and will permit much more flexible treatment of the subject in addition to requiring a positive act of the legislature for its members' constituents to evaluate.

Along with tradition, a variation on the justification for secret committee work sessions can be advanced for preserving the executive session exception for senate confirmation hearings and debate. Senators might be unwilling to attack a nominee in public, and the nominee unwilling to submit his reputation to public attack, but to many this rationale argues more cogently for *requiring* public debate on nominations on the theory that nominees with nothing to hide are the only kind fit for government service.

The push for public decision making by government at all levels may be irresistible, and if so Section 16 should be broadened to require all proceedings of the legislature, its committees and other organizations, to be public.

Sec. 17. ADJOURNMENTS. Neither House shall, without the consent of the other, adjourn for more than three days, nor to any other place than that where the Legislature may be sitting.

History

The present wording resembles that of earlier constitutions, except that the

1875 Convention substituted "where the Legislature may be sitting" for "in which they may be sitting," a change without apparent significance.

Explanation

"Adjourn" is used in two different senses, both in the constitution and the legislative rules, and it would be simpler if it were confined to its terminal sense, as in "adjourn sine die," which means terminate the legislative session (literally, adjourn "without a day" for reconvening). It also means recess, however, as in Section 10's authorization for a smaller number than a quorum to "adjourn from day to day, and compel the attendance of absent members," and this meaning has important parliamentary consequences. Mason explains the difference as follows:

> The basic distinction between adjournment and a recess is that an adjournment terminates a meeting, while a recess is only an interruption or break in a meeting. After an adjournment a meeting begins with the procedure of opening a new meeting. After a recess the business or procedure of a meeting takes up at the point it was interrupted.
>
> Breaks in the meetings of a day, as for meals, are usually recesses, but termination of meetings until a later day are adjournments. (Paul Mason, *Mason's Manual of Legislative Procedure* (New York: McGraw-Hill Book Co., 1953), p. 173.)

Despite the confusion in terminology, the reason for Section 17 is clear: to prevent one house from frustrating the other's business by packing up and going home before the session ends.

The attorney general has ruled that the three-day adjournment (actually recess) limitation is calculated by excluding the first day of "adjournment" and including the last unless it is Sunday; thus the customary recess from Thursday noon until Monday morning does not violate this section. The attorney general also ruled in the same opinion that advance, blanket consent to more than three-day recesses would be unconstitutional. (Tex. Att'y Gen. Op. No. V-207 (1947).)

May the legislature meet elsewhere than in Austin, assuming both houses agree? Section 58 of this article, together with Article IV, Section 8, make clear that it may not unless the governor convenes it elsewhere in special session because Austin is occupied by the public enemy or infested with disease. Section 17, on the other hand, implies that the legislature may meet elsewhere on its own initiative, but if such was the 1875 Convention's intent it was contradicted by the two sections mentioned above. (See the *Author's Comment* on Art. IV, Sec. 8.)

Comparative Analysis

Of the 49 states with bicameral legislatures, all except two limit the power of one house to adjourn without the consent of the other. Most of these states also limit unilateral recesses to three days. About 40 states also require consent to conduct sessions at another place. The United States Constitution contains both of these limitations, but the *Model State Constitution* has nothing comparable. The latter omission is of course consistent with the *Model's* unicameral recommendation, but the limitation's omission from its bicameral alternative may have been an oversight.

Author's Comment

With modest rewriting Section 17 could end the confusion between "adjourn" and "recess": "Neither house without the other's consent may adjourn or recess for more than three days."

Art. III, § 18

Sec. 18. INELIGIBILITY FOR CERTAIN OTHER OFFICES; INTEREST IN CONTRACTS. No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased, during such term, or (2) any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature; provided, however, the fact that the term of office of Senators and Representatives does not end precisely on the last day of December but extends a few days into January of the succeeding year shall be considered as de minimis, and the ineligibility herein created shall terminate on the last day in December of the last full calendar year of the term for which he was elected. No member of either House shall vote for any other member for any office whatever, which may be filled by a vote of the Legislature, except in such cases as are in this Constitution provided, nor shall any member of the Legislature be interested, either directly or indirectly, in any contract with the State, or any county thereof, authorized by any law passed during the term for which he was elected.

History

This section was amended in 1968 to add the proviso to the first sentence: "the fact that the term of office of Senators and Representatives does not end precisely on the last day of December but extends a few days into January of the succeeding year shall be considered as de minimis, and the ineligibility herein created shall terminate on the last day of December of the last full calendar year of the term for which he was elected."

Prior to amendment the section resembled its counterpart in the Constitution of 1845, except that the latter did not prohibit interests in state or county contracts.

While retaining the wording of the 1845 Constitution, the Constitution of 1866 added several clarifications: resignation did not restore eligibility for another office, but members could vote for a speaker and president pro tempore. The Constitution of 1869 omitted these clarifications, as did the present constitution, which as noted added the contractual interest prohibition.

Explanation

Section 18 attempts to eliminate three opportunities for conflict of interest facing legislators. All three prohibitions are designed to prevent a legislator from benefiting privately from performance of his lawmaking duties.

The first clause of the first sentence makes him ineligible for any "civil office of profit," whether elective or appointive, created or for which the "emolument" has been increased by the legislature of which he is a member. The second clause extends the ineligibility to an office or "place" the appointment to which is made "in whole or in part" by either house of the legislature. And both clauses make the duration of ineligibility the legislator's term of office.

The term "civil office of profit" is used in the sections prohibiting dual officeholding and probably has the same meaning here as in those sections. (See the *Explanation* of Sec. 19 of this article for the definition of "office"; see also the *Explanations* of Art. XVI, secs. 33 and 40.) "Emolument" was recently defined for purposes of this Section 18 to include salary (*Hall v. Baum,* 452 S.W.2d 699 (Tex.), *appeal dismissed,* 397 U.S. 93 (1970)); it probably includes any pecuniary gain or advantage as well (see the *Explanation* of Art. XVI, secs. 33 and 40). "Place" is a term peculiar to Section 18 but probably means the same as "position" in the dual officeholding sections.

The Supreme Court in the *Hall* case suggested that insignificant salary increases voted by the legislature would not invoke the ban of Section 18; the court held, however, that a $15,000 a year increase in the governor's salary was not

insignificant as a matter of law. Moreover, a former legislator's serving as a hearing examiner for the Railroad Commission did not invalidate his denial of a motor carrier permit, although he served in the legislature that appropriated funds to the Commission allowing creation of his job (*Keel v. Railroad Commission*, 107 S.W.2d 439 (Tex. Civ. App.—Austin 1937, *writ ref'd*)).

The second clause of the eligibility ban applies to offices filled by appointment subject to senate confirmation, and the attorney general has ruled legislators ineligible for appointment to a state judgeship during their legislative term. (Tex. Att'y Gen. Op. Nos. 0-1092 (1939); WW-305 (1957).)

The first sentence of Section 18 was amended in 1968 to contract the duration of ineligibility by ending legislative terms on December 31 instead of the following January on the date the new legislature convenes. The amendment was necessitated (in the legislature's opinion) by a 1966 amendment to Sections 3 and 4, extending the terms of representatives and senators until the new legislature convened, and its history is discussed in the annotation of Section 3.

The first clause of the second sentence of Section 18 forbids legislators from voting for one of their number for any office (except as authorized elsewhere by the constitution) filled by the legislature, and the second clause forbids their private interest in a state or county contract authorized by statute enacted while they were members.

Before adoption of the Seventeenth Amendment to the federal constitution in 1913, United States Senators were chosen by state legislatures and the first clause prevented election of a legislator to that office. The clause does not prevent election of a representative as speaker or of a senator as president pro tempore, because the election of both is provided for in Section 9 of this article. Today, of course, senators are popularly elected, and there is no other office filled by legislative election. (The secretary of the senate and many of its employees are elected by that body but are not officers within the constitutional sense of that term.)

The second clause was intended "to absolutely prohibit any person from entering into a contract with the state or county authorized by a statute passed by a legislature of which such person was a member. . . ." (*Lillard v. Freestone County*, 57 S.W. 338, 340 (Tex. Civ. App. 1900, *no writ*).) Thus former Representative Lillard was denied payment for printing the county's tax delinquency list because he served in the legislature that authorized the printing contracts. The attorney general has forbidden the secretary of state to contract with a newspaper, owned by a legislator or by a corporation in which a legislator owns stock, to publish constitutional amendment proposals approved by the legislature in which he served. A later opinion somewhat ameliorated this ruling, by noting that ownership of only a few shares of corporate stock might present no real conflict of interest, but the same opinion ruled out contracting with a legislator's partners. (Tex. Att'y Gen. Op. Nos. 0-6582 (1945); M-625 (1970).)

Comparative Analysis

About 38 states forbid legislators from holding another office under state government. The United States Constitution provides in Article I, Section 6:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time. . . .

The *Model State Constitution* is silent on the subject.

With respect to the interest in contracts prohibition, seven states have a comparable restriction, but neither the United States Constitution nor the *Model State Constitution* does.

Author's Comment

As argued in the *Author's Comment* on Section 22 of this article, conflict of interest is best prevented by statute and the legislature in 1973 took a giant first step toward providing meaningful and enforceable standards of conduct for public servants. Section 18, on the other hand, is both too sweeping in application and too difficult to enforce. It is too sweeping because it bars a legislator from running for elective office, even though he resigns from the legislature before getting on the ballot, if the office was created or its salary increased during his term. (See *Spears v. Davis,* 398 S.W.2d 921 (Tex. 1966).) It is difficult to enforce because there is no mechanism for disclosing the contracts of legislators or their business associates.

Barring legislators from accepting any *appointive* state government office during their terms probably is a desirable restriction to remove the temptation of vote trading with the executive. The Constitution of the Republic contained this restriction, copied from the United States Constitution, and each succeeding Texas constitution has preserved it. Legislators should not be barred from seeking any elective office, however, because their opponents and the voters may be depended upon to ferret out any conflict of interest regarding the particular office.

Contracting with government by public servants and their business associates should be regulated by statute with heavy reliance on financial disclosure to reveal potential conflicts of interest. As noted, a 1973 law accomplishes this regulation for legislators and other policymaking officers, and, although imperfect, the statute is vastly more workable than Section 18. (See Tex. Rev. Civ. Stat. Ann. art. 6252—9b.)

The first clause of the second sentence of Section 18 should be deleted because since 1913 there has been no *office* (other than that of speaker and president pro tempore) to which the legislature could elect one of its members.

Sec. 19. INELIGIBILITY OF PERSONS HOLDING OTHER OFFICES. No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.

History

Former Congressman Luce finds the ancestor of this section in a 1348 petition from the English House of Commons to the king "That no person summoned to Parliament should be either a Taxer, Collector, or Receiver of the Fifteenth then granted." A few American colonial charters contained similar dual officeholding bars, but Luce attributes them to "some development of corporation practice in England," not to Montesquieu's doctrine of separation of powers, which had not then been published. Montesquieu's doctrine definitely influenced the emerging states to include such bars in their organic laws following the Revolution, however, and, as noted in the *Comparative Analysis,* the federal constitution contains such a bar. (Robert Luce, *Legislative Assemblies* (Boston: Houghton Mifflin, 1924), pp. 265-70.)

Section 23 of the 1836 Texas Constitution's first article barred from membership in the Republic's Congress a "person holding an office of profit under the

government." The present language derives from the statehood constitution, however, and has remained basically unchanged until the present section added the significant phrase "during the term for which he is elected or appointed" to define the period of ineligibility.

Explanation

This is one of two sections defining disqualifications for legislative office in terms of dual officeholding; the other is Article XVI, Section 12. (Sec. 20 of this article defines a related disqualification, but in terms of conduct in a prior office; see the *Explanation* of that section.) It is notable that neither this Section 19 nor Section 12 of Article XVI contains the traditional exceptions for military officers, certain local government officers, etc. Their absence from Section 12 did not prevent the attorney general from reading in the military exception to permit a retired Air Force colonel to hold a local government office. (Tex. Att'y Gen. Op. No. LA-73 (1973).)

The term "office" of course appears in all the dual officeholding provisions and the following characteristics of an office (as distinguished from a position or employment) may be extracted from the case law: it is usually elective; it is vested with some portion of the sovereign power that its incumbent exercises for the public good largely independently of others; it is created by law rather than contract; it is permanent and continues despite changes in incumbents; and its incumbent must usually qualify by taking the constitutional oath of office and posting a bond. (See, *e.g., Aldine I.S.D. v. Standley,* 154 Tex. 547, 280 S.W.2d 578 (1955); *Kimbrough v. Barnett,* 93 Tex. 301, 55 S.W. 120 (1900); *Dunbar v. Brazoria County,* 224 S.W.2d 738 (Tex. Civ. App.—Galveston 1949, *writ ref'd*). In a recent series of letter advisory opinions, the attorney general has begun to distinguish among a "public office," "civil office," and (position) of "public employment." (See Tex. Att'y Gen. Op. No. LA-63 (1973); see also the *Explanations* of Art. XVI, secs. 12, 33, and 40.)

An office is "lucrative," within the meaning of Section 19, if it yields profit or gain, revenue or salary, and the adequacy of the compensation is immaterial. (Compare *Willis v. Potts,* 377 S.W.2d 622 (Tex. 1964) (city councilman paid $520 a year plus expenses held lucrative office) with *Whitehead v. Julian,* 476 S.W.2d 844 (Tex. 1972) (mayor receiving $50 a month expense allowance but no salary did not hold lucrative office).)

Finally, the courts have held that an office is under this state (or, presumably, the United States or a foreign government) if it is created by a political entity subordinate to and/or a creature of this state (or the United States or a foreign government). (*E.g., Willis v. Potts* (councilman of home-rule city holds office under state).)

The harshest application of Section 19 results from the period of ineligibility it prescribes: "during the term for which he is elected or appointed." Like its counterpart in Section 18 of this article, it has trapped the unwary who believed (not unreasonably) that by resigning their present office they would be eligible to run for the legislature. (Because Sec. 18 is aimed at a different evil, conflict of interest, it must be evaluated differently, for which see the *Author's Comment* on Sec. 18.) One such unwary was a Bexar County Commissioner who resigned his office on the commissioners court, effective February 1, 1964, so he could enter the primary in May of that year to run for the house. The party officials would not put his name on the ballot, however, on the ground he was ineligible under Section 19; the supreme court agreed, because his term as county commissioner did not expire until December 31, 1964, thus overlapping by nearly two months commencement

of the house term, which before the 1966 amendment to Section 4 of this article began when election returns were canvassed in November. (*Lee v. Daniels,* 377 S.W.2d 618 (Tex. 1964).) The 1966 amendment to both Sections 3 and 4, providing for senatorial and representative terms to begin when the legislature convenes, has somewhat mitigated the harshness of Section 19, at least for those elective officers whose terms end in even-numbered years.

Comparative Analysis

The variations in dual officeholding restrictions on eligibility for the legislature in the state constitutions are almost infinite. For example, Tennessee prohibits a "register" from serving in the general assembly, while Virginia bans a "sergeant" and "collector of taxes." Massachusetts illustrates the variety of offices whose incumbents are made ineligible for the legislature by many state constitutions: attorney general, solicitor general, treasurer or receiver general, judge of probate, sheriff, clerk of the house of representatives, register of probate, register of deeds, officer of the customs, and clerk of the supreme judicial court.

The last portion of Article I, Section 6, Clause 2, of the United States Constitution prevents any person holding office under the United States from being a member of either house of congress, but only while actually holding the first office.

The *Model State Constitution* is silent on the subject of dual officeholding.

Author's Comment

It makes good sense to require a candidate for the legislature (or any other elective public office) to tell the voters which office he intends to hold. This is accomplished, of course, by resigning any other office the candidate holds before he gets on the ballot for the legislature. But alas, such candor will avail him naught if the term of his present office happens to extend past the date when the legislature convenes.

Justice Steakley, dissenting in *Lee v. Daniels* (377 S.W.2d 618 (Tex. 1964)), could not believe the 1875 Convention intended this result when it tacked on the period-of-ineligibility phrase at the end of Section 19. The majority thought otherwise, feeling duty-bound to assign meaning to every phrase in the section, and probably the majority was right. The next constitutional convention will not be right, however, if it retains the phrase, or any other that extends ineligibility beyond the date of a resignation effective before applications of candidates to get on the ballot are required.

As mentioned in the *Explanation*, this section differs little from Article XVI, Section 12 (the differences are noted in the *Explanation* of that section). Both sections should thus be consolidated, if retained in a new constitution, and the consolidated section located with Sections 6 and 7 of this article, which prescribe general qualifications for election to the legislature.

Sec. 20. COLLECTORS OF TAXES; PERSONS ENTRUSTED WITH PUBLIC MONEY; INELIGIBILITY. No person who at any time may have been a collector of taxes, or who may have been otherwise entrusted with public money, shall be eligible to the Legislature, or to any office of profit or trust under the State government, until he shall have obtained a discharge for the amount of such collections, or for all public moneys with which he may have been entrusted.

Art. III, § 20

History

The present provision has remained unchanged since the Constitution of 1845. Its language resembles that in the Constitution of 1836, except that the latter only prohibited election to the legislature. The 1845 Constitution added ineligibility for "any office of profit or trust under the State government."

McKay's summarized *Debates* of the 1875 Convention reveal little about the history of this section. Some discussion did take place, however, on whether the offices of tax assessor and collector should exist separately. Some delegates favored separate offices as this tended to prevent abuse. They preferred, however, that the sheriff remained the collector of taxes, because "it took a *man* to be a sheriff" and "if they withheld the work of collection from him, they could not get the office adequately filled." Other delegates favored a combined assessor and collector as an economy measure. They pointed out, too, that from 1845 to 1869 the offices were combined. The convention voted, however, in favor of separate offices. (*Debates,* pp. 309-10. See also the *History* of Art. VIII, secs. 16 and 16a.)

Explanation

This is one of a number of provisions disqualifying certain individuals from holding office under the state. (For the others, see the annotations of Sec. 19 of this article and Sec. 12 of Art. XVI, spelling out ineligibility for the legislature, and Sec. 40 of Art. XVI, prohibiting dual officeholding generally.) Unlike the other sections, however, Section 20 focuses not on the other office but on its holder's conduct while holding it.

Although the section has not been extensively litigated, the courts seem to favor a broad interpretation, one case, for example, applying it to a sheriff entrusted with federal money who argued his voluntary discharge in bankruptcy constituted a discharge within the meaning of Section 20. The court disagreed. (*Orndorff v. State,* 108 S.W.2d 206 (Tex. Civ. App.—El Paso 1937, *writ ref'd*).)

A court of civil appeals expressed concern that a nonjudicial determination of ineligibility under Section 20 (by a party executive committee, for example, in keeping a candidate's name off the ballot) would deny due process of law under the federal constitution. (*Garcia v. Tobin,* 307 S.W.2d 836 (Tex. Civ. App.—San Antonio 1957).) In affirming the court's judgment, however, on a ground different from the due process issue, the supreme court pointed out that a candidate or officer-elect could establish his eligibility in a lawsuit to get on the ballot or take possession of his office. (*Garcia v. Tobin,* 159 Tex. 58, 316 S.W.2d 396 (1958).) In the same opinion the court defined "entrustment," as used in Section 20, to mean: " 'To confer a trust upon; . . .to transfer or deliver property to another to hold as trustee.' "

Comparative Analysis

About a third of the states have comparable provisions. Most of them cover all public offices, but a few are limited to eligibility to serve in the legislature. Neither the United States Constitution nor the *Model State Constitution* contains anything comparable.

Author's Comment

Keeping Section 20 in a new constitution probably won't hurt anything—provided that the ineligibility phrase for officeholding generally is relocated in the general provisions article. The section probably is not necessary, however, in light of the universal requirement that a public officer be a qualified voter, which by virtue of Article VI, Section 1, excludes convicted felons from running for any public office.

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

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

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

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

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

History

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

Explanation

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

Comparative Analysis

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

Author's Comment

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

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

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

History

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

Explanation

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

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

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

Comparative Analysis

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

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

Author's Comment

Section 23 should be deleted as unnecessary.

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

History

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

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

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

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

Explanation

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

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

Comparative Analysis

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

Author's Comment

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

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

Art. III, § 24

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

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

History

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

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

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

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

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

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

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

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

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

Explanation

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

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

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

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

Comparative Analysis

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

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

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

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

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

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

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

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

Author's Comment

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

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

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

History

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

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

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

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

Explanation

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

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

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

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

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

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

Comparative Analysis

See the *Comparative Analysis* of Section 26.

Author's Comment

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

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

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

History

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

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

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

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

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

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

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

Explanation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comparative Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Author's Comment

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

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

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

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

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

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

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

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

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

History

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

Explanation

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

Comparative Analysis

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

Author's Comment

Section 26a is gone with the wind.

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

History

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

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

Explanation

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

Comparative Analysis

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

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

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

Author's Comment

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

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

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

History

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

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

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

As originally adopted in 1876, this section read:

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

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

Explanation

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

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

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

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

Comparative Analysis

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

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

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

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

Author's Comment

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

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

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

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

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

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

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

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

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

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

Art. III, § 29

History

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

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

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

Explanation

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

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

Comparative Analysis

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

Art. III, § 30

Author's Comment

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

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

History

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

Explanation

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

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

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

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

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

Comparative Analysis

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

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

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

Author's Comment

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

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

Sec. 31. ORIGINATION IN EITHER HOUSE; AMENDMENT. Bills may originate in either House, and, when passed by such House, may be amended, altered or rejected by the other.

History

This section originated in the Constitution of 1845 and remained unchanged until the present constitution added the phrase "when passed by such House."

Explanation

Any member of the legislature may introduce a bill by filing it with the designated official of his respective house—the chief clerk of the house or the secretary of the senate. The rules of both houses contain elaborate requirements on the form of bills and mechanics of introduction, and along with Section 5 of this article limit the introduction period for certain bills. (See Tex. H. Rule 19 (1973); Tex. S. Rule 70 (1973); Tex. J. Rules 22-24 (1973).) Section 33 of this article requires that bills for raising revenue be introduced only in the house, and Section 40 forbids the consideration during a special session of bills not included in the governor's call.

Professor Dick Smith succinctly describes the bill enactment process in *How Bills Become Laws in Texas,* 4th ed. (Austin: The University of Texas at Austin, 1972); this process is diagrammed in the appendix to Bureau of Government Research, Lyndon B. Johnson School of Public Affairs, *Guide to Texas State Agencies,* 4th ed. (Austin: The University of Texas at Austin, 1972).

Comparative Analysis

All states except unicameral Nebraska permit bills to originate in either house and to be amended in either house, but only about half the states so specify in their constitutions. In 21 states revenue bills may originate only in the lower house, and in Georgia appropriation bills also must originate in that house. The United States Constitution requires revenue bills to be introduced in the house of representatives. The *Model State Constitution*'s alternative provisions for a bicameral legislature are silent on origin of bills. Eleven states have some kind of prohibition on the introduction of bills toward the end of the session.

Author's Comment

This section states the obvious and can be omitted without loss.

Sec. 32. READING ON THREE SEVERAL DAYS; SUSPENSION OF RULE. No bill shall have the force of a law, until it has been read on three several days in each House, and free discussion allowed thereon; but in cases of imperative public necessity (which necessity shall be stated in a preamble or in the body of the bill) four-fifths of the House, in which the bill may be pending, may suspend this rule, the yeas and nays being taken on the question of suspension, and entered upon the journals.

History

Luce begins his discussion of the three-readings requirement as follows:

> Adequate information was the object in reading bills at length. The practice dates from times when printing was unknown or little used, and the many members of Parliament who were illiterate gained their whole knowledge of bills from the reading

by the Clerk and exposition by the Speaker. . . . (Robert Luce, *Legislative Procedure* (New York: Houghton Mifflin Co., 1922), pp. 211-12.)

He goes on to explain that undoubtledly bills were read at length in the colonial assemblies, but since they were almost always short, the readings seldom took much time. Luce traces the constitutional origin of the requirement to the Kentucky Constitution of 1799. He summarizes congressional experience with the requirement and concludes by noting that most American legislatures early in this century substituted the reading of bill titles for reading at length.

The Constitution of the Texas Republic required readings on three several days but permitted suspending the requirement in case of emergency if "two-thirds of the members of the House where the bill originated" voted for the suspension. The Consitution of 1845 broadened and tightened the requirement: free discussion had to be allowed on the bill in each house and a four-fifths vote of the house "in which the bill shall be pending" was necessary to suspend the requirement in case of "great emergency." The Constitutions of 1861, 1866, and 1869 carried forward the 1845 language intact.

The 1875 Convention made three changes in the statement of the requirement. "Imperative public necessity" was substituted for "great emergency," a change without apparent significance; the necessity had to be stated in the bill's preamble or body; and a record vote was required on the suspension question. The summarized *Debates* of the convention do not mention these changes.

Explanation

Bills are read the first time in the Texas Legislature upon introduction and are then referred to a standing committee by the presiding officer. If the bill is favorably reported by committee it is printed (with any recommended committee amendments), distributed to the members, and placed on one of the calendars, which serve as agenda for the orderly consideration of bills. Bills usually come up for second reading in the order in which they were reported by committee; the senate rarely follows its calendars, however, so the usual way to bring up a bill in the senate is to suspend its rules, which requires a two-thirds vote. Most floor amendments are offered at the second reading stage—an amendment on third reading requires a two-thirds vote. If the bill passes second reading, which requires a simple majority, it is ordered engrossed and the sponsor may attempt to suspend the third-reading-on-a-separate-day requirement, or use the parliamentary device of "adjourning" briefly and then reconvening on a new "legislative" day, in order to take up the bill on third reading. (The legislative day fiction has long been used to circumvent the three-readings requirement, with the house rules commentary pointing out that point of order objections attacking the fiction are routinely overruled. Tex. H. Rule 19, sec. 19, comment, p. 119 (1973).) The third reading of a bill is to consider its final passage, and if it receives majority approval the bill is enrolled and sent to the other house or, if it has already passed one house, to the governor. Curiously, neither the constitution nor rules specifies the vote required to pass a bill. It has traditionally required a simple majority. (For a more detailed description of a bill's passage through the legislature, see Dick Smith, *How Bills Become Laws in Texas,* 4th ed. (Austin: The University of Texas at Austin, 1972).)

All three readings of a bill are customarily by title only; in fact, the reading clerk rarely gets beyond identifying the bill's number and sponsor before further reading is dispensed with. This causes no problem, however, because on second and third readings, which are the only important ones, all members have a printed copy of the bill before them.

The house and senate interpret the four-fifths vote requirement for suspending

the three-readings rule differently. According to the house rules, four-fifths of the members voting must approve suspension; the senate rules require four-fifths of those present—assuming in each house, of course, the presence of a quorum. (See Tex. H. Rule 19, sec. 19 (1973); Tex. S. Rule 33 (1973).)

"If the legislature states facts or reasons which in its judgment authorize the suspension of the rule and the immediate passage of a bill, the courts certainly have no power to reexamine that question, and to declare that the legislature came to an erroneous conclusion." (*Day Land and Cattle Co. v. State,* 68 Tex. 526, 543, 4 S.W. 865, 873 (1887).) This early decision on the suspension requirement has been interpreted to justify the routine inclusion of a boilerplate statement of "imperative public necessity" in every bill to permit a vote on suspending the three-readings requirement. The "emergency clause" is usually set out in a separate section of the bill and the preferred wording is:

> The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each house be suspended, and the Rule is hereby suspended.

The author is unaware of any Texas case reported in this century treating seriously a challenge to the adequacy of this type of conclusory statement, but it is interesting to note that a 1973 addition to the house rules attempts to limit "imperative public necessity" to great loss of life or property and directs the speaker not to entertain a suspension motion "unless it definitely appears that such conditions or state of affairs actually exists." (Tex. H. Rule 19, sec. 19 (1973).)

Compliance with the three-readings requirement is not subject to judicial review under the enrolled bill doctrine. (*El Paso & S.W. Ry. Co. v. Foth,* 100 S.W. 171 (Tex. Civ. App.), *rev'd on other grounds,* 101 Tex. 133, 105 S.W. 322 (1907). See the *Explanation* of Sec. 12 of this article for discussion of the enrolled bill doctrine.) The courts will examine an act's emergency statement, if it furnishes evidence of legislative intent, but the boilerplate variety of course does not, and since the emergency statements are not printed in the annotated compilation of Texas statutes, the better practice is to include purpose statements, if desirable, in the body of acts. (See *Popham v. Patterson,* 121 Tex. 615, 51 S.W.2d 680 (1932).)

Comparative Analysis

Thirty-four states, including Texas, require three readings of bills before passage; three states require two readings; and thirteen states have no reading requirement. In six states the reading must be at length on all three occasions; in two states the reading must be at length twice; and in seven states once, usually on third reading. A few states require reading by sections on various occasions. Of those 37 states requiring at least two readings, 33 require them to be on separate days, but eight of these either permit two of the readings on the same day or empower the legislature to waive the separate day requirement by extraordinary majority vote. A dozen or so states authorize dispensing altogether with the reading requirement in certain circumstances, such as in case of actual insurrection, or upon unanimous, two-thirds, three-fourths, or four-fifths vote. Neither the United States Constitution nor the *Model State Constitution* mentions bill reading as such, but the latter sets out the following in Section 4.15: "No bill shall become a law unless it has been printed and upon the desks of the members in final form at least three days prior to final passage and the majority of all the members has assented to it."

Art. III, § 33

Author's Comment

The historical justification for the three-readings requirement has long since vanished and nothing in the Texas legislative experience has emerged to replace it. Side by side with multiple reprintings showing committee and floor amendments, the notation system showing changes made by amendatory bills, and committee bill analyses and fiscal notes, the reading clerk's mumbling of the title dramatizes that the requirement is an anachronism. (See also the *Author's Comment* on Sec. 35 of this article.)

Routine suspension or circumvention of the third-reading-on-a-separate-day requirement is less quaint. For it must have been this practice (among others) Luce was thinking of when he said: "Everywhere that such requirements prevail the inevitable result is that the Constitutions are not observed, which is bad for the Constitutions and bad for the public. It is one of the utterly absurd and wholly useless ways in which we breed disregard for law." (Luce, p. 217.)

Encouraging careful consideration and deliberate action on every bill is of course a highly desirable objective, but there are far better ways to achieve it than by the three-readings requirement. Much has already been done by legislative rule to achieve it—besides the aids to understanding bills that have been mentioned, both houses have installed TV-type screens in their chambers to display on request the full history and background information on bills—and more will be done if the legislature is given the proper resources of time, staff, money, and material to do its job. Nothing more is required in a new constitution, therefore, than a guarantee that before a bill is voted on for the last time the members have had an opportunity to read it in final form. The *Model State Constitution*'s guarantee, quoted in the *Comparative Analysis,* is an excellent statement, and with the addition of "calendar" to modify "days" and "present" to modify "members" could be copied verbatim into a new Texas Constitution.

Sec. 33. REVENUE BILLS. All bills for raising revenue shall originate in the House of Representatives, but the Senate may amend or reject them as other bills.

History

Professor Thomas says of this section:

> This provision is borrowed from the House of Commons of the British Parliament, for the right to originate money bills is an ancient and indisputable privilege of that body. The reason for the creation of such a privilege was that the House of Lords, a permanent hereditary body created by the king, would, supposedly, be more subject to influence by the crown than commons, a temporary elective body. Hence, it would have been dangerous to permit the Lords to have the power of framing new taxes. . . .
>
> This privilege of the lower house was continued by most of the state constitutions as well as by the federal in the United States. The reason in modern legislative bodies being that the lower house, in Texas the House of Representatives, more directly represents the people and is renewed by more frequent elections. However, under this section, and as distinguished by British practice, the Senate may amend or reject revenue bills as in the case of other bills. (1 *Interpretive Commentary,* p. 606.)

Despite its inclusion in the United States Constitution, the Constitution of the Republic did not contain the provision. It was included in the statehood constitution, and except for being left out of the Constitution of 1869, the wording of the requirement has remained unchanged.

Explanation

The Texas Supreme Court recently said of this section: "This constitutional limitation is confined to bills which levy taxes in the strict sense, and does not extend to bills for other purposes which may incidentally create revenue. *Day Land and Cattle Co. v. State,* 68 Tex. 526 4 S.W. 865 (1887) . . ." (*Smith v. Davis,* 426 S.W.2d 287, 833 (Tex. 1968). See also Tex. Att'y Gen. Op. No. 2972 (1935) for a general discussion of the section.) No Texas case invalidating a law for noncompliance with this section was found, although the fact of noncompliance would of course be apparent on the face of the enrolled act.

Comparative Analysis

In approximately 21 states revenue bills may originate only in the lower house, and in Georgia appropriation bills also must originate in that house. The United States Constitution requires revenue bills to be introduced in the house of representatives. The *Model State Constitution*'s alternative provisions for a bicameral legislature are silent on origin of bills.

Author's Comment

The historical justification for this requirement in the federal constitution vanished in 1913 with adoption of the Seventeenth Amendment providing for popular election of United States Senators. The similar (though never as strong) justification for including it in state constitutions vanished some 50 years later when the Supreme Court decided in the reapportionment cases that membership in both houses of a bicameral state legislature had to be based solely on population. Surely today no one would claim that Texas senators are less sensitive than representatives to the desires of their constituency on tax legislation.

Sec. 34. DEFEATED BILLS AND RESOLUTIONS. After a bill has been considered and defeated by either House of the Legislature, no bill containing the same substance, shall be passed into a law during the same session. After a resolution has been acted on and defeated, no resolution containing the same substance, shall be considered at the same session.

History

This section originated in the Constitution of the Republic, but its lineage is traceable to the English Parliament where, according to Luce, the rule was enforced for centuries "to avoid contradictory decisions, to prevent surprise, and to afford opportunity for determining questions as they arise . . . ." After crossing the Atlantic the rule succumbed, in some colonial assemblies, to the motion to reconsider, a purely American invention, but it thrived in others. Texas shares with Tennessee the honor of being the first American jurisdiction to include the rule against reconsideration in its organic law. (Robert Luce, *Legislative Procedure* (New York: Houghton Mifflin Co., 1922), pp. 383-95.)

The Texas statehood constitution applied the reconsideration ban to resolutions as well as bills, and the next three constitutions preserved this version intact. The present constitution divided the section into two sentences, but otherwise made no change.

Explanation

It is only the defeat on third reading of a bill or resolution that prevents passage of the bill or resolution, or one containing the same substance, at the same session. The rules of both houses permit reconsideration of an unfavorable vote on second reading, although reconsideration is rare because someone from the winning side must move it and the motion must carry by a majority vote. In an analogous situation, Article IV, Section 14, permits reconsideration of a bill vetoed by the governor, and if two-thirds of the members of both houses vote to override the veto, the bill becomes law. (The principal stages of a bill's journey through the legislature are described by Dick Smith in *How Bills Become Laws in Texas,* 4th ed. (Austin: The University of Texas at Austin, 1972).)

Enforcement of this section is solely up to the legislature, the courts having held that noncompliance is shielded from judicial review by the enrolled bill doctrine. (*King v. Terrell,* 218 S.W. 42 (Tex. Civ. App.—Austin 1920, *writ ref'd*). See the *Explanation* of Sec. 12 of this article for discussion of the enrolled bill doctrine.)

Comparative Analysis

Approximately three other states besides Texas have similar provisions in their constitutions. Georgia provides that a defeated bill or resolution can be proposed again during the same session if two-thirds of the members of the house that rejected it agree. Louisiana provides likewise but requires only a majority vote. The wording of the Tennessee provision closely resembles that of Texas but speaks only of bills.

The *Model State Constitution* is silent on the subject as is the United States Constitution.

Author's Comment

The reconsideration ban is more appropriately the subject of legislative rule.

Sec. 35. SUBJECTS AND TITLES OF BILLS. No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof, as shall not be so expressed.

History

The unity of subject requirement, embodied in the first clause of this section's first sentence, is of ancient origin. Former Congressman Luce finds examples of it in Roman law and reports that a civil war was provoked by the Roman Senate's refusal to suspend the requirement to allow passage of an omnibus law granting certain rights to provinces. The title requirement, which is the second prong of Section 35, is strictly an American invention. Mr. Luce notes that acts of Parliament did not contain titles for more than 200 years after that body began making laws, and that when the title practice did develop, the English courts uniformly held the title to be no part of the act it was contained in. This common law was well-known to members of the colonial and revolutionary state assemblies, whose experience was crucial in framing the legislative article of the United States Constitution, and no doubt explains the title requirement's absence from that document.

Not until 1798 did a state constitution include the title requirement for bills. In that year Georgia reacted to the Yazoo land frauds by adopting a constitutional amendment forbidding the passage of any law "containing any matter different from what is expressed in the title thereof." (The so-called "Yazoo Act" gave away millions of acres of state land under a title reciting that it was to pay off Georgia soldiers fighting in the Revolution.) New Jersey claims the honor, in the 1844 revision of its constitution, of putting together the subject and title requirement in a single provision that served as a model for most state constitutions drafted thereafter. (Robert Luce, *Legislative Procedure* (New York: Houghton Mifflin Co., 1922), pp. 545-51.)

Like its federal model, the Constitution of the Republic of Texas contained nothing resembling Section 35. The statehood constitution provided that "Every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title"; and the Constitutions of 1861, 1866, and 1869 preserved this language intact.

The present constitution excepted general appropriations bills from the unity of subject requirement, substituted "subject" for "object" to describe the requirement, and added the second sentence.

Explanation

Drafting form usually followed for bills introduced in the Texas Legislature centers the title of a bill on its first page, immediately under the sponsor's name and bill number. For example, the title of the senate bill adopting a new Penal Code during the 63rd Legislature appeared as follows:

By: Herring S.B. No. 34

A BILL TO BE ENTITLED
AN ACT

reforming the penal law; enacting a new penal code setting out general principles, defining offenses, and affixing punishments; making necessary conforming amendments to outside law; repealing replaced law; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

. . . . . .

Ideally, then, a bill's title (or "caption" as it is interchangeably called) should furnish a brief, general statement of the bill's subject and to this end, for example, only titles are customarily read to identify bills for purposes of the three-readings requirement of Section 32 of this article.

As indicated in the *History*, Section 35 contains two different though related requirements.

> . . . It was doubtless intended by Section 35 to prevent certain practices sometimes resorted to in legislative bodies to secure legislation contrary to the will of the majority,—one, that of misleading members by incorporating in the body of the act some subject not named in the title; the other, that of including in the same bill two matters foreign to each other, for the purpose of procuring the support of such legislators as could be induced to vote for one provision merely for the purpose of securing the enactment of the other. . . . (*McMeans v. Finley,* 88 Tex. 515, 521, 32 S.W. 524, 525 (1895).)

Because it is the less troublesome, the unity of subject requirement will be discussed first.

Unity of Subject. Only four reported Texas cases can be read to have invalidated an act of the legislature (other than a rider to an appropriations act) because it contained more than one subject. The first two cases (*Bills v. State,* 42 Tex. 305 (1875) and *State v. Shadle,* 41 Tex. 404 (1874)) involved the same statute and the last two (Ex parte *Winn,* 158 Tex. Crim. 665, 259 S.W.2d 191 (1953) and *Redding v. State,* 109 Tex. Crim. 551, 6 S.W.2d 360 (1928)) involved similar statutes. All four cases contained alternative rationales adequate to support their holdings, and discussion of the unity of subject requirement was perfunctory in all four cases.

The great majority of Texas cases considering acts claimed to deal with more than one subject—and there aren't many—have rejected the claim, with one court succinctly (and accurately) stating that if the provisions of an act are "germane in any degree," the act complies with the unity-of-subject requirement. (*Dellinger v. State,* 115 Tex. Crim. 480, 28 S.W.2d 537 (1930). See also *Day Land & Cattle Co. v. State,* 68 Tex. 526, 4 S.W. 865 (1887); *Jones v. Anderson,* 189 S.W.2d 65 (Tex. Civ. App.—San Antonio 1945, *writ ref'd*); *City of Beaumont v. Gulf States Utilities Co.,* 163 S.W.2d 426 (Tex. Civ. App.—Beaumont 1942, *writ ref'd w.o.m.*).) The courts of other jurisdictions whose constitutions contain the unity-of-subject requirement are equally liberal in upholding acts claimed to violate it. (See Ruud, " 'No Law Shall Embrace More Than One Subject,' " 42 *Minn. L. Rev.* 389 (1958).)

Appropriations bills naturally invite nongermane amendments, commonly called "riders," and despite the peculiar wording of Section 35 Texas courts have struck them down as violating the unity-of-subject requirement. Thus in *Moore v. Sheppard* (144 Tex. 537, 192, S.W.2d 559 (1946)), the court invalidated a rider to the general appropriations act that purported to require county clerks to deposit all fees in the treasury in the face of a general law requiring deposit of official fees only. The court in reaching this result construed the parenthetical reference to general appropriations bills in the first sentence of Section 35 not as an exception to the unity of subject requirement but rather as recognition that appropriations is a single subject. (The same is true of law revision bills, which Section 43 appears to except from the requirements of this section: they must deal with the single subject of law revision.) The rider issue is tangled, however, with an earlier supreme court decision upholding an appropriations act rider that appeared to conflict with the general law on the subject, but the principle that appropriations is a single subject seems firmly established. (See *Linden v. Finley,* 92 Tex. 451, 49 S.W. 578 (1899). For a comprehensive survey of the authorities, see Tex. Att'y Gen. Op. No. V-1254 (1951).)

Subject Expressed in Title. The title requirement of this section has generated more pages of appellate court opinion than all the other legislative process requirements in this article combined. One reason is that most bills are amended, many extensively, during their legislative passage. A title accurate for a bill when introduced is thus made inaccurate by an amendment adding something unexpressed in the title. Another reason is the predilection, still too common, for overly detailed titles, of which the worst offender is the so-called index variety that attempts to list in the title every topic treated in the body, with the predictable result that some topic goes unmentioned, or is mentioned in the title but deleted from the body, and the title is thus defective. If a court finds a violation of the title requirement, it invalidates that portion of the law unexpressed or deceptively expressed in the title. If the law makes sense without the portion ("Would the legislature have enacted the law without the portion?" is how the courts frame the question), the portion is "severed out" and the remainder of the law enforced. If

the portion is not severable from the remainder, the entire law falls. (See, *e.g., Fletcher v. State,* 439 S.W.2d 656 (Tex. 1969); *White v. State,* 440 S.W.2d 660 (Tex. Crim. App. 1969).)

Resolutions do not require titles, but it is customary to prepare them for joint resolutions amending this constitution. (See *National Biscuit Co. v. State,* 134 Tex. 293, 135 S.W.2d 687 (1940).) And the courts have applied the test for bill titles to determine whether the ballot proposition imparts fair notice of the proposed amendment. (*E.g., Hill v. Evans,* 414 S.W.2d 684 (Tex. Civ. App.—Austin 1967, *writ ref'd n.r.e.*).)

Analytically, defective titles are always misleading, but it is possible to identify subcategories of this general vice from the many court decisions considering a claimed violation of the title requirement. Titles have been found defective because they were narrower than the body of the act, thus implying that something in the act was not included (*Nueces County v. King,* 350 S.W.2d 385 (Tex. Civ. App.—San Antonio 1961, *writ ref'd*)); because incomplete, by indexing certain related topics in the bill but omitting others (*White v. State*); because contradictory, by reciting that the body deals with A when it deals with B (*Whaley v. State,* 496 S.W.2d 109 (Tex. Crim. App. 1973)); and because they were so general as to disclose virtually nothing about the body (*Lee v. State,* 163 Tex. 89, 352 S.W.2d 724 (1962)).

The titles of laws amendatory in form are evaluated by a different test, the aim of which, however, is the same determination of whether the title imparts fair notice of the amendment's subject. The title to a law amendatory in form is sufficient if it merely identifies the law to be amended, providing the title of the original (amended) law embraces the subject of the amendment, and the amendment's title need not (although it is the better practice) express its subject or the subject of the original law. The rationale of this test is that the interested reader can go to the original law to learn the subject of the amendment. (*E.g., Board of Water Engineers v. City of San Antonio,* 155 Tex. 111, 283 S.W.2d 722 (1955); *Walker v. State,* 134 Tex. Crim. 500, 116 S.W.2d 1076 (1938).)

Titles of statutes included in recodifications and revisions—for example, the 1925 bulk revision of Texas civil and criminal statutes—are "cured" of any defects by the title of the revision. This results in part from the wording of Section 43 of this article (see its *Explanation*) but would probably be the law without that section. (See *American Indemnity Co. v. City of Austin,* 112 Tex. 239, 246 S.W. 1019 (1922).)

(For an excellent student work on the title requirement, see Comment, "The Drafting of Statute Titles in Texas," 23 *Texas L. Rev.* 378 (1945).)

Comparative Analysis

Some 40 other states limit a bill to one subject, and almost all of them also require that the subject be expressed in the title. Fifteen states make exceptions, generally for appropriations bills or statutory revisions or both. Six of the nine states with no "one subject" requirement are the New England states. The United States Constitution contains neither requirement. The *Model State Constitution* has a unity of subject requirement with the two customary exceptions, but no title requirement. The *Model's* section concludes: "Legislative compliance with the requirements of this section is a constitutional responsibility not subject to judicial review." (Sec. 4.14.)

Author's Comment

Digests of court decisions and attorney general opinions fill 22 closely printed

pages following this section in the 1955 annotated volume of the Texas Constitution; the 1974-75 supplement to this volume contains ten more. Nearly all of the decisions and opinions digested involve the title requirement, and this raises the basic question: Do the benefits of judicial enforcement of the requirement outweigh the harms of litigation spawned and the invalidation for technical defects of laws long after their enactment?

The title requirement's *raison d'etre* is the prevention of deception in the legislative process by indirectly requiring fair notice of a bill's subject in a heading on its first page. (The requirement is indirect because bills with defective titles are enacted by every session of the legislature and it is only their subsequent, and usually haphazard, invalidation that in theory deters future violation of the requirement.) I submit that the title requirement does not produce fair notice—the variation applied to bills amendatory in form positively conceals the bill's subject—that alternative requirements guaranteeing fair notice are available, and that the title requirement should be abandoned. This is so for several reasons.

The title of an act challenged in court often bears little resemblance to the title of its bill ancestor. This is true because most bills are amended before final passage, and the difference between introductory and final titles is emphasized by the practice of both houses, increasingly common in recent years, of adopting a standard motion following third reading of bills directing the clerk to conform the bills' titles to their bodies. This practice does not cure as many titles as one might suppose. For one reason the "conforming" is too often done by clerks, not professional draftsmen; and for another, the logjam at session's end often precludes any conforming at all. (See *Nueces County v. King,* cited in the *Explanation,* for the ingenious albeit unsuccessful argument of counsel that a conforming motion should be treated as obeyed although the defective title involved was not in fact corrected.) It is of course possible, especially if the duration of sessions is increased, to perfect every title after a bill passes both houses and before it is sent to the governor. But surely no one would argue that this procedure or its current variation serves the purpose of the title requirement.

Routine use of the title conforming motion in the Texas Legislature demonstrates even better than the great volume of litigation that judicial enforcement of the title requirement does not work. Titles fairly expressing the subject of bills are primarily for the benefit of legislators—the origin and historical development of the requirement make this clear—and it is incongruous to permit attacks on titles long after enactment and by strangers to the legislative process who are, of course, interested in title defects solely as a weapon for striking at the substance of legislation. And despite nearly 100 years of experience with this constitution's title requirement, every session of the legislature has enacted laws with defective titles and few have escaped an attack on at least one of its laws on this ground.

As interpreted by the courts the title requirement is difficult to apply, and one application—the test for bills amendatory in form—is counterproductive. For example, the title of an amendment to the State Bar Act, which permitted suspending an attorney from the practice of law pending disposition of his appeal from a disbarment judgment, was challenged in *Bryant v. State* (457 S.W.2d 72 (Tex. Civ. App.—Eastland 1970, *writ ref'd n.r.e.*)). The title recited "An Act amending the State Bar Act; amending Section 6, [citing the compiled version of the Act] . . . ," and the suspension authorization was tacked onto the end of Section 6, which before the amendment dealt solely with venue for disbarment suits. Naturally the attorney claimed the title was misleading: if a legislator examined Section 6 of the State Bar Act he would form the erroneous impression that the amendment dealt solely with venue. The court properly sustained the title, however, because the title of the State Bar Act itself clearly covered suspensions.

As recommended in the *Explanation*, the better practice is to state the amendment's subject in its title, but as the *Bryant* case illustrates this is not always done and in fact is positively discouraged by judicial application of the requirement.

Printing was in its infancy when the title requirement first appeared in a state constitution in 1798. Today in the Texas Legislature bills are *re*printed at several stages of the process and every member gets as many copies as he wants. The printing of bills is now computerized, with the added bonus of permitting the display of their text and history on a TV-type viewer. Moreover, both houses recently adopted a notation system for amendatory bills (at least 90 percent of the bills considered today amend or ought to amend existing law) that requires added language to be underlined and deleted language to be stricken through and bracketed. The joint rules also require a fiscal note prepared by the Legislative Budget Board on bills to expend state funds. (See Tex. J. Rules 20, 22-24 (1973).) There is thus no reason today for relying on a bill's title to disclose its subject, and those who do risk deception.

Bill titles do serve as a shorthand for identification purposes—for example, in the three-readings procedure. (See the *Explanation* of Sec. 32 of this article.) If one wants to preserve the title for identification purposes (recognizing that the unique number assigned each bill on introduction also identifies it), it may easily be done in the rules—which in fact now repeat the unity of subject and title requirements in the language of this section. If worst comes to worst, however, and the title requirement is preserved in the constitution, its enforcement should be left strictly to the legislature by the addition at the end of this section of the sentence concluding Section 4.14 of the *Model State Constitution,* which is quoted in the *Comparative Analysis.*

The unity-of-subject requirement stands on a somewhat different footing, primarily because it has caused so little grief and in the case of appropriations riders some positive good. As a practical matter original bills with truly multiple subjects are rare, and appropriations riders may be attacked when offered under the germaneness doctrine long embodied in the legislative rules. (See the *Explanation* of Sec. 30.) Professor Ruud in his evaluation of the unity-of-subject requirement concludes that it probably does make logrolling more difficult, but former Congressman Luce argues that it is not necessary because omnibus legislation attracts more opponents than supporters. (See Ruud, pp. 447-52; Luce, p. 551.) All in all the requirement seems harmless—which may be the best reason for leaving it out of any new constitution.

Sec. 36. REVIVAL OR AMENDMENT BY REFERENCE; RE-ENACTMENT AND PUBLICATION AT LENGTH. No law shall be revived or amended by reference to its title; but in such case the act revived, or the section or sections amended, shall be re-enacted and published at length.

History

This section originated in the statehood constitution and was carried forward intact by the Constitutions of 1861, 1866, and 1869. The present constitution also carried it forward, but with a most significant change: "revived" was substituted for "revised" in the four earlier constitutions. (See, *e.g.*, Tex. Const. Art. VII, Sec. 25 (1845); Art. XII, Sec. 18 (1869).) Neither the summarized *Debates* nor official *Journal* of the 1875 Convention mentions this change, but as argued in the *Author's Comment,* the change was either inadvertent or the result of a printing error. (The 1875 Convention also added "or sections" to the second clause of the section, but this addition is without significance.)

Art. III, § 36

Explanation

Section 36 is primarily intended to prohibit blind amendments to existing statutes. (*Snyder v. Compton,* 87 Tex. 374, 28 S.W. 1061 (1894)). A blind amendment merely cites the statute to be amended and then proceeds to set out the amendatory language alone—for example: "Substitute '$1,000' for '$200' in the third line of Section 7"; "Strike the second paragraph from the beginning of Section 4." Needless to say, reading a blind amendment discloses little of its subject and examination of the statute amended promises at best a tedious, line-by-line comparison with the amendatory bill. So Section 36 prohibits blind amendments by bill—it does not apply to committee or floor amendments, which are often in blind form—but its application by the courts is confusing.

It is clear that Section 36 applies only to bills amendatory in form. In *Thompson v. United Gas Corp.* (190 S.W.2d 504 (Tex. Civ. App.—Austin 1945, *writ ref'd*)), for example, a statute expressly repealing part of another law merely by citing it was held not within the ban of Section 36. (Accord, *Popham v. Patterson,* 121 Tex. 615, 51 S.W.2d 680 (1932) (implied amendment); *Dallas County Levee Dist. No. 2 v. Looney,* 109 Tex. 326, 207 S.W. 310 (1918) (incorporation by reference); *Johnson v. Martin,* 75 Tex. 33, 12 S.W. 321 (1889) (complete substitute for existing statute); *State Bd. of Insurance v. Adams,* 316 S.W.2d 773 (Tex. Civ. App.—Houston 1958, *no writ*) (implied repeal); *cf. American Indemnity Co. v. City of Austin,* 122 Tex. 239, 246 S.W. 1019 (1922) (recodification act).)

Not so clear is the meaning of "section" in Section 36—*i.e.,* how much of an amended statute must be "re-enacted and published at length"? The better-reasoned cases, considering Section 36's purpose—to make clear what is being amended—apply an understanding test. Thus in *City of Oak Cliff v. State* (97 Tex. 383, 79 S.W. 1 (1904)), the court sustained a statute amending (in form) Section 2 of an act by adding Section 2a without, however, copying out Section 2; the court reasoned that the act amended was clearly identified and the purpose of the amendment also clear. To the contrary is *Henderson v. City of Galveston* (102 Tex. 163, 114 S.W. 108 (1908)), in which the court invalidated an amendment in form to Section 34 of an act that added a new paragraph to Section 34 without copying out the unamended portion of the section; the court expressly rejected the understanding test but did not cite the *City of Oak Cliff* case.

Bills introduced in the Texas Legislature are divided into sections, and the lengthy ones usually into subsections and subdivisions as well. (See Texas Legislative Council, *Drafting Manual* (Austin, 1966), ch. 1, for the preferred form of bills.) Subsections, like sections, contain complete sentences, but certain types of subdivisions do not. The new Texas Penal Code, which is divided into titles, chapters, and subchapters as well as sections, subsections, and subdivisions, contains in its first chapter 36 specially defined terms, used throughout the code, each definition being a complete sentence and located in a numbered subdivision. If the legislature wishes to amend only the definition of "reasonable belief," which is contained in Subdivision (31), must the amendatory bill copy out the 35 other definitions as well? A literal reading of Section 36 indicates it must, but two Texas decisions, along with an emerging trend in other jurisdictions whose constitutions prohibit blind amendments, provide hope that such useless exercises may be avoided.

In *Ellison v. Texas Liquor Control Bd.* (154 S.W.2d 322 (Tex. Civ. App.—Galveston 1941, *writ ref'd*)), the court upheld amendments in form to three *sub*sections of the Liquor Control Act, which is divided into articles, sections, and subsections, noting that "there is no magic in words or designations" and that both the subject and purpose of the amendatory bill were clear. Professor Sands reports

that the more recent decisions in the antiblind-amendment jurisdictions also reach this result, so long as it is not necessary to refer to other parts of the section (not set out) to understand the subsection or subdivision amended. (C. Dallas Sands, *Sutherland Statutory Construction,* 4th ed. (Chicago: Callaghan & Co., 1972), vol. 1A, sec. 22.28.) The presiding judge of the court of criminal appeals stated this rule in a recent opinion, and, although it was dictum, the statement was nevertheless important because he was suggesting guidelines for the legislature to follow in preparing future amendments to the act held unconstitutional in that case. (*White v. State,* 440 S.W.2d 660, 667 (Tex. Crim. App. 1969).)

Section 36 also forbids revival by bill of a repealed statute solely by reference to its title; the entire statute revived must be reenacted. Presumably the prohibition does not cover implied revivals, just as the blind amendment prohibition does not apply to implied amendments, but the only Texas case discovered on this point involved an unconstitutional statute, later amended to excise the unconstitutional section, in which the court upheld the amendment against objection that it did not reenact the entire original statute. (Ex parte *Hensley,* 162 Tex. Crim. 348, 285 S.W.2d 720 (1956).) In *State Bank of Barksdale v. Cloudt* (258 S.W. 248 (Tex. Civ. App.—San Antonio 1924, *no writ*)), on the other hand, the court struck down as violative of this section a repealing act reciting that all laws earlier repealed by the law it repealed were revived, without reenacting the revived laws or even identifying them. The *Cloudt* decision is the only one found applying the revival prohibition to invalidate a statute, and no doubt this is because bills reviving repealed laws without change are very rare.

At common law the repeal of a statute resurrected any statute the repealed statute had repealed. (*Stirman v. State,* 21 Tex. 734 (1858).) Four years after the Republic's Constitution was adopted, the Texas Congress abolished this common-law rule by statute, and our statutes to this day declare against implied revival by repeal. (See Tex. Laws 1840, "An Act Fixing the Time at Which Laws Passed by Congress Shall Go into Effect, and Prescribing the Manner in Which the Same Shall be Promulgated," sec. 2, 2 *Gammel's Laws,* p. 180. The current version, very little changed in wording, appears in Tex. Rev. Civ. Stat. Ann. art. 10, subd. 7; see also Code of Construction Act sec. 3.10 (Tex. Rev. Civ. Stat. Ann. art. 5429b—2).)

Section 43 of this article excepts law revision bills from the requirements of this section, an exception unnecessary as a practical matter. (See the *Author's Comment* on Sec. 43.)

Comparative Analysis

Some 31 other states prohibit blind amendments and, in most cases, specify that the section amended be set out in full. Some 15 other states have much the same prohibition on revival of a statute, and some 13 states prohibit revision of a statute by reference. Interestingly, none of the other states prohibiting *revision* by reference prohibits *revival* by reference, but all except two of the states prohibiting amendment by reference also prohibit either revival or revision. There appear to be three states prohibiting incorporation of part of another statute by reference. Only one of these three states, New York, is not included among the amendment and revival/revision by reference states. Neither the United States Constitution nor the *Model State Constitution* has any kind of prohibition on legislative action by reference.

Author's Comment

Fortunately for the legislature the Texas courts have whittled down the blind

amendment prohibition of this section so that it causes few problems. The job should be finished by omitting it from any new constitution.

The federal constitution does not contain this prohibition, and the congress has managed to function without it from the beginning. The reason is, of course, that from an early date the rules of both houses have required a notation system for amendatory bills that graphically discloses the nature of the changes. A very similar notation system was mandated by the joint rules of the 63rd Texas Legislature (see the *Author's Comment* on Section 35), and the underlining and striking through that it requires disclose change much better than the reenactment as amended required by this section.

Revival of a repealed law by reference is most rare. In part this is because the attempt would so obviously violate this section. Primarily, however, it is because a repealed law so rarely is adequate for resurrection without change. And if change is made, the entire law as changed is reenacted.

It is also likely that "revived" should have been "revised" in this section. ("Revise" is synonymous with "amend," but bills making changes in a large number of statutes are usually called "revision" bills.) It was so in each of the earlier constitutions that contained the counterpart to this section, and "revised" makes more sense in light of Section 43's exception of law revision bills. Whatever the true origin of this language, however, revival by reference is hardly a serious enough problem in modern legislative practice to merit constitutional treatment.

Sec. 37. REFERENCE TO COMMITTEE AND REPORT. No bill shall be considered, unless it has been first referred to a committee and reported thereon, and no bill shall be passed which has not been presented and referred to and reported from a committee at least three days before the final adjournment of the Legislature.

History

Luce traces the origin of the small committee to a parliament in the reign of Elizabeth I, which in 1571 referred a package of election matters to a small group of members. (The committee of the whole, which is the entire membership of a house meeting as a committee, has an even longer history, with Luce finding examples of its use in England as early as the 14th century.) American colonial assemblies copied the committee system not from Parliament, however, where it had not yet taken a firm hold, but from the practices of the English trading companies, whose directing boards often referred matters to small groups of their members.

By the middle of the 18th century, Luce continues, most colonial assemblies had committees, and the early state legislatures preserved the system. These were select or special committees, however, as the standing committee system had to await acceptance by the congress, thereafter to be copied, over nearly half a century, by the individual states. In 1873 Pennsylvania became the first state to entrench the committee system in its constitution, and two years later the Texas delegates copied the Pennsylvania provision, with the addition of the second clause to Section 37, into this state's present constitution. (Robert Luce, *Legislative Procedure* (New York: Houghton Mifflin Co., 1922), ch. IV.)

Explanation

The most important work of the state legislatures, like that of Congress, is conducted by standing and special committees. The tendency everywhere is for the debates on the floors of both houses of the state legislature to decline in importance,

> and for the real consideration of proposed legislation to be given by the committees. The large number of measures that are considered at each session, as well as their complexity and the wide range of subjects covered, make it necessary for the legislature to delegate most of the work of preparing, considering, and revising legislative proposals to its committees, retaining for itself only the final approval or disapproval of their recommendations. The inability of the legislature itself to give adequate consideration to the great mass of proposed legislation, moreover, has made it generally necessary to accept committee recommendations without change. The successful functioning of a state legislature thus depends in large measure on the organization and operations of its committees. (American Political Science Association, *American State Legislatures,* ed. Belle Zeller (New York: Crowell Co., 1954), pp. 95-96.)

The Texas Legislature functions through standing, special, joint, and conference committees, and occasionally through a committee of the whole of one house or the other. Standing committees of each house work hardest during the session, considering bills and resolutions, but since 1961 have been vested with permanent existence during the legislature by which they were created. (See Tex. Rev. Civ. Stat. Ann. art. 5429f.) Occasionally the two houses appoint joint committees—for example, the 1973 joint rules created a joint committee on legislative administration charged with improving the mechanics of lawmaking—but their use is not as common as by the congress. Special or interim committees are usually appointed at the end of a session—hence the latter appellation—to study a particular problem; special committees may be created by one or both houses and may have nonlegislative members. Conference committees are created by both houses to resolve differences in bills and resolutions. (See Dick Smith, *How Bills Become Laws in Texas,* 4th ed. (Austin: The University of Texas at Austin, 1972), pp. 3-4, 8, for a succinct description of committee structure and operation.)

Beginning in 1961, with enactment of the Legislative Reorganization Act (Tex. Rev. Civ. Stat. Ann. art. 5429f), there has been slow but steady progress in reforming the committee system. The 63d Legislature, for example, saw the reduction in the number of house standing committees to 21 and of senate committees to nine. A limited seniority system was established, to ensure the return of at least some experienced members to each committee each session, and a system of permanent subcommittees was inaugurated to further divide the work load in orderly fashion. Finally, the standing committees were required to record their hearings and encouraged to develop and publish their own rules, and a recent amendment to the state Open Meeting Act guaranteed public access to committee meetings. Except for the statute amendment, all of these reforms were accomplished by legislative rule.

The "72-hour rule," as the second clause of Section 37 is usually called, was designed to discourage hasty consideration of bills at session end. It has not accomplished this goal, however, for the same reason the attempt to specify the legislature's order of business in Section 5 of this article was frustrated: the 140-day biennial session is inadequate to deal with this state's legislative business.

In the single decision found involving this section, the supreme court noted that reference to and report by a committee of *either* house satisfied the first clause, and then went on to hold that the enrolled bill doctrine shielded noncompliance with the clause from judicial review. (*Day Land & Cattle Co. v. State,* 68 Tex. 526, 4 S.W. 865 (1887). See the *Explanation* of Sec. 12 for discussion of the enrolled bill doctrine.)

Comparative Analysis

At least 12 states, including Texas, provide for the referral of a bill to committee and for a report thereon.

Texas appears to be the only state that conditions passage of a bill on receiving its committee report at least three days before adjournment.

The United States Constitution is silent on both subjects, while the *Model State Constitution* provides: "No bill shall become a law unless it has been printed and upon the desks of the members in final form at least three days prior to final passage and the majority of all the members has assented to it. . . ." (Sec. 4.15.)

Author's Comment

The Texas Legislature will continue to function through committees whether or not this section is retained in a new constitution. The real question, therefore, is how to encourage careful consideration and deliberate action on all bills. Section 37 speaks to this question only indirectly because it is a question answerable only in terms of providing more resources—of time, staff, money, and material—for the legislature to do its job properly.

The 72-hour rule provided in this section is not without merit, but it should be refocused, in the manner of the *Model State Constitution's* provision quoted in the *Comparative Analysis,* to guarantee a certain minimum period to study each bill and resolution before it is voted on for the last time. If a modified version of the 72-hour rule is carried into a new constitution (and it could as well be preserved in the legislative rules), it should be combined with the replacement for the three-readings rule recommended in the *Author's Comment* on Section 32.

Sec. 38. SIGNING BILLS AND JOINT RESOLUTIONS; ENTRY ON JOURNALS. The presiding officer of each House shall, in the presence of the House over which he presides, sign all bills and joint resolutions passed by the Legislature, after their titles have been publicly read before signing; and the fact of signing shall be entered on the journals.

History

The 1875 Convention probably copied this section from the Pennsylvania Constitution of 1873, as it did not appear in earlier Texas constitutions. The summarized *Debates* of the convention do not mention discussion of the section, so we will never know why concurrent resolutions, which like joint resolutions require approval of both houses and review by the governor, were omitted from the certification requirement.

Luce says the certification requirement was one of several safeguards designed to ensure accuracy and prevent fraud. He reports complaints by American state legislators in the first half of the 19th century to the effect that certain bills signed by the governor had never passed the legislature. The probable ancestor of this section in the 1873 Pennsylvania Constitution was a response to this precise complaint from a Pennsylvania delegate. (Robert Luce, *Legislative Procedure* (New York: Houghton Mifflin Co., 1922), pp. 518-23.)

Explanation

The joint rules of the Texas Legislature adopted in 1973 created a Joint Legislative Committee on Administration with responsibility, among other things, for examining each enrolled bill passed by both houses and reporting it back (with any necessary corrections) for certification by the respective presiding officers.

The rules contemplate formation of a single engrossing/enrolling and printing facility operated jointly by the two houses, but during the 63rd and 64th Legislatures each house continued to operate its separate facility, with the house rules and senate administration committees overseeing the respective operations. Even without the merger, the printing of legislative documents has become highly automated.

After their introduction, bills are entered in a master computer by typists of the house or senate engrossing and enrolling staff. (Bills drafted by the Legislative Council or senate secretary staffs are entered before introduction; the computer terminals of all of these staffs are interchangeable.) Committee and floor amendments are likewise entered when adopted, so that the various bill printings are made directly from highspeed computer printout. Each printout is carefully proofread for errors, which are few because only amendments and corrections are typed in after the original entry, with the result that the enrolled bill is produced, virtually error free, very shortly after its final passage. The opportunity for fraud is greatly minimized, because access to the computer terminals is restricted, and even greater expedition is promised when the printing process itself is fully computerized.

In some jurisdictions sections like 38 are considered the foundation of the enrolled bill doctrine, a species of the best evidence rule that imparts to enrolled acts conclusive presumption of compliance with the various procedural requirements of the constitution. In Texas the doctrine was adopted on a different rationale—the need "to stamp upon each statute evidence of unquestioned authority" and the unreliability of the journal records—and it is thus doubtful that the absence of this section would have led Texas courts to adopt the journal entry or some other competing rule. (See *Williams v. Taylor,* 83 Tex. 667, 19 S.W. 156 (1892), and the discussion of the enrolled bill doctrine in the *Explanation* of Sec. 12 of this article.)

This section's certification requirement is mandatory, and the absence of either presiding officer's signature (which of course appears on the face of the enrolled act) is fatal to the validity of the act. (*Holman v. Pabst,* 27 S.W.2d 340 (Tex. Civ. App.—Galveston 1930, *writ ref'd*); Ex parte *Winslow,* 144 Tex. Crim. 540, 164 S.W.2d 682 (1942).) The journal of a house is inadmissible to contradict the presiding officer's certificate—to show, for example, that a bill's title was not read before signing (*Parshall v. State,* 62 Tex. Crim. 177, 138 S.W. 759 (1911))—but it may be consulted to explain an obvious error. (*Ewing v. Duncan,* 81 Tex. 230, 16 S.W. 1000 (1891) (certificate showed final vote in senate as 24-24).)

Comparative Analysis

Some 29 other state constitutions specify that the presiding officer of each house must sign a bill after passage, and in 20 of these the signing must take place in the presence of the house. Two states also require the signatures of the clerk of each house. Sixteen states require that the fact of signing be entered in the journal. Minnesota even covers the contingency of refusal by a presiding officer to sign a bill after passage. Neither the United States Constitution nor the *Model State Constitution* speaks of bill signing.

Author's Comment

With increased automation in the printing of legislative documents, and the consequent elimination of errors and opportunity for fraud, the historical justification for this section has largely disappeared. Nor need the section be retained as nurture for the enrolled bill doctrine; as noted in the *Explanation,* that doctrine

was firmly rooted (in 1892) in different soil.

The presiding officers' certification does signal the legislature's final action on bills before their transmittal to the governor. This is a signal worth preserving, but it need not be required by the constitution. Both houses have long required their clerks to certify the date of final passage and vote thereon (if recorded), and there is no reason the presiding officers' certification requirement couldn't also be left to legislative rule. (The rules of each house and the joint rules now contain it, of course.)

Sec. 39. TIME OF TAKING EFFECT OF LAWS; EMERGENCIES; ENTRY ON JOURNAL. No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency, which emergency must be expressed in a preamble or in the body of the act, the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journals.

History

Acts of Parliament were deemed to become law on the first day of the session at which they were enacted. As sessions grew longer, however, the unfairness of this rule became manifest, and it was changed by statute about the time of the American Revolution.

The congress of the Texas Republic also changed the rule by statute, in 1840, because as part of the common law it had determined the effective date of congressional acts since 1836. (Tex. Laws 1840, "An Act Fixing the Time at Which Laws Passed by Congress Shall go into Effect, and Prescribing the Manner in Which the Same Shall be Promulgated," sec. 1, 2 *Gammel's Laws,* p. 180.) The effective date of laws was prescribed by statute in Texas until the present constitution was adopted.

Luce credits the Mississippi Constitution of 1832 as the first to contain an effective date provision for laws. (Robert Luce, *Legislative Procedure* (New York: Houghton Mifflin Co., 1922), pp. 561-62.)

Explanation

> The object of the constitutional convention prescribing a period of time within which a law enacted by the legislature should be operative was to give notice of its passage, that they might obey it when it should become effective, and also to enable them to adjust their affairs to the change made, if any. . . . (*Halbert v. San Saba Springs Land & Livestock Ass'n,* 89 Tex. 230, 34 S.W. 639 (1896).)

Although the section's purpose is clear enough, the rules determining the effective date of laws are intricate, and the draftsman in particular must keep them constantly in mind or risk frustration of the legislative objective.

Texas courts have distinguished between the date a bill becomes law and its operative date, and between the date of passage and effective date. Thus in *State Hwy. Dept. v. Gorham* (139 Tex. 361, 162 S.W.2d 934 (1942)), the court held that although an amendment to the Workmen's Compensation Act became law immediately as an emergency measure, it did not become operative by its terms until after plaintiff's injury, thus denying him recovery under the amendment. In an earlier decision the court held that an act that had passed both houses and been signed by the governor provided no notice of its terms until it took effect, which was 90 days after the legislature adjourned. (*Missouri, K. & T. Ry. v. State,* 100

Tex. 420, 100 S.W. 766 (1907).) And in *Martin v. Sheppard* (129 Tex. 110, 102 S.W.2d 1036 (1937)), the court held that an act passed in June and taking immediate effect did not save from repeal a 90-day act passed the previous month because the May act was not a "law" when the June act took effect and the June act's saving provision applied only to laws.

Most acts of the Texas Legislature become law 90 days after adjournment of the regular or special session at which they passed. For example, a 90-day enactment of the 63d Legislature's regular session, which adjourned May 28, 1973, became law August 27 unless the act itself specified a later effective date. Section 39 does not govern the effective date of resolutions, and as a result simple resolutions take effect when adopted and concurrent and joint resolutions when approved by the governor or filed with the secretary of state without approval. Joint resolutons amending the constitution take effect when adopted by the people. (See the Annotations of Art. IV, Secs. 14 and 15; Art. XVII, Sec. 1.)

As with the three-readings requirement of Section 32 of this article, the legislature may suspend the 90-day effective date requirement of this section to put a bill into immediate effect. Only a two-thirds vote is required for this suspension—suspension of the three-readings requirement takes a four-fifths vote—but it is two-thirds of the total membership of each house, *i.e.*, 100 representatives and 21 senators. The bill must state the existence of an emergency justifying the suspension and the suspension vote must be recorded in the journals. The two-thirds suspension vote must also come on the final version of the bill, the supreme court holding that a bill passing the house originally on a nonrecord vote nevertheless took immediate effect because the house concurred in the senate's amendments to it by a record vote of 103-0. (*Caples v. Cole,* 129 Tex. 370, 102 S.W.2d 173 (1937).)

Section 39 exempts general appropriations acts from the 90-day rule, but as a practical matter the exemption is rarely needed because these acts specify a September 1 effective date, the beginning of the state's fiscal year, which is more than 90 days after adjournment of a regular session. Sometimes the biennial general appropriations act is not passed until a special session, and on those occasions the exemption comes in handy to permit an earlier than 90-day effective date.

When does an emergency measure become law, *i.e.,* when does it take immediate effect? If the governor signs it, an emergency bill becomes law at that time. If the governor allows it to become law without his signature, it takes effect when he files it with the secretary of state. (If the governor neither signs nor files it, it becomes law on the 11th day after he received it, if the legislature is in session, or on the 21st day if the legislature is not. See Art. IV, Sec. 14.) If the governor vetoes the bill, and the legislature overrides the veto, it becomes law when the second house votes to override.

The emergency statement justifying suspension of the 90-day rule is not subject to judicial review (*Day Land & Cattle Co. v. State,* 68 Tex. 526, 4 S.W. 865 (1887)), and a boilerplate statement has been developed for routine inclusion in bills. It is invariably tacked on to the end of the statement used to suspend the three-readings requirement (which is quoted in the *Explanation* of Sec. 32) and the preferred form reads: ". . . and that this Act take effect and be in force from and after its passage, and it is so enacted."

Although the courts will not question the emergency statement, they will examine the clerk's vote certification on the enrolled bill to determine if the bill actually received the required two-thirds record vote, and if it did not they will deny it immediate effect despite the emergency statement's declaration to the

contrary. (See, *e.g., Popham v. Patterson,* 121 Tex. 615, 51 S.W.2d 680 (1932); *Morris v. Calvert,* 329 S.W.2d 117 (Tex. Civ. App.—Austin 1959, *writ ref'd n.r.e.*).)

Comparative Analysis

Some 28 states, including Texas, specify when a law takes effect; four specify that a law takes effect either when published, as provided in the act, or both; and 18 states have no provision concerning an effective date. Approximately 13 of the 28 states specify an effective date 90 days after the end of the session, while the rest specify varying periods (*e.g.,* 20 to 60 days after the end of the session) or a particular date (*e.g.,* July 1 following the end of the session).

All 28 states specifying effective dates exempt emergency measures. Sixteen states require a vote of two-thirds of the members elected to each house to invoke the exception, while the remaining 12 states have requirements varying from four-fifths of the members voting, to a majority of the members elected, to certification by the governor.

The United States Constitution does not specify an effective date for laws, but the *Model State Constitution* provides: "The legislature shall provide for the publication of all acts and no act shall become effective until published as provided by law." (Sec. 4.15.)

Author's Comment

Two of the criticisms leveled at the three-readings requirement of Section 32 (see its *Author's Comment*) apply equally to this section: the boilerplate emergency recitation is meaningless and the 90-day effective date requirement is too often suspended unnecessarily. Routine clerical insertion of the emergency-effective-date clause in bills also baits a trap for the unwary, with the unintended result on occasion of a law's provision of a specific effective date conflicting with the boilerplate declaration. (See *Popham v. Patterson,* cited in the *Explanation,* for an example.)

A more fundamental criticism of Section 39 is its incompleteness. As illustrated in the *Explanation,* much of the law on the effective date of statutes has developed judicially, with reliance on other parts of the constitution as much as on this section. Judicial review is of course a necessary and desirable feature of constitutional government, but it works best in the field of constitutional interpretation if the organic law states general principles that the courts may apply case-by-case to the myriad fact situations inevitably arising under that law. Section 39 attempts to state a detailed rule, and a detailed exception to the rule, with the unsurprising result that the statement is both incomplete in coverage and intricate in application.

Any new Texas constitution ought to state the important principle that notice of a statute's content must be given before it becomes operative, and the *Model State Constitution*'s statement of this principle (quoted in the *Comparative Analysis*) is as good as any. (Whether the first clause of that statement, requiring the state to provide for publication of its laws, should be included is a different question. The state now does so, by contract with a commercial publisher, but this important duty could be dignified by inclusion in the constitution.) This principle stated, a statute setting out the intricate rules for the effective date of laws and resolutions could then be enacted to provide comprehensive guidelines for the legislature and courts.

Art. III, § 40

Sec. 40. SPECIAL SESSIONS; SUBJECTS OF LEGISLATION; DURATION. When the Legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor; and no such session shall be of longer duration than thirty days.

History

The 1836 Constitution gave the governor power to call special sessions upon "extraordinary occasions" and, in the event of disagreement as to the time of adjournment, to adjourn both houses.

The 1845 and 1861 Constitutions provided that the governor could "by proclamation on extraordinary occasions convene the Legislature at the Seat of Government, or at a different place, if that should be in the actual possession of a public enemy." He retained the power to adjourn both houses, but "not beyond the day of the next regular meeting of the Legislature."

The comparable section of the 1866 Constitution remained unchanged except for adding another reason for convening the legislature outside Austin: "if that [city] shall be dangerous by reason of disease. . . ."

The Constitution of 1869 resembled its predecessors, except that it gave the governor "power," by proclamation on extraordinary occasions, to convene a special session. In addition, this constitution deleted the provision authorizing the governor to adjourn both houses.

The summarized *Debates* of the Convention of 1875 yield no insight into the history of the present section, which has never been amended.

Explanation

Only the governor may convene the legislature in special session, the supreme court disapproving the senate's doing so on its own to consider gubernatorial appointments in the only case found that decided the issue. (*Walker v. Baker,* 145 Tex. 121, 196 S.W.2d 324 (1946); see also the *Explanation* of Sec. 5 of this article.) The governor may of course submit any subject he wishes, and his proclamation doing so need not "state the details of legislation in order to give the Legislature jurisdiction to consider it at a special session. . . ." (Ex parte *Fulton,* 86 Tex. Crim. 149, 150, 215 S.W. 331, 334 (1919).) As a practical matter, the governor often submits draft legislation on the subjects he wants considered, usually through a member who will sponsor it.

The governor controls the agenda of a special session as to "legislation," this section prohibiting the legislature from legislating on subjects not submitted. A few early cases interpreted "legislation" broadly, invalidating a special session resolution creating a committee to investigate a subject not submitted (*e.g.*, Ex parte *Wolters,* 64 Tex. Crim. 238, 144 S.W. 531 (1912)), but for many years now the legislature has considered and adopted resolutions at special sessions on a variety of subjects not in the governor's proclamations convening the sessions, and this practice has not been challenged. (See, *e.g.*, Tex. Att'y Gen. Op. Nos. M-309 (1968) (study committee created by simple resolution); M-1167 (1972) (joint resolution petitioning amendment to United States Constitution); *cf. Ferguson v. Maddox,* 114 Tex. 85, 263 S.W. 888 (1924), discussed in the *Explanation* of Sec. 5.)

The governor's real control of a special session's agenda derives from his veto power (see Secs. 14 and 15 of Art. IV), with which he can disapprove bills passed on subjects not submitted, and not from this section. This is because the legislature's compliance or noncompliance with Section 40 is shielded from judicial review, and thus enforcement, by the enrolled bill doctrine. Simply stated, this doctrine forbids

the courts from going behind an enrolled bill (*i.e.*, a bill that has passed both houses, has been approved by the governor, and that appears regular on its face) to see whether the legislature complied with the various procedural rules (like Sec. 40) imposed on the legislative process by the constitution. The enrolled bill doctrine is discussed in the *Explanation* of Section 12, and suffice it here to note that Texas courts have applied the doctrine generally since the last century and have applied it specifically to shield noncompliance with Section 40. (See *City of Houston v. Allred,* 123 Tex. 334, 71 S.W.2d 251 (1934); *Maldonado v. State,* 473 S.W.2d 26 (Tex. Crim. App. (1971).) The courts' application of the enrolled bill doctrine to Section 40 should not imply that the legislature regularly legislates on subjects not submitted to the governor. As noted, the veto is always a threat, but more important is the legislature's responsibility to obey the constitution, which it enforces in this instance by parliamentary rule, noncompliance with Section 40 being subject to point of order objection.

The increasing number of special sessions of the Texas Legislature (as the *Author's Comment* to Sec. 5 notes, the 11 legislatures meeting between 1951-1971 held 17) is of course symptomatic of society's increasing complexity and state government's increasing involvement in it.

Comparative Analysis

In all states the governor has power to call special sessions. In North Carolina he does so "by and with the advice of the Council of State," consisting of certain elected executive officers. The legislatures of at least 22 states now have the power to call themselves into special sessions. A dozen or so states authorize the governor to call the senate into session alone. In Alaska the governor may convene either house.

Approximately 21 states limit the special session to the subject matter specified by the governor. With one exception these are states in which only the governor may convene a special session. The exception, Arizona, permits the governor to convene the legislature to consider a specified subject, but two-thirds of the members of each house can force a special session with no limitation on subject matter.

The President of the United States may "convene both houses [of congress], or either of them," but he has no power to limit the subject matter considered. Under the *Model State Constitution* a special session may be called by the governor or by the presiding officer of each house upon the written request of a majority of its members.

Thirty-five states have no limit on the length of a special session. The *Model State Constitution* has no limit either.

During 1970-71 special sessions were numerous, with 14 states holding them in 1970 and 20 in 1971. Florida and West Virginia each had two, and Missouri three, in 1970. Florida and Montana each had two in 1971. (Council of State Governments, *The Book of the States, 1971-72* (Lexington, 1972), p. 52.)

Approximately 23 states authorize the governor to adjourn the legislature in case of disagreement. About six states require a certificate of disagreement, but only Oklahoma calls for a certificate from the house first moving adjournment. In Colorado it is the house last moving adjournment that must certify; in Alaska and Rhode Island, either house; and in Arkansas, both houses. In most of the 23 states the governor is limited only by the prohibition against adjourning beyond the beginning date of the next regular session, but in a few states there are specific limitations such as not exceeding four months. The President of the United States, in the case of disagreement, may adjourn congress "to such time as he shall think proper." There is no comparable provision in the *Model State Constitution.*

Author's Comment

If the legislature is allowed to prescribe its own meeting times, as recommended in the *Author's Comment* on Section 5, the issue of legislative power to convene itself in special session should quickly become moot because the legislature may so order its business to prevent "emergencies" from occurring. Provision probably should be made for true emergencies occurring between statutorily prescribed sessions (although judging from congressional experience continuous sessions may eventually become a reality for state legislatures, too) and, as noted, Section 4.08 of the *Model State Constitution* permits either the governor or both houses of the legislature by majority vote to convene special sessions.

The questions of whether special sessions should be of constitutionally prescribed (limited) duration and who should control their agenda are also answered in terms of the basic issue: how to treat legislative sessions in the constitution? If the legislature is to be allowed to prescribe the frequency and duration of its regular sessions by law, surely it should be entrusted with responsibility to convene itself by simple majority vote in special session, consider what is necessary, and meet as long as necessary to deal with the emergency. If, on the other hand, a new constitutional convention opts for regular sessions of limited duration, it should nevertheless consider permitting the legislature as well as the governor to convene special sessions, perhaps upon two-thirds or three-fourths vote of each house and perhaps only to consider subjects submitted with the vote to convene.

The automatic postveto session, by which the legislature reconvenes to consider legislation vetoed by the governor after adjournment, is discussed in the *Author's Comment* on Article IV, Section 8.

Section 40 of this article of course belongs with the other sections dealing with legislative sessions (Secs. 5 and 24 of this article, Sec. 8 of Art. IV), and all should be consolidated if retained.

Sec. 41. ELECTIONS BY SENATE AND HOUSE OF REPRESENTATIVES. In all elections by the Senate and House of Representatives, jointly or separately, the vote shall be given viva voce, except in the election of their officers.

History

The Constitution of the Republic provided that "All elections by joint vote of both Houses of Congress shall be viva voce, shall be entered on the journals, and a majority of the votes shall be necessary to a choice." The Constitution of 1845 provided for a viva voce (voice) vote in both joint and separate elections by the senate and house, except in the election of their officers, but eliminated the journal record requirement. The present wording has remained unchanged since 1845.

Explanation

Before adoption of the Seventeenth Amendment to the United States Constitution in 1913, U.S. Senators were elected by state legislatures, and this section was aimed at ensuring a public vote for these elections. Today of course senators are popularly elected, and the only officers presently elected by the legislature, other than its own officers, are the governor, lieutenant governor, and other executive officers named in Article IV, Section 1, in case of a tie popular vote or contested election, and the governor and lieutenant governor if either dies or becomes totally incapacitated before qualifying. (See Art. IV, Sec. 3; Election Code art. 8.46.)

"Viva voce" means literally living voice, but the distinction the section makes is between secret ballot, which is permitted only to elect legislative officers, and public

voting. The secret ballot exception for election of officers is to prevent a vindictive winner from punishing members who voted against him.

Strictly speaking the officers of the legislature are the lieutenant governor, who presides over the senate and is popularly elected; the president pro tempore of the senate, who is elected by the senators and presides when the lieutenant governor is absent; and the speaker of the house, who is elected by the representatives. (The elected speaker is authorized to appoint a speaker pro tempore by the house rules. Tex. H. Rule 1, Sec. 11 (1973).) The parliamentarian, chief clerk, and sergeant at arms of each house, and the senate secretary, are often referred to as officers, but they are actually employees of their respective houses, although the senate rules designate them officers (Tex. S. Rule 7 (1973)).

Section 41 does not prevent the use of a voting machine. The house has used one for years, but the senate still votes viva voce.

Comparative Analysis

Approximately two-thirds of the states specify that legislative elections shall be by ballot, and about one-third of these require secret ballot. A dozen or so states specifically authorize the use of voting machines.

The United States Constitution has nothing comparable and the *Model State Constitution* simply instructs the legislature to provide for "the administration of elections" by law.

Author's Comment

This section should be retained not only to ensure a public vote to break ties in gubernatorial (and other) elections (if Art. IV, Sec. 3, is preserved), but also to permit a secret ballot in legislative officer elections. In fact, consideration should be given to *requiring* secret election of officers by this section. Recent experience in house speaker elections point up the desirability of this kind of requirement, and although a secret ballot will not prevent abuse of power, it will encourage uncoerced voting by discouraging reprisal.

Sec. 43. REVISION OF LAWS. The first session of the Legislature under this Constitution shall provide for revising, digesting and publishing the laws, civil and criminal; and a like revision, digest and publication may be made every ten years thereafter; provided, that in the adoption of and giving effect to any such digest or revision, the Legislature shall not be limited by sections 35 and 36 of this Article.

History

Sections commanding periodic statutory revision have appeared in all earlier constitutions, with that of the Republic being the most specific:

> So soon as convenience will permit, there shall be a penal code formed on principles of reformation, and not of vindictive justice; and the civil and criminal laws shall be revised, digested, and arranged under different heads; and all laws relating to land titles shall be translated, revised, and promulgated.

The exception of law revision bills from the subject/title and amendment/revival rules of Sections 35 and 36 originated in the present constitution.

Explanation

Until 1963 statutory revision in Texas was haphazard. Although a new Penal Code and Code of Criminal Procedure were enacted in 1856, the statutes at large

were neither digested nor revised by the state until 1879. Thereafter similar bulk revisions were completed in 1895, 1911, and most recently in 1925.

A "bulk" revision as distinguished from "topical" revision deals with all or nearly all the state's statutes, rearranging them into logical order and into a uniform format and culling out inoperative, inconsistent, and confusing provisions. The resulting revision is then reenacted by the legislature and becomes the law, superseding all of its source statutes. (See *American Indemnity Co. v. City of Austin,* 112 Tex. 239, 246 S.W. 1019 (1922). A digest or compilation, on the other hand, merely rearranges the statutes into logical order to facilitate their consultation; a compilation is not reenacted and is not the law, although commerical compilations are usually accurate copies of the statutes and are customarily relied on by the bench and bar. (See Pool, "Bulk Revision of Texas Statutes," 39 *Texas L. Rev.* 469 (1961).)

The legislature in 1963 created a permanent statutory revision program, to be carried on by the Texas Legislative Council, that will recodify all Texas statutes of a general and permanent nature into 26 topical codes and then keep them up to date on a continuing basis. (See Tex. Rev. Civ. Stat. Ann. art. 5429b–1.) Under this program a Business & Commerce Code and Water Code have already been enacted, and codifications of statutes dealing with alcoholic beverages, parks and wildlife, and natural resources are in progress. (An Education Code has also been enacted, but it was prepared by a gubernatorial committee, not the Legislative Council. See Freeman, "The Texas Legislative Council's Statutory Revision Program," 29 *Texas Bar Journal* 1021 (1966).)

Throughout the state's history various substantive revisions or reforms of the statutes dealing with a particular topic have been undertaken. Unlike bulk revision or recodification, statutory reform seeks to improve the substance and operation of statutory law, often by repealing many existing statutes and drastically altering the remainder. The first example of statutory reform in Texas was the Penal Code and Code of Criminal Procedure of 1856; the most recent example is the Penal Code enacted by the 63rd Legislature. (For a history of statute law reform, see Comment, "Substantive Law Revision in Texas," 37 *Texas L. Rev.* 740 (1959).)

Why the 1875 Convention thought it necessary to except law revision bills from the requirements of Sections 35 and 36 is difficult to guess. (See the *Explanation* of those sections.) Perhaps they feared a bill containing a major law revision would be considered to contain many subjects, one for each topic of the statutes included in the revision, and thus violate the unity-of-subject requirement of Section 35. But why they thought law revision bills needed exemption from the amendment or revival by reference prohibition of Section 36 defies speculation.

In the leading case on the effect of a law revision act, the Texas Supreme Court followed the decisional law of the great majority of American jurisdictions by holding that a bulk revision (the Revised Statutes of 1911) was the statute law of the state, that it repealed any statutes omitted, and that it completely replaced the 1895 revision and all statutes enacted since then. To the objection that the title of one of the revision's source statutes was defective under Section 35 of this article, the court held that the title of the revision "cured" any title defect in the source statutes, quoting this section in passing, and a few pages later giving the real reason for its decision:

> To say that the citizen, in order to know the law by which his rights are to be determined, must go through the many volumes of session laws enacted by nearly 40 different Legislatures, and examine the original acts, including the [titles] and repealing acts and clauses, is not to be seriously considered. . . . (*American Indemnity Co. v. City of Austin,* 112 Tex. 239, 251, 246 S.W. 1019, 1025 (1922). See generally C. Dallas Sands,

Sutherland Statutory Construction, 4th ed. (Chicago: Callaghan & Co., 1972), vol. 1A, ch. 28.)

Comparative Analysis

Four states, including Texas, provide for the revision of their statutes every ten years, while one state, Alabama, requires a revision every 12 years and is the only other state found that excepts revisions from the subject/title requirement. Arkansas provides for the revision, digest, and publication of laws at such times and in such manner as the legislature directs. Michigan authorizes the legislature to provide for the compilation of laws, arranged without alteration under appropriate headings, while South Carolina provides for a commissioner to index and arrange statutes when passed, codify the general statutes, and then report to the legislature at the end of every period not exceeding 10 years.

Both the United States Constitution and the *Model State Constitution* are silent on this subject.

Author's Comment

This section's single mandate was carried out in 1879, and of course the legislature has power to revise the statutes without constitutional authorization.

Does the section's third clause, containing the exception, merit retention? Only one other state, Alabama, has it, and the exception for law revision bills in its constitution is only from the subject/title requirement, making the Texas exception from the amendment or revival by reference prohibition unique and, as already noted, meaningless. It is safe to assume today that Texas courts, like their counterparts in the great majority of jurisdictions whose constitutions do not contain either exception, would uphold the title of a law revision act in the absence of this section if it specified the single subject of law revision. (See, *e.g.*, Ex parte *Jimenez*, 159 Tex. 183, 317 S.W.2d 189 (1958); *Sutherland*, sec. 28.06.)

Sec. 44. COMPENSATION OF PUBLIC OFFICERS, SERVANTS, AGENTS AND CONTRACTORS; EXTRA COMPENSATION; UNAUTHORIZED CLAIMS; UNAUTHORIZED EMPLOYMENT. The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law.

History

This section dates from the Constitution of 1845. The original section had a proviso preserving claims against the Republic. This was dropped from the section in the Constitution of 1869. The only substantive change made by the 1875 Convention was to add the final restriction on employment. This was a floor amendment adopted by voice vote. (See *Journal*, p. 268.) The action took place on October 1, 1875, a day which Professor McKay characterized as "without debates." (*Debates*, p. 134.) Thus it is unknown whether the addition was aimed at some evil that had arisen under the Reconstruction Constitution, whether the delegate who offered the amendment was closing an imagined loophole, or whether there was some other reason. Whatever the reason, it must have been noncontroversial.

Art. III, § 44

Explanation

On its face this section governs compensation and payments by the state whereas Section 53 of this article governs compensation and payments by political subdivisions. The two sections differ in two respects that, under some circumstances, would lead one to believe that there were different meanings intended. One difference is the prohibition against employing anyone without pre-existing authority. As noted previously, this was added to Section 44 on the floor of the 1875 Convention; it was not added to Section 53. The other difference is the requirement in Section 44 of authorization by "pre-existing law" and in Section 53 only of "authority of law."

In his comprehensive article on fiscal and constitutional limitations in contracting with the state of Texas, Stephen D. Susman notes the second difference but concludes that it was not purposeful because Section 44 dates from the 1845 Constitution whereas Section 53 was added in 1875. (The article is part of a symposium on contracting with the state of Texas. Mr. Susman's article is titled "Fiscal and Constitutional Limitations," 44 *Texas L. Rev.* 106 (1965). His analysis of Section 44 is so comprehensive that only a summary explanation will be offered here. His discussion concerning the differences between Sections 44 and 53 appears on pages 129-30.)

Not only is no difference between the sections recognized by the courts, they sometimes rely on both sections in the same case or use Section 53 cases for precedent in a Section 44 case or vice versa. Notwithstanding this somewhat sloppy practice of indiscriminate citing of sections, the two are discussed separately in this annotation.

The first half of the section is straightforward and clear, so much so that there has been almost no litigation concerning it. (For a recent case where the State unsuccessfully invoked Sec. 44, see *The University of Texas System v. Robert E. McKee, Inc.*, 521 S.W.2d 944 (Tex. Civ. App.—Eastland, 1975, *writ ref'd n.r.e.*).) The section prohibits paying an extra amount for services performed or supplies contracted for. This is a prohibition that creates no problem except in the case of a desire to increase the pensions of employees after they have retired. (See *Author's Comment* following this *Explanation.*) There also appears to have been no problem of employing someone in the absence of a pre-existing law.

The principal difficulty arises from the prohibition against payment in the absence of pre-existing law. Under ordinary circumstances this is not too different from the normal rules for doing business with the government. In the world of private business one can normally rely upon a promise by a representative of a business because the common law recognizes an agent's apparent authority to commit his principal. In the case of government business, there can be no reliance on apparent authority. But this is not so bad as it seems, for the authority of government agents is a matter of law and the law is available to the public. If a law authorizes the Widget Department to purchase widgets only after advertising for bids and only to the lowest responsible bidder, a widget manufacturer can hardly complain if his negotiated contract is repudiated. Likewise, if an appropriations bill authorizes the purchase of ten widgets and appropriates $10,000 for them, a businessman can satisfy himself that a government purchasing agent has no power to buy ten widgets for $15,000.

In theory and to a considerable degree in practice, Section 44 is defensible. People doing business with the government may have to rely on more legal advice than when dealing with private parties, but this is only an added cost of doing business with the government, a cost normally passed on to the government. Yet there can be inequities. Consider the emergency situation. *State v. Ragland Clinic-*

Hospital involved a medical bill for services for treating a man who had been shot accidentally by an agent of the Liquor Control Board. The agent took the man to the hospital and promised that the state would pay the bill. The promise was no good. "[No] one has authority to make a contract binding on the State except where he is authorized so to do by the Constitution or a pre-existing statute." (138 Tex. 393, 395, 159 S.W.2d 105, 106 (1942).) Obviously an emergency room physician can hardly be expected to refuse treatment until the hospital's counsel is reached for an opinion. Indeed, the physician could hardly refuse treatment if his counsel told him the promise was no good. Of course, the state can put a statute on the books covering emergencies, but can the legislature anticipate all emergencies? In any event, the real issue is whether the constitution should forbid subsequent payment of a just bill. (See *Author's Comment* following this *Explanation.*)

Another situation, discussed by Mr. Susman, is that of the misleading pre-existing law. He cites a situation where a statute gave contracting authority to an agency but the attorney general ruled that the contractor could not be paid because a later statute dealing with another matter repealed the pre-existing authority by implication. (*Susman,* pp. 137-38.)

Section 44 states that no money may be paid out for any claim unless there was pre-existing authority. This destroys the ancient common law rules of *quantum meruit,* restitution, and unjust enrichment. Ordinary people may be able to get out of contracts for good legal reasons, but they usually have to pay a fair price for anything that they have received and cannot return, or return it if that is appropriate, or give up an unjust windfall. Under Section 44 the state keeps its ill-gotten gains and pays nothing.

The most significant consequence of a Section 44 problem was the adoption of Section 23-a of Article III.

Comparative Analysis

See *Comparative Analysis* of Section 53.

Author's Comment

It is worth noting at some place—this is as good as any—that the economists tell us that there is no such thing as a free lunch. All these restrictions against paying out public moneys mean that someone does not receive money that he deserves. In many of the cases the government ends up with a "free lunch" but some citizen or corporation—poor or rich—ends up having paid for the "lunch."

Except for the reason discussed below, the difficulties under Section 44 evaporate if the section ends at the semicolon. The government would then stand on the same footing as the public—subject to ordinary contract law.

Retention of the first half of Section 44 could create a problem if the state or any of its political subdivisions decided to do something about inequities in a pension system. Many employers, both government and private, recognize the erosion of pensions of retired employees and from time to time make cost-of-living adjustments. In the case of a government the adjustment can be defended as an expenditure for a public purpose. It is not easy to defend the adjustment in the case of a Section 44 prohibition against extra compensation.

In sum, one must conclude that Section 44 may prevent corrupt feeding at the public trough but equally may prevent expenditures that are wholly justifiable.

Sec. 45. CHANGE OF VENUE IN CIVIL AND CRIMINAL CASES. The power to change the venue in civil and criminal cases shall be vested in the courts, to be

exercised in such manner as shall be provided by law; and the Legislature shall pass laws for that purpose.

History

The court's power to change venue was first mentioned in the Constitution of 1845; it was lumped together with a provision for penitentiaries in a section that read: "The Legislature shall provide for a change of venue in civil and criminal cases; and for the erection of a Penitentiary at as early a day as practicable." (Art. VII, Sec. 14.) The venue-changing provision probably was considered necessary because of the belief that courts had no common-law power to change venue. (See *Rogers v. Watrous,* 8 Tex. 62 (1852).)

The section was retained with no change through the 1861 and 1866 Constitutions (Art. VII, Sec. 14), and in 1869 the only change was deletion of the portion relating to erection of a penitentiary (Art. XII, Sec. 10). The more verbose language now in effect was drafted by the 1875 Convention. It provides a classic illustration of why a simple, straightforward command is all that is necessary: the courts have held that the 38 words of the present longer version mean exactly the same thing as the 14 words of the 1845 version. (*Buchanan v. Crow,* 241 S.W. 563 (Tex. Civ. App.—Austin 1922, *no writ*).)

Explanation

This section undertakes three tasks: (1) to give courts power to change venue, (2) to authorize the legislature to regulate the method by which that power is exercised, and (3) to direct the legislature to do so. The Texas courts to some extent have thwarted the first of those objectives by holding that courts have no power to change venue unless a statute authorizes them to do so. (*Humphrey v. Rawlins,* 88 S.W.2d 776 (Tex. Civ. App.—Dallas 1935, *no writ*).) Thus, the section has been interpreted as if it read "the courts shall have such power to change venue as the legislature may provide."

On the other hand, the authority of the legislature to restrict the courts' venue-changing power has been limited by federal court decisions. The Supreme Court has held that a state court must grant a change of venue in a criminal case if such a change is necessary to ensure the defendant a fair trial. (*Irvin v. Dowd,* 366 U.S. 717 (1961).) The lower federal courts have been even more specific, holding that a Texas court must order a change of venue in a criminal case, if necessary for a fair trial, even if a state statute forbids it. (*Mason v. Pamplin,* 232 F. Supp. 539 (W.D. Tex. 1964).) Thus, in some cases, the courts must exercise venue-changing power in criminal cases irrespective of statute. Section 45 therefore is not fully effective in authorizing the legislature to regulate changes in venue.

The third objective of the section—the directive to the legislature to pass laws regulating changes of venue—has fared better. In civil cases, the legislature has delegated this power to the Texas Supreme Court, which has promulgated rules governing changes of venue. (See Rules of Civil Procedure, rules 255, 257-61.) In criminal cases, the legislature itself has prescribed the rules governing the manner in which courts exercise their venue-changing power. (Code of Criminal Procedure arts. 31.01-31.07.)

Another section of the constitution prohibits the legislature from passing local or special laws changing venue in civil or criminal cases. (See the Annotation of Art. III, Sec. 56.)

Comparative Analysis

Most state constitutions simply do not mention the subject of venue. Neither

the federal constitution nor the *Model State Constitution* mentions it.

About 15 state constitutions do mention the subject, and about ten of those give the courts power to change venue, subject to regulation by the legislature. About five states describe constitutionally some of the circumstances under which a change of venue should be granted. (See, *e.g.*, Maryland Constitution Art. IV, Sec. 8.)

About half of the state constitutions prohibit the legislature from changing venue by local or special law.

Author's Comment

There is little reason to retain this section. As pointed out in the preceding *Explanation,* it has not succeeded in giving courts venue-changing power irrespective of statute, but neither does it prevent courts from exercising that power in the absence of statute. The subject of venue is thoroughly covered by statute and rule, so deletion of this section would not change existing practice.

If the section is retained, the more concise language of the 1845 version should be used.

Sec. 47. LOTTERIES AND GIFT ENTERPRISES. The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other States.

History

Article VII, Section 17, of the Constitution of 1845 contained this provision:

> No lottery shall be authorized by this State; and the buying or selling of lottery tickets within this State is prohibited.

An identical prohibition is found in the Constitutions of 1861, 1866, and 1869.

In 1874 and 1875 the Texas Supreme Court decided the cases of *State v. Randle* (41 Tex. 292 (1874)) and *Randle v. State* (42 Tex. 580 (1875)). In those cases the Galveston Gift Enterprise Association attempted to avoid prosecution under the Penal Code article prohibiting lotteries on the grounds that conduct constituting the establishment of a lottery was not defined by the Code; that the legislature had licensed their operation by authorizing an occupation tax on gift enterprises; that religious and charitable organizations freely conduct lotteries; and that everyone who received a ticket received something of value. The court affirmed the conviction, citing cases in other states and treatises for a definition of lottery as "a scheme for the distribution of prizes by chance." The court also chastised religious and charitable organizations for employing unlawful means to achieve worthy ends, condemned novel subterfuges and evasions of conventional lottery rules in an attempt to avoid prosecution, and held that the legislature had no power to legalize lotteries by imposing a tax on "gift enterprises."

The activities giving rise to this case are probably the source of the resolution offered by Mr. DeMorse that became the present Section 47. (*Journal,* p. 139.) Other resolutions offered restatements of the prior constitutional language. (*Journal*, pp. 51-52, 65, 390.) An amendment was offered to add the words "and shall pass laws prohibiting gambling of every character in all places," but this amendment failed. (*Journal*, p. 269.) Curiously, an amendment was adopted on third reading striking everything after the word "State," but the engrossed constitution failed to make this deletion. (See *Journal,* p. 504. This may be a

mistake in the *Journal.*) A slight rewording of DeMorse's resolution was adopted as Section 47. No amendment to the section has been submitted to the voters since the constitution was ratified.

Explanation

One plausible reading of this section is that the legislature is directed (1) to prohibit the establishment of lotteries and gift enterprises in Texas and (2) to prohibit the sale in Texas of tickets for lotteries, gift enterprises, or other evasions involving the lottery principle existing in other states.

However, the courts have given a broader interpretation to these directions. In *Castilleja v. Camero* (414 S.W.2d 424, 430 (Tex. 1967)), Justice Pope tabulates the section as follows:

> The Legislature shall pass laws prohibiting the [1] establishment of lotteries and gift enterprises in this State, [2] as well as the sale of tickets in lotteries, gift enterprises or [3] other evasions involving the lottery principle, established or existing in other States.

Even though the section is apparently not self-executing the courts have cited it as stating public policy, and in *City of Wink v. Griffith Amusement Co.* (129 Tex. 40, 100 S.W.2d 695 (1936)), said that even though only lotteries are covered by the Penal Code, effect must be given to the language of this section so that "gift enterprises" and "other evasions" are also prohibited. The court denied Griffith an injunction against enforcement of a local ordinance aimed at stopping "bank night" at a local theatre on the ground that a party guilty of violating this public policy does not have "clean hands." (Actually, the ordinance was void because it conflicted with a state penal statute.)

In *Barry v. State* (39 Tex. Crim. 240, 45 S.W. 571 (1898)), the court reasoned that a tax on the carnival games of pitching rings or throwing balls cannot authorize a lottery. Likewise, the attorney general has ruled that the legislature may not exempt churches, veterans' organizations, or other nonprofit charitable organizations from prosecution under the lottery provisions of the Penal Code. (Tex. Att'y Gen. Op. No. M-964 (1971).)

The courts have decided that not all distributions of prizes by chance are prohibited, however. In *Brice v. State* (156 Tex. Crim. 372, 242 S.W.2d 433 (1951)), the court held that payment of a consideration, directly or indirectly by the participant, is an element of the lottery offense; therefore, a free drawing for prizes by a retail store where no purchase was necessary to win and no favoritism was shown customers of the store was not a lottery.

The public policy against lotteries is not so strong that it prevents Texas courts from enforcing the rights of the co-owner of a winning ticket in the Mexican National Lottery (*Castilleja v. Camero, supra*). In this case the ticket was purchased in Mexico and redeemed in Mexico, where lotteries are legal.

Comparative Analysis

Almost 30 states contain constitutional prohibitions against lotteries. Most of the more recent constitutions omit any reference to lotteries. Several states constitutionally exempt religious and other charitable organizations from their lottery prohibitions. In 1971 Virginia voters adopted a new constitution omitting a lottery prohibition and at the same election specifically repealed the lottery prohibition in the old constitution. The *Model State Constitution* does not mention lotteries.

Author's Comment

Lotteries and gambling generally are carefully defined and penalized by the new Penal Code that took effect January 1, 1974. (See Penal Code ch. 47 (1974).)

Lotteries were lawful under common law, but during the 19th century there was a nationwide movement against them resulting in widespread adoption of anti-lottery provisions in penal codes and state constitutions. Recently, New Hampshire, New York, Massachusetts, New Jersey, and Michigan have established state lotteries as a source of revenue.

With the enactment of the new Penal Code, Texas has adopted tougher anti-lottery laws than it has ever had before. The inclusion of an anti-lottery provision in the constitution adds nothing to the penal law. Moreover, if the people of Texas desire to change the policy regarding lotteries, by exempting churches and veterans' organizations for example, or by establishing a state-operated lottery, these changes should be possible without the necessity of amending the fundamental document of the state government.

Sec. 48a. FUND FOR RETIREMENT, DISABILITY AND DEATH BENEFITS FOR EMPLOYEES OF PUBLIC SCHOOLS, COLLEGES AND UNIVERSITIES. In addition to the powers given the Legislature under Section 48, Article III, it shall have the right to levy taxes to establish a fund to provide retirement, disability and death benefits for persons employed in the public schools, colleges and universities supported wholly or partly by the state; provided that the amount contributed by the state to such fund each year shall be equal to the aggregate amount required by law to be paid into the fund by such employees, and shall not exceed at any time six per centum (6%) of the compensation paid each such person by the state and/or school districts; and provided that no person shall be eligible for retirement who has not rendered ten (10) years of creditable service in such employment, and in no case shall any person retire before either attaining the age of fifty-five (55) or completing thirty (30) years of creditable service, but shall be entitled to refund of moneys paid into the fund.

Moneys coming into such fund shall be managed and invested as provided in Section 48b of Section III of the Constitution of Texas; provided a sufficient sum shall be kept on hand to meet payments as they become due each year under such retirement plan, as may be provided by law; and provided that the recipients of such retirement fund shall not be eligible for any other state pension retirement funds or direct aid from the State of Texas, unless such other state pension or retirement fund, contributed by the state, is released to the State of Texas as a condition to receiving such other pension aid; providing, however, that this Section shall not amend, alter, or repeal Section 63 of Article 16 of the Constitution of Texas as adopted November, 1954, or any enabling legislation passed pursuant thereto. (Repealed April 22, 1975. See Sec. 67 of Art. XVI.)

History

This section was added to the constitution by amendment in November 1936. Although denominated and worded as an amendment of Section 48, repealed in 1969, Section 48a actually had nothing to do with Section 48. That section was one of many which the Convention of 1875 included in a misguided effort to keep the state government from spending much money. Section 48 told the legislature that it had no right to raise money except for the "economical administration of the government," and added a laundry list of proper purposes for spending money. Except as political orators may have found the admonition effective in campaigning, the section served no function as a limitation on power. At least no court is reported to have invalidated any tax on the ground that Section 48 prohibited it.

Indeed, the supreme court once said that any tax that served a public purpose met the requirements of Section 48. (See *Friedman v. American Surety Co.*, 137 Tex. 149, 158, 151 S.W.2d 570, 577 (1941).) Section 48 was included in the bundle of superfluous sections repealed by the omnibus "clean-up" amendment adopted in 1969.

Section 48a is really an amendment of Section 51 of this article. In 1917 the State Teachers' Association began a campaign to obtain a statewide pension system. Their first effort was rejected in 1919 by the Education Committee of the Texas House of Representatives on the ground that the proposal would be unconstitutional under Section 51. That section prohibits grants to individuals, and the assumption must have been that state contributions to a retirement fund would be grants to individuals. In any event, the Teachers' Association campaigned for a constitutional amendment and succeeded with the adoption of Section 48a. (See Swanson and Miskell, *Public Employee Retirement in Texas* (Austin: Institute of Public Affairs, The University of Texas, 1955), pp. 1-2) The section was amended twice—in 1956 and in 1968.

The original Section 48a provided that the state had to contribute an amount equal to the contribution of the employee but that the legislature could not allow the employee to contribute either more than 5 percent of his salary or more than $180.00 a year. The first amendment to the section increased the maximum percentage to six and the maximum amount to $504.00. The second amendment eliminated the annual maximum so that total salary was subject to a 6 percent maximum contribution to be matched by the state.

The original section also provided that no pension could be paid to a person unless he had 20 years of creditable service but that any person not entitled to a pension would receive a refund of his contributions. The first amendment changed the eligibility rules to require 30 years of service or attainment of age 55. Coverage also was broadened to add disability and death benefits to retirement pensions. The second amendment added the requirement for a minimum of ten years of service in any event.

Finally, the original section required that the retirement fund be invested in government bonds. The first amendment loosened up this restriction by permitting investment "in such other securities as are now or hereafter may be permitted by law as investments for the Permanent University Fund or for the Permanent School Fund. . . ." This was superseded by Section 48b adopted in 1965. The second amendment conformed Section 48a to Section 48b.

Section 48a and all other sections dealing with pensions were repealed on April 22, 1975, when the voters adopted an amendment to replace these several sections. The new pension provision is Section 67 of Article XVI. For reasons discussed in the *Explanation* of Section 67, it is appropriate to retain the annotations of the repealed sections.

Explanation

Section 48a appears to have served two constitutional purposes: (1) to obtain the power to provide pensions and (2) to create a pension right that could not be taken away be statute. As noted above, a statutory retirement program was once turned down because of the prohibition of Section 51, and one must assume that the original Section 48a was propoosed by the 44th Legislature because of this prohibition. The problem is that the 45th Legislature, which passed the Teacher Retirement System bill, also passed the State Firemen's Relief and Retirement Fund bill, for which there was no preceding specific constitutional authorization. The 45th Legislature evidently did not view Section 51 as an obstacle to the firemen's fund.

Part of the confusion may have grown out of the case of *Byrd v. City of Dallas* (118 Tex. 28, 6 S.W.2d 738 (1928)). That case upheld a city pension plan authorized by a statute passed in 1919, the same year that the teachers' proposal was turned down on constitutional grounds. The Dallas plan was attacked both as violating the extra compensation prohibition (Secs. 44 and 53 of this article) and the "grants" provisions (Secs. 51 and 52 of this article). The court's answer was that a pension plan instituted for present employees and payable when they retire is a part of current compensation. It also was argued that it would be invalid to award full pensions to policemen and firemen who retired after the minimum of 20 years but whose service included many years before there was a plan. The court noted that the relationship between contributions to the fund and pensions might be unequal but stated that this was a matter of legislative wisdom and not power. It may be that the 1935 and 1937 legislatures felt secure with the *Byrd* case in backing pensions for local governments but unsure about state pension plans.

Even if the *Byrd* case had been accepted as supporting any retirement plan, employees still would have an interest in a constitutional provision concerning pensions. Over the years the courts have built up a confusing body of law that, in many states, allows the government to renege on what would appear to many to be vested contractual rights. Some people may believe that Section 48a gave teachers vested rights. This is undoubtedly true as to money in the retirement fund. It was not so clear that the legislature had any obligation to keep adding to the fund or to preserve the law that required employees to contribute to the fund. Section 48a was a grant of power with certain limitations on the power; it was not a limitation on the discontinuance of the use of the power. (See *Author's Comment* below and the Annotation of the new Sec. 67 of Art. XVI.)

Subsection (a) of Section 62 of Article XVI, added in 1946, tracked Section 48a in authorizing a retirement system for state employees. In 1949 the legislature passed a bill authorizing transfer of credited service from one system to the other. The supreme court struck this down. (*Farrar v. Board of Trustees,* 150 Tex. 572, 243 S.W.2d 688 (1951).) The court italicized the words "persons employed" in the first sentence of Section 48a and the words comprising what is now the second proviso of the second sentence. The court relied on the words "persons employed" to rule that the legislature had no power to permit transfer of credited service between the two similar plans. (Sec. 63 of Art. XVI "overruled" the *Farrar* case.)

The only other case of any significance construing this section is *Woods v. Reilly* (147 Tex. 586, 218 S.W.2d 437 (1949)). The case involved the common option whereby a pensioner can accept a smaller pension for the rest of his life in return for a continuation of the pension to another person, normally the pensioner's spouse. The supreme court was faced with the literal wording of the section as it then existed: ". . . a Retirement Fund for persons employed in public schools, [etc.] . . ." The court found a way around this by distinguishing between the right to receive a pension and the method by which payment is made. This result is sensible enough, for if the reduced amount is actuarially correct the total cost of all such options is neither more nor less than full payments without options. Conceptually, the opinion leaves much to be desired; indeed, one justice specifically repudiated the distinction.

The *Woods* case also explained the meaning of the obscurely worded second proviso of the second sentence. The court said that it meant that a teacher could not get a second state pension or receive direct state aid unless he gave up the state's contribution toward his teacher's retirement. As noted above, Section 63 of Article XVI allowed transfer of credited service from the state employees' system to the teachers' system, thus effectively nullifying the restriction of the proviso

insofar as two pensions were concerned. Presumably the section continued to be operative insofar as "direct aid" was concerned. Thus, if a retired teacher's pension was so small that he had to apply for state aid, his pension would have to be cut in half. This would make his need all the greater, and presumably the amount of state aid would be increased. This is known as "robbing Peter to pay Paul."

Early in 1975, before the new Section 67 was adopted, the decision was made to increase the pensions of retired teachers and state employees. On the face of it, this proposal would seem to fly in the face of Section 44 prohibiting extra compensation after work is performed, in the face of the *Byrd* case discussed earlier, and possibly in the face of the "grants" prohibition of Section 51 of this article. In an opinion dated January 17, 1975, the attorney general neatly finessed this problem by ignoring it and concentrating on the specific words of Section 48a (and the comparable wording of Section 62 of Article XVI). The attorney general noted that Section 48a prohibited the state from contributing more than 6 percent of the compensation paid to teachers. He ruled that the state could appropriate additional funds to the retirement system to the extent that previously contributed amounts did not add up to 6 percent of compensation paid to teachers. (Tex. Att'y Gen. Op. No. H-497 (1975).)

In an opinion issued the same day, the attorney general, discussing a different question concerning teachers, revealed one of the ways in which there might be room to add to the state's contribution. In the context of the issue involved, the attorney general said that "it is our opinion that in computing the maximum allowable state contribution, the total salaries of all participating employees may be used. Since some covered employees earn in excess of $25,000 per year, it is possible that the state is not currently contributing to the maximum amount allowable under the Constitution." (See Tex. Att'y Gen. Op. No. H-498 (1975). The opinion notes that for contribution purposes the statute, as opposed to the constitution, limits the state's 6 percent contribution to compensation up to a maximum of $25,000 a year.) What is not clear from these opinions is how far back one may go in toting up 6 percent of total compensation for all teachers. As the preceding *History* points out, the state's contribution from 1937 to 1956 was limited to 5 percent of a salary of $3,600 and from 1956 to 1968 to 6 percent of a salary of $8,400. If the 1968 wording relied upon in the two opinions is effective retroactively to 1937, there might be great leeway in appropriating money to increase pensions of retired teachers. All in all, the attorney general's opinion is a masterful bit of ingenuity in getting around Sections 44 and 51 and, for that matter, Section 6 of Article XVI, prohibiting the appropriation of money for private purposes. Except in the "robbing Peter to pay Paul" situation discussed above, an increase in the pension of a retired person would normally be considered an appropriation for a private purpose, a gift, and extra compensation after work was performed. But Section 48a as of 1948 as interpreted by the attorney general can be read to "repeal" Sections 44 and 51 and, of course, Section 6 of Article XVI specifically authorizes appropriations for "individual purposes" if "authorized by this Constitution."

As a practical matter, the questions raised above are both academic and de minimis. A statute that became effective on February 13, 1975 (Tex. Laws 1975, ch. 6) provided for an increase in pensions of retired teachers but the increase was to end unless what is now Section 67 of Article XVI was adopted by the voters. This happy event occurred on April 22, 1975; thus, the increased payments under Section 48a were only for the months of February, March, and April. Payments after that are under Section 67. (See the *Explanation* of that section for a discussion of the constitutional basis for increases in the pensions of those retired.)

Since the pensions of retired teachers were miserably low, it would have been unlikely that any Scrooge would have attempted to halt the payment of this miniscule amount. In any event, no attempt was made; had it been made the attorney general's ingenious reasoning would surely have prevailed.

Comparative Analysis

See the *Comparative Analysis* of Section 67 of Article XVI.

Author's Comment

See the *Author's Comment* on Section 67 of Article XVI.

Sec. 48b. TEACHER RETIREMENT SYSTEM OF TEXAS. There is hereby created as an agency of the State of Texas the Teacher Retirement System of Texas, the rights of membership in which, the retirement privileges and benefits thereunder, and the management and operations of which shall be governed by the provisions herein contained and by present or hereafter enacted Acts of the Legislature not inconsistent herewith. The general administration and responsibility for the proper operation of said system are hereby vested in a State Board of Trustees, to be known as the State Board of Trustees of the Teacher Retirement System of Texas, which Board shall be constituted and shall serve as may now or hereafter be provided by the Legislature. Said Board shall exercise such powers as are herein provided together with such other powers and duties not inconsistent herewith as may be prescribed by the Legislature. All moneys from whatever source coming into the Fund to provide retirement, disability, and death benefits for persons employed in the public schools, colleges, and universities supported wholly or partly by the state and all other securities, moneys, and assets of the Teacher Retirement System of Texas shall be administered by said Board and said Board shall be the trustees thereof. The Treasurer of the State of Texas shall be custodian of said moneys and securities. Said Board is hereby authorized and empowered to acquire, hold, manage, purchase, sell, assign, trade, transfer, and dispose of any securities, evidences of debt, and other investments in which said securities, moneys, and assets have been or may hereafter be invested by said Board. Said Board is hereby authorized and empowered to invest and reinvest any of said moneys, securities, and assets, as well as the proceeds of any of such investments, in bonds, notes, or other evidences of indebtedness issued, or assumed or guaranteed in whole or in part, by the United States or any agency of the United States, or by the State of Texas, or by any county, city; school district, municipal corporation, or other political subdivision of the State of Texas, both general and special obligations; or in home office facilities to be used in administering the Teacher Retirement System including land, equipment, and office building; or in such corporation bonds, notes, other evidences of indebtedness, and corporation stocks, including common and preferred stocks, of any corporation created or existing under the laws of the United States or of any of the states of the United States, as said Board may deem to be proper investments; provided that in making each and all of such investments said Board shall exercise the judgment and care under the circumstances then prevailing which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as probable safety of their capital; and further provided, that a sufficient sum shall be kept on hand to meet payments as they become due each year under such retirement plan, as may now or hereafter be provided by law. Unless investments authorized herein are hereafter further restricted by an Act of the Legislature, no more than one per cent (1%) of the book value of the total assets of the Teacher Retirement System shall be invested in the stock of any one (1) corporation, nor shall more than five per cent (5%) of the voting stock of any one (1) corporation be owned; and provided further, that stocks eligible for purchase shall be restricted to stocks of

companies incorporated within the United States which have paid cash dividends for ten (10) consecutive years or longer immediately prior to the date of purchase and which, except for bank stocks and insurance stocks, are listed upon an exchange registered with the Securities and Exchange Commission or its successors; and provided further, that so long as less then $500,000,000 of said Fund is invested in the government and municipal securities enumerated above, not more than thirty-three and one-third per cent (33 1/3%) of the Fund shall be invested at any given time in common stocks. This Amendment shall be self-enacting and shall become effective immediately upon its adoption without any enabling legislation. This Section shall not alter, amend or repeal the first paragraph of Section 48a of Article III of the Constitution of Texas as amended November 6, 1956, or any legislation passed pursuant thereto. This Section shall not alter, amend or repeal the second paragraph of Section 48a of Article III of the Constitution of Texas as amended November 6, 1956, or any legislation passed pursuant thereto, except insofar as the provisions of the second paragraph of Section 48a and any legislation passed pursuant thereto, may limit or restrict the provisions hereof and only to the extent of such limitation or restriction. (Repealed April 22, 1975. See Sec. 67 of Art. XVI.)

History

This section was added in 1965. In essence it was an amendment of Section 48a as the section then read. (The 1968 amendment of Section 48a served in part to make it consistent with the new Section 48b.) It was repealed on April 22, 1975. (See *History* of Sec. 67 of Art. XVI.)

Explanation

This section served one major purpose and two minor purposes. One minor purpose was to add to the permanence of the retirement plan by giving it a title—Teacher Retirement System of Texas—and stating that it would be run by a Board of Trustees. A second minor purpose was to protect the moneys in the fund by providing that everything that came into the fund was to be administered by the Board of Trustees. (If the purpose was the major one of protecting the retirement program, Sec. 48b did not do this. See the *Explanation* of Sec. 48a.)

The major purpose of the section was to increase the investment discretion of the Trustees. (See the *History* of Sec. 48a for earlier restrictions on investments.) The limits on this discretion were spelled out in great detail. Except for the retirement system's own office headquarters, all holdings had to be in United States or Texas state or local government debt, debt guaranteed by any of these governments, or in corporate debt or stocks. (This may or may not have permitted investment in oil production payments and lease-backs, both of which have been participated in by conservative private pension funds.) Within this initial limitation, the trustees were held to the common law prudent investment rule for fiduciaries. (Any court would hold them to this rule whether Sec. 48b said so or not.) But the section restricted prudent investment in corporate stocks by defining what is "prudent" in terms of which corporations were eligible, what percentage of stock of any one corporation could be owned, and what percentage of total assets could be in common stocks.

This last restriction was a weird one. It provided that until $500 million was in government securities, no more than one-third of all assets could be in common stocks. This meant that, unless the legislature prohibited it or a court said it was not prudent, $1.22 billion of the $1.72 billion in the retirement fund as of August 31, 1971 could be in common stocks so long as the remainder was in government securities. The retirement system did not take advantage of this weird provision. As of August 31, 1971, it held only $16 million in Texas obligations and $301 million

in United States obligations. It held $380 million in corporate stock, or 22 percent. Well over 50 percent was in corporate obligations. The reason for putting only 1 percent of its assets in Texas obligations is obvious: they are tax-exempt; a tax-exempt agency like the retirement system has no incentive for holding obligations that carry a lower yield because of a tax advantage that cannot be used.

Finally, all of this limited discretion could be restricted further by the legislature. Apparently the legislature could have restricted the trustees to investment in government bonds, the restriction of the original Section 48a. There does not appear to have been any official interpretations of this section.

Comparative Analysis

No state appears to have a comparable constitutional provision. Undoubtedly many states have statutes that are comparable. (For pensions in general see *Comparative Analysis* of Sec. 67 of Art. XVI.)

Author's Comment

This section was a totally unnecessary piece of legislation that had no business in a constitution. In fact Section 48b could have ended up being positively harmful. The section was unnecessary because the legislature can do everything this section did. Without the section, of course, the legislature could have passed a statute authorizing the teachers' retirement system to invest its money in speculative cats and dogs. This seems unlikely. If it is not unlikely, the entire governmental system would be in such danger that much more than constitutional provisions like Section 48b would be required to save the state.

One of the problems growing out of this sort of detail is the probability that whatever the section permits can be done safely. "If it's constitutional, it's good." This is a mistaken, but common, notion that flows from the obvious proposition that if something is unconstitutional, it is bad. The Board of Trustees could have made a number of poor investment decisions but if the detailed rules had been followed, it would have been difficult to remove them for incompetence.

Moreover, this business of detailed rules is in itself inadvisable. Section 48b required that any stock invested in must have paid cash dividends for the preceding ten years or longer. This is an acceptable rule of thumb to be considered with all other factors but not to be adhered to rigidly. For example, a purchase of Penn Central Stock in early June 1971 would have met the requirements of Section 48b, but the railroad was on the verge of bankruptcy.

People frequently argue about whether or not a particular constitutional provision is statutory. There is one sentence in Section 48b that settles the issue: "This Amendment shall be self-enacting and shall become effective immediately upon its adoption without any enabling legislation."

Sec. 48-d. RURAL FIRE PREVENTION DISTRICTS. The Legislature shall have the power to provide for the establishment and creation of rural fire prevention districts and to authorize a tax on the ad valorem property situated in said districts not to exceed Three (3¢) Cents on the One Hundred ($100.00) Dollars valuation for the support thereof; provided that no tax shall be levied in support of said districts until approved by vote of the people residing therein.

History

This section was added in 1949. Two years later an amendment was proposed

that would have increased the permissible property tax from 3¢ to 50¢. The amendment was defeated. No statute was enacted under the grant of power until 1957. (Tex. Rev. Civ. Stat. Ann. art. 2351a-6.) As of the end of 1972, there were six fire districts in existence.

Explanation

There is no constitutional necessity for this section. The legislature could authorize the creation of rural fire prevention districts as it has authorized the creation of mosquito control districts. (See Tex. Rev. Civ. Stat. Ann. art. 4477-2.) The real purpose of Section 48-d is to add 3¢ to the maximum property tax rate that may be imposed in a county. (See the *Introductory Comment* to Article VIII.)

Only recently does there appear to have been an official interpretation of this section. In 1975, the attorney general was requested to rule on the constitutionality of two subsections of the implementing statute cited in the preceding *History*. One subsection authorizes cooperative contracts with other government units; the other authorizes a fire district to maintain an ambulance service. The resulting opinion is one of many recent examples of generous interpretation of a constitutional provision that could easily be read as a restriction on legislative power. As noted, Section 48-d exists only as a device to create additional taxing power. Although the attorney general made no reference to this constitutional quirk, he read Section 48-d as if the words "fire prevention" were not there. By reliance on various general rules—*e.g.*, there is a strong presumption of constitutionality, a legislature has all power not expressly or impliedly denied it—the attorney general, in effect, said that the legislature could let rural fire prevention districts do more than just deal with fires. It was as if the attorney general tied "fire prevention" to the power to levy a tax and excluded the words so far as the operating powers of the district were concerned. (Tex. Att'y Gen. Op. No. H-562 (1975).)

Comparative Analysis

No other state appears to have a comparable provision. Many states have fire districts, of course, but they are authorized by statute.

Author's Comment

Texas has many provisions designed to limit voting on financial issues to taxpaying voters. It is ironical that Section 48-d is not so limited. Perhaps the drafter of the amendment assumed that all of the residents of a rural fire district would be property taxpayers.

It is to be hoped that any constitutional revision will provide for a rational and realistic tax structure. In that event there will be no need for a Section 48-d. Under ordinary circumstances a legislature can provide for whatever fire fighting is necessary. No constitutional authorization is required.

Sec. 49. STATE DEBTS. No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debt; and the debt created to supply deficiencies in the revenue, shall never exceed in the aggregate at any one time two hundred thousand dollars.

History

The 1845 Constitution had a section much like Section 49 except that the maximum permissible amount of debt was only $100,000 and any borrowing

that would have increased the permissible property tax from 3¢ to 50¢. The amendment was defeated. No statute was enacted under the grant of power until 1957. (Tex. Rev. Civ. Stat. Ann. art. 2351a-6.) As of the end of 1972, there were six fire districts in existence.

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History

The 1845 Constitution had a section much like Section 49 except that the maximum permissible amount of debt was only $100,000 and any borrowing

within that limit or for defense purposes required a two-thirds vote of each house. (Art. VII, Sec. 33.) The 1861 Constitution increased the maximum to $500,000 but permitted unlimited debt above that amount provided that a specific dedicated tax sufficient to retire the debt was also enacted. The 1866 Constitution reverted to the 1845 wording. There were no restrictions on borrowing in the 1869 Constitution.

The issue of state debt was a matter of some debate in the 1875 Convention. The original committee proposal prohibited all debt except for defense purposes but proposed to limit that debt to $500,000. There was objection that this was too strict. There was also a proposal to go back to the 1845 wording. Judge Reagan, one of the leaders of the convention, offered the debt provision recently adopted in Pennsylvania as a substitute, noting that he had used $200,000 instead of the $1,000,000 limit permitted in Pennsylvania. The substitute was accepted. (*Debates,* at 114-16.) On a subsequent occasion another effort was made to take the more restrictive approach originally proposed but the convention stuck by Judge Reagan's provision (*Debates,* at 264-67), which is Section 49. (See the upcoming *Comparative Analysis* for a discussion of the new Pennsylvania section.)

In 1913 an amendment was proposed which would have changed the $200,000 limit to $500,000 and which apparently would have given the legislature unlimited power to issue bonds to acquire land and to erect buildings to provide "a complete university of the first class" and to issue bonds for buildings for the penitentiary system and for "State institutions." (The amendment was so badly drafted that it is not clear what borrowing power was intended.) The amendment was defeated. In 1919 an amendment authorizing $75,000,000 in highway bonds was defeated. The six lettered sections following Section 49 are, of course, "amendments" of the section. Sections 50b and 50b-1 of this article and Sections 17 and 18 of Article VII are also "amendments" of Section 49. There probably have been others. In 1933, for example, a section 51a was added to Article III authorizing so-called "bread bonds" for relief of the needy. This amendment disappeared in the revision of Section 51a adopted in 1945. (See *History* of Sec. 51-a.) Another example is a proposed amendment defeated in 1942. It would have authorized $2 million in bonds for state office buildings. An interesting quirk in that proposal was that all bonds were to be held by the Permanent School Fund.

Explanation

Section 49 clearly prohibits the issuance of state bonds. One way to get around this prohibition is by constitutional amendment. This has been done a great many times. (For bond issue provisions still in the constitution, see the six lettered sections that follow; also Secs. 50b and 50b-1 of this article and Secs. 17 and 18 of Art. VII.) A second method is to issue bonds that are not secured by the full faith and credit of the state. This is normally done by creating an authority which operates something that is income producing. A turnpike authority is an example. It raises money by pledging revenue from highway tolls and concessions. If revenues are insufficient, the bondholders have no recourse against the state. The Texas Supreme Court has upheld this device. (*Texas Turnpike Authority v. Shepperd,* 154 Tex. 357, 279 S.W.2d 302 (1955).)

A variation is an agency which obtains its revenue from the state rather than from the public. A common device is an authority that floats bonds to acquire buildings which are then leased to the state for an amount of rent adequate to maintain the buildings, pay the interest, and retire the bonds. A Texas example is the National Guard Armory Board. It owns armories which are leased to the state. The package has to be put together carefully, however, in order to avoid the prohibition of Section 49. The principal gimmick is to enter into a new lease every

two years. This coincides with the maximum appropriation period authorized by Section 6 of Article VIII. Thus, the state is not legally obligated beyond current appropriations. A longer commitment could be argued to be in violation of Section 49. The net result of all this is that realistically the state has floated bonds to pay for capital improvements but legally it has not. The device was upheld in *Texas National Guard Armory Board v. McCraw* (132 Tex. 613, 126 S.W.2d 627 (1939). See also Tex. Att'y Gen. Op. No. H-340 (1974).)

Section 49 does not outlaw all long-term contracts, however. For example, a contract was entered into with a publisher whereby Texas agreed to use a particular textbook for a period of five years and the publisher agreed to supply as many as were needed each year. Again, the contract was carefully worded to deny any obligation on the part of the state except to pay for the books actually ordered. In upholding the contract, the supreme court said that "Obligations that run current with revenues are not debts within the contemplation of the Constitution." (*Charles Scribner's Sons v. Marrs,* 114 Tex. 11, 22, 262 S.W. 722, 725 (1924). See also *City of Big Spring v. Board of Control,* 404 S.W.2d 810 (Tex. 1966).)

Section 49 states that "no debt shall be created." This has produced a spate of cases in which the litigants and sometimes the courts have relied incorrectly on those words. For example, the supreme court once held that an appropriation to pay back rent on a leased armory was invalid because the "chits" previously given to the armory owner by the adjutant general represented an attempt to create a debt contrary to Section 49. (*Fort Worth Cavalry Club v. Sheppard,* 125 Tex. 339, 83 S.W.2d 660 (1935).) But since the chits had been given to the owner because the adjutant general's appropriation was exhausted, the real reason for invalidity had to be the absence of the "pre-existing law" required by Section 44 of this article. If there had been no other element of invalidity, the court would not have said that this was an attempt to create a debt. Every unpaid obligation of the state is a debt, but no one would argue that every state transaction must be an instantaneous bilateral transfer of money for goods or services. What lies behind these cases is not that the state is attempting to create a debt but that the state is attempting invalidly to create an obligation. (For additional examples see *State v. Ragland Clinic-Hospital,* 138 Tex. 393, 159 S.W.2d 105 (1942); *Kilpatrick v. Compensation Claim Board,* 259 S.W. 164 (Tex. Civ. App.—El Paso 1924, *no writ*); *State v. Elliott,* 212 S.W. 695 (Tex. Civ. App.—Galveston 1919, *writ ref'd*); *State v. Haldeman,* 163 S.W. 1020 (Tex. Civ. App.—Austin 1913, *writ ref'd).)*

Notwithstanding the definite prohibition against going into debt and specific limitation of a deficit to $200,000, the state has in fact run up a deficit as high as $71,000,000. (See McCleskey, *The Government and Politics of Texas,* 3d ed., p. 287. See also the *History* of Sec. 49a of this article.) The $200,000 limitation operates only as a limit on the governor's power to authorize expenditures in excess of amounts appropriated. (See Tex. Rev. Civ. Stat. Ann. art. 4351 (1966). See also the *Explanation* of Sec. 23-a of this article.) Section 49 is not effective if more money is appropriated than is actually taken in. In 1941, the court of civil appeals upheld a large appropriation against a taxpayer's allegation that Section 49 was violated because the general fund was $27,000,000 in the red. (*King v. Sheppard,* 157 S.W.2d 682 (Tex. Civ. App.—Austin 1941, *writ ref'd w.o.m.*).) The court said that "no debt is created unless the appropriation is made or obligation is created in excess of the reasonably anticipated revenues for the year" (p. 685). This is the only way to read Section 49. Obviously, the government cannot grind to a halt while incoming revenues are used to wipe out the previous deficit. Section 49 prevents only the intentional creation of a debt.

Finally, it should be noted that Section 49 places no limit on incurring debt to

"repel invasion, suppress insurrection, or defend the State in war." The $200,000 limitation applies only to casual deficiencies. No occasion has arisen requiring use of this limited power to incur unlimited debt and there is, therefore, no authoritative interpretation of this aspect of Section 49.

Comparative Analysis

Four states (Connecticut, New Hampshire, Tennessee, and Vermont) have no constitutional debt limitations. Two states (Deleware and Massachusetts) require an extraordinary legislative vote to incur ordinary, long-term debt—three-fourths in Delaware, two-thirds in Massachusetts. The new Illinois Constitution requires either a three-fifths vote in each house or approval by referendum. Maryland has no limitation but requires the enactment of a special tax to pay the interest and to retire the bonds within no more than 15 years.

Not quite half of the states join Texas in putting some sort of absolute limitation on the amount of state debt. Some states have a limitation similar to that of Texas, thus effectively limiting debt except by constitutional amendment. Many states have a limitation expressed as a percentage of taxable property in the state. At least two states tie the limitation to the size of the state budget. One of these is Pennsylvannia, discussed below. Approximately a third of the states simply require approval by referendum but with no limit on the amount that may be so approved. A few of the states with absolute maximums require a referendum for any debt within the maximum.

In 1968, Pennsylvania repealed the provision which served as the model for Section 49. (See preceding *History*.) The new Pennsylvania provision (Art. VIII, Sec. 7) can be summarized thus:

(1) There is no limit on debt incurred to suppress insurrection or cope with natural disasters.

(2) Tax anticipation notes payable within a year from current revenues and refunding debt within the maturity period of the original debt are not limited.

(3) Beyond (1) and (2) the state may incur debt in an aggregate amount not exceeding one and three-quarters times the average of revenues for the preceding five years.

(4) Beyond (3) the state may incur debt if approved in a referendum. The legislature can provide, however, that such debt shall be counted as part of the amount permitted under (3).

One of the interesting developments in recent debt provisions is the treatment accorded revenue bonds. In the Pennsylvania provision just discussed, revenue bonds payable out of revenue received from the public or from leases of state property to local governments do not have to be counted as part of the permissible maximum debt, but revenue bonds payable out of revenue from leases to the state do have to be counted. Hawaii excepts revenue bonds in general from the constitutional limitation. (Art. VII, Sec. 3.) The new Illinois Constitution requires revenue bonds payable, "directly or indirectly, from tax revenue" to meet all the rules for incurring state debt—that is, passage by three-fifths of the members of each house or approval by referendum. (Art. IX, Sec. 9(a).)

The United States Constitution simply empowers congress to "borrow money on the credit of the United States." The *Model State Constitution* provides:

> No debt shall be contracted by or in behalf of this state unless such debt shall be authorized by law for projects or objects distinctly specified therein. (Sec. 7.01)

Author's Comment

This debt business is a frightful can of worms. There are a great many arguments, both theoretical and practical, on all sides of the subject. The first thing to note is that today and from now on the name of the game of government is "money." Notwithstanding periodic "taxpayer revolts," the trend is in the direction of an ever-increasing range of government services and a concomitant increase in the total tax take. From this it follows in theory that legislators and administrators need a maximum amount of flexibility in dealing with the fiscal needs of the state. Against this must be set the political reality that people both want government services and do not want to pay taxes. From this it follows that a legislator can satisfy both of these public wants by providing the services today and postponing payment therefor. Thus, with no limitations on incurring debt, legislators may be tempted to spend without taxing.

A second point is that state and local governments should distinguish between capital costs and current expenses. If it is ill-advised to saddle future taxpayers with the cost of today's government, it is equally ill-advised to saddle today's taxpayer with the full cost of a facility that will be enjoyed by taxpayers for 40 years into the future. From this it follows that most items with a useful life of a decade or more ought to be paid for by borrowing. But, it may be argued, with no restraints on borrowing, legislators and governors may develop "edifice complexes" and overbuild, saddling the future with unpaid-for white elephants. (It should be noted that the foregoing discussion is not applicable to the federal government. Federal fiscal policy includes manipulation of deficits to affect the economy as a whole, and in this context capital budgets and expense budgets become irrelevant.)

A third point is that constitutional restrictions on debt do not work. Bright money managers and their lawyers find ways to get around the restrictions. A case in point is that of the *National Guard Armory Board* discussed earlier. The more stringent the restrictions are, the more ingenious will be the devices to get around the restrictions. All of this is expensive. The cost of borrowing goes up as the risk increases. Remove the full faith and credit of the state and the risk of nonpayment increases.

A final point is that the referendum route is not a particularly sensible one. Whatever the bond issue to be voted upon, it is part of a larger picture that is not presented to the voters. Moreover, votes on bond issues may or may not be rational. All over the United States school budgets are voted down, not because voters are opposed to education but because the budgets are the only forum that voters have for expressing their "revolt" against taxes in general.

Out of all this, some conclusions can be drawn that are probably politically viable. First, the present method of restricting debt should be abandoned. Section 49 in effect provides only that the public shall participate in the decision-making process. This end can be served by requiring a referendum, thus avoiding constitutional amendments. Second, the referendum process, if preserved, ought not to be the exclusive method for borrowing. There should be some realistic amount that can be borrowed by legislative action without a referendum. Third, any debt limit in the constitution should be expressed not in dollars but in a relationship. The value of taxable property should not be used. It is no longer a good measure of wealth, income, or ability to pay. The Pennsylvania method of limiting debt to a multiple of state expenditures is a good one, for it relates capital needs to the level of goods and services provided. A measure that might be tried would be a percentage of the gross national product allocable to Texas. This would represent in today's economy the measure of ability to pay that property represented in an agricultural economy. Finally, some control over the use of

gimmicks to get around a debt limit ought to be included, but the strictures of the control should be proportional to the size of the debt limit. In other words, if it is made relatively easy to borrow needed money in a straightforward manner, the use of gimmicks should not be allowed, but if it is made relatively difficult to borrow money, gimmicks that are necessary to be able to operate the government should not be outlawed. In short, gimmicks should not be available to let the government look good or hide what it is doing but should be available if that is the only way to do what has to be done.

Whatever decision is made on debt limitations, it should be set forth in an article on revenue, not in the article on the legislature.

Sec. 49a. FINANCIAL STATEMENT AND ESTIMATE BY COMPTROLLER OF PUBLIC ACCOUNTS; LIMITATION OF APPROPRIATIONS; BONDS. It shall be the duty of the Comptroller of Public Accounts in advance of each Regular Session of the Legislature to prepare and submit to the Governor and to the Legislature upon its convening a statemennt under oath showing fully the financial condition of the State Treasury at the close of the last fiscal period and an estimate of the probable receipts and disbursements for the then current fiscal year. There shall also be contained in said statement an itemized estimate of the anticipated revenue based on the laws then in effect that will be received by and for the State from all sources showing the fund accounts to be credited during the succeeding biennium and said statement shall contain such other information as may be required by law. Supplemental statements shall be submitted at any Special Session of the Legislature and at such other times as may be necessary to show probable changes.

From and after January 1, 1945, save in the case of emergency and imperative public necessity and with a four-fifths vote of the total membership of each House, no appropriation in excess of the cash and anticipated revenue of the funds from which such appropriation is to be made shall be valid. From and after January 1, 1945, no bill containing an appropriation shall be considered as passed or be sent to the Governor for consideration until and unless the Comptroller of Public Accounts endorses his certificate thereon showing that the amount appropriated is within the amount estimated to be available in the affected funds. When the Comptroller finds an appropriation bill exceeds the estimated revenue he shall endorse such finding thereon and return to the House in which same originated. Such information shall be immediately made known to both the House of Representatives and the Senate and the necessary steps shall be taken to bring such appropriation to within the revenue, either by providing additional revenue or reducing the appropriation.

For the purpose of financing the outstanding obligations of the General Revenue Fund of the State and placing its current accounts on a cash basis the Legislature of the State of Texas is hereby authorized to provide for the issuance, sale, and retirement of serial bonds, equal in principle to the total outstanding, valid, and approved obligations owing by said fund on September 1, 1943, provided such bonds shall not draw interest in excess of two (2) per cent per annum and shall mature within twenty (20) years from date.

History

It was noted in the *Explanation* of Section 49 that the prohibition against debt does not prevent deficits. Professor Edmund Miller pointed out in 1916 that Texas had had a floating debt in the form of outstanding warrants at the close of six fiscal years. These ranged from almost a quarter-million dollars in 1913 to over three-quarters of a million dollars in 1895 and 1904. (Miller, p. 359.) With the coming of the Great Depression, the deficit became an annual affair. The general revenue fund ended up in the red every fiscal year from 1931 through 1944. (See Smith,

"New Financial Procedures in Texas," *State Government* (May 1947), pp. 144-45.) Section 49a was proposed in 1941 as a device designed to stop deficit financing. The amendment was adopted at the general election in 1942 by a vote of 96,418 to 72,816. Four other amendments voted upon at the same election were defeated.

Explanation

Texans say that their constitution embodies a "pay-as-you-go" philosophy. When applied to the prohibition on incurring debt, the expression is not wholly accurate. Section 49 means in effect that only the voters may put the state into debt. Section 49a is the embodiment of a "pay-as-you-go" philosophy. The section says, in effect, "Don't spend more than your income; don't slip into debt accidentally."

Actually, Section 49 embodies the same philosophy so far as the legislature is concerned. That is, in order to reserve to the people the decision on whether to go into debt, Section 49 forbids a casual deficit of more than $200,000. Section 49a is an attempt to force the legislature to obey the command of Section 49. It is this addition of an enforcement device that is evidence of devotion to "pay as you go." (One may speculate, however, that the banks (see below) that had to hold unpaid warrants were the principal proponents of the amendment. Certainly a 56.9 percent majority for adoption of Section 49a is no landslide.)

Section 49a is a typical Texas wordy provision that could be boiled down to a simple limitation: "No appropriation bill may become law unless either (a) the Comptroller of Public Accounts certifies that anticipated revenues will be sufficient to cover the appropriation or (b) the legislature, in default of such certification, passes the appropriation bill by a vote of four-fifths of the membership of each house." The first paragraph of Section 49a consists of procedural details designed to enable the legislature to know in advance how far it can go in appropriating money without increasing taxes and could have been left for statutory implementation. Likewise, many of the details in the second paragraph could have been left for statutory implementation.

In the short version above nothing is said about a "case of emergency and imperative public necessity." There is no great harm in including those words as a matter of public relations. They are not likely to be of constitutional significance. The operative control is the extraordinary majority required to pass the bill. If such a majority can be mustered they will happily include in the bill whatever reasons the constitution requires. No court will second guess such a recitation, partly because the issue is more political than judicial and partly because once a court agreed to entertain the issue, no emergency appropriations bill thereafter would become "law" until the court ratified the existence of an emergency.

The third paragraph of the section is obsolete. The purpose was to facilitate moving to a "pay-as-you-go" basis by converting the existing deficit into 20-year bonds. The bonds were never issued. "Shortly after the amendment was passed, wartime economic conditions improved the solvency of the General Revenue Fund to such an extent that its outstanding obligations could be met exclusively on a cash basis." (Anderson and McMillan, *Financing State Government in Texas* (Austin: Institute of Public Affairs, The University of Texas, 1953), p. 134.)

There have been few problems of interpretation. Early on the attorney general warned that outstanding warrants from previous years would have to be counted as obligations to be paid out of available funds when the amendment became operative on January 1, 1945. (See Tex. Att'y Gen. Op. No. 0-5135 (1943).) He also ruled that a small appropriation of $25,000 could not be spent because, probably inadvertently, no comptroller's certification had been obtained. (See

Tex. Att'y Gen. Op. No. 0-6738 (1945).) He advised the legislature that any bill proposed to be passed by a four-fifths vote should recite the rubric of imperative necessity. (See Tex. Att'y Gen. Op. No. 0-6497 (1945).) He also advised the legislature that if it appropriated money for only one year instead of a biennium, the comptroller's certificate should be tailored to one year, not two. (See Tex. Att'y Gen. Op. No. M-66 (1967). Note that this question arises because of the detail in the first paragraph of the section. No such problem arises in the short version suggested above.)

It should be noted that Section 49a does not guarantee that there will be no deficit. Indeed, as noted in the *Explanation* of Section 49, there was a $70 million deficit in 1961. The comptroller of public accounts has to make two estimates—the amount of receipts and the cost of government—well ahead of time. Neither estimate can be perfect. If either estimate runs the wrong way, a deficit can result. The practical solution to an "unconstitutional" deficit has been for banks to cash warrants but hold them until the treasurer can honor them. In return the state keeps appropriate amounts of special funds on deposit in cooperating banks. (See McCleskey, 4th ed., p. 285.)

Comparative Analysis

Several states have a "pay-as-you-go" provision, but only New Jersey relies on a comparable certification. There the governor provides it (Art. VIII, Sec. II, par. 2). The 1972 Montana Constitution simply states: "Appropriations by the legislature shall not exceed anticipated revenue." (Art. VIII, Sec. 9.) The earlier Montana Constitution said much the same thing but took more than a hundred words to do so. Three other states have a provision like the old Montana section. The 1970 Illinois Constitution provides: "Appropriations for a fiscal year shall not exceed funds estimated by the General Assembly to be available during that year." (Art. VIII, Sec. 2(b).)

Michigan's 1964 Constitution has perhaps the most interesting provision: "No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes." (Art. V, Sec. 20.)

Author's Comment

It is an instructive exercise in analysis of constitutional limitations to compare the effectiveness of the three provisions quoted above with Section 49a in preventing deficits. All except the Michigan provision are effective only as of the date of passing appropriations bills. Within that limited effectiveness there would appear on the surface to be distinctions. The Illinois provision is obviously not judicially enforceable unless perhaps the legislature goofs by failing to keep its estimates up. The Montana provision is an absolute prohibition, but again it seems unlikely that the courts could intervene unless somebody goofed. Section 49a is a bit tighter, for the person who certifies (the comptroller of public accounts) is not the person who makes the decisions to spend. (By the same token the comptroller has the power to create difficulties by underestimating revenues and overestimating program costs.) Nevertheless, there is no likely judicial review of the comptroller's certification. In short, all three provisions are unenforceable in the traditional American judicial way.

This is true of the Michigan provision as well. Although the Michigan provision states that the governor "shall" reduce expenditures whenever "it appears" that revenues will fall short, it is unlikely that a court would entertain a complaint that the governor was failing to act. Nevertheless, the Michigan provision has an edge on the other three because it it operative throughout the spending period. In short, if followed by the governor and the legislative committees the Michigan provision guarantees adherence to the rule of "pay as you go."

Sec. 49-b. VETERANS' LAND PROGRAM. By virtue of prior Amendments to this Constitution, there has been created a governmental agency of the State of Texas performing governmental duties which has been designated the Veterans' Land Board. Said Board shall continue to function for the purposes specified in all of the prior Constitutional Amendments except as modified herein. Said Board shall be composed of the Commissioner of the General Land Office and two (2) citizens of the State of Texas, one (1) of whom shall be well versed in veterans' affairs and one (1) of whom shall be well versed in finances. One (1) such citizen member shall, with the advice and consent of the Senate, be appointed biennially by the Governor to serve for a term of four (4) years; but the members serving on said Board on the date of adoption hereof shall complete the terms to which they were appointed. In the event of the resignation or death of any such citizen member, the Governor shall appoint a replacement to serve for the unexpired portion of the term to which the deceased or resigning member had been appointed. The compensation for said citizen member shall be as is now or may hereafter be fixed by the Legislature; and each shall make bond in such amount as is now or may hereafter be prescribed by the Legislature.

The Commissioner of the General Land Office shall act as Chairman of said Board and shall be the administrator of the Veterans' Land Program under such terms and restrictions as are now or may hereafter be provided by law. In the absence or illness of said Commissioner, the Chief Clerk of the General Land Office shall be the Acting Chairman of said Board with the same duties and powers that said Commissioner would have if present.

The Veterans' Land Board may provide for, issue and sell not to exceed Five Hundred Million Dollars ($500,000,000) in bonds or obligations of the State of Texas for the purpose of creating a fund to be known as the Veterans' Land Fund, Four Hundred Million Dollars ($400,000,000) of which have heretofore been issued and sold. Such bonds or obligations shall be sold for not less than par value and accrued interest; shall be issued in such forms, denominations, and upon such terms as are now or may hereafter be provided by law; shall be issued and sold at such times, at such places, and in such installments as may be determined by said Board; and shall bear a rate or rates of interest as may be fixed by said Board but the weighted average annual interest rate, as that phrase is commonly and ordinarily used and understood in the municipal bond market, of all the bonds issued and sold in any installment of any bonds may not exceed the rate specified in Section 65 of this Article. All bonds or obligations issued and sold hereunder shall, after execution by the Board, approval by the Attorney General of Texas, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchaser or purchasers, be incontestable and shall constitute general obligations of the State of Texas under the Constitution of Texas; and all bonds heretofore issued and sold by said Board are hereby in all respects validated and declared to be general obligations of the State of Texas. In order to prevent default in the payment of principal or interest on any such bonds, the Legislature shall appropriate a sufficient amount to pay the same.

In the sale of any such bonds or obligations, a preferential right of purchase shall be given to the administrators of the various Teacher Retirement Funds, the Permanent University Funds, and the Permanent School Funds.

Said Veterans' Land Fund shall consist of any lands heretofore or hereafter purchased by said Board, until the sale price therefor, together with any interest and penalties due, have been received by said Board (although nothing herein shall be

construed to prevent said Board from acceptinng full payment for a portion of any tract), and of the moneys attributable to any bonds heretofore, or hereafter issued and sold by said Board which moneys so attributable shall include but shall not be limited to the proceeds from the issuance and sale of such bonds; the moneys received from the sale or resale of any lands, or rights therein, purchased with such proceeds; the moneys received from the sale or resale of any lands, or rights therein, purchased with other moneys attributable to such bonds; the interest and penalties received from the sale or resale of such lands, or rights therein; the bonuses, income, rents, royalties, and any other pecuniary benefit received by said Board from any such lands; sums received by way of indemnity or forfeiture for the failure of any bidder for the purchase of any such bonds to comply with his bid and accept and pay for such bonds or for the failure of any bidder for the purchase of any lands comprising a part of said Fund to comply with his bid and accept and pay for any such lands; and interest received from investments of any such moneys. The principal and interest on the bonds heretofore and hereafter issued by said Board shall be paid out of the moneys of said Fund in conformance with the Constitutional provisions authorizing such bonds; but the moneys of said Fund which are not immediately committed to the payment of principal and interest on such bonds, the purchase of lands as herein provided, or the payment of expenses as herein provided may be invested in bonds or obligations of the United States until such funds are needed for such purposes.

All moneys comprising a part of said Fund and not expended for the purposes herein provided shall be a part of said Fund until there are sufficient moneys therein to retire fully all of the bonds heretofore or hereafter issued and sold by said Board, at which time all such moneys remaining in said Fund, except such portion thereof as may be necessary to retire all such bonds which portion shall be set aside and retained in said Fund for the purpose of retiring all such bonds, shall be deposited to the credit of the General Revenue Fund to be appropriated to such purposes as may be prescribed by law. All moneys becoming a part of said Fund thereafter shall likewise be deposited to the credit of the General Revenue Fund.

When a Division of said Fund (each Division consisting of the moneys attributable to the bonds issued and sold pursuant to a single Constitutional authorization and the lands purchased therewith) contains sufficient moneys to retire all of the bonds secured by such Division, the moneys thereof, except such portion as may be needed to retire all of the bonds secured by such Division which portion shall be set aside and remain a part of such Division for the purpose of retiring all such bonds, may be used for the purpose of paying the principal and the interest thereon, together with the expenses herein authorized, of any other bonds heretofore or hereafter issued and sold by said Board. Such use shall be a matter for the discretion and direction of said Board; but there may be no such use of any such moneys contrary to rights of any holder of any of the bonds issued and sold by said Board or violative of any contract to which said Board is a party.

The Veterans' Land Fund shall be used by said Board for the purpose of purchasing lands situated in the State of Texas owned by the United States or any governmental agency thereof, owned by the Texas Prison System or any other governmental agency of the State of Texas, or owned by any person, firm, or corporation. All lands thus purchased shall be acquired at the lowest price obtainable, to be paid for in cash, and shall be a part of said Fund. All lands heretofore or hereafter purchased and comprising a part of said Fund are hereby declared to be held for a governmental purpose, although the individual purchasers thereof shall be subject to taxation to the same extent and in the same manner as are purchasers of lands dedicated to the Permanent Free Public School Fund.

The lands of the Veterans' Land Fund shall be sold by said Board in such quantities, on such terms, at such prices, at such rates of interest and under such rules and regulations as are now or may hereafter be provided by law to veterans who served not less than ninety (90) continuous days, unless sooner discharged by reason of a service-connected disability, on active duty in the Army, Navy, Air Force, Coast Guard or Marine Corps of the United States after September 16, 1940 and who, upon the date of filing his or her application to purchase any such land is a citizen of the United States, is a bona fide resident of the State of Texas, and has not been

dishonorably discharged from any branch of the Armed Forces above-named and who at the time of his or her enlistment, induction, commissioning, or drafting was a bona fide resident of the State of Texas, or who has resided in Texas at least five (5) years prior to the date of filing his or her application, and provided that in the event of the death of an eligible Texas Veteran after the veteran has filed with the Board an application and contract of sale to purchase through the Board the tract selected by him or her and before the purchase has been completed, then the surviving spouse may complete the transaction. The foregoing notwithstanding, any lands in the Veterans' Land Fund which have been first offered for sale to veterans and which have not been sold may be sold or resold to such purchasers, in such quantities, and on such terms, and at such prices and rates of interest, and under such rules and regulations as are now or may hereafter be provided by law.

Said Veterans' Land Fund, to the extent of the moneys attributable to any bonds hereafter issued and sold by said Board may be used by said Board, as is now or may hereafter be provided by law, for the purpose of paying the expenses of surveying, monumenting, road construction, legal fees, recordation fees, advertising and other like costs necessary or incidental to the purchase and sale, or resale, or any lands purchased with any of the moneys attributable to such additional bonds, such expenses to be added to the price of such lands when sold, or resold, by said Board; for the purpose of paying the expenses of issuing, selling, and delivering any such additional bonds; and for the purpose of meeting the expenses of paying the interest or principal due or to become due on any such additional bonds.

All of the moneys attributable to any series of bonds hereafter issued and sold by said Board (a 'series of bonds' being all of the bonds issued and sold in a single transaction as a single installment of bonds) may be used for the purchase of lands as herein provided, to be sold as herein provided, for a period ending eight (8) years after the date of sale of such series of bonds; provided, however, that so much of such moneys as may be necessary to pay interest on bonds hereafter issued and sold shall be set aside for that purpose in accordance with the resolution adopted by said Board authorizing the issuance and sale of such series of bonds. After such eight (8) year period, all of such moneys shall be set aside for the retirement of any bonds hereafter issued and sold and to pay interest thereon, together with any expenses as provided herein, in accordance with the resolution or resolutions authorizing the issuance and sale of such additional bonds, until there are sufficient moneys to retire all of the bonds hereafter issued and sold, at which time all such moneys then remaining a part of said Veterans' Land Fund and thereafter becoming a part of said Fund shall be governed as elsewhere provided herein.

This Amendment being intended only to establish a basic framework and not to be a comprehensive treatment of the Veterans' Land Program, there is hereby reposed in the Legislature full power to implement and effectuate the design and objects of this Amendment, including the power to delegate such duties, responsibilities, functions, and authority to the Veterans' Land Board as it believes necessary.

Should the Legislature enact any enabling laws in anticipation of this Amendment, no such law shall be void by reason of its anticipatory nature.

This Amendment shall become effective upon its adoption.

History

In the 19th century the custom in the United States was to reward veterans with grants of land from the public domain. In the 20th century this inexpensive approach has not been available. (Grants of public domain were inexpensive only in the sense that no taxes had to be raised.) After World War I many states granted cash bonuses to veterans; after World War II, most states again took the bonus route. The legislature considered a Texas bonus but rejected it, obviously because of an estimated cost of half a billion dollars. (See *The Texas Constitutional Amendments of 1960* (Austin: Institute of Public Affairs, The University of Texas, 1960), p. 18.)

Section 49-b was adopted in November 1946, but no implementing statute was

enacted until 1949. Almost immediately thereafter, the amendment parade began. There were successful amendments in 1951, 1956, 1960, 1962, and 1967. Amendments were turned down in 1963 and 1965. The current section was adopted in 1973.

No useful purpose would be served by detailing the differences among the nine versions. In general, there was a steady increase in the amount of bonds authorized—from $25 million to $500 million; in the maximum interest rate that the bonds could bear—from 3 percent to a "weighted average annual interest rate, as that phrase is commonly and ordinarily understood in the bond market," not to exceed the rate specified in Section 65 of this article; and in the coverage of veterans—from "Texas veterans" of World War II to veterans who served "after September 16, 1940." The section also increased in length—from about 600 words to about 2,000 words.

Explanation

As the quoted description of a weighted average interest rate demonstrates, Section 49-b is written for, and probably by, bond attorneys. Much of the detail is constitutionally irrelevant except in the sense that changes in detail necessitate constitutional amendment. As was said concerning the 1963 amendment that failed: "The amendment is quite lengthy and, though much of it might appropriately be termed legislation by constitutional amendment, these sections are no more than an extension of the typical Texas constitutional trend." (Howard and Henry, "The Texas Constitutional Amendments of 1963," *Public Affairs Comment* (September 1963): 3.)

The essentials of Section 49-b are (1) that it authorizes the issuance of full-faith and credit bonds in the amount of $500 million, (2) that the proceeds are to be used to purchase land for resale to veterans, (3) that the program is to be administered by a three-member board chaired by the commissioner of the general land office, and (4) that any profit from the operation of the program goes into the state's general fund.

The principal implication of Section 49-b is that the program is to be self-liquidating at no cost to the taxpayer. The Texas Legislative Council in its analysis of the 1973 proposed constitutional amendments noted that the bonds and obligations under Section 49-b "have never been an expense for which tax money has been used." ("9 Proposed Constitutional Amendments Analyzed," 1973, p. 24.) In its 1967 analysis the council stated that the "program is without cost to the taxpayer." ("6 Proposed Constitutional Amendments Analyzed," 1967, p. 12.) The more precise statement in 1973 probably reflects the fact that the taxpayers pay for the operation of the General Land Office, which administers the veterans' land program.

This $500 million land program may cost the taxpayers almost nothing; it also affects relatively few veterans. As of the end of 1970 only 42,257 veterans had purchased land. (*Texas Almanac: 1972-73,* p. 607.) This is a minute percentage of eligible veterans.

Comparative Analysis

About ten states have a constitutional provision authorizing a veterans' bonus. In some cases this may have been required to get around a grants and loans prohibition. Two other states have a provision authorizing a bond issue for the acquisition of land for resale; one state authorizes appropriations for veterans' housing. Many states may have issued bonds for either a bonus or land acquisition but without having to amend their constitutions.

Art. III, § 49-c

Author's Comment

The only reason for Section 49-b is the prohibition against incurring debt. The very existence of the section with its many amendments increasing the amount of authorized bonds plus Sections 49-c, 49-d, 49-d-1, 49-e, 50b, and 50b-1 is proof enough that Section 49 should be changed to permit debt to be incurred without a constitutional amendment.

Granted that Section 49-b was necessary in the first place, there was no need to include legislative detail. The original section could have read: "The legislature is authorized to incur debt not to exceed $25,000,000 in order to provide by law for the purchase of land to be sold to veterans of the armed forces." A second sentence could have obviated future amendments: "The legislature may increase the amount of such debt if the increase is approved in a referendum held in accordance with the requirements of Article XVII, Section 1."

There is one paragraph of legislative detail in Section 49-b that not only is unnecessary but, one would hope, is ignored. This is the "preferential right of purchase" granted to the various state permanent funds. It is ridiculous for those funds to hold tax-exempt securities. The interest rate is low partly because people offset the low interest by saving on their income taxes. Since the state funds pay no income taxes there is an unjustifiable net income loss in holding bonds that carry an artificially low yield.

Sec. 49-c. TEXAS WATER DEVELOPMENT BOARD; BOND ISSUE; TEXAS WATER DEVELOPMENT FUND. There is hereby created as an agency of the State of Texas the Texas Water Development Board to exercise such powers as necessary under this provision together with such other duties and restrictions as may be prescribed by law. The qualifications, compensation, and number of members of said Board shall be determined by law. They shall be appointed by the Governor with the advice and consent of the Senate in the manner and for such terms as may be prescribed by law.

The Texas Water Development Board shall have the authority to provide for, issue and sell general obligation bonds of the State of Texas in an amount not to exceed One Hundred Million Dollars ($100,000,000). The Legislature of Texas, upon two-thirds (2/3) vote of the elected Members of each House, may authorize the Board to issue additional bonds in an amount not exceeding One Hundred Million Dollars ($100, 000,000). The bonds authorized herein or permitted to be authorized by the Legislature shall be called "Texas Water Development Bonds," shall be executed in such form, denominations and upon such terms as may be prescribed by law, provided, however, that the bonds shall not bear more than four percent (4%) interest per annum; they may be issued in such installments as the Board finds feasible and practical in accomplishing the purpose set forth herein.

All moneys received from the sale of State bonds shall be deposited in a fund hereby created in the State Treasury to be known as the Texas Water Development Fund to be administered (without further appropriation) by the Texas Water Development Board in such manner as prescribed by law.

Such funds shall be used only for the purpose of aiding or making funds available upon such terms and conditions as the Legislature may prescribe, to the various political subdivisions or bodies politic and corporate of the State of Texas including river authorities, conservation and reclamation districts and districts created or organized or authorized to be created or organized under Article XVI, Section 59 or Article III, Section 52, of this Constitution, interstate compact commissions to which the State of Texas is a party and municipal corporations, in the conservation and development of the water resources of this State, including the control, storing and preservation of its storm and flood waters and the waters of its rivers and streams, for all useful and lawful purposes by the acquisition, improvement, extension, or

construction of dams, reservoirs and other water storage projects, including any system necessary for the transportation of water from storage to points of treatment and/or distribution, including facilities for transporting water therefrom to wholesale purchasers, or for any one or more of such purposes or methods.

Any or all financial assistance as provided herein shall be repaid with interest upon such terms, conditions and manner of repayment as may be provided by law.

While any of the bonds authorized by this provision or while any of the bonds that may be authorized by the Legislature under this provision, or any interest on any of such bonds, is outstanding and unpaid, there is hereby appropriated out of the first moneys coming into the Treasury in each fiscal year, not otherwise appropriated by this Constitution, an amount which is sufficient to pay the principal and interest on such bonds that mature or become due during such fiscal year, less the amount in the sinking fund at the close of the prior fiscal year.

The Legislature may provide for the investment of moneys available in the Texas Water Development Fund, and the interest and sinking funds established for the payment of bonds issued by the Texas Water Development Board. Income from such investment shall be used for the purposes prescribed by the Legislature. The Legislature may also make appropriations from the General Revenue Fund for paying administrative expenses of the Board.

From the moneys received by the Texas Water Development Board as repayment of principal for financial assistance or as interest thereon, there shall be deposited in the interest and sinking fund for the bonds authorized by this Section sufficient moneys to pay the interest and principal to become due during the ensuing year and sufficient to establish and maintain a reserve in said fund equal to the average annual principal and interest requirements on all outstanding bonds issued under this Section. If any year prior to December 31, 1982 moneys are received in excess of the foregoing requirements then such excess shall be deposited to the Texas Water Development Fund, and may be used for administrative expenses of the Board and for the same purposes and upon the same terms and conditions prescribed for the proceeds derived from the sale of such State bonds. No grant of financial assistance shall be made under the provisions of this Section after December 31, 1982, and all moneys thereafter received as repayment of principal for financial assistance or as interest thereon shall be deposited in the interest and sinking fund for the State bonds; except that such amount as may be required to meet the administrative expenses of the Board may be annually set aside; and provided, that after all State bonds have been fully paid with interest, or after there are on deposit in the interest and sinking fund sufficient moneys to pay all future maturities of principal and interest, additional moneys so received shall be deposited to the General Revenue Fund.

All bonds issued hereunder shall after approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under the Constitution of Texas.

Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such acts shall not be void by reason of their anticipatory nature.

History

The relentless drought that gripped the state from 1950 through 1956 painfully reminded Texans that the state's welfare is vitally dependent upon adequate water resources and provided the impetus for the adoption of Section 49-c in 1957. Prior to adoption of this section there had been several unsuccessful attempts to allow more active state government participation in the water conservation business, a policy that had had some support even before the drought.

In 1949 a proposed amendment that would have empowered the state to lend its credit up to $200 million for development of water supply projects was squelched in the senate. Two years later an Interim Water Code Committee

reported that construction of necessary dams, reservoirs, and other water projects could not be accomplished by many local political subdivisions without state financial assistance; the committee recommended two amendments that would have enabled the state to underwrite water projects by guaranteeing one-third of the bonded indebtedness created by a local authority. These proposals, as well as a similar joint resolution offered again in 1953, failed to secure the required legislative support.

In response to the water problem, the legislature created the Water Resources Committee in 1953. Again it was recommended that the state provide local agencies with financial assistance to develop water projects. The committee's plan would have permitted issuance of up to $100 million in state obligations, which were to be repaid from the loan repayments by local authorities as well as the levy of a state ad valorem tax. The tax feature prevented the measure from gaining the necessary legislative support, so the 1957 resolution deleted the tax measure and provided instead for "automatic" appropriations from the state treasury in the event loan repayments were insufficient to meet debt service requirements. This self-executing appropriations provision was apparently included on the advice of investment counselors in order to secure the highest possible bond ratings and, hence, the lowest possible interest rate on water bonds sold. (See 2 *Constitutional Revision,* p. 257.)

Explanation

Like Section 49-b, this section (together with companion Sections 49-d, and 49-d-1) is an exception to the general prohibition against state debt, enabling the state, through an administrative arm, the Texas Water Development Board, to make loans to local governments sponsoring water resource "conservation and development" projects. This section establishes the board as a state agency and creates the Texas Water Development Fund, authorizes the sale of up to $200 million in general obligation bonds to finance the water projects, and prescribes the uses to which the fund may be put.

Thus far the courts have had no occasion to interpret this section or Sections 49-d and 49-d-1, although the attorney general has written a few opinions on the subject. This is not to say that these sections are models of constitutional drafting; on the contrary, they provide a good example of how not to draft a constitution. The drafting was influenced in large part by bond attorneys who, meticulous as usual, tend to use more words than necessary. This practice can create problems in that in constitutional drafting prolixity often leads to ambiguity. To illustrate, in defining the authorized uses of the Water Development Fund, Section 49-c reads:

> Such fund shall be used only for the purpose of aiding or making funds available . . . in the conservation and development of the water resources of this State, including the control, storing and preservation of its storm and flood waters . . . or for any one or more of such purposes or methods.

In practice Section 49-c has been read rather restrictively insofar as the purpose of the fund and its authorized uses were concerned; the language after "including" seems to have been taken as definitive rather than descriptive of the stated general purpose to conserve and develop the state's water resources. This is evident from the wording of the 1962 and 1966 water fund amendments (*i.e.,* Section 49-d) referring to "additional purposes" for which water bond proceeds may be used. Whether or not the general purpose of "conservation and development of the water resources of this State" would have subsumed the "additional purposes" authorized by Section 49-d or encompassed other kinds of water projects authorized by statute, the issue is now largely academic, since Section 49-c and subsequently

adopted Sections 49-d and 49-d-1 taken together appear to authorize financial assistance for just about any conceivable water improvement project.

In recent years, however, a controversy has developed over whether Sections 49-c and 49-d prohibit use of the Water Development Fund to finance interstate water transfers. These sections do not expressly prohibit that use. Language in the third paragraph of Section 49-c (*i.e.*, "Such fund shall be used only for the purpose of . . . making funds available . . . in the conservation and development of the water resources of this State. . . .) might be construed to impose such a limitation. But the second paragraph of Section 49-d, which authorizes construction of *any* waterworks system for the transportation of water by the federal government, the state, or an interstate compact commission, leads to the opposite conclusion. The unsuccessful 1969 Texas Water Plan amendment (see the *History* of Sec. 49-d-1) included a provision that would have permitted use of the fund "in addition [to the uses permitted under Sections 49-c and 49-d-1] . . . for the purposes of developing water resources and facilities for the State of Texas, both within . . . and without the State of Texas." Whether this express authorization for interstate waterworks was included because it was thought necessary or simply out of caution is not clear. Should the Water Development Board attempt to use the fund for an interstate water transport project, the question will likely end up in court.

The idea that the Water Development Fund may not be used for a purpose that is not specifically authorized by Sections 49-c, 49-d, or 49-d-1 is reinforced by a 1969 attorney general opinion. Section 49-c provides that the "fund shall be used only for the purposes of aiding or making funds available . . . to the various political subdivisions. . . ." Ruling that the Water Development Board may not make a commitment to buy a political subdivision's bonds in the future, subject to later availability of money in the Water Development Fund, the opinion states that Section 49-c does not "contain any provision which would authorize the Board to enter into an executory contract to commit itself to purchase bonds from a third party or to purchase a political subdivision's refunding bonds." (Tex. Att'y Gen. Op. No. M-634 (1970).)

The composition, authority, and responsibility of the Water Development Board, as well as water bond and development fund regulations, are prescribed by Chapter 11 of the Water Code. The board also has established its own rules and regulations to guide the administration of the loan assistance program.

The Water Development Fund is not a revolving fund in the sense that new bonds may be issued as the old ones are retired. To put it another way, the prescribed maximum applies to the amount of bonds that may be issued, not to the amount of bonds that may continue to be outstanding. Section 11.202 of the Water Code states, however, that the fund "is a special revolving fund in the state treasury." This refers to the eighth paragraph of Section 49-c, which permits money received in excess of yearly debt-service requirements to be plowed back into the fund. (With respect to the 1982 cutoff date for financial assistance also contained in that paragraph, see the *Explanation* of Sec. 49-d-1.) But in actual practice there has been no excess revenue; fiscal years 1967-1975 saw debt-service expenses exceed revenues by an average of $2.9 million a year. Deficits for the next five years are expected to run even higher.

As of August 31, 1974, the Water Development Fund, including water quality enhancement funds from bond sales under Section 49-d-1, had assets totaling over $211 million. Since 1957 slightly over $100 million in loans have been made or committed under Sections 49-c and 49-d. (Texas Water Development Board, *Annual Financial Report: 1973-74,* (Austin, 1974), secs. I and V.) About $221 million in obligations (this includes contracts as well as bonds; see the *Explanation* of Sec. 49-d) have been sold or contracted under these two sections.

In addition to expanding authorized uses of the Water Development Fund, Sections 49-d and 49-d-1 subsequently raised the bond ceiling and interest rate limitations and eliminated the 1982 loan assistance termination date contained in the eighth paragraph of this section.

Comparative Analysis

Although many states might sell bonds to finance water improvement projects, very few state constitutions contain special provisions authorizing water bonds. The Florida Constitution authorizes air and water pollution bonds but does not establish a special state agency or constitutional fund for the purpose and imposes no ceiling on the amount of bonds that can be floated. Two other states, Oklahoma and Oregon, simply permit the state to incur debt or pledge credit to develop conservation and power facilities.

No other state was found to provide for a water development agency although Hawaii authorizes the legislature to create administrative boards and commissions to manage the state's natural resources. Wyoming provides for a state water "engineer" appointed by the governor with senate confirmation for a six-year term. The *Model State Constitution* has nothing comparable.

Author's Comment

While water development and conservation projects are costly, they are also vital, and most provide long-term benefits to the state; accordingly, it is generally prudent to finance these projects with long-term borrowing. However, even if the general debt limitation (Art. III, Sec. 49) remains unchanged, there is no reason to burden the constitution with the profuse statutory detail included in Sections 49-c, 49-d, and 49-d-1. Financial administration can be facilitated by eliminating the Water Development Fund, one of the newer additions to a growing family of constitutionally established special funds. Actually, the section need say little more than that the legislature may authorize by law the issuance of bonds in an amount not to exceed that needed solely for the purposes of developing and conserving the state's water resources. The referendum mechanism could be employed to provide for periodic increases in the debt ceiling without amendment. (See the *Author's Comment* on Sec. 49-b of this article.)

"[N]o resource is more vital to the economy or has wider ramifications for all other resources and industries than water." (John T. Thompson, *Public Administration of Water Resources in Texas* (Austin: Institute of Public Affairs, The University of Texas, 1960), p. 1.) And it is the Water Development Board's job "to assure that the present and future water requirements of the people of Texas are met." (Texas Water Development Board, *Annual Report: 1971-72* (Austin, 1973), p. 1.) To carry out its crucial assignment the board functions as a regulatory service, and developmental agency. One may question whether the present selection process (*i.e.*, members are appointed by the governor with the advice and consent of the senate), which is similar to the manner in which several federal regulatory bodies are constituted (*e.g.*, the Federal Communications Commission), is the one best calculated to achieve the desired results. The key question is, of course, how independent of the executive and legislative branches should the board be?

Sec. 49-d. ACQUISITION AND DEVELOPMENT OF WATER STORAGE FACILITIES; FILTRATION, TREATMENT AND TRANSPORTATION OF WATER; ENLARGEMENT OF RESERVOIRS. It is hereby declared to be the

policy of the State of Texas to encourage the optimum development of the limited number of feasible sites available for the construction or enlargement of dams and reservoirs for conservation of the public waters of the state, which waters are held in trust for the use and benefit of the public. The proceeds from the sale of the additional bonds authorized hereunder deposited in the Texas Water Development Fund and the proceeds of bonds previously authorized by Article III, Section 49-c of this Constitution, may be used by the Texas Water Development Board, under such provisions as the Legislature may prescribe by General Law, including the requirement of a permit for storage or beneficial use, for the additional purposes of acquiring and developing storage facilities, and any system or works necessary for the filtration, treatment and transportation of water from storage to points of treatment, filtration and/or distribution, including facilities for transporting water therefrom to wholesale purchasers, or for any one or more of such purposes or methods; provided, however, the Texas Water Development Fund or any other state fund provided for water development, transmission, transfer or filtration shall not be used to finance any project which contemplates or results in the removal from the basin of origin of any surface water necessary to supply the reasonably foreseeable future water requirements for the next ensuing fifty-year period within the river basin of origin, except on a temporary, interim basis.

Under such provisions as the Legislature may prescribe by General Law the Texas Water Development Fund may be used for the conservation and development of water for useful purposes by construction or reconstruction or enlargement of reservoirs constructed or to be constructed or enlarged within the State of Texas or on any stream constituting a boundary of the State of Texas, together with any system or works necessary for the filtration, treatment and/or transportation of water, by any one or more of the following governmental agencies: by the United States of America or any agency, department or instrumentality thereof; by the State of Texas or any agency, department or instrumentality thereof; by political subdivisions or bodies politic and corporate of the state; by interstate compact commissions to which the State of Texas is a party; and by municipal corporations. The Legislature shall provide terms and conditions under which the Texas Water Development Board may sell, transfer or lease, in whole or in part, any reservoir and associated system or works which the Texas Water Development Board has financed in whole or in part.

Under such provisions as the Legislature may prescribe by General Law, the Texas Water Development Board may also execute long-term contracts with the United States or any of its agencies for the acquisition and development of storage facilities in reservoirs constructed or to be constructed by the Federal Government. Such contracts when executed shall constitute general obligations of the State of Texas in the same manner and with the same effect as state bonds issued under the authority of the preceding Section 49-c of this Constitution, and the provisions in said Section 49-c with respect to payment of principal and interest on state bonds issued shall likewise apply with respect to payment of principal and interest required to be paid by such contracts. If storage facilities are acquired for a term of years, such contracts shall contain provisions for renewal that will protect the state's investment.

The aggregate of the bonds authorized hereunder shall not exceed $200,000,000 and shall be in addition to the aggregate of the bonds previously authorized by said Section 49-c of Article III of this Constitution. The Legislature upon two-thirds (2/3) vote of the elected members of each House, may authorize the Board to issue all or any portion of such $200,000,000 in additional bonds herein authorized.

The Legislature shall provide terms and conditions for the Texas Water Development Board to sell, transfer or lease, in whole or in part, any acquired storage facilities or the right to use such storage facilities together with any associated system or works necessary for the filtration, treatment or transportation of water at a price not less than the direct cost of the Board in acquiring same; and the legislature may provide terms and conditions for the Board to sell any unappropriated public waters of the state that might be stored in such facilities. As a prerequisite to the purchase of such storage or water, the applicant therefor shall have secured a valid permit from the Texas Water Commission or its successor authorizing the acquisition of such storage facilities or the water impounded therein. The money received from any sale, transfer or lease of

storage facilities or associated system or works shall be used to pay principal and interest on state bonds issued or contractual obligations incurred by the Texas Water Development Board, provided that when moneys are sufficient to pay the full amount of indebtedness then outstanding and the full amount of interest to accrue thereon, any further sums received from the sale, transfer or lease of such storage facilities or associated system or works may be used for the acquisition of additional storage facilities or associated system or works or for providing financial assistance as authorized by said Section 49-c. Money received from the sale of water, which shall include standby service, may be used for the operation and maintenance of acquired facilities, and for the payment of principal and interest on debt incurred.

Should the Legislature enact enabling laws in anticipation of the adoption of this Amendment, such Acts shall not be void by reason of their anticipatory character.

History

Growing concern over the adequacy of the state's water storage system led to the adoption of Section 49-d in 1962. (See Bedicheck, *The Texas Constitutional Amendments of 1962* (Austin: Institute of Public Affairs, The University of Texas, 1962), pp. 35-36.) This section was actually an amendment of Section 49-c that granted the Water Development Board explicit powers to meet anticipated water storage needs: (1) to acquire necessary rights-of-way for construction or enlargement of water storage facilities in reservoirs, (2) to execute long-term contracts with federal agencies to provide adequate storage capacity in reservoirs built or to be built by the federal government, and (3) to sell or lease water storage facilities and "unappropriated public waters" owned by the state. Under the 1962 provision, action in each of these three areas also required approval of the Board of Water Engineers, and the aggregate debt ceiling was maintained at the Section 49-c limit of $200 million.

The 1966 amendment to this section made several changes. The requirement of approval of Water Development Board actions by the Board of Water Engineers was omitted, except that a permit issued by a successor agency, the Texas Water Commission (now the Texas Water Rights Commission), was still required as a prerequisite to purchase water or storage facilities from the state. Authorization to develop water filtration and treatment systems was added, and the bond ceiling was increased by $200 million, with issuance of any of these additional bonds requiring approval of two-thirds of the legislature.

A salient feature of the 1966 amendment was the inclusion of a 50-year limitation applicable to state financing of transbasin water transportation projects. Widespread media discussion of the Texas Basins Project generated apprehension among water-wealthy East Texans that led to the adoption of this measure. Termed by many who favored transbasin planning as the "50-year lockup," the provision was adopted to ensure originating areas sufficient water to meet their anticipated needs for a 50-year period following the decision to finance a transbasin water project with state funds. (See Johnson and Knippa, "Transbasin Diversion of Water," 43 *Texas L. Rev.* 1035, 1050-51 (1965).)

Explanation

The two major state water agencies were reorganized by the legislature in 1965 in order to place full responsibility for planning and financing water projects in the Texas Water Development Board and limit the authority of the Texas Water Commission, renamed the Texas Water Rights Commission, essentially to the adjudication of water rights. The board was specifically directed to prepare a "comprehensive state water plan" (Water Code sec. 11.101. See the *History* of Sec. 49-d-1 concerning the constitutional amendment to implement this plan.), but

the law required the plan to respect basin-of-origin water needs for 50 years in much the same language as the 50-year limitation of Section 49-d. (Water Code sec. 11.102.) Whether these two provisions create an absolute preference in favor of intrabasin needs, regardless of the importance or urgency of the needs of other regions, is unclear, though a litereal reading leaves the impression that they do.

The 50-year limitations can be harmonized with established policies of Texas water law according to Professor Corwin Johnson, a noted water law authority. Priorities for water use are established by law (Water Code sec. 5.024), and Professor Johnson suggested that the 50-year provisions be construed as granting a preference for the basin of origin only when the anticipated intrabasin uses have a priority at least as high as the proposed out-of-basin uses. (Johnson and Knippa, p. 1052.) In construing a provision that prohibits interwatershed diversions of water "to the prejudice of any person or property situated within the watershed [of origin] (Water Code sec. 5.085 (a)), the Texas Supreme Court indicated that it is not inclined to interpret provisions designed to protect originating areas as granting *absolute* preferences. Citing Johnson and Knippa, the court said that in determining whether to grant a permit for transbasin diversion under Water Code section 5.085, the Water Rights Commission should balance the proposed diversion's "detriments" against its "benefits" and deny the permit only if the former "outweighed" the latter (*San Antonio v. Texas Water Commission,* 407 S.W.2d 752, 759 (Tex. 1966).)

Regardless of whether the supreme court will balance out-of-basin water needs against those of the basin of origin in resolving disputes arising under the 50-year limitation of Section 49-d, the Water Development Board has a considerable amount of discretion in making the critical decisions required under this provision. Judgments can reasonably differ as to the water needs of a region 50 years into the future; it is also difficult to predict with confidence how much water from various sources will be available to a region 50 years later. (See Johnson and Knippa, p. 1052.) Since the board's decisions in this area probably will be tested under the "substantial evidence rule," the severity of the impact of the 50-year limitations could well depend on the manner in which the board does its job.

The third paragraph of this section, authorizing "long-term contracts" with the federal government, was included to get around the two-year appropriation limitation of Article VIII, Section 6. It is not entirely clear whether the clause "Such contracts . . . constitute general obligations . . . in the same manner and with the same effect as bonds issued under . . . Section 49-c . . ." means that the amount of debt incurred under these contracts must be included in calculating the $400 million maximum amount of bonds authorized under this section and Section 49-c. The unsuccessful 1969 Texas Water Plan amendment (see the *History* of Sec. 49-d-1) contained a paragraph almost identical to this provision except that it included explicit language to the effect that principal payments committed under these contracts constituted part of the aggregate amount of authorized debt. This inconsistency, no doubt, was unintentional but is another illustration of the kind of nearsighted drafting that characterizes these debt sections. The Water Development Board interprets this provision to require contractual obligations to be included in the aggregate authorized debt, which is consistent with the strict construction usually given debt-authorizing provisions. (See generally the *Explanation* of Sec. 49-c.)

Money received from the sale or lease of storage facilities by the board under the fifth paragraph of this section may not be used for purposes other than retiring the outstanding debt until a sum sufficient to pay "the full amount of indebtedness" has been accumulated. Note that this differs from the eighth paragraph of Section 49-c, which frees money received in excess of yearly debt-service require-

ments for use in the board's financial assistance programs. (See the *Explanation* of Sec. 49-c.)

Comparative Analysis

No other state constitution has a provision analogous to the 50-year limitation contained in Section 49-d. For further discussion, see the *Comparative Analysis* of Section 49-c.

Author's Comment

Even without the 50-year limitation, good planning would take into consideration the needs of originating areas. As indicated in the *Explanation,* the impact of this provision on the course of water development is still uncertain but could be severe. Certainly the constitution is no place to attempt to regulate something as speculative as a region's water needs and resources 50 years into the future. (For further discussion see the *Author's Comment* on Sec. 49-c.)

Sec. 49-d-1. ADDITIONAL TEXAS WATER DEVELOPMENT BONDS. (a) The Texas Water Development Board shall upon direction of the Texas Water Quality Board, or any successor agency designated by the Legislature, issue additional Texas Water Development Bonds up to an additional aggregate principal amount of One Hundred Million Dollars ($100,000,000) to provide grants, loans, or any combination of grants and loans for water quality enhancement purposes as established by the Legislature. The Texas Water Quality Board or any successor agency designated by the Legislature may make such grants and loans to political subdivisions or bodies politic and corporate of the State of Texas, including municipal corporations, river authorities, conservation and reclamation districts, and districts created or organized or authorized to be created or organized under Article XVI, Section 59, or Article III, Section 52, of this Constitution, State agencies, and interstate agencies and compact commissions to which the State of Texas is a party, and upon such terms and conditions as the Legislature may authorize by general law. The bonds shall be issued for such terms, in such denominations, form and installments, and upon such conditions as the Legislature may authorize.

(b) The proceeds from the sale of such bonds shall be deposited in the Texas Water Development Fund to be invested and administered as prescribed by law.

(c) The bonds authorized in this Section 49-d-1 and all bonds authorized by Sections 49-c and 49-d of Article III shall bear interest at not more than 6% per annum and mature as the Texas Water Development Board shall prescribe, subject to the limitations as may be imposed by the Legislature.

(d) The Texas Water Development Fund shall be used for the purposes heretofore permitted by, and subject to the limitations in Sections 49-c, 49-d and 49-d-1; provided, however, that the financial assistance may be made pursuant to the provisions of Sections 49-c, 49-d and 49-d-1 subject only to the availability of funds and without regard to the provisions in Section 49-c that such financial assistance shall terminate after December 31, 1982.

(e) Texas Water Development Bonds are secured by the general credit of the State and shall after Approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under the Constitution of Texas.

(f) Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such Acts shall not be void by reason of their anticipatory character.

Art. III, § 49d-1

History

The first attempt to add a Section 49-d-1 to the constitution was the unsuccessful 1969 Texas Water Plan amendment. That amendment was designed to implement a comprehensive statewide water plan developed by the Water Development Board pursuant to the Texas Water Development Board Act (chapter 11, subch. D, Water Code). The main purpose of the amendment, of course, was to authorize long-term state debt to finance the water plan—$3.5 billion in additional water development bonds and contracts. The amendment also would have explicitly authorized use of the Water Development Fund for interstate water projects (see the *Explanation* of Sec. 49-c), eliminated the 4 percent bond interest ceiling, and eliminated the 1982 termination date for financial assistance prescribed in Section 49-c.

Present Section 49-d-1 was added in 1971 to facilitate the undertaking of water quality enhancement projects by local governments. Prior to the adoption of this section local governments in Texas could receive federal assistance of up to only 30 percent of the cost of water waste, sewer, and disposal projects, with the balance necessarily financed locally. Section 49-d-1 added a third partner, the State of Texas, bringing these projects within the financial reach of many more Texas communities.

Explanation

Like Section 49-d, this section amends Section 49-c, authorizing the Water Development Board to issue an additional $100 million in water development bonds, "upon direction of the Texas Water Quality Board," to finance loans and grants "for water quality enhancement purposes" as established by the legislature. These bonds are sometimes called "clean water bonds" to distinguish them from Sections 49-c and 49-d bonds. The assistance program is administered under chapter 21, subch. I, of the Water Code.

Subsection (b) of this section merely restates the third paragraph of Section 49-c. Subsection (c) establishes the permissible maximum interest rate on water development bonds at 6 percent (see also *Explanation* of Sec. 65 of this article). Subsection (d) eliminates the 1982 financial assistance termination date imposed by Section 49-c, though in a rather confusing fashion. The first clause of Subsection (d), ending at the semicolon, as drafted states only what would otherwise be true without the clause. What the drafters probably had in mind was something like: "The 1982 termination date prescribed by Section 49-c is repealed, but no other provisions of Sections 49-c and 49-d concerning the Water Development Fund are changed by this amendment." The second clause of Subsection (d) is interpreted by the Water Development Board to repeal the last sentence of the eighth paragraph of Section 49-c in its entirety. This is a fair construction, since that part of the sentence following the 1982 financial assistance cutoff date is a "winding-down" provision designed to liquidate the assistance program after 1982.

As of August 31, 1974, about $37.5 million of the assets of the Water Development Fund constituted water quality enhancement funds, and on that date almost $31 million in water quality enhancement loans had been made. (Texas Water Development Board, *Annual Financial Report: 1973-1974* (Austin, 1974), Secs. I and VII.) To date some $45 million in bonds have been issued under this section.

Comparative Analysis

See the *Comparative Analysis* of Article III, Section 49-c.

Author's Comment

See the *Author's Comment* on Article III, Section 49-c.

Sec. 49-e. TEXAS PARK DEVELOPMENT FUND. The Parks and Wildlife Department, or its successor vested with the powers, duties, and authority which deals with the operation, maintenance, and improvement of State Parks, shall have the authority to provide for, issue and sell general obligation bonds of the State of Texas in an amount not to exceed Seventy-Five Million Dollars ($75,000,000). The bonds authorized herein shall be called "Texas Park Development Bonds," shall be executed in such form, denominations, and upon such terms as may be prescribed by law, provided, however, that the bonds shall bear a rate or rates of interest as may be fixed by the Parks and Wildlife Department or its successor, but the weighted average annual interest rate, as that phrase is commonly and ordinarily used and understood in the municipal bond market, of all the bonds issued and sold in any installment of any bonds, shall not exceed four and one-half percent (4 1/2%) interest per annum; they may be issued in such installments as said Parks and Wildlife Department, or its said successor, finds feasible and practical in accomplishing the purpose set forth herein.

All moneys received from the sale of said bonds shall be deposited in a fund hereby created with the State Treasurer to be known as the Texas Park Development Fund to be administered (without further appropriation) by the said Parks and Wildlife Department, or its said successor, in such manner as prescribed by law.

Such fund shall be used by said Parks and Wildlife Department, or its said successor, under such provisions as the Legislature may prescribe by general law, for the purposes of acquiring lands from the United States, or any governmental agency thereof, from any governmental agency of the State of Texas, or from any person, firm, or corporation, for State Park Sites and for developing said sites as State Parks.

While any of the bonds authorized by this provision, or any interest on any such bonds, is outstanding and unpaid, there is hereby appropriated out of the first moneys coming into the Treasury in each fiscal year, not otherwise appropriated by this Constitution, an amount which is sufficient to pay the principal and interest on such bonds that mature or become due during such fiscal year, less the amount in the interest and sinking fund at the close of the prior fiscal year, which includes any receipts derived during the prior fiscal year by said Parks and Wildlife Department, or its said successor, from admission charges to State Parks, as the Legislature may prescribe by general law.

The Legislature may provide for the investment of moneys available in the Texas Park Development Fund and the interest and sinking fund established for the payment of bonds issued by said Parks and Wildlife Department, or its said successor. Income from such investment shall be used for the purposes prescribed by the Legislature.

From the moneys received by said Parks and Wildlife Department, or its said successor, from the sale of the bonds issued hereunder, there shall be deposited in the interest and sinking fund for the bonds authorized by this section sufficient moneys to pay the interest to become due during the State fiscal year in which the bonds were issued. After all bonds have been fully paid with interest, or after there are on deposit in the interest and sinking fund sufficient moneys to pay all future maturities of principal and interest, additional moneys received from admission charges to State Parks shall be deposited to the State Parks Fund, or any successor fund which may be established by the Legislature as a depository for Park revenue earned by said Parks and Wildlife Department, or its said successor.

All bonds issued hereunder shall after approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under the Constitution of Texas.

Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such Acts shall not be void by reason of their anticipatory nature.

Author's Comment

See the *Author's Comment* on Article III, Section 49-c.

Sec. 49-e. TEXAS PARK DEVELOPMENT FUND. The Parks and Wildlife Department, or its successor vested with the powers, duties, and authority which deals with the operation, maintenance, and improvement of State Parks, shall have the authority to provide for, issue and sell general obligation bonds of the State of Texas in an amount not to exceed Seventy-Five Million Dollars ($75,000,000). The bonds authorized herein shall be called "Texas Park Development Bonds," shall be executed in such form, denominations, and upon such terms as may be prescribed by law, provided, however, that the bonds shall bear a rate or rates of interest as may be fixed by the Parks and Wildlife Department or its successor, but the weighted average annual interest rate, as that phrase is commonly and ordinarily used and understood in the municipal bond market, of all the bonds issued and sold in any installment of any bonds, shall not exceed four and one-half percent (4 1/2%) interest per annum; they may be issued in such installments as said Parks and Wildlife Department, or its said successor, finds feasible and practical in accomplishing the purpose set forth herein.

All moneys received from the sale of said bonds shall be deposited in a fund hereby created with the State Treasurer to be known as the Texas Park Development Fund to be administered (without further appropriation) by the said Parks and Wildlife Department, or its said successor, in such manner as prescribed by law.

Such fund shall be used by said Parks and Wildlife Department, or its said successor, under such provisions as the Legislature may prescribe by general law, for the purposes of acquiring lands from the United States, or any governmental agency thereof, from any governmental agency of the State of Texas, or from any person, firm, or corporation, for State Park Sites and for developing said sites as State Parks.

While any of the bonds authorized by this provision, or any interest on any such bonds, is outstanding and unpaid, there is hereby appropriated out of the first moneys coming into the Treasury in each fiscal year, not otherwise appropriated by this Constitution, an amount which is sufficient to pay the principal and interest on such bonds that mature or become due during such fiscal year, less the amount in the interest and sinking fund at the close of the prior fiscal year, which includes any receipts derived during the prior fiscal year by said Parks and Wildlife Department, or its said successor, from admission charges to State Parks, as the Legislature may prescribe by general law.

The Legislature may provide for the investment of moneys available in the Texas Park Development Fund and the interest and sinking fund established for the payment of bonds issued by said Parks and Wildlife Department, or its said successor. Income from such investment shall be used for the purposes prescribed by the Legislature.

From the moneys received by said Parks and Wildlife Department, or its said successor, from the sale of the bonds issued hereunder, there shall be deposited in the interest and sinking fund for the bonds authorized by this section sufficient moneys to pay the interest to become due during the State fiscal year in which the bonds were issued. After all bonds have been fully paid with interest, or after there are on deposit in the interest and sinking fund sufficient moneys to pay all future maturities of principal and interest, additional moneys received from admission charges to State Parks shall be deposited to the State Parks Fund, or any successor fund which may be established by the Legislature as a depository for Park revenue earned by said Parks and Wildlife Department, or its said successor.

All bonds issued hereunder shall after approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under the Constitution of Texas.

Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such Acts shall not be void by reason of their anticipatory nature.

Art. III, § 50

History

This section was added by amendment adopted on November 11, 1967. There have been no subsequent amendments to it.

Explanation

The section is one of a series of exceptions to the limitation on creating state debt imposed by Article III, Section 49. (Some of the other exceptions in this article are found in Secs. 49-b, 49-c, and 50b.)

In 1967 the legislature perceived a need to begin a program of land acquisition and development for park purposes, but funds from general revenue were not available. Enabling legislation that was passed at the same session as the proposed amendment provides for admission charges to state parks, which income is to be applied to pay the interest and create the sinking fund for redemption of the park development bonds issued under this section. (See Texas Legislative Council, *An Analysis of Constitutional Amendments for Election November 11, 1967* (Austin, 1967).)

A 1971 statute earmarked a portion of the state's cigarette tax revenue for use by the Parks and Wildlife Department to acquire and develop additional parks. (See Tex. Tax-Gen. Ann. art. 7.06(3).) It is unclear whether the earmarked taxes may be used to retire park bonds, but probably they are not needed since the development fund created by this section is given first crack at the state's revenue to pay off the bonds. (For discussion of this first-in-line-at-the-treasury device, see the *History* of Sec. 49-c of this article.)

Comparative Analysis

Missouri's Constitution requires an annual appropriation for acquisition, development, and maintenance of state parks. Florida authorizes special recreational districts to issue revenue bonds but requires the legislature to earmark revenue or tax sources to repay bonded indebtedness. The *Model State Constitution* is silent on this topic.

Author's Comment

Since parks will be enjoyed by taxpayers for many years, the use of bonds for their acquisition and development is a prudent use of the state's credit. Whether this kind of exception should be retained depends on what kind of debt limitation is included in any revised constitution. See the *Author's Comment* on Article III, Sections 49 and 49-b.

Sec. 50. LOAN OR PLEDGE OF CREDIT OF STATE. The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.

History

This section first appeared in 1876. The wording is unchanged from the draft as first presented to the 1875 Convention by the Committee on the Legislative Department. (*Journal,* at 164.) An amendment of the section was proposed in 1919 but was voted down. It would have permitted the use of the state's credit to assist

people in acquiring or improving their homes. (Compare Sec. 49-b of this article, concerning veterans' land. See also the lettered sections following Sec. 50. They are in part "amendments" of the section.)

Explanation

Section 50 states that the legislature may not "give" the credit of the state to anybody, "lend" the credit of the state to anybody, or "pledge" the credit of the state for anybody. (See the following *Author's Comment* concerning the drafting of this section.) This is an involved and somewhat imprecise way of saying that the state may not aid anybody by lending him money; by providing him land, goods, or services on credit; or by guaranteeing payment to a third party who aids anybody by lending him money or providing him land, goods, or services on credit.

It has been said that Section 50 "is closely associated with and complements Section 49" because it prohibits creating debt indirectly. (2 *Constitutional Revision,* p. 260.) This is true only insofar as pledging credit is concerned, for that would create a contingent debt. Section 50 is more important as a complement to Section 51, which prohibits grants of money. It could be argued, for example, that a scholarship loan is not a "grant of public money," but it obviously is a giving of credit.

The second element of Section 50—prohibiting the extension of credit by deferring payment—has provided the only significant interpretation of this section. In 1937, the attorney general ruled that the treasurer could not send out cigarette, beer and liquor, or documentary stamps on consignment because that would be "lending the credit of the State" contrary to Section 50. (Tex. Att'y Gen. Op. No. 2996 (1937).) But in 1970, a court of civil appeals upheld a statute that permits a distributor to take up to 15 days to pay for cigarette tax stamps. The treasurer, presumably relying on the foregoing attorney general's opinion, had demanded cash on delivery. The court pointed out that even after 15 days the distributor was actually paying the tax in advance, for the ultimate consumer is the real taxpayer. Since the state was getting its money in advance anyway, the 15 days could hardly be called an extension of credit. (*McCarty v. James,* 453 S.W.2d 220 (Tex. Civ. App.—Austin 1970, *writ ref'd n.r.e.*).)

Other cases have cited Section 50, but, as noted in discussing Section 49 of this article, the situation is normally one where any Section 50 argument is subordinate to another constitutional infirmity. A case in point is *Terrell v. Middleton,* a leading and hard-fought case. (187 S.W. 367 (Tex. Civ. App.—San Antonio 1916), *writ ref'd per curiam,* 108 Tex. 14, 191 S.W. 1138; *rehearing denied,* 108 Tex. 14, 193 S.W. 139 (1917). This is also known as the "chicken salad" case.) This was a taxpayer's suit to enjoin the comptroller of public accounts from paying certain bills incurred by the governor in running the executive mansion and subsequently covered by a deficiency appropriation. The court concluded that the deficiency appropriation was a subterfuge to increase the governor's annual salary, which at that time was frozen at "$4,000, and no more." (See *History* of Sec. 5 of Art. IV.) In anticipation of this conclusion the comptroller argued that an appropriation to pay the governor more money would be additional compensation, but picking up the tab later was not. The court replied that in that event the state would be lending its credit in violation of Section 50. Although the *Middleton* case is cited for the proposition that the appropriation to pay the governor's bill was a violation of this section, this is true only because the appropriation was otherwise unconstitutional.

If the current interpretation of Section 51 of this article as set forth in the *Explanation* of that section is correct, it follows that today Section 50 is applicable only if the credit is for a private purpose.

Art. III, § 50a

Comparative Analysis

Most states have a prohibition on extending state credit to private groups. The prohibitions normally include corporations but usually do not include "municipal" or "public" as part of the characterization of corporation. (The *Index Digest* is not always clear on this point and it may be that there are more states that include municipal corporations than the *Index* shows. Moreover, there may be states where the courts have construed "corporation" to include municipal and other public corporations.) Many states have made exceptions to the prohibition in order to meet a public problem—housing, agricultural development, education, and welfare, for example. Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

As noted in the *History,* Section 50 is unchanged from the wording first presented to the 1875 Convention. This indicates that no one noticed the misplaced comma that makes the sentence ungrammatical. The second comma belongs after, not before "of." (The third comma should be omitted or another comma inserted after "or to.") There is no apparent reason for distinguishing between the power of the legislature to act directly or to authorize action. If somebody feared that a denial of power to lend would permit the legislature to authorize the treasurer to lend, the section could have been redrafted to start out: "the credit of the State shall not be given, lent, or pledged. . . ." This would have simplified the sentence and also avoided the omission of a prohibition against authorizing the pledging of credit. The structure of the sentence as it stands limits the denial of power to authorize to "giving or lending," but not to pledging.

One final puzzle in the drafting of Section 50 is why the forbidden recipients are called in the first half "any person, association or corporation, whether municipal or other," but in the second half are called "any individual, association of individuals, municipal or other corporation whatsoever."

Apart from all this close analysis of poor draftsmanship, one may raise the broad question as to why municipal corporations were included in the lending prohibition. The basic reason for Section 50 was to prevent the government from aiding private parties in their grandiose schemes to build railroads and other internal improvements. Section 52 stops municipal corporations from doing this. Thus, there was no occasion to forbid the state to bail out profligate municipalities that might underwrite internal improvements. But, someone might argue, municipal corporations might go wildly into debt if they did not know that the state could not bail them out. This will not wash, however, for the original limitations on municipal taxing power under Sections 4 and 5 of Article XI, combined with the practical limitation on going into debt contained in Section 7 of that article, made wild borrowing well-nigh impossible. One can only conclude that some draftsman in the 1875 Convention was so intent on ending government profligacy that he blindly included everything he could think of. The pity of the blindness is that it gave rise to the ridiculous social security flap that necessitated Section 51g of this article.

For a discussion of the advisability of a provision like Section 50, see the *Author's Comment* on Section 51.

Sec. 50a. STATE MEDICAL EDUCATION BOARD; STATE MEDICAL EDUCATION FUND; PURPOSE. The Legislature shall create a State Medical Education Board to be composed of not more than six (6) members whose

qualifications, duties and terms of office shall be prescribed by law. The Legislature shall also establish a State Medical Education Fund and make adequate appropriations therefor to be used by the State Medical Education Board to provide grants, loans or scholarships to students desiring to study medicine and agreeing to practice in the rural areas of this State, upon such terms and conditions as shall be prescribed by law. The term "rural areas" as used in this Section shall be defined by law.

History

This section was added by amendment adopted in November 1952.

Explanation

Apparently this section was added as an exception to the several prohibitions against appropriations to private individuals. (See, *e.g.*, Art. III, Sec. 51; Art. XVI, Sec. 6.) The amendment was designed to provide incentives for doctors to practice in the rural areas of the state, but the State Medical Education Board was not created until 1973. (See Tex. Rev. Civ. Stat. Ann. art. 4498b.) Almost 20 years after the original section was added, the attorney general approved a statute authorizing tuition equalization grants to students in private colleges and universities (Tex. Att'y Gen. Op. No. M-861 (1971).)

Comparative Analysis

The Georgia Constitution has a similar but more detailed provision.

Author's Comment

Clearly no constitutional authorization is needed to establish a rural medical education board. Providing scholarsips, grants, or loans to medical students who agree to practice in the rural areas of the state is just as clearly a public purpose, so the entire section could be deleted.

Sec. 50b. STUDENT LOANS. (a) The Legislature may provide that the Coordinating Board, Texas College and University System, or its successor or successors, shall have the authority to provide for, issue and sell general obligation bonds of the State of Texas in an amount not to exceed Eighty-five Million Dollars ($85,000,000). The bonds authorized herein shall be called "Texas College Student Loan Bonds," shall be executed in such form, denominations and upon such terms as may be prescribed by law, provided, however, that the bonds shall not bear more than four per cent (4%) interest per annum; they may be issued in such installments as the Board finds feasible and practical in accomplishing the purposes of this Section.

(b) All moneys received from the sale of such bonds shall be deposited in a fund hereby created in the State Treasury to be known as the Texas Opportunity Plan Fund to be administered by the Coordinating Board, Texas College and University System, or its successor or successors to make loans to students who have been admitted to attend any institution of higher education within the State of Texas, public or private, including Junior Colleges, which are recognized or accredited under terms and conditions prescribed by the Legislature, and to pay interest and principal on such bonds and provide a sinking fund therefor under such conditions as the Legislature may prescribe.

(c) While any of the bonds, or interest on said bonds authorized by this Section is outstanding and unpaid, there is hereby appropriated out of the first moneys coming into the Treasury in each fiscal year, not otherwise appropriated by this Constitution, an amount sufficient to pay the principal and interest on such bonds that mature or become due during such fiscal year, less the amount in the sinking fund at the close of the prior fiscal year.

(d) The Legislature may provide for the investment of moneys available in the Texas Opportunity Plan Fund, and the interest and sinking funds established for the payment of bonds issued by the Coordinating Board, Texas College and University System, or its successor or successors. Income from such investment shall be used for the purposes prescribed by the Legislature.

(e) All bonds issued hereunder shall, after approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under this Constitution.

(f) Should the Legislature enact enabling laws in anticipation of the adoption of this Amendment, such acts shall not be void because of their anticipatory nature.

History

Section 50b was adopted in 1965, 50 years after the first and only other attempt to establish a loan fund for Texas students. The 1915 proposal provided for loans to both public school and college students and would have financed a loan fund with ad valorem taxes rather than bond sales, which perhaps explains its defeat at the polls. The creation of the State Medical Education Fund in 1952 (Art. III, Sec. 50a), to provide loans and scholarships to medical students, did, however, establish a precedent for a student loan program in Texas.

Explanation

Section 50b is necessitated not only by Article III, Section 49, prohibiting state debt, but perhaps also by Sections 50 and 51, forbidding state grants and loans to individuals. The section establishes the Texas Opportunity Plan Fund, from which loans are made to Texas students attending public and private institutions of higher education (including junior colleges), and authorizes the sale of $85 million in general obligation bonds to finance the loan program. The loan program is administered by the Coordinating Board, Texas College and University System, in accordance with implementing legislation. (Education Code ch. 52.) Section 50b also includes an "automatic" appropriation feature similar to that provided in Section 49-c for water development bonds. Interest was limited to 4 percent, but Section 50b-1, adopted subsequently, supersedes this limitation. (See the *Explanation* of Sec. 50b-1.)

The Opportunity Plan Fund (together with the sinking fund) has assets totaling about $156 million. To date more than $150 million in student loans have been made, and $171.5 million of the $285 million in bonds authorized by Sections 50b and 50b-1 have been issued. ("Official Notice of Sale, Series 1975 Loan Bonds" (Dallas: First Southwest Co., Investment Bankers, 1975), pp. 4, 9, 11.)

Comparative Analysis

No other state constitution was found to contain a provision comparable to Section 50b, and of course the *Model State Constitution* is silent on the subject. At the time of the adoption of the Texas Opportunity Plan, no other state provided direct, state-financed loans to students.

Author's Comment

As with the previous constitutional bond authorizations (Secs. 49b, 49-c, 49-d, 49-d-1, and 49e of this article), even without revision of the debt and spending limitations, Sections 50b and 50b-1 can be substantially simplified by eliminating all the unnecessary statutory verbiage. Once again, the special Opportunity Plan Fund is unnecessary, and the object of these two sections can be accomplished by

merely authorizing the bonds and stating their purpose. (See the *Author's Comment* on Secs. 49-b and 49-c.)

Sec. 50b-1. ADDITIONAL STUDENT LOANS. (a) The Legislature may provide that the Coordinating Board, Texas College and University System, or its successor or successors, shall have authority to provide for, issue and sell general obligation bonds of the State of Texas in amount not to exceed Two Hundred Million Dollars ($200,000,000) in addition to those heretofore authorized to be issued pursuant to Section 50b of the Constitution. The bonds authorized herein shall be executed in such form, upon such terms and be in such denomination as may be prescribed by law and shall bear interest, and be issued in such installments as shall be prescribed by the Board provided that the maximum net effective interest rate to be borne by such bonds may be fixed by law.

(b) The moneys received from the sale of such bonds shall be deposited to the credit of the Texas Opportunity Plan Fund created by Section 50b of the Constitution and shall otherwise be handled as provided in Section 50b of the Constitution and the laws enacted pursuant thereto.

(c) The said bonds shall be general obligations of the state and shall be payable in the same manner and from the same sources as bonds heretofore authorized pursuant to Section 50b.

(d) All bonds issued hereunder shall, after approval by the Attorney General, registration by the Comptroller of Public Accounts of the State of Texas, and delivery to the purchasers, be incontestable and shall constitute general obligations of the State of Texas under this Constitution.

(e) Should the Legislature enact enabling laws in anticipation of the adoption of this Amendment such acts shall not be void because of their anticipatory nature.

History

At the time Section 50b-1 was added in 1969, there remained available for issuance some $46 million of the original $85 million authorized by Section 50b, and projections indicated that the $46 million would be sufficient to carry the student loan program only through 1971.

Explanation

An additional $200 million in bonds was authorized, but, unlike Section 50b, which limited the interest rate to 4 percent, this section is more realistic in that it permits the coordinating board and legislature to set interest rates for the new bonds. (See also the *Explanation* of Art. III, Sec. 65.)

Comparative Analysis

No other state constitution contains a provision resembling this section.

Author's Comment

See the *Author's Comment* on Section 50b.

Sec. 51. GRANTS OF PUBLIC MONEY PROHIBITED; EXCEPTIONS. The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided, however, the Legislature may grant aid to indigent and disabled Confederate soldiers and sailors under such regulations and limitations as may be deemed by the Legislature as expedient, and to their widows in indigent circumstances under such regulations and limitations as may be deemed by the

Legislature as expedient; provided that the provisions of this Section shall not be construed so as to prevent the grant of aid in cases of public calamity.

History

This grants prohibition dates from the 1875 Convention. (But see the *History* of Sec. 6 of Art. XVI for a related prohibition in earlier constitutions.) The section as originally adopted consisted of the words up to the first semicolon plus the proviso at the end concerning public calamities.

The original 1876 Constitution contained an exception to the grants prohibition in the form of a section authorizing the legislature to provide small pensions to indigent soldiers who fought for independence from Mexico, to indigent signers of the Declaration of Independence of Texas, and to their widows remaining unmarried. (This was Sec. 55 of Art. XVI which was repealed for obvious reasons in 1969.) In 1894, the first of many welfare amendments was adopted. It provided that the legislature could "grant aid to the establishment and maintenance of a home for indigent and disabled Confederate soldiers or sailors who are or may be bona fide residents. . . ." No more than $100,000 a year could be granted for this purpose. (See the following *Author's Comment* for a discussion of this curious provision.)

Four years later a second Confederate amendment was adopted. Without a great deal of historical research it is not possible to be sure what was happening, but one can speculate that the Confederate home was inadequate and that Confederate veterans were moving to Texas to get into the home. The amendment limited aid to indigent and disabled Confederate soldiers and sailors "who came to Texas prior to January 1st, 1880." The amendment also authorized direct "aid" to individuals in addition to "aid" for establishment of a home, but, naturally, "no inmate of said home" could receive any other aid from the state. Various other restrictions showed up. Direct grants were not to exceed $8 a month. Covered under these grants were veterans "who are either over sixty years of age, or whose disability is the proximate result of actual service in the Confederate army for a period of at least three months." Widows also were covered for direct aid but only if (a) "in indigent circumstances," (b) "never re-married," (c) bona fide residents prior to March 1, 1880, and (d) married to such soldiers or sailors "anterior" (!) to March 1, 1866. The amendment put an annual ceiling of $250,000 for the "purpose hereinbefore specified," but went on to include a ceiling of $100,000 for the veterans' home. It is not clear whether the $100,000 was included in the $250,000 or was in addition to it.

This new grant program lasted for six years. In 1904 another amendment was adopted. This one increased the maximum from $250,000 to $500,000 but preserved the $100,000 for the veterans' home in the same ambiguous wording. A new group of widows was allowed in. The magic marriage date was changed from March 1, 1866 to March 1, 1880, the same date as the residency cut-off.

Three years later an effort was made to get wives, widows, and "women who aided in the Confederacy" into the veterans' home. Although the words "under such regulations and limitations as may be provided by law" were retained, somebody thought it necessary or appropriate specifically to authorize the legislature to "provide for husband and wife to remain together in the home." The amendment increased the annual maximum from $100,000 to $150,000. (This change leads one to believe that the ceiling amount was in addition to the ceiling for the "purpose hereinbefore specified" since no change was made in that ceiling.) The amendment lost by the close vote of 41,079 to 43,732. This was a special election at which four other amendments were voted upon, all defeated by

margins of three to one or greater. This was obviously a "coat-tail" phenomenon, for three years later the same amendment was adopted by a vote of 113,549 to 28,534. This was at a general election at which no other amendments were considered. (See Marburger, p. 16.)

This new deal lasted only two years. In 1912 a new amendment was adopted. This one removed the ceilings and the $8 a month maximum and substituted the power to levy a property tax, "in addition to all other taxes heretofore permitted by the Constitution of Texas," not exceeding 5¢ on the $100 valuation for the purpose of creating a "special fund for the payment of pensions." (This would seem to mean that the special fund was not to be used to maintain the veterans' home and that there was no limit on how much could be spent on the home. But at this late date, who knows what the amendment meant?) The amendment changed the date of arrival in Texas from January 1, 1880 for men and March 1, 1880 for widows to January 1, 1900 for both sexes. The magic marriage date was also moved to "anterior" to January 1, 1900, but young widows were excluded—no one born "since 1861" could qualify as a widow. (Any widow under age 50, therefore, was considered "young.") The amendment also expanded the definition of soldier to include those who for at least six months during the War between the States either served in the Texas militia or in "organizations" for the protection of the frontier against Indian raids or Mexican marauders. The minimum pension age of 60 and the definition of "disabled" were dropped. Finally, for no apparent reason, the public calamity proviso was dropped.

Things remained unchanged until 1924, but only because amendments went down to defeat in 1919 and again in 1921. The two defeated amendments and the successful one in 1924 were identical except for one date—the 1917 proposal would not have let a widow be born after 1866 whereas the other two retained the original "after 1861." (There were idiosyncratic variations among the three versions in the usual bad punctuation of Texas amendments.) There were four substantive changes: (1) the residency and marriage date was moved from 1900 to 1910; (2) the minimum six months' service requirement in the militia and frontier organizations was dropped; (3) the levy was made 7¢ instead of 5¢ and changed from an authorization to a direct levy with legislative power to decrease the tax; and (4) the public calamity proviso was reinstated.

The next amendment was adopted in 1928. It simply dropped the residency and marriage dates and deleted the prohibition against pensions for "young" widows. A 20-year-old woman could now marry an 80-year-old veteran and feel secure that she could qualify for a pension—if she were in indigent circumstances, of course. Things remained the same in Section 51 until 1968, but only in the sense that the words of the section remained unchanged. Evidently, the special Confederate fund grew too large. For five years beginning in 1943, the levy was reduced from 7¢ to 2¢. (See Anderson and McMillan, *Financing State Government in Texas,* at p. 54.) In 1947, Section 17 of Article VII was adopted. The first paragraph thereof "amended" Section 51 by levying a 2¢ tax but with legislative authority to reduce the tax.

Evidently, the Confederate fund still continued to generate too much money, for in 1954 Section 51-b of this article was added. It "amended" Section 51 by killing off the special fund, in effect, but directed that the pensions continue to be paid. (See *Explanation* of Sec. 51-b.)

In 1958, Section 66 of Article XVI was added. It "amended" Section 17 of Article VII by directing payment of Texas Ranger pensions from the special Confederate fund. (This appears inconsistent with killing off the fund in the preceding paragraph. Presumably the drafter forgot that the "fund" as such had been abolished.)

In 1968, the current version of Section 51 was adopted. Simultaneously, Section 1-e of Article VIII was adopted. It "amended" both Section 51 and Section 17 of Article VII. Among other things, Section 1-e kills the 2¢ tax as of December 31, 1976, and directs that, if in the meantime the legislature establishes a new trust fund for Confederate veterans, Texas Rangers, and their widows, the 2¢ tax is to be dropped forthwith.

Explanation

Section 51 is three things and at one time was four things. First, and principally, it is a limitation on the power of the state, acting through the legislature, to dispense money. Second and third, the section contains two exceptions to that limitation—Confederate pensions and aid in case of a public calamity. Fourth, from 1912 to 1947, the section contained an operative exception to a different limitation—the power of the state to raise money by levying a tax on property. (This is all very confusing. Section 51 contained the words of the exception until the 1968 amendment, but Section 17 of Article VII took over the tax in 1947.)

Prohibitions on grants and loans for private purposes came into state constitutions in the 19th century as a reaction principally against giving away the public domain to builders of railroads, canals, and other "internal improvements." These giveaways had usually been obtained by gross corruption of legislatures. The reaction to this was so strong that the resulting prohibitions were frequently cast in extremely restrictive language. This was the case in 1875; the convention not only used harsh language, it kept saying the same thing over and over again. (In addition to Sec. 51, there are Secs. 50 and 52 of this article, Sec. 3 of Art. VIII, Sec. 3 of Art. XI, and Sec. 6 of Art. XVI. Moreover, Secs. 44, 53, 54, and 55 of this article are analogous prohibitions flowing from this same reaction.) The problem with these extreme formulations is that they soon get in the way of all sorts of governmental action that is arguably for a public purpose but looks like a "grant." The Texas story of these sections over the last hundred years has been one of extreme rigidity in some areas, considerable inconsistency in others, and general confusion across the board. Fortunately, over the past 20 years the courts have been pointing the way toward clearing up the confusion by a simple rule: if the grant is for a public purpose the grant is constitutional. Although this is now the principal controlling rule, it is appropriate to discuss another rule that has been used to avoid the prohibition and can continue to be used.

The thrust of the new rule is to say that there are "good" grants, those for a public purpose, and "bad" grants, those for a private purpose. Another approach is to distinguish between a grant and what appears to be but really is not a grant. The formal rule is that a grant is not a grant if the state receives a "quid pro quo." This can be easily illustrated if, as in some state constitutions, the word "gift" is substituted for "grant." If one says "You're a nice person, I'll give you ten dollars," one has made a gift. But if one says "You're a nice person, I'll give you ten dollars if you'll whitewash the fence," one has made a promise that is enforceable if the person whitewashes the fence. Although the verb "give" is used in both cases, the verb has distinct meanings. Likewise, there is a difference between a statute that "grants" a pension to veterans because they served in the armed forces and a statute that promises to "grant" a pension to employees who work for the state for a specified minimum number of years. If the "grant" is announced in advance and requires something in return, there is a quid pro quo and the "grant" has become something else.

The only clear instance of judicial reliance on this "quid pro quo" rule is the landmark pension case of *Byrd v. City of Dallas* discussed in the *Explanation* of

Section 48a of this article. There the commission of appeals made it clear that a pension plan announced in advance is part of the employee's compensation. There are other cases that can be brought under either the "quid pro quo" or the "public purpose" rule, but only because of the fuzzy way in which the court discussed the issue. Consider, for example, *Weaver v. Scurry* (28 S.W. 836 Tex. Civ. App. 1894, *no writ*). A state law authorized counties to pay cash bounties for the killing of predatory animals. The court upheld the statute against an attack based on Sections 51 and 52, stating that the bounty was a proper means "by which the public calamity wrought by these animals is to be averted." This is to say that there is no "grant" because the government got something in return. (It should be noted that this one-page opinion succeeded in confusing everything. Note the words "public calamity" in the quotation, presumably a reference to the public calamity exception in Sec. 51. Moreover, the court cited Sec. 23 of Art. XVI as bringing "the enactment within the scope of legislative powers." This might imply that Sec. 23 created an exception to Secs. 51 and 52.)

An even more obscure case is *Housing Authority v. Higginbotham* (135 Tex. 158, 143 S.W.2d 79 (1940)). This case involved an attack, on multiple constitutional grounds, on a state statute authorizing subsidized housing for the poor. The court set out at length the legislative declaration of necessity and relied upon the declaration's assertion that slum clearance would cut down disease and crime and in other ways benefit the entire state. This declaration was used to support the "public use" necessary to justify exercising the power of eminent domain. Later in the opinion the court disposed of the grants-and-loans argument thus: "It necessarily follows from the above holding that the law is not violative of Sections 52 and 53. . . ." (135 Tex. at 168, 143 S.W.2d at 86. Presumably the court meant Secs. 51 and 52.) There is no way of telling whether the court meant that the benefits to the state were a quid pro quo or that a grant is not a grant if it is for a public purpose.

At first blush this appears to be logic chopping of the worst sort. What difference does it make whether a general benefit to the state is called a "quid pro quo" that takes a grant out of the "giveaway" class or is called a "public purpose" and thereby makes the grant constitutional because it is not for a private purpose? In a practical sense there is no difference. As a matter of logical constitutional interpretation there is a profound difference. Sections 3 of Article VII and 6 of Article XVI prohibit spending for a private purpose. If one follows the standard rule that drafters of legal documents mean what they say, Sections 51 and 52 prohibit grants to private individuals whether for a private or a public purpose. Otherwise, the sections are redundant. The "quid pro quo" rule permits one to use the public purpose as if it were consideration for the grant, thus making the action analogous to a contract and taking it out of the giveaway category.

Be all this as it may, Sections 50, 51, and 52 are now to be applied as if they read: "No grant or loan may be made to any person, etc., for a private purpose." There is a line of cases that permits one to reach this conclusion. The first is *Bexar County v. Linden,* a case which has only the remotest rational connection with Section 51. (The case is discussed in the *Explanation* of Sec. 1 of Art. XI.) In the course of the opinion the supreme court said: "The giving away of public money, its application to other than strictly governmental purposes, is what the provision is intended to guard against" (110 Tex. 339, 344, 220 S.W. 761, 762 (1920)).

The next significant case was, paradoxically, the clear-cut "quid pro quo" pension case of *Byrd v. City of Dallas.* In the course of developing the argument that a pension plan is part of compensation, the court said: ". . . , if it is a part of the compensation of such employee for services rendered to the city, *or if it be for a public purpose,* then clearly it is a valid exercise of the legislative power." (118

Tex. 28, 36, 6 S.W.2d 738, 740 (1928) (emphasis added).) Subsequent cases that seem to support this new "public purpose" rule include *Davis v. City of Lubbock* (160 Tex. 38, 326 S.W.2d 699 (1959)); *State v. City of Austin* (160 Tex. 348, 331 S.W.2d 737 (1960)); and *Harris County v. Dowlearn* (489 S.W.2d 140 (Tex. Civ. App.—Houston [14th Dist.] 1972, *writ ref'd n.r.e.*)).

Actually, the attorney general is principally responsible for taking the cited cases and drawing the new rule from them. In one recent letter advisory, he said: "Expenditures for a true public purpose do not violate Article III, Section 51 of the Constitution. . . , even when a private agency is used to achieve the purpose" (Tex. Att'y Gen. Letter Advisory No. 6 (1973)). And again: ". . . Section 52 does not prohibit the grant of funds or property or credit for a public purpose" (Tex. Att'y Gen. Letter Advisory No. 9 (1973)). (See also Tex. Att'y Gen. Op. Nos. H-120 (1973); M-391 (1969); C-584 (1966); C-530 (1965).)

Under the new rule, the question is, of course, whether the grant or loan is for a public purpose. In a sense this is no more than asking whether the public benefit is too remote, indirect, or general to serve as a "quid pro quo." In 1973 the attorney general refused to approve an issue of revenue bonds by the City of McAllen for the purchase of land to be used for industrial development. (In 1968 an amendment permitting this had been defeated. See the *History* of Sec. 52.) The city sought leave to file a mandamus action to compel approval of the bonds, but the supreme court overruled the city's motion (*City of McAllen v. Hill,* No. B-4315, 17 Tex. Sup. Ct. J. 128). In a 1974 opinion on an analogous proposal, the attorney general discussed his earlier refusal to approve the McAllen revenue bonds and concluded: ". . . it is not considered a public purpose within this legal context, when municipal credit is used to obtain for the community and its citizens the general benefits resulting from the operation of a private industry." (See Tex. Att'y Gen. Op. No. H-357 (1974).) The question raised in Opinion No. H-357 was whether a city could give a promissory note to the United States for surplus land under terms that precluded the city from ever being liable on the note. The note was to be paid off out of rents received for the use of, or proceeds from sales of, the land. As in the case of McAllen, the land would be used for industrial purposes. The attorney general's conclusion was: "It is not constitutionally permissible for a city to purchase land for future industrial development by means of a promissory note to be paid out of revenues generated by the land without recourse to the city when the benefit to the public from such a purchase is such benefit as may be derived from the attraction of new industry."

It is fair to speculate whether opinions such as this would be forthcoming if the constitution contained no "grants and loans" prohibition. Would it be so clear that a lending of municipal credit in order to further the general well-being of the community and to increase the city's tax base was not for a public purpose if the constitution were silent about whom the credit was extended to? Obviously, what is a public purpose is a matter of judgment. Even under the new rule that any grant or lending of credit is constitutional if the grant or loan is for a public purpose, it seems likely that Sections 50, 51, and 52 will have some influence on the person trying to make a judgment about whether a public purpose is involved.

To put it another way, old habits are hard to break; people frequently look at problems the same way that they always did. Consider, for example, the attorney general's advice concerning a bill that would indemnify members, officers, and employees of the legislature against financial loss arising out of a claim based on negligence or other acts resulting from the maintenance of order in the legislature. The attorney general said: " Our Constitution prohibits grants of public moneys to an individual in Sec. 51 of Article III. If the state itself is liable for the loss, indemnification would be valid but if there is no liability upon the part of the State

as where a claim is barred by governmental immunity, the use of public money to pay a claim owed by an individual is a gift or donation in violation of the Constitution." (Tex. Att'y Gen. Letter Advisory No. 33 (1973). See also Tex. Att'y Gen. Op. No. H-70 (1973).) This sounds like the workmen's compensation problem all over again. (See the *History* of Sec. 59 of this article.) Indemnification becomes a grant because the state may assert the common law rule of sovereign immunity. (See the following *Author's Comment.*)

But the real problem is that the attorney general apparently forgot his earlier statement: "Expenditures for a true public purpose do not violate Article III, Sec. 51 of the Constitution." It can certainly be argued convincingly that a public purpose is served if the state tells its employees that they may carry out their duties without fear of financial loss. The public interest is not served if employees are afraid to do their job for fear that they will be sued and that their employer will not pick up the tab. (See also Tex. Att'y Gen. Op. No. H-15 (1973) where the attorney general implies that a death benefit payable to the beneficiaries of a deceased county employee would be a prohibited grant under Sec. 52. There is no discussion of public purpose.)

There remains the question of the meaning of the new "public purpose" rule as it applies to grants to municipal corporations—a term which, in effect, means any local government. In the normal sense of the term, a grant by the state to a county, a city, a school district, or any other political subdivision could hardly be for a "private purpose." Presumably, the new statement of the rule equates "public purpose" with "state purpose." In other words, the state can grant money to a local government engaged in activity of interest to the state, but not for activity of interest only to the local government. For example, a grant to a city for a sewage treatment plant might be for a state public purpose whereas a grant to the same city to buy a privately owned public utility might be considered a "private" purpose. (But see the following *Author's Comment.*)

Finally, this new equating of Section 51 with public purposes leaves the public calamity exception out in left field. Since a public calamity is a public purpose par excellence, the exception has withered away. But then the exception apparently is really only an exception to Section 6 of Article VIII, which limits appropriations to two years. In *Dallas County v. McCombs,* the supreme court disallowed a five-year state grant of state ad valorem taxes to counties during the Great Depression. The ground was the violation of Section 6 of Article VIII. Other instances of long-term grants of such taxes were distinguished because they were for real public calamities whereas in the case before the court the legislative declaration of calamities was too general to qualify under Section 51. (135 Tex. 272, 140 S.W.2d 1109 (1940).)

Comparative Analysis

About half the states have a grants and loans prohibition. Some of the states have added exceptions, usually in terms of aiding the poor. Two of the newest constitutions, Illinois and Montana, omit the earlier restrictions, both of which were aimed directly at aid to railroads. The new Louisiana Constitution preserves the prohibition with a typical set of exceptions. Neither the *Model State Constitution* nor the United States Constitution has a comparable provision.

Author's Comment

One wonders whether the 1894 amendment mentioned above is the first Critz theory amendment. (See *Author's Comment* on Sec. 62 of Art. XVI.) In the light of Section 2 of Article XI calling for the establishment of county poor houses and farms, there could hardly have been any doubt that the state had the power to

operate a poor house for Confederate veterans. One can only conclude that the amendment was a device to get public approval of the program. Once the unnecessary provision got into the constitution, every change would naturally follow the same route.

It was suggested earlier that a grant to a municipal corporation to buy a private public utility might be considered for a "private purpose." Actually, the problem of grants to municipal corporations should be considered a problem of general versus local laws. If the state offered grants to any and all municipalities that wished to carry out some local "proprietary" function, there would be no need to argue that a private purpose was involved. (For "proprietary functions," see *Explanation* of Sec. 1 of Art. XI.) If the grant were only to cities with populations between 192,567 and 192,569, the better approach would be to strike down the law as local rather than say that it was a grant for a private purpose. In any event, revenue sharing is now "in." A Section 51 prohibiting grants to local governments is a restriction whose time has gone.

It was also suggested that, notwithstanding the new "public purpose" broom, the "grants and loans" muddle has not been wholly swept away. The recent letter advisory discussed earlier (Tex. Att'y Gen. Letter Advisory No. 33) demonstrated that the sovereign immunity doctrine is stronger than "public purpose." If the state abandoned sovereign immunity there would be no Section 51 problem. To indemnify a public officer or employee for acts for which his employer, the government, is not liable would be spending money for a "private" purpose. But a law that indemnifies the officer or employee for acts for which the government would be liable if it were to waive its immunity is in effect an indirect waiver of immunity and an expenditure for a public purpose.

It must be conceded that an agency of the state has no authority to carry liability insurance to cover a tort which is not covered by the Tort Claims Act, for that would be thwarting the legislative policy not to waive immunity. But even here, it is not appropriate to rely on Section 51. The vice is not a grant for a private purpose but an unauthorized administrative act. On this basis the attorney general's opinion cited previously (Tex. Att'y Gen. Op. No. H-70 (1973)) is undoubtedly correct; his reliance on Sections 51 and 52 is subject to question. If the legislature specifically authorizes liability insurance for an act for which the government could be held liable absent sovereign immunity, Sections 51 and 52 are red herrings diverting attention from the real issue of indirect waiver of sovereign immunity. (See also the *Author's Comments* on Sec. 59 of this article and Sec. 1 of Art. XI.)

Assuming that today Section 51 means simply that money can be spent only for a public purpose, then the section should be dropped. A requirement that public money be spent for public purposes is reasonable. It is not reasonable to state the requirement several different ways, especially if one of the ways is literally saying something else. (For an exposition of the more traditional distinction between "public purpose" and "grants and loans," see Willatt, "Constitutional Restrictions on Use of Public Money and Public Credit," 38 *Texas Bar J.* 413 (1975).)

Sec. 51-a. ASSISTANCE GRANTS AND MEDICAL CARE FOR NEEDY AGED, DISABLED AND BLIND PERSONS, AND NEEDY CHILDREN; FEDERAL FUNDS; SUPPLEMENTAL APPROPRIATIONS. The Legislature shall have the power, by General Laws, to provide, subject to limitations herein contained, and such other limitations, restrictions and regulations as may by the Legislature be deemed expedient, for assistance grants to and/or medical care for, and for rehabilitation and any other services included in the federal laws as they now read or as they may hereafter be amended, providing matching funds to help such families and individuals attain or

retain capability for independence or self-care, and for the payment of assistance grants to and/or medical care for, and for rehabilitation and other services to or on behalf of:

(1) Needy aged persons who are citizens of the United States or noncitizens who shall have resided within the boundaries of the United States for at least twenty-five (25) years;

(2) Needy individuals who are totally and permanently disabled by reason of a mental or physical handicap or a combination of physical and mental handicaps;

(3) Needy blind persons;

(4) Needy dependent children and the caretakers of such children.

The Legislature may prescribe such other eligibility requirements for participation in these programs as it deems appropriate.

The Legislature shall have authority to enact appropriate legislation which will enable the State of Texas to cooperate with the Government of the United States in providing assistance to and/or medical care on behalf of needy persons, in providing rehabilitation and any other services included in the federal laws making matching funds available to help such families and individuals attain or retain capability for independence or self-care, to accept and expend funds from the Government of the United States for such purposes in accordance with the laws of the United States as they now are or as they may hereafter be amended, and to make appropriations out of state funds for such purposes; provided that the maximum amount paid out of state funds to or on behalf of any needy person shall not exceed the amount that is matchable out of federal funds; provided that the total amount of such assistance payments only out of state funds on behalf of such individuals shall not exceed the amount of Eighty Million Dollars ($80,000,000) during any fiscal year.

Supplementing legislative appropriations for assistance payments authorized by this Section, the following sums are allocated out of the Omnibus Tax Clearance Fund and are appropriated to the State Department of Public Welfare for the period beginning September 1, 1969 and ending August 31, 1971: Three Million, Six Hundred Thousand Dollars ($3,600,000) for Old Age Assistance, Two Million, Five Hundred Thousand Dollars ($2,500,000) for Aid to the Permanently and Totally Disabled, and Twenty-Three Million, Nine Hundred Thousand Dollars ($23,900,000) for Aid to Families with Dependent Children. Such allocations and appropriations shall be made available on the basis of equal monthly installments and otherwise shall be subject to the provisions of currently existing laws making allocations and appropriations for these purposes.

Provided further, that if the limitations and restrictions herein contained are found to be in conflict with the provisions of appropriate federal statutes as they now are or as they may be amended to the extent that federal matching money is not available to the state for these purposes, then and in that event the Legislature is specifically authorized and empowered to prescribe such limitations and restrictions and enact such laws as may be necessary in order that such federal matching money will be available for assistance and/or medical care for or on behalf of needy persons.

Nothing in this Section shall be construed to amend, modify or repeal Section 31 of Article XVI of this Constitution; provided further, however, that such medical care, services or assistance shall also include the employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer nor to prescribe any drug or physical treatment whatsoever, unless such optometrist is a regularly licensed physician or surgeon under the laws of this state.

History

The first Section 51-a (then designated "51a") was adopted in 1933. It authorized ten-year bonds in the amount of not more than $20 million with a proviso that the interest and principal should be paid "from some source other than a tax on real property and the indebtedness as evidenced by such bonds shall never become a charge against or lien upon any property, real or personal, within this State." The proceeds from these less than full faith and credit bonds were for welfare as set out in

a nonsentence: "The proceeds of the sale of such bonds to be used in furnishing relief and work relief to needy and distressed people and in relieving the hardships resulting from unemployment, . . ."

That original section, it should be noted, did not authorize the legislature to provide a system of welfare grants. The legislature could authorize the distribution of up to $20 million to the needy. When the money had been distributed, the legislature's power would end.

In 1935, a Section 51-b was added. It permitted cash grants not to exceed $15 a month to actual bona fide citizens of Texas over 65 years of age, residents of the state for five of the nine years preceding the date of application and continuously for the year preceding such application, but not to habitual criminals, habitual drunkards while habitual drunkards, or inmates of state-supported institutions while inmates. The section also authorized the legislature to accept financial aid for old-age assistance from the United States "not inconsistent with the restrictions hereinbefore provided."

In 1937, a Section 51-c was added. It permitted cash grants not exceeding $15 a month to needy blind persons over 21 years of age who were actual bona fide citizens of Texas. The residence requirements set out earlier were repeated as were the exclusions except that habitual drunkards were excluded absolutely and not just while habitual drunkards. The authority to accept federal money was repeated.

A Section 51d was added at the same time. It permitted cash grants to destitute children under 14 years of age not exceeding $8 a month for one child or $12 a month for a single family with more than one child. The section differed from Sections 51-b and 51-c in two important respects. The legislature was given the power to determine all restrictions and limitations, including residence requirements, other than the $8 and $12 maximums. The section also included an annual aggregate ceiling on child assistance of $1.5 million. The authority to accept federal money was repeated.

In 1945, "Sections 51a, 51b, 51c and 51d" were amended "so that the same shall hereafter consist of one section to be numbered 51a." (Obviously, the reference to "51b" and "51c" meant "51-b" and "51-c.") Apart from the economy of words, the consolidation effected several other changes:

(1) Habitual criminals and habitual drunkards were dropped from the exclusions;

(2) The legislature's power to set restrictions and limitations was made applicable to all three categories—old-age, blind, and children—and the power to set residence requirements for destitute children was withdrawn;

(3) The residence requirement for "needy" (formerly "destitute") children under 16 (formerly 14) was set at one continuous year for all children except those under one-year-old in which case one continuous year was required of the mother;

(4) The maximum for old-age assistance was increased from $15 to a maximum payable out of state funds of $20 and the $15 maximum for the needy blind and the $8 and $12 maximums for children were removed altogether;

(5) The maximum aggregate of $1.5 million a year for children was replaced by an aggregate maximum of $35 million for all three categories; and

(6) The authority to accept federal funds was qualified by a proviso that the amount payable to any person out of state funds could not exceed the amount received from the United States for such person.

In 1951, a new Section 51a was proposed but was defeated at the polls. There were two monetary changes in the proposal: an increase in the old-age assistance from a maximum of $20 to $30 a month and an increase in the annual aggregate from $35 million to $42 million. There were three other proposed changes. One turned the residence requirements upside down. Instead of stating that no payment could

be made unless the minimum residence requirement was met, the proposal stated that no payment could be denied to a person who met the residence requirement. This would have changed the residence requirement from a minimum that the legislature might have been able to make longer to an absolute minimum that the legislature could not touch. In the course of drafting this change the qualification of "actual bona fide citizen of Texas" was dropped. A second proposed change was a long paragraph concerning the eligibility of old people who owned property but disposed of it for less than fair market value. The third change proposed to lower the minimum age for assistance to the needy blind from over 21 to over 16.

In 1954 another new Section 51a was proposed and, this time, was accepted by the voters. The amendment reverted to the 1945 version in every respect except for an increase in the aggregate from $35 million to $42 million.

The next amendment was a Section 51-b added in 1956. This amendment covered the "totally and permanently disabled" in much the same manner as the other categories of welfare grants. The only change was from "actual bona fide citizens of Texas" to "citizens of the United States." The amendment included a proviso that no one could receive disability assistance who was also receiving old-age assistance, aid to the blind, or aid to dependent children. The amendment also contained a maximum aggregate of $1.5 million that could be paid annually from state funds for disability assistance.

In 1957, Section 51a itself was amended, principally to increase the monthly old-age maximum from state funds from $20 to $25 and to increase the annual aggregate maximum for all Section 51a categories from $42 million to $47 million. In the course of increasing the monthly maximum from $20 to $25, a proviso was added: "No payment in excess of Twenty-one Dollars ($21) shall be paid out of state funds to an individual until and unless such additional amounts are matched by the Federal Government." (See the following *Explanation* concerning this proviso.)

The 1957 amendment also contained a command to the legislature to "enact appropriate laws to make lists of the recipients of aid hereunder available for inspection." A final paragraph of the amendment was a supplemental appropriation for welfare for the 1957-59 biennium to take advantage of the increase in the annual aggregate maximum authorized by the amendment. (Note that this bypassed Sec. 49a of this article.)

In 1958, Section 51a-1 was added. This amendment authorized payments for medical care to people who were receiving assistance under any of the categories covered by Sections 51a and 51-b. This was a relatively short provision since there was no need to put in the usual qualifications of age, citizenship, residence, and the like. There was also a variation on the usual proviso that individual state payments could not exceed individual federal amounts. In this case, the aggregate amount paid from state funds could not exceed the federal aggregate.

Another revised Section 51a was adopted in 1962. The principal purpose of the amended version was to increase the annual aggregate from $47 million to $52 million. The only other changes were to drop the appropriation act included in 1957 and to add to the command to enact laws concerning publicity of recipients the words "under such limitations and restrictions as may be deemed appropriate by the Legislature."

Section 51-b was also amended in 1962. (It was redesignated Sec. 51-b-1 because when adopted originally as Sec. 51-b in 1956, there was an existing Sec. 51-b, State Building Commission, which had been added in 1954.) The only change was to increase the annual aggregate from $1.5 million to $2.5 million.

One year later, 1963, a new Section 51a, now for the first time designated "51-a," was adopted. This new section combined the old Sections 51a and 51-b-1, both of which had been amended in 1962. (Sec. 51-a-1 remained untouched for the

moment.) The new Section 51-a increased as usual the annual aggregate, this time from $54.5 million ($52 million in Sec. 51a and $2.5 million in Sec. 51-b-1) to $60 million. The new section made a number of other changes:

(1) It eliminated the individual monthly maximum of $25 for the aged and $20 for the permanently disabled and substituted "shall not exceed the amount that is matchable out of Federal funds." The same wording was repeated for the categories of the blind and dependent children.

(2) In each of the four categories it was provided for the first time that "the total amount of such assistance payments out of state funds on behalf of such recipients shall not exceed the amount that is matchable out of Federal funds."

(3) All minimum residency periods were removed and the legislature was commanded to prescribe residence requirements. The difference in citizenship language between Section 51a and Section 51-b-1 was preserved, however, so that the aged, blind, and children had to be "actual bona fide citizens of Texas" whereas the permanently disabled had to be "citizens of the United States."

(4) The command to enact laws concerning publicity of recipients was changed to a permission to enact such laws.

One year later, 1964, Section 51-a was again amended, this time by an addition of Section 51a-2. Section 51a-1, it will be recalled, provided for payments for medical assistance to the four welfare categories. Section 51a-2 added needy old people not receiving old-age assistance to the medical assistance categories. In general, the amendment tracked the other welfare provisions in calling for matching federal funds and the like but had one interesting omission. The amendment covered "needy individuals," without specifying either that they had to be "actual bona fide citizens of Texas," "citizens of the United States," or even residents. The amendment also added what is now the proviso in the first sentence of the curious final paragraph of the current Section 51-a.

One year later, 1965, Sections 51-a, 51a-1, and 51a-2 were combined into a new Section 51-a. This is the last amendment adopted prior to the adoption in 1969 of the current version set out at the beginning of this section. The principal reason for the 1965 version was to make changes necessary to preserve eligibility for federal matching funds. For example, the minimum age for the needy blind was reduced from 21 years to 18 years and the maximum age for dependent children was increased from under 16 years to under 20 years. Likewise, the coverage for medical assistance was broadened. Also, the 1965 amendment for the first time included a grant of power to the legislature to rewrite the section in order to remain eligible for federal grants. (The wording was similar to the next to the last paragraph of the current Sec. 51-a.)

In 1968, an amendment which proposed no change except to increase the annual aggregate maximum from $60 million to $75 million was defeated. In 1969, the current version of Section 51-a was proposed and adopted. In 1971, the voters rejected an amendment that would have retained the annual aggregate maximum only for the category of aid to families with dependent children and would have set that maximum at $55 million. The defeated amendment also would have deleted that supplemental appropriation for the 1969-71 biennium that comprises the fourth paragraph of the current section.

Explanation

The current version of Section 51-a is the 16th amendment on welfare and the sixth version of a comprehensive welfare amendment. In the almost 40 years involved there does not appear to have been a single court interpretation of any of the provisions. There have been a number of attorney general opinions, but only

one or two of the older ones would appear to have any current applicability. In one opinion it was stated that administrative expenses are not to be included as part of the maximum annual aggregate. (Tex. Att'y Gen. Op. No. O-4812 (1942).) A second opinion forbade payment of burial expenses out of old-age assistance monies. (Tex. Att'y Gen. Op. No. O-570 (1939).) Under the current version of Section 51-a, this opinion may be applicable only so long as the United States does not match burial money.

There are two recent opinions of current significance. One opinion concerned the relationship of new Texas acts reducing the age of majority from 21 to 18 to the Aid to Families with Dependent Children program (AFDC) whereby the United States provides matching funds for children under 18 years of age and for children over 17 but under 21 years of age who are attending school or college. In effect the attorney general ruled that the legislature, in lowering the age of majority, did not intend to cut off a federal grant for "children" who now happen to be "adults" under Texas law. The other recent opinion is discussed later.

Section 51-a in all its versions has always been an exception to the grant prohibition of Section 51. Section 51 does not prohibit caring for the aged, the blind, the disabled, and the destitute. Only the handing out of cash is prohibited. Indeed, Section 2 of Article XI and Section 8 of Article XVI refer specifically to poor houses and farms. (There is an attorney general's opinion that argues that these grants of power to counties deny state legislative power to assist the poor (Tex. Att'y Gen. Op. No. O-2578 (1940). The argument is a make-weight not necessary for the opinion's conclusion.) Except for veterans' pensions, which are really welfare payments disguised as supplemental rewards for patriotic service, the regular payment of cash to the needy in Texas dates from the original Social Security Act of 1935.

Most of the welfare amendments adopted since the original "bread bonds" Section 51a of 1933 have been tied to the federal system of grants to the states. The earlier amendments were either designed to get aboard the federal system or to stay aboard after the United States made changes that conflicted with the Texas constitutional limitations. The current version of Section 51-a attempts to end the necessity for constant amendment to meet changing federal regulations.

Before analyzing the current version of Section 51-a, a comment about the word "match" is in order. As noted earlier, the amendment of 1957 had a proviso prohibiting payments in excess of $21 a month "until and unless such additional amounts are matched by the Federal Government." This is the first time the term "match" appeared. Beginning with the amendment adopted in 1963, the term has been used regularly. To "match" funds does not necessarily mean a one-for-one match. A grant by a foundation to a college, for example, can be $1 for every dollar raised by the college, for every $2 raised, or for every 50¢ raised. All three are "matching" grants.

In 1957 when the language quoted above first appeared, the federal grant for old-age assistance was four-fifths of the first $30 plus 50 percent of each dollar above $30 up to a maximum payable to the recipient of $60 a month. Under the $20 a month maximum out of state funds in effect preceding the 1957 amendment, therefore, a recipient could have received only $58 a month. The increase to $21 in the 1957 amendment meant that a recipient could receive $60, which was the federal maximum. Thus, the strange proviso quoted above was in anticipation of an increase in the federal maximum.

Interestingly enough the current version of Section 51-a is obsolete in part because of amendments to the federal welfare statutes enacted in 1972 (Public Law 92-603). These were principally changes that in general relieved the states of any need to participate in grants to the aged, the blind, or the disabled; the United States

in general took over responsibility for these three categories. Consequently, the "grants"—as opposed to medical care—part of Section 51-a now applies only to "needy dependent children and the caretakers of such children," which, as noted earlier, is "AFDC." The only Texas constitutional significance of this change in the federal welfare system is that the limitation of $80 million in annual state assistance payments now limits only AFDC payments. Since, as the preceding *History* shows, there was a need from time to time to increase the amount of the limitation, the federal takeover of three of the categories eased the pressure on the Texas "ceiling." (Note the irony of this in the light of the amendment defeated in 1971. See the last paragraph of the preceding *History*.)

For a variety of reasons AFDC is the most controversial of the several welfare programs. In the case of the aged, the blind, and the disabled there is a physical factor contributing to poverty; in the case of AFDC, there is not. Instead, there is frequently a moral factor involved—the dependent children are illegitimate, or the father has disappeared, or the mother is incompetent or has abandoned the children. Moreover, of the several forms of cash welfare grants, AFDC has long required the largest aggregate pay-outs. (Medicaid, discussed later, is also expensive but for different reasons.) All of this has produced a political resistance to AFDC. Section 51-a has become an element in the continuing political battle over AFDC.

The significant battle words in Section 51-a are: "the maximum amount paid out of state funds to or on behalf of any needy person shall not exceed the amount that is matchable out of federal funds." This restriction has an "independent" ambiguity in it and a "dependent" ambiguity that may arise, depending upon the resolution of the independent ambiguity. The independent ambiguity is in the meaning of the word "matchable." The traditional dictionary definition is that "to match" is "to equal." But as noted earlier, in the world of "matching funds," "to match" means only that the matcher will provide funds according to a formula—so much for every dollar raised or every dollar spent, for example.

Thus, the first question is whether the restrictive language quoted above means that the maximum amount of state funds for AFDC may not exceed the total amount that the United States will contribute. This is the "equal to" meaning of "matchable." In the context of the constitutional restriction, this would mean that the legislature could authorize additional state payments under any federal formula that provided more than 50 percent of a state contribution up to a point and less than 50 percent above that point so long as the state total did not exceed the federal total. For example, one federal formula provides that the United States will reimburse the state for five-sixths of the first $18 of a monthly payment, approximately 60 percent of the next $14, and nothing for a payment above $32. Under this formula the United States will reimburse Texas $23.40 towards the $32, leaving Texas paying only $8.60. If "matchable" means "equal to," Texas can add $14.80 to its contribution so that the dependent child receives $46.80. That is, the United States would be "matching," fifty-fifty, what the state contributes.

But there is the possibility that "matchable out of federal funds" in Section 51-a means that the state may use its money only so long as an additional dollar of state money brings forth some federal money. To use the same formula discussed earlier, under this meaning of "matchable" the state would have to stop at $8.60 because additional dollars would not be "matched." If the first ambiguity is resolved this way, the second ambiguity arises. If the United States has more than one formula for matching, does Section 51-a permit the use of either formula where one formula permits a much larger state expenditure? That is, are the words of Section 51-a designed to restrict the state to the amount that produces the largest percentage of federal matching or may the state use a formula that requires more state money but

brings in more federal money? For example, under the formula discussed earlier the state's $8.60 is 26.87 percent and the federal $23.40 is 73.13 percent of the matchable $32.00. There is another federal formula, however, that simply authorizes the use of the Medicaid percentage for AFDC purposes. In the case of Texas, this would produce a federal matching of approximately 63.5 percent of whatever the state grants for aid to children. Thus, if the state paid $100 a month for a dependent child, the United States would reimburse the state approximately $63.50, leaving the state to contribute approximately $36.50. (It should be noted that the federal statutes are complicated and that the various percentages used in this example change from time to time. For purposes of considering the meaning of Section 51-a, the examples are illustrative only.)

The attorney general recently addressed the issue of the meaning of "maximum amount paid out of state funds . . . shall not exceed the amount that is matchable out of federal funds." (See Tex. Att'y Gen. Op. No. H-437 (1974).) It is a curious opinion, for it apparently assumes that "matchable" means "equal to." In part the summary states: "The Legislature has the authority to enact welfare legislation which utilizes a formula of matching dollar for dollar all federal funds available for individual grants to recipients of Aid to Families with Dependent Children." This clearly implies that "matchable" means "equal to."

The interesting thing about this opinion is that, by assuming that "matching" means "equal to," the "dependent" ambiguity in Section 51-a disappears. If the drafters of Section 51-a were trying to minimize the amount of state money that could be devoted to welfare, this opinion pretty well destroys the effort. So long as the United States uses a matching formula of 50 percent or higher, Section 51-a imposes no limit, except, of course, for the $80 million maximum. Indeed, under the Medicaid percentage formula, there is no way to get to a dollar for dollar match; the United States contributes approximately 63.5 percent of whatever is granted.

An interesting question would arise if the United States changed its policy and reimbursed states at a rate less than 50 percent. The implication of the attorney general's opinion is that Section 51-a would prohibit any aid to dependent children, for the "maximum amount paid out of state funds" would have to be zero since no amount would be "matchable out of federal funds" if "matchable" means "dollar for dollar." It is highly unlikely that the United States will move in this direction. It is also unlikely that the attorney general meant what his opinion implies.

Although the opinion does not give any background concerning the reason for the request, which came from the chairman of the Committee on Human Resources of the House of Representatives, there is reason to believe that some people had been reading Section 51-a to mean that the state is limited to the amount that produces the maximum federal percentage of reimbursement. Prior to the request for an opinion, the welfare commissioner was reported to have said that "increases in state payments would not be matched by increases from the federal government, which would appear to make increased state aid unconstitutional." (See *The Houston Post,* 25 June 1974, page 3/A.) Even this statement is ambiguous. The statement is accurate if the state uses the regular AFDC formula discussed earlier, for federal matching stops when the grant reaches $32; but if the alternative Medicaid formula is used, the federal matching continues no matter how large the grant is. Texas operates under the regular formula, but this can be constitutionally necessary only if Section 51-a is to be read to mean that state contributions must be kept to the minimum necessary to obtain the maximum federal percentage of the total grant.

For the present, the attorney general's opinion solves the problem. Whether the implied reliance on "matching" as meaning "equal to" will create a problem in the future is doubtful. As noted earlier, the United States is likely to continue matching

at least to the extent of 50 percent. Moreover, the attorney general may be able to avoid the "fifty-fifty" implication if that becomes necessary, by noting that he was asked only whether the legislature *could* go fifty-fifty and that his affirmative answer does not preclude his affirmatively answering a different question—whether the state may use state funds so long as each additional state dollar is "matched" to some extent by the United States.

The preceding discussion deals with assistance to needy persons. Section 51-a also covers medical care for needy persons. This is what is known as "Medicaid." (Medicare is available to retired persons under Social Security.) Medicaid under Section 51-a differs in three significant respects from assistance. First, the United States has not taken over medical care for the needy aged, blind, or disabled as it has in the case of assistance. Second, the $80 million limitation does not apply to medical care. Third, the statute implementing the Medicaid program permits the coverage of "such other groups as are found to be financially unable to meet the cost of medical services" (Tex. Rev. Civ. Stat. Ann. art. 695j-1, sec. 5). In other words, all needy persons can be covered, not just the aged, blind, disabled, and dependent children.

How one finds constitutional authority for this extension to all needy persons is a little difficult. The obvious fact is that the constitution was amended in 1965 to take advantage of the federal Medicaid program. But the wording of Section 51-a is so muddled that one is hard put to find the right words on which to hang "all" needy persons. The first paragraph appears to try to authorize the legislature to provide grants to anybody in need for whom the federal government provides matching grants. There is a difficult problem of construction here, however, because it can be argued that the broad language of authority is limited to those needy who come under one of the four numbered categories following the colon. One particularly confusing thing is the reference to "such families and individuals." There is nothing for "such" to refer back to—except perhaps something in the mind of the drafter which he forgot to spell out. Under the rules of grammar "such" cannot refer forward, but if the drafter thought it did, there are still problems because there is no reference to "families" in the four categories, only "persons," "individuals," "children," and "caretakers."

The confusion is increased by the third paragraph of the section. Here the broad authority is repeated but the coverage is simply "needy persons" without regard to the four categories. Again, there is the reference to "such families and individuals." This time there is a possible reference back to "needy persons." This is still not accurate but at least is not meaningless. If this third paragraph is read to override the first paragraph, then the four numbered categories do not limit the term "needy persons." The trouble with this interpretation is that it leaves the section's second paragraph dangling. That paragraph refers to "these programs," which would seem to be limited to the preceding numbered categories.

On top of all this confusion, the next to the last paragraph of Section 51-a appears to authorize the legislature to amend the section by statute. (See forthcoming *Author's Comment.*) Such an unusual authorization may be used, however, only to prevent the loss of federal grants. Since the authority to amend the section is "for or on behalf of needy persons," it would appear that the four numbered categories can be ignored in favor of any federal matching grants for any needy persons.

In any event, the statute authorizes medical care for all needy persons. But the care to be provided is limited to whatever the United States provides "matching" funds for: "provided, however, that no groups and no medical services may be included for which Federal matching funds are not available." (Tex. Rev. Civ. Stat. Ann. art. 695j-1, sec. 5.) This, of course, is simply a statutory equivalent of the

proviso that was construed in the attorney general opinion discussed earlier. Fortunately, there is no problem at the moment concerning "matchable out of federal funds," for the federal "match" for any state is at least 50 percent. (The Texas "match" is approximately 63.5 percent federal reimbursement for each dollar paid out.) If, however, the United States changed the formula to reimburse less than 50 percent, the position taken by the attorney general would appear to be applicable.

The fourth paragraph is obsolete. It was a direct statutory supplemental appropriation to take advantage of the increase in the annual maximum aggregate from $60 million to $80 million, assuming that the 1969 amendment was adopted. The amount appropriated for two years was only $30 million, however, thus using up only three-quarters of the constitutional annual increase.

The final paragraph of Section 51-a is part and parcel of the incredible confusion over Section 31 of Article XVI.

In the course of describing the many changes in Section 51-a and its complementary sections, there were many references to citizenship and residence requirements. All except one have been eliminated. The remaining one is the limitation of old-age assistance to aliens who have resided in the United States for at least 25 years. This is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (*Graham v. Richardson,* 403 U.S. 365 (1971).) Although Section 51-a is now silent as to any other citizenship or residence requirements, the legislature is given the power to prescribe eligibility requirements for assistance. No such requirements based on citizenship or length of residence can be imposed. (*Shapiro v. Thompson,* 394 U.S. 618 (1969).)

Comparative Analysis

No other state appears to have a comparable provision. A good many states have the equivalent of Section 51 and have had to make an exception for welfare grants. (See the *Comparative Analysis* of Sec. 51.) California once had a detailed welfare article (Art. XXVII), but it was repealed in 1962. It appears to be the only other constitutional provision that expressly tied a state program to the federal program. Neither the United States Constitution nor the *Model State Constitution* has anything remotely resembling Section 51-a.

Author's Comment

Sixteen amendments, plus three rejected proposals, on one subject in less than 40 years would seem to be proof enough that this is no way to run a railroad—or a welfare program. If more proof is needed, consider the next to the last paragraph of Section 51-a. Something is surely wrong with a constitutional provision if it has to provide that the legislature may amend it from time to time. The paragraph states in effect that any restrictions in Section 51-a that stand in the way of obtaining federal grants for the needy may be repealed by statute. This legislative power to amend the constitution by statute may very well be unique.

Everybody agrees that the welfare problem in the United States is a mess. It follows that an attempt to control the welfare problem by a constitutional provision will make a mess of the constitution. Even though three proposed welfare amendments were defeated, it is doubtful that the voters have had any real control over the welfare mess by virtue of their control over constitutional amendments.

Consider, for example, the proposed amendment defeated in 1968. All that it would have accomplished was an increase in the maximum annual grant from $60 million to $75 million. The Department of Public Welfare's operating budget for the fiscal year ending August 31, 1973 is $852,451,213, toward meeting which the state

appropriation is $227,069,973. Who is kidding whom? That "Eighty Million Dollars ($80,000,000)" maximum in Section 51-a may be a security blanket for the taxpayer or a rallying cry for "workfare not welfare" but definitely is not a significant limit on spending.

The real question is whether a constitution should say anything about welfare. It has already been suggested that a prohibition on grants to individuals is a mistake. (See the *Author's Comment* on Sec. 51.) But if such a provision remains, there ought to be a blanket exception for any and all grants for welfare purposes. It makes no sense to have to amend a constitution to change the definition of who is needy, or what kind of need is to be met, or how much is to be spent. The people end up not with any real control over the problem but with the nuisance of running to the polls every other year or so to cope with a new crisis. To repeat, 19 proposed constitutional amendments on one subject in less than 40 years is no way to run a government.

Sec. 51-b. STATE BUILDING COMMISSION; STATE BUILDING FUND. (a) The State Building Commission is hereby created. Its membership shall consist of the Governor, the Attorney General and the Chairman of the Board of Control. The Legislature may provide by law for some other State official to be a member of this Commission in lieu of the Chairman of the Board of Control, and in the event said State official has not already been confirmed by the Senate as such State official he shall be so confirmed as a member of the State Building Commission in the same manner that other State officials are confirmed.

(b) The State Building Fund is hereby created. On or before the first day of January following the adoption of this amendment, and each year thereafter, the Comptroller of Public Accounts shall certify to the State Treasurer the amount of money necessary to pay Confederate pensions for the ensuing calendar year as provided by the constitution and laws of this State. Thereupon each year the State Treasurer shall transfer forthwith from the Confederate Pension Fund to the State Building Fund all money except that needed to pay the Confederate pensions as certified by the Comptroller. This provision is self-enacting. The State Building Fund shall be expended by the Commission upon appropriation by the Legislature for the uses and purposes set forth in subdivision (c) hereof.

(c) Under such terms and conditions as are now or may be hereafter provided by law, the Commission may acquire necessary real and personal property, salvage and dispose of property unsuitable for State purposes, modernize, remodel, build and equip buildings for State purposes, and negotiate and make contracts necessary to carry out and effectuate the purposes herein mentioned.

The first major structure erected from the State Building Fund shall be known and designated as a memorial to the Texans who served in the Armed Forces of the Confederate States of America and shall be devoted to the use and occupancy of the Supreme Court and such other courts and State agencies as may be provided by law. The second major structure erected from the State Building Fund shall be a State office building and shall be used by whatever State agencies as may be provided by law.

Under such terms and conditions as are now or may hereafter be provided by law, the State Building Commission may expend not exceeding five (5%) percent of the moneys available to it in any one year, for the purpose of erecting memorials to the Texans who served in the Armed Forces of the Confederate States of America. Said memorials may be upon battlefields or other suitable places within or without the boundaries of this State. The authorization for expenditures for memorials herein mentioned shall cease as of December 31, 1965.

Under such terms and conditions as are now or may hereafter be permitted by law, the State Building Commission may expend not exceeding Thirty Thousand ($30,000.00) Dollars in the aggregate for the purpose of erecting memorials to the Texans who served in the Armed Forces of the Republic in the Texas War for Independence. Said memorials may be erected upon battlefields, in cemeteries, or other suitable places within or without the boundaries of this State. The authorization for

expenditures for memorials herein mentioned shall cease as of December 31, 1965.

(d) The State ad valorem tax on property of Two (2¢) Cents on the One Hundred ($100.00) Dollars valuation now levied under Section 51 of Article III of the Constitution as amended by Section 17, of Article VII (adopted in 1947) is hereby specifically levied for the purposes of continuing the payment of Confederate pensions as provided under Article III, Section 51, and for the establishment and continued maintenance of the State Building Fund hereby created.

(e) Should the 53rd Legislature enact a law or laws in anticipation of the adoption of this amendment, such shall not be invalid by reason of their anticipatory character.

History

This section was added by amendment in 1954. In 1970 a proposed amendment to Subsection (a) was defeated. The amendment would have lengthened to six years the terms of members appointed by the governor. (Art. XVI, Sec. 30, limits their terms to two years.)

Explanation

In the late 1940s and early 1950s state government was in need of additional office space. The prohibition against appropriation for a term longer than two years (Art. VIII, Sec. 6) made it difficult to appropriate enough money out of current general revenue to construct the needed buildings. Since the needs of the Confederate Pension Fund were decreasing and would soon terminate, this section tapped the state ad valorem tax dedicated to payment of Confederate pensions by Article VII, Section 17. However, that tax was abolished by Article VIII, Section 1-e, effective January 1, 1976.

Comparative Analysis

No comparable provision was found in the *Model State Constitution* or in the constitution of any other state.

Author's Comment

Clearly no authorization is necessary to create a State Building Commission and doing so in the constitution further burdens a top-heavy executive branch. A better solution to the state's recurring need for funds to make capital improvements is flexible borrowing authority, perhaps conditioned on statewide referendum approval, not a dedicated tax and not, emphatically, a constitutional amendment for each bond issue. (See the *Author's Comment* on Sec. 49 of this article.)

Sec. 51-c. AID OR COMPENSATION TO PERSONS IMPROPERLY FINED OR IMPRISONED. The Legislature may grant aid and compensation to any person who has heretofore paid a fine or served a sentence in prison, or who may hereafter pay a fine or serve a sentence in prison, under the laws of this State for any offense for which he or she is not guilty, under such regulations and limitations as the Legislature may deem expedient.

History

This section was adopted in 1956.

Explanation

This is another exception to the no-grants-to-individuals prohibition of Section

51. The section is not self-executing, however, and a resolution by the legislature authorizing suit against the state for wrongful imprisonment does not trigger its application. (*State v. Clements,* 319 S.W.2d 450 (Tex. Civ. App.—Texarkana 1958, *writ ref'd*).)

Enabling legislation was enacted in 1965 (Penal Code art. 1176a) and requires that a claimant establish four facts to become entitled to compensation:

(1) the claimant has served time in prison;

(2) the claimant pleaded "not guilty" to the charge for which he was convicted and imprisoned;

(3) the claimant is not guilty of the crime for which he was sentenced; and

(4) the claimant has received a full pardon for the crime and punishment for which he was sentenced.

Recovery under the statute is limited to $25,000 for pain and suffering and $25,000 for all reasonable and necessary medical expenses incurred as a proximate result of the erroneous conviction and imprisonment.

So far only two claims under this section have reached the appellate courts. (*State v. Vargas,* 419 S.W.2d 926 (Tex. Civ. App.—San Antonio 1967), *writ ref'd n.r.e. per curiam,* 424 S.W.2d 416 (Tex. 1968); *Ashford v. State,* 515 S.W.2d 758 (Tex. Civ. App.—Waco 1974, *no writ*).) In the first case, Vargas had won a judgment in the trial court and submitted a claim to the legislature, which made an appropriation to pay it. The governor vetoed the appropriation because the attorney general decided to appeal the case, but Vargas eventually recovered more than $22,000. The second case went off on a procedural technicality.

Comparative Analysis

This section appears to be unique to the Texas Constitution.

Author's Comment

Compensating citizens illegally punished by the state is not only a public purpose but a noble one as well. Since it is now provided for by statute, there is no longer any need (if there ever was) for Section 51-c.

Sec. 51-d. PAYMENT OF ASSISTANCE TO SURVIVORS OF LAW ENFORCEMENT OFFICERS. The Legislature shall have the power, by general law, to provide for the payment of assistance by the State of Texas to the surviving spouse and minor children of officers, employees, and agents, including members of organized volunteer fire departments and members of organized police reserve or auxiliary units with authority to make an arrest, of the state or of any city, county, district, or other political subdivision who, because of the hazardous nature of their duties, suffer death in the course of the performance of those official duties. Should the Legislature enact any enabling laws in anticipation of this amendment, no such law shall be void by reason of its anticipatory nature.

History

This section was added in 1966. In its original wording, it covered survivors of "law enforcement officers, custodial personnel of the Texas Department of Corrections or full-paid firemen who suffer violent death." In 1967, in response to a request for an opinion on the scope of the amendment, the attorney general ruled that the legislature could not cover survivors of volunteer firemen or of custodial employees of state institutions housing the criminally insane. (Tex. Att'y Gen. Op. No. M-28 (1967).) The current version was proposed promptly and adopted in 1969.

In addition to broadening the coverage, the 1969 amendment changed the cause of death from "violent death" to "because of the hazardous nature of their duties, suffer death." The final sentence, added in 1969, is a common provision in the Texas Constitution—there are at least 16 such—but in this case the attorney general's opinion was an important reason for including the sentence because he had ruled that no assistance could be given to survivors of officers who died after the adoption of the original section but before an implementing statute became effective.

Explanation

This is one of the many constitutional provisions required, or assumed to be required, by the prohibition in Section 51 against cash grants to people. There do not appear to have been any official interpretations since the 1969 amendment was adopted. The section appears to be self-explanatory except for the new wording of cause of death. The new wording permits payments in cases of heart attacks and in cases of firemen, perhaps lung cancer. In other words, the new wording appears to add illness to injury as a justification for assistance. The legislature has recognized this change. The operative definition originally covered "loss of life by external means." The statutory amendment to accompany the 1969 amendment of Section 51-d dropped the words "by external means." (Tex. Laws 1969, ch. 456, sec. 1, at 1513; Tex. Rev. Civ. Stat. Ann. art. 6228f (1970).)

It should be noted that the assistance authorized by this section is in addition to any death benefit a spouse and surviving children might receive under a state or local pension plan, under workmen's compensation, and under social security.

Comparative Analysis

Louisiana adopted a comparable provision in 1966. No other state appears to provide constitutionally for special payments to survivors of policemen and firemen who die in the course of their work. Other states have similar programs but presumably do not have to amend their constitutions to get around crabbed interpretations of a cash grant provision like Section 51. Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

This would be an unnecessary provision except for the prohibition in Section 51 against cash grants and may be unnecessary anyway. It has been pointed out that Section 51 would not prevent a state pension system because a pension plan is part of compensation. By the same argument an announcement of special death benefits in a hazardous occupation is additional compensation.

Section 51-d is one of many examples of the legislative approach to a constitutional problem. Something is obviously wrong if a provision has to be amended in less than three years. Even with the revision of 1969, one can easily point out an unnecessary restriction in Section 51-d. It is not uncommon to continue assistance payments to children for some period after majority is reached if the children are full-time students. Section 51-d does not permit this. (Compare *Cook v. Employees' Retirement System,* 514 S.W.2d 329 (Tex. Civ. App.—Texarkana 1974, *writ ref'd n.r.e.*), where the court held that the legislative reduction of minority from 21 years to 18 years cut off assistance payments.)

In the drafting of a statute one usually wishes to be precise and complete so that those affected by the statute know what is and what is not permitted. It seems ironic to draft a constitutional amendment granting power to the legislature in the

same precise and complete way, for the legislature is supposed to be a policy-making body and the restrictions on its policymaking power ought to be broadly, not precisely, stated. A broad grant—to assist the families of government personnel in hazardous occupations who lose their lives—would have given the legislature the necessary flexibility to make decisions on whom to cover and how to provide assistance. (As noted earlier, it should not be necessary to grant such power in the first place.)

Sec. 51-e. MUNICIPAL RETIREMENT SYSTEMS AND DISABILITY PENSIONS. Each incorporated city and town in this State shall have the power and authority to provide a system of retirement and disability pensions for its appointive officers and employees who have become disabled as a direct and proximate result of the performance of their duties, or have passed their sixty-fifth birthday, or have been employed by such city or town for more than twenty-five (25) years and have passed their sixtieth birthday, when and if, but only when and if, such system has been approved at an election by the qualified voters of such city or town entitled to vote on the question of issuance of tax supported bonds; provided that no city or town shall contribute more than the equivalent of seven and one half (7 1/2) per centum of salaries and wages of the officers and employees entitled to participate in its pension system, and that said officers and employees shall contribute a like amount; and this Amendment shall not reduce the authority nor duty of any city or town otherwise existing. (Repealed April 25, 1975. See Sec. 67 of Art. XVI.)

History

This section was added by amendment in 1944. No amendment of the section has ever been submitted to the voters. (But see the discussion below of Art. XVI, Sec. 62, Subs. (c).) Section 51-e has been superseded by Section 67 of Article XVI.

Explanation

The most interesting point about this section is why it was adopted at all. As noted earlier in discussing Section 48a, the constitutionality of municipal pension plans had been upheld in 1928 and a State Firemen's Relief and Retirement Fund had been created in 1937. One possibility is that once one group, the teachers, obtained constitutional status for their pension system, other groups wanted the same status. Another possibility is that municipal governments felt that a constitutional amendment was preferable to an enabling statute since the legislature could repeal the latter but only the voters could repeal the former. A third possibility is that municipal employees wanted constitutional protection for their pension rights. Again, as noted earlier, the protection afforded is probably limited to anything that is in the pension fund and does not prevent a municipality from discontinuing further contributions to the pension plan.

The second most interesting point about this section is that it appears to give all incorporated cities and towns more home-rule power over pensions than the Home Rule Amendment gives to home-rule cities. (See the *Explanations* of Art. XI, Secs. 4 and 5.) This is demonstrated by the fate of Article 6243i, enacted in 1949, providing for a policemen's pension plan for cities with a population between 175,000 and 240,000—namely, Fort Worth. (See the *Explanation* of and the *Author's Comment* on Sec. 56 of this article concerning "local" laws like this one.) The act provided, among other things, that the policemen's pro rata share of any municipal employees' pension fund in any city with a population between 175,000 and 240,000—that is, Fort Worth—should be turned over to the new trustees. It turned out, obviously by the merest coincidence, that Fort Worth had a municipal employees' pension plan adopted pursuant to the "power and authority" granted

in Section 51-e. Fort Worth refused to cooperate and litigation ensued.

The court of civil appeals held that the legislature had always had the power to create pension plans and that Section 51-e did not take away any power of the legislature. Therefore, Article 6243i was constitutional. (*Howerton v. City of Fort Worth,* 231 S.W.2d 993 (Tex. Civ. App.—Fort Worth 1950).) On appeal the supreme court reversed the court of civil appeals in an opinion that both ignored the lower court's reasoning and left the issue of power ambiguous. (*City of Fort Worth v. Howerton,* 149 Tex. 614, 236 S.W.2d 615 (1951).) The supreme court noted that there were substantial differences between the Article 6243i plan and the Section 51-e plan and then said:

> The system created under Article 6243i undertakes to affect the rights and obligations accrued under the system adopted by the City of Fort Worth under a constitutional provision. Clearly this creates a conflict and the rights accrued under the constitutional provision must prevail. The provisions of the Constitution were adopted by the people, while statutes are enacted by the Legislature; and the Legislature may enact, repeal, or amend statutes, but it does not have the power to repeal or amend the provisions of the Constitution. That power rests exclusively with the people. (149 Tex. at 619; 236 S.W.2d at 618.)

This seems to mean that if a city first adopts a Section 51-e plan, the legislature may not supersede the plan, but does the opinion mean that if the legislature adopts a statewide pension system pursuant to Section 51-f, cities and towns without a pension plan can be required to opt for the statewide system if they want any plan at all? By ignoring the lower court's opinion and limiting itself to the conflict between the two Fort Worth plans, the supreme court left the issue up in the air.

To confuse this even more, it may be noted that home-rule cities have all powers not denied by the constitution or by statute. As already noted, the courts have long since upheld the constitutionality of pension plans even without a constitutional grant of power. Therefore, it can be argued, a home-rule city can amend its charter to provide a pension plan that is not in accord with the "power and authority" granted by Section 51-e, for example, a noncontributory plan. This argument is bolstered by the final words of Section 51-e: "and this Amendment shall not reduce the authority nor [*sic*] duty of any city or town otherwise existing." (Obviously, "otherwise existing" modifies "authority" and "duty" rather than "city or town." But the misplacing of "otherwise existing" makes no difference for the phrase adds nothing to the rest of the "sentence.") But then the question arises whether the legislature can command home-rule cities to adopt pension plans only pursuant to their "power and authority" under Section 51-e and not pursuant to their inherent power as home-rule cities.

To complete the confusion, Subsection (c) of Section 62 of Article XVI, added in 1966, appears to offer a third route to municipal employees. The subsection authorizes the legislature to provide a pension plan "for all the officers and employees of a county or other political subdivision of the state. . . ." Cities and towns are "political subdivisions of the state." (The legislature probably did not mean to include cities and towns, but they said what they said.)

This extended discussion is not an exercise in logic chopping. There are significant differences involved. For example, Sections 51-e and 51-f include only "appointive officers and employees" whereas Subsection (c) permits the legislature to include "all the officers and employees." Section 51-e limits the employer's contribution to no more than 7-1/2 percent of salaries and wages, Subsection (c) has no limit, and Section 51-f is silent about contributions. (Interestingly enough, the supreme court in the *Howerton* case noted that "Fort

Worth is obligated to contribute not only an amount equal to that contributed by the employee, but also a substantial amount in recognition of prior service." (149 Tex., at 618; 236 S.W.2d, at 617 (1950).) This would seem to be invalid under the "like amount" restriction of Section 51-e.) Home-rule cities, if they can act under their inherent powers, can ignore all the limitations of Section 51-e.

Section 51-e has been repealed. Whether the extended discussion is now wholly moot is a good question. Section 67 of Article XVI, the replacement for Section 51-e and the other sections discussed earlier, states that general laws in existence remain in effect. Where does that leave the *Howerton* case? After all, that case upheld a local pension plan as against a "general" law. Does a pension plan adopted under Section 51-e, now repealed, retain its status in the face of Section 67? (For further discussion see the *Explanation* of Sec. 67 of Art. XVI.)

Comparative Analysis

See the *Comparative Analysis* of Section 67 of Article XVI.

Author's Comment

See the *Author's Comment* on Section 67 of Article XVI.

Sec. 51-f. STATE-WIDE RETIREMENT AND DISABILITY SYSTEM FOR MUNICIPAL OFFICERS AND EMPLOYEES. The Legislature of this State shall have the authority to provide for a system of retirement and disability pensions for appointive officers and employees of cities and towns to operate State-wide or by districts under such a plan and program as the Legislature shall direct and shall provide that participation therein by cities and towns shall be voluntary; provided that the Legislature shall never make an appropriation to pay any of the cost of any system authorized by this Section. (Repealed April 22, 1975. See Sec. 67 of Art. XVI.)

History

This section was a companion to Section 51-e. Both were submitted to the voters and adopted at the same time, 1944. Presumably, the legislature drafted separate amendments on the theory that the voters might accept local power to set up pensions but would not approve a single statewide system. (Sec. 51-e passed by a margin of 61 percent to 39 percent and 51-f by 59 percent to 41 percent.) It probably did not occur to the legislature that the voters might approve "f" and turn down "e." It can be argued, of course, that the legislature simply wanted to permit large cities to have their own pensions systems, but at the same time to provide a statewide system that small cities and towns would prefer to join in order to avoid the headache of administering a small fund. The argument is valid in general but not to the question of why two separate sections were to be voted upon separately. The section has been superseded by Section 67 of Article XVI.

Explanation

The part of the *Explanation* of Section 51-e concerning why the section was adopted at all and concerning Subsection (c) of Section 62 of Article XVI is equally applicable to Section 51-f.

It should be noted that Section 51-f gives the legislature the *power* to create a statewide system that would be noncontributory, something that neither Section 51-e nor Subsection (c) of Section 62 permits. The implementing statute requires the customary fifty-fifty contribution plus an additional employer contribution for prior service credits, if any. (Tex. Rev. Civ. Stat. Ann. art. 6243h, sec. IV (2) (a)

(1970).) Note also that Section 51-f and Subsection (c) do not require the legislature to require a referendum by the voters of any city or town opting to participate in the statewide system whereas Section 51-e does require a referendum. Under the implementing statute, the governing body or a city or town may join the system, or the voters by initiative petition can call for a referendum which, if successful, forces the municipality to participate. (Tex. Rev. Civ. Stat. Ann. art. 6243h, sec. III (1) (d) (1970).)

The only judicial interpretation of this section stated in effect that the requirement that a city or town's participation must be voluntary extends to subsequent statutory amendments. The case involved a municipal employee who had enough retirement credits if employment in two different cities were cumulated. At the time of employment, cumulation was not authorized. The court of civil appeals held that the subsequent legislative authorization for cumulation did not bind a city retroactively until and unless it took some affirmative action to be bound. (*Texas Municipal Retirement System v. Roark*, 401 S.W.2d 913 (Tex. Civ. App.—Austin 1966, *writ ref'd n.r.e.*).)

Comparative Analysis

See the *Comparative Analysis* of Section 67 of Article XVI.

Author's Comment

See the *Author's Comment* on Section 67 of Article XVI.

Sec. 51g. SOCIAL SECURITY COVERAGE OF PROPRIETARY EMPLOYEES OF POLITICAL SUBDIVISIONS. The Legislature shall have the power to pass such laws as may be necessary to enable the State to enter into agreements with the Federal Government to obtain for proprietary employees of its political subdivisions coverage under the old-age and survivors insurance provisions of Title II of the Federal Social Security Act as amended. The Legislature shall have the power to make appropriations and authorize all obligations necessary to the establishment of such Social Security coverage program.

History

Under the original social security system established by congress in 1935, state and local government employees were specifically excluded. In 1950, congress amended the Social Security Act to permit coverage of state and local employees not covered by a retirement plan. (Congress subsequently amended the act to permit coverage of state and local employees already under a retirement plan.) Texas acted to take advantage of the change enacted by congress.

Unfortunately, the loans prohibition of Section 50 reared its ugly head. (Why this is Sec. "51g" instead of Sec. 50 plus a letter is an interesting question.) Getting from social security coverage of proprietary employees of political subdivisions to the prohibition on state lending of credit is not at all obvious, but the attorney general succeeded, thus bringing about Section 51g.

The attorney general's tortuous argument ran thus:

1. In order for state and local government employees and their employers to become eligible to pay social security taxes, the United States required an agreement with the state government.

2. Under that agreement, the state was required to remit social security taxes on state and local government employees and employers. If the state failed to remit on time, 6 percent interest was added. The United States could offset any

taxes due against any moneys due the state under any other social security programs, which would include all the matching grants under Section 51-a.

3. Since such an agreement meant that the state would be stuck with the bill if a municipality failed to remit its social security taxes to the state for forwarding to the United States, this would be lending or giving the state's credit in violation of Section 50.

4. But Section 50 does not apply when the state is lending or giving its credit for *state* purposes. Counties and other political subdivisions are acting for the state when engaged in governmental activities. Political subdivisions also engage in proprietary activities. They are then not acting for the state.

5. Therefore, Section 50 does not prevent agreement with the United States so long as proprietary employees of political subdivisions are excluded from coverage. (See Tex. Att'y Gen. Op. Nos. S-19 (1953), V-1198 (1951).)

In 1951, the legislature authorized counties and incorporated municipalities to join the social security system but excluded proprietary employees. In 1953, an opinion was requested whether a proposed bill extending authorization to other political subdivisions could include proprietary employees. The attorney general said no. Thus, Section 51g was proposed and adopted at the general election in November 1954 by a vote of 324,612 to 162,219. (It is interesting to speculate about what went through the minds of the 162,219 who voted no.)

Explanation

This section needs no explanation. All it does is wipe out two attorney general opinions. It is not even necessary to explain who are proprietary employees and who are government employees since Section 51g obliterates the distinction for purposes of social security taxes. (Policemen and firemen are governmental employees; waterworks engineers and street cleaners are proprietary employees. See the *History* of Sec. 61 (1952) of this article.) In effect, Section 51g is fully executed but not obsolete since repeal might revive those attorney general opinions. (In 1960, the Legislative Council provided the legislature with a section-by-section analysis of the constitution. It is interesting to note that there is no analysis of Sec. 51g.)

Comparative Analysis

Georgia has a provision, added in 1952, authorizing the legislature to enact such legislation as is necessary for state and local employees to participate in the social security program. (Art. VII, Sec. II, para. I, subpara. 7-A.) No other state appears to have a comparable provision. Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

One must always remember that a constitution has many uses. One use is to support an argument against some proposed course of action. A legislator may argue that a bill should be defeated because it would be unconstitutional. Those favoring the bill may try to get an authoritative opinion that the bill is constitutional. Without a great deal of historical research it is not possible to determine whether the 1951 opinion of the attorney general was designed to meet a constitutional argument against joining the social security system. Unless there was some complicated maneuvering involved, the attorney general's opinion is hard to explain.

There are several ways in which the exclusion of proprietary employees could

have been avoided. The attorney general could have taken the broad approach. The purpose of Section 50 was "to put an end to the use of the credit of the State in fostering private business, a practice which prevailed in the early days of the history of most states." (Tex. Att'y Gen. Op. No. V-1198 (1951).) It makes no sense to distort Section 50 from this purpose by ruling that it prohibits the state from entering into an agreement with the United States whereby state and local employees participate in the social security system.

The attorney general could have taken a technical approach. Nobody is lending his credit to anybody. The state agrees with the United States to pay over the appropriate amount of social security taxes. The legislature requires local governments to collect the tax from employees, add the appropriate amount for the employer, and remit to the state. If a local government fails to remit, the state can bring suit and obtain a judgment. (This is particularly true in the case of proprietary activities.) Only if the local government is judgment proof does the state end up paying the United States more than was collected. There is no credit transaction here anywhere.

The attorney general could have taken a theoretical approach. He could have pointed out that the events just described could arise only if local officials failed to carry out the duties legally imposed upon them. It is not good constitutional theory to say that a statute is unconstitutional because a government official acts unconstitutionally by violating the statute. By the same token the legislature would not violate Section 50 by authorizing an agreement with the United States whereunder the state might be left holding the bag because some local official failed to remit what the law commanded him to remit.

Section 51g is just one of many examples of two Texas legal habits, proclivities, customs, call them what you will. One is the tendency to read constitutional provisions literally rather than practically in the light of their purpose. True, the literal-minded drafters of 1875 make it hard not to continue in their footsteps, but this is simply to call for more imagination and creativity. The other habit is to rush to the constitutional amendment drawing board. True, easy amendment facilitates this approach, but the end result is abominable constitutional clutter.

It has already been suggested that the sensible way to avoid sections like 51g is to get rid of the basic cause—Sections 50, 51, and 52.

Sec. 52. COUNTIES, CITIES, TOWNS OR OTHER POLITICAL CORPORATIONS OR SUBDIVISIONS; LENDING CREDIT; GRANTS. (a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company.

(b) Under Legislative provision, any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the State, or any defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include, towns, villages or municipal corporations, upon a vote of two-thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purposes to wit:

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(1) The improvement of rivers, creeks, and streams to prevent overflows, and to permit of navigation thereof, or irrigation thereof or in aid of such purposes.

(2) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation, or in aid thereof.

(3) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.

(c) Notwithstanding the provisions of Subsection (b) of this Section, bonds may be issued by any county in an amount not to exceed one-fourth of the assessed valuation of the real property in the county, for the construction, maintenance, and operation of macadamized, graveled, or paved roads and turnpikes, or in aid thereof, upon a vote of a majority of the resident property taxpayers voting thereon who are qualified electors of the county, and without the necessity of further or amendatory legislation. The county may levy and collect taxes to pay the interest on the bonds as it becomes due and to provide a sinking fund for redemption of the bonds.

History

This section dates from 1876. The original section was the current Subsection (a) without the words "except as otherwise provided by this section." Since 1876 the section has been amended, directly or indirectly, nine times. Three submissions have failed.

The first amendment was adopted by 1904. This, in substance, was what is now Subsection (b). In 1913 an amendment was proposed which would have changed the required voter approval from two thirds to a majority and would have added a fourth purpose, to wit: "The construction, maintenance and operation of public warehouses or in aid thereof." The amendment was defeated. The amendment as submitted also contained a drastic amendment of Section 49, which was undoubtedly the principal reason for the failure of the amendment. The vote was 19,745 for and 120,734 against. The same legislature proposed another amendment much like the Section 52 part of the defeated amendment, but the governor failed to issue the required proclamation in time and no vote was taken.

In 1915, there was another effort to amend Section 52. This proposal would have authorized the legislature to permit water reclamation districts to incur indebtedness up to 50 percent instead of 25 percent of assessed value of the real property within the district. The amendment was defeated by a vote of 32,772 for and 97,546 against. Two years later, Section 59 of Article XVI was adopted by a vote of 49,116 to 36,827. Section 59 was indirectly an amendment of Section 52 and, considering the greater fiscal freedom in Section 59 compared with that in Section 52 and the minor amendment that went down to defeat in 1915, one wonders what produced such a turnaround in only two years. (The special election in 1915 called for votes on four amendments, including Section 52, and all were defeated. At the special election in 1917, Section 59 was the only amendment on the ballot.)

The next "amendment" was the curious Section 52d, adopted in 1937. Then followed Sections 60 and one of the 61s of Article III, adopted in 1948 and 1952, respectively. In 1962, Section 60 was amended in a manner that further "amended" Section 52.

In 1967, a Section 52e was adopted and in 1968 another Section 52e was added. Both sections numbered 52e are "amendments" of Section 52. In 1968, the voters rejected another "amendment" of Section 52, this one denominated Section 52a. The rejected section would have authorized the legislature to authorize counties, cities, and towns "to issue revenue bonds for industrial and development purposes." (Note that the first addition to Section 52 in 1937 was called "52d." Presumably, this was because Section 52 then had an "(a)," a "(b)," and a "(c)"—what are now "(1)," "(2)," and "(3)" of Subsection (b). This sounds silly, but is

probably the reason for the "d." For that matter, it is absurd not to have and never to have had a Section 52a or 52c, but to have two Sections 52e. (Note also that Section 52b, if it means anything at all, is *not* an amendment of Section 52 but of Sections 50 and 51.)

In 1970, Section 52 itself was amended. The substantive change was the addition of Subsection (c). This bit of sloppy drafting is discussed below.

Explanation

Section 52 started out as a flat prohibition on grants and loans by local governments, thus serving as a complement to Sections 50 and 51. In one respect Section 52 is more prohibitive than Section 51, for the latter prohibits grants of "public money" whereas the former prohibits grants of "public money or thing of value." (The omission of "thing of value" in Section 51 was probably intentional because in 1875 the state still had public domain land to distribute.)

In a different respect, Section 52 would appear to be less restrictive than Section 50, for Section 50 prohibits loans to a "corporation, whether municipal or other" and prohibits grants to "municipal or other corporations," respectively, whereas Section 52 prohibits grants and loans to "corporations." (Of course, Sec. 52 says "corporations whatsoever;" but "whatsoever" also appears in Secs. 50 and 51, and good mathematics permits one to cancel out all "whatsoevers.") Moreover, Section 52 prohibits local governments from becoming stockholders in "such corporation," and municipal corporations do not have stockholders. (Unfortunately, close analysis of the wording of a Texas constitutional provision tends to collapse under the weight of poor drafting. The full phrase is "such corporation, association or company." Associations have "members," not "stockholders." And where did "such" company come from? There is no antecedent—except, of course, "corporation whatsoever.")

From the foregoing, one would like to conclude that although the state may grant no public money to cities and towns, the cities and towns may grant each other public money and things of value. (Whether a county is a municipal corporation is an interesting question. See the *Explanation* of Sec. 1 of Art. XI for a discussion concerning the confused local government terminology used throughout the constitution and the equally confused judicial gloss on "municipal corporations.")

No such conclusion is permissible if one is to believe the court of civil appeals in *San Antonio I.S.D. v. Board of Trustees:*

> A city cannot donate its funds to an independent municipal corporation such as an independent school district. Sections 51 and 52, art. 3, Constitution of the State of Texas; *City of El Paso v. Carroll,* Tex. Civ. App., 108 S.W.2d 251 (*writ ref'd*). (204 S.W.2d 22, 25 (Tex. Civ. App.—El Paso 1947, *writ ref'd n.r.e.*).)

This statement is definite enough, but how the court got there is a good question. Section 51 is irrelevant, and Section 52, as the foregoing discussion shows, does not specifically cover municipal corporations. The *Carroll* case does not mention Section 52 but does say "the city has been granted no power to lend money." (*City of El Paso v. Carroll,* 108 S.W.2d 251, 259 (Tex. Civ. App.—El Paso 1937, *writ ref'd*).)

The *San Antonio* case is a little complicated but for present purposes can be described as an arrangement whereby the city proposed to pay the school district about $130,000 each year for 30 years because the city had bought a private public utility and perforce removed the utility's property from the tax rolls. The court upheld the city's repudiation of the arrangement. (Note that Sec. 16 (1930) of Art.

VII gives counties a property tax equivalent on University of Texas lands.)

The *Carroll* case supports the *San Antonio* conclusion, if not the quoted sentence. In *Carroll*, the city proposed to lend $54,000 from the surplus in its waterworks' account to the school district to tide the school district over until it could collect some delinquent taxes. The court's line of reasoning was in the field of limitations on the power to tax rather than on the prohibition against giving or lending money. The court took as its starting point *City of Fort Worth v. Davis* (57 Tex. 229 (1882), discussed in the *History* of Section 3 of Article VII), reviewed subsequent cases, and concluded that the rigid constitutional property tax structure would be violated if local governments were permitted to shift funds around among themselves.

This line of cases helps demonstrate the reason for the 1904 amendment: it was a device for increasing the power to tax property. What is not clear is why this grant of taxing power was tacked on to Section 52. Prior to the 1904 amendment there had been two unsuccessful proposed amendments authorizing irrigation districts. These had been in the form of a new section to be added to Article VIII. (See *Marburger,* p. 11.) Logic would dictate the same placement of the 1904 amendment, but logic has not always prevailed in the amending process. Rather than speculate on the reason for the present anomaly, it seems appropriate simply to state that Subsection (a) has nothing to do with Subsections (b) and (c).

The foregoing flat statement appears to be inconsistent with the supreme court's discussion of the section in *Collingsworth County v. Allred* (120 Tex. 473, 40 S.W.2d 13 (1931)). That case was an original mandamus action in the supreme court to require the attorney general to approve a bond issue for the construction of a county courthouse. The attorney general had refused because a United States Court of Appeals had just handed down an opinion in which it said that Section 52 prohibited local governments from issuing bonds for any purpose except that set forth in what is now Subsection (b). (The case is *Shelby County v. Provident Savings Bank & Trust Co.*, 54 F.2d 602 (5th Cir. 1932). The Texas Supreme Court noted that the United States court had withdrawn its opinion; the opinion as printed contains no such statement and presumably is a revision of the withdrawn opinion.)

Such a narrow reading of Section 52 requires parsing the sentence as if it read, "no power to lend its credit; and no power to grant money in aid of or to any individual. . . ." In *Collingsworth,* the supreme court seemed to accept this parsing of the sentence but to argue that one must read the constitution as a whole, and since Section 2 of Article XI authorized the construction of courthouses, the legislature can authorize bonds to pay for the courthouses. The court noted that such was the interpretation of that section prior to the 1904 amendment of Section 52 and that there was no reason to assume that the 1904 amendment was intended to destroy any preexisting power to issue bonds.

The normal way to read the original Section 52 is that there is no power to grant money in aid of or to any individual, etc., and no power to lend credit in aid of or to any individual, etc. Such a normal reading is consistent with Sections 50 and 51, which clearly are limited to *who* gets money or credit. Moreover, the original Section 52 was telescoping into one section the prohibitions contained in Sections 50 and 51. In this telescoping the words are "to lend its credit or to grant public money . . . in aid of or to." Note that "in aid of" is found only in Section 50, thus indicating that the lending prohibition in Section 52 parallels the prohibition in Section 50. Why the supreme court fell into a grammatical trap is a mystery. It may be simply because the 1904 amendment was an amendment of Section 52, thus giving rise to the inference that somebody must have thought that there was a connection between the borrowing power authorized thereby and the borrowing

prohibition in the original section. Be all this as it may, the effect of the *Collingsworth* opinion is to make the earlier flat statement true in fact. For *Collingsworth* concludes (a) that the original Section 52 did not prohibit issuing bonds for purposes for which counties and other local governments could spend money and (b) that the 1904 amendment broadened rather than restricted that preexisting power. Thus, *Collingsworth* leaves the lending prohibition with only its natural grammatical meaning.

Subsection (a). Although this subsection is the "local" version of Sections 50 and 51, the *Explanation* of Section 51 covers both "grants" and "loans" as such, whether the government involved is the state or a local unit. Thus, that explanation covers this subsection.

Subsection (b). This subsection is part of the constitutional tax structure and can be understood only after a review of the tax sections, particularly Section 9 of Article VIII. (See *History* and *Explanation* of that section.) The primary original purpose of the subsection was to provide additional means for raising capital funds for water and for roads. With the adoption of Section 59 of Article XVI in 1917, the water power of Subsection (b) became almost but not quite obsolete; there are still some Section 52 water districts around.

To avoid duplication of coverage, the constitutional problems of water districts will be discussed under Section 59 of Article XVI.

Road districts are a different matter. They still exist and will continue even though the state long ago took over many county roads for the state highway system. (There is a long story concerning the takeover of county roads but the problems involved do not arise from Section 52. The leading cases are *Robbins v. Limestone County,* 114 Tex. 345, 268 S.W. 915 (1925), and *Jefferson County v. Board of County and District Road Indebtedness,* 143 Tex. 99, 182 S.W.2d 908 (1944).) Road districts are not "special districts" in the technical sense of an independent unit of government with fiscal and administrative power to provide particular services. A road district is a "body corporate" that can sue and be sued (*Horn v. Matagorda County,* 213 S.W. 934 (Tex. Comm'n App. 1919, *jdgmt adopted*)), but it exists solely as a geographical unit for the purpose of determining who is to vote and to be taxed for a bond issue for road construction. The issuing of the bonds, the levying of the tax, and the construction of roads are handled by the county commissioners court. Subsection (b) authorizes a road district covering more than one county, but the legislature has authorized only whole counties so to combine to form a road district. (Tex. Rev. Civ. Stat. Ann. art. 778a (1964). See Tex. Att'y Gen. Op. No. O-4214 (1941).)

Since the road district exists in practice only as a money-raising unit, the judicial gloss on Subsection (b) is limited substantially to questions concerning bond issues. For example, the proceeds of a bond issue must be used for the roads that the election specified would be built. (*Fletcher v. Howard,* 120 Tex. 298, 39 S.W.2d 32 (1931).) Although the section speaks of "macadamized, graveled or paved roads," "paved" has been interpreted loosely to cover almost anything that makes a road reasonably permanent. (*Aransas County v. Coleman-Fulton Pasture Co.,* 108 Tex. 223, 191 S.W. 556 (1917); Tex. Att'y Gen. Op. No. O-3652 (1941).) Bond money of a road district that includes a city may be spent on city streets that are part of a highway system (see *City of Breckenridge v. Stephens County,* 120 Tex. 318, 40 S.W.2d 43 (1931)); but a city may issue its own bonds for city streets that are part of the highway system. Such bonds are not subject to the limitations of Subsection (b). (See *Lucchese v. Mauerman,* 195 S.W.2d 422 (Tex. Civ. App.—San Antonio 1946, *writ ref'd n.r.e.*), *cert. denied,* 329 U.S. 812 (1947).)

It must be kept in mind at all times that Section 9 of Article VIII and

Subsection (b) both involve taxation for roads. Since Section 9 covers road maintenance, it appears that, notwithstanding the word "maintenance" in Subsection (b), no tax for maintaining roads built by a road district can be levied against the taxpayers of the road district. Road maintenance must be on a countywide basis and paid for from the county tax authorized by Section 9. (See *Commissioners' Court of Navarro County v. Pinkston,* 295 S.W. 271 (Tex. Civ. App.—Dallas 1927, *writ ref'd*).) The attorney general has said, however, that where a county proposes to use its own road crew to build a road for a road district, bond funds may be used to buy road machinery. (Tex. Att'y Gen. Op. No. O-2916 (1941).) The attorney general also has ruled that bond funds may be used to construct a building to house road machinery. (Tex. Att'y Gen. Op. No. O-298 (1939).)

It must also be remembered that the legislature can authorize counties to issue bonds to build roads without regard to the limitations contained in Subsection (b). The county would have to pay for the bonds—interest and sinking fund—out of the regular county tax levy authorized by Section 9 of Article VIII. All of this flows from the argument set forth earlier in the discussion of the *Collingsworth* case. (See also *Burke v. Thomas,* 285 S.W.2d 315 (Tex. Civ. App.—Austin 1955, *writ ref'd n.r.e.*).) Interestingly enough, the court of civil appeals in the *Burke* case repeated the strange interpretation of Subsection (a) discussed earlier:

> Section 52, art 3 as originally adopted in 1876, simply forbade the Legislature from authorizing any political subdivision to lend its credit. (p. 318.)

Subsection (c). It is not at all clear what this new subsection means. Obviously, it is designed to lower the majority required to get a bond issue through. Presumably, the subsection is also designed to permit a larger indebtedness than Subsection (b) permits, but the language is so fuzzy that it is not clear how much additional borrowing is permitted. It has been said that Subsection (c) would "grant any county the same authority to issue road bonds as that granted to Dallas County under Article III, Section 52e. . . ." (Texas Legislative Council, *7 Proposed Constitutional Amendments Analyzed* (Austin, 1970), p. 21.) This is fine except that the wording of the two provisions differs. Moreover, it is not clear what that Section 52e means.

At least three things are clear. First, Subsection (c) is a direct grant of power rather than an authorization to the legislature to grant power to issue bonds. For example, under "legislative provision" pursuant to Subsection (b) a county could be required to set up a sinking fund of 3 or 4 percent or more for bond retirement whereas under Subsection (c) a county would appear to have to set aside no more than the 2 percent required by Section 7 of Article XI. But there are questions even on this score, for the subsection grants the power "without the necessity of further or amendatory legislation." Does this mean that existing restrictions on bond issues remain in effect except to the extent that such restrictions conflict with the grant of power? But then does the final sentence of the subsection in effect repeal all legislative restrictions on interest rates and sinking funds?

Second, it is clear that only a county has whatever power is granted by the subsection. Road districts are still subject to Subsection (b). Third, it is clear that Subsection (c) permits a county to issue bonds in an amount equal to 25 percent of the assessed value of the real property of the county no matter what bonded indebtedness is outstanding.

What is not clear is whether Subsections (b) and (c) combined permit road bonds in an amount equal to 50 percent of assessed valuation, assuming that all water districts operate under Section 59 of Article XVI. Or does Subsection (c)

mean that a county may forthwith incur debt to the 25 percent limit but that no further bonds may be issued by subsidiary units? This question arises because Subsection (b) does not say "notwithstanding Subsection (c)." But then Subsection (b) has the words "in addition to all other debts," which might cover Subsection (c) debts. (See the *Author's Comment* following.)

The foregoing problem can be demonstrated by analogy to a problem that used to arise under Subsection (b). Assume that the assessed value of the real property of an entire county is $1,000,000 and that there are outstanding county road bonds of $100,000, which use up 10 percent of the 25 percent allowed by Subsection (b). If one area of the county proposed to establish a road district and if the assessed valuation of the real property within that area were $200,000, the maximum allowable bond issue would be 15 percent of $200,000, or $30,000, since the countywide 10 percent of the assessed valuation would have to be factored in. (See Tex. Att'y Gen. Op. No. O-486 (1939).) The unanswered question today is how a subsidiary road district—or a Section 52 water district, for that matter—determines what bonds it may issue. Does it have to count Subsection (c) bonds?

It should also be noted that Subsection (c) authorizes "bonds" whereas Subsection (b) authorizes a unit to issue "bonds or otherwise lend its credit." Under Subsection (b) a road district can issue time warrants to pay for roads provided that the referendum procedure is followed. (See Tex. Att'y Gen. Op. No. O-763 (1939).) Presumably, a county can issue time warrants payable out of its normal Article VIII, Section 9, tax levy but not under Subsection (c).

Comparative Analysis

Subsection (a). See the *Comparative Analysis* of Section 51 of this article.

Subsections (b) and (c). Only a handful of states limit the public purpose for which money may be borrowed. A majority of the states have limits on the amount of local debt that may be incurred. Most limits are expressed either as a percentage of assessed valuation or as a percentage of the value of property as determined from the assessment rolls. In these latter cases it may be that the limit is measured by full value. In terms of percentage, no other state approaches 25 percent; most are below 10 percent. Many of the provisions also require approval by referendum, but only a few of those require as large an affirmative vote as two-thirds. Neither the *Model State Constitution* nor the United States Constitution has a comparable provision.

Author's Comment

The Texas Constitution is full of badly drafted provisions. It will not be worthwhile to analyze each of them in detail, but it seems important on occasion to take the time to demonstrate bad draftsmanship. Constitutional provisions above all other legal documents should be most carefully drafted, for they should be reasonably permanent and not subject to annual "perfection" as in the case of legislation. (For principles of constitution drafting, see the *Citizens' Guide,* at 6-10.) What follows is a partial dissection of Subsection (b).

(1) Why were the words "under Legislative provision" used? In the 1904 amendment, Subsection (b) was grammatically a proviso excepting the granted borrowing power from the denial of legislative power to authorize. Why not track the original wording of the section and say "provided, however, that the Legislature may authorize"? In using the words "under Legislative provision," did the drafter make a conscious determination that he was authorizing local laws? (See *Explanation* of Sec. 56 of this article.)

(2) "Under Legislative provision" would appear to control everything that follows in the subsection. What then is added towards the end by the clause "as the Legislature may authorize, and in such manner as it may authorize the same"?

(3) The subsection uses the terms "county," "political subdivision of a county," "political subdivision of the state," "defined district," "territory," "towns, villages or municipal corporations," and "city or town." This is confusing terminology. Secton 1 of Article XI states that a county is a political subdivision of the state. Section 4 of the same article states that a town may be chartered, which would make it a municipal corporation. "Political subdivision of a county" presumably refers to county precincts. With all this, one would suppose that a "defined district" would have to be some geographical area that was not a county, political subdivision of a county, or the state. And since a "defined district" "may or may not include, towns, villages or municipal corporations," it would seem to follow that "a" town, "a" village, or "a" municipal corporation could not be defined as "a" district. For an example of a court getting confused by all this, see *Browning v. Hooper* (269 U.S. 396 (1926)), which concerned a "defined district" consisting of two precincts in Archer County.

(4) In the case of purposes (1), (2), and (3), what is the significance in (1) of "or in aid of such purposes" and in (2) and (3) of "or in aid thereof"? (And why "purposes" in (1) and "thereof" in (2) and (3)?) Is there anything that can be done that could not be done if the words were omitted? Perhaps the drafter was hypnotized by the words "in aid of" in the original prohibition of Section 52.

(5) What does the phrase "in addition to all other debts" signify? Nothing. Leave it out and the subsection makes complete sense. Indeed, the only way in which the phrase could be given any meaning would be to say that the debt limitation of 25 percent applies only to the proposed bond issue and that pre-existing bond issues are not to be counted because they are "other debts." This would destroy the limitation. (Note that "all other debts" creates a problem in construing the relationship between Subsections (b) and (c). See the preceding *Explanation.*

(6) The most incredible part of the subsection is the clause "except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of the constitution." There are no such "other provisions." There are practical limits on municipal debt derived from restrictions on municipal taxing power, but no constitutional limits. Perhaps the drafter meant: "No city or incorporated town may constitute itself a 'defined district' and thereby increase its tax rate above the constitutional limit by levying a separate 'district' tax to retire 'district' bonds." If that is what the drafter meant, why not say it? And if that is what he meant, it is all sort of silly because the whole purpose of the 1904 amendment was to permit additional taxes.

Apart from fuzzy drafting, the whole concept of the 1904 amendment—to say nothing of the 1970 patch—was fuzzy. As noted earlier, Subsections (b) and (c) have nothing to do with Subsection (a). And none of this belongs in an article on the legislature anyway. There is no reason for saying that the "Legislature shall have no power to authorize." If there is to be a prohibition against grants and loans by local government, say so directly in the appropriate article. If there is to be an exception to a limitation on taxing and borrowing power, the exception belongs in an article on taxation and revenue.

It must be conceded that, given the hopelessly confused structure of the constitution as it came out of the 1875 Convention, it is not easy to bring order out of chaos by the amending process. But it is not necessary to compound the chaos by unnecessarily putting an amendment in the wrong place.

Whether there should be a grants and loans prohibition at all is discussed elsewhere. (See the *Author's Comment* on Sec. 51.)

Sec. 52-b. LOAN OF STATE'S CREDIT OR GRANT OF PUBLIC MONEY FOR TOLL ROAD PURPOSES. The Legislature shall have no power or authority to in any manner lend the credit of the State or grant any public money to, or assume any indebtedness, present or future, bonded or otherwise, of any individual, person, firm, partnership, association, corporation, public corporation, public agency, or political subdivision of the State, or anyone else, which is now or hereafter authorized to construct, maintain or operate toll roads and turnpikes within this State.

History

This section was added by amendment in 1954.

Explanation

In 1953 the legislature enacted the Texas Turnpike Act (Tex. Rev. Civ. Stat. Ann. art. 6674v), establishing the Texas Turnpike Authority and authorizing issuance of revenue bonds to finance construction of the Dallas-Fort Worth Turnpike. In the same session of the legislature this amendment to the constitution was passed to preempt any recourse against the state by holders of these revenue bonds. Apparently, opponents of the Turnpike Authority were pacified by adoption of this section, which merely repeats for would-be turnpike builders the prohibition against lending state credit found in Article III, Section 50.

In the only case discussing this section, the court comments:

> This section, we think, adds nothing of substance to Section 50 of that Article except to name expressly and include any agency, public or otherwise, authorized to construct, maintain or operate toll roads and turnpikes.

(*Texas Turnpike Authority v. Shepperd,* 154 Tex. 357, 360, 279 S.W.2d 302, 305 (1955).)

Comparative Analysis

Nothing like this section is found in other state constitutions or in the *Model State Constitution.*

Author's Comment

This section was superfluous when it was adopted and is long overdue for deletion.

Sec. 52d. COUNTY OR ROAD DISTRICT TAX FOR ROAD PURPOSES. Upon the vote of a majority of the resident qualified electors owning rendered taxable property therein so authorizing, a county or road district may collect an annual tax for a period not exceeding five (5) years to create a fund for constructing lasting and permanent roads and bridges or both. No contract involving the expenditure of any of such fund shall be valid unless, when it is made, money shall be on hand in such fund.

At such election, the Commissioner's Court shall submit for adoption a road plan and designate the amount of special tax to be levied; the number of years said tax is to be levied; the location, description, and character of the roads and bridges; and the estimated cost thereof. The funds raised by such taxes shall not be used for purposes

other than those specified in the plan submitted to the voters. Elections may be held from time to time to extend or discontinue said plan or to increase or diminish said tax. The Legislature shall enact laws prescribing the procedure hereunder.

The provisions of this section shall apply only to Harris County and road districts therein.

History

This "local" amendment was adopted in 1937.

Explanation

At the time of adoption of the amendment everybody presumably thought of it as an exception to Section 52. Actually, the amendment is another exception to Section 9 of Article VIII. Subsection (b) of Section 52 was a device to increase the tax permitted by Section 9, but the increase could be effected only by borrowing money. The county commissioners of Harris County apparently disapproved of borrowing and sought permission to levy a higher road tax than that permitted by Section 9. Harris County does not use Section 52d at this time. (Communication from the county auditor of Harris County, dated July 27, 1972.) The section is not obsolete, but in these days of taxpayer "revolts," it seems unlikely that pay-as-you-go road-building taxes would be proposed for referendum approval.

Comparative Analysis

See *Comparative Analysis* of Section 52e (1968).

Author's Comment

See the *Author's Comment* on Section 52e (1968).

Sec. 52e. PAYMENT OF MEDICAL EXPENSES OF LAW ENFORCEMENT OFFICIALS. Each county in the State of Texas is hereby authorized to pay all medical expenses, all doctor bills and all hospital bills for Sheriffs, Deputy Sheriffs, Constables, Deputy Constables and other county and precinct law enforcement officials who are injured in the course of their official duties; providing that while said Sheriff, Deputy Sheriff, Constable, Deputy Constable or other county or precinct law enforcement official is hospitalized or incapacitated that the county shall continue to pay his maximum salary; providing, however, that said payment of salary shall cease on the expiration of the term of office to which such official was elected or appointed. Provided, however, that no provision contained herein shall be construed to amend, modify, repeal or nullify Article 16, Section 31, of the Constitution of the State of Texas.

History

This "statute" was proposed and adopted in 1967.

Explanation

This is another constitutional provision required by, or presumably believed by some people to be required by, the grants prohibition of Section 52 and, perhaps, the extra compensation prohibition of Section 53. The section is a "statute" because it is a self-executing policy decision by the State of Texas concerning an employee benefit.

The section has four elements. First, it *permits* counties to pay medical

expenses of county law enforcement officials injured in the course of employment. Second, it *requires* counties to continue to pay the salaries of "said" officials. Whether "said" refers to the officials of any county or only to officials of those counties that elect to pay medical expenses is not clear. Third, it *prohibits* the county from paying the salary of an injured employee after his term expires. Fourth, it denies any relationship to Section 31 of Article XVI.

Article 1581b-1, Tex. Rev. Civ. Stat. Ann. (1973), addresses this subject by providing subrogation rights to the county. However, there have been no judicial interpretations of this section.

Comparative Analysis

No state appears to have a comparable provision. New York, in what is euphemistically denominated "Bill of Rights for Local Governments," has a provision authorizing counties to provide for the "protection, welfare and safety of its officers and employees" subject to any overriding state law. (Art. IX, Sec. 2 (c) (1).) Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

It is not easy to determine which is the most extreme provision forced into the constitution by virtue of Sections 44, 50, 51, 52 and 53 of Article III and the many restrictive judicial and attorney general interpretations thereof. In any prize competition this section would surely be among the finalists.

Then again, perhaps this section is an example of what may be called the "Judge Critz theory of amendment." (See the *Author's Comment* on Sec. 62 of Art. XVI.) In other words, perhaps the amendment was simply a device for getting a popular referendum on the subject. The analysis of the proposed amendment prepared by the Texas Legislative Council lends support to this speculation. The council called the proposal an "exception" to the grants prohibition of Section 52. The council then said that there were two arguments in favor of the amendment: (1) county law enforcement officers were not covered by workmen's compensation and (2) it was becoming difficult to recruit law enforcement officers and this benefit should make positions more attractive. The first argument was not constitutional because, under Section 60 of Article III, the officers could have been put under workmen's compensation. The second argument automatically gets around Section 52 because any employee benefit used to attract employees is by definition "compensation," not a "grant."

The legislative council set out two arguments against the proposed amendment: (1) "it is unfair to select a certain class of public employees for special treatment"; and (2) the amendment was permissive, which might result in some counties using the employee benefit to attract better personnel while some counties would not. (Texas Legislative Council, *6 Proposed Constitutional Amendments Analyzed* (Austin, 1967), pp. 13-14.) Since the pro arguments are not constitutional, it may be that the first argument against the proposed amendment is the real reason for the proposal.

Sec. 52e. DALLAS COUNTY BOND ISSUES FOR ROADS AND TURNPIKES. Bonds to be issued by Dallas County under Section 52 of Article III of this Constitution for the construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof, may, without the necessity of further or amendatory legislation, be issued upon a vote of a majority of the resident property taxpayers voting thereon who are qualified electors of said county, and bonds

heretofore or hereafter issued under Subsections (a) and (b) of said Section 52 shall not be included in determining the debt limit prescribed in said Section.

History

This "local amendment" of Section 52 was added in 1968. It may or may not have been superseded by the 1970 amendment of Section 52.

Explanation

After the adoption of Section 59 of Article XVI in 1917, it was possible for a county or its road districts to utilize the entire 25 percent maximum debt limit permitted by Section 52 for road bonds since existing water districts could transfer to Section 59 under the Canales Act (now Water Code sec. 55.053), and new districts could be organized under Section 59. It would appear that not all water districts have done this, for one of the arguments in support of the 1968 amendment was that it "would liberalize the debt limitation in Dallas County and enable the county to meet its expanding needs." (Texas Legislative Council, *14 Proposed Constitutional Amendments Analyzed* (Austin, 1968), p. 18.)

The road to "liberalization" is the final part of the compound sentence that is Section 52e (1968): "and bonds heretofore or hereafter issued under Subsections (a) and (b) of said Section 52 shall not be included in determining the debt limit prescribed in said Section." (Note that (a) and (b) are now (1) and (2) of Subs. (b) of Sec. 52.) Presumably the drafter of this amendment meant to provide that the full 25 percent of assessed valuation could be used for bonds for roads in Dallas County. But did the drafter mean that Section 52 water districts in Dallas County were no longer subject to *any* debt limit at all? That is certainly what the quoted words say.

Undoubtedly the principal reason for the 1968 amendment was to reduce the required vote from two-thirds to a majority. This was not designed to "liberalize" the debt limit but to make it easier to get approval for bonds. This part of the amendment is clear. It is also clear that only Dallas County as such could utilize the liberalized majority. Road districts in the county and all water districts, of course, would still have to get a two-thirds vote.

Thus, Section 52e (1968) and Subsection (c) of Section 52 are in agreement on who gets to use the majority vote power—the whole county. The two likewise are direct grants of power. Subsection (c) is a direct grant of power to issue road bonds up to 25 percent of assessed valuation regardless of any existing debt, but Section 52e (1968) seems to exclude only existing water district debt. If there were county or road district road bonds in existence when Section 52e(1968) was adopted, Dallas County would appear to have less leeway than it would have under Subsection (c) of Section 52. (See the *Explanation* of Subs. (c) concerning the confusion about how much borrowing power a county has under both Subs. (b) and Subs. (c).)

If the foregoing analysis is correct, then it would be to Dallas County's advantage to argue that Subsection (c) of Section 52, adopted in 1970, supersedes Section 52e(1968). But if the earlier analysis concerning the quoted portion of Section 52e(1968) is correct, it would be to the advantage of Section 52 water districts in Dallas County to argue that the 1968 amendment is not superseded. Or maybe everybody could agree that the 1968 amendment is not superseded as to water districts but that Dallas County has the option of issuing road bonds under either provision.

Comparative Analysis

Very few states go in for "local" amendments. The principal states that do are Alabama and Georgia. Georgia, however, has a special system whereby local amendments are voted upon only by the political subdivision affected. If these local amendments are counted, Georgia has by far the longest state constitution, approximately 500,000 words. Neither the *Model State Constitution* nor the United States Constitution has a comparable provision.

Author's Comment

If local and special laws are a bad idea, (see *Author's Comment* on Sec. 56), then a fortiori, as the lawyers say, local and special constitutional provisions are a bad idea.

Sec. 53. COUNTY OR MUNICIPAL AUTHORITIES; EXTRA COMPENSATION; UNAUTHORIZED CLAIMS. The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

History

This section dates from 1876. There was no comparable provision in any earlier constitution. (But see the *History* of Sec. 44.) There do not appear to have been any efforts to amend the section.

Explanation

This is usually characterized as the local government complement to Section 44. Actually, the two sections overlap; almost everything prohibited by Section 44 is repeated in slightly different language in Section 53. Moreover, as discussed earlier, the courts do not discriminate between Section 44 and this section. (See *Explanation* of Sec. 44.)

The first part of Section 53 is straightforward and substantially self-explanatory. An employee may not be granted extra pay after services have been performed and a contractor or seller cannot be paid extra for what he agreed to do. In the case of pay, the only serious question that can arise is whether the amount to be paid can be determined after the service is rendered. In *Dallas County v. Lively,* for example, the supreme court was faced with the question whether a county judge could be paid $75 a month for his *ex officio* services—that is, those duties for which he did not receive a fee—pursuant to statutory authority for the commissioners court to pay for *ex officio* services but where the order fixing the amount was entered nine months after the services had been performed. "The Constitution does not forbid the fixing of compensation after service rendered, but forbids increasing the agreed or prescribed sum after service rendered or work performed." (106 Tex. 364, 368, 167 S.W. 219, 220 (1914).)

In the case of contracts, there is likewise no bar to agreeing upon a contract price after work has started. (*Galveston County v. Gresham,* 220 S.W. 560 (Tex. Civ. App.—Galveston 1920, *writ ref'd*).) Nor is there any bar to compromising a dispute over what the contract price actually is. (See Tex. Att'y Gen. Op. No. O-6270 (1944).)

Many of the apparent violations of Section 53 arise from the words "made without authority of law" in the last part of the section. These "apparent" violations occur when the question of whether payment can be made is asked in advance. The attorney general, to whom these questions are submitted, once he finds no authority in law adds that payment would be in violation of Section 53. (See *e.g.*, Tex. Att'y Gen. Op. Nos. O-1149 (1939), O-1940 (1940).) But if there is no power to act, that ends the matter. In other words, the attorney general would reach the same conclusion in the absence of a Section 53. Indeed, in many lawsuits the defense of no authority is successful. (See, for example, *Hardin County, Texas v. Trunkline Gas Co.*, 311 F.2d 882 (5th Cir. 1963).) An actual violation occurs when an attempt is made to ratify or validate an action taken "without authority of law." In the *Trunkline* case, the United States Supreme Court granted certiorari and sent the case back to the United States Court of Appeals for consideration of a validating statute. (*Trunkline Gas Co. v. Hardin County*, 375 U.S. 8 (1963).) On remand, Judge Hutcheson, in an opinion which has an undercurrent of suppressed anger, after pointing out that the original opinion had ruled that the county had no authority to act, now ruled that no validating act could be operative because Section 53 prohibits the paying of a claim if there had been no authority to create the claim. (*Hardin County v. Trunkline Gas Co.*, 330 F.2d 789 (5th Cir. 1964).) Not all validating statutes run afoul of Section 53, however. In 1926 the United States Supreme Court declared unconstitutional the method by which special districts were permitted to be established under the statute enacted pursuant to Section 52 of this article. (See *Browning v. Hooper*, 269 U.S. 396 (1926).) At a special session that year a number of statutes were enacted validating all existing Section 52 special districts. These were upheld in *Louisiana Ry. & Nav. Co. v. State*, 298 S.W. 462 (Tex. Civ. App.—Dallas 1927), *aff'd*, 7 S.W.2d 71 (Tex. Comm'n App. 1928, *holding approved*). The court noted that, unless otherwise restricted by the constitution, the legislature can validate anything which it could have done in the first instance. Obviously, Section 53 is a specific restriction that precludes validation of a claim against the government. But the litigant in the *Louisiana* case was not trying to rely on a validation of its claim against the government; it was a taxpayer trying to invalidate a tax claim by the government against it. The result is a "heads I win, tails you lose" situation.

Comparative Analysis

Approximately eight other states appear to have a comparable section aimed specifically at local governments. All of those states also have a section comparable to Section 44. Approximately 18 more states have a section comparable to Section 44. It is likely that most of these sections would be construed to cover local governments. There appear to be four states that permit the legislature to grant extra compensation by a two-thirds vote. A couple of state constitutions specifically authorize increases in pensions for retired employees. It also is likely that courts in all states would outlaw payment of claims arising out of unauthorized action by a government employee. But it does not appear likely that courts would invalidate subsequent ratification unless the state constitution had a strict "without authority of law" provision.

The United States Constitution has no comparable provision, but the courts follow the rule of requiring specific authority for a government employee to create a claim against the government. The *Model State Constitution* provides that no "obligation for the payment of money [may] be incurred except as authorized by law." (Sec. 7.03(a).) The Commentary on the *Model State Constitution* makes it clear, however, that the quoted restriction is limited to requiring authority to make

payment. (p. 93.) Thus, ratification and validating statutes and appropriations to pay "just claims" would be permitted.

Author's Comment

With all these restrictions on giving away money—Sections 44, 50, 51, 52, 53, and 55 of this article among others—it is no surprise to find people getting mixed up. In the *Explanation* it was noted that the first part of Section 53 is "straightforward and substantially self-explanatory." An employee may not be granted extra pay "after service has been rendered." The attorney general recently ruled that Section 53 prohibited granting back pay following acquittal to an employee who had been suspended without pay pending trial on a felony charge. (See Tex. Att'y Gen. Op. No. H-402 (1974).) How can Section 53 be relevant if no service was rendered? Section 52 is relevant, of course, since it can be argued that the pay is a grant *because* no service was rendered. Indeed, the attorney general said that if the county commissioners court had had an announced policy to pay under these circumstances the matter would be a condition of employment like the rate of compensation or the amount of vacation to be received. But then he went on to refer to an earlier opinion in which he "decided that providing an employee with compensation not 'previously earned by the employee' would constitute a gift or grant of public moneys in direct violation of Section 53 . . . ." That earlier opinion (Tex. Att'y Gen. Op. No. H-51 (1973)), however, relied upon Sections 51, 52, and 53. There, at least, one of the three sections—Section 52—was relevant. Here somebody apparently picked one of the three without much thought whether it was the right one. (Of course, the whole business could simply be a typographical error.)

Concerning the general policy, see the *Author's Comment* on Section 44 of this article.

Sec. 54. LIENS ON RAILROAD; RELEASE, ALIENATION OR CHANGE. The Legislature shall have no power to release or alienate any lien held by the State upon any railroad, or in any wise change the tenor or meaning, or pass any act explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired.

History

This section was submitted to the Constitutional Convention of 1875 by the Committee on the Legislative Department and apparently adopted without floor debate. (See *Journal*, p. 165.) No amendment to this section has ever been submitted.

Explanation

Before the Civil War the state loaned money from the permanent school fund to the railroads to stimulate construction; these loans were secured by mortgage bonds. During and after the war many railroads defaulted on their interest payments.

In 1871, one railroad mortgage was foreclosed and the road sold for $165,800 less than the amount owed the school fund. In 1870 a relief act was passed prohibiting foreclosure of these mortgages if current interest payments were being made. In 1871 a New York financial syndicate proposed to purchase a large portion of the mortgages at 60 percent to 70 percent of their face value, a proposal viewed with great suspicion. The Reconstruction Era, with its general cynicism and

particular distrust of railroads, not surprisingly motivated the delegates of 1875 to include Section 54 to prohibit the cancellation of railroad mortgages unless paid in full. (See 1 *Interpretive Commentary,* p. 741.)

Comparative Analysis

The 1870 Illinois Constitution had a similar provision relating to the Illinois Central Railroad. The *Model State Constitution* has nothing like it.

Author's Comment

All indebtedness owed by railroads to the state and incurred before 1876 has long since been discharged. Article III, Section 50, and Article XI, Section 3, have prohibited state and local government loans to railroads since 1876, so there is nothing for Section 54 to operate on. Anyway, Section 55 forbids release of indebtedness generally, so Section 54 was not even necessary in the first place.

Sec. 55. RELEASE OR EXTINGUISHMENT OF INDEBTEDNESS TO STATE, COUNTY, SUBDIVISION OR MUNICIPAL CORPORATION. The Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State or to any county or defined subdivision thereof, or other municipal corporation therein, except delinquent taxes which have been due for a period of at least ten years.

History

This section dates from 1876. It read substantially the same as the present section up to the final phrase beginning "except delinquent taxes." This phrase was added by an amendment adopted in 1932 at the depth of the Great Depression. That amendment also added the words "or defined subdivision thereof," and corrected a typographical error—"any incorporation" in the original.

Explanation

Section 55 is another example of the effort of the 1875 Convention to kill one of the many methods by which corrupt legislatures bestowed favors, particularly on railroads. Section 55, together with Section 54 and Section 10 of Article VIII, is also another example of overkill. The delegates in 1875 kept saying the same thing several times. For reasons set forth earlier, Section 54 was unnecessary. If the drafters in 1875 had added to Section 55 the "calamity exception" of Section 10 of Article VIII, that section would have been unnecessary. To avoid duplication, taxes will be discussed under Section 10.

Although the principal purpose of Section 55 was to prevent forgiveness of delinquent taxes, its wording is as comprehensive as it can be and consequently can catch a lot of other things. For example, the legislature once repealed a statute requiring reimbursement from patients in state mental hospitals. The attorney general ruled that Section 55 preserved the obligation to reimburse for hospital care to the date of repeal. (Tex. Att'y Gen. Op. No. 0-6120 (1944).) This is a mystifying opinion. The repeal took place in 1925. Why was the chairman of the State Board of Control asking for an opinion 19 years later? Moreover, the attorney general noted that he was not following a court of civil appeals case that had denied the state recovery on the ground that the 1925 repeal eliminated a statutory cause of action

and there was no underlying common law cause of action which the state could use. (See *Wiseman v. State,* 94 S.W.2d 265 (Tex. Civ. App.–San Antonio 1936, *writ ref'd*).) The attorney general said that Section 55 had not been relied upon and, therefore, the precedent was not binding on him. Since the case had been handled by the attorney general, the 1944 opinion says in effect that his predecessor goofed.

Another example is an effort to refinance an obligation at a lower rate of interest. This cannot be done. (*Delta County v. Blackburn,* 100 Tex. 51, 93 S.W. 419 (1906). See also Tex. Att'y Gen. Op. No. 0-5924 (1944).)

Although the state or local government may not directly release an obligation, it can do so indirectly. If a statute of limitations runs against the government, the opportunity to collect may be lost. A discharge in bankruptcy would release the obligation, but, of course, it is the Bankruptcy Act, not Texas, that effects the release. (See *Mission Independent School District v. Texas,* 116 F.2d 175 (5th Cir. 1940).)

Comparative Analysis

About half a dozen other states have comparable provisions. Neither the *Model State Constitution* nor the United States Constitution has a comparable provision.

Author's Comment

See *Author's Comment* on Section 10 of Article VIII, where doubt is expressed that there is any pressing need today for such a section. If that doubt is well expressed in the case of delinquent taxes, there is more doubt about a broadside that also covers everything else.

Sec. 56. LOCAL AND SPECIAL LAWS. The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing:

(1) The creation, extension or impairing of liens;

(2) Regulating the affairs of counties, cities, towns, wards or school districts;

(3) Changing the names of persons or places;

(4) Changing the venue in civil or criminal cases;

(5) Authorizing the laying out, opening, altering or maintaining of roads, highways, streets or alleys;

(6) Relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other State;

(7) Vacating roads, town plats, streets or alleys;

(8) Relating to cemeteries, grave-yards or public grounds not of the State;

(9) Authorizing the adoption or legitimation of children;

(10) Locating or changing county seats;

(11) Incorporating cities, towns or villages, or changing their charters;

(12) For the opening and conducting of elections, or fixing or changing the places of voting;

(13) Granting divorces;

(14) Creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts;

(15) Changing the law of descent or succession;

(16) Regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate;

(17) Regulating the fees, or extending the powers and duties of aldermen, justices of

the peace, magistrates or constables;

(18) Regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes;

(19) Fixing the rate of interest;

(20) Affecting the estates of minors, or persons under disability;

(21) Remitting fines, penalties and forfeitures, and refunding moneys legally paid in to the treasury;

(22) Exempting property from taxation;

(23) Regulating labor, trade, mining and manufacturing;

(24) Declaring any named person of age;

(25) Extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of his official duties, or his securities from liability;

(26) Giving effect to informal or invalid wills or deeds;

(27) Summoning or empanelling grand or petit juries;

(28) For limitation of civil or criminal actions;

(29) For incorporating railroads or other works of internal improvements;

And in all other cases where a general law can be made applicable, no local or special law shall be enacted; provided, that nothing herein contained shall be construed to prohibit the Legislature from passing special laws for the preservation of the game and fish of this State in certain localities.

NOTE: For purposes of discussion, item numbers have been given to the enumerated cases. These numbers are not official.

History

The Constitution of the Republic was silent on the subject of local and special laws. (But see the *History* of Sec. 6 of Art. VIII, concerning appropriations for "private or local purposes.") The Constitution of 1845 touched the subject by prohibiting legislative divorces (Art. VII, Sec. 18) and restricting the legislature's power to create private corporations by special law. (See *History* of Sec. 1 of Art. XII.) No changes were made in the Constitutions of 1861 and 1866. The Reconstruction Constitution of 1869 preserved the legislative divorce prohibition intact (Art. XII, Sec. 37) but added a section requiring general laws for adoptions, emancipation of minors, and divorces and prohibiting special laws in these three areas. (Art. XII, Sec. 13.) Also prohibited for the first time were special laws concerning sale of real estate and the prohibitions contained in Items (5) and (7) of the present Section 56. (Art. III, Sec. 25.) An amendment added to the 1869 Constitution in 1873, which was after the Democrats regained control of the legislature, prohibited local or special laws on the subjects now covered by Items (2), (4), (10), (11), (15), (17), (18), (19), and (21) and one of the subjects included in Item (16). (Art. XII, Sec. 40. Confusion in section numbers started early in Texas. After the 1873 amendment there were two sections numbered "40" in Art. XII of the 1869 Constitution.)

The Section 56 laundry list provided by the 1875 Convention was undoubtedly taken from the Pennsylvania Constitution of 1873. The first 23 items are almost exact duplicates, in exact order, of the first 24 items in the 1873 Pennsylvania laundry list. The one omission was an item in Pennsylvania concerning townships and boroughs, local government units not known in Texas. Moreover, as noted earlier, the amendment of 1873 covered ten of these 23 items, but the wording in Section 56 is that of Pennsylvania, not of the 1873 amendment. Pennsylvania had a 25th item which is matched in part by Section 1 of Article XII. A final 26th Pennsylvania item forbade special laws granting special privileges or immunities or "the right to lay down a railroad track." The first half of this special law prohibition

is more or less totally prohibited in the Texas Bill of Rights. (Art. I, Secs. 3 and 17.)

In the absence of verbatim debates of the 1875 Convention it is difficult to determine why things are as they are. Indeed, it was only the known reference to the Pennsylvania debt provision that made it seem useful to compare the two local law laundry lists. The *Journal* of the 1875 Convention shows that Section 56 as originally presented to the convention by the Committee on the Legislative Department consisted of the first 27 items plus the 28th without the words "or criminal." (*Journal*, pp. 165-66.) The words "or criminal" were added by floor amendment on third reading. (*Id.*, at 504.) The 29th item was added by floor amendment on second reading. (*Id.*, at 267.) The only other change was the addition of the fish and game proviso at the end of the section. This was also added by floor amendment on second reading. (*Id.*, at 268.)

Explanation

This business of local and special laws is complicated at best. If the courts muddle the terminology, waffle from time to time, and dream up confusing rules, the whole business gets worse. This is the case in Texas, so much so that, in order to help the reader through the morass, the explanation that follows will hew more to a straight line of logic than to a meandering line of judicial interpretation.

To start with, one would like to think that there is a clear distinction between a "local" and a "special" law, but "local or special law" seems to be thought of as one word, so to speak, and distinctions become blurred. Indeed, the blurring dates at least from the 1875 Convention. In Section 23 of Article XVI the legislature is granted power to pass "general and special laws" concerning livestock, but "any local law thus passed" is subject to local referendum. In an early case involving this section, the court of appeals said: "We think the words *local* and *special* are used in said Section 23 as synonymous terms. . . ." (*Lastro v. State*, 3 Tex. App. 363, 374 (1878) (italics in original).) In a subsequent case involving Section 56, the supreme court acknowledged the difference between local and special laws and set forth definitions much like the ones used below. (See *Clark v. Finley*, 93 Tex. 171, 178, 54 S.W. 343, 345 (1899).) But, as one commentator has pointed out, the definitions "have hardly bothered the court in later Texas decisions, in which the words 'local' and 'special' have been used interchangeably or together to describe any act falling within the prohibition of Article III, 56." (Comment, "Population Bills in Texas," 28 *Texas L. Rev.* 829, 832 (1950).)

Local laws. The term "local law," and not "special law," should be used to describe a law that applies to the governing of a specific geographical area within the state. By analogy, Sections 52d and 52e are "local" amendments because they are applicable only to Harris and Dallas counties, respectively. A "general law," in this context, applies to the entire area of the state. To continue the analogy, Subsection (c) of Section 52 is a "general" amendment giving all counties roughly the same authority given in Section 52e only to Dallas County.

Prohibitions against local laws were adopted originally to combat corruption, personal privileges, and meddling in local affairs—or conversely, to prevent a group from dashing to the Capitol to get something their local government would not give them. Actually, the reasons for a Section 56 are muddled because such a section always covers both local and special laws, and the reasons for prohibiting them are not always the same. Today, there is one overriding reason for prohibiting local laws: they are inconsistent with the concept of home rule.

Assuming that everyone can agree on what is a local law and why it is a good idea to prohibit the legislature from passing one, there are still two problems that will arise: one is the case where a matter of genuine state concern can be handled only by

a local law; the other is the case where a general law treating all local governments alike would be a poor piece of legislation. The latter problem is dealt with by classification as discussed in detail later. The former problem has been solved in Texas by judicial fiat. Beginning with the *Finley* case cited earlier, the courts have said from time to time that a law that applies only to a given locality is not a local law if the subject matter is of general interest or affects the state as a whole.

Consider, for example, the problem of the county juvenile board. Beginning in 1917, the legislature provided that any county with a population of 100,000 or more should have a juvenile board consisting of the district judges and the county judge, all of whom would receive additional compensation for serving. In *Jones v. Alexander,* the supreme court adopted the opinion of the commission of appeals upholding the act. (122 Tex. 328, 59 S.W.2d 1080 (1933).) There was no reference to Section 56 or to whether the law was a local one, but the opinion did say that it was appropriate for the legislature to take into account the size, population, taxable values, and general conditions of counties in setting the compensation of judges. The opinion went on to say that the legislature could provide additional compensation for judges who had additional duties.

In 1947, the legislature added juvenile boards in certain other counties under several strange descriptions, one of which read: "In any county having a population of less than seventy thousand (70,000) inhabitants according to the last preceding Federal Census, which county is included in, and forms a part of a Judicial District of seven (7) or more counties having a combined population of more than fifty-two thousand inhabitants . . . ." The attorney general ruled that this was an unreasonable classification, making the act a void local law regulating the affairs of counties. He distinguished the *Alexander* case by noting that there the population classification—all counties over 100,000 were to have boards; no counties under 100,000 were to have boards—had been held to be reasonable. (Tex. Att'y Gen. Op. No. V-386 (1947).) A member of the juvenile board who was refused extra compensation on the strength of the attorney general's opinion brought suit for the extra compensation. The court of civil appeals upheld the 1947 amendment. The court noted that if the additional duties of the board were to be performed "upon behalf of the State and not on behalf of the counties as entities distinct from the State," then the act in question was not a local law. This was followed by a sentence quoted from the *Alexander* case: "The welfare of minors has always been a deep concern to the state." The court then tied the new law to the original one upheld in *Alexander*: "Both laws provide means for promoting the welfare of minors, a matter in which the State at large is interested." (*Lamon v. Ferguson,* 213 S.W.2d 86, 88 (Tex. Civ. App.—Austin 1948, *no writ*).)

This was a neat bit of judicial legerdemain. *Alexander,* as the attorney general pointed out, was a case of reasonable classification, not of "state interest." Indeed, the sentence quoted from *Alexander* was from a part of the opinion dealing with whether the creation of juvenile boards was unconstitutional either as a matter of dual officeholding or as a violation of separation of powers because the board's duties were not judicial. In context, the word "state" meant "government," for the sentence following stated that in England welfare of minors was a branch of equity jurisprudence.

The significance of the *Lamon* case was not lost on the legislature. In 1965, for example, the attorney general upheld an act that provided: "The commissioners court of Grayson County may appoint a juvenile officer and an assistant juvenile officer." After quoting extensively from the *Lamon* case, the attorney general concluded that "the Legislature has addressed itself to a matter of statewide concern . . . and the mere fact that the operation of House Bill No. 119 . . . is restricted to a

particular county does not make the Bill a local or special law. . . ." (Tex. Att'y Gen. Op. No. C-544 (1965).)

This juvenile board example is an extreme case of judicial winking at local laws masquerading as general laws. If juvenile boards are a matter of statewide concern, one would expect the legislature to express its concern by general legislation, not a series of local laws covering counties individually. But once the rule of "general concern" exists, it can be used to subvert Section 56. It is also available when needed to preserve a necessary local law. This can be the case with an authority that operates in a local area. In *Lower Colorado River Authority v. McCraw,* the supreme court turned away a Section 56 argument by saying that the act in question "operates upon a subject that the state at large is interested in." (125 Tex. 268, 280, 83 S.W.2d 629, 636 (1935).) The rule is also available as an additional prop to a ruling that upholds the reasonableness of a classification. (See, for example, *County of Cameron v. Wilson,* 160 Tex. 25, 326 S.W.2d 162 (1959), and *Smith v. Davis,* 426 S.W.2d 827 (Tex. 1968).) The rule also has its uses in connection with Section 57.

The acute problem in general laws regulating local government arises out of classification. The real and honest problem is in the reasonableness of the classification; an artificial and dishonest problem arises when the classification is phony. For example, the state might decide to enact a general law limiting cities to the employment of one dogcatcher for each 50,000 of population. But then it might be pointed out that Onetown differs from all other cities because it is bordered by an uninhabited area known to have packs of wild dogs that make forays into the city. It seems reasonable to make an exception in the case of Onetown—not by name, obviously, but by a description that is related to the problem faced by Onetown: "except cities bordered by uninhabited areas conducive to the harboring of packs of wild dogs which prey upon such bordering cities." Note that the exception is open-ended. As situations change, other cities could qualify.

A general law may remain general even if it does not treat all local governments alike. The crucial distinction is whether the classification is related reasonably to the differences in treatment that necessitate the classification. It would make sense to classify cities into those bordering on the sea, on lakes, and on rivers for purposes of health regulations relating to swimming, boating, sewage treatment, and the like. Such a classification would not be reasonable in setting standards for minimum wages for firemen, or limiting the number of dogcatchers.

One important difference among local governments is population. Obviously, large cities are different from small towns. The state would be justified in requiring large cities to have land-use planning departments, but a general law requiring all cities to have such a department would impose an inordinate expense on small cities. (Land-use planners would probably disagree.) It is reasonable, therefore, to classify cities by size, but the classification can become suspect. A Texas law applying only to cities over a million population would look like a local law in view of the fact that Dallas, with a population of 844,401, is not much smaller than Houston. (The problem is different in a state like Louisiana with one city much larger than any other.) Yet a general law concerning port regulations of cities with a population in excess of a million which were also seaports might well be reasonable. (Compare *O'Brien v. Amerman,* 112 Tex. 254, 247 S.W. 270 (1922).) But when a law is applicable only to cities with a population of from 550,000 to 650,000, all eyebrows should go up. (See *Devon v. City of San Antonio,* 443 S.W.2d 598 (Tex. Civ. App.—Waco 1969, *writ ref'd*), noted in 2 *Texas Tech L. Rev.* 336 (1971).)

One of the difficulties in judicial monitoring of this local law business is that courts normally do not question the motives of legislators. If a law seems reasonable on its face, a heavy burden rests on those who attack it. The courts have little trouble with a law that covers a single county or city that is the only one within a population

bracket that is closed—*i.e.*, "between 80,000 and 90,000 according to the Federal Census of 1970." But if the bracket is open-ended—*i.e.*, according to the last preceding census—courts may uphold the law on the theory that the next census around a new entity may fall into the bracket. (See generally, Comment, "A History of the Constitutionality of Local Laws in Texas," 13 *Baylor L. Rev.* 37 (1961); Comment, "Population Bills in Texas," 28 *Texas L. Rev.* 829 (1950). For a recent case that utilized the reasonable classification test properly, see *Robinson v. Hill,* 507 S.W.2d 521 (Tex. 1974).)

In the case of open-ended brackets, the cases are not consistent. This should surprise no one, for eventually courts will rebel against a rule of law that can be flouted simply by using the correct rubric. Moreover, judges are no fools; they know that just before or after the next census all such laws can be amended to new open-ended classifications that would preserve the limitations to particular counties or cities. (For an example of this, see *Smith v. State,* 120 Tex. Crim. 431, 49 S.W.2d 739 (1932).) The end result is a collection of fuzzy judicial generalizations. (A number of them will be found in the "Comments" cited earlier.) Sometimes, the problem may be that the consequences of overturning a statute are too much like trying to unscramble eggs. In the *Devon* case previously cited as eyebrow-raising, a policeman who had resigned sued to get a refund of eleven years' contributions to a pension plan. Among other things, he alleged that the statute creating the plan was a local law. Since the plan had been in operation for a long time, a grand mess would have followed from invalidation of the statute.

Presumably for the same reason, the pension system of El Paso was upheld against a Section 56 attack. (See *Gould v. City of El Paso,* 440 S.W.2d 696 (Tex. Civ. App.—El Paso 1969, *writ ref'd n.r.e.*).) The saga of the El Paso system is instructive as an example of the open-ended population bracket law that remains forever a local law. The original statute creating the El Paso system, passed in 1933, applied to all incorporated cities and towns containing more than 100,000 inhabitants and fewer than 185,000, "according to the last preceding Federal Census." (The population of El Paso in 1930 was 102,421. At that time Fort Worth was in the same population bracket, but the *Howerton* case discussed in the *Explanation* of Sec. 52e indicates that Fort Worth did not operate under this act.) In 1959, the act was amended to provide that all cities within the population bracket "may continue to operate such fund notwithstanding the fact any future Federal Census may result in the city being above or below the population as specified in this Act." (The population of El Paso in 1960 was 276,687.) In 1961, the foregoing was amended by changing "may continue to operate" to "shall continue to operate." In 1963, the population bracket was changed to more than 275,000 but fewer than 300,000. At the same time the following was added:

> It is further provided that the fact that any future Federal Census may result in said city being above or below the population bracket herein specified shall not affect the validity of such fund and such fund shall continue to be operated pursuant hereto.

In 1971, the population bracket was changed to more than 310,000 but less than 330,000. (The population of El Paso in 1970 was 322,261.) (See Art. 6243b and Historical Note in *Texas Revised Civil Statutes Annotated.*)

The purpose of Section 56 is to stop the legislature from meddling in local matters. Even if the courts are sympathetic to the need for enforcing the section, they can be expected to hesitate in a case that threatens to injure a lot of innocent people. By way of contrast, the attorney general is usually asked for his opinion before much concrete has been poured. It is not surprising to find that the attorney

general almost always calls a local law a spade. Give him a population bracket with only one county or city in it and he will normally rule it a local law. (In the annotations of Sec. 56, Tex. Const. Ann., over 60 attorney general opinions concerning population brackets are cited. Almost all of them rule the actual or proposed law unconstitutional.)

Special laws. The term "special law" should be used only for a law that applies to a segment of the state—its people, its institutions, its economy—in some sense other than geographical. An obvious example is a law granting John Doe a divorce from his wife Dosie or a law granting a corporate charter to Tom, Dick, and Harry to operate an employment service. Special laws are almost always easy to spot, for it is difficult to disguise them by a device comparable to the population bracket. A statute expressed in open-ended general terms would rarely be considered a special law even if it were shown that only one person or corporation came under it. For example, if the minimum residence period for obtaining a divorce is one year, a statute shortening the period to three months for a political refugee from a foreign country who had sued for divorce before fleeing to the United States would still be a general law even though the bill was introduced for the benefit of a particular refugee. (Compare *Wood v. Wood,* 159 Tex. 350, 320 S.W.2d 807 (1959).) Or a law regulating manufacturers of drilling bits for oil well drilling would not be a special law just because there happened to be only one company making the bits. Such statutes are open-ended and are much more likely eventually to include others than are most open-ended narrow population-bracket statutes.

There is also the problem of classification within a general law, or the classification resulting from regulating one group but not regulating other groups. As in the case of population brackets for local laws, the crucial point is whether the classification is reasonable. Fortunately, the rule of reasonableness is, or can be, and certainly should be the same rule of reasonableness used in the case of most claims of denial of the equal protection of the laws. (See, for example, *Linen Service Corporation of Texas v. City of Abilene,* 169 S.W.2d 497 (Tex. Civ. App.—Eastland 1943, *writ ref'd*).) Presumably because of the availability of the equal protection argument, there appear to have been few attempts to attack legislation as "special." In most of the enumerated special law prohibitions, the legislature is unlikely to pass a special law because it is too difficult to disguise the law by using words of "generality." But even Item (23)—"regulating labor, trade, mining and manufacturing"—has not been used much as a device to attack the reasonableness of a classification. One rare case was *State v. Hall,* involving a code of fair competition in the marketing of milk. The statute applied only to counties with a population of 350,000 or more which, at that time, covered only Harris County. Since the statute had a life of only two years, the court of civil appeals deemed it not open-ended and, therefore, a local or special law regulating trade. (76 S.W.2d 880 (Tex. Civ. App.—Galveston 1934, *writ dism'd*).)

A particularly interesting and rare special law case is *Inman v. Railroad Commission* (478 S.W.2d 124 (Tex. Civ. App.—Austin 1972, *writ ref'd n.r.e.*)). Under a statute authorizing specialized trucking operations, the Railroad Commission granted authority to nine truckers to transport agricultural products. Regular truckers sought to enjoin the commission's order as defective. The attack was successful. Fortunately for the specialized truckers, the legislature was in session and promptly passed a bill validating "[a]ny authorization to transport agricultural products in their natural state issued . . . prior to January 1, 1971, is validated, . . ." (*General and Special Laws of the State of Texas,* 62d Legislature, 1971, ch. 328, at 1286.) The regular truckers tried again, arguing among other things that the act was a special law prohibited by Section 56. This time the regular truckers were

unsuccessful. The court of civil appeals upheld the act against the Section 56 attack. The argument used by the court was the one discussed earlier to the effect that a law is "general" if it deals with a subject of interest to the people at large. Obviously this is the case, for the legislature gave the Railroad Commission authority to grant special authorization to transport agricultural products.

It is equally obvious that this was not a "general" law in the ordinary sense. A validating act never is, for it speaks only to the past and normally only to specific categories of defective actions. Thus, the real question is whether this particular validating act was a "special" act because of its narrowness. In the *Inman* case, the court in dealing with the classification issue concluded that restricting the validating act to the limited class of special authorizations was reasonable because the original grant of authority to issue the special authorizations was reasonable.

The *Inman* case is probably as difficult a special/general law issue as is likely to come along. On the nonlegal level, the act involved was obviously a bit of legislative relief to a small group; in this light the act was "special." On the legal level, this was just another "general" validating act; if the class of actions to be validated was a reasonable one, the act was a "general" law. On balance the result reached by the court seems correct.

The only other significant appeal to Section 56 has been the case of legislative action concerning claims against the state. An appropriation to pay a claim or a statutory consent to sue the state must be a special act, but it normally is not a case "where a general law can be made applicable." In *Austin Nat'l Bank of Austin v. Sheppard,* the attorney general relied upon Section 56 to attack an appropriation to refund a specific filing fee paid under protest. The commission of appeals said: "That constitutional provision deals with local or special laws. Obviously this appropriation is not a local law. The terms 'special' or 'local' are used in the same sense in this constitutional provision." (123 Tex. 272, 71 S.W.2d 242, 244 (1934).) The attorney general's argument was certainly a weak one, but Judge Critz, who wrote the opinion, was a little too short in the shrift he gave the argument. A legislative divorce is obviously not a local law and by Judge Critz's logic would be valid. The normal way to get around this situation would be to say that a statute paying a just claim or authorizing a suit against the state is a matter of general interest and thus a general law, or to rely on the conclusive presumption of inapplicability discussed next, or both. (See, for example, *Handy v. Johnson,* 51 F.2d 809 (E.D. Tex. 1931).)

In all other cases. Section 56 provides that "in all other cases where a general law can be made applicable, no local or special law shall be enacted." This prohibition has long since been emasculated by the courts.

> In construing the provision of the Constitution quoted last above, it has been held that it is the sole province of the Legislature to determine whether or not a general law can be made applicable. (*Lamon v. Ferguson,* 213 S.W.2d 86, 88 (Tex. Civ. App.—Austin 1948, *no writ*).)

The first case cited by the court for the foregoing and presumably the first statement of the rule is *Beyman v. Black* (47 Tex. 558 (1877)). What nobody appears to have noticed is that *Beyman* arose under the 1869 Constitution and involved the 1873 amendment to that constitution. That provision read in pertinent part:

> The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say, . . . ; and in all other cases where a general law can be

made applicable, no special law shall be enacted. The Legislature shall pass general laws providing for the cases before enumerated in this section, and for all other cases which, *in its judgment,* may be provided by general laws. (Art 12, Sec. 40 (1873) (italics supplied).)

The opinion of the supreme court is addressed specifically to the foregoing wording. After quoting the provision, the court said:

> Even if the law could be regarded as a local or special act, its passage would be taken *as the judgment* of the Legislature, that the case was not one which could be provided for by a general law, and their decision is conclusive of that question. (*Id.,* at 567 (italics supplied).)

As already noted, the 1875 Convention copied the Pennsylvania prohibition and not the 1873 Amendment. The current wording is significantly different from the earlier provision. One would like to conclude that the courts have relied upon the *Beyman* case without bothering to read it carefully. The difficulty is that the second case relied upon by the *Lamon* court for the quoted rule does not cite the *Beyman* case.

The second case is *Smith v. Grayson County,* decided by the court of civil appeals 20 years after *Beyman.* The opinion in this case uses the words appearing above in the quotation from the *Lamon* case: ". . . it is the sole province of the legislature to determine whether or not a general law can be made applicable." To support this, the court cited six cases from four other states and treatises on constitutional law. (*Smith v. Grayson County,* 44 S.W. 921, 923 (Tex. Civ. App.—1897, *writ ref'd*).)

The *Lamon* opinion cited two other cases in support of the quoted sentence, one decided in 1908 and one in 1920. The first of these quoted the *Grayson County* opinion; the second one cited *Beyman v. Black* and *Grayson County.* (*Logan v. State,* 54 Tex. Crim. 74, 111 S.W. 1028 (1908); *Harris County v. Crooker,* 224 S.W. 792 (Tex. Civ. App.—Texarkana), *aff'd,* 112 Tex. 450, 248 S.W. 652 (1920).)

Whatever the source, the rule is as set forth in the *Lamon* quotation. Or is it? In *State Highway Department v. Gorham,* a case involving a "special" act granting Gorham permission to sue the state, the supreme court said: "It is also violative of Article III, Section 56, of our State Constitution, which provides that no local or special law shall be enacted where a general law can be made applicable." (139 Tex. 361, 367, 162 S.W.2d 934, 937 (1942).) Since the court held the applicable part of the act invalid for two other reasons, this apparent variance from the standard *Beyman* rule is hardly to be relied upon. (But see Tex. Att'y Gen. Op. No. 0-5115 (1943).)

Except as otherwise provided. Section 56 begins: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law. . . ." Here is a loophole that a truckload of local laws can slip through if an "except as otherwise provided" can be found. There are a great many. One is a proviso in Section 56 itself authorizing special game and fish laws. There are several others that explicitly authorize local or special laws. (See, *e.g.,* Art. V, Secs. 7 and 22; Art. VIII, Sec. 9; and Art. XVI, Secs. 22 and 23.) Others authorize such laws by necessary implication. (See, *e.g.,* Art. III, Sec. 51, authorizing grants in aid in cases of public calamity (Tex. Att'y Gen. Op. No. O-941 (1939); Art. VIII, Sec. 10; and Art. XVI, Sec. 22).) But a great many provisions simply authorize the legislature to do something "by law" or to pass "laws." In many instances, the context lends itself to reading "law" or "laws" to mean local laws. This is especially the case with provisions authorizing the creation of special districts. (See, *e.g.,* Art. III, Secs. 48-d and 52; Art. IX, Secs. 4, 9, and 12; and Art. XVI, Sec. 59.)

Art. III, § 56

Comparative Analysis

Approximately three-fourths of the states have a general prohibition against local and special laws. Most of those states use the laundry list approach. Pennsylvania, it was noted earlier in the *History*, had a laundry list almost identical to Section 56. In 1967, as part of a general revision of the Pennsylvania Constitution, the laundry list was cut from 26 to eight items. (Six of the eight retained are also in Section 56: (2), (7), (10), (21), (22), and (23). A seventh is the township prohibition mentioned earlier as omitted in Texas because there are no townships. The eighth is the standard corporate charter prohibition covered in Texas by Sec. 1 of Art. XII.)

Two recent constitutional conventions, those of Illinois and Montana, dropped their laundry lists in favor of a simple prohibition. The new Illinois provision (Art. III, Sec. 13) is in substance the *Model State Constitution* provision set out below. The new Montana provision (Art. V, Sec. 12) is in substance the first half of the provision set out below. An official text of the proposed Montana Constitution provided the following explanation: "No change except in grammar." Evidently somebody in Montana agrees that the laundry list adds little or nothing to a local or special law prohibition.

The *Model State Constitution* has the following recommended provision:

> SPECIAL LEGISLATION. The Legislature shall pass no special or local act when a general act is or can be made applicable, and whether a general act is or can be made applicable shall be a matter for judicial determination. (Sec. 4.11.)

There is no comparable provision in the United States Constitution. Congress regularly passes special acts, referred to as "private laws." In a sense congress also enacts "local laws" for the District of Columbia and the territories and possessions.

Author's Comment

In any constitutional revision of a late 19th century state constitution something should be done about a laundry list of prohibited local and special laws. The laundry list itself is old-fashioned and really not necessary. If, as is frequently the case, the prohibition has not been effective in preventing local laws, a drastic change in the provision is advisable. This warns everybody that things are to be different. Moreover, the drafters of the revision can use the opportunity to make a record showing why the change was made and what is to be accomplished by the change.

All this assumes, of course, that people generally would prefer that the legislature attend to state matters and leave local governments to solve their own problems. This seems an eminently reasonable assumption. (Except for the fact that "local" and "special" have been used interchangeably, one could forget a prohibition on special laws. The problem is pretty much dead and in any event can be handled by the equal protection section of the Bill of Rights.) One must also hope that legislators will cooperate. A provision like the one from the *Model State Constitution* goes about as far as a constitution can in trying to keep legislatures from wasting their time on local matters.

In the light of the rule of the *Beyman* case, discussed earlier, it is essential that any revised Section 56 include words such as "and whether a general law is or can be made applicable is a matter for judicial determination." It is also essential to drop the "except as otherwise provided in this Constitution" *and* to avoid otherwise so providing. The way to do this is to make "general law" one word, so

to speak, and to use it whenever there is an occasion to use the word "law." In other words, any instructions to the legislature should always be instructions to pass general laws, never just to pass laws.

Sec. 57. NOTICE OF INTENTION TO APPLY FOR LOCAL OR SPECIAL LAWS. No local or special law shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the Legislature of such bill and in the manner to be provided by law. The evidence of such notice having been published, shall be exhibited in the Legislature, before such act shall be passed.

History

This section dates from 1876. The wording is substantially the wording of a comparable provision in the Pennsylvania Constitution (Art. III, Sec. 7). As noted in the *History* of Section 56, that section was undoubtedly modeled after the Pennsylvania prohibition. Presumably, the delegates in 1875 simply lifted the companion Pennsylvania notice section.

No attempts have been made to amend Section 57 directly. There were two indirect amendments—one in 1883 authorizing creation of school districts by local law without the required notice (Art. VII, Sec. 3), the other in 1890 authorizing local laws for road maintenance without notice (Art. VIII, Sec. 9). Subsection (d) of Section 59 of Article XVI is also an indirect amendment of Section 57. Somebody must have decided that nobody could depend on Section 57 and that it was easier to play with Section 59 than it was to fix up Section 57.

Explanation

The courts have destroyed Section 57. (This may explain the Sec. 59 amendment just referred to.) This was accomplished by four judicial rules which, when juggled around appropriately, can avoid the effect of Section 57 under all circumstances. Before discussing these rules, it is appropriate to look at the section on its merits, so to speak. This will show what a beautiful job of emasculation has been performed by the courts.

There are three types of local or special laws plus what may be called a general-local hybrid. First, there are the 29 enumerated items under Section 56. No local or special law may be passed covering any of these items. Therefore, Section 57 cannot come into operation. Any case that holds a law invalid under Section 56 *and* Section 57 is illogical. (See *Bexar County v. Tynan,* 69 S.W.2d 193 (Tex. Civ. App.—San Antonio 1934), *aff'd,* 128 Tex. 223, 97 S.W.2d 467 (1936). But see *Duclos v. Harris County,* 251 S.W. 569, 571 (Tex. Civ. App.—Galveston 1921), *aff'd,* 114 Tex. 147, 263 S.W. 562 (1924), where the court correctly said: ". . . it follows that . . . the Legislature was without authority to enact this measure with or without the notice prescribed by succeeding Section 57 of the same article. The fact that no notice was given was accordingly immaterial. . . .") Second, there is the general-local hybrid, the local law that a court says is general because of a general interest in the subject matter. Section 57 cannot come into operation since the law has been characterized as "general."

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to speak, and to use it whenever there is an occasion to use the word "law." In other words, any instructions to the legislature should always be instructions to pass general laws, never just to pass laws.

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The other types are local or special laws otherwise permitted by the constitution and local or special laws not in the enumerated laundry list but "where" a

general law cannot be made applicable. These two types are the only laws that can be governed by Section 57.

Now for the rules. Rule One: Section 57 is applicable only to local or special laws passed pursuant to Section 56; a local or special law passed under a provision elsewhere in the constitution does not require notice. (See *Rogers v. Graves,* 221 S.W.2d 399 (Tex. Civ. App.–Waco 1949, *writ ref'd*); *Tom Green County v. Proffitt,* 195 S.W.2d 845 (Tex. Civ. App.—Austin 1946, *no writ*).) It must be conceded that the courts in the cited cases probably did not focus on what they were saying. Sometimes the court indicates that the local law is permitted by another provision, but is also a "general" law because of "general" interest. (See the *Graves* case just cited. This is Rule Four discussed below.) It may be that it would take a case proving lack of notice under Section 57 to get a court to focus on the issue. (Compare the *Duclos* case quoted earlier. That statement was induced by a specific argument of counsel. See also the discussion of the *Cravens* case following.)

Rule Two: It is presumed that the notice required by Section 57 was given. (*Cravens v. State,* 57 Tex. Crim. 135, 122 S.W. 29 (1909); *Moller v. City of Galveston,* 57 S.W. 1116 (Tex. Civ. App. 1900, *no writ*); *Thompson v. State,* 56 S.W. 603 (Tex. Civ. App. 1900, *no writ*).) The *Cravens* case reduces this rule to *ad absurdum,* for the court said:

> It may be objected that this act purports, on its face, to be a general law . . . The fact that on its face it purports to be a general law would not deny it validity as a special law, if notice in fact were given, and if it were such an act as might have been passed as a special law . . . We think, on full review of the subject, that the act can, and should be, sustained as a special law, and that certainly, in the absence of proof to the contrary, we should and must assume that proper notice was given. (57 Tex. Crim., at 138; 122 S.W., at 31.)

It should be obvious at once that the foregoing case must have been one where the court did not follow Rule One. This law was a population bracket "general" law applicable in fact only to Galveston. The claim of violation of Section 56 was turned aside by holding that it was in effect an amendment of the Galveston city charter. This would make it a local law "otherwise provided" for. (Prior to the Home Rule Amendment, cities could be chartered by local law. See *History* of Sec. 5 of Art. XI.)

Rule Three: Section 57 is not applicable if the legislature passes a local or special law not in the enumerated list of Section 56 so long as the law is called "general." This is the "in all other cases" situation discussed under Section 56.

Rule Four: If all else fails, make the local or special law a general-local hybrid because of a general state or public interest. This is the saga of *Stephenson v. Wood* (35 S.W.2d 794 (Tex. Civ. App.—Galveston 1930), *aff'd,* 199 Tex. 564, 34 S.W.2d 246 (1931)). Section 56 contains a specific permission to pass "special laws for the preservation of the game and fish of the State in certain localities." Rule One does not apply, for the permission is in Section 56. (Actually, the court of civil appeals came close to using Rule One. After using Rule Four, the court said: "We are also of opinion that by the last clause of Section 56 of Article 3 of the Constitution the authority of the Legislature to pass such laws as the one under consideration without the notice mentioned in Section 57 of Article 3 is specifically reserved." 35 S.W.2d, at 797.) Rule Three apparently did not work because the law in question could have been brought under an enumerated item in Section 56. Nobody talked about this in *Stephenson.* Since seine fishing in Galveston Bay was prohibited and Stephenson was a commercial fisherman, the law could have been stuffed into Item 23—"Regulating labor, trade, mining and manufacturing." It is also possible that

it never occurred to anybody that fish and game laws could be one of the "in all other cases." Rule Two would not work because it had been stipulated that the Section 57 notice had not been given.

Thus, Rule Four came to the rescue. Both the court of civil appeals and the commission of appeals whose opinion was adopted by the supreme court rang all the changes on the general interest in the legislation and concluded that it was, indeed, a general law. Therefore, no notice under Section 57 was required. It would appear that the delegates who inserted the fish and game exception into Section 56 need not have bothered. The courts would have solved the problem anyway.

With these four rules to play with, the courts appear never to have invalidated a law for failure to adhere to the requirements of Section 57. This raises the question why two constitutional amendments—one to Section 3 of Article VII in 1883 and the other to Section 9 of Article VIII in 1890—eliminating the need for notice were adopted. It may be that in the early days the legislature enforced the rule of Section 57 and that the 1883 and 1890 amendments were to ease the legislature's enforcement problem.

Although it has been argued that the courts have killed Section 57, it must be conceded that the legislature is an accomplice. Its penchant for trying to get around Section 56 by using population brackets and other devices for turning local laws into general laws created difficult problems for the courts. The quotation from the *Cravens* opinion exemplifies the difficulty. In a situation where the legislature has the power to pass a local law but nevertheless uses general law language, Section 57 will not be followed. If the court were to knock the law down only because Section 57 was not followed, the legislative process would become a yo-yo.

Although the opinions are not clear, it appears that all cases arising under Section 57 have involved laws that purported to be general. It appears, however, that even a law which is denominated special or local is not required to follow Section 57. The rules of the senate and the house of representatives are silent on the subject. This indicates that the legislature ignores Section 57.

Comparative Analysis

Approximately ten of the states prohibiting local or special laws also have a notice provision. Two states, Louisiana and Missouri, require a recital of notice in the private law. Alabama enjoins the courts to pronounce void any such law if the legislative journals do not affirmatively show compliance with the prescribed notice requirement. Oklahoma requires that proof of notice be filed with the secretary of state. (See also *Comparative Analysis* of Sec. 56.)

Author's Comment

Section 57 seems to be a case of "it's good in theory, but it won't work in practice." On the one hand, the legislature is not supposed to pass any local or special law; on the other hand, it is supposed to notify the locality involved that it may pass such a law. It is this very inconsistency that has produced constitutional confusion. If there were no Section 56, Section 57 would probably be enforced by the courts in accordance with the theory of the section—that the locality to be affected should have advance notice of any legislative tampering with their fate. But Section 56 forbids such tampering which means that any valid law is not local and no notice is required. There are, of course, the exceptions scattered throughout the constitution, but these serve only to muddy the water.

It has been suggested that Section 56 be revised in a manner designed to change legislative and judicial behavior to the end that the practice of local legislation be

stopped. (See *Author's Comment* on Sec. 56.) Part of this revision is the elimination of Section 57. The theoretical underpinning for the section is that local laws will be passed. Prohibit them and no reason for Section 57 remains.

Sec. 58. SEAT OF GOVERNMENT. The Legislature shall hold its sessions at the City of Austin, which is hereby declared to be the seat of government.

History

In 1840 the city of Austin was selected as the location for a permanent capital of the Republic. After the Mexican invasion in 1842, the seat of government was moved first to Houston then to Washington-on-the-Brazos, but the citizens of Austin protested and refused to allow transfer of the archives. In 1845 the capital was returned to Austin. The Constitution of 1845 called for an election to determine the seat of government and Austin was confirmed by that election in 1850.

The Constitutions of 1861 and 1869 also called for elections to determine the seat of government. The Constitution of 1866 designated Austin the capital, subject to removal by election. (See 1 *Interpretive Commentary,* p. 773.)

By 1875 Austin was the established seat of government and this section was adopted apparently without debate.

Explanation

Section 58 is straightforward and has not been the subject of litigation.

Sections 8 and 13 of Article IV also relate to the seat of government, the former specifying the meeting place for special sessions of the legislature and the latter requiring the governor to reside at the seat of government. (See the *Explanation* of those two sections.)

Comparative Analysis

Most state constitutions contain a provision designating a seat of government where the legislature is required to convene.

Author's Comment

Power should be vested in the office of governor to designate a temporary seat of government in the event that Austin becomes unsuitable or unsafe because of war, disease, or other catastrophe. No doubt this was intended by Section 8 of Article IV, but as drafted it is limited to special sessions of the legislature.

Sec. 59. WORKMEN'S COMPENSATION INSURANCE FOR STATE EMPLOYEES. The Legislature shall have power to pass such laws as may be necessary to provide for Workmen's Compensation Insurance for such State employees, as in its judgment is necessary or required; and to provide for the payment of all costs, charges, and premiums on such policies of insurance; providing the State shall never be required to purchase insurance for any employee.

History

The English common law, which the Americans adopted as their legal system, by and large was "tilted" against the poor, the ignorant, and the propertyless. Nowhere was this more obvious than in the case of injuries to employees. Two rules in particular protected the employer: assumption of risk and the fellow-

servant rule. The former rule meant that if a job was likely to produce injuries, the employee assumed the risk of injury and could not blame his employer if he got hurt. The latter rule meant that if an employee was injured by the negligence of another employee, the employer was not responsible. (Note that this is an exception to the usual rule that an employer is responsible for the negligent acts of his employees.) Beyond the "tilt" of the law itself was the practical disadvantage of trying to sue one's employer.

All of this may have been tolerable in an agricultural society. In an industrial society with a large number of employees in one plant, with dangerous machinery around, and with the loss of the personal, almost familial relationship that frequently existed between farmer and hired-hand, the unfairness of the common law rules became obvious. Out of this first came laws taking away such employer defenses as assumption of risk and the fellow-servant rule. This proved unsatisfactory since an employee still had to bring a lawsuit, prove that someone had been negligent, and not be found contributorily negligent himself. A new theory, workmen's compensation, was developed: the cost of injury to employees should be a cost of doing business. Workmen should be compensated when injured on the job regardless of fault.

A workmen's compensation system requires a method of awarding compensation and a method of providing a fund from which to make payments. The former is invariably a state administrative agency—in Texas, the Industrial Accident Board. The latter normally is in the form of "insurance." At the time Texas first adopted workmen's compensation, the law created the Texas Employers Insurance Association, a mutual company to which Texas employers could subscribe.

One of the first questions to arise in Texas under workmen's compensation was whether municipal corporations were subject to the act. The First Assistant Attorney General, C. M. Cureton, later chief justice of the Texas Supreme Court, ruled in 1913 that municipal corporations were not covered. (*Report of Attorney General, 1912-1914,* pp. 437-43.) His opinion was the first of a series of narrow, conceptualistic interpretations of the constitution that brought about Section 59. The opinion notes that workmen's compensation is a legislative modification of common law liability. "When we come to consider the question of its applicability to municipal corporations, we are confronted at the outset with the fact that municipal corporations in this State are not made liable by statute or by the Constitution for torts and injuries due to their default or negligence. . . ." (*Id.*, at 440.)

In 1926, the Commission of Appeals confirmed the 1913 opinion that municipal corporations were not covered and implied that they could not be covered. "As already pointed out, the act contemplates compensation in the absence of any legal liability other than the acceptance of the plan. Cities and towns have no power to appropriate the tax money of its citizens to such a purpose. It is at best a gratuity, a bonus to the employee. The city might as well pay his doctor's fee, his grocer's bill, or grant him a pension." (*City of Tyler v. Texas Employer's Ins. Ass'n,* 288 S.W. 409, 412 (Tex. Comm'n App. 1926, *holding approved*).) Thus, the litany ran: The sovereign is not liable for its negligence. Payment to an injured employee is payment without liability. Payment without liability is a gratuity. The constitution forbids gratuities. And so the grants and loans prohibition of Section 51 *appears* to be the reason for the adoption of Section 59. (The *Author's Comment* points out that sovereign immunity, not Sec. 51, is the real reason. It should also be noted that, in the case of municipal corporations, there is an additional legalistic tangle involving Sec. 3 of Art. XI.)

Section 59 was added in 1936.

Art. III, § 59

Explanation

Section 59 authorizes the legislature to provide workmen's compensation for state employees on a selective basis. State highway employees were the first to be covered. (See Tex. Att'y Gen. Op. No. 0-779 (1939).) Employees of Texas A&M, The University of Texas, and Texas Tech have also been covered. (Tex. Rev. Civ. Stat. Ann. arts. 8309b, 8309d, and 8309f.) The attorney general recently ruled that since the legislature has not included Tyler State College under the authority granted by Section 59 that college may not purchase workmen's compensation insurance. (Tex. Att'y Gen. Op. No. M-1257 (1972).)

The only constitutional case arising under the section appears to be *Matthews v. University of Texas,* where the court of civil appeals held that a prospective state employee who is physically unfit can be required to waive compensation rights as a condition of employment. (295 S.W.2d 270 (Tex. Civ. App.—Waco 1956, *no writ*).)

Comparative Analysis

Approximately eight states have constitutional provisions authorizing the legislature to pass general workmen's compensation laws. Many years ago, some state courts held such laws to be unconstitutional under a state due process clause. (There was never any problem under the Due Process Clause of the Fourteenth Amendment. See *New York Central R. Co. v. White,* 243 U.S. 188, 200 (1917).) If a state court holds a statute unconstitutional under a state due process clause but the United States Supreme Court holds the same kind of legislation constitutional under the Fourteenth Amendment, a state legislature and the voters can "overrule" the state court's decision by a simple constitutional amendment. This explains the eight state provisions referred to.

One of the states with a general workmen's compensation provision, Arizona, requires the legislature to include the state and its subdivisions as "employers" under the authorized general workmen's compensation statute. No other state has a provision like Section 59. Neither the United States Constitution nor the *Model State Constitution* mentions workmen's compensation.

Author's Comment

This business of workmen's compensation for government employees is perhaps the most interesting muddle in the Texas Constitution. The muddle exists because a constitutional restriction—no grants to individuals—comes into play because of sovereign immunity, but this is a common law doctrine which the legislature could have destroyed at any time. Indeed, the Texas Supreme Court could have abolished the doctrine on its own. (Other state courts have done so. See, for example, *Molitor v. Kaneland Community Unit District,* 18 Ill.2d 11, 163 N.E.2d 89 (1959).) It seems odd to keep amending the constitution to permit something which is prohibited only because of a nonconstitutional rule of law. But then it also seems odd that nobody sorted out the relationship among sovereign immunity, proprietary functions of municipal corporations, and workmen's compensation for municipal proprietary employees. (See *History* of Sec. 61 (1952).)

In 1969 the legislature passed the Texas Tort Claims Act, effective January 1, 1970 (Tex. Rev. Civ. Stat. Ann. art. 6252-19 (1970)). This is the traditional way to remove sovereign immunity, but no one need relax and assume that the constitutional muddle has been cleared up.

> The Texas Tort Claims Act, . . . struck a telling blow at the ancient doctrine of sovereign immunity, behind whose crumbling but still formidable fortress local

governments had shielded themselves from responsibility for their employees' negligence. . . .

But the legislature took away with one hand what it had bestowed with the other. Some twelve exceptions follow the rule, cutting a broad swath through the expectations of those who naively sought a truly liberal reform of the sovereign immunity concept. . . . (*Little v. Schafer,* 319 F.Supp. 190, 191 (S.D. Tex. 1970).)

In the area of any of the exceptions, the government remains immune from liability. Moreover, the removal of immunity is not a substitute for workmen's compensation. In *Boswell v. City of Sweetwater,* the court of civil appeals held that a city which did not provide workmen's compensation could assert the defenses of assumption of risk and contributory negligence against an employee who sued the city. (341 S.W.2d 664 (Tex. Civ. App.—Eastland 1960, *writ ref'd*). To the alert reader: the employee was in the city water department, a proprietary function.)

In any event, muddle or no muddle, adequate or inadequate Tort Claims Act, the real culprit is the grants prohibition. Drop that and all the confusion vanishes. (See *Author's Comment* on Sec. 51.)

Sec. 60. WORKMEN'S COMPENSATION INSURANCE FOR EMPLOYEES OF COUNTIES AND OTHER POLITICAL SUBDIVISIONS. The Legislature shall have the power to pass such laws as may be necessary to enable all counties and other political subdivisions of this State to provide Workmen's Compensation Insurance, including the right to provide its own insurance risk, for all employees of the county or political subdivision as in its judgment is necessary or required; and the Legislature shall provide suitable laws for the administration of such insurance in the counties or political subdivisions of this State and for the payment of the costs, charges and premiums on such policies of insurance and the benefits to be paid thereunder.

History

Not long after Section 59 was added to the constitution, the attorney general was asked whether it was "the duty of the county or of the road precincts to carry employers liability insurance for the protection of road workmen of the county." (Tex. Att'y Gen. Op. No. 0-779 (1939).) The question may have been raised by county workmen who were aware that State Highway Department employees had the benefit of workmen's compensation or by a lawyer who wondered whether county employees were "state employees" under Section 59 since the county is an arm of the state. (See *Explanation* of Sec. 1 of Art. XI.) The attorney general answered the question: "The law does not require the Commissioner's Court to take out insurance."

Four years later the question was raised in a different formulation: "Do the County Commissioners of a county have the right and are they empowered to take out compensation insurance on drivers of County maintainers or County graders?" (Tex. Att'y Gen. Op. No. 0-5315 (1943).) This time the traditional litany set out in the *History* of Section 59 was recited in abbreviated form. A county is not liable for the negligence of its employees. The constitution prohibits grants and loans. "We answer your question in the negative." (*Id.*)

Presumably, county road crews pushed for the same protection that state highway crews had. In any event, Section 60 was added in 1948. The original section omitted the words "political subdivisions" in the three places where they appear. Thus, Section 60 originally covered only counties. (The next chapter in the workmen's compensation story is Sec. 61 (1952), covering municipalities.)

In 1943, the attorney general also advised the Harris County-Houston Ship Canal and Navigation District that it had no power to provide workmen's

compensation for its employees. (Tex. Att'y Gen. Op. No. 0-5360 (1943).) Actually, the district had developed an ingenious plan whereby it purported to be including workmen's compensation as part of regular employee compensation. (This was an attempt to rely on the *Byrd* case upholding pensions. See *Explanation* of Sec. 48a.) The attorney general knocked this idea down:

> The compensations provided by said regulations are to be considered as salary to the employee. Considering the regulations as a whole, it is immaterial whether such compensation is considered as salary or otherwise. Said regulations are nothing more nor less than an attempt by the District to provide workmen's compensation for its employees. . . . It is our opinion that the Navigation District has no expressed or implied authority to make agreements which amounts [*sic*] to insurance contracts with its employees, regardless of the form of such contract or regulations. There are no statutes empowering such navigation districts to enter into an agreement or adopt regulations such as are under consideration.

For some reason, nothing was done about the problem of workmen's compensation for employees of special districts and school districts until Section 60 was amended in 1962. At that time, the words "political subdivisions" were added.

Explanation

Although Section 60 is worded differently from Section 59, the differences probably mean nothing. The words "including the right to provide its own insurance risk" presumably mean that the legislature must permit counties and other political subdivisions to be self-insurers if it permits them to have workmen's compensation at all. Or do the words mean that the legislature's power to authorize includes the power to authorize self-insurance? If so, then somebody was afraid that if the words were omitted, the power would not exist. Perhaps the sensible thing is to forget the wording of Section 60 and simply say that it permits the legislature to permit local governments to provide for workmen's compensation. This includes cities, towns, and villages, of course, since they are "political subdivisions." Thus, cities, towns, and villages are now covered by both Section 60 and Section 61. (See the upcoming *Author's Comment.*)

The statement above suggesting that the wording of Section 60 be forgotten ends up being too cautious. Section 60 seems to go no further than to permit the legislature to permit political subdivisions to opt for workmen's compensation. Over the years the legislature had acted as if its power were only permissive. That is, each authorizing statute specifically left it up to each political subdivision to decide whether to opt for workmen's compensation. (See Tex. Rev. Civ. Stat. Ann. arts. 8309c, 8309c-1, and 8309e-1.) In 1973 the legislature wiped out all these acts with a master act making workmen's compensation mandatory for all political subdivisions. (See Tex. Rev. Civ. Stat. Ann. art. 3809h. This includes cities, towns, and villages which, as noted earlier, are covered both by this section and Sec. 61. Thus, art. 8309e-2, the statute enacted under that section, was also repealed.) In 1974 the attorney general issued a comprehensive opinion answering some 18 questions concerning this new master statutory requirement that everybody provide workmen's compensation (Tex. Att'y Gen. Op. No. H-338). The first question was whether, in the light of the wording of Section 60, the legislature had the power to mandate workmen's compensation. The attorney general said "yes" but did not say why this was so. It seems likely that the attorney general simply decided to ignore Sections 59, 60, and 61 because they were never necessary in the first place in the sense that the legislature has always had the power to modify the common law rule of sovereign immunity. To come right out and explain that enacting workmen's compensation for government employees is an indirect

form of lifting sovereign immunity would, of course, fly in the face of a lot of Texas law. (See the *History* of Sec. 59.) It may be that the attorney general thought that the best way to let the sleeping dogs lie was not to mention them. In any event, Sections 60 and 61 are now obsolete if the attorney general's ruling is correct, for the new mandatory act cannot be derived from the permissive words of the sections.

Comparative Analysis

See *Comparative Analysis* of Section 59.

Author's Comment

Apart from everything else in this muddle, the drafting approach to Sections 59, 60, and 61 was wrong. Anybody who knows anything about state constitutions knows that a legislature can pass any law on any subject unless there is something in the constitution that prevents it. There is *never* any need to give the legislature *power* to pass a law; there is only a need to remove an obstacle to legislative power.

The only obstacle to workmen's compensation for government employees was the grants and loans prohibitions of Sections 51 and 52. The proper way to remove an obstacle is to remove it: "Notwithstanding Sections 51 and 52, workmen's compensation may be provided for employees of the state and its political subdivisions." Or: "Payments under a system of workmen's compensation for employees of the state or its political subdivisions are not grants of money."

Apart from being proper, this approach simplifies constitution drafting. If, at the time Section 59 was drafted, someone had focused on the obstacle to power rather than the granting of power, there might have been one comprehensive amendment solving the whole problem. Moreover, such approach should avoid focusing on the narrow power issue of the moment. For whatever reason, probably pressure from some group, the focus in 1935 was on the state, in 1947 on counties, and so on. The legislature normally does not legislate on an issue no one is strongly pressing. Therefore, the power approach naturally gets limited to the pressure of the moment. The obstacle approach leaves the legislature free to legislate whenever new pressures arise. Finally, the power approach leads to long amendments with too much detail. There is always the fear that if the grant of power specifies a, b, and c, a court will say that power "d" does not exist according to the ancient maxim *expressio unius est exclusio alterius*—the enumeration of some excludes others. The obstacle approach avoids mentioning power and thus avoids any problem of an inadequate grant of power through sloppy draftsmanship.

See also the *Author's Comment* on Sections 51 and 59.

Sec. 61. MINIMUM SALARIES. The Legislature shall not fix the salary of the Governor, Attorney General, Comptroller of Public Accounts, the Treasurer, Commissioner of the General Land Office or Secretary of State at a sum less than that fixed for such officials in the Constitution on January 1, 1953.

History

This provision was added in 1954. It was mistakenly given the same number as a section adopted in 1952.

Explanation

Prior to 1954 the salaries of the officers enumerated in this section were fixed by the constitution. The governor was entitled to $12,000 annually under Article IV, Section 5; the attorney general was entitled to $10,000 annually under Article IV, Section 22; and the other officials were entitled to $6,000 annually under Article IV, Sections 21 and 23. Each of those sections was amended in 1954 to remove the fixed salary and permit the legislature to determine the compensation for the office. This section was included in the resolution proposing those amendments in order to prevent the legislature from reducing salaries below what they had been.

Comparative Analysis

The state constitutions that permit the legislature to fix salaries of executive officers customarily prohibit changes during the incumbent's term of office. A few states prohibit only reductions. The two newest states (Alaska and Hawaii) do not prohibit salary changes during the term but restrict them (one restricts only reductions) to general changes applicable to all salaried state officials. Only one other state imposes a constitutional minimum on the salaries of executive officers. The *Model State Constitution* has no provision on compensation.

Author's Comment

This section is most notable for the awkward way it has imposed minimum salaries. A layman reading the sections on executive salaries would be unaware that a minimun is imposed, and if he happened to discover this section, he could not find what the minimum is by reading the constitution but would have to rely on a footnote or seek the text of the outdated provisions. Simpler and clearer draftsmanship could be achieved by imposing the minimum salary in each section that provides for executive salaries.

Sec. 61. WORKMEN'S COMPENSATION INSURANCE FOR MUNICIPAL EMPLOYEES. The Legislature shall have the power to enact laws to enable cities, towns, and villages of this State to provide Workmen's Compensation Insurance, including the right to provide their own insurance risk for all employees; and the Legislature shall provide suitable laws for the administration of such insurance in the said municipalities and for payment of the costs, charges, and premiums on policies of insurance and the benefits to be paid thereunder.

History

There is a bit of mystery about workmen's compensation for municipal employees. As the *History* of Section 59 points out, the only basis for outlawing workmen's compensation is the traditional absence of liabilitiy of a government for the negligence of its employees. This immunity does not apply to all municipal employees. Municipal corporations are said to engage in "governmental" and "proprietary" functions. (See the *Explanation* of Sec. 1 of Art. XI.) A municipal corporation is liable to the public for the negligence of its employees when they are engaged in proprietary functions. For some reason this apparently failed to occur to First Assistant Attorney General Cureton whose opinion was quoted from earlier. (See *History* of Sec. 59.) Legally, it would appear, workmen's compensation could have been extended to municipal employees whenever they were

engaged in proprietary functions. As a matter of practical administration, however, this might not be possible. For this very reason, an imaginative lawyer could argue that because of the difficulties in administering a workmen's compensation system under such circumstances, the grants prohibition of Section 52 should be considered inapplicable. But apparently no one tried this argument.

The mystery deepens when one reads the cases that followed the *City of Tyler* case quoted from earlier (*History* of Sec. 59). That case was limited to holding that municipal corporations were not corporations covered by the Workmen's Compensation Act, but behind the statutory interpretation issue were two constitutional issues, the grants problem and the question of whether a city could carry insurance in a mutual company. This latter issue is discussed elsewhere. (See *Explanation* of Sec. 3 of Art. XI.) Three years after the *City of Tyler* case, the commission of appeals held that an injured employee could collect under a workmen's compensation policy taken out in an "old line" insurance company by the city of Weatherford prior to the *City of Tyler* decision. (*Southern Casualty Co. v. Morgan*, 12 S.W.2d 200 (Tex. Comm'n App. 1929, *holding approved*).) For technical reasons arising out of the law of contracts, the contract was held to be enforceable. In a concurring opinion, Judge Critz expressed the opinion that there was no constitutional prohibition against permitting cities to obtain workmen's compensation insurance in old line companies. His view was that a city might not have the authority, but so long as no one stopped the city from buying the policy in an old line company, workmen's compensation was in effect in that city.

In 1938, the supreme court upheld payment of compensation involving an employee of Corpus Christi. (*McCaleb v. Continental Casualty Co.*, 132 Tex. 65, 116 S.W.2d 679 (1938).) The interesting thing about this case is that the insurance was in the form of a voluntary compensation rider on an indemnity policy. The rider provided that the workmen's compensation statute was not applicable but that the amount of compensation would be the same as if the statute were applicable. By 1950, a court of civil appeals was saying: "The authorities are now uniform that a city may subscribe for workmen's compensation insurance for its employees provided it does so in an old line legal reserve company." (*Hartford Accident & Indemnity Co. v. Morris*, 233 S.W.2d 218, 220 (Tex. Civ. App.—San Antonio 1950, *writ ref'd n.r.e.*).)

This line of cases indicates that insurance companies that sold liability insurance to municipal corporations to cover proprietary activities happily added workmen's compensation coverage—for an additional premium, naturally. It appears that, in many instances, cities were covering all their employees before Section 61 was adopted. "In the year 1952, eighty-one out of 252 Texas cities reported that they carried workmen's compensation insurance. Fifty-five of these cities covered all of their employees under this program while twenty-six cities covered only a portion of their employees." (Andrus, *Municipal Tort Liability in Texas* (Institute for Public Affairs, The University of Texas at Austin, 1962), p. 89. Mr. Andrus cited a bulletin of the League of Texas Municipalities published in October 1952. Sec. 61 was adopted on November 4, 1952.)

All this leaves one mystified. Why was an amendment necessary at all? The only apparent difference between before and after is that workmen's compensation could be processed through the Industrial Accident Board. Whatever the reason, Section 61 was adopted.

Explanation

See the *Explanation* of Section 60.

Comparative Analysis

See *Comparative Analysis* of Section 59.

Author's Comment

See *Author's Comments* on Sections 59 and 60.

Sec. 62. CONTINUITY OF STATE AND LOCAL GOVERNMENT OPERATIONS. The Legislature, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and the immediate duty to provide for prompt and temporary succession to the powers and duties of public offices, except members of the Legislature, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices. Provided, however, that Article I of the Constitution of Texas, known as the "Bill of Rights" shall not be in any manner, affected, amended, impaired, suspended, repealed or suspended hereby.

History

In 1958, the United States Office of Civil and Defense Mobilization recommended that the several states adopt a state constitutional amendment and several implementing statutes, all to assure continuity of government in case of a nuclear war. (*Continuity of Government—Suggested State Legislation 1959* (Washington, D.C.: Government Printing Office, 1958).) The Council of State Governments endorsed the recommendation. (Council of State governments, *Suggested State Legislation—Program for 1959* (1958), pp. 29-52.) In 1959, a proposed amendment passed the Senate but was not acted upon in the House. A second try in 1961 was successful. The amendment was adopted in November 1962.

Explanation

Section 62 is not self-executing; it simply authorizes the legislature to provide by law for temporary succession in public offices in case of an enemy attack. Although words such as "notwithstanding any other provisions of the constitution" were not used, the purpose of Section 62 is to permit by-passing all constitutional restrictions on filling vacancies temporarily. Section 62 specifically excludes providing for temporary succession of legislators. The proviso concerning the Bill of Rights is probably redundant but obviously does no harm.

Comparative Analysis

Most states adopted the recommended amendment. Texas appears to be the only state that varied from the recommendation that the legislature have the power to provide for its own temporary succession. The recommended amendment also would authorize the legislature "to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations." Approximately 30 states included this power in their amendments. No other state has a proviso concerning the Bill of Rights.

Neither the United States Constitution nor the *Model State Constitution* has a continuity of government provision.

Author's Comment

This widely adopted amendment is one of the reminders of the Cold War. It is

doubtful that many states would adopt such an amendment today. Indeed, it is doubtful that the Office of Emergency Preparedness, a successor to the Office of Civil and Defense Mobilization, would recommend such a program today. Actually, the whole thing was probably a public relations push in support of such Cold War programs as air raid shelters and other civilian defense activities. If a nuclear war had broken out and nuclear ICBMs had hit American cities, the presence or absence of a Section 62 in a state constitution would have made precious little difference.

Sec. 63. CONSOLIDATION OF GOVERNMENTAL FUNCTIONS OF POLITICAL SUBDIVISIONS IN COUNTIES OF 1,200,000 OR MORE. (1) The Legislature may by statute provide for the consolidation of some functions of government of any one or more political subdivisions comprising or located within any county in this State having one million, two hundred thousand (1,200,000) or more inhabitants. Any such statute shall require an election to be held within the political subdivisions affected thereby with approval by a majority of the voters in each of these political subdivisions, under such terms and conditions as the Legislature may require.

(2) The county government, or any political subdivision(s) comprising or located therein, may contract one with another for the performance of governmental functions required or authorized by this Constitution or the Laws of this State, under such terms and conditions as the Legislature may prescribe. The term "governmental functions," as it relates to counties, includes all duties, activities and operations of state-wide importance in which the county acts for the State, as well as of local importance, whether required or authorized by this Constitution or the Laws of this State.

History

When this amendment was proposed in 1965 and adopted in 1966, it applied only to Harris County. (Today Dallas County would also come under the section.) One would assume that somebody in Harris County wanted the amendment, but one wonders, for after adoption no implementing statutes were ever enacted. (See Texas Research League, *Texas County Government: Let the People Choose* (Austin: Texas Research League, 1972), p. 80.) No matter. The amendment has been superseded by the 1970 amendment of Section 64.

Explanation

Anything that Harris and Dallas counties could do under Section 63 can be done under Section 64. Moreover, two things are possible under Section 64 that are not possible under Section 63: (1) the legislature may authorize consolidation of "governmental offices"; and (2) the dual officeholding prohibition of Section 40 of Article XVI is "repealed" in part. One can only express bewilderment that the 1970 amendment of Section 64 did not simultaneously repeal Section 63.

Comparative Analysis

See *Comparative Analysis* of Section 64.

Author's Comment

See *Author's Comment* on Section 64.

Sec. 64. CONSOLIDATION OF GOVERNMENTAL OFFICES AND FUNCTIONS. (a) The Legislature may by special statute provide for consolidation of

governmental offices and functions of government of any one or more political subdivisions comprising or located within any county. Any such statute shall require an election to be held within the political subdivisions affected thereby with approval by a majority of the voters in each of these subdivisions, under such terms and conditions as the Legislature may require.

(b) The county government, or any political subdivision(s) comprising or located therein, may contract one with another for the performance of governmental functions required or authorized by this Constitution or the Laws of this State, under such terms and conditions as the Legislature may prescribe. No person acting under a contract made pursuant to this Subsection (b) shall be deemed to hold more than one office of honor, trust or profit or more than one civil office of emolument. The term "governmental functions," as it relates to counties, includes all duties, activities and operations of statewide importance in which the county acts for the State, as well as of local importance, whether required or authorized by this Constitution or the Laws of this State.

History

Section 64 was adopted in November 1968, two years after Section 63. The section applied only to El Paso and Tarrant counties. (In other words, it was a "local" amendment rather than an ostensibly "general" amendment like Sec. 63.) The original section read as the present section does except for the first sentence of (a). In the original, "special" was omitted before "statute" and "El Paso or Tarrant Counties" appeared instead of "any County."

The current version was adopted in November 1970. Thus, in a space of four years coverage went from one county to three to 254. (Four years is a much better track record than the 26 years it took to get workmen's compensation under control. See Secs. 59, 60 and 61 (1952). Even so, one wonders why, if it took only four years to see the light, no one saw the light from the beginning.)

After the original adoption of Section 64 and before its amendment, a local law was adopted pursuant to Subsection (b) authorizing El Paso and Tarrant counties to enter into cooperative contracts. (*General and Special Laws of the State of Texas,* 61st Legislature, 2nd Called Sess. 1969, ch. 28, at p. 183.) Following adoption of the 1970 amendment, the legislature passed the "Interlocal Cooperation Act" (Tex. Rev. Civ. Stat. Ann. art. 4413(32c), sec. 3A (1973)), also pursuant to Subsection (b). No statute has been passed pursuant to Subsection (a).

Explanation

Although the general purpose of Section 64 is clear enough—to permit consolidation of local governments and to facilitate local intergovernmental cooperation—the actual effectiveness of the section is not clear. The threshold question is: What new power does the section grant?

Consider Subsection (b). The first sentence appears to be a direct grant of power to local government. The words "under such terms and conditions as the Legislature may prescribe" do not appear to mean that a statute must first be passed before any contractual activity is permissible. But the quoted words would appear to permit rigid state control; one condition could be that no contract could go into effect until approved by the legislature. Prior to adoption of Section 64, cities, particularly home-rule cities, could enter into contracts. (See Texas Research League, *Tarrant County Government and the New Constitutional Amendment* (Austin: Texas Research League, 1969), p. 14.) Counties, of course, have only the power granted by the legislature, but before Section 64 was adopted, the legislature could, and in the case of tax assessment and collection did, grant power to a county to perform services for other local governments. (*Id.,* at 15.) Subsection (b), therefore, appears to add nothing to the bundle of state and local

governmental powers. Even the second sentence concerning dual-officeholding does not expand power; it only removes a restriction on who may exercise power. The third sentence adds nothing; it would appear to be little more than a "signal" to the courts that the drafters of the amendment knew that counties provide both state services as agent for the state and local services.

Subsection (a) appears at first glance to be an important grant of power. On its face the subsection appears to give the legislature almost unlimited discretion to permit consolidation of political subdivisions subject only to a reservation of power in the local citizenry to veto a proposed consolidation. The only limit on discretion is that consolidations must be within a single county. But, on closer reading, the grant of power evaporates. In the first place, Subsection (a) authorizes consolidation of "offices" and consolidation of "functions"; consolidation of "political subdivisions" is not included. This is not to say that the legislature has no power to permit consolidation of political subdivisions, only that the subsection does not grant the power. (Query: Does *expressio unius est exclusio alterius* raise its ugly head? See *Author's Comment* on Sec. 60 of this article.) Does the grant of power to consolidate offices and functions deny the power to consolidate units of government?

As for "functions" of government, it seems confusing to speak of consolidating them. One can speak of putting two functions in one "office," such as putting a fire department and a police department under a director of public safety. Or one can transfer the peace-keeping function from the office of sheriff to the office of the county chief of police. Or the state can allocate the peace-keeping function: geographically among rangers, sheriffs, and municipal police departments; or by types of peace-keeping, such as limiting game wardens to arrests for violations of fish and game laws and meter maids to summonses for parking violations but not moving violations. But it seems difficult to consolidate functions. Presumably, the grant of power in Subsection (a) is to move functions around rather than to consolidate them.

Assuming that this is the case, it is not clear that the legislature has any more power to authorize rearrangement of functions than would be the case without Section 64. Except for Section 14 of Article VIII, stating that the assessor and collector of taxes shall assess property and collect taxes, the constitution leaves it up to the legislature to prescribe the powers and duties of local governments and their officials. (This is an overstatement in the case of home-rule cities. See *Explanation* of Sec. 5, Art. XI.) Even in the case of special districts within a county, the legislature probably could transfer their functions to the county. This is not likely to occur since the reason for special districts is to increase the allowable property tax rate. (See *Explanation* of Sec. 52 of this article.) Section 64 can hardly be read to repeal limitations on taxing power. (Note that the legislature had the power to take over certain county roads and to make them part of a state highway system. See *Robbins v. Limestone County,* 114 Tex. 345, 268 S.W. 915 (1925).) Moreover, in creating additional taxing power by creating constitutional special districts, the constitution ends up inhibiting cooperation among local governments. The attorney general recently ruled that the Tarrant County Hospital District could not take over all services performed by the county and Fort Worth health departments. (The county had already contracted to have the Fort Worth health department assume the duties of the county health department.) The stumbling block was the restrictive language in Section 4 of Article IX concerning the powers of a hospital district. (See Tex. Att'y Gen. Op. No. H-31 (1973).) If this analysis is correct, it would seem that Section 64 adds nothing to existing power over governmental functions. (Except for power to enact "special" statutes. See *Author's Comment* following.) Indeed, it may be that the legislature's power has

been diminished by Section 64, for now any "consolidation" of functions must be ratified by the voters in each political subdivision affected.

As for consolidation of offices, there is a different problem. Although the subsection authorizes blanket consolidation of governmental offices within a county, it is most unlikely that any court would construe this general statement to "repeal" the nine or so sections specifically creating a commissioners court, elective offices of sheriff, county clerk, assessor and collector of taxes, and so on. If Subsection (a) meant anything so far-reaching, words such as "including any county offices provided for in this Constitution" would have been used. Thus, consolidation of any specific county offices created by the constitution is undoubtedly not authorized by Subsection (a). (Compare Tex. Att'y Gen. Op. No. V-723 (1948) concerning the relationship between constitutional county offices and the county home rule section, Art. IX, Sec. 3, repealed in 1969.)

Subsection (a) would appear, therefore, to authorize consolidation of statutory offices only. This could be done without a Section 64. Thus, it would appear that, as in the case of "functions," rather than add to the legislature's power, the subsection diminishes that power by giving the voters a veto power over consolidations.

It must be conceded that Section 64 undoubtedly serves a public relations purpose. The section focuses attention on the subject of consolidation and stands as an encouraging beacon for those who favor consolidation of local governments or contractual intergovernmental cooperation, or both. And, of course, the existence of Section 64 makes it difficult for an opponent to deny that there is any such power around.

Comparative Analysis

There are about a dozen states that have a comparable provision. Two of the most recent provisions, those of Illinois (1970) and Montana (1972), are worthy of quotation in full, for they recognize the increasing importance of all kinds of intergovernmental cooperation. The 1970 Illinois section reads:

> Sec. 10. INTERGOVERNMENTAL COOPERATION.
>
> (a) Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.
>
> (b) Officers and employees of units of local government and school districts may participate in intergovernmental activities authorized by their units of government without relinquishing their offices or positions.
>
> (c) The State shall encourage intergovernmental cooperation and use its technical and financial resources to assist intergovernmental activities. (Art. VII, Local Government.)

The 1972 Montana section reads:

> Sec. 7. INTERGOVERNMENTAL COOPERATION.
>
> (1) Unless prohibited by law or charter, a local government unit may
>
> (a) cooperate in the exercise of any function, power, or responsibility with,
>
> (b) share the services of any officer or facilities with,
>
> (c) transfer or delegate any function, power, responsibility, or duty of any

officer to one or more other local government units, school districts, the state, or the United States.

(2) The qualified electors of a local government unit may, by initiative or referendum, require it to do so. (Art. XI, Local Government.)

The *Model State Constitution* approaches the subject in the negative but concludes with an affirmative grant of power:

> Sec. 11.01. INTERGOVERNMENTAL COOPERATION. Nothing in this constitution shall be construed: (1) To prohibit the cooperation of the government of this state with other governments, or (2) the cooperation of the government of any county, city or other civil division with any one or more other governments in the administration of their functions and powers, or (3) the consolidation of existing civil divisions of the state. Any county, city of other civil division may agree, except as limited by general law, to share the costs and responsibilities of functions and services with any one or more other governments. (Art. XI, Intergovernmental Relations.)

The United States Constitution has a "negative" provision concerning interstate cooperation: "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power. . . ." (Art. I, Sec. 10.) The situation here is much different from the state-local government relationship. The states have all the power of independent "sovereigns" except as restricted by the United States Constitution. Without a veto power, the federal government could not prevent any number of states agreeing among themselves to undercut the national government. Thus, this particular restriction is one of the many provisions necessary to protect the supremacy of the federal government.

Author's Comment

On the state level, the intergovernmental relationship referred to just above is exactly the opposite. Local governments have only the power given to them by the state constitution or by statute. In one sense, therefore, there is no need for a constitutional authorization for intergovernmental cooperation. The legislature can permit local governments to cooperate to whatever extent the constitution permits government to act. Nevertheless, for a variety of reasons, a section on intergovernmental cooperation is a "must."

In the first place, there is the public relations value referred to earlier. Urbanization has overtaken government structure. Short of a revolutionary restructuring of all local government, urban needs can be met only if units of local government cooperate. A constitutional provision on the subject both encourages cooperative efforts and kills off the argument: "'Tain't allowed."

In the second place, there is a historical reason for a positive constitutional statement on the subject. As discussed later in connection with home rule, the very fact that local governments have only the power given to them by constitution and statute generated a line of narrow judicial interpretations of grants of power. A strong statement encouraging intergovernmental cooperation will help break the judicial tradition of narrow vision.

In the third place, an intergovernmental cooperation provision properly drafted puts the monkey on the back of the legislature by allowing any local cooperation not forbidden by the legislature. It has already been pointed out that Section 64 accomplishes little, if anything, by authorizing the legislature to do something it probably could have done anyway. A provision like the quoted Illinois or Montana sections lets local governments grab the ball and take off unless and until the legislature blows the whistle. A negative formulation as in the *Model State Constitution* coupled with a strong home-rule section is equally effective.

It should be noted, however, that an intergovernmental cooperation section cannot be effective if local government structure is frozen in the constitution. In the present Texas Constitution, county government is hopelessly frozen. No effective intergovernmental cooperation involving a county will be possible unless the county structure is unfrozen. (See the *Comparative Analysis* of and *Author's Comment* on Sec. 18 of Art. V for a practical political means of obtaining flexible county government.)

It should be noted also that Section 64 has a "no no"—the word "special" modifying "statute." As has been noted already, the cause of locally controlled intergovernmental cooperation, home rule, and most everything else local is in great danger unless the practice of legislating on a local basis is stopped. (See *Author's Comment* on Sec. 56.) It will be hard enough to stop the practice by flatly prohibiting it. To put any exceptions in the constitution is unconditional surrender. (Incidentally, a section on intergovernmental cooperation does *not* belong in the legislative article.)

Sec. 65. MAXIMUM INTEREST RATE ON BONDS. Wherever the Constitution authorizes an agency, instrumentality, or subdivision of the State to issue bonds and specifies the maximum rate of interest which may be paid on such bonds issued pursuant to such constitutional authority, such bonds may bear interest at rates not to exceed a weighted average annual interest rate of 6%. All Constitutional provisions specifically setting rates in conflict with this provision are hereby repealed. [This amendment shall become effective upon its adoption.]

History

It has been traditional in Texas to provide an interest-rate ceiling in a constitutional provision authorizing a bond issue. For example, the original Section 49-b, Veterans' Land Program, had a ceiling of 3 percent interest on the bonds authorized. Section 49-c, added in 1957, has a 4 percent ceiling on water development bonds whereas Section 49-d-1, added in 1971, raised the ceiling to 6 percent.

The foregoing range of interest rates from 3 percent to 6 percent demonstrates the difficulty that arises when a specific restrictive figure is placed in the constitution. If the prevailing cost of borrowing money rises above the constitutional limit, bonds cannot be sold at par. In 1969 the legislature decided to solve this problem by a simple addition to the constitution: "All other provisions of the Constitution notwithstanding, bonds issued pursuant to constitutional authority shall bear such rates of interest as shall be prescribed by the issuing agency, subject to limitations as may be imposed by the legislature." Unfortunately, the amendment was turned down by the voters 311,832 to 282,096 at the special election on August 5, 1969. The present section was proposed by the next legislature and approved by a vote of 1,359,239 to 1,017,158 on November 7, 1972.

Explanation

The last sentence of Section 65 is in brackets because of what appears to have been an error in House Joint Resolution No. 82 proposing the amendment. The resolution proposed a "new Section 65 to read as follows." The first two sentences were set out in quotation marks, the normal method of indicating what goes into the constitution. The third sentence followed in the same paragraph but outside the quotation marks. Technically, the sentence is not part of Section 65, but considering the tendency to put sentences like these in the body of amendments,

the intention probably was to include the sentence. In any event, it makes no difference, for an amendment becomes effective upon adoption unless there is a specific direction to the contrary.

Section 65 is clear in purpose. The several interest-rate ceilings scattered through the constitution are all repealed. In their stead is permission to issue bonds at any rate that does not produce a "weighted average annual interest rate" in excess of 6 percent. This means that any bonds yet to be issued may exceed 6 percent if any have already been issued since those would have had a rate lower than 6 percent. (This would not necessarily be true of any water bonds issued after May 18, 1971, for Section 49-d-1 authorizes a 6 percent maximum rate. Section 65 would allow future water bonds to exceed 6 percent so long as any bonds issued prior to May 18, 1971 are outstanding.) Section 65 also means that, in the case of debt authorizations hereafter adopted, any time the interest rate on an issue is below 6 percent a later issue may be somewhat above 6 percent.

The key question is what "weighted average annual interest rate" means. In Sections 49-b and 49-e the words are used followed by "as that phrase is commonly and ordinarily used and understood in the municipal bond market." Presumably, the omission of these words in Section 65 does not mean that the phrase has a meaning different from that commonly and ordinarily understood in the municipal bond market. Presumably also, there is no significance in the 1973 amendment of Section 49-b, which retains the clause quoted above but substitutes "the rate specified in Section 65 of this Article" for 4-1/2 percent. (Thus, "the weighted average annual interest rate" of Sec. 49-b bonds may not exceed "a weighted average annual interest rate of 6%." Presumably, a weighted average of a weighted average is no different from a single weighted average.)

Actually, the purpose of a weighted average is simple. An "average" rate of 6 percent would allow an issue of one $1,000 bond at 2 percent and one hundred million dollars worth at 10 percent. Requiring a weighted average simply means that the total aggregate cost of the borrowing must not exceed 6 percent. Thus, if the authorized issue is one hundred million and fifty are out at 5 percent the second fifty could go out at 7 percent; but if the first fifty is out at 5 percent and another twenty-five is out at 6 percent, the final twenty-five could go out at 8 percent. In both instances the total interest paid on the entire one hundred million is the same.

There are two exceptions to the operation of Section 65. Since 1947 the Board of Regents of The University of Texas System and the Board of Directors of the Texas A&M System have had authority to issue bonds with no restriction on the rate of interest they could pay. (See Sec. 18 of Art. VII. It may be argued that since these bonds are payable out of Permanent University Fund income, the taxpayers do not have to be reassured about the interest to be paid. But so long as the legislature appropriates any money for the operation of the systems the taxpayers are indirectly affected.) Section 65 does not change this since only those authorizations specifying a maximum rate are covered by the new 6 percent limitation.

The other exception is in Section 50b-1, which increased the authorized amount for student loans. No maximum interest rate is specified, but the section provides that "the maximum net effective interest rate . . . may be fixed by law." Section 50b-1 was adopted in 1969 by which time limitations on permissible interest rates had become a problem. Interestingly enough, the quoted proviso reflects a loophole that is in all other provisions, including Section 65. All speak of the interest "rate." Bonds may be offered at 5 percent interest but if the purchaser will pay only $800 for a $1,000 bond the "net effective interest rate" becomes 6.25 percent. Just why this loophole-closing phrase showed up in Section 50b-1 is not clear, for the statute in effect at the time forbade sale of bonds for less than face

value. (See Education Code sec. 52.15.) That law remains in effect. Section 65 does not apply, however, since there is no "specified" maximum rate in Section 50b-1.

Comparative Analysis

No other state appears to have a comparable provision. This is explained by the apparent absence in state constitutions of any constitutional maximum interest rate on state debt except in Colorado and Nebraska for debt long since paid off.

Author's Comment

This business of trying to limit the interest to be paid on public debt is a manifestation of economic illiteracy. Money has a "price" like every ordinary commodity. To say that the state will not pay more than a certain price for money simply means that nobody will lend money to the state if the going interest rate is higher. It is not economically illiterate, however, to say that if it costs too much to borrow money, the state should defer the borrowing. In the light of the history set forth above it seems unlikely that this was the reason for the original maximum rates. Whatever the reason for the restrictions, it should be obvious to all that they do not work.

Article IV

EXECUTIVE DEPARTMENT

Sec. 1. OFFICERS CONSTITUTING THE EXECUTIVE DEPARTMENT. The Executive Department of the state shall consist of a Governor, who shall be the Chief Executive Officer of the State, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, and Attorney General.

History

This section originated in the 1869 Constitution. In earlier constitutions the comparable provision stated: "The supreme executive power of the State shall be vested in the Chief Magistrate, who shall be styled the Governor of the State of Texas." Other sections of the early constitutions created additional executive offices (secretary of state, treasurer, comptroller of public accounts, and attorney general).

The 1866 Constitution added the office of superintendent of public instruction. The 1869 Constitution retained all the executive offices created in the previous constitutions, added a commissioner of the general land office (see the *History* of Art. IV, Secs. 2 and 23), and consolidated them all into an "executive department," with the governor the "chief magistrate." When this section was adopted in 1876, the superintendent of public instruction was eliminated, and the governor became the "chief executive officer." Several attempts to eliminate the office of lieutenant governor were narrowly defeated. (See *Debates,* pp. 96, 152; *Journal,* p. 284.) Apparently no one suggested that any of the other officers might not be worthy of constitutional stature.

Explanation

The sole apparent constitutional function of this section is the creation of the seven enumerated offices, but it is not necessary for that purpose. The remaining sections of Article IV deal with each of those offices individually and would have created them in the absence of this section. The section does not ensure a fragmented executive by creating the seven offices. Section 2 of this article, by requiring all but the secretary of state to be elected rather than appointed by the governor, takes care of that.

The section designates the governor as the chief executive officer, but that apparently has no legal significance. At least no court has cited that designation as grounds for distinguishing the governor from the other constitutional executive officers who are elected, and if the office enjoys greater political significance and prestige, it is by virtue of the powers vested in it elsewhere in this article and the status that traditionally inheres in the title.

A technical reading of the section might indicate that it limits the number of executive offices, since it provides that the executive department "shall consist of" enumerated offices and does not expressly authorize the legislature to create additional ones. Courts frequently conclude that similar constitutional terminology is exclusive and permits no expansion. No reported judicial opinion has considered the issue, however, and it obviously is too late now. In the 100 years since Section 1 took effect, the legislature has created an average of more than two additional executive offices, agencies, etc., per year. (See Texas Advisory Commission on Intergovernmental Relations, *Handbook of Governments in Texas* (Austin, 1973), pp. I-35 through I-364.) Moreover, a 1972 amendment to Section 23 of Article IV expressly mentions statutory executive officers, impliedly recognizing the legis-

lature's power to create them. Finally, unlike Section 1 of Article III and Section 1 of Article V, which "vest" legislative and judicial power, this section does not grant executive power. Indeed, unlike legislative and judicial power, executive power is not vested in any office or political body by this constitution. Individual executive powers are lodged in individual offices elsewhere in the constitution, particularly in the remaining sections of this article.

In the absence of a provision vesting executive power, Section 1, as the intitial section in the executive article, is a logical point at which to discuss the constitutional limits on the power to execute the laws. Because of the failure of the constitution to make a general grant of that power and because of the theory of democratic, constitutional government that *all* power inheres in the people unless they have delegated it through their constitution, there are no inherent executive powers. (See, *e.g., Fulmore v. Lane,* 104 Tex. 499, 140 S.W. 405, *aff'd on rehearing,* 104 Tex. 499, 140 S.W. 1082 (1911); *Day Land & Cattle Co. v. State,* 68 Tex.526, 4 S.W. 865 (1887).) Executive officers may exercise only those executive powers granted by the people either through the constitution or through the repository of their legislative power, the legislature. (See the *Explanation* of Art. III, Sec. 1.) On the other hand, the powers granted to executive officers by the constitution usually are exclusive, and the legislature may not limit their exercise or authorize other officials to exercise them. (See, *e.g., Snodgrass v. State,* 67 Tex. Crim. 615, 150 S.W. 162 (1912); *State v. Paris Ry.,* 55 Tex. 76 (1881).)

Comparative Analysis

Some 20 states have an "executive department" provision similar to this section, listing from 5 to 12 executive officers. In most of those states, the governor is the "supreme" executive; and in two states nothing sets the governor apart from the other members of the executive branch except a statement, similar to Section 10 of this article, enjoining the governor to take care that the laws be faithfully executed.

In the remaining 30 states, executive offices are created in separate sections, as was done in earlier Texas constitutions. All but two, however, have multiple executives of at least three and usually six or more offices.

Several states have adopted various measures designed to impose an organizational structure on the executive branch. For example, approximately eight state constitutions have a provision limiting the executive branch to no more than 20 separate departments. Two of those provide that departments are headed by a single executive appointed by the governor. The Missouri Constitution creates five departments in addition to six executive officers and provides that the legislature can create no more than five additional departments. The New York Constitution creates 19 departments in addition to the governor's office and prohibits the creation of new ones. Nebraska requires a two-thirds vote of the legislature to create new departments. Recently, a few states have also adopted a provision authorizing the governor to reorganize the executive branch. (Two of them also have the 20-department limit.)

The *Model State Constitution* provides for a single executive officer—the governor—who appoints all heads of departments. The *Model* also would impose a 20-department limit and authorize gubernatorial reorganization as follows:

> *Administrative Departments.* All executive and administrative officers, agencies and instrumentalities of the state government, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments so as to group them as far as practicable according to major purposes.

Regulatory, quasi-judicial and temporary agencies established by law may, but need not, be allocated within a principal department. The legislature shall by law prescribe the functions, powers and duties of the principal departments and of all other agencies of the state and may from time to time reallocate offices, agencies and instrumentalities among the principal departments, may increase, modify, diminish or change their functions, powers and duties and may assign new functions, powers and duties to them; but the governor may make such changes in the allocation of such functions, powers and duties, as he considers necessary for efficient administration. If such changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the legislature while it is in session, and shall become effective, and shall have the force of law, sixty days after submission, or at the close of the session, whichever is sooner, unless specifically modified or disapproved by a resolution concurred in by a majority of all the members. (Sec. 5.06.)

Author's Comment

The two most notable innovations in recent constitutions—20 departments and executive reorganization—suggest that there has been considerable dissatisfaction with the performance of legislatures in structuring the executive branches of state governments. The Texas experience has been no better than that in any other state. The Texas executive branch consists of a chaotic, ever-increasing list of independent agencies, boards, commissions, bureaus, offices, committees, departments, etc. The officials who govern them are chosen in a variety of ways, although most are appointed by the governor with advice and consent of the senate; but once in office, they are as immune from removal as an elected official. (Fortunately for the voter who has difficulty informing himself about the candidates in all the constitutionally mandated statewide elections, only one statutory officer—the commissioner of agriculture—is elected.) The duties of the agencies frequently involve a single, often minute, problem area, but in many instances several govern different aspects of a larger problem area. The negative impact of this confusion on efficiency, economy, and responsiveness is immeasurable.

The lack of discernible organization in the executive branch is not entirely the fault of the constitution, however. Section 1 creates only seven offices and the constitution elsewhere creates only a handful of agencies—*e.g.*, State Board of Education (Art. VII, Sec. 8), Water Development Board (Art. III, Sec. 49-c), Board of Pardons and Paroles (Art. IV, Sec. 11), Veterans' Land Board (Art. III, Sec. 49-b), State Building Commission (Art. III, Sec. 51-b), Teacher Retirement System (Art. III, Sec. 48b), Employees Retirement System (Art. XVI, Sec. 62(a)). (The last two are now covered by Sec. 67 of Art. XVI.) Most of the confusion was created by legislative enactment, and therefore, the legislature could restructure most of the executive branch without a constitutional mandate to have a limited number of executive departments. The governor could propose a reorganization plan without express constitutional authority, too. Of course, in the absence of a constitutional provision like that in the *Model State Constitution* (quoted in the *Comparative Analysis*), a gubernatorial proposal could take effect only if enacted into law by the legislature.

Thus under the present constitution the legislature must act affirmatively to impose order, and it may be, as some states and the drafters of the *Model State Constitution* apparently have concluded, that the pressures on legislatures to restructure the executive branch need constitutional assistance to overcome the pressures against reorganization. Neither the departmental limitation provisions nor the gubernatorial reorganization provisions, however, would guarantee a rational executive organization.

Art. IV, § 2

Sec. 2. ELECTION OF OFFICERS OF EXECUTIVE DEPARTMENT. All the above officers of the Executive Department (except Secretary of State) shall be elected by the qualified voters of the State at the time and places of election for members of the Legislature.

History

The Constitution of the Republic of Texas required election of only the president and vice president. The president appointed a secretary of state "and such other heads of executive departments as may be established by law," with the advice and consent of the senate. The 1845 Constitution adopted the same organization of the executive branch with some modification. The governor and lieutenant governor were the only elected executive officials; and the governor appointed the secretary of state and attorney general (and district attorneys) with senate confirmation; but a treasurer and a comptroller of public accounts were elected by the legislature.

The genesis of the present executive selection method came in 1850 when a constitutional amendment provided for election of the treasurer, comptroller of public accounts, and attorney general as well as the commissioner of the general land office, which was a statutory office created to administer the general land office required by another section of the 1845 Constitution. (See the *History* of Art. XIV, Sec. 1.) Since adoption of that amendment, constitutional executive officers other than the secretary of state, who has always been appointed, have been elected with only two exceptions. The 1866 Constitution created an appointed superintendent of public instruction (the 1869 Constitution made the office elective after the first term), and the 1869 Constitution made the attorney general an appointive official. Until the adoption of this section in 1876, however, the method of selection of each officer was prescribed in the individual sections creating each office.

The only debate about this section in the 1875 Convention involved unsuccessful efforts to make the secretary of state an elected official. (*Debates,* pp. 152, 256; *Journal,* pp. 284, 371-72.)

Explanation

This section simply provides that all the executive officers created by Section 1, except the secretary of state, are elected. The secretary of state is appointed by the governor with the advice and consent of the senate. (See also the *Explanation* of Sec. 21.) Another section of the constitution requires statewide election of three railroad commissioners (Art. XVI, Sec. 30). In addition, a statute requires election of a commissioner of agriculture and another requires election, by districts, of members of a state board of education. As a consequence, there are eight divisions of the executive branch that are headed by elected officers and therefore are wholly independent of the governor.

Comparative Analysis

Two states provide for election of only the governor and the governor's successor, and two more elect only one additional executive officer. All the rest elect several executive officers, usually six to eight, but in one case 12. In addition, many states, like Texas, provide for election of one or more statutory officers plus officers of multimember boards and commissions. The *Model State Constitution* recommends only one elected executive officer—the governor—who appoints and removes the heads of all departments.

Author's Comment

The advantages and disadvantages of a fragmented executive branch governed by several independently elected officials have been debated extensively and do not merit further discussion. It is curious, however, that the proponents of a single elected executive have had so little success. As the *Comparative Analysis* notes, some 95 percent of the states still elect four or more executive officials. That, of course, does not provide much opportunity for comparing the performance of the two types of executive organization.

Sec. 3. RETURNS OF ELECTION; DECLARATION OF ELECTION; TIE VOTES; CONTESTS. The returns of every election for said executive officers, until otherwise provided by law, shall be made out, sealed up, and transmitted by the returning officers prescribed by law, to the seat of Government, directed to the Secretary of State, who shall deliver the same to the Speaker of the House of Representatives, as soon as the Speaker shall be chosen, and the said Speaker shall, during the first week of the session of the Legislature, open and publish them in the presence of both Houses of the Legislature. The person, voted for at said election, having the highest number of votes for each of said offices respectively, and being constitutionally eligible, shall be declared by the Speaker, under sanction of the Legislature, to be elected to said office. But, if two or more persons shall have the highest and an equal number of votes for either of said offices, one of them shall be immediately chosen to such office by joint vote of both Houses of the Legislature. Contested elections for either of said offices, shall be determined by both Houses of the Legislature in joint session.

History

The substance of this section first appeared in the 1845 Constitution. (The Constitution of the Republic provided only that the house of representatives determine ties and that the returns of elections for president and vice president be sealed and transmitted to the speaker of the house, who was directed to open and publish them before congress.) In 1845, however, the governor and lieutenant governor were the only state executive officers who were elected, and the section applied only to the governor. (The section providing for a lieutenant governor stated that he was to be "chosen at every election for Governor, by the same persons, and in the same manner. . . .")

Although four additional state executive officers were made elective by an amendment adopted in 1850 and the 1861, 1866, and 1869 Constitutions each required election of several state executive officers, the section was not expanded to include them until 1869, and then it provided only that the legislature determine contests. Only the 1876 Constitution has called on the legislature to canvass returns and break ties in elections of the attorney general, treasurer, comptroller of public accounts, and commissioner of the general land office.

Other than the inclusion of additional officers, the only changes in the original 1845 version were the addition in 1861 of the current language authorizing the legislature to provide other methods of handling the returns and the naming in 1876 of the secretary of state as the recipient of the returns until the speaker is chosen.

Explanation

This section serves four purposes: (1) it provides the means for gathering and transmitting the returns of elections for executive officers to the canvassing authority "until otherwise provided by law"; (2) it establishes the method of

canvassing those returns and determining who has been elected; (3) it provides the means for breaking ties; and (4) it provides a forum to settle election contests. (It also permits election by a plurality.) These purposes are served, however, only for the elected offices named in Section 2 and only in general elections. Canvassing, breaking ties, and settling contests in general elections of all other officers and in primary elections of nominees to all offices are governed wholly by statute.

The details covering transmittal of the returns to the speaker are now provided by statute (Election Code art. 8.37), and the constitutional provision is no longer operative.

In practice the legislature apparently has never canvassed returns for offices other than the governor and lieutenant governor. As mentioned above, the other officers were not included in the sections from which this section derived. After adoption of this section the legislature apparently ignored the inclusion of additional offices and continued the practice under prior constitutions of canvassing only the returns for governor and lieutenant governor. Within six months after this constitution took effect the legislature passed a statute providing another method for canvassing returns and certifying elections of all officers other than the governor and lieutenant governor (Tex. Laws 1876, ch. 166, sec. 19, 8 *Gammel's Laws,* p. 1143), and that has been the practice since that time. (See Election Code, arts. 8.38, 8.39.) Moreover, all officers other than the governor, lieutenant governor, and members of the legislature are required to take office on January 1 after the general election—before the legislature convenes (Tex. Rev. Civ. Stat. Ann. art. 17.)

The courts have held that the designation of the legislature as the forum to settle contests and determine eligibility is exclusive—the judiciary has no jurisdiction to determine those issues when a general election for one of the enumerated offices is involved. (*Dickson v. Strickland,* 114 Tex. 176, 265 S.W. 1012 (1924); *Kilday v. State,* 75 S.W.2d 148 (Tex. Civ. App.—San Antonio 1934, *writ dism'd*).) The courts will rule on qualifications in primary elections, however, and since candidates are ordinarily nominated in primaries, the judiciary usually will determine whether a questionable candidate is qualified. (See *Ferguson v. Maddox,* 114 Tex. 85, 263 S.W. 888 (1924).)

Comparative Analysis

Approximately one-half of the states provide that the legislature determine the results of elections for governor. (One state specifies only the lower house and another provides for a joint committee of both houses to canvass the returns.) A few states specify the procedure and name a board of executive officers or judges or both to canvass returns. Eight states leave canvassing to be determined by law, and, presumably, the same obtains in the states that have no provision for canvassing.

About 20 states direct the legislature, the lower house (one state), or a joint committee of both houses (two states) to settle contests in gubernatorial elections; five specify that the method be prescribed by law; and one requires the highest court to settle contests. In other states the matter is handled by legislation.

About three-fourths of the states direct the legislature to break a tie by a joint vote. In two of those the procedure applies when no candidate receives a majority. Massachusetts requires the lower house to select two of the four highest candidates, if no one receives a majority vote, and its senate elects as governor one of those two. In Mississippi the lower house elects a governor if no candidate receives a majority. Kentucky directs that the choice be made by lot. Hawaii directs that the choice be made as prescribed by law, and the remaining state constitutions are silent.

In general, each state applies the same rules to canvassing, contests, and ties for other state offices. There are a few exceptions, however. In Maryland, for example, the governor breaks the tie in elections for attorney general.

The *Model State Constitution* simply states that the legislature shall provide for the administration of elections.

Author's Comment

It is obvious that detailed provisions for canvassing votes, breaking ties, and determining contests are traditional and that placing control in the hands of the legislature is also traditional. With modern election equipment and rapid communications making the results known within a short time after the polls close, however, it seems unnecessary to hold all official action in abeyance for the two months that elapse before the legislature meets. It is also questionable whether the legislature is the appropriate forum to determine contests. An election contest involves legal and evidentiary questions, which the legislature is not designed or prepared to handle properly. Moreover, the stakes are political, and the legislature —a political body by definition—is more likely to make a political determination of the legal issues than is a court.

The fitness of the legislature as the forum for contest disputes is not the only objection. The courts can begin to consider a contest immediately after election day or, if a candidate's qualifications are at issue, for example, even before the election. The legislature, however, must wait until it convenes and the results are published.

It is, of course, advisable to have some method for breaking ties. The procedure ought to be left to statute, however.

Sec. 3a. DEATH, DISABILITY OR FAILURE TO QUALIFY OF PERSON RECEIVING HIGHEST VOTE. If, at the time the Legislature shall canvass the election returns for the offices of Governor and Lieutenant Governor, the person receiving the highest number of votes for the office of Governor, as declared by the Speaker, has died, then the person having the highest number of votes for the office of Lieutenant Governor shall act as Governor until after the next general election. It is further provided that in the event the person with the highest number of votes for the office of Governor, as declared by the Speaker, shall become disabled, or fail to qualify, then the Lieutenant Governor shall act as Governor, until a person has qualified for the office of Governor, or until after the next general election. Any succession to the Governorship not otherwise provided for in this Constitution, may be provided for by law; provided, however, that any person succeeding to the office of Governor shall be qualified as otherwise provided in this Constitution, and shall, during the entire term to which he may succeed, be under all the restrictions and inhibitions imposed in this Constitution on the Governor.

History

This section was added in 1948. Apparently, the confusion generated by the death of a governor-elect in Georgia created the concern. (See A.P. Cagle, *Fundamentals of the Texas Constitution* (Waco: Baylor University Press, 1954), p. 66.)

Explanation

The primary purpose of this section is to provide that the lieutenant governor-elect assume the duties of the governor in the event something occurs prior to the

inauguration that prevents the governor-elect from taking office. Otherwise, the outgoing governor, presumably, would hold over. (See Art. XVI, Sec. 17.) The wording of the section presents an ambiguity about the tenure of the successor to the office similar to an ambiguity in the other succession provisions. (See the *Explanation* of Art. IV, Sec. 17, for discussion of the ambiguity.)

This section also permits succession in circumstances not governed by the constitution to be determined by statute. A statute now provides that when both the governor-elect and lieutenant governor-elect are unable to take the oath of office and qualify, the legislature, in joint session, elects a governor and lieutenant governor. (Election Code art. 8.46; see also Tex. Rev. Civ. Stat. Ann. art. 6252—10.)

Comparative Analysis

Approximately ten states expressly provide for succession in case of the death of the governor-elect. Most of them also provide for failure of the governor-elect to take office for other reasons. In each instance the officer-elect who is first in line to succeed as governor assumes the office for the full term or until the governor-elect qualifies. Although the governor-elect does not become governor until he qualifies, close to 20 states apparently deal with this situation by including failure of the "governor" to qualify or to take the official oath as an additional circumstance under the traditional succession provisions.

The *Model State Constitution* provides that the presiding officer of the legislature (or of the senate in a bicameral legislature) acts as governor until the governor-elect qualifies and assumes office. If the governor-elect does not qualify and assume office within six months, it requires a special election to fill the unexpired term with the presiding officer acting as governor until the newly elected governor takes office. The *Model* also provides for the outgoing governor to hold over until the legislature organizes and elects a presiding officer.

Author's Comment

Obviously a succession scheme that neglects to provide for the possibility of death, disqualification, or disability of a governor-elect is incomplete. Without it, a defeated former governor might be held over under Article XVI, Section 17. Logical organization, however, would dictate that the constitutional details on succession be grouped in a single place. This section and the succession provisions of Sections 16 and 17 of this article should be combined.

Sec. 4. INSTALLATION OF GOVERNOR; TERM; ELIGIBILITY. The Governor elected at the general election in 1974, and thereafter, shall be installed on the first Tuesday after the organization of the Legislature, or as soon thereafter as practicable, and shall hold his office for the term of four years, or until his successor shall be duly installed. He shall be at least thirty years of age, a citizen of the United States, and shall have resided in this State at least five years immediately preceding his election.

History

The date of the governor's inauguration has always been tied to the organization of the legislature because the results of the election are not official until the legislature has organized and canvassed the returns. (See the *Explanation* of Sec. 3.) Prior to the 1866 Constitution, however, this section referred only to "the regular time of installation." In 1869 inauguration was set on the first Thursday after organization of the legislature, "or as soon thereafter as practicable."

All Texas constitutions have required the governor to be "at least thirty years of age," but citizenship and residence requirements have varied from constitution to constitution. The 1845 Constitution required the governor to be "a citizen of the United States, or a citizen of the State of Texas, at the time of the adoption of this Constitution" and to have resided in the state for three years. The 1861 Constitution retained the residency provision but required the governor to be only a citizen of this state (Texas was then a part of the Confederate States). The 1866 Constitution returned to the 1845 citizenship requirement but increased the residency requirement to six years. In the 1869 Constitution the governor had to be a citizen of the United States and "a resident and citizen" of this state for three years.

The governor's term has also varied. In the 1845 and 1861 Constitutions the governor's term was for two years but the governor could not serve more than four years in any six-year period. In 1866 the term was increased to four years and the limitation on successive terms was increased accordingly; the governor could serve no more than eight in any 12 years. The 1869 Constitution retained four-year terms and was the first constitution that imposed no limits on successive terms. The delegates to the 1875 Constitutional Convention debated the governor's term extensively. The report of the Committee on the Executive Article provided for two-year terms and allowed only two terms in any six-year period. At first, that was increased to four years and only two terms in a 12-year period, but the vote was reconsidered the next day and the Convention reduced the term to two years without limitation. (See *Debates,* p. 152; *Journal,* pp. 284, 294, 297-98, 372.) An amendment adopted in 1972 increased the governor's term to four years.

Explanation

This section prescribes the term of office, qualifications, and date of inauguration of the governor. The courts have ruled that the constitutional qualifications are exclusive—the legislature may not impose additional qualifications. (*Dickson v. Strickland,* 114 Tex. 176, 265 S.W. 1012 (1924); *Kilday v. State,* 75 S.W.2d 148 (Tex. Civ. App.—San Antonio 1934, *writ dism'd*).)

The 1972 amendment adopting four-year terms also provided for gubernatorial elections in nonpresidential years.

The inauguration date apparently is made flexible because of the possibility of delay caused by an election contest, which cannot be considered until the legislature has organized. (See Art. IV, Sec. 3.)

Comparative Analysis

Terms. In about 40 states, including Texas after the 1974 general election, the governor is elected for four years. In about one-fourth of those states the governor cannot succeed himself. Another one-fourth of the states limit the governor to only two consecutive terms, and a few states have an absolute limit of two terms, consecutive or otherwise. Almost one-half of the states with four-year terms, however, have no limit on the number of terms. One of the states with two-year terms limits consecutive terms to two.

About one-fourth of the four-year states hold gubernatorial elections in presidential years. Most of the others hold the elections in the other even-numbered years, but a few hold elections in odd-numbered years. All two-year states hold elections in even-numbered years. The *Model State Constitution* calls for a four-year term and election in an odd-numbered year; it has no limitation on reelection.

Qualifications. In 34 states the minimum age for governor is 30. Two states have a higher minimum age (31 and 35) and five states have a lower minimum age (25). Approximately 40 states specify that the governor must be a citizen of the United States. Almost half of these specify no minimum number of years. Of the others, the number of years ranges from two to 20. Residency (or state citizenship) requirements also vary widely from no minimum to up to ten years. The most common minimun is five years (17 states, including Texas). The *Model State Constitution* requires only that the governor be a qualified voter of the state but includes a minimum age requirement with the age figure to be supplied.

Inauguration. Only about four states other than Texas tie the beginning of the governor's term to the convening of the legislature after the election. Some 30 states fix the inauguration date in their constitutions. Those states usually specify a weekday (for example, the second Wednesday in January after the election), and only three specify a month other than January after the election. (Two of those specify December, one specifies February.) The *Model State Constitution* provides that the governor's term begins on the first day of the month and suggests December or January following the election.

Author's Comment

If the governor is not inaugurated until after the legislature convenes, the governor has no time to prepare for the legislative session, and the session may be half over before the governor learns the ropes. Moreover, with modern election equipment and communications the results of the election are known within a few days and the delay is no longer necessary to prepare returns and transmit them to the capital. Thus inauguration could be as early as the first of December after the election to give the new governor time to organize a staff and prepare for the legislative session. Of course, an early inauguration date would also require a change in canvassing procedures specified in Section 3.

The *Model State Constitution* requires elections to be in odd-numbered years to ensure that the focus on state issues will not be diminished by races for federal office. Of course, much of the intrusion of federal issues is avoided by election in nonpresidential years. On the other hand, voter participation is usually greater in presidential election years.

Sec. 5. COMPENSATION OF GOVERNOR. The Governor shall, at stated times, receive as compensation for his services an annual salary in an amount to be fixed by the Legislature, and shall have the use and occupation of the Governor's Mansion, fixtures and furniture.

History

Under the Constitution of the Republic the president received a salary that was not subject to increase or decrease "during his continuance in office." The early state constitutions contained similar provisions for the governor—he received compensation that could not be changed "during the term for which he shall have been elected." The 1845 and 1861 Constitutions, however, added a second sentence providing that "the first Governor shall receive an annual salary of two thousand dollars and no more," and a section in another article fixed the governor's salary at that figure for the first ten years. In 1866 the reference to the first governor was deleted and the governor's salary was increased to $4,000 "until otherwise provided by law." The 1869 Constitution increased the governor's compensation to $5,000 until changed by law and added the use of the mansion.

The departure came in 1876. Initially, this section simply fixed the compensation at $4,000 annually plus the use of the mansion and provided that the legislature could not change it. Apparently, the inadequacy of that sum led some to resort to subterfuge. The appropriation for maintenance of the mansion, which amounted to $110 per year in 1876, grew to $5,000 per year by 1915 and then a deficiency appropriation of $1,500 more was required. Finally, someone discovered that money appropriated to maintain the mansion was being spent for groceries, stationery, gasoline, and other personal needs of the governor and his family. (See *Terrell v. Middleton,* 187 S.W. 367 (Tex. Civ. App.—San Antonio), *writ ref'd n.r.e. per curiam,* 191 S.W. 1138 (1916).) The court declared the practice an illegal circumvention of constitutional limits on compensation, and the governor subsequently was impeached, although not convicted, for engaging in it. (See Tex. Sen. Jour., 35th Leg., 3d Called Sess., (1917), at 14-15, 895-96.)

Between 1908 and 1929 five efforts to amend this section to increase the salary to either $8,000 or $10,000 failed. (The 1929 proposal would have added a new Sec. 30a to Art. XVI fixing salaries and repealing "all provisions of the Constitution of Texas fixing or limiting the amount of salary" state officers received.) Finally, an amendment adopted in 1936 increased the constitutionally fixed salary of the governor to $12,000. Fixed salaries were abandoned and the present language adopted in 1954.

Explanation

This section guarantees the governor a salary, to be fixed by the legislature, and the use of the governor's mansion. Not so obviously, the legislature's power to fix the governor's salary is not entirely unfettered. Section 61 of Article III provides that $12,000, the amount fixed by the constitution prior to adoption of the present language, is a minimum below which the legislature may not go.

Another provision of the executive article limits the sources of the governor's outside income. (See the *Explanation* of Art. IV, Sec. 6.)

Comparative Analysis

A large majority of states provide either that salaries be set by law or stipulate a sum subject to change by law. Very few states still specify salaries (and most of those are unrealistically low). Apparently only two states besides Texas require an executive mansion.

The recent Illinois Constitution provides that executive salaries are established by law but that any change does not take effect during an officer's term. The new Montana Constitution provides only that salaries be provided by law. The *Model State Constitution* has no provision on compensation.

Author's Comment

The experience with constitutionally fixed salaries prior to 1954 demonstrates the futility of that method of limiting expenditures. (See also the *Author's Comment* on Art. III, Sec. 24.) It is unlikely that a specific salary will remain reasonable, thus necessitating periodic amendment. One hopes that this necessity was banished permanently in 1954.

Sec. 6. HOLDING OTHER OFFICES; PRACTICE OF PROFESSION; OTHER SALARY REWARD OR COMPENSATION. During the time he holds the office of Governor, he shall not hold any other office: civil, military or corporate; nor shall he practice any profession, and receive compensation, reward, fee, or the promise thereof

for the same; nor receive any salary, reward or compensation or the promise thereof from any person or corporation, for any service rendered or performed during the time he is Governor, or to be thereafter rendered or performed.

History

The corresponding section in each of the prior Texas constitutions reads as follows: "No person holding the office of Governor, shall hold any other office or commission, civil or military." The prohibitions against holding corporate offices, practicing a profession, and receiving outside compensation were added by the Convention of 1875, apparently without debate. Delegates arguing for greater salaries pointed out that this section would prevent a governor from earning outside income, which several prior governors had been compelled to do to support their families (*Debates,* pp. 152-55).

Explanation

There are probably two explanations for the inclusion of this section. It tends to encourage a governor to devote all efforts to the duties of the office and to prohibit some activities that might create a conflict of interest. The dual-officeholding prohibition to some extent duplicates the general prohibition in Section 40 of Article XVI, which applies to the governor as well as other officers but is broader in that it covers all civil and military offices without exception. Like the other dual-officeholding prohibitions, this section does not prevent the legislature from requiring the governor to serve as an ex officio member of a board or commission. (*Arnold v. State,* 71 Tex. 239, 9 S.W. 120 (1888).)

The conflict of interest portion, which includes the prohibition against holding corporate office as well as the prohibition against practicing a profession or earning outside income, also limits a governor's sources of incomes. It does not prevent the governor from receiving income from investments or compensation for services rendered prior to taking office, however.

This section has caused no problems, probably because the governorship of a state as populous and diverse as Texas is a full-time job and leaves a governor no time to hold other offices or engage in outside employment.

Comparative Analysis

Dual-Officeholding. Only about half the states have dual-officeholding restrictions specifically applicable to the governor and several of those are applicable to constitutional executive officers generally. A few other states have general prohibitions against holding more than one office, which would apply to the governor. (See the *Comparative Analysis* of Sec. 40, Art. XVI.) Two states also prohibit the governor from holding another position or employment of profit under the state. In a few states the dual-officeholding restriction applies only to state offices or only to United States offices, and a couple enumerate specific offices that the governor may not hold. Two states have included a sanction declaring that the governor's acceptance of an office the governor is prohibited from holding creates a vacancy in the governorship. The constitution recently adopted in Montana provides that elected executive officers cannot hold other public offices or receive compensation from other governmental agencies during their terms. (Mont. Const. Art. VI, Sec. 5.) The new Illinois Constitution and the *Model State Constitution* have no provision on dual officeholding.

Outside Employment. No other state constitution prohibits nongovernmental employment or compensation or holding corporate office, and the *Model State Constitution* has no such provision.

Author's Comment

It is, of course, desirable that a governor devote all his energy to the duties of his office and that he have as few outside interests that might affect his official judgment as possible. Conflict of interest regulations, however, are more appropriately the subject of a statute that can be more detailed and thus more effective and can be changed more readily to provide for new developments. Dual-officeholding regulations, on the other hand, are probably unnecessary. The governorship is so obviously a full-time job that there is little likelihood a governor would ever attempt to hold another job. It is noteworthy that the other executive officers are governed only by the general dual-officeholding provision (Art. XVI, Sec. 40).

Sec. 7. COMMANDER-IN-CHIEF OF MILITARY FORCES; CALLING FORTH MILITIA. He shall be Commander-in-Chief of the military forces of the State, except when they are called into actual service of the United States. He shall have power to call forth the militia to execute the laws of the State, to suppress insurrections, repel invasions, and protect the frontier from hostile incursions by Indians or other predatory bands.

History

The substance of Section 7 has appeared in every Texas constitution since statehood, but prior to the 1876 Constitution it was divided into two sections. The first sentence appeared in the executive article, and the second appeared in an article dealing with the militia. (Curiously, under the Constitution of the Republic of Texas the president was commander-in-chief of the army, navy, and militia, but the congress had the power to call out the militia "to execute the law, to suppress insurrection, and repel invasion.")

Except for the consolidation of the two provisions into one section that occurred in 1876, changes since 1845 have been minor. Instead of "military forces," the 1845, 1861, and 1866 Constitutions gave the governor command of the army, navy, and militia, and the 1861 Constitution recognized that the state's military forces could be called into service by the Confederate States of America rather than the United States.

The Convention of 1875, after extensive debate, added the clause permitting use of the militia to protect the frontier because some of the delegates from the southern part of the state feared that "invasion" implied an organized military force acting under authority of a foreign government and would not include the outlaws that had been raiding out of Mexico. (*Debates,* pp. 156-61.)

Explanation

This is a traditional statement that supports the fundamental subordination of military power to civilian power. (See Art. I, Sec. 24.) It recognizes that the President of the United States commands the state's armed forces when they are called into the service of the United States. (See U.S. Const. Art. II, Sec. 2.)

The courts have ruled that this section does not prevent the state from establishing other statewide, as opposed to local, law enforcement agencies (*Neff v. Elgin,* 270 S.W. 873 (Tex. Civ. App.–San Antonio 1925, *writ ref'd*)), and the attorney general has ruled that it does not require all state law enforcement agencies to be under the direct command of the governor (Tex. Att'y Gen. Op. No. 0-2262 (1940)).

Art. IV, § 8

Comparative Analysis

Every state except Connecticut makes the governor the "commander-in-chief" of the state's military forces. In Connecticut the governor is the "captain-general" of the militia. The title used for the military forces varies from state to state. Some refer to "armed forces," some to the "army, navy, and militia," and some simply to the "militia." Thirty states join Texas in acknowledging that the governor's command is not applicable when the state's armed forces are under the control of the United States. Four states warn the governor not to take personal command unless the legislature or, in one state, the senate consents.

As justification for calling out the armed forces, approximately 20 states set forth the following grounds: the execution of laws, the suppression of insurrection, and the repulsion of invasion. Eight states, including Texas, add an additional ground such as suppression of riots, preservation of the public peace, or protection of the public health. The new Montana Constitution adds the protection of "life and property in natural disasters." No other state, however, refers to frontiers and predatory bands. About five states have some variation on the traditional terminology, and California permits calling out the armed forces only to execute the laws. One state prohibits calling out the armed forces without a legislative declaration that the public safety requires it. Apparently, some 12 state constitutions are silent on this subject. The *Model State Constitution* makes the governor "commander-in-chief of the armed forces of the state" and authorizes the governor to call them out "to execute the laws, to preserve order, to suppress insurrection, or to repel invasion."

Author's Comment

"Execution of the law," alone, is probably sufficient justification for calling forth the state's armed forces in any emergency. It includes, but is broader than, the remaining justifications in the present constitution and all those added in other state constitutions.

Sec. 8. CONVENING LEGISLATURE ON EXTRAORDINARY OCCASIONS. The Governor may, on extraordinary occasions, convene the Legislature at the seat of Government, or at a different place, in case that should be in possession of the public enemy or in case of the prevalence of disease thereat. His proclamation therefor shall state specifically the purpose for which the Legislature is convened.

History

The Constitution of the Republic stated that the president could "upon extraordinary occasions, convene both Houses, or either of them" and empowered him to adjourn the Congress if the two houses could not agree to a time for adjournment.

Every constitution since statehood also has authorized the governor to convene the legislature in special session "on extraordinary occasions," and each has authorized him to convene them elsewhere than the seat of government in some emergencies. Under the 1845 and 1861 Constitutions the capital had to be "in the actual possession of the public enemy"; the 1866 Constitution required that the capital be dangerous "by reason of disease or the public enemy"; and the 1869 Constitution required another place to be "necessary" because of "the prevalence of dangerous disease, or the presence of the public enemy."

The early constitutions also authorized the governor to adjourn the legislature "to such time as he shall think proper, not beyond the day of the next regular

meeting of the Legislature," if the two houses were unable to agree to a time of adjournment, but that provision was omitted from the 1869 Constitution. The last sentence of Section 8 first appeared in the present constitution.

Explanation

The meaning of this section is reasonably clear and consequently it has been the subject of little litigation. The governor's judgment of what constitutes an "extraordinary occasion" justifying a special session has never been questioned.

The supreme court has held that this section vests the power to convene special sessions solely in the governor, and therefore, the senate cannot convene itself to consider recess appointments (*Walker v. Baker,* 145 Tex. 121, 196 S.W.2d 324 (1946)). Another case has intimated, however, that the house and senate may convene themselves solely for impeachment purposes (*Ferguson v. Maddox,* 114 Tex. 85, 263 S.W. 888 (1924)). A statute enacted during the Ferguson impeachment sets out the procedures for doing so (Tex. Rev. Civ. Stat. Ann. arts. 5962, 5963), and the houses have convened themselves under the statutes on two separate occasions. (See Tex. H. Jour., 42d Leg., 1st Called Sess., 364, 368 *et seq.* (1931); Tex. Sen. Jour., 42d Leg., 281 *et seq.* (1931); Tex. H. Jour., 64th Leg., Impeachment Sess. (1975); Tex. Sen. Jour., 64th Leg., Impeachment Sess. (1975).)

The number of special sessions a governor may call is unlimited, but Section 40 of Article III limits the duration of each to 30 days and restricts the scope of the session to consideration of legislation concerning the subjects in the governor's proclamation. A 1972 amendment of Article XVII, Section 1, also authorizes consideration of constitutional amendments during a special session. Section 58 of Article III fixes the seat of government in Austin and declares that the legislature shall hold its sessions there. It includes no exception for emergencies that might make meeting in the capital impracticable. Thus, there is no authorization for meeting elsewhere in emergencies except in special sessions.

Comparative Analysis

All 50 states authorize the governor to call special sessions, and only one state imposes a formal limitation on that power. In North Carolina the governor must have approval of the "Council of State," which consists of named constitutional elected officers. In a dozen or so states the governor also may call the senate alone into session, and in Alaska the governor may convene either house in special session. About 12 states permit the legislature, sometimes by an extraordinary vote, to call itself into session or require the governor to do so. The new Illinois Constitution permits the presiding officers of the two houses to call a session by joint proclamation "issued as provided by law." (Ill. Const. Art. IV, Sec. 5(b).) Hawaii provides a special procedure permitting the legislature to convene itself solely to consider bills vetoed after adjournment (Hawaii Const. Art. III, Sec. 17), and two states provide for automatic sessions to reconsider vetoes.

Only six states other than Texas mention the meeting place for special sessions. (Two of those, like Texas, appear to permit sessions outside the capital only in specified emergencies.) In the remaining states the meeting place is determined either by a general provision applicable to both special and regular sessions or by statute.

Approximately 23 states also authorize the governor to adjourn the legislature when the two houses cannot agree on adjournment. Six states require certification of disagreement by the house first moving adjournment (Oklahoma), the house last moving adjournment (Colorado), both houses moving adjournment (Arkansas), or either house moving adjournment (Alaska, Illinois, Rhode Island). Most states

provide that the governor may not adjourn beyond the next regular meeting, but five states provide specific limits of from 90 days to four months.

Under the *Model State Constitution* either the governor or the presiding officer (or officers in a bicameral legislature), on the written request of a majority of the legislature, may convene special sessions. It contains no provision on adjournment or meeting places, leaving those matters to be governed by statute or legislative rule.

Author's Comment

Most contemporary discussion of special sessions concerns whether the legislature should be authorized to convene itself in special session. In a state that has only a biennial regular session of limited duration, special sessions are more likely to be necessary and the governor's exclusive control of whether and when one should be called becomes a significant power. The legislature, however, is reponsible for enacting laws and it seems only appropriate to give that body some control over its own meetings. Automatic sessions to reconsider postadjournment vetoes or some mechanism to permit the legislature to convene itself for that purpose are additional possibilities with an entirely different impact on the governor's legislative powers. (See the *Author's Comment* on Section 14 of this article.)

Although less important than the preceding issues, it seems desirable to delete mention of the meeting place for sessions and let it be prescribed by law. It is inconceivable that the legislature would meet outside the capital except when necessary, and a statute may provide more flexibly for the exigencies that would justify meeting elsewhere.

Sec. 9. GOVERNOR'S MESSAGE AND RECOMMENDATIONS; ACCOUNTING FOR PUBLIC MONEY; ESTIMATES OF MONEY REQUIRED. The Governor shall, at the commencement of each session of the Legislature, and at the close of his term of office, give to the Legislature information, by message, of the condition of the State; and he shall recommend to the Legislature such measures as he may deem expedient. He shall account to the Legislature for all public moneys received and paid out by him, from any funds subject to his order, with vouchers; and shall accompany his message with a statement of the same. And at the commencement of each regular session, he shall present estimates of the amount of money required to be raised by taxation for all purposes.

History

The Constitution of the Republic simply required the president to give information on the state of government, from time to time, and to recommend measures he deemed necessary. The early state constitutions retained that provision but required the messages to be written. The 1876 Constitution specified times for messages, including a farewell message; deleted the requirement that they be written; and added the details about accounting for funds and estimating revenues.

Explanation

In addition to the traditional "state of the state" message by the governor, this section requires a farewell message, an accounting to the legislature at the close of the governor's term, and an estimate of revenues needed to operate the state. Although this section speaks only of messages at the beginning of each session and at the end of the governor's term, Section 5 of Article III mentions that the

governor may submit "emergency matters . . . in special messages," and in practice, the governor usually submits several messages during the course of a session.

The estimate of revenues required by this section has become a full-blown budget message since 1931, when a statute required the governor to do so and gave him some assistance in preparing the budget. (Tex. Laws 1931, ch. 206, at 339-49.) He did not control the preparation of the budget, however, until 1951. (Tex. Rev. Civ. Stat. Ann. arts. 688, 689.) Indeed, without a budget as a guide, it is doubtful that a governor could make a realistic estimate of the revenues needed.

Comparative Analysis

Almost every state constitution requires the governor to deliver messages and recommendations to the legislature. The only exceptions are Vermont, which calls for recommendations but no message; Georgia, which requires only a budget message; and Massachusetts, New Hampshire, Rhode Island, and New Mexico, which say nothing about messages. About half the states make it clear that the governor can deliver a message any time he wants, sometimes in addition to a required message at the beginning of each session and sometimes with no mention of timing. Only six states, besides Texas, clearly restrict the timing of messages to the beginning of each session, and only one of those joins Texas in requiring a farewell message. Five other states require a farewell message.

Two states authorize the legislature to require the governor to deliver a message. Four other states require an accounting by the governor, and three require estimates of revenue needed. About 15 state constitutions, including the new constitutions in Illinois, Montana, and Pennsylvania, require the governor to provide a detailed budget message.

The *Model State Constitution* commands the governor to give information and recommendations to the legislature at the beginning of each session and permits him to do so at other times. It also provides for a budget message:

> *The Budget.* The governor shall submit to the legislature, at a time fixed by law, a budget estimate for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments and agencies of the state, as well as a general appropriation bill to authorize the proposed expenditures and a bill or bills covering recommendations in the budget for new or additional revenues. (Sec. 7.02.)

Author's Comment

Three of the four requirements of this section accomplish little constitutional purpose. Another provision of the constitution requires an annual accounting of expenditures (Art. XVI, Sec. 6); the estimate of revenues has been supplanted by the budget message discussed in the *Explanation;* and the farewell message of a lame-duck governor is usually little more than a touting of the accomplishments of that governor's administration.

Many of the recently drafted constitutions have required a comprehensive budget message by the governor as part of the budget initiative and execution authority. (See, *e.g.,* Illinois Const. Art. VIII, Sec. 2; Montana Const. Art. VI, Sec. 9.) Fiscal decisions are the most important of governmental decisions, and budget preparation is the most important part of the fiscal process. The governor, as chief executive, is the most logical repository of budget-making powers. A constitutional provision such as that quoted above from the *Model* would ensure that the governor has that responsibility, which in turn would enable the governor to develop a comprehensive fiscal program for the state. (See Kresky, "Taxation

and Finance," *Salient Issues of Constitutional Revision* (New York: National Municipal League, 1961), p. 147.) Of course, a provision like that in the *Model* would not ensure that the legislature would consider the governor's budget, particularly if they have a competing budget as the Texas Legislature has. In practice the budget considered in Texas is the one prepared by the Legislative Budget Board, a legislative body governed by legislative leaders. (See Tex. Rev. Civ. Stat. Ann. art. 5429c.) To ensure that the governor's budget-making power has substance, a provision should require the legislature to consider a budget submitted by the governor.

Execution of the budget, too, poses peculiar problems in Texas. Legislative appropriations are seldom specific. An agency's appropriation usually lists a lump sum for each of several general purposes and the guidelines for specific expenditures are nonexistent. Unless a single officer or body has authority to approve specific expenditures under a broad appropriations authorization for an executive branch consisting of scores of separate, independent agencies it is impossible to have rational, comprehensive fiscal administration. Several recent attorney general opinions, however, have obstructed the legislature's piecemeal efforts to lodge some budget execution authority in the governor. According to the attorney general, a statute requiring gubernatorial approval of specific expenditures within a general item of appropriation confers a veto power in addition to that conferred in Article IV, Section 14, of the constitution, and since the power to veto or disapprove a bill is a legislative power, a grant of such power without express constitutional support for it violates the separation of powers statement of the constitution (Art. II, Sec. 1). (See Tex. Att'y Gen. Op. Nos. M-1199, M-1141 (1972).) Similarly, a provision authorizing transfers of appropriated funds between agencies at the governor's request was held to be a delegation to the governor of the legislature's power to determine how much may be expended, for what, and by whom and also was held to be in violation of the separation of powers provision. (See Tex. Att'y Gen. Op. No. M-1191 (1972).) Curiously, an earlier opinion found budget execution authority to be an executive power, so that the separation of powers section prevented the legislature from placing the authority in the Legislative Budget Board, a legislative body. (See Tex. Att'y Gen. Op. No. V-1254 (1951).)

Of course, there are constitutional problems involved in granting the governor authority to prevent expenditures for a program of which he disapproves (and which may even have passed over his veto) or to change the character of a program by preventing expenditure of a substantial part of the amount appropriated for it. Every agency head must supervise specific expenditures and usually does so without, in effect, "vetoing" or reducing an appropriation. Also, the practice of requiring gubernatorial approval of specific expenditures in some situations is a longstanding one in Texas and has continued since 1972 despite the rulings of the attorney general discussed above. Because of the uncertainties raised by those opinions, however, a constitutional provision is needed that authorizes the governor, as the *chief* executive officer, to exercise some of the controls over overall spending in the executive branch that the head of an executive agency has over spending in the agency.

Sec. 10. EXECUTION OF LAWS; CONDUCT OF BUSINESS WITH OTHER STATES AND UNITED STATES. He shall cause the laws to be faithfully executed and shall conduct, in person, or in such manner as shall be prescribed by law, all intercourse and business of the State with other States and with the United States.

Art. IV, § 10

History

The Constitution of the Republic of Texas enjoined the president to "see that the laws be faithfully executed." The framers of the 1845 Constitution made one minor change, substituting "take care" for "see," and that language survived until this section substituted "cause" for "take care" in 1876. The remainder of the section first appeared in 1876.

Explanation

The first part of this section is traditional and is related to the statement in Section 1 that the governor is the chief executive officer. It is a responsibility that the governor apparently lacks tools for, however, since no governor appears to have asserted any authority that might be derived from it. No judicial or attorney general opinions have construed it.

The second part of the section is rare among state constitutions. The only decision applying it concluded that this language makes it mandatory that the governor conduct relations with other states and the federal government. Statutes authorizing interstate negotiations may require other state officials or agencies to represent the state and need not even mention the governor's role, but the final product of any negotiations must have the governor's approval to be effective, whether or not the statute requires it. (*Highway Commission v. Vaughn,* 288 S.W. 875 (Tex. Civ. App.—Austin 1926, *writ ref'd*).) The attorney general recently issued rulings to the same effect. (Tex. Att'y Gen. Op. Nos. M-891 (1971), M-312 (1968).)

Comparative Analysis

Execution of the Laws. Only two state constitutions—New Hampshire and Massachusetts—do not contain a statement that the governor shall take care that the laws be faithfully executed. Some recent constitutions, *e.g.,* Illinois, Alaska, and Hawaii, state that the governor is "responsible" for the faithful execution of the laws. South Carolina requires the governor to take care that the laws are "faithfully executed in mercy." Alaska, Michigan, and New Jersey have attempted to give the injunction some meaning by adding an authorization for the governor to institute court action against officials of the executive branch and local governments to enforce the law. Nebraska adds that the governor shall take care that the affairs of state are efficiently and economically administered, and six states add that the governor is to expedite matters resolved on by the legislature. The *Model State Constitution* uses the same language as Illinois, Alaska, and Hawaii and adds enforcement authority similar to that in Alaska, Michigan, and New Jersey.

Intercourse with Other States. Two other states—Oklahoma and Virginia—have provisions almost identical with Section 10's provision on state business with other governments. Vermont provides that the governor is to correspond with other states. The other states and the *Model State Constitution* have no similar provision.

Author's Comment

The *Model State Constitution* section that seeks to implement the governor's responsibility for faithful execution of the laws provides:

> The governor shall be responsible for the faithful execution of the laws. He may, by appropriate action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitu-

tional or legislative power, duty or right by an officer, department or agency of the state or any of its civil divisions. This authority shall not authorize any action or proceeding against the legislature. (Sec. 5.04(a).)

Of course, the governor is the only elected executive officer under the *Model* and other executive officers may be removed by him. Such a provision in a state like Texas, with many executive officers who are otherwise legally independent, would enhance the governor's executive powers and give him some authority to "cause the laws to be faithfully executed," which is totally absent under this constitution.

Sec. 11. REPRIEVES, COMMUTATIONS AND PARDONS; REMISSION OF FINES AND FORFEITURES. There is hereby created a Board of Pardons and Paroles, to be composed of three members, who shall have been resident citizens of the State of Texas for a period of not less than two years immediately preceding such appointment, each of whom shall hold office for a term of six years; provided that of the members of the first board appointed, one shall serve for two years, one for four years and one for six years from the first day of February, 1937, and they shall cast lots for their respective terms. One member of said Board shall be appointed by the Governor, one member by the Chief Justice of the Supreme Court of the State of Texas, and one member by the presiding Justice of the Court of Criminal Appeals; the appointments of all members of said Board shall be made with the advice and consent of two-thirds of the Senate present. Each vacancy shall be filled by the respective appointing power that theretofore made the appointment to such position and the appointive powers shall have the authority to make recess appointments until the convening of the Senate.

In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons; and under such rules as the Legislature may prescribe, and upon the written recommendation and advice of a majority of the Board of Pardons and Paroles, he shall have the power to remit fines and forfeitures. The Governor shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days; and he shall have power to revoke paroles and conditional pardons. With the advice and consent of the Legislature, he may grant reprieves, commutations of punishment and pardons in cases of treason.

The Legislature shall have power to regulate procedure before the Board of Pardons and Paroles and shall require it to keep record of its actions and the reasons therefor, and shall have authority to enact parole laws.

History

The Constitution of the Republic stated simply that the president had the power "to remit fines and forfeitures, and to grant reprieves and pardons, except in cases of impeachment." The 1845 Constitution specified that the power applied only in criminal cases and only after conviction; authorized the legislature to enact rules for the remission of fines and forfeitures; and required concurrence of the senate for clemency in cases of treason, with a provision for preventing execution of sentence until the senate convened and acted. The 1869 Constitution required the governor to file in the secretary of state's office the reason for granting clemency, but otherwise made no change in the original 1845 provision. The 1876 Constitution adopted the 1869 language, adding only that the governor could also grant commutations of punishments.

In 1893 a statute established a board of pardon advisors, composed of two members who served at the pleasure of the governor, to assist the governor in evaluating the large volume of applications for executive clemency. In 1929, amid

tional or legislative power, duty or right by an officer, department or agency of the state or any of its civil divisions. This authority shall not authorize any action or proceeding against the legislature. (Sec. 5.04(a).)

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History

The Constitution of the Republic stated simply that the president had the power "to remit fines and forfeitures, and to grant reprieves and pardons, except in cases of impeachment." The 1845 Constitution specified that the power applied only in criminal cases and only after conviction; authorized the legislature to enact rules for the remission of fines and forfeitures; and required concurrence of the senate for clemency in cases of treason, with a provision for preventing execution of sentence until the senate convened and acted. The 1869 Constitution required the governor to file in the secretary of state's office the reason for granting clemency, but otherwise made no change in the original 1845 provision. The 1876 Constitution adopted the 1869 language, adding only that the governor could also grant commutations of punishments.

In 1893 a statute established a board of pardon advisors, composed of two members who served at the pleasure of the governor, to assist the governor in evaluating the large volume of applications for executive clemency. In 1929, amid

rumors of bribery and other abuses of clemency power, that board was replaced by a statutory Board of Pardons and Paroles composed of three members appointed by the governor to six-year staggered terms. Neither board restricted the governor's constitutional prerogatives in granting clemency, however, as both performed only duties assigned by the governor. (See MacCorkle, "Pardoning Power in Texas," 15 *Southwestern Social Science Quarterly* 218, 222-23 (1934); F. Gantt, *The Chief Executive in Texas* (Austin: The University of Texas Press, 1964), pp. 150-52.) In 1936 the present clemency language was adopted. It gave the old board constitutional status and dispersed the power of appointment. The amendment retained the original 1876 provision in paragraph two but added the language restricting the grant of clemency to cases approved by the board, the provision on reprieves in capital cases, and the provision on revocations. It required approval by both houses of the legislature for clemency in cases of treason and omitted a provision for respite of sentence execution during recess of the legislature.

Explanation

This section has three principal functions: (1) it empowers the governor to grant and revoke clemency in certain cases, (2) it creates a board whose recommendation is necessary before clemency may be extended in most cases, and (3) it purports to authorize the legislature to enact parole laws.

The various kinds of clemency have been defined as follows: A "reprieve" postpones the execution of a sentence. It is usually associated with delays in carrying out the death penalty, but it may also work a delay in putting a convicted person behind bars. A "commutation" is a reduction of punishment. A death sentence may be commuted to life imprisonment; a life sentence may be commuted to, say, ten years. A "pardon" absolves a person of most of the consequences of the crime. It restores the right to vote and to serve on juries and removes any other civil disabilities imposed on persons convicted of crimes. If there is any time on the sentence left when the pardon is granted, it frees that person of that punishment. A pardon does not remove all the consequences of the conviction, however. Texas courts long ago concluded that the conviction of a pardoned offender may be introduced in court to discredit that person's credibility as a witness, nothwithstanding the "accepted doctrine" that a pardon "makes the offender a new man . . . blots out his offense, and gives him a new credit and capacity; and even so far extinguishes his guilt as that, in the eye of the law, the offender is as innocent as if he had never committed the offense." (*Bennett v. State,* 24 Tex. Crim. 73, 81, 5 S.W. 527, 529 (1887). See also *Sipanek v. State,* 100 Tex. Crim. 489, 272 S.W. 141 (1925).) More recently, the Texas Court of Criminal Appeals has restricted the regenerative effect of a pardon even further. In *Jones v. State* (141 Tex. Crim. 70, 147 S.W.2d 508 (1941)), the court overruled an earlier conclusion, in *Scrivnor v. State* (113 Tex. Crim. 194, 20 S.W.2d 416 (1928)), and held that a pardoned conviction may be used on subsequent conviction of another offense to enhance the penalty for the second conviction under Texas statutes providing greater punishment for repeat offenders. The final type of clemency, "remission of fines," involves restoration of the amount paid. (*Easterwood v. State,* 34 Tex. Crim 400, 31 S.W. 294 (1895); *Snodgrass v. State,* 67 Tex. Crim. 615, 150 S.W. 162 (1912).)

The courts have ruled that this grant of clemency powers is exclusive; no other official or agency may be authorized to grant any form of clemency reserved to the governor. (See *Snodgrass, supra; Goss v. State,* 107 Tex. Crim. 659, 298 S.W. 585 (1927).) The *Snodgrass* case involved a statute authorizing the courts to suspend imposition of sentence in certain circumstances and, at the end of a specified

period, to set aside the judgment of conviction. The court of criminal appeals ruled that the authorization amounted to an unconstitutional grant of clemency powers to the courts since the exercise of the authority removed the consequences of conviction. Another case held that a statute restricting the law making convicted felons incompetent to be witnesses in judicial proceedings could not apply to persons convicted before the statute took effect. Otherwise, it would have been a legislative restoration of a civil disability accompanying a conviction, in effect a partial pardon, which authority this section grants to the governor exclusively. (*Underwood v. State,* 111 Tex. Crim. 124, 12 S.W.2d 206 (1927).) Presumably, then, a statute reducing the circumstances in which a felony conviction disenfranchises a person or prevents him from obtaining a license to engage in a business or profession applies only to convictions occurring after the statute takes effect.

The legislature subsequently devised a scheme to circumvent the burdensome restricton on the corrections process adopted resulting from the *Snodgrass* construction of this section. In effect, the next statute defined a suspended sentence as an alternative *punishment* but also provided that when a suspended sentence was imposed, it be imposed as an *alternative* to conviction and imprisonment. The court accepted the fiction that there was no conviction and thus upheld the provision for setting aside the "nonfinal" conviction if the defendant violated no law during the period of the suspension. (*Baker v. State,* 70 Tex. Crim. 618, 158 S.W. 998 (1913); *King v. State,* 72 Tex. Crim. 394, 162 S.W. 890 (1914).) In 1935 an amendment adding Section 11A authorized statutes like that involved in *Snodgrass.*

In more recent years, the court of criminal appeals has retreated a few steps from the *Snodgrass* position. For example, in Ex parte *Anderson* (149 Tex. Crim. 139, 192 S.W.2d 280 (1946)), the court upheld statutes extending credit to prisoners for good behavior without approval by the governor and the Board of Pardons and Paroles on the ground that the credit (or commutation) must be earned while executive clemency need not be. Despite the more lenient application of this section in *Anderson,* the ruling in *Snodgrass* that clemency is exclusively in the hands of the governor (and the Board of Pardons and Paroles) by virtue of the grant in this section still obstructs the capacity of the legislature to provide flexibility in the corrections process and to ameliorate some of the consequences of a conviction. For example, in 1973 the legislature drastically reduced the penalties for possession of small amounts of marijuana from a felony punishable by a maximum of imprisonment for life to a misdemeanor punishable by a maximum of six month imprisonment and a $1,000 fine and attempted to apply the reduced penalties to persons convicted under the prior law. The court had no difficulty in invalidating the application of the newer, more lenient penalties to prior offenders because under *Snodgrass* it infringed on the governor's power to pardon and commute. (*Smith v. Blackwell,* 500 S.W.2d 97 (Tex. Crim. App. 1973).)

There are some limits on the governor's clemency power. The governor may not act except on the recommendation of the Board of Pardons and Paroles, and while the governor may grant less clemency than the board recommends, the governor may not grant greater. (Ex parte *Lefors,* 165 Tex. Crim. 51, 303 S.W.2d 394 (1957).) The governor may grant clemency only in criminal cases; the governor may not pardon for contempt of court (*Taylor v. Goodrich,* 40 S.W. 515 (Tex. Civ. App. 1897, *no writ*); Ex parte *Green,* 116 Tex. 515, 295 S.W. 910 (1927)); and a pardon does not restore a disbarred attorney's license to practice law (*Hankamer v. Templin,* 143 Tex. 572, 187 S.W.2d 549 (1945)). Finally, the governor's power applies only after conviction. Consequently, the legislature may provide for grants

of immunity or amnesty before conviction. (Ex parte *Muncy,* 72 Tex. Crim. 541, 163 S.W. 29 (1914); *Camron v. State,* 32 Tex. Crim. 180, 22 S.W. 682 (1893).)

Aside from the question of exclusivity of the governor's clemency power, this section has caused few problems. One case concluded that the exception of impeachment from the governor's clemency power means that no one may grant clemency in those instances. (*Ferguson v. Wilcox,* 119 Tex. 280, 28 S.W.2d 526 (1930).) Another case suggested that the failure to require a recommendation by the board for the governor to revoke paroles and conditional pardons means that he may do so on his own initiative. (Ex parte *Ferdin,* 147 Tex. Crim. 590, 183 S.W.2d 466 (1944).) A recent decision by the United States Supreme Court requiring a hearing and other due process protections to parole revocations seems to foreclose that possibility, however. (See *Morrissey v. Brewer,* 408 U.S. 471 (1972).)

Comparative Analysis

Almost all states give the governor the power to grant pardons and reprieves, and usually, commutation or remission of penalties or both are included. In all but a handful of states the power clearly applies only after conviction. A majority of states deny clemency powers in cases of impeachment and most require approval of the legislature or the senate for clemency in cases of treason.

Approximately 11 states leave the power unrestricted, six permit the legislature to prescribe rules only for applications for clemency, and several permit the legislature to prescribe rules for the exercise of gubernatorial clemency powers. Of the remaining states, about eight join Texas in creating a board that either recommends clemency to the governor or approves the governor's grant of clemency. Some six states make the governor a member of a board that extends clemency by a majority vote, four place the power in a board independent of the governor, one permits the legislature to provide for clemency, and one permits the governor to grant clemency with the advice and consent of the senate. Several of the states that restrict or remove most clemency powers from the governor do permit him to grant reprieves with few or no restrictions. About 11 states have provisions specifically authorizing the legislature to enact parole laws and a few have similar provisions for probation.

The *Model State Constitution* states that "the governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses and may delegate such powers, subject to such procedures as may be prescribed by law." (Sec. 5.05.) The commentary to the *Model* section resolves the ambiguity about the legislature's power making it clear that the power to prescribe procedures applies to the delegation and not to the exercise of clemency powers.

Author's Comment

Although it may be desirable or even imperative that the governor be given assistance and guidance in making clemency decisions, particularly since clemency has become an important correctional tool, it is unwise for the constitution to establish permanently the existence and organization of that assistance and the form of clemency decisions. A simple statement that gubernatorial clemency decisions shall be made as prescribed by law would accomplish a similar result but with the flexibility to take advantage of new corrections techniques or changes in the organizational needs of the corrections system.

As the *Explanation* of this section emphasizes, the section, as construed in *Snodgrass* and its progeny, has obstructed the legislature in its efforts to provide greater flexibility in the corrections process. Perhaps a statement authorizing the

legislature to extend clemency to classes of offenders, as opposed to the individual offenders with which the governor is concerned, would permit desirable legislative action without interfering with the governor's prerogatives. The governor is not even equipped to make determinations of eligibility that are necessary to deal fairly with a category or class of offender.

Finally, the distinctions between parole and clemency should be clarified. Confusion between the two grew out of the use of "conditional pardons," which do not restore the rights of citizenship, in order to release prisoners on the condition that they violate no law. Conditional pardons were a common practice prior to the development of the concept of parole. (See *Carr v. State,* 19 Tex. Ct. App. 635 (1885).) Later, when parole developed, the legislature, probably as a precaution against invalidation under a *Snodgrass*-type challenge, vested the parole decision in the governor. Parole, however, is not clemency but is clearly an alternative punishment—supervision outside prison walls. Involvement of the governor in granting and revoking paroles merely enhances the opportunity for political influence in what should be a purely correctional decision. Moreover, parole revocations no longer may be made without affording the convict some minimum protections of due process (*Morrissey v. Brewer,* 408 U.S. 471 (1972)). Under *Morrissey* if the governor disapproves a Board of Pardons and Paroles recommendation, he presumably must have reviewed a record of the revocation hearing and found some legal or factual insufficiency. His ruling might even be subject to appeal to the courts. Such judicial-type activity should not be imposed on or expected of the governor.

Sec. 11A. SUSPENSION OF SENTENCE AND PROBATION. The Courts of the State of Texas having original jurisdiction of criminal actions shall have the power, after conviction, to suspend the imposition or execution of sentence and to place the defendant upon probation and to reimpose such sentence, under such conditions as the Legislature may prescribe.

History

This section is the product of some of the most remarkable jurisprudence in Texas. In 1912 the court of criminal appeals held unconstitutional a statute permitting courts to suspend sentences. The court reasoned that suspension of sentence was really a form of clemency, and that under Section 11 of Article IV, only the governor has power to grant clemency. (*Snodgrass v. State,* 67 Tex. Crim. 615, 150 S.W. 162 (1912).) Both of those conclusions are questionable. Since Section 11 speaks only of "reprieves, and commutations of punishment and pardons," the court could have held that suspension of sentence simply was not covered by Section 11. Moreover, even if suspension of sentence is considered a form of clemency covered by Section 11, nothing in Section 11 says that the governor's clemency power is exclusive; the court therefore could have held that the legislature had power to provide for suspension of sentences, even if the subject also is within the governor's power. The court, however, ignored both of these opportunities to uphold the legislation and instead seemed to go out of its way to invalidate the act.

The very next year, the court leaned far in the other direction to uphold an act that was functionally equivalent to the one struck down in *Snodgrass v. State.* The statute in the *Snodgrass* case provided for suspension of sentence *after* conviction. The subsequent statute was characterized not as a law permitting the jury to suspend punishment after conviction, but as a provision allowing the jury to suspend the sentence as an alternative to convicting the defendant. Seizing upon

this distinction, the court of criminal appeals upheld the second statute, stating that because it did not purport to relieve the defendant of punishment after conviction, it did not conflict with the clemency power of the governor, which the court still assumed to be exclusive. (*Baker v. State,* 70 Tex. Crim. 618, 158 S.W. 998 (1913).)

This decision permitted the courts to use the device of the suspended sentence, but since it rested on such a fine distinction, it obviously was not a very satisfactory basis for a system of probation. Section 11A therefore was added in 1935 to make clear the courts' power to suspend sentences and place defendants on probation.

Explanation

Despite the adoption of Section 11A, the courts do not yet have full power to suspend sentences and place defendants on probation. Although the section seems to be clearly an outright grant of power to the courts subject to regulation by the legislature, the court of criminal appeals has said that the courts have no such power until the legislature confers it. (*State v. Klein,* 154 Tex. Crim. 31, 224 S.W.2d 250 (1949).) This question is no longer of major importance, however, because the legislature in 1947 enacted a general Adult Probation and Parole Law, now codified as Article 42.12 of the Code of Criminal Procedure.

Snodgrass v. State still casts its shadow over the matter of probation and suspension of sentence. The courts' power to grant probation in misdemeanor cases is not clear. In Ex parte *Hayden* (152 Tex. Crim. 517, 215 S.W.2d 620 (1948)), for example, the court of criminal appeals suggested that Section 11A did not apply to misdemeanors. The court's reasoning was as follows: Section 11A mentions "sentences," but not "judgments" or "convictions"; felonies come within the section because in a felony there is a formal "sentence" which is distinct from the judgment of conviction; but in misdemeanors there is no formal sentence because the punishment is simply part of the judgment of conviction. Therefore language authorizing suspension of "sentences" does not authorize suspension of punishment in misdemeanors. Actually, it was not necessary to decide in *Hayden* whether Section 11A covered misdemeanors, because the statute also used the term "sentence" rather than "judgment" or "conviction" and the court held as a matter of statutory construction that probation was not authorized in a misdemeanor case. Nevertheless, citing *Hayden,* the court subsequently held that Section 11A does not authorize the legislature to provide for probation in misdemeanor cases. (*Waggoner v. State,* 161 Tex. Crim. 242, 275 S.W.2d 821 (1955).)

The legislature has taken the position that it does have power to permit probation in misdemeanor cases; it has retained the misdemeanor probation act as Article 42.13 of the Code of Criminal Procedure. The attorney general, relying not on Section 11A but on the old distinction drawn in *Baker v. State* between clemency before and after conviction, ruled the statute constitutional. (Tex. Att'y Gen. Op. No. C-492 (1965).) The court of criminal appeals has relied upon this distinction, and at the same time illustrated its fictitiousness. The court held that a judge in a misdemeanor cannot probate a portion of a jail term while requiring the defendant to serve the remaining portion of the term; to do so "would result in the appellant's incarceration without a judgment," because there is no judgment when probation is granted. Yet the court applied a provision in the statute which permits a fine to be imposed even though probation is granted. (*Lee v. State,* 516 S.W.2d 151, 152 (Tex. Crim. App. 1974).)

Art. IV, § 11A

Comparative Analysis

Although nearly all states permit either the governor or a board to grant pardons or some other form of executive clemency, only about ten state constitutions mention suspension of sentence or probation. About half of those provide that the legislature may authorize the courts to suspend sentences or grant probation. Three authorize the governor to suspend sentences and two give the power to a board.

Neither the federal constitution nor the *Model State Constitution* mentions the subject.

Author's Comment

Section 11A should never have been necessary. Probation and suspension of sentence are in no way inconsistent with the concept of executive clemency; they are simply additional tools that may be used to adjust punishment to individual cases. As the preceding *Comparative Analysis* indicates, most states utilize all three methods, even though their constitutions do not specifically authorize probation or suspension of sentence. The federal constitution gives the president "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." (Art. II, Sec. 2.) The courts have held that this power is exclusive and cannot be subjected to congressional control. (Ex parte *Garland,* 71 U.S. (4 Wall.) 333 (1867).) Yet the president's clemency power, though exclusive, does not prevent the congress from providing for probation, nor does it prevent the courts from suspending sentence. (See *United States v. Benz,* 282 U.S. 304 (1931); *The Laura,* 114 U.S. 411 (1885); *Nix v. James,* 7 F.2d 590 (9th Cir. 1925).)

A series of recent decisions by the court of criminal appeals make it clear that that court still considers the governor's clemency power to be exclusive. In *Smith v. Blackwell* (500 S.W.2d 97 (Tex. Crim. App. 1973)), the court stated that the clemency power given to the governor by Section 11 of Article IV is exclusive, and that an attempt by the legislature to permit district courts to resentence certain persons previously convicted of offenses involving marijuana is therefore unconstitutional, because resentencing is a form of clemency. The court extended that reasoning even further in Ex parte *Giles* (502 S.W.2d 774 (Tex. Crim. App. 1973)) holding that the legislature had no power to provide for resentencing even in cases pending on appeal on the effective date of the statute. The court held that once the trial court has imposed sentence, the governor's power to reduce the sentence is exclusive. Judge Douglas, dissenting, would have held, with respect to cases on appeal on the effective date of the statute, "that the executive and judicial powers may co-exist and complement each other in promoting the public welfare, assisting in the reformation of one convicted, and promoting justice." (502 S.W.2d, at 794.) The Supreme Court of Texas deferred to the decision of the court of criminal appeals. (*State* ex rel. *Pettit v. Thurmond,* 516 S.W.2d 119 (Tex. 1974).)

If the Texas courts could consider the question today as one of first impression, they might well hold that there is no inconsistency between executive clemency and the courts' power to suspend sentences and grant probation. Unfortunately, however, the cases described above are now embedded in the jurisprudence of the state, and it is still possible that in the absence of Section 11A the courts would hold probation and suspended sentence legislation unconstitutional.

There is, however, no need to retain Section 11A as a separate section. Section 11 could simply be amended to make it clear that the governor's clemency power does not preclude the exercise of power by the courts to suspend sentences and

grant probation. To avoid the problem created by Ex parte *Hayden,* the amendment should be clearly written to include misdemeanors as well as felonies.

Sec. 12, VACANCIES IN STATE OR DISTRICT OFFICES. All vacancies in State or district offices, except members of the Legislature, shall be filled unless otherwise provided by law, by appointment of the Governor, which appointment, if made during its session, shall be with the advice and consent of two-thirds of the Senate present. If made during the recess of the Senate, the said appointee, or some other person to fill such vacancy, shall be nominated to the Senate during the first ten days of its session. If rejected, said office shall immediately become vacant, and the Governor shall, without delay, make further nominations, until a confirmation takes place. But should there be no confirmation during the session of the Senate, the Governor shall not thereafter appoint any person to fill such vacancy who has been rejected by the Senate; but may appoint some other person to fill the vacancy until the next session of the Senate or until the regular election to said office, should it sooner occur. Appointments to vacancies in offices elective by the people shall only continue until the first general election thereafter.

History

Provision in a single section for filling vacancies in both elective and appointive offices originated in the Constitution of 1876. All previous constitutions covered vacancies in elective offices in the sections that created the offices. As to vacancies in appointive offices, all the earlier constitutions contained a section, similar to the second sentence of this section, requiring gubernatorial appointments to fill vacancies that occurred during an interim between legislative sessions in offices normally filled by appointment by the governor with advice and consent of the senate to be submitted for senate confirmation after the legislature convened. In effect, it permitted vacancies to be filled in an interim, yet preserved the senate's power of confirmation in those instances.

The method of filling vacancies in elective offices (and in those offices elected by the legislature under the Constitutions of the Republic and of 1845) varied significantly under prior constitutions. Until 1850, no officers were elective but the chief executive, the chief executive's successor, and the legislators; and vacancies in those offices were always and still are filled by succession or special election. (See Art. IV, Sec. 16, and Art. III, Sec. 13.) Thus, only recess vacancies in offices elected by the legislature needed consideration, and the Constitution of 1845 authorized the governor to fill them "until the close of the next session of the legislature," by which time the legislature would have elected permanent occupants.

In 1850 a constitutional amendment required public election of all officers previously elected by the legislature and of most officers previously appointed by the governor with senate confirmation. The wording of the amendment was confusing but it apparently provided for filling vacancies in the offices it covered by special election. It clearly did not provide for any other method of filling vacancies. (See Tex. Laws 1850, ch. 40, 3 *Gammel's Laws* p. 474.)

The next change came in the 1866 Constitution, which empowered the governor to fill vacancies in elective offices until the next election. The 1869 Constitution was the first to provide that vacancies in elective offices be filled by gubernatorial appointment with senate confirmation. (Curiously, the 1869 provision applied only to vacancies in elective offices that occurred during recess of the legislature. Vacancies occurring during a session were overlooked.)

Every prior constitution contained some restriction on renomination of reject-

ed nominees where appointive officers were concerned, but the details in the third and fourth sentences of this section originated in 1876. The Constitution of the Republic simply stated that the president could not renominate a rejected nominee to the same office. The 1845, 1861, and 1866 Constitutions prohibited renomination only during the session in which the rejection occurred and also prohibited filling vacancies during a recess if no nominee was submitted during the session. Apparently, if the senate rejected the governor's nominee the governor could hold off and install the nominee after adjournment; but if the governor submitted no nomination he could install no one after adjournment. The 1869 provision omitted the restriction on filling vacancies when no nominee was submitted but otherwise was similar to its predecessors.

The last sentence of this section and the clause in the first sentence authorizing the legislature to provide alternative methods of filling vacancies first appeared in 1876. Prior constitutions did not mention the tenure of appointees to vacancies or authorize legislative alteration of the vacancy-filling provision.

Although the Convention of 1875 made some significant changes and added a lot of detail in this section, no debate on the subject was reported. (See *Debates,* pp. 151-67, 257-58.)

Explanation

The primary function of this section is to provide the method by which a new officeholder is selected in the event an incumbent dies, resigns, is removed from office, or otherwise legally becomes incapable of performing the duties of the office before the term of the office expires. In the ordinary legal sense, that is what constitutes a vacancy in an office. The normal selection procedures are designed to have a successor ready to assume office when a term expires, and if for some reason a successor does not assume an office when the successor is supposed to, Article XVI, Section 17, requires the prior occupant to continue in the office until a successor does assume it. Thus expiration of a term cannot, in the ordinary legal sense, create a vacancy in an office. The section also preserves the senate's power of confirmation in the case of vacancies occurring while the senate is not in session and ensures that the requirement of confirmation is effective by preventing reappointment of a rejected nominee after the senate adjourns. Finally, it requires a mid-term election to fill a vacancy in an elective office the term of which extends past the next general election.

An additional function of this section is hidden in a few sentences in judicial opinions that grew out of a dispute over the senate's refusal to confirm Governor Miriam A. Ferguson's nominee to fill the statutory office of chairman of the highway commission. The incumbent chairman's term was about to expire and Governor Ferguson submitted her nominee for senate confirmation for the next full term, as the statute creating the office required. The senate twice considered the candidate in executive session and both times reported to the governor that it refused to confirm. Governor Ferguson installed her nominee in the office without confirmation, and the attorney general brought an action challenging her nominee's right to the office. Apparently, Governor Ferguson and her nominee had proof that a majority but not two-thirds of the senators present had voted to confirm, so they argued that since the statute was silent about the number of senators required to confirm only a majority was necessary. Both the court of civil appeals and the supreme court rejected that contention, stating that, in the case of *appointive* offices, a vacancy occurs on expiration of the term. Thus unless a statute provides otherwise, Article IV, Section 12, requires *all* gubernatorial nominees, whether they are to fill an unexpired term or an entire term, to be confirmed by two-thirds of

the senators present. (*Denison v. State,* 61 S.W.2d 1017 (Tex. Civ. App.–Austin), *writ ref'd n.r.e. per curiam,* 122 Tex. 459, 61 S.W.2d 1022 (1933).) Apparently, the possibility that, if a vacancy exists when the term expires, the prior occupant may hold over until a successor qualifies has not caused any problems.

Of course, Section 12 permits the legislature to alter the procedures for filling "vacancies" in both elective and appointive offices ("vacancy" still has its ordinary meaning in the case of elective offices), but the court of civil appeals also stated in *Denison* that the phrase "unless otherwise provided by law" in Section 12 refers to the nominating authority but not to senate confirmation. Section 12, then, has an additional hidden meaning. If the legislature creates an office to be filled by appointment, the appointing authority can be given to anyone but the governor without the necessity for senate confirmation. In fact, the attorney general has ruled that a statute requiring senate confirmation of an officer appointed by someone other than the governor violates the separation of powers statement (Art. II, Sec. 1), since appointment of executive officers is an executive function in which the senate, a legislative body, may not participate without express constitutional authorization. (Tex. Att'y Gen. Op. No. WW-324 (1957).) If the governor is to appoint an official, however, the court of civil appeals said in *Denison* that Section 12 requires senate confirmation; the governor may not be given the sole authority to appoint to any state or district executive office. (That part of *Denison* may not be valid. The statement was not necessary for the court's holding, and the legislature, in a few statutes, has authorized the governor to appoint to an office without senate confirmation. Apparently, none of those statutes has been questioned.)

The attorney general's ruling on senate confirmation may explain the *Denison* court's insistence on finding more in Section 12 than is immediately apparent. The court could have ruled as a matter of statutory construction that senate confirmation meant approval by two-thirds of the senators. In that event, however, the court might have had to consider whether the widespread Texas practice of requiring senate confirmation of gubernatorial appointees to statutory offices is in violation of separation of powers. The decision, by finding a constitutional *requirement* of senate confirmation, eliminated the issue.

The statement that appointments made "during the recess of the Senate" are to be nominated to it "during the first ten days of its session," which is probably a holdover from the provision in the Constitution of the Republic authorizing the president to convene the senate alone, once led the senate to attempt to convene itself during an interim between regular sessions solely to consider gubernatorial appointments. The court ruled that the senate could not do so, that recess appointments may be considered only in biennial regular sessions or in special legislative sessions called by the governor under Section 8 of Article IV. (*Walker v. Baker,* 145 Tex. 121, 196 S.W.2d 324 (1946).)

Section 12 applies only to state and district offices. Vacancies in county and precinct offices and in offices of other political subdivisions are not subject to this section. (Tex. Att'y Gen. Op. No. 0-5153 (1943).) Also, Section 12 applies only to vacancies in *executive* offices for which the constitution does not contain an express provision, as it does, for example, for railroad commissioner (Article XVI, Section 30) and lieutenant governor (Article III, Section 9). Section 12 does not apply to vacancies in legislative offices, which are governed by Article III, Section 13, or to judicial vacancies, which are governed by Article V, Section 28, in the case of constitutional courts (*State ex rel. Peden v. Valentine,* 198 S.W. 1006 (Tex. Civ. App.–Fort Worth 1917, *writ ref'd*) or by statute in the case of statutory courts (*cf. Sterrett v. Morgan,* 294 S.W.2d 201 (Tex. Civ. App.—Dallas 1956, *no writ.*)).

During a session an appointment under Section 12 consists of two acts:

nomination by the governor and confirmation by the senate. If the senate fails to act on a proposed appointee named during a session, the appointee may not qualify for the office. (Tex. Att'y Gen. Op. No. 0-4864 (1942).) The attorney general has ruled that a different result follows senate inaction if the appointee is named during an interim and nominated to the senate after it convenes. In that event, according to the attorney general, senate inaction is not tantamount to rejection; the senate must affirmatively reject the nominee or he continues in the office until the next session, even though the prohibition in Section 12 on appointment of a rejected nominee following a session appears to consider failure to confirm as rejection. (Tex. Att'y Gen. Op. No. M-267 (1968).)

Comparative Analysis

The provisions for filling vacancies in executive offices vary greatly from state to state. In general, if the office is elective the governor fills a vacancy – sometimes on his own, sometimes with the advice and consent of the senate. Several states permit the legislature to prescribe another method of filling vacancies. A number of states also specifically call for filling the vacancy only until the next general election, some having exceptions for vacancies that occur shortly before an election.

Approximately ten states appear to have no constitutional provision for filling vacancies in appointive offices. Of the remaining states, about 17 have provisions comparable to Section 12 in that they are designed in one way or another to preserve any legislative power to confirm or reject recess appointments, and about half of those specifically prohibit subsequent appointment of rejected nominees during recess.

The vote required for senate confirmation of gubernatorial appointees occasionally is specified as a majority, a majority of those elected, two-thirds, or two-thirds of those elected. Usually, however, the vote is not specified. Two states require confirmation of appointees to some offices by both houses. The new Michigan Constitution contains an unusual provision on senate confirmation, which provides as follows:

> Appointment by and with the advice and consent of the senate when used in this constitution or laws in effect or hereafter enacted means appointment subject to disapproval by a majority vote of the members elected to and serving in the senate if such action is taken within 60 session days after the date of such appointment. Any appointment not disapproved within such period shall stand confirmed. (Mich. Const. Art. V, Sec. 6.)

A number of state constitutions also have provisions governing appointments generally in addition to a temporary vacancy provision. Many of those are modeled after Article II, Section 2, of the United States Constitution and require the governor to nominate and, "by and with the advice and consent" of the senate, appoint all nonelective officers. Others do not require confirmation of gubernatorial appointees. Several, however, make the constitutional provision on selection of officers operative only if a statute does not provide another method of selection.

About a dozen states have provisions giving the governor the power to remove persons in appointive executive offices, but there are many variations in the stated reasons for removal and the offices covered. Several others provide that removal from some offices shall be provided by law.

The *Model State Constitution* has no elected executives, other than the governor, and gives the governor unrestricted power to appoint and remove heads of departments. Obviously, under the *Model* the governor may fill vacancies, and

no provision like Section 12 is needed.

Author's Comment

A provision covering temporary vacancies may be desirable to ensure that vacancies in constitutional appointive offices for which senate confirmation is required may be filled temporarily while the legislature is not in session. Provision for temporarily filling vacancies in constitutional elective offices may also prevent confusion in the absence of a statute covering the situation. Finally, limitations on reappointment of rejected nominees make certain that the governor does not circumvent any power of confirmation given the senate by reappointing rejected nominees after adjournment. Temporary vacancy provisions, however, do not determine the power of the governor (or any other official or body) to any major extent.

A general appointment provision, which the *Denison* case made of Section 12, is more important in defining the governor's power. Appointment without the necessity of senate confirmation gives the appointing authority more freedom in selecting subordinates. A requirement of senate confirmation reduces that freedom (with the degree of the reduction growing as the number of senators necessary to confirm increases), and the reduction is even greater in a state in which, like Texas, the tradition of "senatorial courtesy" permits any senator to block an appointee from the senator's district by objecting to the confirmation. Somewhere in between is the Michigan provision quoted in the *Comparative Analysis,* which eliminates the requirement of affirmative action by the senate to confirm and requires affirmative action only to disapprove an appointee. A general appointment provision is necessary in a constitution, however, only if the drafters want to prevent the legislature from making some offices elective or from lodging appointive powers in some official or body other than the one named. If the drafters want senate confirmation of appointive officials, a general provision is also necessary to prevent the legislature from excluding it and may be necessary to avoid the separation of powers objections made in the attorney general's opinion on senate confirmation discussed in the *Explanation.*

Removal powers, too, are not constitutional necessities but, when covered, determine the power of the appointing authority to influence the official actions of the appointees. An appointing authority with no removal power, like the Texas governor (see Art. XV for the Texas Constitution's provisions on removal), has few tools with which to influence the appointees, even though the appointing authority may be responsible politically for their official conduct.

Sec. 13. RESIDENCE OF GOVERNOR. During the session of the Legislature the Governor shall reside where its sessions are held, and at all other times at the seat of Government, except when by act of the Legislature, he may be required or authorized to reside elsewhere.

History

The requirement that the governor reside where legislative sessions are held dates to the 1845 Constitution. Under the early constitutions, when the legislature was not in session the governor resided "wherever, in their opinion, the public good may require."

The 1869 Constitution required the governor to reside at the capital when the legislature was not in session unless, "in the opinion of the legislature, the public good may otherwise require." That provision was revised in 1875, to specify the

manner in which the legislature must express its opinion (by law) and to permit it to authorize, as well as require, residence elsewhere.

Explanation

The first part of this section is necessary because, although legislative sessions ordinarily are required to be at the seat of government, in extraordinary circumstances the sessions may have to be held elsewhere. (See Art. IV, Sec. 8.) Otherwise the section is self-explanatory; it has caused no problems.

Comparative Analysis

Only 17 states, besides Texas, have constitutional residence requirements for the governor while in office. One requires only that the governor reside in the state during the term of office. The others require the governor to reside at the seat of government. Two include exceptions for periods during wartime emergencies or epidemics. No other state empowers the legislature to require the governor to reside somewhere. The *Model State Constitution* does not mention the governor's residence during the term of office.

Author's Comment

Obviously the official and political duties of the governor of a large and populous state demand that the governor stay close to the center of official and political activity. It is doubtful that a residence requirement is necessary to keep the governor in the capital, however, and in any event the state provides an official residence.

Sec. 14. APPROVAL OR DISAPPROVAL OF BILLS; RETURN AND RECONSIDERATION; FAILURE TO RETURN; DISAPPROVAL OF ITEMS OF APPROPRIATION. Every bill which shall have passed both houses of the Legislature shall be presented to the Governor for his approval. If he approve he shall sign it; but if he disapprove it, he shall return it, with his objections, to the House in which it originated, which House shall enter the objections at large upon its journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members present agree to pass the bill, it shall be sent, with the objections, to the other House, by which likewise it shall be reconsidered; and, if approved by two-thirds of the members of that House, it shall become a law; but in such cases the votes of both Houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the Governor with his objections within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Legislature, by its adjournment, prevent its return, in which case it shall be a law, unless he shall file the same, with his objections, in the office of the Secretary of State and give notice thereof by public proclamation within twenty days after such adjournment. If any bill presented to the Governor contains several items of appropriation he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and no item so objected to shall take effect. If the Legislature be in session, he shall transmit to the House in which the bill originated a copy of such statement and the items objected to shall be separately considered. If, on reconsideration, one or more of such items be approved by two-thirds of the members present of each House, the same shall be part of the law, notwithstanding the objections of the Governor. If any such bill, containing several items of appropriation, not having been presented to the Governor ten days (Sundays excepted) prior to adjournment, be in the hands of the Governor at the time of adjournment, he shall have twenty days from such adjournment within which to file

objections to any items thereof and make proclamation of the same, and such item or items shall not take effect.

History

The general veto provisions of this section originated in the Constitution of the Republic, which closely followed the veto provision of the United States Constitution (Art. I, Sec. 7). The statehood constitution made the changes necessitated by the change from nation to state, and that version has appeared in every subsequent state constitution with only two substantive changes. First, until adoption of the present constitution, the chief executive had only five days to return objectionable bills to the house of origin. Second, under the Republic the president could veto bills presented to him within the last five days by refusing to sign them – the pocket veto. No constitution since statehood has permitted the pocket veto, and the Constitutions of 1845, 1861, 1866, and 1869 provided that the governor could not even veto bills after adjournment. The Constitutional Convention of 1875 increased the time to return objectionable bills to ten days and permitted vetoes of bills after adjournment.

The 1875 Convention made one additional change. It neglected to specify whether two-thirds of those present or those elected is necessary to override a veto of a bill in the second house. All previous state constitutions clearly required only two-thirds of those present in each house – the Constitution of the Republic only specified "a vote of two-thirds of both Houses" – and there is no indication in the journal of the convention or its reported debates that the omission in 1875 was intentional. In fact, the draft by the Committee on the Executive Department to the 1875 Convention expressly included the term "present" for the second house, and the convention journal records no amendment to delete it. It apparently was omitted inadvertently in the enrolling process. (*Journal,* pp. 231, 283-304, 371-74.) Intentional omission would be inconsistent with retention of two-thirds of those present in *each* house, which is clearly the requirement to override *item* vetoes. The omission, therefore, should be disregarded. The two houses have disagreed, however. The senate requires two-thirds of those elected to override vetoes of house bills. (See Tex. S. Rule 31(b) (1975).) The senate rules deal only with vetoed bills and do not mention the vote required to override a veto of an item of appropriation; presumably, only two-thirds of the senators present suffice to override a vetoed item in a house appropriations bill, since Section 14 is clear on that point. The house requires only two-thirds of those present to override vetoes of senate bills. (Annotation of Tex. H. Rule 32 (1975) in Texas Legislative Council, "Rules of the House" *Texas Legislative Manual* (Austin, Supp. 1975), p. 139.)

The item veto in appropriation bills first appeared in the 1866 Constitution. It was an innovation of the Confederate constitutions and proved to be a major contribution to American government. (See J. Burkhead, *Government Budgeting* (New York: Wiley, 1956), p. 416.) Curiously, in 1866 the governor could veto items of appropriation after adjournment. Postadjournment item vetoes were submitted to the next session of the legislature for reconsideration. In 1875 the Convention, having permitted post adjournment vetoes of bills, omitted provision for reconsideration of item vetoes at the next session.

Explanation

By authorizing the governor to prevent any bill or, in the case of a general appropriations bill, any item of appropriation from becoming law by objecting in the proper manner (assuming the legislature does not muster the votes necessary to override), Section 14 grants the governor a substantial role in the legislative

process. In fact, the veto power repeatedly is referred to as a legislative, not an executive, power, and because it is a legislative power, its scope is limited strictly to the terms of the constitutional grant and may not be enlarged, even by statute. (See *Fulmore v. Lane,* 104 Tex. 499, 140 S.W. 405, *aff'd on rehearing,* 104 Tex. 499, 140 S.W. 1082 (1911); *Pickle v. McCall,* 86 Tex. 212, 24 S.W. 265 (1893); Tex. Att'y Gen. Op. Nos. M-1199, M-1141 (1972).)

The scope of the power represented by the general veto and the item veto is immeasurably increased by existence of the postadjournment veto, which the legislature gets no opportunity to override. The great majority of bills that pass each session of the legislature, including the general appropriations bill and most other major bills, pass during the last ten days of the session. On all those passed during that period, the legislature will not have an opportunity to override a veto if the governor, because he wants to avoid the possibility of an override or because he is unable to determine which of the great volume of bills he may find objectionable, waits until after adjournment to veto a bill.

Few questions have arisen about the governor's power to veto bills, but the power to veto items of appropriation has generated a number of major disputes. The major source of confusion has involved the meaning of "items of appropriation," and the most important case on that question is *Fulmore v. Lane (supra).* In 1911 the legislature's appropriation to the attorney general's department was as follows:

> Attorney General's Department.
> For the Years Ending –
> August 31, 1912 – August 31, 1913.
>
> For the support and maintenance of the Attorney General's department, including postage, stationery, telegrams, telephones, furniture, repairs, express, typewriters and fittings, contingent expenses, costs in civil cases in which the state of Texas or any head of a department is a party; for the actual traveling expenses and hotel bills incurred by the Attorney General or any of his assistants or employés in giving attention to the business of the state elsewhere than in the city of Austin; for depositions and procuring evidence and documents to be used in civil suits or contemplated suits wherein the state is a party; for law books and periodicals; for the payment of any and all expenses incident to and connected with the administration of the duties of the Attorney General's office; for the enforcement of any and all laws, wherein such duty devolves upon the Attorney General; for the payment of any and all expenses in bringing, prosecuting and defending suits; for the payment of the salary and maximum fees provided by the Constitution for the Attorney General, and for the payment of the salaries and compensation of his assistants and employés and other help deemed by the Attorney General to be necessary to carry on the work of the Attorney General's department, there is hereby appropriated the sum of eighty-three thousand and one hundred and sixty ($83,160.00) dollars, to be expended during the two fiscal years ending August 31st, 1912, and August 31st, 1913, to be paid by the Treasurer on warrants drawn by the Comptroller upon vouchers approved by the Attorney General . . . $41,580.00 $41, 580.00

A lengthy "rider," detailing exactly how much could be spent for each purpose (*e.g.,* the salary of the attorney general, the number and salaries of his assistants, the number and salaries of clerical and other personnel, the amount available for postage, stationery, etc.) followed the appropriation. In contrast, the appropriations for all other executive departments in the bill resembled that for the treasury department, which follows:

Treasury Department.	For the Years Ending – Aug. 31, 1912	Aug. 31, 1913
Salary of Treasurer	$2,500 00	$2,500 00
Salary of chief clerk	2,000 00	2,000 00
Salaries of three assistant clerks	4,500 00	4,500 00
Salary of stenograher and general assistant clerk	1,200 00	1,200 00
Salary of night watchman	800 00	800 00
Salary of porter	480 00	480 00
Books, stationery, furniture and postage	1,200 00	1,200 00
Keeping in repair time locks, combinations, vaults, and office furniture and files	150 00	150 00
Contingent expenses	300 00	300 00
To pay express charges and to pay the charges on postoffice and express money orders upon money due the State as interest or principal due on bonds held by the State where the bonds are payable at any other point than Austin, Texas, and to pay express charges to place money in the city of New York for payment of interest on State bonds payable in said city and to pay exchange to and from depositories	300 00	300 00
Total	$13,430 00	$13,430 00

The governor objected to the appropriation to the attorney general's department and, in his veto message to the legislature, stated:

> I regret that the Legislature felt it incumbent upon itself to seek to deprive the Governor of the constitutional prerogative of vetoing any item for any department where in his judgment such appropriation was excessive or unnecessary. In the bill as filed with the Secretary of State I have exercised this prerogative, nevertheless, and vetoed the lump sum of $83,160.00 appropriated to the Attorney General's department. After making this lump appropriation in one item, the Legislature divided the same into two items of $41,580.00 each for the fiscal years ending August 31, 1912 and 1913, respectively. By striking out the lump appropriation and the words describing the same, and the appropriation of $41,580.00 for the second year, the sum of $41,580.00 is left subject to the use of the Attorney General for the maintenance of his department for the two fiscal years named, any portion of which can be used, under the language of the bill, for any purpose in carrying on the duties of his office . . . . The paragraph containing the items which follow the appropriations for the respective years named [the rider] is vetoed, because it is out of harmony with the remainder of the appropriation after the objection already noted and the items named were disapproved.

In September 1911, the first month of the biennium covered by the bill, the comptroller refused to issue warrants for the department contending that the governor, by striking the lump sum of $83,160, had vetoed the department's appropriation for both years of the biennium. A clerk in the department filed suit to compel the comptroller to issue a warrant to pay for his services in September. (Thus none of the disputants in an apparently major political controversy were actual parties to the suit. The underlying source of the dispute is unclear, but the dissent in the original opinion intimated that the governor did not believe the state's antitrust efforts should be as extensive as the legislature wanted. *Fulmore v. Lane,* 140 S.W. 405, at 425.)

The principal question was whether the appropriation consisted of two items, one for each year, or one item covering both years. The court ultimately held that the governor had vetoed only the second year's appropriation. Each of the three justices sitting on the court at that time wrote an opinion, however, and two of them wrote two opinions. For that reason, the case provides little guidance for the future. It simply illustrates the problems of statutory construction created when the legislature seeks to prevent an item veto of a particular project. (One opinion points out that the appropriations for the department resembled those of other departments when the bill was introduced in the legislature and that the change probably was made expressly to prevent an item veto of a sum added during the legislature's deliberations for a particular purpose opposed by the governor.) In reaching the final resolution of the case, the court did establish that an item of appropriation is an appropriation of a sum of money and that the governor may not reduce an item but must veto the entire item. If the governor vetoes an item, he vetoes the provisions governing its expenditure, but he may not veto a "rider" or provision governing expenditure of several separate items without vetoing each item to which it applies. (See also *Jessen Associates, Inc. v. Bullock,* 531 S.W.2d 593 (Tex. 1975) on the governor's inability to veto an appropriations rider.) Thus the legislature, by adept use of riders or by lumping many purposes of expenditure for a single item, can curtail the effect of the item veto. The only limitation is the requirement of "specific" appropriation. (See the Annotation for Art. VIII, Sec. 6.) Usually, an agency's appropriation consists of a total sum subdivided into several secondary sums, which may also be subdivided, as follows:

AIR CONTROL BOARD

	For the Years Ending August 31, 1976	August 31, 1977
1. Administrative Services:		
a. Per Diem of Board Members	$6,000	$6,000
b. Executive Director	31,400	33,200
c. Executive Administration	115,859	123,447
d. Fiscal & Personnel	307,575	328,404
e. General Services	783,473	797,630
f. Data Processing	465,715	485,425
g. Public Information & Training	146,441	158,369
Total, Administrative Services	$1,856,463	$1,932,475
2. Control and Prevention:		
a. Deputy Director Control & Prevention	$ 25,500	$ 27,000
b. Compliance	324,802	353,429
c. Legal	133,305	143,213
d. Prevention	730,547	790,727
e. Regional Operations	2,189,745	2,346,406
f. Contingency for Workload Increase	136,652	140,616
Total, Control and Prevention	$3,540,551	$3,801,391
3. Measurements and Analysis:		
a. Deputy Director Measurements and Analysis	$ 25,500	$ 27,000
b. Air Quality Evaluation	935,300	969,694
c. Laboratory	342,893	364,985

d. Source Sampling	473,217	505,494
e. Meteorology	64,478	69,665
Total, Measurements and Analysis	$1,841,388	$1,936,838
4. For Administration of Senage Bill No. 41, Acts of the 64th Legislature, Regular Session, 1975	$ 30,000	$ 30,000
GRAND TOTAL, AIR CONTROL BOARD	$7,268,402	$7,700,704

SOURCE: Tex. Laws 1975, ch. 743, art. III, at pp. 2541-42.

Neither the *Fulmore* case discussed previously nor any other reported opinion has decided whether the item veto applies only to the total or may be used to strike a secondary sum or even a subdivision of a secondary sum. In practice, governors frequently veto subdivisions of secondary sums, even though the effect is to reduce the secondary sum and the total. For example, in the foregoing agency's appropriation, the governor vetoed item 2.f. (See Tex. Laws 1975, veto proclamation, at p. 2878.)

The *Fulmore* opinions refused to decide whether the attorney general would have money to operate in the second year of the biennium and thus left open the extent of the governor's power to destroy another constitutional office. The possibility is yet to be determined judicially, but six years after *Fulmore,* Governor James Ferguson was impeached following an item veto of the entire appropriation (except the salary of one official) for The University of Texas, an institution mandated by Article VII, Section 10. (See Tex. S. Jour., 35th Leg., 3d Called Sess. (1917), at p. 15.) Although the article of impeachment recognized the legality of the veto, it stated that he had an obligation to call a special session to appropriate for the university and that his refusal to do so would destroy an entity mandated by the constitution. Possibly because he subsequently did call a special session to appropriate for the university, the senate acquitted him of that particular charge. (Id. at pp. 897-99.) Recently, Governor Preston Smith vetoed all appropriations for the second year of a biennium and called a special session later to enact a one-year appropriations bill. (See Tex. Laws 1971, at p. 3823.)

Most of the other disputes over the veto power have involved minor questions, primarily involving procedures under Section 14. In one case, the supreme court ruled that Sundays are included in the 20 days that the governor has after adjournment to consider bills. (*Minor v. McDonald,* 104 Tex. 461, 140 S.W. 401 (1911).) In another case, the governor had filed a bill after adjournment in the secretary of state's office with a statement criticizing some of its provisions. Because the governor's statement clearly indicated that he intended to permit it to become law, the court rejected the contention he had vetoed the bill. (*Jackson v. Walker,* 121 Tex. 303, 49 S.W.2d 693 (1932).) The attorney general has ruled that when a bill is filed in the secretary of state's office, even though the governor's time to consider it has not elapsed, he may not recall it to change his action. (Tex. Att'y Gen. Op. No. O-5310 (1943).) Until it is filed, however, it may be recalled by the legislature for additional action. (*Teem v. State,* 79 Tex. Crim. 285, 183 S.W. 1144 (1916).) When only items are vetoed, the statement of the items the governor returns to the legislature is conclusive even though he neglects to sign the bill in strict compliance with the procedure for item vetoes. Thus, he may not veto an additional item he had inadvertently overlooked when he later signs the bill after legislative recon-

sideration. (*Pickle v. McCall,* 86 Tex. 212, 24 S.W. 265 (1893).)

Two uncertainties in the language of Section 14 have not caused any problems. First, the adjournment that frees the governor from returning a vetoed bill apparently has been construed to be adjournment *sine die*; at least it appears that no governor has attempted to circumvent the legislature's power to override by filing a bill with objections and issuing a veto proclamation during a mid-session adjournment or recess. Second, the ambiguity about the number of votes to override a general veto in the second house, which is discussed in the *History* to this section, has never arisen in court.

Comparative Analysis

General Veto. North Carolina is the only state that has no gubernatorial veto of any kind. All other states require the governor to return a vetoed bill within a specified number of days after presentation to him (three days, nine states; five days, 22 states; six days, four states; ten days, ten states; 12 days, one state; 15 days, one state) usually excepting Sundays and sometimes excepting holidays. Under the 1964 Michigan Constitution the governor has 14 days "measured in hours and minutes" from the time of presentation. The new Illinois Constitution gives the governor 60 days to return a vetoed bill.

Overriding a veto requires a vote of two-thirds of the elected members in 16 states, of those present in ten states, and of those voting in two states. Seven states require a two-thirds vote without specifying the members to be counted. Six states require a vote of three-fifths of the elected members and one requires three-fifths of those present. A simple majority of elected members suffices in six states. In Alaska, the required two-thirds of elected members rises to three-fourths for revenue and appropriation measures, including item vetoes. Three states increase the vote required to override vetoes of emergency matters.

In some 18 states the intervention of adjournment permits a governor to veto a bill by doing nothing—a "pocket veto." In the other states he must specifically veto a bill. Approximately 30 states give the governor a longer time to consider bills following adjournment than during a session. In some cases the increase may be only from three to five days, or from five to ten days. In other cases the period is lengthy, frequently 30 days, and in a few cases 45 days. Like Texas, the question of whether or not adjournment refers to final adjournment is not answered by the wording of most constitutions. A few states, however, have separate provisions for recess and final adjournment. Presumably bills vetoed after final adjournment are permanently dead in all states that do not provide a special procedure for reconsideration of postadjournment vetoes. A few state constitutions provide for a special session to reconsider postadjournment vetoes, either automatically or under a procedure by which the legislature may call itself into session. An additional two or three constitutions clearly provide that bills vetoed after adjournment may be returned for reconsideration at the beginning of the next regular session. In two states, the legislature in practice delays adjournment until the governor has acted on all bills.

The new Montana and Illinois Constitutions include an innovation authorizing the governor to return a bill with recommendations for amendments. If his suggestions are accepted, the bill is again presented for his approval. (Mont. Const. Art. VI, Sec. 10 (2); Ill. Const. Art. IV, Sec. 9 (e).)

The *Model State Constitution* provides for a general veto as follows:

> When a bill has passed the legislature, it shall be presented to the governor and, if the legislature is in session, it shall become law if the governor either signs or fails to veto it within fifteen days of presentation. If the legislature is in recess or, if the session

of the legislature has expired during such fifteen-day period, it shall become law if he signs it within thirty days after such adjournment or expiration. If the governor does not approve a bill, he shall veto it and return it to the legislature either within fifteen days of presentation if the legislature is in session or upon the reconvening of the legislature from its recess. Any bill so returned by the governor shall be reconsidered by each house of the legislature and, if upon reconsideration two-thirds of all the members shall agree to pass the bill, it shall become law. (Sec. 4.16(a).)

Note that the *Model* clearly distinguishes between recess and adjournment *sine die* (expiration) and permits a pocket veto, but only in the case of adjournment *sine die*.

Item Veto. Approximately 42 states grant the governor power to veto appropriation items, but there are limitations in some states. In one state, Missouri, the item veto may not be used in the case of appropriations for public schools or for payment of principal and interest on public debt. In Nebraska appropriations in excess of the governor's budget request require a three-fifths vote, but such items may not then be vetoed. In West Virginia, the legislature may not increase items in the governor's budget and, consequently, the bill does not require the governor's approval; his item veto applies only to supplemental appropriations. Six states permit the governor to reduce an item rather than veto it. The *Model* also permits reduction as follows:

The governor may strike out or reduce items in appropriation bills passed by the legislature and the procedure in such cases shall be the same as in case of the disapproval of an entire bill by the governor. (Sec. 4.16 (b).)

Author's Comment

The veto, particularly the item veto, is perhaps the most significant of the Texas governor's constitutional powers. Its availability and the threat of its use provides the governor with an effective tool by which to influence any legislative enactment, and because he has no significant budgetary powers (see the *Author's Comment* on Art. IV, Sec. 9), the item veto is the primary method by which he exercises some control over the amounts and purposes of state expenditures. As the *Comparative Analysis* reveals, the veto and item veto are almost universally accepted, and debate over their desirability is almost nonexistent.

The impact of the veto in practice, however, indicates that some adjustment may be in order. The legislature has not overriden a veto since 1941, which does not necessarily indicate an imbalance, but the likelihood of an override diminishes each year. The modern demands on the legislature make it increasingly more difficult for the members to consider adequately in 140 days every two years the many bills, both important and unimportant, presented to them. More and more, final action on bills is crowded into the closing hours of the session so that most of them, particularly the important ones, pass during the last ten days (Sundays excepted) of the legislature. Thus most vetoes are made in the 20 days after adjournment. For example, 210 of the 229 bills vetoed (not including item vetoes) from 1961 through 1975 have been after adjournment and not subject to an override. All item vetoes during that span have been after adjournment. Perhaps the figures on the numbers of bills considered after adjournment, whether vetoed, approved, or filed to become law without approval, are even more indicative of the significance of the veto. During this same period, the legislature passed 6,147 bills. Of that number, 3,725 or 60.6 percent were not considered by the governor until after adjournment. (In addition, governors have approved a significant number of bills passed during the last ten days (Sundays excepted) prior to adjournment.)

This imbalance will undoubtedly continue as long as the legislature is limited to one regular session of limited duration per biennium and probably will continue if regular sessions, however frequently they are permitted, are limited in duration. If that is to be the case, serious consideration should be given to an automatic session to reconsider vetoes only or to a legislatively called (*e.g.*, on petition of so many members of each house) veto session. The former, of course, would shift more legislative power back to the legislature than would the latter.

On the other hand, the inability of the governor to veto appropriations riders and the freedom the legislature has to lump several purposes under a single appropriations item has hampered the governor's use of the item veto. Of course, if the governor's budget powers were greater and particularly if the legislature's powers to alter his budget were limited as in the West Virginia Constitution, the item veto would be less important. If the legislative budget prevails, however, the power to reduce as well as veto appropriations items, which several states have adopted recently, would increase the governor's control over state expenditures, and if sessions are unlimited or a veto session is authorized or required, the likelihood of abuse would be diminished.

In the event of an effort to revise the constitution, the experience of the 1875 Constitutional Convention with the following section (see the *Author's Comment* on Art. IV, Sec. 15) illustrates the kinds of problems that can arise if the veto provisions are placed in the executive article. It is a legislative power and should be considered together with other legislative issues. Location of the veto section in the legislative article would be more likely to ensure that the entire constitutional legislative process is coordinated.

> Sec. 15. APPROVAL OR DISAPPROVAL OF ORDERS, RESOLUTIONS OR VOTES. Every order, resolution or vote to which the concurrence of both Houses of the Legislature may be necessary, except on questions of adjournment, shall be presented to the Governor, and, before it shall take effect, shall be approved by him; or, being disapproved, shall be repassed by both Houses, and all the rules, provisions and limitations shall apply thereto as prescribed in the last preceding section in the case of a bill.

History

The Constitution of the Republic lifted a provision almost identical with this section from Article I, Section 7, of the United States Constitution. The language has been carried forward in every subsequent constitution.

Explanation

Neither the house rules, the senate rules, nor the joint rules of the Texas Legislature recognize an "order" as a legislative document, and apparently no one has ever suggested that any vote preliminary to final passage of a bill or resolution is subject to gubernatorial veto. (Indeed, such a requirement would pose an almost insurmountable obstruction to the legislative process.) Thus Section 15 in practice applies only to resolutions. Resolutions requiring concurrence of both houses are of two types: joint resolutions, which propose amendments to this constitution and ratify proposed amendments to the United States Constitution (Tex. H. Rule 17 (1975)); and concurrent resolutions, which most frequently are used to adopt or suspend joint rules, to create joint committees, to recall bills and resolutions from the governor, to direct the appropriate enrolling clerk to make corrections in bills and resolutions, to confer permission to sue the state, to express legislative

opinion, and to adjourn *sine die* or beyond the constitutional three-day limit. (See Art. III, Sec. 17.)

Of course, adjournment resolutions are excepted from veto by the express terms of Section 15, but all others literally are subject to veto. In practice, the section is not applied that broadly. The attorney general recently ruled that a resolution requesting the United States Congress to call a constitutional convention pursuant to Article V of the United States Constitution is not subject to veto, because the federal provision mentions only requests by the *legislatures* of the states. (Tex. Att'y. Gen. Op. No. M-1167 (1972).) The attorney general's reasoning applies as well to joint resolutions ratifying proposed amendments to the United States Constitution, since only legislatures are mentioned in the Article V ratification process. An early attorney general's opinion ruled that proposed amendments to the state constitution are not subject to veto. (Tex. Att'y Gen. Op. (To Honorable F. O. Fuller, Feb. 13, 1917), 1917-1918 Tex. Att'y Gen. Bien. Rep. 760, which is discussed in detail in Tex. Att'y Gen. Op. No. M-1167 (1972).) Finally, resolutions dealing with the rules of proceedings of the two houses are, in practice, given effect without gubernatorial approval. (See *Annotation* of Tex. H. Rule 17, Sec. 13 (1975), in Texas Legislative Council, "Rules of the House," *Texas Legislative Manual* (Austin, 1971), p. 100.)

A supreme court justice has suggested that, unlike the section on veto of bills, this section requires the governor to approve a resolution (or have his veto overriden) for it to take effect. See *Fulmore v. Lane,* 104 Tex. 499, 140 S.W. 405, at 420 (1911) (dissenting opinion). As noted in the *History* of this section, its language has not been changed since the Constitution of the Republic, although the 1845 Constitution eliminated the pocket veto in the predecessor of Section 14 and this constitution added the postadjournment veto to that section. It seems more likely that the statement "all rules, provisions and limitations [prescribed in Section 14] shall apply thereto" means that the governor must actually disapprove to prevent effectiveness of a resolution, just as is required in the case of a bill.

Comparative Analysis

Approximately 20 other state constitutions authorize a gubernatorial veto of an "order, resolution or vote" (in a few instances, a resolution only) requiring concurrence of both houses. Almost all expressly except adjournment. Several, however, include other exceptions as well. Almost half except resolutions relating to the transaction of legislative business (a few expressly mention legislative investigations), and a similar number exclude proposals of constitutional amendments. Two states exclude resolutions relating to elections (probably referenda) from veto.

Author's Comment

As the *History* of this section noted, it is derived from the United States Constitution. The congressional view of the model for Section 15 is as follows:

> The sweeping nature of this obviously ill-considered provision is emphasized by the single exception specified to its operation. Actually, it was impossible from the first to give it any such scope. Otherwise the intermediate stages of the legislative process would have been bogged down hopelessly, not to mention the creation of other highly undesirable results. In a report rendered by the Senate Judiciary Committee in 1897 it was shown that the word "necessary" in the clause had come in practice to refer "to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two

Houses"; or more briefly, "necessary" here means necessary if an "order, resolution, or vote" is to have the force of law. Such resolutions have come to be termed "joint resolutions" and stand on a level with "bills," which if "enacted" become statutes. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President, nor resolutions passed by the Houses concurrently with a view to expressing an opinion or to devising a common program of action, or to directing the expenditure of money appropriated to the use of the two Houses.

. . . Also, it was settled as early as 1789 that resolutions of Congress proposing amendments to the Constitution need not be submitted to the President, the Bill of Rights having been referred to the States without being laid before President Washington for his approval—a procedure which the Court ratified in due course [citing *Hollingsworth v. Virginia,* 3 U.S. (3 Dall.) 378 (1798)]. (Library of Congress Congressional Research Service, *The Constitution of the United States of America—Analysis and Interpretation,* rev. ed. (Washington, D.C.: Government Printing Office, 1973), pp. 127-28 (footnotes omitted).)

As in the case of the federal constitution, the power to veto resolutions was necessary to ensure effectiveness of the veto under the Constitution of the Republic and under the prior state constitutions. Otherwise, laws enacted by resolution rather than bill might have escaped executive scrutiny. Since its adoption, the present constitution has prohibited the enactment of laws by resolution (see the *Annotation* of Art. III, Sec. 30), and the probable original reason for Section 15 no longer exists. As is the case in the federal constitution, about one-half of the states with a similar provision have no constitutional requirement that laws be enacted only by bill. It is probable that the lack of coordination between the 1875 Convention's Committees on the Legislative Department and the Executive Department (and the failure to include the veto in the legislative article, where it belongs, and thus under the jurisdiction of the Committee on the Legislative Department) let Section 15 slip through unnoticed.

The congressional experience suggests that Section 15 was too broadly worded even when it was necessary under the prior constitutions, and there is no justification under the present constitution for its retention. If not eliminated, it should be narrowed to preclude gubernatorial involvement in legislative operations as well as to remove the burden on the governor of having to consider every resolution memorializing or congratulating a citizen or otherwise expressing legislative opinion.

Sec. 16. LIEUTENANT GOVERNOR. There shall also be a Lieutenant Governor, who shall be chosen at every election for Governor by the same electors, in the same manner, continue in office for the same time, and possess the same qualifications. The electors shall distinguish for whom they vote as Governor and for whom as Lieutenant Governor. The Lieutenant Governor, shall by virtue of his office, be President of the Senate, and shall have, when in Committee of the Whole, a right to debate and vote on all questions; and when the Senate is equally divided to give the casting vote. In case of the death, resignation, removal from office, inability or refusal of the Governor to serve, or of his impeachment or absence from the State, the Lieutenant Governor shall exercise the powers and authority appertaining to the office of Governor until another be chosen at the periodical election, and be duly qualified; or until the Governor impeached, absent or disabled, shall be acquitted, return, or his disability be removed.

History

This section originated in the 1845 Constitution and has appeared virtually unchanged in every subsequent constitution. During the 1875 Convention there

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History

This section originated in the 1845 Constitution and has appeared virtually unchanged in every subsequent constitution. During the 1875 Convention there

were a few attempts to abolish the office, but both were rejected without extensive debate. (*Debates*, pp. 96, 152.)

Explanation

Section 1 of this article establishes the office of lieutenant governor as an executive officer of the state, but this section reveals that his principal duties are legislative. The lieutenant governor exercises executive duties only when acting as governor. (The succession provisions of this section are discussed more fully in the annotation of Sec. 17.) Because the lieutenant governor is the principal successor to the office of governor his qualifications, selection, and term are the same as the governor's.

The legislative duties imposed by this section are not inherently significant except when there is a tie vote. The Vice-President of the United States and lieutenant governors in most states have similar constitutional duties, but in most cases the role of presiding officer is formal and offers no opportunity to influence legislation. In Texas, the senate's rules have given the lieutenant governor, as presiding officer, significant power over its organization and operation. By statute the lieutenant governor serves on and appoints senate members to several legislative service agencies, including the Legislative Budget Board and the Texas Legislative Council, and another section of the constitution (Art. III, Sec. 28) makes him a member of the Legislative Redistricting Board.

Comparative Analysis

In 38 states the lieutenant governor is a constitutional officer, and in almost all of those states he presides over the senate. In Nebraska he presides over that state's unicameral legislature. In Massachusetts he is a member of the governor's council, which includes eight other members elected by districts to advise the governor, and presides over it in the governor's absence. In Hawaii he performs only the duties prescribed by law, and statutes have given him the duties normally imposed on a secretary of state. In Tennessee the title of lieutenant governor has been given by statute to the speaker of the senate, a constitutional officer who succeeds to the governorship. Several states in recent years have withdrawn the lieutenant governor's legislative duties, permitting the senate to elect its presiding officer from its membership, and have given him only those duties delegated by the governor or prescribed by law.

Recently, several states have also adopted a team system, similar to that for electing the U.S. president and vice-president, for election of governor and lieutenant governor. In at least 11 states, voters cast one vote for a governor-lieutenant governor team (secretary of state in Alaska), so that succession will be in the same party. Before 1960, only New York required the team system.

No state permits the lieutenant governor, as presiding officer, to vote except when a tie occurs, and most permit him to break a tie. In only six or so states does the lieutenant governor retain the right to vote and debate in committee of the whole senate.

Under the *Model State Constitution* there is no lieutenant governor. The governor is the only constitutional executive officer and the legislature elects its presiding officers. (For a discussion of the other states' succession provisions, see the *Comparative Analysis* of Sec. 17.)

All of the recently revised state constitutions have sought new ways to handle the elected lieutenant governor. The office exists primarily to have an official elected statewide on hand to succeed to the governorship, and a few states,

adopting the approach of the *Model State Constitution,* have abolished the office and require a special election to fill a vacancy in the governor's office if a substantial portion of the term remains. Several of the newest constitutions (Michigan, Illinois, and Montana) have, instead, omitted the traditional legislative duties of the office and have given him the duties delegated by the governor. (Montana's and Michigan's constitutions, however, state that the governor may not delegate constitutional powers and duties.) Those states also require a joint election—one vote for a governor-lieutenant governor team—which, considering the nature of the lieutenant governor's duties, seems appropriate. Alaska abolished the office and provided that the secretary of state be elected on a joint ballot to succeed to the governorship if necessary. Hawaii reached the same result by giving the lieutenant governor, by statute, the duties normally given a secretary of state.

Author's Comment

As the attempts to abolish the office of lieutenant governor during the 1875 Convention indicate, debate over the need for an elected lieutenant governor is not a recent phenomenon. Unlike Texas, where the office exercises potent legislative powers by virtue of the senate's rules, most states have found little for the occupant to do, even though he is expected to have the stature necessary to become governor. Of course, the Texas practice is only informal and continues only at the sufferance of the senate, which controls its own rules. (See Art. III, Sec. 11.) If the senate ever revolts, Texas may find itself with an idle lieutenant governor.

Sec. 17. DEATH, RESIGNATION, REFUSAL TO SERVE, REMOVAL, INABILITY TO SERVE, IMPEACHMENT OR ABSENCE; COMPENSATION. If during the vacancy in the office of Governor, the Lieutenant Governor should die, resign, refuse to serve, or be removed from office, or be unable to serve; or if he shall be impeached or absent from the State, the President of the Senate, for the time being, shall in like manner, administer the Government until he shall be superseded by a Governor or Lieutenant Governor. The Lieutenant Governor shall, while he acts as President of the Senate, receive for his services the same compensation and mileage which shall be allowed to the members of the Senate, and no more; and during the time he administers the Government, as Governor, he shall receive in like manner the same compensation which the Governor would have received had he been employed in the duties of his office, and no more. The President, for the time being, of the Senate, shall, during the time he administers the Government, receive in like manner the same compensation, which the Governor would have received had he been employed in the duties of his office.

History

Only one significant change has been made in this section since 1845. Prior to the 1876 Constitution the predecessors of this section provided for the senate to elect a president only when the lieutenant governor was acting as governor or otherwise was unable to preside over the senate. Another section directed the senate to choose a president when it organized. (See the *History* of Art. III, Sec. 9.) Apparently that president was not the one who stood in line to succeed to the governorship. Prior constitutions also contained a provision requiring the secretary of state to convene a special session of the senate to choose a president if the lieutenant governor, while acting as governor during a recess of the legislature, died, resigned, or was absent from the state. Section 17, as submitted by the 1875 Convention's Committee on the Executive Department, contained similar provisions. The convention, during floor debate, deleted election of a president of the

senate for the sole purpose of succession and the requirement for the secretary of state to convene a special session of the senate. Thus, the president *pro tempore* of the senate, elected under Section 9 of Article III, became the second officer in the line of succession. (*Journal,* pp. 232-33, 293.)

Under the first three state constitutions the lieutenant governor, while acting in a legislative capacity, received the same compensation as the speaker of the house. The 1869 Constitution gave him "twice the *per diem* or pay of a Senator." The 1875 delegates apparently did not debate the reduction to the same compensation as senators and the addition of mileage made by the present section.

Explanation

Succession. This section and the preceding section provide for the line of succession to the governorship, and their application is reasonably clear. Under Section 16 the lieutenant governor acts as governor under certain circumstances, and when he does, the president *pro tempore* of the senate exercises the duties of the lieutenant governor's office under Article III, Section 9. Then, if something happens to the lieutenant governor while acting as governor, this section moves the president *pro tempore* into the governor's office. It also provides that an officer that acts as governor receives the equivalent of the governor's salary.

There are a few problems posed by Sections 16 and 17, however. First, there is an ambiguity under Section 16 concerning the tenure of the lieutenant governor in the governor's office. This ambiguity was created by the 1972 amendment that made the governor's term four years (Sec. 4). If the lieutenant governor succeeds to the governorship during the first two years of a four-year term, serving until a governor is chosen "at the periodical election" might require election of a new governor to fill two years of the unexpired term. This problem did not exist when terms were two years; expiration of the governor's term and the next general election always coincided. (The four-year term amendment created the same ambiguity in Section 3a of this article, which provides for succession if a governor-elect does not take office.) In analogous situations, Section 12 of this article clearly requires an election at the next general election to fill the unexpired term when the governor makes an appointment to fill a vacancy in an elective office. This section was written when terms were two years, however, and it is unlikely that anyone intended to limit the tenure of a successor when four-year terms were adopted. Moreover, less reason exists in the case of succession by the lieutenant governor than in the case of appointed successors governed by Section 12 to have an election to fill an unexpired term. The lieutenant governor is elected by the same electorate as the person he is to succeed, and his only executive function is to succeed to the governorship. The ambiguity is less pronounced in Section 17. The tenure of a president *pro tempore* of the senate succeeding to the governorship—"until he is superseded by a Governor or a Lieutenant Governor"—would permit service either for the unexpired term or until the next general election. Whether a successor should be elected at a midterm general election clearly is subject to statutory resolution if the president *pro tempore* succeeds to the governorship, but as yet no statute exists.

Another problem relates to the qualifications of a president *pro tempore* for the office of governor. A senator may be as young as 26 (Art. III, Sec. 6), while a governor may be no younger than 30 (Art. IV, Sec. 4), and a 26-year-old senator may be elected president *pro tempore* of the senate (Art. III, Sec. 9). Section 18 of this article makes successors subject to the "restrictions and inhibitions imposed in this Constitution on the Governor." But Section 3a does likewise in limiting statutory succession schemes, and in that section qualifications are mentioned in

the same context, suggesting that "restrictions and inhibitions" do not include qualifications. Thus Sections 4 and 18 may not limit this section, and a president *pro tempore* of the senate who is younger than 30 might succeed to the governorship.

In practice, the first sentence of this section has been ignored. It requires a "vacancy" in the office of governor, which normally means death, resignation, or removal and not disability or absence, before the president *pro tempore* of the senate may act as governor. He frequently does so, however, when both the governor and lieutenant governor are outside the state (see C. McClesky, *The Government and Politics of Texas,* 5th ed. (Boston: Little, Brown, 1975), p. 147), and apparently no one has contested the validity of gubernatorial acts performed by a president *pro tempore* in those circumstances.

Compensation. Although it results in awkward organization, this section also fixes the lieutenant governor's compensation. He is paid a legislator's salary, which is fixed in Article III, Section 24, at $7,200 annually plus a $30 daily allowance during legislative sessions. (The mileage authorized by this section referred to the allowance for travel to and from the capital for each session, which Article III, Section 24, provided prior to a 1975 amendment. Since that amendment, travel expenses are no longer covered in the constitution, and a statute authorizes a more generous allowance. See Tex. Rev. Civ. Stat. Ann. art. 5429f.) The salaries of all other constitutional executive officers are fixed by statute (see Secs. 5, 21, 22, and 23), and for the fiscal year that began September 1, 1975 the lowest paid of those, the secretary of state, received an annual salary of $38,100. (See Tex. Laws 1975, ch. 743, art. III, at 2670.) An amendment that would have deleted the provisions of this section on the lieutenant governor's legislative salary and fixed his salary in a new section in the legislative article at $22,500 annually was defeated in November 1972. The strange wording about compensation of the lieutenant governor and the president of the senate while acting as governor probably is intended to prevent them from receiving both a governor's and a legislator's compensation.

Comparative Analysis

Succession. In the 38 states that have a constitutional lieutenant governor, he is, of course, the person who is first in line to succeed to the office of governor. Among the remaining states, seven make the president of the senate first to succeed, four make the secretary of state first, and one permits the legislature to elect a successor (but if the legislature is in recess, the president of the senate succeeds until the legislature convenes and makes a choice).

There are a great many variations in the order of succession. One-half of the states with a lieutenant governor make the president of the senate the second in the line of succession, seven designate the secretary of state, three the speaker of the lower house, one the attorney general, and eight permit subsequent succession to be determined by law. The speaker of the lower house is second in line in the states that make the president of the senate first in line to succeed. Approximately one-half the states designate the third official to succeed to the governorship (usually the speaker of the lower house in states in which the lieutenant governor and the president of the senate are the first two), and about ten even specify subsequent successors. Two states provide for legislative election of a successor after the first two. A few of the states that enumerate several elected officials in the line of succession provide that they are ineligible if they were not elected to the office.

In general, all states provide for succession under much the same circumstances

as those set forth in Sections 16 and 17. New Hampshire adds that if the governor's absence from the state is for official business he continues to perform his duties. (*Cf.* Art. XVI, Sec. 9, of the Texas Constitution.) Almost all states provide that the successor serves the remainder of the term or, if the governor's absence, disability, etc., is temporary, until the disability or absence terminates. When the succession is permanent, however, a few states with four-year terms provide, if the circumstances are appropriate, for election at the next general election to fill the final two years of the term, and two states require a *special* election under some circumstances to fill the unexpired term. About five states provide a procedure for determining whether the governor is absent or disabled and one authorizes the legislature to do so. One state specifically exempts the president of the senate and the speaker of the lower house from meeting some qualifications for governor when they succeed to the office. About half the states specify that an acting governor receives the governor's salary.

The *Model State Constitution* contains a comprehensive section (Sec. 5.08) on gubernatorial succession. First, it covers the failure of a governor-elect to take office. (See the *Comparative Analysis* of Sec. 3a of this article.) Next it covers temporary situations—impeachment, mental or physical disability, and "continuous absence"—in which case the presiding officer of the legislature (or of the senate in a bicameral legislature) serves as acting governor. If the disability or absence exceeds six months the office becomes vacant. In case of vacancy, the presiding officer succeeds to the office for the remainder of the term unless more than one year remains of the term. In that event he serves as acting governor until a new governor is elected at a special election and assumes office. The legislature is given the duty to prescribe by law for special elections to fill vacancies in the governorship, and the supreme court is given "original, exclusive and final jurisdiction" to settle any questions of absence, disability, existence of a vacancy, and all other matters concerning succession to the office or to its powers and duties.

Compensation. About nine other states that have a constitutional lieutenant governor tie his compensation to that of a legislator, usually the speaker of the lower house. The majority of those states, however, permit a legislator's salary to be fixed by law, and a few specify that the lieutenant governor's salary is double a legislator's. The others, like Texas, fix a legislator's pay at a miniscule amount in the constitution.

Of the remaining states, about three fix the lieutenant governor's salary at a small amount ($1,000 to $2,500 a year). The others permit the legislature to fix his salary. The *Model State Constitution* has no such office, but it does permit salaries to be fixed by law.

Author's Comment

As was suggested in the *Author's Comment* on Section 16, there have been several new approaches for ensuring availability of a successor to the governorship who is elected statewide. Of the various approaches, the special election is one that is most certain to ensure indefinite succession and most likely to put an effective person in the office. Another approach is to authorize the legislature to provide by law for succession beyond the first in line to succeed. That, of course, would permit the legislature to provide for special elections. The new Illinois Constitution fixes an order of succession among several offices that are filled by statewide election, disqualifies an incumbent in one of those offices if he was appointed to a vacancy, and authorizes a statute to determine succession after the enumerated officials are exhausted. (Ill. Const. Art. V, Sec. 6.)

Another recent innovation has been the establishment of a formal method for

determining when the governor is mentally or physically disabled. The Twenty-fifth Amendment to the United States Constitution provides that in the absence of a voluntary declaration of incapacity from the president, the vice-president and a majority of the cabinet decide. If the president disagrees, however, it takes a two-thirds vote by congress, within a specified time, for the vice-president to continue as acting president. The *Model State Constitution* gives the supreme court "original, exclusive and final jurisdiction to determine absence and disability . . . existence of a vacancy . . . and all questions concerning succession." It leaves the procedures to be developed by the court or the legislature. Under the new Montana Constitution the lieutenant governor and the attorney general jointly raise the issue of the governor's ability to continue, and the governor raises the issue of his ability to resume. In either case, the governor continues to perform the duties unless the legislature, convening in special session if necessary, by a two-thirds vote finds him incapacitated. The simplest approach, however, is that adopted in Illinois. The legislature determines by law who may question the governor's capacity and the forum and procedures for settling the issue. The failure of the Texas Constitution to provide a forum and procedures for deciding questions about the governor's capacity to continue and other succession issues has not yet caused a problem and rarely will. If the problem arises only once, however, it could be disastrous. Some constitutional provision should be made, and the Illinois provision is the most flexible.

Less important is the question whether the lieutenant governor should temporarily succeed when the governor is outside the state. Today, a governor can administer the office better from outside the state than he could have from 100 miles outside the capital in 1845. The *Model State Constitution* requires "continuous absence" and provides a procedure for determining when it exists. The new Montana and Illinois Constitutions do not mention absence but permit the governor to notify his successor to act as governor when he wants a vacation from the duties of the office, for example. (The successor is elected on a joint ticket.)

Sections 16 and 17 only hint at a distinction between an acting governor, who exercises the powers and duties of the office temporarily but does not move into the governor's mansion and retains title to his first office, and one who succeeds to the office permanently. For example, the compensation provisions are necessary only for acting governors. A clarification of the distinction would be helpful and appropriate. The *Model State Constitution* expresses the distinction as follows:

> When the presiding officer of the legislature succeeds to the office of governor, he shall have the title, powers, duties, and emoluments of that office and, when he serves as acting governor, he shall have the powers and duties thereof and shall receive such compensation as the legislature shall prescribe by law. (Sec. 5.08(c).)

One other advantage of the *Model* over Texas' succession provisions is that it covers succession in one place and not in three sections sprinkled haphazardly around the executive article. Finally, a clarification about whether or not a successor must also be eligible for election to the governorship and, if he must, provision for an alternative when the person in line to succeed is ineligible might forestall confusion in the future.

Sec. 18. RESTRICTIONS AND INHIBITIONS. The Lieutenant Governor or President of the Senate succeeding to the office of Governor, shall, during the entire term to which he may succeed, be under all the restrictions and inhibitions imposed in this Constitution on the Governor.

Art. IV, § 19

History

The 1875 Convention added this section to the present constitution without apparent debate. No similar provision appeared in any of the prior Texas constitutions.

Explanation

The delegates to the Convention of 1875 apparently wanted to be certain that anyone succeeding to the office of governor could not circumvent constitutional restrictions on the occupant of that office. Presumably, the restrictions they had in mind were those on dual officeholding and outside employment (Art. IV, Sec. 6) and residence (Art. IV, Sec. 13). No reported judicial opinion or attorney general's opinion has construed the provision, however.

Comparative Analysis

Neither the *Model State Constitution* nor any other state's constitution contains a provision resembling this one.

Author's Comment

It is inconceivable that anyone could devise a persuasive argument that a successor to the vacant office of governor is not under the same restrictions as a person elected to the office. On the other hand, if this section applies to an acting governor—one who exercises the powers and duties of the office during temporary absence or disability of the governor—it is mostly ignored. It is doubtful that every president *pro tempore* who has signed a proclamation as governor while the governor and lieutenant governor were out of the state has resigned all his directorships in corporations (see Art. IV, Sec. 6), for example. In any event, the most important restriction—against dual officeholding—applies to all officeholders. (See Art. XVI, Sec. 40.)

Sec. 19. SEAL OF STATE. There shall be a Seal of the State which shall be kept by the Secretary of State, and used by him officially under the direction of the Governor. The Seal of the State shall be a star of five points encircled by olive and live oak branches, and the words "The State of Texas."

History

The Constitution of the Republic required a seal of the Republic, which was to be kept and used officially by the president. The 1845 Constitution continued the provision, substituting the governor for the president and adding the design detail. The provision has been included in every subsequent constitution. When this section was adopted in 1876, the secretary of state was given custody of the seal and directed to use it at the direction of the governor.

Explanation

This section is self-explanatory.

Comparative Analysis

All but 11 states have some constitutional reference to a seal. Over half the states give custody of the seal to the secretary of state and another 12 give custody to the governor. There are other miscellaneous references relating to its use or design. The *Model State Constitution* is silent on the subject.

Author's Comment

It is traditional for governments to adopt a seal, and someone must have custody of it. Both could be provided by statute, but it must be conceded that this type of inclusion, unlike most unnecessary inclusions, has caused no constitutional mischief.

Sec. 20. COMMISSIONS. All commissions shall be in the name and by the authority of the State of Texas, sealed with the State Seal, signed by the Governor and attested by the Secretary of State.

History

This section originated in the 1845 Constitution. (A similar provision appeared in the Constitution of the Republic.) It has continued unchanged since then.

Explanation

This section provides the means of authenticating the official status of public officials, local and state. (See Election Code art. 8.45.)

Comparative Analysis

Some 34 states have constitutional references to the issuance of commissions to public officials. All but two require that they be issued in the name of the state, sealed with the state seal, and signed or attested by the governor, and only eight do not require a countersignature or attestation by the secretary of state. The mavericks provide only that commissions be issued by the governor (New Jersey) or in the name of the state (West Virginia). The *Model State Constitution* provides that the governor commissions all state officers.

Author's Comment

Obviously it is desirable to provide some method of authenticating the official status of persons who exercise governmental powers. It could be provided by statute, however.

Sec. 21. SECRETARY OF STATE. There shall be a Secretary of State, who shall be appointed by the Governor, by and with the advice and consent of the Senate, and who shall continue in office during the term of service of the Governor. He shall authenticate the publication of the laws, and keep a fair register of all official acts and proceedings of the Governor, and shall, when required, lay the same and all papers, minutes and vouchers relative thereto, before the Legislature, or either House thereof, and shall perform such other duties as may be required of him by law. He shall receive for his services an annual salary in an amount to be fixed by the Legislature.

History

The Constitution of the Republic stated that the president could appoint a secretary of state with the advice and consent of the senate. He served "during the term of service" of the president "unless sooner removed by the President, with the advice and consent of the Senate."

This section first appeared in 1845, although it did not require the secretary of state to authenticate publication of the laws and his compensation was not mentioned. The 1845 Constitution also specified that he served "during the term of service of the Governor elect." The provision continued in that form until the 1876

Constitution.

At the 1875 Convention the delegates added the duty to authenticate publication of the laws and added a sentence fixing his salary at $2,000 annually. There was an effort to make the office elective and extensive debate about the amount of his salary but none on the deletion of "elect" following "Governor" in the 1869 phrase. (See *Debates,* pp. 162-63, 166, 256-57.)

In 1936 an amendment increased the salary for the office to $6,000 annually, and in 1954 an amendment removed the constitutional limitation on salary, but a companion amendment prohibited the legislature from setting the salary at less than $6,000. (See Art. III, Sec. 61.)

Explanation

With one exception, this section is self-explanatory. The peculiar wording about the tenure of the office suggests that a governor who succeeds to the office when vacant can select his own secretary of state. That construction was more plausible under the earlier constitutions, when the tenure was the "term of service of the Governor elect," but there is no indication that the 1875 delegates intended to make a change, for if they had, it easily could have been clearer.

Comparative Analysis

Most states have a constitutional secretary of state. A majority make it an elective office, and two provide for filling it by a joint vote of the legislature. Almost all states provide that the duties of the office are to be prescribed by law, and a substantial percentage provide some constitutional duties ranging from *ex officio* membership on boards to attending to the governor, council, and legislature. There is no secretary of state provided by the *Model State Constitution.*

Author's Comment

Constitutional debate about the secretary of state usually involves the necessity of making it a constitutional office. The *Author's Comment* on Section 16 points out that two states have made the officer who performs the duties of the secretary of state the successor to the governor. Unless the secretary of state performs this role, however, there seems little justification for maintaining his constitutional status.

Sec. 22. ATTORNEY GENERAL. The Attorney General elected at the general election in 1974, and thereafter, shall hold office for four years and until his successor is duly qualified. He shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law. He shall reside at the seat of government during his continuance in office. He shall receive for his services an annual salary in an amount to be fixed by the Legislature.

History

The 1845 Constitution created the constitutional office of attorney general in the judicial article. He was appointed by the governor, with advice and consent of

the senate, to a two-year term, and his duties and salary were prescribed by statute. An amendment in 1850 made the office elective, and the 1861 Constitution retained the 1845 language and the 1850 amendment.

In the 1866 Constitution the office remained in the judicial article. He was elected to a four-year term, required to reside in the capital and perform duties fixed by law, and received, in addition to perquisites, an annual salary fixed at $3,000 that could not be "increased or diminished during his term of office."

The 1869 Constitution moved the office into the executive article and provided that it be filled by appointment of the governor with senate confirmation. Again, the attorney general had to reside in the capital and served for four years. In addition to the duties required by law, he was to "represent the interests of the State in all suits or pleas in the Supreme Court in which the State may be a party; superintend, instruct, and direct the official action of the district attorneys so as to secure all fines and forfeitures, all escheated estates, and all public moneys to be collected by suit; and . . . when necessary, giving legal advice in writing to all officers of the government. . . ." (See Tex. Const. Art. IV, Sec. 23 (1869).) Only the 1869 Constitution imposed qualifications (same as the governor) on the office.

The 1876 Constitution again made the office elective and reduced its term to two years. The attorney general's compensation was an annual salary of $2,000 "besides such fees as may be prescribed by law; provided, that the fees which he may receive shall not amount to more than two thousand dollars annually." The delegates to the 1875 Convention without much debate added lengthy instructions to the attorney general about corporate charters and illegal corporate actions or charges. (See *Journal*, p. 295; *Debates,* pp. 163-64.)

In 1936 an amendment increased the attorney general's salary to $10,000 and deleted the fee provisions. In 1954 another amendment adopted the present language on compensation while a companion amendment prohibited the legislature from setting the salary at less than $10,000. (See Art. III, Sec. 61.) A 1972 amendment increased the term of the office to four years.

Explanation

The provisions of this section regarding the attorney general's term of office, residence, and compensation are simple and straightforward. If the powers and duties of the office had been left to be prescribed by law, Section 22 would have caused few problems. Since some powers and duties were included, however, the meaning of the section has been a continuous source of litigation and speculation.

One of the first questions to arise involved the relationship between the attorney general and the county and district attorneys. Article V, Section 21, provides that the county and district attorneys "shall represent the State in all cases in the District and inferior courts," and this section requires the attorney general to "represent the State in all suits and pleas in the Supreme Court." Presumably, the draftsmen intended the local state's attorneys to handle trials and the attorney general to handle appellate work. If that was so, Section 22 was incomplete because the constitution directed no one to appear for the state in the court of appeals, which appeared in the 1876 Constitution as it was originally adopted. (The court of criminal appeals and courts of civil appeals replaced the court of appeals in 1891. See the *History* of Art. V, Sec. 1.) Apparently, the Committee on the Executive Department, whose report the convention considered and finally adopted four days before the Committee on the Judicial Department had even reported (*Journal*, pp. 375, 406), anticipated that the judiciary article would provide only one appellate court—a supreme court—as had been the case in all the prior state constitutions. (See the *History* of Art. V, Sec. 1.) In fact, the report of

the Committee on the Judicial Department provided only for the supreme court. (*Journal*, pp. 406-22.) The convention added the court of appeals during floor debate more than 20 days after final adoption of the executive article (*Journal*, p. 640), and apparently no one remembered to go back and add the court of appeals to this section.

Shortly after adoption of the constitution, Justice Stayton, who had been a delegate to the 1875 Convention, stated for the supreme court that indeed the constitution divided responsibility for representing the state with the attorney general to appear before the supreme court and county and district attorneys to appear in trial courts. (The legislature could determine who would represent the state before the court of appeals.) This constitutional division of authority was mandatory, and a statute could not authorize the attorney general to file suit in behalf of the state without express constitutional authorization. (*State v. Moore*, 57 Tex. 307 (1882).) Such a division of authority proved impracticable, however. As a supreme court opinion in a later case pointed out (see following citation for *Brady v. Brooks*), county and district attorneys are elected locally and they are elected primarily to perform their principal function—prosecution of criminal cases. Their independence of any statewide authority made it impossible to apply a uniform policy in the initiation (or defense) of suits on behalf of the state. Perhaps for those reasons the legislature ignored *Moore* and continued to direct the attorney general to sue on behalf of the state to collect delinquent taxes, recover state lands, etc. Finally, in *Brady v. Brooks* (99 Tex. 366, 89 S.W. 1052 (1905)) the supreme court ruled that the phrase in Section 22 directing the attorney general to "perform such other duties as may be required by law" empowers the legislature "to create causes of action in favor of the state, and to make it the exclusive duty [of the attorney general] to prosecute such suits" in trial as well as appellate courts. Since *Brady* the courts have emphasized repeatedly that the attorney general may be given trial duties when the legislature creates a new or additional cause of action. (See *Smith v. State*, 160 Tex. 256, 328 S.W.2d 294 (1959); *Maud v. Terrell*, 109 Tex. 97, 200 S.W. 375 (1918).)

The *Brady* rule that the attorney general may appear for the state in trial court only to enforce a *new* cause of action in favor of the state has not been explored further. No reported opinion has ruled that a cause of action the attorney general sought to enforce pursuant to a statutory authorization was an old or preexisting one that is to be enforced exclusively by county and district attorneys. One case, however, ruled that the attorney general may not be given *exclusive* authority to prosecute *criminal* offenses, but the court declined to decide whether he may be authorized to prosecute crimes in instances in which local state's attorneys refuse to prosecute. (See *Shepperd v. Alaniz*, 303 S.W.2d 846 (Tex. Civ. App.—San Antonio 1957, *no writ*).) In practice, the *Moore-Brady* rule that the trial-appellate division of powers in this section and Article V, Section 21, is exclusive has been ignored. The attorney general frequently appears for the state at the trial level, sometimes without statutory authorization, and district and county attorneys usually appear before the supreme court in appeals of cases they handled in trial court.

The attorney general's constitutional powers respecting private corporations have also required judicial clarification. Soon after adoption of this constitution the supreme court ruled that the attorney general's supervisory powers over private corporations authorize him to institute and maintain suit to prevent or redress illegal acts by private corporations even in the absence of a statute and that his power to do so is exclusive and may not be exercised by or given by law to the county and district attorneys. (*State v. Paris Ry.*, 55 Tex. 76 (1881); *State v. International & G.N.R.Co.*, 89 Tex. 562, 35 S.W. 1067 (1896). Prior to *Brady*, this

was the attorney general's only constitutional authority to appear in trial court.) The attorney general may not sue a corporation when only private rights are involved, however; injury to the public generally must have occurred or be imminent. (*State v. Farmers' Loan & Trust Co.*, 81 Tex. 530, 17 S.W. 60 (1891).) Thus if a public utility seeks to charge unreasonably high rates, the attorney general may, at least in the absence of governmental regulation of rates, institute suit to prevent imposition of the unreasonable rates. (*State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526 (Tex. 1975).)

This section and Article V, Section 22, in defining who may represent the state, are exclusive. The legislature may not authorize a private citizen to maintain suit on behalf of the state (*American Liberty Pipe Line Co. v. Agey*, 167 S.W.2d 580 (Tex. Civ. App.—Austin 1942), *aff'd*, 141 Tex. 379, 172 S.W.2d 972 (1943)). More importantly, the legislature may not authorize another state, county, or district office or agency to employ attorneys to represent its and, hence, the state's interest in court unless the agency's attorney acts as a subordinate to and with approval of the attorney general or a county or district attorney. (*Maud v. Terrell*, 109 Tex. 97, 200 S.W. 375 (1918).) Perhaps because the caseloads in some instances have become too burdensome for the state's attorneys and their staffs, the legislature occasionally authorizes other attorneys to represent the state in court (presumably as a *special* assistant state's attorney), if the attorney general or a local state's attorney approves. (See, *e.g.*, Tex. Rev. Civ. Stat. Ann. art. 7335a.)

The legislature has created an office of state's attorney, appointed by the court of criminal appeals and independent of the constitutional state's attorneys, to represent the state before the court of criminal appeals. (See Tex. Rev. Civ. Stat. Ann. art. 1811.) Presumably, the legislature concluded that it could do so because this section mentions only appearances for the state before the supreme court.

An early case stated that the attorney general may act only if he has constitutional or statutory authority to do so. (*Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S.W. 865 (1887) (Stayton, J.). See also *Garcia v. Laughlin*, 155 Tex. 261, 285 S.W.2d 191 (1955); *State* ex rel. *Downs v. Harney*, 164 S.W.2d 55 (Tex. Civ. App.—San Antonio 1942, *writ ref'd w.o.m.*).) Several attorneys general have contended, however, that the office has inherent, common-law powers (*e.g.*, Shepperd, "Common Law Powers and Duties of the Attorney General," 7 *Baylor L. Rev.* 1 (1955)), and gratuitous statements in a few early decisions support the contention (*e.g.*, *Queen Ins. Co. v. State*, 22 S.W. 1048, 1052 (Tex. Civ. App.), *rev'd on other grounds*, 86 Tex. 250, 24 S.W. 397 (1893)). In fact, the attorney general has been representing the state on the assumption that he has common-law authority to do so in federal habeas corpus proceedings, for example. (See Taylor, "Modernizing the Powers of the Attorney General of Texas," 36 *Texas Bar J.* 51 (1973).) The issue has not yet been decided by the courts. It is not inconceivable that the courts ultimately may decide that the office has implied or common-law powers to represent the state in situations in which the constitution and the statutes are silent. Yet the *Brady* case and the express constitutional requirement that county and district attorneys represent the state in trial courts appear to be insuperable obstacles to any implied power to institute or defend suits in state courts.

The attorney general's constitutional duty to render advisory opinions has caused no problems. Indeed, the constitutional duty has been supplanted by broader statutory responsibilities (Tex. Rev. Civ. Stat. Ann. art. 4399).

Comparative Analysis

The attorney general is a constitutional officer in most states and is elected in about half. In one state he is appointed by the supreme court to an eight-year term.

His term of office is usually the same as the governor's, and his duties are usually prescribed by law, although several states also prescribe some duties in the constitution. Only a few constitutions require the attorney general to be an attorney. The *Model State Constitution* does not mention a chief law officer.

Author's Comment

It is because of the excessive detail about the duties of the attorney general (and of the county and district attorneys) that this section has caused so much litigation. If the 1875 Convention had abandoned the 1869 Constitution's specification of duties and returned to the form of the first three state constitutions, which left *all* the attorney general's duties to be prescribed by law, a century of jurisdictional clashes with local state's attorneys probably would not have occurred.

Moreover, if the 1875 Convention's Committee on the Executive Department had paid closer attention to the effect of the changes it was making it might have foreseen the unworkability of divided authority to represent the state. The 1869 Constitution directed the attorney general to represent the state before the appellate court, but it also gave him supervisory power over local state's attorneys in most civil cases. (See the *History* of this section.) Thus the 1869 division of authority made sense. At least in theory, the cases the attorney general handled on appeal had been tried by his subordinates. The committee probably was displeased with the theoretical subordination of local state's attorneys to the attorney general, but their retention of the 1869 Constitution's division of authority without any central supervision over the local trial attorneys undoubtedly created as many problems as it solved. It may have appeared convenient to delegates who had come long distances to the convention, probably on horseback over poor or nonexistent roads, to let the attorney general stay in the capital and the local state's attorneys stay in their localities, but had the delegates questioned the need for preserving that convenience in the constitution, particularly in light of the change they made in the status of the local state's attorneys, they might have elected to return to the language of earlier constitutions.

Traditionally, the primary state function of county and district attorneys has been the prosecution of criminal cases. The connotations of the label "district attorney" should be sufficient to preserve that function. If the constitution must expressly divide authority to represent the state, however, it should go no further than to specify the local state's attorneys' criminal responsibilities.

Section 22 also illustrates the importance of convention procedures in determining the content of the convention's proposal. The task of drafting a constitution probably cannot be handled successfully without dividing its parts among several committees. Usually there are committees on the executive article, the legislative article, the judiciary, local government, etc. The product of each committee, however, is part of a single document, and all its parts must mesh. Close coordination between committees is imperative, but even this is not enough. It was not the lack of committee coordination that led the 1875 Convention to overlook inclusion of the court of appeals in this section; that court was written into the judicial article during floor debate after the executive article had been finally approved. Final approval of each article should await preliminary approval of all articles, and the convention should prescribe some procedure for detecting the impact of a change made in one article on other articles and for making the necessary modifications prior to final approval.

Art. IV, § 23

Sec. 23. COMPTROLLER OF PUBLIC ACCOUNTS; TREASURER; COMMISSIONER OF GENERAL LAND OFFICE; OTHER STATUTORY STATE OFFICIERS; FEES, COSTS, AND PERQUISITES. The Comptroller of Public Accounts, the Treasurer, the Commissioner of the General Land Office, and any statutory State officer who is elected by the electorate of Texas at large, unless a term of office is otherwise specifically provided in this Constitution, shall each hold office for the term of four years and until his successor is qualified. The four-year term applies to these officers who are elected at the general election in 1974 or thereafter. Each shall receive an annual salary in an amount to be fixed by the Legislature; reside at the Capital of the State during his continuance in office, and perform such duties as are or may be required by law. They and the Secretary of State shall not receive to their own use any fees, costs or perquisites of office. All fees that may be payable by law for any service performed by any officer specified in this section or in his office, shall be paid, when received, into the State Treasury.

History

The treasurer and comptroller first appeared as constitutional officers in the 1845 Constitution. Until an 1850 amendment required public election, both were elected to two-year terms by a joint ballot of the house and senate. The 1850 amendment also required election of the land commissioner, who had been a statutory officer. The 1861 Constitution retained the 1845 provisions and the 1850 amendment. The 1866 Constitution did not mention the land commissioner. It provided for election of the treasurer and comptroller to four-year terms. Although the first three constitutions limited the number of consecutive terms of governors, none did so for other elected executive officers.

The 1869 Constitution included all three officers, but covered each in a separate section. Each was elected to a four-year term, was required to have the same qualifications as the governor, and was entitled to a salary fixed at $3,000 annually. The duties of the three officers were spelled out in detail.

The 1876 Constitution consolidated these offices into a single section, deleted the detailed lists of duties required by the 1869 Constitution, reduced their salaries to $2,500 annually, and reduced their terms to two years. It also required residence in the capital and added the last two sentences relating to fees and other perquisites of office.

In 1936 an amendment increased their salaries to $6,000. In 1954 another amendment removed constitutional limits on their compensation, but a companion amendment prohibited the legislature from setting the salaries at less than $6,000. (See Art. III, Sec. 61.) An amendment adopted in 1972 increased their terms to four years and added the language applying to statutory officers.

Explanation

The offices of treasurer, comptroller, and land commissioner are created in Section 1 of this article and their election is required by Section 2. This section only fixes their terms of office at four years, requires them to reside in the capital while in office, and prohibits them from receiving fees and other perquisites of office as compensation. Curiously, this section, instead of Section 21, also prohibits the secretary of state's receipt of fees and other perquisites as compensation. The legislature could prescribe duties and fix salaries whether or not this section authorized it.

The 1972 amendment added statutory officers who are elected statewide in order to get around the restrictions on the lengths of terms of office in Article XVI, Section 30, but it also apparently imposed the residence and fee requirements on them. The exception of statutory officers who are elected statewide but whose

terms of office are prescribed elsewhere in the constitution applies to members of the Railroad Commission. (See Art. XVI, Sec. 30.)

Comparative Analysis

In the states that give constitutional status to executive officers in addition to the governor, lieutenant governor, secretary of state, and attorney general, treasurers and either auditors or comptrollers are the most frequently provided. Less frequent are superintendents of public instruction, agriculture commissioners, and insurance commissioners. Land commissioners are relatively rare. (For a comparison of numbers of constitutional offices, see the *Comparative Analysis* of Sec. 1 of this article.) The *Model State Constitution* provides no constitutional executive officers other than the governor.

Only a small number of states appear to have specific prohibitions against fees and other emoluments. The *Model State Constitution* has no provision on compensation.

Author's Comment

The term limitation that necessitated inclusion of statutory offices in this section is discussed in the annotation to Article XVI, Section 30. Some of the issues involved in giving the officers in this section constitutional status are discussed in the annotations of Sections 1 and 2 of this article.

Presumably, the fee prohibitions in this section may be eliminated. The legislature is unlikely to authorize fees as compensation since the need to circumvent constitutional limitations on compensation no longer exists.

Sec. 24. ACCOUNTS AND REPORTS; INFORMATION TO, AND INSPECTION BY, GOVERNOR; PERJURY. An account shall be kept by the officers of the Executive Department, and by all officers and managers of State institutions, of all moneys and choses in action received and disbursed or otherwise disposed of by them, severally, from all sources, and for every service performed; and a semi-annual report thereof shall be made to the Governor under oath. The Governor may, at any time, require information in writing from any and all of said officers or managers, upon any subject relating to the duties, condition, management and expenses of their respective offices and institutions, which information shall be required by the Governor under oath, and the Governor may also inspect their books, accounts, vouchers and public funds; and any officer or manager who, at any time, shall willfully make a false report or give false information, shall be guilty of perjury, and so adjudged, and punished accordingly, and removed from office.

History

The 1845 Constitution and each of its successors contained the customary statement that the governor "may require information in writing from the officers of the Executive Department, on any subject relating to the duties of their respective offices." No previous Texas constitution contained any of the additional details now included in Section 24. The report of the Committee on the Executive Department to the 1875 Convention proposed to add to the traditional information-to-the-governor provision the sentence requiring accounts and periodic, sworn reports on them; the clause authorizing gubernatorial auditing; and the perjury language. The committee also proposed to permit the governor to require the traditional reports to be under oath. The convention added the removal statement and altered the committee's version to require that the traditional reports be under oath. (See *Journal*, pp. 234, 298, 304.)

Art. IV, § 24

Explanation

Apparently only one question has arisen under Section 24. That involved the extent of its application to statutory executive agencies. The attorney general concluded that the state "institutions" mentioned include all state boards, commissions, departments, authorities, and agencies. (Tex. Att'y Gen. Op. No. O-4904 (1942).)

The absence of reported disputes about the section, however, cannot be attributed to the clarity of draftsmanship. For example, it literally requires the governor to file a sworn accounting report with himself. Also, a literal reading of the perjury language could define as perjury *any* false statement by an executive officer, whether or not it is made under oath. Presumably, however, the draftsmen intended the perjury language to apply only to false statements in the reports required to be sworn by this section or, perhaps, by the second sentence of the section.

The lack of any controversy probably results because the innovations the 1875 Convention included in the section have been ignored. State agencies and offices keep accounts and make periodic reports on them to the governor and the Legislative Budget Board. They do so pursuant to statutory requirements, however, and the reports are made only annually or biennially and are not under oath. (See, *e.g.*, Tex. Rev. Civ. Stat. Ann. arts. 688, 5429c; Tex. Laws 1975, ch. 743, art. V, secs. 51 and 52, at 2866-67.) The legislature has established an auditing process, but the auditor is appointed by and responsible to a legislative committee. (See Tex. Rev. Civ. Stat. Ann. arts. 4413a-7a — 4413a-24.) In 1929 the legislature created an auditor under the governor, giving the governor some assistance in performing his constitutional auditing powers. (Tex. Laws 1929, 1st Called Sess., ch. 91.) Within 15 years, however, the legislature repealed the authorization of a governor's auditor and established the current legislative auditor. (See Tex. Laws 1943, ch. 293, sec. 1.) Finally, the statutes always have defined perjury to apply to *all* false statements under oath, including those by state officers. (See, *e.g.*, Penal Code secs. 37.02-37.07.)

Comparative Analysis

Only some ten state constitutions have a provision requiring state officers to keep accounts and make a periodic report on them to the governor. In five states the reports are semiannual; in the others, they are annual or when required by the governor or both. Seven require the accounting to be under oath, but only one other state constitution includes the perjury language.

Approximately three-fourths of the states, however, have a requirement that executive officers report to the governor at his request on subjects relating to the duties of their offices. Again, only a few require them to be under oath and even fewer include the perjury language. A few states require regular reports, but in each the report is for transmittal to the legislature at the beginning of its regular session.

Two or three states require reports to the governor at his request only for his use in preparing the state's budget, and one state has a separate, additional reporting requirement covering information needed for budget preparation. In that state (California) the governor-elect also may demand information to assist him in preparing a budget.

One or two states also provide in the constitution that executive officers report to the legislature when either house requires it.

Approximately 20 state constitutions expressly mention audits of executive agencies or direct an official or agency to perform postaudit functions. Five of

those provide only for an audit of the state's treasurer (plus the comptroller in one case and the auditor in another). More than half of the constitutions that mention an audit impose the duty on a comptroller, auditor, examiner, or other similarly styled official, and another five simply direct the legislature to provide by law for auditing of state agency accounts. Only three other state constitutions grant the governor auditing powers, although a few other constitutions make the auditing official a gubernatorial appointee. Most of the recently adopted constitutions—*e.g.*, Alaska, Hawaii, Illinois, Montana, New Jersey—make the auditor a legislative appointee.

Some five state constitutions empower the governor to investigate or appoint a committee to investigate *all* state agency operations, which of course includes finances. Most of those, however, expressly lodge audit powers elsewhere.

The *Model State Constitution* specifies that the governor "may, at any time, require information, in writing or otherwise," from executive officers. This, of course, could include financial reporting. It does not mention accounts or accounting reports, but it mandates an auditing process under an auditor who is a legislative employee.

Author's Comment

As the *Comparative Analysis* indicates, the requirement that executive officers give information in writing to the governor on his request is customary in state constitutions. In an executive branch such as in Texas, where officials are removable only for cause and only after a trial-type hearing (see Art. XV), the requirement is mainly decorative. It may indicate that the governor is boss, but it confers little legal authority on him.

The requirements that state officials keep accounts and file periodic reports on these accounts and the granting of auditing powers to the governor apparently represent an attempt by the delegates to the 1875 Convention to ensure honesty in reaction to abuses by the Reconstruction government. The 1875 Convention's final product required two separate kinds of sworn accounting reports, however. Subsection (a) of Section 6, Article XVI, also requires a sworn report of "the receipts and expenditures of all public money." It is to be published annually in the manner prescribed by law. If a required accounting made under oath will aid in securing honesty in the handling of public funds, the annual one required in Article XVI should be enough. The legislature, however, undoubtedly would require accounts and accounting reports by law without constitutional mention of them.

A comprehensive auditing process is a more effective method of controlling the receipt and expenditure of public money. Most contemporary authorities consider auditing to be a legislative function, however. For example, the comment on the *Model State Constitution's* audit provision states:

> In view of the tremendous growth of state expenditures over the past half-century, the post-audit function has become a necessity. The post-audit function is crucial not only to insure honesty among administrative officials but also to insure that officials of the executive branch have made their expenditures in line with policies established by the legislature.
>
> The auditor should, of course, be directly responsible to the legislature and be chosen by that body. Yet today in only fifteen states is the official exercising the post-audit function legislatively appointed; eighteen are elected and (indefensibly) nine are appointed by the executive. In the remaining states the appointment is exercised in a variety of ways. This function is of such importance as to justify constitutional prescription for appointment. (Sec. 4.17, Comment.)

Of course, a constitution is not an appropriate document for treating auditing or

any other subject comprehensively. Accordingly, the *Model* and most recently adopted state constitutions designate constitutional responsibility for conducting audits but leave the details to be specified by law. The new Illinois Constitution, for example, requires the legislature to provide by law for "the audit of the obligation, receipt and use of public funds" and requires the legislature to appoint an auditor general to conduct the audits. (Ill. Const. Art. VIII, Secs. 3 and 4.)

The perjury language in Section 24 is superfluous. It is inconceivable that the legislature would ever except public officials from application of the perjury laws or remove criminal sanctions for false statements under oath. If it did so, however, the prospect of a criminal prosecution under this constitutional provision seems even more remote.

Sec. 25. CUSTODIANS OF PUBLIC FUNDS; BREACHES OF TRUST AND DUTY. The Legislature shall pass efficient laws facilitating the investigation of breaches of trust and duty by all custodians of public funds and providing for their suspension from office on reasonable cause shown, and for the appointment of temporary incumbents of their offices during such suspension.

History

This section first appeared in the 1876 Constitution. The Committee on the Executive Department proposed the section in its report, and the convention adopted it without reported debate. (*Journal,* p. 234.)

Explanation

This section appears to be nothing more than an exhortation to the legislature to take affirmative action to ensure honesty in government. It may be that the draftsmen feared that, without express constitutional authorization, the legislature might not be able to provide for suspension of an officer pending his removal under Article XV and statutes enacted under it. The legislature has provided for suspension pending removal and for appointment of a temporary replacement in the case of removal proceedings against several kinds of public officers, including some who are not "custodians of public Funds." (Tex. Rev. Civ. Stat. Ann. art 5982.) Long ago a county judge who was suspended under the statute argued that the legislature may not provide for suspension. The supreme court rejected the contention without mentioning this section, upholding the plenary power of the legislature to act in the absence of an express constitutional prohibition of its action. (See *Griner v. Thomas,* 101 Tex. 36, 104 S.W. 1058 (1907).) Thus, Section 25 clearly is unnecessary and adds nothing.

Comparative Analysis

A few states mention suspension of officers in the sections providing for removal, but it is usually to restrict the legislature's power to provide for suspension. For example, two states provide that the legislature can provide suspension only during the pendency of an appeal from a removal suit. Apparently no other state has a provision similar to this one, and the *Model State Constitution* certainly has nothing like it.

Author's Comment

Unnecessary and superfluous provisions like Section 25 cannot be dismissed as harmless in a constitution. The state constitution is a limiting instrument and the

legislature has all legislative power not expressly prohibited by the constitution. (See the *Explanation* of Art. III, Sec. 1.) There being no prohibition against statutes providing for investigations or for suspension of officeholders and appointment of temporary replacements, the direction and authorization for the legislature to do so adds nothing to the constitution. Because the provision is included, however, a court might well be persuaded that it must have been necessary and that the legislature lacks the power in situations not covered by Section 25. For example, in the *Griner* case discussed in the *Explanation* the supreme court might have been compelled to hold Section 25 to be superfluous in order to uphold the suspension if a crafty lawyer had argued forcefully that the section, if necessary, implies a lack of legislative power to provide for suspension of officers who are not "custodians of public funds."

On the other hand, Section 25 illustrates the futility of constitutional directions to the legislature to do something. The only general statutory removal procedure for state officers provides for removal by impeachment and no statute mentions suspension from office. (See Tex. Rev. Civ. Stat. Ann. arts. 5961-5963.) Obviously, the drafters of the statutes assumed that the constitutional provision on suspension pending trial of impeachment charges (Art. XV, Sec. 5) also applies to statutory impeachments. That assumption is questionable, however, as is the statutory provision for removal by the impeachment process of officers not mentioned in Section 2 of Article XV, but neither assumption has been tested.

Sec. 26. NOTARIES PUBLIC. (a) The Secretary of State shall appoint a convenient number of Notaries Public for each county who shall perform such duties as now are or may be prescribed by law. The qualifications of Notaries Public shall be prescribed by law.

(b) Nothing herein shall affect the terms of office of Notaries Public who have qualified for the present term prior to the taking effect of this amendment.

(c) Should the Legislature enact an enabling law hereto in anticipation of the adoption of this amendment, such law shall not be invalid by reason of its anticipatory character.

History

Constitutional status for notaries public dates from the Constitution of 1845. (Under the Republic they were provided for by statute.) Section 19 of Article V of that constitution provided for appointment by the governor with the advice and consent of the senate of not more than six notaries for each county. The section remained unchanged in the Constitutions of 1861 and 1866.

The Reconstruction Constitution of 1869 dropped the provision but provided that justices of the peace "shall also be commissioned to act as notaries public." (Art. V, Sec. 20.) The Reconstruction Constitution also had a dual-officeholding provision that excepted from the prohibition both notaries public and justices of the peace. (Art. III, Sec. 30.) Assuming that the left and right hands of the Reconstruction constitutional convention knew what each other was doing, notaries public were to continue on a statutory basis.

Whatever the 1869 Constitutions meant concerning notaries public, it appears that some delegates to the 1875 Convention assumed that they were living under a constitution that allowed only justices of the peace to be notaries. During that convention it was proposed to strike Section 26 on the grounds that justices of the peace acting as notaries would be sufficient. The proposal lost. (See *Debates,* pp. 166-67.)

The original Section 26 was the first sentence of the current Subsection (a) with the words "The Governor, by and with the advice and consent of two-thirds of the

Senate," instead of "The Secretary of State." The current version was adopted in 1940. The reason for the amendment is obvious; what is not obvious is why someone did not simply propose to repeal Section 26 and handle the whole business by statute.

Explanation

This section is self-explanatory. The only significant constitutional question to arise under the section concerned the secretary of state's power to remove a notary public. The attorney general ruled against the power of removal (Tex. Att'y Gen. Op. No. O-4940 (1942)).

Comparative Analysis

Only five states besides Texas give the office of notary public constitutional status. A great many states refer to a notary public in some context of qualification for public office. (Consider Sec. 40 of Art. XVI, for example.) Neither the United States Constitution nor the *Model State Constitution* mentions notaries public.

Author's Comment

It seems obvious from the foregoing that there is no need to make notaries public constitutional officers.

ARTICLE V

JUDICIAL DEPARTMENT

Sec. 1. JUDICIAL POWER; COURTS IN WHICH VESTED. The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.

The Criminal District Court of Galveston and Harris Counties shall continue with the district jurisdiction and organization now existing by law until otherwise provided by law.

The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.

History

The Texas judicial system reflects both Spanish and Anglo-American traditions. The state's earliest judicial system was of Spanish origin. When the colonists arrived in Texas, the legal system theoretically in force was the Roman civil law as modified by the Spanish. The key figure in that system was the alcalde, an official who had both administrative and judicial duties. The alcalde bore some resemblance to both the mayor and the justice of the peace in the Anglo-American system. In fact, however, there was no functioning court system in the undeveloped province of Texas. In 1822, before leaving for Mexico City to obtain confirmation of his authority to colonize, Stephen F. Austin introduced the first Anglo-American judicial institution by appointing a provisional justice of the peace, Josiah H. Bell, to administer justice among the colonists during Austin's absence.

While Austin was in Mexico City, the Mexican provisional governor established the rudiments of a Spanish legal system by dividing the colony into two districts and authorizing the election of an alcalde in each district. The Texans accepted this sytem; Austin's first justice of the peace, Bell, was elected as one of the alcaldes. Austin, upon his return from Mexico City, created a third alcalde district and promulgated a set of "Instructions and Regulations" for the alcaldes. The Texans modified the Spanish system by adding Anglo-American elements, however. In his 1824 Code, Austin created the quintessentially English offices of constable and sheriff, the former to be process servers for the alcaldes and the latter to serve process and execute decrees for Austin himself. (See Art. 1, "Civil Regulation," reproduced in Gracy, *Establishing Austin's Colony* (1970), pp. 75-82.) This was the beginning of a unique amalgamation of two quite different legal systems, both of which have left a mark on the present Texas judicial system. (See Gilmer, "Early Courts and Lawyers in Texas," 12 *Texas L. Rev.* 435, 438-40 (1934); see generally Wharton, "Early Judicial History of Texas," 12 *Texas L. Rev.* 315 (1934).) The Spanish influence on the Texas judicial system is ably described in Townes, "Sketch of the Development of the Judicial System of Texas," 2 *Southwestern Historical Quarterly* 29 (1898).

Under Austin's code, the alcaldes had jurisdiction of all criminal cases and all civil cases up to $200. In cases under $25, judgments of the alcaldes were final. The first appellate court was Austin himself. He was variously called "judge of the colony," "principal judge," or "superior judge." He had exclusive appellate jurisdiction (except in cases involving less than $25) and original jurisdiction of civil cases exceeding $200. His decision was final in all except capital cases, which were reviewable by Mexican authorities. (See "Civil Regulation," reproduced in

Gracy, *Establishing Austin's Colony* (1970), pp. 75-82.) This very quickly created more business than Austin could handle personally, so in 1826 he created a tribunal composed of any three of the alcaldes. They met three times annually at San Felipe as an appellate court. This system was permitted to continue even after formation of the Mexican State of Coahuila and Texas in 1824, because the "Constitutive Act of Federation" of that year provided that "the judicial power shall for the present be vested in the authorities by which it is now exercised in the State." (Laws and Decrees of the State of Coahuila and Texas, Decree No. 1, Sec. 10, 1 *Gammel's Laws*, p. 114.)

Austin's judicial system applied the Spanish civil law, rather than the English common law. It was a model of simplicity; it required only one category of judges. Sitting alone, those judges exercised original jurisdiction in all cases; in panels of three they exercised all appellate jurisdiction. This system survived until 1828; since then the history of the judicial system in Texas has been one of increasing complexity and proliferation.

The 1827 Constitution of the State of Coahuila and Texas continued the alcalde system but added numerous other provisions. It created a supreme tribunal composed of three "halls" of one or more magistrates each and gave the "third hall" authority to "decide the power of inferior judges." It provided that "the inferior courts of justice shall continue in the manner and form that shall be prescribed by law." (Laws and Decrees, arts. 194-96, 1 *Gammel's Laws*, p. 449.) It apparently was intended to deny the courts the kind of power they had in the common law system; all courts were directed to simply apply the laws without attempting to "interpret the same, or suspend their execution." (*Id.* art. 172, 1 *Gammel's Laws*, p. 447.) It did, however, recognize one Anglo-American institution, the jury. It instructed the state congress to establish jury trial in criminal cases and to introduce jury trial gradually in civil cases "as the advantages of this valuable institution become practically known." (*Id.* art. 192, 1 *Gammel's Laws*, p. 449.)

This judicial system did not please the Texans. At the Texas Convention of 1833 at San Felipe, Austin complained that the alcaldes were ignorant of the law, that the criminal laws under the Spanish system were too complex, that the 700-mile trip to the supreme tribunal (it sat only in Saltillo) prevented any effective method of appellate review, and that the congress had failed to implement the constitutional directive to provide for jury trial.

The government of the State of Coahuila and Texas attempted to meet some of these objections by a decree creating an entirely new judicial system for Texas. It would have made Texas a separate judicial district with its own superior court, which was to meet annually in each of three districts within Texas, and would have guaranteed jury trial. (*Id.* Decree No. 277, *Gammel's Laws*, p. 364.) But the decree came too late; the Texas Revolution intervened, and the Superior Judicial Court of Texas never met.

The court system created by the Constitution of the Republic in 1836 reflected a great deal of Anglo-American influence. It adapted from the United States Constitution the sentence "The judicial powers of the government shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish." (Art. IV, Sec. 1.) Unlike the United States Constitution, however, it then went on to describe the court system in great detail. It provided for division of the Republic into three to eight districts, each containing an appointed district judge. (Art. V, Sec. 2.) The supreme court consisted of a chief justice and all of the district judges as associate judges. (Art. IV, Sec. 7.) It provided for a county court in each county and such justice courts as the congress

might establish. (Art. IV, Sec. 10.) It provided for the election of justices of the peace (JPs), sheriffs, and constables, and for the appointment of district attorneys and district clerks. (Art. V, Secs. 5, 6, 12.) This court system included many English offices that were unknown to the Spanish law (*e.g.,* justices of the peace, sheriffs, constables, justice courts, and county courts) and obviously provided the model for the present system that was established by the Constitution of 1876.

The Constitutions of 1845, 1861, 1866, 1869, and 1876 all provided for a supreme court, district courts, county courts (under the 1869 version the county court consisted of three or more justices of the peace and functioned primarily as a commissioners court), and justice courts. The commissioners court first made its appearance in the 1866 Constitution (Art. IV, Sec. 17), although a county board quite similar to the commissioners court apparently had governed the county since the days of the Republic. (See 3 *Interpretive Commentary,* p. 262.)

The court of appeals did not appear until 1876. The revival of the economy after Reconstruction had crowded the docket of the supreme court. The court of appeals was created to relieve the supreme court of all criminal appeals and all civil appeals from courts below the district level. (*Debates,* p. 422.)

The 1876 judiciary article was extensively revised by amendment in 1891. The amendment did not change provisions relating to the district, county, commissioners, and justice courts, but it completely restructured the appellate courts. The court of appeals became the court of criminal appeals, with criminal jurisdiction only. A new classification of intermediate appellate courts, the courts of civil appeals, was created. Again, the reason for creation of the new courts was to relieve overcrowding of the supreme court's dockets. Despite the transfer of all criminal jurisdiction and some civil cases to the court of appeals in 1876, the supreme court's docket remained overcrowded. The 1891 amendment therefore shifted even more civil jurisdiction away from the supreme court. (See Williams, "History of the Texas Judicial Machine and Its Growth," 5 *Texas L. Rev.* 174, 178-80 (1927).) The 1891 amendment also added to Section 1 of Article V a paragraph overruling decisions which had held that the legislature could not create types of courts other than those specified in the constitution. (See the *Explanation* following.)

The 1876 Constitution authorized the legislature to establish criminal district courts in cities containing at least 30,000 inhabitants and retained the existing Galveston and Harris County criminal district courts, which had been created by statute in 1870. These criminal courts in Galveston and Harris counties were created to handle large numbers of criminal cases generated by ships' crews along the coast. (See *Debates,* p. 422.)

Explanation

Section 1 names the courts that are to exercise the state's judicial power. The list, however, is neither accurate nor complete. The commissioners court, though included in the list, is not a functional part of the state judicial system. It is occasionally spoken of as a court, but its duties are administrative and legislative. (See, *e.g., Welch v. Kent,* 153 S.W.2d 284 (Tex. Civ. App.—Beaumont 1941, *no writ*).) The attorney general has stated that a statute applicable to courts in general does not apply to a commissioners court. (Tex. Att'y Gen. Op. No. M-1030 (1971).) On the other hand, Section 1 omits many courts that unquestionably do exercise judicial power. These include municipal courts (every incorporated city is authorized to have at least one; see Tex. Rev. Civ. Stat. Ann. art. 1194 *et seq.*) and other statutory courts created pursuant to the last paragraph of Section 1. The latter includes criminal district courts, domestic relations courts, special juvenile

courts, and county courts at law. Within the general category of "county courts at law" are courts with a variety of names, including "county civil court at law," "county criminal court at law," "county court for criminal appeals," "probate court," and "county criminal court." (For a complete listing of all these courts, see Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), pp. ix-xi.) In general, the criminal district courts and domestic relations courts try cases that otherwise would go to the district courts, while the other courts listed handle cases that otherwise would be tried by the county court. Each statutory court's jurisdiction depends, however, on the language of the statute creating that particular court, so no completely accurate generalization can be made. The statutes name three other courts—probate, juvenile, and small claims. These actually are not separate courts, however, because their functions are performed by judges of other courts. The justice of the peace presides over the small claims court, the county judge or a district judge normally acts as the probate court, and the juvenile court usually is either the county judge or a district judge. In some cases, these functions are performed by statutory courts, *e.g.*, special juvenile courts or, in probate matters, county courts at law.

The second paragraph of Section 1 is no longer operative. It was effective only "until otherwise provided by law," and the law now provides otherwise. Galveston County has been removed from the district, the name of the court has been changed to the 174th District Court of Harris County, and it has been made a constitutional district court with civil as well as criminal jurisdiction. (Tex. Rev. Civ. Stat. Ann. art. 199—174.)

The "constitutional courts" are the supreme court, court of criminal appeals, courts of civil appeals, district courts, county courts, and justice courts. Until recently, the supreme court has been reluctant to permit creation of additional kinds of courts. Although the original Constitution of 1876 vested the judicial power in the named courts "and such other courts as may be established by law," the supreme court ruled in 1877 that the legislature could not create any courts other than those named. (Ex parte *Towles,* 48 Tex. 413 (1877).) This led to the 1891 amendment adding the third paragraph of the section, specifically authorizing the legislature to "establish such other courts as it may deem necessary. . . ." The courts complied with this provision only grudgingly; they permitted "legislative courts" but under the pretext that they were really constitutional courts, either district courts or county courts. (*Whitner v. Belknap,* 89 Tex. 273, 34 S.W. 594 (1896).) In 1950, however, the supreme court reconsidered the 1891 amendment and decided that it gives the legislature broad power to create new courts, or entirely new families of courts that do not fit the description of any constitutional court. (*Jordan v. Crudgington,* 149 Tex. 237, 231 S.W.2d 641 (1950).)

The phrase "conform the jurisdiction of the district and other inferior courts thereto" does not permit the legislature to withdraw jurisdiction granted constitutionally to a court, but it does allow the legislature to give statutory courts jurisdiction concurrent with that of constitutional courts. (*Reasonover v. Reasonover,* 122 Tex. 512, 58 S.W.2d 817 (1933).) This means, for example, that when the legislature creates a special court with only criminal jurisdiction the new court may exercise that jurisdiction, but the constitutional district court still has concurrent jurisdiction over criminal cases. (*Lord v. Clayton,* 163 Tex. 62, 352 S.W.2d 718 (1961).)

Comparative Analysis

Every state has some constitutional provision creating a judicial branch of government. All have a supreme court, or its equivalent, but only two states—

Texas and Oklahoma—have two courts of last resort (a supreme court and a court of criminal appeals).

The trend toward creation of intermediate appellate courts has accelerated in recent years; ten states have provided for such courts since 1956, and now about half of the states have them. In about six of these states, the constitution merely authorizes the legislature to create intermediate appellate courts.

About four-fifths of the states name trial courts in the constitution; about 12 of these provide for a single unified trial court, often with two or three levels. Most states authorize the legislature to create additional types of trial courts of limited jurisdiction.

The United States Constitution establishes only "one supreme court, and such inferior Courts as the Congress may from time to time ordain and establish." (Art. III, Sec. 1.) The *Model State Constitution* vests the judicial power in a supreme court, an appellate court, a general court, and such inferior courts of limited jurisdiction as may be established by law.

Author's Comment

The Texas court system is one of the most complex in the United States, if not the world. It has more than 2,000 judges—9 supreme court justices, five judges of the court of criminal appeals, 42 judges of courts of civil appeals, 227 district judges, 34 judges of special domestic relations and juvenile courts, 254 county judges, 70 judges of various types of county courts at law, approximately 934 justices of the peace, and approximately 1,000 municipal judges—far more than any other state. (See *Forty-Fifth Annual Report, supra*, pp. viii-xi.) Appellate jurisdiction is exercised by eight levels of courts: the supreme court, court of criminal appeals, courts of civil appeals, statutory county courts of appeals, district courts, criminal district courts, county courts, and county courts at law. There are eight different types of trial courts: district courts, criminal district courts (some of which have limited civil jurisdiction—see, *e.g.*, Tex. Rev. Civ. Stat. Ann. art. 1926-22), special juvenile courts, domestic relations courts, county courts, county courts at law, justice courts, and municipal courts.

Multiplicity of courts is not the only problem. In many instances, jurisdiction of the courts is spelled out in detail in the constitution. As a result, a mistake in choosing the proper court either initially or on appeal is often an error of constitutional dimension. For example, a misdemeanor conviction in a justice court is usually appealable to either the county court or a county court at law; but if the county happens to have a criminal district court, the constitution requires that the appeal go to that court, and an attempt to follow the normal appellate channel is unconstitutional. (Art. V, Sec. 16.)

In recent revisions of judiciary articles in other states, the trend has been toward unification and simplification of the court system. (See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington, D.C.: Government Printing Office, 1967), p. 82.) A major goal of these revisions has been the elimination of multiple layers of limited and specialized courts. The unified trial court system, in which virtually all original jurisdiction is placed in a single trial court of general jurisdiction, has been adopted by 12 states and in some modified form by 17 other states. (See Tate, "Relieving the Appellate Court Crisis, Containing the Law Explosion," 56 *Judicature* 228, 232 (1973).)

In the fragmented Texas court structure, a court's jurisdiction is often too limited to permit it to resolve fully the dispute before it. The county court, for example, has general probate jurisdiction but is prohibited from resolving disputes

over title to land. Many probate matters therefore must go to both the county and district courts before they can be fully resolved. The lack of uniformity in the jurisdictional patterns of the various courts makes effective court administration practically impossible. (See Guittard, "Court Reform, Texas Style," 21 *Sw.L.J.* 451 (1967).)

The second paragraph of Section 1, relating to specific criminal district courts, is obsolete and should be deleted. (See the preceding *Explanation.*)

The third paragraph, authorizing the legislature to create additional courts and conform the jurisdiction of other courts thereto, probably is also unnecessary, although the somewhat tangled history of that provision makes it difficult to predict with certainty how the supreme court would interpret its omission. The pre-1891 history suggests that a simple statement vesting judicial power in certain named courts "and such other courts as the legislature may create" would not be enough to authorize creation of additional courts. On the other hand, more recent history reveals a more generous attitude toward the legislature's power to create new courts and suggests that such a statement probably would be enough to authorize creation of "legislative courts." (See the preceding *History.*) This interpretation would be consistent with the interpretation that has been placed on the federal constitution, which vests the judicial power in "one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish."

In other states, provisions vesting the judicial power in certain named courts, "and such other courts as may be provided by law," have been held sufficient to authorize the legislature to create additional types of courts. (See, *e.g., Gerlach v. Moore,* 243 Pa. 603, 90 A. 399 (1914); *State v. Kelly,* 2 Kan. 178, 43 p. 299 (1896).)

On the other hand, if the goal is to prevent the legislature from creating any courts other than those named in the constitution, the history indicates that this could be accomplished merely by vesting the state's judicial power in certain named courts. In the absence of a phrase mentioning "such other courts as the legislature may create," it seems unlikely that the Texas courts would permit them.

Sec. 1-a. RETIREMENT, CENSURE, REMOVAL AND COMPENSATION OF JUSTICES AND JUDGES; STATE JUDICIAL QUALIFICATIONS COMMISSION; PROCEDURE. (1) Subject to the further provisions of this Section, the Legislature shall provide for the retirement and compensation of Justices and Judges of the Appellate Courts and District and Criminal District Courts on account of length of service, age and disability, and for their reassignment to active duty where and when needed. The office of every such Justice and Judge shall become vacant when the incumbent reaches the age of seventy-five (75) years or such earlier age, not less than seventy (70) years, as the Legislature may prescribe; but, in the case of an incumbent whose term of office includes the effective date of this Amendment, this provision shall not prevent him from serving the remainder of said term nor be applicable to him before his period or periods of judicial service shall have reached a total of ten (10) years.

(2) There is hereby created the State Judicial Qualifications Commission, to consist of nine (9) members, to wit: (i) two (2) Justices of Courts of Civil Appeals; (ii) two (2) District Judges; (iii) two (2) members of the State Bar, who have respectively practiced as such for over ten (10) consecutive years next preceding their selection; (iiii) three (3) citizens, at least thirty (30) years of age, not licensed to practice law nor holding any salaried public office or employment; provided that no person shall be or remain a member of the Commission, who does not maintain physical residence within this State, or who resides in, or holds a judgeship within or for, the same Supreme Judicial District as another member of the Commission, or who shall have ceased to retain the qualifications above specified for his respective class of membership. Commissioners

of classes (i) and (ii) above shall be chosen by the Supreme Court with advice and consent of the Senate, those of class (iii) by the Board of Directors of the State Bar under regulations to be prescribed by the Supreme Court with advice and consent of the Senate, and those of class (iiii) by appointment of the Governor with advice and consent of the Senate.

(3) The regular term of office of Commissioners shall be six (6) years; but the initial members of each of classes (i), (ii) and (iii) shall respectively be chosen for terms of four (4) and six (6) years, and the initial members of class (iiii) for respective terms of two (2), four (4) and six (6) years. Interim vacancies shall be filled in the same manner as vacancies due to expiration of a full term, but only for the unexpired portion of the term in question. Commissioners may succeed themselves in office only if having served less than three (3) consecutive years.

(4) Commissioners shall receive no compensation for their services as such. The Legislature shall provide for the payment of the necessary expense for the operation of the Commission.

(5) The Commission may hold its meetings, hearings and other proceedings at such times and places as it shall determine but shall meet at Austin at least once each year. It shall annually select one of its members as Chairman. A quorum shall consist of five (5) members. Proceedings shall be by majority vote of those present, except that recommendations for retirement, censure, or removal of any person holding an office named in Paragraph A of Subsection (6) of this Section shall be by affirmative vote of at least five (5) members.

(6)A. Any Justice or Judge of the Appellate Courts and District and Criminal District Courts, any County Judge, and any Judge of a County Court at Law, a Court of Domestic Relations, a Juvenile Court, a Probate Court, or a Corporation or Municipal Court, and any Justice of the Peace, and any Judge or presiding officer of any special court created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent conduct, which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or administration of justice; or any person holding such office may be censured, in lieu of removal from office, under procedures provided for by the legislature.

B. Any person holding an office named in Paragraph A of this subsection who is eligible for retirement benefits under the laws of this state providing for judicial retirement may be involuntarily retired, and any person holding an office named in that paragraph who is not eligible for retirement benefits under such laws may be removed from office, for disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature.

(7) The Commission shall keep itself informed as fully as may be of circumstances relating to the misconduct or disability of particular persons holding an office named in Paragraph A of Subsection (6) of this Section, receive complaints or reports, formal or informal, from any source in this behalf and make such preliminary investigations as it may determine. Its orders for the attendance or testimony of witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings in the District Court.

(8) After such investigation as it deems necessary, the Commission may in its discretion issue a private reprimand, or if the Commission determines that the situation merits such action, it may order a hearing to be held before it concerning the removal, or retirement of a person holding an office named in Paragraph A of Subsection (6) of this Section, or it may in its discretion request the Supreme Court to appoint an active or retired District Judge or Justice of a Court of Civil Appeals as a Master to hear and take evidence in any such matter, and to report thereon to the Commission. If, after hearing, or after considering the record and report of a Master, the Commission finds good cause therefor, it shall issue an order of public censure or it shall recommend to the Supreme Court the removal, or retirement, as the case may be, of the person in question holding an office named in Paragraph A of Subsection (6) of this Section and shall thereupon file with the Clerk of the Supreme Court the entire record before the Commission.

(9) The Supreme Court shall review the record of the proceedings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence and shall order public censure, retirement or removal, as it finds just and proper, or wholly reject the recommendation. Upon an order for involuntary retirement for disability or an order for removal, the office in question shall become vacant. The rights of an incumbent so retired to retirement benefits shall be the same as if his retirement had been voluntary.

(10) All papers filed with and proceedings before the Commission or a Master shall be confidential, and the filing of papers with, and the giving of testimony before, the Commission, Master or the Supreme Court shall be privileged; provided that upon being filed in the Supreme Court the record loses its confidential character.

(11) The Supreme Court shall by rule provide for the procedure before the Commission, Masters and the Supreme Court. Such rule shall afford to any person holding an office named in Paragraph A of Subsection (6) of this Section, against whom a proceeding is instituted to cause his retirement or removal, due process of law for the procedure before the Commission, Masters and the Supreme Court in the same manner that any person whose property rights are in jeopardy in an adjudicatory proceeding is entitled to due process of law, regardless of whether or not the interest of the person holding an office named in Paragraph A of Subsection (6) of this Section in remaining in active status is considered to be a right or a privilege. Due process shall include the right to notice, counsel, hearing, confrontation of his accusers, and all such other incidents of due process as are ordinarily available in proceedings whether or not misfeasance is charged, upon proof of which a penalty may be imposed.

(12) No person holding an office named in paragraph A of Subsection (6) of this Section shall sit as a member of the Commission or Supreme Court in any proceeding involving his own retirement or removal.

(13) This Section 1-a is alternative to and cumulative of, the methods of removal of persons holding an office named in Paragraph A of Subsection (6) of this Section provided elsewhere in this Constitution.

History

The first version of Section 1-a, adopted in 1948, merely authorized the legislature to provide for the retirement of appellate and district judges and their compensation and reassignment to active duty. A constitutional authorization was considered necessary because of Section 51 of Article III, which prohibits the legislature from paying public monies to private individuals.

The decade of the 1960s was a period of increasing dissatisfaction nationally with existing methods of judicial discipline, removal, and retirement. Articles dealing with the censure and removal of judges abounded. (see, *e.g.,* Burke, "Judicial Discipline and Removal, the California Story," 48 *Judicature* 167 (1964); Calvert, "Judicial Retirement," 27 *Texas Bar Journal* 963 (1964); Frankel, "Judicial Discipline and Removal," 44 *Texas L. Rev.* 1117 (1966); Frankel, "Judicial Discipline and Removal, A Survey and Comparative Study," 48 *Judicature* 173 (1964).)

In 1960, California created a Commission on Judicial Qualifications. In 1964, the Texas Civil Judicial Council and the Board of Directors of the State Bar of Texas proposed an amendment modeled after the California plan. The amendment, adopted in 1965, retained the pension authorization of the 1948 amendment, fixed a mandatory retirement age of 75, created the Judicial Qualifications Commission, and established a method of disciplining judges. The Texas Supreme Court was authorized to censure, remove, or involuntarily retire a judge. The amendment's origins and purposes are explained by its chief draftsman in Garwood, "Involuntary Retirement and Removal of Appellate and District Judges," (27 *Texas Bar Journal* 947 (1964)).

Originally Section 1-a applied only to judges of the appellate, district, and criminal district courts. In 1970 the section was again amended to make it

applicable to all judges, including justices of the peace, municipal judges, county judges, and judges of statutory courts.

Explanation

Section 1-a deals with five distinct subjects. First, it fixes a mandatory retirement age of 75 for judges of appellate, district, and criminal district courts. The legislature is authorized to lower that figure to not less than 70 years but has not done so. The section contains a "grandfather clause" exempting incumbents from mandatory retirement. This clause cannot have any effect after November 19, 1975 (ten years after the effective date of the 1965 amendment). The section does not prevent a judge over the age of 72 from serving temporarily by special assignment. (*Werlein v. Calvert,* 460 S.W.2d 398 (Tex. 1970).)

Second, the section directs the legislature to provide for the "retirement and compensation" of judges. In this respect, Section 1-a is partially superseded by Section 67 of Article XVI, which authorizes "the system of retirement, disability, and survivors' benefits heretofore established in the constitution or by law for justices, judges, and commissioners of the appellate courts and judges of the district and criminal district courts." Unfortunately, Section 67, adopted in 1975, did not expressly repeal the retirement and compensation provisions of Section 1-a, so both must be consulted. In addition, since Section 67 purports to authorize benefits previously established by law, the pre-1975 statutes relating to retirement and compensation also must be consulted.

Both sections mention only the appellate, district, and criminal district courts. Many other judges, however, are eligible for retirement benefits under county retirement systems. These lower court judges are not subject to the mandatory retirement provisions of Section 1-a.

Even though commissioners of the court of criminal appeals were not listed among those eligible for benefits under the 1965 and 1970 amendments of Section 1-a, the statute continued to include them. (See Tex. Rev. Civ. Stat. Ann. art. 6228b(1).) The adoption of Section 67 apparently ratifies that inclusion.

The third subject addressed by Section 1-a is involuntary retirement of a disabled judge. The only ground is "disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature." The phrase has not been judicially construed. Since the supreme court is to review both the law and the facts in cases under Section 1-a, it is clear that the determination of disability is to be made by that court.

Here, as in the provision on retirement for age, the matter of retirement is tied to the availability of benefits. Involuntary retirement is the method of dealing with disability only if the judge is eligible for state judicial retirement benefits. If he is not, the problem can be dealt with only by removal from office. A judge who is involuntarily retired gets all the benefits he would have received if he had retired voluntarily.

The fourth subject in Section 1-a is removal of judges for misconduct. Here the sole ground is "willful or persistent conduct, which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or administration of justice."

In its first ten years of operation, the Judicial Qualifications Commission only once recommended removal. The supreme court rejected the recommendation and instead censured the judge (In re *Brown,* 512 S.W.2d 317 (1974)). The court had difficulty defining the kind of conduct that would justify removal. The principal accusations against the judge were that he was excessively absent from his court (in part because he was working elsewhere for compensation as a

mediator or arbitrator), that he too readily found persons in contempt of court, that he injected himself into the affairs of the county attorney and district attorney, that he conducted two hearings with a defendant without notifying the defendant's attorney, that he authorized a surreptitious tape recording of a conversation between an accused and his attorney, and that he failed to include his own promissory note in his inventory of an estate of which he was independent executor. Six justices considered the conduct sufficient to warrant censure but not removal. Two justices were unable to see "any possible justification for finding Judge Brown unfit to hold his office" (At 325). On the other hand, one justice thought the judge should have been removed from office on the ground that misconduct had been "clearly established by the overwhelming preponderance of the evidence" (At 333). One of the justices voting with the majority expressed the opinion that a judge should not be removed from office for acts of misconduct antedating his re-election (At 325).

The Code of Judicial Conduct, drafted by the American Bar Association, apparently will be given some weight in evaluating alleged misconduct. When the *Brown* case was decided, the code was pending before the supreme court but had not yet been adopted in Texas. Nevertheless, both the majority and one of the dissenters cited its statement that "A judge should not act as an arbitrator or mediator." (Canon 5E, Code of Judicial Conduct, American Bar Association, 1972.) Since the code has now been adopted in Texas, one might expect the supreme court to rely upon it even more heavily in defining judicial misconduct.

The Judicial Qualifications Commission itself can neither retire nor remove a judge. It can privately reprimand or publicly censure a judge, but in most serious cases it can only recommend that the supreme court remove or retire the judge. It is not clear whether the supreme court may take such action in the absence of a recommendation from the commission.

A judge can be censured in lieu of removal. Section 1-a(9) gives the supreme court power to censure under the same procedures and circumstances as those provided for removal and involuntary retirement. This seems to be a direct grant of power to the supreme court, requiring no legislative implementation. Censure is also mentioned in two other places, however. Section 1-a(6)B provides that any judge "may be censured, in lieu of removal from office, under procedures provided for by the Legislature." Section 1-a(8) gives the commission power to "issue an order of public censure." It is not clear whether this means that (1) the supreme court's censure power must be exercised in accordance with the procedures provided by the legislature; (2) the commission must exercise its censure powers under procedures provided by the legislature; or (3) the legislature is authorized to provide censure procedures completely unrelated to the commission or the supreme court. The legislature apparently has accepted something similar to interpretation (2); it provided that the commission must hold a hearing before prescribing "procedures to be employed by the commission in the exercise of its power of censure. . . ." (Tex. Rev. Civ. Stat. Ann. art. 5966a(6A).) The commission has neither exercised the censure power nor prescribed procedures for doing so.

Finally, Section 1-a creates the Judicial Qualifications Commission. It prescribes in copious detail the qualifications, method of selection, and terms of commission members; the commission's meeting times and places; and safeguards for protection of judges in proceedings before both the commission and the supreme court.

The commission consists of nine members: two justices of courts of civil appeals, two district judges, two lawyers, and three laymen. The members receive

expenses but no salaries. The commission is essentially an investigatory body. It is directed to "keep itself informed as fully as may be of circumstances relating to the misconduct or disability of judges, to receive complaints and reports from any source, and make preliminary investigations." After investigating, the commission may issue a private reprimand, hold a hearing, or ask the supreme court to appoint a master to hold a hearing. A master must be an active or retired judge of a district court or court of civil appeals. The hearing, whether conducted by the commission or by a master, must adhere to rules prescribed by the Supreme court and must protect the judge's right to due process of law. All proceedings of the commission or a master are secret. After the hearing, the commission may issue a public order of censure or recommend more drastic action by the supreme court.

If the commission recommends removal or involuntary retirement, the record of proceedings before the commission (or a master) is filed with the supreme court. Upon filing, the record becomes public. The supreme court then reviews the record "on the law and the facts." It has power to take additional evidence itself. (It is not clear whether this evidence is to be taken in secret. Section 1-a(10) states that ". . . the giving of testimony before, the Commission, Master or the Supreme Court shall be privileged; . . ." but it goes on to state that "upon being filed in the Supreme Court the record loses its confidential character.") The supreme court may then reject the commission's recommendation, issue an order of public censure, or order the judge's removal or involuntary retirement. If it orders removal or retirement, the judge's office automatically becomes vacant.

When adopted, Section 1-a added another method of removal to the several methods already in the constitution. Section 2 of Article XV provides for impeachment of appellate and district judges. Section 6 of Article XV provides for removal of district judges by the supreme court upon petition by practicing lawyers. Section 8 of Article XV provides for removal of appellate and district judges by the governor upon address of the legislature. Section 24 of Article V provides for removal of county judges and justices of the peace by district judges.

One might expect that the earlier removal procedures would be superseded in practice by those of Section 1-a. The latter is the only removal method that provides for an investigative and enforcement mechanism, and the grounds for sanction under Section 1-a are broad enough to encompass virtually any ground that would support removal under one of the other sections. In the most noteworthy removal proceeding of recent years, however, the legislature chose to use the impeachment method rather than await action by the Judicial Qualifications Commission. (See H.S.R. 161, 64th Leg., 1975.) Many members of the legislature apparently consider the commission's methods too slow and too cautious. Because Section 1-a is "alternative to and cumulative of, the methods of removal . . . provided elsewhere in this Constitution," all of the earlier methods remain available.

Comparative Analysis

About 25 states have judicial qualifications commissions; apparently all but one of these is provided for constitutionally. (See American Judicature Society, *Judicial Discipline and Removal* (Chicago, 1969).) None of these constitutional provisions contains as much detail as the Texas provision. About five simply permit the legislature to provide the mechanics of removal. Most of the others specify a few basic elements of the removal plan, such as the grounds for removal.

All states provide some constitutional method of removal. About 46 states have an impeachment provision (applicable to judges). About 28 states provide for removal by address, a formal request by the state legislature asking the governor to

remove a judicial officer. Seven states utilize the recall, typically a petition for a new election filed by the electorate. Thirty-two states and the District of Columbia provide for a judicial body or commission to hear complaints; 14 of these jurisdictions have added this provision since 1968.

About 16 states provide for the temporary assignment of retired judges to active duty.

About half of the states have constitutional provisions for compulsory retirement, usually at the age of 70. In five states a judge who reaches age 70 is permitted to serve out his term before retiring. Four states provide a retirement age of 75.

All states provide some kind of pension system for judges. About three-fifths of these are retirement programs specifically for judges; in the other states, judges participate in general public employees retirement systems. (See Winters, *Judicial Retirement and Pension Plans,* rev. ed. (Chicago: American Judicature Society, 1968).)

The Constitution of the United States provides for impeachment of officers generally and states specifically that judges "shall hold their offices during good behavior."

The *Model State Constitution* provides for a retirement age of 70, appointment of retired judges to special judicial assignments, removal of appellate and general court judges by the supreme court, and impeachment of all judges.

Author's Comment

Section 1-a contains a great deal of statutory detail (particularly concerning the creation and operation of the Judicial Qualifications Commission) that could be removed from the constitution without loss. On the other hand, an argument can be made for retaining in the constitution some mention of the method for retirement and removal of judges; leaving the entire matter to the legislature might create a potential threat to the independence of the judiciary. This danger can be prevented, however, by a provision far simpler than present Section 1-a. (See, *e.g.,* American Bar Association, *Model State Judiciary Article,* sec. 6 (Chicago, 1962).) The detail of the 1965 amendment which created the present judicial discipline plan probably was politically useful; inclusion of many details undoubtedly helped to forestall opposition by quieting judges' apprehensions about the way the system might operate. Now, however, the system is firmly established and accepted, and that justification for great detail no longer exists. Details removed from Section 1-a generally would have to be provided for by new legislation, because the existing statute (Tex. Rev. Civ. Stat. Ann. art. 5966a) does not duplicate the provisions of Section 1-a.

Consideration should be given to making the mandatory retirement age applicable to all judges. The limited scope of the present provision (it applies only to types of judges who are covered by the state judicial retirement system) is politically understandable, but questionable for at least two reasons. First, many judges not covered by the state judicial retirement system do participate in other retirement systems. Second, the purpose of mandatory retirement is to maintain the competence of the judiciary, and there is no demonstrable correlation between competence and the availability or unavailability of retirement benefits.

Consideration also might be given to permitting the involuntary retirement of any disabled judge. Under the 1970 amendment a disabled judge who is not eligible for state judicial retirement cannot be "involuntarily retired"; he can only be "removed from office." (See the preceding *Explanation.*) Perhaps it was thought incongruous to speak of "retiring" a judge who was not eligible for retirement

benefits. Such a judge may very well be eligible for county retirement benefits, however; moreover, even if he is ineligible for any benefits, it still might be more appropriate to refer to him as "involuntarily retired" than "removed from office."

The authorization for compensation of retired judges probably was never necessary, and in any event Section 67 of Article XVI now authorizes a judicial retirement system along with other employee retirement systems. Section 67 operates in a rather obtuse way: it authorizes judicial retirement compensation by cross reference to previous constitutional and statutory enactments. For the sake of clarity, all of the retirement provisions of Section 1-a should be repealed and replaced by a simple statement in Section 67 authorizing a judicial retirement system as established by law.

Most state constitutions do not attempt, as Section 1-a does, to define misconduct and disability. The definitions of these terms, contained in Subsections (6A) and (6B) respectively, leave something to be desired in terms of both conciseness and clarity. They probably should be replaced with the terms "misconduct" and "disability," leaving definition to the supreme court, which has the responsibility of assigning meaning anyway.

The language in Subsection 1-a(11) requiring that the supreme court's procedural rules afford due process of law is gratuitous. Rules that failed to afford due process of law would be invalid under the federal constitution in any event. The draftsmen of the subsection apparently were concerned that a judge's interest in retaining his office might be held to be a privilege, rather than a right protected by the Due Process Clause. It is now clear, however, that a state may not deprive an official of his office without due process. (See, *e.g., Bond v. Floyd,* 385 U.S. 116 (1966).)

The major policy question presented by Section 1-a is whether this method of judicial discipline is the best available. There is no clear answer to that question. The formal removal and retirement provisions of Section 1-a have never been fully used; the supreme court has never removed or involuntarily retired a judge. That is probably not the best gauge of the section's effectiveness, however. The commission has a staff, receives complaints, makes investigations, and conducts hearings. A number of judges apparently have been induced by the commission to resign or retire rather than suffer the public exposure that results from the filing of a formal recommendation with the supreme court. At the end of 1972, the executive director of the commission reported that as a result of the commission's investigations, eight judges resigned, two underwent physical and psychiatric examinations, one disabled judge decided not to seek reelection, one was defeated while under investigation, one was fired by the city council, and two retired. (Pipkin, "How Do You Plead, Your Honor?" 7 *Trial Lawyers Forum* 14, 39 (1972).)

The commission plan generally is considered effective, workable, and not unduly expensive. (See, *e.g.,* The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington, D.C.: Government Printing Office, 1967), p. 71; Buckley, "The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct," 3 *U. San Fran. L. Rev.* 244 (1969); Calvert, "Judicial Retirement," 27 *Texas Bar Journal* 963 (1964); Frankel, "Judicial Discipline and Removal," 44 *Texas L. Rev.* 1117 (1966).)

If the judicial discipline plan of Section 1-a is retained, some of the other removal methods provided in the constitution should be deleted. Section 6 of Article XV (removal of district judges by the supreme court on petition by practicing lawyers), Section 8 of Article XV (removal of district and appellate judges by the governor upon address by the legislature),and Section 24 of Article V (removal of county judges and justices of the peace by district judges) have proven

to be ineffective or unsatisfactory methods of judicial discipline. Section 2 of Article XV provides for impeachment of various officials, including certain judges. As the preceding *Comparative Analysis* suggests, a number of states provide for impeachment of judges in addition to more specific removal provisions aimed exclusively at judges. The major difference between the two approaches is that impeachment is carried out entirely by the legislature (the house impeaches and the senate tries the case), while other methods involve the judiciary and/or the executive. An argument might be made that the impeachment method should be retained, at least for members of the supreme court, if the supreme court holds the ultimate power to discipline under the other method. The present impeachment provision is anachronistic, however, because it names the "courts of appeals," which has not existed for more than 80 years, and omits the court of criminal appeals and the courts of civil appeals. (See Art. XV, Sec. 2.)

Sec. 2. SUPREME COURT; JUSTICES; SECTIONS; ELIGIBILITY; ELECTION; VACANCIES. The Supreme Court shall consist of a Chief Justice and eight Associate Justices, any five of whom shall constitute a quorum, and the concurrence of five shall be necessary to a decision of a case; provided, that when the business of the court may require, the court may sit in sections as designated by the court to hear argument of causes and to consider applications for writs of error or other preliminary matters. No person shall be eligible to the office of Chief Justice or Associate Justice of the Supreme Court unless he be, at the time of his election, a citizen of the United States and of this state, and unless he shall have attained the age of thirty-five years, and shall have been a practicing lawyer, or a lawyer and judge of a court of record together at least ten years. Said Justices shall be elected (three of them each two years) by the qualified voters of the state at a general election; shall hold their offices six years, or until their successors are elected and qualified; and shall each receive such compensation as shall be provided by law. In case of a vacancy in the office of any Justice of the Supreme Court, the Governor shall fill the vacancy until the next general election for state officers, and at such general election the vacancy for the unexpired term shall be filled by election by the qualified voters of the state. The Justices of the Supreme Court who may be in office at the time this amendment takes effect shall continue in office until the expiration of their term of office under the present Constitution, and until their successors are elected and qualified. The Judges of the Commission of Appeals who may be in office at the time this amendment takes effect shall become Associate Justices of the Supreme Court and each shall continue in office as such Associate Justice of the Supreme Court until January 1st next preceding the expiration of the term to which he has been appointed and until his successor shall be elected and qualified.

History

The Texas Constitution has provided for a supreme court since the days of the Republic. Before 1876, the number of members changed frequently, ranging from three to five. The present constitution originally provided for a supreme court of only three members. This number almost immediately proved too small to handle the workload, and in 1879 the legislature created a three-member "commission of appeals" to assist the supreme court. The caseload continued to be unmanageable, however, and in 1891 the judiciary article was extensively amended, primarily in an attempt to reduce the backlog of cases in the supreme court. The court of criminal appeal replaced the court of appeals, and courts of civil appeals were created to further reduce the supreme court's workload in civil cases. Membership of the supreme court was continued at three, however, and that number again proved inadequate despite the drastic measures taken in 1891 to reduce the workload. In 1918 the legislature again created a "commission of appeals,"

this time with six members sitting in two sections of three judges each. The commissioners considered cases referred to them by the supreme court, heard arguments, wrote opinions, and sometimes sat en banc with the supreme court. But only the three supreme court justices had voting power, and all opinions by commissioners had to be approved by the supreme court. An amendment in 1945 made the commissioners associate justices of the Supreme Court, abolished the commission of appeals, and brought the court to its present membership of nine. (See Calvert, "The Judicial System of Texas," 361-362 S.W.2d (Texas cases, 1963), pp. 1-3; see also Sinclair, "The Supreme Court of Texas," 7 *Hous. L. Rev.* 20 (1969).)

The Constitution of the Republic provided for election of supreme court justices by congress. The succeeding constitutions and amendments alternated between popular election and appointment by the governor. Popular election of judges was one of the basic tenets of the populist movement, and the 1876 Constitution called for popular election of judges generally. That has been the method of judicial selection in Texas ever since with two notable exceptions: (1) vacancies on the district and appellate benches are filled by appointment of the governor; and (2) the charters of some home-rule cities provide for appointment of municipal judges.

The 1876 Constitution required a supreme court justice to be at least 30 years of age and to have at least seven years' combined experience as a lawyer and judge. The 1945 amendment raised those figures to 35 years of age and ten years' experience.

Tenure of supreme court justices has been as short as four years (under the Republic) and as long as ten years (under the 1866 Constitution); the present six-year term has been in effect since 1876.

Until 1945, salaries of supreme court justices were fixed in this Section 2; the 1945 amendment allowed the legislature to fix them. The authorization to sit in sections also was added by the 1945 amendment.

The article by Prof. T. C. Sinclair, cited previously, is an excellent study of the supreme court, including not only its history, but its personnel and methods of operation.

Explanation

This section is straightforward and has produced little litigation. It creates a nine-member supreme court; provides for the election, qualifications, compensation, and terms of the chief justice and eight associate justices; and directs the governor to fill vacancies by appointment. The last two sentences are merely transitional provisions for the 1945 amendment and no longer have any effect.

The section does not state how the chief justice is to be chosen. Presumably he could be selected by the members of the court themselves. (Indeed, that was the method by which the chief justice was selected under the 1869 Constitution, the only Texas Constitution that has spoken to the question.) Since 1876, however, the unchallenged practice has been to treat the office of chief justice as a distinct office. It is specifically identified on the ballot, and upon the death or resignation of the person selected for that office there is no chief justice until the vacancy is filled by appointment or election.

Section 2 provides not only for a quorum (five), but also that "the concurrence of five shall be necessary to a decision of a case." It also permits the court to sit in sections. The authorization to sit in sections is an exception to the quorum requirement; it may have been included to make sure the conversion from the commission of appeals system to the nine-member supreme court would not be taken as disapproval of the practice of working in smaller groups. It permits fewer

than five justices to hear arguments, consider writ applications, and consider other preliminary matters. This seems to cover anything less than the decision of a case; and since the latter requires five under the concurrence requirement, the requirement of a quorum of five seems to add nothing. The supreme court does not sit in sections, although it does use ad hoc groups of three justices to hear applications for writs of habeas corpus. (See Sinclair, *supra,* at 45.)

Comparative Analysis

About 15 state constitutions provide some form of merit system for the selection and retention of judges. Seven of these have been added in the 1970s. About a dozen states use some voluntary form of screening of judicial appointees. Several others have statutory provisions for merit selection. About half of the states select supreme court justices by popular election. Those states are about equally divided between partisan and nonpartisan elections.

The chief justice is popularly elected in nine states. The remaining states are fairly equally divided – the court chooses its own chief justice, he is appointed, or there is some provision for automatic accession by an associate justice.

Only five other state supreme courts have nine members. Nearly half the states have seven members, and another one-third have five.

Only one state has a term shorter than six years for justices of its court of last resort. About one-third have a six-year term. Five states provide for a life (or "to age 70") term. Ten states have ten-year terms, and ten have 12-year terms.

The Constitution of the United States specifies the term of office of judges to be "during good behavior." Selection is by presidential appointment with the advice and consent of the senate. No mention is made of the size of the court or the selection and term of the chief justice. The *Model State Constitution* provides for executive appointment of judges, or alternatively, for merit selection. The judges serve an initial term of seven years, and upon reappointment serve "during good behavior." Both the United States Constitution and the *Model* provide that judges' salaries, to be provided by law, are not to be diminished during their terms of office.

Author's Comment

No one is likely to argue that this section should be deleted entirely. Virtually all constitutions name at least one court, probably because that is the surest way to ensure the existence of a judicial branch of government, and the court chosen for that role is invariably the highest court of the jurisdiction.

Section 2 probably should be combined with Section 3, which defines the supreme court's jurisdiction and authorizes appointment of its clerk. The method of selecting the chief justice perhaps should be clarified, and the provisions relating to concurrence, quorum, and sections could be deleted. (See the preceding *Explanation.)*

Section 2 (and all of the other sections creating courts) could be greatly shortened and simplified by grouping all provisions relating to judicial selection, tenure, qualifications, compensation, and vacancies for all the courts into a single part of the judicial article. This would eliminate the need to repeat again and again such statements as "In the case of a vacancy in the office of any judge of the _____ court the governor shall fill the vacancy until the next general election for state officers, and at such general election the vacancy for the unexpired term shall be filled by election by the qualified voters . . . ." Similarly, all provisions for clerks of courts can be placed in one section instead of including such a provision in each section creating a court.

The most controversial question that arises in connection with appellate court

judges is the method of their selection. The principal alternatives are popular election, appointment by the governor, and the "Missouri plan," or "merit selection system," under which judges are appointed (usually by the governor) from a list of nominees suggested by a commission.

Popular election has been the usual method of judicial selection in Texas since 1876 and is still the predominant method nationally. (See Winters, "Selection of Judges – An Historical Introduction," 44 *Texas L. Rev.* 1081 (1966).) The United States, however, is virtually the only country in the world where judges are popularly elected. (See The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington, D.C.: Government Printing Office, (1967), p. 66.)

Popular selection is frequently criticized as an unwise and inefficient method of judicial selection. Some of the arguments against it may be summarized as follows:

(1) The electorate has little interest in judicial races and little knowledge upon which to base an intelligent decision. The likelihood that the most qualified candidate will win is therefore not great; a candidate's party affiliation, the familiarity of his name, or his talent for political campaigning is likely to be more important than his judicial ability.

(2) Campaigns for reelection are wasteful of judicial resources. Incumbent judges are rarely defeated (indeed, in the past they have usually been unopposed; see Sinclair, "The Supreme Court of Texas," 7 *Hous. L. Rev.* 20, 23 (1969)); but if they do have an opponent, they must spend a significant amount of time campaigning. One justice of the supreme court reportedly has stated that the court operates at a "7½ judge average capacity," because three of its places are up for election each two years and the court assigns no cases to a justice who is engaged in a campaign. (Sinclair, p.39.)

(3) The need for funds to finance a campaign is a potential threat to judicial integrity. Judicial campaigns, like other political contests, require expenditure of large sums for media advertising. Most of these funds are contributed by lawyers. It may be doubted whether any judge, no matter how scrupulously honest, can erase from his memory the fact that a certain lawyer did or did not contribute to his campaign.

Arguments in favor of popular election include the following:

(1) Election is the most democratic method of judicial selection. Judges, no less than executive officers and legislators, are public officials who make decisions affecting all citizens; therefore they should be answerable to the voters.

(2) Popular election of judges has produced reasonably good judges for nearly a century; in any event, shortcomings in the quality of judges are a minor problem compared with many of the other deficiencies of the court system. (See Burnett, "Observations of the Direct Election Method of Judicial Selection," 44 *Texas L. Rev.* 1098 (1966).) If an incompetent judge is elected, the problem now can be handled by the removal and involuntary retirement provisions of Section 1-a of Article V.

(3) Popular election is a lesser evil than any of the alternatives. Appointment of judges by the executive is likely to lead to political cronyism in judicial selection and may threaten the independence of the judiciary by making judges beholden to the executive who appointed them. Under the "Missouri" or "merit" plan, the selection process is likely to be dominated by the bar or some faction of the legal profession.

The debate over these points has raged for half a century, and it cannot be said that any consensus has been reached, either by the bar, the judiciary, or the commentators. One point relevant to this debate is the fact that all vacancies in judicial office in Texas are filled by appointment, either by the governor (in the case of the district and appellate courts) or by the commissioners court or city governing

board. In the past, at least, this has meant that most judges initially were selected not by popular election but by political appointment. (See Henderson and Sinclair, "The Selection of Judges in Texas," 5 *Hous. L. Rev.* 430 (1968).) There are indications, however, that this pattern may be changing. Five of the nine supreme court justices sitting in 1975 reached the court initially through open election, rather than by appointment. At least one reason for this change is the improvement of judicial retirement benefits in recent years and the establishment of a mandatory retirement age. In the past, judges often stayed on the bench until they died; that created a vacancy, requiring the appointment of a successor. Now a judge is more likely to retire voluntarily at the end of a term; that creates no vacancy, so there is no appointment and his successor is chosen through the regular popular election process.

Another development that may be relevant is the recent improvement in judges' salaries in Texas. For 1976, the legislature established annual salaries of $46,100 for the chief justice of the supreme court and the presiding judge of the court of criminal appeals and $45,600 for the other members of those courts; $40,500 for the chief justices of the courts of civil appeals and $40,000 for the other members of those courts; and $31,000 for district judges. In addition, counties are permitted to supplement the salaries of district judges and justices of the courts of civil appeals so long as the combined state and county earnings of those judges are at least $1,000 less than the total salaries of judges of the next highest level of courts. (See Tex., Legislature, Senate, SB12, 64th Leg., Reg. Sess. 1975.) By contrast, in 1953 supreme court justices were paid $12,000 a year and district judges $7,000. The likelihood that an incumbent judge will be unopposed may well decline as the salary of the office rises.

A possible modification of the present system of popular election would be nonpartisan election. Under this system, judges are elected without regard to party affiliation. Typically, judicial elections are conducted at the same time as primary and general elections for other officials, but judicial races are listed on separate ballots. If one candidate gets an absolute majority of the votes at the primary election, he is declared elected; if not, the names of the two candidates with the most votes go on a special judicial ballot submitted at the general election. (See, *e.g.*, Okla. Const. Art. VII, Sec. 3.)

Nonpartisan election reduces the danger that a good judge may be swept out of office by straight-ticket voters whose decisions are based on their attitudes toward the candidates at the top of the ticket, not their views on the judicial race. On the other hand, nonpartisan election sometimes is criticized on the ground that it is even more likely than partisan election to produce an unqualified judge. The argument is that in partison elections each party has some responsibility to recruit good candidates, or at least disassociate itself from candidates who are clearly not qualified, while in nonpartisan elections there is no preliminary screening of candidates. (See, *e.g.*, Note, "Analysis of Method of Judicial Selection and Tenure," 6 *Suffolk U. L. Rev.* 955 (1972).)

The method most frequently urged as an alternative to popular election is the "Missouri" or "merit" plan. Under this system, a nominating commission (consisting of laymen, lawyers, and judges in proportions that vary widely from state to state) screens potential candidates for a vacant judgeship and then submits a list to the governor. The governor must either appoint one of those nominees or ask the commission to submit additional names. A judge so appointed holds office until the next general election; the voters then are asked to decide whether the judge should be retained in office. If their answer is "yes," the judge serves a full term; if it is "no," the judgeship automatically becomes vacant and is filled by the nominating commission and governor in the manner described above. At the end of each full

term, voters again are given the choice of retaining or removing the judge from office. (See, *e.g.*, American Bar Association, *Model State Judicial Article*, secs. 5, 6.)

The "Missouri" plan works essentially the same in the case of trial courts, except that regional nominating commissions are sometimes created to screen and propose candidates for trial court appointments. Some states have adopted the "Missouri" or "merit" plan for appellate judges but retained popular election of trial judges – Montana is an example – perhaps on the theory that voters are more likely to be able to make intelligent electoral choices in races involving local candidates.

Sec. 3. JURISDICTION OF SUPREME COURT; WRITS; SESSIONS; CLERK. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction.

The Supreme Court shall appoint a clerk, who shall give bond in such manner as is now or may hereafter, be required by law, and he may hold his office for four years and shall be subject to removal by said court for good cause entered of record on the minutes of said court who shall receive such compensation as the Legislature may provide.

History

The 1836 Constitution simply gave the supreme court "appellate jurisdiction only." Since then, many limitations have been placed upon the supreme court's jurisdiction. Most of these undoubtedly were prompted by the heavy caseload that plagued the supreme court throughout most of the nineteenth century. (See the *History* of Sec. 2.) These repeated attempts to reduce the supreme court's workload by limiting its jurisdiction naturally introduced a great deal of detail into the section.

The 1845 and 1861 Constitutions permitted the legislature to restrict appeals from criminal convictions and interlocutory (*i.e.*, nonfinal) orders. (Art. IV, Sec. 3.) The 1866 Constitution permitted the legislature to restrict criminal appeals only in misdemeanor cases, thus restoring the supreme court's constitutional jurisdiction in felony appeals. (Art. IV, Sec. 3.)

The 1869 Constitution attempted an entirely new solution to the continuing problem of criminal appeals; it simply prohibited them unless a supreme court judge, after reviewing the record, believed the trial court had erred. (Art. V, Sec. 3.) This limitation proved unsatisfactory and was removed by amendment in 1873.

The 1876 Constitution created a separate "court of appeals" to handle all criminal appeals and some civil appeals. It gave the supreme court jurisdiction only of civil cases in which the district courts had original or appellate jurisdiction. Since

term, voters again are given the choice of retaining or removing the judge from office. (See, *e.g.*, American Bar Association, *Model State Judicial Article*, secs. 5, 6.)

The "Missouri" plan works essentially the same in the case of trial courts, except that regional nominating commissions are sometimes created to screen and propose candidates for trial court appointments. Some states have adopted the "Missouri" or "merit" plan for appellate judges but retained popular election of trial judges – Montana is an example – perhaps on the theory that voters are more likely to be able to make intelligent electoral choices in races involving local candidates.

Sec. 3. JURISDICTION OF SUPREME COURT; WRITS; SESSIONS; CLERK. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction.

The Supreme Court shall appoint a clerk, who shall give bond in such manner as is now or may hereafter, be required by law, and he may hold his office for four years and shall be subject to removal by said court for good cause entered of record on the minutes of said court who shall receive such compensation as the Legislature may provide.

History

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at that time appeals from most county court judgments went to the court of appeals, this meant that the supreme court had virtually no jurisdiction over cases tried by the county and justice courts. This limitation was attacked in 1881 and 1887 by proposed amendments that would have given the supreme court appellate jurisdiction of all civil cases, but both amendments failed.

A minority report at the 1875 Convention would have created an appeals plan for civil cases very similar to the one now in use. It suggested creation of an intermediate appellate court, and would have limited the supreme court's jurisdiction to appeals from the decisions of the intermediate court. (See *Journal,* p. 543.) This plan was ahead of its time, however, and was rejected by a 46-1 vote, apparently without serious consideration. (*Journal*, p. 458.) The only recorded discussion of the plan is one judge's objection that the intermediate appellate court would simply duplicate the role of the supreme court. (See *Debates,* p. 380.)

The 1891 reorganization of the judicial system gave the supreme court essentially the jurisdiction that it has now. The 1891 amendment contained a provision on supreme court sessions which was deleted from Section 2 in 1930 when Section 3-a was added.

The Legislature in 1927 and again in 1929 attempted to permit direct appeal to the supreme court from county or district court judgments holding statutes unconstitutional, but the voters both times rejected the proposed amendments.

Explanation

Although this section is somewhat intricate, the primary function of the supreme court can be described quite simply: it reviews decisions of the courts of civil appeals on questions of law. Its appellate jurisdiction is constitutionally limited (1) to civil cases, (2) to questions of law (fact findings by the courts of civil appeals are final), (3) to cases that have been decided by a court of civil appeals (except for the direct appeals allowed by Sec. 3-b), and (4) to cases in which the jurisdiction of the courts of civil appeals is appellate, rather than original (*e.g.,* the supreme court has no appellate jurisdiction of original mandamus proceedings in the courts of civil appeals). (*Schintz v. Morris,* 89 Tex. 648, 35 S.W. 1041 (1896).)

Cases reach the supreme court in three ways: (1) by an original proceeding in the supreme court, (2) by direct appeal under Section 3-b on certified questions filed by a court of civil appeals, or (3) on writ of error to a court of civil appeals. (See Calvert, "The Mechanics of Judgment Making in the Supreme Court of Texas," 21 *Baylor L. Rev.* 439 (1969).)

Section 3 contains five grants of jurisdiction to the Supreme Court.

1. The most important of these grants is the one giving the supreme court appellate jurisdiction "in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe." In 1973, 611 of the 936 cases decided by the supreme court rested on this jurisdictional foundation. (See Texas Civil Judicial Council, *Fourty-Fifth Annual Report,* (Austin, 1973), p. 11.)

This grant has been interpreted to permit the legislature to diminish the supreme court's jurisdiction. Many cases within the appellate jurisdiction of the courts of civil appeals are excluded by statute from the supreme court's jurisdiction. For example, the supreme court is forbidden by statute from granting writs of error in cases of slander, divorce, and certain uncontested elections. (Tex. Rev. Civ. Stat. Ann. art. 1821.) Because the 1891 amendment was designed to ease the supreme court's caseload by reducing the number of cases within its jurisdiction, this section has been interpreted to limit the court's jurisdiction. (See *Betts v. Johnson,* 96 Tex. 360, 73 S.W. 4 (1903).)

The language of this grant is somewhat peculiar; it limits the supreme court's jurisdiction to cases within the appellate jurisdiction of the courts of civil appeals, but then leaves the appellate jurisdiction of those courts entirely to the legislature. (See Sec. 6 of Art. V.)

2. The legislature is authorized to "confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State." By its terms this is not a constitutional grant of jurisdiction to the supreme court; it is merely an authorization for the legislature to confer jurisdiction. (A "writ of mandamus" is an order directing a public official to perform a ministerial duty; a "writ of quo warranto" is an infrequently used method of challenging a person's right to hold an office.) The supreme court therefore has jurisdiction under this provision only to the extent that it is provided for by statute. (*Malone v. Rainey,* 133 Tex. 622, 133 S.W.2d 951 (1939).)

3. Section 3 provides that "under such regulations as may be prescribed by law, the [Supreme Court] and the Justices thereof shall have power to issue the writs of mandamus, procedendo, certiorari and such other writs as may be necessary to enforce its jurisdiction." This grants a second, more specific kind of mandamus power quite distinct from the general mandamus power discussed under number 2 above. This mandamus power is broader because it can be exercised by a single justice as well as by the entire supreme court. On the other hand, it is also narrower because it may be used only to enforce the supreme court's jurisdiction. (The supreme court has held that the phrase "as may be necessary to enforce its jurisdiction" applies to all of the writs mentioned.) (*Milam County Oil Mill Co. v. Bass,* 106 Tex. 260, 163 S.W. 577 (1914).) These two sources of mandamus jurisdiction have sometimes been confused. The legislature has enacted four civil statutes on the subject: Articles 1733, 1734, 1735, and 1735a. In doing so, it has not always observed the distinction between the two constitutional grants. Article 1733 purports to give the supreme court "or any Justice thereof" power to issue writs of mandamus against lower court judges "or any officer of the state government, except the Governor." Since this power is not limited to enforcement of the court's jurisdiction, it must rest on the general constitutional mandamus power discussed under number 2 above, but that power is exercisable only by the full supreme court, not by an individual justice. Similarly, Article 1734, providing for mandamus to compel a district judge to proceed to trial, necessarily is based on the general mandamus power, but it also purports to give the power to individual justices. Article 1734 has been held unconstitutional insofar as it purports to give the power to individual justices, though it remains valid as a grant of power to the full supreme court. (*Kliever v. McManus,* 66 Tex. 48, 17 S.W. 249 (1886).) Presumably the same reasoning would apply to Article 1733.

Article 1735a purports to give the supreme court power to issue "the writ of mandamus, or any other mandatory or compulsory writ or process" in certain election cases. Again, the statute attempts to implement the general power discussed under number 2 but exceeds that power because that authorization encompasses only two writs, mandamus and quo warranto. Article 1735a therefore has been held void insofar as it attempts to give the supreme court power to issue writs other than the two named. (*Love v. Wilcox,* 119 Tex. 256, 28 S.W.2d 515 (1930).)

The general mandamus power exists only to the extent that the legislature has authorized it, but the power to issue writs to enforce the court's jurisdiction is an outright grant of jurisdiction to the supreme court that does not require legislative implementation. (*Cleveland v. Ward,* 116 Tex. 1, 285 S.W. 1063 (1926).)

The court of criminal appeals, courts of civil appeals, and district courts also have mandamus powers. (See Art. V, Sec. 5, 8; Tex. Rev. Civ. Stat. Ann. arts.

1823, 1824.) The supreme court restricts its own mandamus caseload by refusing in most cases to consider an application for mandamus unless relief has first been sought in a court of civil appeals. The court further restricts mandamus and other original writ actions by refusing to consider them if fact issues are raised (*e.g., Depoyster v. Baker,* 89 Tex. 155, 34 S.W. 106 (1896)).

Although the supreme court's jurisdiction is essentially civil, it considers some criminal cases under its mandamus powers. Despite the grant of mandamus power to the court of criminal appeals in Section 5 of Article V, the supreme court, rather than the court of criminal appeals, has jurisdiction to order a district judge to proceed to trial in a criminal case. (*State* ex rel. *Moreau v. Bond,* 114 Tex. 468, 271 S.W. 379 (1925).) The supreme court also has power to order a district judge to vacate an improper sentence in a criminal case. (*State* ex rel. *Pettit v. Thurmond,* 516 S.W.2d 119 (Tex. 1974).) In 1973, 150 of the 197 mandamus applications filed in the supreme court were in criminal cases. (See *Forty-Fifth Annual Report, supra,* p. 9.) These are primarily letters from prisoners asking the supreme court to mandamus trial courts to act speedily on their applications for habeas corpus or on other pending felony charges. (See Calvert, 21 *Baylor L. Rev.* at 443.)

The writs of procedendo and certiorari are rarely used. The only "other writ" of significance is the writ of prohibition, which is sometimes issued by the supreme court to prohibit a lower court from acting. (See, *e.g., Milam County Oil Mill Co. v. Bass,* 106 Tex. 260, 163 S.W. 577 (1914).)

The supreme court's mandamus powers are described in detail in Norvell and Sutton, "The Original Writ of Mandamus in the Supreme Court of Texas," 1 *St. Mary's L. J.* 177 (1969).

4. "The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law . . . ." This gives the supreme court only such habeas corpus power as may be prescribed by law, and the legislature has prescribed very little. The "writ of habeas corpus" is an order directing that a person be released from custody. The legislature has given the supreme court this power only when a person is restrained of his liberty for violation of any order in a civil case. (Tex. Rev. Civ. Stat. Ann. art. 1737.) In practice, this means that most habeas corpus petitions filed in the supreme court come from fathers who are held in contempt for failure to make child support payments. (See Calvert, 21 *Baylor L. Rev.,* at 440.) In 1973 only ten habeas corpus petitions were filed in the supreme court.

Although both this provision and the statute permit a writ of habeas corpus to be granted by an individual justice, in practice at least three justices consider each petition. This has been explained as an attempt to discourage petitioners from "shopping" among the justices for a receptive one. (Calvert, 21 *Baylor L. Rev.,* at 440.)

5. The supreme court is given power "to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction." Perhaps because it does not want to spend its time conducting evidentiary hearings, the court has used this fact-finding power very sparingly. As pointed out above, the court has held that it has no power to act in mandamus cases that raise fact issues. The court has explained this reluctance as follows:

> This court is not provided with the means of ascertaining the facts in any controversy. It has none of the powers conferred by law upon the district court to take depositions, issue subpoenas, writs of attachment, or other process neccessary to the trial of issues of fact; and in this court the right of trial by jury, which is secured by the constitution to every person demanding it, could not be afforded. (*Depoyster v. Baker,* 89 Tex. 155, 160, 34 S.W. 106, 108 (1896).)

The court does, however, exercise power to determine facts relating to the court's jurisdiction—for example, whether a party had notice of the filing of a document. (*e.g., Tarpley v. Epperson,* 125 Tex. 63, 79 S.W.2d 1081 (1935).)

There are at least three other sources of supreme court jurisdiction elsewhere in the constitution. Section 3-b of Article V gives the supreme court jurisdiction of direct appeals from trial courts in certain cases. Section 28 of Article III gives the court power to mandamus the Legislative Redistricting Board. Section 1-a of Article V gives the court power to censure or remove a judge for misconduct or involuntarily retire him for disability.

The last paragraph of Section 3, providing for a clerk of the supreme court, is generally self-explanatory and has raised few questions.

Comparative Analysis

More than half of the state constitutions mention supreme court jurisdiction, but with widely varying degrees of specificity. About 11 define at least part of the court's jurisdiction. About 14 have provisions containing as much detail as or more than the Texas provision. In four states, the subject is left entirely to the legislature, and in seven others jurisdiction is determined primarily by the legislature, but one or more specific jurisdictional matters are also mentioned in the constitution.

About six state constitutions make no mention of supreme court jurisdiction, and the recently revised constitutions of Michigan and Illinois allow the supreme court to fix its own jurisdiction by rule.

Approximately 32 states provide constitutionally for some original jurisdiction in the supreme court. A few do not mention original jurisdiction generally but authorize the court to issue remedial writs.

About 19 states provide constitutionally for a clerk of the supreme court.

The United States Constitution grants the Supreme Court original jurisdiction in "all Cases affecting Ambassadors, other public Ministers and Consuls," and those in which a state is a party. In all other justiciable matters enumerated in Article III, Section 2, the Supreme Court is given appellate jurisdiction, "both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The *Model State Constitution* provides the high court with original jurisdiction in two areas: review of legislative redistricting and all matters concerning the governor and "in all other cases as provided by law." Appellate jurisdiction is granted in all cases arising under the state and federal constitutions and "in all other cases as provided by law."

Author's Comment

Compared to the constitutional provisions governing jurisdiction of trial courts in Texas, the provisions governing supreme court jurisdiction are relatively simple and straightforward. With the exception of the two grants of mandamus power, they have not proven unduly troublesome.

It is sometimes said that the legislature has given the supreme court too much jurisdiction. The 1891 amendment stated that until otherwise provided, the supreme court should have jurisdiction of three categories of cases in the courts of civil appeals: (1) those in which the various courts of civil appeals hold differently on the same question of law, (2) those in which a judge of a court of civil appeals dissents, and (3) those in which a state statute is held to be void. When the legislature replaced that provision with its own definition of the supreme court's appellate jurisdiction, it retained these three grounds, but it also added three others.

(See Tex. Rev. Civ. Stat. Ann. art. 1728.) One of these additional grounds is a catch-all giving the supreme court jurisdiction in any other case in which it is made to appear that an error of substantive law has been committed by the court of civil appeals which affects the judgment, but excluding those cases in which the jurisdiction of the court of civil appeals is made final by statute. (Tex. Rev. Civ. Stat. Ann. art. 1728(6).) This clause has had two major effects. First, it permits practically any kind of case to be appealed twice – once to a court of civil appeals, then to the supreme court. Second, it complicates the matter of defining supreme court jurisdiction. The courts have held that, because of this clause, the supreme court's jurisdiction is limited not only by the statutes and constitutional provisions dealing with that subject directly, but also by the statutes dealing with finality of civil appeals decisions. (*State* ex rel. *Dunn v. Thompson,* 88 Tex. 228, 30 S.W. 1046 (1895).)

One writer has stated that "One of the objectives of the reform movement of 1891 was the limiting of appeals to the three essential categories which are listed in the first three sections of article 1728." (Sinclair, "The Supreme Court of Texas," 7 *Hous. L. Rev.* 20, 44 (1969).) If this is true, the amendment failed to carry out the objective because it very clearly authorized the legislature to give the supreme court jurisdiction of all cases within the appellate jurisdiction of the courts of civil appeals. Nevertheless, one objective of the amendment undoubtedly was reduction of the supreme court's workload, and the interim provision limiting the jurisdiction to the three specified grounds probably indicated a desire to limit the supreme court's jurisdiction. The present system gives litigants a second appeal, regardless of the public importance of the case, and introduces additional elements of chance and expense into litigation. (See Sunderland, "The Problem of Double Appeals," 12 *Texas L. Rev.* 47, 49 (1933).)

Another criticism of the present jurisdictional scheme is that it allows the supreme court little discretion in deciding which cases merit its attention. Unlike the United States Supreme Court, which generally may refuse to review decisions of the United States Courts of Appeals for any reason, the Texas Supreme Court takes the position that it is required to grant a writ of error when the statutory conditions are met, regardless of the importance of the case. (See Hart, "The Appellate Jurisdiction of the Supreme Court of Texas," 29 *Texas L. Rev.* 285, 290 (1951).) Former Chief Justice Robert W. Calvert has estimated that only 20 percent of the court's time is spent on cases "which develop the jurisprudence of the state." (Sinclair, 7 *Hous. L. Rev.*, at 45, n.27.) A system giving the court more flexibility in deciding which cases to review might result in a more productive allocation of judicial resources.

The supreme court's habeas corpus jurisdiction is quite insignificant. As pointed out in the preceding *Explanation,* virtually all habeas corpus petitions go to some other court. It might be argued, therefore, that all habeas corpus power could be removed from the supreme court without significantly changing present practice. The writ of habeas corpus, however, is "the great writ" of Anglo-American jurisprudence (see *Fay v. Noia,* 372 U.S. 391, 399-405 (1963)), and it may be argued that it should be within the arsenal of any court of last resort.

The criticisms mentioned so far could be met without constitutional change. The court's appellate jurisdiction is subject to restriction by the legislature; if the court's workload is too heavy, the legislature has power to reduce it. The legislature also is free to give the court more discretion in deciding which cases it should hear. Since the court has only such habeas corpus power as the legislature may prescribe, the legislature is free to remove it entirely.

Section 3 could be simplified greatly by simply providing that the supreme court has such original and appellate jurisdiction as is provided by law. As pointed out

above, the legislature already has great freedom in defining the supreme court's jurisdiction. On the other hand, the case law interpreting present Section 3 is well-settled and most of the language is reasonably clear. With a few minor changes, the section could be retained without serious harm to the objectives of good constitution-making.

At least three changes should be made, however. The third sentence should be deleted; the legislature long ago "provided otherwise," so the sentence is now inoperative. The two grants of mandamus power should be clarified, either by combining them in a single general grant of mandamus power or by more clearly distinguishing between them. Finally, the direct appeal provision of Section 3-b should be consolidated with this section.

Two other changes might be considered. As pointed out previously, the supreme court has no appellate jurisdiction in cases within the original jurisdiction of the courts of civil appeals. This is important primarily in mandamus cases. The supreme court generally declines to consider such cases unless they have been presented first to a court of civil appeals. If that court denies the writ, the applicant then goes to the supreme court. His action must be an original mandamus proceeding, however, because the supreme court has no appellate jurisdiction of the matter. There is no apparent reason why the legislature should not be empowered to give the supreme court appellate jurisdiction of all decisions of courts of civil appeals, whether they result from original or appellate proceedings. This could be accomplished simply by deleting the word "appellate" from the phrase "in cases of which the Courts of Civil Appeals have appellate jurisdiction."

Second, the provision for a clerk of the supreme court might be removed. It is hardly a matter of constitutional magnitude, and the subject already is covered by statute. (See Tex. Rev. Civ. Stat. Ann. arts. 1718–1721.) Even if the office of clerk is to remain constitutional, however, it could be removed from this section. Sections 5 and 6 of Article V provide for clerks of the court of criminal appeals and the courts of civil appeals, respectively, and are patterned after the provision for the supreme court clerk. These three sections could be combined in a single, one-sentence provision for appellate court clerks, thereby eliminating two of the three references to the subject.

Sec. 3a. SESSIONS OF COURT. The Supreme Court may sit at any time during the year at the seat of government for the transaction of business and each term thereof shall begin and end with each calendar year.

History

Until 1930 sessions of the supreme court were prescribed in Section 3. The 1845 Constitution provided for an October-June term and authorized the court to sit "at not more than three places in the State." (Art. IV, Sec. 3.) All subsequent constitutions fixed specific, noncontinuous terms, and all except the 1869 Constitution authorized the court to sit in places other than the state capital. The 1891 amendment provided that the court sit only at the state capital, and the term provision was repealed in 1930 by the adoption of Section 3a.

Amendments proposed in 1927 and 1929 would have provided for continuous terms, but they were defeated, probably because they also contained other, more substantial changes.

Explanation

When the supreme court's term was noncontinuous, it had no power to act as a court during the "vacation" months. The court in *Hines v. Morse,* 92 Tex. 194, 47

S.W. 516 (1898), alleviated this problem somewhat by holding that it could issue a writ of mandamus during vacation because the phrase "and the Justices thereof" in Section 3 conferred power on the justices even at times when the court as such was powerless. The court sometimes did dispose of agreed motions during vacation. (See Stayton and Kennedy, "A Study of Pendency in Texas Civil Litigation," 23 *Texas L. Rev.* 311, 316, n.16 (1945).)

Adoption of Section 3a removed this problem from the constitution by allowing the court to sit year-round. A statute purporting to limit the supreme court's term from June through October is still on the books (Tex. Rev. Civ. Stat. Ann. art. 1726), but it presumably was implicitly repealed by the addition of Section 3a in 1930.

Comparative Analysis

Only Maryland has a constitutional provision naming specific dates for supreme court sessions, and it provides only minimum terms.

More than half the states prescribe the state capital as the court's meeting place. A few provide for alternative meeting places in certain circumstances.

Author's Comment

There is no apparent reason for constitutionally limiting the supreme court's work-year. In this respect, Section 3a is obviously an improvement over the previous continuous term provision. But it may be doubted whether the section serves any useful purpose, other than to repeal the old provision. It does not require the court to sit continuously, and in fact the court customarily does not meet during a portion of the summer. As an authorization to the court to sit at any time during the year, it is unncessary because the court would have that authority anyway in the absence of any limitation on its term.

A great deal of repetitive verbiage could be eliminated from the judiciary article by removing all the term provisions from Sections 3a, 5, 6, 7, 17, 19, and 29 of Article V and replacing them with a single, general provision for court terms.

Sec. 3-b APPEAL FROM ORDER GRANTING OR DENYING INJUNCTION. The Legislature shall have the power to provide by law, for an appeal direct to the Supreme Court of this State from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State.

History

During the 1920s the legislature twice asked voters to give it power to permit direct appeals in certain cases in which the legislature's enactments had been held unconstitutional. Both proposed amendments were defeated. The more limited provision now contained in Section 3-b was approved by the voters in 1940 by a majority of 2-1. (See *Seven Decades*, p. 219.)

Explanation

This section is in effect an exception to Section 3 which gives the supreme court appellate jurisdiction only of cases that have already been decided by a court of civil appeals. (See the *Explanation* of Sec. 3.) Section 3-b allows an appellant to bypass the intermediate court in certain cases. It probably is a recognition of the fact that delay in granting an injunction, or in dissolving an injunction that should not have been granted, often works a great hardship on one of the parties. This obviously is

not the only purpose of Section 3-b, however, because the section does not apply to all injunctions. It applies only to injunctions granted or denied "on the grounds [sic] of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State." This limitation undoubtedly reflects the legislature's desire, evidenced in the 1927 and 1929 proposed amendments, to obtain quick, decisive action in cases challenging the constitutionality of legislative acts.

Section 3-b is merely an authorization for legislative action. Article 1738a of the civil statutes actually implements the direct appeal authorization. Although the constitution says "any state agency," Article 1738a says "any State Board or Commission." The supreme court has interpreted this difference to mean that the legislature has not exercised the full measure of its constitutional power. In *Standard Securities Service Corp. v. King* (161 Tex. 448, 341 S.W.2d 423 (1960)), for example, the court held that it had no jurisdiction under the statute when the order in question was the order of the securities commissioner, because a single officer is not a state board or commission. The supreme court also has restricted direct appeals by requiring that the decision granting or denying the injunction be based squarely on a constitutional determination. If unconstitutionality is only one of two possible grounds for the trial court's decision, the supreme court will refuse to accept a direct appeal. (See *Mitchell v. Purolator Security, Inc.*, 515 S.W.2d 101 (Tex. 1974).)

A litigant in a case that qualifies under Section 3-b and Article 1738a is not required to take a direct appeal. He has the option of choosing that route or the usual route through a court of civil appeals. (See Calvert, "The Mechanics of Judgment Making in the Supreme Court of Texas," 21 *Baylor L. Rev.* 439, 443 (1969).)

Comparative Analysis

Of the 19 states having constitutional intermediate appellate courts, seven provide for direct appeal in some cases. None of the other state constitutions that provide for intermediate appellate courts prohibit direct appeals, however, either directly or indirectly (as Sec. 3 of Art. V does) by limiting supreme court jurisdiction to cases from the intermediate court.

Author's Comment

In a system that has an intermediate appellate level, direct appeal to the supreme court is an extraordinary procedure usually reserved for cases of great importance, or cases in which there is an unusual need for speedy resolution. It is not clear that the cases defined by Section 3-b fit either of those categories. There is no apparent reason why injunctions involving constitutionality of a statute or validity of an administrative order deserve more speedy treatment than other kinds of injunctions. If the goal is speedy resolution of the constitutionality of a statute or the validity of an administrative order, there is no reason to restrict the procedure to injunction cases. Finally, the cases covered by Section 3-b are not necessarily those of greatest importance; injunctions based on administrative orders are fairly routine, and as a class probably have no greater public importance than many other classes of lawsuits.

There are situations in which the usual two-step appellate process is inefficient. Sometimes a number of suits involving the same legal question are pending in several courts of appeals; time and expense could be saved if there were some way the supreme court could resolve the question for the benefit of all the intermediate courts. There are other cases in which time does not permit the full appellate

process; by the time two appeals have been completed, the matter will be mooted by other developments.

The California Constitution contains a provision that in effect permits the supreme court itself to decide when the intermediate court should be bypassed. Section 12 of Article VI of the California Constitution provides that "The Supreme Court may, before decision becomes final, transfer to itself a cause in a court of appeal." This procedure requires no action by the litigants or the intermediate court; the supreme court simply transfers the case on its own motion. This may be done at any time from the filing of the case in the intermediate court until 30 days after the intermediate court's decision becomes final. (The California Supreme Court may extend this period for an additional 30 days "for good cause.") (This system is described and evaluated in Comment, "California Supreme Court Review: Hearing Cases on the Court's Own Motion," 41 *S. Cal. L. Rev.* 749 (1968).) New Jersey has a somewhat similar procedure. (N.J. Supreme Court Rules 1: 10-1(a) (1963).)

This procedure, called "transfer *sua sponte*" (on the court's own motion), might offer a more flexible method than that of Section 3-b to provide for direct review of certain cases. In any event, the provisions for direct appeal should be consolidated with the other supreme court jurisdictional provisions contained in Section 3 of Article V.

Sec. 4. COURT OF CRIMINAL APPEALS; JUDGES. The Court of Criminal Appeals shall consist of five Judges, one of whom shall be Presiding Judge, a majority of whom shall constitute a quorum, and the concurrence of three Judges shall be necessary to a decision of said court. Said Judges shall have the same qualifications and receive the same salaries as the Associate Justices of the Supreme Court. They shall be elected by the qualified voters of the state at a general election and shall hold their offices for a term of six years. In case of a vacancy in the office of a Judge of the Court of Criminal Appeals, the Governor shall, with the advice and consent of the Senate, fill said vacancy by appointment until the next succeeding general election.

The Judges of the Court of Criminal Appeals who may be in office at the time when this Amendment takes effect shall become Judges of the Court of Criminal Appeals and continue in office until the expiration of the term of office for which each has been elected or appointed under the present Constitution and laws of this state, and until his successor shall have been elected and qualified.

The two members of the Commission of Appeals in aid of the Court of Criminal Appeals who may be in office at the time when this Amendment takes effect shall become Judges of the Court of Criminal Appeals and shall hold their offices, one for a term of two years and the other for a term of four years, beginning the first day of January following the adoption of this Amendment and until their successors are elected and qualified. Said Judges shall by agreement or otherwise designate the incumbent for each of the terms mentioned.

The Governor shall designate one of the five Judges as Presiding Judge and at the expiration of his term and each six years thereafter a Presiding Judge shall be elected.

History

In the original Constitution of 1876, Section 4 of Article V related to the clerk of the supreme court; Sections 5 and 6 related to the court of appeals. In the 1891 revision, the sections were rearranged by moving the clerk provisions to Section 3 and devoting Sections 4 and 5 to the court of criminal appeals, thus making Section 6 available for creation of the courts of civil appeals.

The court of criminal appeals is the descendant of the old court of appeals, which was created under the Constitution of 1876. Under the earlier constitutions, all appeals went to the supreme court, and the result was an unmanageable backlog of

cases in that court. Several attempts had been made to relieve this problem; the 1861 Constitution permitted the legislature to exclude all criminal appeals from the supreme court's jurisdiction; the 1866 Constitution permitted the exclusion of misdemeanor appeals; the 1869 Constitution excluded criminal cases from the supreme court entirely unless a member of the supreme court granted permission for an appeal in a specific case. (See Williams, "History of the Texas Judicial Machine and Its Growth," 5 *Texas L. Rev.* 174, 175-77 (1927).) None of these measures solved the workload problems, however, and the resumption of normal activities after Reconstruction crowded the supreme court's docket even more. This prompted the 1875 Convention to consider more drastic measures to relieve some of the pressure on the supreme court. (See *Debates,* p. 422.) Several alternatives were considered. One plan would have created an intermediate appellate court and given the supreme court jurisdiction of both civil and criminal appeals from that court. (*Journal,* p. 457.) Another would have permitted the supreme court to sit in two sections, one civil and one criminal. (*Journal,* p. 563.) But the plan chosen was one creating a separate court of last resort.

Section 5 of Article V of the 1876 Constitution created a court of appeals with three judges and gave it jurisdiction of all criminal cases and some civil cases. Decisions of the court of appeals were not reviewable by the supreme court.

The decision to separate the civil and criminal appellate processes has been described as a result that "arose as a makeshift rather than from any hallowed legal or constitutional theories." (Willis, "The Evolution of the Texas Court of Criminal Appeals," 29 *Texas Bar Journal* 723 (1966).)

The court of appeals was not a totally satisfactory solution. For one thing, it did not solve the caseload problem; by 1891 the supreme court had a backlog of about 1,200 cases. (Williams, *supra,* 5 *Texas L. Rev.,* at 179.) For another, there was no method for resolving conflicts between the court of appeals and the supreme court; each was authoritative within its sphere of jurisdiction. Amendments proposed in 1881 and 1887 would have removed all civil jurisdiction from the court of appeals, but both were defeated.

The inability of the court of appeals and the supreme court to cope with the volume of appeals led to the extensive judicial reform package of 1891. The major innovation in that package was creation of the courts of civil appeals as intermediate appellate courts. Creation of the court of criminal appeals was merely a by-product; the civil jurisdiction of the court of appeals was transferred to the new courts, and its name was changed to reflect its resulting status as a purely criminal court. Judges of the court of appeals automatically became judges of the court of criminal appeals.

Section 4 was unchanged from 1891 until 1966, when membership of the court was increased from three to five by making the two "commissioners" full-fledged members of the court.

The "Commission of Criminal Appeals" had been authorized by statute in 1925. (Tex. Laws 1925, ch. 95, 22 *Gammel's Laws,* p. 269.) It was composed of two attorneys who sat with the court and generally performed all the functions of judges, except that they were not permitted to vote. (See Barrow, "In Support of Constitutional Amendment No. 9 Providing for a Court of Criminal Appeals of Five Judges," 29 *Texas Bar Journal* 721 (1966).) The commission was abolished after expansion of the court to five members, but in 1969 it was recreated because the workload of the court had become too heavy for five judges. (Roberts, "Proposed Changes in Structure of Appellate Courts," 35 *Texas Bar Journal* 1003 (1972).) A new statute describing the powers and duties of commissioners in greater detail was enacted in 1971. (Tex. Rev. Civ. Stat. Ann. art. 1811e.)

Art. V, § 4

Explanation

The court of criminal appeals is the court of last resort in Texas in criminal matters. Within its field, its decisions are authoritative and must be obeyed by all lower courts. (*State v. Briggs,* 171 Tex. Crim. 479, 351 S.W.2d 892 (1961).) Texas thus has two "highest" courts; the supreme court is the highest court in civil matters, but the court of criminal appeals is supreme in criminal matters. There is no provision for resolving conflicts between the two courts. As a result, there are a few areas in which the law is one thing in the civil courts and another in the criminal courts. For example, in the criminal courts a witness can be impeached by showing that he has been convicted of any felony (*Smith v. State,* 346 S.W.2d 611 (Tex. Crim. App. 1961)), but in the civil courts such convictions are inadmissible unless they involve crimes of moral turpitude. (*Compton v. Jay,* 389 S.W.2d 639 (Tex. 1965).)

Judges of the court of criminal appeals are required to meet the same qualifications as judges of the supreme court, and they receive the same compensation and serve terms of the same length, six years. The tendency to treat judges of the two courts equally is so strong that the attorney general has ruled that the presiding judge of the court of criminal appeals, like the chief justice of the supreme court, may be paid more than the other judges of his court, even though Section 4 clearly states that judges of the court of criminal appeals are to receive the same salaries as "Associate Justices of the Supreme Court." (Tex. Att'y Gen. Op. No. M-1003 (1971).)

The presiding judge of the court of criminal appeals, like the chief justice of the supreme court, is considered a distinct office; the presiding judge is chosen by the voters, rather than by the other members of the court. In the case of the chief justice, this is merely a matter of custom (see the *Explanation* of Sec. 2). But in the case of the presiding judge, Section 4 apparently requires this practice by providing specifically for the election of a presiding judge.

Commissioners of the court of criminal appeals perform all the functions of a judge, except that they may not vote. Their opinions, when approved by the court, have the same legal effect as opinions written by members of the court. (Tex. Rev. Civ. Stat. Ann. art 1811e.) The statute provides for two different kinds of commissioners. Those in the first category might be called "temporary commissioners." They must be retired district or appellate judges. They receive the same salaries as members of the court and are designated by the presiding judge with the concurrence of a majority of the court. They perform whatever duties the court gives them and may serve for a period of time or in particular cases. (Tex. Rev. Civ. Stat. Ann. art. 1811e(1).)

The second category of commissioners are the full-time, permanent commissioners. They need not be retired judges. They must be attorneys, must have the qualifications of judges of the court of criminal appeals, and are appointed by the full court for two-year terms. Their salaries are left to the legislature. (Tex. Rev. Civ. Stat. Ann. art. 1811e(1a).)

Comparative Analysis

Oklahoma is the only other state that has a separate court of last resort for criminal matters. In Oklahoma the court of criminal appeals is not quite "equal" with that state's supreme court. The Oklahoma Constitution permits the legislature to take away the exclusive appellate jurisdiction of the court of criminal appeals and gives the supreme court power to resolve jurisdictional conflicts between itself and the court of criminal appeals (Okla. Const. Art. VII, Secs. 1, 4).

Alabama and Tennessee recently have created courts of criminal appeals, but they are intermediate appellate courts rather than courts of last resort, because their

decisions are subject to review by the state supreme court.

Author's Comment

The desirability of retaining the court of criminal appeals cannot be intelligently discussed without keeping in mind two important factors. First is the large volume of criminal appellate work in Texas. The state has about 2,000 trial courts with criminal jurisdiction; in about 525 of these courts (including all the major ones), the only route of appeal from criminal convictions is to the court of criminal appeals. The general increase in criminal litigation, together with federal court decisions giving indigent defendants a right to counsel, increased the caseload of the court of criminal appeals more than 50 percent since 1968. As a result, the court is undeniably overworked. The court of criminal appeals disposed of 2,560 cases in 1973. In the same year, the supreme court, with 9 judges, disposed of 936. The 14 courts of civil appeals, with a total of 42 judges, disposed of 1,404 cases. Another measure of a court's workload is the number of opinions written. The judges and commissioners of the court of criminal appeals wrote 1,839 opinions in 1973; the justices of the supreme court wrote 130; and the judges of the courts of civil appeals wrote 1,313. (Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), pp. xiv-xvii.) These comparisons do not reflect unfavorably on the judges of the supreme court and the courts of civil appeals. Civil appeals are often more complex than criminal appeals; and part of the problem of the court of criminal appeals is a statute that requires the court to write an opinion in every case appealed, however frivolous. (Code of Criminal Procedure art. 44.24.) But by any conceivable measure, the court of criminal appeals handles far more work than any other appellate court in Texas, and possibly in the nation.

Second, retention or abolition of the court of criminal appeals cannot be considered without regard to the rest of the appellate court structure. Any change in jurisdiction of the court of criminal appeals is likely to affect the supreme court and the courts of civil appeals, and vice versa.

The solution that usually comes to mind first when an appellate court is overworked is to increase the number of judges. This was tried in 1866 when the supreme court's membership was increased to five. A variation on this solution was attempted in 1927 when the court of criminal appeals was given two commissioners to assist it. The same variation was used again in 1969 when the commission was revived to aid the five judges then sitting on the court of criminal appeals. These increases in personnel did not solve the court's workload problem, and the caseload now has probably reached such proportions that no expansion of the court can solve the problem. To reduce the opinion-writing burden of each judge of the court of criminal appeals to that of the average judge of the courts of civil appeals would require a court of 51 judges. (See Roberts, 35 *Texas Bar Journal,* at 1006.)

Another possible solution is creation of intermediate appellate courts. This is the method that finally solved the supreme court's caseload problem in 1891 after several less drastic measures had failed. (See the *History* of Sec. 6.) Since Texas already has intermediate appellate courts, it has two choices in pursuing this solution. The existing courts of civil appeals could be given criminal jurisdiction, or a separate system of intermediate courts with only criminal jurisdiction could be created. Both of those possibilities have disadvantages as well as advantages. Creating a separate system of intermediate courts for criminal cases seems wasteful when the state already has 14 intermediate courts distributed widely across the state, each with clerks, courtrooms, offices, and the other resources needed to operate a court.

On the other hand, the existing courts of civil appeals might be overworked if

they were required to take on criminal appeals in addition to their present civil caseloads. If all the cases disposed of by the court of criminal appeals in 1972 had been handled by courts of civil appeals, the total caseload of those courts would have nearly tripled, increasing from 1,392 to 3,625 cases. (See Texas Civil Judicial Council, *Forty-Fourth Annual Report,* pp. 34, 39.) The caseload per judge, however, would still have been considerably less than that of either the supreme court or court of criminal appeals. Moreover, the intermediate courts in other populous states apparently are able to dispose of both civil and criminal appeals with judicial manpower not significantly greater than that of Texas. (California has 48 intermediate appellate court judges, Ohio has 38, New York has 28, and Illinois has 24. See U.S. Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System* (Washington, D.C.: Government Printing Office, 1971), pp. 92-94 (Table 14).)

A decision on intermediate jurisdiction of criminal appeals would not automatically decide the fate of the court of criminal appeals. The latter could be abolished even if separate intermediate criminal appellate courts are created, or retained even if civil and criminal jurisdiction are merged in a single appellate court system. But at both levels, the same questions are presented: (1) should an appellate court specialize in civil or criminal cases, and if so, (2) should such specialization be jurisdictional or only administrative?

The chief argument in favor of specialization is the opportunity it gives judges to develop expertise. No judge or lawyer can know all the law applicable to every kind of case. Maintenance of separate criminal courts permits the judges of those courts to become thoroughly familiar with the criminal law and relieves judges of civil courts of the necessity to do so. This may result in more efficient use of judicial manpower, because judges spend less time briefing themselves on unfamiliar subjects. (See Morrison and Bruder, "Merger of the Court of Criminal Appeals and Supreme Court of Texas," 35 *Texas Bar Journal* 1002 (1972).) On the other hand, specialization may deprive judges of the broadening influence of exposure to a wide variety of legal problems. It may lead to the development of divergent and even conflicting legal doctrines, rules of procedure, and vocabularies. While this kind of division of the bar and judiciary into civil and criminal specialties has long been accepted in Texas, it becomes increasingly troublesome as new rules on representation of indigents force more civil lawyers to accept appointments that place them on the unfamiliar terrain of the criminal law. Finally, specialization probably narrows the scope of the bar's interest in and support for either court. Lawyers who do not practice criminal law are not likely to take much interest in the recruitment and election of good judges to the court of criminal appeals or in demanding adequate appropriations for that court. Likewise, criminal lawyers cannot be expected to have the same solicitude for the well-being of the courts of civil appeals and supreme court that they have for the court of criminal appeals.

Even if specialization on balance is considered desirable, it need not be jurisdictional. Individual judges, panels of judges within a court, or even entire courts can be permitted to specialize as a matter of personal preference, administrative convenience, or need, without denying them jurisdiction to hear other kinds of cases. For example, if the supreme court were given criminal jurisdiction, it might, as an administrative matter, permit certain justices to consider most of the criminal cases. This could be formal (*e.g.*, by dividing the court into permanent civil and criminal sections) or very informal (*e.g.*, by assigning to a judge who prefers criminal cases a higher proportion of applications for review in such cases).

Possibilities for flexible administrative specialization in the intermediate courts would be even greater if those courts were unified so that each judge had statewide jurisdiction and thus could sit with judges other than those of his district.

Intermediate criminal appellate courts cannot alone solve the present caseload problem. If all of the cases still go to a court of last resort after first being heard by an intermediate court, there would be no reduction in the burden on the highest court. Some decisions in criminal appeals would have to be final at the intermediate court stage. There is no reason why this could not be done. There is no constitutional right to even one appeal, much less two. (*National Union v. Arnold,* 348 U.S. 37 (1954); *McKane v. Durston,* 153 U.S. 684 (1894); *United States v. Brierley,* 412 F.2d 193 (3d Cir.), *cert. denied,* 397 U.S. 942 (1969).)

There are two major methods of limiting the number of cases that are appealable from the intermediate courts. One is by permitting second appeals in specified kinds of cases, such as capital cases or cases in which a long prison sentence is imposed. Other states permit such appeals only to resolve conflicts between intermediate courts or when constitutional questions are raised (since nearly every criminal case can involve constitutional issues, this solution may be unsatisfactory). (See the *Explanation* of Sec. 6.)

The other common method of limiting appeals from the intermediate court is to give the highest court (or courts) discretion to determine which cases it will review. This is basically the method by which the United States Supreme Court limits review and is the method favored by many students of judicial administration. (See, *e.g.,* Tate, "Relieving the Appellate Court Crisis," 56 *Judicature* 228, 233 (1973).)

The second and third paragraphs of Section 4 are transitional provisions whose purposes have been accomplished. They should be deleted from any revision of the section, and Section 4 should be combined with Section 5, relating to jurisdiction of the court of criminal appeals. Provisions on selection, qualifications, terms, and compensation of judges, as well as the method of filling vacancies, should be consolidated with provisions dealing with those subjects for other courts. (See the *Author's Comment* on Sec. 2.)

> Sec. 5. JURISDICTION OF COURT OF CRIMINAL APPEALS; TERMS OF COURT; CLERK. The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the state in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law.
>
> The Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and under such regulations as may be prescribed by law, issue such writs as may be necessary to enforce its own jurisdiction. The Court of Criminal Appeals shall have power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction.
>
> The Court of Criminal Appeals may sit for the transaction of business at any time from the first Monday in October to the last Saturday in September in each year, at the State Capitol. The Court of Criminal Appeals shall appoint a clerk of the court who shall give bond in such manner as is now or may hereafter be required by law, and who shall hold his office for a term of four years unless sooner removed by the court for good cause entered of record on the minutes of said court.
>
> The Clerk of the Court of Criminal Appeals who may be in office at the time when this Amendment takes effect shall continue in office for the term of his appointment.

History

See the *History* of Section 4.

Section 5 was reenacted by amendment in 1966. The only substantive changes were deletion of a phrase from the old section that permitted the legislature to require the court to sit at two locations other than the capital and removal of language authorizing a clerk at each of the additional locations.

Art. V, § 5

Explanation

Although this section seems to give the court of criminal appeals jurisdiction of all criminal appeals unless the legislature excepts them, the court has said that it has no appellate jurisdiction unless a statute specifically confers it. (*Millican v. State,* 145 Tex. Crim. 195, 167 S.W.2d 188 (1942).) The precise question apparently has never arisen, however, and is not likely to arise under the present statute. The statute gives the court of criminal appeals jurisdiction of all criminal cases except misdemeanors that have already been appealed to a county court (or county court at law) in which the fine imposed does not exceed $100. (Code of Criminal Procedure art. 4.03.) All cases that are within the constitutional jurisdiction of the court of criminal appeals thus are either included within the statutory grant of jurisdiction or specifically excluded therefrom. Whether the court would have jurisdiction of a case on which the statute is silent therefore is a question that does not arise.

Most of the cases appealed to the court of criminal appeals are felonies (murder, rape, robbery, theft, burglary, forgery and drug offenses make up about two-thirds of the court's workload), but the court also receives a substantial number of misdemeanor appeals. (Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), p. 23.)

The appellant is always the defendant, because the state has no right of appeal in criminal cases in Texas. (See Art. V, Sec. 26.)

The original jurisdiction of the court of criminal appeals is approximately the reverse of that of the supreme court. The supreme court has general power to issue writs of mandamus but only limited power to issue writs of habeas corpus (see the *Explanation* of Sec. 3); the court of criminal appeals may issue writs of mandamus only in aid of its jurisdiction but has general power to issue writs of habeas corpus. The grant of habeas corpus power appears to be an absolute constitutional grant, not requiring legislative implementation. The legislature has, however, provided an extensive body of rules governing habeas corpus proceedings in all courts, including the court of criminal appeals. (Code of Criminal Procedure arts. 11.01-11.64.)

The court has power to issue writs of habeas corpus even in connection with civil proceedings, (*e.g.,* where a person is jailed for contempt for violating an injunction) but if the application is also within the jurisdiction of the supreme court, the court of criminal appeals generally will not act until the supreme court decides whether it will accept jurisdiction. If the supreme court does take the case, the court of criminal appeals will not review the supreme court's decision in the matter. (Ex parte *Cvengros,* 384 S.W.2d 881 (Tex. Crim. App. 1964.)

The constitution gives the court of criminal appeals no power to issue other writs except "as may be necessary to enforce its own jurisdiction," and such writs are to be issued "under such regulations as may be prescribed by law." This power exists even when not specifically provided for by statute. (See *State v. Clawson,* 465 S.W.2d 164 (Tex. Crim. App.), *cert. denied* 404 U.S. 910 (1971); *State v. Jones,* 395 S.W.2d 612 (Tex. Crim. App. 1965), both holding the court has power to issue writs of prohibition even though the statute does not mention such a writ.)

There have been times when neither the supreme court nor the court of criminal appeals would exercise its mandamus powers. For example, in one case the supreme court declined to accept an application for a writ of mandamus on grounds it was within the jurisdiction of the court of criminal appeals. That court disagreed; it said the writ sought was not necessary for the enforcement of its own jurisdiction, so it also refused to application. The applicant then went back to the supreme court, but the latter still said it had no jurisdiction. (*Millikin v. Jeffrey,*

108 Tex. Crim. 84, 299 S.W. 435 (1927); *Millikin v. Jeffrey,* 117 Tex. 134, 299 S.W. 393 (1927); *Millikin v. Jeffrey,* 117 Tex. 152, 299 S.W. 397 (1927).) The supreme court's holding is questionable. It is undoubtedly wise (and perhaps even obligatory) for that court to defer to the court of criminal appeals until the latter is given an opportunity to enforce its own jurisdiction. It might even be desirable, as a matter of policy, to continue to refuse relief even after the court of criminal appeals has refused it. But since the supreme court has general mandamus power, it is difficult to argue that it has no jurisdiction of an application simply because it believes the matter is also within the jurisdiction of the court of criminal appeals. In any event, the case illustrates the injustice produced because Texas has two courts of last resort with no means of resolving a conflict between them.

Another example of injustice resulting from the dual system of courts is *Bretz v. State,* 508 S.W.2d 97 (Tex. Crim. App. 1974). Bretz was acquitted of a charge of receiving and concealing stolen property, but the trial court nevertheless awarded to the complaining witness the property alleged to have been stolen. When Bretz appealed to the court of criminal appeals, he was told the court had no jurisdiction because there was no longer any criminal case. Judge Roberts, concurring in the result, wrote a separate opinion in which he described numerous other problems created by the bifurcated system of courts of last resort and advocated merger. (508 S.W.2d, at 98-100.)

The court of criminal appeals construes its mandamus jurisdiction narrowly. For example, it refused to exercise mandamus jurisdiction in a criminal case when it had not yet received the appellate record. (Ex parte *Giles,* 502 S.W.2d 774 (Tex. Crim. App 1974).) Once the court of criminal appeals has acted, however, it will exercise mandamus jurisdiction to assure that its mandate is carried out. (*State* ex rel. *Vance v. Hatten,* 508 S.W.2d 625 (Tex. Crim. App. 1974).)

The court of criminal appeals, like the supreme court, has limited fact-finding powers and virtually no fact-finding capability. Its power is limited to the determination of "such matters of fact as may be necessary to the exercise of its jurisdiction." The court has held that this gives it power to consider matters not in the official record of a case. (See, *e.g., Vance v. State,* 34 Tex. Crim. 395, 30 S.W. 792 (1895) (certificate from district judge).) The court does not conduct evidentiary hearings, however, even on applications for writs of habeas corpus. (Ex parte *Carlile,* 92 Tex. Crim. 495, 244 S.W. 611 (1922); see also *Castillo v. Beto,* 281 F. Supp. 890 (N.D. Tex. 1967).) As a practical matter, the evidentiary hearing in habeas corpus matters is conducted by a district court, and the court of criminal appeals considers only the record. (See Code of Criminal Procedure art. 11.07.)

Comparative Analysis

The Oklahoma Constitution permits the legislature to give appellate jurisdiction in criminal cases to courts other than its court of criminal appeals. It also gives the Oklahoma Supreme Court power to resolve conflicts between the two courts (Okla. Const. Art. VII, Sec. 4.)

Author's Comment

If a separate criminal court of last resort is to be continued, most of this section could be retained; it does a reasonably good job of describing the court's jurisdiction. The section actually gives the legislature considerable flexibility. For example, there is nothing in the constitution to prevent the legislature from modifying the onerous requirement that the court of criminal appeals write an opinion in every case. (See Code of Criminal Procedure art. 44.24.) Moreover, there is nothing in this section that prevents the legislature from significantly

reducing the number of criminal cases that are appealable to the court of criminal appeals; this section clearly permits the legislature to withdraw jurisdiction from the court. The real problem is finding another court to handle those appeals. Misdemeanor appeals might be placed within the jurisdiction of the district courts. But those courts are the general trial courts in the system and probably should not be burdened with extensive appellate jurisdiction. The only alternative within the present system is to route some criminal appeals to the intermediate appellate courts. This might be possible under the existing constitutional provisions. Certainly Section 5 presents no bar to such a change. The question would be whether the courts of civil appeals constitutionally can be given criminal jurisdiction. Since the second jurisdictional grant in Section 6 of Article V gives the courts of civil appeals "such other jurisdiction, original and appellate as may be prescribed by law," it can be argued that the legislature already has power to give those courts criminal jurisdiction. The contrary argument would be that the language, taken in context with the rest of Section 6 and also with Sections 4 and 5, must be interpreted as if it read "other *civil* jurisdiction." There is language in several cases suggesting that the courts of civil appeals cannot exercise criminal jurisdiction (*e.g., State v. Morris*, 208 S.W.2d 701 (Tex. Civ. App.—Waco 1948, *writ ref'd n.r.e.*)), but the question has never been decided because the legislature apparently has never attempted to give the courts of civil appeals criminal jurisdiction.

The provision describing the court's term should be deleted or consolidated with term provisions of other courts (see the *Author's Comment* on Sec. 3a), and the provision for appointment of a clerk should be deleted or included in a single section dealing with appellate court clerks generally (see the *Author's Comment* on Sec. 3). The last paragraph of Section 5 is merely transitional and should be deleted.

Sec. 6. COURTS OF CIVIL APPEALS; TRANSFER OF CASES; TERMS OF JUDGES. The Legislature shall as soon as practicable after the adoption of this amendment divide the State into not less than two nor more than three Supreme judicial districts and thereafter into such additional districts as the increase of population and business may require, and shall establish a Court of Civil Appeals in each of said districts, which shall consist of a Chief Justice and two Associate Justices, who shall have the qualifications as herein prescribed for Justices of the Supreme Court. Said Court of Civil Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all civil cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error.

Each of said Courts of Civil Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a [a] term of six years and shall receive for their services the sum of three thousand five hundred dollars per annum, until otherwise provided by law. Said courts shall have such other jurisdiction, original and appellate as may be prescribed by law. Each Court of Civil Appeals shall appoint a clerk in the same manner as the clerk of the Supreme Court which clerk shall receive such compensation as may be fixed by law.

Until the organization of the Courts of Civil Appeals and Criminal Appeals, as herein provided for, the jurisdiction, power and organization and location of the Supreme Court, the Court of Appeals and the Commission of Appeals shall continue as they were before the adoption of this amendment.

All civil cases which may be pending in the Court of Appeals shall as soon as practicable after the organization of the Courts of Civil Appeals be certified to, and the records thereof transmitted to the proper Courts of Civil Appeals to be decided by said courts. At the first session of the Supreme Court the Court of Criminal Appeals and such of [of] the Courts of Civil Appeals which may be hereafter created under this article after

the first election of the Judges of such courts under this amendment. The terms of office of the Judges of each court shall be divided into three classes and the Justices thereof shall draw for the different classes. Those who shall draw class No. 1 shall hold their offices two years, those drawing class No. 2 shall hold their offices for four years and those who may draw class No. 3 shall hold their offices for six years, from the date of their election and until their successors are elected and qualified, and thereafter each of the said Judges shall hold his office for six years, as provided in this Constitution.

History

The courts of civil appeals were the major innovation of the 1891 reform package. The supreme court was falling so far behind that either the right to appeal had to be severely curtailed or the system had to be radically revised. (See Murray, "Our Courts of Civil Appeals," 25 *Texas Bar Journal* 269 (1962).) It is not surprising that the solution chosen was intermediate courts; the federal courts of appeal were also first created in 1891. Shortly after the adoption of the 1891 amendment, the governor called the legislature into special session to enact legislation implementing the new constitutional provisions. (See Black, "Importance of the Courts of Civil Appeals," 9 *Texas Bar Journal* 426 (1946).)

The theory in creating the courts of civil appeals apparently was that their decisions would be final in most civil cases. The supreme court's primary function was to be the resolution of conflicts. The creation of supreme judicial districts was thought desirable because of the vastness of the state. (See Crane, "Suggestions for Improving Court Procedure in Texas," 5 *Texas L. Rev.* 285 (1927).)

Creation of the courts of civil appeals was one of a series of attempts to reduce the caseload of the supreme court. One earlier attempt was the creation of the court of appeals in 1876; that court was given appellate jurisdiction of all criminal cases and of all civil cases from the county courts. A still earlier attempt was included in the 1869 Constitution which permitted no criminal appeals unless authorized by a supreme court justice. Unlike the earlier attempt, which did not succeed in relieving the supreme court's backlog, the intermediate appellate court system has proven quite durable; it has not been substantially changed since 1891. Ironically, a proposal for intermediate appellate courts had been introduced in the 1875 Convention but was rejected overwhelmingly. (*Debates,* p. 380; *Journal,* p. 457.)

At the special session called to implement the 1891 amendment, the legislature created three courts of civil appeals at Dallas, Austin, and Galveston. (Tex. Laws 1892, ch. 15, *Gammel's Laws,* p. 389.) The legislature has added courts from time to time since then, and there are now 14 courts of civil appeals. (Tex. Rev. Civ. Stat. Ann. art. 1817.)

In 1927 a proposed amendment to Section 6 would have limited the maximum number of civil appeals court districts to 12 but would have permitted more than three judges per district. This was apparently the legislature's answer to a bar association proposal for a unified court system. (See McKnight, "Proposed Amendment to the Judiciary Article of the Constitution," 5 *Texas L. Rev.* 290 (1927).) The 1927 proposal was a compromise and was therefore disappointing to many. (McKnight, "The Fortieth Legislature and Judicial Reform," 5 *Texas L. Rev.* 360 (1927).) Some reformers wanted to do away with the courts of civil appeals altogether. Some thought there were too many of these courts. (McKnight, 5 *Texas L. Rev.*, at 363.) Some thought the amendment offered in 1927 should have gone farther toward bringing about a unified court system. (Dabney, "Court Organization: The Superiority of the Unit or Collegiate System," 5 *Texas L. Rev.* 377 (1927).) When the proposed amendment was submitted to the voters it was defeated.

In 1954, in response to an expressed desire by members of the state bar for judicial reform, the Bar Committee on Constitutional Revision submitted a new judiciary article to members of the bar in a referendum. The article proposed, among other things, a court of appeals with both civil and criminal jurisdiction. The supreme court was to define districts, appoint judges, and prescribe jurisdiction of this intermediate court. (The proposal, and various arguments pro and con, appear in 17 *Texas Bar Journal* 687 *et seq.* (1954).) The proposal was rejected by state bar members 2 to 1. (18 *Texas Bar Journal* 65 (1955).)

In 1973 a similar proposal by the Chief Justice's Task Force for Court Improvement was introduced in the legislature but died without action. (Tex., Legislature, Senate, SJR4, 63d Leg., Reg. Sess., 1973.)

Explanation

It is not clear whether Section 6 would permit the legislature to reduce the number of courts of civil appeals. The section authorizes creation of "such additional districts as the increase of population and business may require." Population and business can decrease as well as increase, however, and presumably the intention was to permit the legislature to adjust the number of courts as needed—in either direction. Since no attempt has been made to reduce the number, the question has not been resolved.

The courts of civil appeals are the courts to which virtually all appeals from county and district courts are taken. There is one exception: A few cases may be appealed directly from the trial court to the supreme court under Section 3-b. (See the *Explanation* of that section.)

Although most decisions of the courts of civil appeals are reviewable by the supreme court, in fact their decisions are usually final. In 1973, for example, 614 civil appeals decisions were taken to the supreme court, but only 80 were accepted. In other words, in nearly 90 percent of the cases taken to the supreme court, the decision of the court of civil appeals was allowed to stand. In the same year, there were only four direct appeals to the supreme court. (Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), pp. 7-8.) Thus, for most litigants in civil cases, a court of civil appeals is in fact the court of last resort.

In all cases, Section 6 makes the decision of the court of civil appeals final "on all questions of fact brought before them on appeal or error." This provision is really a limitation on the supreme court's scope of review, rather than a grant of power to the courts of civil appeals. It is one of the more troublesome phrases in Texas jurisprudence. The courts have held that whether there is *any* evidence to support a jury verdict is a question of law and therefore may be reviewed by the supreme court. (*E.g., Choate v. San Antonio & A.P. Ry.*, 91 Tex. 406, 44 S.W. 69 (1898).) But whether the evidence is *sufficient* to support a verdict is held to be a question of fact and therefore not reviewable by the supreme court. (*E.g., Electric Express & Baggage Co. v. Ablon,* 110 Tex. 235, 218 S.W. 1030 (1920).) The attempt to apply this distinction to specific cases has produced much litigation, considerable confusion, and several traps for unwary lawyers. (See, *e.g.*, Calvert, " 'No Evidence' and 'Insufficient Evidence' Points of Error," 38 *Texas L. Rev.* 361 (1960).)

The provision making civil appeals court decisions conclusive on matters of fact applies only to questions "brought before them on appeal or error." This presumably means that a civil appeals court's conclusions on matters of fact are *not* conclusive when they arise in an original proceeding in that court. This exception is of little consequence, however, for several reasons. First, courts of civil appeals have no general fact-finding power; the fact-finding power given them by article

1822 of the civil statutes and rule 406 of the Rules of Civil Procedure applies only to determining facts necessary to the proper exercise of their own jurisdiction. (*Rosenfeld v. Steelman,* 405 S.W.2d 301 (Tex. 1966).) Second, even if a court of civil appeals were to make a fact finding in an original proceeding, that finding would not be subject to appellate review because the supreme court has no appellate jurisdiction of original proceedings in the courts of civil appeals. Such proceedings reach the supreme court only if the same case is filed as an original proceeding in that court. (See Sec. 3 of Art. V.) Third, in an original proceeding in the supreme court, that court would not be likely to review an earlier fact finding in a court of civil appeals, because the supreme court normally refuses to consider any writ application that involves a disputed fact question—whether or not the question has been previously decided by another court. (See *Depoyster v. Baker,* 89 Tex. 155, 34 S.W. 106 (1896).)

The only case in which the supreme court might reverse a civil appeals court's conclusion of fact in an original proceeding would be one in which the court of civil appeals made a fact finding relating to its own jurisdiction, that finding also involving the supreme court's jurisdiction, and the supreme court disagreed with the finding. Section 3 of Article V gives the supreme court power to ascertain facts necessary to the proper exercise of its jurisdiction. The supreme court has held that this gives it power to reject a district court's fact finding on a jurisdictional question in a mandamus case. (*Tarpley v. Epperson,* 125 Tex. 63, 79 S.W.2d 1081 (1935).) Moreover, the supreme court has held that the fact-finding power of a court of civil appeals applies only to facts relating to its own jurisdiction and does not permit it to ascertain facts relating to a trial court's jurisdiction. (*Rosenfeld v. Steelman, supra.*) The supreme court stated in that case that it would apply the same rule to itself and would not inquire into the jurisdiction of the court below by reference to facts outside the record. The possibility of the supreme court reviewing a fact conclusion of a court of civil appeals in an original proceeding therefore is very remote.

The phrase in Section 6 providing that the appellate jurisdiction of the courts of civil appeals is only "co-extensive with the limits of their respective districts" has also proven troublesome. As soon as the courts of civil appeals were created, problems of inequality in their caseload became apparent. (See Williams, "History of the Texas Judicial Machine and its Growth," 5 *Texas L. Rev.* 174, 179-180 (1927).) The legislature attacked the problem by directing the supreme court to equalize the intermediate courts' dockets by transferring cases from those with too many cases to those with too few. (Tex. Rev. Civ. Stat. Ann. art. 1738.) This statute was attacked on the ground it attempted to give courts of civil appeals jurisdiction beyond the boundaries of their districts. The supreme court saved the statute by relying on other language in Section 6 which allows the legislature to give courts of civil appeals "such other jurisdiction original and appellate, as may be prescribed by law." Normally this phrase would be interpreted to mean other kinds of *substantive* jurisdiction, rather than additional territorial jurisdiction. But the supreme court said that the phrase also permits the legislature to increase the intermediate courts' territorial jurisdiction. (*Bond v. Carter,* 96 Tex. 359, 72 S.W. 1059 (1903); *Witherspoon v. Daviss,* 163 S.W. 700 (Tex. Civ. App.—Austin 1914, *no writ*).) The phrase "co-extensive with the limits of their respective districts" is not entirely inoperative, however. When the transfer statute is not applicable, one court of civil appeals has no jurisdiction of a case arising in another court's district. (*Parr v. Hamilton,* 437 S.W.2d 29 (Tex. Civ. App.—Corpus Christi 1968, *no writ*).) In other words, the phrase has been interpreted as if it read, "The appellate jurisdiction of the courts of civil appeals is co-extensive with the limits of their respective districts except to the extent that the legislature provides otherwise."

The courts of civil appeals have two different sources of appellate jurisdiction

under Section 6. The first paragraph of the section gives them jurisdiction "of all civil cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law." The second paragraph provides that "said courts shall have such other jurisdiction, original and appellate as may be prescribed by law." It is not clear, however, that the courts of civil appeals have anything more than "such jurisdiction as the legislature may prescribe." The first grant could be construed as a constitutional grant of jurisdiction which the legislature may regulate but cannot take away. There are a few cases suggesting that there is a constitutional right of appeal to a court of civil appeals that the legislature cannot deny. (*Outlaw v. Gulf Oil Corp.*, 137 S.W.2d 787 (Tex. Civ. App.—El Paso 1940), *rev'd on other grounds,* 136 Tex. 281, 150 S.W.2d 777 (1941)); *Eppstein v. Holmes,* 64 Tex. 560 (1884); *Pratley v. Sherwin-Williams Co. of Texas,* 36 S.W.2d 195 (Tex. Comm'n App. 1931, *holding approved*).) None of these cases actually decides the question, however, and in fact the courts have permitted the legislature to diminish the appellate jurisdiction given to the courts of civil appeals under the first grant. Articles 2249 and 1819 of the civil statutes deny the intermediate courts jurisdiction of cases within the jurisdiction of the county courts if the amount in controversy or the judgment does not exceed $100. (*Ray v. San Antonio & A.P. Ry.*, 45 S.W. 479 (Tex. Civ. App. 1898, *no writ*); *Green v. Warren,* 45 S.W. 608 (Tex. Civ. App. 1898, *no writ*).) Section 6 contains no minimum jurisdictional amount; it therefore appears that the courts have assumed that the phrase "under such restrictions and regulations as may be prescribed by law" includes the power to take away the jurisdiction specifically conferred by Section 6. If so, then the effect of Section 6 is merely to give the courts of civil appeals jurisdiction of the specified cases only until the legislature provides otherwise. The question has not been definitively answered because, with the exception of the $100 minimum, the legislature has not attempted to take jurisdiction away from the courts of civil appeals.

The 1973 amendment to Section 8 of Article V also contains a grant of appellate jurisdiction to the courts of civil appeals. It states that the legislature may provide for appeals to the courts of civil appeals in probate matters. This appears to be unnecessary, since the courts of civil appeals would have jurisdiction of probate cases anyway because they are cases within the original or appellate jurisdiction of the district or county court. The provision in Section 6 giving the courts of civil appeals "such other jurisdiction . . . as may be prescribed by law" makes the language in Section 8 doubly superfluous.

Section 6 contains no specific grant of original jurisdiction. The courts of civil appeals therefore have only such original jurisdiction as the legislature has prescribed, and that is quite limited. They have power to issue writs of mandamus to compel the judge of a district or county court to proceed to trial in a case and power to issue writs of mandamus or other writs for the enforcement of their own jurisdiction. (Tex. Rev. Civ. Stat. Ann. arts. 1823, 1824.)

In 1969 the courts of civil appeals were given limited power, concurrent with that of the supreme court, to grant writs of habeas corpus. (Tex. Rev. Civ. Stat. Ann. art. 1824a; see also Chadick, "Original Habeas Corpus Proceedings in the Courts of Civil Appeals," 33 *Texas Bar Journal* 183 (1970).) It is limited to cases in which the petitioner is confined on account of violation of an order entered in a divorce case, wife or child support case, or child custody case. It is not clear whether a single judge can issue the writ of habeas corpus. (Chadick, 33 *Texas Bar Journal,* at 184.) This habeas corpus power was given to the courts of civil appeals on the recommendation of the Civil Judicial Council to relieve the Supreme Court of some cases.

Neither the supreme court nor a court of civil appeals has power to issue advisory opinions. Since it is not mentioned in the constitution along with original and

appellate jurisdiction, the courts have held that the legislature cannot confer advisory jurisdiction. (*Morrow v. Corbin,* 122 Tex. 553, 62 S.W.2d 641 (1933).)

The final two paragraphs of Section 6 are notable mainly because they have been obsolete for 80 years. They were transitional provisions to implement the 1891 reorganization and then became surplusage.

Comparative Analysis

Almost half of the states have intermediate appellate courts. (See Tate, "Relieving the Appellate Court Crisis," 56 *Judicature* 228, 232 (1973).) Half of these are organized on a unitary or statewide basis, and the other half are organized by district or region. Not all of these are constitutional courts; only about 19 states create intermediate appellate courts by constitutional provision.

Author's Comment

The intermediate court system created by Section 6 is rather inflexible. Each court has three judges, regardless of its workload. This limitation can be circumvented only by creating an additional district in the same geographical area. This has been done in Harris and Galveston counties, where districts 1 and 14 both encompass the same two counties. (See Tex. Rev. Civ. Stat. Ann. arts. 198, 1817a.) The result is two separate courts, rather than a single court with six judges.

There is no provision for the assignment of judges from one court of civil appeals to another. Article 1738 of the civil statutes does, however, permit the supreme court to equalize dockets by transferring cases from one civil appeals court to another and permits the judges of the latter to go to the court from which the case was transferred to hear oral arguments. (See Guittard, "Court Reform: Texas Style," 21 *Sw.L.J.* 451 (1967).) This is a useful device for reducing the inequality of workloads among the courts, but it is not completely effective. Some of the courts of civil appeals still handle twice as many cases as others. (See Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), pp. xvi-xvii.)

Most of the intermediate appellate courts created recently in other states are "unified," meaning that there is a single court with statewide jurisdiction that sits in panels, usually of three judges. This system is generally thought to provide more efficient use of judicial manpower and more consistency in intermediate court decisions. (Tate, "Relieving the Appellate Court Crisis," 56 *Judicature* 228 (1973).)

Intermediate appellate courts generally are not considered essential elements in an ideal judicial system, but rather an evil that is necessary in most populous states. Invariably, they make the appellate process more complex, more time consuming, and more costly. They create another procedural step before final disposition of a case and often permit wasteful double appeals. But where the volume of appeals is large, creation of intermediate courts generally is considered a better solution than expansion of the highest court; there is a point of diminishing return at which the addition of more judges to the highest court creates more problems than it solves. One observer has said, "The basic [ideal] model for the high court is one with discretionary review of intermediate court opinions, based upon a primary function of clarifying and developing the law and of resolving conflicts between the three-judge intermediate panels." (Tate, 56 *Judicature,* at 233.)

Most intermediate appellate courts have criminal as well as civil jurisdiction; the possibility of giving the Texas courts of civil appeals criminal jurisdiction is considered in the *Author's Comment* on Section 5.

The name used in Section 6 to designate the districts served by the courts of civil appeals—"Supreme judicial districts"—is confusing. The word "supreme" is simply misleading, because the courts of civil appeals are in no way supreme, and the

districts have no connection with the supreme court. Moreover, the districts themselves are one of three kinds of districts in the Texas judicial system; the others are "judicial districts," which are the geographical unit for the district courts, and "administrative districts," which are nine regions each with a presiding (district) judge who has limited power to transfer judges and cases between district courts in his district. (Tex. Rev. Civ. Stat. Ann. art. 200a.) Since there is no correlation between "administrative districts" and "Supreme judicial districts," a district court may be in one district for administrative purposes and another for appellate purposes. The system could be simplified somewhat merely by making administrative districts correspond to the districts of the civil appeals courts.

In any revision of Section 6, the last two paragraphs should be deleted because they are no longer operative. Consideration should also be given to the possibility of eliminating the two troublesome phrases relating to the territorial limits of the courts' jurisdiction and the conclusiveness of their decisions on questions of fact. (In any event, the latter should be moved to the supreme court section because it is really a limitation on that court's power.) The legislature's power (or lack thereof) to reduce the number of courts and to take away the courts' jurisdiction by means of "restrictions and regulations" should also be clarified.

Sec. 7. JUDICIAL DISTRICTS; DISTRICT JUDGES; TERMS OR SESSIONS; ABSENCE, DISABILITY OR DISQUALIFICATION OF JUDGE. The State shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law. For each district there shall be elected by the qualified voters thereof, at a General Election, a Judge, who shall be a citizen of the United States and of this State, who shall be licensed to practice law in this State and shall have been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election, who shall have resided in the district in which he was elected for two (2) years next preceding his election, who shall reside in his district during his term of office, who shall hold his office for the period of four (4) years, and shall receive for his services an annual salary to be fixed by the Legislature. The Court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law. He shall hold the regular terms of his Court at the County Seat of each County in his district at least twice in each year in such manner as may be prescribed by law. The Legislature shall have power by General or Special Laws to make such provisions concerning the terms or sessions of each Court as it may deem necessary.

The Legislature shall also provide for the holding of District Court when the Judge thereof is absent, or is from any cause disabled or disqualified from presiding.

The District Judges who may be in office when this Amendment takes effect shall hold their offices until their respective terms shall expire under their present election or appointment.

History

District courts have been the trial courts of general jurisdiction in Texas since the Republic. The Constitution of the Republic provided for "convenient judicial districts, not less than three, nor more than eight," with judges chosen by the congress to serve in each district. (Art. IV, Sec. 2.)

Under the Constitutions of 1845 and 1861, district judges were appointed by the governor with the advice and consent of the senate. (Art. IV, Sec. 5.) The 1866 Constitution provided for popular election of district judges (Art. IV, Sec. 5), but in 1869 the method of selection was changed back to gubernatorial appointment. (Art. V, Sec. 6.) From 1866 to 1876, the term of a district judge was eight years; before that the term was six years, and since 1876 it has been four years.

The 1876 Constitution provided for 26 districts, and an accompanying ordinance

districts have no connection with the supreme court. Moreover, the districts themselves are one of three kinds of districts in the Texas judicial system; the others are "judicial districts," which are the geographical unit for the district courts, and "administrative districts," which are nine regions each with a presiding (district) judge who has limited power to transfer judges and cases between district courts in his district. (Tex. Rev. Civ. Stat. Ann. art. 200a.) Since there is no correlation between "administrative districts" and "Supreme judicial districts," a district court may be in one district for administrative purposes and another for appellate purposes. The system could be simplified somewhat merely by making administrative districts correspond to the districts of the civil appeals courts.

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defined those districts. (See Sec. 14 of Art. V.) The legislature was permitted to increase or diminish the number of districts, however, and the number has been growing ever since. As of the end of 1973, there were 227 district (including criminal district) courts. (Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), p. viii.)

There have been several attempts to make the district court system more flexible. In 1913 the legislature proposed to amend Section 7 to authorize more than one judge per district and give the legislature greater freedom to fix the courts' sessions. This amendment also would have increased the length-of-practice requirement for a judge from four to six years. The proposal was soundly defeated. (*Seven Decades*, p. 218.)

In 1927 the legislature proposed to amend Sections 2 through 7 to permit the supreme court to transfer judges, including district judges, to courts other than their own. This amendment also was defeated.

The latest change in Section 7 was made in 1949. The amendment of that year added the requirement that a district judge be licensed to practice law in Texas, permitted the combining of judicial experience and law practice to meet the four-year minimum, allowed the legislature to fix district judges' salaries, added the requirement that the court sit at the county seat, and authorized the legislature to provide for terms and sessions of the district courts.

Explanation

The district courts are the foundation of the entire Texas judicial system. They handle most of the important litigation, both civil and criminal, at the trial court level.

The constitution does not expressly prohibit the creation of more than one court per district, but since the days of the Republic the pattern has been one district, one court, and one judge. In all populous areas of the state, however, there is more than one district court, because the districts overlap. There are two kinds of overlapping districts. Each of the major metropolitan counties have several district courts, each comprising only that county. Dallas County, for example, has 13 district courts (and 5 criminal district courts); each of these courts technically has a distinct district, since the only way to create a district court under this section is to create a district. But in fact the district served by each of these courts is Dallas County.

The other type of overlapping districts usually occurs in areas of moderate population. These are districts that share one or more common counties but are not coterminous. For example, the 119th district includes Tom Green and Runnels counties. The 51st district also includes Tom Green County, but the other counties in that district are Coke, Irion, Schleicher, and Sterling. (Tex. Rev. Civ. Stat. Ann. arts. 199-51, 199-119.) The existence of overlapping districts makes the compilation of statistics on district courts very difficult. If they are reported by court, the task of appraising the overall docket situation in the metropolitan counties is made more difficult. If they are reported by county, the figures for each court get lost in the county total, making the appraisal of an individual judge's work virtually impossible. The Texas Civil Judicial Council at present publishes district court statistics by county. (See *Forty-Fifth Annual Report,* pp. 34-179.)

The methods by which the district courts divide the work in multicourt counties vary widely from county to county. (Procedures in the four most populous counties are described with admirable clarity and detail in Comment, "Local Procedure and Judicial Efficiency: A Comparative Empirical Study of Texas Metropolitan District Courts," 49 *Texas L. Rev.* 677 (1971).) In Dallas County, for example, cases are randomly assigned to one of the district courts by a collating machine in the clerk's

office, but after that, each judge uses his own method of docketing cases. In most respects, each district court in Dallas operates independently of the others. In San Antonio, on the other hand, a presiding judge monitors all the district courts and supervises the assignment of cases and the adjustment of caseloads. In Dallas, once a case is filed in a certain court, the judge of that court normally handles all proceedings in that case. In San Antonio, a single case is likely to be handled by several judges at various stages of the litigation.

The requirement that district courts sit "at the county seat of the county in which the case is pending, except as otherwise provided by law," is the source of some rigidity. A court of civil appeals has held that this prevents district judge A, sitting in his own county, from acting on behalf of district judge B, who sits in another county, even though judge B has disqualified himself and requested judge A to replace him, and even though the case is not one that is required by statute to be tried in the county where filed. (Ex parte *Lowery*, 518 S.W.2d 897 (Tex. Civ. App.—Beaumont 1975 *no writ*).)

The language prescribing the term of the district courts has caused some difficulty. The requirement that each court hold two terms per year in each county undoubtedly was included for the convenience of litigants and lawyers. It was probably important when districts were very large and transportation was difficult. In recent years, however, the requirement has served primarily to complicate the matter of creating new courts. A statute changing the terms of court in a county is unconstitutional if its effect would be to give the county only one term in any given year. (*E.g.*, *Bowden v. Crawford*, 103 Tex. 181, 125 S.W.5 (1910).) The courts have minimized the impact of this rule, however, by holding that such a statute is not completely void; its implementation is simply delayed until it can be given effect without depriving any county of two terms per year. (*E.g.*, Ex parte *Curry*, 156 Tex. Crim. 499, 244 S.W.2d 204 (1951).) The 1949 amendment giving the legislature power to provide for the terms or sessions of the district courts "as it may deem necessary" probably was intended to resolve this problem. Unfortunately, however, it did not delete the language requiring two terms per county per year.

The legislature has solved most of the problems by requiring continuous terms in all district courts. (Tex. Rev. Civ. Stat. Ann. art. 1919.) Moreover, most of the statutes creating courts now provide for what amounts to continuous terms but describe them as two separate terms: *e.g.*, from the first Monday in January through the last Saturday in June, and from the first Monday in July through the last Saturday in December. (See, *e.g.*, Tex. Rev. Civ. Stat. Ann. arts. 199-58, 199-60.)

The legislature's power to provide for a special judge to hold court when a district judge is absent, disabled, or disqualified is quite limited. The courts have held that such a special judge may act only to complete an unfinished term of court in a particular county and does not have the full authority of the regular judge. (*Wynn v. R. E. Edmonson Land & Cattle Co.*, 150 S.W. 310 (Tex. Civ. App.—Amarillo 1912, *writ ref'd*).) The legislature has provided three methods for the selection of a special judge. If the regular judge certifies to the governor that he is disqualified in a particular case, the parties may by agreement select a lawyer to try the case; if they cannot agree, the governor is to appoint a person to try the case. (Tex. Rev. Civ. Stat. Ann. art. 1885.) If the regular district judge fails or refuses to hold court, "the practicing lawyers of the court present may elect from among their number a special judge. . . ." (Tex. Rev. Civ. Stat. Ann. art. 1887.)

In practice, the primary method of providing a substitute for the regular district judge is none of these, but rather assignment of a "visiting" district judge. By statute, the state is divided into nine "Administrative Judicial Districts," and in each an active or retired district judge is appointed by the governor to serve as presiding judge. The presiding judge has power to assign active and retired district

judges temporarily to other district courts within the administrative district. (Tex. Rev. Civ. Stat. Ann. art. 200a.) The use of this method of reallocating judicial manpower is rather limited, in part because the metropolitan areas where additional judges are needed do not have the extra courtrooms and other facilities needed to accommodate them, and perhaps in part because of the reluctance of presiding judges to assign other judges against their will. (See Comment, 49 *Texas L. Rev.* 693-95 (1971).)

These presiding judges of administrative districts are one of two quite different types of presiding judges in the district court system. The other type consists of the presiding judges in several of the metropolitan counties. These are active district judges chosen by majority vote of their colleagues, rather than by the governor, and their effectiveness depends primarily on voluntary cooperation from other judges in the county. (See Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451, 463 (1967).)

The Texas court system includes one hybrid variety of court which may or may not be a district court within the meaning of this section. These are called "criminal district courts." The first one was created to handle a high volume of criminal cases attributed to the presence of ships' crews on liberty in the Houston and Galveston areas. (*Debates,* p. 423.) The constitution still contains a specific authorization for that court in Section 1 of Article V. The modern criminal district courts were created as "legislative courts," *i.e.,* courts whose powers were established by statute rather than by the constitution. They had whatever jurisdiction their creating statutes provided. Usually they were not given district numbers in the statewide system of district courts but were named, for example, "Criminal District Court No. 2 of Dallas County." A number of the criminal district courts still fit this description. There is no clear line, however, between a criminal district court and a regular district court. Since the legislature has general power to create new "constitutional" district courts, it presumably can transform any "statutory" criminal district court into a regular district court within the meaning of this section simply by amending the court's creating statute. The legislature has purported to do this with a number of courts in Harris and Dallas counties that formerly were called "criminal district courts"; it has simply changed the name, for example, to "174th Judicial District," (*e.g.,* Tex. Rev. Civ. Stat. Ann. art. 199–174). This may not be enough to make such a court a "constitutional" district court under Section 7, however. Presumably, the court also must be given full district court jurisdiction. In the case of the former criminal district courts of Dallas and Harris counties, this has been done. An attempt to convert a criminal district court into a regular district court without giving it civil jurisdiction probably would run afoul of the general rule that the legislature cannot reduce the constitutional jurisdiction of a regular district court. (*Lord v. Clayton,* 163 Tex. 62, 352 S.W.2d 718 (1961).) It is not clear whether this rule applies to the former criminal district courts, and if it does, it is not clear whether it means that they therefore are not "constitutional" district courts, or that they are "constitutional" district courts and therefore the statutes limiting their jurisdiction are unconstitutional.

One solution that avoids this entire problem is the creation of regular district courts with the full scope of jurisdiction, but with a direction that they give "preference to criminal cases." (*E.g.,* Tex. Rev. Civ. Stat. Ann. art. 199a-182.)

Judges of the criminal district courts are treated as regular district judges for compensation purposes. Unlike the judges of other statutory courts, they receive state salaries and are eligible for benefits under the state judicial retirement system.

Comparative Analysis

Virtually every state has a functional equivalent of the Texas district court. About 41 states are divided into districts or circuits for purposes of allocating trial courts of general jurisdiction. Several states have "unified trial courts," *i.e.*, a single statewide court of general jurisdiction, subdivisions of which handle all the trial court litigation in the state. (See, *e.g.*, Ill. Const. Art. VI, Secs. 8, 9.)

In about one-third of the states, the judges of the trial courts of general jurisdiction are chosen by partisan election. About one-third more are chosen by nonpartisan election. In the remaining one-third, the judges are chosen by gubernatorial appointment (usually through some form of merit selection plan), or in a few cases, by appointment by the legislature.

The length of terms of judges of trial courts of general jurisdiction ranges from four years to 15 years in Maryland and life in Massachusetts. The most common length of term is six years.

The *Model State Constitution* provides no specific provisions relating to trial courts. It simply vests judicial power in a supreme court, an appellate court, a general court, and such inferior courts of limited jurisdiction as provided by law. The federal constitution provides only for "such inferior courts as the Congress may from time to time ordain and establish."

Author's Comment

The organization and shortcomings of the present district court system are well described in Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451 (1967).

The most frequent complaint is that the district system is too rigid to permit efficient court administration. The inflexibility stems from two main sources: (1) the autonomy of each court and (2) the legislature's reluctance to redistrict the state.

Each judge has a distinct court which he considers his own. Generally he has his own docket and considers himself answerable to no one but the voters. While this independence in many respects may be admirable, it is also inefficient. For example, in most multijudge counties, a judge is responsible only for his own docket. If a last-minute postponement gives him a free day or two, he may remain idle even though there are many cases waiting to be heard on the dockets of other district courts in the county. As pointed out in the *Explanation,* this inefficiency has been greatly reduced in some of the metropolitan counties by use of a presiding judge, central docketing, and other administrative devices. But the pattern generally is still individual autonomy.

The failure to redistrict judicial districts results in malapportionment of judicial resources. The legislature has created nearly 200 new district courts over the past 95 years, but never has it passed a comprehensive judicial redistricting bill. New courts are created in the metropolitan areas at nearly every session of the legislature, but old courts are virtually never abolished. (For a detailed history of the creation of new courts from 1953-1972, see Texas House Judiciary Committee, *Streamlining the Texas Judiciary: Continuity with Change* (Austin, 1972), pp. 99-110.) As a result, some of the urban district courts have caseloads several times greater than those of their rural counterparts.

The malapportionment of judicial districts is all the more serious because of the lack of any really effective mechanism for transferring judges and cases among courts. The presiding judges of the administrative districts are authorized to assign "visiting judges," but for the reasons pointed out in the *Explanation,* this has not produced widespread transfer of judges.

Another substitute for judicial redistricting has been creation of statutory courts with limited jurisdiction. This may be even more undesirable than piecemeal

creation of new district courts. "The gimmick is that those courts are financed entirely from county funds; thus the legislation is essentially local in nature and no opposition is encountered from legislators from other districts." (Guittard, 21 *Sw. L. J.*, at 471.) Thus, when the dockets of the district courts of a county become too crowded, the legislature often is tempted to attack the problem by creating a special court, such as a court of domestic relations, to relieve the regular district courts of those types of cases. This adds even more rigidity to the system. The special court does not have general jurisdiction; a few years after its creation, the problem may be too many criminal cases rather than too many divorce cases, but the domestic relations court cannot help because it has no jurisdiction of criminal cases.

The most frequently advocated method of increasing administrative flexibility in trial courts is to abandon the one-judge, one-court, one-district pattern and adopt multijudge districts. This can take the form of a single statewide trial court with as many judges and courtrooms as necessary. (See, *e.g.*, American Bar Association, *Model State Judiciary Article,* sec. 4 (Chicago, 1972).)

Much the same result can also be accomplished simply by expanding districts; for example, the present supreme judicial districts (court of civil appeals districts) or administrative judicial districts could become the basic judicial districts, and all district judges within each of those districts could either have jurisdiction anywhere in the larger district or sit in divisions within the larger district. Either of these methods would help to remove artificial barriers that inhibit the free movement of judges and cases.

Alternative methods of selecting judges, such as nonpartisan election, executive appointment, and "merit" selection, are discussed in the annotation of Section 2. It should be noted, however, that the method chosen for selection of trial judges need not be the same as that for appellate judges. For example, it is sometimes suggested that election is a more appropriate method for selecting trial judges because they are essentially local officers about whom the voters are more likely to be informed and interested. Some states therefore provide for appointment of appellate judges but continue to elect trial judges. (*E.g.*, Kan. Const. Art. III, Sec. 2.)

The provisions in Section 7 relating to terms of the district courts probably should be removed. As pointed out in the *Explanation,* they have created confusion. In any event, the matter of terms of court is not of constitutional importance and in practice is governed by the continuous terms statute, Tex. Rev. Civ. Stat. Ann. art. 1919.

Consideration also should be given to removing the requirement that the district court sit at the county seat of the county in which the case is pending. The requirement causes considerable waste of judicial time. For example, if a judge schedules a jury trial in one county, he must set aside several days to be spent in that county. If the trial is unexpectedly terminated or postponed, the judge cannot proceed with another jury trial in some other county because preparations, such as the summoning of prospective jurors, will not have been made. (See Murray and Hooper, "A Proposal for Modern Courts," 33 *Texas Bar Journal* 199 (1970).) Removal of the requirement would not, of course, necessarily end the general practice of sitting in each county in the district; it would simply permit the legislature to define circumstances in which the district courts might sit elsewhere. (See Tex. Rev. Civ. Stat. Ann. art. 1919 which allows a district judge some flexibility in transacting business outside the county.)

The provisions of this section relating to judicial selection, terms, qualifications, compensation, and vacancies should be consolidated. (See the *Author's Comment* on Sec. 2.)

The last paragraph of this section is transitional and should be removed. The

penultimate paragraph probably could also be deleted because the legislature has done what that paragraph directs it to do.

Sec. 8. JURISDICTION OF DISTRICT COURT. The District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction.

The District Court shall have appellate jurisdiction and general control in probate matters, over the County Court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law.

The district court, concurrently with the county court, shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law. In any proceeding involving the general jurisdiction of a probate court, including such specified proceedings, the district court shall also have all other jurisdiction conferred upon the district court by law. The legislature, however, shall have the power, by local or general law, Section 16 of Article V of this Constitution notwithstanding, to increase, diminish or eliminate the jurisdiction of either the district court or the county court in probate matters, and in cases of any such change of jurisdiction, the legislature shall also conform the jurisdiction of the other courts to such change. The legislature shall have power to adopt rules governing the filing, distribution and transfer of all such cases and proceedings as between district courts, county courts, and other courts having jurisdiction thereof, and may provide that all appeals in such matters shall be to the courts of (civil) appeals.

History

Under the Constitution of the Republic, the district court had exclusive original jurisdiction of admiralty matters, cases involving ambassadors, and capital cases; and original jurisdiction of all other cases where the amount in controversy was $100 or more. (Art. IV, Sec. 3.) The 1845 Constitution made things more specific. There was no county court system under the 1845 and 1861 Constitutions, so the district court had general jurisdiction over all criminal cases, some specific classes of civil cases, and all other suits where the amount in controversy was $100 or more. (Art. IV, Sec. 10.)

The 1866 Constitution created a county court system, and apparently its

framers thought that it was necessary to spell out in the constitution the division of jurisdiction between the district and county courts. Most of the detailed language of present Section 8 is derived from Section 6 of Article IV of the 1866 Constitution. For example, all of the language about suits for trial of title to land and suits involving enforcement of liens first appeared in 1866. Likewise, the language defining the district court's supervision of the county court in probate matters comes from the 1866 Constitution.

These jurisdictional provisions were carried forward in the 1869 and 1876 Constitutions, except that in 1876 the minimum jurisdictional amount was raised from $100 to $500 and criminal jurisdiction was limited to felonies.

The latter two provisions were not suggested by the majority report on the judiciary in the 1875 Constitutional Convention. (*Journal,* p. 408.) The Convention, however, apparently felt that numerous petty cases in the district courts were causing unjust and unnecessary delay in trying more important cases. It was argued that it did no good to create county courts if the district courts had concurrent jurisdiction of misdemeanors and of all civil cases between $100 and $500. (*Journal,* pp. 413-15.)

The 1891 amendment added to the district court's jurisdiction contested elections, appellate jurisdiction for "probating wills," and appellate jurisdiction and supervisory control over the county commissioners court. The provision for general original jurisdiction over causes not provided for elsewhere and the authorization for the legislature to provide additional jurisdiction also were new with the 1891 amendment.

An amendment approved in 1973 expanded the district court's probate jurisdiction. The purpose of the amendment was to eliminate the wasteful practice of having two trials of contested probate matters, one in the county court (or a statutory court) and a second trial de novo in the district court on appeal. The amendment is described more fully in the *Explanation* following.

(See also the *History* of Sec. 7, Art. V.)

Explanation

Although the details of district court jurisdiction are quite complex, its essence can be described quite simply: it is the trial court of general jurisdiction. It has original jurisdiction of all matters not within the jurisdiction of some other court. Its jurisdiction is criminal as well as civil; all felonies are within the jurisdiction of the district court. Its civil jurisdiction includes virtually all of the most important types of litigation and is described in detail in 1 McDonald, *Texas Civil Practice* (St. Paul: West Publishing Co., 1965), pp. 56-88.

The original civil jurisdiction of the district courts generally falls into one of four categories. First, certain kinds of cases are specifically named in Section 8. For example, divorce cases and suits for "slander or defamation of character" are within the jurisdiction of the district court. (*E.g., Clare v. Clare,* 138 S.W.2d 220 (Tex. Civ. App.—Amarillo 1940, *no writ*).) In cases in which the district court's jurisdiction attaches because of the subject matter of the suit the amount in controversy is usually immaterial. The only exception is in suits "for the trial of the right of property levied upon by virtue of any writ of execution, sequestration, or attachment. . . ." This rather clumsily worded phrase refers to a special kind of suit in which a third party asserts a claim to property that is the subject of a dispute between two other parties in another proceeding. In these cases, by the terms of Section 8 itself, the district court has jurisdiction only "when the property levied on shall be equal to or exceed in value five hundred dollars."

Second, the district court has original jurisdiction of other civil cases, regard-

less of subject matter, if the matter in controversy "shall be valued at or amount to" $500. When the amount in controversy is between $500.01 and $1,000, the district court's jurisdiction is concurrent with that of the county court, because Section 16 of Article V gives the latter jurisdiction of suits involving $200 to $1,000.

When the amount in controversy is exactly $500 an interesting problem develops because Section 8 places such a case within the jurisdiction of the district court while Section 16 places it in the county court. The resolution of this problem is somewhat curious: the courts have held that the county court has exclusive jurisdiction of a $500 suit under the general amount-in-controversy clause (*Gulf, Colo. & Santa Fe Ry. Co. v. Rainbolt,* 67 Tex. 654, 4 S.W.356 (1887), but the district court has exclusive jurisdiction of a suit involving exactly $500 under the right-to-title-of-property clause discussed above. (*Erwin v. Blanks,* 60 Tex. 583 (1884).)

In cases in which the amount in controversy is between $500 and $5,000, the district court's jurisdiction is also concurrent with that of the county courts at law. (Tex. Rev. Civ. Stat. Ann. art. 1970a-1.) (For a discussion of the rather intricate rules for determining amount in controversy, see McDonald, *supra,* at 43-56.)

The third major source of civil jurisdiction of the district courts is the "residuary" clause of Section 8 – *i.e.,* the clause giving those courts jurisdiction of "All causes of action whatever for which a remedy or jurisdiction is not provided by law or this constitution...." Perhaps the most notable example of this jurisdiction is the district court's general jurisdiction to issue injunctions. When an injunction proceeding involves an ascertainable amount in controversy, it is within the jurisdiction of whatever court has jurisdiction of suits of that amount; but when no amount can be determined, the district court has jurisdiction. (*E.g., Repka v. American Nat'l Ins. Co.,* 143 Tex. 542, 186 S.W.2d 977 (1945).)

The fourth major source of the district court's civil jurisdiction is the phrase permitting the legislature to give the district courts "such other jurisdiction, original and appellate, as may be provided by law." An example of this is the 1971 law giving district courts (in counties where there is no county court at law) jurisdiction of eminent domain proceedings, which previously had been in the county courts. (Tex. Rev. Civ. Stat. Ann. arts. 1960, 3266a.)

The jurisdiction of the district court is generally held to be exclusive, at least vis-à-vis the other constitutional courts, even when the constitution does not expressly make it exclusive. (*Meyers v. State,* 105 S.W. 48 (Tex. Civ. App. 1907, *no writ*).) For example, Section 8 gives the district court jurisdiction of suits to try title to land; Section 16 specifically denies the county court power to try such a suit, but nothing in the constitution specifically denies the justice court that power if the amount in controversy does not exceed $200. Nevertheless, the courts have held that justice courts cannot consider suits to try title to land because they are within the exclusive jurisdiction of the district courts. (See *Fry v. Ahrens,* 256 S.W.2d 115 (Tex. Civ. App.–Galveston 1953, *no writ*).)

In the case of statutory courts, the courts have been somewhat more receptive to the notion of concurrent jurisdiction. Originally the courts refused to permit creation of statutory courts on the ground that the court system created by the 1876 Constitution was complete. (Ex parte *Towles,* 48 Tex. 413 (1877).) The 1891 amendment, however, specifically authorized statutory courts and provided further that the legislature "may conform the jurisdiction of the district and other inferior courts thereto." (Sec. 1, Art. V.) The courts have held that this permits the legislature to create statutory courts and give them jurisdiction concurrent with that of the district and county courts but does not permit the legislature to take

jurisdiction away from the constitutional courts. (*Reasonover v. Reasonover,* 122 Tex. 512, 58 S.W.2d 817 (1933); *Jordan v. Crudgington,* 149 Tex. 237, 231 S.W.2d 641 (1950).) As a result, in counties that have statutory courts such as domestic relations courts, the constitutional district courts retain their jurisdiction over those cases, but share it with the statutory courts. Presumably, the same rule applies in the case of criminal district courts, despite language in some statutes purporting to give criminal district courts exclusive jurisdiction of criminal cases. (See, *e.g.,* Tex. Rev. Civ. Stat. Ann. art. 199-174.)

Section 8 gives the district court jurisdiction of all felonies and of misdemeanors involving official misconduct. The latter phrase has been interpreted to mean willful illegal behavior in relation to the official's public duties. (*Robinson v. State,* 470 S.W.2d 697 (Tex. Crim. App. 1971).) Questions concerning the district court's jurisdiction sometimes arise when a pending felony case becomes a misdemeanor, either because the legislature reduces the penalty for the offense or because the prosecutor reduces the charge. If the legislature reduces the penalty for an offense to less than two years' imprisonment, the offense becomes a misdemeanor and the district court loses its jurisdiction. (*Donald v. State,* 171 Tex. Crim. 60, 345 S.W.2d 538 (1961).) But if the prosecutor merely reduces the charge to a misdemeanor, the district court retains jurisdiction. (*Bruce v. State,* 419 S.W.2d 646 (Tex. Crim. App. 1967).)

A 1973 amendment to Section 8 gave the district court general probate jurisdiction concurrent with that of the county court. The amendment also gave the legislature power to increase, diminish, or eliminate the probate jurisdiction of either the district or county court, however, and the legislature exercised this power in an anticipatory statute. The statute gives the district court concurrent jurisdiction with the county court in probate matters in counties in which there is no statutory court with probate jurisdiction (*e.g.,* county court at law). But in counties that have such statutory courts, probate jurisdiction is shared by the constitutional county court and the statutory courts, and the district court has no probate jurisdiction. (*General and Special Laws of the State of Texas,* 63rd Legislature, Reg. Sess., 1973, ch. 610, at 1684.) The legislature is free to modify this scheme by local law, however, so probate jurisdiction may vary from county to county.

The 1973 amendment was simply tacked on to the end of Section 8 and made no attempt to state how much of the previous language is still operative. Since the county court still has concurrent probate jurisdiction, the clause giving the district court "appellate jurisdiction and general control in probate matters, over the County Court established in each county . . ." presumably is still at least potentially effective with respect to probate matters tried initially in the county court. The statute, however, provides that appeals "in such matters" go to the courts of civil appeals, rather than to the district court. The supreme court has interpreted this to mean that all appeals in probate cases, including those initially tried in county courts, go to courts of appeals rather than district courts. But the court distinguished between appeals and review by certiorari and held (as a matter of statutory construction) that county court judgments in probate matters are still reviewable by the district court upon a writ of certiorari. (*Cluck v. Hester,* 521 S.W.2d 845 (Tex. 1975).)

The phrase "and general control" apparently adds nothing to this provision; the district court's jurisdiction under this clause is treated as purely appellate. Thus the district court has no jurisdiction under this clause if the county court had none (*Schoenhals v. Schoenhals,* 366 S.W.2d 594 (Tex. Civ. App.—Amarillo 1963, *writ ref'd n.r.e.*)) or if the county court has not reached a final decision. (*Fischer v. Williams,* 160 Tex. 342, 331 S.W.2d 210 (1960).) Such appeals, however, are tried

de novo (*i.e.,* as if there had been no previous trial) in the district court. The requirement of trial de novo stems from the Rules of Civil Procedure, Rules 334 and 350, however, rather than from the phrase "general control" and undoubtedly is based at least in part on the knowledge that county judges are not required to be —and often are not—lawyers. That this clause does not give the district court "general control" in probate proceedings is further emphasized by the fact that the district court in its appellate capacity can only consider issues that were presented to and acted upon by the county court. (*E.g., Hunnicutt v. Moorman,* 290 S.W.2d 278 (Tex. Civ. App.—Austin 1956, *writ ref'd n.r.e.*).)

Before the 1973 amendment, Section 8 contained a second source of probate-related jurisdiction. The district court has "original jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law." At least in the absence of contrary legislation, this grant of jurisdiction presumably is still effective. It is not clear whether the language in the 1973 amendment allowing the legislature to increase, diminish, or eliminate the jurisdiction of the district court in probate matters would permit the legislature to change the district court's jurisdiction over executors, administrators, guardians, and minors. While these are undoubtedly "probate matters" in a general sense, it might be argued that the language authorizing a change in jurisdiction refers only to the types of probate matters not previously within the district court's jurisdiction. Without mentioning the 1973 amendment, a court of civil appeals held that a statute giving a domestic relations court concurrent jurisdiction of dependent and neglected child cases was not inconsistent with the constitutional grant to the district court of original jurisdiction over minors. (*Clark v. Tarrant County Child Welfare Unit,* 509 S.W.2d 378 (Tex. Civ. App.—Fort Worth 1974, *no writ*).) This of course does not necessarily mean that the legislature could take such jurisdiction away from the district court.

Once again, the phrase "and general control" adds little. Except where the district court has general probate jurisdiction, it is the county court, rather than the district court, that in fact exercises general control over executors and administrators. (See, *e.g.,* Probate Code. sec. 4.) With regard to minors, however, at least one court has relied in part on the "general control" language in holding that a district court has implied power to make an ex parte order relating to custody of children, at least in an emergency situation. (*Gray v. State,* 508 S.W.2d 454 (Tex. Civ. App.—Texarkana 1974, *no writ*).)

One important consequence of this grant of original jurisdiction to the district court is that it gives that court the exclusive power to call independent executors to account. For example, suits to remove an independent executor for mismanagement, or to compel him to account, must be brought in the district, rather than county, court. (*E.g., Bell v. Still,* 403 S.W.2d 353 (Tex. 1966); *Carter v. Brady,* 423 S.W.2d 946 (Tex. Civ. App.—San Antonio 1967, *writ ref'd n.r.e.*).) Another important result is that it gives the district court exclusive jurisdiction to determine custody of minors; although the county court has the power to appoint a guardian for a minor, only the district court can award custody. (Ex parte *Reeves,* 100 Tex. 617, 103 S.W. 478 (1907).)

The relationship between the district and county courts in probate matters has been complicated by the provision in Section 16 denying the county court jurisdiction of suits to try title to land. Obviously, many probate matters involve title to land, and there would be little probate jurisdiction left in the county court if all of these matters were held to be within the exclusive jurisdiction of the district court, so many of them are not. The courts developed an intricate set of rules to determine when a probate matter becomes a suit to try title to land, based

generally on the principle that the county court had jurisdiction unless its probate jurisdiction was inadequate to grant the relief sought. (*Griggs v. Brewster,* 122 Tex. 588, 62 S.W.2d 980 (1933).) Specifically, the county court had jurisdiction, even if a claim to land was involved, if the dispute was between heirs and no outsiders were involved, but the district court had jurisdiction if a third party (*e.g.*, a creditor) asserted a claim to the land. (*E.g., Hartely v. Langdon & Co.,* 347 S.W.2d 749 (Tex. Civ. App.–Houston 1961, *no writ*); *Jones v. Sun Oil Co.,* 137 Tex. 353, 153 S.W.2d 571 (1941).) A proceeding whose only purpose was to secure construction of a will was exclusively within the equity jurisdiction of the district court, but a county court could construe a will when that action was merely incidental to a general probate proceeding. (*E.g., Rust v. Rust,* 211 S.W.2d 262 (Tex. Civ. App.–Austin), *aff'd per curiam,* 147 Tex. 181, 214 S.W.2d 462 (1948); *McCarty v. Duncan,* 330 S.W.2d 899 (Tex. Civ. App.–Waco 1959, *no writ*); *Ragland v. Wagener,* 142 Tex. 651, 180 S.W.2d 435 (1944).)

These problems probably have been solved by the statute passed pursuant to the 1973 amendment. The statute gives all courts with original probate jurisdiction, including the county court, power to hear all matters incident to an estate, including questions involving title to land. *(General and Special Laws of the State of Texas,* 63rd Legislature, Reg. Sess., 1973, ch. 610, at 1684.) The attorney general rejected an argument that this statute was unconstitutional because of the provision in Section 16 denying the county court jurisdiction over suits for the recovery of land. (Tex. Att'y Gen. Op. No. H-434 (1974).)

In addition to the provisions mentioned above, the 1973 amendment provided (1) that in probate proceedings the district court "shall have all other jurisdiction conferred upon the district court by law"; (2) that if the legislature changes the probate jurisdiction of the district and county courts, it "shall also conform the jurisdiction of the other courts to such change"; (3) that the legislature "shall have the power to adopt rules governing the filing, distribution and transfer of all [probate] cases as between district courts, county courts, and other courts having jurisdiction thereof"; and (4) that the legislature may provide for appeals in probate cases to the courts of civil appeals. All of these provisions appear to be unnecessary. The district courts need no constitutional authorization to exercise the jurisdiction otherwise conferred on them by law. The amendment specially authorizes legislative changes in jurisdiction of the district and county courts and the courts of civil appeals, and the legislature needs no constitutional authorization to change jurisdiction of statutory courts, so the language referring to conforming jurisdiction is unnecessary. The legislature has general rule-making power, so there is no need to specifically authorize legislative rules governing the filing and transfer of probate cases. The specific authorization for legislation permitting appeals to the courts of civil appeals in probate cases also is unnecessary because Section 6 of Article V gives the legislature general power to define the appellate jurisdiction of the courts of civil appeals. It might be argued that even if the appeal language is unnecessary to confer jurisdiction upon the courts of civil appeals, it is nevertheless necessary to permit the legislature to remove appellate jurisdiction from the district court. (*Cf. Vail v. Vail,* 438 S.W.2d 115 (Tex. Civ. App.–Waco 1969, *no writ*).) The language also is unnecessary for that purpose, however, because the amendment specifically authorizes the legislature to increase, diminish, or eliminate district court jurisdiction in probate matters.

Section 8 gives the district court "appellate jurisdiction and general supervisory control" over the commissioners court. Here, as in the provisions relating to probate, the "control" phrase adds nothing. Indeed, in this provision the phrase "general supervisory control" is demonstrably inaccurate because the district court does not have any kind of general control over commissioners courts; the courts

have held that the district court may exercise its jurisdiction over commissioners courts only if a commissioners court has acted without legal authority or abused its discretion, and even then it may not review actions of the commissioners court unless a statute provides for such review or unless an independent equitable action is brought in the district court. (See *Garcia v. State,* 290 S.W.2d 555 (Tex. Civ. App.–San Antonio 1956, *writ ref'd n.r.e.*).) This principle was reaffirmed recently in *Atlantic Richfield Co. v. Liberty-Danville Fresh Water Supply Dist. No. 1* (506 S.W.2d 931 (Tex. Civ. App.–Tyler 1974, *no writ*)).

The provision giving the district court and the judges thereof "power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction" appears to be an outright grant of constitutional jurisdiction, which the district courts could exercise even if there were no statutory authorization. The question has not arisen because since 1846 there has been a statute authorizing the district courts "to hear and determine any cause which is recognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts . . . ." (Tex Rev. Civ. Stat. Ann. art. 1913.) Another statute specifically authorizing issuance of writs also has been on the books since 1846. (Tex Rev. Civ. Stat. Ann art. 1914.) Any attempt to take away the district court's writ jurisdiction arguably would be unconstitutional under the general rule that the legislature cannot take away jurisdiction conferred by the constitution. (See Ex parte *Richards,* 137 Tex. 520, 155 S.W.2d 597 (1941).)

In one rather narrow category of cases, however, the courts have permitted the legislature to deny the district courts jurisdiction to issue injunctions. Article 1735 of the civil statutes gives the supreme court exclusive power to issue writs of mandamus or injunction against officers of the executive department and certain other named officers. The argument was made that this statute was unconstitutional because it deprived the district courts of writ jurisdiction conferred on them by the constitution. The courts, however, held the statute constitutional. They relied on language in Section 3 permitting the legislature to give the supreme court power to issue writs of mandamus and quo warranto. They reasoned that the relief sought by a mandatory injunction is analogous to a writ of mandamus and, therefore, is within the Section 3 power of the supreme court. (*E.g., American National Bank v. Sheppard,* 175 S.W.2d 626 (Tex. Civ. App.–Austin 1943, *writ ref'd w.o.m.*); *Herring v. Houston National Exchange Bank,* 113 Tex. 264, 253 S.W. 813 (1923).)

The phrase "necessary to enforce their jurisdiction" applies only to "other writs" and does not limit the district court's general writ power; it may issue all writs known at common law or in equity, whether or not the purpose is to enforce its jurisdiction. (*Thorne v. Moore,* 101 Tex. 205, 105 S.W. 985 (1907).) One civil appeals case states that "Art. V, Sec. 8, Texas Constitution, . . . limits the jurisdiction of the district courts to issuing injunctions which are necessary to enforce their jurisdiction." (*Holmes v. Delhi-Taylor Oil Corp.,* 337 S.W.2d 479 (Tex. Civ. App. – San Antonio 1960).) The statement is clearly erroneous, however; the cases cited do not support the proposition, and the case was reversed by the supreme court. (162 Tex. 39, 344 S.W.2d 420 (1961).)

Comparative Analysis

Section 8 is far more detailed than comparable provisions in virtually every other state constitution. Only about half a dozen states mention any minimum amount in controversy in their constitutions. Four states specifically give jurisdiction over felonies, and eight states give the general trial court supervisory control over lower courts. About half of the state constitutions specifically permit some

exercise of appellate jurisdiction by the general trial court, but since 1966 seven states have removed all appellate jurisdiction from the general trial court.

Of the 16 states that have adopted new or revised judiciary articles since 1965, about six leave all trial court jurisdiction entirely to the legislature. Eight give the general trial court all original jurisdiction, subject to restriction by the legislature.

California and Florida have added provisions authorizing the appointment of a commissioner to aid the general trial court.

The *Model State Constitution* provides simply that all courts other than the supreme court are to have original and appellate jurisdiction as provided by law, and that the jurisdiction of all similar courts is to be uniform.

Author's Comment

Section 8 is far too detailed. The residuary clause (giving the district court jurisdiction over "all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution") is all the constitutional language needed to make the district court the trial court of general jurisdiction. This clause, furthermore, describes with reasonable accuracy the present jurisdiction of the district court; the court *does* have all jurisdiction not given to some other court. (See *Dean v. State,* 88 Tex. 290, 30 S.W. 1047 (1895); see also Tex. Rev. Civ. Stat. Ann. arts. 1909, 1913.)

The only additional statement that might be considered necessary is a clause defining the legislature's power to change the jurisdiction of the district court. The present language gives the district court original jurisdiction of all causes of action for which jurisdiction is not otherwise specified and then adds "and such other jurisdiction, original and appellate, as may be provided by law." With respect to original jurisdiction, this is somewhat nonsensical; if the district court has all original jurisdiction not otherwise given, there can hardly be any "other jurisdiction" left for the legislature to confer. A better statement would be one giving the district court original jurisdiction of all cases except as provided by law and such appellate jurisdiction as provided by law.

All of present Section 8 except the clauses mentioned above is superfluous. Most of the categories of cases specified as being within the district court's jurisdiction would be within that jurisdiction under the residuary clause, and in any event all are covered by the "as may be provided by law" clause. (See Tex. Rev. Civ. Stat. Ann. arts. 1906-1909, 1913-1914; Code of Criminal Procedure art. 4.05.)

It might be argued that the naming of specific types of cases is important because it makes the district court's jurisdiction exclusive in those matters. There are several answers to that argument. First, Section 8 does not by its terms make any of the district court's jurisdiction exclusive, in the named categories or any other. The rule that jurisdiction specifically conferred on the district courts is exclusive is entirely a gloss supplied by the courts. (See, *e.g., Meyers v. State,* 105 S.W. 48 (Tex. Civ. App. 1907, *no writ*).) Second, even when this rule applies, the district court's jurisdiction is "exclusive" only in a narrow sense; it is exclusive in the sense that it cannot be exercised by another constitutional court, such as the county court, but it is not exclusive with respect to statutory courts. For example, because divorce cases are specifically designated as within the district court's jurisdiction, they are beyond the power of the county court, but they are nevertheless within the jurisdiction of the statutory domestic relations courts. (*Jordan v. Crudgington,* 149 Tex. 237, 231 S.W.2d 641 (1950).) Finally, matters specifically enumerated in this section are not always within the exclusive jurisdiction of the district court, even vis-à-vis another constitutional court. For

example, as noted above, the legislature has been permitted to give the supreme court exclusive original jurisdiction to issue certain injunctions, despite the specific grant of injunction jurisdiction to the district court. And this statute not only makes the district court's jurisdiction nonexclusive, it takes it away entirely by making the supreme court's jurisdiction exclusive. (See Tex. Rev. Civ. Stat. Ann. art. 1735; *American National Bank v. Sheppard,* 175 S.W.2d 626 (Tex. Civ. App. – Austin 1943, *writ ref'd w.o.m.*).)

In short, the enumeration of specific categories in Section 8 does not expressly make the district court's jurisdiction exclusive; it never makes that jurisdiction exclusive vis-à-vis statutory courts; and sometimes it is not even effective to make it exclusive vis-à-vis other constitutional courts. Retention of the long list therefore can hardly be justified on the ground that it defines what jurisdiction is exclusive and what is concurrent.

The list serves only one real function: in most cases, it prevents the legislature from completely withdrawing the specified types of cases from the district court. (*Reasonover v. Reasonover,* 122 Tex. 512, 58 S.W.2d 817 (1933).) This barrier is more apparent than real, however. The legislature is not prohibited from giving statutory courts jurisdiction concurrent with the district courts, and the creation of special courts for certain types of cases usually has the practical effect of removing virtually all of those cases from the district courts. Moreover, as pointed out above, a specific mention in Section 8 is not always enough to prevent the legislature from taking the jurisdiction away from the district court altogether.

If for some reason it is still thought desirable to enumerate certain categories of trial court jurisdiction in the constitution, it should be done in the sections relating to the trial courts of limited jurisdiction. It is confusing and inefficient to define the district court as the court of general jurisdiction and then also list categories of cases that are within its jurisdiction. It requires a double inquiry to determine jurisdiction in any case; one must first determine that the matter is within the district court's jurisdiction, then determine that it is not within the jurisdiction of another court. It also enhances the possibility of conflicting jurisdictional provisions. Matters that are to be excluded from the jurisdiction of one or more other courts should simply be listed as exceptions to the jurisdiction conferred on those courts.

The language added to Section 8 by the 1973 amendment is a good example of the haphazard amendment process that has made the Texas Constitution so convoluted. The amendment first grants probate jurisdiction to the district courts, then authorizes the legislature to take it away. It permits probate jurisdiction to be assigned by local law—a decision that surely should lead one to ask whether the subject needs to be included in the constitution at all. The amendment affects Sections 16 and 22 also, but the language of those sections was not changed to reflect that fact. The amendment supersedes, and perhaps negates, some of the previous language in Section 8, but no attempt was made to accommodate new language with old, and the new language repeats the archaic and offensive language of Section 16 in referring to "idiots," "lunatics," and "common drunkards." It contains unnecessary language relating to appeals, confirming jurisdiction of other courts, and transferring cases between various probate courts. It fails to make clear whether the legislature can place probate jurisdiction exclusively in the statutory courts. It fails to indicate whether the district court retains any appellate probate jurisdiction, and it fails to state whether the district court retains its original jurisdiction over executors, administrators, guardians, and minors, and if so, whether the legislature can change that jurisdiction. Failures of this type breed litigation, make the constitution unnecessarily verbose and complex, and often create a demand for further amendment. At the very least, the language added by the 1973 amendment

should be integrated with the rest of Section 8; the provisions shown to be unnecessary in the preceding *Explanation* should be deleted, and the language of Sections 16 and 22 should be revised to reflect the changes that the amendment makes in those provisions. A better solution would be to simply leave the entire matter of probate jurisdiction to the legislature; the constitutional status of the subject is mostly illusory anyway because the amendment gives the legislature virtually unlimited power to change probate jurisdiction.

Sec. 9. CLERK OF DISTRICT COURT. There shall be a Clerk for the District Court of each county, who shall be elected by the qualified voters for State and county offices, and who shall hold his office for four years, subject to removal by information, or by indictment of a grand jury, and conviction of a petit jury. In case of vacancy, the Judge of the District Court shall have the power to appoint a Clerk, who shall hold until the office can be filled by election.

History

The office of district clerk has been included in every Texas constitution since the Republic. The present provision is virtually identical with that of the 1845 Constitution (Art. IV, Sec. 11). There have been changes in the intervening years, however. The 1869 Constitution reduced the district clerk's term from four years to two and gave the district judge power to remove the district clerk for cause. This power was taken away by the Convention of 1875, which apparently felt that Reconstruction judges had abused the power. The four-year term was not restored until 1954.

Explanation

The term "district clerk" is something of a misnomer; the position is more accurately discribed as a county office. By the terms of Section 9 itself, each county has a district clerk. Thus, in rural areas where several counties are served by a single district court, each county nevertheless has its own district clerk (or joint county-district clerk; see below). On the other hand, if a county has more than one district court, it nevertheless has only one district clerk. (*Duclos v. Harris County,* 251 S.W. 569 (Tex. Civ. App.–Galveston 1923), *aff'd,* 114 Tex. 147, 263 S.W. 562 (1924).) In counties with more than one district court, the district clerk must act as clerk for all the district courts. (*Kruegel v. Daniels,* 109 S.W. 1108 (Tex. Civ. App. 1908, *writ ref'd*).) It apparently makes little difference whether the position is classified as a county or district office. The distinction between county and district offices can be important in connection with Section 12 of Article IV, which provides that vacancies in district and state offices are to be filled by the governor. Vacancies in county offices, on the other hand, are usually filled by the commissioners court. (See Secs. 20, 23, and 28 of Art. V.) In the case of the district clerk, however, this distinction is immaterial because Section 9 contains a specific provision giving the district judge power to fill a vacant district clerkship.

The constitution does not say how a vacancy in the office of district clerk is to be filled if the county has two or more district judges and they cannot agree on an appointee. A statute (the constitutionality of which apparently has not been tested) directs the governor to fill the vacancy in such a case. (Tex. Rev. Civ. Stat. Ann. art. 1895.)

The only exception to the pattern of one district clerk per county is the joint clerk authorized by Section 20. That section permits election of a single clerk to serve both the county and district courts in counties with a population of fewer than 8,000. The statute implementing this section provides for a single clerk in these counties unless the voters of the county opt to retain separate county and district clerks. (Tex. Rev.

Civ. Stat. Ann. art. 1903.) The listings of clerks in the *Texas Almanac, 1972-73* and the *Texas Legal Directory, 1971* indicate that approximately 75 counties (including a few with populations in excess of 8,000) have a joint county-district clerk. Although the statute calls these officials "joint clerks," they are sometimes listed in these directories as "district-county clerks."

Unlike the county clerk, who serves as a recorder as well as a court clerk, the district clerk's duties are all court-related. He is custodian of the district court's records, depository of funds paid into the district court, and, to a very limited extent, administrator for the district court. (See Tex. Rev. Civ. Stat. Ann. arts. 1893-1905.)

In addition to the language in Section 9 providing for removal of district clerks upon conviction, district clerks also are subject to removal under Section 24. The latter gives district judges power to remove county and district clerks (and other named officials) from office upon a jury finding of incompetence, official misconduct, habitual drunkenness, "or other causes defined by law." In practice, the latter section appears to be the more important. It is broader than the provision in Section 9, and Section 9 is unclear as to what kind of conviction will lead to removal. Most importantly, the statutory procedure for removal of district clerks clearly is based on Section 24, rather than Section 9. (See Tex. Rev. Civ. Stat. Ann. arts. 5970-5982.)

Comparative Analysis

Approximately half of the states provide in their constitutions for a clerk of the trial court of general jurisdiction; of these, about 15 make the clerk elective, and two make the position appointive. (The others do not specify in their constitutions a method of selection.)

Most of the states that have clerks as constitutional officers provide for a term of years. About five states provide for removal of the clerk for cause, and the same number permit the judge of the general trial court to fill vacancies in the office of clerk.

The *Model State Constitution* contains no mention of clerks.

Author's Comment

Any court system obviously must have some equivalent of the district clerk. The major questions are whether the office should be constitutional, whether it should be elective, whether it should be tied to a one-per-county pattern, and whether there should be separate clerks for other levels of trial courts.

Students of judicial administration are almost unanimous in the view that clerks are administrative appendages of the court, rather than independent policy-making officials, and therefore should be within the general control of the courts. Some contend that administrative efficiency is impossible as long as clerks are responsible primarily to the voters, rather than to the courts. (*E.g.*, Smith, "Court Administration in Texas: Business Without Management," 44 *Texas L. Rev.* 1142, 1155 (1966).)

The number of levels of court clerks depends in part on the organization of the trial courts; a state with a unified trial court obviously has no need for more than one kind of trial court clerk. Unification of clerks' offices, however, need not await unification of the trial courts. Since each county in Texas has a district clerk (or joint district-county clerk), it would be relatively easy to consolidate the functions of the county and district clerk. The latter could take over the clerk functions for both the county and district courts (and perhaps the lower courts and statutory courts as well), permitting the county clerk to devote full time to his duties as

county recorder and clerk of the commissioners court. Such a consolidation would eliminate much duplication in recordkeeping, accounting, and filing.

Even if the offices are not consolidated statewide, the joint-clerk provision in Section 20 probably should be expanded to permit the legislature to make that option available to all counties.

Sec. 10. TRIAL BY JURY. In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature.

History

The Constitution of the Republic contained only one reference to jury trial; it simply stated that "the right to jury trial shall remain inviolate." (Declaration of Rights, Sec. 9.) The 1845 Constitution and all subsequent versions have contained two jury trial provisions, one in the Bill of Rights and another in the judiciary article. The former is now Section 15 of Article I.

In Texas and elsewhere, there is a well-established rule that a constitutional right to jury trial normally is not absolute, but only guarantees the right in cases in which jury trial would have been available when the constitution was adopted. (*Cockrill v. Cox,* 66 Tex. 669, 1 S.W. 794 (1886).) Thus, in many states, there is no right to a jury in equity cases because historically jury trial was available only in the "law" courts, not in equity. In Texas, however, law and equity were merged from the very beginning, so there has always been a right to jury trial in equity cases. To assure that the adoption of the common law would not preclude the continuation of this practice, the 1845 Constitution contained a separate provision granting the right to a jury trial in the district court in equity cases. (Art. IV, Sec. 16.) This provision was carried forward with modifications in the Constitutions of 1861 (Art. IV, Sec. 16), 1866 (Art. IV, Sec. 20), and 1869 (Art. V, Sec. 16). In the 1876 Constitution the phrase "all causes" was substituted for the previous language "all cases of law or equity." Thus Section 10 of Article V is clearly the successor to this series of provisions guaranteeing jury trial in equity cases. (For an excellent discussion of the early history of the jury in England, see Pope, "The Jury," 39 *Texas L. Rev.* 426 (1961).)

Explanation

Section 15 of Article I guarantees a right to jury trial and authorizes the legislature to regulate it. That leaves no apparent role to be served by this section except that of describing the procedure by which the right is to be exercised. The section thus has the effect of abrogating the right to jury trial unless the party seeking it demands it and pays a jury fee (currently $5) or signs an affidavit of inability to pay. (See Rules of Civil Procedure, rules 216, 217.)

Comparative Analysis

Virtually all state constitutions contain some guarantee of a right to jury trial, but only about 14 also include language dealing with waiver of the right. None contain two separate and unrelated provisions comparable to those of the Texas Constitution.

The *Model State Constitution* guarantees the right to an impartial jury in the trial of felonies.

Author's Comment

This section should be deleted. As pointed out in the preceding *Explanation,* the right to jury trial is guaranteed by Section 15 of Article I. This section regulates the exercise of that right, but it is unnecessary for that purpose because Section 15 of Article I also authorized the legislature to regulate the right to jury trial.

An argument has been made that this section guarantees a right to jury trial in some cases not covered by Section 15 of Article I. The argument is that the latter preserves the right to jury trial only in cases in which that right was recognized at the time of adoption of the constitution, while Section 10 of Article V guarantees a right to jury trial in all cases in the district courts, without regard to the practice in 1876. (Harris, "Jury Trial in Civil Cases–A Problem in Constitutional Interpretation," 7 *Sw. L. J.* 1 (1953).) This distinction does not appear to have been observed consistently by the courts, however. Several decisions state that the right to jury trial is limited to the right as it existed in 1876, whether the right is asserted under Section 15 of Article I or Section 10 of Article V. (*Welch v. Welch,* 369 S.W.2d 434 (Tex. Civ. App.–Dallas 1963, *no writ*); *Hatten v. City of Houston,* 373 S.W.2d 525 (Tex. Civ. App.–Houston 1963, *writ ref'd n.r.e.*).) And although the courts have stated frequently that Section 10 of Article V is broader than Section 15 of Article I (*e.g., Tolle v. Tolle,* 101 Tex. 33, 104 S.W. 1049 (1907), they have nevertheless upheld denial of jury trial in district court cases. (*E.g.,* Ex parte *Howell,* 488 S.W.2d 123 (Tex. Crim. App. 1972).) Thus, despite its broader language, this section is not a reliable guarantee of a right to jury trial in cases not covered by Section 15 of Article I.

The argument advanced by Professor Harris attempts to reconcile the two provisions and give some meaning to each. As long as both sections remain in the constitution, the established principles of constitutional interpretation require that such an effort be made. But the history of this section strongly indicates that the framers of the 1876 Constitution did not in fact intend to create two guarantees of jury trial, one broader than the other. Rather, in Section 10 of Article V they were simply carrying forward a provision that had been necessary in 1845 to preserve the right to jury trial to equity cases but was no longer necessary in 1876 because by then the right to a jury in equity was established and therefore was guaranteed under the Bill of Rights provision.

Sec. 11. DISQUALIFICATION OF JUDGES; EXCHANGE OF DISTRICTS; HOLDING COURT FOR OTHER JUDGES. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law.

Art. V, § 11

History

The 1836 Constitution of the Republic provided only that no supreme court judge was to sit in a case tried by him in the court below; it had no provision for replacing any disqualified judge. (Art. IV, Sec. 8.)

The present Section 11 first appeared in the 1845 Constitution (Art. IV, Sec. 14) and has not been significantly changed since.

Explanation

This section specifies three grounds for disqualification: interest, relationship to the parties, or participation as counsel in the case. The term "interest" has a special and limited meaning; it refers only to direct pecuniary interest. (*City of Oak Cliff v. State,* 97 Tex. 391, 79 S.W. 1068 (1904).) Ideological bias or emotional prejudice is not a ground for disqualification because it does not amount to "interest" under this section. (Ex parte *Pease,* 123 Tex. Crim. 43, 57 S.W.2d 575 (1933).) On the other hand, if the judge's potential stake in the outcome is one that meets this definition of interest, the courts have stated that since the section says "may be interested" rather than "is interested," the judge should disqualify himself if there is any possibility that he might be "interested" in the outcome. (*Pahl v. Whitt,* 304 S.W.2d 250 (Tex. Civ. App.—El Paso 1957, *no writ*).) Nevertheless, the courts have held that a judge is not disqualified if his financial interest is "indirect, remote, and uncertain." Thus, a judge is not disqualified even though he is a taxpayer in a governmental unit the tax rate of which might be affected by the outcome of the litigation. (*Nueces County Drainage and Conservation Dist. No. 2 v. Bevly,* 519 S.W.2d 938 (Tex. Civ. App.—Corpus Christi 1975, *writ ref'd n.r.e.*) (supplemental opinion).)

Curiously, although the section disqualifies a judge if he has served previously as a lawyer in the case, it does not disqualify him for previous participation in the case as a judge. It therefore does not prevent a newly chosen appellate judge who was previously a trial judge from reviewing his own decision.

Relationship to a party is a ground for disqualification only if the affinity or consanguinity is within the third degree. (Code of Criminal Procedure art. 30.01; Tex. Rev. Civ. Stat. Ann. arts. 15, 1717, 1815, 2378.) Common-law rules for determining degree of relationship are used. (These are explained in *Tyler Tap R.R. v. Overton,* 1 White & W. 267 (Tex. Ct. App. 1878). See also 1 McDonald, *Texas Civil Practice* (St. Paul: West Publishing Co., 1965), pp. 96-101.)

In the case of trial courts, the judge himself is required to make the initial determination on the question of his disqualification and, if necessary, to conduct a hearing on the question. (*Pinchback v. Pinchback,* 341 S.W.2d 549 (Tex. Civ. App.—Fort Worth 1960, *writ ref'd n.r.e.*).) In the case of appellate courts, it is not clear who is to make the initial determination; it could be made by the judge himself, by his colleagues on the court, or by him and his colleagues together. The most common practice seems to be for the judge in question to disqualify himself temporarily pending a determination of the issue by his colleagues. (See *Galveston & Houston Investment Co. v. Grymes,* 94 Tex. 609, 63 S.W. 860 (1901); *City of Oak Cliff v. State,* 97 Tex. 391, 79 S.W. 1068 (1904); *Love v. Wilcox,* 119 Tex. 256, 28 S.W.2d 515 (1930).) However, in the recent *Bevly* case discussed earlier, the two civil appeals judges whose possible disqualification was in question themselves decided the issue.

In the appellate courts, there is no requirement for appointment of a special judge after disqualification of the regular judge, so long as a quorum remains and the required number concur in the decision. (*Long v. State,* 59 Tex. Crim. 103, 127 S.W. 551 (1910).)

In the district court, a disqualified judge is replaced by a special judge agreed upon by the parties, or, if they are unable to agree, by another district judge from an adjoining district designated by the governor. (Tex. Rev. Civ. Stat. Ann. art. 1885.)

If a judge fails to remove himself when this section requires disqualification, his actions in the case are invalid. The disqualification cannot be waived by consent of the parties; the judgment is void and subject to collateral attack. (Ex parte *Washington,* 442 S.W.2d 391 (Tex. Crim. App. 1969).)

The provision that the district judges may change districts or hold courts for each other, and shall do so when the law requires, is the nearest thing to an authorization for court administration that appears in the Texas Constitution. It has been construed to allow judges to exchange places voluntarily without restriction. (*Johnson v. State,* 61 Tex. Crim. 104, 134 S.W. 225 (1911); *Randel v. State,* 153 Tex. Crim. 282, 219 S.W.2d 689 (1949).) It also has been used to permit several recent developments in court administration.

Judges in multidistrict counties are authorized by rule 330 of the Rules of Civil Procedure to transfer cases freely from one court to another within the county without a formal transfer. The rule's broad provisions for coordination of judges have been upheld as a valid exercise of the power given by this section. (*Currie v. Dobbs,* 10 S.W.2d 438 (Tex. Civ. App.—El Paso 1928, *no writ*).)

Article 200a of the civil statutes sets up an administrative structure for district courts with the chief justice of the supreme court at the head. The state is divided into nine administrative judicial districts, each with a presiding judge appointed by the governor; the presiding judge is authorized to assign judges of the district to other district courts within the administrative judicial district. The chief justice has authority to assign a judge of one district to the court of another district. (The system is described in Smith, "Court Administration in Texas: Business Without Management," 44 *Texas L. Rev.* 1142, 1153 (1966).) The constitutionality of this statute has been upheld. (*Haley v. State,* 151 Tex. Crim. 392, 208 S.W.2d 378 (1948); *Eucaline Medicine Co. v. Standard Inv. Co.,* 25 S.W.2d 259 (Tex. Civ. App.—Dallas 1930, *writ ref'd*).)

Section 5a of Article 200a provides that it is the duty of an assigned district judge to accept his assignment; he can be excused for good cause, however, and there is no method of enforcing the requirement. The practice of assigning judges to different districts has elicited little opposition from judges; it has been suggested that presiding judges generally do not assign judges unless they agree beforehand to the assignment. (Smith, 44 *Texas L. Rev.* at 1153, n. 79.) More important, perhaps, is the fact that judges who accept such assignments receive extra compensation. (See Tex. Rev. Civ. Stat. Ann. art. 200a, secs. 2a(4), 10a.)

Comparative Analysis

Most states do not provide for disqualification of judges in their constitution. In those that do, the most common grounds for disqualification are "affinity and consanguinity" (in about six states), having been counsel in the case in a lower court (in about five states), having presided over the case in the lower court (in about three states), or interest in the outcome (in about five states).

Approximately 18 states provide constitutionally that judges may exchange districts or hold court for each other; about 20 states provide that judges may be assigned.

More than two-thirds of the states have created the office of court administrator, but only 11 of these mention the office in their constitutions. (Council of State Governments, *State Court Systems,* rev. ed. (Chicago, 1970), p. 70, table XI.)

About half a dozen other states have revised their constitutions recently to give administrative authority to the supreme court or its chief justice, including power to appoint necessary administrative personnel.

The *Model State Constitution* provides that the chief justice is the administrative head of a unified court system. He has power to assign judges, appoint an administrative director, and submit a budget.

Author's Comment

Disqualification of judges in specific cases (which is a quite different matter than removal of judges from office; see Secs. 1-a and 24 of Art. V and Secs. 2, 8, and 16 of Art. XV) is hardly a matter of constitutional importance. If the section is to be retained, however, the method of determining whether an appellate judge is disqualified should be clarified. Also, responsibility for certifying a judge's disqualification to the governor should be fixed; the present language states that it shall be done but fails to state who is to do it.

The last paragraph of the section, authorizing assignment of judges, has proven useful, but it does not go far enough. It does not cover judges of the appellate courts, for example, or the judges of the many lower courts and statutory courts. Moreover, it has not led to a comprehensive system of court administration even in the district courts; in practice, assignment is almost entirely a matter of voluntary cooperation. (See Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451, 465 (1967).)

The provision contains no mention at all of other important areas of administration, such as budget, nonjudicial personnel, material, intergovernmental relationships, and public relations. (See Smith, 44 *Texas L. Rev.*, at 1163.) In any event, assignment of judges should not be treated as merely an adjunct to the matter of disqualification but should be part of a separate provision dealing with court administration.

Sec. 12. JUDGES TO BE CONSERVATORS OF THE PEACE; STYLE OF WRITS AND PROCESS; PROSECUTIONS IN NAME OF STATE; CONCLUSION. All judges of courts of this State, by virtue of their office, be conservators of the peace throughout the State. The style of all writs and process shall be, "The State of Texas." All prosecutions shall be carried on in the name and by authority of the State of Texas, and shall conclude: "Against the peace and dignity of the State."

History

All Texas constitutions have had this provision in very nearly the present language. The 1876 version originally listed all the courts whose judges were to be conservators of the peace; the section was amended in 1891 to read "courts of this state."

Explanation

The phrase "conservator of the peace" apparently serves only one purpose: it has been held to classify a judge as a peace officer under a statute authorizing peace officers to carry weapons. (*Hooks v. State,* 71 Tex. Crim. 269, 158 S.W. 808 (1913).)

An indictment that does not begin with the phrase "In the name and by the authority of the state of Texas" and end with "against the peace and dignity of the state" is defective in substance as well as form. (*Wade v. State,* 52 Tex. Crim. 619, 108 S.W. 677 (1908).) The phrases must be almost letter perfect—an indictment containing "ainst" instead of "against" in the conclusion was held to be fatally

defective. (*Bird v. State,* 37 Tex. Crim. 408, 35 S.W. 382 (1896).)

Where the prosecution is based on a properly worded indictment, the fact that the complaint did not have the required introductory clause does not require reversal. (*Vogt v. State,* 159 Tex. Crim. 211, 258 S.W.2d 795 (1953).) An indictment is fatally defective, however, unless it has the prescribed phrases. (*Etter v. State,* 164 Tex. Crim. 177, 297 S.W.2d 834 (1957).) Similarly, inclusion of the prescribed concluding phrase in one count of a multicount indictment is sufficient, even if that count is abandoned by the prosecution. (*Franks v. State,* 513 S.W.2d 584 (Tex. Crim. App. 1974).)

Comparative Analysis

About half of the state constitutions contain some provision for the style of writs. Since 1964, half a dozen states have deleted the provision.

The number of states presently requiring introductory phrases or conclusions is about 17, a decrease of five since 1965.

The constitutions of four states make all judges conservators of the peace. About five other states make their supreme court judges conservators of the peace.

The *Model State Constitution* has no similar provision.

Author's Comment

This entire section is one of the Texas Constitution's more egregious examples of trivia elevated to constitutional status. If it is thought that judges need authority to carry guns, they can be given that right by statute. (This section is in fact repeated virtually verbatim in the Code of Criminal Procedure, art. 1.23.)

The portion of the section specifying the style of writs serves no purpose except to freeze a specimen of 19th century procedural rigidity into the constitution. It is inconsistent with the trend toward simplification of procedural rules, including relaxation of strict rules regarding formal defects in indictments and informations. (See Stumberg, "The Accusatory Process," 35 *Texas L. Rev.* 972, 973 (1957).) This portion of the section is repeated verbatim by the statute cited above (see also Rules of Civil Procedure, rule 15) and therefore could be deleted without changing present law.

Sec. 13. NUMBER OF GRAND AND PETIT JURORS; NUMBER CONCURRING. Grand and petit juries in the District Courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict.

History

The 1876 version was the first Texas Constitution to mention specific numbers of jurors and the first to permit nonunanimous verdicts. Nonunanimous verdicts were permitted in Texas, however, by an 1834 statute permitting 8 of the 12 jurors to render a verdict in either a civil or criminal case. (Tex. Laws 1834, 1 *Gammel's Laws,* p. 365.) The 1836 Constitution probably put an end to that practice, however, because it said "the common law shall be the rule of decision," and the

common law at that time required unanimous verdicts.

Some delegates to the 1875 Convention apparently objected to the authorization for nonunanimous verdicts, but the substance of the debate is not reported. (See *Debates,* p. 379.) One writer suggests that those favoring nonunanimous verdicts believed it would reduce costs, minimize compromise verdicts, and prevent delay, while the opponents argued it would lead to injustices. (2 *Interpretive Commentary,* pp. 192-93.)

Some scholars believe the decision to fix the number of jurors at 12 has biblical origins.

> If the twelve apostles on their thrones must try us in our eternal state, good reason hath the law to appoint the number twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve.

(Duncomb, *Trials per Pais* (1665), quoted in White, "Origin and Development of Trial by Jury," 29 *Tenn. L. Rev.* 8, 15 (1961).)

Explanation

The first sentence of this section is quite straightforward; it simply fixes the number of grand and petit (trial) jurors at 12 and establishes a grand jury quorum of nine. The rest of the section, however, is rather intricate. It describes two situations in which a verdict may be returned by fewer than the full 12 members of a petit jury. (1) In all cases in the district courts, nine, ten, or 11 jurors may return a verdict if the other jurors die or are disabled, but the jurors who remain must be unanimous. (2) In civil cases and misdemeanors in the district courts, nine, ten, or 11 jurors may return a verdict, despite the dissent of the other one, two, or three, but all of those in the majority must sign the verdict. To further complicate matters, the legislature is given power to modify "the rule authorizing less than the whole number of the jury to render a verdict." This is somewhat ambiguous because there are really two such rules. The legislature has assumed it has power to modify both rules. In felony cases, both rules have been modified; no verdict may be returned over the dissent of any participating juror, and no verdict may be returned if more than one juror dies or is disabled. (Code of Criminal Procedure, art. 36.29.)

For nearly 100 years rule (2) was modified to require unanimous verdicts in civil cases. This was done first by statute (Tex. Laws 1876, ch. 76, 8 *Gammel's Laws,* p. 918), then by Rule 291 of the Rules of Civil Procedure. Thus, despite the clear authorization in this section for nonunanimous verdicts, the common-law rule of unanimity was retained. Effective in 1973, however, Rule 291 finally was amended to delete the unanimity requirement. The rules still do not go quite as far as this section; Rule 292 permits no more than two dissenting jurors. But verdicts of 11-1 or 10-2 are now permissible under rule (2) of this section. The constitutionality of Rule 292 was upheld in *Sherrill v. Estate of Plumley,* 514 S.W.2d 286 (Tex. Civ. App.—Houston [1st Dist.] 1974, *no writ*).

The courts have not decided whether a verdict can be rendered in a civil case when one of the original 12 jurors is disabled and another dissents. Under the Rules of Civil Procedure prior to 1973, such a verdict apparently was invalid. Old Rule 291 required the concurrence of "all members of the jury trying the case," and old Rule 292 permitted a verdict to be rendered in the disablement situation only if "signed by each juror rendering it." The new rules, however, contain neither of those requirements. Rule 291 now contains no unanimity requirement, and Rule 292 simply requires "the concurrence, as to each and all answers made, of the same 10 members of an original jury of 12 . . ."; apparently it does not

matter whether the failure of the other two to concur results from disagreement or disability. The signature requirement in new Rule 292 simply states that a verdict by fewer than 12 jurors "must be signed by each juror *concurring therein,*" thus apparently permitting ten jurors to return a verdict when one juror is disabled and another dissents.

There appears to be nothing in Section 13 to prevent this combination of the disablement and dissent exceptions. Indeed, Section 13 apparently goes farther and permits nine concurring jurors to render a verdict despite the nonconcurrence of any combination of three disabled or dissenting jurors. It is not clear whether the present Rules of Civil Procedure permit a verdict of 9-1 or 9-2 with one or two jurors disabled. It might be argued that such a verdict is invalid because the first sentence of the rule requires the concurrence of ten. The second sentence, permitting verdicts by nine jurors in the disablement situation, obviously operates as an exception to the concurrence-of-ten requirement, however, and it might be argued that there is no reason to permit nine jurors to return a verdict when the other three are all disabled, but not when two are disabled and one dissents. That argument, however, would apply as well to the concurrence-of-ten requirement itself; if it is illogical to prohibit a verdict by nine when some of the remaining three are dissenters rather than disabled, it is probably equally illogical to prohibit a verdict by nine when all of the remaining three are dissenters. The supreme court evidently has not considered this distinction illogical, so it probably would hold that verdicts of 9-1 or 9-2 are invalid. In any event, this is a matter of interpretation of Rules of Civil Procedure, not the constitution.

The requirement that all the concurring jurors sign a nonunanimous verdict appears to apply only to rule (2), but Article 36.29 of the Code of Criminal Procedure also applies it to the disablement rule, and Rule 292 of the Rules of Civil Procedure appears to do likewise. For a discussion of Section 13 and an argument in favor of nonunanimous verdicts, see Kronzer and O'Quinn, "Let's Return to Majority Rule in Civil Jury Cases," 8 *Hous. L. Rev.* 302 (1970).

This section deals only with district court juries. In county courts, petit juries have six members. Although there is no specific constitutional authorization for nonunanimous verdicts in county court, Rule 292 permits a six-member jury to return a 5-1 verdict. In criminal cases, county court verdicts must be unanimous. (Code of Criminal Procedure, art. 37.03.) This indicates that the supreme court believes nonunanimous verdicts may be authorized even if the constitution does not specifically permit them. If this is true, most of Section 13 is unnecessary; if no constitutional authorization is needed to permit nonunanimous verdicts in county court, presumably none is needed to permit such verdicts in district court either.

Comparative Analysis

About half of the states have constitutional provisions dealing with the number of members on juries.

About 29 states allow nonunanimous verdicts by constitutional provision, statute, or rule. Only about four of those allow nonunanimous verdicts in criminal cases, however, and about seven others permit nonunanimity only if the parties consent. At least two states permit nonunanimous verdicts only after the jury has deliberated a specified length of time without agreeing.

Fourteen state constitutions fix the number of grand jurors, or at least a minimum number. The most common number is 12, although two states fix a minimum of seven and two others leave the number to the counties. There are two primary methods of selecting grand jurors: (1) they may be chosen at random or

(2) they may be chosen by officials who have some discretion in making their selections. Texas is one of only about eight states that use the latter method. (See Comment, "The Grand Jury, Past and Present: A Survey," 2 *American Criminal Law Quarterly* 119 (1964).)

Author's Comment

Since its abolition in England thirty years ago, the need for a grand jury in our modern society is frequently questioned. According to one view, safeguards have been developed over the years which eliminate the need for the grand jury. It has been suggested that a judicial preliminary examination should replace the grand jury since such would afford greater protection for the accused and would entail a less expensive procedure. But most recent and best considered legal opinion is to the contrary. (Comment, 2 *American Criminal Law Quarterly,* at 120, n. 10.)

Chief Justice Vanderbilt of New Jersey, in defense of the grand jury once stated: "What cannot be investigated in a republic is likely to be feared. The maintenance of popular confidence in government requires that there be some body of laymen which may investigate any instance of public wrongdoing." (*Ibid.,* n. 10).

The trend in some areas is toward a smaller trial jury. One federal district judge argues that reduction in the number of jurors saves both time and money, without sacrificing "the essential merits of the jury as a fact-finding institution." (Tamm, "The Five-Man Civil Jury: A Proposed Constitutional Amendment," in Winters, ed., *Selected Readings: The Jury* (Chicago: American Judicature Society, 1971), p. 35.)

Another controversial subject is the requirement of unanimity in verdicts. Judge Tamm argues that it is crucial to retain the requirement of unanimity, since that ensures full consideration in the jury room of all opposing views. (Tamm, *Selected Readings,* at 18.)

The chief objections to a requirement of unanimity are that verdicts become compromises, that excessive amounts of time and expense are required to reach a verdict, and that the irrational prejudice of a single juror can cause a hung jury and thereby require an entire new trial. (See Kronzer and O'Quinn, 8 *Hous. L. Rev.,* at 305-06.) These authors, however, find the unanimity requirement less objectionable in criminal cases. Because guilt must be proved "beyond a reasonable doubt," the authors reason that it is appropriate to require the concurrence of every juror in criminal cases. It is not constitutionally necessary to do so, however. In *Johnson v. Louisiana* (406 U.S. 356 (1972)), the United States Supreme Court upheld the constitutionality of nonunanimous verdicts in criminal cases.

Whatever one's view on the desirability of nonunanimous verdicts, the language of Section 13 leaves much to be desired. It permits certain nonunanimous verdicts, then gives the legislature power to prohibit them. It would be better simply to leave the matter to the legislature. This could be done either by omitting the entire matter of petit juries or by fixing the number of petit jurors at 12 and authorizing the legislature to fix the number required for decision.

Sec. 14. JUDICIAL DISTRICTS AND TIME OF HOLDING COURT FIXED BY ORDINANCE. The Judicial Districts in this State and the time of holding the Courts therein are fixed by ordinance forming part of this Constitution, until otherwise provided by law.

History

Ordinances were the 1875 Convention's answer to the problem of making the judiciary's transition to a new constitution.

The convention appended several ordinances to the 1876 Constitution. One divided the state into judicial districts. (*Journal,* pp. 727-29, 766.) Another designated specific times for district court to be held in each county. (*Journal,* pp. 754-67). Still another provided that no ordinance passed by the convention was operative unless the constitution was ratified. (*Journal,* pp. 768, 769.) These are the ordinances referred to in Section 14.

There was a proposal during the 1875 Convention to delete this section, but it was defeated. (*Journal,* p. 731.)

One of the ordinances adopted pursuant to this section created 26 judicial districts. (8 *Gammel's Laws,* p. 751.) The legislature soon began creating additional districts, and in 1975 there were 220 numbered districts (plus ten criminal district courts), all provided for by statute. (Tex. Rev. Civ. Stat. Ann. art. 199.)

Explanation

Section 14 is a transitional provision, but it is also something more. A true transitional provision merely provides for the continuation of the existing system until a new one is created. This provision, however, does not continue the existing system. Section 14 and the ordinances it refers to created new districts different from those in existence previously. It thus represents an attempt by the 1875 Convention to act as a legislature as well as a constitutional convention; each ordinance is in effect a statute that changes existing districts and remains in effect until the legislature acts. *Bass v. Albright,* 59 S.W.2d 891 (Tex. Civ. App. – Texarkana 1933, *writ ref'd*), suggests that this section makes the ordinances referred to therein a part of the fundamental law, although they cannot supersede provisions appearing in the constitution itself and are valid only until changed by statute law.

Section 14 has been cited, along with Sections 1, 7, 8, and 11, for the proposition that the framers intended to give the legislature exclusive authority to determine the number and territorial jurisdiction of the district courts. (*Pierson v. State,* 147 Tex. Crim. 15, 177 S.W.2d 975 (1944).) By virtue of Sections 7 and 14, the legislature may fix the terms of district courts. (*Citizens State Bank of Frost v. Miller,* 115 S.W.2d 1183 (Tex. Civ. App. – Waco 1938, *no writ*).)

Comparative Analysis

Any new constitution obviously must provide some method of achieving a transition from the previous court system to the new one. It appears, however, that no other state has a permanent constitutional provision stating that judicial districts are fixed by ordinance until otherwise provided by law.

Author's Comment

If a constitutional provision by its own terms can be superseded by ordinary legislative enactment, it almost inevitably becomes "deadwood." (Dishman, *State Constitutions: The Shape of the Document,* rev. ed. (New York: National Municipal League, 1968), p. 40.) Section 14 is such a provision; since judicial districts and times of holding court long ago were fixed by statute, the section has no effect. (Tex. Rev. Civ. Stat. Ann. arts. 199, 1919.)

For a general discussion of the methods for handling transition problems, see the annotation of Article XVI, Section 48.

Sec. 15. COUNTY COURT; COUNTY JUDGE. There shall be established in each county in this State a County Court, which shall be a court of record; and there

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Sec. 15. COUNTY COURT; COUNTY JUDGE. There shall be established in each county in this State a County Court, which shall be a court of record; and there

shall be elected in each county, by the qualified voters, a County Judge, who shall be well informed in the law of the State; shall be a conservator of the peace, and shall hold his office for four years, and until his successor shall be elected and qualified. He shall receive as compensation for his services such fees and perquisites as may be prescribed by law.

History

The Constitution of 1836 provided simply that each county was to have a county court. (Art. IV, Sec. 10.) A statute apparently provided for election by the congress of a chief justice of each county court. The chief justice also served as probate judge. Two justices of the peace in each county served as associate justices of the county court. (See Townes, "Sketch of the Development of the Judicial System of Texas," 2 *Southwestern Historical Quarterly* 29, 46-47 (1898).) The 1845 and 1861 Constitutions provided for the establishment in each county of "inferior tribunals" very similar to county courts but did not give them a name. (Art. IV, Sec. 15.) The 1866 Constitution named this inferior tribunal the "county court" and provided for the election of a judge who was to be conservator of the peace and elected for a four-year term.

The Constitution of 1869 is the only one that did not provide for the equivalent of the county court. It contained provisions calling for the justices of the peace of the county to sit as a county court, but they were to exercise the jurisdiction of the former county commissioners and police courts, rather than that of a county court. (Art. V, Secs. 20, 21, 23; see also *Daniel v. Hutcheson* (22 S.W. 278 (Tex. Civ. App.), *rev'd on other grounds,* 86 Tex. 51, 22 S.W. 933 (Tex. 1893)).) This abolition of the county court probably is attributable to the 1868 Convention's strong tendency toward centralization and strengthening of the executive power. (For example, the convention gave district judges eight-year terms, gave the governor power to appoint them, and even considered making all county officials appointive. See *Seven Decades,* p. 21.)

In the 1875 Convention, reestablishment of county courts was proposed as a way to facilitate the speedy trial of criminals. (*Debates,* p. 380.) It was also argued that the county court system was the only way to relieve the burden of the district courts. (*Debates,* p. 422.) The economy-conscious 1875 Convention reduced the number of district courts from 35 to 26. (*Seven Decades,* p. 122.) Some argued against creating county courts on the ground they were merely additional district courts whose main consequence would be to make the judiciary more expensive. (*Debates,* p. 421.) The convention heard suggestions that the county courts be optional (*Debates,* p. 431), and also that the legislature be authorized to strip them of any or all of their jurisdiction. (*Journal,* p. 667.) There was some opposition to payment of county judges by "fees and perquisites" on the grounds it caused judges to "subsist and become bloated on the misfortunes of the people." (*Debates,* p. 433.) The mandatory county court system was approved by the convention, however, by a strong 52-11 margin. (*Debates,* p. 422.) The language adopted was identical with the present Section 15, except that the judge's term was two years. The 1954 amendment changing the term to four years was the only attempt since 1876 to change Section 15.

A 1953 state bar committee proposal for a new judiciary article would have retained a county court in each county but would have given the supreme court power to merge the county courts of several counties if thought desirable. It provided further that the county judge was to exercise only judicial powers and was to be a lawyer. ("Proposed Judiciary Article," 16 *Texas Bar Journal* 12 (1953).) The committee strongly criticized the existence of judges with no legal training sitting in the lower courts. The proposal to allow the supreme court to merge

county courts was severely criticized, however, (see, *e.g.,* Holloway, "Judiciary Amendment Should be Defeated," 17 *Texas Bar Journal* 695 (1954)), and a subsequent referendum of bar association members killed the entire proposal. (18 *Texas Bar Journal* 65 (1955).)

Explanation

This section, together with Section 16, created 254 constitutional courts of limited jurisdiction below the district courts. It follows the one-district, one-court, one-judge pattern established for the district courts by providing that "there shall be elected in each county . . . a County Judge . . . ." This pattern long ago proved too rigid, and many counties now have what amounts to more than one county court. Although there can be only one constitutional county court per county, there are also 70 statutory county courts in Texas, usually called "county courts at law." (Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), p. x.) These courts have at least six different names: (1) county courts at law, (2) county civil courts at law, (3) county courts for criminal cases, (4) county criminal courts, (5) county courts for criminal appeals, and (6) county probate courts. (Herring, "Streamlining the Trial Courts," 35 *Texas Bar Journal* 1008 (1972).) The statutes establishing county courts generally authorize judges of courts of like jurisdiction in the same county to transfer cases, exchange benches, and sit for each other, but the courts remain distinct tribunals. (Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451, 477 (1967).) Also, articles 1969a-1, 1969a-2, and 1969a-3 of the civil statutes provide for exchanges among county court judges. The statutes, however, authorize the county judge to sit for the judge of a county court at law only if he is a "duly licensed attorney."

In the 29 counties that have county courts at law, the constitutional county judge often performs few, if any, judicial functions; he devotes all or most of his time to his administrative responsibilities as head of the commissioners court. Some of these judges continue to perform some judicial functions, such as hearing probate matters and mental incompetency questions. (Guittard, 21 *Sw. L. J.*, at 451, 477.)

The major reason for creation of the county courts at law, in addition to the need for more than one county-level judge in populous counties, is the fact that the county judge need not be a lawyer. Section 15 requires that the judge be "well informed in the law of the State," but the courts have held that this does not require him to be a lawyer; indeed, it does not even authorize any inquiry into his knowledge of the law. "The requirement that the county judge should be well informed in the law was intended as a direction to the voters, and . . . a majority of the ballots settles the question." (*Little v. State,* 75 Tex. 616, 12 S.W. 965 (1890).) One case seems to imply that legal training could be required if the legislature decided to "make more specific the meaning of that phrase." (Ex parte *Craig,* 150 Tex. Crim. 598, 193 S.W.2d 178 (1946), *rev'd on other grounds sub nom. Craig v. Harney,* 331 U.S. 367 (1947).) The legislature has not done so, however, and according to 1965 estimate, only about 77 of the 254 county judges were lawyers. (Smith, "Court Administration in Texas: Business Without Management," 44 *Texas L. Rev.* 1142, 1150, n. 61 (1966).) A more recent survey of 102 county judges showed that 37 percent were licensed attorneys, another 16 percent had attended some type of graduate school, and 30 percent had attended a court seminar. (Texas Office of Information Services, *Analysis: The Lower Courts of the State of Texas* (Austin, 1972), section III, introduction.)

There can be no general statement of the qualifications required for judges of the county courts at law. They must meet whatever requirements are set out in the

statute creating the particular court. These statutes usually require them to be lawyers, however, and sometimes require several years' experience in the practice of law.

It is often unclear whether a reference elsewhere in the constitution to "county courts" should include the statutory courts, such as county courts at law. For example, the general guarantee of a right to jury trial in Section 15 of Article I has been interpreted to mean a 12-member jury, while Section 17 of Article V authorizes a 6-member jury in county courts. The courts have held that this means a statutory domestic relations court must use a 12-member jury because it is not a county court, but a county court at law has the jurisdiction and attributes of a county court and therefore may use a 6-member jury. (*Jordan v. Crudgington,* 149 Tex. 237, 231 S.W.2d 641 (1950); Ex parte *Melton,* 161 Tex. Crim. 563, 279 S.W.2d 362 (1955).) This might suggest that county courts at law whose jurisdiction is shared with the constitutional county courts are likely to be considered county courts, while other statutory courts, such as domestic relations courts, which share their jurisdiction with the district courts are not. The question is not settled, however. For example, one court of civil appeals has held that a judge of a county court at law is a "county judge" for purposes of Section 28 of Article V and therefore a vacancy in the office must be filled by appointment of the commissioners court rather than the governor, but another has held the opposite. (*State v. Valentine,* 198 S.W. 1006 (Tex. Civ. App.—Fort Worth 1917, *writ ref'd*); *contra, Sterrett v. Morgan,* 294 S.W.2d 201 (Tex. Civ. App.—Dallas 1956, *no writ*).) The supreme court has not considered the question.

Salaries of county judges are paid entirely by the county and vary widely. (Texas Civil Judicial Council, (Austin, 1973), p. xi, *Forty-Fifth Annual Report.*) One survey indicates that the salaries of a large majority (66 percent) are less than $10,000. (*Analysis: The Lower Courts of the State,* section III, introduction.)

The provision that county judges are conservators of the peace means primarily that they may carry pistols. It makes county judges "peace officers" for purposes of a statute excepting "peace officers" from regulations concerning pistols. (*Jones v. State,* 43 Tex. Crim. 283, 65 S.W. 92 (1901).) It duplicates Section 12 of Article V and should be deleted from the county court section.

County judges are county officers subject to the residency requirement of Section 14 of Article XVI (*Jordan v. Crudgington,* 149 Tex. 237, 231 S.W.2d 641 (1950)). They are required to have been residents of the county for six months in order to run for office. (Election Code, art. 1.05.)

The intended meaning of the phrase stating that the county court "shall be a court of record" is not clear. By one definition, a court of record is simply "one the history of whose proceedings is perpetuated in writing." (*Tourtelot v. Booker,* 160 S.W. 293 (Tex. Civ. App. – El Paso 1913, *writ ref'd*).) "At common law, any jurisdiction which has the power to fine and imprison is a court of record." (*Wahrenberger v. Horan,* 18 Tex. 57 (1856).) "Courts of record" usually have a seal. (*Houston Oil Co. v. Kimball,* 103 Tex. 94, 122 S.W. 533 (1909).)

A court is a "court of record" in a meaningful sense only if its proceedings are in fact recorded. This is determined by whether or not a court reporter or some other method of recording is available, rather than by whether the constitution denominates it as a "court of record." A court can be a "court of record" without benefit of any constitutional or even statutory statement to that effect; the Texas district courts, for example, are courts of record within all of the meanings mentioned even though nothing in the constitution or statutes says so.

Comparative Analysis

About nine states provide constitutionally for county courts; this is a decrease of two since 1964. About three-fourths of the states, however, have some form of county-level court, either in the form of statutory county courts or county-level subdivisions of other courts. (See U.S., Department of Justice, Law Enforcement Administration, *National Survey of Court Organization* (Washington, D.C.: Government Printing Office, 1972).)

The only states that have no counterpart to the Texas county courts are those with "unified" trial courts (*i.e.*, a single trial court of general jurisdiction with magistrates or other subordinate officials of that court handling matters that otherwise would be handled by inferior courts such as county courts). (See, *e.g.*, Illinois Const. Art. VI, Secs. 8, 9.) About 20 states have this plan or some variation thereof.

The *Model State Constitution* allows the legislature to establish inferior courts of limited jurisdiction and provides that the jurisdiction is to be prescribed by law.

Seven other states have constitutional provisions similar to that of Section 15 providing for election of the county judge by the voters of the county. Election is probably the most common method of selection of county-level judges in all states, however. About 40 states elect at least some of the judges of courts of limited jurisdiction. (U.S., Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System* (Washington, D.C.: Government Printing Office, 1972), table 18, pp. 101-02.)

Qualifications of county judges are not mentioned in the constitutions of most states. Two state constitutions fix a minimum age requirement, and two require that the county judge be a lawyer.

Author's Comment

It is easy to criticize the county court system in Texas. First, the judge is not a fulltime judge; by definition the judge is also the county's chief executive and administrative officer. This produces not only conflicts in allocation of his time but may even produce conflicts of interest in cases that involve the county or its finances.

Indeed, there is serious doubt as to whether the dual role of the county judge in Texas is permissible under the federal constitution. The United States Supreme Court has held that a defendant was denied due process of law when the judge who tried him also served as mayor of a village that received a substantial portion of its revenues from fines and fees collected in the mayor/judge's court. (*Ward v. Village of Monroeville,* 409 U.S. 57 (1972).) The county judge in Texas occupies a position somewhat analogous to that of the mayor/judge in the *Ward* case; as chief executive officer of the county, the judge has at least a potential interest in maximizing county revenues, including those he generates while wearing his judicial hat. It is not clear, however, whether these revenues are as significant in most Texas counties as they were in the village of Monroeville, where fines and fees provided about 40 percent of the village budget. The court of criminal appeals has rejected an argument based on the *Ward* case, but the case was not one squarely challenging the county judge's impartiality. (Ex parte *Ross,* 522 S.W.2d 214 (Tex. Crim. App. 1975).) The court also said:

> The record in the present case was simply not developed fully enough to reveal the exact extent of the county judge's executive authority and duties. The testimony of the judge that he spends most of his time on administrative duties and is the chief administrator of the county is simply too vague to delineate the exact parameters of his executive functions. (522 S.W.2d., at 217.)

The court thus appears to have left open the possibility that a fully developed case might well produce the conclusion that the present role of the county judge in Texas is unconstitutional.

Second, the requirement that every county have one county court and the limitation that no county can have more than one obviously are not well suited to the needs of a state in which the population of counties varies widely. Most of the counties of the state probably do not generate enough county court business to keep a full-time judge busy; that is perhaps one reason for the original decision to give county judges administrative duties as well. That it is still true is indicated by the fact that 228 of the 254 counties are still able to get along without a county court at law.

Third, the county court is not integrated administratively into the rest of the judicial system. There is no effective provision for transfer of judges among counties, or for cases among judges. The lines between county and district court jurisdiction are too rigid to permit any significant transfer of judges or cases between those courts. As long as each county court has one county judge who is answerable only to the voters, effective court administration at the county court level is unlikely.

Finally, the judge of the county court, though he is a major judicial officer in the present court system, is not required to be – and usually is not – a lawyer. The county court's general civil and criminal jurisdiction is limited, but the county judge nevertheless is entrusted with some of the most difficult and sensitive legal decisions in the system. His decisions in incompetency proceedings may involve long-term losses of liberty, and his decisions in probate matters can involve huge fortunes. Much of the complexity of the present Texas court system has resulted from attempts to deal with this problem of the nonlawyer county judge.

The present Texas practice of allowing a nonlawyer judge to preside over criminal trials may be unconstitutional. The California Supreme Court has held that requiring a defendant to stand trial before a nonlawyer judge in a case that involves possible loss of liberty deprives the defendant of effective counsel and therefore denies him due process of law. (*Gordon v. Justice Court,* 12 Cal. 3d 323, 115 Cal. Rptr. 632, 525 P.2d 72 (1974).) The Texas courts have consistently rejected arguments that the county judge must be a lawyer (see, *e.g.,* Ex parte *Ross,* 522 S.W.2d 214 (Tex. Crim. App. 1975)), but these cases will be irrelevant if the federal courts should follow California's lead and require lawyer-judges as a matter of federal constitutional law.

It is easier to criticize the county court system than to devise a satisfactory alternative. One problem is that the lower courts have received far less attention from court reformers than have the appellate courts. Another problem is a lack of detailed information on the facilities, workloads, and qualifications of the present county judges and judges of other inferior courts. (See Reavley, "Court Improvement: The Texas Scene," 4 *Tex. Tech. L. Rev.* 269, 279 (1973).) Another obstacle is the great diversity of Texas counties. Some counties probably do not generate enough litigation below the district court level to justify even one full-time judge. Some of the metropolitan counties, on the other hand, have scores of municipal, justice, and county courts and county courts at law, and their dockets are as crowded as those of the district courts.

Any reorganization of the courts below the district court level probably should have at least two goals: (1) improving the qualifications of lower court judges and (2) simplifying the lower court structure.

Virtually all advocates of judicial reform believe that all judges who hear contested cases should be lawyers. (See, *e.g., State-Local Relations in the Criminal Justice System,* p. 43; McCormick, "Modernizing the Texas Judicial System," 21

Texas L. Rev. 673, 688 (1943); Uhlenhopp, "Some Plain Talk about Courts of Special and Limited Jurisdiction," 49 *Judicature* 212 (1966).) The difficulty or importance of a case, and the degree of learning, tact, and wisdom necessary to decide it, do not necessarily depend on the amount of money involved or the severity of the penalty. Most citizens' only contact with the court system comes in the lower courts in such matters as traffic cases, small claims, and petty misdemeanors. The public's impressions of the entire legal system therefore are likely to be based on experiences in the lower courts. (See Roscoe Pound, *Organization of Courts* (Boston: Little Brown, 1940), pp. 260-79.) The chief arguments against requiring all judges to be lawyers are: (1) it is impractical because there are not enough qualified lawyers who are willing to serve as lower court judges and (2) requiring all judges to be lawyers narrows the range of social and political backgrounds from which judges are chosen. There are several answers to the first of these objections. One is that if the lower courts were reorganized into a more efficient system, fewer judges would be required and thus for the same total cost the state could provide better qualified judges. Another is that better qualified judges would reduce other costs in the court system; for example, if the county judge were required to be a lawyer, it might not have been necessary to give the district court original jurisdiction in probate cases.

The second objection is based on the undeniable fact that the legal profession is not representative of society at large; racial minorities, for example, obviously are underrepresented in the bar. But judges, unlike other elected officials, are not chosen to represent particular constituencies; on the contrary, they should be chosen at least in part for their ability to put aside personal preferences and decide cases according to the applicable law. Legal training may help a judge to control the impulse to apply personal social and political inclinations. In most instances, however, these considerations are academic; the cases decided by the lower courts usually do not turn on the judge's social or political views but rather involve the application of fairly well settled rules of law to specific fact situations.

As suggested above, the question of improving qualifications of lower court judges cannot be separated from the issue of simplifying the lower court structure; as long as every county, no matter how small, must have one county judge, at least four justices of the peace, and as many municipal judges as there are towns in the county, there is little hope of making sure all judges are qualified. Most of the states that have attacked this problem have settled on the same basic solution: unification of the trial court system. This simply means merger of all the trial courts into one—or sometimes two—court systems. If Texas were to adopt a truly unified trial court system, all of the present trial courts would be integrated into the district court system; there would continue to be judges (perhaps called "magistrates") performing the functions now performed by county judges, justices of the peace, and municipal judges, but they would do so as agents of, and under the supervision of, the district court.

A somewhat more modest unification plan would be one with two levels of trial court: (1) a trial court of general jurisdiction, corresponding to the present district court level, and (2) a trial court of limited jurisdiction. The latter would take over the functions of the county, justice, and municipal courts, just as in the more sweeping unification plan described above. For a good description of the organization and operation of a completely unified trial court system, see Underwood, "The Illinois Judicial System," 47 *Notre Dame Lawyer* 247 (1971).

Sec. 16. COUNTY COURTS; JURISDICTION; APPEALS TO COURT OF CIVIL APPEALS AND COURT OF CRIMINAL APPEALS; DISQUALIFICATION OF JUDGE. The County Court shall have original jurisdiction of all

misdemeanors of which exclusive original jurisdiction is not given to the Justices Court as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed $200, and they shall have exclusive jurisdiction in all civil cases when the matter in controversy shall exceed in value $200, and not exceed $500, exclusive of interest, and concurrent jurisdiction with the District Court when the matter in controversy shall exceed $500, and not exceed $1,000, exclusive of interest, but shall not have jurisdiction of suits for the recovery of land. They shall have appellate jurisdiction in cases civil and criminal of which Justices Courts have original jurisdiction, but of such civil cases only when the judgment of the court appealed from shall exceed $20, exclusive of cost, under such regulations as may be prescribed by law. In all appeals from Justices Courts there shall be a trial de novo in the County Court, and appeals may be prosecuted from the final judgment rendered in such cases by the County Court, as well as all cases civil and criminal of which the County Court has exclusive or concurrent or original jurisdiction of civil appeals in civil cases to the Court of Civil Appeals and in such criminal cases to the Court of Criminal Appeals, with such exceptions and under such regulations as may be prescribed by law.

The County Court shall have the general jurisdiction of a Probate Court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law; and the County Court, or judge thereof, shall have power to issue writs of injunctions, mandamus and all writs necessary to the enforcement of the jurisdiction of said Court, and to issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of the County Court, or any other Court or tribunal inferior to said Court. The County Court shall not have criminal jurisdiction in any county where there is a Criminal District Court, unless expressly conferred by law, and in such counties appeals from Justices Courts and other inferior courts and tribunals in criminal cases shall be to the Criminal District Court, under such regulations as may be prescribed by law; and in all such cases an appeal shall lie from such District Court to the Court of Criminal Appeals. When the judge of the County Court is disqualified in any case pending in the County Court the parties interested may, by consent, appoint a proper person to try said case, or upon their failing to do so a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law.

History

The county court's jurisdiction was not constitutionally defined until 1866. The Constitution of the Republic created a county court but did not mention its jurisdiction. (Art. IV, Sec. 10.) The Constitutions of 1845 and 1861 established "inferior tribunals" in each county and made them essentially probate courts. (Art. IV, Sec. 15.) Much of the present detail of Section 16 originated in the 1866 Constitution. It gave the county court jurisdiction of all misdemeanors and petty offenses, civil cases up to $500, and numerous specified probate matters. (Art. IV, Sec. 16.)

When the county court was abolished in 1869 (see the *History* of Sec. 15), most of its jurisdiction was transferred to the district court. When the county court was revived in 1876, its jurisdiction was generally patterned after that given by the 1866 Constitution. In addition, however, it was given appellate jurisdiction over justice court cases but was denied criminal jurisdiction in counties that have criminal district courts.

There was significant opposition in the 1875 Convention to reestablishment of the county court, and even more opposition to the rather extensive jurisdiction given to it. The system was condemned for "localizing justice" thereby making it

more susceptible to local passions and prejudices. In fact, the majority report to the convention would have placed more jurisdiction in higher courts and less jurisdiction in the lower courts. The language adopted was that of the minority report. (*Debates,* pp. 383-84.) Late in the convention, another unsuccessful attempt was made to return the county courts to the role they had as probate courts under the Constitution of 1845. (*Debates,* p. 433.)

The 1845 and 1861 Constitutions provided that problems of disqualification of judges of inferior tribunals were to be remedied by law. (Art. IV, Sec. 14.) A similar provision appeared in the 1866 Constitution (Art. IV, Sec. 12) and in Section 11 of Article V of the 1876 Constitution. Section 16, as originally adopted, added a provision that if the county judge were disqualified, the case was to be transferred to the district court for trial. The present mode of replacing a disqualified county judge was added by amendment in 1891.

The 1876 Constitution originally provided that judgments of the county court would be final in cases tried de novo in county court on appeal from a justice court if the county court's judgment or fine did not exceed $100. The 1891 amendment removed this limitation but permitted the legislature to make exceptions.

When the present constitution was adopted, the decision to vest jurisdiction of probate matters and administration of estates in the county courts was perfectly understandable. The county court was always available and accessible, whereas the district court met only twice a year in each county for short sessions. (Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451, 472 (1967).) To protect litigants, however, jurisdiction had to be rather limited because the judge usually had no legal training. The provision for trial de novo (*i.e.,* as if the matter had not been tried before) on appeal was another concession to the fact that the judge was likely to be a nonlawyer.

The new Article V proposed in 1887 would have made county courts optional, with jurisdiction to be provided by the legislature, subject to the limitations that all officers were to be elected and that certain listed jurisdiction was not to be vested in any courts inferior to the district courts. (See the *History* of Sec. 15.)

A new judiciary article proposed by the Civil Judicial Council in 1946 contained no mention of county courts. ("Proposed Amendment to Article V of the State Constitution," 9 *Texas Bar Journal* 347 (1946).) This aspect of the proposal apparently was overshadowed by debate on other sections that would have changed the method of selecting judges. (See Storey, "Shall Our Texas Constitution Be Revised?" 11 *Texas Bar Journal* 621 (1948).)

A 1953 proposal by a state bar committee, eventually defeated by bar association members, provided that the jurisdiction of the county court was to be defined by the supreme court. ("Proposed Judiciary Article," 16 *Texas Bar Journal* 12, 13 (1953).)

A constitutional revision committee of the state bar recommended in 1968 that all definitions of jurisdiction of district and county courts be removed from the constitution (Brite, "Bar's Obligation," 32 *Texas Bar Journal* 145 (1969).) (See also the *History* of Sec. 15.)

Explanation

Three distinct types of jurisdiction are conferred on the county courts by Section 16: criminal, civil, and probate. Section 17 of Article V illustrates this division by providing separate terms for the three. More importantly, Section 22 of Article V, permitting the legislature to diminish the county court's civil and criminal jurisdiction, does not permit diminution of its probate jurisdiction (*State v. Gillette's Estate,* 10 S.W.2d 984 (Tex. Comm'n App. 1928, *jdgmt. adopted*)).

Reduction or even elimination of the county court's probate jurisdiction is now permitted, however, under a 1973 amendment to Section 8 of Article V.

Until 1973, the county court had original jurisdiction of matters involving probate of wills, administration of estates, and appointment of guardians and administrators. This jurisdiction was exclusive among the constitutional courts, but the statutory courts could be given concurrent probate jurisdiction. (*State* ex rel. *Rector v. McClelland,* 148 Tex. 372, 224 S.W.2d 706 (1949).) The 1973 amendment to Section 8 gave the district court probate jurisdiction concurrent with that of the county court; however, it also permitted the legislature "by local or general law, Section 16 of Article V of this Constitution notwithstanding, to increase, diminish, or eliminate the jurisdiction of either the district court or the county court in probate matters." The legislature exercised that power by enacting a statute denying the district courts original probate jurisdiction in counties with statutory courts that have probate jurisdiction. (*General and Special Laws of the State of Texas,* 63rd Legislature, Reg. Sess., 1973, ch. 610, at 1684.) Thus, at present, the constitutional county court has original probate jurisdiction in every county; it shares that jurisdiction with the statutory probate courts in counties that have them, and in all other counties it shares its probate jurisdicion with the district courts. In the latter counties, the statute provides for the transfer of contested probate cases from the county court to the district court and provides that all appeals in such matters go to a court of civil appeals rather than to the district court. The amendment authorizes the legislature to withdraw all probate jurisdiction and give it exclusively to the district court (or vice versa). Whether it also permits the legislature to withdraw all probate jurisdiction from the county court and give it to statutory probate courts is not clear. The amendment permits elimination of the probate jurisdiction "of either the district court or county courts." This may mean that the legislature must allow at least one of those constitutional courts to retain at least concurrent probate jurisdiction.

Until 1973, the county court's probate jurisdiction was quite limited. It had no jurisdiction to construe wills (*Langehennig v. Hohmann,* 139 Tex. 452, 163 S.W.2d 402 (1942)); to enforce a contract to make a will (*Huston v. Cole,* 139 Tex. 150, 162 S.W.2d 404 (1942)); to determine title to property claimed by an estate (*Jones v. Sun Oil Co.,* 137 Tex. 353, 153 S.W.2d 571 (1941)); or to decide a claim against an estate, after the claim had been refused by the administrator, unless the amount in controversy was within the civil jurisdiction of the court (*George v. Ryon,* 94 Tex. 317, 60 S.W. 427 (1901)). In these cases, suit had to be brought in district court; if the district court had jurisdiction, it could determine all incidental questions involved, including probate matters that otherwise would have been within the exclusive jurisdiction of the county court; if it did not have power to enforce its judgment, it certified the judgment to the county court for enforcement. (*Higginbotham v. Davis,* 221 S.W.2d 290 (Tex. Civ. App.—Dallas 1949, *no writ*); *Gregory v. Ward,* 118 Tex. 526, 18 S.W.2d 1049 (1929).) Appeals from probate decisions went to the district court where the case was tried de novo. (Guittard, 21 *Sw. L. J.,* at 472.) The district court's jurisdiction over probate matters was appellate only; a county court's judgment could be overturned only when it exceeded its powers, or where there was an error of law. (*Dunway v. Easter,* 133 Tex. 309, 129 S.W.2d 286 (1939). See also the *Explanation* of Sec. 8.)

The 1973 amendment changed all that. The amendment authorized the legislature to increase the probate jurisdiction of the county court, and the implementing statute did so. It provided that "all courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate, including but not limited to, all claims by or against an estate, all actions for trial of title to land incident to an estate and for the enforcement of liens thereon incident to an

estate and of all actions for the trial of the right of property incident to an estate." Thus, the county court now appears to have broad power to deal with all probate-related matters.

The lengthy enumeration of specific types of probate matters in the second paragraph of Section 16 accomplishes very little. Most of the matters specifically mentioned would be included anyway under the general phrases "general jurisdiction of a probate court" and "all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons." The list apparently does not determine by omission the types of probate matters that are *not* within the county court's jurisdiction; those are determined by the specific grants of probate jurisdiction to the district court in Section 8.

The statement relating to apprenticeship of minors is anachronistic and has no practical effect because the courts have held that custody of minors is within the exclusive jurisdiction of the district courts. (Ex parte *Reeves,* 100 Tex. 617, 103 S.W. 478 (1907).) This rule also applies if the county court purports to act under the phrase giving it power to appoint guardians of minors, rather than the apprenticeship phrase; it may appoint the guardian, but it may not award custody. (*Worden v. Worden,* 148 Tex. 356, 224 S.W.2d 187 (1949).)

The county court's civil jurisdiction is quite narrow. It includes only suits in which the amount in controversy is between $200 and $1,000, and when that amount is between $500 and $1,000, the county court shares its civil jurisdiction with the district court. (If the amount is exactly $500, the county court has exclusive jurisdiction unless the suit is one to try right to title of property under Section 8; if so, the district court's jurisdiction is exclusive.) Moreover, even within these monetary limits, the county court has no jurisdiction if the suit is one involving a subject within the exclusive jurisdiction of the district court, such as divorce or slander. (See the *Explanation* of Sec. 8.)

With two exceptions, the county court has jurisdiction of all misdemeanors punishable by imprisonment or by fine exceeding $200. Although the language gives the county court jurisdiction "when the fine to be imposed *shall* exceed $200," this is interpreted as if it said "may exceed"—regardless of the penalty actually assessed. If the maximum penalty for the offense exceeds $200, the county court's jurisdiction is exclusive. (*Anderson v. State,* 18 Tex. Ct. App. 17 (1885).) If conviction entails some other penalty, such as forfeiture of a hunting or fishing license, in addition to a $200 fine, the courts have held that the county court's jurisdiction is exclusive, because the total possible penalty exceeds $200. (*E.g.,* Ex parte *Howard,* 171 Tex. Crim. 278, 347 S.W.2d 721 (1961).)

One exception to the county court's criminal jurisdiction is for misdemeanors involving official misconduct. Section 8 places these within the jurisdiction of the district court, and the courts have held that this grant is exclusive. (*Simpson v. State,* 138 Tex. Crim. 622, 137 S.W.2d 1035 (1940).)

The other exception applies only when the county has a criminal district court; in those counties, the county court has no criminal jurisdiction unless the legislature specifically grants it. The intention apparently was to put all criminal jurisdiction in these counties in the criminal district court. This exception is of little consequence, however, because all counties that have criminal district courts also have county courts at law, which in practice have largely taken over the county court's criminal cases anyway. (See Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), pp. ix-xi.) Also, some of the former criminal district courts have been converted into regular district courts, making this exception inapplicable. (See the *Explanation* of Sec. 8.)

The county court's appellate jurisdiction is at least as important as its original jurisdiction. It is the court to which most appeals from the justice and municipal courts are taken unless the county has a county court at law; if it does, appeals from the lower courts usually go there. Section 16 permits appeals from justice courts in civil cases "only when the judgment of the court appealed from shall exceed $20." If this were read literally, it would be quite unfair, since it would never permit an appeal by a plaintiff who suffers a "take nothing" judgment in the justice court. The legislature has avoided this result by interpreting the language as if it said "only when the amount in controversy exceeds $20." (Tex. Rev. Civ. Stat. Ann. art. 2454.) The courts have upheld this reinterpretation of the constitutional language as a valid exercise of the power given the legislature by Section 22 of Article V to change jurisdiction of the county courts. (See *Brazoria County v. Calhoun,* 61 Tex. 223 (1884); also see the *Explanation* of Sec. 22.)

The county court has jurisdiction of all appeals from justice courts and, by statute (Code of Criminal Procedure, art. 45.10), of all appeals from municipal courts. Again, there is an exception: if the county has a criminal district court, appeals from the justice and municipal courts go there rather than to the county court.

All appeals are tried de novo in the county court (*i.e.,* as if there had not been a previous trial). This requirement probably is based at least in part on the fact that there usually is no record of the testimony heard in the justice or municipal court.

The county court's power to issue writs is rather limited. Before the 1891 amendment, the county court had power to issue injunctions only to enforce its jurisdiction. (*Carlisle v. Coffee & Price,* 59 Tex. 391 (1883).) In 1891, the language was changed slightly and the courts have interpreted the present language to allow the county court to issue injunctions and writs of mandamus, even if they are not necessary to enforce its jurisdiction. (*Dean v. State,* 88 Tex. 290, 31 S.W. 185 (1895).) In injunction and mandamus suits, however, the county court has jurisdiction only if the amount in controversy is between $200 and $1,000. (*Repka v. American Nat'l Ins. Co.,* 143 Tex. 542, 186 S.W.2d 977 (1945).) If the amount is more than $1,000, the suit belongs in district court; if it is less than $200, it still goes to district court, because the justice of the peace has no general power to issue writs of injunction or mandamus. (*Bowles v. Angelo,* 188 S.W.2d 691 (Tex. Civ. App.—Galveston 1945, *no writ*). See also Note, 12 *Texas L. Rev.* 457 (1933).)

The county court's habeas corpus jurisdiction is the same as its general criminal jurisdiction.

Section 16, despite its many detailed grants of jurisdiction to the county court, usually does not prevent the legislature from taking away any or all of that jurisdiction. This is because of Section 22 which specifically authorizes the legislature to "increase, diminish or change the civil and criminal jurisdiction of the County Courts," and the 1973 amendment to Section 8 which authorizes changes in probate jurisdiction. Section 1 contains a provision authorizing the legislature to conform the jurisdiction of the district and other inferior courts to that of any new courts that may be created. The courts have held that this permits the legislature to give statutory courts jurisdiction concurrent with that of the district and county courts but does not permit it to take that jurisdiction away entirely. (See the *Explanation* of Sec. 1.) Section 22, however, goes further. It permits the legislature to withdraw completely civil and criminal jurisdiction from the county court and give it to another court. (See, *e.g., Chappell v. State,* 153 Tex. Crim. 237, 219 S.W.2d 88 (1949); *Rogers v. Graves,* 221 S.W.2d 399 (Tex. Civ. App.—Waco 1949, *writ ref'd.*) The county court's jurisdiction may also be expanded to matters formerly within the exclusive power of the justice courts. (*Commercial Inv. Trust v. Smart,* 123 Tex. 180, 69 S.W.2d 35 (1934).) The legislature may change the

appellate, as well as the original, jurisdiction of the county court. (*Kubish v. State,* 128 Tex. Crim. 666, 84 S.W.2d 480 (1935).)

The method provided in the last sentence of this section for choosing a special judge if the county judge is disqualified is not the only method of dealing with the problem. Before 1891, this section did not provide for a special judge but required rather that any case in which the county judge was disqualified be transferred to the district court of the county. After the 1891 amendment replaced that provision with the present one, the courts held that the legislature still had power to provide for transfer of cases to the district court when the regular judge is disqualified. (*San Angelo National Bank v. Fitzpatrick,* 88 Tex. 213, 30 S.W. 1053 (1895).) Moreover, Section 11 gives the legislature general authority to provide other alternatives for dealing with the problem of disqualification of judges of the inferior courts. Section 16 does not preclude use of another method. (*Dulaney v. Walsh,* 90 Tex. 329, 38 S.W. 748 (1897).) The present statutes, however, generally follow the method outlined in Section 16; the parties may agree on a "proper person" to try the case (Tex. Rev. Civ. Stat. Ann. art. 1930), and if they fail to agree, the governor is to appoint a special judge. (Tex. Rev. Civ. Stat. Ann. arts. 1931, 1932.) In some counties the judge of the county court at law is authorized to sit for the county judge. (Tex. Rev. Civ. Stat. Ann. arts. 1969a-1, 1969a-2, 1969a-3.)

Comparative Analysis

Of the approximately nine state constitutions that mention county courts, none provide for its jurisdiction in such minute detail as does the Texas Constitution. One simply gives the county court such jurisdiction as may be provided by law, and four specify some jurisdiction but authorize the legislature to change it. Only two other states confer probate jurisdiction on the county court by constitutional provision, and two other constitutions specifically give it misdemeanor jurisdiction.

The *Model State Constitution* leaves the entire matter of inferior courts, including their jurisdiction, to the legislature.

Author's Comment

At best, there is little to be said in favor of a detailed constitutional definition of the jurisdiction of inferior courts. The only purpose such a definition can serve is to prevent the legislature from taking away that jurisdiction. Here not even that argument can be made; Section 16 does not accomplish that purpose because Sections 8 and 22 authorize the legislature to change the county court's civil, criminal, or probate jurisdiction.

If trial court jurisdiction is to be divided among two or more levels of courts, the division should be made in the definition of the jurisdiction of the inferior court, rather than in that of the court of general jurisdiction. The latter is the general court because it has all jurisdiction not assigned elsewhere. (See the *Author's Comment* on Sec. 8.) This division probably should not be made in the constitution, however. Its primary purpose is to allocate judicial business among the different levels of courts. That requires some flexibility; and the legislature must be free to change the dividing line as types of litigation change. For example, it must be able to respond to changes in the value of money. The present $1,000 maximum on the county court's jurisdiction has been in the constitution since 1876. The real value of $1,000 now, however, is only a fraction of what it was in 1876. Thus, even though the county court's jurisdiction technically has not been changed, it in fact has been steadily eroded so that its civil jurisdiction today is

considerably less significant than it was a century ago.

The provisions of this section that are most effective—and most troublesome—are those giving the county court probate jurisdiction and requiring trial de novo of all appeals to the county court. In any revision, consideration should be given to removing both of these provisions.

As pointed out in the preceding *Explanation* and in the *Explanation* of Section 8, the county court's probate jurisdiction is not truly exclusive; the district court in fact has jurisdiction of many probate-related matters, and in metropolitan counties probate matters usually are handled by county courts at law rather than the county court. The division of probate responsibility between the county court, statutory courts, and district court is unnecessarily complex.

There is no easy solution to the location of probate jurisdiction. The work involves a great deal of day-to-day administrative detail, and a district judge's time may be considered too expensive to be spent signing routine probate orders. Moreover, the district judge cannot match the easy accessibility that is provided by having a probate judge in every county courthouse. On the other hand, probate matters often involve some of the most complex questions known to the law; a nonlawyer can hardly be asked to make those decisions. The difficulty is compounded by the great disparity of population in Texas counties. Some counties generate enough business to keep several full-time probate judges busy; others do not generate enough to justify even one full-time probate judge and yet still need to have someone with some probate powers available on a more or less full-time basis. (See generally Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451, 472-73.)

All of these factors make it exceedingly difficult to arrive at a single, permanent, constitutional assignment of probate responsibility.

The requirement in this section (repeated in Sec. 19) that all appeals from justice and municipal courts be tried de novo is one of the most inefficient provisions in the entire judiciary article. At best, such an appeal requires a full trial in the county court, in which all of the expense, time, and inconvenience of the initial trial are repeated. At worst, the case never goes to trial, and justice is thwarted. Dockets of the county courts (or county courts at law) in some counties are clogged with de novo appeals, making such an appeal an almost certain way of delaying the consequences of a judgment or conviction in the justice or municipal court. Those consequences can be avoided altogether if the court finally is forced to give up and dismiss the case.

If trial de novo in the county court is considered necessary because the quality of justice in the lower courts is not dependable or because the lower courts have no means of making a record of their trials, those problems should be attacked directly rather than by attempting to gloss over them by providing for a second trial.

The last sentence of the first paragraph of Section 16, providing for appeals from county court judgments, is both syntactically garbled and unnecessary. It makes no sense to say "exclusive or concurrent or original jurisdiction of civil appeals in civil cases. . . ." If they are appeals, they cannot be within the court's original jurisdiction. If they are within the courts' original jurisdiction, they must be within either its exclusive or concurrent jurisdiction; "original" is not a third alternative to "concurrent" or "exclusive." Presumably the sentence is intended to say that judgments of the county court, whether entered in the exercise of its original or appellate jurisdiction, are appealable to the courts of civil appeals or court of criminal appeals. The provision does not, however, guarantee a right of appeal. The courts have held that the legislature may deny any appeal from a judgment of the county court. (Ex parte *Killam*, 144 Tex. Crim. 606, 162 S.W.2d

426, *cert. denied,* 317 U.S. 668 (1942); *Millican v. State,* 145 Tex. Crim. 195, 167 S.W.2d 188 (1942).)

Since the provision does not guarantee an appeal, its only remaining function is to give the courts of civil appeals and court of criminal appeals power to hear appeals from the county court. It is unnecessary for that purpose, however, because that power is given by the sections dealing with those courts. (See the Annotations of Secs. 5 and 6.)

Sec. 17. TERMS OF COUNTY COURT; PROSECUTIONS; JURIES. The County Court shall hold a term for civil business at least once in every two months, and shall dispose of probate business, either in term time or vacation as may be provided by law, and said court shall hold a term for criminal business once in every month as may be provided by law. Prosecutions may be commenced in said court by information filed by the county attorney, or by affidavit, as may be provided by law. Grand juries empaneled in the District Courts shall enquire into misdemeanors, and all indictments therefor returned into the District Courts shall forthwith be certified to the County Courts or other inferior courts, having jurisdiction to try them for trial; and if such indictment be quashed in the County, or other inferior court, the person charged, shall not be discharged if there is probable cause of guilt, but may be held by such court or magistrate to answer an information or affidavit. A jury in the County Court shall consist of six men; but no jury shall be empaneled to try a civil case unless demanded by one of the parties, who shall pay such jury fee therefor, in advance, as may be prescribed by law, unless he makes affidavit that he is unable to pay the same.

History

Except for the provision fixing a minimum number of terms of court for the county court, which first appeared in the 1866 Constitution (Art. IV, Sec. 16), this section was new to the 1876 Constitution. One possible explanation for the excess of detail included by the 1875 Convention on the subject of county courts (aside from that Convention's general tendency to include a great amount of detail on nearly everything) is the fact that county courts were being reestablished in 1876 after having been abolished under the 1869 Constitution. (See the *History* of Sec. 15.) Since there was no existing system of county courts, the delegates may have felt it necessary to describe in detail the system they envisioned.

Section 29 of Article V, adopted by amendment in 1883, supersedes portions of this section (*Kilgore v. State,* 52 Tex. Crim. 447, 108 S.W. 662 (1908)) and may have been intended to replace it entirely. The 1883 amendment did not contain a clause repealing Section 17, however, so both sections remain on the books, even though Section 29 duplicates most of Section 17 and is inconsistent with it in several respects. (See the annotation of Sec. 29.)

The six-member jury was an innovation of the 1875 Convention. It apparently was proposed primarily for economic reasons. One of the reasons for reestablishment of the county court was to reduce the number and cost of district courts, and the committee that proposed six-member county court juries predicted that because of the reduction in size "much expense, both to litigants and to the public, will be saved." (*Journal,* p. 418.)

Explanation

The provision in Section 17 prescribing terms of the county court is no longer operative; the courts have held that it is superseded by Section 29 of Article V. (*Kilgore v. State, supra.*) The provisions on commencement of prosecutions and number of jurors presumably also are superseded by Section 29, but those questions apparently have not arisen and are not likely to arise because the Section

29 provisions are almost the same as those in Section 17.

It is not entirely clear whether the sentence in Section 17 concerning transfer of misdemeanor indictments from the district court to the county court is still operative. Since Section 29 provides that all prosecutions are to be commenced as provided by law, it might be argued that that provision supersedes the more specific language of Section 17. On the other hand, it could be argued that the two sections are not in conflict because Section 29 speaks only to the commencement of prosecutions generally, while Section 17 deals with the peculiar problem of indictments for offenses of which the district court has no jurisdiction. One fairly recent case cites Section 17 for the proposition that a district court must transfer a misdemeanor indictment to the county court. (*Hullum v. State,* 415 S.W.2d 192 (Tex. Crim. App. 1966).) The decision is not squarely in point, however, because article 21.26 of the Code of Criminal Procedure contains the same requirement; the same decision therefore presumably would have been reached under Section 29 and the statute if Section 17 were considered superseded.

A similar uncertainty exists with respect to the language in Section 17 denying jury trial in civil cases unless one of the parties demands it and pays a fee or signs an affidavit of inability to pay. Since Section 29 contains part of the Section 17 language on juries in county court, it could be argued that Section 29 was intended to control that entire subject. The counterargument again would be that while the general jury provision of Section 17 is superseded, its more specific language on the method of exercising the right is still controlling. Again, there is no decision on the question, and none is likely because the rules prescribing the method of exercising the right to jury trial are consistent with both sections. (See Rules of Civil Procedure, rules 216, 217.)

Comparative Analysis

See the *Comparative Analysis* of Section 29.

Author's Comment

As pointed out in the *Explanation* above, most of Section 17 clearly has been superseded by Section 29. The only Section 17 provisions that arguably are still operative are those that (1) direct grand juries to inquire into misdemeanors, (2) require district courts to transfer misdemeanor indictments to county courts, (3) permit a misdemeanor defendant to be tried on an information even if his indictment is quashed, and (4) regulate the method of exercising the right to jury trial in civil cases. None of these is a matter of constitutional importance, and all are covered by existing statutes or rules. (Code of Criminal Procedure, arts. 12.05, 21.26, 28.04; Rules of Civil Procedure, rules 216, 217.) Section 17 therefore can be deleted without loss.

Sec. 18. DIVISION OF COUNTIES INTO PRECINCTS; ELECTION OF CONSTABLE AND JUSTICE OF THE PEACE; COUNTY COMMISSIONERS AND COUNTY COMMISSIONERS COURT. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the

qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.

History

The Constitution of the Republic provided that the "Republic shall be divided into a convenient number of counties" (Art. IV, Sec. 11). That constitution also provided that each county should have "a convenient number of Justices of the Peace, one Sheriff, one Coroner, and a sufficient number of Constables, who shall hold their offices for two years, to be elected by the qualified voters of the district or county, as the Legislature may direct." (Art. IV, Sec. 12.) This was carried over into the Constitution of 1845 (Art. IV, Sec. 13). No change was made in 1861.

The 1866 Constitution was the first to provide constitutionally for county government:

> There shall be elected in each county in the State, by the persons qualified to vote for members of the Legislature, four County Commissioners, whose term of office shall be four years, who, with the Judge of the County Court, shall constitute, and be styled, the Police Court for the County; whose powers, duties and mode of action, in regulating, promoting, and protecting the public interest relating to the county, shall be the same as that now prescribed by law for the Commissioners Court of Roads and Revenue, until otherwise provided for and regulated by the Legislature. (Art. IV, Sec. 17.)

The concluding portion of this section refers to the existing statutory system of county government. That system was created by the congress of the Republic early in 1845. In the early days of the Republic each county had a chief justice elected by congress and two associate justices elected by the justices of the peace. "This trio acted as the governing body of the county and 'was responsible for the superintendence and control of public roads, bridges and ferries, and for the care of the indigent, lame, blind, and poor persons who were unable to support themselves.' This body was changed on February 3, 1845, to the county commissioners consisting of four commissioners and one chief justice, all elected for two year terms." (Davis and Oden, *The Constitution of Texas: Municipal and County Government, Arnold Foundation Monograph No. VIII* (Dallas: Southern Methodist University Press, 1961), pp. 106-07. The internal quotation is cited to Claunch, *The Government of Dallas County* (Dallas: Southern Methodist University Press, 1954), p. 3.)

The 1869 Constitution changed things again. As noted earlier (*History* of Sec. 15), the 1869 Constitution abolished the county court and county judge. Each county was to elect five justices of the peace, not more than one of whom could "be a resident of the same justice's precinct." (Art. V, Sec. 19.) One of the justices was to "reside, after his election, at the county seat." Section 20 provided that the five justices were to "constitute a court, having such jurisdiction, similar to that heretofore exercised by county commissioners and police courts, as may be prescribed by law. And when sitting as such court the justice who resides at the county seat shall be the presiding justice." It seems clear that the justices in 1869 and the commissioners in 1866 and 1845 were elected by the voters at large. One deduces that the 1869 precincts into which a county was divided were designed to give the different geographical areas representation without letting the voters of each precinct choose their own man. If this is true and if there were contests, then

there was a "place" system in operation in 1869.

In the 1875 Convention the committee report included a section creating a commissioners court in substantially the form now appearing in Section 18, but justices of the peace and constables were covered by a separate section. (*Journal,* pp. 412-13.) A substitute section combining commissioners, justices, and constables was subsequently offered and accepted. (*Id.,* at 669-70.) This substitute was much the same as Section 18 except that the wording would have permitted as many as eight commissioners. This was adjusted by floor amendment. (*Id.,* at 671.)

Section 18 was amended in 1954 to change terms of office from two years to four years. The same amendment removed an obsolete provision concerning the first division of counties into precincts. It should be noted that over the years many changes in the judicial system have been proposed and many of them have been adopted. The only proposal that would have covered the commissioners court system was an entirely new judiciary article that was defeated in 1887. That article abolished the commissioners court but substituted nothing. There was a provision authorizing statutory county courts. Under that provision the legislature probably could have created something like the commissioners courts; in any event, the legislature under its general powers could have created a form of government for counties.

Explanation

Composition of Court. Section 18 sets forth four propositions concerning the composition of the commissioners court. First, the county judge is the presiding officer. Second, there are four commissioners, each elected from one of four precincts into which the county must be divided. (See Tex. Att'y Gen. Op. No. H-32 (1973).) Third, the commissioners court has the power to draw the lines of the four precincts. (In the preceding *History,* it was noted that obsolete material was removed in 1954. That referred to a provision that authorized the then existing county court to make the first division. As the 1869 provision quoted in the *History* shows, counties were already divided into four precincts. Indeed, some of the county precinct divisions as of 1964 antedated the 1876 Constitution. See Newell, *County Representation and Legislative Reapportionment* (Austin: Institute of Public Affairs, The University of Texas, 1965), p. 13.) Fourth, the only guideline for precinct line drawing is "for the convenience of the people."

In 1968 the United States Supreme Court handed down *Avery v. Midland County,* one of the leading one-man, one-vote cases. (390 U.S. 474. Three justices dissented.) Obviously not by accident, the case involved the Texas county that had the greatest population variation among its precincts. The city of Midland was one precinct; the balance of the county contained the other three precincts. The estimated 1963 population for each of the precincts was: 67,906; 852; 414; and 828. (*Id.,* at 476.) The court held that the one-man, one-vote rule applied.

Redrawing precinct lines following the *Avery* case created a minor problem in one county because of the staggered terms required by Section 65 of Article XVI. In *Dollinger v. Jefferson County Commissioners Court,* a United States district judge was faced with massive shifts of people as a result of redrawing precinct lines. In the 1972 election voters in the new Precincts 1 and 3 would vote for commissioners, but voters in Precincts 2 and 4 would have to wait until 1974 to vote. In the case of Precinct 4 this created no problem for the judge; 85 percent of the people in that precinct had been there all along. But in Precinct 2, he found that less than 50 percent of the population had been in the precinct when the incumbent commissioner was elected. Accordingly, he ordered an election in Precinct 2 for a commissioner who would serve for only two years. (335 F. Supp.

340 (E.D. Tex. 1971).) This problem is probably peculiar to a massive shift following overturning of a non-one-man, one-vote system. Future redrawing following a decennial census would not be likely to create massive shifts of people. This would not necessarily be true, of course, if instead of making minor adjustments to meet population changes the commissioners court decided to start from scratch.

Powers. Notwithstanding several constitutional provisions concerning powers of counties (*e.g.*, Art. III, Sub. (c) of Sec. 52; Sec. 1-a of Art. VIII; and Sec. 7 of Art. XI), numerous statutes spelling out county powers, and a great many court cases, it is easy to explain the constitutional powers of counties: there are hardly any.

As of 1876, only Section 9 of Article VIII could even be argued to be a direct grant of power to counties. The original wording was ambiguous. It could be read as a direct grant to levy property taxes. The better reading would be as a limitation on the legislature's power to authorize county property taxes.

The grants of power now in the constitution got there by amendments. For example, the present wording of Section 9 of Article VIII does seem to give counties the power to levy the full tax of 80¢ on the $100. (See the *Explanation* of that section.) Section 1-a of the same article clearly authorizes counties to levy 30¢ on the $100 for farm-to-market roads and flood control. Subsection (c) of Section 52 of Article III is another direct grant of taxing power.

There are other examples of grants of power through amendments. Section 7 of Article XI, for example, originally permitted counties on the Gulf to levy taxes for seawalls "as may be authorized by law." When the section was amended in 1932 the wording became "as may now or may hereafter be authorized by law." This would seem to freeze the statutory grant as of November 1932 into a constitutional grant. Other examples of direct grants are Section 52(e) (1967) of Article III and Subsection (b) of Section 62 of Article XVI. (Sec. 62 was repealed in 1975. See Sec. 67 of Art. XVI.)

With no general constitutional grant of power, it follows that counties must look to the legislature. Here the rule is even more stringent than the Dillon Rule for municipal corporations. (See the *Author's Comment* on Sec. 5 of Art. XI.) Once a corporation is created there is an assumption that it has some inherent power. The Dillon Rule calls for strict construction of any granted powers, but under the rule a municipality possesses such powers as are essential to the accomplishment of the declared objectives and purposes of the corporation. A county does not start with this aura of power. True, Section 1 of Article XI recognizes counties "as legal subdivisions of the State." But this is a far cry from incorporation for a purpose. (In the course of time and a great many judicial opinions the terminology in this area has become frightfully muddled.) (See the *Explanation* of Sec. 1 of Art. XI.)

In essence a county is an administrative convenience for the state. In *Bexar County v. Linden,* Chief Justice Phillips, after describing the nature of a municipal corporation, described counties thusly:

> They are essentially instrumentalities of the State. They are the means whereby the powers of the State are exerted through a form and agency of local government for the performance of those obligations which the State owes the people at large. They are created by the sovereign will without any special regard to the will of those who reside within their limits. Their chief purpose is to make effective the civil administration of the State government. The policy which they execute is the general policy of the State. Through them the powers of government operate upon the people and are controlled by the people. They are made use of by the State for the collection of taxes, for the diffusion of education, for the construction and maintenance of public highways, and

> for the care of the poor. All of these things are matters of State, as distinguished from municipal, concern. They intimately affect all the people. The counties are availed of as efficient and convenient means for the discharge of the State's duty in their regard to all the people. (110 Tex. 339, 346, 220 S.W. 761, 763 (1920).)

In another leading case, *Robbins v. Limestone County,* the supreme court drove this point home when it upheld the taking over of county highways for the state highway system, leaving the counties saddled with paying off bonds issued to pay for the roads. (114 Tex. 345, 268 S.W. 915 (1925). The legislature later took over responsibility for those bonds.) Limestone County argued that it had bought and was paying for the roads, and obviously, owned them. The court replied:

> While the title, under the authority of law, was taken in the name of the county and under statutory authority, and the county was authorized and charged with the construction and maintenance of the public roads within its boundaries, yet it was for the state and for the benefit of the state and the people thereof. (114 Tex., at 355; 268 S.W., at 918.)

Part of the problem facing the court was the psuedo-grant of power to tax and borrow for roads as provided in what is now Subsection (b) of Section 52 of Article III and Section 9 of Article VIII. (Sec. 9 was worded somewhat differently then.) The court noted that "these provisions of the Constitution are not limitations upon the legislative authority and control over the roads and the expenditure of road funds by counties or other agencies of government under provisions of law." (114 Tex., at 358; 268 S.W., at 919.)

The *Limestone County* opinion also pointed out that the grant of power in the final clause of Section 18 is of no particular significance. The court declined to list what powers are conferred by the constitution; the court simply repeated, in effect, what it had said earlier—the laying out, construction, and maintenance of public roads are powers conferred by statute. "In other words, it is only by the laws of the state, as enacted by the Legislature, that jurisdiction over public roads has ever been exercised by county commissioners' courts as a part of its 'county business.' " (114 Tex., at 360; 168 S.W., at 920.)

In sum, then, a county has only whatever powers of government are given to it by the legislature. As counties become more urban, the legislature obviously has to add to their powers. In some instances this has been started through a constitutional amendment as in the case of hospital and airport districts (Secs. 9 and 12 of Art. IX). These are only authorizations to the legislature to act, however, and they show up in the constitution only to permit additional property taxes. It is also instructive that five local amendments for hospital districts (Secs. 4-8, Art. IX) preceded the general amendment, Section 9. Once counties become urban, they are no different from cities in the need for individual treatment. In other words, many counties today are where many cities were in 1912—in need of home rule. (See the following *Author's Comment.*)

Acting as a Court. One of the minor confusions is that the commissioners court is a "court." It does not try cases. But when it acts it does so in a format not unlike that used by a court—"Now, therefore, the commissioners court orders and decrees. . . ." (See *Canales v. Laughlin,* 147 Tex. 169, 214 S.W.2d 451 (1948), for a verbatim order of a commissioners court.)

There are a number of cases that speak of the commissioners court as a court and suggest that the designation is important. These cases fall into three broad categories.

(1) *Immunity from Civil Liability.* Judges usually are held to be absolutely immune

from civil liability for damages resulting from acts or statements made while discharging their judicial duties. (*E.g., Morris v. McCall,* 53 S.W.2d 667 (Tex. Civ. App.—Beaumont 1932, *writ dism'd*).) Local administrative officials, however, sometimes have only a "qualified" or "conditional" immunity; this means they can be held liable if it can be shown that they acted with "malice." (See, *e.g.,* William E. Prosser, *Handbook of Torts,* 4th ed. (St. Paul: West Publishing Co., 1970), pp. 988-92.) Thus, a commissioner might have absolute immunity if considered a judge, but only qualified immunity if considered an administrative or legislative officer. The immunity of a commissioner in Texas is not always absolute, however.

A commissioner generally does have immunity when acting within his jurisdiction and in good faith. (*Wright v. Jones,* 38 S.W. 249 (Tex. Civ. App. 1896, *writ ref'd*); *Gaines v. Newbrough,* 34 S.W. 1048 (Tex. Civ. App. 1896, *writ ref'd*).) A statute (Tex. Rev. Civ. Stat. Ann. art. 2340) requires county commissioners to post bond. A court of civil appeals has stated that "this article must be strictly construed as a limitation on the immunity accorded a judge in the exercise of his judicial discretion. In voting 'to pay out county funds,' a county commissioner is not liable when actuated by pure motives, but only when he acts maliciously or corruptly, or under circumstances imputing malice or corrupt motives." (*Welch v. Kent,* 153 S.W.2d 284, 286-87 (Tex. Civ. App.—Beaumont 1941, *no writ*).) Thus, despite the designation of the commissioners court as a "court," its members do not have true judicial immunity. It is possible, however, that their immunity is absolute except in connection with the payment of claims, but this has not been established.

(2) *Powers of Commissioners Court.* The commissioners court has many powers that are characteristic of courts. It may issue notices, citations, writs and process and has the power to punish contempt. (Tex. Rev. Civ. Stat. Ann. art. 2351, subds. (13), (14).) Administrative bodies, however, can also be given most of these powers, including the power to punish contempt. (See, *e.g.,* Tex. Rev. Civ. Stat. Ann. art 3184, subd. (4) (State Board of Control) and Tex. Rev. Civ. Stat. Ann. art. 5190 (Industrial Accident Board).)

Administrative agencies normally do not have power to issue writs, however; that is a true judicial function, and since the commissioners court has some limited power to issue writs, it might be argued that it must be a true court. The extent or constitutionality of this statutory writ power of the commissioners court is not clear, however; the courts apparently have never been asked to decide whether it is constitutional. Moreover, the power seems to be very rarely—if ever—used. In most instances, commissioners courts obtain compliance with their orders by suing in a regular court for an injunction or a writ of mandamus, rather than issuing their own writs. (See, *e.g., Guerra v. Weatherly,* 291 S.W.2d 493 (Tex. Civ. App.—Waco 1956, *no writ*).)

(3) *Review of Decisions of Commissioners Court.* Higher courts often say that since the commissioners court is a "court," its orders are entitled to the same consideration as those of other courts. (*E.g., Tarrant County v. Shannon,* 129 Tex. 264, 104 S.W.2d 4 (1937); *Alley v. Jones,* 311 S.W.2d 717 (Tex. Civ. App.—Beaumont 1958, *writ ref'd n.r.e.*); *Burleson Co. v. Giesenschlag,* 354 S.W.2d 418 (Tex. Civ. App.—Houston 1962, *no writ*).) This language usually is a predicate for holding that the order of the commissioners court is not subject to collateral attack (*i.e.,* it must be challenged by appeal or some other direct method, rather than by bringing another proceeding before a different tribunal).

Again, the same result probably would be reached even if the commissioners court were not considered a court. Orders of administrative agencies, as well as courts, usually are protected against collateral attack unless the agency is not

legally constituted or has acted outside its jurisdiction. (*Glenn v. Dallas County Bois D'Arc Island Levee Dist.*, 114 Tex. 325, 268 S.W. 452 (1925); see Hodges, "Collateral Attacks on Judgments," 41 *Texas L. Rev.* 499, 518 (1963).) This is essentially the same rule that is applied to judgments of courts.

There is one possible difference, however, in the treatment given orders that are considered administrative rather than judicial. While courts are presumed to have been acting within their jurisdiction, it is sometimes said that no such presumption (or at least a weaker presumption) attaches to orders of administrative agencies. (See, *e.g.*, *Todd Shipyards Corp. v. Texas Employment Commission*, 153 Tex. 159, 264 S.W.2d 709 (1953).) Thus, if commissioners courts were considered administrative rather than judicial, it might be easier to attack their orders collaterally by demonstrating that the commissioners lacked jurisdiction. It is not clear, however, that the commissioners court is treated as a court for purposes of assigning this presumption; it has been suggested that since most orders of commissioners courts are not exercises of judicial functions they should be treated as administrative orders rather than judicial judgments. (See Hodges, 41 *Texas L. Rev.*, at 539.)

When an order of a commissioners court is attacked directly, *e.g.*, on appeal, it seems to be treated no differently than judgments of administrative agencies and other local governing bodies, such as city councils, are treated. Unless a statute requires that the judgment be reviewed de novo (*i.e.*, as if no previous determination had been made), orders of all these bodies generally are presumed to be valid and will not be overturned if made in good faith, are reasonably supported by substantial evidence, and are not clearly illegal, unreasonable, or arbitrary. (*E.g.*, *Park v. Adams*, 289 S.W.2d 829 (Tex. Civ. App.—Waco 1956, *no writ*) (city governing board); *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, 131 S.W.2d 73 (1939) (Texas Railroad Commission); *Bexar County v. Hatley*, 136 Tex. 354, 150 S.W.2d 980 (1941) (commissioners court).)

The various contexts in which the commissioners court has been called a "court" were carefully examined over 40 years ago in Shirley, "County Commissioners' Court—A Court or An Administrative Body?" 11 *Texas L. Rev.* 518, 521 (1933). The author concluded that "there is little to be said for the holding that this body is a regular court." That conclusion remains sound today.

Geographical Limitations. It is obvious that a county government governs only in its own territory. It would seem equally obvious that this creates no problem. But there are cities that straddle county lines. If the state exercises its power by delegation to counties, how is the power to be exercised in the case of such a two-county city? This actually became an issue in a local option referendum under Section 20 of Article XVI. The implementing statute directs the commissioners court of each county upon petition to order an election in any incorporated city "therein." (Tex. Penal Code Ann., art. 666-32 (1952).) Grand Prairie is located partly in Dallas County and partly in Tarrant County. The court of civil appeals held that the Dallas County commissioners court could not order an election in Grand Prarie because no statute gives them any authority over that part of the city located in Tarrant County. (*Ellis v. Hanks*, 478 S.W.2d 172 (Tex. Civ. App.—Dallas 1972, *writ ref'd n.r.e.*).)

County Judge, Justice of the Peace, and Constable. For the county judge see the *Explanation* of Section 15, and for justices of the peace, the *Explanation* of Section 19. There is nothing constitutionally important to say about constables. They are governed by subdivision 2 of Title 120 of the Revised Civil Statutes. (Tex. Rev. Civ. Stat. Ann. arts. 6878-6889e (1960).)

Comparative Analysis

The county as a unit of government is traditional throughout the United States, but a distinction must be made between what may be called the "Southern" county and the "New England" county. In New England states all area is covered by contiguous towns, each of which has a government. (This is an oversimplification that does not consider cities; the basic point is that any piece of land is under a local government below the county level.) A county government is superimposed on the local government. This normally makes county government not only less important in general, but less important to the individual citizen who always has a local town government to turn to. Connecticut, for example, reached the point of abolishing county government. The New England system is followed in most of the states north of the Mason-Dixon line, but the towns are frequently known as "townships." Outside of New England proper, however, county government is frequently as significant as in Southern states notwithstanding towns or townships.

The counties in the Southern states are the principal government for any portion of a geographical area that does not get set aside by incorporation as a village, town, or city. Except in a county that is so urban that all the area becomes incorporated, a county will always remain the only local government for some people.

There are also hybrid systems. Illinois, for example, has township counties, principally in the northern part of the state, and non-township counties, principally in the southern part of the state.

In township counties the traditional form of county government was to have a board of representatives, one from each township. (This system has had to be adjusted to the one-man, one-vote rule.) In the Southern-type county only about a half dozen appear to mix up county government with the county court. The normal governing body is a board of county commissioners, sometimes elected at large, sometimes by districts. More than a third of the states, New England- and Southern-type, do not freeze the form of county government in their constitutions. About a dozen states permit home rule, in some cases limited to particular urban counties, however.

The *Model State Constitution* includes counties in its home-rule provisions. (See the *Comparative Analysis* of Sec. 5, Art. XI.) The *Model* offers a self-executing alternative.

> Section 8.02. Home Rule for Local Units.
>
> (a) Any county or city may adopt or amend a charter for its government, subject to such regulations as are provided in this consitution and may be provided by general law. The legislature shall provide one or more optional procedures for nonpartisan election of five, seven or nine charter commissioners and for framing, publishing and adopting a charter or charter amendment.

Subsection (b) provides for a vote on whether to have a charter commission, Subsection (c) permits the inclusion of the names of people who will be charter commissioners if the vote is favorable, and Subsection (d) provides for a vote on a proposed charter.

> (e) A charter or charter amendments shall become effective if approved by a majority vote of the qualified voters voting thereon. A charter may provide for direct submission of future charter revisions or amendments by petition or by resolution of the local legislative authority.

The 1972 Montana Constitution provides a neat combination of full home-rule power and a means of preserving traditional county government. Section 5 of

Article XI, Local Government, directs the legislature to provide for home rule but includes a self-executing subsection which took effect on July 1, 1975, if the legislature failed to act. Section 3 of the same article directs the legislature to provide optional forms of local government but specifies: "One optional form of county government includes, but is not limited to, the election of three county commissioners, a clerk and recorder, a clerk of district court, a county attorney, a sheriff, a treasurer, a surveyor, a county superintendent of schools, an assessor, a coroner, and a public administrator." Thus, the voters of any county in Montana must be allowed to choose the kind of government they want, but the old system must be one of the available choices.

The 1970 Illinois Constitution preserves the historic county offices but permits the more important ones to be eliminated or their method of selection to be changed by countywide referendum, and the lesser ones to be eliminated or their method of selection changed by law. (Art. VII, Sec. 4(c).)

The constable has constitutional status in only about ten states.

Author's Comment

The most important thing to do about county government is to provide for home rule either across the board or for counties with some minimum population. This is probably the most difficult political issue to face any reviser of the constitution. The complex, self-contradictory, overwritten so-called county home rule amendment adopted in 1933, never used and deleted in 1969, is proof enough of the difficulty. Much more important are the political interests with a stake in the status quo.

In the *Explanation* it was noted that a county is an administrative convenience for the state and that the county government depends on the legislature for power. But the structure of county government is minutely spelled out in the constitution. There are a great many elected county officials but they have to depend on the legislature for their power. This results in mixed-up democracy. The people elect their rulers, but the people have to turn to their legislators for new powers if the rulers are unable to give the people what they want. This helps to preserve the practice of passing local laws. This situation also encourages county officials to look more to the legislature than to their constituents.

There is more to home rule than having the power to make policy. Home rule also allows the voters to choose their form of government. Voters cannot do this in Texas counties. (In the case of general law cities, the legislature has authorized optional forms of city government.) Herein lies the rub. Almost all elected county officials can be expected to favor the status quo. For obvious reasons they represent a powerful political force. There is hope, however. In the *Comparative Analysis* it was pointed out that the new Montana and Illinois Constitutions preserve the traditional county offices but permit them to be abolished by the voters. This approach may not succeed but is probably the only safe one to take. Elected county officials might oppose a new constitution that permitted the voters to cut down the power of county officials, but their opposing arguments would have to be irrelevant—for example, "Why change what has been so good for you?"—since a new constitution would not as such take away anything—their jobs, the people's right to elect them, or the traditional form of county government.

Sec. 19. JUSTICES OF THE PEACE; JURISDICTION; APPEALS; EX OFFICIO NOTARIES PUBLIC; TIMES AND PLACES OF HOLDING COURT. Justices of the Peace shall have jurisdiction in criminal matters of all cases where the

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penalty or fine to be imposed by law may not be more than for two hundred dollars, and in civil matters of all cases where the amount in controversy is two hundred dollars or less, exclusive of interest, of which exclusive original jurisdiction is not given to the District or County Courts; and such other jurisdiction, criminal and civil, as may be provided by law, under such regulations as may be prescribed by law; and appeals to the County Courts shall be allowed in all cases decided in Justices' Courts where the judgment is for more than twenty dollars exclusive of costs; and in all criminal cases under such regulations as may be prescribed by law. And the justices of the peace shall be ex officio notaries public. And they shall hold their courts at such times and places as may be provided by law.

History

The justice of the peace originated in England, where he was the king's local conservator of the peace and judicial officer. When transportation and communication were slow and lawyers were scarce, the judgment of a respected layman in the local community was the accepted method of dispensing local justice, both in England and on the American frontier. (See Vanlandingham, "The Decline of the Justice of the Peace," 12 *Kansas L. Rev.* 389 (1964).)

The justice of the peace has been an institution in Texas since the earliest days of the colony. In the Mexican judicial system, the local judges were alcaldes rather than justices of the peace. (See the *History* of Sec. 1.) But Stephen F. Austin introduced the justice of the peace to the colony in 1824 when he appointed a "provisional justice of the peace" for the settlers on the Brazos. The Congress of the Mexican State of Coahuila and Texas also provided for a justice of the peace, but it seems to have used the term more or less interchangeably with "alcalde." (Decree No. 39, promulgated by the Congress of Coahuila and Texas on June 15, 1827, contained the judicial code for the state. It is incomplete in Gammel's compilation of the acts of that congress. A copy of it has been found, however, and is described in Wharton, "Early Judicial History of Texas," 12 *Texas L. Rev.* 315, 317-18 (1934).)

The jurisdiction of the alcalde created by Austin's Code of 1824 was remarkably similar to that of the justice of the peace in Texas today. The alcalde had jurisdiction of all criminal cases and all civil cases up to $200, and in civil cases involving less than $25 his decision was final. (See "Civil Regulations," reproduced in Gracy, *Establishing Austin's Colony* (1970), pp. 72-82; see also *Wharton, supra,* at 315-16.)

The Constitution of the Republic provided for "such justice courts as the Congress may, from time to time, establish." (Art. IV, Sec. 10.) The justice of the peace has appeared in every subsequent Texas constitution. (Art. IV, Sec. 19, of the Constitutions of 1845, 1861, and 1866; Art. V, Sec. 20, of the Constitution of 1869.) The 1866 amendment imposed the first constitutional limit ($100) on the civil jurisdiction of the justice of the peace. The figure was raised to $200 in the 1876 Constitution.

Section 19 has been unchanged since 1876, despite several attempts to abolish the justice of the peace. In 1965 the State Bar of Texas proposed legislation permitting abolition of justices of the peace by local option election. (Randolph, " 'Local Option' Abolition of Justice Courts," 25 *Texas Bar Journal* 1021 (1962); "Suggested Legislation for Local Abolition of Justice Courts," 25 *Texas Bar Journal* 16 (1962).) Despite strong support from members of the bar, the proposal was defeated in the legislature. Its failure was attributed to a strong lobbying effort by justices of the peace. (See Randolph, "Improving Justice Court Justice," 26 *Texas Bar Journal* 522 (1963).)

Art. V, § 19

Explanation

Section 18 of Article V provides the method of selecting justices of the peace. The commissioners court of each county is directed to divide the county "from time to time, for the convenience of the people, into precincts, not less than four nor more than eight. . . . In each such precinct there shall be elected one Justice of the Peace and one Constable . . . provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace."

This provision permits a county to have anywhere from four to 16 justices of the peace. Although the election of a second justice in any precinct containing a city of 8,000 seems to be mandatory, the courts have held that the commissioners court cannot be compelled to create the office of the second justice even when the population requirement is met. (*Meredith v. Sharp,* 256 S.W.2d 870 (Tex. Civ. App.—Texarkana) *writ ref'd n.r.e. per curiam,* 152 Tex. 437, 259 S.W.2d 172 (1953).) Moreover, the commissioners court has power to reduce the number of precincts (to not less than four) without regard to population. (See *Telles v. Sample,* 500 S.W.2d 677 (Tex. Civ. App.—El Paso 1973, *no writ*).) Thus, both the number of precincts (four to eight) and the number of justices in each precinct (one or two) are left to the discretion of the commissioners court, except that there can be only one justice per precinct unless the 8,000 population minimum is met. That requirement is met if there is a city of 8,000 wholly within one justice precinct. (*Grant v. Ammerman,* 451 S.W.2d 777 (Tex. Civ. App.—Texarkana 1970, *writ ref'd n.r.e.*).) It is not clear whether the requirement also is met if the precinct contains only part of a city containing 8,000 inhabitants or if the precinct contains 8,000 inhabitants but no part of a city. There is dictum in *Grant v. Ammerman, supra,* suggesting that a second justice court is not authorized in either of these situations.

The territorial extent of the justice of the peace's jurisdiction is not described in the constitution. Three attorneys general have ruled that the justice of the peace's jurisdiction is countywide and that the legislature may not reduce it. The courts have not ruled on this question, however, and the reasoning of the opinions is questionable. Countywide justice of the peace jurisdiction may be desirable as a policy matter; it undoubtedly forestalls much quibbling over jurisdictional questions. It does not follow, however, that the constitution therefore must compel countywide jurisdiction.

Normally, the Texas courts are given jurisdiction in the geographical area from which the judge is elected. (The supreme court, for example, whose judges are elected statewide, has statewide jurisdiction; district judges have jurisdiction in the same counties from which they are elected.) This does not mean, of course, that as a matter of constitutional law the justice of the peace's jurisdiction must be limited to the justice precinct. However, it does suggest that if a territorial limit is to be read into the constitution the justice precinct, rather than the county, would be the interpretation most consistent with the pattern established elsewhere in the court system.

A more logical conclusion, however, is simply that the constitution leaves the legislature free to define the territorial scope of the justice of the peace's jurisdiction. This is consistent with the general rule that matters not provided for in the constitution are left to the legislature.

The case relied upon by the series of attorneys general's opinions is Ex parte *Von Koenneritz,* (105 Tex. Crim. 135, 286 S.W. 987 (1926).) Von Koenneritz was convicted by the justice court of Precinct 6 of speeding. He contended that his offense, if any, took place in Precinct 3, and that the Precinct 6 justice of the peace

therefore was without jurisdiction. The court of criminal appeals rejected that argument, noting that the statute then in effect (art. 60 of the 1925 Code of Criminal Procedure) did not limit the justice of the peace's jurisdiction to the precinct. That did not necessarily mean, of course, that the legislature could not limit the justice of the peace's jurisdiction to the precinct if it chose to do so. The first attorney general's opinion, however, seems to have erroneously interpreted this decision as a constitutional prohibition against legislative limits on justice of the peace jurisdiction. (Tex. Att'y Gen. Op. No. O-6940 (1945).) Succeeding opinions relied on the first opinion without reexamining its mistaken reliance on the *Von Koenneritz* case. (Tex. Att'y Gen. Op. No. V-496 (1948); Tex. Att'y Gen. Op. No. C-602 (1966).)

The scope of the justice of the peace's territorial jurisdiction may be important in determining whether the "one-man, one-vote" requirement applies to justice precincts. In *Romero v. Coldwell,* 455 F.2d 1163 (5th Cir. 1972), plaintiffs contended that the requirement does apply. Their argument was that since the justice of the peace exercises countywide jurisdiction, it is unconstitutional to permit wide population disparities among the precincts from which justice of the peace are chosen. The court held that federal courts should abstain because Texas courts have not decided whether justices of the peace do indeed have countywide jurisdiction. The courts thus did not reach the main issue in the case but suggested that there might be no "one-man, one-vote" problem if justice of the peace jurisdiction were limited to the justice of the peace precinct. (*Cf. Wells v. Edwards,* 347 F. Supp. 453 (M.D.La. 1972), *aff'd,* 409 U.S. 1095 (1973), and *Kaplan v. Milliken,* (W.D.Ky. 1973), *aff'd,* 409 U.S. 1002 (1972) (both holding the one-man, one-vote principle inapplicable to the judiciary).)

The constitution prescribes no qualifications for justices of the peace. The legislature, however, has required justices of the peace who are not attorneys to attend a 40-hour training course. Justices of the peace who had served two terms before the effective date of the statute are excepted from the requirement. (Tex. Rev. Civ. Stat. Ann. art. 5972(b).) As of 1973, only about 6 percent of the more than 900 justices of the peace in Texas were lawyers. (Texas Civil Judicial Council *Interim Report* (1973), p. 17.)

Section 14 of Article XVI requires all county and district officers to reside within their districts or counties. Whether justices of the peace are "county officers" for purposes of this section has not been decided. The question was raised, but not resolved, in two cases that arose when several justices of the peace and constables were redistricted out of their precincts in Harris County. (See *Commissioners Court of Harris County v. Moore,* 525 S.W.2d 926 (Tex. Civ. App.—Houston [14th Dist.] 1975, *no writ*), and *Harris County Commissioners Court v. Moore,* 420 U.S. 77 (1975).)

Justices of the peace, like other local officials in Texas, originally were compensated from the fees they collected, and until 1973 the fee system was still a permissible method of compensating justices of the peace. But an amendment approved by the voters in 1972 required all counties to compensate justices of the peace on a salary basis effective January 1, 1973. (Art. XVI, Sec. 61.)

Section 19 gives the justice of the peace both civil and criminal jurisdiction. He has jurisdiction of civil cases in which the amount in controversy does not exceed $200. When the relief sought is not a fixed amount of money, but some nonmonetary form of relief such as an injunction, the justice court is generally held to be without jurisdiction. *(E.g., Lamesa Rural High School Dist. v. Speck,* 253 S.W.2d 315 (Tex. Civ. App.—Eastland 1952, *writ ref'd n.r.e.*).) Even when the relief sought is a monetary award under $200, the justice court has no jurisdiction

if the subject matter is one assigned to another court, such as probate, divorce, or slander.

The justice of the peace's criminal jurisdiction is limited to cases in which the maximum penalty or fine permitted by law does not exceed $200. The courts have held that this clause deprives the justice court of jurisdiction whenever the offense charged is punishable by a jail term. (*Billingsly v. State,* 3 Tex. Ct. App. 686 (1878).) It also deprives the justice court of jurisdiction in cases in which conviction is punishable by a $200 fine and some other penalty, such as forfeiture of a hunting license. (Ex parte *Howard,* 171 Tex. Crim. 278, 347 S.W.2d 721 (1961).) The courts have held that neither the civil nor criminal jurisdiction of the justice court is exclusive; the legislature therefore is free to grant other courts concurrent jurisdiction of these matters. (*E.g., Turnbow v. J. E. Bryant Co.,* 107 Tex. 563, 181 S.W. 686 (1916); *Patterson v. State,* 122 Tex. Crim. 502, 56 S.W.2d 458 (1933).)

Section 19 authorizes the legislature to give the justice court additional jurisdiction and the legislature has done so. In addition to the civil jurisdiction described in the constitution, a statute (Tex. Rev. Civ. Stat. Ann. art. 2385) gives the justice court jurisdiction "of cases of forcible entry and detainer, and to foreclose mortgages and enforce liens on personal property, where the amount in controversy is within their jurisdiction." Because the action of forcible entry and detainer is a common method for resolving disputes over leases, the justice of the peace plays an important role in landlord-tenant law, even though he usually is not a lawyer.

Another statute (Tex. Rev. Civ. Stat. Ann. art. 2386) gives the justice court power to punish contempt and issue writs of attachment, garnishment, and sequestration.

Every justice of the peace in Texas also wears three other hats simply by virtue of being a justice of the peace. The constitution makes him an *ex officio* notary public, and the statutes make him a judge of the small claims court and a magistrate.

Each county has a small claims court of which each justice of the peace in the county is a judge. This court has civil jurisdiction up to $150 ($200 in claims for wages) and operates under simplified rules of pleadings and procedure designed to eliminate the need for a lawyer. (Tex. Rev. Civ. Stat. Ann. art. 2460a.)

A justice of the peace performs some of his most important and time-consuming duties not as a justice of the peace, but as a magistrate. The justice of the peace along with judges of the higher courts, is a magistrate. (Code of Criminal Procedure art. 2.09.) In practice, magisterial duties are performed primarily by justices of the peace and municipal judges. The magistrate is the judge who handles most of the preliminary matters in a felony case. He has power to issue arrest and search warrants, accept a felony complaint, advise the defendant of his constitutional rights, fix bail, and conduct an examining trial to determine whether the defendant should be held, discharged, or released on bail. (Code of Criminal Procedure arts. 15.04, 15.05, 15.17, 17.05, 16.01 *et seq.*)

Justices of the peace also issue peace bonds, perform marriages, conduct inquests (except in counties that have a medical examiner), and perform many informal counseling and mediating services. (See Code of Criminal Procedure arts. 7.01 *et. seq.* and 49.01 *et seq.*, Tex. Rev. Civ. Stat. Ann. art. 4602.)

The justice court would seem to be a court of record in the sense in which that term historically has been used, because it is a court whose proceedings are perpetuated in writing. (See *Tourtelot v. Booker,* 160 S.W. 293 (Tex. Civ. App.—El Paso 1913, *writ ref'd*).) The Texas courts have stated several times, however, that the justice court is not a court of record. (*E.g.,* Ex parte *Quong Lee,* 34 Tex.

Crim. 511, 31 S.W. 391 (1895); *Hutcherson v. Blewett,* 58 S.W. 150 (Tex. Civ. App. 1900, *no writ*); *Warren v. Barron Bros. Millinery Co.,* 118 Tex. 659, 23 S.W.2d 686 (1930).) As a result, a statute applicable to "courts of record" does not apply to justice courts (Ex parte *Hayden,* 152 Tex. Crim. 517, 215 S.W.2d 620 (1948)), and a search warrant issued by a justice of the peace does not comply with a federal rule applicable to state courts of record (*United States v. Hanson,* 469 F.2d 1375 (5th Cir. 1972)). These cases do not explain why the justice court is not a court of record, nor do they suggest what attributes it would have to be given to become a court of record.

Section 19 guarantees a right of appeal to county court from all criminal convictions in justice court and from all civil judgments "for more than twenty dollars exclusive of costs." A literal reading of the quoted phrase would deny an appeal to unsuccessful plaintiffs because any judgment for the defendant is not "more than twenty dollars." The courts, however, have construed this section as if it read "judgment or amount in controversy," (*e.g., Brazoria County v. Calhoun,* 61 Tex. 223 (1884)), and the implementing statute permits appeals "where such judgment, or the amount in controversy, shall exceed twenty dollars exclusive of costs." (Tex. Rev. Civ. Stat. Ann. art. 2454.)

Although this provision suggests that all appeals from the justice court go to the county court, that is not the case. Such appeals go to the district court in counties in which the civil jurisdiction of the county courts has been transferred to the district courts. (Tex. Rev. Civ. Stat. Ann. arts. 2455, 2455-1.) If the county has a criminal district court, appeals from the justice of the peace court in criminal cases must go there rather than to the county court. (See Art. V, Sec. 16.) Finally, in most metropolitan counties, appeals from justice courts go to statutory county courts at law rather than the constitutional county court. Indeed, some counties have special "appellate" county courts at law that do nothing except try cases appealed from justice of the peace and municipal courts. (See, *e.g.,* Tex. Rev. Civ. Stat. Ann. art. 1970-31.20, creating the Dallas County Criminal Court of Appeals.)

Comparative Analysis

As late as 1928 no state had completely done away with justices of the peace. Today, they have been abolished in about one-third of the states. About 15 states retain the justice of the peace as a constitutional office. Within the last decade, 10 states have removed the justice of the peace from their constitutions. Two states have adopted new constitutions retaining the justice of the peace. Other states, while retaining the constitutional provision, have reduced the role of the justice courts. For example, in 1972 Montana reduced their number and Kansas in 1964 effectively abolished their civil jurisdiction by reducing it to suits involving $1 or less.

Counting the special statutory courts and the justice courts, Texas has more than 2,000 courts of limited and special jurisdiction—substantially more than any other state.

All decisions concerning the creation, nature, and jurisdiction of lower courts, and the qualifications of their judges, are left to the legislature under both the United States Constitution and the *Model State Constitution.*

In most of the states, the justice of the peace apparently is not required to be a lawyer. (See Institute of Judicial Administration, *The Justice of the Peace Today* (1965), table II.)

Author's Comment

The justice of the peace is probably the most criticized office in the judicial

system. The following comment is not atypical:

> It is doubtful if a more striking example of cultural lag can be found in the political field than the attempt which is made in most of our forty-eight states to serve the ends of justice in the twentieth century by a medieval English instrument. . . . The only persons actively desiring its continuation are those who profit from its operation in some way. (Howard, "The Justice of the Peace System in Tennessee," 13 *Tenn. L. Rev.* 19 (1934).)

The critics point out that the justice of the peace often has little or no legal training, conducts his proceedings in a nonjudicial manner and atmosphere, and lacks the supporting personnel (*e.g.*, clerks and court reporters) needed to operate as a full-fledged court. Some Texas justices of the peace apparently have purported to delegate some of their judicial duties to secretaries, clerks, or spouses, permitting these persons to accept guilty pleas, levy fines, and set bonds. A recent attorney general's opinion has stated the obvious: these practices are illegal (Tex. Att'y Gen. Op. No. H-386 (1974)).

The workloads of different justice courts are often widely disparate, even within the same county or precinct. The justice of the peace's jurisdiction to some extent overlaps that of the municipal and county courts. Justice court judgments are nullified when appealed. This means that such cases must be tried over again ("de novo") in the county court or county court at law, resulting in inefficient use of judicial resources.

The major factors cited in favor of retaining the office are its closeness to the people, its convenience, and its utility in freeing other, more highly trained (and therefore more expensive) judges from the many time-consuming chores performed by justices of the peace. It is undeniable that abolition of the justice of the peace would require designation of some other official to perform his many duties. (See the preceding *Explanation* for a description of those duties.)

As the *Comparative Analysis* indicates, the trend has been toward abolition of the justice of the peace, or at least a sharp reduction in his numbers and powers. Many students of court reform favor a unified trial court in which the justice of the peace's functions are performed by magistrates—officials who are supervised by the judges of the general trial court. Unified trial court systems have been successfully established in a number of states, often incorporating present justices of the peace into the new system as magistrates. (See, *e.g.*, Underwood, "The Illinois Judicial System," 47 *Notre Dame Lawyer* 247, 251 (1971).)

There are several alternatives short of outright abolition of the justice of the peace. One is reduction of the number of justices of the peace, or at least better allocation of their numbers. Since each county in Texas has at least four justice courts, and no county may have more than 16, population of justice precincts and workloads of the justice courts vary widely. The experience of other states indicates that the number of justice courts can be drastically reduced without losing the advantages of the justice of the peace system.

Another alternative is to retain the justice of the peace and continue his role as a magistrate, peace keeper, and informal mediator but transfer his formal judicial functions to a court whose judge is a lawyer.

The practice of requiring trial de novo of appeals from justice courts could be ended without abolishing justices of the peace. The practice gives a person charged with a misdemeanor the right to two trials, while a person charged with a more serious crime gets only one trial. More importantly, since county court dockets often are clogged with de novo appeals, it provides a means by which justice can be deliberately delayed or thwarted. (See Truax, "Courts of Limited Jurisdiction are

Passé," in *Current Issues on the Judiciary* (1971), p. 95.)

From a constitutional perspective, however, the question is not necessarily whether the justice of the peace should be abolished. Rather, it is whether he should be preserved *constitutionally*. Removal of the justice of the peace from the constitution need not lead to abolition of the office of a single justice of the peace. If justices of the peace are as useful as their defenders assert, they should have little trouble persuading the legislature to preserve them. On the other hand, if their utility is so questionable that they are in danger of abolition by the legislature, it is difficult to justify their retention in the constitution. Removal from the Texas Constitution of all mention of justices of the peace and justice courts would not significantly alter their operations, because the statutes provide for their election, terms, duties, and jurisdiction. (Tex. Rev. Civ. Stat. Ann. arts. 2373-2387.)

In any event, the provision in Section 19 making justices of the peace *ex officio* notaries public is not a matter of constitutional moment and should be removed. (The matter is covered by Tex. Rev. Civ. Stat. Ann. art. 2376.) The jurisdictional limits of the justice court also are covered by statute (Tex. Rev. Civ. Stat. Ann. art. 2385; Code of Criminal Procedure art. 4.11) and probably should not be constitutionally fixed. The provision for appeals from justice court to county court is no longer descriptive of actual practice. (See the preceding *Explanation.*) Again, the matter is covered by statute (Tex. Rev. Civ. Stat. Ann. arts. 2454, 2455, 2455-1; Code of Criminal Procedure arts. 44.07, 44.13, 44.17) and therefore could be removed from the constitution without affecting present practice.

If the provisions of Section 18 relating to election of justices of the peace are to be retained, the language should be rewritten to make clear when one precinct may elect two justices. (See the preceding *Explanation.*) The second justice probably should be authorized whenever the precinct reaches the prescribed population minimum, without regard to whether the population resides in a city located entirely within the precinct or in any city at all; a provision giving 8,000 city dwellers two justices of the peace but limiting 8,000 rural residents to one may create legal problems under the equal protection clause of the federal constitution. (*Cf. Avery v. Midland County*, 390 U.S. 474 (1968).)

Sec. 20. COUNTY CLERK. There shall be elected for each county, by the qualified voters, a County Clerk, who shall hold his office for four years, who shall be clerk of the County and Commissioners Courts and recorder of the county, whose duties, perquisites and fees of office shall be prescribed by the Legislature, and a vacancy in whose office shall be filled by the Commissioners Court, until the next general election; provided, that in counties having a population of less than 8,000 persons there may be an election of a single Clerk, who shall perform the duties of District and County Clerks.

History

The county clerk first appeared as a constitutional officer in the Constitution of 1866. (Art. IV, Sec. 18.) Under the Republic, the office was statutory. (See Davis and Oden, *Municipal and County Government* (Arnold Foundation Monograph No. VIII, 1961), p. 120.) This practice continued under the Constitutions of 1845 and 1861. Under the Constitution of 1869 the county clerk was dropped, but his traditional duties were assigned to the clerk of the district court. (Art. V, Sec. 9.)

The 1875 Convention reverted to the 1866 scheme of things, but with a nod to the 1869 arrangement. The proviso recognized that in counties with a relatively small population, one person could serve as both district and county clerk. The

source of the magic number 8,000 is not clear. Efforts were made on the convention floor to increase the figure to 12,000 and to 10,000. Both changes were defeated. (*Journal*, p. 672.) At that time there were 140 counties of which only 46 had a population of 8,000 and over. Nineteen of these had a population between 8,000 and 10,000 and another six had between 10,000 and 12,000. Today there are 85 counties with a population under 8,000.

In 1887, the voters turned down an amendment proposing a new judicial article. It would have dropped the county clerk as a constitutional officer. The only other amendment affecting Section 20 was the 1954 omnibus amendment increasing the length of county and district terms of office to four years.

Explanation

Section 20 refers to "perquisites and fees of office." Since 1935, clerks in counties with a population of 20,000 or more have had to be paid a salary in lieu of fees and in the other counties could be paid a salary at the option of the commissioners court. (See Sec. 61, Art. XVI.) Although the "perquisites and fees" are to be "prescribed by the Legislature," the practice in the case of salaries has been to provide upper and lower limits within which the commissioners courts can set the salaries of county officers. (See Tex. Rev. Civ. Stat. Ann. art. 3883 *et seq.* (1966). These are mostly population-bracket laws which are, or ought to be, recognized as unconstitutional under Sec. 56 of Art. III.)

Section 20 also states that the legislature shall "prescribe" the duties of the county clerk. (For a discussion of "duties," see the *Author's Comment* on Sec. 14, Art. VIII.) These can be found in Articles 1935 through 1948 of the Revised Civil Statutes. Presumably, these duties could be redistributed. (See *Explanation* of Sec. 64, Art. III.)

Section 20 permits but does not mandate a single county and district court clerk for counties with a population of less than 8,000. Until 1962, a single clerk was mandatory in such counties. Since that date the applicable statute has provided that:

> [i]n counties having a population of less than eight thousand (8,000), according to the last preceding Federal Census, there shall be elected a single clerk . . . , unless a majority of the qualified voters of the county who participate in a special election, called by the Commissioners Court for that purpose, vote to keep the offices of county and district clerk separate. (Tex. Rev. Civ. Stat. Ann. art. 1903 (1964).)

The section goes on to state that the commissioners court "may" submit the question not less than 30 days before a regular primary election preceding the expiration of the clerk's term of office and again "immediately prior to the expiration of each subsequent constitutional term of office of the separate clerk."

What was once clear is now ambiguous. If the quoted sentence means what is says, it is applicable only to counties whose population fell below 8,000 according to the last preceding census because those are the only counties that would have had separate clerks to "keep." It is not clear whether "may" means "shall" submit the question to the voters. Presumably, "immediately prior" to each subsequent term means at least 30 days before each subsequent appropriate primary election. It also appears that the subsequent submissions can be made only if the first vote is against a single clerk. Thus, assuming that the statute means that the commissioners court must act, the voters in any county with separate clerks may choose to have a single clerk provided that the census shows a population of less than 8,000. But it is a one-way street. Any county with a single clerk or which votes for a single clerk is stuck until the population rises above 8,000 at which time there must be

separate clerks. This may be characterized as "teensy-weensy home rule."

Any person serving as both county clerk and district clerk has two seals of office. He must be careful that he uses the seal that matches the hat he is wearing when he seals a document. A district court document with a county court seal is void. (*Hardy Oil Co. v. Markham State Bank,* 131 S.W. 440 (Tex. Civ. App. 1910, *no writ*).)

Comparative Analysis

The county clerk is an elected constitutional officer in about 12 states. All constitutional clerks are elected for terms varying from two years to eight years. Two of those states, Illinois and Montana, have adopted new constitutions which retain the offices subject to abolition by the voters. (See *Comparative Analysis* of Sec. 18.)

Author's Comment

It is not uncommon for inconsistencies and ambiguities to appear in any long document, particularly if more than one "author" is involved. The Texas Constitution is most unusual in the almost complete lack of consistency in drafting. A good example is pay for county officers.

There are six provisions dating from 1876 dealing with county officers' compensation, all worded differently:

(1) County Judge
> . . . shall receive as compensation for his services such fees and perquisites as may be prescribed by law. (Art. V, Sec. 15)

(2) County Clerk
> . . . whose duties, perquisites and fees of office shall be prescribed by the Legislature, ... (Art. V, Sec. 20)

(3) County and District Attorneys
> The Legislature may . . . make provision for the compensation of District Attorneys and County Attorneys. (Art. V, Sec. 21)

(4) Sheriffs
> . . . whose duties and perquisites, and fees of office, shall be prescribed by the Legislature, ... (Art. V, Sec. 23)

(5) County Treasurer and County Surveyor
> . . . who . . . shall have such compensation as may be provided by law. (Art. XVI, Sec. 44)

(6) Public Officers
> The Legislature shall provide by law for the compensation of all officers, . . . , not provided for in this Constitution, ... (Art. III, Sec. 44)

One must assume that these provisions all mean the same thing. If they do not, there is chaos. One would have to try to make sense out of the differences and might conclude that "legislature" was used in order to by-pass the governor's power of veto, or that judges, sheriffs, and clerks cannot be paid salaries and that attorneys, treasurers, and surveyors can be paid only by salary. This may all seem to be a tempest in an inkwell, but if all inconsistencies in language are written off, how does one know when differences in wording are supposed to mean something?

In any event, there is no need to say anything about compensation except to the extent of a limitation, such as "shall not fix the salary . . . at a sum less than . . . ." (See Art. III, Sec. 61 (1954).) And, of course, there is no constitutional need to mention a county clerk anyway. However, there may be a practical political necessity for mentioning the county clerk. (See *Author's Comment* on Sec. 18.)

Art. V, § 21

Sec. 21. COUNTY ATTORNEYS; DISTRICT ATTORNEYS. A County Attorney, for counties in which there is not a resident Criminal District Attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of four years. In case of vacancy the Commissioners Court of the county shall have the power to appoint a County Attorney until the next general election. The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature. The Legislature may provide for the election of District Attorneys in such districts, as may be deemed necessary and make provision for the compensation of District Attorneys and County Attorneys. District Attorneys shall hold office for a term of four years, and until their successors have qualified.

History

The Constitution of the Republic provided for appointed district attorneys "whose duties, salaries, perquisites and term of service shall be fixed by law." (Art. III, Sec. 5.) Appointments were made by the president with the advice and consent of the senate. In the Constitution of 1845, district attorneys were elected by joint vote of the two houses of the legislature for terms of two years. (Art. IV, Sec. 12.) An omnibus amendment of 1850 made the office elective. The term of office was not specified, but another section of the 1845 Constitution (Art. VII, Sec. 10) provided that no term of office not otherwise specified could exceed four years.

The Constitution of 1861 left the wording of Section 12 unchanged but by vote of the convention "chairman of committee" continued in effect the amendment of 1850. The 1866 Constitution continued the office as elective but specified a four-year term. There was no reference to "duties," "perquisites" were to be prescribed by law, and annual salary was "one thousand dollars, which shall not be increased or decreased during his term of office." (Art. IV, Sec. 14. No effort will be made to explain *that* "which" clause.) The Constitution of 1869 made no change except to get rid of the stated salary and to provide that "duties, salaries, and perquisites" were to be prescribed by law.

The office of county attorney first appeared in the Constitution of 1866 in the form of permission to the legislature to provide for an appointed one to represent the state and county in the county court. Term of office, duties, and compensation were to be as prescribed by law. (Art. IV, Sec. 16.) This was omitted from the Constitution of 1869.

Section 21 as it appeared in 1876 differed from the current version in three respects: (1) the term of county attorney was set at two years; (2) there was no concluding sentence concerning the term of office of district attorneys; and (3) the section concluded with the words:

> provided, District Attorneys shall receive an annual salary of $500, to be paid by the State, and such fees, commissions and perquisites as may be provided by law. County Attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law.

In 1887, the voters were presented an amendment consisting of an entirely new Judiciary Article. The counterpart of Section 21 was short and sweet: "The Legislature shall provide for the election of district and county attorneys, and such other officers as may be deemed necessary to the due administration of justice, define their duties, and fix their compensation." (There was a second, transitional sentence covering attorneys then in office.) The amendment was defeated.

In November 1954 the current version of Section 21 was adopted.

Explanation

This section has caused the courts a lot of trouble. This should come as no surprise to anyone who reads the section. The first thing to hit the reader is the dangling "resident Criminal District Attorney." He is a negative personality. Until 1954 he did not appear elsewhere in the constitution; his duties, his pay, and his term of office are not mentioned. (Sec. 30, added in 1954, states that "all Criminal District Attorneys now or hereafter authorized by the laws of this State" shall be elected for four-year terms.)

This is all understandable if one looks to the wording of Section 1 of Article V as it appeared in 1876. At that time the legislature was authorized to "establish criminal district courts," but only if the district contained a city of at least 30,000 people. The section also contained the sentence concerning "Harris and Galveston Counties" now appearing as the second paragraph of the section. (The section was amended in 1891. See *History* of Sec. 1.) Obviously, then, the drafters of the 1876 Constitution were saying that, in the case of "Harris and Galveston Counties," there should be no county attorney in the county in which the criminal district attorney lived and that, if another criminal district court were created, there should be no county attorney in the county in which the criminal district attorney lived. But it is equally obvious that the drafters were assuming that everybody knew that there was a criminal district attorney if there was a criminal district court. Unfortunately, the drafters failed to spell this out. Thus, the poor resident criminal district attorney remained an assumed figure.

Decades later, the origins of the shadowy office obviously having been forgotten, the legislature created a regular district court, not a criminal district court, for Gregg County and simultaneously created a "criminal district attorney" for the new court who was to perform all the duties of county attorney and district attorney. Litigation followed. The issue was whether the legislature could kill off a county attorney position by calling the district attorney "criminal." The answer was yes:

> It will be seen that none of these provisions in express terms prohibits the creation of the office mentioned in the first sentence, resident criminal district attorney, without its being created as part of a strictly criminal district court . . . .
>
> . . . It is our opinion that there is no implied prohibition in the provisions of the Constitution, to which reference is made above, which limits the power of the Legislature to create the office of criminal district attorney as a part of the organization of a district court of general jurisdiction. (*Neal v. Sheppard*, 209 S.W.2d 388, 390 (Tex. Civ. App.—Texarkana 1948, *writ ref'd*).)

The provisions referred to are Section 21, Section 1, and Section 16, which limits the criminal jurisdiction of the county court if there is a criminal district court in the county. The *Neal* case is an example of the principle that a legislature has all power not denied to it by the constitution. (See *Explanation* of Sec. 1, Art. III.)

There is nothing in the *Neal* opinion indicating why the legislature took the route of a criminal district attorney rather than district attorney. In one earlier case, *Hill County v. Sheppard*, the Supreme Court refused to recognize the creation of a resident criminal district attorney because the statute included the following language:

> Sec. 5-A. It is not the intention of this Act to create any office of District Attorney nor any other Constitutional office and the office of Criminal District Attorney is hereby declared to be a separate and distinct office from the Constitutional office of District

Attorney and no Criminal District Attorney shall draw or be entitled to any salary whatsoever from the State of Texas. (142 Tex. 358, 36, 178 S.W.2d 261, 262 (1944).)

The court expressly reserved the question whether the office of criminal district attorney could be created only for a criminal district court. (142 Tex., at 362; 178 S.W.2d, at 263.) The court simply held that "the Legislature could not create a statutory office with authority to take over the duties of county attorney." (142 Tex., at 364; 178 S.W.2d, at 264. The unsuccessful criminal district attorney was Robert W. Calvert who retired recently as chief justice of the supreme court.)

Reading between the lines, one gets the impression that in the process of creating courts there was pulling and hauling over that extra $500 that the section then required the state to pay to district attorneys, and that this, rather than any rational system of judicial administration, shaped the legislation.

The office of district attorney is only slightly less shadowy than the resident criminal district attorney. Section 21 does not require any district attorneys. It does say that if there are any, they shall be elected and shall have such duties as the legislature takes away from the county attorney. There is no way of knowing whether the 1875 Convention drafted the section in this indirect manner in order to facilitate the district court system that has grown up or whether the existing system grew up as it did because of the looseness of the section. Whatever the reason, there is only one district attorney for a county that has several district courts in it. There are approximately 20 counties that have a resident criminal district attorney without a criminal district court, as upheld in the *Neal* case. Dallas, Jefferson, and Tarrant counties have criminal district courts with criminal district attorneys. In these counties there is no county attorney and the criminal district attorney also serves as district attorney. The criminal district courts in Harris and Galveston counties have been abolished, but the office of criminal district attorney was retained in Galveston County, thus leaving it with no county attorney. (The foregoing is deduced from the tables in the 1972-1973 *Texas Almanac,* pp. 581-94. It is presumably possible to determine all this from the statutes, but they are so hopelessly confused that one can be forgiven for relying on a secondary source. In 1971, the legislature created four more criminal district attorneys, Tex. Rev. Civ. Stat. Ann. arts. 326k-64, -67, -68, -69 (1973). One of these is Eastland County, the county of Earl Conner, Jr., whose case is discussed on page 466.)

Everything about the county attorney is definite. Especially so is the statement that he "shall represent the State in all cases in the District and inferior courts." This has created problems for the attorney general. The courts have held that he cannot initiate litigation on behalf of the state in district courts except in the limited instance specified in Section 22 of Article IV or with the concurrence of the county or district attorney. (See *State v. Moore,* 57 Tex. 307 (1882); *Shepperd v. Alaniz,* 303 S.W.2d 846 (Tex. Civ. App.—San Antonio 1957, *no writ*).) The reason for this is the language "represent the State in all cases" and the complementary language in Section 22 of Article IV "represent the State in all suits and pleas in the Supreme Court."

This rigid allocation of litigating power has been loosened up by the courts. In 1959, the court of civil appeals reviewed the judicial development since the *Moore* case and concluded that the legislature could entrust to the attorney general the bringing of a suit in a district court if the cause of action upon which the suit was based was newly created by the legislature. (*State v. Walker-Texas Investment Co.,* 325 S.W.2d 209 (Tex. Civ. App.—San Antonio), *writ ref'd n.r.e. per curiam,* 160 Tex. 256, 328 S.W.2d 294 (1959).) In a way, the courts are saying that the rigid allocation of 1876 is frozen as of that date for traditional litigation but that new legal problems may be handled as the legislature may direct.

The confused language of Section 21 concerning criminal district attorneys, county attorneys, and district attorneys has generated a great deal of litigation, but for the most part the main thrust of the litigation has been a substantive matter other than the jurisdictional question of which attorney could do what. (See, for example, *State v. Gary,* 163 Tex. 565, 359 S.W.2d 456 (1962); *Garcia v. Laughlin,* 155 Tex. 261, 285 S.W.2d 191 (1956).) The confusion of Section 21 is perhaps best summed up by a request from the secretary of state to the attorney general:

> Should Earl Conner, Jr. be commissioned as "County Attorney," "County and District Attorney," "District Attorney," or a "Criminal District Attorney?"

The attorney general carefully reviewed Section 21, the applicable statute, and the *Hill County* case and concluded that "the said Earl Conner, Jr. should be commissioned as County Attorney." (Tex. Att'y Gen. Op. No. 0-6374 (1945).) The attorney general noted that Mr. Conner held the same opinion.

One final point should be made concerning the confusion over these various titles of attorneys. In a well-ordered system the public's attorneys on the local level usually handle either criminal or civil matters. The former are normally called "district attorneys," "prosecuting attorneys," or "state's attorneys"; the latter are normally called "county attorneys," "city attorneys," "town attorneys," or "corporation counsel." It should follow that a county attorney handles civil matters for a county and that a district attorney, with or without "criminal" added to the title, handles criminal matters for the state. Obviously, things are not that neat under Section 21. As a rough approximation of the system, it can be said that in a county that has more than a county attorney, he handles civil matters; in all other situations, the single attorney, whatever his title, handles both civil and criminal matters.

Comparative Analysis

Over three-fourths of the states provide for a prosecuting attorney. Some 25 provide for a set term of office, usually four years. About half of the provisions mention compensation, but all except three leave the amount to the legislature. Most but not all of these states specify a method of selecting the prosecuting attorney. With one exception, the method is by popular election.

The *Index Digest* notes that various terms are used for the office. Texas is listed under "county attorney" and not under "district attorney" (p. 786). There is no reference to the term "criminal district attorney." It seems unlikely that any other state uses the term. Kentucky has a provision which permits the legislature to abolish the office of commonwealth's attorney in which case his duties devolve upon the county attorney. (This is indexed under "Abolition of Office," p. 787. It may be that there are other state constitutions that create more than one prosecuting attorney. The *Index Digest* allocates only one title to each state.)

Neither the United States Constitution nor the *Model State Constitution* refers to a prosecuting attorney under any title.

Author's Comment

Section 21 is an example of two errors sometimes made in drafting a constitution. One is exposition by assumption. The 1875 drafter knew, as presumably most people did, what the court system was and building on that knowledge produced a section that assumed the existing system. This is not a good idea at the time it is done; it is disastrous if the constitution is to be around for many decades. This is not to say that no assumptions may be made. Everybody

knows, women's liberation to the contrary notwithstanding, that "he" in a constitution means "he or she." (But see Sec. 19, Art. XVI.)

The second error is, paradoxically, one of unnecessary explicitness. The drafters assumed rightly that the county attorney would represent the state in the local courts but by spelling it out they created problems. If, for example, the drafters had left out "all" in describing the cases to be handled, the ensuing difficulties might not have been encountered. If, however, the drafters had asked themselves "Is this explicit statement really essential?" they would probably have decided that it was not.

There is a third error in the 1954 amendment brought about by a failure to follow the rule: Read the *entire* constitution before amending it. The concluding sentence, added in 1954, includes the clause "until their successors have qualified." Section 17 of Article XVI already said that.

Section 21 is undoubtedly the only constitutional provision that ever commanded a governor to commission the qualified voters.

Sec. 22. CHANGING JURISDICTION OF COUNTY COURTS. The Legislature shall have power, by local or general law, to increase, diminish or change the civil and criminal jurisdiction of County Courts; and in cases of any such change of jurisdiction, the Legislature shall also conform the jurisdiction of the other courts to such change.

History

This provision first appeared in the Constitution of 1876. It probably was a concession to delegates who opposed creation of a county court altogether and others who felt that it was given too much jurisdiction. (See the *History* of Secs. 15 and 16.) In the absence of this section, the legislature would have had no power to change county court jurisdiction under the original 1876 Constitution, because the language in present Section 1, permitting the legislature to conform the jurisdiction of existing courts to that of new ones, was not added until 1891. (See the *History* of Sec. 1.)

Explanation

This provision, unlike Section 1 of Article V, permits the legislature to take constitutionally prescribed jurisdiction away from a constitutional court. Although Section 1 permits the legislature to create additional courts "and conform the jurisdiction of the district and other inferior courts thereto," that language does not permit the legislature to *deprive* a constitutional court of its jurisdiction. It permits the legislature to give a new court jurisdiction concurrent with that of the constitutional court (*Reasonover v. Reasonover,* 122 Tex. 512, 58 S.W.2d 817 (1933)) but does not permit jurisdiction to be taken away from the constitutional court entirely. (*Lord v. Clayton,* 163 Tex. 62, 352 S.W.2d 718 (1961).)

Because of Section 22, however, the courts have been more liberal in allowing the legislature to take jurisdiction away from the county courts. The legislature can deprive the county courts of their criminal jurisdiction (*King v. State,* 158 Tex. Crim. 347, 255 S.W.2d 879 (1953), their civil jurisdiction (*Rogers v. Graves,* 221 S.W.2d 399 (Tex. Civ. App. – Waco 1949, *writ ref'd*)), and their appellate jurisdiction (*Brazoria County v. Calhoun,* 61 Tex. 223 (1884)).

Even under the broad language of Section 22, however, the courts' reluctance to permit withdrawal of jurisdiction from constitutional courts did not disappear entirely. The section permits the legislature to change the "civil and criminal jurisdiction" of the county courts; it does not mention their probate jurisdiction. The courts concluded that this omission was meaningful, and that probate was not

intended to be included within the word "civil" for purposes of this section. The legislature therefore was held to have no power completely to withdraw the county court's probate jurisdiction. (*State v. Gillette's Estate,* 10 S.W.2d 984 (Tex. Comm'n App. 1928, *jdgmt adopted*).) Under the more general language of Section 1, however, the legislature could give another court concurrent jurisdiction in probate matters. (*State* ex rel. *Rector v. McClelland,* 148 Tex. 372, 224 S.W.2d 706 (1949).) A 1973 amendment to Section 8 of Article V appears to have eliminated this problem; it gave the legislature broad power to "increase, diminish, or eliminate" the county court's probate jurisdiction. See the *Explanation* of Sections 8 and 16.

Section 22 permits the legislature to increase, as well as diminish, county court jurisdiction. County courts thus can be given jurisdiction concurrent with that of the justice courts. (*Gulf, W.T. & P.Ry. Co. v. Fromme,* 98 Tex. 459, 84 S.W. 1054 (1905).)

Comparative Analysis

At least two other states have constitutional provisions permitting the legislature to take jurisdiction away from the county court. The West Virginia Constitution permits the legislature, upon application of a county, to modify the county court established by the constitution or, if the voters of the county approve, even replace it with a new tribunal. The New Jersey Constitution provides that the jurisdiction of the county court may be altered as the public good may require.

In the vast majority of states, changes in jurisdiction of the county court are simply treated the same as changes in jurisdiction of all other courts.

Author's Comment

There is no persuasive reason why the legislature should be given greater power to change county court jurisdiction than that of other courts. It might be argued that the distinction can be justified because the county judge often is not a lawyer, and that Section 22 is an attempt to deal with this problem by allowing the legislature to withdraw matters it is unwilling to entrust to a nonlawyer judge. The justice of the peace, however, is even more likely to be a nonlawyer, yet there is no provision permitting withdrawal of his jurisdiction. Moreover, some of the county court's toughest legal questions arise in probate matters, yet Section 22 as interpreted does not permit the legislature to take away those matters (although Sec. 8 does). Finally, even if the nonlawyer judge is the problem addressed by Section 22, withdrawal of jurisdiction is at best a crude and indirect method of dealing with the problem.

In any event, it is awkward and potentially confusing to provide for withdrawal of jurisdiction in a separate section. The subject should be addressed in the sections granting jurisdiction; the language conferring each kind of jurisdiction should make clear whether that jurisdiction may be withdrawn or regulated by the legislature. If those sections are properly drafted, inclusion of a separate provision like Section 22 is unnecessary and is likely to create conflicts.

Sec. 23. SHERIFFS. There shall be elected by the qualified voters of each county a Sheriff, who shall hold his office for the term of four years, whose duties and perquisites, and fees of office, shall be prescribed by the Legislature, and vacancies in whose office shall be filled by the Commissioners Court until he next general election.

History

The Constitution of 1836 provided for a sheriff in each county to be appointed or elected as provided by congress for a two-year term. Sheriffs were commissioned by the President of the Republic. The Constitution of 1845 followed this approach,

changing president to governor, and added a limitation on eligibility to serve as sheriff – not more than four out of every six years. The Constitution of 1866 extended the sheriff's term to four years and limited eligibility to not more than eight out of every 12 years.

The Constitution of 1869 added new language. Sheriffs were subject to removal by the local district judge for good cause "spread upon the minutes of the court." Special provision was made for a constable to serve process against a sheriff facing removal or a lawsuit.

In the Convention of 1875 this section as reported by the Committee on the Judicial Department included a provision for constables. (*Journal,* pp. 412-13.) A floor substitute for the Judicial Article would have included the limitation on eligibility found in previous constitutions but was defeated. (*Journal,* p. 567.) In floor debate, the commissioners court rather than the county judge was given power to fill a vacancy in the office of sheriff, and the reference to constables was stricken by amendment. (*Journal,* pp. 680-81.)

The sheriff's term was increased to four years in 1954 along with that of most other county officials.

Explanation

In the ninth century the English kings appointed reeves who watched over royal interests in the towns of England. Early in the tenth century, the reeves were given jurisdiction over shires (counties) and were called shire-reeves. Soon after the Norman conquest, the power of sheriffs reached its zenith as they became the chief political officers of the shire. Over the centuries their delegated power has diminished, but by law sheriffs still act as conservators of the peace, serve writs, summon juries, execute judgments, operate jails, and enforce the law.

Court decisions involving this section have focused on the clause which provides for filling vacancies.

If a vacancy occurs in the office of sheriff, the commissioners court must appoint a successor rather than call a special election (Tex. Att'y Gen. Op. No. 0-2965 (1940)). If a sheriff-elect dies after a general election but before the beginning of the new term, the court can appoint one person to fill the unexpired term and another to fill the new term. (*Dobkins v. Reece,* 17 S.W.2d 81 (Tex. Civ. App.–Fort Worth 1929, *writ ref'd).)*

In *Poe v. State* (72 Tex. 625, 10 S.W. 737 (1889)), the court upheld a statute authorizing district judges to suspend a sheriff for good cause and appoint a temporary successor pending disposition of a suit for removal. The court reasoned that although this section does not allow the legislature to authorize district judges to fill a vacancy by appointment, it does not prohibit suspension. However, if a sheriff so suspended resigns, the commissioners court has power to fill the vacancy and its appointee takes office rather than the temporary appointee of the district judge who suspended the incumbent. (*Leonard v. Speer,* 48 S.W.2d 474 (Tex. Civ. *App.–Galveston 1932), writ dism'd as moot,* Tex. Comm'n App., 56 S.W.2d 640 (1933).)

Comparative Analysis

Thirty-four other states provide for election of a sheriff in their constitutions. In New Orleans two sheriffs are elected — one for civil matters and one for criminal matters. Washington provides for elected sheriffs unless a county with a home-rule charter provides otherwise. Eight other state constitutions provide that the powers of the sheriff are to be prescribed by law.

Methods for filling vacancies vary among gubernatorial appointment (Connecti-

cut and Maryland), judicial appointment (Tennessee), special election (New York), and commissioners court appointment (North Carolina and Montana).

The *Model State Constitution* does not designate local government officials or their method of selection.

Author's Comment

Whether each county should have a sheriff and how the sheriff should be selected should be matters for local determination. Theoretically, incumbent sheriffs should not object to putting the continuation of their office to a vote of their constituents, but reality frequently does not accord with theory.

Sec. 24. REMOVAL OF COUNTY OFFICERS. County Judges, county attorneys, clerks of the District and County Courts, justices of the peace, constables, and other county officers, may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

History

Article IX, Section 6, of the Constitution of 1845 required the legislature to provide for trial, punishment, and removal from office of all officers of the state not subject to impeachment. The Constitutions of 1861, 1866, and 1869 contained identical provisions, with the Constitution of 1869 adding the following section to the judicial article:

All county and district officers, whose removals are not otherwise provided for, may be removed, on conviction by a jury, after indictment, for malfeasance, nonfeasance, or misfeasance in office. (Art. V, Sec. 24.)

Section 24 as reported by committee to the Convention of 1875 included "sheriffs" in the list of officers subject to removal (*Journal,* p. 413); however, the *Journal* does not indicate at what point in the proceedings sheriffs were deleted.

The proposed but unsuccessful revision of Article V of 1887 added sheriffs as well as prosecuting attorneys to the removal authorization. No other amendment to this section has been submitted to the voters.

Explanation

Removal by district judges is a summary procedure. One convicted of a felony by a jury automatically forfeits his office (Tex. Rev. Civ. Stat. Ann. art. 5968), but the purpose of this section and its implementing statutes is both to permit a speedy removal and a removal on the grounds that may not allow criminal prosecution or impeachment. (*Trigg v. State,* 49 Tex. 645 (1878).)

Statutes authorizing the temporary suspension of a county officer without notice, hearing, or jury verdict pending trial of a petition for removal do not contravene this section. (*Griner v. Thomas,* 101 Tex. 36, 104 S.W. 1058 (1907).)

The power to remove is vested in the district judge. If the judge quashes a petition for removal without trial, his decision is final. (See Tex. Rev. Civ. Stat. Ann. art. 5979; *Smith v. Brennan,* 49 Tex. 681 (1878).) Likewise, the district judge can direct a trial verdict in favor of the accused officer or refuse to remove the officer despite a finding by a jury of facts justifying removal. (*State v. O'Meara,* 74 S.W.2d 146 (Tex. Civ. App. – San Antonio 1934, *no writ*).)

The district or county attorney, not the attorney general, represents the state in a removal suit under this section. (*State v. Harney,* 164 S.W.2d 55 (Tex. Civ. App. – San Antonio 1942, *writ ref'd w.o.m.*); *Garcia v. Laughlin,* 155 Tex. 261, 285 S.W.2d

191 (1955).) Private citizens may not pursue a removal suit when the district attorney who brought the suit has obtained a dismissal. (*State v. Ennis,* 195 S.W.2d 151 (Tex. Civ. App. – San Antonio 1946, *writ ref'd n.r.e.*).)

Comparative Analysis

The Alabama, Arkansas, Lousiana, and West Virginia constitutions have provisions similar to this section. Georgia provides for removal on conviction for malpractice in office. Indiana and Kansas provide for removal as prescribed by law. The Mississippi and Wisconsin constitutions authorize removal by the governor subject to regulation by the legislature.

The *Model State Constitution* provides for removal from office by impeachment but has no other removal provision.

Author's Comment

Removal of county-level officers is comprehensively provided for in the statutes (see Tex. Rev. Civ. Stat. Ann. art. 5968 *et. seq.*), and there is thus no reason to retain a section like this so long as there is some provision making it clear that impeachment is not the exclusive means of removal of constitutional officers.

Sec. 25. RULES OF COURT. The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the State for the government of said court and the other courts of this State to expedite the dispatch of business therein.

History

Texas constitutions prior to 1876 gave the courts no rule-making power. Apparently, however, the supreme court even before 1876 had promulgated "a few short rules of court." (See *Texas Land Co. v. Williams,* 48 Tex. 602 (1878).) The 1876 Constitution gave the supreme court more rule-making power than it has now. It authorized the supreme court to "make rules and regulations for the government of said court, and the other courts of the State, to regulate proceedings and expedite the dispatch of business therein." The legislature was given no power to veto or supersede the court's rules.

The 1891 amendment, for reasons that are obscure, diluted the supreme court's rule-making power by adding the phrase "not inconsistent with the laws of the State." This led to the enactment of many piecemeal statutory regulations of procedure, and by the 1930s Texas practice had become highly technical. (McDonald, "The Background of the Texas Procedural Rules," 19 *Texas L. Rev.* 229 (1941).)

More than 30 years of lobbying by the state bar association and the Texas Civil Judicial Council led to passage in 1939 of the present statute conferring general rule-making power on the supreme court. (Tex. Rev. Civ. Stat. Ann. art. 1731a.) The statute states that the legislature relinquishes and confers upon the supreme court "full rule-making power in the practice and procedure in civil actions."

Under this statute, the supreme court appointed an advisory committee which drafted a complete set of rules. These were adopted by the court, with some modifications, in 1941 and have been modified further from time to time since then. The 822 rules promulgated through 1972 are contained in six annotated volumes of the Texas Rules of Civil Procedure.

Explanation

Although the statute relinquishes full rule-making power to the supreme court,

it is clear that the ultimate power still lies with the legislature. Since Section 25 still contains the phrase "not inconsistent with the laws of the State," conflicts between the supreme court's rules and statutes must be resolved in favor of the statute. (*Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424 (Tex. 1971).) The power conferred by this section therefore is not the complete, supervisory rule-making power that court reformers have been advocating for half a century. (See Pound, "Rule-Making Power of the Courts," 10 *Journal of the American Judicature Society* 113 (1926).) Rather, it is only "supplementary" rule-making power — *i.e.*, supplementary to the ultimate power of the legislature. Since 1939, however, the legislature has generally permitted the supreme court to exercise its rule-making power without much legislative interference, and the power is now well-established and accepted. (See 1 McDonald, *Texas Civil Practice* (Chicago: Callaghan, 1965), p. 5.)

Section 25 is not by its terms limited to rules of *civil* procedure, but that is the only field in which the supreme court has exercised the power. Rules of criminal procedure are prescribed by the statutory Code of Criminal Procedure. This is at least in part a result of the segregation of civil and criminal jurisdiction in the Texas appellate court system. Since the supreme court has no criminal jurisdiction, it is understandably reluctant to exercise its rule-making powers in the criminal law field. The court of criminal appeals, which has virtually all of the appellate jurisdiction in criminal cases, would be the logical court to promulgate rules of criminal procedure, but the constitution gives it no rule-making power. If the constitution were silent on the matter of rule making by courts, it might be argued that the court of criminal appeals has inherent power to prescribe rules for criminal cases, or at least that the constitution would not prohibit the legislature from giving it that power. But since this section gives rule-making power specifically to the supreme court, it probably precludes that argument. It might still be argued, however, that the phrase "not inconsistent with the laws of the State" permits the legislature to delegate its rule-making power in criminal cases to the court of criminal appeals. This has never been attempted, and since the legislature in 1965 enacted a revision of the Code of Criminal Procedure, it is probably not likely to delegate the rule-making power in criminal cases in the near future.

Comparative Analysis

One state has a statute prohibiting the supreme court from prescribing rules of procedure. (Ore. Rev. Stat. sec. 1.002 (Supp. 1968).) In all other states the supreme court has some rule-making power either by statute, common law, or constitutional provision. In about 20 states, the supreme court's rule-making power is complete; in the remainder it is subject to some control by the legislature. In about four states, the rules are effective only if the legislature does not disapprove them; in about four others the legislature has power to modify or repeal the rules after they become effective. In about seven states, the supreme court may prescribe rules for its own procedures, but not those of the lower courts. In several states, a judicial conference or council acts as an advisory committee to aid the supreme court in prescribing rules, and in California and New York, these councils themselves hold the power to prescribe rules for appellate proceedings.

A description of the rule-making mechanism in each state is contained in American Judicature Society, *The Judicial Rule Making Power in State Court Systems* (Chicago, 1970).) Most of the information in this *Comparative Analysis* comes from that work.

Author's Comment

Advocates of court reform have long argued that state supreme courts should

have full rule-making power, unfettered by any legislative control. (See A. Vanderbilt, *Minimum Standards of Judicial Administration* (New York, 1949), p. 92.) The argument is that "a court cannot be said to be exercising rulemaking power unless its rules override statutory rules." On the other hand, the experience of a number of states, including Texas, seems to indicate that in practice a supreme court can in fact exercise general rule-making power even though that power is technically only delegated by the legislature. (See *Judicial Rulemaking Power, supra,* pp. 2-3.)

In any event, the present Texas system gives the supreme court nearly as much power as it would have if the constitution reserved for the legislature no role at all in the rule-making process. Under Section 25 and article 1731a of the *Texas Revised Civil Statutes Annotated,* the initiative to propose new rules or modify old ones lies with the court; no legislative action is needed to begin the process. Moreover, once a rule is promulgated, the burden of action lies with the legislature; since the legislature's affirmative approval is not required, the rule is effective unless and until superseded by statute. Finally, the supreme court's rule-making power is firmly entrenched in tradition and practice, so that attempts by the legislature to withdraw rule-making power are infrequent.

Although there is disagreement about the proper role of the legislature in rule making, there is little doubt that the supreme court should have some rule-making power. The courts, rather than the legislature, are ultimately responsible for the efficient and just operation of the judicial system; the courts cannot discharge that responsibility without some power to regulate procedures. As one judge said soon after implementation of the Rules of Civil Procedure,

> Almost overnight, the judges, from the trial court to the Supreme Court, began to realize that along with the power went the responsibility, and that through the right to prescribe their own procedure they had inherited the obligation to make the system work properly. (Alexander, "Improving Our Judicial System," 8 *Dallas Bar Speaks* 117, 121 (1943).)

One major question posed by the present rule-making system in Texas is whether court-made rules should also govern criminal procedure. The arguments in favor of giving courts the power in civil cases seem equally applicable to criminal cases. The fact that the courts already have the power in civil cases also raises the issue of uniformity; different rules for civil and criminal cases are almost inevitable as long as the rule-making power is divided. As suggested in the preceding *Explanation*, the real impediment to court-made rules of criminal procedure in Texas is the existence of separate courts of last resort. If the supreme court and court of criminal appeals are to continue as separate courts, the goal of a single set of court-made procedural rules for both civil and criminal cases will be difficult to achieve. One solution might be to give the two courts power jointly to prescribe such rules.

Sec. 26. CRIMINAL CASES; NO APPEAL BY STATE. The State shall have no right of appeal in criminal cases.

History

Section 26 probably derives from the common-law rule that the state has no right to appeal in criminal cases. (*United States v. Sanges,* 144 U.S. 310 (1892).) For a brief period, however, Texas deviated from this rule. The constitutions prior to 1869 did not mention the matter of appeals by the state, but an 1856 statute gave the state a limited right to appeal. (See Code of Criminal Procedure art. 718

(1857).) During Reconstruction, the supreme court stated that under the 1869 Constitution "[t]he state now has the same right to appeal in felony cases that is afforded to the defendant." (*State v. Wall,* 35 Tex. 485 (1871).) This statement has generally been accepted at face value. (*E.g.*, 2 *Interpretive Commentary,* 326; Vance, "Why the State Should be Given the Limited Right of Appeal in Criminal Cases," 8 *Hous. L. Rev.* 886 (1971).) There is nothing in the 1869 Constitution, however, to support the statement. That constitution merely provided that no criminal case was appealable to the supreme court unless a judge of that court certified his belief that the trial court had erred. Moreover, the state's right to appeal under the 1869 Constitution clearly was *not* equal to that of the defendant, because Section 12 of Article I of that constitution contained a double jeopardy clause which would prevent the state from obtaining a new trial of a once-acquitted defendant but would not prevent a convicted defendant from winning a new trial. Furthermore, the cases in which the supreme court permitted appeals by the prosecution were simply cases in which a trial court had quashed indictments; they therefore are hardly authority for the broad proposition of a state's right of appeal equal to that of the defendant. (*State v. Wall, supra; State v. Hedrick,* 35 Tex. 486 (1871).) Thus, the most that can be said is that from 1856 until 1876 there was a limited statutory right to appeal by the state. The subject was not addressed constitutionally until 1876.

Explanation

There is probably no clearer or more unambiguous section that this in the entire Texas Constitution. By simply prohibiting all state appeals in criminal cases, the section avoids the difficult questions that arise in attempting to determine what kind of state appeals can be permitted without violating the double jeopardy clauses of the state and federal constitutions.

It might be argued that "appeal" in this context means only an appeal from acquittal, but the courts have refused to limit its meaning. They have held that the section prevents the state from appealing a decision quashing an indictment (*State v. Wilson,* 131 Tex. Crim. 43, 95 S.W.2d 971 (1936)) or from seeking to reinstate an appeal originally brought by the defendant (*Yordy v. State,* 425 S.W.2d 352 (Tex. Crim. App. 1967)).

In one recent case the state obtained review by the United States Supreme Court despite the prohibition of Section 26. The Texas Court of Criminal Appeals had reversed a conviction on federal constitutional grounds. The district attorney applied for a writ of certiorari from the United States Supreme Court, which granted the writ and reversed the court of criminal appeals. (See *Texas v. White,* 96 S.Ct 304 (1976).) The supreme court apparently was not apprised of the Texas prohibition against appeals by the state. Counsel for the defendant raised the issue in a motion for rehearing, but the court denied the motion without addressing the question. (See 96 S.Ct. 869 (1976).)

This case might lead one to argue that the state is free to appeal to the federal courts in criminal cases. *Texas v. White* does not require that conclusion, however, because the question of the state's right to appeal was not adequately presented. Whether Section 26 applies to federal appeals will remain unsettled until some court squarely aces the question.

Even if Section 26 were repealed, the state's right to appeal would be limited by the double jeopardy clauses of the state and federal constitutions. The state double jeopardy clause provides that "No person, for the same offense, shall twice be put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction." (Art. I,

Sec. 14.) This clause obviously imposes some limit on the state's ability to subject a defendant to a second trial. An argument has been made that retrying a defendant who is acquitted because the trial court makes an error of law does not place the defendant in double jeopardy since the first trial is not complete until an error-free trial is obtained. (See Vance, 8 *Hous. L. Rev.*, at 890-91.) This view of double jeopardy is not generally accepted, however, and in any event in Texas a second trial after acquittal would seem to violate the second clause of Section 14 even if it did not amount to double jeopardy because the second clause quite clearly prohibits a second trial after acquittal, irrespective of the double jeopardy question.

Any system permitting state appeals also would be limited by the federal double jeopardy clause, because that provision is now applicable to the states under the Due Process Clause of the Fourteenth Amendment. (*Benton v. Maryland,* 395 U.S. 784 (1969).)

A court of civil appeals has held that the state has no right to appeal the dismissal of a juvenile delinquency action, even though such actions are considered civil rather than criminal. The court cited this section, but it is not clear whether the decision rests on this section, on the double jeopardy clause, or on the court's interpretation of a statute. (*State v. Marshall,* 503 S.W.2d 875 (Tex. Civ. App.—Houston [1st Dist.] 1973, *no writ*).) The statute applicable at the time gave a right of appeal in juvenile proceedings to "any party aggrieved," but the court did not hold the statute unconstitutional. Moreover, the court ignored at least one earlier case in which a court of civil appeals not only entertained an appeal by the state but also reversed the trial court's judgment that the accused was not delinquent. (See *State v. Ferrell,* 209 S.W.2d 642 (Tex. Civ. App.—Fort Worth 1948, *writ ref'd n.r.e.*). Since the *Marshall* case was decided, the legislature has enacted a new Family Code, which apparently gives the state no right of appeal in juvenile delinquency cases. (See Family Code sec. 56.01.)

Comparative Analysis

Texas is one of only about four states that give the state no right of appeal whatsoever. At the other extreme, two states purport to give the state (by statute) a right of appeal equal to that enjoyed by the defendant. Connecticut, for example, allows an appeal by the state (with permission of the presiding judge) "in the same manner and to the same effect as if made by the accused." (Conn. Gen. Stat. Ann. sec. 54-96 (Supp. 1972).) The Connecticut Constitution contains no double jeopardy clause, but the courts of that state have imposed a judicially created double jeopardy limitation. (See *State v. Stankevicius,* 222 A.2d 356 (Conn. App. Div. 1966).) The Connecticut statute in practice is therefore not as sweeping as it sounds.

Between these two extremes lie many different types of limited state appeals. Most states permit the prosecution to appeal from pretrial rulings quashing indictments, dismissing complaints, or sustaining pleas in bar to the prosecution; in these cases, if the state wins the appeal, it usually may continue the prosecution. (See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington, D.C.: Government Printing Office, 1967), p. 47.) In recent years, a few states have given the prosecution a right to appeal from pretrial orders suppressing evidence or statements of a defendant. (See Kronenberg, "Right of a State to Appeal in Criminal Cases," 49 *Journal of Criminal Law* 473, 476-79 (1959).)

About 13 states permit "moot appeals" by the prosecution. Under this procedure, the state may appeal from trial court rulings in cases in which the

defendant is acquitted, but even if the state wins the appeal, the defendant cannot be retried. (See, *e.g.*, Ohio Rev. Code Ann. secs. 2945.68-70 (1954).) This avoids the double jeopardy problem but still permits the prosecution to obtain correction of an erroneous ruling.

Although at least 45 states have constitutional prohibitions against double jeopardy, almost none treat the question of appeal by the state in the constitution. (See Comment, "Should the State Have an Appeal in Criminal Cases?" 1 *Sw. L. J.* 152, n. 4 (1947).)

Author's Comment

The major argument against permitting appeals by the state in criminal cases is that when a defendant wins (whether by acquittal or dismissal), it is unfair to put him to the expense and tribulation of contesting the state—which usually has far greater resources—on appeal. The argument also has been made that appeals by the state are likely to be wasteful of judicial resources because even when the state wins it may be barred from retrying the defendant. Yet another argument is that there are already too many criminal appeals, and the focus should be on ways to reduce the number of appeals rather than create new ones.

The major argument in favor of permitting appeals by the state is simply that it would give the state an equal right to a fair and error-free trial. An offshoot of this argument is the contention that the present system encourages trial judges to resolve all doubtful legal questions against the state, because such a ruling cannot harm the judge's reversal ratio.

The argument in favor of some right of appeal by the state probably has been strengthened in recent years by developments in constitutional law. The United States Supreme Court has developed an extensive and intricate body of rules relating to exclusion of evidence (such as physical evidence obtained by illegal searches and seizures and confessions obtained involuntarily) that are applicable to state criminal proceedings. These rules often require trial judges to decide difficult legal questions before and during trial on admissibility of evidence. If the judge decides to exclude the evidence, conviction may be made difficult or impossible; and if that decision is legally incorrect, the present system gives the prosecution no chance to get it corrected. Moreover, police then are faced with the difficult problem of deciding whether to conform their practice to a trial court decision that they (and the prosecutor) believe to be erroneous or to continue the practice that the trial court has held unconstitutional in the hope that they will eventually be vindicated in an appeal taken by a defendant.

If the state is to be given some right of appeal, it would be unwise to attempt to describe the limits and conditions of the right in the constitution. The limits are likely to be affected by changes in rules of procedure and by changes in interpretation of constitutional principles such as double jeopardy and due process of law. The legislature should be free to condition the right upon the adoption of other measures that will protect the defendant from long delays and other abuses.

Sec. 27. TRANSFER OF CASES PENDING AT ADOPTION OF CONSTITUTION. The Legislature shall, at its first session, provide for the transfer of all business, civil and criminal, pending in District Courts, over which jurisdiction is given by this Constitution to the County Courts, or other inferior courts, to such County or inferior courts, and for the trial or disposition of all such cases by such County or other inferior courts.

Art. V, § 28

History

The Convention of 1875 apparently considered this section necessary because, under the Constitution of 1869, there were no county courts. (See the Annotations of Secs. 15 and 16 of this article.) This section was the method chosen to move cases from the district courts back to the reestablished county courts. Because this problem was unique to the 1876 situation, Section 27 has no counterpart in earlier constitutions.

Explanation

By treating the jurisdictional provisions of the 1876 Constitution as self-executing, the courts made this section unnecessary. Although Section 27 applies only to cases that the 1876 Constitution placed within county court jurisdiction, the supreme court said a constitutional change in jurisdiction from the district court to the justice court automatically deprived the district court of jurisdiction and conferred jurisdiction on the justice court; the district court had no power to do anything more than enter an order transferring the case to justice court. The legislature had passed a statute transferring such cases to the justice court, but the supreme court rested its decision on the constitution. (*Hardeman v. Morgan,* 48 Tex. 103 (1877).) Had the 1875 Convention been able to foresee this decision, it could have eliminated this section. The legislature obeyed the mandate of Section 27 and did provide for the transfer of cases from district to county courts, however. (Tex. Laws 1876, ch. 27, 3 *Gammel's Laws,* p. 855; see also *Bowser v. Williams,* 25 S.W. 453 (Tex. Civ. App. 1894, *no writ*).)

Comparative Analysis

For reasons that are apparent from the *History* of this section, other state constitutions do not contain provisions comparable to Section 27.

Author's Comment

Transition provisions like Section 27 are objectionable for at least two reasons. First, they are unenforceable; if the legislature had refused to provide for transfer of cases from the district to the county courts in 1876, there is no way it could have been compelled to do so. It is better to simply make the transitional provision self-executing, *i.e.,* provide that such cases are automatically transferred to the jurisdiction of the county courts. The county courts to which cases are transferred are given jurisdiction immediately, and if necessary the courts can then exercise that jurisdiction to order clerks to physically transfer the papers. Second, provisions like Section 27 cease to have any effect as soon as the legislature acts, yet they remain a part of the constitution until they are removed by amendment. This particular section has been superfluous since the legislature acted in 1876, yet it has been carried forward for a century. Transitional provisions can better be handled in a separate schedule that ceases to be part of the constitution once it has served its purpose. (See the Annotation of Art. XVI, Sec. 48.)

There is, of course, no need for a different transitional provision for each court; the subject can be handled in a provision relating to all courts.

Sec. 28. VACANCIES IN JUDICIAL OFFICES. Vacancies in the office of judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and the District Courts shall be filled by the Governor until the next succeeding General Election; and vacancies in the office of County Judge and Justices of the Peace shall be filled by the Commissioners Court until the next succeeding General Election.

Art. V, § 28

History

The 1876 Constitution was the first to contain a general provision dealing with judicial vacancies; the previous constitutions contained various vacancy provisions relating to each level of court. The 1876 Constitution directed the governor to fill vacancies on the district and appellate benches "until the next succeeding general election" and directed commissioners courts to fill vacancies in the county and justice courts "until the next general election for such offices." The 1891 amendment did not change this section except to delete the name "court of appeals" and add the names of the "court of criminal appeals" and "courts of civil appeals" to conform to the changes made that year in the appellate court structure. (See the Annotation of Sec. 6 of this article.)

In the 1876 and 1891 versions of the constitution, persons appointed to vacancies in the county and justice courts served until the next general election *for such offices.* A court of civil appeals said this meant that a justice of the peace appointed to a vacancy in 1955 continued to hold office through 1958, even though a general election was held in 1956, because the latter was not a general election "for such offices." (*Rawlins v. Drake,* 291 S.W.2d 349 (Tex. Civ. App.—Dallas 1956, *no writ*).) This led to the 1958 amendment that changed the phrase to "until the next succeeding general election." Thus all appointments to fill judicial vacancies now are good only until the next general election, without regard to the date on which an election for that office otherwise would have been held.

Explanation

The Texas Constitution suffers from a surplus of provisions for filling judicial vacancies. Section 2 of this article contains a special vacancy provision for supreme court justices. That provision is inconsistent with this section because it directs the governor to fill such vacancies "until the next general election for state officers." With adoption in 1972 of the amendment giving state officials four-year terms, this inconsistency becomes significant, because appointees could serve up to four years under the Section 2 language, but no more than two years under the Section 28 language. Since the latter amendment was adopted more recently, it presumably would govern, but the question has not been decided. (See also the annotation of Art. IV, Sec. 12.)

Section 4 of this article also contains a specific vacancy provision relating to the court of criminal appeals, but it is not inconsistent with this section. Section 11 provides that vacancies resulting from disqualification of judges of inferior courts shall be filled as may be prescribed by law.

In addition to all of these, Section 12 of Article IV provides that "all vacancies in state or district offices" shall be filled by gubernatorial appointment unless otherwise provided by law, and that such appointments require senate confirmation. Presumably, judgeships on the district and appellate courts are "state or district offices." An attorney general's opinion considers them so for purposes of the senate confirmation requirement. (Tex. Att'y Gen. Op. No. O-1092 (1939).) If judicial vacancies are subject to the confirmation requirement of this Section 28, however, they presumably are also subject to the provision of Article IV, Section 12, permitting the legislature to provide some method for filling vacancies other than gubernatorial appointment. Neither of these questions has been decided by the courts, so whether Section 12 applies to judicial vacancies at all is not certain.

Section 28 names only the constitutional courts; it therefore is not clear how vacancies on the statutory courts are to be filled. One court of civil appeals held that since a statutory county court at law was essentially a county court, a statute giving the governor power to fill a vacancy on the county court at law was

unconstitutional because it violated this section's directive that county court vacancies be filled by the commissioners court. (*State v. Valentine,* 198 S.W. 1006 (Tex. Civ. App.—Fort Worth 1917, *writ ref'd*).) Another court of civil appeals held that a county court at law judge is not a county judge within the meaning of this section, and therefore the legislature may permit the governor to make the appointment. (*Sterrett v. Morgan,* 294 S.W.2d 201 (Tex. Civ. App.–Dallas 1956, *no writ*).) The supreme court has not decided the question.

Section 28 quite clearly does not mean what it says when it provides that appointees to fill vacancies serve "until the next succeeding general election"; read literally, that would end the term on the date of the general election, even though the successor cannot possibly take office until the votes are canvassed and he takes whatever other steps are necessary to qualify for the office. The section generally has been read to permit the appointee to serve until January 1 of the year following the next succeeding general election. (See Tex. Att'y Gen. Op. No. M-742 (1970).)

Comparative Analysis

Judicial vacancies are filled by gubernatorial appointment in most states, and such appointments generally are good only until the next state elections. Except in the states that have some form of "merit" selection, the constitution usually leaves details of the vacancy-filling procedure to the legislature. "Merit" selection plans usually are spelled out in some detail, because in those states the method of filling vacancies is in practice the method by which all judges are chosen. (See the annotation of Sec. 2 of this article.)

The Mississippi Constitution allows the legislature to determine the method of filling vacancies in state offices generally but provides that gubernatorial appointments to judicial vacancies, if made when the senate is in recess, expire at the end of the next senate session. (Art. VI, Sec. 177.) The Delaware Constitution allows the governor to fill judicial vacancies for the remainder of the unexpired term, thus permitting the governor to appoint a judge to a term of up to 12 years. (Art. IV, Sec. 3.)

The new Florida Constitution contains a provision permitting a judge to name his successor for the remainder of the term under certain circumstances. (Art. V, Sec. 14.)

Under the new Illinois Constitution, judicial vacancies are filled as provided by law, and if the legislature doesn't act, the state supreme court fills vacancies. If an appointment is made within 60 days before a primary election for judges, the appointee continues to serve until the second election. (Art. VI, Sec. 12.)

Author's Comment

Separate vacancy provisions relating to specific courts should be removed to eliminate conflicts such as the one described in the *Explanation* above. These provisions are unnecessary because Section 28 covers all the constitutional courts. The argument has been made that Section 28 also should be removed, leaving judicial vacancies to be governed by the general vacancy provisions applicable to all state, district, and local officials. This would be unwise, however, if the method of selecting judges is ever changed to the "merit" system. The latter system operates as a method of filling vacancies; under the "merit" system there is no need to select a new judge until there is a vacancy, either by death, resignation, or removal of the incumbent or because of his rejection by the voters. (See the annotation of Sec. 2.) Thus, for purposes of instituting "merit selection," it is vastly more convenient, if not essential, to have judicial vacancies addressed in a provision separate from other types of vacancies.

In view of the confusion concerning applicability of this section to statutory courts, a provision might be added to this section authorizing the legislature to specify the method of filling vacancies in statutory courts.

If Section 28 is retained, Section 12 of Article IV should be amended to make clear that it does not cover judicial vacancies, or Section 28 should be amended to make it consistent with Section 12 of Article IV on the matters of senate confirmation and the legislature's power to provide for a different method of filling vacancies.

The language of Section 28 should be rewritten to make clear that appointees to vacancies serve not only until the date of the next general election but until some later date, such as January 1 of the following year, thus giving their successors time to qualify.

Sec. 29. COUNTY COURT; TERMS OF COURT; PROBATE BUSINESS; COMMENCEMENT OF PROSECUTIONS; JURY. The County Court shall hold at least four terms for both civil and criminal business annually, as may be provided by the Legislature, or by the Commissioners' Court of the county under authority of law, and such other terms each year as may be fixed by the Commissioners' Court; provided, the Commissioners' Court of any county having fixed the times and number of terms of the County Court, shall not change the same again until the expiration of one year. Said court shall dispose of probate business either in term time or vacation, under such regulation as may be prescribed by law. Prosecutions may be commenced in said courts in such manner as is or may be provided by law, and a jury therein shall consist of six men. Until otherwise provided, the terms of the County Court shall be held on the first Mondays in February, May, August and November, and may remain in session three weeks.

History

This entire section was added by amendment in 1883 for reasons that are somewhat obscure. For the most part, the amendment simply restated provisions contained in Section 17 of Article V, yet it did not repeal that section. The amendment's main purpose probably was to provide more local control over terms of county courts.

Trial court terms evidently were a matter of some concern during the latter part of the 19th century, probably because lawyers and citizens in some counties felt that their judges were not devoting enough time to litigation in the county. The section on district courts was amended in 1891 to allow the legislature to prescribe their terms by general or special law; this amendment probably reflected a desire to permit court terms to be adapted to local conditions. (See the annotation of Sec. 7 of this article.)

Explanation

The major effect of Section 29 has been to give the commissioners court primary control over county court terms. Section 17 prescribed one civil term every two months and one criminal term every month for all counties. Section 29 requires at least four terms annually for both civil and criminal business but authorizes the commissioners court to fix additional terms. The courts have held that Section 29 supersedes the terms provision of Section 17, so that an order of the commissioners court fixing only four terms in one year is valid. (*Kilgore v. State,* 52 Tex. Crim. 447, 108 S.W. 662 (1908).)

The courts have held that the phrase "as may be provided by the Legislature" applies only to fixing dates of the required four annual terms and therefore does not permit the legislature to limit the commissioners court's power to authorize

more than four terms. (*Farrow v. Star Ins. Co. of America*, 273 S.W. 318 (Tex. Civ. App.—Waco 1925, *no writ*).) The legislature may regulate the method by which the commissioners court fixes terms, but the court's failure to comply with the statute makes its order merely voidable, rather than void. (*Henn v. City of Amarillo*, 157 Tex. 129, 301 S.W.2d 71 (1957).)

Under Sections 17 and 29, the county court is authorized to transact probate business without regard to terms.

As pointed out in the *Explanation* of Section 17, it is not clear how much of that section is superseded by Section 29.

Comparative Analysis

Only about one-fourth of the state constitutions mention the subject of county court terms. Of these, about four simply prescribe such terms as the legislature may provide. At least two state constitutions require the county courts to hold four terms annually; about four state constitutions require two terms per year. Two more specify that county courts shall be open at all times. In one state, where a single county court may have more than one judge, the court must hold as many sessions as there are county judges.

Texas appears to be the only state whose constitution specifies that county court terms are to be fixed by the county governing body.

Author's Comment

This section deals with eight subjects. First, the section fixes a minimum of four county court terms annually. Second, it authorizes the legislature to fix dates of those four terms or to delegate that responsibility to the commissioners court. The legislature has done the latter. (Tex. Rev. Civ. Stat. Ann. art. 1961.) Third, it authorizes the commissioners court to prescribe additional terms. Fourth, the section prohibits the commissioners court from changing terms more frequently than once a year. Fifth, it authorizes county courts to transact probate business at any time. Sixth, this section provides that prosecutions "may" be commenced as provided by law. (This provision is gratuitous; presumably it means they "must" be commenced as provided by law, but even then it is unnecessary because prosecutions could hardly be commenced in any other manner.) Seventh, it fixes membership of juries in county court at "six men." (The word "men" must be read to mean "persons," because women cannot be excluded. See Sec. 19 of Art. XVI.) Eighth, it specifies four three-week terms of county court, which are effective until the commissioners court provides otherwise. The commissioners courts have had 80 years to provide otherwise, but there is no way to determine whether all have done so without examining all of the minutes in each of the 254 counties since 1893.

The first five of these subjects are covered by statute. (Tex. Rev. Civ. Stat. Ann. arts. 1961-1963.) The sixth, method of commencing prosecutions, has been provided by law. (Code of Criminal Procedure arts. 21.20-21.23, 21.26.)

The seventh subject, fixing the number of jurors at six, may be constitutionally necessary, because the courts have said that Section 15 of Article I, guaranteeing a right to jury trial, requires a jury of 12 unless another section of the constitution provides otherwise. (*Jordan v. Crudgington,* 149 Tex. 237, 231 S.W.2d 641 (1950).)

The last provision of this section, fixing dates of county court terms, is unnecessary even though there still may be some commissioners courts that have not acted. A statute (Tex. Rev. Civ. Stat. Ann. art. 1961) contains the same provision. The statute is within the legislature's power, because it merely fixes dates for the required four terms and does not attempt to exercise any power given

exclusively to the commissioners court.

This entire section, except for the six-member jury provision, therefore could be deleted without changing existing practice. The jury provision could be relocated in Sections 13, 15, or 16 of this article.

Sec. 30. JUDGES OF COURTS OF COUNTY-WIDE JURISDICTION; CRIMINAL DISTRICT ATTORNEYS. The Judges of all Courts of county-wide jurisdiction heretofore or hereafter created by the Legislature of this State, and all Criminal District Attorneys now or hereafter authorized by the laws of this State, shall be elected for a term of four years, and shall serve until their successors have qualified.

History

This section was part of the 1954 amendment extending the terms of district, county, and precinct officials from two to four years. The amendment of Section 15 of this article gave the constitutional county judge a four-year term; Section 18 was amended to do the same for justices of the peace, and Section 21 extended the terms of regular county and district attorneys. This section was added to give the four-year term to two types of nonconstitutional officials: judges of county courts at law and other statutory courts, such as domestic relations courts, and criminal district attorneys.

Explanation

The presence of this section in the constitution is rather anomalous. None of the officials named in this section—criminal district attorneys or judges of statutory courts—is a constitutional officer. This section and Section 65 of Article XVI, which provides for transition to the four-year term prescribed by this section, are the only places in the entire constitution where these officials are mentioned. It makes little sense to prescribe constitutionally the length of term for nonconstitutional officers. This section is necessary, however, because in its absence the terms of criminal district attorneys and judges of statutory courts would be limited to two years by Section 30 of Article XVI.

Comparative Analysis

Most states do not prescribe constitutionally the length of terms of officials who otherwise are not mentioned in the constitution. Of the approximately 20 states that have county-level courts (either statutory or constitutional), half provide four-year terms. About five prescribe longer terms, including ten-year terms (in two states). (See U.S., Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System* (Washington, D.C.: Government Printing Office, 1971), pp. 105-06, table 19.)

About three-fourths of the states that have elected local prosecutors provide four-year terms. Only about four have longer terms, and about 10 prescribe two-year terms. (U.S., ACIR, *supra,* pp. 113-14, table 24.)

Author's Comment

Inasmuch as all other matters concerning the offices of criminal district attorney and judges of statutory courts—including their very existence— are left to the legislature, the length of their terms also should be left to the legislature. To accomplish this it would be necessary to delete not only this section but also Section 30 of Article XVI.

ARTICLE VI

SUFFRAGE

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

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

Second: Idoits and lunatics.

Third: All paupers supported by any county.

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

History

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

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

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

Art. VI, § 1

Explanation

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

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

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

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

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

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

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

Comparative Analysis

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

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

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

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

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

Author's Comment

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

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

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

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

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

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

Art. VI, § 2

History

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

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

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

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

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

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

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

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

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

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

Explanation

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

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

> The term "residence" is an elastic one and is extremely difficult to define. The meaning that must be given to it depends upon the circumstances surrounding the person involved and largely depends upon the present intention of the individual.

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

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

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

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

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

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

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

Comparative Analysis

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

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

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

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

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

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

Author's Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

History

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

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

Explanation

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

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

Comparative Analysis

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

Author's Comment

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

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

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

History

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

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

Explanation

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

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

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

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

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

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

Comparative Analysis

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

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

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

Author's Comment

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

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

History

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

Explanation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comparative Analysis

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

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

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

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

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

Author's Comment

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

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

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

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

History

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

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

Explanation

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

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

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

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

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

Comparative Analysis

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

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

Author's Comment

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

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

History

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

Explanation

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

Comparative Analysis

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

Author's Comment

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

ARTICLE VII

EDUCATION
THE PUBLIC FREE SCHOOLS

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

History

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

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

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

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

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

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

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

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

Explanation

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

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

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

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

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

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

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

Comparative Analysis

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

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

Author's Comment

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

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

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

History

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

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

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

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

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

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

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

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

Explanation

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

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

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

Comparative Analysis

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

Author's Comment

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

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

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

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

History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Explanation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comparative Analysis

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

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

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

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

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

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

Author's Comment

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

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

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

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

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

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

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

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

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

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

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

History

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

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

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

Explanation

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

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

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

Comparative Analysis

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

Author's Comment

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

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

History

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

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

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

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

Explanation

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

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

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

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

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

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

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

Comparative Analysis

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

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

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

The *Model State Constitution* contains no similar provision.

Author's Comment

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

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

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

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

History

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

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

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

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

Explanation

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

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

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

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

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

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

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

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

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

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

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

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

Comparative Analysis

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

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

Author's Comment

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

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

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

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

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

History

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

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

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

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

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

Explanation

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

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

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

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

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

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

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

Comparative Analysis

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

Author's Comment

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

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

History

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

Explanation

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

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

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

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

Comparative Analysis

No other state constitution contains a comparable provision.

Author's Comment

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

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

History

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

Explanation

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

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

Comparative Analysis

No other state constitution contains a comparable provision.

Author's Comment

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

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

History

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

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

Explanation

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

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

Comparative Analysis

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

Author's Comment

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

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

History

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

Explanation

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

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

Comparative Analysis

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

Author's Comment

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

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

History

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

done to promote a state university under the Republic.

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

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

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

Explanation

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

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

Comparative Analysis

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

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

Author's Comment

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

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

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

History

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

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

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

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

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

Explanation

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

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

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

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

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

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

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

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

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

Comparative Analysis

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

Author's Comment

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

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

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

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

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

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

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

History

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

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

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

Explanation

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

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

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

Comparative Analysis

See the *Comparative Analysis* of Section 11.

Author's Comment

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

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

History

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

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

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

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

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

Explanation

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

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

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

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

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

Comparative Analysis

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

Author's Comment

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

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

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

History

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

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

Explanation

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

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

Comparative Analysis

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

Author's Comment

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

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

History

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

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

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

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

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

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

Explanation

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

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

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

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

Comparative Analysis

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

Author's Comment

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

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

History

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

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

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

Explanation

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

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

Comparative Analysis

This section is unique to the Texas Constitution.

Author's Comment

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

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

History

This section was added in 1928.

Explanation

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

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

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Article VII, Section 8, to the extent it deals with the terms of members of the State Board of Education, duplicates this section.

Comparative Analysis

Only three other state constitutions include mention of the terms of officers of a public education system. One authorizes the legislature to fix the terms of officers, other than the state superintendent, who supervise public instruction; one specifies that the terms of the board of trustees of a particular university be 12 years with one-third of them expiring every four years; and one requires terms with an even number of years not exceeding four. The *Model State Constitution* contains no provision on terms of office in the educational system.

Author's Comment

See the *Author's Comment* on Article XVI, Section 30.

Sec. 16. COUNTY TAXATION OF UNIVERSITY LANDS. All land mentioned in Sections 11, 12, and 15 of Article VII, of the Constitution of the State of Texas, now belonging to the University of Texas shall be subject to the taxation for county purposes to the same extent as lands privately owned; provided they shall be rendered for taxation upon values fixed by the State Tax Board; and providing that the State shall remit annually to each of the counties in which said lands are located an amount equal to the tax imposed upon said land for county purposes.

History

As a result of the vast land grants made to The University of Texas, many Texas counties contain large areas of this public land. The long-standing policy of the board of regents has been to execute mineral leases on these lands instead of offering them for outright sale. The property tax being the primary revenue source for counties, the thinking behind this section seems to have been to insure taxability of university fund lands for county purposes. (See Hankerson, "Special Governmental Districts," 35 *Texas L. Rev.* 1004 (1957).)

The section was added in 1930 and for no good reason was also called "Section 16" notwithstanding a Section 16 adopted in 1928.

Explanation

The policy underlying this section is clear enough, but why put it in the constitution? The section is probably a result of a conglomeraion of ideas. First, proponents of this section may have assumed that the phrase "and all other property devoted exclusively to the use and benefit of the public" in Section 9 of Article XI exempted state-owned property in addition to the city and county-owned property exempted under that section. Fifteen years after the adoption of Section 16 (1930) the Texas Supreme Court seemed to agree with that construction of Article XI, Section 9. Such an interpretation is inconsistent, however, with the permissible exemption of public property allowed under Article VIII, Section 2. (See *Lower Colorado River Authority v. Chemical Bank & Trust,* 144 Tex. 326, 190 S.W.2d 48 (1945). For further discussion see the *Explanation* of Art. XI, Sec. 9.) Second, as suggested in the *History,* the drafters may simply have wanted a constitutional guarantee that the specified lands would be taxable by counties. Third, some might have held the notion that, notwithstanding Section 2 of Article VIII and Section 9 of Article XI, state property is exempt from taxation under some implied constitution-

al limitation. The attorney general expressed this latter view some ten years after the adoption of this section:

> It is our opinion that land belonging to the State of Texas is exempt from taxation unless there is an express enactment to that effect. We do not have any decisions from this jurisdiction directly on this point. . . . [W]hen the state decided that the land belonging to the Permanent University Fund should be subject to taxation for county purposes, it was necessary to adopt Article VII, Section 16(a) of the Constitution. (Tex. Att'y Gen. Op. No. 0-1861 (1940).)

The 1940 opinion quoted from above involved land acquired by The University of Texas under a will directing that the property be used by the university to establish and maintain a special lecture foundation (revenue derived from renting the land actually went to a designated scholarship fund). In ruling that the property was exempt from taxation the attorney general said that Section 16 (1930) did not apply to the land "because it is not a part of the Permanent University Fund, *and* it did not belong to the University at the time said amendment went into effect." (Emphasis added.) According to this opinion, then, Section 16 (1930) applies only to permanent university fund land, not to land donated to the university that is "limited to specific purposes" within the meaning of Section 11 and therefore excluded from the permanent fund. Furthermore, land dedicated to the permanent university fund after the effective date of Section 16 (1930) apparently is not covered. Though not explicitly stated in the opinion, this construction must rest on the phrase "now belonging to the University of Texas" in the first clause of Section 16 (1930).

The second and third clauses of this section have not been the subject of any authoritative writing to date. As a general rule, each individual county in Texas does its own appraising for property tax purposes. But under the second clause of this section appraisal of university fund land subject to county taxation is done by a state agency, the state tax board. The third and final clause is interesting in that it provides that the state (*i.e.*, the state general revenue fund), not The University of Texas, picks up the tab. (See, *e.g.*, the current appropriations act, Tex. Laws 1975, Ch. 743, which budgets $260,000.00 for county taxes on university lands for fiscal 1975.)

Comparative Analysis

No similar provision appears in the constitution of any other state or the *Model State Constitution.*

Author's Comment

Whether the exception preserved in Section 16 need be included in a revised constitution will depend in large part upon the overall taxation structure adopted. (See Art. VIII, *Introductory Comment.*)

> Sec. 17. STATE AD VALOREM TAX FOR PENSIONS AND FOR PERMANENT IMPROVEMENTS AT INSTITUTIONS OF HIGHER LEARNING. In lieu of the state ad valorem tax on property of Seven Cents ($.07) on the One Hundred Dollars ($100.00) valuation heretofore permitted to be levied by Section 51 of Article III, as amended, there is hereby levied, in addition to all other taxes permitted by the Constitution of Texas, a state ad valorem tax on property of Two Cents ($.02) on the One Hundred Dollars ($100.00) valuation for the purpose of creating a special fund for the continuing payment of Confederate pensions as provided under Section 51, Article III, and for the establishment and continued maintenance of the State Building Fund as

provided in Section 51b, Article III, of the Constitution.

Also, there is hereby levied, in addition to all other taxes permitted by the Constitution of Texas, a state ad valorem tax on property of Ten Cents ($.10) on the One Hundred Dollars ($100.00) valuation for the purpose of creating a special fund for the purpose of acquiring, constructing and initially equipping buildings or other permanent improvements at the designated institutions of higher learning provided that none of the proceeds of this tax shall be used for auxiliary enterprises; and the governing board of each such institution of higher learning is fully authorized to pledge all or any part of said funds allotted to such institution as hereinafter provided, to secure bonds or notes issued for the purpose of acquiring, constructing and initially equipping such buildings or other permanent improvements at said respective institutions. Such bonds or notes shall be issued in such amounts as may be determined by the governing boards of said respective institutions, shall bear interest not to exceed four per cent (4%) per annum and shall mature serially or otherwise in not more than ten (10) years; provided further, that the state tax on property as heretofore permitted to be levied by Section 9 of Article VIII, as amended, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of the public free schools, shall never exceed Thirty Cents ($.30) on the One Hundred Dollars ($100.00) valuation. All bonds shall be examined and approved by the Attorney General of the State of Texas, and when so approved shall be incontestable; and all approved bonds shall be registered in the office of the Comptroller of Public Accounts of the State of Texas. Said bonds shall be sold only through competitive bids and shall never be sold for less than their par value and accrued interest.

The following state institutions then in existence shall be eligible to receive funds raised from said Ten Cent ($.10) tax levy for the twelve-year period beginning January 1, 1966, and for the succeeding ten-year period:

Arlington State College at Arlington
Texas Technological College at Lubbock
North Texas State University at Denton
Lamar State College of Technology at Beaumont
Texas College of Arts and Industries at Kingsville
Texas Woman's University at Denton
Texas Southern University at Houston
Midwestern University at Wichita Falls
University of Houston at Houston
Pan American College at Edinburg
East Texas State College at Commerce
Sam Houston State Teachers College at Huntsville
Southwest Texas State College at San Marcos
West Texas State University at Canyon
Stephen F. Austin State College at Nacogdoches
Sul Ross State College at Alpine
Angelo State College at San Angelo.

Eighty-five percent (85%) of such funds shall be allocated by the Comptroller of Public Accounts of the State of Texas on June 1, 1966, and fifteen per cent (15%) of such funds shall be allocated by said Comptroller on June 1, 1972, based on the following determinations:

(1) Ninety per cent (90%) of the funds allocated on June 1, 1966, shall be allocated to state institutions based on projected enrollment increases published by the Coordinating Board, Texas College and University System for fall 1966 to fall 1978.

(2) Ten per cent (10%) of the funds allocated on June 1, 1966, shall be allocated to certain of the eligible state institutions based on the number of additional square feet needed in educational and general facilities by such eligible state institution to meet the average square feet per full time equivalent student of all state senior institutions (currently numbering twenty-two).

(3) All of the funds allocated on June 1, 1972, shall be allocated to certain of the eligible state institutions based on determinations used in the June 1, 1966, allocations except that the allocation of fifty per cent (50%) of the funds allocated on June 1, 1972, shall be based on projected enrollment increases for fall 1972 to fall 1978, and fifty per cent (50%) of such funds allocated on June 1, 1972, shall be based on the need for

additional square feet of educational and general facilities.

Not later than June first of the beginning year of each succeeding ten-year period the Comptroller of Public Accounts of the State of Texas shall reallocate eighty-five per cent (85%) of the funds to be derived from said Ten Cent ($.10) ad valorem tax for said ten-year period and not later than June first of the sixth year of each succeeding ten-year period said Comptroller shall reallocate fifteen per cent (15%) of such funds to the eligible state institutions then in existence based on determinations for the said ten-year period that are similar to the determinations used in allocating funds during the twelve-year period beginning January 1, 1966, except that enrollment projections for succeeding ten-year periods will be from the fall semester of the first year to the fall semester of the tenth year. All such designated institutions of higher learning shall not thereafter receive any general revenue funds for the acquiring or constructing of buildings or other permanent improvements for which said Ten Cent ($.10) ad valorem tax is herein provided, except in case of fire, flood, storm, or earthquake occurring at any such institution, in which case an appropriation in an amount sufficient to replace the uninsured loss so incurred may be made by the Legislature out of any General Revenue Funds. The State Comptroller of Public Accounts shall draw all necessary and proper warrants upon the State Treasury in order to carry out the purpose of this Amendment, and the State Treasurer shall pay warrants so issued out of the special fund hereby created for said purpose. This Amendment shall be self-enacting. It shall become operative or effective upon its adoption so as to supersede and repeal the former provisions of this Section; provided further, that nothing herein shall be construed as impairing the obligation incurred by any outstanding notes or bonds heretofore issued by any state institution of higher learning under this Section prior to the adoption of this Amendment but such notes or bonds shall be paid, both as to principal and interest, from the fund as allocated to any such institution.

History

This section was added in 1947. In the 1947 version the first paragraph differed from the present wording in two substantive respects: no mention was made of the State Building Fund—it came into existence in 1954— and the paragraph ended with an authorization to the legislature to reduce the 2¢ tax. The second paragraph picked up the 5¢ taken from the Confederate Pensions tax (then in Sec. 51 of Art. III) and levied it to create annual income which could be pledged to retire bonds issued by certain state colleges for construction and initial equipment of buildings. There were numerous details, many of which still remain. One major provision ended the power to issue the bonds 30 years from the effective date of the amendment and ended the 5¢ tax after all bonds were retired, a period that could be an additional ten years. The third paragraph allocated the income for the first ten years among 14 colleges by specific percentages carried to five decimal places. The fourth paragraph contained details for allocating the money for each succeeding ten-year period. The paragraph also forbade providing other state funds for buildings except to restore losses from fires and acts of God. Finally, the paragraph contained the telltale confession that most of the section was statutory: "This amendment shall be self-enacting."

The statutory rigidity of the section was presumably the reason that it was soon amended. The 1956 amendment made a necessary change in the first paragraph but the change as made was ridiculous. In 1954 Section 51-b of Article III was adopted. One of its provisions took the 2¢ away from Section 17 and "hereby levied" it under Section 51-b. Instead of dropping the first paragraph altogether, the end of the paragraph was redrafted to refer to Section 51-b. (The present version is substantially the same as the 1956 version. Both refer to Section "51b," not "51-b,") The result is that two sections, 17 and 51-b, battle with each other to levy the same 2¢ tax.

The second paragraph retained more or less the same details except that the

myth that this would all end was changed to a certain date, September 1, 1978, instead of December 31, 1986, the outside date found in the original wording. The pargraph continued the provision that the state property tax permitted under Section 9 of Article VIII was limited to 30¢ even though Section 1-a of Article VIII, adopted in 1948, had abolished the tax as of January 1, 1951.

The third paragraph allocated the income among 12 colleges instead of 14 for what was now to be the second ten-year period. Instead of percentages to five decimal places, the formula from the original fourth paragraph was used, but with perfecting language as befits a "statute." Part of the original formula used the words "full-time student." In the 1956 version the following appeared: "(fifteen (15) semester credit hours shall constitute one full-time student)." (This is a strange definition; students are normally human beings.)

The fourth paragraph repeated the new allocation formula, the act of God exception, and the self-enactment statement. This last item suddenly became complicated. Having said "This amendment shall be self-enacting," the drafter realized apparently that he had problems, for he went on to say that it (a) did not become effective upon adoption; (b) did not repeal or suspend the original Section 17; (c) would become operative on January 1, 1958; (d) did not impair anything done under the original section; (e) folded into the section some actions undertaken pursuant to a named statute; and (f) repealed the statute. It should be noted that there was a single vote in 1956 on this amendment, an amendment of Section 18, and a new Section 11a. All three sections have since been amended, which makes it a rather pointless exercise to spell out the 1956 interrelationships among them.

The 1956 perfecting amendment also lasted less than ten years. The current version dates from November 2, 1965.

Explanation

This section presently does two things. First, it levies a tax, something that belongs in the article on revenue and taxation. Second, it provides in the most excessive detail for the use of the tax money for higher education. The two will be discussed separately.

The tax. The first paragraph, as noted in the *History,* is inoperative. The second paragraph levies a 10¢ ad valorem state property tax. If Section 1-e of Article VIII remains effective, this 10¢ tax will be the only state property tax after December 31, 1978. The second paragraph still continues the obsolete provision concerning the state property tax formerly authorized by Section 9 of Article VIII.

The tax proceeds. The second paragraph dedicates tax proceeds to a special building fund for the stated purpose "of acquiring, constructing and initially equipping buildings or other permanent improvements at the designated institutions . . . ." The attorney general on several occasions has ruled that this means additional structures or improvements resulting in expansion of existing facilities, not repair or alteration of existing facilities. (Tex. Att'y Gen. Op. Nos. V-1427 (1952); V-931 (1949); and V-848 (1949).) The governing board of each institution is directly granted authority to pledge "all or any part" of its allocated share of the building fund to secure bonds to finance the authorized permanent improvements. Unlike Section 18, which permits a 30-year maturity for permanent university fund bonds, this section limits building fund bonds to a maximum maturity of ten years. The 4 percent interest ceiling is no longer operative because of the addition in 1972 of Section 65 of Article III raising the ceiling to "a weighted average annual interest rate of 6%."

Inclusion of "Arlington State College" (now The University of Texas at

Arlington) is somewhat of an anomaly and is illustrative of the chaos extant in higher education organization in Texas. The school is part of the "statutory" University of Texas System for administrative purposes but participates in the Section 17 college building fund rather than the Section 18 University of Texas System bonding program. When the school was in Section 18 (prior to the 1965 and 1966 amendments; see the *History* of Section 18), it was part of the Texas A&M System.

A remarkable feature of Section 17 is the absence of any maximum debt limitation, certainly an aberration insofar as Texas constitutional debt provisions are concerned. See the *Author's Comment* on this section for further discussion.

The 1965 amendment increased the number of participating institutions from 12 to 17 and inaugurated a rather complicated allocation formula that is based not only on enrollment (as had been done since 1947) but also on an additional factor:

> . . . the number of additional square feet needed in educational and general facilities by such eligible institutions to meet the average square feet per full time equivalent student of all state senior college institutions (currently numbering twenty-two).

The proceeds are allocated for successive ten-year periods after the first, a 12-year period that began in 1966 and will end in 1978.

The comptroller's computation of allocations for each decennium is done in two separate stages: the first at the beginning of the ten-year interval and the second "no later than June first of the sixth year." In the first stage the comptroller allocates among the participating schools 85 percent of the proceeds for that ten-year period, and in the second stage he allocates the remaining 15 percent, but according to a different formula. Ninety percent of the first-stage proceeds (*i.e.*, 90 percent of 85 percent of the total for the ten-year period) is allocated on the basis of projected enrollment at each school and the other 10 percent on the square-foot factor. In allocating the second-stage proceeds (*i.e.*, 15 percent of the ten-year total), the two factors (*i.e.*, projected enrollment and square footage) are given equal weight. This process of allocation was apparently adopted in response to criticism that the previous method, based solely on student enrollment, was a grossly inaccurate way to determine the varying capital needs of participating institutions. (See Texas Legislative Council, *Public Higher Education in Texas* (Austin, 1950), p. 118.)

The provision precluding general revenue appropriations to participating schools for capital improvements (except to replace losses from natural disasters) parallels a provision in Section 18 pertaining to The University of Texas and Texas A&M systems.

Comparative Analysis

Obviously, Section 17 is peculiar to the Texas Constitution.

Author's Comment

This section represents bad constitution making with an abundance of irony. The delegates to the 1875 Convention, recognizing the great foresight of their predecessors, preserved the public domain set aside for higher education. Unfortunately, the delegates used a term, "The University of Texas," to denominate "higher education." Over the years some institutions of higher education were created that were not included under the umbrella term "The University of Texas." Thus, the first irony: By misguided specificity, the delegates, who were surely interested in higher education as such, had created two levels of higher education, one favored by a constitutional capital fund, the other dependent wholly upon

legislative largesse.

Obviously, this is an intolerable situation. The sensible solution would be to include all higher education under the capital fund. But this would not be acceptable to "The University of Texas," since it would lose by having to share its income from the capital fund with others. Thus, the second irony: One would think that a university in pursuit of the truth would rise to the logic of the situation; but, alas, an institution faced with a choice whether to adhere to its principles or preserve its status, tends to fudge the principles. Therefore, the "inferior" higher institutions must try to elevate themselves to the same status as the favored "The University of Texas." This can be done only through the constitution.

Consequently, the other institutions ask for a fund just like the permanent university fund. But this is easier said than done. There is no more public domain to set aside, no capital to earmark. The only solution is to earmark tax funds. Thus, irony number three: The legislature, which must elevate the other institutions to constitutional status by proposing amendments, combined their legislative policy with their constitutional policy; having decreed by statute that income from the permanent university fund must be used for capital improvements and not for operating expenses, the legislature proposed an amendment that earmarks annual tax income to pay for capital improvements for the other institutions..Thus, irony number four: Whatever simplistic logic transformed income from capital endowment for The University of Texas into creation of capital assets is transferred to the other institutions of higher education.

This confusion having been created, how can it be unraveled? There is surely no good reason for killing off the permanent university fund; this would simply tempt a lot of people to live on capital until it was gone. So long as there is flexibility in administration of investment, the existence of the fund does not hamper the government; so long as the income is not too large there is no misallocation of available resources. But it is undoubtedly not politically feasible either to divert some of the permanent fund income to the other institutions or to tell them that they cannot have any comparable constitutional guarantee of money. One solution would be to tie an appropriation for the other institutions to the permanent fund income. A model section might read thus:

> The Permanent University Fund is preserved and the income therefrom may be used only by The University of Texas System and the Texas A&M System for such educational purposes as may be specified by general law. Each year [or each biennium] there is to be appropriated to all other state senior institutions of higher learning an amount in the aggregate at least as large as the estimated income from the Permanent University Fund for the same period. The appropriation may be used only for the same purposes specified in the general law governing uses of the income from the Permanent University Fund.

The foregoing is not ideal, but there is no ideal short of letting all higher educational institutions share in the income. But the suggestion preserves the status of The University of Texas and Texas A&M Systems, preserves the purpose of the 10¢ tax without freezing the tax in the constitution, and leaves neither The University of Texas and Texas A&M Systems nor the other institutions in a position of gaining or losing – something which can happen today if fund income goes up and tax receipts go down, or vice versa.

The bond authorization of Section 17 is, of course, required because of Section 49 of Article III prohibiting state debt. Unlike most other Texas constitutional debt authorizations (*e.g.*, Art. III, Secs. 49-c, 49-e, and 50b), which are payable from the state's general revenue fund, Section 17 bonds are payable out of dedicated tax proceeds. While other constitutional bond authorizations prescribe a definite debt

ceiling, this section permits perpetual issuance of bonds, so long as annual dedicated tax revenues are sufficient to meet annual debt service requirements. In essence, Section 17 authorizes "revolving" or perpetual debt. Those who would revise the constitution should consider the wisdom of continuing a system of financing capital improvements for higher education that is substantially insulated from control by the people.

Sec. 18. TEXAS A&M UNIVERSITY SYSTEM; UNIVERSITY OF TEXAS SYSTEM; BONDS OR NOTES PAYABLE FROM INCOME OF PERMANENT UNIVERSITY FUND. For the purpose of constructing, equipping, or acquiring buildings or other permanent improvements for the Texas A&M University System, including Texas A&M university, Prairie View Agricultural and Mechanical College of Texas at Prairie View, Tarleton State College at Stephenville, Texas Agricultural Experiment Stations, Texas Agricultural Extension Service, Texas Engineering Experiment Station at College Station, Texas Engineering Extension Service at College Station, and the Texas Forest Service, the Board of Directors is hereby authorized to issue negotiable bonds or notes not to exceed a total amount of one-third (⅓) of twenty per cent (20%) of the value of the Permanent University Fund exclusive of real estate at the time of any issuance thereof; provided, however, no building or other permanent improvement shall be acquired or constructed hereunder for use by any part of the Texas A&M University System, except at and for the use of the general academic institutions of said System, namely, Texas A&M University, Tarleton State College, and Prairie View A&M College, without the prior approval of the Legislature or of such agency as may be authorized by the Legislature to grant such approval; and for the purpose of constructing, equipping, or acquiring buildings or other permanent improvements for The University of Texas System, including the Main University of Texas at Austin, The University of Texas Medical Branch at Galveston, The University of Texas Southwestern Medical School at Dallas, The University of Texas Dental Branch at Houston, Texas Western College of The University of Texas at El Paso, The University of Texas M. D. Anderson Hospital and Tumor Institute at Houston, The University of Texas Postgraduate School of Medicine, The University of Texas School of Public Health, McDonald Observatory at Mount Locke, and the Marine Science Institute at Port Aransas, the Board of Regents of The University of Texas is hereby authorized to issue negotiable bonds and notes not to exceed a total amount of two-thirds (⅔) of twenty per cent (20%) of the value of the Permanent University Fund exclusive of real estate at the time of any issuance thereof; provided, however, no building or other permanent improvement shall be acquired or constructed hereunder for use by any institution of The University of Texas System, except at and for the use of the general academic institutions of said System, namely, The Main University and Texas Western College, without the prior approval of the Legislature or of such agency as may be authorized by the Legislature to grant such approval. Any bonds or notes issued hereunder shall be payable solely out of the income from the Permanent University Fund. Bonds or notes so issued shall mature serially or otherwise not more than thirty (30) years from their respective dates.

The Texas A&M University System and all of the institutions constituting such System as hereinabove enumerated, and The University of Texas System, and all of the institutions constituting such System as hereinabove enumerated, shall not receive any General Revenue funds for the acquiring or constructing of buildings or other permanent improvements, except in case of fire, flood, storm, or earthquake occurring at any such institution, in which case an appropriation in an amount sufficient to replace the uninsured loss so incurred may be made by the Legislature out of General Revenue funds.

Said Boards are severally authorized to pledge the whole or any part of the respective interests of Texas A&M University and of The University of Texas in the income from the Permanent University Fund, as such interests are now apportioned by Chapter 42 of the Acts of the Regular Session of the 42nd Legislature of the State of Texas, for the purpose of securing the payment of the principal and interest of such bonds or notes. The Permanent University Fund may be invested in such bonds or notes.

All bonds or notes issued pursuant hereto shall be approved by the Attorney General of Texas and when so approved shall be incontestable. This Amendment shall be self-enacting; provided, however, that nothing herein shall be construed as impairing any obligation heretofore created by the issuance of any outstanding notes or bonds under this Section by the respective Boards prior to the adoption of this Amendment but any such outstanding notes or bonds shall be paid in full, both principal and interest, in accordance with the terms of such contracts.

History

Section 18 was adopted in 1947 at the same time that Section 17 was adopted. The purpose was also the same as that of Section 17: to provide a means of raising capital for expansion necessitated by the post-war influx of students. The original version authorized a bond issue of $10 million for "The University of Texas" and $5 million for the "Agricultural and Mechanical College of Texas," payable out of permanent university fund income. An amendment in 1956 among other things raised the debt ceiling to a maximum of two-thirds (for the University of Texas System) and one-third (for the then A&M College System) of 20 percent of the value of the permanent university fund. The 1956 amendment also enumerated the specific schools included in each system and lengthened the bond-maturity limitation from 20 to 30 years. By amendment in 1966 Arlington State College (now the University of Texas at Arlington) was removed from the A&M System; the previous year that school had been placed in the college building fund by amendment to Section 17.

Explanation

This section does essentially the same thing for the Texas A&M University System and The University of Texas System as the preceding section does for the 17 designated schools, except that Section 18 bonds and notes are payable out of the available university fund rather than a dedicated state property tax. Like Section 17, this section directly grants the systems' governing boards authority to issue bonds or notes, but, without all the complicated allocation detail spelled out, the boards under Section 18 have much more discretion in determining which schools get how much. The third paragraph, however, does freeze the traditional statutory one-third/two-thirds division of the available fund to the extent required for debt service. (See also the *Explanation* of Sec. 11.) It should also be noted that since Section 18 does not specify a maximum interest rate, the maximum prescribed by Article III, Section 65, does not apply, leaving the regents free to set interest as high as necessary to sell the bonds.

Section 18 bonds and notes may be issued only for use by the institutions specified in the section, not for institutions made part of either system by statute. (Tex. Att'y Gen. Op. No. WW-783 (1960).)

Comparative Analysis

Section 18 is unique to the Texas Constitution.

Author's Comment

Like Section 17, Section 18 is one of several constitutional provisions necessitated by Section 49 of Article III. But unlike Section 17, debt under this section is payable out of permanent university fund income, not taxes. Under these circumstances it is perhaps justifiable to lodge bond-issuing authority directly in the regents. (For related discussion see the *Author's Comment* on Sec. 17.)

ARTICLE VIII

TAXATION AND REVENUE

Introductory Comment

Much of the constitutional confusion in the 1876 document and its many amendments is attributable to the original severe limitations on the raising and spending of money and the multitude of exceptions to the limitations added over the years. It was noted in 1957:

> Slightly less than one-third of the total number of sections in the present constitution are partially or wholly concerned with some aspect of governmental finance, and out of this number no less than forty-eight relate specifically to the subject of revenue and taxation. (Anderson, "Constitutional Aspects of Revenue and Taxation in Texas," 35 *Texas L. Rev.* 1011 (1957).)

In a well-ordered and well-controlled constitution, a section-by-section analysis is sufficient; when things get as confused as is now the case with revenue and taxation, an overview is essential.

History of the problem. Prior to 1875, the several constitutions had had either one or two short provisions on taxation. (See *History* of Sec. 1 of this article.) There had also been a few provisions on spending but they were not particularly restrictive. The 1875 Convention came about because of the corruption and excesses of the Reconstruction government and the almost nationwide corruption associated with "internal improvements," which in Texas meant railroads. Corruption and excesses principally affected the general public in their pocketbooks by way of high taxes. Hence, the delegates to the convention were resolved to prevent corruption, to curtail spending, and to cut taxes. One might assume that the delegates would realize that curtailing the power to raise money by taxation and borrowing would automatically curtail spending. But feelings were running so high that the delegates hit out at both.

Preoccupation with parsimony is illustrated by the absence of a verbatim record of the convention debates. Solely because of a desire to save money, the delegates refusal to hire stenographers to record the debates. (*Journal,* p. 128.) Equally illustrative is the recurring battle over the proper level of compensation for executive and judicial officers. (See *Debates,* pp. 152-55, 162-66, 424-31.)

Frugality was the principle which guided the Committee on Revenue and Taxation. The committee's report of a proposed article began:

> Your committee, to whom has been entrusted the consideration of the question of revenue and taxation, in the correct solution of which are involved the necessity of immediate relief to the over-burdened tax-payers of the State, and at the same time the antagonistic requirements for increase of revenue and avoidance of further sale of State responsibilities, have endeavored to define a system of taxation based upon consideration of natural rights and upon correct principles of political economy, limiting the assessment and expenditure strictly to legitimate objects of government and to so guard the definement as to prevent future variance and abuses. (*Journal,* pp. 378-79.)

The original proposal was soon replaced by a much shorter article proposed by a dissenting member of the committee. (*Id.,* at 422 and 455.) This substitute was in turn extensively amended.

The flavor of the original proposal can be demonstrated by one proposed section:

> Sec. 4. The legislative power to tax shall extend only to the levying of such an amount as shall suffice to pay the necessary expenses of the government of the State, the support of its asylums for the unfortunate; provision for the ordinary expenses of the courts

(including cost of libraries) and the payment of their officers; the public defence; the maintenance of the peace; the arrest of criminals; the survey of the public lands or geological survey of any portion of the State; the maintenance of the public schools; the enforcement of the laws; the payment of the floating or unfunded debt; the maintenance of quarantine regulations; and to the payments of the principal and interest of the bonded public debt, and shall not extend to any system of public improvements, except the erection of necessary public buildings, and the improvement and ornamentation of the grounds attached thereto; and any proposition to appropriate public money for any purpose deemed of public benefit, and not herein stated, including the erection of any public building whose cost shall exceed a half million dollars, shall be referred by action of the Legislature to the people at a general election, and two-thirds of the popular vote approving, may be authorized by subsequent approval of a majority of the Legislature, for a levy not exceeding in amount two per cent of the property in the State returned for taxation. (*Id.*, at 379-80.)

When the convention finished, the constitution contained a great many restrictions on the expenditure of money, only one of which, Section 6, remained in Article VIII. (The first part of the section just quoted ended up somewhat revised as Sec. 48 of Art. III, repealed in 1969.)

The delegates' concern over taxation was concentrated on the property tax since it was the principal source of revenue. During Reconstruction the property tax soared. For example, the state rate in 1865 was 12½¢ on the $100; by 1871 it had risen to 50¢. In that year the combined state and county property taxes came to $2.17½. This, it is estimated, was the equivalent of an income tax of 21 percent. (See Miller, p. 167.) In addition, there was a state and county poll tax, occupation taxes, and city property taxes. "Conventions of taxpayers were held in a number of counties, and as a culminating protest a convention of the taxpayers of the state was held in Austin on September 22, 23, and 25, 1871, with two hundred and seventeen delegates present representing ninety-four counties." (*Ibid.*)

The significance of all this is that the delegates in 1875 concentrated on the property tax. The original Constitution of 1876 literally had only one limit on the size of any other tax—occupation taxes levied by local governments could not exceed one-half the state tax. Section 9, however, prescribed the maximum property tax that could be levied by county, state, or city. The only exceptions to prescribed maximum rates were for payment of preexisting debt, for public works in Gulf Coast counties (Sec. 7, Art. XI), for schools in cities and towns (Sec. 10, Art. XI, repealed in 1969), and for cities of over 10,000 population (Sec. 5, Art. XI). This last exception had its own maximum rate, however.

The importance of the original rigidity of Section 9 cannot be overstated. The many constitutional amendments authorizing the creation of special districts were necessary only in order to permit additional taxes to be levied upon property. Many other constitutional amendments were either wholly or partially necessary because of the property tax restrictions. Section 9, of course, has been amended six times.

Even in 1876 not all provisions concerning taxation were in Article VIII. Since then, tax provisions have been inserted helter-skelter throughout the constitution. (A table of current tax provisions is provided at the end of this *Introductory Comment.*)

The current confusion is best illustrated by the peregrinations of the Confederate pension state property tax. It first appeared—5¢ on the $100—in Section 51 of Article III by amendment in 1912. In 1924, the rate went from 5¢ to 7¢. In 1947, Section 17 of Article VII was added. It "amended" Section 51 by substituting a 2¢ rate for the 7¢ rate. (Sec. 17 also created a new tax—5¢ on the $100—for the creation of a special fund for certain designated colleges and universities.) Thus, a tax that never should have been in the legislative article was transferred to the education

article where it did not belong either. (The "tax" was transferred; the old words remained in Sec. 51 until 1968.)

Things really began getting complicated in 1954 when Section 51-b was added to Article III. It created another special fund and moved the 2¢ tax thus:

> (d) The State ad valorem tax on property of Two (2¢) Cents on the One Hundred ($100.00) Dollars valuation now levied under Section 51 of Article III of the Constitution as amended by Section 17, of Article VII (adopted in 1947) is hereby specifically levied for the purposes of continuing the payment of Confederate pensions as provided under Article III, Section 51, and for the establishment and continued maintenance of the State Building Fund hereby created.

Although the foregoing provision carefully but inaccurately describes the peregrinations of the 2¢ levy, people soon forgot that they had moved the tax back to Article III. In 1958, Section 66 was added to Article XVI. It provided for payment of pensions to certain Texas Rangers or their widows but "only from the special fund created by Section 17, Article VII."

With the adoption of Section 1-e in 1968, the peripatetic confederate pension tax finally found a resting place in the article on taxation. Even so, people still forgot where the tax provision actually was. Section 1-e of Article VIII states:

> The State ad valorem tax of Two Cents ($.02) on the One Hundred Dollars valuation levied by Article VII, Section 17, of this Constitution shall not be levied after December 31, 1976.

Even in 1875, the convention delegates were not watching each other's left and right hands carefully. Section 1 states that the legislature may impose a poll tax; the original Section 3 of Article VII directly levied a poll tax of one dollar. The original Section 2 of Article VIII granted the legislature power to exempt from taxation "public property used for public purpose"; Section 9 of Article XI directly exempts from taxation such public property of counties, cities, and towns.

Basic constitutional principles of taxation. In a state constitution there is no need to mention any power to tax; the legislature has all the taxing power anybody can dream up. It follows that any affirmative statements about the power to tax are redundant. This is so even if the purpose is to introduce a limitation. It is not necessary, for example, to say that occupation taxes may be imposed as a hook upon which to hang a prohibition against taxing agricultural and mechanical pursuits; it is sufficient to provide that no occupation tax may be imposed on mechanical and agricultural pursuits. ("Mechanics and farmers" would be less ambiguous, of course, but that is another matter.)

Keeping power and limitations on power straight can get complicated. For example, the straightforward proposition "All property shall be taxed in proportion to its value" is not a grant of power to tax. (If it is a command to tax property, it is no more effective than any other affirmative command to the legislature.) The proposition is both a limitation on the power of the legislature to exempt property from any taxation and on either the power to set different rates for different kinds of property or to tax property by any method other than ad valorem. (See *Explanation* of Sec. 1 concerning this ambiguity.) It follows that a grant of power to exempt property from taxation is an exception to the limitation rather than a true grant of power.

Thrust of the Texas limitations. A glance at the table at the end of this *Introductory Comment* reveals that most of the restrictions, limitations, exemptions, and exceptions involve ad valorem property taxes. The state is free to levy and

to authorize local governments to levy any and all other taxes with only two exceptions: there can be no occupation tax on "persons engaged in mechanical and agricultural pursuits"; and local governments may only piggy-back on a state occupation tax and then only to the extent of one-half of the state tax rate. Likewise, there are almost no limitations on the power of the legislature to grant exemptions or make other kinds of classification for nonproperty taxes. The only specific limitation is that the legislature may not exempt anyone from the mandated $1 poll tax. There is, of course, a general limitation that taxes must be equal and uniform, but outside the property field this has been interpreted to mean no more than that taxes must meet the basic limitations of equal protection and due process.

A *look to the future.* It may seen paradoxical but it is relatively easy to clean up the constitutional tax mess. The first step would be to eliminate any mandatory taxes levied directly by the constitution. This would require dropping the poll tax levied by Section 3 of Article VII and the mandatory state property tax levied by Section 17 of the same article. That would permit complete flexibility in determining tax policy on the state level. The second step would be to eliminate the requirement that "[a]ll property in this State, . . . shall be taxed in proportion to its value, . . ." This would provide the legislature with the necessary flexibility to decide whether to tax intangible personal property, tangible personal property, or only real property and whether to classify any one of these kinds of property for different treatment. The third step would be to decide whether the rigidity of "all" property should be put back in to restrict the legislature's power to grant exemptions. (In thinking about this decision it is worth remembering that 13 proposed amendments have involved exemptions, eight of them since 1964.) The fourth step would be to decide whether to put absolute tax limitations on local government in the constitution—that is, to require all the people of the state to make decisions about taxing power or to put the power to set limits in the hands of the people's representatives, the legislature. Once made, the appropriate property tax decisions could be embodied in a couple of relatively simple sections. With that, the tax confusion would evaporate, for all other tax power is relatively unfettered.

TAX PROVISIONS OF THE TEXAS CONSTITUTION

		General
Article VIII	– Section 1	General "grant" and general limitation.
	– Section 3	Taxes for public purposes only.
		State Property Taxes
Article VII	– Section 17	10¢ on the $100.
Article VIII	– Section 1-a	Continuation of state tax donated to local units.
	– Section 1-e	Phased discontinuance of all except the 10¢ on $100 of Section 17.
		Other State Taxes
Article VII	– Section 3	Poll tax.
		Local Property Taxes
Article VIII	– Section 48-d	Rural fire districts.
	– Section 52	Water and road districts.
	– Section 52D	Road tax for Harris County.
	– Section 52e(1967)	Road tax for Dallas County.
Article VII	– Section 3	School district taxes.
	– Section 6a	Local taxation of county school lands.
	– Section 16(1930)	County taxation of state university lands.
Article VIII	– Section 1-a	County tax for farm-to-market roads and flood control.
	– Section 8	Allocation of railroad rolling stock for assessment purposes.
	– Section 9	County tax rate limit.
Article VIII	– Section 18	Equalization of assessment.
Article IX	– Section 4	Hospital district tax for certain counties.

Article IX	– Section 5	Hospital district tax for certain counties and Amarillo.
	– Section 7	Hospital district tax for Hidalgo County.
	– Section 8	Hospital district tax for a precinct of Comanche County.
	– Section 9	Hospital district taxes in general.
	– Section 11	Hospital district taxes for certain counties.
	– Section 12	Airport authority taxes.
Article XI	– Section 4	Tax limit on general law cities and towns.
	– Section 5	Tax limit on home-rule cities.
	– Section 7	Additional taxing power for coastal counties and cities for protection from the sea.
Article XVI	– Section 59	Conservation districts.
		Other Local Taxes
Article VIII	– Section 1	Local occupation tax limited to one-half state tax.
		Exemptions
Article VIII	– Section 1	Household furniture.
	– Section 1-a	Homestead.
	– Section 1-b	Homestead.
	– Section 2	Charitable and educational property; disabled veterans' property.
	– Section 19	Farm products and supplies.
Article XI	– Section 9	Public property.
		Other Limitations
Article III	– Section 55	Taxes forgiven only if ten or more years delinquent.
Article VIII	– Section 1-d	Agricultural property not to be assessed as if nonagricultural.
	– Section 10	Release of taxes in case of public calamity.
	– Section 13	Right of redemption.
	– Section 20	No assessment above fair market value.
		Miscellaneous
Article VII	– Section 3-b	Changing school district boundaries.
Article VIII	– Section 11	Where to pay property tax.

NOTE: Not included are sections that are

obsolete –	Article III, Section 51-b
	Article VIII, Section 1-c
	Article XI, Section 6
administrative –	Article VIII, Section 14
	Article VIII, Section 16
	Article VIII, Section 16a
redundant –	Article VIII, Section 4
	Article VIII, Section 5
	Article VIII, Section 15

Sec. 1. EQUALITY AND UNIFORMITY; TAX IN PROPORTION TO VALUE; POLL TAX; OCCUPATION TAXES; INCOME TAX; EXEMPTION OF HOUSEHOLD FURNITURE. Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The Legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; Provided, that two hundred and fifty dollars worth of household and kitchen furniture, belonging to each family in this State shall be exempt from taxation, and provided further that the occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or

business, shall not exceed one half of the tax levied by the State for the same period on such profession or business.

History

The Constitution of the Republic provided that congress "shall have the power to levy and collect taxes and imposts, excise and tonnage duties; . . ." (Art. II, Sec. 1.) This was, of course, a grant of power, the result of using the United States Constitution as a model. (See *Citizen's Guide,* p. 11.)

The Constitution of 1845 had only two sections dealing with taxation. (Article VII, Secs. 27 and 28.) Combined, the sections were close to Section 1 of the present constitution. The only differences of substance were that the household belongings exemption was permissive, not mandatory; the legislature by two-thirds vote could exempt any other property; and there was no proviso concerning local occupation taxes. There were other differences that appear substantive but really were not. There was no mention of a poll tax, for example, but under normal rules of constitutional power, the legislature could have imposed one. The sections remained unchanged in the 1861 and 1866 Constitutions. The 1869 Constitution dropped the household belongings exemption, but made no other change. (Art. XII, Sec. 19.) This meant only that a two-thirds vote would be required to grant that exemption.

From McKay's *Debates* it is possible to reconstruct reasonably accurately the key issues in the 1875 Convention. There was clearly a strong feeling against exemptions previously granted by the legislature. For example, delegates were particularly concerned that "the property of a powerful railroad corporation had been exempted for twenty-five years." (*Debates,* p. 296.) There was also considerable debate over whether to permit occupations to be taxed. Although some delegates evidently realized that an affirmative statement of taxing power was not necessary, the nature of the debate obviously led any proponent of a power to insist upon inserting it. This was particularly significant in the case of occupation taxes, for the original report of the Committee on Revenue and Taxation proposed that occupation taxes should "be laid only to discourage pursuits immoral in their tendency or not strictly useful, or as a discrimination against itinerant traders." (*Journal,* p. 379.)

Section 1 was put into final form by a series of floor amendments on October 30. As the debate began, Section 1 read:

> Taxation shall be equal and uniform throughout the State, and all property in the State shall be taxed in proportion to its value, to be ascertained as may be provided by law. Provided, there shall be exempt from taxation household and kitchen furniture to the value of two hundred and fifty dollars. The Legislature shall have power to impose *ad valorem* and poll taxes, and also occupation or income taxes, except on agricultural or mechanical pursuits. The Legislature may also, in its discretion, provide for levying a tax on the gross earnings and franchises, or either, of all corporations, or of any class of corporations.

The first amendment on October 30 added the words "belonging to each family in this" to the household exemption. (See *Journal,* p. 524. Omission of "State" is obviously a typographical error.) An amendment was then offered striking the two sentences following the exemption. A substitute section was offered as an amendment to the amendment to strike. This substitute section also struck the same two sentences but substituted a sentence authorizing "occupation and income taxes," prohibiting "any tax upon occupations or pursuits" levied by political subdivisions, but permitting the legislature to return to counties any portion of or all "such occupation or income tax." The convention adjourned for lunch.

Upon reconvening the substitute was withdrawn by the proposer. Mr. Stockdale, Chairman of the Committee on Private Corporations, then offered a new substitute Section 1. This was Section 1 as it now stands except for the occupation tax piggy-back proviso at the end of the section. Mr. Stockdale's substitution was adopted without a roll-call vote. The piggy-back proviso was then offered and adopted. (See *Journal,* pp. 525-26.)

The convention then turned to Section 2. At that moment Section 2 began "All taxes" and continued as it now reads to the second semicolon. The first amendment proposed would have stricken everything through the word "but." Mr. Stockdale proposed to insert the word "occupation" in front of "taxes." The proposal to strike was withdrawn and Mr. Stockdale's amendment was adopted. This explains how—but not why—a reference to occupation taxes ended up in Section 2. (There is a further discussion of Mr. Stockdale's amendments in the *Explanation* below.) There is no explanation for putting the household exemption in Section 1. Indeed, the *Journal* is garbled on this point. On an earlier occasion, Section 2 was offered on the floor but the *Journal* does not show any action taken. Immediately following the entry is a proposal to "amend the amendment" by including the household exemption. This was adopted. (See pp. 467-68.) Thus, it is unclear whether the household exemption was to go into Section 1 or Section 2. What is clear is that on October 30, when the two sections were put into final form, the exemption was in Section 1.

There have been two proposed direct amendments of Section 1. The first defeated in 1927, took the form of an additional section:

> Section 1-a. The Legislature may separate the objects of taxation for State purposes from the objects of taxation for the support of the counties, districts and political subdivisions of the State and counties; and may provide for the levy of an ad valorem tax, or other form of tax, on certain classes of taxable property, or other objects, for State purposes only (including school purposes); or upon certain classes of property, or other objects, for county or local purposes only (including school purposes). In no event shall the rate of such taxes exceed the sum of the limits of such taxes fixed by this Constitution for State, county and other local purposes. The Legislature may provide for the classification of objects of taxation. Taxation shall be equal and uniform.

The foregoing is set out in full because of the difficulty of explaining it, assuming one can figure out what it means. Certainly the voters must have been confused, for the ballot in 1927 described the section as one "providing for changing the taxation system so that the State may derive its income, in whole or in part, from other sources than the ad valorem tax." (H.J.R. 25, Laws, 40th Legislature, 1927, p. 473.) The vote was 16,739 for and 175,484 against. (This was a special election on August 1, 1927. The three other amendments on the ballot also went down to defeat. They received more favorable votes than Sec. 1-a, but none more than 28,000 for. See Marburger, p. 28.)

The second unsuccessful effort was an amendment defeated in 1934. This amendment made two changes in Section 1. The first sentence was altered to read: "Taxation of real property shall be equal and uniform." A new sentence was added between the second and third sentences, reading: "The Legislature may by general laws make reasonable classifications of all property other than real property for the purpose of taxation, and may impose different rates thereon; provided that the taxation of all property in any class shall be equal and uniform."

Again, the voters must have been confused, for this time the legislature went to the other extreme and specified that the ballot should contain "For" and "Against" statements reading:

For [Against] the Amendment to the Constitution of the State of Texas providing that taxation of real property shall be equal and uniform; and that all property in this State, other than that owned by municipal corporations, shall be taxed in proportion to its value as ascertained as may be provided by law; and providing that the Legislature may make reasonable classifications of all property, other than real property, for the purpose of taxation; and that the taxation of all property in any class shall be equal and uniform; and providing further that the Legislature may impose poll tax and occupation tax and income tax and exempting from occupation tax persons engaged in mechanical and agricultural pursuits; and exempting from taxation Two Hundred and Fifty ($250.00) Dollars worth of household and kitchen furniture belonging to each family; and providing that the occupation tax levied by any county, city or town shall not exceed one-half that levied by the State for the same period. (S.J.R. 16, Laws, 43rd Legislature, 1933, p. 991.)

The vote, this time at the regular election, was 106,034 in favor, 245,031 against. (Seven other amendments were voted on at the same time. All were defeated, four by wider margins than the Sec. 1 proposal. (See Marburger, pp. 29-30.) The amendment most decisively defeated is discussed under the *History* of Sec. 3 of this article.)

There have been several indirect amendments of Section 1. The first was Section 19, added in 1879. Section 1-d, added in 1966, is another. Section 2 is an exception to the requirement that all property must be taxed. It follows that all direct and indirect amendments of that section are indirect amendments of Section 1. There was also an unsuccessful attempt at an indirect amendment of Section 1. In 1968 the voters rejected a proposal to add a Section 1-j. It would have permitted the legislature to authorize a refund of the excise tax paid on "cigars and tobacco products" if they ended up being sold at retail in Texarkana or contiguous incorporated cities and towns. (One wonders whether the drafter of this amendment was a cigar smoker who thought cigars deserved special mention. It is hard to believe that he thought that cigars are not tobacco products.)

Explanation

In general. Section 1 should be viewed only as a limitation on the power to tax. Thus, there is no need to discuss any affirmative grant of taxing power unless the grant contains within it words of limitation. For example, Section 1 states that the legislature may impose a tax on incomes. This is an unnecessary grant of power. But a question can be raised whether the words "of both natural persons and corporations" are words of limitation in the sense that if an income tax is imposed it must be imposed on both individuals and corporations. Since Texas has not enacted an income tax, there is no judicial interpretation of the grant.

In the light of the generally sloppy drafting by the 1875 delegates it seems fair to conclude that no limitation was intended. A reading of the *Journal* of the convention reveals that there were two ideas floating around. One was to continue the power to tax incomes and occupations. (Beginning with the 1845 Constitution income taxes and occupation taxes have always gone together.) The other was to tax the incomes and franchises of corporations. Mr. Stockdale, who offered the floor amendment that became all of Section 1 (except for the final piggy-back proviso), would appear to have been trying to bring together the two ideas. (See *Journal,* pp. 380, 465, 489, 525.) It is also worth noting that his floor amendment created two sentences, the first limited to occupation taxes, the second covering income taxes but ending with the traditional "mechanical and agricultural pursuits" exception from an occupation tax. (The 1845 section was one sentence, but the order was: income, occupation, exception.) In both sentences natural persons and corporations are stated to be

subject to a tax. This leads one to guess that Mr. Stockdale was interested in being sure that corporations were covered rather than in being sure that any tax would apply to both. This is supported by the wording of the piggy-back exception, which was added immediately after adoption of the proposal. The exception speaks of an occupation tax on "persons or corporations." And immediately following that addition, as set out in the *History* of this section, Mr. Stockdale stopped a deletion of the first "sentence" of Section 2 by proposing the insertion of the word "occupation" in front of "taxes." Mr. Stockdale, in preserving the power of classification of at least occupation taxes, surely did not intend to prohibit classification of individuals and corporations for purposes of income taxes. (It must be conceded that, absent verbatim debates, delegates' intentions are not easily discerned.)

There is nothing further to say about income taxes. Poll taxes are discussed in the *Explanation* of Section 3 of Article VII. The household goods exemption is discussed with the other exemptions of Section 2. The first "sentence" of Section 2 is discussed below in conjunction with other aspects of occupation taxes. By virtue of the principle that the power to tax is unlimited, to say nothing of Section 17 of this article, it follows that except for the first sentence of Section 1 there are no limitations on imposing a tax not mentioned in the constitution. (As noted in the following discussion of occupation taxes, this has not always been the conventional wisdom in Texas.)

Equality and uniformity. There are several puzzling problems with the first sentence of Section 1. The first problem is that the opening words of Section 2 include "equal and uniform" in a context that requires equality and uniformity only within a class. From this one could argue that "equal and uniform" in Section 1 does not permit classifications for purposes of levying any other tax.

The second puzzling problem is the meaning of the first sentence in relation to the second sentence. There is reason to believe that the second sentence means that property is to be taxed only *ad valorem.* These words first appeared in the 1845 Constitution. Under the Republic there had been a mix of ad valorem taxes and specific taxes on certain property—for example, $1 a head on cattle. (See Miller, pp. 36-39.) But if this is the only meaning of the second sentence, then some other constitutional provision has to be relied upon to prohibit taxing intangible property at a different rate from tangible property or to prohibit taxing residential real property at a different rate from the rate on farm land. But if it is the first sentence that serves this purpose, then "equal and uniform" prohibits classification of any objects of taxation except occupations.

The third puzzling problem is determining how all this logic turns out not to be the law. As will be seen, the law is that "equal and uniform" does not prohibit reasonable classifications in the case of any tax except the property tax; as for property, the law is that all property must be taxed at the same ad valorem rate. One possible explanation is that the drafters of the original "equal and uniform" sentence meant it to apply only to property taxes. Under the Republic there were different ad valorem rates for different kinds of property—for example, "The act of 1842, however, levied a rate of 1/10 of 1% on land owned by residents, 1/5 of 1% on that owned by nonresidents, 1/4 of 1% on town lots and improvements and money loaned at interest, and 1/2 of 1% on pleasure carriages." (See Miller, p. 38.) Thus, it may be that everybody from 1845 to 1875 knew what these two sentences meant—namely, all property is to be taxed only ad valorem and only at a uniform rate.

This is the law as derived from the cases. Unfortunately, the courts usually do not spell out exactly how they reached this result. In most instances involving attacks on discriminatory or unequal property assessments, the courts simply state the applicable constitutional rule by quoting or paraphrasing both sentences. (See, for

example, *State v. Federal Land Bank of Houston,* 160 Tex. 282, 329 S.W.2d 847 (1959); *Whelan v. State,* 155 Tex. 14, 282 S.W.2d 378 (1955); *State v. Whittenburg,* 153 Tex. 205, 265 S.W.2d 569 (1954).) On other occasions the courts speak of equality and uniformity in the words of the *Lively* case discussed below. (See, for example, *Aycock v. Travis County,* 255 S.W.2d 910 (Tex. Civ. App.—Austin 1953, *writ ref'd); Weatherly Independent School Dist. v. Hughes,* 41 S.W.2d 445 (Tex. Civ. App.—Amarillo 1931, *no writ*).) Only rarely does the court talk only of equality and uniformity. (See, for example, *City of Arlington v. Cannon,* 153 Tex. 566, 271 S.W. 2d 414 (1954).)

The case in which the supreme court came closest to spelling out the constitutional rule on property taxes is *Lively v. Missouri, K. & T. Ry.* (102 Tex. 545, 120 S.W. 852 (1909)). At issue was the action of Dallas County in levying its county tax on the basis of the full value of railroad intangible property as prorated by the state tax board rather than on the basis of the assessment ratio used for all other property in the county. In preparation for striking down the county action, the court quoted only the second sentence of Section 1 and continued:

> The rule announced by that provision is "equality and uniformity." To secure this "uniform and equal" taxation, the same sentence prescribes that the property of all persons and corporations, other than municipal, "shall be taxed in proportion to its value, which shall be ascertained as may be provided by law." This is a clearly expressed purpose, that the officers charged with the assessment of property shall in the manner prescribed by law ascertain its value. "The value of the property is to be determined by what it can be bought and sold for." . . . If it means full market value when applied to the intangible assets of a railroad company, it means the same thing when applied to land, horses, etc. The standard of uniformity prescribed by the Constitution being the value of the property, taxation cannot be in the same proportion to the value of the property, unless the value of all property is ascertained by the same standard. (102 Tex., at 558; 120 S.W., at 856.)

One important point about this statement is that the court did not quote the first sentence of Section 1. Instead the court seemed to be saying that whatever "taxation shall be equal and uniform" might mean in general, there is no need to consider the meaning in the case of property taxes; the second sentence states a rigid and specific rule of uniformity. That is, the second sentence is a definition of uniformity in the case of property taxes. It may be, of course, that the author of the *Lively* opinion had the first sentence in the back of his mind while he was writing the opinion. Nevertheless, he said that the second sentence by itself requires uniformity in property taxation. In any event, the rule of the *Lively* case is the law whether one gets there by way of the first sentence of Section 1, by way of the second sentence, or by a combination of the two.

Because Section 2 grants a power to classify occupation taxes, cases not involving either property or occupation taxes should offer clues to the meaning of "equal and uniform" in Section 1. One of the earliest cases involved the poll tax. In *Solon v. State* (54 Tex. Crim. 261, 114 S.W. 349 (1908)), the court of criminal appeals addressed itself to the question of whether Section 1 prohibited exempting certain people from paying a poll tax. The court quoted the classification power in Section 2 and then said:

> There is no such provision in respect to the poll tax, unless it can be found in the first sentence of section 1, art. 8, to the effect that "Taxation shall be equal and uniform." Occupation taxes are levied on the business conducted, and not upon the person, or with reference to the person engaged in it . . . . In all the cases in this State, in respect to occupation taxes, it has been uniformly held, both by this Court and by our Supreme

> Court, that not only the right, but the duty, of reasonable classification inheres in the Legislature . . . .
>
> Applying this rule to the matter of poll taxes . . .,the Legislature, under the limitations of our Constitution, is authorized to classify these subjects of taxation. (54 Tex. Crim., at 285; 114 S.W., at 359.)

The significance of the court's opinion is emphasized by the dissenting opinion. The dissenting judge did not dispute the argument that the first sentence of Section 1 permits classification. He argued that for poll tax purposes, there is only one class. (Tex. Crim., at 290; S.W., at 362.)

The classifications in the inheritance tax law were attacked as a violation of the equal and uniform requirement of Section 1. In *State v. Hogg,* the attack was turned aside in short order: ". . . the almost universal rule is that inheritance taxes such as are levied by our statutes are held to be privilege taxes, and not property taxes." (123 Tex. 568, 579, 72 S.W.2d 593, 594 (1934).) In its way, this supports the suggestion made earlier that perhaps the 1845 drafters meant the equal and uniform requirement of Section 1 to apply only to property taxes. A later case cited *Hogg* as authority for the constitutionality of the inheritance tax law but prefaced the citation with the statement: "It is long since settled, however, that this provision does not prevent the making of reasonable classifications of persons and property for purposes of taxation; . . ." (See *San Jacinto Nat'l Bank v. Sheppard,* 125 S.W.2d 715, 716 (Tex. Civ. App.—Austin 1939, *no writ*).)

Strange as it might seem at first blush, franchise taxes are not occupation taxes; they are privilege taxes on the privilege of doing business as a corporation. (See further discussion below.) In *Grayson County State Bank v. Calvert,* the court of civil appeals dealt with a claim of unconstitutional classification arising from the levy of a franchise tax on a state bank while a competing national bank was not so taxed. This particular situation is a little bit indirect. National banks can be taxed only in the manner specified by congress; it has authorized several types of state taxes on national banks, but a franchise tax is not one of them. The argument by the state bank was rejected:

> The equal protection clause of the Fourteenth Amendment of the United States Constitution and the equal and uniformity requirements of the Texas Constitution upon the taxing powers of the State are substantially similar. *Hurt v. Cooper* [discussed later under *Occupation Taxes*].
>
> The Constitution requires that tax legislation may classify persons and items for purposes of taxation and are [sic] satisfied when such legislation meets two tests: (1) is the classification of the tax reasonable? and (2) within the class, does the legislation operate equally?
>
> . . . National banks and State banks are not in the same class; both are banks with differences. (357 S.W.2d 160, 162 (Tex. Civ. App.—Austin 1962, *writ ref'd n.r.e.*).)

In summary, all property must be taxed equally and uniformly in proportion to its value; all other taxation must be equal and uniform, but the legislature may classify the objects for taxation so long as the classification is reasonable, a requirement also imposed by Section 3 of Article I of the Texas Constitution and by the Fourteenth Amendment to the United States Constitution. It should be noted, however, that there is a reverse equal and uniform argument that can be made with respect to property taxation. This is the case where taxing all property in proportion to its value is alleged to result in inequality. Consider the early case of *Norris v. City of Waco* (57 Tex. 635 (1882)). The property owner argued that annexation of her farm by Waco had resulted in the imposition of city property taxes for which she received no reciprocal benefits. The court rebutted the argument by stating that "equal and uniform" literally meant that her property had to be taxed, benefits or

no; by pointing out that there were some benefits flowing from being in a city; and by hinting that property contiguous to a growing city increased in value, thus implying that inequality might result more from failure to annex than from annexation.

All property. The supreme irony is that the constitutional command to tax all property in proportion to its value is crystal clear and yet is flagrantly violated in an almost infinite variety of ways. The quotation from the *Lively* case set out earlier states the rule. It is clear that if there are no exceptions, there can be no argument. The supreme court enforced the rule in that case by holding that the railroad's allocated portion of its property had to be taxed by applying the same assessment ratio used for other property in the taxing jurisdiction.

Since *Lively* there have been myriad cases invoking the rule of rigid uniformity. No court has ever said that all property does not have to be taxed uniformly. The difficulty is that the courts have erected many procedural hurdles and barriers to enforcement of the rule. In a recent article on Texas property law, Professor Mark Yudof observed:

> Despite the many cases in which Texas courts have affirmed statutory and constitutional requirements relating to property taxation, taxpayers have no effective way of compelling assessors and boards of equalization to abide by the law. State courts have imposed a heavy burden of proof on taxpayers and have been niggardly in granting remedies sufficient to force compliance with the law. ("The Property Tax in Texas under State and Federal Law," 51 *Texas L. Rev.* 885, 900-01 (1973).)

In his article, Professor Yudof describes the many ways in which all property is *not* taxed in proportion to its value and the congeries of court rules that make it difficult to obtain obedience to the constitutional command. There is no need here to describe the actual situation. Any Texas reader and most other readers know that most intangible property is not taxed at all, that much tangible personal property is not taxed, and that what property is taxed is rarely, if ever, taxed uniformly in proportion to its value. Most readers may not be aware that the courts "have been niggardly in granting remedies sufficient to force compliance with the law." But since this problem is really not a constitutional matter, the details will not be set out here. Professor Yudof's review of the cases is recommended for those who are interested in the judicial intricacies. *The Texas Property Tax: Background for Revision,* a study prepared in 1973 for the Texas Advisory Commission on Intergovernmental Relations by the Texas Research League, is recommended for those who are interested in the realities of the property tax.

Occupation taxes. It was noted earlier that prior state constitutions covered income taxes and occupation taxes in the same sentence. In popular parlance there apparently was total confusion. Professor Miller, speaking of an extensive system of occupation taxes enacted in 1862 and 1863, says that the taxes "were popularly known as 'income' taxes." (Miller, p. 142.) He notes that in 1863 a gross receipts tax was imposed on those engaged in the sale of merchandise. "This was known as the 'merchandise tax.' " (*Ibid.*) The use of gross receipts as a measure was extended in 1864, "though it was yet so restricted as to make the tax an occupation tax rather than an income tax in the accepted sense of the term." (*Id.*, at 143.)

In 1936 the United States Supreme Court was faced with a problem under one of the Texas "occupation" taxes. The case involved the "occupation" tax on the production of oil. Prior to 1933, the tax was levied on the lessee-producer alone; under a 1933 act the lessor was required to pay his proportionate share of the tax. It was argued that the tax was arbitrary because the lessor was not in the business or occupation of producing oil.

The court noted that the "taxing act calls the tax an 'occupation tax' and a 'gross production tax,' " and that the Texas Court of Civil Appeals applied both of these designations as well as calling it a "tax levied on the business or occupation of producing oil." The United States Supreme Court observed that "when mere characterizations of the tax are put aside and attention is given to the substance of the [Texas] court's opinion in this and a companion case, . . . it unmistakably appears that the court regarded the tax as an excise laid on the production of oil, measured by the extent of the production, . . ." (See *Barwise v. Sheppard,* 299 U.S. 33, 36 (1936).)

The court disposed of the claim of arbitrariness because the land-owner/lessors were not in the oil business:

> Without question the State has the power to lay an excise on the production of oil. Here it is laid, admissibly we think, on those having a direct and beneficial interest in the oil produced and is apportioned between them according to their interests. The apportionment is reasonable, not arbitrary; and is as reasonable to the lessors as to the lessee. (p. 39.)

The United States Supreme Court's conclusion that a "rose by any other name would smell as sweet" is not necessarily available to the Texas courts. Since 1883, Section 3 of Article VII has dedicated one-fourth of the revenue derived from the "State occupation taxes" for the benefit of the public schools. It would be unconstitutional to levy an occupation tax and not deposit 25 percent of the receipts into the available school fund. It follows that it would be unconstitutional to levy an occupation tax, call it something else, and not put 25 percent of the receipts into the available school fund. This is one of the two constitutional issues that can arise if the legislature imposes a tax under any name other than "occupation." (The other issue concerns agricultural and mechanical pursuits. A different constitutional question can arise if the legislature attempts to levy an ad valorem property tax by any other name. Likewise, a different constitutional question arises under the local government piggy-back limitation. All these are discussed later.) There is no constitutional requirement that the legislature call something an "occupation" tax in order to send one-fourth of the receipts into the available school fund; the legislature can mandate the dedication no matter what it calls the tax. Indeed, the available school fund receives one-fourth of the motor vehicles sales and use tax and prior to repeal received the same share of the stock transfer tax, both in the attorney general's list of nonoccupational taxes set out below. (See Tex. Tax.-Gen. Ann. art. 24.01.) Likewise, there is no constitutional requirement that the legislature call something an "occupation" tax in order to activate the piggy-back limitation, for the legislature has full power to limit local taxing power except for certain local property taxes. (See Subs. (c) of Sec. 52, Sec. 52d, and Sec. 52c (1968), all in Art. III; and Sec. 9 of Art. VIII.) Indeed, the legislature has decreed that "no city, county or other political subdivision may levy an occupation tax levied by this Act unless specifically permitted to do so by the Legislature of the State of Texas." (Tex. Tax.-Gen. Ann. art. 1.09. "This Act" covers all taxes in Chapter 122A, which is "Taxation-General.").

There are no cases and only one attorney general's opinion that deal with this constitutional issue. In 1950 the legislature voted increases in a number of taxes and directed that all receipts from the increases go into a State Hospital Fund except those that had to go into the available school fund by virtue of Section 3 of Article VII. The comptroller of public accounts asked the attorney general to classify the taxes. The attorney general advised the comptroller:

The following in our opinion are occupation taxes: Oil production, gas production, sulphur production, telephone gross receipts, gas, electric and water company gross receipts, carbon black production, cement distributors', motor carrier gross receipts, oil well servicing, insurance gross receipts, and chain store.

The following in our opinion are not occupation taxes: Motor vehicle sales and use, liquor and wine sales, franchise, new radio, television sets, cosmetics and playing cards sales, stock transfer, and beer sales.

The attorney general followed this with a list of authorities upon which his opinion was based. (See Tex. Att'y Gen. Op. No. V-1027 (1950).) None of the cases classified a tax on a basis related to the problem under consideration. For example, one of the cases cited, *Producers' Oil Co. v. Stephens* (99 S.W. 157 (Tex. Civ. App. 1906, *writ ref'd*)), held that an occupation tax on the business of producing oil was not a property tax. If the legislature had called that tax a severance tax or a privilege tax, the tax would still not have been a property tax, but the attorney general would not have been able to use the case as an applicable authority. In short, the attorney general simply classified the taxes according to what the legislature had called the tax. (One of his cited cases, *Kansas City Life Ins. Co. v. Love,* 101 Tex. 531, 109 S.W. 863 (1908), comes close to making a distinction of significance. In that case it was crucial to the decision that the tax was an occupation tax measured by the preceding year's gross receipts and not a gross receipts tax as such.)

One problem in dealing with occupation taxes is to determine why in any given case the tax imposed was called an "occupation" tax rather than a severance tax, an excise tax, a gross receipts tax, or whatever. The leading theory has been that Texas "evidences an occupation tax complex, the Legislature under the slightest pretext characterizing a given imposition as a tax upon an 'occupation'; . . ." (See M. M. Mahany, *Texas Taxes* (Dallas, 1946), p. 557.) The reason for this "complex" is well stated in a staff research report of the Texas Legislative Council. After noting that Section 1 enumerates four taxing grants to the legislature—property, poll, income, and occupation taxes—and after citing Mahany, the report continues:

> Although a subsequent section of this Constitution (Art. VII, Sec. 17) reads, "The specification of the objects and subjects of taxation shall not deprive the Legislature of the power to require other subjects or objects to be taxed . . .," the courts have avoided a clear-cut decision as to whether or not the four types of taxes are the only kinds the Legislature may impose. Although recent years have brought a legislative swing away from the occupation tax complex and there has been wide acceptance of the opinion that the Legislature has a general taxing power, the issue has not been finally settled, and the seemingly limiting provisions of the Constitution still influence tax legislation. (*A Survey of Taxation in Texas,* Part II (1951), p. 2.)

There is an additional problem with the term "occupation tax" because of the dedication to education of one-fourth of the revenue from state occupation taxes. It may be that the legislature tended to label a tax as an "occupation" tax in order automatically to activate the one-fourth dedication to the available school fund. In bald political terms, the labeling might make the tax more palatable or harder to oppose since the needs of education could be used as a justification for the tax.

Perhaps the most telling example of this problem of nomenclature is the motor fuel tax. At one time, the statute imposed "an occupation or excise tax" of 4¢ on each gallon of gasoline. The tax was to accrue on the "first sale," which was defined to "mean and include the first sale, distribution or use in this State." El Paso got into trouble with the state by buying great quantities of gasoline in New Mexico for use in police cars, fire trucks, and other vehicles. The state sued for its 4¢ a gallon; the city defended, arguing among other things that as a municipal corporation it was exempt from occupation taxes. The supreme court held for the state:

> No actual sale ever took place in Texas. (We here use the term *sale* in its ordinary sense.) It follows that if any tax is due the State in this instance, it is by virtue of the fact that this motor fuel was used in motor vehicles operated on the public highways of this State. By no known rule of law can a tax levied on such use be classed as an occupation tax. . . . Such tax is an indirect or excise tax. This being true, the constitutional exemption of municipal corporations from occupation taxes cannot apply. (*State v. El Paso,* 135 Tex. 359, 363-64, 143 S.W.2d 366, 369 (1940). Emphasis in original.)

The court's opinion does not indicate whether the motor fuel tax was an occupation tax where paid by a seller and an excise tax only when paid by a user. In any event, the motor fuel tax in litigation in the *El Paso* case was subsequently replaced by a law which imposes an "excise tax." (See Tex. Tax.-Gen. Ann. art. 9.02(1).) This is the reason that Section 7-a of Article VIII dedicates one-fourth of the motor fuel tax to education. (See *Explanation* of that section.)

In summary, then, the principal constitutional significance of the term "occupation tax" in the Texas Constitution is the dedication of funds to education. In one sense this is not particularly important. Roughly 34 percent of the total state funds spent each year on education comes from the available school fund, but less than 40 percent of the available school fund comes from "occupation" taxes. It is obvious that nothing much need happen if a court or the attorney general rules that one-fourth of the receipts from some tax must go into the available school fund because the tax is constitutionally an "occupation" tax even though called something else. The additional money dedicated to education could easily be offset by reducing funds from other sources.

Assuming that someone can find a way to raise the question "What is an occupation tax?" the answer would seem to be "Whatever the delegates in 1875 meant." Unfortunately, as the earlier discussion demonstrates, the 1875 intent is not easy to determine. The Revised Statutes of 1879 offer some clues to the general understanding of the day. Article 4665 begins: "There shall be levied on and collected from every person, firm, company, or association of persons pursuing any of the following named occupations, an annual tax (except when herein otherwise provided) on every such occupation, or separate establishment, as follows." The remainder of Article 4665 can be summarized thus:

Occupation	Annual Tax
Liquor dealers	$250-150*
Lager beer	50
Merchants	200-5
Drummers	200
Patent medicine peddlers	200
Fortune tellers	200
Clairvoyants	5
Bankers	200-20
Photographers	20-5
Auctioneers	75-20
Ship merchants	25-10
Toll bridge keepers	10
Land agents	10
Attorneys	10
Physicians	50-10
Dentists	12-10
Bill-posters	25
Shooting galleries	20
Billiard parlors	50
Horse racing with betting	($25 for each horse in each race by the owner of the horse)

Pool-sellers (Bookmakers)	($5 per day)
Bowling alleys	1000
Person keeping a hobby-horse or flying jenny	20
Peddlers	40-20
Theaters	500 (or $5 per day)
Circuses	50-10 (per performance)
Magicians	10 (per performance)
Bull fights	500 (per performance)
Cock fights	5 (per fight)
Menageries	10 (per day)
Concerts	5 (per concert)
Livery stable	50 cents for each stall 50 cents for each buggy
Stockbrokers	75-10
Life insurance companies	300
Fire insurance companies	200
Lightning-rod dealers	50 (per wagon)
Cotton brokers	50-25
Pawnbrokers	100
Sewing machine men	20
Express companies	750
Passenger travel	—(see below)
Telegraph messages	—(see below)
Gas companies	50

*[NOTE: In most instances the range indicated was related to the size of the city in which the occupation was carried on. In some cases there was an additional smaller annual tax for each county in which the occupation was carried on.]

All of these are occupations in the normal meaning of the word and, except for passenger travel and telegraph messages, the nature of the tax is consistent with the concept of an "occupation" tax. For travel, Article 4665 levied a gross receipts tax of 1 percent on all passenger travel within the state on railroads, steamboats, or stagecoaches. For telegrams the tax was "one cent for every full-rate message, and one-half that for every message less than a full-rate message sent." Both of these taxes were first levied in 1879. (Miller, p. 218.)

Two tentative conclusions can be drawn from the range of occupation taxes levied in 1879. One is that the occupation tax was used to express disapproval of certain occupations. The other is that some occupations were taxed because property was not a significant element in the occupation. For whatever reason, the tax levied could fairly be called an occupation tax. The taxes that do not fit are those on passenger travel and telegrams. The former is a gross income tax, the latter, an excise tax. It is unlikely that anyone will ever know why these two particular taxes were called "occupation" taxes. It seems fair to conclude that "occupation tax" as used in 1875 meant the kind of tax levied on the other occupations listed in Article 4665—that is, a flat annual tax on the privilege of engaging in the occupation or a flat tax on each occasion of engaging in the occupation.

Franchise taxes were first levied in 1893. In the case of domestic corporations the tax is on the privilege of doing business as a corporation franchised by Texas. In the case of foreign corporations the tax is on the privilege of doing business in the state. The traditional franchise tax was measured by the capital of the corporation. In the case of foreign corporations it has been traditional to use an allocation formula so that Texas does not burden interstate commerce. In a way, the franchise tax ends up being much like an occupation tax except that the tax does not change from occupation to occupation. Note, also, that among the corporations exempted from

paying the franchise tax are those that are "required to pay an annual tax measured by their gross receipts." (Tex. Tax.-Gen. Ann. art. 12.03(a).)

The discussion earlier concerning the principle of equal and uniform taxation covers occupation taxes. Nevertheless, it is appropriate to mention the leading cases: *Texas Co. v. Stephens* (100 Tex. 628, 103 S.W. 481 (1907)) and *Hurt v. Cooper* (130 Tex. 433, 110 S.W.2d 896 (1937)). The *Stephens* case involved several gross receipts taxes and a severance tax, all covering oil. The Texas Company attacked two of the levies as disguised property taxes and thus a violation of Section 9 of Article VIII, which at the time limited the state ad valorem to 55 cents on the $100. One of the taxes was on the "occupation" of the wholesale business of dealing in petroleum products. The measure of the tax was two percent of gross receipts from sales and two percent "of the cash market value" of petroleum products "received or possessed or handled or disposed of in any manner other than by sale in the State." The provision ended up saying "ownership and possession of such articles (where no sale is made) . . . shall subject the same to the tax herein provided for." The supreme court conceded that the concluding words certainly sounded like a property tax, "but [they] are controlled by the leading provision defining the business on the doing of which the tax is imposed. This, . . . must be viewed as merely dealing with incidents of the business taxed, . . . and as probably intended also to prevent evasions." (100 Tex., at 640; 103 S.W., at 484.)

The "severance" tax of 1 percent was levied upon those in the business of producing oil, measured by the value of the oil removed from the ground. The court turned away the Texas Company argument, saying:

> The contentions on this branch of the case are all met by the propositions that the taking of oil from wells, as conducted by plaintiff and others so engaged, is a business subject to be taxed, that such business is sufficiently indicated in the statute and the tax is imposed upon it as an occupation tax and not as a tax upon land or oil or property of any kind. (100 Tex., at 646; 103 S.W., at 488.)

The other constitutional attack was on the unreasonableness of the classification arising from the various taxes on the petroleum business. The court answered:

> Persons who, in the most general sense, may be regarded as pursuing the same occupation, as, for instance, merchants, may thus be divided into classes, and the classes may be taxed in different amounts and according to different standards. Merchants may be divided into wholesalers and retailers, and, if there be reasonable grounds, these may be further divided according to the particular classes of business in which they may engage. The considerations upon which such classifications shall be based are primarily within the discretion of the Legislature. The courts, under the provisions relied on, can only interfere when it is made clearly to appear that an attempted classification has no reasonable basis in the nature of the businesses classified, and that the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them undertaken by the Legislature. This is the rule in applying both the state and federal Constitutions, and it has been so often stated as to render unnecessary further discussion of it . . . . Differences in the profits derived, in the extent of the consumption of the articles, and therefore in the facility with which the burdens may in the course of business be distributed among consumers generally, and other conditions that might be supposed would properly be taken into consideration by the Legislature in making classifications and determining the amount of the tax to be laid upon each; and it would be only an extreme and a clear case that would justify an interference by the courts with the legislative action. We see nothing of the kind in this law. The mere fact that discrimination is made proves nothing against a classification which is not, on its face, an arbitrary, unreasonable, or unreal one. (100 Tex., at 641; 103 S.W., at 485.)

The *Hurt* case involved the chain store tax. This type of tax was a product of the

Great Depression. Although raising revenue was a prime purpose of the tax, it was also a regulatory measure designed to decrease the competitive advantage enjoyed by large corporations. The Texas tax was an annual occupation tax graduated according to the number of stores in the state, the graduation running from $1 for a single store to $750 for each store over 50. (Louisiana went further and graduated the tax according to the number of stores both in and out of the state. That tax was upheld in *Great Atlantic & Pacific Tea Co. v. Grosjean,* 301 U.S. 412 (1936).) The Supreme Court of Texas disposed of the classification argument by using the *Stephens* case quotations set out above and several United States Supreme Court cases that had upheld chain store taxes.

Section 1 limits local occupation taxes to one-half of any occupation tax levied by the state. This means: "no state tax, no local tax." It does not mean: "state tax, local tax." This second proposition is not obvious from the proviso itself. The effect comes from the rule that no local government, except a home-rule city, has any taxing power except that granted directly by the constitution or by statute. Home-rule cities may levy a piggy-back occupation tax unless the legislature has withdrawn the power. As noted above, the legislature has done just that in a manner that puts home-rule cities in the same position as other local governments. (Nobody appears to have strained to read the proviso of Sec. 1 as a direct grant of taxing power.)

Local governments, particularly home-rule cities, frequently exercise their police power to regulate a business by requiring a license. Since this is a license to engage in an occupation, a question arises if there is a license fee high enough to generate revenue, thus arguably turning the fee into an "occupation" tax. An early case is *Brown v. City of Galveston* (97 Tex. 1, 75 S.W. 488 (1903)). Galveston enacted an ordinance requiring a license and a fee for all vehicles kept for public use or hire. It was argued that the size of the fee demonstrated that it was in part a revenue measure and therefore unconstitutional under Section 1 since there was no equivalent state occupation tax. The court conceded "that the police power cannot be used for the purpose alone of raising revenue, and, where exercised by a city for the purpose of raising revenue, it will be held to be by virtue of taxing power, and not of the police. But the fact that the assessment under the police power results in producing revenue . . . does not deprive the assessment of the character of a police regulation." (97 Tex., at 75; S.W., at 496.) The court concluded that the fees were levied in the exercise of the police power and that the incidental revenue did not invalidate the ordinance.

The rule—a license fee is not an occupation tax if any revenue above the cost of regulation is incidental—seems clear enough; but as frequently happens when the judiciary applies a clear rule, the results seem a little strange. Consider *Mims v. City of Fort Worth* (61 S.W.2d 539 (Tex. Civ. App.—Fort Worth 1933, *no writ*)) and Ex parte *Dreibelbis* (109 S.W.2d 476 (Tex. Crim. App. 1937)). In the *Mims* case, an annual license fee of $100 for selling fruits and vegetables at wholesale was held a valid police power regulation and not an occupation tax; in the *Dreibelbis* case, a license fee of $10 on a "temporary merchant" was held to be an occupation tax because the fee was "not levied for the purpose of regulating the enumerated businesses, but to raise revenue." (p. 477.)

In all fairness, it should be noted that the supreme court said in the *Hurt* case discussed earlier that it "is sometimes difficult to determine whether a given statute should be classed as a regulatory measure or as a tax measure." (130 Tex., at 438; 110 S.W.2d, at 899.) The court continued by stating that if the primary purpose of the fee appears to be to raise revenue, the fee is an occupation tax; if the primary purpose appears to be regulation, the fee is a license. Difficult to apply or not, the rule remains clear.

If a license fee is a license fee and not an occupation tax, it makes no difference

that the occupation involved is a mechanical or agricultural pursuit. In Ex parte *Cramer* (66 Tex. Crim. 11, 136 S.W. 61 (1911)), an electrician failed to obtain a permit to make an electrical installation in a building and to pay the required inspection fee. The court held that the electrician could not use the mechanical pursuit exemption to avoid the payment of the inspection fee.

If the tax is an occupation tax, the question becomes "What is an agricultural or mechanical pursuit?" Nobody seems to have had great difficulty deciding what an agricultural pursuit is. The only relevant case appears to be one in which the supreme court, in passing, observed that a tax on the occupation of packaging and marketing or processing citrus fruits was not an occupation tax on an agricultural pursuit. (See *H. Rouw Co. v. Texas Citrus Commission,* 247 S.W.2d 231 (1952).) An interesting point about this case is how agricultural pursuits came to be an issue. The act did not characterize the tax as one on an occupation or, for that matter, as any other kind of tax. The court seemed to assume that the tax had to be either a license tax or an occupation tax. Once this assumption was made it became obvious that the tax had to be an "occupation" tax. Once this conclusion was reached, the court concluded that the tax was invalid because the act exempted any natural person who packaged fruit grown on his own land, thus creating an unreasonable classification. On motion for rehearing, the state sought to justify the exemption as one required by the prohibition on taxing agricultural pursuits. The motion was overruled.

In the case of mechanical pursuits the courts have stated the rule thus:

> The test . . . is whether or not the intellectual quality predominates over manual skill in performing the duties of the particular calling. If the mental aspect is controlling, then the pursuit is classified as a profession. If skill in the manipulation of the hands, tools, and machinery is emphasized over the mental side, then the calling is classified as a mechanical pursuit. (*Calvert v. A-1 Bit & Tool Co.,* 256 S.W.2d 224, 229 (Tex. Civ. App.—Austin 1953, *writ ref'd n.r.e.*), quoting from *Western Co. v. Sheppard,* 181 S.W.2d 850, 854 (Tex. Civ. App.—Austin 1944, *writ ref'd*), which in turn was quoting from a Louisiana case, *State v. Cohn,* 184 La. 53, 65, 165 So. 449, 451 (1936).)

One would assume that by the hundredth anniversary of the 1875 Convention, the meaning of "occupation tax" and its quaint exemption of agricultural and mechanical pursuits would be so well settled that no one could find a significant way to use the exemption to strike down a state statute. Not so. In that year, five justices of the supreme court used the agricultural exemption to strike down a statutory provision that was neither an "occupation tax" in the ordinary understanding of the word nor a "tax" in the ordinary meaning of the word. The case is *Conlen Grain & Mercantile, Inc. v. Texas Grain Sorghum Producers Board* (519 S.W.2d 620 (Tex. 1975) (four justices dissenting)).

The statute in question was Article 55c of the *Texas Revised Civil Statutes Annotated.* (The popular title is the "Texas Commodity Referendum Act.") The statute permitted the producers of most agricultural commodities to agree by referendum that they were to be assessed a certain percentage of the price at which they sold their commodity to a processor. The processor collected the assessment by deducting the appropriate amount from the amount due each producer for the commodities purchased. The processor remitted the assessment to a board elected by the producers. The board spent the money for "programs of research, disease and insect control, predator control, education, and promotion, designed to encourage the production, marketing, and use of" the particular commodity (Sec. 1). Once all this machinery was set up, all producers of the commodity within a defined geographical area were assessed, but any producer for whatever reason could demand a refund of his assessment within two months after it was collected.

One of the commodity programs involved the producers of sorghum in 29 counties in West Texas. For some unexplained reason a sorghum processor refused to collect the assessment authorized by the producers. (Note that the person who attacked the assessment was only a middleman, a conduit with no stake in the matter.) The Sorghum Producers Board sued for the amount of the assessments that the processor had failed to collect. (The principal stockholder of the processor intervened in the suit. He was a producer subject to the assessment, which may be the reason that a "disinterested" party induced the litigation.) The processor lost in the lower court.

On appeal a majority of the supreme court held in the processor's favor. The Sorghum Board argued naturally that the required payment was exactly what the statute called it—an assessment. The majority simply replied: "The levy is not a special assessment." The only reason given was that "the assessment paid by any particular person is not necessarily related to the benefits that will be received by that person . . ." (At p. 623.) Since this is probably true of many special assessments, the majority's argument seems to be that the assessment was not an assessment because either it was not a "good" assessment or was an unconstitutional assessment by virtue of an inadequate relationship between the assessment and the benefit received. In short, the majority gave a nonreason for denying that the levy was an assessment. (Of course, the court stressed the point that assessments are traditionally levied against property, which was not the case here. Actually, the assessment was indirectly related to property, for the sorghum came from land. In any event, there is no constitutional rule that an assessment can be levied only on property or that the assessment must be measured by property.) Having reached this nonconclusion, it was no step at all to conclude that the assessment was an occupation tax on an agricultural pursuit. (Interestingly enough, the court relied on the *Rouw* case previously discussed. That case held that the levy was an occupation tax but not one on an agricultural pursuit. There, however, the processor paid the assessment.)

There were two dissenting opinions. Justice Daniel, speaking only for himself, simply said that he believed that the levy was an assessment and not a tax. Justice McGee, speaking for himself and Justices Denton and Johnson, concentrated principally on the meaning of "occupation tax" and the agricultural exception in the constitutional context of 1875. His conclusion was the obvious one: ". . . the framers of the Texas Constitution did not intend to prohibit such programs as the Texas Commodity Referendum Act when they prohibited occupation taxes upon agricultural pursuits." (At p. 629.) He then switched to 1975 and observed that "the constitutional provision involved is an outmoded and unnecessary restriction upon the legislative power and should not be given the broad interpretation which the majority imparts to it." (*Ibid.*) He reinforced this by observing that the Constitutional Revision Commission in 1973 and the Constitutional Convention in 1974 had no difficulty in dropping the provision as "a product of a bygone era and tax structure [that] served no useful purpose in today's society." (*Ibid.*)

The sequel to the *Sorghum* case is probably the strangest episode in this occupation tax drama. The *Sorghum* case came down just as the legislature was undertaking to submit the 1974 Convention product to the voters by way of the amending process. (See the *Explanation* of Sec. 1 of Art. XVII.) The legislature added a section to the proposed finance article "overruling" the *Sorghum* case. Since the proposed constitution eliminated the agricultural pursuits exception, the added section had no significance except to assure that no part of the assessment would have to go into the available school fund under the proposed continuation of the constitutional dedication of one-fourth of occupation taxes to that fund.

Comparative Analysis

In general. It is difficult to compare the overall limitations on taxing power in the several state constitutions. Constitutions run the gamut from Connecticut, for example, which has no provision concerning the power to tax, to states like Texas, with its rigid uniformity provision for property taxes, and Tennessee and Florida, which prohibit income taxes.

As of 1965, 34 states imposed personal income taxes. In 20 of these the constitution specifically authorized an income tax; in the remaining 14, the constitution was silent. Thirty of the income taxes were graduated, four were flat rate. Most of the states without a personal income tax can levy one. (Note the restriction to "personal" income taxes. A state can approximate a corporate income tax by an annual graduated franchise tax on the privilege of doing business in the state.)

Prior to 1969, Illinois was a state that could not levy an income tax because of a state court case. In 1969 that case was overruled by an opinion that seemed to open the door to a graduated income tax. (See Braden and Cohn, *The Illinois Constitution: an Annotated and Comparative Analysis* (1969), pp. 420-22, 435.) A consequence of that opinion was the inclusion in the 1970 Illinois Constitution of a prohibition on a graduated income tax and a requirement that an income tax imposed upon corporations could not exceed the rate imposed on individuals by more than a ratio of 8 to 5.

For poll taxes see the *Comparative Analysis* of Section 3 of Article VII.

Equal and uniform. There are about six states that have a general "equal and uniform" provision. Some 14 states have provisions requiring uniformity within a class. Four of these have a separate provision concerning property taxation which has the effect of making property a single class. In two of them "all" property is a single class, in one the class is tangible property, and in one the single class is real property. It may be that courts in other states have construed "class" in a manner that restricts legislative classification. Georgia provides: "Classes of subjects for taxation shall consist of tangible property and one or more classes of intangible personal proprty including money." (Art. VII, Sec. I, Para. III.) An amendment in 1964 added permission to treat "all motor vehicles including trailers" as a separate class of tangible property. (*Ibid.*)

All property to be taxed. About eight states have a provision requiring property to be taxed in proportion to its value. Two of these limit the requirement to tangible property and one, to real property. Three states require all property to be taxed but do not include "in proportion to its value."

Occupation taxes. Three states have an affirmative grant of power to tax "occupations." All three provisions include permission for a graduated tax, but one calls it a "license" tax. A few states have an affirmative grant of power but instead of "occupation" refer variously to "peddlers," "merchants," and "trades and professions." A few states have an affirmative grant of power to levy license taxes. No other state exempts mechanical and agricultural pursuits.

Only Louisiana has a tie between state and local occupation taxes. Local license taxes may not exceed the amount of the state license tax unless authorized by a statute passed by a two-thirds vote of each house.

Model State Constitution. The only reference to taxation in the *Model*'s article on finance is the prohibition on dedicated taxes quoted in the *Comparative Analysis* of Section 7-a of this article. The *Model*'s Commentary states:

The *Model State Constitution* is based upon confidence in the system of representative democracy. The finance article reflects these beliefs by leaving to the legislature and the governor, the people's elected leaders, broad responsibility for the conduct of the state's fiscal affairs with ample power to adjust needs to the rapid changes characteristic of modern times.

Ideally, some authorities believe, a state constitution should be silent on matters of taxation and finance, thus giving the legislature and the governor complete freedom to develop fiscal policies to meet current and emerging requirements . . . . [T]he complex and lengthy fiscal articles found in many state constitutions . . . obviously are barriers to responsible government.

Despite elaborate constitutional limitations upon the legislature designed to insure fiscal prudence, state revenues, expenditures, and outstanding debt have grown enormously since World War II . . . . Legislatures have been resourceful in circumventing tax and debt limitations. (*Model State Constitution,* p. 91.)

Author's Comment

In the light of (a) the chaos in the property tax field, a part of which is the wholesale violation of the constitutional commands by both the public and its government; (b) the universal violation of the constitutional command to pay a poll tax; (c) the chaotic state of "occupation" taxes as a category of taxes, a state compounded by the dedication to education of one-fourth of the receipts from this ill-defined tax; and (d) the confusion over exemptions, compounded by the accelerating practice of providing more and more exemptions—in the light of all this, the rational step is to drop every constitutional provision concerning taxes and either substitute nothing, or, at the maximum, as a security blanket for the timid, provide that "taxes shall be equal and uniform," explaining, of course, that this is a security blanket only and means nothing more than what Section 3 of the Texas Bill of Rights and the Fourteenth Amendment to the United States Constitution require.

So much for the sensible solution. Unfortunately, voters generally (a) hate taxes; (b) oppose anything that, or anyone who, proposes to raise taxes; (c) assume that if the legislature, county commissioners court, or city council is given power to increase taxes, taxes will be increased; and (d) believe that taxes can be kept low and fair by stuffing the constitution with all sorts of limitations. The voters are correct about one thing. If the limitations on the power to tax are drafted with the ingenuity of a Wall Street lawyer drafting a multimillion dollar loan agreement, taxes can be kept low; the government will be paralyzed; and the voters will be up in arms because garbage is not collected, the streets and highways are full of potholes, schools are overcrowded, and nobody replies to complaint letters. Granted that government is frequently, if not usually, inefficient, the equations still remain: low taxes equal poor service, higher taxes equal better service.

The only realistic way to work with these equations is to keep rigidities out of the constitution and leave in the legislature and the governing bodies of local governments the battle over high taxes and the services to be provided by government. Any attempted restrictions placed in the constitution—unless they are Wall-Street-lawyer airtight—will not work. And to the extent that they do work, Texas will be off on another constitutional amendment binge.

In short, any restrictions on the kind of tax that may be levied, on the power to classify, or on the power to exempt will create difficulties, encourage slick gimmicks, and spawn constitutional amendments. For those who note, correctly and realistically, that the voters demand restrictions—and special groups demand special protection—the proper plea is to urge that those restrictions be kept to the absolute minimum.

Art. VIII, § 1-a

Sec. 1-a. NO STATE AD VALOREM TAX LEVY; COUNTY LEVY FOR ROADS AND FLOOD CONTROL; TAX DONATIONS. From and after January 1, 1951, no State ad valorem tax shall be levied upon any property within this State for general revenue purposes. From and after January 1, 1951, the several counties of the State are authorized to levy ad valorem taxes upon all property within their respective boundaries for county purposes, except the first Three Thousand Dollars ($3,000) value of residential homesteads of married or unmarried adults, male or female, including those living alone, not to exceed thirty cents (30¢) on each One Hundred Dollars ($100) valuation, in addition to all other ad valorem taxes authorized by the Constitution of this State, provided the revenue derived therefrom shall be used for construction and maintenance of Farm to Market Roads or for Flood Control, except as herein otherwise provided.

Provided that in those counties or political subdivision or areas of the State from which tax donations have heretofore been granted, the State Automatic Tax Board shall continue to levy the full amount of the State ad valorem tax for the duration of such donation, or until all legal obligations heretofore authorized by the law granting such donation or donations shall have been fully discharged, whichever shall first occur; provided that if such donation to any such county or political subdivision is for less than the full amount of State ad valorem taxes so levied, the portion of such taxes remaining over and above such donation shall be retained by said county or subdivision.

History

This section was originally added in 1932. It then simply granted a $3,000 exemption from the state property tax—the same words now appearing as Subsection (a) of Section 1-b—but provided that the exemption was not operative in any county or other political subdivision so long as the subdivision received a remission of the state property tax. Less than a year later the section was amended to provide that a political subdivision could certify to the "State Comptroller" that it no longer needed the remitted taxes, in which case the exemption became operative.

In 1948 the section was used as a vehicle to kill off that portion of the state property tax that was levied for general revenue purposes. At that time the state property tax was 72¢ on the $100, consisting of 30¢ for general revenue (Sec. 9 of this article as amended by Sec. 17 of Art. VII), 35¢ for public schools (Sec. 3 of Art. VII), 5¢ for university and college buildings (Sec. 17 of Art. VII), and 2¢ for Confederate pensions (same section). Thus, 30¢ of the 72¢ was removed. In its place counties were given the 30¢ for farm-to-market roads and flood control. In the drafting of the section the $3,000 exemption was tied to the new 30¢ county tax. This removed the exemption from the remaining state tax of 42¢, thus requiring Section 1-b. (See *History* of that section.) The 1948 amendment also substituted the second paragrah of the current section for the 1932/1933 version of remitted taxes.

In 1973 the section was amended by adding the words "of married or unmarried adults, male or female, including those living alone" after "homesteads."

Explanation

There is little to explain about this section. The principal homestead exemption is now in Section 1-b and will be discussed in the *Explanation* of that section. There is no reason to believe that the words there and in this section have different meanings. The homestead exemption remaining in Section 1-a is, so to speak, an aberration. There was nothing particularly logical about creating the county exemption in 1948. The original 1932 exemption had applied to the state tax and not to the county tax. But since the amendment "gave" the counties a 30¢ state tax, it made political sense to carry along with the "gift" to the counties the reduced amount of the gift represented by the exemption. Moreover, people like tax exemptions; they might

have preferred keeping the state tax with the exemption to giving the counties the tax without the exemption. In other words, preserving the exemption may have been politically necessary to secure a favorable vote. The exemption is applicable, of course, only to the county tax levied under this section and not to any other county tax. (See Tex. Att'y Gen. Op. No. V-1144 (1951).)

Several problems have arisen out of the implementing statute governing the 30¢ county tax (Tex. Rev. Civ. Stat. Ann. art. 7048a). This raises the threshold question of whether Section 1-a is self-executing. On the one hand, the section states that counties "are authorized to levy ad valorem taxes . . . not to exceed thirty cents"; on the other hand, counties can act only in the manner provided by law. (Note, for example, that Sec. 9 of this article gives direct authority to the commissioners court to levy the regular county tax. See the *Explanation* of that section.) In one supreme court case it was argued that Article 7048a is unconstitutional because Section 1-a is self-executing, but the court found it unnecessary to pass upon the question.

The case was *San Antonio River Authority v. Shepperd* (157 Tex. 73, 299 S.W.2d 920 (1957)). The authority is a conservation and reclamation district created under Section 59 of Article XVI. The district includes all of Bexar County and "the natural bed and banks of the San Antonio River from its source to its junction with the Guadalupe River." (The opinion does not indicate whether there are any voters in the district outside of Bexar County, but Wilson, Karnes and Goliad counties elect directors of the authority.) The authority has no power to tax but does have the power to issue revenue bonds if approved by the voters in the district. Under Article 7048a, the voters of Bexar County voted for a 15¢ tax for flood control. The commissioners court entered into a contract with the authority whereby the authority would carry out a flood control program using the proceeds of the flood control tax for a period of 30 years, or, if the authority issued revenue bonds, until they were fully paid off. The attorney general refused to approve the bonds because the taxpaying voters of Bexar County had not approved the bond issue. (He relied in large measure on the *San Saba County* case discussed in the *Explanation* of Sec. 9 of this article.) Although Article 7048a requires voter approval of bonds issued against the Section 1-a tax, the court held that these were not such bonds, which was true, and that Article 7048a clearly gave the commissioners court the power to use Section 1-a funds "in connection with the plans and programs of . . . Conservation and Reclamation Districts," which was all that the commissioners court had done. This is the reason that the supreme court found it unnecessary to decide whether Section 1-a is self-executing; Article 7048a authorized what was done. The court did imply that a construction of Article 7048a that would prohibit an agreement of the kind in litigation might be an unconstitutional interference with the taxing power granted by Section 1-a (157 Tex., at 91; 299 S.W.2d, at 926).

In an earlier case, Article 7048a was attacked on the ground that bonds for farm-to-market roads could be issued only under the power granted under Section 52 of Article III. At that time Section 52 required a two-thirds vote for bonds whereas Article 7048a requires only a majority vote. The court of civil appeals rejected the attack in an opinion that gave the argument more attention than it deserved. (See *Burke v. Thomas,* 285 S.W.2d 315 (Tex. Civ. App.—Austin 1955, *writ ref'd n.r.e.*).) The only other problem that appears to have arisen involves "lateral roads." Section 10a speaks of "Farm to Market Roads," whereas Article 7048a keeps talking about "Farm-to-Market and Lateral Roads." Not long after Section 1-a became effective, a county attorney asked the attorney general just what roads are included in the term "Lateral Roads." The attorney general replied, in effect, that the term "lateral roads" means nothing, for if it did the statute would be unconstitutional. (See Tex. Att'y Gen. Op. No. V-1169 (1951).) Obviously, a constitutional grant to levy a tax for farm-to-market roads cannot be extended by

statute to cover roads that are not farm-to-market roads. No significant questions have arisen concerning the second paragraph of Section 1-a. In any event, the paragraph is now obsolete. The last donated tax expired in 1968. (Information received from the office of the comptroller of public accounts.)

Comparative Analysis

For tax rates see *Comparative Analysis* of Section 9; for homestead exemptions see *Comparative Analysis* of Section 1-b. No other state appears to have a provision comparable to the second paragraph of Section 1-a.

Author's Comment

This section is just one of the many examples of the confusion that drifts into a constitution if there are too many tax rigidities in it. One can only hope that a revised constitution will deal with taxing power in a manner that obviates the necessity for amendments like this one.

For the benefit of grammarians it may be noted that the second paragraph of this section may be used as an example of an entire paragraph that is not even a sentence with a subject and a predicate. A grammarian might also wish to point out that the 14th word in the paragraph is wrong. Either "to" or "for" will fit; "from" makes no sense.

Sec. 1-b. RESIDENCE HOMESTEAD EXEMPTION. (a) Three Thousand Dollars ($3,000) of the assessed taxable value of all residence homesteads of married or unmarried adults, male or female, including those living alone, shall be exempt from all taxation for all State purposes.

(b) From and after January 1, 1973, the governing body of any county, city, town, school district, or other political subdivision of the State may exempt by its own action not less than Three Thousand Dollars ($3,000) of the assessed value of residence homesteads of married or unmarried persons sixty-five (65) years of age or older, including those living alone, from all ad valorem taxes thereafter levied by the political subdivision. As an alternative, upon receipt of a petition signed by twenty percent (20%) of the voters who voted in the last preceding election held by the political subdivision, the governing body of the subdivision shall call an election to determine by majority vote whether an amount not less than Three Thousand Dollars ($3,000) as provided in the petition, of the assessed value of residence homesteads of persons sixty-five (65) years of age or over shall be exempt from ad valorem taxes thereafter levied by the political subdivision. Where any ad valorem tax has theretofore been pledged for the payment of any debt, the taxing officers of the political subdivision shall have authority to continue to levy and collect the tax against the homestead property at the same rate as the tax so pledged until the debt is discharged, if the cessation of the levy would impair the obligation of the contract by which the debt was created.

History

In 1947 the legislature proposed an amendment to Section 1-a. (See *History* of that section.) Through a drafting error the $3,000 homestead exemption was destroyed except for the new farm-to-market-road county property tax provided for in the amendment. The error was discovered too late to doctor up Section 1-a. Hence, another resolution was prepared continuing the homestead exemption for state property taxes. Included in the resolution was Section 1-c, which was designed to make Section 1-b effective only if the voters approved the amendment of Section 1-a. (See discussion of Sec. 1-c.) In November 1948 the voters approved all three amendments.

Section 1-b, as adopted, consisted of what is now Subsection (a) except for the 1973 change noted below. In 1972 the section was amended by the addition of

Subsection (b) except for the 1973 change.

In 1973 both subsections were amended to the present wording. In Subsection (a) the words "as now defined by law" followed the word "homesteads"; in place of those words the amendment substituted the words "of married or unmarried adults, male or female, including those living alone." (Note that the same words were added to Sec. 1-a but that section had not contained the words "as now defined by law." Note also that Secs. 1-a and 1-b were voted upon together, thus obviating another Sec. 1-c.) Subsection (b) was amended by inserting the words "married or unmarried" in front of "persons" and the words "including those living alone" a little later in the sentence. (Secs. 50 and 51 of Art. XVI were amended at the same time to extend the regular homestead exemption to single adults. There was no "Section 1-c" conditioning either change upon adoption of the other.)

Explanation

Subsection (a). With the adoption of the 1973 amendment of this subsection and Section 1-a, the judicial gloss on "residence homesteads" has become obsolete. Presumably any adult who owns a residence gets an exemption. (One can have a homestead on leased land and obtain the protection afforded by Sec. 50 of Art. XVI, but there does not appear to be any way to transfer this concept to a real property ad valorem tax.) Of course, an adult who owns two residences can get an exemption on only one of them. One can dream up complications, such as a case of a married couple with a residence in the city owned as separate property by one spouse and a summer home on the Gulf owned separately by the other spouse, but these complications will be rare and not constitutionally significant.

The important point to note about the exemption is that it applies only to the state tax and to a county tax for farm-to-market roads. This seems obvious, but Wichita Falls, a home-rule city, tried to grant a $3,000 exemption on the authority of the pre-1948 Section 1-a. The exemption was struck down. (See *City of Wichita Falls v. Cooper,* 170 S.W.2d 777 (Tex. Civ. App.–Fort Worth 1943, *writ ref'd*).)

Subsection (b). This subsection is too new to have acquired a judicial gloss. The attorney general has received a number of inquiries and has rendered three opinions which, in combination, answer many of the questions that occur to the reader of the subsection. The first of these opinions preceded the 1973 amendment of Subsection (b) and answered homestead questions that are now obsolete. The opinion is still relevant, however, in ruling that someone 65 or older must have a taxable interest in the residence and that he or she must be 65 on January 1 to get an exemption for that taxable year. Thus, for example, if a spouse over 65 died after January 1, the exemption would cover that year but would be lost the following year if the surviving spouse did not reach 65 by the next January 1. A person who became 65 on January 2 would not be entitled to an exemption until the following year. Perhaps the most important point of the opinion is that the constitutional classification of property owners into those below 65 and those 65 and older is a reasonable classification under the Equal Protection Clause of the Fourteenth Amendment. (There can be no question of reasonableness under the Texas Constitution since the classification is in the constitution.) (See Tex. Att'y Gen. Op. No. H-9 (1973).)

A second opinion held that a county exemption for those 65 and older would be in place of the farm-to-market-road tax exemption of Section 1-a. In other words, whatever the amount of the Subsection (b) exemption–$3,000 or more–the farm-to-market exemption could not be added to create, as to that tax, an exemption of $6,000 or more. (See Tex. Att'y Gen. Op. No. H-36 (1973).) There is no basis for reaching this conclusion from the wording of the two provisions. The attorney general relied upon the traditional rule that exemptions from taxation are not

favored. The reasoning of the attorney general would also mean that a disabled veteran 65 or over could not receive a Subsection (b) exemption and an exemption under Subsection (b) of Section 2. It seems likely that this issue of double exemptions will eventually reach the supreme court.

The third opinion answered questions about the amount of an exemption granted under Subsection (b). The attorney general ruled that the exemption of $3,000 or more referred to assessed value and not to market value. This would mean that in a political unit that assessed property at 25 percent of market value, the exemption would be worth twice as much as in a neighboring unit that assessed at 50 percent market value. The attorney general also ruled that the exemption could be in any amount above $3,000 so long as the last sentence of the subsection did not come into play. (See the further discussion below.) Finally, he ruled that "future Boards or electorates may alter or discontinue future exemptions." That is, the word "thereafter" in "ad valorem taxes thereafter levied by the political subdivision" means only that the exemption may not be retroactive, not that once granted the exemption cannot be taken away. (See Tex. Att'y Gen. Op. No. H-162 (1973).)

The quotation from the opinion is ambiguous concerning one question that is not clearly answered by Subsection (b). Assume that a governing body refused to grant an exemption, following which a petition was filed and a favorable vote obtained granting an exemption of $4,000. It seems reasonable to conclude that, on general principles of democratic rule, the governing board could not remove the exemption. But could a new petition be filed and a new election held reducing an exemption or rescinding it? The second sentence speaks only to voting on obtaining an exemption but again, on the same general principles, the procedure seems reasonable. But assume that the governing body grants an exemption. Could a petition be filed and an election held rescinding the governing board's action? Although this is analogous to the case of a governing body trying to rescind an exemption voted at an election, Subsection (b) does not seem to permit an election to take away an exemption granted by a governing body. The key is the phrase "As an alternative." This is certainly a strange phrase, pregnant with some hidden meaning. A good guess is that what the drafter meant by the phrase was: "If the governing body refuses to grant an exemption (or a high enough exemption), then the proponents of an exemption may try the following procedure." It does not seem possible to read the phrase to mean: "In addition, any action by the governing body is subject to the following procedure."

It was noted that the attorney general called attention to the final sentence of the subsection. Although he made no point of it, it seems obvious that the sentence is aimed principally at an exemption obtained by petition. It seems most unlikely that a governing body would grant an exemption where a tax had been pledged to service debt. (Consider the flood control tax of Bexar County discussed in the *Explanation* of Sec. 1-a. If the attorney general is correct that there can be no double exemption, there is no problem. But if he is wrong, would the last sentence come into play if Bexar County granted a Subsection (b) exemption? The flood control tax is not literally pledged to service the debt of the San Antonio River Authority; as a practical matter the tax is so pledged.) The real thrust of the final sentence is that it gives the "taxing officer" the power to act without waiting for bondholders or their trustee to obtain an injunction against granting the exemption. In the case of a governing body of a political subdivision that levies ad valorem taxes for more than one purpose, the final sentence enables the body to grant the exemption from "all ad valorem taxes" and then to instruct the taxing officer to ignore the action to the extent necessary. In short, the final sentence is not a necessary protection for bondholders; it is an administrative device for their protection.

Art. VIII, § 1-c

Comparative Analysis

Homestead. Approximately five states have a mandatory exemption for the homestead. Each state differs in the details of the exemption. The same number of states permit the legislature to grant a homestead exemption, several with no limit on size of the exemption.

The Elderly. Georgia mandates an exemption of $4,000 for those over 65 whose income is less than $3,000. New Jersey permits the legislature to exempt such property in an amount not exceeding $800, but only if income does not exceed $5,000. Washington simply authorizes exemptions for residences of retired persons.

The foregoing is probably not complete. The *Index Digest* to the state constitutions covers only changes through December 31, 1967. It is likely that there have been further amendments recently in those states that constitutionally prohibit exemptions. For exemptions generally see the *Comparative Analysis* of Section 2.

Author's Comment

The extended *Explanation* of Subsection (b) is another example of the difficulties that arise when a self-executing "statute" goes into the constitution. If a provision simply said that exemptions for those 65 and over are not prohibited, the legislature could work out all the fine points that are unclear in Subsection (b). See also the *Author's Comment* on Section 2.

Sec. 1-c. EFFECTIVENESS OF RESOLUTION. Provided, however, the terms of this Resolution shall not be effective unless House Joint Resolution No. 24 is adopted by the people and in no event shall this Resolution go into effect until January 1, 1951.

History

This section was added by amendment in 1948.

Explanation

Prior to 1948, Section 1-a contained the $3,000 exemption now contained in Section 1-b. The 1948 amendment of Section 1-a dropped that exemption. Section 1-c provides that the 1948 amendment adding Section 1-b does not go into effect unless the 1948 amendment of Section 1-a is adopted. Section 1-c also provides that all this shifting around is to be effective on January 1, 1951.

Comparative Analysis

There may be a comparable provision in some constitution somewhere. One hopes not.

Author's Comment

Lawyers get used to arcane references in statutes. The lawyer's understanding is facilitated by industrious footnoting by publishers. In *Vernon's Constitution of the State of Texas Annotated* there are footnotes to "this Resolution" and "Resolution No. 24." The footnotes tell the reader what the second sentence of the *Explanation* sets out.

A constitution is, or certainly should be, the people's document. It should tell them about the government they have created—what it can and cannot do, how it is organized, and who can do whatever the government is permitted to do. One

would hope that school children can learn about their state government by reading their state constitution. There is, of course, a lot of detail in the Texas Constitution, much of which would tell a school child more than he wants to know about airport authorities, the veterans' land program, and the like. But it would surely take a precocious logician to understand Section 1-c if his copy of the constitution had no footnotes. The most that one can say for Section 1-c is that a teacher could use it to explain why sentences require subjects and predicates.

The Texas practice is to draft constitutional amendments as if Section 36 of Article III applied—that is, the Joint Resolution states: "Section so-and-so is amended to read as follows: . . . ." A second section of the resolution sets forth the procedure for voting on the amendment. There is no apparent reason that a third section of a resolution may not provide details concerning the effective date. Section 1-c could have been a separate section of the resolution instead of a separate amendment.

Sec. 1-d. ASSESSMENT OF LANDS DESIGNATED FOR AGRICULTURAL USE. (a) All land owned by natural persons which is designated for agricultural use in accordance with the provisions of this Section shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use. "Agricultural use" means the raising of livestock or growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, which business is the primary occupation and source of income of the owner.

(b) For each assessment year the owner wishes to qualify his land under provisions of this Section as designated for agricultural use he shall file with the local tax assessor a sworn statement in writing describing the use to which the land is devoted.

(c) Upon receipt of the sworn statement in writing the local tax assessor shall determine whether or not such land qualifies for the designation as to agricultural use as defined herein and in the event it so qualifies he shall designate such land as being for agricultural use and assess the land accordingly.

(d) Such local tax assessor may inspect the land and require such evidence of use and source of income as may be necessary or useful in determining whether or not the agricultural use provision of this article applies.

(e) No land may qualify for the designation provided for in this Act unless for at least three (3) successive years immediately preceding the assessment date the land has been devoted exclusively for agricultural use, or unless the land has been continuously developed for agriculture during such time.

(f) Each year during which the land is designated for agricultural use, the local tax assessor shall note on his records the valuation which would have been made had the land not qualified for such designation under this Section. If designated land is subsequently diverted to a purpose other than that of agricultural use, or is sold, the land shall be subject to an additional tax. The additional tax shall equal the difference between taxes paid or payable, hereunder, and the amount of tax payable for the preceding three years had the land been otherwise assessed. Until paid there shall be a lien for additional taxes and interest on land assessed under the provisions of this Section.

(g) The valuation and assessment of any minerals or subsurface rights to minerals shall not come within the provisions of this Section.

History

This section was added by amendment in 1966. Within three years a new version was proposed. It provided:

Section 1-d. The Legislature shall have the power to provide by law for the establishment of a uniform method of assessment of ranch, farm and forest lands, which shall be based upon the capability of such lands to support the raising of livestock and/or

to produce farm and forest crops rather than upon the value of such lands and the crop growing thereon.

The new version was turned down on November 3, 1970.

Explanation

The problem that lies behind this section is one of general concern across the nation. The solution adopted in Texas found its way into the constitution because of one of two sets of five words in Section 1—"shall be equal and uniform" or "in proportion to its value"—depending on how one reads the section. (See the *Explanation* of Sec. 1.)

The problem is that of agricultural land suitable for urban development. It is obvious that the "value" of a tract of land usable only for farming is directly related to and substantially controlled by the income that can be gained from farming it. If that tract of land is close to an expanding metropolis, the "value" of that tract is at least the amount of any equivalent farming tract anywhere else, but to any land developer the tract may be worth a great deal more. This creates a number of social problems. For one thing, a tax assessor must ask himself what that tract is really worth. It is worth what it can be sold for, a sum perhaps many times the value of the tract as a farm. He may also suspect that the farmer is plowing away, but with one eye on whether he should sell this year or wait until next year or the year after. If the market value keeps rising the farmer increases his eventual profit but has not paid his fair share of property taxes while plowing away. For another thing, if the property assessment is based on market value, the farmer who is keeping both eyes on his plow must give serious thought to selling. Yet there may be social gains in preserving agricultural pursuits in the vicinity of the metropolis. A tax system that encourages continued farming may be socially desirable. Finally, a speculator may buy a farm and continue to farm it while waiting for a better profit. If he can use the tax system to keep his costs down, the tax assessor will view him as no different from the farmer who is suspected of hanging onto farming only to get a better price for his land.

These are social problems that normally can be solved by statute. Unfortunately, the words quoted earlier do not allow the Texas legislature to change the rules of assessment to solve the problems. Section 1 requires all property to be valued by the same measuring stick. Hence, Section 1-d was adopted—a statutory exception to the general rules.

The section endeavors to cover all the significant social problems. Subsection (a) protects the real farmer from higher taxes just because his farm is capable of assessment at a higher, nonfarm value. The exclusion of corporations is in part a device to exclude the land developer and in part a nod to the historic man-of-the-soil. Subsections (b), (c), (d), and (e) are typical statutory devices to keep everybody honest. Subsection (f) is a device by which the government can share in the windfall which accrues to the farmer if he succumbs to the siren call of the land developer. The subsection picks up the additional taxes based on market value that could have been collected for the three years preceding sale. Subsection (g) recognizes, probably unnecessarily, that mineral rights are irrelevant under these circumstances.

Although this section has been in the constitution only seven years, considerable litigation has ensued. The first reported case involved a charitable foundation which, among other properties, "owned" a great deal of ranch and farmland. The farm, located in Nueces County, was operated under a sharecrop lease. The property taxes levied on the farm exceeded $25,000 but the net income before

property taxes from farming rarely exceeded $10,000. There were oil and gas royalties from the farm but even when they were added to farm income, the net before property taxes rarely exceeded $25,000. From this one can deduce that the market value of the farm greatly exceeded the agricultural use value plus the mineral rights value.

The tax assessors rejected the foundation's effort to use Section 1-d. (There is no indication whether the same effort was made for the ranches.) It was stated that the taxpayer was not a natural person, not in the business of agriculture, not primarily occupied in farming, and not primarily obtaining income from farming. For some undisclosed reason, the case was heard by the court of civil appeals in Beaumont. It decided that the trustees of the foundation qualified as a "natural person" and that the trustees were in the business of agriculture notwithstanding their passive role of landlord to a farmer tenant and the failure of the farm to yield much profit. The trustees lost their argument that they were primarily engaged in farming or obtaining their income primarily from farming. The controlling fact was that oil and gas royalties from the farm and the ranch land apparently exceeded the net income from the farm and the ranches. (*Driscoll Foundation v. Nueces County,* 445 S.W.2d 1 (Tex. Civ. App.–Beaumont 1969, *writ dism'd*).) One judge concurred specially, stating that he did not consider the foundation or the trustees a "natural person." In dismissing the writ of error the supreme court specifically reserved opinion on the natural person issue. (450 S.W.2d 320 (Tex. 1969).)

A second case fairly well settled the mechanics of valuation. In this instance the parties quarreled only over the way in which the agricultural use value was ascertained. The initial valuation by the school district involved was an average of $40 an acre for any and all agricultural land. Several land owners objected, arguing that Section 1-d did not permit a simplistic average valuation. The school district engaged an expert appraiser who arrived at valuations per acre for each tract, some of which were lower than, others higher than, $40 an acre. Again the owners objected. Their principal argument was that the agricultural value should be computed principally by capitalization of their own income, an argument rejected by the court of civil appeals in observing that that method "makes no differentiation between the fact that one operator may be an efficient operator, and the other may not; nor does it consider speculative matters such as weather conditions or other factors, varying from year to year. Such method ignores that it is the land that is to be valued for agricultural use, and not the particular operator, or the particular operator's business." (*King v. Real,* 466 S.W.2d 1, 7 (Tex. Civ. App.–San Antonio 1971, *writ ref'd n.r.e.*).) The court also ruled that a residence on an agricultural tract should not be valued under the agricultural use standard.

Two other cases arising under Section 1-d settled lesser issues. One case noted that the taxpayer has the burden of proof in establishing eligibility under Section 1-d. (*Stein v. Lewisville I.S.D.,* 481 S.W.2d 436 (Tex. Civ. App.–Fort Worth 1972), *cert. denied,* 414 U.S. 948 (1974).) The other case held that a farmer could still rely upon Section 1-d even if he obtained a great deal of money from the sale of portions of his tract. (*Klitgaard v. Gaines,* 479 S.W.2d 765 (Tex. Civ. App.–Austin 1972, *writ ref'd n.r.e.*).) This case demonstrates the practicalities of Section 1-d. As agricultural land the tract was assessed at $88,560; at market value the assessment would have been $549,440. The court noted that the taxpayer testified that without a Section 1-d assessment "he would be forced to sell the ranch 'pretty fast.' " (*Id,* at 768.)

In 1976 the supreme court for the first time addressed itself to Section 1-d. In *Gragg v. Cayuga I.S.D.* (539 S.W.2d. 861), the court was faced with a problem far removed from the social concerns that led to adoption of the section; rather it was a problem arising out of the way in which the wording attempted to solve one of the

social concerns. It was noted above that Subsection (a) is designed to protect the "real" farmer's or rancher's business. The key limiting words are "which business is the primary occupation and source of income of the owner." The question in the *Gragg* case was whether Mr. Gragg was a "real" rancher. In the years in question, 1970-1972, Mr. Gragg had an average annual *net* income of almost $600,000 of which a little over an average of $100,000 was attributable to his agricultural operations. During the same period he averaged in excess of $800,000 in *gross* income of which the average agricultural annual gross was $300,000. He argued that ranching was his primary occupation and source of income. "Mr. Gragg testified that he spent ten hours a day, seven days a week, in the ranching business. This was not disputed." (*Id.*, at p. 863.) The difficulty, of course, was that such a large part of both his gross and net incomes came from other sources, described as " 'eight or twelve other businesses.' " (*Ibid.*) Is agriculture one's primary source of income if it is only one-sixth of net income or three-eighths of gross?

The majority opinion approached this question as principally a matter of definition of "primary" and "income." The majority concluded that "income" means "gross income" and that "primary" means not 50 percent or more, but more gross income from one occupation than from any other single occupation. Thus, Mr. Gragg could qualify if his gross income from ranching exceeded the amount received from any one of his other "eight or twelve" businesses. Mr. Gragg lost, however, because he had not sustained his burden of proof to establish this. For this reason, what would otherwise have been a dissent was filed as a concurring opinion. The three concurring justices argued that "income" meant "net income" and that "primary" referred to the primacy of agricultural income over the aggregate income from the other businesses. The most interesting thing about the concurring opinion is that its focus is directed at the overall purpose of Section 1-d whereas the majority opinion leaves the reader with the impression that technical definitions were the principal determinants. And yet, when all is said and done, it is not at all clear which set of definitions in the long run would serve better in preserving land for agricultural uses. If there is a significant difference in effect between the two opinions, it is that the gentleman farmer, the wealthy entrepreneur who farms as a hobby, and the seeker for a tax shelter may be able to get relief under the majority ruling but probably not under the dissenting view. Whether this is good or bad so far as preserving agricultural land is concerned is another question.

Comparative Analysis

As of the end of 1967 there were three other states that had a comparable provision, but all were in the nature of authorizations to the legislature to give a break to the landowner. A few states have even more limited special exceptions. Two states provide that plowing of land is not to be considered as adding to the value. One state authorizes the legislature to provide that increased land value due to shade or ornamental trees planted along the highway is not to be considered in making an assessment. Another state specifies that large tracts of land are not to be assessed at a lower value than equivalent land held in small tracts.

The 1970 Illinois Constitution contains a mystifying provision that is said to have been requested by the Farm Bureau: "Real property used in farming in a county shall not be assessed at a higher level of assessment than single family residential real property in that county." (Art. IX, Sec. 4(b).) Superficially this seems to imply that farmland can be more valuable as such than as a potential subdivision. Or one might say that the provision forbids assessing large tracts of land at a higher rate than small tracts.

Author's Comment

Given the rule in Texas that all property must be taxed "equally and uniformly," meaning that property cannot be classified for different treatment, it was necessary to amend the constitution to permit a special rule for valuing agricultural land. It was not necessary, however, to draft a self-executing statute. (Justice Daniel, the author of the majority opinion in the *Gragg* case discussed in the *Explanation,* made a revealing slip when he wrote: "The Alaska statute, enacted in 1974, follows many provisions of the Texas statute, but it is less cumbersome." (539 S.W.2d, at 865).) The proposed 1975 Constitution, using the version worked out by the 1974 Convention, simply said:

> The legislature by general law shall establish separate formulas for appraising land to promote the preservation of open-space land devoted to farm or ranch purposes and by general law may establish separate formulas for appraising land to promote the preservation of forest land devoted to timber production. The legislature by general law may provide limitations and impose sanctions in furtherance of the appraisal policy of this subsection. (Art. VIII, Sec. 3(a).)

Note that this version took the road of but did not go so far as the unsuccessful amendment discussed in the *History* to this section. Under the 1975 version agricultural valuation was mandatory and forest valuation permissive whereas in the 1969 proposal special valuation was mandatory for both.

The advantage of the 1974-1975 approach is demonstrated by the confusion of the *Gragg* case discussed earlier. In that case the court found itself in a public policy thicket and was unable to agree on the correct way out. This is normal, of course, in cases involving constitutional public policies. Here the problem was not the basic policy—all agreed on that; the problem was a matter of "statutory interpretation" of a detail. Unfortunately, this "statutory" detail is now a part of the judicial gloss; if the effect of the decision is unacceptable, the constitution must be amended. The obvious moral is to keep statutes out of the constitution.

Sec. 1-e. ABOLITION OF AD VALOREM PROPERTY TAXES. 1. From and after December 31, 1978, no State ad valorem taxes shall be levied upon any property within this State for State purposes except the tax levied by Article VII, Section 17, for certain institutions of higher learning.

2. The State ad valorem tax authorized by Article VII, Section 3, of this Constitution shall be imposed at the following rates on each One Hundred Dollars ($100.00) valuation for the years 1968 through 1974: On January 1, 1968, Thirty-five Cents ($ .35); on January 1, 1969, Thirty Cents ($ .30); on January 1, 1970, Twenty-five Cents ($ .25); on January 1, 1971, Twenty Cents ($ .20); on January 1, 1972, Fifteen Cents ($ .15); on January 1, 1973, Ten Cents ($ .10); on January 1, 1974, Five Cents ($ .05); and thereafter no such tax for school purposes shall be levied and collected. An amount sufficient to provide free textbooks for the use of children attending the public free schools of this State shall be set aside from any revenues deposited in the Available School Fund, provided, however, that should such funds be insufficient, the deficit may be met by appropriation from the general funds of the State.

3. The State ad valorem tax of Two Cents ($ .02) on the One Hundred Dollars valuation levied by Article VII, Section 17, of this Constitution shall not be levied after December 31, 1976. At any time prior to December 31, 1976, the Legislature may establish a trust fund solely for the benefit of the widows of Confederate veterans and such Texas Rangers and their widows as are eligible for retirement or disability pensions under the provisions of Article XVI, Section 66, of this Constitution, and after such fund is established the ad valorem tax levied by Article VII, Section 17, shall not thereafter be levied.

4. Unless otherwise provided by the Legislature, after December 31, 1976 all delinquent State ad valorem taxes together with penalties and interest thereon, less

lawful costs of collection, shall be used to secure bonds issued for permanent improvements at institutions of higher learning, as authorized by Article VII, Section 17, of this Constitution.

5. The fees paid by the State for both assessing and collecting State ad valorem taxes shall not exceed two per cent (2%) of the State taxes collected. This subsection shall be self-executing.

History

This section was added in 1968.

Explanation

In one sense this section needs no explanation; it simply tidies up the state property tax. In another sense, the section requires explanation unless one wishes to grub around in the constitution and elsewhere to find out what the section really does.

As of January 1, 1951, the state property tax was reduced from 72¢ to 42¢ on the $100. (See *History* of Sec. 1-a.) In 1965 the tax went up to 47¢ through an amendment of Section 17 of Article VII which increased the 5¢ property tax for university and college buildings to 10¢. Subsection 1 of Section 1-e kills off all state property taxes as of December 31, 1978, except the 10¢ tax levied by Section 17. Subsection 2 disposed of 35¢ of the 37¢ in a phased withdrawal of 5¢ each year until it disappeared at the end of 1974. Since the income from the 35¢ tax was added to the available school fund under Section 3 of Article VII, somebody must have felt that it was essential to say something about all this, for Subsection 2 continues the constitutional mandate to provide free textbooks and the unnecessary permission to the legislature to appropriate general funds for that purpose.

Subsection 3 disposes of the remaining 2¢ tax. It is to be levied through 1976 unless the legislature sooner establishes a trust fund to cover Confederate pensions and the limited pensions for certain Texas Rangers and their widows authorized by Section 66 of Article XVI. (It is to be noted that the subsection recognizes that there are no living Confederate veterans; the reference is to "widows of Confederate veterans.") The legislature has not created the trust fund.

One mystifying feature about Section 1-e is that the last state tax of 2¢ expires on December 31, 1976, but Subsection 1 states that no state tax may be levied after December 31, 1978, except the 10¢ university and college building fund tax which continues indefinitely. What taxing power exists in 1977 and 1978? This is probably a nonquestion. Whatever the reason for the error, it is unlikely that any court would approve a new state property tax for those two years. Nobody seems to have an explanation for the two-year gap. The best assumption is that the 1978 figure in Subsection 1 is a typographical error.

Subsection 4 is one of those insignificant constitutional provisions that show up from time to time. The drafter of Section 1-e, thinking ahead, may have decided to alert everybody that some disposition would have to be made of delinquent taxes collected after the tax had been abolished; or he may have thought that, since the only continuing state ad valorem property tax would be the university and college building fund tax, any money collected after the cut-off date of all other property taxes might as well go into the same fund. But whatever his reason, he created nothing more than a "default" subsection. That is, he said, so to speak: "If the legislature forgets to pass a bill disposing of delinquent taxes collected after December 31, 1976, the comptroller of public accounts is hereby told what to do with the money."

Subsection 5 is a "constitutional" statute "repealing" in part Articles 3937 and

3939 of the *Texas Revised Civil Statutes Annotated.* Article 3937 provides a fee for assessing property; article 3939 provides a fee for collecting taxes. Since the statutory fee to be paid by the state to the county is 2 percent of all taxes over $20,000, all fees for assessment and three-fifths of the 5 percent fee for collecting the first $20,000 are "repealed." (See Tex. Att'y Gen. Op. No. M-509 (1969).) One can only speculate why the drafter of Subsection 5 considered the constitutional route preferable to amending articles 3937 and 3939. The attorney general has also ruled that Subsection 5 does not affect articles 7335 and 7335a, which permit hiring lawyers to collect delinquent taxes. "Thus, the compensation allowed the attorney is in the nature of legal fees for enforcement services and does not smack of the fees for assessment and collection contemplated by the amendment in question." (Tex. Att'y Gen. Op. No. M-318 (1968).)

Comparative Analysis

See *Comparative Analysis* of Section 9 for state property tax limits. At least four states prohibit a property tax for state purposes. Florida prohibits a state ad valorem property tax on real and tangible personal property but not on intangible property. California prohibits raising more than 25 percent of funds for state appropriations from ad valorem property taxes. The 1970 Illinois Constitution has a provision prohibiting an ad valorem personal property tax after December 31, 1979. This tax is levied only locally. The constitution requires that revenue lost because of the prohibition is to be replaced by statewide taxes levied only on those who paid the ad valorem personal property tax. No other state appears to limit the fee that the state may pay a local government for assessing and collecting state taxes.

Author's Comment

See *Comment* on Section 1-a of this article.

Sec. 2. OCCUPATION TAXES; EQUALITY AND UNIFORMITY; EXEMPTIONS FROM TAXATION. (a) All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places or (of) religious worship, also any property owned by a church or by a strictly religious society for the exclusive use as a dwelling place for the ministry of such church or religious society, and which yields no revenue whatever to such church or religious society; provided that such exemption shall not extend to more property than is reasonably necessary for a dwelling place and in no event more than one acre of land; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools and property used exclusively and reasonably necessary in conducting any association engaged in promoting the religious, educational and physical development of boys, girls, young men or young women operating under a State or National organization of like character; also the endowment funds of such institutions of learning and religion not used with a view to profit; and when the same are invested in bonds or mortgages, or in land or other property which has been and shall hereafter be bought in by such institutions under foreclosure sales made to satisfy or protect such bonds or mortgages, that such exemption of such land and property shall continue only for two years after the purchase of the same at such sale by such institutions and no longer, and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned shall be null and void.

(b) The Legislature may, by general law, exempt property owned by a disabled veteran or by the surviving spouse and surviving minor children of a disabled veteran. A disabled veteran is a veteran of the armed services of the United States who is classified as disabled by the Veterans' Administration or by a successor to that agency; or the military service in which he served. A veteran who is certified as having a disability of

less than 10 percent is not entitled to an exemption. A veteran having a disability rating of not less than 10 percent nor more than 30 percent may be granted an exemption from taxation for property valued at up to $1,500. A veteran having a disability rating of more than 30 percent but not more than 50 percent may be granted an exemption from taxation for property valued at up to $2,000. A veteran having a disability rating of more than 50 percent but not more than 70 percent may be granted an exemption from taxation for property valued at up to $2,500. A veteran who has a disability rating of more than 70 percent, or a veteran who has a disability rating of not less than 10 percent and has attained the age of 65, or a disabled veteran whose disability consists of the loss or loss of use of one or more limbs, total blindness in one or both eyes, or paraplegia, may be granted an exemption from taxation for property valued at up to $3,000. The spouse and children of any member of the United States Armed Forces who loses his life while on active duty will be granted an exemption from taxation for property valued at up to $2,500. A deceased disabled veteran's surviving spouse and children may be granted an exemption which in the aggregate is equal to the exemption to which the decedent was entitled at the time he died.

History

As noted in the *History* of Section 1, earlier constitutions authorized the legislature by a two-thirds vote to exempt property from taxation. The 1875 Convention began debate with a proposal before it that contained the same legislative power. As the debate developed, one of the first changes was to delete the power of the legislature to exempt property from taxation. (*Journal,* p. 467.) The delegate who proposed that deletion then offered a section reading:

> All taxes shall be uniform and upon the same class of subjects within the limits of the authority levying the tax. But the Legislature may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity, and all laws exempting property from taxation other than the property above enumerated shall be void. (*Ibid.*)

Immediately after this section was offered, the proviso now in Section 1 concerning household furniture was offered. (*Id.,* at 468.) As noted in the *History* of Section 1, the *Journal* is garbled at this point, for there is only one entry of a vote. The normal reading would tie the vote to the household exemption, but if this is correct the proposed section was never acted upon. It is clear, however, that when the delegates took up Article VIII on October 30, this proposed section on exemptions was before them. (The *Journal* does not reveal how "uniform and upon" became "equal and uniform upon" or how two sentences became one. This latter change was particularly ill-advised once "occupation" was inserted in front of "taxes." Presumably all this was the work of the Committee on Style and Arrangement.)

When the convention took up Section 2 on October 30 the first change was the insertion of "occupation" discussed in the *History* of Section 1. Then followed a series of maneuvers concerning exemption of school property, ending with the insertion of the following between cemeteries and charitable institutions: ". . . all buildings used exclusively and owned by persons, or associations of persons, for school purposes, and the necessary furniture of all schools." (*Ibid.*) This ended floor action on Section 2.

After the convention finished with Section 2, it still consisted of two sentences, the second of which began with "But" and had no semicolons. Presumably, the Committee on Style and Arrangement changed it, for the section as finally adopted read:

> All occupation taxes shall be equal and uniform upon the same class of subjects

within the limits of the authority levying the tax; but the Legislature, may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes (and the necessary furniture of all schools), and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned, shall be void.

The original Section 2 held for 30 years. Beginning in 1906, it has been subjected to eight amendments, three direct and five indirect. There have also been five proposed amendments that were rejected. Eight amendments were on the ballot in the ten years preceding 1974.

The first direct amendment, adopted in 1906, added the words concerning endowment funds in Subsection (a) beginning after the sixth semicolon and ending with the comma before the eighth and last semicolon. The 1906 amendment also drove an unnecessary nail in the exemption coffin by providing that all other exemptions shall be not just void but *null* and void. This extra nail is still there.

The second direct amendment, adopted in 1928, made two changes. One added the words exempting rectories and parsonages in Subsection (a) beginning after the first comma following the second semicolon and ending with the fourth semicolon. The other was the addition of the words beginning "and property used" following the words "of all schools" in the portion of Subsection (a) after the fifth semicolon and continuing to the sixth semicolon. (It would appear that the mysterious man who sprinkles commas and semicolons into constitutional amendments found his sprinkling can jammed; thus, neither a comma nor a semicolon was dropped in at the beginning of these additional words.) This part of the 1928 amendment was for the benefit of the YMCA and the YWCA. The third direct amendment, adopted in 1972, added Subsection (b).

The five indirect amendments of Section 2 were adopted in 1932, 1933, 1948, 1972, and 1973. These are Sections 1-a, 1-b, 1-c, and amendments of them. (One may ask why the amendments were not made direct amendments of Sec. 2. Presumably, the drafter of the 1932 amendment analogized the $3,000 homestead exemption to the $250 household goods exemption in Section 1. But since the "null and void" provision is in Section 2, Section 1-a and successive progeny are really amendments of Section 2. But then again, as noted in the *History* of Section 1, Section 2 is an exception to the command to tax all property thus making all amendments of Section 2 indirect amendments of Section 1.)

Four of the defeated amendments were direct amendments in the sense that three of them used "2" as a section number and the fourth was an amendment of Section 2 in the traditional manner of dumping more words into the overgrown sentence. This amendment, defeated in 1969, was essentially the same as the amendment, styled "Section 2C," which was defeated on November 6, 1973. Both would have authorized ad valorem tax exemption for nonprofit suppliers of water. (The 1969 version covered corporations; the 1973 version covered corporations and cooperatives. See the *Author's Comment* on this section.) Another defeated amendment, styled "Section 2-A," would have directly exempted charitable hospitals from all ad valorem taxes except the state tax. The exemption was subject to a host of "provided thats." This one failed in 1965. The fourth defeated amendment, styled "Section 2-a," would have authorized ad valorem tax exemption for antipollution capital equipment. It failed in 1968.

The fifth defeated amendment was a proposed Section 1-f, voted upon on November 5, 1968. It would have exempted goods temporarily stored in Texas pending shipment out of the state.

Explanation

As indicated above, the first "sentence" of Subsection (a) of this section has nothing to do with the several "sentences" which follow. In order to keep apples separate from oranges, the first "sentence" has been covered in the *Explanation* of Section 1; by the same logic the household exemption in Section 1 is covered here.

In general. The logical steps explaining Section 2 are: (1) a legislature has plenary power to levy and to authorize the levy of ad valorem property taxes; (2) Section 1 limits that power by stating that if a property tax is levied it must be levied upon *all* property (except that of municipal corporations) in proportion to its value (the "if" was theoretical in 1876; today it is not even accurate, for Sec. 17 of Art. VII directly levies a property tax); (3) Section 2 permits the legislature to make exceptions to the limitation but only as specified; and (4) these exceptions must exempt the property from taxation—that is, the legislature is not empowered to tax the property at a lower rate than other property. This last point is not applicable to the household property exemption in Section 1, the homestead exemptions in Sections 1-a and 1-b, and the exemptions in Subsection (b) of this section. These are all related to "in proportion to its value." In some instances the dollars of exemption might equal or exceed the value of the property; normally, these are exemptions of a part of the value of the property rather than an exemption of the property. (Note that the household property exemption in Sec. 1 and the homestead exemptions in Sec. 1-a and Subs. (a) of Sec. 1-b are direct exemptions by the constitution whereas the exemptions of Subs. (b) of Sec. 1-b and Subs. (b) of Sec. 2 are permissions to exempt. Note also that the farm products and supplies exemption in Sec. 19 is a direct exemption subject to cancellation by the legislature and that the agricultural land valuation exception in Sec. 1-d is a direct "exemption" from the requirement to treat all property equally in ascertaining value.)

Household goods. Notwithstanding the odd wording of this exemption—"household and kitchen furniture"—no questions of interpretation appear to have arisen. The legislature has expressed an opinion by listing household and kitchen furniture, "in which may be included one sewing machine." (Tex. Rev. Civ. Stat. Ann. art. 7050, item 11.) Many years ago a sewing machine was seized for sale to satisfy delinquent poll taxes. It was held that the constitutional and statutory exemption applied only to the levy of taxes and not to seizure for failure to pay taxes. (*Ring v. Williams,* 35 S.W. 733 (Tex. Civ. App. 1896, *writ ref'd*).)

Public property. In the discussion of Section 9 of Article XI it is noted that that section plus two supreme court cases have fairly well destroyed the limited permission to exempt "public property used for public purposes." The law today is, first, that by virtue of the words "other than municipal" in the second sentence of Section 1, *any* property owned by a municipal corporation may be exempted from taxation. ("Municipal corporation" in this context probably means any political subdivision that has been designated a body corporate with power to sue and be sued.) Second, public property "devoted exclusively to the use and benefit of the public" and owned by any political subdivision is constitutionally exempt from taxation by the terms of Section 9 of Article XI. In short, Section 1 gives the legislature more power to grant exemptions than does Section 2 but Section 9 of Article XI takes away much of the power *not* to exempt.

In 1888, Chief Justice Stayton, who had been a delegate to the 1875 Convention, said that Section 2 "seems to apply to property owned by persons or corporations in private right, but which, from the use to which it is applied, is, in a qualified sense, deemed public property." (*Daugherty v. Thompson,* 71 Tex. 192, 199, 9 S.W. 99, 101 (1888).) Later in the same opinion he stated it more positively: "As said before,

section 2, art. 8, of the constitution, gave to the legislature the power to exempt property held in private ownership, but used for purposes which give to it a public character." (71 Tex., at 201; 9 S.W., at 102.) This is an accurate statement of the general purpose of Subsection (a), but the chief justice did not mean to include "public property used for a public purpose" in his description of the section. Only a few years later he wrote: "It cannot be claimed that the property of appellant is public property used for public purposes, for to give it such character it is believed that the ownership should be in the state or some of its municipal subdivisions, ..." (See *St. Edwards College v. Morris,* 82 Tex. 1, 3, 17 S.W. 512 (1891). This case is discussed later in this *Explanation.)*

There is a possibility that what Chief Justice Stayton said in 1888 was based more on his memory of the 1875 Convention than on the wording of Section 2. In the *History* above, Section 2 as it was first proposed is quoted. It is possible to read the original as if it meant that the legislature could exempt the following "public" property used for public purposes: churches, cemeteries, and charitable institutions. After school buildings and furniture were added and after somebody dropped in several semicolons, it was not possible so to read the section. It may be that in 1891 Chief Justice Stayton was relying on the words of the constitution and not on his memory.

On one occasion the supreme court said that Chief Justice Stayton was referring specifically to "public property" as private property "deemed public property." (See p. 910 of the *Fertitta* opinion cited and discussed in the *Explanation* of Sec. 9 of Art. XI.) In view of the many cases strictly construing the specific exemptions, it is obvious that the *Daugherty* dictum is not to be taken seriously.

Religious property. As noted in the *History* above, one of the purposes of the 1928 amendment was to include residences of ministers under this exemption. This was the direct result of a holding under the original wording that the residence of a minister could not qualify under "actual places of religious worship." (*Trinity Methodist Episcopal Church v. City of San Antonio,* 201 S.W. 669 (Tex. Civ. App.—San Antonio 1918, *writ ref'd*).) Since the amendment, the courts have had to decide whether the exemption can extend to the residence of a minister who is not attached to an actual place of worship but superintends the ministries of several churches. The supreme court decided that supervising ministers could be housed in tax-exempt dwellings. (See *McCreless v. City of San Antonio,* 454 S.W.2d 393 (Tex. 1970), reversing 448 S.W.2d 518 (Tex. Civ. App.—San Antonio 1969) and overruling *City of Houston v. South Park Baptist Church,* 393 S.W.2d 354 (Tex. Civ. App.—Houston 1965, *writ ref'd*).)

There have been other problems involving the meaning of "actual places of religious worship." In *Radio-Bible Hour, Inc. v. Hurst-Euless I.S.D.* (341 S.W.2d 467 (Tex. Civ. App.—Fort Worth 1960, *writ ref'd n.r.e.*)), the court was faced with a claim for exemption of a building on 3.2 acres of land plus house trailers, a tent, electronic and office equipment, furniture and other personalty. The building was used principally for the preparation, recording, and dissemination of religious programs and sermons to radio stations. A 15-minute religious service was held five days a week. All work done in the building was actual religious work. Exemption was denied because the premises did not constitute an "actual place of worship." The court relied on the presumption against exemption and on the *YMCA* case discussed later. (In 1967 the exemption statute was amended by the addition of a definition of "actual places of worship." Included in the definition are the words "property owned by a church or by a strictly religious institution or organization, . . . used exclusively to support and serve the spread of a religious faith, and to effect accompanying religious, charitable, benevolent and educational purposes by

the dissemination of information on a religious faith through radio, television and similar media of communication." (Tex. Rev. Civ. Stat. Ann. art. 7150, item 1(a).) Would this include a religious publishing house? A religious bookstore? No one appears to have passed judgment on the validity of this definition. (See the discussion of the *Daughters of St. Paul* case in this *Explanation.*)

One of the most recent cases in this field is *Davis v. Congregation Agudas Achim* (456 S.W.2d 459 (Tex. Civ. App.–San Antonio 1970, *no writ*)). The question here was whether exemption was lost because a portion of the synogogue was rented out from time to time to civic organizations, schools, and other churches. The annual income of roughly $10,000 was about half the cost of maintenance of the portion rented out.

In an excellent opinion, Justice Cadena pointed out that prior to 1928 the constitutional language granted an exemption to "actual places of worship." The words "and which yields no revenue whatever" came in with the 1928 amendment adding residences for the ministry. He noted that the residence amendment speaks of a "dwelling place" in the singular, that the original Section 2 spoke and still speaks of "actual places of worship" in the plural, and that the clause about revenue is in the singular. Ergo, the rules of grammar decided that issue. In the same 1928 amendment, he also noted, words of exclusivity appeared–"exclusive use as a dwelling place"–but again, this does not cover places of worship. Part of the argument by the assessor-collector was that the *YMCA* case discussed below spoke of exclusive use of a place of worship, but Justice Cadena pointed out, at that time words of exclusivity appeared in the statute granting exemption. (One must never forget that the legislature can narrow the exemption authorized by Sec. 2.) In answer to the citation of cases involving exclusive use of property for charitable purposes, Justice Cadena threaded his way through Section 2 and demonstrated again that the appropriate constitutional adjective could not relate to places of worship. (At this point in the opinion Justice Cadena figuratively lost his temper. See the quotation in the *Author's Comment* on this section.)

Justice Cadena's opinion indicates that he is not at all sympathetic when it comes to construing tax exemptions narrowly. One may speculate whether this is related to the fact that so many of the Section 2 cases come from San Antonio. (Seven of the 18 cases mentioned in this *Explanation* arose in San Antonio.) In the most recent supreme court pronouncement on this "actual places of worship" exemption, the court noted that "claims for tax exemptions are strictly and narrowly construed." (See *Davies v. Meyer,* 541 S.W.2d 827, 829 (1976) (only the two acres containing a chapel and residence of a 155-acre church camp are exempt).)

YWCA and YMCA. In 1913 the legislature granted tax exemption to buildings of the YMCA and YWCA, "used exclusively for the purpose of furthering religious work." (See Tex. Rev. Civ. Stat. Ann. art. 7150, item 2.) In 1926 the district court dismissed a suit by the city of San Antonio against the YMCA for property taxes delinquent from 1905. The court of civil appeals reversed, holding that the 1913 statute was unconstitutional because it had been conceded that the building was not used exclusively for religious worship and could not qualify as an institution "of purely public charity." (*City of San Antonio v. Young Men's Christian Ass'n,* 285 S.W. 844 (Tex Civ. App.—San Antonio 1926, *writ ref'd*). The court also said that the 1913 statute was a special law prohibited by Sec. 56 of Art. III, but the case is not remembered for this point.) It was pointed out by Justice Cadena, as noted earlier, that "exclusive" use for public worship was statutory in 1926, not constitutional. Justice Cadena did not point out that use of the term "exclusive" had been irrelevant in 1926 since the exemption was based on the 1913 YMCA statute, not the places-of-worship statute, and that the validity of the 1913 statute—leaving aside the special

law argument—could not be judged by the statutory narrowing of a different constitutional exemption. Unfortunately, the 1913 statute did not speak of "actual places of worship"; the words, quoted above, were "used exclusively for the purpose of furthering religious work." Everybody seems to have gotten mixed up in sorting out the YMCA problem. The solution was to amend Section 2 as pointed out in the *History* of this section.

Cemeteries. The words in Section 2 are "places of burial not held for private or corporate profit." (The 1875 Convention's dislike of corporations is manifested in the strangest ways. "Corporate" adds nothing here.) There does not appear to be any interpretation of this provision. The statutory exemption is somewhat more limited:

> All lands used exclusively for graveyards or grounds for burying the dead, except such as are held by any person, company or corporation with a view to profit, or for the purposes of speculating in the sale thereof. (Tex. Rev. Civ. Stat. Ann. art. 7150, item 3.)

There is a possible ambiguity in the statutory grant. Does "lands" refer only to the ground? Are mausoleums and other buildings in a cemetery exempt? The only official pronouncement on coverage is an attorney general's opinion holding that oil and gas royalties to a nonprofit cemetery are taxable even though the income is used for maintenance of the cemetery. (Tex. Att'y Gen. Op. No. 0-4755 (1942).)

Schools. In the confused language of Section 2, the educational exemption covers "all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools." In other parts of the section, the references are to "places"—churches and cemeteries—and "property"—parsonages and YMCA. The principal questions, therefore, are whether land used for school purposes is exempt and what "exclusively" means. In the early case of *St. Edwards College v. Morris* (82 Tex. 1, 17 S.W. 512 (1891)), Chief Justice Stayton held that the land on which a school building and necessary out-buildings were situated would be exempt; that land necessary for educational purposes, such as land used for teaching agricultural pursuits, would be exempt; but that contiguous farmland used to provide food for a boarding school would not be exempt. In an even earlier case, the supreme court spelled out the meaning of "exclusively." In *Red v. Morris* (72 Tex. 554, 10 S.W. 681 (1889)), the court found no exemption problem if three sisters operated a seminary for young ladies and lived on the premises. The point was driven home by the fact that tax exemption had been denied earlier when the sisters' parents operated the same school but used the building as their home. This distinction was adhered to in the case of a lawyer who lived in a house which was used as a school and in which his wife taught. Although he and his wife owned the building and the school, the building was held not to be used exclusively for school purposes. (*Edmonds v. City of San Antonio,* 36 S.W. 495 (Tex. Civ. App. 1896, *writ ref'd*).)

The foregoing cases all involved private schools operated for profit. The constitutional permission to exempt school buildings says nothing about nonprofit education, thus differing from parsonages, cemeteries, and institutions of purely public charity. This point was specifically affirmed in *Smith v. Feather* (149 Tex. 402, 234 S.W.2d 418 (1950).) Unfortunately, the husband and wife owners of both a building and a proprietary school made a mistake in creating a partnership to run the school and included their daughter as a partner. Thus, the building was no longer both "used exclusively *and* owned by persons or associations of persons for school purposes." (Presumably, the partnership was thereafter dissolved or ownership of the building was transferred to the partnership.)

"Exclusive" use for school purposes can plague a nonprofit organization in the

same way that institutions of purely public charity are plagued. (See the forthcoming discussion. Churches, as already noted, do not suffer from this plague.) In *Little Theatre of Dallas, Inc. v. City of Dallas* (124 S.W.2d 863 (Tex. Civ. App.–Dallas 1939, *no writ*)), exemption was denied. On the one hand, the nonprofit corporation ran a school to which Southern Methodist University students were admitted and for which they received college credits; on the other hand, the auditorium was rented out from time to time for lectures and recitals. But the court's principal point was that the "primary purpose is to furnish pleasure and entertainment to its members and patrons; although it gave instruction in diction, acting, playwriting, fencing, the use of voice, dancing, etc., yet, however laudable and, in a general sense, educational and cultural these activities, they fall far short of showing that the property in question was used exclusively for school purposes." (p. 865.) One wonders whether the theater attorneys argued that education in acting, playwriting, and the rest requires productions before live audiences. If a farm is appropriate for teaching farming, an audience is appropriate for teaching the performing arts. But then this was one of the many cases stressing strict construction of exemptions.

Institutions of purely public charity. The first point to be made about this category is that the constitutional exemption is for "all buildings used exclusively and owned by . . . institutions of purely public charity." There are 141 words, five commas and two semicolons within the segment represented above by the ellipsis. Fortunately, the original wording in 1876 was not so bad; then there were only 16 intervening words, seven of which were in parentheses surrounded by commas. Thus, at that time, the wording was clear. Even so, the meaning produced by the clear wording is probably not what the 1875 Convention intended. Section 2 as originally proposed probably meant that the "property" of charitable institutions could be exempted. It was the insertion of the words concerning school buildings and the subsequent selective introduction of semicolons that tied charitable institutions to "buildings." (Compare the original proposal with the section as adopted. Both are set out in the preceding *History*. See also the discussion above concerning Chief Justice Stayton's opinion in the *Daugherty* case.) The 1906 and 1928 amendments added another 125 words between "buildings" and "institutions," but since neither amendment was concerned with institutions of purely public charity, the meaning remains the same.

The second point to be made is that this is the catch-all category. If the legislature purports to grant exemption to an institution that is not a school, an actual place of worship (plus parsonage), a cemetery, or something like the "Y," the only category that works is "institutions of purely public charity."

The leading case on a "purely public charity" is *River Oaks Garden Club v. City of Houston* (370 S.W.2d 851 (Tex. 1963)), where the supreme court divided five to four over the meaning of the phrase. The majority took the narrow view that the only institutions that can qualify are those that dispense "aid to the sick, the distressed and the needy, by providing for their basic needs," or that "assume, to a material extent, that which otherwise might become the obligation or duty of the community or the state." (p. 854.) The dissenters took the broad view that a purely public charity is one that is devoted to charitable purposes, which includes relief of poverty, advancement of education and religion, promotion of health, and other purposes beneficial to the community. (p. 858.)

If the supreme court adheres to the *River Oaks* definition, a great many of the items in the laundry list of statutory exemptions (Tex. Rev. Civ. Stat. Ann. art. 7150) are of doubtful constitutionality: Item 14–art galleries; Item 15–Boy Scouts (unless they qualify as a "Y"); Item 16–demonstration farms (unless they qualify as "schools"); Item 19–Federation of Women's Clubs; Item 20–American Legion

and other Veterans' Organizations or "any non-profit organization chartered ... for the purpose of preserving historical buildings, sites and landmarks"; first Item 22–fraternal organizations; second Item 22–nonprofit corporations using their property for (1) libraries and archival institutions; (2) zoos; (3) restoration and preservation of historic houses, structures and landmarks; (4) symphony orchestras, choirs, and chorals; and (5) theaters of the dramatic arts and historical pageants; Item 22a–ecological laboratories used solely by public and private colleges and universities in Texas; first Item 24–nonprofit corporations providing housing for the elderly if managed by a board of trustees selected by a church or strictly religious society; second Item 24–organizations promoting gardening; Item 25–real property owned by Nature Conservancy of Texas, Inc.; and Item 26–all garden clubs. (Beginning in 1959 with Item 21, the legislature has denominated the items "Section.")

If the minority view in *River Oaks* prevails, all foregoing statutory exemptions would probably be valid as would the tax exemption for a great many other nonprofit organizations. It can even be argued that the first and second Items 23, nonprofit water supply corporations, would be exempt under the minority view notwithstanding the defeat of the amendments discussed in the *History*.

A relatively recent supreme court case indicates that the justices are not prepared to adopt the minority view. In *City of Waco v. Texas Retired Teacher Residence Corp.* (464 S.W.2d 346 (Tex. 1971)), a per curiam opinion denied exemption to a retired home comparable to the exemption set forth in the first Item 24 set out above. The only difference was that the teachers' residence was not controlled by a board of trustees chosen by a church. The important point, however, is that the court made no reference to Item 24, adopted by the legislature in 1969, following *Hilltop Village, Inc. v. Kerrville I.S.D.* (426 S.W.2d 943 (Tex. 1968)), involving a residence meeting the requirements of Item 24. Instead, the court referred to Item 7, the "purely public charity" exemption, cited the *Hilltop Village* and *River Oaks* opinions, and concluded that not enough had been done to dedicate the facilities to the poor. In 1973 the attorney general advised the governor to veto an amendment of Item 24 that added handicapped persons, broadened control beyond a board of trustees selected by a religious group, and tied nonprofit status to tax exemption from the federal income tax. The attorney general relied on the recent *Amarillo Lodge* case discussed below, using the narrow language of "purely public charity" of that opinion. For reasons discussed below, *Amarillo Lodge* does not belong in the "purely public charity" category, but the attorney general is undoubtedly justified in relying on what the court said in reinforcement of the narrow view of the majority in *River Oaks*. (See Tex. Att'y Gen. Letter Advisory No. 52 (1972).)

The latest judicial struggle over "purely public charity" involved an intermediate nursing home. The home was operated by the Evangelical Lutheran Good Samaritan Society, which operates some 170 institutions in 21 states. Charges were made on the basis of ability to pay, with the society assuming the loss if the set charge was not met. An effort was made to deny exemption on the authority of the *River Oaks* and *Hilltop* cases discussed earlier. The supreme court upheld the exemption. (See *City of McAllen v. Evangelical Lutheran Good Samaritan Society*, 530 S.W.2d 806 (Tex. 1976) (three justices dissenting).) In essence the court adhered to the *River Oaks* rule by taking a realistic view of the facts of modern "purely public charity." Some people admitted to the nursing home paid the full rate; those who could not were "welfare patients," most of whom were "on welfare," which meant that the state contributed to their care. (This would include the working poor who are eligible for Medicaid.) An old-fashioned view of "charity" implies that public-spirited citizens provide the money to run an institution that serves the poor; an institution receiving government money to cover the cost of treating the poor does

not fit this old-fashioned view. But if the nonprofit, charitable institution does not turn people away because of inability to pay and does absorb any loss because of the government's failure to make a welfare grant large enough to cover costs, the institution is a "purely public charity" in today's world. In this realistic sense the Good Samaritan Society qualified.

In the course of such free-wheeling opinions as those of the majority and minority in *River Oaks,* the peculiar words of Section 2 tend to be forgotten. As pointed out earlier, the institution of purely public charity can be granted an exemption only for "buildings used exclusively" for the stated purpose. In the first Item 22 the legislature purported to give a blanket exemption to fraternal organizations so long as they engaged in "charitable, benevolent, religious, and educational work" and did not provide insurance for their members or support candidates for political office. The supreme court in *City of Amarillo v. Amarillo Lodge #731, A.F. & A.M.* (488 S.W.2d 69 (Tex. 1972) (two justices dissenting)) went straight back to the leading case of *City of Houston v. Scottish Rite Benevolent Ass'n* (111 Tex. 191, 230 S.W.978 (1921)) for the proposition that the institution must be organized and operated purely for public charity. Both in Houston and Amarillo the buildings were meeting places for groups that, among other things, engaged in charitable work.

The point is that whereas the quarrel over "charity" in *River Oaks* could be decided either way without doing violence to the English language, there are real difficulties over the word "exclusively." (Purists might argue that "charity" must be held to the same meaning held by the 1875 delegates. Many, including the majority in the *Good Samaritan* case, would disagree. A word like "exclusively" represents a value judgment that does not change with the times. What is "charity" today may differ from what was "charity" in 1875. What was "exclusive" then is still "exclusive.") In any event, the court's opinion in *Amarillo Lodge* turned on "exclusively" but, unfortunately, talked about "purely public charity" in the traditional narrow terms.

There have been other "exclusively" cases. Consider, for example, *City of Longview v. Markham McRee Memorial Hospital* (137 Tex. 178, 152 S.W.2d 1112 (1941)), where an exemption was lost because the hospital rented office space to two doctors. (Presumably, the doctors left and the hospital obtained an exemption the next year. Presumably, also, no hospital ever made that mistake after 1941.) Consider, also, the problem in *Hedgecroft v. City of Houston* (150 Tex. 654, 244 S.W.2d 632 (1951)), where a nonprofit corporation bought property on December 30, started work on converting the property into a hospital, and claimed an exemption on the succeeding January 1. In the eyes of the constitution as seen through the supreme court, the building was used "exclusively" as an institution of purely public charity on that first day of January.

In the earlier discussion of places of worship, the question was raised whether, under the amended statutory definition, a religious bookstore would qualify as an actual place of worship. It does not qualify as an institution of purely public charity. (See *Daughters of St. Paul, Inc. v. City of San Antonio,* 387 S.W.2d 709 (Tex. Civ. App.–San Antonio 1965, *writ ref'd n.r.e.*).) If the bookstore is still in business, the Daughters of St. Paul might try again using the new definition of places of worship.

All this raises the question of the extent to which assessor-collectors across the state follow the constitution, the supreme court, the legislature, or the election returns. Certainly the legislature has not paid much heed to supreme court opinions. Since 1963 when the *River Oaks* case denied exemption to a garden club engaged in preserving a historic building, there have been two enactments granting exemption for historic preservation and two enactments granting exemptions to garden clubs.

Perhaps the legislature was banking on the minority view in *River Oaks* becoming a majority.

Endowment funds. It was noted in the *History* that the endowment language first came in during 1906. Commas and semicolons were shifted around when more words were added in 1928. Neither version is intelligible. Fortunately, the supreme court, by brute force so to speak, took the words, twisted them around, and pronounced judgment on their meaning. (See *Harris v. City of Fort Worth,* 142 Tex. 600, 180 S.W.2d 131 (1944).) Except for the possible ambiguity noted below, the endowment clause means:

1. Endowment funds and the income therefrom of educational institutions and of religious institutions are tax-exempt.

2. Real property held for investment is not tax-exempt except for property acquired by foreclosure, but only for two years following the foreclosure sale. (See Tex. Att'y Gen. Op. No. 0-871 (1939).)

3. The institutions must be institutions that otherwise qualify for tax exemption under Section 2. That is, the institution would have to have a building used for school purposes or an actual place of worship.

There is one hooker in the supreme court case. The endowment fund was a trust for the benefit of Texas Christian University, characterized by the court as "admittedly an institution of learning and religion." (142 Tex., at 601; 180 S.W.2d, at 132.) This is the ambiguous language of the endowment clause. Do the words mean only a religious educational institution or do they mean institutions of learning and institutions of religion? (And since the 1928 amendment, when the YMCA and YWCA words got dropped in between school buildings and endowment funds, do their endowment funds get covered? The applicable statute purports to cover them. See Tex. Rev. Civ. Stat. Ann. art. 7150, item 2.)

Although the supreme court did not have to construe "such institutions of learning and religion," the thrust of its opinion would lead one to believe that it would have ruled the same had the trust fund been for the benefit of an educational institution not connected with a church. The court noted, for example, that from 1876 on there was a statute exempting endowment funds of institutions of learning and that the constitution was amended in 1906 "when for the first time the Legislature was authorized to exempt endowment funds." (142 Tex., at 604; 180 S.W.2d, at 133.) (Indeed, the ballot in 1906 called for a vote for or against an amendment "exempting from taxation endowment funds used exclusively for school purposes." See Tex. Laws, 29th Leg., p. 411 (1905).)

An unanswered question is whether endowment funds of "institutions of purely public charity" are tax-exempt. As noted earlier, those institutions are tied back to "all buildings used exclusively and owned by. . . ." In the statutory laundry list endowment funds are mentioned in the items on Schools and Churches, Christian Associations (the "Y"), and Demonstration farms (Tex. Rev. Civ. Stat. Ann. art. 7150, items 1, 2 and 16). In the last case, the wording is fascinating in its breadth. It refers to "demonstration farms for the purpose of teaching and demonstrating modern and scientific methods of farming," which sounds like an institution of learning, but the item ends up ". . . and when any of the income, over and above an amount sufficient to maintain and operate the same, is used and bound for the use of other institutions of public charity, . . ." which sounds as if the farms are not institutions of learning.

Absence of the term "endowment funds" does not mean that other statutory exemptions do not purport to include capital funds. Many of the statutory items refer to "all property," "the property," or "all real and personal property." These would include endowment funds. As noted earlier, the statutory "public charities"

item used to refer only to "buildings," as if tracking the constitutional language, but now it refers to "all buildings and personal property." (Someone may argue that "personal" means "tangible personal," which would exclude endowment funds. But this gets nowhere, for the constitutional language still covers only buildings.)

It is important to remember that the preceding discussion of the grammatical relationship between "buildings" and "institutions of purely public charity" is on the constitutional level. On the practical level the discussion is probably irrelevant. As pointed out in the *Explanation* of Section 1, most intangible property and much tangible personal property is not taxed. It makes little difference whether an institution of purely public charity omits to render property in reliance upon a statutory exemption that may be unconstitutionally broad or because most people do not render personal property anyway.

Presumptions. In the course of this *Explanation,* it has been noted from time to time that tax exemptions are to be "strictly" and "narrowly" construed. It is always a good question whether rules of construction like this one mean a great deal. A comparable rule of evidence is a rule placing the burden of proof on one side or the other—in the area of tax exemption, for example, the burden is on the taxpayer. Here the rule both governs the process of trial and affects the result. Whether a rule of construction affects the result is not clear. What is likely is that the rule of construction facilitates reaching a desired result quickly. Judges who think tax exemptions are not good find the traditional rule a handy tool; judges who approve of tax exemptions find the rule a hurdle. Presumably the former judges think that the rule governs them while the latter judges simply jump the hurdle while paying lip service to the rule. In any event, there is no known way to determine whether a particular rule of construction is actually decisive in any given situation.

Subsection (b). This subsection is in part an authorization to the legislature to exempt property and in part a command to provide an exemption; it is not a self-executing grant of an exemption as in Subsection (a) of Section 1-b. (See Tex. Att'y Gen. Op. No. H-88 (1973).) In the opinion just cited, the attorney general held that the statute carrying out the authorization and command of Subsection (b) was unconstitutional in its entirety even though he found only two relatively minor unconstitutional items in the statute. This was the result of a section that was the opposite of the traditional severability provision. The statute provided:

> The provisions of this Act are declared to be non-severable, and if any provision of this Act is declared invalid by a final judgment of a court of competent jurisdiction as to any person, the Act is void.

In 1975 the legislature tried again. (See Tex. Rev. Civ. Stat. Ann. art. 7150h.) This time the legislature succeeded. Nevertheless, the attorney general had a bit of a problem with the wording of Subsection (b). The normal way to grant a partial exemption is to use the formulation found in Section 1-b: so many dollars of the assessed value of property. Subsection (b), however, refers to granting a veteran an exemption for "property valued at up to" so many dollars. Article 7150h uses the normal "assessed value" wording. This raised the argument that the enabling act was unconstitutional on the ground that the statute exempted the maximum permissible amount of assessed value instead of that amount of true value. Another argument against the constitutionality of article 7150h was based on the "up to" wording of the exemption. Since the subsection is, as to disabled veterans, simply an authorization to act, the dollar exemption figure is a limitation on the power of the legislature. This, the argument went, meant that no exemption could be granted if the value of the veteran's property exceeded the maximum value authorized.

In answering these arguments, the attorney general relied on two rules of construction, one of which is touched with irony. He quoted a supreme court opinion that stated that the policy of the courts is to construe liberally a constitutional provision directing the action of the legislature. (A tax-exemption authorization is to be construed liberally?) His second argument was more appropriate. This is the rule that courts give deference to a legislature's construction of a constitutional provision relatively contemporaneously adopted. Accordingly, the attorney general concluded that article 7150h carried out the intent of Subsection (b). (See Tex. Att'y Gen. Op. No. H-857 (1976).) What the attorney general would probably have liked to say is that everybody knows what these words of Subsection (b) mean and that nobody should let poor draftsmanship destroy the obvious purpose of the provision.

Comparative Analysis

In general. About a dozen states prohibit the granting of any exemptions not specified in the constitution. Another half dozen or so states have an "all-property-shall-be-taxed" provision which may have been construed to prohibit exemptions. A few states have provisions granting the legislature power to grant exemptions. Many of these are really limitations requiring that exemptions be granted by general law only. About half a dozen states have provisions authorizing particular exemptions but without a readily identifiable provision that would otherwise prohibit the exemption. In sum, it would appear that about half the states have no substantive restrictions on the power to grant exemptions.

For specific exemptions, there are three general categories. There are states like Texas which authorize exemptions of specific classes of property and prohibit all others. There are states that directly exempt whatever classes are to be outside the prohibition. The third category covers those states that do not restrict the power to grant exemptions but directly grant some exemptions. The second and third categories, of course, represent a restriction on the power to tax. All three categories of states total about 30. Most of them exempt or authorize the exemption of much the same classes of property—for example, cemeteries, charities, and schools. No other state appears to have a special exemption for endowment funds. The *Model State Constitution* has neither restrictions on granting exemptions nor mandatory exemptions.

Veterans. Approximately five states have a mandatory exemption for veterans, two of which are limited to disabled veterans. New Jersey had a modest veterans' exemption of $500 but amended it to provide an annual reduction or cancellation of property taxes in the amount of $50.00. About four states permit the legislature to grant an exemption, one of which is limited to disabled veterans and one of which is limited to disabled veterans' homes substantially paid for by the Veterans' Administration. At least two states include permission to extend the exemption to surviving widows and children of military personnel who died while on active duty.

Public property. The states generally follow the same practice with public property that is followed for other exemptions. If schools and charities are directly exempted, public property is, too; if the legislature is authorized to exempt schools and charities, the same authorization runs to public property. It is a good guess, however, that all states follow the sensible rule that one unit of government does not tax the property of another unit. There can be special exceptions, but the general theory is that governments do not tax each other since in the long run they must end up collecting the money from the same set of taxpayers.

There does not appear to be any other state that has three constitutional

provisions inconsistently dealing with the subject of taxing public property. (See the *Explanation* of Sec. 9 of Art. XI.)

Author's Comment

As a result of various amendments which took the form of inserting additional language designed to enlarge the legislative power, with no effort being made to simplify the section by redrafting, Article 8, Sec. 2 now consists of a remarkable sentence of almost three hundred words, with the seemingly impossible task of holding this amazing structure together being assigned to ten overworked commas and eight overburdened semi-colons.

Thus Justice Cadena, in a footnote to the *Davis* opinion discussed above, characterized what is now Subsection (a) of Section 2. One can proceed from his comment on the intelligibility of the wording of Section 2 to the advisability of the policy of Section 2.

Consider the following:

1. There have been 13 proposed amendments concerning exemptions from property taxes, eight of which have been on the ballot in the ten years preceding 1974.

2. The legislature has enacted a number of statutory exemptions that do not square with the constitutional restrictions on exemptions.

3. The legislature has enacted exemptions that purport to redefine an exemption in order to "overrule" a court case that relied not on the statute but on the constitutional limitation in Section 2.

4. Section 2 originally was filled with detailed restrictions on such exemptions as were permitted. Amendments, both those adopted and those defeated, continued the practice of providing great detail in spelling out new permissible exemptions.

The time has come to look at this exemption business totally afresh. There are cogent reasons for not restricting the legislature at all. There are those who are suspicious of government and fear that if the legislature has power to make reasonable exemptions it will exempt everybody willy-nilly. But there are those who realize that the tax structure is part of the larger complex of the economics of the society. Flexibility is necessary in tailoring the tax structure to the economic and social needs of the people. (The people, incidentally, are also the taxpayers.) A prohibition on granting tax exemptions can be a serious restriction on the flexibility needed to cope with changing fiscal and social requirements.

But if total flexibility is too much to accept, then the task is to find the minimum acceptable restriction on legislative power. The Montana Constitution of 1972, for example, preserved the power to grant some of the traditional exemptions, such as public property, charitable institutions, cemeteries, and schools, but added "(c) Any other classes of property." (Art. VIII, Sec. 5(1).) This will allow additional exemptions without the necessity of constitutional amendment. Someone will point out, of course, that Montana now has no real restriction except that exemptions must be a class of property, which is not much more than requiring that exemptions be made by general law.

If this is too much flexibility, then at least use the referendum device and avoid constitutional amendment. A skeleton provision might read:

Section _____ Exemptions.

(a) The following classes of property may be exempted in whole or in part from taxation:

(b) No other class of property may be exempted in whole or in part unless the law granting the exemption is approved by a majority of the qualified voters voting

on the question at the general election next following enactment of the law.

In filling in the details under (a), it would be essential to use broad terms for classes—for example, "public property," "property of nonprofit charitable institutions," "property of educational institutions"—in order to avoid hassles like the ones that arose over such limiting words as "exclusively," "actual places of worship," and the like. Note that "in whole or in part" is designed to preserve legislative flexibility in controlling the extent of the exemption and not just the amount. Thus, the legislature could exempt property of educational institutions used for education but not exempt commercial and residential property used to produce income for the educational institutions.

The essential point is to keep legislation out of the constitution. One way is to leave the legislature free to act. The other way is to require referendum approval of additions to legislative power. The former preserves the purity of the constitution. The latter does also, but at the cost of burdening the voter with legislative policy matters.

Sec. 3. GENERAL LAWS; PUBLIC PURPOSES. Taxes shall be levied and collected by general laws and for public purposes only.

History

This section dates from 1876. It was one of the sections in the substitute article submitted by a dissenting member of the Committee on Revenue and Taxation. (See *Introductory Comment, supra.*) This section and Section 17 are the only ones that remained unchanged after the delegates accepted the substitute article.

In 1933 the legislature proposed to amend Section 3 by the addition of a long provision limiting the amount of revenue that the state could collect during a biennium to $22.50 multiplied by the population of the state. In November 1934 the voters rejected the amendment by a healthy margin of 268,247 against to 66,873 for. (In today's terms this would have permitted revenue of $252 million for the 1971-73 biennium. The actual estimated revenue for the first year of that biennium was $3.46 billion, of which approximately $2.5 billion came from sources that would have been governed by the defeated amendment.)

Explanation

The "public purpose" part of this section duplicates the private purpose appropriation prohibition of Section 6 of Article XVI. And if money raised by taxation were to be handed over to private groups, the grants and loans prohibitions of Sections 51 and 52 of Article III would come into play. Notwithstanding all this duplication there may be occasions when a particular "purpose" falls afoul of one provision rather than another.

For example, in the leading case of *Waples v. Marrast,* the supreme court used Section 3 to invalidate a statute requiring counties to pay for the cost of primaries. Such expenditure was held not to be for a public purpose because political parties were private associations; their method of choosing a candidate was a private matter. (108 Tex. 5, 184 S.W. 180 (1916).) Section 3 was undoubtedly relied upon because the law did not provide for the grant of money necessary to invoke Sections 51 and 52. Section 6 of Article XVI may have been of doubtful use because of an inability to point to an "appropriation." (The *Waples* case was overruled in 1972. See *Bullock v. Calvert,* 480 S.W.2d 367 (Tex. 1972).) Other cases relying only upon Section 3 have usually involved direct governmental expenditures. (See, for example, *Goodknight v. City of Wellington,* 118 Tex. 207, 13 S.W. 2d 353 (1929) (maintenance of city band); *Neal v. Cain,* 247 S.W. 694 (Tex. Civ. App.—

Beaumont 1923, *no writ*) (county expenditures for livestock tick eradication).)

Distinguishing between a public and a private purpose is not always easy, for there is a strong subjective element involved. To some extent courts insulate themselves from subjective judgment by reliance upon the presumption of constitutionality of legislation. Additional help comes from a legislative recital of public purposes. (See the discussion of the *Higginbotham* case in the *Explanation* of Sec. 51 of Art. III.) It is safe to say that over the years there has been a broadening of public purpose. Many things taken for granted today would not have been accepted by the 1875 Convention as an expenditure for a public purpose. (For an illuminating discussion of public purpose, see *Bland v. City of Taylor,* 37 S.W.2d 291 (Tex. Civ. App.–Austin 1931), *aff'd sub. nom., Davis v. City of Taylor,* 123 Tex. 39, 67 S.W.2d 1033 (1934).)

The general laws part of Section 3 appears to have been construed as if, like Section 56 of Article III, the words "except as otherwise provided in this Constitution" had been included in the section. For example, a local law providing an extra motor vehicle registration fee in Harris County was held to violate Section 3. (*County of Harris v. Shepperd,* 156 Tex. 18, 291 S.W.2d 721 (1956).) But a local law creating a water district under Section 59 of Article XVI was upheld against an objection that the local law provided a method of taxation different from the method provided in the general law for such water districts. The court of civil appeals made the usual bow to the concept that a local law becomes general because the people generally are interested in the subject (see *Explanation* of Sec. 56) but went on to argue that Section 59 was adopted after Section 3 and is a "particular" provision whereas Section 3 is a "general" provision. (*Brown v. Memorial Villages Water Authority,* 361 S.W.2d 453 (Tex. Civ. App.–Houston 1962, *writ ref'd n.r.e.*).)

Comparative Analysis

About a dozen states specify that taxes are to be levied only for a public purpose. Almost as many states specify that taxes are to be levied only by general law. Only four states provide that taxes are to be levied by general law *and* only for public purposes. The Vermont Constitution of 1793 has a delightful way of expressing the purpose of taxation. In Article 9 of the Declaration of Rights it is said that "previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more service to community than the money would be if not collected." Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

It has been suggested that it is wrong to try to control the purpose for which public money is spent by specifying who may not receive it. (See the *Author's Comment* on Sec. 51 of Art. III.) It follows that the right way is to control purpose directly. This is what Section 3 does.

It has also been recommended that local and special laws ought to be forbidden effectively. (See the *Author's Comment* on Sec. 56 of Art. III.) It follows that every opportunity to stress *general* law should be utilized. Section 3 does this.

Sec. 4. SURRENDER SUSPENSION OF TAXING POWER. The power to tax corporations and corporate property shall not be surrendered or suspended by act of the Legislature, by any contract or grant to which the State shall be a party.

History

This section dates from 1876. In the substitute revenue article accepted by the

convention, the section was a straightforward sentence ending with the word "Legislature." (*Journal,* p. 423.) Subsequently, an amendment was offered and adopted adding the words "but they and their property shall be taxed as other individuals." (*Id.,* at 485.) A few days later, new wording was proposed:

> The power to tax all of the property, real and personal, of corporations shall never be surrendered or suspended by act of the Legislature, but the same shall always be taxed as other property. (*Id.,* at 528.)

This appears to have produced considerable debate revolving around the problem of the city of Sherman. (*Debates,* pp. 372-73. See *History* of Sec. 5.) The new proposal was tabled, following which the present concluding phrase was offered as a substitute for the additional words added earlier. The substitution was adopted by voice vote. (*Journal,* p. 528.) There is no indication in the debates why the substitution was made. (See the *Author's Comment* on this section for a speculative answer.)

Explanation

Among other corrupt practices in state legislatures in the middle of the 19th century was the granting of tax advantages to corporations, particularly in special acts chartering corporations. If the advantage was nailed down correctly, it was possible for a corporation to rely upon the United States Constitution's prohibition against a state's impairing the obligation of contracts. Section 4 was designed to make this impossible.

There appears to have been only one case arising under this section. *Gaar, Scott & Co. v. Shannon* involved a foreign corporation which obtained a ten-year permit to do business in Texas and paid the franchise tax required by law. Subsequently, within the ten-year period, the law was changed to require additional franchise taxes. The corporation paid under protest and sued for a refund. The court of civil appeals held that there was no impairment of an obligation, relying on Section 4 but implying that without such a section the same result would obtain. (115 S.W. 361 (Tex. Civ. App. 1908), *aff'd,* 223 U.S. 468 (1911).)

Comparative Analysis

About half the states have a prohibition against surrendering the power to tax. Interestingly enough, there is a stronger prohibition than the Texas version, namely, one that is across-the-board rather than limited to corporations. Half again as many states go that route as follow the Texas route. A few states include exceptions, mostly for the purpose of permitting use of tax advantages to lure corporations to build new plants in the state.

Author's Comment

Section 4 is confused grammatically. Presumably there is supposed to be an "or" in place of the comma. One can speculate that the delegate who proposed the concluding words pointed out that the original section covered only an act of the legislature, that there was nothing to stop the state from entering into a contract with a corporation whereby for a consideration certain taxes were given up. One must also speculate that no other delegate pointed out that Section 1 requires *all* property to be taxed, that Sections 51 and 52 of Article III prohibit grants in aid of any corporation whatsoever, that Section 17 of Article I prohibits irrevocable grants of special privileges, or that by putting "or contracted away" after "suspended" and dropping the words "by act of Legislature" the loophole would disappear.

If half the states get along without a Section 4, it obviously is not indispensable to the integrity of the public fisc. But the section is a comforting thing to have. An appropriate, comprehensive formulation would be: "The power to tax may not be surrendered, suspended, or contracted away."

Sec. 5. RAILROAD PROPERTY; LIABILITY TO MUNICIPAL TAXATION. All property of railroad companies, of whatever description, lying or being within the limits of any city or incorporated town within this State, shall bear its proportionate share of municipal taxation, and if any such property shall not have been heretofore rendered, the authorities of the city or town within which it lies, shall have power to require its rendition, and collect the usual municipal tax thereon, as on other property lying within said municipality.

History

This section dates from 1876 and has been explained thus:

> This article [sic] on municipal taxation of railroad property is a direct outcome of a petition of the people of Sherman to the constitutional convention of 1875. The city of Sherman had granted municipal subsidies in the form of bonds to one railroad amounting to $84,000, and to another of $50,000. The citizens of the municipality were taxed to pay the interest on these subsidies, but when the railroads rendered their property for taxation, one reported only $10,000 worth of property for municipal taxation, while the other reported none. Thus, while the city was being taxed for the benefit of the roads, the roads were not taxed for their property lying in the city. Thus, this proviso was added to make sure railroads could not escape municipal taxation. (Art. VIII, Sec. 5, *Interpretive Commentary.*)

Explanation

This section says that railroads shall pay their property taxes just like everybody else. In other words, the section is redundant since Section 1 states that "all property . . . shall be taxed." The section has been relied upon in litigation, but always as a make-weight. (Lawyers and judges are sometimes like mountain climbers: Use it because it's *there.*)

Comparative Analysis

No other state has a comparable section. The nearest appears to be a South Carolina provision commanding the legislature to require municipal corporations to tax all nonexempt property within their borders.

Author's Comment

One wonders why this section was not among the provisions in the omnibus amendment to repeal "obsolete, superfluous and unnecessary sections of the Constitution." Maybe somebody was afraid that if it were repealed, railroads would claim that they no longer had to pay municipal taxes.

Sec. 6. WITHDRAWAL OF MONEY FROM TREASURY; DURATION OF APPROPRIATION. No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; nor shall any appropriation of money be made for a longer term than two years, except by the first Legislature to assemble under this Constitution, which may make the necessary appropriations to carry on the government until the assemblage of the sixteenth Legislature.

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Sec. 6. WITHDRAWAL OF MONEY FROM TREASURY; DURATION OF APPROPRIATION. No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; nor shall any appropriation of money be made for a longer term than two years, except by the first Legislature to assemble under this Constitution, which may make the necessary appropriations to carry on the government until the assemblage of the sixteenth Legislature.

Art. VIII, § 6

History

The requirement that money may be spent only under an appropriation dates from the Constitution of the Republic (Art. I, Sec. 25). The Constitution of 1845 added the two-year limitation to appropriations but with an exception "for the purposes of education" (Art. VII, Sec. 8). That section remained unchanged through the Constitutions of 1861, 1866, and 1869.

In the 1875 Convention the majority report of the Committee on Revenue and Taxation included a section calling on the legislature to make appropriations sufficient to support the government for two years. The minority report used by the convention contained no section concerning appropriations. Such a section, reading as Section 6 now does down to the obsolete "except" phrase, was offered as a floor amendment and apparently accepted by voice vote without debate. (*Journal,* p. 469. Professor McKay makes no reference to the section. See *Debates,* pp. 301-10.) There is nothing to indicate why "except for purposes of education" was dropped from the earlier versions of the section. Education was, of course, a hotly debated issue in the convention (see *Seven Decades,* pp. 98-104); discretion may have led the proposer to omit a phrase that might have started a debate over education.

The "except" phrase was also added by floor amendment (*Journal,* p. 529). This is the sort of provision that belongs in a schedule since it becomes obsolete almost at once. The reason for the "except" phrase was that the 1875 Convention provided that the existing legislature should become the 15th Legislature and serve until the beginning of 1879. (See *Journal,* pp. 181-82.) The 15th Legislature necessarily would have to adopt a three-year budget.

Explanation

A prohibition against spending government money except under an appropriation is a traditional constitutional limitation. Under the American theory of separation of powers, the legislature sets government policy and the executive carries it out. Obviously, the expenditure of money is one of the principal ways of establishing a government policy. It follows that a prohibition against spending money without an appropriation protects the policymaking legislative power. (In part. A refusal to spend appropriated funds also frustrates legislative policymaking. See the *Author's Comment* that follows.)

Even the simple proposition that moneys can be spent only under an appropriation quickly turns out to have exceptions. For example, there may be occasions when the government receives private money that may have to be paid out. In *Manion v. Lockhart* (131 Tex. 175, 114 S.W.2d 216 (1938)), the question involved the disposition of unclaimed money in a probated estate.

Under the applicable statute, upon final settlement of the estate unclaimed money was to be paid "to the State Treasurer." (Tex. Prob. Code Ann. sec. 427 (1956).) The statute provided further that claimants subsequently "may recover the portion of such funds to which he or they would have been entitled." (*Id.*, sec. 433.) Unfortunately, the treasurer deposited the money in the general fund. The supreme court ruled that the treasurer should have deposited the money in a special fund because the statute used the words "to the State Treasurer" and not the words "into the State Treasury." But the court also held that once the treasurer had deposited the money in the general fund, an appropriation was required.

Shortly after the *Manion* case, the supreme court was faced with another special fund situation. This was the unemployment insurance plan whereby a tax is levied on employers to create a fund from which unemployment compensation is to be paid. The court, relying in part on the *Manion* case, held that the "money here

involved is not the property of the state in any capacity, but is a trust fund to be held out of the State Treasury, but in the hands of the State Treasurer as trustee, for the benefit of a class of employees whose employers pay it in by virtue of a tax levied, the tax being in the nature of an excise tax." (*Friedman v. American Surety Co.*, 137 Tex. 149, 166, 151 S.W.2d 570, 580 (1941).) Although the court did not discuss the point, by-passing the appropriation process was required by the federal unemployment compensation law. (See the many references to the federal law in Tex. Rev. Civ. Stat. Ann. art. 5221b (1971).)

In both these instances there is a good reason for excepting the disbursement of funds from the appropriation process. In both instances the court had to find a gimmick to justify ignoring Section 6. In the *Manion* case, the gimmick was the wording of the instructions to pay—"to the Treasurer," not "into the State Treasury." One can speculate whether the drafter of the statute involved made the distinction with malice aforethought. This is particularly interesting because the unemployment compensation law provided that tax money should be "paid into the State Treasury" (137 Tex., at 164; 151 S.W.2d, at 574). From this one can fairly conclude that the form of words used is not crucial. What is important is whether by-passing the appropriation process is consistent with the reason for the constitutional requirement.

Section 6 also prohibits appropriations for longer than two years. "The reason usually given for [this] requirement is that, since each biennium there is a new legislature, one legislature should not be allowed to authorize expenditures of the revenues of a subsequent legislature." (Susman, "Contracting with the State of Texas: Fiscal and Constitutional Limitations," 44 *Texas L. Rev.* 106, 108 (1965). As noted in the Explanation of Sec. 44 of Art. III, this article contains an excellent analysis of the applicable cases.) There are several weaknesses in this usual reason (see the following *Author's Comment*), but the provision exists and certainly affects the appropriations process.

The principal effect is that the legislature normally does not try to appropriate for a period longer than two years. But even this is misleading. Under normal circumstance, any legislature limits appropriations for ordinary operating expenses. Obviously, accuracy in forecasting requirements decreases as the period of time covered increases. Legislatures will appropriate most funds for the shortest, not the longest, possible period. If a legislature has annual sessions, it will appropriate operating funds for only one year.

Nevertheless, a two-year limit can create problems. Long-term contracts, for example, frequently provide substantial savings. Fortunately, Section 6 has not stood in the way of such contracts so long as they are carefully drafted. If the contract permits the state to decide each year how much it will buy, Section 6 is not violated. (See *Charles Scribner's Sons v. Marrs*, 114 Tex. 11, 262 S.W. 722 (1924), discussed in the *Explanation* of Sec. 49 of Art. III.) A literal-minded lawyer might advise his businessman client that such a contract is a one-way street, but a practical lawyer would point out that the state is likely to make the contract two-way because of the financial advantages flowing from a long-term contract. Three other comparable devices can be used. One is to give the state an option to renew the contract at the end of the two years; a second is to provide that the long-term contract is subject to appropriations; the third is to prepay the full amount of the contract. In the third case, it is advisable that the legislature clearly indicate that the state is authorized to enter into such long-term prepayments. (See Susman, cited above, pp. 143-44.) It is also to be noted that appropriations in the event of a "public calamity" may exceed two years. (See *Explanation* of Sec. 51 of Art. III.)

Section 6 also refers to "specific" appropriations. Although there have been cases construing "specific" (Susman at 108-109), the rules are probably no different

from what the courts would have said in the absence of "specific." An appropriation should be specific enough that the legislature, the executive, the courts, and the general public can tell how much money is to be spent for what. But this still requires some drawing of lines. In the case of "how much," an appropriation, like a budget, is an estimate of how much will be needed in the future. Obviously, an appropriation act cannot say "however much is needed" but can cover the estimated need by setting forth a maximum amount. Even so indefinite a statement as "the unexpended balance in the widget fund" or "all receipts from the widget tax" meets the need of providing in advance an estimate of how much will be spent. (See, for example, *Atkins v. State Highway Dept.*, 201 S.W. 226 (Tex. Civ. App.–Austin 1918, *no writ*).)

The specificity of the purpose—the "for what"—is a different matter altogether. Obviously, it would be absurd to appropriate $5 billion "for running the government." But it is equally absurd to require such specificity as "$300 for pencils, $400 for ball-point pens, and $600 for erasers." Somewhere between these extremes a line must be drawn. It is a line to be worked out by the legislature and the executive.

Comparative Analysis

Almost every state has a provision that directly or by necessary implication prohibits expenditure of money except by appropriation. Approximately ten states limit appropriations to two years. About half a dozen states use the adjective "specific." The *Model State Constitution* provides: "No money shall be withdrawn from the treasury except in accordance with appropriations made by law. . . ." (Sec. 7.03.) The United States Constitution provides: "No money shall be drawn from the treasury, but in consequence of appropriations made by law. . . ." (Art. I, Sec. 9.) It also provides that no appropriation of money to raise and support armies may be for a longer term than two years. (Art. I, Sec. 8.) The purpose of the federal limitation was to prevent the creation of a professional standing army.

Author's Comment

In the days beyond recall, state government was small business except when financing or underwriting internal improvements. Today, state government is big business, especially in large states with large populations. The most important tool in the managment of a large enterprise is the budget because it translates every activity into a common medium—dollars. A state government as a large enterprise ought to use the budgeting process as a management tool. It follows that great care should be taken not to include in a constitution provisions that restrict the budgeting process.

At the beginning of the *Explanation* it was stated that Section 6 is an appropriate protection of the policymaking power of the legislature. The executive branch should be limited to spending money for those purposes which the legislature authorizes. Questions arise, however, if words are used that restrict flexibility in spending the money authorized. Is it a good idea to limit appropriations to two years? Is it advisable to use restrictive adjectives like "specific?"

In the interest of good money management, a constitution ought to permit a legislature to authorize the executive branch, normally the governor, to transfer funds from one program to another, to withold funds, and the like. A ruling that the legislature cannot constitutionally condition certain expenditures upon the governor's prior approval is an unconscionable restriction on good budget management. (See Tex. Att'y Gen. Op. No. M-1141 (1972).)

In general, there ought to be three positive constitutional positions on budgeting. First, there should be a requirement that the governor prepare the budget. Second, there should be some provision that inhibits legislative increases in the budget without corresponding increases in revenue. (See the *Author's Comment* on Sec. 49a of Art. III.) Third, there should be a restriction on the executive's power to disregard the legislature's budget determinations—other than the item veto, of course. Section 6 covers this point in part. The section does not force the executive to spend appropriated funds. This has been a lively subject in congress recently; it is not likely to be a problem in a state that gives the governor an item veto. Although the attorney general's reliance on the veto provision to forbid legislative permission not to spend seems far-fetched, reliance on the provision to require the governor to spend anything he failed to veto seems appropriate.

In addition to these positive provisions there is a negative proposition: Do not include anything that goes beyond these three provisions. For example, it is suggested later that constitutional earmarking of tax revenues is ill-advised. (See the *Author's Comment* on Sec. 7-a.) Likewise, if the legislature wishes to permit the governor to refuse to spend, nothing should stop this. For another example, there may be circumstances when long-term contracts and leases represent efficient use of available money. A legislature ought to be able to authorize this. (The argument that a legislature should not be able to commit the revenues of a subsequent legislature is not convincing. As a practical matter many legislative actions commit future legislatures. One legislature's increase in salary schedules commits subsequent legislatures to continue the schedule. One legislature's construction of a building commits subsequent legislatures to maintain the building. One legislature's proposal of a bond issue commits subsequent legislatures to pay off the bonds.)

The point of all this is not that the constitution should impose good money management on the government; rather, the constitution should not inhibit good money management.

Sec. 7. BORROWING, WITHHOLDING OR DIVERTING SPECIAL FUNDS. The Legislature shall not have power to borrow, or in any manner divert from its purpose, any special fund that may, or ought to, come into the Treasury; and shall make it penal for any person or persons to borrow, withhold or in any manner to divert from its purpose any special fund, or any part thereof.

History

This section was offered as a floor amendment at the 1875 Convention. According to McKay's *Debates*, the proposing delegate explained that "he understood before the war that the school tax, university, frontier, and other funds, had been diverted by speculation, and the party speculating being prepared when the Legislature met, to make good the fund. He held that an express provision ought to be made to guard against it. The amendment was adopted." (p. 311.)

Explanation

The statement of the proposing delegate explains why this unnecessary section was added. Wherever the constitution creates a capital fund or directs that money be spent for a particular purpose, the handlers of the money are charged with obeying the constitution. A separate statement of that duty is unnecessary.

The only question that could arise under Section 7 is whether it applies to

special funds created by statute. In *Gulf Ins. Co. v. James,* the supreme court said that in an earlier case "this Court held that the above-quoted constitutional inhibition applies only to special funds created by the constitution, and not to special funds created by statute." (143 Tex. 424, 433, 185 S.W.2d 966, 971 (1945).) Actually, the earlier case was not quite that definite. It held that Section 7 "has no application to the general fund of the Treasury" but explained that the purpose of the section is to prevent diversion of the special funds created by the constitution. (See *Brazos River Conservation & R. Dist. v. McCraw,* 126 Tex. 506, 522, 91 S.W.2d 665, 674 (1936). The court cited McKay's *Debates,* quoted above.)

Comparative Analysis

West Virginia has a provision that no money or fund may be taken for any purpose except that for which appropriated. No other state appears to have a provision comparable to Section 7.

Author's Comment

As noted above, Section 7 is unnecessary.

Sec. 7-a. REVENUES FROM MOTOR VEHICLE REGISTRATION FEES AND TAXES ON MOTOR FUELS AND LUBRICANTS: PURPOSES FOR WHICH USED. Subject to legislative appropriation, allocation and direction, all net revenues remaining after payment of all refunds allowed by law and expenses of collection derived from motor vehicle registration fees, and all taxes, except gross production and ad valorem taxes, on motor fuels and lubricants used to propel motor vehicles over public roadways, shall be used for the sole purpose of acquiring rights-of-way, constructing, maintaining, and policing such public roadways, and for the administration of such laws as may by prescribed by the Legislature pertaining to the supervision of traffic and safety on such roads; and for the payment of the principal and interest on county and road district bonds or warrants voted or issued prior to January 2, 1939, and declared eligible prior to January 2, 1945, for payment out of the County and Road District Highway Fund under existing law; provided, however, that one-fourth (1/4) of such net revenue from the motor fuel tax shall be allocated to the Available School Fund; and, provided, however, that the net revenue derived by counties from motor vehicle registration fees shall never be less than the maximum amounts allowed to be retained by each County and the percentage allowed to be retained by each County under the laws in effect on January 1, 1945. Nothing contained herein shall be construed as authorizing the pledging of the State's credit for any purpose.

History

This section was added by amendment adopted on November 5, 1946, by the impressive margin of 231,834 to 58,555.

Explanation

Although inserted as a companion to the special fund section, Section 7-a is more accurately characterized as a constitutional earmarking, or dedication, of particular receipts for a particular purpose. Roughly, the particular receipts are fees and taxes related to the use of motor vehicles and the particular purpose is construction and maintenance of roads.

The excessive detail in the section results in part from the protection of the various interests that had a stake in the system as it existed when the section was drafted. The principal protection is for the available school fund. (See Sec. 5 of

Art. VII, for the origins of this fund.) Section 3 of Article VII requires one-fourth of all state occupation taxes to be used for the benefit of public schools. For reasons discussed earlier (see *Explanation* of Sec. 1), the motor fuel tax was called an "occupation" tax. The available school fund proviso in Section 7-a guaranteed the continued one-fourth allocation even if the legislature turned the "occupation" tax into what it really is—an excise tax.

A second interest protected by Section 7-a was the use of motor fuel tax receipts for payment of principal and interest on certain county road bonds. Under the laws existing at the time Section 7-a was proposed, one-fourth of the receipts went into the County and Road District Highway Fund to be used for payment of such principal and interest. Obviously, if Section 7-a stopped at the first semicolon, receipts could not be used to pay off preexisting debt.

The third interest protected was the rural counties. There is, of course, no way to know this from reading the final proviso of Section 7-a. One has to know the "laws in effect on January 1, 1945." According to the *Interpretive Commentary* to *Vernon's Annotated Constitution*, the laws then in effect provided that, of the motor vehicle registration fees collected, a county kept the first $50,000, the county and the state split the next $125,000 (fifty-fifty), and the state took all of any amount over $175,000. "As this system of registration fees is designed to favor the smaller, rural counties, there was much agitation to obtain a different formula for dividing the receipts. Representatives from the smaller counties succeeded in defeating this agitation by obtaining the approval of the present Sec. 7a [*sic*] of Art. 8 in 1946." (Art. VIII, Sec. 7-a, *Interpretive Commentary*.) A less discreet but more accurate way to put it is that the final proviso was the price demanded to support the adoption of any amendment earmarking motor taxes.

Section 7-a "does not constitute a grant of power, but affirms existing policy." (*County of Harris v. Shepperd*, 156 Tex. 18, 21, 291 S.W.2d 721, 725 (1956).) This odd statement—odd because constitutional provisions are not normally designed to affirm existing policy—was the concluding comment by the supreme court in holding that Section 7-a is not an exception to the requirement of Section 3 that taxes are to be levied by general laws. The court should have characterized the section as not granting power but limiting power—the power to spend.

There appear to have been only two interpretations of this limitation. In one instance, the supreme court ruled that the cost of relocating utility lines as part of preparation of a right-of-way came within the uses permitted by Section 7-a. (*State v. City of Austin*, 160 Tex. 348, 331 S.W.2d 737 (1960).) The attorney general has ruled, however, that the removal of billboards and the screening of junkyards are not within the permitted uses of the earmarked funds. (Tex. Att'y Gen. Op. No. C-783 (1966).)

It has been pointed out that the same legislature that proposed Section 7-a also passed a bill authorizing any county not levying a road tax to divert its motor vehicle registration moneys to any other county fund or funds. (See Tex. Rev. Civ. Stat. Ann. art. 6675a-17 (1969).) "Yet the present amendment declares that registration fees may be used only under legislative act and only for traffic control and road purposes. Although the question has not arisen, it would appear that under the constitutional amendment this statute is invalid." (Art. VIII, Sec. 7-a, *Interpretive Commentary*, p. 514.) Under the 1967 amendment of Section 9, any county may put all tax money into one general fund, "without regard to the purpose or source of each tax." Presumably, this change in Section 9 supersedes the limitation in Section 7-a. In any event, the question still does not appear to have arisen.

The second sentence of the section is totally unnecessary. There is nothing in the first sentence which by any reasonable stretch of the imagination could ever be

construed to authorize the pledge of the state's credit. But there is always someone who sees monsters behind every lamp post. Presumably, it is easier to humor him than to convince him that he is seeing ghosts.

Comparative Analysis

Almost half the states have a constitutional dedication of motor vehicle and fuel taxes to highway purposes. One state, Georgia, once had a flat prohibition against earmarking funds but in 1960 excepted motor fuel taxes from the prohibition by an amendment which dedicates the net receipts to highway purposes. The amendment does permit the diversion of money in case of "invasion of this State by land, sea, or air, or in case of a major catastrophe. . . ." (Art. VII, Sec. 9, Para. IV (b).) New Jersey indirectly prohibits dedication by requiring all expenditures to be covered by an annual general appropriation law (Art. VIII, Sec. II, Para. 2). Alaska also has a prohibition against dedication but cagily permits "the continuance of any dedication for special purposes existing upon the date of ratification. . . ." (Art. IX, Sec. 7.) The *Model State Constitution* provides that "no appropriation shall allocate to any object the proceeds of any particular tax or fund or a part or percentage thereof, except when required by the federal government for participation in federal programs." (Sec. 7.03.)

Author's Comment

Students of government finance are generally agreed that constitutional dedication of tax revenues is an undesirable restriction on government budgeting. Indeed, there is difficulty enough in nonconstitutional budgeting from year to year. This is the reason for the current effort to institute zero-based budgeting (ZBB), a system designed to require constant re-evaluation of continuing programs. Constitutional dedication of tax revenues completely negates ZBB. Whatever arguments can be made in favor of earmarking should have to be made regularly to the legisature. That is, the proponents of earmarking should have to convince the legislature to preserve the dedication notwithstanding whatever new financial or social problems arise. The uses of tax money should not be removed, even in part, from legislative policymaking. In short, the policy of Section 7-a should not be frozen in the constitution. The foregoing is a "good government" argument; practical politics may dictate preserving the policy of Section 7-a.

Sec. 8. RAILROAD COMPANIES; ASSESSMENT AND COLLECTION OF TAXES. All property of railroad companies shall be assessed, and the taxes collected in the several counties in which said property is situated, including so much of the roadbed and fixtures as shall be in each county. The rolling stock may be assessed in gross in the county where the principal office of the company is located, and the county tax paid upon it, shall be apportioned by the Comptroller, in proportion to the distance such road may run through any such county, among the several counties through which the road passes, as a part of their tax assets.

History

This section dates from 1876. The reason for including it is fairly well summarized by Professor McKay:

> Mr. DEMORSE said . . . that it had been inserted in the majority report upon the earnest suggestions of the Comptroller, that it was important, that that officer had stated that under the present system of assessments he had no way of determining whether the values reported were correct, but if the property were assessed in the

counties where the road ran the State would get its just dues . . . .

Mr. KILGORE said the law of 1873 provided that every railroad in the State should render its property for assessment, and the number of miles of its road-bed in each county, their personal property to be reputed from the general office, and that to be apportioned to the several counties, but he was opposed to incorporating that law in the Constitution.

Mr. FLOURNOY said his impression was that the law had been repealed. It was not proposed by the amendment to increase the taxation of railroads . . . . It did not affect railroads in the least, was a matter in which they had no concern, but was simply a matter between the counties and the Treasury.

JUDGE REAGAN said if one thing was clear in his mind it was that they had already provided that *all* property should be assessed in the county where situated, and that saying so once was enough in one Constitution; but it might be that railroads were not considered property, and that it was necessary to mention them again to get the tax to stick. (*Debates*, pp. 318-19. Italics in original.)

It should be noted that Judge Reagan's concluding comment was a bit of sarcasm. Indeed, he was one of those who voted against inclusion of the section. (The vote was 56 to 24. *Journal*, p. 490.)

Explanation

As the quoted debates indicate, Section 8 is a straightforward statutory solution to the problem of how to tax the rolling stock of a railroad. It is also wholly unnecessary, as Judge Reagan made clear.

In 1905 the legislature passed the Intangible Assets Act. (See Tex. Rev. Civ. Stat. Ann. art. 7098 *et seq.* (1960).) This created a state board to which railroads and other common carriers had to render their property, tangible as well as intangible. Such railroad property was allocated among the several counties according to mileage. Although this would take care of the rolling-stock problem, Section 8 stands in the way. Accordingly, there remains on the books the old statute that tells railroads and the comptroller to do more or less what Section 8 says. (For "more or less," see the *Author's Comment* that follows.) The supreme court upheld the 1905 law against a many-pronged attack, including a claim that Section 8 precluded such a law. (*Missouri, K. & T. Ry. v. Shannon*, 100 Tex. 379, 100 S.W. 138 (1907).)

Not until 1973 was there a definitive and comprehensive judicial analysis of Section 8, but even that analysis is not conclusive, for the discussion, reasoning, and judgment of the court are all tied to the wording of both Section 8 and the applicable statutes (Tex. Rev. Civ. Stat. Ann. arts. 7168 and 7169). The case, *City of Houston v. Southern Pacific Transp. Co.* (504 S.W.2d 554 (Tex. Civ. App.–Houston [14th Dist.] 1973, *writ ref'd n.r.e.*)), involved an attempt by Houston to levy the city—and school district—property tax on the rolling stock of the Southern Pacific on the theory that, under Section 11 of this article, the rolling stock as personal property is situated in Houston, the principal office of the railroad. As the *Explanation* of Section 11 points out, the courts recognize the legislature's power to determine the situs—"where situated"—of personal property. Section 8, however, sets forth a special rule for rolling stock. Unfortunately, the rule is ambiguous in two respects. First, it states that rolling stock *may* be assessed in the county of the principal office but that the tax *shall* be apportioned among counties according to track mileage. Does this mean that the legislature may do something else and that the duty to apportion arises only if the legislature does what the sentence permits? Or does the sentence require apportionment? (Actually, the legislature has done "something else." See the *Author's Comment* that follows.) The second ambiguity arises because the sentence speaks only of the "county tax." Does this mean that the sentence limits the power of the legislature to authorize

some method of taxation of rolling stock by cities, school districts, and other taxing jurisdictions? Or, to put it more startlingly, is the sentence an exception to the command of Section 1 that all property is to be taxed? As will be shown next, the legislature has certainly read the sentence to mean that rolling stock is exempt from all property taxes except those levied by the county and, vicariously, by the state since the county levies and collects the state tax.

Article 7168 requires railroads to render their property for taxation to each taxing jurisdiction in which the roads have property, except that in rendering personal property, they are to exclude rolling stock. Article 7169 instructs the railroads to render rolling stock to the county of the railroad's principal office. Thus, by negative inference, cities, towns, and other taxing jurisdictions through which a railroad runs may not tax rolling stock because the legislature has instructed the railroads not to list the rolling stock.

In the *Southern Pacific* case, the court of civil appeals in deciding against Houston relied particularly on the exclusion of rolling stock from article 7168. Thus, there is no question that the court's decision was correct. There is a question whether one can rely on the decision as conclusively establishing the meaning of Section 8. The questions raised earlier concerning the ambiguity of the section remain unanswered.

Comparative Analysis

About half a dozen states have a somewhat comparable provision. Almost all of them centralize assessment at the state level. The 1972 Montana Constitution omits the comparable provision that was in the 1889 Constitution.

Author's Comment

The excerpt from the *Debates* set out earlier shows that some of the 1875 delegates recognized the difference between a constitutional provision and a statute. Unfortunately, they were in the minority. It is also to be noted that, having made the decision to put a statute into the constitution, the delegates wrote a poor one. Section 8 lets a railroad's home office county assess all rolling stock; the sensible procedure is to have the assessment made at the state level. But as noted elsewhere, the 1875 delegates did not look favorably on centralized assessment. (See Sec. 18 of this article.)

In any event, Section 8 is unnecessary. It makes more sense to drop it than to try to fix it up. Interestingly enough, the Constitutional Revision Commission in its 1973 recommended draft constitution did drop the section. By the time the 1974 Constitutional Convention was underway, however, the *Southern Pacific* case had come down. The railroads naturally pushed for retention of Section 8. They succeeded in retaining something that is like Section 8 but nearer article 7169.

The rolling-stock sentence in Section 8, if read literally, instructs the assessing county to levy its county tax and the comptroller to apportion the tax paid. Article 7169 instructs the assessing county to determine the full value of the rolling stock and the comptroller to apportion that true value to the counties. Each county then levies its tax. The difference between these two methods could be significant. Under the literal reading of Section 8, a county that used a low assessment ratio compared to other counties or that did not levy the maximum county tax would produce less tax receipts to be apportioned than the aggregate tax receipts provided for under article 7169. Conversely, a county with a high assessment ratio would produce more tax receipts than the aggregate provided for under article 7169.

In working out the wording of the proposed provision for the 1974 Convention,

the drafters were able to obtain acceptance of a formulation that reflected article 7169:

> The legislature by general law may permit the rolling stock of railroads to be assessed for ad valorem tax purposes by the county in which the principal office of the railroad is located and require the comptroller of public accounts to apportion on the basis of track mileage the assessed value of the rolling stock among the counties through which the railroad runs. (Art. VIII, Sec. 3(b).)

In the end, then, Section 8 was "fixed up." Nevertheless, the section remained unnecessary. As the *Explanation* of Section 11 makes clear, the legislature could so provide absent either Section 8 or the revised version. It must be conceded, however, that even under the revised wording, railroads could argue that the permissive language entailed the negative inference that rolling stock must remain free of other local property taxes. The validity of this argument must await a legislative revision of articles 7168 and 7169 that would permit some form of taxation by other local jurisdictions.

> Sec. 9. MAXIMUM STATE TAX; COUNTY, CITY AND TOWN LEVIES; COUNTY FUNDS; LOCAL ROAD LAWS. The State tax on property, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of the public free schools, shall never exceed Thirty-five Cents ($.35) on the One Hundred Dollars ($100) valuation; and no county, city or town shall levy a tax rate in excess of Eighty Cents ($.80) on the One Hundred Dollars ($100) valuation in any one (1) year for general fund, permanent improvement fund, road and bridge fund and jury fund purposes; provided further that at the time the Commissioners Court meets to levy the annual tax rate for each county it shall levy whatever tax rate may be needed for the four (4) constitutional purposes; namely, general fund, permanent improvement fund, road and bridge fund and jury fund so long as the Court does not impair any outstanding bonds or other obligations and so long as the total of the foregoing tax levies does not exceed Eighty Cents ($.80) on the One Hundred Dollars ($100) valuation in any one (1) year. Once the Court has levied the annual tax rate, the same shall remain in force and effect during that taxable year; and the Legislature may also authorize an additional annual ad valorem tax to be levied and collected for the further maintenance of the public roads; provided, that a majority of the qualified property taxpaying voters of the county voting at an election to be held for that purpose shall vote such tax, not to exceed Fifteen Cents ($.15) on the One Hundred Dollars ($100) valuation of the property subject to taxation in such county. Any county may put all tax money collected by the county into one general fund, without regard to the purpose or source of each tax. And the Legislature may pass local laws for the maintenance of the public roads and highways, without the local notice required for special or local laws. This Section shall not be construed as a limitation of powers delegated to counties, cities or towns by any other Section or Sections of this Constitution.

History

It was noted in the Introduction to Article VIII that property taxes had soared during Reconstruction days and that this explains the unusually stringent restrictions placed by the 1875 Convention on the power to levy property taxes. It also should be noted that no earlier constitution had any provision limiting property taxes.

The original Section 9 provided that: (a) the state tax could not exceed 50¢ on the $100; (b) the county, city, or town tax could not exceed 25¢ plus 50¢ for the "erection of public buildings"; and (c) state and local governments could levy additional taxes for existing debts. There was an "except as in this Constitution is

otherwise provided." In 1876 there were three such exceptions, all in Article XI. Section 5 permitted the legislature to authorize cities over 10,000 to levy a property tax of $2.50 "for any purpose"; Section 7 authorized counties and cities bordering on the Gulf to levy taxes for seawalls, breakwaters, and sanitary purposes; and Section 10 authorized cities and towns to levy a tax for public schools. (Sec. 10 was repealed in 1969.)

The first change in property tax limits occurred in 1883. Section 9 was amended to provide that: (a) the state tax could not exceed 35¢ plus any tax to pay the public debt and a newly authorized state tax for schools and (b) the county, city, or town tax could not exceed 25¢, plus 15¢ for roads and bridges and 25¢ for the "erection of public buildings, street, sewer and other permanent improvements," and plus any tax to pay any debt incurred "prior to the adoption of this amendment." At the same time Section 3 of Article VII was amended to add a 20¢ maximum state property tax for schools. The "except as otherwise provided" clause remained.

The next change was in 1890. Only the county and city portion was affected. The amended version included the following changes: (a) it added "water works" to the list of public improvements; (b) it authorized an additional 15¢ for roads but only upon referendum approval by the "property tax paying voters" (hereafter just called "voters") of the county; and (c) it added the local law exception still in the section.

After 1890 the once-every-seven-years amending process stopped. Nothing happened until 1906, at which time "not exceeding fifteen cents to pay jurors" was added. In 1908 a proposed Section 9a was defeated. It would have authorized the voters in any county or "one or more political subdivisions thereof," to levy a road and bridge tax of 30¢ "or" issue bonds not exceeding 20 percent of "assessed value of real property in such district." (Tax or bonds? Such district?) In 1909 Sections 4 and 5 of Article XI were amended. The tax consequence was that cities of 5,000 to 10,000 moved into the $2.50 "for any purposes" class and out from under Section 9 by virtue of "except as otherwise provided."

In 1915 a second unsuccessful attempt to increase county and small city and town taxing power was made. This amendment proposed to increase the public improvements maximum from 25¢ to a dollar. The amendment also proposed to increase the extra subject-to-referendum road tax from 15¢ to 50¢. This time the terminology used was "county, or of any political subdivision or subdivisions of the county, or of any defined district." This means that the extra road-tax part of the proposal was as much aimed at loosening up Section 52 of Article III as it was intended to loosen up Section 9, for the amendment covered special districts. (Apparently the defeated 1908 amendment just discussed also had been designed to do the same thing.)

In 1919 another try was made. This proposal increased the basic local tax from 25¢ to 35¢, the regular road tax from 15¢ to 30¢, the public improvements tax from 25¢ to 50¢, and the extra subject-to-referendum road tax from 15¢ to 60¢. This would have jumped the maximum combined rate from 80¢ plus 15¢ to $1.30 plus 60¢. The amendment was roundly defeated. In 1920 Section 4 of Article XI was amended to increase the maximum city and town property tax "for any purpose" from 25¢ to $1.50. From this date, then, Section 9 has not covered cities and towns.

No further attempt was made to amend Section 9 until 1944. (In 1940 there had been a proposed local amendment in the form of a Section 9-A which would have permitted Red River County to levy a 25¢ tax for not more than 15 years "to refund all the outstanding warrant indebtedness of the General Fund of such County." The voters of the entire state turned down Red River County by a vote of 167,000 for, 207,000 against.) The 1944 amendment succeeded. It was a step

toward the current version of Section 9 in that the commissioners court was authorized to reallocate the 80¢ among county purposes, roads, jurors, and permanent improvements but the voters had to approve the reallocation. Moreover, the reallocation was binding for six years unless another referendum was held. This amendment for the first time added the sentence that still appears at the end of the section, but the words "except as in this Constitution is otherwise provided" were still in the section. (They went out in 1956.)

In 1956, the inching-along process continued. This amendment permitted the commissioners court to set the tax rates for the four purposes without the need for a referendum. The rate allocation had to remain in effect for one year. This amendment also dropped the power to levy unlimited taxes to pay off debts incurred prior to September 25, 1883. In its place, so to speak, was added a prohibition against levying the four taxes in such a manner as would impair outstanding debt. This was simply a warning to the commissioners court that it could not levy an 80¢ tax for county purposes if there were road or permanent improvement bonds to be serviced. This was also an unnecessary warning, since Section 7 of Article XI was still on the books, to say nothing of the prohibition against impairing the obligation of contracts contained in the United States Constitution.

In 1967, little more than ten years later, another inching step was taken by amendment. What happened this time was that somebody dropped a sentence into the section—"any county may put all tax money collected by the county into one general fund, without regard to the purpose or source of each tax." This eliminated any problem of having unneeded money in Peter's account but being unable to rob it to pay Paul's bills. This sentence also made meaningless the 1956 prohibition against impairing debt, but nobody bothered to remove the prohibition. For that matter, nobody bothered in 1944, or 1956, or 1967 to remove "city or town" from the tax limitation even though neither had come under the limitation since 1920 and even though all three amendments covered only counties.

The first part of Section 9 is a limitation on the state property tax. Those words have remained unchanged since 1890, but since 1947 they have not meant what they say. In that year Section 17 of Article VII was added to the constitution. In the middle of a long sentence dealing with bond issues there popped up a "provided further, that" henceforth the 35¢ in Section 9 was only 30¢. In 1948 Secton 1-a of Article VIII was added. It killed off the new 30¢ figure effective January 1, 1951. Why, when Section 9 was amended in 1956 and again in 1967, no one bothered to bring the words of Section 9 into line with the rest of the constitution is an interesting question. The simple and probably correct answer is that those amendments dealt with county taxes. Correcting an obsolete provision concerning a state tax would not be part of the job description of a drafter of language concerning a county tax.

Explanation

After many amendments Section 9 remains a wordy and unreadable mishmash, but at least it is now relatively simple in its scope. The section does four things: (1) it grants counties power to levy an 80¢ property tax for any purpose; (2) it grants counties, subject to referendum approval, power to levy a 15¢ property tax for the "further" maintenance of the public roads; (3) it permits any other taxing power of counties to coexist; and (4) it permits the legislature to pass local laws "for the maintenance of the public roads and highways" notwithstanding Sections 56 and 57 of Article III. This last item, added in 1890, has nothing to do with taxation.

One can argue whether the section has anything to do with cities and towns. As

noted in the *History* to this section, all cities and towns have a higher property tax maximum than Section 9 authorizes. Also, as noted earlier, the section has always had a phrase or a sentence that subordinates the section to any other section authorizing a higher property tax. But beginning with the 1944 amendment and continuing with the 1956 and 1967 amendments, the details have all been in terms of counties and only counties. Thus, one can argue that "city or town" is an obsolete phrase left in the section inadvertently. This assumes, of course, that the only cities and towns that have taxing power are those that are incorporated, since Sections 4 and 5 of Article XI apply only to municipal corporations. Interestingly enough, there are two statutory provisions covering the property taxing power of cities and towns of 5,000 and under. One refers to "any city or town," the other to "any incorporated city or town." But since they both use the $1.50 maximum of Section 4 of Article XI, it would appear that both provisions apply to corporations only. (See Tex. Rev. Civ. Stat. Ann. arts. 1026 and 1027. Home-rule cities are covered by art. 1028.)

At one time Section 9 spawned much litigation and innumerable attorney general opinions. Most of this revolved around the four different county tax funds—regular, road, jury, and permanent improvements. Since the 1967 amendment, all of that lore has become obsolete. Today a county may levy an 80¢ tax and use the proceeds for anything which a county is authorized to do. Everything has been so simplified that the only answers to questions raised since 1967 seem self-evident. In one opinion the attorney general held that the commissioners court could consolidate three of the funds but retain the fourth as a separate fund (Tex. Att'y Gen. Op. No. M-207 (1968)). In a second opinion he ruled that a separate fund mandated by statute has to remain separate. This is the Officers' Salary Fund, which does not receive property tax moneys (Tex. Att'y Gen. Op. No. M-369 (1969)). Recently, the attorney general ruled that "farm-to-market road" tax money raised under Section 1-a of this article may not be commingled. (Tex. Att'y Gen. Op. No. H-530 (1975).)

One question concerning the 80¢ tax is whether it is a direct grant of taxing power to the counties or a maximum limit on the taxing power which the legislature may authorize. The section as now worded certainly seems to be a direct grant.

The special road tax of 15¢ is not a direct grant; the "Legislature may also authorize an additional" tax for the "further maintenance of the public roads." In 1906 the supreme court worried about the word "maintenance" as used in Section 9 and concluded that the word was not to be restricted literally to maintenance. Referring to the 1890 amendment, which added the special road tax, the court observed it was "for the evident purpose of conferring upon counties the power to lay out, construct and maintain better systems of public highways" than would be possible with only the regular road tax. (See *Dallas County v. Plowman,* 99 Tex. 509, 513, 91 S.W. 221, 222 (1906).) In 1891 the legislature authorized the new tax levy by a countywide election (Tex. Laws 1913, Ch. 48, 10 *Gammel's Laws,* p. 53); in 1913 the law was amended to authorize an election in any political subdivision or defined district (Tex. Laws 1913, Ch. 17, 16 *Gammel's Laws,* p. 30.) This change was presumably related to the 1904 amendment of Section 52 of Article III, which first introduced "defined districts" for road purposes. In 1927 the court of civil appeals held that the 1913 part is unconstitutional and that the only tax authorized is a countywide tax voted upon by the voters of the county. (*Commissioners' Court of Navarro County v. Pinkston,* 295 S.W. 271 (Tex. Civ. App.—Dallas 1927, *writ ref'd*). The statute is Tex. Rev. Civ. Stat. Ann. art. 6790.)

It should astonish no one that the authorization to pass local laws "for the maintenance of the public roads and highways" has generated a great deal of

litigation. The crucial problem has been whether any given local law was limited to the purpose quoted above or went too far and ran afoul of the prohibition in Section 56 of Article III against regulating the affairs of counties. Two cases illustrate the problem. In *Austin Bros. v. Patton,* the supreme court adopted the recommendation of the commission of appeals that a local road law for Houston County be declared unconstitutional because the law created several different road funds to which the regular 15¢ road tax was to be allocated and created several advisory boards to supervise roads. (288 S.W. 182 (Tex. Comm'n App. 1926, *jdgmt. adopted*).) In the other case, the court of civil appeals was faced with a taxpayer's claim that under the local road law for Dallas County, the commissioners court had to use the county engineer to supervise road work costing $22 million rather than engage an outside firm of engineers. As part of its defense Dallas County attacked the constitutionality of the local law. The court concluded that the part of the law in issue did not create a county office and did not prohibit the hiring of outside engineers. (*Hill v. Sterrett,* 252 S.W.2d 766 (Tex. Civ. App.–Dallas 1952, *writ ref'd n.r.e.*).) Actually, the real claim was that the engineering firm was to be paid too much. (As usual, lawyers rely on every argument they can think of.)

The most interesting thing about the *Sterrett* case is that the local law dealt, among other things, with a Section 52 road district and the proceeds of a bond issue under that section. No one seems to have speculated about whether the 1890 amendment added the sentence as a general exception to the prohibition against local laws in Section 56 and the call for general laws in Section 2 of Article XI or added it as a limited exception to the two parts of Section 9 pertaining to a road tax. One cannot complain about the court in the *Sterrett* case not considering this, for the opinion incorrectly states that the local law sentence was added in 1906 (252 S.W.2d, at 769). This would have been after Section 52 was amended to include road districts. In the *Plowman* case cited earlier, the court, in the course of struggling with "maintenance," said: "Recognizing that differences existed and would exist in the financial conditions, the character of the soil, and otherwise in the counties, which would make it necessary for the different counties to use different methods in maintaining public highways, the last clause of Section 9 was added to authorize the Legislature to meet the varying needs of the counties by local laws." (99 Tex., at 513; 91 S.W., at 222.) This may very well be true. Of course, the basic argument applies to any other area of legislation concerning many counties with different circumstances. The real answer is probably that legislators who liked local laws saw a chance to get their licks in, at least as to roads.

Interestingly enough, although the local law sentence may be broader than Section 9 road taxes, it is narrower than Section 9 taxes. San Saba County apparently spent more for roads between 1924 and 1937 than was raised by the two 15¢ taxes because, by the beginning of 1937, the county had some $48,000 in scrip warrants outstanding. The legislature passed a local road law authorizing the San Saba County Commissioners Court to issue bonds to pay the warrants. The attorney general refused to approve the bonds and a mandamus action followed. The supreme court agreed with the attorney general. The court first noted that the local law pledged the receipts of both the regular road tax and the additional road tax and continued with the observation that Section 9 permitted the legislature to authorize the additional road tax and that the legislature's authorization (a) permitted the voters to rescind the tax after two years and (b) prohibited using the tax moneys to pay off bonds. Then, in an ellipsis that omitted pointing out that the local law came after the authorizing statute, the court concluded that the local law

was unconstitutionally retroactive under Section 16 of Article I and unconstitutional under Section 9. Finding the local law unconstitutional under Section 9 was a rather neat maneuver. The court first noted that, by virtue of the wording of the section, the additional road tax is levied not by the county government but by the voters themselves. The court continued by pointing out that the authorizing statute was, in effect, a part of the vote of the people when the additional tax was levied. Therefore, since the voters had said that the tax could be repealed after two years and could not be used to pay off bonds, the legislature had no power under the local law sentence to pass a local law changing the ground rules for the additional tax. (See *San Saba County v. McCraw,* 130 Tex. 54, 108 S.W.2d 200 (1937).)

Comparative Analysis

There are approximately 15 states besides Texas which have a maximum limit on the state property tax rate, ranging from a low of 2.5¢ to a high of $1.00. Another five states have a combined state and local limit ranging from $1.50 to $5.00. Many of the states have exceptions to the limits, the most common excluding debt service. A few of the states with a combined limit permit a local increase when approved by the local voters. One state permits an increase in the state limit if approved by referendum.

Approximately 18 states besides Texas, including the five with combined limits, have a maximum permissible local rate. It is not fruitful to try to give the range of maximum rates, partly because many of the states have exceptions, the most common excluding debt service and education, and partly because many states have multiple limits for different purposes. Texas is one of them because of its county limit in Section 9, plus the county taxes permitted for road district, water district, hospital district, airport district, and seawall and breakwater bonds and taxes for rural fire districts and school districts. At least two states have even more complicated limitations.

The *Model State Constitution* has no limits on property tax rates.

Author's Comment

Substantially everything said in the *Author's Comment* on Section 1 applies to Section 9, only more so. It was suggested that there is no constitutional reason for putting a limit on what or how heavily the legislature may tax. It seems even less significant constitutionally to limit the taxing power of political subdivisions. The legislature can impose limits on the taxing power of counties, cities, towns, school districts, and other special districts. Indeed, the advocates of home rule are probably more interested in restricting the power of the legislature over the taxing power of local governments than in restricting the local governments themselves. The home-rule provision of the 1970 Illinois Constitution, for example, requires a three-fifths vote of the full membership of each house to deny or limit a home-rule government's power to tax. (This provision is quoted in the *Comparative Analysis* of Sec. 5 of Art. XI.)

If there must be some reservation of power to the people, the reservation should be local, not statewide. A provision might read something like this: "Any general law authorizing a political subdivision to levy an ad valorem tax in excess of _____ on the $100 must provide that the excess may be levied by a political subdivision only upon referendum approval by the voters of the subdivision." It cannot be repeated too often that a substantive limitation prevents the government from acting but not the people. If power is to be reserved, which people should have the power? It hardly seems appropriate to require the approval of the people of the entire state to permit an increase in the tax burden desired by one, two, ten,

or fifty local governments. It should be sufficient to require the local governments to get the approval of their own voters.

This same theory should apply in the case of debt limits. At present there is no constitutional debt limit, but there is a practical limit by virtue of the constitutional restrictions on taxing power. If, in the process of revision, someone proposes that local debt limits must be imposed if constitutional limits on local taxation are lifted, the best constitutional solution would be to leave it to the legislature. But if some felt that the people should retain some control, a provision like this would be appropriate: "No general law establishing a debt limit for political subdivisions may authorize debt in excess of _____ percent of the assessed valuation of taxable property in a subdivision unless the law includes a requirement for referendum approval for the excess."

It goes without saying that the process of revising Section 9 requires throwing away the section and starting from scratch. Section 9 is beyond repair.

In the *Author's Comment* on Section 20 of Article V, it was suggested that care should be taken in using terms consistently throughout a constitution. Section 9 offers another example of drafting confusion in talking about roads. The original constitution had two provisions mentioning roads; three general amendments also mentioned roads. The result:

Section 56 of Article III—"laying out, opening, altering or maintaining of roads, highways, streets or alleys";

Section 2 of Article XI—"Laying out, construction and repairing of county roads";

Section 52(b) (1904 amendment)—"construction, maintenance and operation of macadamized, graveled or paved roads or turnpikes";

Section 9 (1883 amendment)—"roads and bridges";

Section 9 (1890 amendment)—"further maintenance of the public roads"; and

Section 1-a of Article VIII—"construction and maintenance of Farm to Market Roads."

> Sec. 10. RELEASE FROM PAYMENT OF TAXES. The Legislature shall have no power to release the inhabitants of, or property in, any county, city or town from the payment of taxes levied for State or county purposes, unless in case of great public calamity in any such county, city or town, when such release may be made by a vote of two-thirds of each House of the Legislature.

History

Forgiveness of delinquent taxes is an exemption after the fact. In the *History* of Section 2, it was pointed out that the delegates to the 1875 Convention had strong views on the prior abuse of the power to exempt people and property from taxation. There were equally strong feelings about forgiveness.

The principal prohibition against forgiveness is Section 55 of Article III. That section, as is pointed out in the *Explanation*, is more comprehensive than Section 10. This raises the question of why there is a Section 10. In the absence of a verbatim transcript of the convention proceedings, one can only speculate. In the substitute revenue and taxation article used by the convention there was a peculiar secton modeled after a section in the 1870 Illinois Constitution. The proposal read:

> No county, city, town or other municipal corporation, nor the inhabitants thereof, nor the property therein, shall be released or discharged from their or its proportionate share of taxes to be levied for State purposes, nor shall commutation for such taxes be authorized in any form whatever. (*Journal*, p. 423.)

In Illinois this section was inserted to prevent the state from aiding a local government by "donating," in effect, state taxes for a local purpose. (See Braden and Cohn, *The Illinois Constitution: An Annotated and Comparative Analysis* (1969), pp. 454-55.) The thrust of the provision was to prevent legislative favoritism to a particular locality. The thrust was not to prevent the legislature from letting taxpayers avoid the payment of taxes.

In the course of the convention the proposal was changed several times. First, a new version was substituted. It consisted of the first part of what is now Section 10 up to "unless," but without including county purposes. (*Journal,* p. 485.) Subsequently, the "unless" clause was added. One can speculate that at that moment the delegates recognized the original purpose of the section although they had perhaps forgotten that Section 51 of Article III covered the same thing, including the "unless' clause but without the two-thirds vote. But when, still later, "county" was added in front of "purposes" (*Id.,* at 532), one's speculation becomes difficult. Why should there be a prohibition against the legislature forgiving county taxes payable to the county? That reads like a prohibition against tax relief per se. This is prohibited by Section 55 of Article III. (Just before "county" was added, a delegate moved unsuccessfully to delete the entire section. *Ibid.* Did he recognize the confusion that was developing?) One can only guess that the 1875 Convention delegates tended to concentrate on the issue before them at the moment and not to recognize duplications arising from something done on another day. (The legislative article, including Secs. 51 and 55, had long since been accepted at the time Sec. 10 was under consideration.)

Explanation

Section 10 prohibits the legislature from forgiving state or county taxes. Section 55 of Article III does the same thing. Section 10 does not prohibit the state from forgiving city, town, or special district taxes. Section 55 does. (This is probably the reason that the amendment in 1932 permitting the forgiveness of taxes delinquent at least ten years was added to Sec. 55 and not to Sec. 10.) Most of the cases raising questions concerning forgiveness of taxes arose under Section 55 because they involved city taxes.

Most of these are cases which in effect permit the forgiveness of taxes. The most important device is a simple statute of limitations. The taxes are not "released"; there is just no way that suit can be brought to collect them. (*Texas & P. Ry. Co. v. Ward County Irr. Dist. No. 1,* 257 S.W. 333 (Tex. Civ. App.—El Paso 1923), *aff'd,* 270 S.W. 542 (Tex. Comm'n App. 1925, *jdgmt adopted holding approved); City of San Antonio v. Johnson,* 186 S.W. 866 (Tex. Civ. App.–San Antonio 1916, *no writ*).) Of course, there is no requirement that there be a statute of limitations. If there is not, liability exists forever, which explains the 1932 amendment of Section 55 of Article III.

The statute-of-limitations cases can be brought under a broader generalization: a tax can be "released" through any relevant official act or failure to act. A statute-of-limitations case arises because some official failed to file suit in time. If a statute states that a tax certificate showing payment of taxes in full is conclusive, it is irrelevant whether some employee by error issued an incorrect certificate. (See *Amerada Petroleum Corp. v. 1010.61 Acres of Land,* 146 F.2d 99 (5th Cir. 1944).) If one statute authorizes an assessor to assess property only currently and another statute forbids a suit for unpaid taxes until the tax collector has made demand for the taxes, a taxpayer is home free for taxes in prior years. This is true because if the assessor failed to make an assessment, the tax collector cannot make a demand. (See *State v. Cage,* 176 S.W. 928 (Tex. Civ. App.–Fort Worth 1915, *writ ref'd*).)

The public calamity exception created no problem until the Great Depression. Obviously, a "great public calamity" refers to a fire, flood, tornado, or similar natural occurrence that destroys property values. Although as a general rule the courts would accept a legislative declaration of a calamity (*Martin v. Hidalgo County,* 271 S.W. 436 (Tex. Civ. App.—San Antonio 1925, *writ dism'd*)), the supreme court put its foot down when the legislature called the depression a calamity. (*Jones v. Williams,* 121 Tex. 94, 45 S.W.2d 130 (1931).) The statute involved in that case did not forgive delinquent taxes, only interest and penalties if the taxes were paid by January 31, 1932. The court upheld the statute. The court said that although the legislature improperly tried to get the statute under the calamity exception, the statute was still valid because there was no constitutional prohibition against forgiveness of interest and penalties.

The 1932 amendment of Section 55 of Article III was not the result of the *Jones* case. The amendment was proposed by the legislature before passage of the statute involved in that case. After adoption of the amendment, the legislature by no means exercised all the power given to it. In 1935 it forgave taxes delinquent prior to December 31, 1919. In 1965, 30 years later, the legislature cautiously moved the forgiveness date up 20 years to December 31, 1939. (See Tex. Rev. Civ. Stat. Ann. art. 7336f (1960).)

Comparative Analysis

There are four states besides Texas that have a provision like the one quoted in the *History* above as modeled after an Illinois provision. These states probably also took the provision from Illinois or from one another since they are all post-1870 constitutions. The 1970 Illinois Constitution dropped the section. The 1972 Montana Constitution also dropped a like provision.

Author's Comment

Whether one reads Section 10 as a prohibition on helping a particular local government or as a general prohibition on forgiving taxes, or both, the section seems unnecessary. This is particularly true if there is a real end to local and special legislation. Under any circumstances it seems unlikely that the legislature will grant a special state tax favor to a single locality. If local laws are prohibited it cannot be done anyway. Likewise, there seems no harm in permitting the forgiveness generally of delinquent taxes. The actual legislation mentioned above shows that the legislature does not go overboard. Given the power to forgive ten-year-old taxes, the legislature opted first for a 15-year date, and not a rolling date, either. Next time around they made it a 25-year date, and still not a rolling one. Indeed, as of the end of 1973 only taxes delinquent for 34 years were forgiven. This is surely not legislative irresponsibility that must be guarded against by constitutional limitations.

Moreover, there are good arguments in favor of general forgiveness. Nothing spurs action like a deadline. Tell the tax collector and his lawyer that they can wait forever to sue and they will. Give them a deadline and they may act. In addition, clouds on land titles impair free transfer. A piece of land with delinquent taxes going back 30 years is not an enticing purchase. It seems ill-advised to throw this sort of permanent wet blanket on land out of a fear that some legislature some day might try to pull a fast one.

Sec. 11. PLACE OF ASSESSMENT; VALUE OF PROPERTY NOT RENDERED BY OWNER. All property, whether owned by persons or corporations shall be assessed for taxation, and the taxes paid in the county where situated, but the

Art. VIII, § 11

Legislature may, by a two-thirds vote, authorize the payment of taxes of non-residents of counties to be made at the office of the Comptroller of Public Accounts. And all lands and other property not rendered for taxation by the owner thereof shall be assessed at its fair value by the proper officer.

History

This section dates from 1876. The delegates to the 1875 Convention debated the section extensively on three different days. (See *Debates,* pp. 313-15, 320-22, 374-77.) The discussion was limited to the question of where a property owner could pay his taxes. Delegates who wanted taxes paid in the county where the property was located appeared to fear that if the money were paid elsewhere it might never find its way back to the proper county. Delegates who favored payment in county of residence stressed the fact that many people owned land in frontier areas and could ill afford to travel there once a year to pay their taxes or to hire an agent to take care of them. In the background was the obvious interest of large property owners in paying their taxes at one place. The issue was hardly earth-shaking, but there seems to be a Parkinson's Law of constitutional conventions: The less important the issue, the more protracted the debate. In any event, the compromise was to pass the issue to the legislature. In 1879 the legislature provided that nonresidents of counties could pay their taxes at the Office of the Comptroller. (See Tex. Rev. Civ. Stat. Ann. art. 7265.)

The second sentence of the section is another story. The majority and minority proposals before the convention both provided that land not rendered for assessment should be assessed by the assessor "and in no case shall be valued at less than fifty cents per acre." One can only guess at the purpose that the drafters had in mind. In the context of the discussion of frontier lands of absentee owners, it may be that the "fifty cents an acre" minimum was to be an inducement to get people to render their land. Whatever the purpose, the whole business was fuzzed up by the floor amendment which offered what is now the second sentence. (*Journal,* p. 469.)

Explanation

As noted above, the first sentence of this section dealt with the narrow question of whether a taxpayer could pay his property tax where he lived rather than where the property was located. On this level, the section is self-explanatory and should not have spawned any litigation. (On this same level, the section is almost totally meaningless. See the *Author's Comment* that follows. Unfortunately, two words—"where situated"—have produced an abundance of litigation.

The *Interpretive Commentary* puts it thus: "This section states the general rule governing situs of property for taxation, namely in the county where situated. But it is subject to some very important exceptions. In order to accurately determine the exact situs of property for assessment it is necessary to distinguish between real, tangible personal, and intangible personal property." (*Interpretive Commentary,* Art. VIII, Sec. 11.) It seems doubtful, to say the least, that the delegates in 1875 thought they were dealing with technical legal problems of situs of property. They surely were thinking only of the problem of where to pay taxes levied on real property and on the ordinary tangible personal property located on that real property. They also obviously knew that there were problems about mobile personal property, for they included a specific tax situs for railroad rolling stock (Sec. 8).

The only significance attaching to the words "where situated" has been the attempt by litigants to use them. In *City of Dallas v. Texas Prudential Ins. Co.,* for

example, the City of Dallas tried to levy an ad valorem tax on the office furniture and fixtures of a domestic insurance company notwithstanding a statute declaring the situs of all such personal property to be at the home office of any domestic insurance company. The supreme court brushed aside the argument that "where situated" in Section 11 fixed the situs of tangible personal property. In the court's view, the words in Section 11 did not represent a new definition of situs. In the absence of such a constitutional definition, situs remains a matter of the common law, which in turn can almost always be changed by statute. This, the court held, was validly done when the situs of tangible personal property was placed in the home office of insurance companies rather than "where situated." (156 Tex. 36, 291 S.W.2d 693 (1956).) See also *City of Dallas v. Overton* (363 S.W.2d 821 (Tex. Civ. App.—Dallas 1962, *writ ref'd n.r.e.*)), where it was held that an airplane should be taxed where kept rather than where its owner lived. The court so decided on the basis of the common law and explicitly did not rely upon the words "where situated." Thus, Section 11, notwithstanding frequent mention in court opinions, is of no significance as a limitation on the legislature's power to determine the situs of personal property for tax purposes.

As noted in the *Author's Comment* below, the second sentence concerning unrendered property is superfluous. Courts have cited the sentence in holding that a board of equalization may not add property which the assessor has omitted from the tax rolls. (See, *e.g., San Antonio Street Ry. v. City of San Antonio,* 54 S.W. 907 (Tex. Civ. App. 1899, *no writ*).) But courts would undoubtedly have reached the same conclusion absent the second sentence of Section 11. (See *Explanation* of Sec. 18.)

Comparative Analysis

Only a few states have any kind of provision concerning the situs of property for purposes of assessment. No other state appears to have a provision concerning where payment must be made. Many states have a provision concerning the standard of valuation. (See *Comparative Analysis* of Sec. 1.) The *Model State Constitution* is silent on this subject.

Author's Comment

The first sentence of this section evaporates unless somebody thinks it makes a difference that legislative action has to be by a two-thirds vote. Nothing seems less vital in a constitution than a provision which says that things are thus and so unless the legislature provides otherwise. Moreover, such a provision implies that today's conditions will not remain the same for long. Delegates writing a constitution ought to think twice before saddling future generations with today's solution to what may be a nonproblem tomorrow. In 1875 not many people paid their bills by check, which undoubtedly contributed to the argument over where taxes should be paid. But one would think that delegates to a convention could recognize that this is an ephemeral matter to be left wholly, not partially, to the legislature.

The second sentence is an example of saying the same thing over and over. Section 1 states that *all* property is to be taxed in proportion to its value. The second sentence of Section 11 does nothing except to tell the "proper officer" to do his duty as commanded by Section 1. Thus, the second sentence also evaporates.

Sec. 13. SALES OF LANDS AND OTHER PROPERTY FOR TAXES; REDEMPTION. Provision shall be made by the first Legislature for the speedy sale, without the necessity of a suit in Court, of a sufficient portion of all lands and other property for the taxes due thereon, and every year thereafter for the sale in like

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Sec. 13. SALES OF LANDS AND OTHER PROPERTY FOR TAXES; REDEMPTION. Provision shall be made by the first Legislature for the speedy sale, without the necessity of a suit in Court, of a sufficient portion of all lands and other property for the taxes due thereon, and every year thereafter for the sale in like

manner of all lands and other property upon which the taxes have not been paid; and the deed of conveyance to the purchaser for all lands and other property thus sold shall be held to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud; provided, that the former owner shall within two years from date of the filing for record of the Purchaser's Deed have the right to redeem the land on the following basis:

(1) Within the first year of the redemption period upon the payment of the amount of money paid for the land, including One ($1.00) Dollar Tax Deed Recording Fee and all taxes, penalties, interest and costs paid plus not exceeding twenty-five (25%) percent of the aggregate total;

(2) Within the last year of the redemption period upon the payment of the amount of money paid for the land, including One ($1.00) Dollar Tax Deed Recording Fee and all taxes, penalties, interest and costs paid plus not exceeding fifty (50%) percent of the aggregate total.

History

The 1869 Constitution had two sections aimed at cleaning up delinquent taxes. One commanded the "first" legislature to provide "for the condemnation and sale of all lands for taxes due thereon; and, every five years thereafter, of all lands, the taxes upon which have not been paid to that date." (Art. XII, Sec. 22.) The other section provided: "Landed property shall not be sold for taxes due thereon, except under a decree of some court of competent jurisdiction." (Sec. 21.)

The section as adopted by the 1875 Convention read the same as the present Section 13 down to the redemption proviso except for the phrase "without the necessity of a suit in Court." This phrase was added by amendment in 1932. That amendment also substituted the present redemption proviso for the original wording: ". . . provided that the former owner shall, within two years from the date of purchaser's deed, have the right to redeem the land upon the payment of double the amount of money paid for the land."

Explanation

Under normal circumstances a legal system provides a means for collecting debts, including seizure and sale of assets. In the case of taxes, there appear to have been two lines of cases. One said that a common law action for debt would not lie unless the government affirmatively so provided by statute; the other line said that, unless the constitution or statute forbade a common law action for debt, the government could bring one. In *City of Henrietta v. Eustis,* the supreme court noted that Texas followed the latter rule. Accordingly, the court looked at the constitution and implementing statutes and concluded that nothing precluded a personal action against an individual for unpaid taxes in addition to foreclosing on the property on which the tax was levied. (87 Tex. 14, 26 S.W. 619 (1894). Note: In the discussion that follows, "property" means real estate. Section 13 covers "other property," but all of the cases discussed deal with real property.)

It follows that there is no need to put into a constitution any statement about the power of the government to collect its taxes. In the light of this, one can speculate about what the 1875 Convention thought it was doing in drafting Section 13. First, it is clear that the convention meant to remove the quoted 1869 limitation that forbade summary tax sales, that is, sales by the tax collector to the highest bidder. Second, it seems likely that such words as "speedy sale" and "vest a good and perfect title" were nothing more than a plea by the delegates to the legislature and the courts not to make it difficult to collect delinquent taxes. (Prior to 1875 the strict procedure for tax sales resulted in faulty titles which, in turn, tended to protect a delinquent taxpayer. See Miller, pp. 109-10.) Third, it seems likely that the

delegates thought that they were providing an across-the-board right of redemption.

The "first legislature" dutifully fulfilled its obligation to provide for "speedy sales." (See Tex. Rev. Civ. Stat. Ann. arts. 7273-7283.) Nevertheless, faulty titles caused by failure to follow the strict requirements of the law continued to be a problem. (See Miller, pp. 269-70.) In 1895 a new statute added foreclosure of tax lien followed by judicial sale. (See Tex. Rev. Civ. Stat. Ann. arts. 7326, 7328, and 7330.) There were now two statutory methods of selling land for delinquent taxes, but these covered only state and county taxes.

In 1898 the supreme court decided *City of San Antonio v. Berry* (92 Tex. 319, 48 S.W. 496). This was a suit for delinquent city taxes and foreclosure of a tax lien. San Antonio operated under a local law charter which gave it the power to foreclose a tax lien without a right of redemption. The property owner tried to rely upon Section 13, but the court was not persuaded. "The right of redemption which was secured to the owner by that section applies only to the 'speedy sale' for which the legislature was required to make provision . . . . The provision in which the right of redemption is given makes the period begin from the date of the purchaser's deed, and the deed referred to is . . . the 'land thus sold.' Clearly, by 'land thus sold' is meant the land which was to be sold under the summary remedy which the legislature was to provide." (92 Tex., at 328; 48 S.W., at 500.)

The legislature evidently did not approve the court's conclusion, for in 1899 at the regular session, which convened the month following the decision, a simple law was enacted providing that all lands sold for taxes under a court decree could be redeemed by the owner within two years from the date of the deed. (See Tex. Rev. Civ. Stat. Ann. art. 1065.) Then a new problem arose. In 1905 the legislature enacted a local law charter for Houston, one of the provisions of which denied the right of redemption. In *Brown v. Fidelity Inv. Co.* (280 S.W. 567 (Tex. Comm'n App. 1926, *jdgmt adopted*)), the commission of appeals held the charter provision void because it contravened the 1899 law. The writer of the opinion did not say that even though the special charter was enacted after 1899, the legislature undoubtedly did not mean to repeal the 1899 general law as to Houston only. The writer did say a lot of things about local laws and general laws and equal rights and the requirement of the 1912 Home Rule Amendment that a home-rule charter could not have a provision inconsistent with the general laws. In short, the opinion reached the right result but not on the basis of normal statutory interpretation. This is undoubtedly the reason that the supreme court adopted only the judgment of the commission of appeals.

Special districts also went the way of cities. The statute authorizing water improvement districts contained all the usual provisions but no right of redemption except "at any time before the lands are sold." (Originally Tex. Rev. Civ. Stat. Ann. art. 5107-50; now art. 55.613 of the Water Code.) In *Alamo Land & Sugar Co. v. Hidalgo County Water Imp. Dist. No. 2,* the court of civil appeals dutifully followed the *Berry* case by holding that Section 13 was inapplicable. (276 S.W. 949 (San Antonio 1925, *no writ*).) Again the legislature promptly provided a right of redemption for any land sold for delinquent taxes "levied by or for any district organized under the laws . . . ." (See Tex. Rev. Civ. Stat. Ann. art. 7284a.) This statute was held an unconstitutional impairment of contract as to any taxes levied to pay bonds issued prior to enactment but valid as to bonds issued subsequently. (See *Dallas County Levee Imp. Dist. No. 6 v. Rugel,* 36 S.W.2d 188 (Tex. Comm'n App. 1931, *jdgmt. adopted*).)

At this point it is appropriate to pause to note that Section 13 involved, first, problems of methods of collecting taxes—by summary sale by the tax collector or judicial sale under court order; and, second, the problem of the availability of a

right of redemption. So far in this discussion, it has been made clear that Section 13 was considered to cover only state and county property taxes. Redemption rights existed in cities and special districts only if the legislature granted them. It also seems clear that the "first legislature" obeyed the command to provide for summary sale, but that thereafter the legislature preferred the route of judicial sales. In 1895 this route was made available for state and county taxes; in 1897 it was extended to cities, towns, and school districts. (See Tex. Rev. Civ. Stat. Ann. art. 7337. Laws still on the books but predating the 1876 Constitution authorize summary sales in cities (Tex. Rev. Civ. Stat Ann. arts. 1041, 1058). The last sentence of another 1897 law (Tex. Rev. Civ. Stat. Ann. art. 7343) seems to authorize cities, towns, and school districts to use the summary sale procedure.)

In 1929, the legislature decided to kill off summary tax sales. A simple statute was enacted providing; "That [*sic*] all sales of real estate made for the collection of delinquent taxes due thereon shall be made only after the foreclosure of tax lien securing same has been had in a court of competent jurisdiction in accordance with existing laws governing the foreclosure of tax liens in delinquent tax suits." (See Tex. Rev. Civ. Stat. Ann. art. 7328a. The "*sic*" is to alert the reader that the statute is a nonsentence.) The second section of the bill provided: "All laws and parts of laws in conflict with the provisions of this Act be and the same are hereby repealed." (*General and Special Laws of the State of Texas,* 41st Legislature, ch. 48, sec. 2, at 103.) This lazy approach leaves all conflicting laws on the books and requires courts and lawyers to puzzle over what does conflict with the new law. Presumably, the 1929 law "repealed" the 1876 summary sale statute as amended. That statute covered only state and county property taxes. But presumably the 1929 words "that all sales" meant *all* sales and not just sales under the 1876 law.

In 1932 Section 13 itself was amended in a manner that could hardly have been more confusing. As noted in the *History* above, the words "without the necessity of a suit in Court" were added. But these words became part of a command to the "first Legislature." That legislature went out of existence in 1879. Or was there a new command to the first legislature to meet after 1932? If somebody was trying to repeal the 1929 statute, he certainly did not know how to go about it. Section 13 was left as a command to the legislature—dead or alive—to do something. It did nothing.

The supreme court tackled the problem of the amended Section 13 in *Mexia I.S.D. v. City of Mexia* (134 Tex. 95, 133 S.W.2d 118 (1939)). It was argued that use of the judicial process to foreclose a tax lien violated Section 13 because the words "without the necessity of a suit in Court" made summary sale the exclusive method for collecting delinquent taxes. The court noted, first, that Section 13 by its own language did not appear to be exclusive, and, second, that Section 13 had to be read in conjunction with Section 15, particularly its concluding words "under such regulations as the Legislature may provide." In the discussion of Section 15, it is noted that much of the section adds nothing to legislative power over means of collecting taxes. Nevertheless, because the quoted words were there, the court could use them to bolster its argument that amended Section 13 did not make summary sale exclusive.

Apparently this pronouncement was not effective, for in 1948 the supreme court had to go through the whole business again. The tax collector for the Pasadena Independent School District tried the summary sale device. A couple of taxpayers obtained an injunction on the ground that the 1929 statute forbade summary sales. On an appeal by the tax collector, the supreme court reviewed the matter in great detail. (*Duncan v. Gabler,* 147 Tex. 229, 215 S.W.2d 155 (1948). The opinion does not cite the statute that the tax collector relied upon. It may have been Tex. Rev. Civ. Stat. Ann. art. 7343, previously cited.) The conclusion was

that the 1929 statute is constitutional and effectively limits tax sales to judicial foreclosure after suit.

The 1932 amendment also changed the rules for redemption. The *Berry* case discussed earlier said that the right of redemption given by Section 13 covered only summary sales. The *Berry* case has frequently been distinguished but never overruled. This raises an interesting question. In the case of judicial sales, does the legislature have full power to deny any period of redemption, to make the period shorter, or to increase the redeemer's cost above that set forth in Section 13? If the *Berry* case is good law, there is no constitutional guarantee of the right of redemption. It is inconceivable that the drafters of the 1932 amendment and the voters who ratified it at the depth of the Depression thought that they were engaging in an idle gesture. Surely they thought that they were helping delinquent taxpayers redeem their property at a lower cost than "double the amount of money paid for the land," as Section 13 had previously provided. So far the question raised remains theoretical; the right of redemption now granted is apparently the same as set forth in Section 13. (See Sec. 12, Tex. Rev. Civ. Stat. Ann. art. 7345b. Interestingly enough, the two redemption statutes mentioned earlier–Tex. Rev. Civ. Stat. Ann. art. 1065 for cities and Tex. Rev. Civ. Stat. Ann. art. 7284a for special districts—are still on the books with "double the amount paid" required to redeem. They have been "repealed" presumably by the enactment of Tex. Rev. Civ. Stat. Ann. art. 7345b.)

Comparative Analysis

Several states have provisions prohibiting the *exemption* of property from sale for nonpayment of taxes. Several states also make it clear that the homestead exemption does not cover tax sales. Prior to 1970, Illinois also had an affirmative provision. The 1970 Convention turned the provision into a simple prohibition: "Real property shall not be sold for the non-payment of taxes or special assessments without judicial proceedings." (Art. IX, Sec. 8(a).)

The right of redemption appears to be guaranteed in four states. The verb "appears" is appropriate because anyone reading Section 13 would say that Texas guarantees the right of redemption. It is possible that one of the other states has a *Berry* case floating around. The *Model State Constitution* has nothing on either tax sales or redemption.

Author's Comment

There are enough morals in the story of Section 13 to fill a book of fables. Moral No. 1: Badly drafted constitutional provisions breed bad court decisions. One must read the intent of the 1875 Convention, poorly expressed as it was, as guaranteeing a right of redemption. The *Berry* case represents a literal reading of Section 13, not a reading of the intent behind the words.

Moral No. 2: Beware of using "provided that." Properly used, "provided that" expresses a condition that must be met before the main proposition is effective. For example, "I bequeath my library to my son provided that he survives me." (There may be such a proper use in the Texas Constitution, but it is a needle-in-a-haystack chore to find it.) In the Texas Constitution, "provided that" frequently means "but," "except that," "also," and even "oh, and here is another idea." If, in the case of Section 13, "provided that" was properly used to mean that any "speedy sale" statute had to include a right of redemption, then the *Berry* case was correct if it was correct in equating "speedy sale" with "summary sale." (See the *Duncan* opinion where the court repudiated this very equation.) But if, as seems more likely, "provided that" meant "also," then *Berry* was wrong.

Moral No. 3: Think before you amend. How anyone could have amended a provision and left it reading "Provision shall be made by the first Legislature" is beyond comprehension.

Moral No. 4: Read the cases before you amend. The 1932 amendment of the redemption proviso must have been based on the assumption that the existing proviso guaranteed a right of redemption. Even a quick reading of the *Berry* case would have alerted a drafter to start over; "Any owner of property sold for non-payment of taxes may redeem the property . . .," etc.

Moral 5: Do not command the legislature to pass statutes. It may not work because the legislature may not act.

Moral No. 5a: If you must command the legislature to pass a statute, do not include too much advice. Section 13 would have been relatively harmless if it had read: "The Legislature shall provide by general law for the sale of property for non-payment of taxes. Such law shall provide for a right of redemption within two years following such sale." (For an exercise in puzzling over the meaning of details, compare the wording of (1) and (2) of Sec. 13 with the wording of (1) and (2) of Sec. 12 of Tex. Rev. Civ. Stat. Ann. art. 7345b.)

> Sec. 14. ASSESSOR AND COLLECTOR OF TAXES. Except as provided in Section 16 of this Article, there shall be elected by the qualified voters of each county, an Assessor and Collector of Taxes, who shall hold his office for four years and until his successor is elected and qualified; and such Assessor and Collector of Taxes shall perform all the duties with respect to assessing property for the purpose of taxation and of collecting taxes, as may be prescribed by the Legislature.

History

The 1845 Constitution provided that the "Assessor and Collector of Taxes shall be appointed in such manner, and under such regulations as the Legislature may direct." (Art. VII, Sec. 29.) No change was made in 1861 or 1866. The Reconstruction Constitution of 1869 provided that the justices of the peace should assess the property in their precinct and that the sheriffs should collect the assessed taxes in their respective counties. (Art. XII, Sec. 28.) After the democrats gained control of the legislature in 1873, an amendment was proposed and adopted the same year providing that at the next general election and every four years thereafter an assessor and collector of taxes was to be elected in each organized county.

In the 1875 Convention, the majority report of the Committee on Revenue and Taxation provided for an elected assessor in each county; the minority substitute accepted by the convention for debate also provided for a county assessor but left it to the legislature to decide whether he should be elected or appointed. During debate a number of amendments were offered covering both this section and Section 16. (See *Journal,* pp. 468-69, 540. See also *Debates,* pp. 309-10.) The version finally agreed upon was:

> There shall be elected by the qualified electors of each county at the same time and under the same law regulating the election of State and county officers, an Assessor of Taxes, who shall hold his office for two years and until his successor is elected and qualified.

In 1932 the section was amended to change "Assessor" to "Assessor and Collector" and to add the words following the semicolon in the current version. (Sec. 16 was amended at the same time.)

In 1954 the section was amended to increase the term of office to four years.

That amendment also added the opening "Except" clause and dropped the phrase concerning time of election.

Explanation

As the section now stands it is relatively self-explanatory. Between 1932 and 1954, Sections 14 and 16 were contradictory because Section 14 said that there should be an assessor and collector elected in "each" county but Section 16 said that the sheriff should be "the" assessor and collector of taxes in each county except those with a population of 10,000 or more. Since the 1932 amendments of Sections 14 and 16 were submitted to the voters as a single vote for or against "combining into one office of Assessor and Collector of Taxes, the offices of Assessor and Tax Collector," it was obvious what was intended notwithstanding the contradictory language. The 1954 amendment corrected the error by adding the "Except" clause. Even so, the correction ended up only partially correct. It ought to read "Except as provided in Sections 16 and 16a of this Article."

The only significant interpretation of this section is an attorney general's opinion issued in 1971 (Tex. Att'y Gen. Op. No. M-986). The question posed to him was whether a county with over 10,000 population could enter into a contract with a city within the county whereby the city's tax assessor would assess property within the city for county taxes. In practical terms, the question was whether the county assessor could use the valuations determined by the city assessor. The attorney general held that Section 14 prohibited such a contract but did not prohibit a "contract for services, such as the making of appraisal *recommendations,* that would not constitute an abrogation of the duties of the county assessor-collector *granted* by the Constitution." (Italics supplied; duties are imposed, not "granted.") It seems obvious that permitting the county assessor-collector to rely upon the "recommendations" of the city assessor-collector reaches the same result as a contract to provide the actual valuations. (For a detailed analysis of the attorney general's opinion, see the *Author's Comment* on this section.)

It would appear to be obvious that local governments with power to levy property taxes could be authorized to provide their own assessor-collector. But as late as 1965, a court of civil appeals had to brush aside a claim that a school district had to use the county assessor-collector (*Jackson v. Maypearl I.S.D.*, 392 S.W.2d 892 (Tex. Civ. App.–Waco 1965, *no writ*)). Still more recently the attorney general has ruled that a school district may designate the county assessor-collector as its agent to assess and collect taxes and may direct him to assess at a higher percentage of market value than he uses for county assessments. (Tex. Att'y Gen. Op. No. M-859 (1971). This is all pursuant to statute. Education Code sec. 23.94.)

Comparative Analysis

Approximately ten states mandate the election of a county tax assessor. One of those, Montana, provides in its 1972 Constitution for the continuation of traditional county government, including election of an assessor, but also provides for alternative forms of county government that would permit elimination of the elected assessor.

No other state has a constitutional county assessor-collector. Three states make the sheriff *ex officio* collector, but two of them, Arkansas and West Virginia, have unless-otherwise-provided-by-law qualifications and the third, Louisiana, excepts Orleans Parish. Colorado and Montana provide that the county treasurer shall be the tax collector. (But note the Montana change described above.) Florida's constitution provides for the election of the county tax collector. Mississippi permits the legislature to determine the manner of selection of the collector.

Many of the other states may have elected assessors or tax collectors, or both, but not with constitutional status. For example, Idaho provides that taxes shall be collected by an officer or officers designated by law. The *Model State Constitution* does not provide for named county officers.

Author's Comment

The attorney general's opinion discussed in the *Explanation* above leaves much to be desired. In the first place, a county attorney requested an opinion on whether H.B. 646, passed March 20, 1971 (Tex. Rev. Civ. Stat. Ann. art. 4413 (32c)), authorized the contract described above. Instead of addressing himself to the statute, the attorney general quoted Section 14 and then turned to the 1907 supreme court opinion that upheld the Intangible Assets Act. In the course of permitting a state board to supersede local assessors in determining the total value of a railroad's property in the state, the court said, in passing, that "we think that the Legislature could not strip the assessor of all authority, and probably that it was intended by the framers of the constitution that all ordinary assessments of property for taxation should be made by him. . . ." (*Missouri, K. & T. Ry. Co. v. Shannon,* 100 Tex. 379, 391, 100 S.W. 138, 142 (1907).) Relying upon this quotation, the attorney general concluded that the proposed contractual arrangement would be unconstitutional. He then said: "For the above reasons, House Bill No. 646 does not authorize a county to contract away the duty of its elected tax assessor and collector to make ordinary assessments of property for taxation purposes."

Although the question asked was framed in terms of the statute, the opinion by-passed it on the way to the constitutional issue. H.B. 646, "The Interlocal Cooperation Act," authorizes contracts whereby one local government may perform, among other things, an "administrative function" for another local government. "Administrative functions" are defined as "functions normally associated with the routine operation of government such as tax assessment and collection . . . [etc.]" (Sec. 3(3).) It is clear that the proposed contract came within the statute which would mean that the constitutional issue had to be faced. Unfortunately, failure to analyze the statute may have led the attorney general into a faulty analysis of Section 14.

Although the attorney general quoted Section 14, he did not analyze it. Instead, he quoted the *Shannon* opinion. But the Section 14 that the court construed is the section set out above in the *History*. At that time the section neither mentioned "duties" nor granted to the legislature any specific power to "prescribe" such duties. These words entered the section in 1932. It would seem to follow that the *Shannon* opinion is irrelevant because whatever the "framers of the Constitution intended," their intent has been modified by the "intent" of the voters in adopting an amended Section 14 in 1932. Indeed, it can even be argued that the words "as may be prescribed by the Legislature" were "intended" to "overrule" the dictum in the *Shannon* case. (Note that the words quoted by the attorney general not only were not part of the holding of the court, they were in contradiction to the upholding of a statute that took some of the power of assessment away from assessors.)

Construing Section 14 is not an easy matter. A constitution frequently creates a constitutional office and provides that the officer shall perform "such duties as may be prescribed by law." (See Art. V, Sec. 23; Art. VII, Sec. 8.) Sometimes a provision will set forth certain duties and add "and such other duties as may be prescribed by law." (See Art. V, Sec. 21.) The wording of Section 14 may be unique, for it states that the assessor-collector shall perform "all duties with respect to assessing property . . . and of [*sic*] [to] collecting taxes, as may be prescribed by the Legislature."

Presumably, Section 14 means that the legislature may prescribe the duties of the assessor-collector of taxes. In other words, "all" is to be disregarded. If this is not the case, the phrase "as may be prescribed by the Legislature" is well nigh meaningless. (It is only fair to note that the attorney general disagrees. See Tex. Att'y Gen. Letter Advisory No. 117 (1976).)

If, then, the duties of the assessor-collector may be prescribed by law, it would seem reasonable for the legislature to prescribe that in any case where there are two assessors and one piece of property, only one assessor is to determine the value. If this is so, the legislature can surely take the lesser step of permitting any two assessors so to agree. H.B. 646 in effect does no more than this.

It should be noted that the attorney general's opinion ends up at the same place by permitting a contract for "recommendations" by one assessor to the other. It may be that this practical resolution of the problem avoids a constitutional confusion involving Section 18. If the county assessor were to rely upon the valuation determined by the city assessor, would the property owner have to protest to both the county and city boards of equalization? What would happen if one board agreed with the property owner and the other did not? It would be neither good constitutional government nor good administration to have two independent reviewing bodies for a single administrative act. In view of the wording of Section 18, H.B. 646 can hardly authorize a county to contract with a city for board of equalization services. (H.B. 646 undoubtedly does not authorize this, for the definition quoted above refers to "routine operation of government." A board of equalization sitting as a reviewing agency to hear protests would not be considered by most people to be a "routine operation.")

If a county and city enter into a contract for "recommendations," the confusion just outlined evaporates. Each assessor makes his own valuation; each board of equalization reviews the valuation of its assessor. One may raise an eyebrow over the attorney general's reasoning yet applaud his finding as a neat, practical solution to a constitutional problem that he did not discuss.

The moral to all this is that intergovernmental cooperation can be made viable only if the constitution does not contain restrictions like those in Section 18 and in Section 14 as construed by the attorney general. (See also the *Author's Comment* on Sec. 64 of Art. III.)

Sec. 15. LIEN OF ASSESSMENT; SEIZURE AND SALE OF PROPERTY. The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide.

History

The Reconstruction Constitution provided: "The annual assessments made upon landed property shall be a lien upon the property, and interest shall run thereon upon each year's assessment." (Art. XII, Sec. 20.) Neither the majority nor minority reports to the 1875 Convention mentioned liens. In the course of debate, Mr. Fleming, author of the minority report, proposed to add as a new section what is now the opening third of Section 15. This was apparently accepted by voice vote. (*Journal,* p. 495.) Several days later, just before the convention engrossed the article, a delegate offered an amendment adding the remainder of the section. This apparently was also accepted by voice vote. (*Journal,* pp. 540-41.)

Art. VIII, § 15

Explanation

In the absence of verbatim debates of the 1875 Convention it is not possible to know why Mr. Fleming felt the need to create a constitutional lien. (Perhaps he suddenly discovered the 1869 section quoted above.) Nor is it possible to know why anybody felt that the additional two "sentences" added anything significant. (See the *Author's Comment* on this section.)

As already noted in the *Explanation* of Section 13, our legal system permits the use of judicial process to obtain payment of a debt, including seizure of the debtor's property. A "lien" is a device to latch onto a person's property in advance so that he cannot dispose of it without satisfying the debt represented by the lien. The legislature does not have to provide this protection for creditors, of course, but it traditionally does so. (The statutory equivalent of Sec. 15 is Tex. Rev. Civ. Stat. Ann. art. 7172.) Indeed, the most likely step for a legislature to take is not only to create a lien for taxes but to give that lien priority over all other liens. (See Tex. Tax.–Gen. Ann. art. 1.07.)

There are many cases which cite Section 15, but most of them are not of constitutional significance. That is, they are the normal cases that would arise under a lien statute. Two cases of constitutional significance involved the relationship between Section 15 and another section of the constitution. One early case held that the lien created by Section 15 was not destroyed by the homestead protection guaranteed by Section 50 of Article XVI. (*City of San Antonio v. Toepperwein,* 104 Tex. 43, 133 S.W. 416 (1911). The problem in this case arose because of poor drafting of Sec. 50.) The other case involved the relationship between Section 15 and Section 6a of Article VII. (See *Childress County v. State,* 127 Tex. 343, 92 S.W.2d 1011 (1936).) A third case gave short shrift to an argument that the direct creation of a tax lien on real property precluded the legislature from creating a tax lien on personal property. (See In re *Brannon,* 62 F.2d 959 (5th Cir. 1933).)

Comparative Analysis

No other state creates a constitutional tax lien. For constitutional provisions concerning tax sales, see the *Comparative Analysis* of Section 13.

Author's Comment

The first "sentence" of Section 15 is a simple, self-executing statute. The second and third "sentences" are negative statutes. Presumably, the legislature cannot pass a law stating that property of a delinquent taxpayer is *not* liable to seizure and sale. But, in the absence of a statute authorizing a suit or other action, an official could hardly proceed solely on the basis of the assertion of liability in Section 15.

Statutory material in a constitution is usually recognizable by length and detail. (See, for example, Secs. 48a, 48b, and 49b of Art. III; and Sec. 12 of Art. IX.) But length and detail are not essential. If a provision directly establishes a public policy that the legislature could establish, the provision is likely to be statutory. This is particularly true if the legislature is almost certain to adopt the policy. But, as is always the case in human affairs, the matter is not wholly black and white. For example, it is not unreasonable to include in a constitution a right of redemption for property sold for nonpayment of taxes. (See Sec. 13.) On the one hand, a legislature is not likely to deny the right of redemption. (As noted earlier, Sec. 13 was so construed by the courts that the right of redemption was not always protected.) On the other hand, protection of the homestead is sufficiently important in maintaining family stability to excuse inclusion of redemption rights as part of a constitutional homestead protection. In other words, some statutes are more fundamental than others. If the statutory policy is so fundamental that the necessity for its repeal will

never arise, there is hardly any harm in embedding it in constitutional concrete.

As noted above, the balance of Section 15 is not significant. Every step necessary for the collection of delinquent taxes could be taken without these statements of liability—and without a Section 15 or a Section 13, for that matter. This is not to say that the statements have not been used; judges and lawyers, like mountain climbers, will use anything just because it is there.

Sec. 16. SHERIFF TO BE ASSESSOR AND COLLECTOR OF TAXES; COUNTIES HAVING 10,000 OR MORE INHABITANTS. The Sheriff of each county, in addition to his other duties, shall be the Assessor and Collector of Taxes therefor; but, in counties having 10,000 or more inhabitants, to be determined by the last preceding census of the United States, an Assessor and Collector of Taxes shall be elected as provided in Section 14 of this Article, and shall hold office for four years and until his successor shall be elected and qualified.

History

Prior to the Reconstruction Constitution of 1869, assessor and tax collector was a single office. Under that constitution justices of the peace were the assessors and the sheriff was the tax collector. In 1873 an amendment was adopted, again combining the offices. (See the *History* of Sec. 14.)

In the 1875 Convention both the majority and minority reports of the Committee on Revenue and Taxation proposed to revert to the Reconstruction system of separate offices with the sheriff as the tax collector. There was considerable debate over whether the offices should be combined or separate and whether, if separate, the sheriff should be the collector. (See *Debates,* p. 309.) In the course of debate a compromise proposal to have a separate collector in the more populous counties was accepted without a recorded vote. (*Journal,* p. 469.) The original section thus read:

The Sheriff of each county, in addition to his other duties, shall be the collector of taxes therefor. But in counties having ten thousand inhabitants to be determined by the last preceding census of the United States, a Collector of Taxes shall be elected to hold office for two years and until his successor shall be elected and qualified.

In 1932 the section was amended by changing the "collector of taxes" and "Collector of Taxes" to read "Assessor and Collector of Taxes." Several minor changes were made, the most important of which was to add "or more" after "ten thousand," thus correcting an error in the original wording.

In 1954 the section was amended to increase the specified term of office from two years to four years. At the same time "as provided in Section 14 of this Article" was added, thus correcting the 1932 error discussed in the *Explanation* of that section. (See also the *Author's Comment* on Sec. 16a.)

Explanation

The only significant questions arising under this section have involved candidacies for office at the time of census taking. In an early case the supreme court held that a certified census enumeration of fewer than 10,000 people filed prior to election day governed. (*Nelson v. Edwards,* 55 Tex. 389 (1881).) Many years later, a man read in the paper that the population of Lubbock County had passed 10,000. He tried to file for tax collector in the primary but was too late. His name was written in by several voters, however, and his nomination certified. He then ran in the general election as a certified candidate and again won, but the sheriff refused to recognize the validity of the election. The court of civil appeals held that so long as an official

census certification is made prior to the general election, Section 16 is operative. Lubbock County was declared to have an elected assessor and collector of taxes. (*Holcomb v. Spikes,* 232 S.W. 891 (Tex. Civ. App.–Amarillo 1921, *writ dism'd*).) The legislature has recently tackled this problem of when the United States census takes effect. (See the *Author's Comment* below.)

Comparative Analysis

See *Comparative Analysis* of Section 14.

Author's Comment

Section 1 of article 29d of the *Texas Revised Civil Statutes Annotated* provides:

> Neither the state nor any political subdivision or agency thereof except the Legislature shall ever officially recognize or act upon any report or publication, in whatever form, of any Federal Decennial Census, either as a whole or as to any part thereof, before the first day of September of the year immediately following the calendar year during which such census was taken. (Tex. Rev. Civ. Stat. Ann. art. 29d, sec. 1 (Supp. 1972-73).)

Section 2 states that as of the same September 1, everybody, including, presumably, the legislature, shall recognize and act upon the official census figures but goes on to provide that any figures not officially published until later are to be recognized and acted upon immediately upon publication. This version of article 29d became effective on March 11, 1971. Prior to that the statute used the date of January 1 of the year following the taking of the census and did not exclude the legislature from the operation of the statute.

In *Mauzy v. Legislature Redistricting Board,* Chief Justice Calvert, speaking for the supreme court, said: "If this statute was intended to prevent action by the Legislative Redistricting Board before September first of the year referred to on the basis of census figures theretofore published, it is ineffective in so far as it conflicts with Sec. 28, Art. III of the constitution as we have interpreted it." (471 S.W.2d 570, 575 (Tex. 1971).) The chief justice properly limited himself to invalidating article 29d only in so far as Section 28 of Article III is concerned, for that was the only constitutional provision involved in the lawsuit before the court. But the *Mauzy* case is a persuasive precedent for invalidating the statute in the case of any constitutional provision that uses a federal census as an operative event. Indeed, *Mauzy* may be an a fortiori case because Section 28 refers to "publication" of the census whereas Section 16, for example, says "determined" by the census. The United States Census Bureau presumably can control the date of "publication," but population is "determined" when the census is taken. The only open question under these circumstances is the reliability of figures as they are announced. That question also is controlled by the Census Bureau and the statute under which it operates. If the bureau certifies census figures as "final" within whatever range is adequate for a constitutional purpose, the census has been "determined." (See the extensive discussion of the census in *Cahill v. Leopold,* 141 Conn. 1, 103 A.2d 818 (1954). The Connecticut Supreme Court relied in part on the *Holcomb* case discussed earlier.)

It seems fair to conclude that any state constitutional provision tied to the decennial census can be construed only by the courts. A statute like article 29d is of no effect. Article 29d is operative, however, in the case of any purely statutory provision tied to the decennial census.

Sec. 16a. ASSESSOR-COLLECTOR OF TAXES; COUNTIES HAVING LESS THAN 10,000 INHABITANTS. In any county having a population of less than ten

thousand (10,000) inhabitants, as determined by the last preceding census of the United States, the Commissioners Court may submit to the qualified property taxpaying voters of such county at an election the question of adding an Assessor-Collector of Taxes to the list of authorized county officials. If a majority of such voters voting in such election shall approve of adding an Assessor-Collector of Taxes to such list, then such official shall be elected at the next General Election for such Constitutional term of office as is provided for other Tax Assessor-Collectors in this State.

History

This section was added in 1954. It was voted upon separately from the omnibus amendment increasing the terms of district, county, and precinct offices from two years to four years. This explains the odd wording at the end of the second sentence.

Explanation

There do not appear to have been any interpretations of this section. Thus, it is not known whether the question of offering the voters the choice of having a separate assessor-collector is the prerogative of the commissioners court. Presumably it is because of the word "may." There is also ambiguity about the "election." The first sentence states that the question, if submitted, is to be "at an election." This could be, presumably, either a special election or a regular election. The operative words in the second sentence are "majority of such voters voting in such election." Does this mean that if the election is a regular one, the majority required is of those voting or only of those voting on the question? There is an implementing statute, but it provides only that after a favorable vote the commissioners court "in its discretion may" fill the office by appointment until the next general election. (Tex. Rev. Civ. Stat. Ann. art. 7246-1/2 (Supp. 1972-73). Presumably, "in its discretion" means that "may" means "may" and not "shall.")

It also is not known whether there is any significance to the absence in Section 16a of any words about duties of an assessor-collector. Does the legislature have more, the same, or less power to prescribe the duties of an assessor-collector for a county of "less than 10,000 inhabitants" than it has for a county of 10,000 or more? (See the *Author's Comment* on Sec. 14.)

Comparative Analysis

See *Comparative Analysis* of Section 14.

Author's Comment

It was noted in the *History* above that this section does not spell out the term of office because no one could know in advance whether the voters would approve the general increase in term of office from two to four years. For a discussion of the problem of interrelated amendments voted upon simultaneously, see the *Author's Comment* on Section 1-c of this article. It also is worth noting that, absent the problem of interrelated amendments, Sections 14, 16, and 16a could have been combined into one section.

Sec. 17. SPECIFICATION OF SUBJECTS NOT LIMITATION OF LEGISLATURE'S POWER. The specification of the objects and subjects of taxation shall not deprive the Legislature of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution.

Art. VIII, § 18

History

This section dates from 1876. It was one of the sections in the substitute article submitted by a dissenting member of the Committee on Revenue and Taxation. (See *Introductory Comment.*) This section and Section 3 are the only ones that remained unchanged after the delegates accepted the substitute article.

One interesting sidelight is that Section 17 is exactly the same as a section in the 1870 Constitution of Illinois except for the addition of the words "or objects." In turn, the Illinois section was exactly the same as a section in the 1848 Constitution of Illinois except that "objects or" appeared in the 1848 instrument preceding "subjects." (The new 1970 Illinois Constitution omits the provision.) No other constitution contains a comparable provision.

Explanation

This is either an unnecessary or an indispensable provision. It is unnecessary if everyone understands that a legislature has plenary taxing power except for such limitations as are contained in the constitution. It is indispensable if some people think that taxing power has to be granted to the legislature. If, as is the case in the Texas Constitution, fuzzy drafting produces a mixture of granting words and limiting words, a Section 17 helps to knock down arguments against a new form of taxation. (See *American Transfer & Storage Co. v. Bullock,* 525 S.W.2d 918 (Tex. Civ. App.–Austin 1975, *writ ref'd*); *State v. Wynne,* 134 Tex. 455, 133 S.W.2d 951 (1939); *Missouri, K. & T. Ry. v. Shannon,* 100 Tex. 379, 100 S.W. 138 (1907).)

Comparative Analysis

As noted earlier in the *History,* no other state has a provision like this.

Author's Comment

If the drafters of a revised revenue and taxation article were to assume the power to tax and to restrict the article to limitations on that power, a Section 17 would obviously be unnecessary.

Sec. 18. EQUALIZATION OF VALUATIONS; CLASSIFICATION OF LANDS. The Legislature shall provide for equalizing, as near as may be, the valuation of all property subject to or rendered for taxation, (the County Commissioners' Court to constitute a board of equalization); and may also provide for the classificaton of all lands with reference to their value in the several counties.

History

This section dates from 1876. The original section as proposed by the Committee on Revenue and Taxation of the 1875 Convention read as follows:

> The sheriff, county clerk and chief justice shall compose a board of equalization in each county, to hear appeals by property holders and determine the just value of the property rendered for taxation. (*Journal,* p. 383.)

The minority substitute contained the same section. (*Id.,* at 424.) On second reading, the following took place:

> Mr. Ferris offered the following substitute for Section 14:
>
> 'Sec. 14. The Legislature shall provide for equalizing, as near as may be, the valuation of all property subject to or rendered for taxation, by creating a board or boards of equalization, and it may also provide for the classification of all lands with reference to

their value in the several counties.'

Mr. Pauli proposed to amend Section 14 by striking out the words 'the Sheriff, County Clerk and Chief Justice shall compose,' and insert 'the Commissioners' Court in open session shall act as,' also insert after the word [*sic*] 'property holders' the words 'or the Assessor.'

Mr. Ferris's substitute was adopted. (*Id.*, at 496.)

The *Journal* is silent on how Mr. Ferris's Section 14 was changed to what is now Section 18.

Explanation

Section 18 is an utterly confused combination of apples and oranges. The original proposal as amended by Mr. Pauli created a constitutional agency to which a taxpayer—or assessor—could appeal if he felt that the assessor had not properly assessed the property. Mr. Ferris proposed to require the legislature to set up a system for statewide equalization (Mr. Ferris's intention would have been clearer if he had left out "or boards." See the *Author's Comment* that follows.) This is a different matter altogether. A state board could require that all counties use the same standards for assessment. In other words, it would be possible to prevent a situation where county "A" assessed at 20 percent of market value, county "B" at 30 percent, county "C" at 40 percent, and so on. (The significance of this is discussed in the *Author's Comment* below.)

One way to read the confusion of Section 18 is that the legislature is commanded to take steps to equalize property assessments but, in the case of county assessments, the commissioners court must be the agency that does whatever the legislature authorizes. This is what happened. Chapter Seven of Title 122—Taxation— deals with county assessments and assessors and prescribes the powers and duties of the commissioners court as a board of equalization. (See Tex. Rev. Civ. Stat. Ann. art. 7206 (1960).) In the case of other taxing units, any board of equalization provision is part of the substantive statute. (For example, see Tex. Rev. Civ. Stat. Ann. art. 1048 (1963) for general law cities and towns; Education Code sec. 23.93 (1972) for independent school districts; and Water Code sec. 51.571 (1972) for Water Control and Improvement Districts.) Home rule cities provide for a board of equalization in their charters. (See *Forwood v. City of Taylor*, 147 Tex. 161, 214 S.W.2d 282 (1948).) On the state level there is a board that collects property information concerning common carriers for the purpose of allocating intangible property among the counties in which the carrier operates. (See *Explanation* of Sec. 8.)

The concluding half of Section 18 is especially mystifying. As noted in the *Explanation* of Section 1, however one reads that section, property cannot be classified for purposes of taxing at different rates. Hence, there hardly seems to be any constitutional significance in providing "for the classification of all lands with reference to their value." In any event there does not appear ever to have been a case construing this power. The original implementing statute states that the commissioners court, acting as a board of equalization,

> . . . shall equalize improved lands in three classes, first-class to embrace the better quality of land and improvements, the second-class to embrace the second quality of lands and improvements, and the third-class to embrace lands of but small value or inferior improvements. The unimproved lands shall embrace first, second and third class, and all other property made as nearly uniform as possible. (Tex. Rev. Civ. Stat. Ann. art. 7206 (1960).)

This does not seem to mean anything and probably simply represents some

draftsman's effort to exercise the power granted in Section 18 in a way that raised no questions under Section 1. The only annotated cases referring to the statutory language brush it aside as unimportant. (See *State v. Mallet Land & Cattle Co.*, 126 Tex. 392, 88 S.W.2d 471 (1935); *Taylor v. Alanreed I.S.D.*, 138 S.W.2d 149 (Tex. Civ. App.—Amarillo 1940, *no writ*).)

Comparative Analysis

Four states make the county governing body a board of equalization, but one of them, California, permits a county to substitute a board of appeals. All of these states also provide for a state board to equalize taxes among the counties. An additional four states also create such a state board. Another five states call for statewide equalization to be provided for by law. One of these is Montana. Prior to the adoption of its 1972 Constitution, Montana had a constitutional state board and a county board consisting of the county commissioners.

Author's Comment

The confused nature of Section 18 is all the more mystifying in light of the following resolution offered early in the 1875 Convention:

> Resolved, that the following provision be incorporated in the constitution, viz: 'There shall be a State board of equalization, consisting of the Governor, Comptroller and State Treasurer. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the State, and it shall perform such other duties as may be prescribed by law.' (*Journal*, p. 86.)

It could be that the 1875 delegates thought that Section 18 permitted such a state board. But since the early legislatures that implemented the new constitution did nothing, it may be that the confused wording of Section 18 was actually designed to discourage statewide equalization.

There are many reasons for requiring statewide equalization. If there is a state property tax, local assessing units can play games for their taxpayers by assessing at a lower ratio to market value than other units do. If the state uses assessed property values as part of a formula for distributing state aid, the formula is skewed if the several taxing units use different assessment ratios. If partial tax exemptions are granted on the basis of so many dollars of assessed value, the exemption differs in value to property owners depending upon the assessment ratio and the tax rate. That is, a person with a partial exemption is better off with a $2 tax on an assessment at 10 percent of market value than he would be with a $1 tax on an assessment at 20 percent of market value.

Up to now the state has not sought to impose a system of statewide equalization of assessments. For the reasons just given, the state ought to move in this direction. Section 18—as well as the words "which shall be ascertained as may be provided by law" in the second sentence of Section 1—provides ample constitutional authority for the legislature to act.

> Sec. 19. FARM PRODUCTS AND FAMILY SUPPLIES; EXEMPTION. Farm products in the hands of the producer, and family supplies for home and farm use, are exempt from all taxation until otherwise directed by two-thirds vote of all the members elect to both houses of the Legislature.

History

This section has the dubious honor of being the first amendment to the 1876

Constitution. The amendment was proposed by the 16th Legislature at the regular session in 1879 and was adopted at a special election on September 2, 1879. (It is interesting to note that the third edition of Sayles, *The Constitution of Texas,* printed in 1888, omits Sec. 19 but includes the amendments adopted in 1883.)

Explanation

In 1879 Texas was in the throes of an economic depression. In order to off-set some of the effects of this depression, Article VIII, Section 19 was added to the constitution to exempt farm products, and incidentally family supplies, from all taxation at least temporarily. This could only be accomplished by an amendment because of the proviso in Article VIII, Section 2 declaring ". . . all laws exempting property from taxation other than the property mentioned above shall be null and void."

The general exemption provision of the constitution, Article VIII, Section 2, permits the legislature to exempt certain property from taxation. This is a mere authorization, and there is no exemption until the legislature has acted in pursuance of this authority. On the other hand, this provision of the constitution declares that farm products and family supplies are tax-exempt, and this is a self-executing provision which needed no legislation to make the exemptions effectual.

Exemption provisions are usually the cause of heated debate for they favor one group of taxpayers over all others. This is particularly true of this section, for farmers here receive benefits which no other producer of goods or sevices in the state can claim. Therefore, in order to secure passage of the amendment, it was agreed that a stipulation would be included permitting the legislature to recall the exemption when the immediate need therefor had passed. Although various attempts were made to secure the enactment of such legislation, to date they have met with no success. (Art. VIII, Sec. 19, *Interpretive Commentary.*)

There is little to add to the foregoing. A lumber company tried to get under the exemption by arguing that modern methods of forest development, known as "tree farming," converted its lumber into farm products. The argument was unsuccessful. (*Kirby Lumber Corp. v. Hardin I.S.D.,* 351 S.W.2d 310 (Tex. Civ. App.—Waco 1961, *writ ref'd n.r.e.*).) Equally unavailing was the effort of a nurseryman to get an exemption for his trees, shrubs, and rose bushes. (*City of Amarillo v. Love,* 356 S.W.2d 325 (Tex. Civ. App.—Amarillo 1962, *writ ref'd n.r.e.*).) The attorney general recently ruled that livestock and poultry are not farm products. (Tex. Att'y Gen. Op. No. H-898 (1976).) On several occasions he has held that a farmer's produce is still in his "hands" even if stored elsewhere so long as he continues to own it. (See Tex. Att'y Gen. Op. Nos. M-632 (1970), V-511 (1948), V-193 (1947), O-5404 (1943), O-5091 (1943).) He has also said that "family supplies for home and farm use" are "consumable articles reasonably necessary for day-to-day use in operating or maintaining a farm or home." (Tex. Att'y Gen. Op. No. WW-1025 (1961), quoted with approval in Tex. Att'y Gen. Op. No. H-898 (1976).)

It is clear from the *Interpretive Commentary* quoted above and from the various opinions interpreting Section 19 that the "taxation" referred to is assumed to be ad valorem property taxation. But the exemption embraces "all taxation." What, if anything, this means is unknown. There are not many taxes that can be levied on farm products in the hands of the producer or family supplies for farm and home use. (Whether "home" means only a home on a "farm" or any "home" is also unknown.) It could be argued that no sales tax may be levied on family supplies and that no inheritance tax may be levied on the passing of ownership of the supplies. The latter seems de minimis and the former partially moot because of existing

exemptions in the sales tax law. (Food and many farm items are exempt. See Tex. Tax.–Gen. Ann. art. 20.04.)

Comparative Analysis

Several states have comparable farm produce provisions, but none exactly like Section 19. The Louisiana exemption is much the same but without the legislative power to remove the exemption. (Art. VII, Sec. 21(c)(11).) Tennessee exempts the produce in the hands of the farmer and his immediate vendee. (Art. II, Sec. 28.) Kentucky exempts produce grown in the year in which assessment is made. (Sec. 170.) California and Oklahoma exempt growing crops. (Art. XIII, Sec. 1, and Art. X, Sec. 6, respectively.) Georgia authorizes the legislature to exempt farm products in the producer's hands, but not for longer than the year following production. (Art. VII, Sec. 1, Para. 4.) West Virginia simply permits exemption by law. (Art. X, Sec. 1.) Obviously, the states mentioned have these exemption provisions only because of a general constitutional prohibition against exemptions. Absent such a general prohibition, a legislature may create all sorts of statutory exemptions. (See *Comparative Analysis* of Sec. 2.)

Author's Comment

See the *Author's Comment* on Section 2.

Sec. 20. FAIR CASH MARKET VALUE NOT TO BE EXCEEDED; DISCOUNTS FOR ADVANCE PAYMENT. No property of any kind in this State shall ever be assessed for ad valorem taxes at a greater value than its fair cash market value nor shall any Board of Equalization of any governmental or political subdivision or taxing district within this State fix the value of any property for tax purposes at more than its fair cash market value; provided that in order to encourage the prompt payment of taxes, the Legislature shall have the power to provide that the taxpayer shall be allowed by the State and all governmental and political subdivisions and taxing districts of the State a three per cent (3%) discount on ad valorem taxes due the State or due any governmental or political subdivision or taxing district of the State if such taxes are paid ninety (90) days before the date when they would otherwise become delinquent; and the taxpayer shall be allowed a two per cent (2%) discount on said taxes if paid sixty (60) days before said taxes would become delinquent; and the taxpayer shall be allowed a one per cent (1%) discount if said taxes are paid thirty (30) days before they would otherwise become delinquent. This amendment shall be effective January 1, 1939. The Legislature shall pass necessary laws for the proper administration of this Section.

History

This section was added in 1937. Why it was put together this way–see the *Explanation*– and why the "fair cash market value" part was proposed at all are probably explained in some archive somewhere. None of the published historical material sheds any light on this most unusual mishmash.

Explanation

The first sentence of the section contains two totally unrelated ideas tied together by a wholly irrelevant "provided that." ("Provided that" and variations thereof are poor drafting devices frequently used in the Texas Constitution, but normally the conjunction is reasonably relevant.) The second and third sentences represent a masterpiece in constitutional obfuscation.

The first part of the first sentence is a ringing bill-of-rights-like declaration against evil, especially with "ever" inserted between "shall" and "be." (One has the

feeling that some legislator was frightfully angry at some board of equalization somewhere in the state; it is inconceivable that there was any general practice of overassessing all property.) But why was the effective date pushed ahead for almost 18 months? Obviously, one would say, delay was necessary to give the legislature time to act according to the third sentence. But this assumes, first, that the governor would call a special session in 1938, and, second, that the flat prohibition of the first part of the first sentence requires some kind of statutory implementation. Well then, it may be argued, the second and third sentences are related only to the second part of the first sentence. The difficulty here is, first, that it requires arguing that somebody was afraid that the governor would call a special session in 1938 to provide for discounts on taxes payable in 1938, and, second, that the final word, "Section," refers only to the discount part of the first sentence.

Interestingly enough, the second and third sentences appear to have caused no problems. Prior to the adoption of Section 20, there was a statutory provision telling assessors how to value property, including language apparently inconsistent with Section 20. The provision has never been changed and the courts appear to have gone along as if nothing had happened. The statute (Tex. Rev. Civ. Stat. Ann. art. 7211 (1960)) provides that the assessor shall be guided by the "reasonable cash market value," but if "property shall be found to have no market value," it may be assessed at its "real or intrinsic value." Cases which have arisen since 1938 have construed Article 7211 without mentioning Section 20. (See *Harlingen I.S.D. v. Dunlap,* 146 S.W.2d 235 (Tex. Civ. App.–San Antonio 1940, *writ ref'd*); *Superior Oil Co. v. Sinton I.S.D.*, 431 S.W.2d 383 (Tex. Civ. App.–Corpus Christi 1968, *no writ*).)

The second half of the first sentence is easy to explain. In 1934 the legislature adopted a statute providing for discounts for prompt payment of taxes. (Tex. Laws 1934, Ch. 10, sec. 1, at 36.) In 1935 the supreme court invalidated the statute for obscure reasons involving Sections 1, 1-a, 2, and 9 of Article VIII and what is now Subsection (b) of Section 52 of Article III. (*Rowan Drilling Co. v. Sheppard,* 126 Tex. 276, 87 S.W.2d 706 (1935).) In 1939 the invalid statute was repealed in favor of a statute tracking the wording of the newly adopted amendment. (Tex. Rev. Civ. Stat. Ann. art. 7255b (1960).) The only significant construction of the new statute was a holding that a city could not provide that the discount was unavailable if any property taxes were delinquent. (*City of Taylor v. Taylor Bedding Mfg. Co.*, 215 S.W.2d 215 (Tex. Civ. App.–Austin 1948, *writ ref'd*).)

Comparative Analysis

Only one state, South Dakota, prohibits assessments in excess of actual value. (Art. XI, Sec. 2.) About half a dozen states specify assesssment at full cash value. Michigan states that assessed valuation is not to exceed 50 percent of value, Oklahoma not in excess of 35 percent. (Art. IX, Sec. 3, and Art. X, Sec. 8, respectively.) Washington provides that assessment is to be at 50 percent of value. (Art. VII, Sec. 2.) No other state appears to have a constitutional discount schedule for prompt payment.

Author's Comment

The market value part of this section seems wholly unnecessary. The discount part should be unnecessary and would become so if the taxation provisions were rationalized and simplified so that ingenious lawyers and judges could not dream up esoteric reasons for invalidating such a sensible business practice as giving a modest discount for prompt payment.

ARTICLE IX

COUNTIES

Sec. 1. CREATION OF COUNTIES. The Legislature shall have power to create counties for the convenience of the people subject to the following provisions:

First. In the territory of the State exterior to all counties now existing, no new counties shall be created with a less area than nine hundred square miles, in a square form, unless prevented by preexisting boundary lines. Should the State lines render this impracticable in border counties, the area may be less. The territory referred to may, at any time, in whole or in part, be divided into counties in advance of population and attached, for judicial and land surveying purposes, to the most convenient organized county or counties.

Second. Within the territory of any county or counties now existing, no new county shall be created with a less area than seven hundred square miles, nor shall any such county now existing be reduced to a less area than seven hundred square miles. No new counties shall be created so as to approach nearer than twelve miles of the county seat of any county from which it may in whole or in part be taken. Counties of a less area than nine hundred, but of seven hundred or more square miles, within counties now existing, may be created by a two-thirds vote of each House of the Legislature, taken by yeas and nays and entered on the journals. Any county now existing may be reduced to an area of not less than seven hundred square miles by a like two-thirds vote. When any part of a county is stricken off and attached to, or created into another county, the part stricken off shall be holden for and obliged to pay its proportion of all the liabilities then existing, of the county from which it was taken, in such manner as may be prescribed by law.

Third. No part of any existing county shall be detached from it and attached to another existing county until the proposition for such change shall have been submitted, in such manner as may be provided by law, to a vote of the electors of both counties, and shall have received a majority of those voting on the question in each.

History

The Constitution of the Republic provided for its division into a convenient number of counties, each with an area of not less than 900 square miles, on petition of 100 free male inhabitants of the territory to be organized. (Art. IV, Sec. 11.) Twenty-three existing "municipalities" under the Mexican state of Coahuila and Texas were apparently recognized as counties and were referred to as such in all later legislation.

The Constitution of 1845 allowed the legislature to create new counties, each with an area of at least 900 square miles; a two-thirds vote was required if the creation reduced the area of an existing county below 900 square miles. (Art. VII, Sec. 34.) Bowie County, however, could be reduced below 900 square miles by simple majority vote. No petition of inhabitants was required to create new counties under the 1845 document.

The Constitution of 1866 declared existing counties legally constituted and required a minimum of 120 "qualified jurors" in an area before it could become a county. (Art. VII, Sec. 34.) This minimum was raised to 150 by the Constitution of 1869, which also made it the floor to be retained in existing counties from which territory was taken. (Art. XII, Sec. 24).

At the Convention of 1875, the Committee on Counties and County Lands submitted this section and Section 2 (Removal of County Seats) as the whole of proposed Article IX. The committee report provided a 450-square-mile minimum area for new counties created out of existing counties and for the remaining parent counties. This figure was increased by committee amendment to 700 square miles. (*Journal,* p. 742.) According to McKay, "at the night session [of the same day, the next-to-last of the Convention] the article on county and county lands was engrossed, . . . passed under a suspension of the rules, and without debate." (*Debates,* p. 445.)

The present Section 1 is the culmination of restrictions on the creation of counties, but as noted its progressively restrictive ancestry may be traced from 1845 and its sire is of course the Reconstruction experience. The 900-square-mile-minimum-area requirement was retained for counties created out of the public domain; for new counties created out of existing counties, 900 square miles became the maximum, and 700 the minimum, area permitted. The two-thirds legislative vote requirement of the 1845 Constitution was resurrected for creating new counties out of old, and a majority of residents of the old county was required to approve creation of the new. Finally, no new county's boundary may be nearer than 12 miles from the county seat of an existing county, and the new county must assume its share of debt of the county from whose territory it is created.

Section 1 has not been amended since 1876; however, in 1934 the voters defeated a proposed amendment to the second paragraph which would have authorized the legislature to combine existing counties, abolish existing counties, change boundary lines, and reduce the area of counties to less than 900 square miles if the reduced county retained a population of at least 50,000. Such changes would have required a two-thirds vote of both houses and majority approval of those voting in the affected counties.

Explanation

The first paragraph of Section 1 is obsolete since all public domain has been occupied and the last unorganized administrative unit became a county in 1931.

Although a court has held that only the state may challenge a county's creation (*Blackburn v. Delta County,* 107 S.W. 80 (Tex. Civ. App. 1908, *writ ref'd*)), taxpayers have been permitted to enjoin creation of a new county whose proposed boundary passed 11.43 miles from the county seat of an adjacent county. (*Woods v. Ball,* 166 S.W. 4 (Tex. Civ. App.–San Antonio 1914, *no writ*).)

The debt assumption share of a new county is based on taxable value, not area, with the new county liable for that percentage of debt of the old county equal to the ratio the assessed valuation of land in the new county bears to the total assessed valuation of the existing county before separation. (*Mills County v. Brown County,* 85 Tex. 391, 20 S.W. 81 (1892).)

Comparative Analysis

Approximately 22 states have constitutional geographical limitations on making little counties out of big counties. Just over half of them use the magic number of 400 square miles. Except for Tennessee, the remaining states require larger areas, from 432 square miles to 900 square miles. Tennessee permits the formation of a county of not fewer than 275 square miles, but the old county's area may not be reduced below 500 square miles. Approximately ten states have provisions concerning proximity of the county seat to the county line. The *Model State Constitution* requires the legislature by general law to provide for "methods and procedures of . . . merging, consolidating and dissolving [counties] and of altering their boundaries. . . ."

Approximately 24 states have a constitutional provision limiting the division of counties. In most instances, a referendum is required, usually of the voters of the areas affected, but in some cases only the voters in the area to be stricken have to approve. In some states, a majority of the voters is required. In at least four states, the requirement is a two-thirds' vote, either of those voting (two states) or of the voters (two states). The *Model State Constitution* has no referendum provision.

Some 20 states have a provision for apportionment of debt. Three states optimistically provide for apportionment of assets. There is no comparable

provision in the *Model State Constitution.*

Author's Comment

A 1970 amendment to Article III, Section 64(a), permits the legislature to provide "for consolidation of governmental offices and functions of government of any one or more political subdivisions comprising or located within any county." No consolidation may be effected unless the voters in the affected subdivisions approve, but the authorization may intensify the yearning for county home-rule and at the least should make even more unlikely the creation of new counties out of old under Article IX, Section 1.

County home rule was purportedly authorized in Texas by the addition of Section 3 to Article IX in 1933. No previous constitution contained such a provision. The amendment was accepted during the Great Depression as a possible means of reducing the cost of government. However, in the process of passing through the legislature the amendment was compromised in so many respects that it proved inoperative. The adoption of a home-rule charter in any county was precluded as a practical matter by the requirements of majority approval by the resident qualified electors (rather than a majority of those voting), a majority of those voting within incorporated areas of the county, and a majority of those voting outside the incorporated area.

No county adopted a home-rule charter under Section 3. In El Paso County rural voters vetoed a proposed home-rule charter despite an overall majority in the county favoring it. (See Benton, "The County Home Rule Movement in Texas," 31 *Southwestern Social Science Quarterly* 108 (1950).)

In 1947 Delta County had a home-rule charter drafted which abolished the office of county tax assessor and collector, transferring the duties of that office to a county manager. When asked to rule on the charter's constitutionality, the attorney general commented on Section 3 as follows:

> The amendment is a most unusual one, involving, as it does, a potential change in every county of the State in respect to its governmental affairs. It is unusual in length and scope. Its phrasing and meticulous limitations are extraordinary, and furthermore it contains some apparently conflicting provisions.

The opinion concluded that the office of county tax assessor and collector could not be abolished by a home-rule charter since the occupant is a state functionary exercising powers and performing duties of statewide as distinguished from countywide importance. (Tex. Att'y Gen. Op. No. V-723 (1948).)

No other attempt to secure county home rule was made under Section 3, and the section was repealed as part of the "deadwood" amendment in 1969.

The object of county home rule in Texas ought to be to empower the county to function as an autonomous unit of local government as well as an administrative arm of the state. (See the *Explanation* of Sec. 18 of Art. V.) County home-rule authorization should permit the residents of each county to create a form of government most suited to their needs. A county and the incorporated cities within it could consolidate functions and offices or completely merge into a single governmental entity. Counties should have the same power to make and enforce local ordinances now enjoyed by home-rule cities, thus freeing the legislature from the burdensome task of trying to solve county problems by local law. (For a strategy designed to achieve county home rule despite the anticipated resistance of present officeholders, see the *Author's Comment* on Sec. 18 of Art. V.)

Art. IX, § 1-A

Sec. 1-A. COUNTIES BORDERING ON GULF OF MEXICO OR TIDEWATER LIMITS THEREOF; REGULATION OF MOTOR VEHICLES ON BEACHES. The Legislature may authorize the governing body of any county bordering on the Gulf of Mexico or the tidewater limits thereof to regulate and restrict the speed, parking and travel of motor vehicles on beaches available to the public by virtue of public right and the littering of such beaches.

Nothing in this amendment shall increase the rights of any riparian or littoral landowner with regard to beaches available to the public by virtue of public right or submerged lands.

The Legislature may enact any laws not inconsistent with this Section which it may deem necessary to permit said counties to implement, enforce and administer the provisions contained herein.

Should the Legislature enact legislation in anticipation of the adoption of this amendment, such legislation shall not be invalid by reason of its anticipatory character.

History

This section was added in 1962. A comment by the Legislative Reference Library states, "There is presently [before Section 1-A] no clear cut power in these counties to regulate the use of the beaches that are used by the public."

In 1959 the legislature had enacted article 5415d of the civil statutes, which provides in Section 8:

> The Commissioners Court of any county shall have, and is hereby granted, the authority to regulate motor vehicular traffic and the littering of such state-owned beaches, or such larger area, extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico, in the event the public has acquired a right of use or easement to or over such area by prescription, dedication, or has retained a right by virtue of continuous right in the public, within the limits of said county. Such regulations may include the speed of motor vehicles in accordance with existing state laws and rules or regulations promulgated by the Texas Highway Commission, and the zoning of designated areas for non-vehicular traffic. The Commissioners Court may declare the violation of such regulations to be and the same shall be considered as a violation of this Act, and the Commissioners Court may prescribe civil penalties therefor not to exceed a penalty in the payment of Two Hundred Dollars ($200.00) in money . . . .

Curiously, the legislature's power to authorize this kind of regulation was never formally questioned until *after* adoption of Section 1-A of Article IX. In 1963 then Governor John Connally requested an opinion of the attorney general on the constitutionality of H.B. 92 of the 58th Legislature, which would have amended article 5415d. Despite a favorable opinion, Governor Connally vetoed the bill on policy grounds. (Tex. Att'y Gen. Op. No. C-80 (1963).)

In 1964 the criminal district attorney of Galveston County requested an opinion on a proposed regulation under article 5415d that authorized constables and the sheriff to arrest persons violating the regulation. The attorney general ruled that the regulation would be constitutional in light of Section 1-A of Article IX, but that the statute authorized only a civil penalty, could not be enforced by peace officers, and did not permit arrest. (Tex. Att'y Gen. Op. No. C-368 (1964).)

In 1965, the legislature amended article 5415d to authorize criminal penalties, including jail sentences for subsequent offenses.

Explanation

It is difficult to understand the need for Section 1-A. For three years prior to adoption, article 5415d had clearly authorized county beach regulation, and the

statute had never been challenged. Moreover, as pointed out in the *Author's Comment* below, the Texas Supreme Court in 1959 had upheld against special or local law constitutional attack (see Art. III, Sec. 56) a statute applicable to a narrower classification of counties than article 5415d.

Comparative Analysis

The California, Washington, and Idaho constitutions authorize counties to make and enforce within their limits such local, police, sanitary, and other regulations as are not in conflict with state law. No state constitution has addressed the specific problem of beach littering and traffic, however, and the *Model State Constitution* is silent on the issue.

Author's Comment

In *County of Cameron v. Wilson* (160 Tex. 25, 326 S.W.2d 162 (1959)), the court considered a statute granting to Gulf Coast counties which included within their boundaries islands suitable for park purposes the authority to issue revenue bonds for parks. The statute was attacked as local legislation, in violation of Article III, Section 56, but a divided court upheld its classification as reasonable and thus constitutional. In light of this case it is difficult to imagine a successful local law challenge to article 5415d, which applies to all Gulf Coast counties—not just those with island parks—and authorizes them to act on a problem not shared by any other class of counties in the state. Section 1-A is obviously unnecessary.

Sec. 2. REMOVAL OF COUNTY SEATS. The Legislature shall pass laws regulating the manner of removing county seats, but no county seat situated within five miles of the geographical centre of the county shall be removed, except by a vote of two-thirds of all the electors voting on the subject. A majority of such electors, however, voting at such election, may remove a county seat from a point more than five miles from the geographical centre of the county to a point within five miles of such centre, in either case the centre to be determined by a certificate from the Commissioner of the General Land Office.

History

No prior Texas constitution covered the establishment or relocation of county seats. In 1838 the Congress of the Republic authorized the relocation of a seat of justice in any county, if it was more than five miles from the center of the county, to within five miles of the center of the county if two-thirds of the qualified voters desired its relocation (1 *Gammel's Laws,* p. 428.). In 1873 the legislature amended this law to require only a simple majority vote to authorize relocation, thereby encouraging a rash of disputes over relocation of county seats.

Although there was no law passed, or decision of our courts, that recognized that a citizen had any legal right or interest involved in the question of the locality of the county-seat, in point of fact, citizens who lived at the county-seat of a county, and who settled there because it was a county-seat, and made valuable improvements, were largely interested, in money values, in the locality of the county-seat. (Ex parte *Towles,* 48 Tex. 414, 425 (1877).)

Explanation

Article III, Section 56, of the constitution prohibits local or special laws locating or changing county seats. The statutes implementing Section 2 of Article IX elaborate somewhat on the mechanics of relocation. A two-thirds majority of the

voting residents is required to move a seat from a point within five miles of the county's geographical center to another point either more or less than five miles from the center or from a point more than five miles from the center to another point more than five miles from the center. But only a majority is required to move a seat from more than five miles from the center to another point within five miles of the center. A vote on relocation is initiated by application of 100 freeholders and qualified voters who are residents of the county, unless the county seat has been established more than ten years, in which event 200 applicants are required. If established for more than 40 years, a majority of the resident freeholders and qualified voters of the county must petition to hold the relocation election. (Tex. Rev. Civ. Stat. Ann. arts. 1595, 1596 (1962).) Article 1601 prohibits relocation elections more frequently than every ten years. However, if the county seat is more than five miles from a railroad, an election to relocate it on the railroad right-of-way may be held every two years.

Comparative Analysis

Nearly half of the states require a referendum on changing location of the county seat. Some states require a two-thirds' vote of all voters, and some only of those voting on the question. Several states require three-fifths of those voting to approve the relocation of a county seat. One state besides Texas provides for a simple majority to relocate nearer the center. The *Model State Constitution* does not deal with county-seat location.

Author's Comment

The Texas statutes provide adequate safeguards against costly and capricious relocations of county seats, and Section 2 is thus mostly unnecessary. If the subject merits constitutional treatment, the requirement of a general law prescribing relocation procedure, including a referendum by the affected residents, is all that is needed.

Sec. 4. COUNTY-WIDE HOSPITAL DISTRICTS. The Legislature may by law authorize the creation of county-wide Hospital Districts in counties having a population in excess of 190,000 and in Galveston County, with power to issue bonds for the purchase, acquisition, construction, maintenance and operation of any county owned hospital, or where the hospital system is jointly operated by a county and city within the county, and to provide for the transfer to the county-wide Hospital District of the title to any land, buildings or equipment, jointly or separately owned, and for the assumption by the district of any outstanding bonded indebtedness theretofore issued by any county or city for the establishment of hospitals or hospital facilities; to levy a tax not to exceed seventy-five ($ .75) cents on the One Hundred ($100.00) Dollars valuation of all taxable property within such district, provided, however, that such district shall be approved at an election held for that purpose, and that only qualified, property taxpaying voters in such county shall vote therein; provided further, that such Hospital District shall assume full responsibility for providing medical and hospital care to needy inhabitants of the county, and thereafter such county and cities therein shall not levy any other tax for hospital purposes; and provided further that should such Hospital District construct, maintain and support a hospital or hospital system, that the same shall never become a charge against the State of Texas, nor shall any direct appropriation ever be made by the Legislature for the construction, maintenance or improvement of the said hospital or hospitals. Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such Acts shall not be invalid because of their anticipatory character.

Art. IX, § 5

History

This amendment was adopted in 1954 after the defeat in 1949 of an amendment authorizing hospital districts generally. The population requirement of Section 4 limited its application at the time to Dallas County (Dallas), Harris County (Houston), Bexar County (San Antonio), Tarrant County (Fort Worth), El Paso County (El Paso), and Jefferson County (Beaumont). Galveston County is expressly named. The enabling statute (Tex. Rev. Civ. Stat. Ann. art. 4494n) originally designated the preceding federal census (1950) as determinative of population, but this restriction was removed in 1955. As a result, Travis County (Austin), Nueces County (Corpus Christi), Hidalgo County, and possibly others now come within the Section 4 authorization.

For the history of hospital district amendments, see the *History* of Section 9 of this article.

Explanation

There has been no significant court decision or attorney general opinion interpreting Section 4. (See the *Explanation* of Sec. 9.)

Comparative Analysis

See the *Comparative Analysis* of Section 9.

Author's Comment

This is an example of a "local" amendment that has served its purpose. The districts it originally authorized have been created, Section 9 now authorizes hospital districts in every county, and Section 4 is thus obsolete.

Sec. 5. CITY OF AMARILLO; WICHITA COUNTY; JEFFERSON COUNTY; CREATION OF HOSPITAL DISTRICTS. (a) The Legislature may by law authorize the creation of two hospital districts, one to be coextensive with and have the same boundaries as the incorporated City of Amarillo, as such boundaries now exist or as they may hereafter be lawfully extended, and the other to be coextensive with Wichita County.

If such district or districts are created, they may be authorized to levy a tax not to exceed Seventy-five Cents (75¢) on the One Hundred Dollars ($100.00) valuation of taxable property within the district; provided, however, no tax may be levied until approved by a majority vote of the participating resident qualified property taxpaying voters who have duly rendered their property for taxation. The maximum rate of tax may be changed at subsequent elections so long as obligations are not impaired, and not to exceed the maximum limit of Seventy-five Cents (75¢) per One Hundred Dollars ($100.00) valuation, and no election shall be required by subsequent changes in the boundaries of the City of Amarillo.

If such tax is authorized, no political subdivision or municipality within or having the same boundaries as the district may levy a tax for medical or hospital care for needy individuals, nor shall they maintain or erect hospital facilities, but the district shall by resolution assume all such responsibilities and shall assume all of the liabilities and obligations (including bonds and warrants) of such subdivisions or municipalities or both. The maximum tax rate submitted shall be sufficient to discharge such obligations, liabilities, and responsibilities, and to maintain and operate the hospital system, and the Legislature may authorize the district to issue tax bonds for the purpose of the purchase, construction, acquisition, repair or renovation of improvements and initially equipping the same, and such bonds shall be payable from said Seventy-five Cents (75¢) tax. The Legislature shall provide for transfer of title to properties to the district.

(b) The Legislature may by law permit the County of Potter (in which the City of

Amarillo is partially located) to render financial aid to that district by paying a part of the expenses of operating and maintaining the system and paying a part of the debts of the district (whether assumed or created by the district) and may authorize the levy of a tax not to exceed Ten Cents (10¢) per One Hundred Dollars ($100.00) valuation (in addition to other taxes permitted by this Constitution) upon all property within the county but without the City of Amarillo at the time such levy is made for such purposes. If such tax is authorized, the district shall by resolution assume the responsibilities, obligations, and liabilities of the county in the manner and to the extent hereinabove provided for political subdivisions having boundaries coextensive with the district, and the county shall not thereafter levy taxes (other than herein provided) for hospital purposes nor for providing hospital care for needy individuals of the county.

(c) The Legislature may by law authorize the creation of a hospital district within Jefferson County, the boundaries of which shall include only the area comprising the Jefferson County Drainage District No. 7 and the Port Arthur Independent School District, as such boundaries existed on the first day of January, 1957, with the power to issue bonds for the sole purpose of purchasing a site for, and the construction and initial equipping of, a hospital system, and with the power to levy a tax of not to exceed Seventy-five Cents (75¢) on the One Hundred Dollars ($100.00) valuation of property therein for the purpose of paying the principal and interest on such bonds.

The creation of such hospital district shall not be final until approved at an election by a majority of the resident property taxpaying voters voting at said election who have duly rendered their property for taxation upon the tax rolls of either said Drainage or said School District, nor shall such bonds be issued or such tax be levied until so approved by such voters.

The district shall not have the power to levy any tax for maintenance or operation of the hospital or facilities, but shall contract with other political subdivisions of the state or private individuals, associations, or corporations for such purposes.

If the district hereinabove authorized is finally created, no other hospital district may be created embracing any part of the territory within its boundaries, but the Legislature by law may authorize the creation of a hospital district incorporating therein the remainder of Jefferson County, having the powers and duties and with the limitations presently provided by Article IX, Section 4, of the Constitution of Texas, except that such district shall be confirmed at an election wherein the resident qualified property taxpaying voters who have duly rendered their property within such proposed district for taxation on the county rolls, shall be authorized to vote. A majority of those participating in the election voting in favor of the district shall be necessary for its confirmation and for bonds to be issued.

(d) Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such Acts shall not be invalid because of their anticipatory character.

History

This amendment was adopted on November 4, 1958. See the *History* of Article IX, Section 9, for a history of hospital districts generally.

Explanation

Section 5 authorized creation of four hospital districts with taxing power. Two districts were authorized for Jefferson County, one for Wichita County, and one for the City of Amarillo. Potter County (in which the city of Amarillo is partially located) was authorized to contribute to the support of the district and to use its facilities and services. This amendment for the first time authorized a hospital district less than countywide.

No significant court or attorney general opinion has interpreted this section. See the *Explanation* of Section 9 for cases and opinions on hospital districts generally.

Comparative Analysis

See the *Comparative Analysis* of Section 9.

Author's Comment

See the *Author's Comment* on Section 9.

Sec. 6. LAMAR COUNTY; HOSPITAL DISTRICT; DISSOLUTION. On the effective date of this Amendment, the Lamar County Hospital District is abolished. The Commissioners Court of Lamar County may provide for the transfer or for the disposition of the assets of the Lamar County Hospital District.

History

This section, adopted in 1972, replaced the original Section 6, which read as follows:

Sec. 6. LAMAR COUNTY; HOSPITAL DISTRICT; CREATION; TAX RATE. The Legislature may by law authorize the creation of a Hospital District co-extensive with Lamar County, having the powers and duties and with the limitations presently provided in Article IX, Section 5(a), of the Constitution of Texas, as it applies to Wichita County, except that the maximum rate of tax that the said Lamar County Hospital District may be authorized to levy shall be seventy-five cents (75¢) per One Hundred Dollars ($100) valuation of taxable property within the District subject to district taxation.

Section 6 was one of three local hospital district amendments adopted in 1960. See the *History* of hospital district amendments generally under Section 9.

Explanation

In response to a question concerning the original text of Section 9, the attorney general concluded that no authority existed to abolish a hospital district once created. (Tex. Att'y Gen. Op. No. C-380 (1965).) Section 9 was amended in 1966 to provide this authority, but since the Lamar County district had not been created under Section 9, the 1972 amendment was used to abolish the district directly.

Comparative Analysis

No other state constitution provides for the abolition of a single hospital district.

Author's Comment

This section has served its purpose and can be eliminated.

Sec. 7. HIDALGO COUNTY; HOSPITAL DISTRICT; CREATION; TAX RATE. The Legislature may by law authorize the creation of a Hospital District co-extensive with Hidalgo County, having the powers and duties and with the limitations presently provided in Article IX, Section 5(a), of the Constitution of Texas, as it applies to Hidalgo County, except that the maximum rate of tax that the said Hidalgo County Hospital District may be authorized to levy shall be ten cents (10¢) per One Hundred Dollars ($100) valuation of taxable property within the District subject to district taxation.

History

This section was adopted in 1960 along with Sections 6 and 8. See the *History* of hospital district amendments generally under Section 9.

Art. IX, § 8

Explanation

See the *Explanation* of Section 9 for discussion of hospital district amendments generally.

Comparative Analysis

See the *Comparative Analysis* of Section 9.

Author's Comment

See the *Author's Comment* on Section 9.

Sec. 8. COUNTY COMMISSIONERS PRECINCT NO. 4 OF COMANCHE COUNTY; HOSPITAL DISTRICT; CREATION; TAX RATE. The Legislature may by law authorize the creation of a Hospital District to be co-extensive with the limits of County Commissioners Precinct No. 4 of Comanche County, Texas.

If such District is created, it may be authorized to levy a tax not to exceed seventy-five cents (75¢) on the One Hundred Dollar ($100) valuation of taxable property within the District; provided, however, no tax may be levied until approved by a majority vote of the participating resident qualified property taxpaying voters who have duly rendered their property for taxation. The maximum rate of tax may be changed at subsequent elections so long as obligations are not impaired, and not to exceed the maximum limit of seventy-five cents (75¢) per One Hundred Dollar ($100) valuation, and no election shall be required by subsequent changes in the boundaries of the Commissioners Precinct No. 4 of Comanche County.

If such tax is authorized, no political subdivision or municipality within or having the same boundaries as the District may levy a tax for medical or hospital care for needy individuals, nor shall they maintain or erect hospital facilities, but the District shall by resolution assume all such responsibilities and shall assume all of the liabilities and obligations (including bonds and warrants) of such subdivisions or municipalities or both. The maximum tax rate submitted shall be sufficient to discharge such obligations, liabilities, and responsibilities, and to maintain and operate the hospital system, and the Legislature may authorize the District to issue tax bonds for the purpose of the purchase, construction, acquisition, repair or renovation of improvements and initially equipping the same, and such bonds shall be payable from said seventy-five cent (75¢) tax. The Legislature shall provide for transfer of title to properties to the District.

(b) The Legislature may by law permit the County of Comanche to render financial aid to that District by paying a part of the expenses of operating and maintaining the system and paying a part of the debts of the District (whether assumed or created by the District) and may authorize the levy of a tax not to exceed ten cents (10¢) per One Hundred Dollar ($100) valuation (in addition to other taxes permitted by this Constitution) upon all property within the County but without the County Commissioners Precinct No. 4 of Comanche County at the time such levy is made for such purposes. If such tax is authorized, the District shall by resolution assume the responsibilities, obligations, and liabilities of the County in the manner and to the extent hereinabove provided for political subdivisions having boundaries co-extensive with the District, and the County shall not thereafter levy taxes (other than herein provided) for hospital purposes nor for providing hospital care for needy individuals of the County.

(c) Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such Acts shall not be invalid because of their anticipatory character.

History

This amendment was adopted in 1960, at the same time Sections 6 and 7 were adopted. See the *History* of hospital district amendments generally under Section 9.

Explanation

See the *Explanation* of Section 9.

Note that Section 8 is similar to Section 5 in that it authorizes creation of a district within a portion of a county—in this case a commissioners precinct—and authorizes the county-at-large to help pay for (but at a lower tax rate) and to use the facilities and services of the district.

Comparative Analysis

See the *Comparative Analysis* of Section 9.

Author's Comment

See the *Author's Comment* on Section 9.

Sec. 9. HOSPITAL DISTRICTS; CREATION, OPERATION, POWERS, DUTIES AND DISSOLUTION. The Legislature may by law provide for the creation, establishment, maintenance and operation of hospital districts composed of one or more counties or all or any part of one or more counties with power to issue bonds for the purchase, construction, acquisition, repair or renovation of buildings and improvements and equipping same, for hospital purposes; providing for the transfer to the hospital district of the title to any land, buildings, improvements and equipment located wholly within the district which may be jointly or separately owned by any city, town or county, providing that any district so created shall assume full responsibility for providing medical and hospital care for its needy inhabitants and assume the outstanding indebtedness incurred by cities, towns and counties for hospital purposes prior to the creation of the district, if same are located wholly within its boundaries, and a pro rata portion of such indebtedness based upon the then last approved tax assessment rolls of the included cities, towns and counties if less than all the territory thereof is included within the district boundaries; providing that after its creation no other municipality or political subdivision shall have the power to levy taxes or issue bonds or other obligations for hospital purposes or for providing medical care within the boundaries of the district; providing for the levy of annual taxes at a rate not to exceed seventy-five cents ($.75) on the One Hundred Dollar valuation of all taxable property within such district for the purpose of meeting the requirements of the district's bonds, the indebtedness assumed by it and its maintenance and operating expenses, providing that such district shall not be created or such tax authorized unless approved by a majority of the qualified property taxpaying electors thereof voting at an election called for the purpose; and providing further that the support and maintenance of the district's hospital system shall never become a charge against or obligation of the State of Texas nor shall any direct appropriation be made by the Legislature for the construction, maintenance or improvement of any of the facilities of such district.

Provided, however, that no district shall be created except by act of the Legislature and then only after thirty (30) days' public notice to the district affected, and in no event may the Legislature provide for a district to be created without the affirmative vote of a majority of the taxpaying voters in the district concerned.

The Legislature may also provide for the dissolution of hospital districts provided that a process is afforded by statute for:

(1) determining the desire of a majority of the qualified voters within the district to dissolve it;

(2) disposing of or transferring the assets, if any, of the district; and

(3) satisfying the debts and bond obligations, if any, of the district, in such manner as to protect the interests of the citizens within the district, including their collective property rights in the assets and property of the district, provided, however, that any grant from federal funds, however dispensed, shall be considered an obligation to be repaid in satisfaction and provided that no election to dissolve shall be held more often than once each year. In such connection, the statute shall provide against disposal or transfer of the assets of the district except for due compensation unless such assets are transferred to another governmental agency, such as a county, embracing such district and using such transferred assets in such a way as to benefit citizens formerly within the district.

Art. IX, § 9

History

In September 1949 the voters rejected two proposed amendments authorizing the legislature to establish special districts with taxing power to provide for local medical services. House Joint Resolution 15 proposed adding a Section 48-b to Article III to permit creation of "county-city health units" which could tax up to 20¢ on the $100 valuation. House Joint Resolution 36 of the same session proposed adding a Section 60 to Article III to authorize legislative creation, subject to approval by local voters, of countywide hospital districts with power to tax property in the county.

Both of these defeated amendments were proposed in response to the desires of many Texas communities to maintain or improve public health care and facilities, especially for indigents. The increasing cost of medical services had strained the budgets of cities and counties, both of which are subject to stringent constitutional limitations on their power to tax. Some of the metropolitan areas—Houston, Dallas and Fort Worth, and San Antonio—had public hospitals supported jointly by the city and county and this method alleviated somewhat the unfairness of having city residents bear the entire burden for use of their public hospital by indigents from surrounding areas. Nevertheless, the city residents of such counties pay both city and county taxes and therefore bear a greater share of the cost of the hospital services than the rural residents. (See Woodworth G. Thrombley, *Special Districts and Authorities in Texas,* Austin, The University of Texas, Institute of Public Affairs, 1959). Most of this *History* comes from Thrombley's excellent study.)

For cities and counties desiring to increase taxes to provide better health services, an increase in the assessed valuation of taxable property was the only alternative if the maximum permissible tax rate was already being levied. Although such an increase is usually possible, since most cities and counties assess at only a fraction of fair market value, an increase has the undesired consequence for county taxpayers of increasing their state property tax, which is based on the same assessment. Today the state property tax is being phased out, and this conflict between local and state interest in property value assessments is diminishing. (See the *Author's Comment* on Art. VIII, Sec. 1-e.) But until recently the conflict was intense and the countywide hospital district was viewed as the most expedient way of maintaining or improving local health care without a major revision of local government tax structure.

In 1954 the voters approved the addition of Section 4, authorizing the establishment of hospital districts in counties with a population of 190,000 or more and in Galveston County. (See the *Explanation* of that section.) Acting under this authority voters of Dallas and Bexar counties approved the creation of hospital districts in 1954 and 1955, but voters of Harris, Tarrant, and El Paso counties rejected such districts during the same years. (El Paso County voters reversed themselves and approved creation of a district in 1958.)

The Optional Hospital District Law was pushed through by Harris County legislators in 1957. This law set a lower maximum tax rate than the 75¢ allowed by Section 4. (See Tex. Rev. Civ. Stat. Ann. art. 4494p.) Nevertheless, in August 1957 Harris County voters again defeated creation of a proposed hospital district. The legislature authorized the creation of a hospital district in Brazoria County in 1957, apparently without constitutional authority since Brazoria County had many fewer than 190,000 inhabitants. That same year the legislature also authorized creation of hospital authorities without taxing power but with power instead to issue revenue bonds. Only the city of Mesquite has established a hospital authority of this type.

In 1958 Article IX was amended by adding Section 5 to authorize creation of hospital districts with taxing power in the city of Amarillo (supported partially by

Potter County), Wichita County, and in two special districts within Jefferson County. (See the *Explanation* of that section.)

In 1960 Article IX was again amended by adding Sections 6, 7, and 8 to authorize creation of hospital districts in Lamar County, Hidalgo County, and County Commissioners Precinct No. 4 of Comanche County. (See the *Explanations* of those sections.)

In 1962 Section 9 was added along with Section 11, which authorizes hospital districts in Ochiltree, Castro, Hansford, and Hopkins counties. A proposed Section 10, authorizing two districts in Brazoria County, was defeated, perhaps because it would have limited the authorized tax rate to 25¢ whereas Section 9, applicable to all counties, authorizes a maximum of 75¢.

Section 9 is a general authorization for the creation of hospital districts that, except for a 1966 "perfecting amendment" to permit the abolition of hospital districts, ended the need for a separate constitutional amendment each time a local government wished to establish a hospital district.

Explanation

Hospital districts, as well as many other special-purpose districts, are probably created because of the inability of established general purpose local governments to furnish needed services. The constitutional limits on the taxing power of cities and counties already have been mentioned. In addition, local problems and needs often do not conform to the geographic boundaries of cities or counties. The diversity of function which special-purpose districts exhibit, the variation in the degree of fiscal and administrative authority they possess, and their location within the state are all results of the variety of methods by which they are created.

Use of special-purpose districts in Texas has both advantages and disadvantages. The use of special-purpose districts often results in a fragmented approach to local government. The citizen, therefore, is confronted with a complex array of local governing units with which to contend. However, whether created by general or local law, special-purpose districts have been responsive to the many localized problems and needs of the citizens of the state. It is readily apparent that in Texas, special-purpose districts represent a flexible approach to both isolated and widespread problems, the solutions to which are beyond the geographic boundaries, financial capability, or legal authority of existing local general purpose governments.

Both the attorney general and a court of civil appeals have concluded that the vote necessary to create a hospital district is a majority of those who vote in the election rather than a majority of all the district's residents, as the second paragraph of Section 9 seems to require. (See Tex. Att'y Gen. Op. No. C-54 (1963); *Yeary v. Bond,* 384 S.W.2d 376 (Tex. Civ. App.–Amarillo 1964, *writ ref'd n.r.e.*).) And in *Sweeny Hosp. Dist. v. Carr,* 378 S.W.2d 40 (Tex. 1964), the supreme court held that Section 9 and its enabling statute (Tex. Rev. Civ. Stat. Ann. art. 4494q), which both refer to a vote by "qualified property taxpaying electors," means those otherwise qualified electors who have duly rendered property for taxation. (See the *Explanation* of Art. VI, Sec. 3a.)

A hospital district may be created within a portion of a county and may levy taxes in the district, despite the fact that there already exists a county hospital in another part of the county supported in part from the county's general fund. In other words, the county may use its general tax levy on property within the new hospital district to support a hospital *outside* the district at the same time that the district may tax within the district to support the new hospital there. (*Moore v. Edna Hosp. Dist.,* 449 S.W.2d 508 (Tex. Civ. App.–Corpus Christi 1969, *writ ref'd n.r.e.*).)

Until 1966, with adoption of an amendment adding the last paragraph to Section

9, taxpayers having second thoughts about the wisdom of their creating another tax burden could not abolish a hospital district because the attorney general had ruled that Section 9 permitted only creation and not abolition. (Tex. Att'y Gen. Op. No. C-380 (1965).)

Still another amendment was required, this one in 1967 adding Section 13 (see its *Explanation*), in response to an attorney general's opinion ruling that a county with a hospital district could not contribute land to the State Department of Mental Health and Mental Retardation as the site for a community mental health center. This opinion was based on the Section 9 provision that a hospital district must assume full responsibility for providing medical and hospital care for all needy within the district and that a political subdivision within the district could not tax for this purpose. (Tex. Att'y Gen. Op. No. C-646 (1966).)

Comparative Analysis

Numerous states have created hospital districts, authorities, health and hospital corporations, etc., by statute, but Louisiana appears to be the only other state which treated the subject in its constitution. (The new 1974 Louisiana Constitution omits this detail.) Alabama has a number of constitutional provisions authorizing bond issues to build and operate hospitals. The *Model State Constitution* says simply that 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 them. (Sec. 8.01.)

Author's Comment

If the constitutional limitations on the taxing power of counties and cities were removed, there would be no need for constitutional authorization for hospital districts. The power of the legislature to create or abolish any type of special-purpose governmental district is otherwise clear and only the need for additional taxing authority necessitates inclusion of special districts in the constitution.

The proliferaton of hospital and other special-purpose districts has the undesirable consequence of fragmenting local government, thereby reducing its visibility and increasing its administrative complexity. Administrative reorganization, increased taxing power for city and county governments, and regional consolidation would permit hospital and other special-purpose districts to be phased out by having the general local governments assume their duties.

But regardless of whether hospital districts are retained or phased out, no need exists for their elaborate treatment in the constitution. The history of local amendments, perfecting amendments, and amendments to amendments concerning hospital districts clearly demonstrates the inflexibility, cost, and awkwardness of including such legislative detail in a constitution. If they must be retained, however, a brief section granting taxing and perhaps borrowing authority, subject to local voter approval (though this requirement could as well be in the implementing statute), would suffice.

Sec. 11. HOSPITAL DISTRICTS; OCHILTREE, CASTRO, HANSFORD AND HOPKINS COUNTIES; CREATION; TAXES. The Legislature may by law authorize the creation of hospital districts in Ochiltree, Castro, Hansford and Hopkins Counties, each district to be coextensive with the limits of such county.

If any such district is created, it may be authorized to levy a tax not to exceed Seventy-five Cents (75¢) on the One Hundred Dollar ($100) valuation of taxable property within the district; provided, however, no tax may be levied until approved by a majority vote of the participating resident qualified property-taxpaying voters who have duly rendered their property for taxation. The maximum rate of tax may be changed at

subsequent elections so long as obligations are not impaired, and not to exceed the maximum limit of Seventy-five Cents (75¢) per One Hundred Dollar ($100) valuation.

If such tax is authorized, no political subdivision or municipality within or having the same boundaries as the district may levy a tax for medical or hospital care for needy individuals, nor shall they maintain or erect hospital facilities, but the district shall by resolution assume all such responsibilities and shall assume all of the liabilities and obligations (including bonds and warrants) of such subdivisions or municipalities or both. The maximum tax rate submitted shall be sufficient to discharge obligations, liabilities, and responsibilities, and to maintain and operate the hospital system, and the Legislature may authorize the district to issue tax bonds for the purpose of the purchase, construction, acquisition, repair or renovation of improvements and initially equipping the same, and such bonds shall be payable from said Seventy-five Cent (75¢) tax. The Legislature shall provide for transfer of title to properties to the district.

Should the Legislature enact enabling laws in anticipation of the adoption of the amendment, such Acts shall not be invalid because of their anticipatory character.

History

This amendment, adopted in 1962, was the last "local" amendment concerning hospital districts. At the same election a proposed Section 10, which would have authorized two hospital districts in Brazoria County, was defeated. Section 9 was adopted at the same election, however, and Brazoria County later created a district under the authority of Section 9.

See the *History* of hospital district amendments generally under Section 9.

Explanation

See the *Explanation* of Section 9.

Comparative Analysis

See the *Comparative Analysis* of Section 9.

Author's Comment

See the *Author's Comment* on Section 9.

Sec. 12. AIRPORT AUTHORITIES. The Legislature may by law provide for the creation, establishment, maintenance and operation of Airport Authorities composed of one or more counties, with power to issue general obligation bonds, revenue bonds, either or both of them, for the purchase, acquisition by the exercise of the power of eminent domain or otherwise, construction, reconstruction, repair or renovation of any airport or airports, landing fields and runways, airport buildings, hangars, facilities, equipment, fixtures, and any and all property, real or personal, necessary to operate, equip and maintain an airport; shall provide for the option by the governing body of the city or cities whose airport facilities are served by certificated airlines and whose facility or some interest therein, is proposed to be or has been acquired by the Authority, to either appoint or elect a Board of Directors of said Authority; if the Directors are appointed such appointment shall be made by the County Commissioners Court after consultation with and consent of the governing body or bodies of such city or cities, and if the Board of Directors is elected they shall be elected by the qualified taxpaying voters of the county which chooses to elect the Directors to represent that county, such Directors shall serve without compensation for a term fixed by the Legislature not to exceed six (6) years, and shall be selected on the basis of the proportionate population of each county based upon the last preceding Federal Census, and shall be a resident or residents of such county; provide that no county shall have less than one (1) member on the Board of Directors; provide for the holding of an election in each county proposing the creation of an Authority to be called by the Commissioners Court or Commissioners Courts, as the

case may be, upon petition of five per cent (5%) of the qualified taxpaying voters within the county or counties, said elections to be held on the same day if more than one county is included, provided that no more than one (1) such election may be called in a county until after the expiration of one (1) year; in the event such an election has failed, and thereafter only upon a petition of ten per cent (10%) of the qualified taxpaying voters being presented to the Commissioners Court or Commissioners Courts of the county or counties in which such an election has failed, and in the event that two or more counties vote on the proposition of the creation of an Authority therein, the proposition shall not be deemed to carry unless the majority of the qualified taxpaying voters in each county voting thereon vote in favor thereof; provided, however, that an Airport Authority may be created and be composed of the county or counties that vote in favor of its creation if separate propositions are submitted to the voters of each county so that they may vote for a two or more county Authority or a single county Authority; provide for the appointment by the Board of Directors of an Assessor and Collector of Taxes in the Authority, whether constituted of one or more counties, whose duty it shall be to assess all taxable property, both real and personal, and collect the taxes thereon, based upon the tax rolls approved by the Board of Directors, the tax to be levied not to exceed Seventy-Five Cents ($.75) per One Hundred Dollars ($100) assessed valuation of the property, provided, however, that the property of state regulated common carriers required by law to pay a tax upon intangible assets shall not be subject to taxation by the Authority, said taxable property shall be assessed on a valuation not to exceed the market value and shall be equal and uniform throughout the Authority as is otherwise provided by the Constitution; the Legislature shall authorize the purchase or acquisition by the Authority of any existing airport facility publicly owned and financed and served by certificated airlines, in fee or of any interest therein, or to enter into any lease agreement therefor, upon such terms and conditions as may be mutually agreeable to the Authority and the owner of such facilities, or authorize the acquisition of same through the exercise of the power of eminent domain, and in the event of such acquisition, if there are any general obligation bonds that the owner of the publicly owned airport facility has outstanding, the same shall be fully assumed by the Authority and sufficient taxes levied by the Authority to discharge said outstanding indebtedness; and likewise any city or owner that has outstanding revenue bonds where the revenues of the airport have been pledged or said bonds constitute a lien against the airport facilities, the Authority shall assume and discharge all the obligations of the city under the ordinances and bond indentures under which said revenue bonds have been issued and sold. Any city which owns airport facilities not serving certificated airlines which are not purchased or acquired or taken over as herein provided by such Authority, shall have the power to operate the same under the existing laws or as the same may hereafter be amended. Any such Authority when created may be granted the power and authority to promulgate, adopt and enforce appropriate zoning regulations to protect the airport from hazards and obstructions which would interfere with the use of the airport and its facilities for landing and take-off; an additional county or counties may be added to an existing Authority if a petition of five per cent (5%) of the qualified taxpaying voters is filed with and an election is called by the Commissioners Court of the county or counties seeking admission to an Authority and the vote is favorable, then admission may be granted to such county or counties by the Board of Directors of the then existing Authority upon such terms and conditions as they may agree upon and evidenced by a resolution approved by two-thirds (2/3rds) of the then existing Board of Directors, provided, however, the county or counties that may be so added to the then existing Authority shall be given representation on the Board of Directors by adding additional directors in proportion to their population according to the last preceding Federal Census.

History

This amendment was adopted in 1966.

In 1929 the legislature authorized counties and incorporated cities to acquire, maintain, and operate airports. The act also provided that cities and counties could levy a special maintenance tax, not to exceed 5¢ on the $100 valuation, in addition to

taxes necessary to retire the debt created to finance airport acquisition and construction. (Tex. Rev. Civ. Stat. Ann. art. 1269b.)

In 1935 the legislature passed another airport act, applicable to cities with more than 40,000 inhabitants, that authorized bonds, warrants, mortgages, and unlimited taxes for the establishment and operation of airports. (Tex. Rev. Civ. Stat. Ann. art. 1269j.)

In 1947, without repealing either of the earlier laws, the legislature passed the Municipal Airports Act, authorizing counties, incorporated cities, villages, and towns to establish and operate airports, issue bonds for acquisition and improvement of airports, and levy a special 5¢ tax for their operation and maintenance. (Tex. Rev. Civ. Stat. Ann. arts. 46d-1 through 46d-22.) This act provides for airport creation and operation jointly by two or more local governments or by a unit of local government and another governmental agency. The act expressly prohibits local governments operating under it from exceeding otherwise applicable constitutional tax limits. To date six airport authorities have been created under Section 12.

Local government's inability to tax for airports beyond the constitution's general rate limitations (see Art. XI, Secs. 4 and 5; Art. VIII, Sec. 9) necessitated adoption of Article IX, Section 12, with its authorization for an additional tax not exceeding 75¢ on the $100 valuation. (For a ruling that the general rate limitations also applied to local government airport taxes authorized by the pre-1947 statutes, see Tex. Att'y Gen. Op. No. O-6762 (1945).) In proposing Section 12 the legislature was merely following the route already mapped out by amendments authorizing creation of hospital districts with additional taxing power. (See the *Explanation* of Sec. 9.)

Comparative Analysis

No other state has a comparable provision.

Author's Comment

Section 12 contains one sentence with 803 words, the longest in the constitution. This length is the result of a dizzying use of semicolons setting off an incredible number of details about the creation and operation of airport authorities. As pointed out in the *Author's Comment* on Section 9 of this article, in authorizing creation of hospital districts only the taxing (and perhaps borrowing) authority of special-purpose districts need be placed in the constitution. Thus, all but a single sentence of Section 12 should be transferred to the statutes—after a thorough revision, one would hope, of both the section's interminable sentence and the existing airport statutes.

Sec. 13. PARTICIPATION OF MUNICIPALITIES AND OTHER POLITICAL SUBDIVISIONS IN ESTABLISHMENT OF MENTAL HEALTH, MENTAL RETARDATION OR PUBLIC HEALTH SERVICES. Notwithstanding any other section of this article, the Legislature in providing for the creation, establishment, maintenance and operation of a hospital district, shall not be required to provide that such district shall assume full responsibility for the establishment, maintenance, support, or operation of mental health services or mental retardation services including the operation of any community mental health centers, community mental retardation centers or community mental health and mental retardation centers which may exist or be thereafter established within the boundaries of such district, nor shall the Legislature be required to provide that such district shall assume full responsibility of public health department units and clinics and related public health activities or services, and the Legislature shall not be required to restrict the power of any municipality or political subdivision to levy taxes or issue bonds or other obligations or to expend public moneys for the establishment, maintenance, support, or operation of mental health services,

mental retardation services, public health units or clinics or related public health activities or services or the operation of such community mental health or mental retardation centers within the boundaries of the hospital districts; and unless a statute creating a hospital district shall expressly prohibit participation by any entity other than the hospital district in the establishment, maintenance, or support of mental health services, mental retardation services, public health units or clinics or related public health activities within or partly within the boundaries of any hospital district, any municipality or any other political subdivision or state-supported entity within the hospital district may participate in the establishment, maintenance, and support of mental health services, mental retardation services, public health units and clinics and related public health activities and may levy taxes, issue bonds or other obligations, and expend public moneys for such purposes are provided by law.

History

This section was adopted in 1967. See the *History* of hospital district amendments generally under Section 9.

Explanation

Wilbarger County, which contains the city of Vernon, created a hospital district under Article IX, Section 9. Thereafter the State Department of Mental Health and Mental Retardation proposed to build a community mental health center there if the county would provide the land. The local district attorney requested an opinion from the attorney general on the legality of using county funds for this purpose in light of the following language in Section 9:

> . . . providing that any district so created shall assume full responsibility for providing medical and hospital care for its needy inhabitants [and] after its creation no municipality or political subdivision shall have the power to levy taxes or issue bonds or other obligations for hospital purposes or for providing medical care within the boundaries of the district . . . .

The attorney general ruled that mental health services constituted "medical care" within the meaning of Section 9 and that use of county funds to purchase a site for a mental health center constituted levying taxes for that purpose. (Tex. Att'y Gen. Op. No. C-646 (1966).) Section 13 was accordingly adopted the following year to authorize political subdivisions within or coextensive with hospital districts to levy taxes and spend public funds for mental health and mental retardation facilities and services *and* public health units or clinics or related public health activities. In light of this section, the attorney general has ruled that a county may use federal revenue sharing funds to contract with a hospital district for a mental health center since the statute authorizing creation of the district did not expressly prohibit participation by other entities (Tex. Att'y Gen. Op. No. H-454 (1974)).

Comparative Analysis

This is a unique constitutional provision. See the *Comparative Analysis* of Section 9.

Author's Comment

The two main objectives of creating hospital districts by constitutional amendment were to get around the limits on the taxing power of local governments and to improve the quality of public health services. The apparent intent of the various sections authorizing hospital districts with taxing power was to deny the use of this power for public health care purposes to the remaining governmental subdivisions

that were coextensive with or that overlapped the hospital district. Thus, an effective limitation was still imposed on the authority of general local governments to tax for this purpose. With the adoption of Section 13, however, this limitation vanished and the financing of public health care by local governments became fragmented but not so severely limited.

ARTICLE X

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

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 money. (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

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

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, *jdgmt 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.)

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

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, *jdgmt 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

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 corporaton 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

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

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 if 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.

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 abondon 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 dism'd*).)

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

amendment thereto providing a method for filling any vacancy to elective offfices 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.

(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.

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.

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

(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.

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, *jdgmt 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

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

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

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

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,"

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 dism'd*) (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

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.

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.

ARTICLE XII

PRIVATE CORPORATIONS

Sec. 1. CREATION BY GENERAL LAWS. No private corporation shall be created except by general laws.

History

Prior to 1874 all corporations in Texas were created by special act of the legislature. Private business corporations were greatly distrusted in the early 19th century although churches and charities were freely permitted to incorporate. According to Supreme Court Justice Brandeis, dissenting in *Louis K. Liggett Co. v. Lee* (288 U.S. 517 (1933)), Americans feared corporations because they were monopolistic, because they subjugated labor to capital, because they were believed to encroach upon individual liberties and opportunities, and because their large aggregations of capital seemed inherently menacing.

The 1845, 1861, and 1866 Constitutions reflected this distrust by providing that corporations could be created only by a two-thirds vote of the legislature. This system led, however, to corruption of legislators by corporation directors seeking special favors and powers for their corporations. The widespread abuses during the mid-19th century of this method of corporate regulation resulted in the view that everyone should have an equal opportunity to form corporations for lawful purposes. The enactment of general incorporation statutes was the method adopted to provide this opportunity and also to control abuses.

General laws also appeared to the public to be the best method for responding to the intense pressures for enormous business expansion brought about by the Industrial Revolution. The public had become resigned to the need for many corporations but only on the condition that they all be treated alike.

New York's 1846 Constitution was the first to require incorporation by general law; other states followed in fairly rapid succession. By 1900, 35 states had similar provisions, Texas included. The Texas legislature enacted a general incorporation statute in 1874 to compensate for the 1869 Constitution's complete silence on corporations. The statute was ineffective because of technical defects, and the 1875 Convention made certain the new doctrine received constitutional stature. The records of the convention reveal no debate on this provision although there was some discussion of other sections of Article XII, since repealed.

Explanation

The section has rarely been construed. In order to determine which corporations are covered, the courts have distinguished between public corporations, which are not covered, and private corporations, which are. "Public corporations" have been defined as those "connected with the administration of the government, and the interests and franchises of which are the exclusive property and domain of the government itself," and private corporations as all others. (*Miller v. Davis,* 136 Tex. 299, 307, 150 S.W.2d 973, 978 (1941).) The attorney general has ruled, for example, that the Bank Deposit Insurance Corporation was not covered by the section because it was an instrumentality of government. (Tex. Att'y Gen. Op. No. 2971 (1935).)

Comparative Analysis

Nearly three-quarters of the states provide for the creation of corporations by general law, and approximately that many also prohibit their creation by special law. A number of states permit exceptions for certain types of corporations; the most common (permitted by about ten states) allows creation of corporations by

special act for "charitable, educational, penal or reformatory purposes." The *Model State Constitution* makes no mention of corporations but prohibits a special act when a general one can be made applicable.

Author's Comment

Article III, Section 56, which prohibits local or special laws on a laundry list of subjects "and in all other cases where a general law can be made applicable," duplicates this section, which thus could be omitted.

Sec. 2. GENERAL LAWS TO BE ENACTED; PROTECTION OF PUBLIC AND STOCKHOLDERS. General laws shall be enacted providing for the creation of private corporations, and shall therein provide fully for the adequate protection of the public and of the individual stockholders.

History

See the *History* of Article XII, Section 1.

Explanation

As with Section 1 the courts have seldom construed this section. Applying the public-private distinction, *City of Tyler v. Texas Employers' Insurance Ass'n* (288 S.W. 409 (Tex. Comm'n App. 1926, *holding approved*)) held that the Texas Employers' Insurance Association was not a private corporation for purposes of this section although it had many of the elements of a private corporation; it was held instead to be a public corporation created for the proper administration of the Workmen's Compensation Law. The mandate to the legislature to provide for the protection of the public was held to be sufficient authorization for a statute providing for damages to survivors for the death of a relative caused by the negligence of a corporation's agents or employees despite the fact that its constitutionality was questionable when applied to the negligence of natural persons. (*Sid Westheimer Co. v. Piner,* 263 S.W. 578 (Tex. Comm'n App. 1924, *jdgmt adopted*).)

The legislature long ago provided comprehensive regulation of corporations: the current statutes are the Business Corporation Act of 1955, Non-Profit Corporation Act of 1959 (Tex. Rev. Civ. Stat. Ann. art. 1396), and Miscellaneous Corporation Laws Act of 1961 (Tex. Rev. Civ. Stat. Ann. art. 1302).

Comparative Analysis

Nearly two-thirds of the states have provisions that are substantially the same. The *Model State Constitution* makes no mention of corporations.

Author's Comment

This section is not needed to confer power on the legislature to enact corporation laws since it already has that power. In any event, the section's command has long since been obeyed and the section could be omitted.

Sec. 6. CONSIDERATION FOR STOCK OR BONDS; FICTITIOUS INCREASE. No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void.

History

During the 1875 Convention this section was added to Article XII by floor

amendment on second reading, apparently without debate. No prior Texas constitution contained a similar provision. The Texas Legislative Council recommended its deletion (1 *Constitutional Revision,* pp. 97-99), but for some reason the section was not included in the 1969 "deadwood" amendment.

Explanation

The *Interpretive Commentary* to this section states that this provision was inserted as a response to a contemporary scandal involving the issuance of watered stock in a company set up to construct portions of the Union Pacific Railroad. Stock watering—issuing stock for less than full payment—defrauds stockholders who pay full value for their shares and creditors who rely on the stated capital of a corporation in extending credit. (2 *Interpretive Commentary,* pp. 712-13.) In 1872 a congressional investigation of this scandal revealed that stock watering was a common business practice among all large corporations, but by 1875 congress had not legislated to regulate this abuse.

Since the 1875 Convention, however, this problem has been thoroughly treated by statute. The Business Corporation Act, Insurance Code, and Banking Code all contain detailed rules on stock issuance. (See, *e.g.,* Tex. Bus. Corp. Act. Ann. art. 2.16; Tex. Rev. Civ. Stat. Ann. art. 342-303; Tex. Ins. Code Ann. art. 2.08.) Numerous cases have interpreted and applied these statutes, making reference to the constitutional section, but since the statutes have always tracked the section, none of the decisions is constitutionally significant.

Comparative Analysis

Fourteen other states have similar constitutional provisions. One state refers only to the requirement that stock be issued for labor done or money or property received, and four states refer only to fictitious increases of stock or indebtedness. The *Model State Constitution* is silent on the subject.

Author's Comment

The abuse prohibited by this section is now thoroughly treated by statute and case law. The section has no constitutional significance and could safely be deleted.

ARTICLE XIII

SPANISH AND MEXICAN LAND TITLES

(Repealed, August 5, 1969.)

ARTICLE XIV

PUBLIC LANDS AND LAND OFFICE

Sec. 1. GENERAL LAND OFFICE. There shall be one General Land Office in the State, which shall be at the seat of government, where all land titles which have emanated or may hereafter emanate from the State shall be registered, except those titles the registration of which may be prohibited by this Constitution. It shall be the duty of the Legislature at the earliest practicable time to make the Land Office self sustaining, and from time to time the Legislature may establish such subordinate offices as may be deemed necessary.

History

While Texas was part of Mexico, records of land titles were maintained in separate land offices established in each colony, and no system of recordation existed. The chaos and fraud that resulted under that system and the need for a central agency to administer the 216 million acres of land still belonging to the Republic led the framers of the Constitution of the Republic to direct the Congress of the Republic to establish a general land office, in which all land titles of the Republic were to be registered, "with a view to the simplification of the land system, and the protection of the people and the government from litigation and fraud." (Constitution of the Republic of Texas, General Provisions, Sec. 10. See T. Miller, *The Public Lands of Texas, 1915-1970* (Norman, Okla.: University of Oklahoma Press, 1972), p. 213.) Although the office was not fully operational until 1844 (see *Dobbin v. Bryan,* 5 Tex. 276 (1849)), it was created by the first congress. (Tex. Laws 1836, An Act To Establish a General Land Office, 1 *Gammel's Laws,* p. 1276.)

When Texas entered the Union it was permitted to retain its public lands. The Constitution of 1845 also required that a general land office be maintained in the capital, and the provision has been included in every succeeding constitution. The only change since 1845 was made in the present constitution, which added the provisions relating to the registration of titles prohibited by the constitution and to making the office self-sustaining.

Explanation

The section's exception of prohibited titles referred to the remaining sections of this article. They were repealed in 1969 as obsolete. Otherwise, the section is self-explanatory. It has caused no problems.

Comparative Analysis

No other state constitution creates a repository for records of land titles emanating from the state. A few create a constitutional officer with some responsibilities relating to public land. (See the *Comparative Analysis* of Art. IV, Sec. 23.)

Author's Comment

This is the only remaining section of Article XIV, the others having been repealed as obsolete in 1969.

This section is also obsolete or at least unnecessary. The authorization of subordinate offices adds nothing to the legislature's plenary power to create them. The admonition to make the land office self-sustaining is unenforceable and states a goal that probably never has been achieved but that legislators ordinarily pursue even without constitutional mandate. The language about prohibited titles was redundant when adopted and clearly is obsolete now since it relates to sections repealed in 1969. As long as the commissioner of the general land office exists as a

constitutional officer, the existence of the General Land Office as an agency administered by him is implicit as is its maintenance in the capital, since the commissioner is required to reside there. (See Art. IV, Sec. 23.)

The only function of this section is to require as one of the duties of the land office the maintenance of records of land titles. (It has been given numerous statutory functions. See, *e.g.*, Tex. Rev. Civ. Stat. Ann. arts. 5306-5337 (administration of public lands set aside for schools and asylums), arts. 5339-5382e (leasing for oil and gas development), art. 5421m (administration of Veteran's Land Program).) It is inconceivable that the legislature would discontinue state maintenance of land records or that it would transfer those duties to another agency while the commissioner and the land office exist. If cause sufficient to induce the legislature to resort to either of those unlikely eventualities develops, however, the constitution should not prevent the legislature from doing so.

ARTICLE XV

IMPEACHMENT

Sec. 1. POWER OF IMPEACHMENT. The power of impeachment shall be vested in the House of Representatives.

History

The institution of impeachment originated in England. Its purpose was to reach highly placed offenders whose power and influence might place them beyond the reach of punishment by ordinary tribunals. After the division of Parliament into two branches, the House of Commons assumed the duties of accusation and preferring charges of impeachment, while the House of Lords acted as a judicial body to try the accusations. This separation of functions came about so that the same body would not act as accuser, prosecutor, and judge, a combination of powers too dangerous to permit in a democracy. (For an interesting discussion of the origins of impeachment and its early development in United States history, see R. Berger, *Impeachment: The Constitutional Problems* (Cambridge: Harvard University Press, 1973).)

Impeachment appeared in a number of colonial constitutions, such as those of Virginia and Massachusetts, and was then embodied in the United States Constitution. The United States House of Representatives has the power of impeachment (Art. I, Sec. 2), with trial by the senate.

The 1836 Texas Constitution of the Republic contained an impeachment provision mirroring that of the United States Constitution. The 1845 Constitution, adopted when Texas entered the Union, contained a separate impeachment article, Section 1 of which stated that "The power of impeachment shall be vested in the House of Representatives." The adoption of a separate impeachment article was probably done in the interests of clarity and was no doubt influenced by other state constitutions with similar articles. This section and Sections 2, 3, 4, 5, and 7 of the impeachment article were continued unchanged in the Constitutions of 1861, 1866, and 1869 and are found in practically identical language in the present constitution.

Present Article XV was reported by committee late in the Convention of 1875 (*Journal,* p. 770), and, after very little debate, adopted on second and third reading the next day. (*Journal,* pp. 793-94.) No proposed amendment to the impeachment article has been submitted to the voters.

Explanation

Impeachment is an extraordinary method for removing from public office and disqualifying from holding public office one who has abused the public trust by serious misconduct. (Technically, "impeachment" is merely an accusation, analogous to a criminal indictment, and must be followed by trial and conviction for removal. The entire procedure is customarily called "impeachment," however.) This power is vested in the legislative branch, although impeachment proceedings are judicial in nature.

Unlike the United States Constitution, the present Texas Constitution has no list of impeachable offenses such as "treason, bribery, or other high crimes and misdemeanors." (As noted, the Constitution of the Republic did identify these offenses.) However, the supreme court has said that the term "impeachment," as used in the Texas Constitution, embraces by reference to American and English parliamentary law both the offenses triable and the procedure for trying them.

> While impeachable offenses are not defined in the Constitution, they are very clearly designated or pointed out by the term "impeachment," which at once connotes the offenses to be considered and the procedure for the trial thereof.

"Impeachment," at the time of the adoption of the Constitution, was an established and well-understood procedure in English and American parliamentary law, and it had been resorted to from time to time in the former country for perhaps 500 years. It was designed, primarily, to reach those in high places guilty of official delinquencies or maladministration. It was settled that the wrongs justifying impeachment need not be statutory offenses or common-law offenses, or even offenses against any positive law. Generally speaking, they were designated as high crimes and misdemeanors, which, in effect meant nothing more than grave official wrongs.

In the nature of things, these offenses cannot be defined, except in the most general way. A definition can, at best, do little more than state the principle upon which the offense rests. Consequently, no attempt was usually made to define impeachable offenses, and the futility as well as the unwisdom of attempting to do so has been commented upon. In the Constitution of the United States impeachable offenses are designated as "treason, bribery, or other high crimes and misdemeanors." Const. U.S. art. 2, para. 4. Substantially the same language is used in many of the state Constitutions. In others "misdemeanors in office," "maladministration," "oppression in office," and the like, are declared to be impeachable offenses.

When the Constitution of Texas was adopted, it was done in the light of, and with a full knowledge and understanding of, the principles of impeachment as theretofore established in English and American parliamentary procedure. The Constitution in this matter of impeachment created nothing new. By it, something existing and well understood was simply adopted. The power granted to the House to "impeach," and the Senate to try "impeachment," carries with it, by inevitable implication, the power to the one to prefer and to the other to try charges for such official delinquencies, wrongs, or malfeasances as justified impeachment according to the principles established by the common law and the practice of the English Parliament and the parliamentary bodies in America. The grant of the general power of "impeachment" properly and sufficiently indicates the causes for its exercise. (*Ferguson v. Maddox*, 114 Tex. 85, 97, 263 S.W. 888, 892 (1924).)

In the English Parliament, the House of Commons initiated impeachment by investigating and bringing formal charges. In Texas the house of representatives performs this function and after voting impeachment, it appoints someone, usually a committee of its members, to serve as prosecutors (called "managers") for the trial in the senate.

A private citizen can not initiate impeachment proceedings. (Tex. Att'y Gen. Op. No. 898 (1939).)

Section 1 does not identify the officers subject to impeachment and Section 2 provides only that the officers it lists must be *tried* by the senate following impeachment. (Sec. 7 authorizes statutory removal procedures for those officers whose removal is not provided by the constitution, so Sec. 2 presumably lists certain officers to guarantee a certain procedure for them. See also Texas Constitution Art. IX, Secs. 1-3 (1845).) The United States Constitution subjects to impeachment all civil officers of the federal government and as noted the Constitution of the Republic copied this provision. Arguably, therefore, the legislature has power to impeach and try any state officer except a member of the legislature (whose removal is provided for separately, in Art. III, Sec. 11).

Comparative Analysis

Virtually all states have adopted an impeachment plan similar to that set out in Article I, Section 2, of the United States Constitution, with impeachment by the lower house and trial by the upper house. Forty-seven states specify that the house of representatives, house of delegates, or general assembly has the power of impeachment. In 17 state constitutions a majority vote of all members is required to impeach; six states specify a two-thirds vote of all members. Mississippi requires

only a two-thirds vote of those present and the Rhode Island Constitution states that a two-thirds vote is necessary to impeach the governor. Nebraska, with its unicameral legislature, requires a majority vote of all members for impeachment. The Alaska Constitution, in an unusual reversal of the normal procedure, specifies that impeachment originates in the senate and must be approved by a two-thirds vote of its members; trial is then conducted by the house of representatives.

Oregon is the only state with no provision for impeachment. Its constitution provides that "no public official shall be impeached, but incompetency . . . or delinquency in office may be tried in the same manner as criminal offenses, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law." (Oregon Const. Art. VII, Sec. 6.)

The *Model State Constitution* provides for legislative impeachment by a two-thirds vote of all members of each house, with trial to be provided by law. (Sec. 4.18.)

Author's Comment

If a bicameral legislature is retained, this section should be retained, perhaps specifying whether a simple or extraordinary majority is needed to impeach. Since impeachment by the house merely initiates a trial of the accused and does not result in removal from office, the house should retain the power which it now has of determining the procedure and vote required by simple majority.

Protections against political or partisan impeachments are better built into the trial stage. To make impeachment too difficult may subject the people to continuation of the very corruption or tyranny this extraordinary remedy is designed to remove.

Sec. 2. TRIAL OF IMPEACHMENT OF CERTAIN OFFICERS BY SENATE. Impeachment of the Governor, Lieutenant Governor, Attorney General, Treasurer, Commissioner of the General Land Office, Comptroller and the Judges of the Supreme Court, Court of Appeals and District Court shall be tried by the Senate.

History

See the *History* of Section 1.

Explanation

In the English Parliament persons impeached by the House of Commons were tried by the House of Lords. In the United States the trial function is customarily performed by the upper house of a bicameral legislature. In addition to following this custom, Section 2 lists the state officials whose impeachment is to be tried by the senate. Section 7 of this article provides that the legislature may add to this list, and it has done so, clarifying in the process that judges of the court of criminal appeals and courts of civil appeals, which courts are the successors to the court of appeals abolished in 1891, are subject to impeachment. (See Tex. Rev. Civ. Stat. Ann. art. 5961.)

The power and duty to try and judge one holding high public office may have been vested in the House of Lords originally to guarantee a tribunal powerful enough to sit in judgment on the highest in the land.

> . . . [A]s history appears to have taught, human beings are sometimes frail when called upon to judge those in high places; hence, it is sometimes well that the power to judge the powerful be placed in powerful hands. (3 *Constitutional Revision,* p. 207.)

Comparative Analysis

See the *Comparative Analysis* of Section 1.

Author's Comment

As pointed out in the *Explanation* of Section 1, the legislature probably has power to impeach any state officer and this section merely guarantees that the officers it names will receive a trial by the senate. Whether judges should be subject to impeachment at all, as distinguished from some less cumbersome removal method, is less certain.

Sec. 3. OATH OR AFFIRMATION OF SENATORS; CONCURRENCE OF TWO-THIRDS REQUIRED. When the Senate is sitting as a Court of Impeachment, the Senators shall be on oath, or affirmation impartially to try the party impeached, and no person shall be convicted without the concurrence of two-thirds of the Senators present.

History

See the *History* of Section 1.

Explanation

This provision was copied from the federal constitution. The function of the senate in an impeachment trial is judicial rather than legislative. (See *Ferguson v. Maddox,* 114 Tex. 85, 263 S.W. 888 (1924).) Acting as a court, the senators are sworn impartially to ascertain the facts, the applicable law, and apply the law to the facts. Acting in this capacity the senators should not primarily represent the interests or wishes of their constituents, as they normally would as legislators, but should assume a judicial role.

In the English House of Lords, conviction on impeachment required only a majority vote; however, the Lords inherit their seats and are thus considered insulated from popular clamor. (See 3 *Interpretive Commentary,* p. 48.) In a popularly elected body such as the Texas Senate, on the other hand, two-thirds of the members present must concur to convict and this extraordinary majority helps to protect the accused from a purely partisan trial.

Comparative Analysis

See the *Comparative Analysis* of Section 1.

The *Model State Constitution* requires the chief justice of the state's highest court to preside at the trial of the governor or lieutenant governor.

Author's Comment

The presence and participation of the chief justice would lend dignity to what otherwise could become (or at least be characterized as) a purely partisan attack on the governor or lieutenant governor. It might also be useful for the senate rules to set out at least the major procedural elements of the impeachment trial. This would permit advance familiarization, save time when impeachment is voted, and help ensure procedural regularity in the trial.

Sec. 4. JUDGMENT; INDICTMENT, TRIAL AND PUNISHMENT. Judgment in cases of impeachment shall extend only to removal from office, and disqualification

from holding any office of honor, trust or profit under this State. A party convicted on impeachment shall also be subject to indictment, trial and punishment according to law.

History

See the *History* of Section 1.

Explanation

This limitation on the nature of the judgment following impeachment distinguishes it from the traditional criminal prosecution. The accused may be removed and disqualified from ever again holding government office but cannot otherwise be deprived of life, liberty, or property. Conversely, the judgment does not bar criminal prosecution or civil suit based on the conduct for which impeached. (For a definition of the term "office of honor, trust or profit under this state," see the annotations of Art. XVI, Secs. 12 and 40.)

During the impeachment trial of Governor James Ferguson, he submitted his resignation one day before the senate rendered its judgment of removal and disqualification. Several years later Ferguson filed as a candidate for governor and argued that the judgment of the senate was void for lack of jurisdiction over his person. In *Ferguson v. Maddox* (114 Tex. 85, 99, 263 S.W. 888, 893 (1924)), the supreme court rejected this contention:

> If the Senate only had the power to remove from office, it might be said, with some show of reason, that it should not have proceeded further when the Governor, by anticipation performed, as it were, its impending judgment. But under the Constitution the Senate may not only remove the offending official; it may disqualify him from holding further office, and with relation to this latter matter his resignation is wholly immaterial. For their protection the people should have the right to remove from public office an unfaithful official. It is equally necessary for their protection that the offender should be denied an opportunity to sin against them a second time. The purpose of the constitutional provision may not be thwarted by an eleventh hour resignation.

Thus impeachment has been called a quasi-criminal proceeding. Its purpose is not to punish the public official, but to protect the public from him. (Of course the impeached official is punished by the removal and permanent disqualification from officeholding as well as the stigma of a highly-publicized trial, but this is not impeachment's principal objective.)

Also in *Ferguson* the court offered some instructive dicta on the nature of a judgment of impeachment:

> This opinion should not be concluded without a statement as to the status under our organic law of the judgment of the Senate, sitting as a court of impeachment. It is unquestionably true that such judgment cannot be called in question in any tribunal whatsoever, except for lack of jurisdiction or excess of constitutional power. For instance, an attempt by the Senate to try an officer who had not been impeached by the House, or to pronounce a judgment other than that authorized by section 3, of article 15, would be without effect and its action void. The Senate must decide both the law and the facts. It must determine whether or not the articles presented by the House set forth impeachable offenses, and it must determine whether or not these charges are sustained by the evidence produced. Its action with reference to these matters is undoubtedly within its constitutional power and jurisdiction. This is as it should be. The power reposed in the Senate in such case is great, but it must be lodged somewhere, and experience shows there is no better place. The courts, in proper cases, may always inquire whether any department of the government has acted outside of and beyond its constitutional authority. The acts of the Senate, sitting as a court of impeachment, are

not exempt from this judicial power; but so long as the Senate acts within its constitutional jurisdiction, its decisions are final. As to impeachment, it is a court of original, exclusive, and final jurisdiction.

Comparative Analysis

See the *Comparative Analysis* of Section 1.

Author's Comment

Historical English impeachment procedure allowed the House of Lords to impose any punishment upon conviction, including banishment and death. But American constitutional law, with, among others, its basic requirement of specifying criminal conduct in advance to provide notice of what is forbidden before one is punished for doing it, probably would not sanction punishment of such severity, and Section 4's limitation on the nature of the judgment following impeachment is therefore sound.

Sec. 5. SUSPENSION PENDING IMPEACHMENT; PROVISIONAL APPOINTMENTS. All officers against whom articles of impeachment may be preferred shall be suspended from the exercise of the duties of their office, during the pendency of such impeachment. The Governor may make a provisional appointment to fill the vacancy occasioned by the suspension of an officer until the decision on the impeachment.

History

See the *History* of Section 1.

Explanation

This section further distinguishes impeachment from a criminal prosecution because one who is indicted is presumed innocent and probably could not be automatically suspended from office without constitutional authorization. Because one being impeached stands accused of serious misconduct *in office,* however, suspension is desirable to protect the public from continuing misdeeds.

If the governor or lieutenant governor is impeached, Article IV, Sections 16 and 17, provide for the lieutenant governor and president pro tempore of the senate to fill those respective offices during the trial, and since both are next in line, they would automatically succeed to those offices following removal of the governor or lieutenant governor.

Comparative Analysis

Approximately 20 other state constitutions provide for suspension following impeachment and temporary appointment to fill the resulting vacancy. The *Model State Constitution* simply directs that impeachment procedure be provided by law. The United States Constitution is silent on the subject.

Author's Comment

Permitting the lieutenant governor (as president of the senate) to preside over the impeachment trial of the governor whom he will succeed upon removal presents the potential for abuse. (The same potential of course exists when the president pro tempore presides over the lieutenant governor's trial.) One remedy, already mentioned in the *Comparative Analysis* of Section 3, is to require the chief justice of

the state's highest court to preside over the impeachment trial of both the governor and lieutenant governor.

Sec. 6. JUDGES OF DISTRICT COURT; REMOVAL BY SUPREME COURT. Any judge of the District Courts of the State who is incompetent to discharge the duties of his office, or who shall be guilty of partiality, or oppression, or other official misconduct, or whose habits and conduct are such as to render him unfit to hold such office, or who shall negligently fail to perform his duties as judge; or who shall fail to execute in a reasonable measure the business in his courts, may be removed by the Supreme Court. The Supreme Court shall have original jurisdiction to hear and determine the causes aforesaid when presented in writing upon the oaths taken before some judge of a court of record of not less than ten lawyers, practicing in the courts held by such judge, and licensed to practice in the Supreme Court; said presentment to be founded either upon the knowledge of the persons making it or upon the written oaths as to the facts of creditable witnesses. The Supreme Court may issue all needful process and prescribe all needful rules to give effect to this section. Causes of this kind shall have precedence and be tried as soon as practicable.

History

See the *History* of Section 1. This section has no counterpart in earlier Texas constitutions.

The committee report of this section allowed a removal proceeding to be instituted by seven citizens, of whom three had to be practicing lawyers. (*Journal,* p. 771.) A minority report was filed opposing this provision, but a motion to strike it failed. However, it was amended to substitute ten lawyers practicing in the court of the accused judge for the four citizens and three lawyers. (See *Journal,* pp. 776, 793.)

Explanation

The only reported case in which this procedure for removal was used is In re *Laughlin* (153 Tex. 183, 265 S.W.2d 805 (1954)). In this case the supreme court appointed a district judge as special master to take testimony and make findings of fact. The accused judge was confronted by the witnesses against him, he testified in his own behalf, and he had an opportunity to contest the findings of fact and argue all legal questions before the supreme court. Both the master and the supreme court applied a standard of proof whereby all allegations against the accused judge had to be proved by clear and convincing evidence. In rendering its judgment of removal, the court refused to disqualify the judge from holding public office because this section, unlike Section 4 for impeachment, does not so provide. In fact, Judge Laughlin was re-elected at the next election following removal.

There is also a wider range of conduct for which removal is authorized under this section than under the impeachment sections. For example, Section 6 may be invoked against a judge who is physically unfit to carry out his duties and the threat of invocation can serve to force early retirement. (See 3 *Interpretive Commentary,* p. 52.)

Comparative Analysis

Indiana and New York have similar provisions. The *Model State Constitution* gives the supreme court power to remove appellate judges and judges of trial courts of general jurisdiction for such cause and in such manner as provided by law.

Author's Comment

Texas district judges are subject to more removal provisions than any other officeholder. In addition to impeachment and address authorized by this article, Article V, Section 1-a, creates a Judicial Qualifications Commission with authority to remove them. (See the *Author's Comment* on that section.)

Sec. 7. REMOVAL OF OFFICERS WHEN MODE NOT PROVIDED IN CONSTITUTION. The Legislature shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution.

History

See the *History* of Section 1.

Explanation

Title 100 of the *Texas Revised Civil Statutes Annotated* includes a variety of provisions relating to removal from office. Article 5961 adds to the constitutional list of officers subject to impeachment under Section 2 of this article.

Articles 5962 and 5963 provide that the house or senate may continue in session beyond the normal adjournment date when considering impeachment or may convene in a special session for this purpose on proclamation of the governor, speaker, lieutenant governor, or president pro tempore of the senate or upon majority vote of either house.

Articles 5970-5997 implement this section and Article V, Section 24, by providing the mechanics for removal of district, county, and municipal officials.

Article 6253 of the civil statutes also provides for removal from office by quo warranto, initiated by the attorney general or county or district attorney, of one who illegally holds office.

In *Bonner v. Belsterling* (104 Tex. 432, 138 S.W. 571 (1911)), the court held that a city charter providing for recall elections to remove city officials did not violate the requirement in Section 7 that *state* officials be removed only after trial.

Comparative Analysis

Numerous state constitutions contain similar authorization, but both the *Model State Constitution* and United States Constitution are silent on the matter.

Author's Comment

This section is unnecessary because the legislature has this authority anyway.

Sec. 8. REMOVAL OF JUDGES BY GOVERNOR ON ADDRESS OF TWO-THIRDS OF EACH HOUSE OF LEGISLATURE. The Judges of the Supreme Court, Court of Appeals and District Courts, shall be removed by the Governor on the address of two-thirds of each House of the Legislature, for wilful [*sic*] neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment; provided, however, that the cause or causes for which such removal shall be required, shall be stated at length in such address and entered on the journals of each House; and provided further, that the cause or causes shall be notified to the judge so intended to be removed, and he shall be admitted to a hearing in his own defense before any vote for such address shall pass, and in all such cases, the vote shall be taken by yeas and nays and entered on the journals of each House respectively.

Art. XV, § 8

History

Address originated in England as the form by which parliament or either house of parliament communicated its wishes or requests to the king. (See L.S. Cushing, *Law and Practice of Legislative Assemblies*, 315-16, 357-60, (Boston: Little, Brown & Co., 9th ed. 1907).) Address did not become a removal procedure until 1700, when the English Parliament in the Act of Settlement, restricted the king's power to remove judges from office, requiring cause for their removal. The act authorized, but did not require, the king to remove a judge without cause, however, on address by both houses of parliament requesting removal. (See R. Berger, *Impeachment: The Constitutional Problems*, 125, 150-52, (Cambridge: Harvard University Press, 1973).) Several states incorporated removal of judges by address in their first constitutions.

Removal of judges by address first appeared in Texas in the judiciary article of the 1845 Constitution. The 1845 version listed only "wilful neglect of duty or other reasonable cause which shall not be sufficient cause for impeachment" as grounds for removal by address; otherwise it was substantively identical to this section. The 1861 and 1866 Constitutions retained the 1845 version, as part of the judiciary article, with only minor changes in punctuation.

The 1869 Constitution included two provisions on removal by address. A section in the judiciary article governing removal of judges by address retained the 1845 language but added "incompetency" as an express cause for removal and specified that the vote required was "two-thirds of the members elected to each House." A separate section in the article on general provisions provided: "All civil officers of this State shall be removable by an address of two-thirds of the members elect to each House of the Legislature, except those whose removal is otherwise provided for by this Constitution."

During the 1875 Convention, the committee on the Judicial Department omitted removal of judges by address, and the convention adopted the judicial article without an address provision. Three days later, just moments after the convention adopted an impeachment article without providing for removal of judges or other officers by address, a member proposed that the 1845 Constitution's address section, with the additional causes now in Section 8 added, be included in the judiciary article. The convention adopted the proposal. (*Journal*, pp. 730-32, 793-94, 796.) Just one year earlier, in 1874, the legislature had proposed to address the governor to remove a number of district judges who had gained office under the reconstruction government and had succeeded in removing four. (See, *e.g.*, *Tex. H. Jour.* 14th Leg., 1st Reg. Sess., 588-90, 597-98, 604, 618-19, 659, 686 (1874).) Presumably, the convention concluded that the usefulness of address the year before justified its retention, although it is probable that the convention had included Section 6 of this article as a remedy for the problems that initiated the earlier address proceedings.

The *Journal* of the 1875 Convention contains no record of additional action on the address section, but the final version of the constitution had moved it from the judiciary article to this article. Apparently, the committee on Style and Arrangement decided this article was the more logical location.

In 1891 a constitutional amendment revised the judiciary article, substituting a court of criminal appeals and courts of civil appeals for the court of appeals. The drafters of the amendment forgot to make the substitution in this section and in Section 2 of this article.

Explanation

Impeachment originated as and continues to be a judicial removal procedure,

with the two houses of the legislature performing judicial functions. (*Ferguson v. Maddox*, 114 Tex. 85, 263 S.W. 888 (1924).) Address originated as a legislative removal procedure. It required no cause for removal and no hearing, although the legislature obviously could assert a cause and permit presentation of a defense. In effect, removal by address was a precursor of recall, with the elected representatives acting instead of the electorate. (See R. Berger, *supra*, pp. 150-52.) Whether the addition to address proceedings of traditionally judicial procedures—a complaint or statement of causes, notice, and an opportunity to appear at a hearing—has changed the legislative character of address proceedings is uncertain.

In *Ferguson v. Maddox*, *supra*, the supreme court intimated that the judicial character of impeachment justified the house and senate convening themselves during an interim between regular sessions, without action by the governor under Article IV, Section 8, for impeachment purposes. A statute prescribes procedures for convening for impeachment purposes, (Tex. Rev. Civ. Stat. Ann. arts. 5962, 5963), and the legislature has done so twice. (See *Tex. H. Jour.*, 42d Leg., 1st Called Sess., 364, 368 *et seq.* (1931); *Tex. Sen. Jour.*, 42d Leg., 281 *et seq.* (1931); *Tex. H. Jour.*, 64th Leg., Impeachment Sess. (1975); *Tex. Sen. Jour.*, 64th Leg., Impeachment Sess. (1975).) No court opinion discusses whether the legislature may convene for address proceedings, no statute prescribes procedures for doing so, and the legislature has never attempted it.

As the *History* of this section notes, the legislature instituted address proceedings against several district judges in 1874 under the 1869 Constitution and removed some of them. Under the current constitution, address proceedings appear to have been instituted only twice—against a district judge in 1887 and an associate justice of the supreme court in 1977. (In the 1887 address, the house voted for removal, but the senate voted against it. In 1977, the justice resigned before presentation of evidence began.) In 1953 the senate considered instituting address proceedings against another district judge but decided against it. (*Tex. Sen. Jour.*, 53d Leg., Reg. Sess., 506-07, 629, 877-78 (1953).) Subsequently, the supreme court removed the judge by the procedure prescribed by Section 6 of this article, (In re *Laughlin*, 153 Tex. 183, 265 S.W.2d 805 (1954)), but he was reelected, then subjected to an unsuccessful disbarment attempt. (See *State v. Laughlin*, 286 S.W.2d 278 (Tex. Civ. App.—San Antonio 1956, *writ ref'd n.r.e.*).)

In 1887, the house and senate conducted the hearing required by this section separately. (*Tex. H. Jour.*, 20th Leg., Reg. Sess., 119-20, 461-66, 498, 501-03, 509 (1887); *Tex. Sen. Jour.*, 20th Leg., Reg. Sess., 363, 652-53, 684 (1887).) In 1874 and 1977, however, the house and senate acted jointly. In 1874 a joint committee of five house members and three senators held the hearing and reported to the two houses. The two houses then heard argument of counsel for the judge and the state in joint session. (See *Tex. H. Jour.*, 14th Leg., 1st Reg. Sess., (1874); *Tex. Sen. Jour.*, 14th Leg., 1st Reg. Sess. (1874).) The procedure in 1977 provided for committees of the whole house and the whole senate to meet jointly to hear evidence and argument. (*Tex. H. Jour.*, 65th Leg., 1st Called Sess., 3, 8-13, App. (1977); *Tex. Sen. Jour.*, 65th Leg., 1st Reg. Sess., 7-12, 15-16, App. (1977).)

The curious wording of the phrase specifying the causes for removal has created problems. Although the constitution does not specify grounds for impeachment, Section 8 appears to provide that a ground for impeachment may not be a cause for removal by address. In the 1874 address proceedings, the issue arose twice. Judge J.B. Williamson excepted to the charges against him because, among other grounds, he claimed he was charged with conduct subject to impeachment and therefore not proper cause for address. (*In the Matter of the Charges Against Honorable J.B. Williamson*, p. xiii (Austin, Texas: 1874), bound with *State Against Hon. S.B. Newcomb*, (Austin, Texas: J.D. Elliott, State Printer, 1874).) The

legislature, in voting to sustain the address, overruled the objection. (The house, before voting on the address, overruled the objections in a separate vote.) (*Tex. H. Jour.*, 14th Leg., 1st Reg. Sess., 604 (1874); *Tex. Sen. Jour.*, 14th Leg., 1st Reg. Sess., 598m (1874).) During the same session, the house impeached a judge. The senate acquitted him of the charges, and a senator filed address charges against him. The address never came to a vote, but the senate judiciary committee ruled that grounds for impeachment may also be a basis for address, stating that the option "is a privilege extended to the government and if it sees proper to pursue the milder course of address in which no disabilities follow conviction, as in impeachment, that it might do so." (*Tex. Sen. Jour.*, 14th Leg., 1st Reg. Sess., 541-45, 601, 611-14 (1874).)

During the 1887 address proceedings against Judge Willis, the judge argued before a senate committee that this section requires two-thirds of the members *elected* to each house. The house vote to sustain the address had been by more than two-thirds of the members present but by less than two-thirds of the total membership. The house, in reporting adoption of the address, obviously disagreed. The senate committee also rejected the contention. (*Tex. H. Jour.*, 20th Leg., Reg. Sess., 509 (1887); *Tex. Sen Jour.*, 20th Leg., Reg. Sess., 344, App. p. 7 (1887).)

Comparative Analysis

Just 20 years ago removal by a vote of both houses of the legislature or by the governor on address of both houses of the legislature was a common feature of state constitutions. Approximately 30 state constitutions provided for some form of legislative removal in addition to impeachment. In the past 15 years, however, almost one-third of those states in the course of revising a judiciary article or an entire constitution have eliminated legislative removal, usually replacing it with a judicial qualifications commission similar to Section 1-a of Article V.

Most of the states that retain legislative removal make it applicable only to judges. Five states authorize legislative removal of state officers generally or of executive and judicial officers. Three others include the attorney general and all prosecuting attorneys along with judges, and one of those, Arkansas, also includes the secretary of state, the treasurer, and the auditor.

Only two states do not require an extraordinary majority of both houses. One-half of the states providing for legislative removal omit the governor's participation. The other half is evenly divided between requiring the governor to remove on address by the legislature, as Texas does, and merely authorizing the governor to remove.

A few states, like Texas, enumerate several causes that justify legislative removal. Most, however, require good or reasonable cause without more. Two or three do not mention cause for removal. North Carolina specifies mental or physical incapacity, expressly requiring removal for any other cause to be by impeachment. Five other states attempt to treat the relationship between address and impeachment. Only Nevada makes it clear that cause for removal by address "may or may not be" sufficient ground for impeachment. The Michigan, Mississippi, New Hampshire, and South Carolina provisions on the relationship between address and impeachment are almost identical to the Texas provision. Only one-half of the legislative removal provisions require notice and a hearing on the charges, and an additional three require only notice.

Neither the United States Constitution nor the *Model State Constitution* provides for legislative removal by any means other than impeachment.

Art. XV, § 8

Author's Comment

As the *Comparative Analysis* indicates, the trend in modern state constitutions is to substitute a judicial qualifications commission with removal power for address. In fact, address is not an effective mechanism for policing judicial conduct. Part-time legislators who meet regularly only once every two years for 140 days and have more business than they can handle are not going to concern themselves with any but the most serious judicial misconduct.

When the judge's misconduct is major and he resists removal, however, the current procedures for removal by the supreme court on recommendation by the judicial qualifications commission under Article V, Section 1-a, appear to be inadequate. In the three cases in which that removal procedure was fully used, almost a year or more elapsed between the date the proceedings were instituted and the date the issue was determined. (See *Matter of Bates,* 555 S.W.2d 420 (Tex. 1977) (10 days less than a year); *Matter of Carrilo,* 542 S.W.2d 105 (Tex. 1976) (14 months); In re *Brown,* 512 S.W.2d 317 (Tex. 1974) (3 years and 3 months).) Two of the judges involved in those cases had been indicted and convicted of felony offenses—one in state court for receiving a bribe and the other in federal court for violation of federal income tax laws—months before their removal, and the judicial qualifications commission has no power to suspend pending final determination.

Obviously, address can be a speedier procedure in a serious case. Before address is eliminated, judicial qualifications commission procedures should be modified to permit the commission to suspend a judge pending final determination of the case against him. Also, it seems desirable to provide that suspension is automatic on indictment for a felony and that removal is automatic on conviction.

ARTICLE XVI

GENERAL PROVISIONS

Sec. 1. OFFICIAL OATH. Members of the Legislature, and all other elected officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the giving or withholding a vote at the election at which I was elected. So help me God."

The Secretary of State, and all other appointed officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward to secure my appointment or the confirmation thereof. So help me God."

History

Section 1, as adopted in 1876, prescribed a single oath of office for members of the legislature and all state and local officers. It included a section requiring the official to swear that he had not fought a duel, made or accepted a challenge to fight a duel, acted as a second, or "aided, advised or assisted" in such acts. The original oath contained two conclusions, one for elective officers and one for appointees.

In 1938 the section was amended. All language dealing with dueling was omitted. The phrase requiring officers to swear to "preserve, protect and defend" the state and federal constitutions was inserted in place of the previous promise to perform official duties "agreeably" to the constitution and laws. The court of criminal appeals suggested that this change was intended to strengthen the oath in response to what were considered radical and subversive movements.

> In this present day and time, when subversive influences and activities which would destroy our governments and the principles upon which they are founded are abroad in this country, it is a matter of much concern and importance that our public officials should be required to swear their personal allegiance to, and belief in, the principles upon which our governments are founded. The wisdom of such an addition to the former oath is, therefore, demonstrated and readily apparent.

(*Enloe v. State,* 141 Tex. Crim. 602, 605, 150 S.W.2d 1039, 1041 (1941).)

The 1938 amendment omitted the alternative conclusion for appointed officials, thus requiring all officials to swear that they had not given or promised any favors "as a reward for the giving or withholding a vote at the election at which I was elected." This obviously was nonsensical as applied to an appointed official, but the attorney general held that appointive officers should insert after "reward" the words "to secure my appointment" and omit the reference to votes and election. (Tex. Att'y Gen. Op. No. O-322 (1939).) Nothing in the constitution authorizes such a rewriting, but apparently no one ever challenged the authority of an official who took the oath as modified by the attorney general.

In 1956 Section 1 was amended to its present form, providing two oaths, one for legislators and other elected officers and another for appointed officers.

The Constitutions of 1845, 1861 and 1866 (Art. VII, Sec. 1) contained provisions

essentially the same as the 1876 version of Section 1, except that the portion dealing with bribery did not appear until 1876.

The 1869 Constitution contained an oath reflecting the concerns of Reconstruction; it required an official to promise that he had not committed assault with a deadly weapon, was not disqualified under the Fourteenth Amendment to the federal constitution (which disqualified former officers and supporters of the Confederacy), and was a qualified elector of the state. This language disappeared in 1876 with the end of Reconstruction.

Explanation

There is nothing complex about the role of this section: It simply supplies the oath that is administered to every official when he takes office. The major questions that have arisen under the section are (1) what officers are required to take the oath? and (2) what are the consequences of failing to take the prescribed oath? The oath is required of everyone who takes office under the authority of the state or its subdivisions. For example, trustees of a school district must take the oath (*Buchanan v. Graham,* 81 S.W. 1237 (Tex. Civ. App. 1904, *no writ*)), but a special prosecutor employed by the victim's family in a murder trial need not. (*Lopez v. State,* 437 S.W.2d 268 (Tex. Crim. App. 1969).) The general rule is that if an officer is one who is required to take the oath, his official actions are void if he fails to do so. In the leading case (*Enloe v. State,* 141 Tex. Crim. 605, 150 S.W.2d 1039 (1941)), the court of criminal appeals held a murder indictment void because it was returned by a grand jury impaneled by a special judge who had taken the wrong oath. The problem was only that the judge had taken the pre-1938 oath instead of the later version, and the person indicted had been fairly tried and convicted. But the court of criminal appeals held nevertheless that the slight difference between the old and new oaths was fatal:

> Heretofore the officer was required only to swear to perform the duties of the office agreeably to the Constitutions and laws, while now he must not only swear to faithfully perform the duties of the office, but, in addition, must swear and affirm his personal allegiance to his governments. The former oath related only to performance of the duties. The present oath, in addition, relates to a personal attitude and relation to his governments and their preservation.

(150 S.W.2d, at 1041.) The court of criminal appeals has taken this same strict view in at least two subsequent cases. (See *Garza v. State,* 157 Tex. Crim. 381, 249 S.W.2d 212 (1952) (murder conviction reversed because judge had taken old oath); *Brown v. State,* 156 Tex. Crim. 32, 238 S.W.2d 787 (1951) (liquor law conviction reversed for same reason).)

Despite these cases, the same court held that either the pre-1938 or post-1938 oath is sufficient to fulfill the requirement in Article VI of the federal constitution that all state officials pledge to support the Constitution of the United States. (*Van Hodge v. State,* 149 Tex. Crim. 64, 191 S.W.2d 24 (1945).)

Comparative Analysis

Almost every state has some constitutional provision dealing with the oath of office. About 41 other state constitutions prescribe the oath of office for legislators, and about 46 have similar provisions for certain other officers or officers in general. Most states that have a constitutional oath of office require the oath of virtually all officers, but about eight exempt certain "inferior" officers or permit them to be exempted by law.

About 35 states provide in their constitutions that legislators shall swear to

faithfully perform their duties; about 44 have a similar requirement for other officers. A pledge by legislators to support the constitution (and in some cases the laws) of the United States is required by the constitutions of about 35 other states, and about 39 require an oath to support the constitution of the state. About 42 other state constitutions require officers in general to promise to support the federal and state constitutions.

At least seven other states make some reference to bribery in the oaths required of legislators. About five require a pledge that no bribe was given to secure election, and about seven include a promise that the legislator will not accept a bribe. In three of these states legislators and other elected officials must also swear that they have not knowingly violated election laws. At least five states require officeholders in general to pledge that they have not bribed anyone to secure their offices. Two states that previously had bribery provisions in their oaths, Pennsylvania and Illinois, have omitted them from recent revisions and now require simply a pledge to support the federal and state constitutions and faithfully execute the duties of office.

The United States Constitution (Art. VI, Clause 3) requires that "the Members of the several State Legislatures, and all executive and judicial officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ." The *Model State Constitution* suggests an oath pledging support for the federal and state constitutions and promising to faithfully discharge the duties of office. (Sec. 1.07.)

Author's Comment

The bribery disclaimer in Section 1 is one of many sections in the Texas Constitution piously designed to ensure honesty in government. (See also Secs. 4 and 41 of Art. XVI; *Citizens' Guide,* p. 68.) Like most of the others, this section has little legal effect. As the supreme court has pointed out, this section is effective only "insofar as it appeals to the conscience of the candidate, and subjects him to the chances of an indictment for perjury . . . ." (*State v. Humphreys,* 74 Tex. 466, 470, 12 S.W. 99, 101 (1899).)

Aside from this minimal role in preventing corruption, the only function served by this section is to provide the language to be used in the oath of office. The purpose of such an oath presumably is to impress upon the officeholder the importance of the undertaking and his own subordination to the constitution and laws. Presumably the oath also is expected to lend dignity to swearing-in ceremonies. For that purpose the present oath seems somewhat inappropriate; its repetitive language about bribery and corruption tends to overwhelm the more positive portions of the oath and gives the occasion the tone of a public denial of guilt rather than an affirmative undertaking of public trust. The oath could be provided by statute; if it is to be retained in the constitution, it should be simplified, perhaps along the lines suggested by the *Model State Constitution.*

Sec. 2. EXCLUSIONS FROM OFFICE, JURY SERVICE AND RIGHT OF SERVICE; PROTECTION OF RIGHT OF SERVICE. Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who may have been or shall hereafter be convicted of bribery, perjury, forgery, or other high crimes. The privilege of free suffrage shall be protected by laws regulating elections and prohibiting under adequate penalties all undue influence therein from power, bribery, tumult or other improper practice.

History

This section comes, with minor changes in wording, from the Constitution of 1845 (Art. VII, Sec. 4) and was included in all the intervening constitutions.

(Constitutions of 1861 and 1866, Art. VII, Sec. 4; Constitution of 1869, Art. XII, Sec. 2.) Provisions of this type are very common in other state constitutions, and the adoption of this section does not seem to have generated any controversy, although Article VI, Section 1, was the subject of some debate during the 1875 Convention. (See *Debates,* pp. 258-62.)

Explanation

This provision has attracted less attention than the somewhat similar provisions in Sections 1, 2, and 4 of Article VI. (See also Art. XVI, Sec. 19, and Art. I, Sec. 15.) Statutes implementing this section include articles 1.05 and 5.01 of the Election Code, article 1002a of the Penal Code, and articles 2133 and 5968 of the civil statutes.

The courts have held that where the constitution prescribes qualifications for office, it is beyond the power of the legislature to change or add to those qualifications unless the constitution specifically authorizes the legislature to do so. (*Burroughs v. Lyles,* 142 Tex. 704, 181 S.W.2d 570 (1944).) The courts have said that provisions restricting the right to hold public office are to be strictly construed, *i.e.,* to restrict the right as little as possible. (*Hall v. Baum,* 452 S.W.2d 699 (Tex.), *appeal dismissed,* 397 U.S. 93 (1970). Disabilities resulting from felony conviction, including ineligibility to hold office, may be removed. (*Brackenridge v. State,* 11 S.W. 630 (Tex. Ct. App. 1889).)

Because of the disqualification of convicted felons from jury service, a conviction returned by a jury that included a convicted and unpardoned perjurer cannot stand. (*Rice v. State,* 52 Tex. Crim. 359, 107 S.W. 832 (1908).) A full pardon, however, removes the disqualification from jury service. (*Easterwood v. State,* 34 Tex. Crim. 400, 31 S.W. 294 (1895).)

Texas courts have stated that the right to vote is not inherent, that no one may vote unless the people have conferred on him the right to do so, and that the right of suffrage may be withdrawn or modified by the authority which conferred it. (*Koy v. Schneider,* 110 Tex. 369, 221 S.W. 880 (1920).) These statements probably are too broad in light of recent United States Supreme Court decisions. (See, *e.g., Dunn v. Blumstein,* 405 U.S. 330 (1972).)

A pardon or dismissal of the indictment restores a convicted felon's right to vote; where no such action has been taken, however, the disqualification remains. (*Aldridge v. Hamlin,* 184 S.W. 602 (Tex. Civ. App.—Amarillo 1916, *no writ*); Tex. Att'y Gen. Op. No. M-795 (1971).) The Supreme Court of California has held that its constitutional provision disfranchising persons convicted of crime, as applied to all ex-felons whose term of incarceration and parole had expired, violates the Equal Protection Clause of the Fourteenth Amendment. (*Ramirez v. Brown,* 9 Cal.3d 199, 507 P.2d 1345, 107 Cal. Rptr. 137 (1973).) Similar attacks in Texas, New York, and North Carolina have been unsuccessful. (*Hayes v. Williams,* 341 F. Supp. 182 (S.D. Tex. 1972); *Green v. Board of Elections,* 380 F.2d 445 (2d Cir. 1967), *cert. denied,* 389 U.S. 1048 (1968); *Fincher v. Scott,* 352 F. Supp. 117 (M.D.N.C. 1972), *aff'd,* 411 U.S. 961 (1973).)

Comparative Analysis

Some 38 other states have provisions for disqualification from office on conviction for felonies, high crimes, and/or certain state offenses.

Three other states besides Texas provide for disqualification from jury service on grounds similar to those of Section 2. Two states provide that jurors must be qualified electors, and in separate provisions identify certain crimes for which conviction is a disqualification.

The constitutions of 46 other states make some provision for disfranchisement of those convicted of crime.

Six states have provisions virtually identical with Section 2. Three states have similar sections relating to preservation of the process from corruption and disorder. Twenty-four constitutions contain statements that elections "shall" or "ought to be" free.

The *Model State Constitution* provides that the legislature may establish "disqualifications for voting for mental incompetency or conviction of felony." (Sec. 3.01.) There is no similar provision regarding qualifications for office or jury duty.

Author's Comment

The last sentence of Section 2 has little real effect, because it simply exhorts the legislature to pass laws protecting the sanctity of the ballot box. It is unnecessary as an authorization to vote because Section 2 of Article VI provides generally for the right of suffrage. The provision disqualifying felons from voting is unnecessary, because Section 1 of Article VI does that. There is no other constitutional prohibition against felons serving on juries, but Section 19 of Article XVI permits the legislature to establish the qualifications of jurors and Section 15 of Article I directs the legislature to pass laws to regulate jury trial and "maintain its purity and efficiency."

Section 2 is the only section that addresses the subject of disqualification of felons to hold public office. This too could be eliminated simply by providing elsewhere that only persons qualified to vote are eligible for public office; since felons are disqualified from voting under Section 1 of Article VI, they would also be ineligible for office.

Sec. 5. DISQUALIFICATION TO OFFICE BY GIVING OR OFFERING BRIBE. Every person shall be disqualified from holding any office of profit, or trust, in this State, who shall have been convicted of having given or offered a bribe to procure his election or appointment.

History

Section 5 is the descendent of similar provisions in the Constitutions of 1845, 1861, and 1866. The Constitution of 1869 contained a section which read: "It shall be the duty of the Legislature immediately to expel from the body any member who shall receive or offer a bribe, or suffer his vote influenced by promise of preferment or reward; and every person so offending, and so expelled, shall thereafter be disabled from holding any office of honor, trust, or profit in this State." (Art. III, Sec. 32.)

Explanation

This is one of four sections in Article XVI dealing with bribery of or by officeholders. Section 1 requires, as part of the oath of office, that an official swear that he did not commit bribery to secure his office. Section 2 states that laws "shall be made to exclude from office" anyone convicted of certain crimes, including bribery. Section 41 provides a detailed definition of bribery and specifies that an officeholder found guilty of bribery shall forfeit his office. There is an apparent conflict between Sections 2 and 5; Section 2 obviously envisions a statutory method for removing persons convicted of bribery while Section 5 appears to be self-executing. It has been suggested that Section 5 "would probably be considered as prevailing over the somewhat more general provisions of Section 2 . . . ." (Texas

Legislative Council, 3 *Constitutional Revision* (Austin, 1960), p. 225.) The same conflict may exist between Sections 2 and 41.

Under the terms of Section 5, a person must be convicted before he is disqualified. In *State v. Humphreys* (74 Tex. 466, 12 S.W. 99 (1889)), a quo warranto proceeding sought to oust the clerk of the county court who had offered during the election to serve for less than the lawful compensation of the office. The court said such a promise might constitute bribery of the voters but held that under Section 5 "he could not be deprived of the office until he had been convicted of the offense (of bribery) in a court of competent jurisdiction, and in a proceeding instituted and prosecuted according to the provisions of our Code of Criminal Procedure. . . . [O]ur constitution does not warrant the removal of the respondent from office for the act charged against him in a proceeding of this character, before a legal conviction of the offense." (74 Tex., at 468; 12 S.W., at 100.)

Section 5 applies to bribery committed by the officeholder but not to attempts by private citizens to bribe officials. Sections 2 and 41, however, appear to cover bribery or attempted bribery of an officeholder by a citizen.

Statutes proscribing bribery of officers are codified in Chapter 36 of the Penal Code (1974).

Comparative Analysis

About half of the states have constitutional provisions barring from office persons convicted of bribery. A few are more lenient than Section 5, either limiting the period of disqualification or barring the offender only from the office to which he was elected. Almost all of these provisions refer to "conviction" for bribery.

The *Model State Constitution* does not directly address the subject of bribery, but provides that "the legislature may by law establish . . . disqualifications for voting for . . . conviction of felony"; other sections require certain officials, such as legislators and the governor, to be qualified voters.

For provisions of other state constitutions comparable to Sections 2 and 41 of Article XVI, see the *Comparative Analysis* of those sections.

Author's Comment

Section 2 of Article XVI provides for a statutory scheme of removal from office for bribery, and Section 41 provides the detailed constitutional treatment of the subject. The major virtue of this section is (1) its simplicity and (2) the fact that it is self-executing. Neither of these would be lost by combining it with Sections 2 and 41, however, or, better still, providing for disqualification and removal in a comprehensive statute.

Sec. 6. APPROPRIATIONS FOR PRIVATE PURPOSES; STATE PARTICIPATION IN PROGRAMS FINANCED WITH PRIVATE OR FEDERAL FUNDS FOR REHABILITATION OF BLIND, CRIPPLED, PHYSICALLY OR MENTALLY HANDICAPPED PERSONS. (a) No appropriation for private or individual purposes shall be made, unless authorized by this Constitution. A regular statement, under oath, and an account of the receipts and expenditures of all public money shall be published annually, in such manner as shall be prescribed by law.

(b) State agencies charged with the responsibility of providing services to those who are blind, crippled, or otherwise physically or mentally handicapped may accept money from private or federal sources, designated by the private or federal source as money to be used in and establishing and equipping facilities for assisting those who are blind, crippled, or otherwise physically or mentally handicapped in becoming gainfully employed, in rehabilitating and restoring the handicapped, and in providing other services determined by the state agency to be essential for the better care and treatment

of the handicapped. Money accepted under this subsection is state money. State agencies may spend money accepted under this subsection, and no other money, for specific programs and projects to be conducted by local level or other private, nonsectarian associations, groups, and nonprofit organizations, in establishing and equipping facilities for assisting those who are blind, crippled, or otherwise physically or mentally handicapped in becoming gainfully employed, in rehabilitating and restoring the handicapped, and in providing other services determined by the state agency to be essential for the better care or treatment of the handicapped.

The state agencies may deposit money accepted under this subsection either in the state treasury or in other secure depositories. The money may not be expended for any purpose other than the purpose for which it was given. Notwithstanding any other provision of this Constitution, the state agencies may expend money accepted under this subsection without the necessity of an appropriation, unless the Legislature, by law, requires that the money be expended only on appropriation. The Legislature may prohibit state agencies from accepting money under this subsection or may regulate the amount of money accepted, the way the acceptance and expenditure of the money is administered, and the purposes for which the state agencies may expend the money. Money accepted under this subsection for a purpose prohibited by the Legislature shall be returned to the entity that gave the money.

This subsection does not prohibit state agencies authorized to render services to the handicapped from contracting with privately-owned or local facilities for necessary and essential services, subject to such conditions, standards, and procedures as may be prescribed by law.

History

Article VII, Section 8, of the Constitution of 1845 prohibited appropriations for private or individual purposes or for internal improvements without the concurrence of two-thirds of both houses of the legislature. The statement and account were also required, but not under oath. The Constitutions of 1861, 1866, and 1869 contain language identical with that of the 1845 section.

This section, as reported out by the Committee on General Provisions of the 1875 Convention, included the provisions now found in Article VIII, Section 6, together with the following:

> . . . and no appropriation for private or individual purposes shall be made without the concurrence of both houses of the Legislature. A regular statement, under oath, and on [*sic*] account of the receipts and expenditures of all public money shall be published annually, in such manner as shall be provided by law. (*Journal,* p. 554.)

On second reading this section was amended first by inserting after the word "concurrence" the words "of two thirds." Then the phrase "without the concurrence of both houses of the Legislature" was stricken. (*Journal,* p. 685.)

On third reading the sentences now found in Article VIII, Section 6, were deleted from this section. (*Journal,* p. 776.)

In 1966 this section was amended by adding the phrase "unless authorized by this Constitution" to the first sentence of Subsection (a) and by adding Subsection (b).

Explanation

Subsection (a) is more evidence of the intent of the 1875 Convention delegates to restrict the use of public funds, and it is often cited along with the many other restrictive fiscal provisions in litigation challenging government spending as not for a public purpose. (See the annotations of Art. III, Secs. 44, 50, 51, 52, 53; Art. VIII, Sec. 3; and Art. XI, Sec. 3.) In Ex parte *Smythe* (56 Tex. Crim. 375, 120 S.W. 200 (1909)), for example, the court held unconstitutional a law which authorized the proceeds of a fine imposed for nonsupport to be paid to the spouse or

children. Reasoning that a fine when paid became public money, the court concluded that payment over to the needy spouse or children violated this section because it was for "private or individual purposes." (See also *Terrell v. Middleton,* 187 S.W. 367 (Tex. Civ. App.—San Antonio 1916), *writ ref'd n.r.e. per curiam,* 108 Tex. 14, 191 S.W. 1138 (1917).)

As the annotations to the other fiscal restriction provisions point out, however, Texas courts and attorney general opinions over the years have broadened considerably the scope of the public-purpose doctrine, upholding in recent years uses of public funds that would have been struck down during the earlier period. These decisions are elaborated elsewhere, particularly in the *Explanation* of Section 51 of Article III.

Subsection (b) was added to comply with the requirements of the federal Vocational Rehabilitation Act of 1964. That act made federal funds available to match private contributions but required depositing the funds with the state's vocational rehabilitation agency. Since on deposit these federal and private funds would become state funds and would be spent for "private or individual purposes," constitutional authority was considered necessary as an exception to Subsection (a) and the related constitutional restrictions.

Comparative Analysis

Alaska's Constitution forbids appropriations except for public purposes. Mississippi requires a two-thirds vote of each house of the legislature to appropriate a donation or gratuity. Iowa, Michigan, Rhode Island, and New York require a two-thirds vote in each house to appropriate money for a local or private purpose. The *Model State Constitution* does not limit the object of public expenditures, requiring only that they be matters of public record. (Sec. 7.03(c).)

Author's Comment

Putting aside the question of whether the uses of public money and credit ought to be constitutionally limited to serving a public purpose, the chief vice of Section 6(a) is redundancy. The public-purpose limitation is repeated elsewhere, in various and repetitive forms throughout the constitution, and there is no need for it in Article XVI. (See the *Author's Comment* on Secs. 44 and 51 of Art. III.) Moreover, the exception embodied in Subsection (b), authorizing expenditure for vocational rehabilitation purposes, is no longer necessary, if it ever was, because health and welfare expenditures by government are clearly a public purpose.

The second sentence of Subsection (a) arguably is worth saving, especially if coupled with a public record requirement like the *Model State Constitution*'s Section 7.03(c), as a solemn statement of policy to be implemented by detailed statutory and administrative accounting procedures. If it is retained, it should be combined with a similar requirement in Article IV, Section 24, which applies only to the executive branch.

Sec. 8. COUNTY POOR HOUSE AND FARM. Each county in the State may provide, in such manner as may be prescribed by law, a Manual Labor Poor House and Farm, for taking care of, managing, employing and supplying the wants of its indigent and poor inhabitants.

History

The 1869 Constitution, in Article XII, Section 26, contained a similar provision which directed that each county "shall" provide a poor house. The 1869 section also included a provision, deleted from the 1876 version, that persons committing "petty

offenses" might be committed to the county poor house for "correction and employment."

The sharp increase in indigency following the Civil War, accompanied by recognition that private charity, which had been relied on previously, could no longer cope, was apparently the motivation for inclusion of the provision in the 1869 Constitution. (See 3 *Interpretive Commentary,* p. 71.)

Explanation

This section appears to have escaped notice almost completely. No case was found construing, or even citing, it. Relevant civil statutes include article 718, which gives the commissioners courts power to issue bonds for the establishment of "county poor houses, farms, and homes for the needy or indigent," and article 2351, directing the commissioners courts to "provide for the support of paupers . . . who are unable to support themselves."

Comparative Analysis

Seven other state constitutions provide for care of the poor by counties, and seven expressly confer this power on their legislatures. Five states have a provision to the effect that prohibitions against aid to private individuals do not preclude the care and maintenance of the sick and indigent. The recent Florida, Michigan, and North Carolina constitutions omit their predecessors' references to this matter altogether. The *Model State Constitution* is silent on the matter.

Author's Comment

This section is obviously outdated. The federal and state governments have taken over virtually all responsibility for the welfare of indigents. It may be desirable for the counties to have some power in this field, but it could be provided by statute.

Sec. 9. FORFEITURE OF RESIDENCE BY ABSENCE ON PUBLIC BUSINESS. Absence on business of the State, or of the United States, shall not forfeit a residence once obtained, so as to deprive any one of the right of suffrage, or of being elected or appointed to any office under the exceptions contained in this Constitution.

History

This section originated in the 1845 Constitution (Art. VII, Sec. 11) and has appeared without substantive change in all succeeding constitutions. (Constitution of 1861, Art. VII, Sec. 11 (substituted "Confederate States of America" for "United States"); Constitution of 1866, Art. VII, Sec. 11; and Constitution of 1869, Art. XII, Sec. 7.) The section supplements those dealing with residence requirements for suffrage (Art. VI, Secs. 2 and 2a) and officeholding (*e.g.,* Art. III, Secs. 6 and 7; Art. IV, Secs. 4 and 16; Art. VI, Secs. 2, 4, 6, 7.).

Explanation

Section 9 purports to deal with the problem of residence requirements for those who are called away from their homes on public business. As a court of civil appeals said, "To hold otherwise would be to deprive hundreds of voters who are employed by the state and federal government of an opportunity to vote at any election." (*Clark v. Stubbs,* 131 S.W.2d 663, 666 (Tex. Civ. App.—Austin 1939, *no writ*).) The same protection extends, however, regardless of constitutional statement, to those who are temporarily absent from their residence on private business, due to

illness, or, apparently, for virtually any reason, so long as the absence is in fact temporary and there is an intention to return. (*E.g., Atkinson v. Thomas,* 407 S.W.2d 234 (Tex. Civ. App.—Austin 1966, *no writ*); *Mills v. Bartlett,* 375 S.W.2d 940 (Tex. Civ. App.—Tyler), *aff'd,* 377 S.W.2d 636 (Tex. 1964).) However, the protection afforded public employees by this section is not so absolute as it sounds; a court may conclude, in light of all the circumstances, that a residence has been forfeited. In *Spraggins v. Smith,* 214 S.W.2d 815 (Tex. Civ. App.—Amarillo 1948, *no writ*), for example, the court held that a voter who had lived in Washington, D.C. for six years while working for the federal government, visiting Texas only occasionally, and who had not paid a poll tax between 1941 and 1947 (when someone paid it for her) was a resident of the District of Columbia and not entitled to vote in Texas.

Comparative Analysis

Approximately 26 other states have similar provisions stating that absence from one's residence for certain stated causes will not affect the right to vote or hold office.

In addition to the circumstances provided for in Section 9, other states frequently include absence due to military service; attendance at college; confinement in a poorhouse, asylum, or prison; navigation in state waters or on the high seas; and necessary private business.

Author's Comment

This provision is unnecessary. So long as the legislature has the power to prescribe requirements for voting and officeholding, the circumstances provided for in Section 9 can be handled by statute. The need for a provision such as this, at least concerning suffrage (and, by implication, officeholding, if all officers must be qualified electors), is further weakened by the United States Supreme Court's decision in *Dunn v. Blumstein,* 405 U.S. 330 (1972), which held lengthy residence requirements for voting unconstitutional. The court suggested that a 30-day residence requirement would be ample for the state to complete all necessary paperwork for voting.

The *Model State Constitution* contains a provision which would allow the legislature to "define residence for voting purposes, insure secrecy in voting and provide for the registration of voters, absentee voting, the administration of elections and the nomination of candidates." (Sec. 3.02.)

Sec. 10. DEDUCTIONS FROM SALARY FOR NEGLECT OF DUTY. The Legislature shall provide for deductions from the salaries of public officers who may neglect the performance of any duty that may be assigned them by law.

History

All previous constitutions of the state contained sections almost identical with Section 10; the earlier provisions stated that the legislature "shall have power" to provide for such deductions. At the 1875 Constitutional Convention, the Committee on General Provisions included this section in its proposed article, changing the language from a grant of power to the legislature to a command. (*Journal,* p. 555.) The section was adopted without change and apparently without debate.

Explanation

This section is not self-executing. A court of civil appeals has held that, absent

statutory authorization, salary deductions may not be made for neglect of duty. (*Miller v. James,* 366 S.W.2d 118 (Tex. Civ. App.—Austin 1963, *no writ*).) The attorney general has held that a college has no power to withhold a professor's salary unless the legislature has authorized it to do so. (Tex. Att'y Gen. Op. No. H-509 (1975).) The only implementing statute found is Tex. Rev. Civ. Stat. Ann. art. 6252—2, enacted in 1949, which authorizes judicial forfeiture of salary upon suit by a public prosecutor for an officer's failure to publish legal notices or financial statements. There is no annotation under the statute, so apparently no forfeiture suit has ever reached an appellate court in Texas.

Comparative Analysis

About five other states have similar provisions in their constitutions. One provides that the legislature may reduce salaries for neglect of duty. Four states declare that "it shall be the duty" of the legislature to describe the cases in which deductions shall be made. There is no similar provision in the *Model State Constitution.*

Author's Comment

The legislature needs no constitutional grant of power to forfeit salary because of a public servant's neglect of duty. There is probably no likelihood that the legislature will pass a rash of forfeiture statutes. Section 10 serves no purpose except to clutter the constitution.

Sec. 11. USURY; RATE OF INTEREST IN ABSENCE OF CONTRACT. The Legislature shall have authority to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest; provided, however, in the absence of legislation fixing maximum rates of interest all contracts for a greater rate of interest than ten per centum (10%) per annum shall be deemed usurious; provided, further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six per centum (6%) per annum. Should any regulatory agency, acting under the provisions of this Section, cancel or refuse to grant any permit under any law passed by the Legislature; then such applicant or holder shall have the right of appeal to the courts and granted a trial de novo as that term is used in appealing from the justice of peace court to the county court.

History

Usury has been condemned at least since biblical times. (*E.g.,* Deuteronomy 15:7-10.) Originally it was considered usurious to make any charge for the use of money. It was not until about the time of the Reformation that the term took on its present connotation of excessive interest. (See generally J. Noonan, *The Scholastic Analysis of Usury* (1957).)

The Texas Constitution of 1869 abolished all usury laws and forbade the legislature from passing new ones. (Art. XII, Sec. 44.) This probably was a response to the argument, advanced by many in the mid-19th century, that usury laws were an unnecessary interference with the principles of free enterprise. The experiment was short-lived, however; the Constitution of 1876 fixed the maximum interest rate at 12 percent, declaring all higher rates usurious, and fixed 8 percent as the legal rate when the parties did not agree on another figure. An 1891 amendment reduced these rates to 10 and 6 percent, respectively.

The section was completely rewritten in 1960 to permit the legislature to authorize rates higher than 10 percent. The 10 percent limit (and the 6 percent rate in the absence of contract) continue to be applicable when the legislature has not

provided some other figure.

The amendment was designed to legalize—and thus subject to regulation—the small loan industry that had long been charging rates higher than the 10 percent constitutional maximum. The amendment made possible passage in 1963 of the Texas Regulatory Loan Act and in 1967 of its successor, the Texas Consumer Credit Code. (Tex. Rev. Civ. Stat. Ann. art. 5069-1.01 *et seq.*)

Explanation

This section authorizes the legislature to fix maximum interest rates and retains a 10 percent maximum if the legislature does not. The legislature apparently takes the position that it may exercise some of the powers given to it by this section (*e.g.*, to classify loans and fix maximum interest rates for such loans) without exercising all of the other powers given (*e.g.*, to classify lenders, license and regulate lenders, and define interest). It has been argued that this interpretation of the section is correct. (See Loiseaux, "Some Usury Problems in Commercial Lending," 49 *Texas L. Rev.* 419, 438 (1971).)

Most of the litigation citing this section involves the definition of "interest." The legislature has narrowed the definition of usury considerably by providing that the term interest "shall not include any time price differential however denominated arising out of a credit sale." The courts have held that the difference between a "cash price" and a "credit price," no matter how large, is not interest under this definition. (*Hernandez v. United States Finance Co.*, 441 S.W.2d 859 (Tex. Civ. App.—Waco 1969, *writ dism'd*).) However, the courts have held that the term interest may include "points," origination charges, bonuses, premiums, closing fees, and unearned interest that becomes due under an acceleration clause. (See Loiseaux, *supra,* at 422-430.)

The courts also have limited the application of the usury prohibition by holding that the statutory penalties for usury apply only to intentional overcharges. A contract usurious on its face is presumed to be intentional. (*Walker v. Temple Trust Co.*, 134 Tex. 575, 80 S.W.2d 935 (1935)); but if the overcharge results from a bona fide error, the statute precludes a penalty. (Tex. Rev. Civ. Stat. Ann. art. 5069-1.02.) In fixing the amount of interest to be awarded on damages assessed in lawsuits, however, the courts seem to rely on the statutory "legal interest rate" rather than the constitutional provision. (See *Smelser v. Baker,* 88 Tex. 26, 29 S.W. 377 (1895).) Moreover, there is dictum in at least one case suggesting that the legislature is free to vary this rate from time to time. (*Ellis v. Barlow,* 26 S.W. 908, 909 (Tex. Civ. App. 1894, *no writ*).)

The last sentence of Section 11 is a "trial de novo" provision. Its effect is to dilute the power of administrative agencies set up to regulate interest rates. It gives a lender whose permit is denied or cancelled a right to have a court redetermine the issue. Generally, in the absence of a "trial de novo" requirement, courts will not reject the findings of administrative agencies if those findings are supported by substantial evidence. Under "trial de novo," the court disregards the decision of the agency and redetermines the issue itself.

Comparative Analysis

Although most states impose statutory limits on interest rates, only four besides Texas have a constitutional ceiling. Arkansas and Tennessee have a 10 percent maximum. California also has a 10 percent maximum, but exempts most major categories of lenders from it and permits the legislature to regulate interest rates charged by the exempted lenders. In 1968 Oklahoma adopted an amendment copying the 1960 Texas amendment without the "trial de novo" provision. About

half the states have provisions prohibiting the fixing of interest rates by local, private, or special law.

Author's Comment

Since the 1960 amendment, Texas has had no real constitutional limit on interest rates because the amendment permits the legislature to set limits for any class of loans or lenders. The only effect of the present limit is to provide a 10 percent ceiling on loans that the legislature has not regulated. This could be accomplished just as effectively by a statute stating that the maximum allowable interest is 10 percent unless otherwise provided.

Section 11 also establishes an interest rate of 6 percent when the parties have not agreed upon a rate, but as pointed out above, the courts seem to rely exclusively on the statutory "legal interest rate" rather than the constitutional provision. Since prevailing rates of interest are subject to change much more quickly than the constitution can possibly be amended, it would probably be wise to permit the legislature to fix the rate of interest to be paid in noncontractual transactions.

The major effect of Section 11 at present seems to be its requirement of trial de novo. Despite efforts to provide for trial de novo of agency decisions generally, the voters have refused to do so. (For example, a 1961 amendment proposition authorizing the legislature to provide for trial de novo of all administrative agency decisions was soundly defeated. See H.J.R. 32, 57th Legislature, 1961.) It is difficult to see why decisions of the Consumer Credit Commission and other agencies that may be authorized to regulate interest rates under this section should be subject to trial de novo while decisions of most other state agencies are not. In any event, the standard by which decisions of individual agencies are judicially reviewed is more appropriately a subject of statutory law than constitutional law.

Sec. 12. MEMBERS OF CONGRESS; OFFICERS OF UNITED STATES OR FOREIGN POWER; INELIGIBILITY TO HOLD OFFICE. No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State.

History

This provision has been included in every Texas constitution. In the Constitutions of 1845, 1861, and 1866 it was Article VII, Section 13; in the Constitution of 1869 it was Article XII, Section 9. The present Section 12 must be read together with Sections 33 and 40, which extend the prohibition against dual-officeholding to state officers and provide numerous exceptions.

Explanation

The Texas Constitution reflects a preoccupation with the problem of persons holding more than one public job. This is one of three sections dealing with the subject. Two other sections deal with the related subject of prohibiting certain public officials from running for the legislature. (See Secs. 19 and 20 of Art. III.)

Section 12 of Article XVI deals only with persons who hold offices of profit or trust with the federal government, a foreign government, or another state.

Section 40 of this article is not so limited. It prohibits (with many exceptions) a person from holding any two "civil offices of emolument," whether they are state, local, or federal. (Because of federal supremacy, the state could not prevent a person from holding two federal offices, but it can prevent a federal official from holding state or local office.)

Section 33 of Article XVI provides that no one who holds two offices in violation of Section 40 may receive compensation from the state treasury.

Originally, each of the three sections probably had a distinct purpose. Section 12 evidently was designed to exclude officials of "foreign" governments from government positions in Texas. Section 40 apparently was written with local officials in mind, since it excepted certain local officials such as justices of the peace and county commissioners. Section 33 originally prevented the state from paying persons who held two positions, even if the two positions were permissible under Sections 12 and 40. (See *Explanation* of Sec. 33.)

Now, however, partly because of amendments to all three sections, it is impossible to deal with any one of these sections without also considering the other two.

There are still some technical differences among the three sections. While the offices mentioned in Section 12 are undoubtedly "civil offices" as that term is used in Section 40, the offices covered by Section 12 need not be offices "of emolument"; Section 12 covers offices of *profit or trust.* (Apparently there have been no cases construing the Sec. 12 term "office of profit or trust.") Thus a state employee who holds a federal office "of trust" but receives no compensation for that office would not be violating Sec. 40 but might be in violation of Sec. 12.

Section 33 no longer applies in any situation that is not also covered by Section 40, but it still serves an enforcement function. Without it, a person could hold two offices in violation of Section 40, and could continue to be paid, until someone took action to have him removed from one of the jobs. Section 33 in effect makes the comptroller the enforcer of Section 40 by requiring him to make sure he does not pay anyone who is violating Section 40.

Despite these differences, in practice the three sections often have been lumped together. The 1926 amendment to Section 40, permitting state officials to hold National Guard or military reserve positions, probably should have amended Section 12, since the latter deals specifically with federal officeholding. The courts saved the draftsmen of the amendment from possible embarrassment, however, by holding that the amendment to Section 40 in effect also amended Section 12, so that a person permitted to hold two "civil offices of emolument" under Section 40 also was permitted to hold two "offices of profit or trust" under Section 12, although nothing in Section 12 said so. (*Carpenter v. Sheppard,* 135 Tex. 413, 145 S.W.2d 562 (1940), *cert. denied,* 312 U.S. 697 (1941).)

The 1926 and 1932 amendments adding new exemptions to Section 40 also added the exemptions to Section 33, probably on the assumption that the two sections were designed to work together. The 1972 amendment makes this assumption explicit by directly referring in Section 33 to Section 40.

Many of the decisions and attorney general's opinions interpreting Sections 12, 33, and 40 are obsolete because they deal with types of officials (especially retired military and reserve officers) who have since been excepted from the operation of these sections by the 1926, 1932, 1967, and 1972 amendments. Many of the questions that have arisen in interpreting these sections have never been decided by the courts. On these questions, the only sources of interpretations are opinions of the attorney general, which are not definitive. The lack of appellate litigation on these questions may be attributable in part to the fact that those affected by these provisions are often persons who are eligible to obtain an attorney general's opinion (which is free) and who, as public officials, feel bound to abide by the advice of the state's chief legal officer.

In addition to its more general prohibition against dual-officeholding, Section 12 also specifically prohibits holders of federal, foreign, or sister-state offices

from serving in the legislature. This ban differs only slightly from the one found in Section 19 of Article III.

Comparative Analysis

Two states provide that the legislature may declare what offices are incompatible. Eighteen states have provisions similar to Section 12 which forbid state officers from holding federal positions at the same time. Often exceptions are made, usually for service in the militia or national guard; for notaries public; or for postmasters (sometimes limited to those not earning over a specified amount). The *Model State Constitution* contains no provision on dual-officeholding.

Author's Comment

The differences among Sections 12, 33, and 40, described in the *Explanation* above, hardly seem significant enough to justify retaining all three sections. Section 40 covers virtually all of the offices covered by Section 12, except federal offices of trust but not profit, and if it is thought desirable to apply the ban to these offices, Section 40 can easily be reworded so to provide. The Section 40 exceptions apply to Section 12 (see *Carpenter v. Sheppard*). Section 33 now has no effect except as an enforcement provision for Section 40. (See the *Explanation* of Sec. 33.) Under these circumstances, there is no persuasive reason for retaining Sections 12 and 33. For a discussion of the desirability of retaining any dual-officeholding prohibition, see the *Author's Comment* on Section 40.

Sec. 14. CIVIL OFFICERS; RESIDENCE; LOCATION OF OFFICES. All civil officers shall reside within the State; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

History

This section, with the exception of the failure-to-comply clause, which was added in 1876, comes verbatim from the Constitution of 1845, Article VII, Section 9, and was included in all intervening constitutions. (Constitution of 1861, Art. VII, Sec. 9; Constitution of 1866, Art. VII, Sec. 9; Constitution of 1869, Art. XII, Sec. 12.)

Explanation

There are several other constitutional provisions dealing with residence of various officers and location of offices, including: Article III, Sections 6, 7, and 23; Article IV, Sections 4, 13, 16, 22, and 23; and Article V, Sections 2, 4, 6, and 7. The general requirements of Section 14 make most of these other provisions unnecessary.

The cases involving this section do little more than enforce the plain language of the provision. It has been held inapplicable to officers of local districts such as levee improvements and navigation districts (*Waton v. Brownsville Navigation Dist. of Cameron County,* 181 S.W.2d 967 (Tex. Civ. App.—San Antonio 1944, *writ ref'd*)) and to a special judge appointed by the governor when the regular judge disqualified himself (*Edwards v. State* ex. rel. *Lytton,* 406 S.W.2d 537 (Tex. Civ. App.—Corpus Christi 1966, *no writ*).) According to the attorney general, a county commissioner who moved from his precinct to an adjoining one in the same county did not thereby vacate his office. (Tex. Att'y Gen. Op. No. 0-6905 (1945).) And where there is more than one judicial district in a county, the court clerk may serve both districts so long

as he resides within the county. (*Kruegel v. Daniels,* 109 S.W. 1108 (Tex. Civ. App. 1908, *writ ref'd*).)

Comparative Analysis

Four states have provisions similar to Section 14. Three have provisions to the effect that executive officers shall reside and keep records at the seat of government. There is no comparable provision in the *Model State Constitution.*

Author's Comment

Either this section or the many others concerning residence requirements for officers and specifying location of offices—or all of them—should be deleted. If this section is retained, it would be helpful to include in it citizenship and length of residence requirements for officeholders. That would eliminate the need for many, if not all, of the specific references to these matters in several other sections. If such requirements vary so much from office to office that they cannot be standardized, they should be provided for separately, and this section should be eliminated.

Sec. 15. SEPARATE AND COMMUNITY PROPERTY OF HUSBAND AND WIFE. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of the wife; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband; provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.

. This Amendment is self-operative, but laws may be passed prescribing requirements as to the form and manner of execution of such instruments, and providing for their recordation, and for such other reasonable requirements not inconsistent herewith as the Legislature may from time to time consider proper with relation to the subject of this Amendment. Should the Legislature pass an Act dealing with the subject of this Amendment and prescribing requirements as to the form and manner of the execution of such instruments and providing for their recordation and other reasonable requirements not inconsistent herewith and anticipatory hereto, such Act shall not be invalid by reason of its anticipatory character and shall take effect just as though this Constitutional Amendment was in effect when the Act was passed.

History

A definition of separate property has appeared in every Texas Constitution. It has never been significantly changed. Texas inherited the community property system from Spain. When Texas was first settled, in 1821, it was Spanish territory. Spanish law, including community property law, was retained as the basic law when Texas came under the Mexican flag in 1824, and again when the Republic of Texas was established in 1836. (See de Funiak & Vaughn, *Principles of Community Property* (Tucson: University of Arizona Press, 1971), p. 72.) The first explicit decision to adhere to the community property system rather than the common-law property system came in 1840, when the Republic by statute adopted the common law of England as the general law of the Republic but retained the community property system with regard to land and slaves. (2 *Gammel's Laws,* pp. 177-80.) The constitution adopted when Texas joined the Union retained the community

property system with regard to "all property, both real and personal." (Art. V, Sec. 19 (1845).)

Everything in the present Section 15 except the definition (*i.e.*, everything from the word "provided" to the end) was added in 1948. The amendment was an attempt to overcome a decision holding that a husband and wife could not convert their community property to separate property by voluntarily partitioning it. (*King v. Bruce,* 145 Tex. 647, 201 S.W.2d 803 (1947).) As is pointed out in the *Explanation,* the amendment did not fully succeed in permitting spouses to alter the status of property by agreement.

Explanation

An excellent discussion of the origins, effects, and desirability of the present constitutional provision appears in Huie, "The Texas Constitutional Definition of the Wife's Separate Property," 35 *Texas L. Rev.* 1054 (1957).

The apparent purpose of this section, as indicated by its history, was to establish the community property system in Texas. The principal alternative marital property system is the common law system, which came to the United States from England. The common law system was based on the idea that upon marriage, the wife's legal identity merged with that of her husband, and therefore she could have no independent property rights. At common law, all personal property owned by the wife at marriage or acquired thereafter became the property of her husband. The wife's realty remained hers in theory, but the husband was entitled to manage it and keep all profits from it, and the land could not be sold by the wife without the husband's consent. The harshness of the common law system has been softened somewhat by the passage of the Married Women's Acts, which generally give the wife power to manage her own property. However, under the common law system, the wife still has no ownership interest in the husband's property until his death. (See 2 Pollock & Maitland, *History of English Law* (2d ed. 1898), pp. 403-08; Cribbet, *Principles of the Law of Property* (Brooklyn: Foundation Press, 1962), pp. 83-86).)

By contrast, under the community property system the spouses are treated as partners. As a general rule property acquired during marriage is community property, and one-half belongs to each spouse. Property acquired by either spouse before marriage or during marriage by gift, inheritance, or devise (a gift pursuant to a will) is the separate property of that spouse.

Although Section 15 is entitled "Separate and community property of husband and wife" (the title is unofficial and has no legal effect), the text does not establish a community property system. Indeed, it does not even mention community property. It only defines *separate* property, and only the wife's separate property at that. The 1840 statute went on to define community property, but no Texas constitution has done so. The courts have assumed that the section establishes a community property system in Texas and have deduced a definition of community property from what is not defined as separate property. (See *Arnold v. Leonard,* 114 Tex. 535, 273 S.W. 799 (1925).)

Whether the husband's separate property is defined the same way as the wife's has never been completely resolved. One decision suggested that since the husband's separate property is not constitutionally defined, the legislature is free to define it more broadly than the wife's. (*Stephens v. Stephens,* 292 S.W. 290 (Tex. Civ. App.—Amarillo 1927, *writ dism'd*).) Since 1929, the statutory definitions have been the same for both husband and wife, so the question has not arisen. (See Tex. Rev. Civ. Stat. Ann. arts. 4613 and 4614.) Any discrimination against either sex in the definition of separate property probably would violate the 1972 Texas "Equal

Rights Amendment" (Sec. 3-a of Art. I).

The portion of Section 15 that was added in 1948 attempts to permit spouses to convert community to separate property by agreement. It authorizes the legislature to regulate the method of executing and recording such agreements. The legislature has provided such regulations. (Tex. Rev. Civ. Stat. Ann. arts. 852a-6.09 (1964), 4624a.) Notwithstanding the 1948 amendment, however, the courts have severely restricted the circumstances under which community property by agreement can be converted to separate property. The supreme court has held that mutual fund shares are community property, if purchased with community funds, even though they are bought in the name of the husband and wife as "joint tenants with right of survivorship," and even though the parties clearly intend that form of ownership rather than community property. (*Hilley v. Hilley,* 161 Tex. 569, 342 S.W.2d 565 (1961).) After that decision, the legislature amended the Probate Code to provide specifically that "any husband and his wife may, by written agreement, create a joint estate out of their community property, with rights of survivorship." The supreme court held that statute unconstitutional, however, on the ground that Section 15 permits spouses to convert community assets to separate property only if they first comply with the partition statutes passed pursuant to the 1948 amendment. (*Williams v. McKnight,* 402 S.W.2d 505 (Tex. 1966).) The result is that married couples in Texas cannot convert their community property to another form of ownership, *e.g.,* joint tenancy, merely by agreeing to do so; rather they must first partition the community property by going through the procedures provided by statute. The parties then must go through another transaction to convert the property back into a form of joint ownership other than community.

Moreover, spouses are not permitted to make any kind of agreement changing the nature of community assets that may be acquired in the future, because the 1948 amendment permits agreements only with respect to "existing community property."

There is one possible exception to this general pattern of hostility toward agreements by spouses. Courts of civil appeals have held that spouses who are separated may enter into property settlements that have the effect of dividing the community property and making it separate. Such agreements are valid not only with respect to existing community property but also with respect to assets to be acquired in the future. (*Corrigan v. Goss,* 160 S.W. 652 (Tex. Civ. App.—El Paso 1913, *writ ref'd*); *Speckels v. Kneip,* 170 S.W.2d 255 (Tex. Civ. App.—El Paso 1942, *writ ref'd.*)) The supreme court has not considered this question, however, and since the rule adopted by these cases is contrary to the general trend, there is no certainty that it will be followed.

For nearly a century, the courts of Texas said Section 15 prohibited a wife from recovering from a negligent third party for her personal injuries if her husband's negligence contributed to the injuries. In 1883 the supreme court said such a recovery would be community property under Section 15, because it would be property acquired after marriage by means other than gift, devise, or descent. (*Ezell v. Dodson,* 60 Tex. 331 (1883).) From this the courts reasoned that since the wife's recovery would be community property, in which the husband would have a one-half interest, permitting the wife to recover would permit the husband to "profit from his own wrong." They therefore denied the wife any recovery. (*Texas Central Ry. Co. v. Burnett,* 61 Tex. 638 (1884).) The legislature attempted to change this rule in 1915 by statute declaring that all compensation received by a wife for personal injuries was her separate property. (Tex. Laws, 1915, ch. 54, 17 *Gammel's Laws,* p. 103.) A court of civil appeals held this statute unconstitutional under Section 15. (*Northern Texas Traction Co. v. Hill,* 297 S.W. 778 (Tex. Civ. App.—El Paso 1927, *writ ref'd.*) The court reasoned that the statute was invalid

because it attempted to add to Section 15's definition of separate property, and this line of reasoning survived until 1972 when the supreme court held that recovery for the wife's bodily injuries is her separate property. "Therefore, the contributory negligence by the husband does not bar the recovery by the wife." (*Graham v. Franco,* 488 S.W.2d 390, 397 (Tex. 1972).)

The new rule applies only to the wife's recovery for bodily injury, disfigurement, and pain and suffering. The court said recovery for the wife's loss of earnings and for medical expenses is still treated as community property, and therefore the husband's contributory negligence would still bar the wife from recovering for those losses. This apparently would be the rule even if Section 15 were repealed, because the court was relying not on the language of Section 15, but on general community property law principles.

Comparative Analysis

Seven other states (Arizona, California, Louisiana, Nevada, New Mexico, Oregon, and Washington) have the community property system. The other 42 have various modifications of the common law marital property system. Of the seven other community property states, only two, California and Nevada, provide for such a system in their constitutions. In the other five the system is implemented entirely by statute and by reference to the civil law principles that governed community property in Spain, Mexico, and France. (See de Funiak & Vaughn, pp. 59-87.)

The community property provision of the California Constitution of 1849 was identical with the Texas provision before the 1948 amendment. In the 1879 California Constitution, its community-property section was rewritten to read as follows:

> All property, real and personal, owned by either husband or wife before marriage, and that acquired by either of them afterwards by gift, devise or descent, shall be their separate property.

In 1970 the section was again rewritten: "Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property."

The Nevada constitutional provision is identical with the sections of the pre-1948 Texas Constitution and the 1849 California Constitution, from which it was copied.

No other state has any constitutional provision comparable to the portion of Section 15 that was added by the 1948 amendment attempting to permit spouses to partition by agreement. Despite this specific provision authorizing agreements, Texas is said to be the strictest of all the community property states in restricting spouses' power to hold their property by means other than community. (de Funiak & Vaughn, p. 331.) Texas is the only state that prohibits both prenuptial and postnuptial contracts between spouses to change the character of community property, and it has been said that this rule has produced "some of the most fatuous cases in Texas jurisprudence." (Vaughn, "The Policy of Community Property and Inter-spousal Transfers," 19 *Baylor L. Rev.* 20 (1967).)

Author's Comment

A possible disadvantage of the community property system is that it is foreign to the common law tradition upon which most of the law of the United States—including Texas—is based. This means that Texas marital property laws seem strange, if not incomprehensible, to spouses and lawyers in the 42 states that adhere to the common law marital property system. It also means that in interpreting

marital property laws, Texas courts must refer not only to the principles of the Anglo-American common law but also to the principles of Spanish, Mexican, and French law. It has been suggested that some of the confusion that has arisen in the application of community property law in Texas is caused by a judicial tendency to "mix apples and oranges"—*i.e.*, to apply Anglo-American common law rules to a system that has entirely different antecedents and therefore different rules. (See Vaughn, p. 67.)

On the other hand, commentators suggest that the community property system recognizes the equality of the spouses more effectively than the common law system and generally provides more generously for the wife upon the husband's death. (See Cribbet, cited earlier, p. 90.) Moreover, even critics of the community property system concede that it is a generally satisfactory system for states that are familiar with it peculiarities. (Powell, "Community Property–A Critique of its Regulation of Intra-Family Relations," 11 *Washington L. Rev.* 12 (1936).)

A community property system can be maintained without specific constitutional authorization. This is apparent from the fact that five of the eight community property states have never had any constitutional statement on the matter. It is also apparent from the fact that Texas has always had a community property system even though none of its constitutions expressly required one.

Texas would continue to have a community property system if Section 15 were deleted. Section 5.01 of the Family Code establishes a community property system and the succeeding sections spell out its details. The general principles of Spanish law supplement the statutes and provide additional details of the system. (See *Graham v. Franco,* 488 S.W.2d 390 (Tex. 1972).)

Professor Huie has pointed out that inclusion of a provision in the constitution offers little real assurance that a particular type of community property system will be maintained. For example, although the California provision until 1970 was virtually identical with that of Texas, the courts of the two states interpreted that provision in exactly opposite ways. As pointed out earlier, the Texas Supreme Court has held that revenue from the wife's separate property is community property, and that the constitution prohibits the legislature from providing otherwise. The California Supreme Court, interpreting exactly the same language, held that revenue from the wife's separate property is separate property, and that the legislature cannot change *that.* (*George v. Ransom,* 15 Cal. 322 (1860).) These diametrically opposed views still prevail in the two states, thus demolishing the argument that a constitutional provision assures retention of the traditional community property rules.

It might be argued that deletion of all of Section 15 would repeal the 1948 amendment authorizing partition while retaining a statutory community property system, and thereby return community property law in Texas to its pre-1948 condition. This argument is not persuasive for two reasons. First, the decision that led to the 1948 amendment relied on Section 15's definition of separate property and the fact that the courts had held that the legislature could not add to that definition. If all of Section 15 were deleted, the rationale of *King v. Bruce* would fall. Second, the supreme court now seems to have recognized that in the absence of contrary legislation, the community property system is governed by general principles of Spanish law. Under those principles, spouses were permitted to freely contract away the community structure, either before or after marriage. Deletion of Section 15 thus might well accomplish what the voters attempted to do through the 1948 amendment, and what the legislature attempted to do in the amendment to Section 46 of the Probate Code–namely, permit spouses to freely contract to hold their property by means other than community.

The Texas courts' reluctance to permit such agreements may be based on a fear

that such a policy would encourage frauds on spouses or creditors. The answer to that argument lies in the experience of the other seven community property states. They have taken steps to protect spouses by requiring a clear showing that the agreement was entered into willingly and knowingly. (See, *e.g.*, *Estate of Brimhall,* 62 Cal. App.2d 30, 143 P.2d 981 (1943).) They have given protection to creditors by such methods as providing that agreements between spouses cannot prejudice preexisting creditors and requiring recordation of agreements in order to give notice to subsequent creditors.

Section 15 does not readily lend itself to shortening by partial deletion. Removal of the definition portion makes retention of the rest of the section unnecessary. Retention of the definition without retaining the rest of the section would raise the possibility of restoring the law on partition agreements to its pre-1948 state.

If the portion of the section defining separate property is to be retained, it should be reworded to make it applicable to husbands as well as wives. The 1970 California amendment, quoted above, accomplishes this with commendable clarity and brevity.

None of these possible methods of revision, however, accomplishes what the section apparently is intended to do: require the legislature to retain the community property system in Texas. The legislature probably can be trusted to retain the system, without constitutional compulsion, as long as the system serves satisfactorily; if it ceases to do so, the legislature should be free to change it. Although the community property system may be intrinsically satisfactory, there is always the possibility that extrinsic events, such as federal legislation, might suddenly make it unsatisfactory, just as federal tax laws suddenly made the community property system attractive to several common law states in the late 1930s and early 1940s—and just as suddenly made it unattractive to those same states after the tax advantage was terminated in 1948.

If the intent is not to leave the choice of a marital property system to the legislature, Section 15 should be replaced with a new section clearly requiring continuation of the community property system. Such a provision might read: "Marital property is governed by community property law." A less forthright, and therefore perhaps less desirable, alternative would be: "The legislature by general law shall provide for a system of community property."

Sec. 16. CORPORATIONS WITH BANKING AND DISCOUNTING PRIVILEGES. The Legislature shall by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of State supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof.

No such corporate body shall be chartered until all of the authorized capital stock has been subscribed and paid for in full in cash. Such body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter.

No foreign corporation, other than the national banks of the United States, shall be permitted to exercise banking or discounting privileges in this State.

History

In the Constitutions of 1845, 1861, and 1866 this section read: "No corporate body shall hereafter be created, renewed or extended with banking or discounting privileges." (Art. VII, Sec. 30.) There was no similar provision in the Constitution of 1869, but the provision was restored in 1876. Commentators have attributed this to a depression, beginning in 1873 and lasting until 1880. "Unable to sell cotton or cattle for any price at the time of the constitutional conclave, Texans were not disposed to relax their typical distrust of financial organizations. As a result, the

that such a policy would encourage frauds on spouses or creditors. The answer to that argument lies in the experience of the other seven community property states. They have taken steps to protect spouses by requiring a clear showing that the agreement was entered into willingly and knowingly. (See, *e.g.*, *Estate of Brimhall,* 62 Cal. App.2d 30, 143 P.2d 981 (1943).) They have given protection to creditors by such methods as providing that agreements between spouses cannot prejudice preexisting creditors and requiring recordation of agreements in order to give notice to subsequent creditors.

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constitution prohibited the incorporation of banks by the state." (Thomas and Thomas, *The Texas Constitution of 1876,* 35 *Texas L. Rev.* 907, 911 (1957).)

The Constitution of 1876 did not prohibit all state banks; it only prohibited banking corporations. This permitted the operation of private banks and state-chartered noncorporate banks. Also, under the historic United States Supreme Court decision in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), a state could not prohibit or tax the operation of national banks, so the section could not prevent corporations from doing banking business in Texas under federal charters. By the turn of the century, the number of national banks in Texas was reported to have reached 440. (See 3 *Interpretive Commentary,* p. 172.) This led to the decision in 1904 to permit incorporation of state banks in Texas under a comprehensive state regulatory system. The 1904 amendment was identical to the language of present Section 16, except that it contained an additional paragraph making bank shareholders liable for the bank's debts up to the par value of their shares. The legislature provided the first comprehensive state bank regulatory system in 1905. (Tex. Laws 1905, ch. 10, *Gammel's Laws* p. 489.) The paragraph imposing liability on bank stockholders was removed from Section 16 in 1937, apparently because the creation of the Federal Deposit Insurance Corporation by the federal government in 1933 enabled bank stockholders to persuade the voters that it was no longer necessary.

Explanation

This section contains four distinct provisions. The first permits state-chartered banks to operate in Texas and directs the legislature to regulate them. The legislature has complied by enacting the Texas Banking Code of 1943 (Tex. Rev. Civ. Stat. Ann. arts. 342-101 *et seq.*). This system of regulation is administered by a nine-member finance commission appointed by the governor, a banking commissioner chosen by the Finance Commission, and a state banking board composed of the banking commissioner, the state treasurer, and a citizen appointed by the governor. (Tex. Rev. Civ. Stat. Ann. arts. 342-103, 342-115, 342-201.)

The second provision prohibits the granting of a state bank charter until all authorized capital stock has been sold. This has been supplemented by statutes prescribing additional procedures and requirements for chartering a new bank. (Tex. Rev. Civ. Stat. Ann. arts. 342-301, 342-305.) Where the capital stock of a bank has not been fully paid up as required by Section 16, the courts treat the bank as if it had never been legally incorporated. (See, *e.g., Shaw v. Kopecky,* 27 S.W.2d 275 (Tex. Civ. App.–Galveston 1930, *writ ref'd*).)

The third provision prohibits branch banking in Texas. This ban applies to national banks as well as state banks, and the United States Supreme Court has held that the states have power to enforce such a prohibition against national banks. (*First Nat'l Bank v. Missouri,* 263 U.S. 640 (1924).) But when federal law permits national banks to open facilities on military installations in Texas, a state cannot place limitations on these facilities under prohibitions on branch banking. (*Texas* ex. rel. *Faulkner v. National Bank of Commerce,* 290 F.2d 229 (5th Cir.), *cert. denied,* 368 U.S. 832 (1961).) Such a facility on a military base is not a branch bank, but an arm of the federal government. (*United States v. Papworth,* 156 F. Supp. 842 (N.D. Tex.), *aff'd,* 256 F.2d 125 (5th Cir. 1957), *cert. denied,* 358 U.S. 854 (1958).) A drive-in teller window across the street from the main banking building and connected by a tunnel and pneumatic tubes is not a branch bank. (*Great Plains Life Ins. Co. v. First Nat'l Bank,* 316 S.W.2d 98 (Tex. Civ. App.–Amarillo 1958, *writ ref'd n.r.e.*).)

The attorney general has ruled that use of automated machines to dispense cash

on the premises of a bank would not violate Section 16. (Tex. Att'y Gen. Op. No. M-915 (1971).) Another attorney general's opinion held that a check-cashing service operated by a retail store for participating banks did not violate the branch banking prohibition. (Tex. Att'y Gen. Op. No. H-277 (1974).)

Notwithstanding Section 16, there is much interconnection between Texas banks. In *Bank of North America v. State Banking Bd.*, 468 S.W.2d 529 (Tex. Civ. App.—Austin 1971, *no writ*), an injunction was sought to prevent issuance of a new state bank charter in Houston. Plaintiffs alleged that the new bank was in reality a branch of a much larger bank. Almost half of the shares in the new bank were subscribed by the larger bank's law firm and its officers and employees; an officer of the larger bank was to be president of the new bank; a member of the law firm who was a director of the larger bank was active in soliciting subscribers for the new bank; some of the larger bank's officers assisted in collecting economic data for the new bank's charter application; and the larger bank was expected to be the main correspondent of the new bank. Nevertheless, the court found no violation of Section 16. Relying primarily on a 1952 study by the attorney general, the court said:

> Section 16, more than just prohibiting a single banking corporation from directly engaging in business at more than one place, was intended to effectuate a State policy requiring that each banking corporation operate as an independent unit. Section 16 was construed (by the attorney general) to prohibit one bank from organizing separate banks and then dominating and controlling them to the extent of indirectly engaging in the banking business through the ostensibly independent banks. (468 S.W.2d, at 531.)

But the court said the main issue in determining whether such domination exists is "whether the stockholders in one bank (own) a majority or a controlling amount of stock in another bank." (*Id.*, at 532.) Finding no evidence of this, the court denied the injunction. The attorney general subsequently ruled that even where a bank holding company owns the majority of the stock in several banks, there is no violation of the branch banking prohibition. (Tex. Att'y Gen. Op. No. H-606 (1975).)

A number of reasons have been offered to explain the distrust of branch banking, especially in the late 19th century, which was not limited to Texas. These include: difficulties in communication and supervision, concern for stability and the possibility of cumulative failure, competency of management, desire to control the influence of "big money," and fear of monopoly. (See Comment, "Branch Banking in Colorado," 48 *Denver Law Journal* 575 (1972).)

Comparative Analysis

At least ten other states flatly prohibit branch banking. (*Id.*, at 576, n. 7.) An earlier article puts the number at 15. (Gup, "A Review of State Laws on Branch Banking," 88 *Banking Law Journal* 675 (1971).) It appears, however, that Texas is the only state that has made this prohibition constitutional. The *Model State Constitution* does not mention banking.

Author's Comment

In part because of the prohibition against branch banking, Texas has more banks than any other state. (See Skillern, "Closing and Liquidation of Banks in Texas," 26 *Sw. L. J.* 830 (1972).) Prohibitions against branch banking have been attacked as unsound, and commentators have asserted that "branching means a more competitive market structure and improved bank performance." (See, *e.g.*, Horwitz and Khull, "Branch Banking, Independent Banks and Geographic Price Discrimina-

tion," 14 *Antitrust Bulletin* 827 (1969).) These critics recognize the danger that branch banking may lead to geographic price discrimination but they propose legislation requiring "price" uniformity by branch banks at all offices as a possible solution. James Saxon, the former comptroller of the currency, asserted that restrictive branch banking laws "show little regard for the public interest [and] are designed to protect the selfish interests of the less energetic or competent segments of the industry which cannot abide the prospect of competition. It is unfortunate that such laws do not meet the economic needs of the people and of the industries, but serve instead the determined opposition of parochial interest." (*100th Annual Report of Comptroller of the Currency* (Washington, D.C.: Government Printing Office, 1962), pp. 147, 150, quoted in *Denver Law Journal,* p. 583 (1972).)

Professor Leon Lebowitz has suggested that the decision in *Bank of North America v. State Banking Board* ignores the reality of interconnection among Texas banks through such devices as the correspondent banking system, chain banking, and one-bank and multibank holding companies. He concludes that the growth of holding companies and recent bank scandals may "prove that [*Bank of North America*] marked the end of the lull before the storm, both legislatively and judicially." (Lebowitz, "Annual Survey of Texas Law: Corporations," 26 *Sw. L. J.* 876, 150-52 (1972).)

Whatever the merits of branch banking, the fact that no other state constitution prohibits branch banking seems to indicate that the decision can be left to the legislature.

Sec. 17. OFFICERS TO SERVE UNTIL SUCCESSORS QUALIFIED. All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.

History

The Constitution of 1845 contained a section stating: "The Legislature shall provide in what cases officers shall continue to perform the duties of their offices, until their successors shall be duly qualified." (Art. VII, Sec. 23.) This provision was retained unchanged in the next three constitutions. The section was adopted in its present form in 1876, removing the matter from the legislature's discretion and making the requirement mandatory for "all officers within this State."

Explanation

A court of civil appeals said the purpose of Section 17 is "to prevent a break in the public service and to insure continuity by requiring all officers, after their respective terms of office had expired, to 'continue to perform the duties of their offices until their successors shall be duly qualified.' " (*Underwood v. Childress I.S.D.,* 149 S.W. 773, 774 (Tex. Civ. App.—Amarillo 1912, *writ dism'd*).) The section is self-executing and mandatory. (*Plains Common Consol. School Dist. v. Hayhurst,* 122 S.W.2d 322 (Tex. Civ. App.–Amarillo 1938, *no writ*).)

Even if an officer resigns and his resignation is accepted, under this section the law operates to continue him in office, for an officer cannot arbitrarily divest himself of the obligation to perform his duties until his successor qualifies. (*Keen v. Featherton,* 69 S.W. 983 (Tex. Civ. App. 1902, *writ ref'd*).) However, "an officer may divest himself of an office before his successor has qualified by himself qualifying for and entering upon the duties of another office which he cannot lawfully hold at the same time." (Tex. Att'y Gen. Op. No. M-627 (1970).) Thus, when an official loses his office under one of the prohibitions against dual officeholding (*e.g.,* Secs. 12 and 40 of Art. XVI), his duties terminate immediately,

without awaiting the qualification of a successor. The same is true of a judge removed from office under Section 1-a of Article V. Section 17 does not apply to nonelected officers of municipal corporations. (*Stubbs v. City of Galveston,* 3 White & W. 143 (Tex. Ct. App. 1883).)

Section 17 does prevail, however, over a constitutional provision (*e.g.*, Sec. 28 of Art. V), stating that one appointed to fill a vacancy serves only until the next general election; if no successor has qualified by that time, the appointee still continues to serve. (Ex parte *Sanders,* 147 Tex. 248, 215 S.W.2d 325 (1948).)

Comparative Analysis

Seventeen states have provisions similar to Section 17. A few states except legislators from these provisions. The *Model State Constitution* contains nothing comparable.

Author's Comment

This provision is useful, but it should be incorporated into a single general provision on terms of office.

Sec. 18. EXISTING RIGHTS OF PROPERTY AND OF ACTION; RIGHTS OR ACTIONS NOT REVIVED. The rights of property and of action, which have been acquired under the Constitution and laws of the Republic and State, shall not be divested; nor shall any rights or actions which have been divested, barred or declared null and void by the Constitution of the Republic and State, be re-invested, renewed, or re-instated by this Constitution; but the same shall remain precisely in the situation which they were before the adoption of this Constitution, unless otherwise herein provided; and provided further, that no cause of action heretofore barred shall be revived.

History

This section is substantially the same as Article VII, Section 20, of the Constitutions of 1845, 1861 and 1866.

At the Constitutional Convention of 1866, this provision took on a new significance because of the question of the validity of actions taken during secession. "The chief point at issue was whether the secession ordinance was null and void from the beginning, or became null and void as a result of the war. The first view was based upon the principle that there never was such a thing as a 'right of secession'; the second view implied that the right of secession had been at least an open legal question until the war had settled it." (C. Ramsdell, *Reconstruction in Texas* (Austin: University of Texas Press, 1970), p. 94.) The former view was known as the *ab initio* position, and it was advocated primarily by the Radicals. The 1866 Convention adopted an ordinance declaring the secession ordinance and all "ordinances, resolutions, . . . proceedings . . . (and) amendments" of the 1861 Convention null and void without settling the question of their validity during secession. (*Reconstruction in Texas,* p. 96.)

Debate over this point continued during the following years and into the Convention of 1869. The Radicals split among themselves on the issue, some contending that all laws not in violation of the federal laws or constitution, nor annulled by the military commander, remained in force, though provisional in character. Other Radicals, however, insisted that the Reconstruction Acts had rendered all acts of the state government since the date of secession null and void from their inception. The question was bitterly fought in the 1869 Convention; at

one point, a large number of *ab initio* delegates withdrew from the convention and conducted a convention of their own. The section finally adopted by the convention (Constitution of 1869, Art. XII, Sec. 33) embodied the theory advanced by the Radicals but reached the result sought by the moderates. It declared the ordinance of secession and all laws founded thereon null and void from the beginning, and stated that the legislature sitting during the Civil War and until August 6, 1866 had no consitutional authority to make binding laws. However, laws passed during this time which had been in actual force and which neither violated the constitution and laws of the United States nor aided rebellion or prejudiced loyal United States citizens were to be respected and enforced. In addition, "private rights which may have grown up under such rules and regulations" were not to be prejudicially affected. The legislature which met in August 1866 was declared to be provisional only, and its acts were to be respected only if not in violation of the federal laws and constitution, not intended to reward participants in the rebellion, and not discriminatory.

Explanation

This section serves as a saving clause to avoid uncertainty over the status of prior constitutions and laws. One of the purposes it serves is to prevent a new constitution from operating retroactively; the new constitution may affect the rights of persons to enter into contracts, acquire property, or acquire causes of action after its effective date, but it cannot alter rights that existed before that date. For example, a forced sale of property in 1877 was valid, even though the property was part of a homestead exempted from forced sale by the 1876 Constitution, because the property was not exempt prior to 1876, and the judgment ordering the sale had been entered before the new constitution took effect. (*Wright v. Straub,* 64 Tex. 64 (1885).)

Section 18 preserves only "rights of property" and "rights of action"; comparable provisions in other states usually also protect contract rights. The latter probably are preserved in Texas under the "rights of action" clause; the courts could hold that a contractual right acquired under a previous constitution could not be taken away by the new one, because to do so would deprive the contractor of a right of action. The question apparently has not arisen.

Comparative Analysis

Most state constitutions include schedules with saving provisions. Approximately 15 append the schedule at or near the end of the constitution without giving it an article or section number. Usually, however, it is contained in the body of the document and "must be regarded, therefore, as an integral part of the constitution." (R. Dishman, *State Constitutions: The Shape of the Document* (New York: National Municipal League, rev. ed. 1968), p. 39.) The *Model State Constitution* contains several schedule provisions; the one most closely resembling Section 18 is Section 13.02.

Author's Comment

This is one of several schedule or transitional provisions scattered throughout the Texas Constitution. (See, for example, Sec. 14 of Art. V and Secs. 48 and 53 of Art. XVI.) For a discussion of transition problems, see the annotation of Section 48.

It is undoubtedly desirable to retain some provision similar to this section, but it should be combined with other transitional provisions, such as those providing

for the continuation of pending lawsuits, the continuation of present officeholders, and the validity of existing statutes.

Sec. 19. QUALIFICATIONS OF JURORS. The Legislature shall prescribe by law the qualifications of grand and petit jurors; provided that neither the right nor the duty to serve on grand and petit juries shall be denied or abridged by reason of sex. Whenever in the Constitution the term "men" is used in reference to grand or petit juries, such term shall include persons of the female as well as the male sex.

History

The subject of qualifications of jurors made its first appearance in the Constitution of 1869, which stated that "all qualified voters of each county shall also be qualified jurors of such county." (Art. III, Sec. 45.)

The 1876 version of this section provided simply that "The Legislature shall prescribe by law the qualifications of grand and petit jurors." However, since the sections prescribing the number of jurors all used (and still use) the word "men," all women were in fact disqualified from jury service because of their sex. (See the *Explanation* of Secs. 13, 17, and 29 of Art. V.) Despite the adoption of the state and federal women's suffrage amendments, the Texas courts held as late as 1938 that the state could exclude women from juries and in fact was required by the state constitution to do so. (*Glover v. Cobb,* 123 S.W.2d 794 (Tex. Civ. App.—Dallas 1938, *writ ref'd*); see also *Stroud v. State,* 90 Tex. Crim. 286, 235 S.W. 214 (1921).) Thus it was not until the amendment of this section in 1954 that women were allowed to serve on juries in Texas.

Explanation

Section 19 expressly gives women the duty, as well as the right, to serve on juries. (See *Rogers v. State,* 163 Tex. Crim. 260, 289 S.W.2d 923 (1956).) The legislature, however, has provided that women with children under the age of ten may claim an exemption from jury service. Such women are not ineligible, however, and may waive the exemption if they wish to serve. (Tex. Rev. Civ. Stat. Ann. arts. 2135, 2137.)

By the terms of this section, the qualifications of jurors are statutory, not constitutional. The statute fixes the minimum age for a juror at 21 (Tex. Rev. Civ. Stat. Ann. art. 2133), and the court of criminal appeals held that this minimum was still valid even after the Twenty-sixth Amendment to the federal constitution lowered the voting age to 18, because qualifications of voters are not necessarily the same as those of jurors. (*Shelby v. State,* 479 S.W.2d 31 (Tex. Crim. App. 1972).)

Apparently, however, the minimum age for a juror is now 18. A 1973 statute provides that all persons 18 or older have the same rights, privileges, and obligations as those 21 and over. (Tex. Rev. Civ. Stat. art. 5923b.) Since jury duty is an "obligation," and since qualifications of jurors are statutory rather than constitutional, the statute apparently has the effect of lowering the minimum age of jurors.

The United States Supreme Court recently held that a state may not systematically exclude women from jury service, nor automatically exempt women solely on the basis of their sex, if the result of such a system is virtually all-male juries. (*Taylor v. Louisiana,* 419 U.S. 522 (1975).) The court said, however, that the states are still free to grant exceptions on the basis of hardship, so the Texas practice of offering exemptions to mothers of children under age ten presumably is still valid. The decision probably does not make Section 19 superfluous, because the latter

prohibits any denial or abridgement of women's right to serve on juries, while the federal constitution as interpreted in *Taylor v. Louisiana* only prohibits discrimination that effectively excludes virtually all women from juries.

Comparative Analysis

Women are now permitted to serve on juries in all 50 states. (Council of State Governments, *The Book of the States* (Chicago, 1972-1973), p. 406.) In about half of the states, however, women do not have a duty to serve on juries; they may decline to serve because they are women; as indicated in the *Explanation* above, in some states their names are not placed on jury lists unless they volunteer. (Rudolph, "Women on the Jury—Voluntary or Compulsory," in Glenn R. Winters, ed., *Selected Readings: The Jury,* (Chicago: American Judicature Society, 1971), p. 98.) A list (somewhat out-of-date) of all state statutes dealing with jury service by women can be found in *Hoyt v. Florida* (368 U.S. 57, at 62-63, n. 6. (1961)). Obviously, the 1975 *Taylor* case will change this "volunteer" status in many states.

Author's Comment

The antidiscrimination provision of this section may be unnecessary since the adoption in 1972 of Section 3a of Article I, providing that "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." The language of Section 19, however, is far more specific and precludes any argument that exclusion of women from juries is not a denial or abridgement of equality. The section probably should be relocated in Article I, the Bill of Rights, however.

Since this section gives women the duty, as well as the right, to serve on juries, it arguably precludes the kind of devices described above that do not exclude women from juries but permit them to escape jury duty more easily than men. The present statutory exemption, however, is based at least in part on parenthood, rather than sex, and therefore might be valid even if Section 19 were held to prohibit the exemption of women from jury service because of their sex.

The second sentence of the section is ineffective. The only way to eliminate the verbal discrimination of Sections 13, 17, and 29 of Article V is to amend those sections to replace the word "men" with "individuals." The sentence is not necessary to prevent the actual discrimination anyway, however, because that is accomplished by the first sentence.

Sec. 20. MIXED ALCOHOLIC BEVERAGES; INTOXICATING LIQUORS; REGULATION; LOCAL OPTION. (a) The Legislature shall have the power to enact a Mixed Beverage Law regulating the sale of mixed alcoholic beverages on a local option election basis. The Legislature shall also have the power to regulate the manufacture, sale, possession and transportation of intoxicating liquors, including the power to establish a State Monopoly on the sale of distilled liquors.

Should the Legislature enact any enabling laws in anticipation of this amendment, no such law shall be void by reason of its anticipatory nature.

(b) The Legislature shall enact a law or laws whereby the qualified voters of any county, justice's precinct or incorporated town or city, may, by a majority vote of those voting, determine from time to time whether the sale of intoxicating liquors for beverage purposes shall be prohibited or legalized within the prescribed limits; and such laws shall contain provisions for voting on the sale of intoxicating liquors of various types and various alcoholic content.

(c) In all counties, justice's precincts or incorporated towns or cities wherein the sale of intoxicating liquors had been prohibited by local option elections held under the

laws of the State of Texas and in force at the time of the taking effect of Section 20, Article XVI of the Constitution of Texas, it shall continue to be unlawful to manufacture, sell, barter or exchange in any such county, justice's precinct or incorporated town or city, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication or any other intoxicants whatsoever, for beverage purposes, unless and until a majority of the qualified voters in such county or political subdivision thereof voting in an election held for such purpose shall determine such to be lawful; provided that this subsection shall not prohibit the sale of alcoholic beverages containing not more than 3.2 per cent alcohol by weight in cities, counties or political subdivisions thereof in which the qualified voters have voted to legalize such sale under the provisions of Chapter 116, Acts of the Regular Session of the 43rd Legislature.

History

Liquor by the drink was first regulated in Texas by an 1854 local-option statute prohibiting the sale of liquor in quantities of less than a quart unless authorized by the voters of the county. (Texas Laws 1854, ch. 88, 3 *Gammel's Laws,* 1560; see Comment, "The 'Open Saloon' Prohibition," 46 *Texas L. Rev.* 967 (1968).) Two years later the law was declared unconstitutional in *State v. Swisher,* 17 Tex. 441 (1856), on the ground that the constitution did not permit submission of legislation to the voters for ratification. The act had been repealed, however, prior to the court's decision, and the court admitted that it therefore had not given the question "elaborate investigation." (*Id.,* at 447.)

The Constitution of 1869 allowed the legislature to prohibit sale of alcoholic beverages near colleges and "seminar(ies) of learning" located elsewhere than in a county seat or the state capital. (Art. XII, Sec. 48.) The record discloses no reason for this exception; perhaps the delegates felt that the need to protect students was outweighed by some special need for libation in seats of government.

In the 1876 Constitution, Section 20 of Article XVI directed the legislature to enact a law providing for local option on the question of liquor sales by the voters of any "county, justice's precinct, town, or city" but made no reference to liquor by the drink.

The temperance movement already was gaining support, however, and in 1887 an amendment to Section 20 was proposed that would have produced statewide prohibition. The ensuing campaign attracted national interest. "The ablest orators of the state spoke to crowds of many thousands of voters, rallies were staged in all parts of the state, large campaign funds were collected and expended by both sides, torch light parades were featured, extravagant predictions of victory were made by both sides, and the voters were kept excited for many week prior to election day." (*Seven Decades,* pp. 189-90.) When the votes were in, the amendment had failed by a majority of almost two to one. (*Id.,* at 191.)

The temperance forces continued their campaign and in 1911 another statewide prohibition amendment was submitted to the electorate. This election, like the one in 1887, aroused public interest to a degree that is unusual in elections on constitutional amendments. Unlike the 1887 election, however, the vote in 1911 was very close. It was, and for at least 30 years thereafter remained, "the closest amendment contest in Texas political history which involved a representative vote of the people." (*Id.,* at 192.) The antiprohibitionists charged that prohibition would "increase taxes, would harm the schools, and would be detrimental to the principles of government." Proponents of the amendment asserted (in addition to the usual temperance arguments) that the "open saloons 'seek to control the politics and governments of the state, and all other important interests, including schools;' . . . and that the saloons constituted the main cause of . . . 'outlawing.' "

(*Id.,* at 193.) Out of almost 470,000 votes case, the amendment failed by about 6,300 votes.

In 1919, the prohibitionists finally won. After Texas had ratified the Eighteenth Amendment to the United States Constitution, the legislature enacted a statewide prohibition law. The voters subsequently approved a constitutional amendment that repealed the local-option provision to comply with the national prohibition. (See Comment, "The 'Open Saloon' Prohibition," 46 *Texas L. Rev.* 467 (1968).)

By the 1930s, disillusionment with prohibition was apparent. In 1933, Section 20 of Article XVI was again amended, this time to allow the sale, on a local-option basis, of beer and wine with an alcohol content of not more than 3.2 percent. After the repeal of federal prohibition, another amendment was passed, in 1935, which repealed statewide prohibition, prohibited the "open saloon," and provided for local-option regulation of the sale of alcoholic beverages. This amendment endured until the legalization of liquor by the drink in 1970. The 1935 amendment also authorized the legislature "to establish a State Monopoly on the sale of distilled liquors," but this was never done. Another amendment, submitted to the voters the same year, would have established (without legislative action) a state monopoly over the purchase and sale of all alcoholic beverages; the proposal also prohibited on-premises consumption and retained the local option. This proposed amendment was defeated at the polls.

By the 1960s, it was clear that the "open saloon" prohibition did not in fact prevent the sale of liquor by the drink. Perhaps the most widespread method of circumventing the law was the private club, often "private" for liquor law purposes only. In holding that a so-called private club in Houston could not qualify as a private club for purposes of the Civil Rights Act, a federal district judge said, "This Court is familiar with the hypocrisy of Texas liquor laws, and knows that often what are termed 'private clubs' under these laws are nothing more than commercial ventures. Texans are forbidden by their state constitution to operate 'open saloons.' Thus, so-called 'private clubs' have been established to dispense liquor-by-the-drink to Texans." (*Wright v. Cork Club,* 315 F. Supp. 1143, 1153 (S.D. Tex. 1970).)

The liquor-by-the-drink issue arose again in 1967 when Governor John Connally proposed a statute allowing sale of liquor in "minibottles." This plan was defeated by the legislature. (See 7 *Proposed Constitutional Amendments Analyzed* (Austin: Texas Legislative Council, 1970), p. 13.) Just before the vote on the Connally proposal, the mixed-beverage question was submitted to the voters in a statewide nonbinding referendum. The results showed a 40,000-vote margin in favor of liquor by the drink out of 1.4 million votes cast. (*Ibid.*)

At the time of the referendum in 1967, it was not clear whether sale of liquor by the drink could be legalized by statute or would require a constitutional amendment. Section 20, as amended in 1935, provided in part: "The open saloon shall be and is hereby prohibited. The Legislature shall have the power, and it shall be its duty to define the term 'open saloon' and enact laws against such." The legislature at that time defined "open saloon" as "any place where any alcoholic beverage whatever . . . is sold . . . for beverage purposes by the drink or in broken or unsealed containers . . . ." (Penal Code art. 666-3(a).) The attorney general in 1939 ruled that "the Legislature . . . may not now define the term 'open saloon,' as being something different from what it was generally understood to be at the time the people voted on the proposition . . . ." (Tex. Att'y Gen. Op. No. 0-337 (1939).) That interpretation clearly required a constitutional amendment before any change could be made in the "open saloon" prohibition. This theory has been criticized as a grant of constitution-making power to the legislature. (See Comment, "The 'Open Saloon' Prohibition," 46 *Texas L. Rev.* 967 (1968).)

Because of this doubt about the constitutionality of statutory authorization for liquor by the drink, a proposed constitutional amendment was submitted to the voters in 1970 and was approved. This amendment is Subsection (a) of present Section 20. The section now gives the legislature authority to pass laws regulating the sale of mixed beverages; it retains the local-option aspect of previous amendments and also the power to establish a state monopoly on the sale of liquor.

Explanation

This section is largely self-explanatory, and since the 1970 amendment there have been no major cases or attorney general's opinions construing it. Those controversies which do arise generally depend on statutory rather than constitutional construction. (The Texas Liquor Control Act is compiled as article 666-1 *et seq.* of the auxiliary laws section of the Penal Code.) The court of criminal appeals held that convictions under the statutory prohibition against open saloons were invalid if they had not become final before repeal of the statute, because after its repeal there was no basis left for prosecution. (*Williams v. State,* 476 S.W.2d 307 (Tex. Crim. App. 1972).)

The requirement for local voter approval has been construed rather strictly. For example, when a "dry" area is annexed to a "wet" justice precinct, the annexed area remains "dry" until it votes to become "wet." The attorney general has ruled that permitting such an area to automatically become "wet" would violate the constitutional requirement that residents be given an opportunity to vote on the issue. (Tex. Att'y Gen. Op. No. M-865 (1971).) Likewise, redistricting of the precincts within the county has no effect on the wet-dry status of territory transferred from one precinct to another. (Tex. Att'y Gen. Op. No. H-97 (1973); see also Tex. Att'y Gen. Op. No. H-515 (1975).)

Even though a city is "wet," it may prohibit the sale of alcoholic beverages in certain locations within the city. (*Discount Liquors No. 2, Inc. v. City of Amarillo,* 420 S.W.2d 422 (Tex. Civ. App.—Amarillo 1967, *writ ref'd n.r.e.*).) A city or precinct may opt to be "wet" even though the county in which it is located is "dry" and apparently may also opt to be "dry" even though the county is "wet" *Myers v. Martinez,* 320 S.W.2d 862 (Tex. Civ. App.—San Antonio 1959, *writ ref'd n.r.e.*).

A portion of a precinct (*e.g.*, a "dry" portion lying outside a "wet" city) cannot hold a local-option election; the election must involve a full justice precinct, city, or county. (*Patton v. Texas Liquor Control Board,* 293 S.W.2d 99 (Tex. Civ. App.—Austin 1956, *writ ref'd n.r.e.*).)

Whether the constitution permits a citywide local-option election in a city that straddles a county line is not clear. In *Ellis v. Hanks* (478 S.W.2d 172 (Tex. Civ. App.—Dallas 1972, *writ ref'd n.r.e.*)), the court held that the commissioners court of Dallas County could not call a local-option election for the city of Grand Prairie because part of that city lies in Tarrant County. That decision, however, was based on a statute (Tex. Rev. Civ. Stat. Ann. art. 66-32) rather than the constitution. The statute gives the county commissioners court power to order an election only within the county or an "incorporated city or town therein" and does not authorize the city itself to conduct the election.

Under Subsection (b) of Section 20, the legislature apparently could solve this problem by allowing the city itself to conduct the election on a citywide basis. That solution might be held unconstitutional under Subsection (c), however, because the latter requires a vote by the county "or a political subdivision thereof." The argument would be that a city may vote only as a subdivision of a county, and that a city located in two counties thus would have to vote as two separate subdivisions. A more sensible interpretation would be that a city may vote as a single entity,

whether it is a subdivision of one county or more than one.

Comparative Analysis

About six other states have constitutional provisions authorizing local-option elections on liquor questions.

A dozen states have provisions authorizing the legislature to regulate the traffic, sale, etc., of alcoholic beverages. Apparently no other state has a constitutional provision expressly allowing mixed-beverage sales. The Oklahoma and West Virginia constitutions forbid "open saloons." The *Model State Constitution* contains no provision on liquor.

Author's Comment

There are at least two arguments in favor of retaining this section. First, state policy toward alcoholic beverages may be considered a matter of such basic importance that it should not be left entirely within the discretion of the legislature. This argument can be embellished by asserting that in Texas, the changeability of public attitudes toward liquor requires a constitutional provision to ensure some stability in state liquor policy. On the other hand, the vast majority of other states are able to deal with liquor regulation without constitutional help (see the previous *Comparative Analysis*). The local-option approach to liquor in Texas probably is now firmly entrenched, so that frequent changes in policy are unlikely. Moreover, as the history of this section shows, constitutional treatment of the liquor problem has provided little stability.

The second major argument for retaining Section 20 is based on the theory that local-option legislation is invalid unless specifically permitted by the constitution. As pointed out in the *History* above, the Texas Supreme Court in 1852 advanced this theory. The validity of that decision today is highly doubtful. First, the decision was based on the Constitution of 1845 and therefore is not binding today; the courts have not had occasion to reconsider the question since then because all subsequent local-option provisions have been specifically authorized by the constitution. Second, the 1856 decision itself is not wholly persuasive; the opinion cites no authority and its holding was shaky at the time because the statute in question had been repealed. Finally, the court's rationale is contrary to the overwhelming weight of authority. A few early cases held local-option legislation invalid (see, *e.g.*, *Rice v. Foster*, 4 Harr. 479 (Del. 1849); *Parker v. Commonwealth*, 6 Pa. 507 (1847)), but many of those early decisions now have been overruled. (See, *e.g.*, *Locke's Appeal*, 72 Pa. 491 (1873).) The recognized authorities on the subject agree that local-option legislation is valid and cite numerous cases in support of their view. (1 Cooley, *Constitutional Limitations* (Boston: Little, Brown, 8th ed., Carrington, 1927), pp. 244-45; 1 Sutherland, *Statutory Construction* (Chicago: Callaghan, 4th ed., Sands, 1972), pp. 87-89.)

It appears, therefore, that retention of Section 20 is not necessary to permit continuation of the local-option system. It still might be argued, however, that the section is needed to prevent the legislature from abolishing the local-option authorization. That danger probably is lessened by the political advantages that the local-option system offers to legislators; it permits them to avoid politically sensitive decisions by "passing the buck" to local voters.

Sec. 21. PUBLIC PRINTING AND BINDING; REPAIRS AND FURNISHINGS; CONTRACTS. All stationary, and printing, except proclamations and such printing as may be done at the Deaf and Dumb Asylum, paper, and fuel used in the

Legislative and other departments of the government, except the Judicial Department, shall be furnished, and the printing and binding of the laws, journals, and department reports, and all other printing and binding and the repairing and furnishing the halls and rooms used for the meetings of the Legislature and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price, and under such regulations, as shall be prescribed by law. No member or officer of any department of the government shall be in any way interested in such contracts; and all such contracts shall be subject to the approval of the Governor, Secretary of State and Comptroller.

History

This section first appeared in the Constitution of 1876 and was apparently a reaction against practices of the Reconstruction government. For example, the 12th Legislature under the leadership of Governor E. J. Davis provided for a state printer to do all printing and publishing of the government. Friends of Davis formed a newspaper, the *State Journal*, which was designated the state printer and became an official organ of the Radical Republican Administration. (See *Seven Decades*, p. 32.)

An unsuccessful amendment in 1907 would have authorized providing for all printing, publishing, stationery, etc., by law. In 1968 a proposed amendment to this section deleted the references to fuel, repairing and furnishing the halls and rooms of the legislature, and the requirement that contracts be approved by the governor, secretary of state, and comptroller. It too was defeated.

Explanation

In *State v. Steck Co.*, 236 S.W.2d 866 (Tex. Civ. App.—Austin 1951, *writ ref'd*), the court held that where officers representing the state did not require bids or the approval of the governor, secretary of state, and comptroller on a contract to manufacture cigarette tax stamps, the state could not pay for the stamps even though they had been delivered.

Comparative Analysis

Fourteen states have constitutional provisions similar to this section concerning the letting of certain contracts by the state. Eleven states require competitive bidding; most states either permit or require that the legislature establish a maximum price. Twelve states provide that state officials may not be interested in such contracts. (See also the *Explanation* of Art. III, Sec. 18.)

Illinois, Michigan, and Pennsylvania have deleted similar provisions in recent constitutional revisions. The *Model State Constitution* contains no comparable provision.

Author's Comment

The Texas State Board of Control, which was created in 1919, has purchasing responsibility for all state agencies. Detailed statutory provisions regulate the functions of the board and require, for example, competitive bidding. (See Tex. Rev. Civ. Stat. Ann. art. 601 *et seq.*) The elaborate and carefully drafted provisions of the State Purchasing Act of 1957 (Tex. Rev. Civ. Stat. Ann. art. 3205a) far better serve the objectives of Section 21, which could safely be omitted.

Sec. 22. FENCE LAWS. The Legislature shall have the power to pass such fence laws, applicable to any sub-division of the State, or counties, as may be needed to meet the wants of the people.

Art. XVI, § 22

History

This section first appeared in the Constitution of 1876. At the Convention of 1875 the Committee on Agriculture and Stockraising proposed a section instructing the legislature to pass general laws authorizing any county, by a two-thirds vote of its qualified electors, to adopt a fence system in the county for the protection of farmers and stockraisers. (*Journal*, p. 202.) On second reading amendments were offered to permit justice precincts to determine local fence systems, to require a three-fourths majority at the local election, and to require a simple majority vote. All of these amendments failed. Finally, the language of the present section was offered as a floor substitute and was adopted. (*Journal,* p. 700.) The section has remained unchanged since the convention.

Explanation

Prior to the Civil War, the open-range cattle industry became prominent in Texas. Ranchers claimed grazing rights over large areas, bred large herds, but had no title to the vast unsettled lands. By the end of the Reconstruction Era, homesteaders and farmers began encroaching on the open pastureland used by ranchers for many years and friction between the two groups ensued.

In 1840 the Congress of Texas enacted a fence law permitting livestock to roam at large and prescribing the kind of fence that farmers must erect to protect their crops. If livestock entered upon cropland which was adequately fenced, the owners of the livestock were liable for the damage done. If the fence was "insufficient," however, the farmer had to bear the loss. (This law is now codified as Tex. Rev. Civ. Stat. Ann. art. 3947 *et seq.*)

In 1876 the legislature passed a local-option stock law under which any county or subdivision of a county could vote to prohibit hogs, sheep, and goats from running at large, thereby forcing their owners to keep them fenced or tied (Tex. Rev. Civ. Stat. Ann. art. 6928 *et seq.*, amended in 1953 to include horses, mules, jacks, jennets, and donkeys). In 1925 certain counties were authorized to prohibit cattle from running at large (Tex. Rev. Civ. Stat. Ann. art. 6954 *et seq.*).)

The laws implementing Section 22 have followed the original proposal of the Convention's Committee on Agriculture and Stockraising; namely, to authorize fence laws by local-option election. Thus article 6954 was originally a "local" law, since it applied only to a few named counties, authorizing them to decide by election whether to prohibit cattle from running at large. However, repeated amendments have added to the list so that now 235 of Texas' 254 counties are covered by this law.

Comparative Analysis

Four other states have constitutional provisions relating to fence laws, but each *prohibits* the legislature from passing special or local laws on the subject. The *Model State Constitution* makes no reference to fence laws but of course prohibits special or local laws where a general law is or can be made applicable. (Sec. 4.11.)

Author's Comment

The only constitutional significance of this section is to authorize local laws on the subject. In fact, with the exception of article 6954 discussed above, the subject has been handled by general law authorizing local-option elections.

Presumably, the section was included as an exception to Article III, Section 56, which prohibits local or special laws on a variety of subjects and "in all other cases where a general law can be made applicable." (See the *Explanation* of that section.) As currently applied, however, Section 56 would not prohibit a local fence law, but as noted the legislature has handled the problem by general law anyway. If ever needed, therefore, Article XVI, Section 22, is superfluous today.

Art. XVI, § 23

Sec. 23. REGULATION OF LIVE STOCK; PROTECTION OF STOCK RAISERS; INSPECTIONS; BRANDS. The Legislature may pass laws for the regulation of live stock and the protection of stock raisers in the stock raising portion of the State, and exempt from the operation of such laws other portions, sections, or counties; and shall have power to pass general and special laws for the inspection of cattle, stock and hides and for the regulation of brands; provided, that any local law thus passed shall be submitted to the freeholders of the section to be affected thereby, and approved by them, before it shall go into effect.

History

This section first appeared in the Constitution of 1876. On second reading of the article on General Provisions, a section was added by floor amendment which consisted of the language as it now appears but without the phrase "and shall have power to pass general and special laws for inspection of cattle, stock and hides and for the regulation of brands." (*Journal*, p. 690.) Two days later the quoted language was added by floor amendment as a separate section. (*Journal*, p. 714.) On third reading an amendment was accepted combining the two sections into present Section 23. The section has never been amended.

Explanation

The purpose of this section overlaps that of Section 22 authorizing local fence laws (see the *Explanation* of Sec. 22). The section is awkwardly drafted and has led to numerous challenges to the validity of stock regulation laws on the ground that they are local or special but fail to provide for the local-option election the section mandates. In *Lastro v. State* (3 Tex. Ct. App. 363 (1877)), this contention was rejected and the court upheld as a general law an act regulating the sale of livestock and hides that exempted 62 counties from its operation. The court reasoned that the act's application only to stock-raising counties represented a reasonable classification, thus categorizing it as a general law, whereas Section 23's requirement of local-option approval applied only to local laws.

In *Armstrong v. Traylor* (87 Tex. 598, 30 S.W. 440 (1895)), the supreme court construed the section to authorize general laws that may or may not except certain counties; local laws subject to local-option approval; and general laws with a statutory requirement for local option approval.

A law requiring the governor to appoint an inspector of hides in each of five named counties was declared a void local law because it failed to require a local vote of approval. (*State v. Castleberry*, 252 S.W. 221 (Tex. Civ. App.—El Paso 1923, *no writ*).) However, the section does not require that municipal ordinances prohibiting free-running stock be submitted to the voters for approval. (*Batsel v. Blaine*, 15 S.W. 283 (Tex. Ct. App. 1891).)

Comparative Analysis

Five other state constitutions prohibit the legislature from passing local or special laws relating to livestock. Four states have provisions relating to control of animal diseases. Kentucky expressly authorizes local-option laws relating to stock running at large. The *Model State Constitution* has no provisions on stock regulation but prohibits special and local legislation when general legislation is or can be made applicable. (Sec. 4.11.)

Author's Comment

No special constitutional provision is necessary to authorize legislation regulating the livestock industry. The only constitutional significance of this section is

its authorization of special and local laws which might otherwise violate Article III, Section 56. But general laws can be drafted that apply only to counties or other political subdivisions that share certain distinctive characteristics—for example, an infestation of hoof-and-mouth disease. Such laws are not special or local, within the constitutional ban of Section 56, if the distinctive characteristics are reasonably related to the purpose of the law, *i.e.,* if the law's classification is reasonable. (See the *Explanation* of Art. III, Sec. 56.) This has been the legislative experience under Article XVI, Section 23: general laws have been enacted to apply where needed or where approved by local voters. And since they are *general* laws, local approval is *not* required, although often permitted, and Section 23 is thus without significance.

Sec. 24. ROADS AND BRIDGES. The Legislature shall make provision for laying out and working public roads, for the building of bridges, and for utilizing fines, forfeitures, and convict labor to all these purposes.

History

This section originated in the Constitution of 1876, and was adopted as proposed by the Committee on General Provisions, without change and apparently without debate. (*Journal,* p. 556.)

Explanation

This section has three possible functions. One is to authorize the legislature to provide for a system of public roads. For this purpose, the section is undoubtedly unnecessary, since road building is generally considered "an inherent and necessary attribute of sovereignty existing independently of constitutional provisions . . . ." (39 *C.J.S.* Highways, sec. 25, p. 946 (1944).) Section 2 of Article XI specifically directs the legislature to provide for the building of county roads, making this section redundant as an authorization for county road building.

A second possible function of the section is to permit the use of fines and convict labor in road building. Again, for this purpose the section probably is unnecessary. The Thirteenth Amendment to the federal constitution specifically exempts convict labor from the prohibition against involuntary servitude, and about half of the states by statute require convicts to work. (See S. Rubin, *The Law of Criminal Correcton* (St. Paul: West Publishing Co., 1963), p. 289.)

In Texas, the Code of Criminal Procedure (art. 43.10) provides generally for manual labor by persons convicted of misdemeanors, and the civil statutes (Tex. Rev. Civ. Stat. Ann. arts. 6736, 6764) provide for the use of convict labor on roads and bridges. The labor of prisoners in the Texas Department of Corrections is generally provided for by articles 6166x *et seq.* of the Penal Code. Likewise, there appears to be no reason why a constitutional authorization is needed to permit use of fines and forfeitures to build roads and bridges.

A court of civil appeals has held that once a fine or forfeiture is received by the government it becomes the property of the government (*Flewellen v. Ft. Bend County,* 42 S.W. 775 (Tex. Civ. App. 1897, *no writ*), and the government may thus use it for any public purpose, including, of course, road and bridge building.

The third possible function of this section is less readily apparent, but it is the only one that has been mentioned in the cases. It involves the ownership of public roads. The courts have held that all public roads belong to the state, and have cited this section as support for that proposition. The leading case is *Robbins v. Limestone County* (114 Tex. 345, 268 S.W. 915 (1925)). The question was whether

ownership of the public roads of the state is in the state itself or in the counties or road districts. The court held that the state owned the roads. Even though "the county was authorized and charged with the construction and maintenance of the public roads within its boundaries, yet it was for the state and for the benefit of the state and the people thereof." (*Id.*, at 918.) The court determined that the state, acting through the legislature, has the power to establish public highways; this right may be exercised by the legislature or delegated to an agency or political subdivision of the state; and the legislature may still possess or control the public roads. "The Legislature then has the sole and exclusive power pertaining to public roads and highways, unless and only to the extent that power may be, if at all, modified or limited by other plain provisions of the Constitution." (*Ibid.*) This holding has been consistently followed.

Although the *Robbins* decision relied in part on Section 24, there is language in the opinion to indicate that the road-building power, though it may be limited by the constitution, is not dependent on it. The court declared that roads "in their very nature and as exercised by general sovereignty . . . belong to the state. From the beginning in our state the public roads have belonged to the state. . . ." (*Ibid.*) It is difficult to see how Section 24 contributes anything to the debate over ownership of the public roads.

Comparative Analysis

Comparable provisions in other state consitutitons vary considerably in scope and detail. Eight states have rather general provisions stating that the state, the legislature, or some subdivision shall provide for the establishment of roads and bridges. About half of the states have provisions similar to Article VIII, Section 7a, earmarking certain types of revenue, usually from motor vehicle registration and gasoline taxes, for road construction. Thirteen states have constitutional provisions allowing the use of convict labor on such public projects as street and road construction and other public works. North Carolina's constitution previously contained a similar provision, but it was omitted from the recent revision. The *Model State Constitution* contains no similar provision.

Author's Comment

The powers necessary to provide for public roads and bridges, to pay for them with fines and forfeitures, and to use convict labor in their construction are conceded to be within the scope of governmental authority even without specific constitutional authorization to that effect. The controversy over ownership of the public roads has been resolved, and in any event, Section 24 has no bearing on that controversy.

Sec. 25. DRAWBACKS AND REBATEMENT TO CARRIERS, SHIPPERS, MERCHANTS, ETC. That all drawbacks and rebatement of insurance, freight, transportation, carriage, wharfage, storage, compressing, baling, repairing, or for any other kind of labor or service of, or to any cotton, grain, or any other produce or article of commerce in this State, paid or allowed or contracted for, to any common carrier, shipper, merchant, commission merchant, factor, agent, or middleman of any kind, not the true and absolute owner thereof, are forever prohibited, and it shall be the duty of the Legislature to pass effective laws punishing all persons in this State who pay, receive or contract for, or respecting the same.

History

This section has no counterpart in earlier constitutions. The Committee on General Provisions reported this section with the instructions to the legislature to punish "as felons" all who violated it. (*Journal*, p. 556.) On second reading the words "as felons" were deleted. (p. 701.)

Explanation

The *Interpretive Commentary* explains this section as a Granger-motivated response to the rebate scheme devised by John D. Rockefeller. Under this scheme, Standard Oil Company was charged a standard price for oil shipments but received a secret rebate. At one point, rebates were paid to Rockefeller on shipments of oil by competitors. Apparently this secret rebate system became common practice among all large companies doing business with the railroads. Thus farmers and small industrialists were discriminated against by being forced to pay higher shipping costs to subsidize the large corporations. (3 *Interpretive Commentary*, p. 227.)

Several state and federal statutes have been enacted to carry out the policy of this section. For example, Tex. Rev. Civ. Stat. Ann. art. 6559i-4 prohibits unjust discrimination by railroads, and the federal Robinson-Patman Act, which is enforced by the Federal Trade Commission, generally prohibits discriminatory pricing. (See 15 U.S.C.A. sec. 13.) Few Texas cases have construed this section. The court in *Continental Fire & Gas Co., Inc. v. American Mfg. Co.* (206 S.W.2d 669 (Tex. Civ. App.—Fort Worth 1947, *no writ*)), merely noted in passing that it is not self-executing. In 1973, the Texas Railroad Commission ruled that a "brokerage fee" paid by a hauler to a feedlot where no brokerage work was performed was illegal by virtue of this section and various statutes. The San Antonio Court of Civil Appeals refused to uphold a judgment against the feedlot based upon a breach of the contract wherein a part of the consideration was the illegal rebate. (*Cox Feedlots Inc. v. Hope*, 498 S.W.2d 436 (Tex. Civ. App.—San Antonio 1973, *writ ref'd n.r.e.*).)

Comparative Analysis

The Alabama, Kentucky, and Missouri constitutions forbid rebates by railroad companies. Several other states have general provisions forbidding discrimination in rate charges. Washington's constitution forbids rate discrimination by telegraph companies and express companies. The *Model State Constitution* contains nothing on the subject.

Author's Comment

Regulation of unjust price discrimination is more appropriately the subject of statutory law. The legislature certainly needs no special constitutional authorization to legislate on these matters. Since there are limitless varieties of unjust price discrimination, regulation is best achieved by administrative agencies acting under broad grants of statutory authority rather than under inflexible constitutional detail.

Sec. 26. HOMICIDE; LIABILITY IN DAMAGES. Every person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

Art. XVI, § 26

History

Under the common law a suit for personal injuries was terminated without recovery if the injured person died. The family of the deceased had no right to sue for damages because the right was considered personal to the injured party and did not survive him. In 1846 Lord Campbell's Act in England altered the common law to permit suit and recovery of damages in such cases. Subsequently all states in the United States provided a remedy for wrongful death. Texas adopted a "wrongful death" statute in 1860.

A question arose whether wrongful death statutes authorized recovery of exemplary or punitive damages where the acts of the defendant were intentional or grossly negligent. Most state courts held that wrongful death statutes did not authorize exemplary damages, and in 1877 the Texas Supreme Court decided that the first Texas statute did not. (*March v. Walker,* 48 Tex. 372 (1877).)

The Constitution of 1869 contained a provision similar to this section but omitted "gross neglect" as a basis for recovery. In the Convention of 1875, present Section 26 was adopted without debate after a floor amendment adding the words "or gross neglect." (*Journal,* p. 701.)

Explanation

In 1879 the statutes of Texas were recodified. The wrongful death statute was amended to provide that exemplary damages could be awarded in any suit for wrongful death. (The statute is now Tex. Rev. Civ. Stat. Ann. art. 4673.) A series of cases followed in which the supreme court said in *dicta* that a parent could not recover exemplary damages for the wrongful death of a child. (See, *e.g., Houston & T.C. Ry. Co. v. Baker,* 57 Tex. 419 (1882). The decisions are analyzed and criticized in Green, "The Texas Death Act," 26 *Texas L. Rev.* 133, 143-49 (1947).) Despite Dean Green's criticism, however, a court of civil appeals emphatically upheld the denial of exemplary damages to a parent in *Scoggins v. Southwestern Electric Service Co.* (434 S.W.2d 376 (Tex. Civ. App.—Tyler 1968, *writ ref'd n.r.e.*)), reasoning that Section 26 limited the authority of the legislature to permit recovery of exemplary damages only by the classes of persons named in the section.

Despite the comma following "wilful [*sic*] act" an omission that is not willful does not justify exemplary damages (*Helmes v. Universal Atlas Cement Co.,* 202 F.2d 421 (5th Cir. 1953).

Comparative Analysis

Several states have constitutional provisions *prohibiting* the legislature from limiting the amount of recovery under a wrongful death statute. No state has a provision similar to this section, however, and the *Model State Constitution* is silent on this topic.

Author's Comment

This section is an excellent example of the danger of using the constitution as a vehicle to change judge-made law. In acting from noblest motives to provide for exemplary damages in a wrongful death suit, because damages were not allowed by the courts and the statute was ambiguous, the Convention of 1875 unintentionally limited the power of future legislatures to expand the class of those entitled to damages. The result is an anomaly. The intentional or grossly negligent killing of a parent may be punished and deterred by awarding exemplary damages to his or her surviving children, but not vice versa.

The law of torts, recovery for wrongful death, entitlement to exemplary damages, etc., should be left to the legislature and courts to develop. The inclusion of narrow rules on these topics in the constitution too frequently results in the imposition of unintended limitations on the power of the legislature and courts to do justice.

Sec. 27. VACANCIES FILLED FOR UNEXPIRED TERM. In all elections to fill vacancies of office in this State, it shall be to fill the unexpired term only.

History

This section first appeared in the Constitution of 1876 and apparently was included without significant debate.

Explanation

The purpose of this section is to keep the beginning and end of office terms uniform. At common law, one elected to fill a vacancy is entitled to serve the full term prescribed for the office. (*Banton v. Wilson*, 4 Tex. 400 (1849).) Obviously, under such a system the expiration of terms of various offices eventually would be scattered randomly throughout the year, making it virtually impossible to hold a general election. This section operates together with Section 12 of Article IV, which authorizes the governor to fill vacancies in state and district offices by appointment. Such appointments are effective only until the next general election; then this section comes into play to provide that those so elected serve only the unexpired term.

When a vacancy occurs in either house of the legislature, the governor is not authorized to fill it by appointment; rather, he must call a special election. (Sec. 13 of Art. III.) Again, Section 27 then comes into play to limit the term of the person so elected.

Comparative Analysis

Eight other states have provisions similar to Section 27.

Author's Comment

This provision should be combined with Section 13 of Article III and Section 12 of Article IV. A properly drafted combination of these provisions would permit deletion of many vacancy provisions that are scattered throughout the constitution. (See, *e.g.*, Secs. 2, 4, 7, 11, and 29 of Art. V, each containing provisions for filling vacancies on various courts.)

Sec. 28. WAGES NOT SUBJECT TO GARNISHMENT. No current wages for personal service shall ever be subject to garnishment.

History

Garnishment of wages is a creditor's remedy that evolved in the 19th century. It did not exist in early common law. The common-law writ of attachment permitted a defendant's property to be seized, but only to compel his appearance after he had failed to respond to a summons. If the defendant still failed to respond, the goods went to the state rather than to the creditor. If the defendant responded to the summons, his goods were promptly returned to him. There was no method by which a creditor could reach a debtor's future earnings. The American colonies

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made some inroads into this immunity in the 17th and 18th centuries by passing statutes that allowed a creditor to reach a debtor's property if he had reason to believe that the debtor was about to abscond from the jurisdiction. (See Comment, "Some Implications of Sniadach," 70 *Columbia L. Rev.* 942, 945-46 (1970).)

During the early 19th century, ". . . there was a consolidation of creditor's remedies into the all-purpose writ of execution. Concurrently, there was a vast judicial as well as legislative expansion of the type and character of debtors' properties that could be reached by the new writ, going beyond vested estates in realty and corporeal assets in personalty to reach future interests, choses in action, and intangible assets. Wage garnishment followed as a logical extension of this trend." (Sweeney, "Abolition of Wage Garnishment," 38 *Fordham L. Rev.* 197, 201, (1969).) The Texas prohibition against garnishment, which first appeared in the 1876 Constitution and has been unchanged since, apparently was a reaction to this expansion of creditors' remedies.

Explanation

Garnishment is a legal procedure by which an employer is ordered not to deliver some or all of an employee's wages to the employee, but to hold them for the benefit of a creditor. The effect of Section 28 is quite simple: It flatly prohibits the practice in Texas. Once the money reaches the employee, however, it is no longer "current wages" and therefore not protected by this section. Not surprisingly, there has been considerable litigation to define "current wages." The term has been defined as compensation to be paid periodically or from time to time for personal services, as the services are rendered or the work performed. (*Miller v. White,* 264 S.W. 176 (Tex. Civ. App.—Austin 1924, *no writ*); *First Nat'l Bank of Cleburne v. Graham,* 22 S.W. 1101 (Tex. Ct. App. 1889).) Section 28 and the statutes enacted thereunder have been construed as necessarily implying a relationship of master and servant, or employer and employee, and therefore compensation due to an independent contractor is not exempt. (*Brasher v. Carnation Co. of Texas,* 92 S.W.2d 573 (Tex. Civ. App.—Austin 1936, *writ dism'd*).) Thus, money due a physician under a contract with the city is exempt from garnishment (*Sydnor v. City of Galveston,* 15 S.W. 202 (Tex. Ct. App. 1890)), but money due an attorney for legal services is not exempt because the attorney is not the client's employee. (*First Nat'l Bank of Cleburne v. Graham.*) Sales commissions are considered wages (*Alemite Co. v. Magnolia Petroleum Co.,* 50 S.W.2d 369 (Tex. Civ. App.—Fort Worth 1932, *no writ*) (gas station operator); (*J.M. Radford Grocery Co. v. McKean,* 41 S.W.2d 263 (Tex. Civ. App.—Fort Worth 1931, *no writ*) (salesman)), but proceeds of a claim for loss of wages under an accident insurance policy are not exempt, even though the premiums were paid with exempt wages. (*Mitchell v. Western Casualty & Guaranty Ins. Co.,* 163 S.W. 630 (Tex. Civ. App.—Galveston 1914, *no writ*).) However, all compensation received under the workmen's compensation law is exempt. (Tex. Rev. Civ. Stat. Ann. art. 8306 (3).)

Past-due wages left with the employer because they cannot be collected are exempt, but past wages voluntarily left with the employer are not "current wages" and thus are not exempt. (*Davidson v. F. H. Logeman Chair Co.,* 41 S.W. 824 (Tex. Civ. App. 1897, *no writ*).) The courts have held that the purpose of Section 28 is to exempt the wage until it is due and in possession of the earner; if he is unable to collect it when due, the exemption continues until he can collect, in the exercise of ordinary diligence. (*Lee v. Emerson-Brantingham Implement Co.,* 222 S.W. 283 (Tex. Civ. App.—Dallas 1920, *no writ*).)

As early as 1889 it was determined that Section 28 was not limited to residents

of the state but also applied to nonresidents who earn wages in Texas. (*Bell v. Indian Live-Stock Co.*, 11 S.W. 344 (Tex. 1889).)

Comparative Analysis

All 50 states and the District of Columbia have statutes concerning garnishment of wages. (See *Sweeney*, p. 203.) Nearly all of these permit some form of garnishment; in fact, Texas is the only state with an absolute statutory or constitutional prohibition against garnishment. At least one other state, however, has a statutory policy disfavoring garnishment. (See Pa. Stat. Tit. 42, sec. 886.)

Author's Comment

This section may be one instance in which the Texas Constitution of 1876 was ahead of its time. In 1969 the United States Supreme Court said state laws that permit garnishment of wages before a court has entered a judgment against the debtor are unconstitutional. The court said this amounts to a taking of property without due process of law. (*Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).) This decision is not as sweeping as the Texas prohibition against garnishment, however, because the decision still permits garnishment of wages pursuant to a court judgment. But since *Sniadach*, all forms of wage garnishment have come under attack. One of the major arguments is the apparent connection between such garnishment and a high incidence of bankruptcy; the debtor files for bankruptcy to terminate the garnishment of his wages. (See Brunn, "Wage Garnishment in California," 53 *California L. Rev.* 1214, 1234-38 (1965).) Texas is said to have the second lowest per capita personal bankruptcy rate in the nation. (*Id.*, at 1236.) Other arguments against garnishment are that it encourages overextension of credit by marginal high-risk lenders, creates an undesirable adversary relationship between employer and employee, is unnecessary because creditors can use other devices to secure payment, and is used mostly against the poor and ignorant. (See Sweeney, 38 *Fordham L. Rev.*, at 222-23.)

On the other hand, if a debtor has no assets that can be attached (and because of the homestead and personal property exemptions created by Secs. 49-53 of Art. XVI a person can have significant assets and still be "judgment-proof"), the only effective method of collection may be garnishment of his wages. Moreover, since *Sniadach* there is less possibility of abuse, because there can be no garnishment until after judgment.

If the decision is to continue the flat ban against garnishment, there is no reason to change the language of present Section 28; it is brief and clear. One possible alternative to the present absolute ban would be a provision permitting garnishment of wages only for specified purposes, such as to collect child-support payments.

Sec. 30. DURATION OF OFFICES; RAILROAD COMMISSION. The duration of all offices not fixed by this Constitution shall never exceed two years; provided, that when a Railroad Commission is created by law it shall be composed of three Commissioners who shall be elected by the people at a general election for State officers, and their terms of office shall be six years; provided, Railroad Commissioners first elected after this amendment goes into effect shall hold office as follows: One shall serve two years, and one four years, and one six years; their terms to be decided by lot immediately after they shall have qualified. And one Railroad Commissioner shall be elected every two years thereafter. In case of vacancy in said office the Governor of the State shall fill said vacancy by appointment until the next general election.

Art. XVI, § 30

History

The 1845, 1861, 1866, and 1869 Constitutions each provided: "The duration of all offices fixed by this Constitution shall never exceed four years." (The 1866 Constitution added two exceptions—one providing that superintendents of the lunatic and other asylums established by law held office "during good behavior" and another permitting the governor to remove his appointees from office for "good cause." The 1869 Constitution omitted the two exceptions. See Art. VII, Sec. 10 (1845 and 1861) and Sec. 13 (1866); Art. XII, Sec. 38 (1869).) As adopted in 1876, this section retained the language of the prior constitutions, but since the 1875 Convention insisted on short terms for all offices, it reduced the maximum term from four to two years.

An 1894 amendment added the remainder of the section relating to the election, membership, and terms of office of the Railroad Commission. The Railroad Commission had been created in 1891, following adoption in 1890 of an amendment to Section 2 of Article X that dispelled doubts about the legislature's power to create a commission to regulate railroads. (See the *History* of that section.) Initially, the railroad commissioners were appointed by the governor and, as this section then required, held office for terms of two years. (See Tex. Laws 1891, Ch. 51, sec. 10, 10 *Gammel's Laws,* pp. 57-58.) During the next gubernatorial campaign, in 1892, one candidate, who was the attorney for all but two of the railroads in the state, contended that the commissioners should be elected. His opponent, Jim Hogg, the incumbent governor, opposed election of the commissioners unless this section was amended so that all three commissioners would not be elected every two years. Hogg won the election. The next session of the legislature submitted and the people adopted the current version of Section 30, making the commission elective with six-year staggered terms.

Explanation

Terms. With the exception of senators, district and appellate judges, and notaries public, the 1876 Constitution originally fixed the terms of all constitutional officers at two years. (Senators and district judges were given four-year terms, appellate judges were given six-year terms, and the terms of notaries public were not fixed.) This section maintained consistency by limiting the terms of offices created by statute (and of notaries public) to two years as well. Through the years, however, amendments have increased the terms of all "short-term" constitutional officers except members of the house of representatives and today the only other officers who are limited by the constitution to two-year terms are those covered by this section.

Periodic amendments have eroded the coverages of this section, however, and now it is more an exception than a rule. In addition to the longer terms required for railroad commissioners by the 1894 amendment to this section, other specific exceptions are scattered throughout the constitution. Section 30a of this article authorizes terms of six years for members of state—but not district or local—boards if the terms are staggered and one-third of them expire every two years. (See *San Antonio I.S.D. v. State* ex rel. *Dechman,* 173 S.W. 525 (Tex. Civ. App.—San Antonio 1915, *writ ref'd*); *Lower Colorado River Authority v. McCraw,* 125 Tex. 268, 83 S.W.2d 629 (1935).) Section 30b excludes appointive municipal officers governed by a civil service system. Sections 64 and 65 of this article require four-year terms for some elective local offices created by statute and Section 30 of Article V requires four-year terms for county-level courts and criminal district attorneys created by statute. Section 11 of Article XI authorizes municipalities to provide terms of office of up to four years. Sections 8 and 16 of

Article VII authorize terms of up to six years for offices in the public school and higher education systems. Section 23 of Article IV requires four-year terms for statutory officers who are elected statewide.

In the absence of an exception elsewhere in the constitution, however, this section limits the term for any office, including not only a state office but also a county, city, school district, and special district office. (See, for example, *Jordan v. Crudington,* 149 Tex. 237, 231 S.W.2d 641 (1950) (judge of statutory, county-level court); *Kimbrough v. Barnett,* 93 Tex. 301, 55 S.W. 120 (1900) (school district board of trustees); *Donges v. Beall,* 41 S.W.2d 531 (Tex. Civ. App.—Fort Worth 1931, *writ ref'd*) (deputy county clerk); *White v. Fahring,* 212 S.W. 193 (Tex. Civ. App.—Galveston 1919, *writ ref'd*) (irrigation district board of directors); *Cawthon v. City of Houston,* 71 S.W. 329 (Tex. Civ. App. 1902, *writ ref'd*) (city police officers); Tex. Att'y Gen. Letter Advisory No. 91 (1975) (state auditor).) Section 30 applies only to civil officers, however, and does not restrict the term of a military officer (*Texas Nat'l Guard Armory Bd. v. McCraw,* 132 Tex. 613, 126 S.W.2d 627 (1939)). In *San Antonio I.S.D. v. Water Works Bd. of Trustees* (120 S.W.2d 861 (Tex. Civ. App.—Beaumont 1938, *writ ref'd*)), the court intimated that this section does not apply to city officers responsible for management of proprietary, as opposed to governmental, operations. Finally, the attorney general has ruled that this section does not apply to state members of a commission created pursuant to an interstate compact, reasoning that they are interstate, not state, officers. (See Tex. Att'y Gen. Op. No. M-814 (1971); but see Tex. Att'y Gen. Op. No. H-165 (1973).)

This section only imposes a maximum term, and a term may be fixed at less than two years. If the law creating an office does not prescribe its term, the courts have read this section to impose a two-year term. (See, for example, *Donges v. Beall, supra.*) If the law creating the office prescribes a term of more than two years in violation of this section, the longer term is invalid. The courts usually will reform the term to two years and preserve the office and its powers and duties and uphold the actions of the officer if the issue reaches final decision before the end of the first two years of the term. (See *Jordan v. Crudington, supra*; *White v. Fahring, supra.*) However, in *Lower Colorado River Authority v. McCraw,* cited above, the court stated that if the terms of board members for the special district involved violated this section "the entire act must fall, because the district would be left without a governing body." (125 Tex., at 276; 83 S.W.2d, at 634.) The reported cases have not considered the validity of an officer's official acts that occur after the first two years of a term fixed at more than two years in violation of this section.

Not every public servant holds an "office" as opposed to a position or employment. A position filled by public election clearly is an office, and one filled by executive appointment subject to senate confirmation is probably an office. Whether a position filled by some other kind of appointment is an office or an employment is not so readily discernible. The distinction is important, however, because an employee may be discharged at any time while an officer may be removed only by impeachment or some other trial. (See Art. XV, particularly Sec. 7, and Art. V, Sec. 24. But see *Bonner v. Belsterling,* 104 Tex. 432, 138 S.W. 571 (1911) (removal of city officers by recall during term is permissible; the cited sections do not apply to city officials).) After expiration of his term an officer may be ousted at any time by the selection and qualification of a successor, and civil service or other legal restrictions on discharging employees can provide a holdover officer no protection.

Initially, the courts defined "officer" broadly as one whose governmental position is created by law and who "is invested with some portion of the sovereign

functions of government, to be exercised by him for the benefit of the public." (See *Kimbrough v. Barnett,* 93 Tex. 301, 310, 55 S.W. 120, 123 (1900).) Under that definition, the courts have held that any one who performed official duties, whether by virtue of his position or pursuant to a legal delegation of authority by a superior, was an officer. (See, *e.g., Donges v. Beall,* 41 S.W.2d 531 (Tex. Civ. App.—Fort Worth 1931, *writ ref'd*) (deputy county clerk); *Cawthon v. City of Houston,* 71 S.W. 329 (Tex. Civ. App. 1902, *writ ref'd*) (peace officers).)

In 1937, however, the supreme court narrowed the application of the definition of "officer" and, thus, the application of this section by ruling that policemen appointed by a city manager under a charter provision authorizing him to determine how many officers and patrolmen in the police department were necessary were not "officers." To be an officer, a law (*i.e.,* charter or ordinance in the case of a city) must establish the specific position or a specific number of positions, and a law authorizing an executive to hire whatever number is necessary does not *create* an indefinite number of offices. (*City of Dallas v. McDonald,* 130 Tex. 299, 103 S.W.2d 725.) Although the *McDonald* opinion is ambiguous and could be interpreted to mean that Dallas police officers had not been legally acting as peace officers, the court, in denying a motion for rehearing (130 Tex. 299, 107 S.W.2d 987 (1937)), ruled that the policemen had been discharged in compliance with the city's civil service provisions, assuming that they had been legally employed and had rights under the civil service law. Clearly, the position of the policeman was legal; it just was not an "office.")

Subsequent to the *McDonald* decision the supreme court also narrowed the second part of the test distinguishing offices from other public positions. The "sovereign functions of government" vested in a position must be exercised by the occupant of the position "in his own right" or "largely independent of others" if he is to be an officer instead of an employee. (See *Green v. Stewart,* 516 S.W.2d 133 (Tex. 1974); *Aldine I.S.D. v. Standley,* 154 Tex. 547, 280 S.W.2d 578 (1955); *Dunbar v. Brazoria County,* 224 S.W.2d 738 (Tex. Civ. App.—Galveston 1949, *writ ref'd*).) Thus, a subordinate apparently is not an officer unless duties separate and different from those of his superior are conferred by law on his specific position with no ultimate responsibility in his superior.

Railroad Commission. As the *History* of this section notes, the amendment to this section authorized longer terms for the commissioners than this section would have permitted without the amendment, required the terms to be staggered, and made the offices elective. In authorizing the governor to appoint to vacancies on the commission without senate confirmation, the amendment established an exception to Section 12 of Article IV.

In an early case, one of the parties contended that this section and Section 2 of Article X, together, created the commission as a constitutional agency, that it could exercise only the powers enumerated in Section 2, and that the legislature lacked authority to confer the additional powers it had conferred, *i.e.,* regulation of natural gas rates. In rejecting that contention, the court stated that the legislature may abolish the commission and either discontinue the services it performs or distribute them among other agencies (*City of Denison v. Municipal Gas Co.,* 117 Tex. 291, 3 S.W.2d 794 (1928)).

Comparative Analysis

Terms. Three state constitutions prohibit terms for life or during good behavior, and a handful limit terms not fixed by the constitution to a specified number of years—usually four. Apparently only one other state limits the terms to as short a period as two years. The majority of states either provide that terms shall

be fixed by law or do not mention terms for nonconstitutional offices, although a few provide that an officeholder's term may not be extended after he is selected. The *Model State Constitution* provides that the heads of administrative departments are appointed and removed by the governor and that other officers in the administrative service are appointed and removed as provided by law. Local governmental organization is left to the legislature and home-rule charters. Thus, mention of terms is unnecessary.

Railroad Commission. A number of state constitutions create or authorize creation of a commission with the power to regulate railroads, common carriers, or public utilities generally, but no other constitution contains a provision comparable to the portions of this section relating to the Railroad Commission. The *Model State Constitution* mentions regulatory commissions only to authorize the legislature to exclude them from the limitation of executive departments to 20 (Sec. 5.06).

Author's Comment

The gradual accretion of constitutional exceptions to the term limitations originally prescribed by this section, which are enumerated in the *Explanation,* suggests that a constitutional limitation on the duration of terms of statutory offices is unwise, particularly if the duration fixed is short. It is unlikely that a legislative body would authorize terms of substantially greater duration than those provided in the constitution for elective, constitutional officers without a compelling reason for doing so. Because of the unforeseeability of the development of a compelling reason, however, the legislature should have the flexibility, should it arise. Of course, the duration of a term of office would be of less importance if the constitutional restrictions on removal in Article XV and Section 24 of Article V were eliminated for appointive officers.

Sec. 30a. MEMBERS OF BOARDS; TERMS OF OFFICE. The Legislature may provide by law that the members of the Board of Regents of the State University and boards of trustees or managers of the educational, eleemosynary, and penal institutions of the State, and such boards as have been, or may hereafter be established by law, may hold their respective offices for the term of six (6) years, one-third of the members of such boards to be elected or appointed every two (2) years in such manner as the Legislature may determine; vacancies in such offices to be filled as may be provided by law, and the Legislature shall enact suitable laws to give effect to this section.

History

This section was added in 1912.

Explanation

This is an exception to the preceding section. During the first quarter century under this constitution the legislature frequently forgot about the two-year limit on terms in the preceding section and occasionally authorized terms of up to eight years on some governmental boards. (See *Cowell v. Ayers,* 110 Tex. 348, 220 S.W. 764 (1920).) Finally, the courts pointed out that provision and, in the process, invalidated the acts creating the offices. (See *Kimbrough v. Barnett,* 93 Tex. 301, 55 S.W. 120 (1900); *Rowan v. King,* 94 Tex. 650, 55 S.W. 123 (1900).) Subsequently, the legislature proposed and the people adopted this amendment to provide more flexibility.

Soon after adoption of this section the legislature provided for six-year terms for trustees of school districts, which had been the subject of the *Kimbrough* and *Rowan* cases. The courts quickly concluded that the terms of this section apply only to state boards and not to local or district boards (*San Antonio I.S.D. v. State* ex rel. *Dechman,* 173 S.W. 525 (Tex. Civ. App.—San Antonio 1915, *writ ref'd*)). A state board is distinguished from a local board by the extent of its jurisdiction—that is, at least some of its powers are statewide—and by the geographical limitations on residence of its members—that is, at least some members of a state board may be chosen from all parts of the state (*Lower Colorado River Authority v. McCraw,* 125 Tex. 268, 83 S.W.2d 629 (1935)). One unusual application of this section is that it requires the membership of a board, to be eligible for the longer terms, to be divisible by three. A seven-member board does not qualify (*Lower Neches Valley Authority v. Mann,* 140 Tex. 294, 167 S.W.2d 1011 (1943)). Whether the subsequent adoption in 1928 of Section 16 of Article VII, authorizing terms up to six years for "State institutions of higher education," replaces the requirement in this section that terms of "members of the Board of Regents of the State University" be staggered and that the number of members be divisible by three has not been decided. That amendment obviously supplanted this section for other state institutions of higher education and, thus, probably did for *the* state university as well.

In one case a party contended that this section gave constitutional status to the "boards of trustees or managers of the educational, eleemosynary, and penal institutions" existing at the time of adoption of this section and, therefore, that the legislature could not abolish them. The court had little difficulty rejecting the argument. (*Cowell v. Ayers,* 110 Tex. 348, 220 S.W. 764 (1920).)

Comparative Analysis

See the *Comparative Analysis* of Section 30 of this article.

Author's Comment

See the *Author's Comment* on Section 30 of this article.

Sec. 30b. CIVIL SERVICE OFFICES; DURATION. Wherever by virtue of Statute or charter provisions appointive offices of any municipality are placed under the terms and provisions of Civil Service and rules are set up governing appointment to and removal from such offices, the provisions of Article 16, Section 30, of the Texas Constitution limiting the duration of all offices not fixed by the Constitution to two (2) years shall not apply, but the duration of such offices shall be governed by the provisions of the Civil Service law or charter provisions applicable thereto.

History

This section was added in 1940.

Explanation

As the *Explanation* of Section 30 of this article points out, under this constitution an "officer" has a term of office during which he may be removed only by a "trial." After his term expires, however, he may be ousted at any time by selection and qualification of a successor. Thus, the procedures for discharging employees prescribed by a merit or civil service system of public employment cannot apply to an officer.

Prior to the adoption of this section in 1940, the courts had applied an overly

inclusive definition of "officer" and, as a consequence, had frustrated the implementation of civil service systems. (See the *Explanation* of Sec. 30 for a discussion of the definition of "officer.") Adoption of this section removed the obstacles to proper functioning of civil service for a "municipality." Presumably, this means only an incorporated city. Section 3 of Article XI, However, indicates that counties and other political subdivisions may be municipal corporations—"county, city, or other municipal corporation"—and the courts have described counties as "quasi-municipal corporations." (See *Stratton v. Commissioners Court of Kinney County,* 137 S.W. 1170, 1177 (Tex. Civ. App.—San Antonio 1911, *writ ref'd*); see also the *Explanation* of Sec. 1 of Art. XI.) The supreme court did not mention that possibility when it decided a challenge of a county civil service system. (See *Green v. Stewart,* 516 S.W.2d 133 (Tex. 1974).)

By the time this section was adopted, the courts had changed course and narrowed the definition of "officer" to the extent that this section probably was no longer necessary. (See the discussion of *City of Dallas v. McDonald* in the *Explanation* of Sec. 30.) A recent supreme court decision upholding the application of a county civil service system makes it clear that this section is unnecessary for the implementation of a civil service system. (See the *Stewart* case cited earlier.)

It should be noted that the section of the constitution that authorizes cities to provide for four-year terms for city officials also excepts employees governed by civil service from the term requirement. (See Sec. 11 of Art. XI.)

Comparative Analysis

Approximately 15 states have a constitutional provision mentioning civil service or a merit system for public employees. No other state, however, appears to have a provision similar to this one. The provisions in other state constitutions are designed to abolish a "spoils system" of public employment rather than to create an exception to term requirements. Most of the states simply authorize or require the legislature to establish a merit system for employment and promotion; some of them establish a commission to administer the system and impose some enforcement provisions. The *Model State Constitution* provides:

> MERIT SYSTEM. The legislature shall provide for the establishment and administration of a system of personnel administration in the civil service of the state and its civil divisions. Appointments and promotions shall be based on merit and fitness, demonstrated by examination or by other evidence of competence. (Sec. 10.01)

Author's Comment

As the *Explanation* notes, this section was adopted to remove judicially erected obstacles to the operations of local civil service systems that apparently had already been lowered by judicial decision when the section was adopted. Nine years later, the courts lowered the obstacles even further, and it is now clear that a constitutional provision excepting "officers" subject to civil service from constitutional term requirements is unnecessary. (See *Green v. Stewart,* 516 S.W.2d 133 (Tex. 1974); *Dunbar v. Brazoria County,* 224 S.W.2d 738 (Tex. Civ. App.–Galveston 1949, *writ ref'd*).)

Sec. 31. PRACTITIONERS OF MEDICINE. The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish

persons for mal-practice, but no preference shall ever be given by law to any schools of medicine.

History

This section originated in the Constitution of 1876 and has not been changed. Its adoption reflected a widespread move in the latter part of the 19th and early 20th centuries to control admission to medical practice. State medical societies concerned about the medical profession's public image sponsored regulatory legislation "as a response to the failure of the profession's efforts to control quackery, deception, and medical incompetence." (Quirin, "Physician Licensing and Educational Obsolescence," 36 *Albany L. Rev.* 503, 505 (1972).)

Explanation

Section 31 does two things: (1) it authorizes the legislature to regulate the practice of medicine and to punish malpractice and (2) it prohibits preferential treatment of any "schools of medicine." The first portion of the section has caused no difficulty, probably because it is superfluous. Legislative regulation of the practice of medicine by whatever means necessary to protect the people (within equal protection limitations) is within the police power of the state, without reference to constitutional authorization. (See *Collins v. Texas,* 223 U.S. 288, 296 (1912); Ex parte *Halsted,* 147 Tex. Crim. 453, 182 S.W.2d 479 (1944).) This power necessarily includes the power to punish illegal practice of medicine.

The more important—and confusing—portion of Section 31 is the last clause. The term "school of medicine" as used here does not refer to an institution for the training of physicians; rather, the courts have said it means "the system, means, or method employed, or the schools of thought accepted, by the practitioner." (Ex parte *Halsted,* 147 Tex. Crim. 453, 466, 182 S.W.2d 479, 487 (1944).) This interpretation apparently was first suggested by the supreme court in 1898 (in *Dowdell v. McBride,* 92 Tex. 239, 47 S.W. 524) and has never been challenged. Thus the effect of the clause is to prohibit the legislature from discriminating against particular kinds of practitioners, and the clause has been invoked primarily in disputes between conventional medical doctors and other types of practitioners, such as chiropractors, chiropodists, naturopaths, and osteopaths.

Section 31 contains a built-in tension. A necessary purpose of the licensing clause is to permit the legislature to determine which practitioners may be trusted to treat the public, and then to "discriminate" against the rest by barring them from practicing. But the last clause of Section 31 expressly prohibits the legislature from basing this discrimination on the school of medical thought to which the practitioner belongs.

The courts have resolved this tension primarily in two ways. First, they have held that Section 31 permits a practitioner of any school of medical thought to practice his profession as he sees fit—as long as he first obtains a conventional medical license. So long as all who wish to practice medicine are subjected to the same requirements as to education, examination, and other qualifications, the courts say there is no unconstitutional discrimination. If one is licensed to practice medicine, then he may employ "his own peculiar method of diagnosis and treatment." (See, *e.g., Schlichting v. Texas State Board of Medical Examiners,* 158 Tex. 279, 310 S.W.2d 557 (1958); *Germany v. State,* 62 Tex. Crim. 276, 137 S.W. 130 (1911).) For example, an osteopath must meet the same licensing requirements as a medical doctor; only then is he free to practice osteopathy.

The second device for accommodating practitioners other than conventional medical doctors is implemented by permitting the legislature to define medical

practice. If the activity of a particular group of practitioners is not considered the practice of medicine, then the legislature is free to "discriminate" by prescribing different licensing requirements for that profession. This is the method by which dentists and optometrists, for example, are permitted to practice without holding medical licenses. The legislature has defined a practitioner of medicine as any person:

> (1) Who shall publicly profess to be a physician or surgeon and shall diagnose, treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof; (2) or who shall diagnose, treat or offer to treat any disease or disorder, mental or physical or any physical deformity or injury by any system or method and to effect cures thereof and charge therefor, directly or indirectly, money or other compensation. . . . (Tex. Rev. Civ. Stat. Ann. art. 4510.)

In addition, the legislature has specifically exempted dentists, optometrists, and chiropractors from the Medical Practice Act (Tex. Rev. Civ. Stat. Ann. art. 4504). These professions have their own less rigorous licensing laws. The supreme court has held that these exemptions are not "preferential treatment" in violation of Section 31 (*Schlichting v. Texas State Board of Medical Examiners,* 158 Tex., at 289; 310 S.W.2d, at 564).

Section 31 does, however, limit the legislature's power to define medical practice. The legislature cannot prescribe a different and less onerous licensing scheme for a particular profession if its activity is in fact the practice of medicine. The test seems to be whether the art in question involves the whole body and all types of ailments (as in osteopathy and naturopathy) or only a limited portion of the anatomy (as in dentistry, optometry, and chiropractic); if the art involves the former, it is the practice of medicine and an attempt by the legislature to prescribe a separate licensing scheme for that profession is preferential treatment in violation of Section 31. (*Wilson v. State Board of Naturopathic Examiners,* 298 S.W.2d 946 (Tex. Civ. App.—Austin 1957, *writ ref'd n.r.e.*).)

This distinction is the result of considerable trial and error by the legislature. As early as 1909 it was determined that osteopaths came within the definition of practicing medicine and thus must obtain a license. (Ex parte *Collins,* 57 Tex. Crim. 2, 121 S.W. 501 (1909), *aff'd sub nom., Collins v. Texas,* 223 U.S. 288 (1912).) The same determination regarding naturopathy was made in 1957, when the Naturopathy Act was held unconstitutional because the practice of medicine as defined in Tex. Rev. Civ. Stat. Ann. art. 4510 included the practice of naturopathy as defined in the act, and therefore the act, in prescribing different licensing requirements, constituted an unconstitutional preference in favor of naturopathy. (*Wilson v. State Board of Naturopathic Examiners,* 298 S.W.2d 946 (Tex. Civ. App.–Austin, *writ ref'd n.r.e.*), *cert. denied,* 355 U.S. 870 (1957).)

The legislature was equally unsuccessful in its first attempt to regulate chiropractic separately from traditional medical practice. An early court of criminal appeals case had held that chiropractors had to qualify for a license to practice medicine under the same requirements as any other doctor. (*Teem v. State,* 79 Tex. Crim. 285, 183 S.W. 1144 (1916).) In the first Chiropractic Act, passed in 1943, the legislature defined "chiropractic" as limited to treatment of the "spinal column and its connecting tissues." The court of criminal appeals concluded that this definition embraced the whole body and therefore came within the definition of the practice of medicine; therefore the separate licensing procedures established by the act were unconstitutional as showing preference to chiropractic. (Ex parte *Halsted,* 147 Tex. Crim. 453, 182 S.W.2d 479 (1944).) The present law

regulating the practice of chiropractic successfully limited the definition. (Tex. Rev. Civ. Stat. Ann. art. 4512b.)

Thus to regulate the practice of any of the various fields within the broad area of health care separately from the regulation of the "practice of medicine," the practice in question must be capable of a definition which distinguishes it from the practice of medicine. "While the Constitution forbids any legislation showing preference for any school of medicine, it does not forbid the legislative definition of what does and also of what does not constitute the practice of medicine." (*Baker v. State,* 91 Tex. Crim. 521, 240 S.W. 924 (1922) (upholding Optometry Act).)

The no-preference clause of Section 31 applies only to licensing. It does not prevent discrimination in practice. Thus an osteopath may be excluded from the staff of a public hospital even though he is licensed to practice medicine. (*Hayman v. City of Galveston,* 273 U.S. 414 (1927).) This is true even though the hospital is the only one in town, and even though nonstaff physicians are excluded from the hospital entirely. (*Duson v. Poage,* 318 S.W.2d 89 (Tex. Civ. App.—Houston 1958, *writ ref'd n.r.e.*).)

A curious reference to Section 31 appears in Section 51-a of Article III. The latter section authorizes the legislature to appropriate matching funds for participation in federal programs to provide medical care for welfare recipients. The last paragraph of the section provides that for these purposes the term "medical care" includes the fitting of eyeglasses by optometrists, but does not authorize optometrists to undertake eye treatment or prescribe drugs unless they are licensed physicians. This paragraph is prefaced by the statement, "Nothing in this Section shall be construed to amend, modify or repeal Section 31 of Article XVI of this Constitution . . . ." It is difficult to see how anything in Section 51-a could affect Section 31, even in the absence of this sentence. Apparently the sentence was included merely from an abundance of caution and was intended to eliminate any possibility of inadvertently expanding the permissible scope of optometrists' activities.

Comparative Analysis

No other state has a provision comparable to Section 31. However, all 50 states have legislation regulating the practice of medicine. (See generally Epstein, "Limitations on the Scope of Practice of Osteopathic Physicians," 32 *Missouri L. Rev.* 354 (1967).) The *Model State Constitution* has no similar provision.

Author's Comment

The first clause of this section, concerning licensing and malpractice, covers matters that are within the police power of the state and therefore require no specific constitutional authorization.

The only significant language in Section 31 is the no-preference clause. As the *Explanation* demonstrates, this clause does *not* prevent discrimination. The legislature is free to establish less onerous licensing requirements for such practitioners as optometrists and chiropractors by excluding them from the definition of "medical practice." The only real effect of the clause is to prevent the legislature from establishing separate licensing requirements for activities that the courts consider to be medical practice, such as osteopathy and naturopathy. As pointed out in the *Comparative Analysis,* no other state has found it necessary to deal with this matter constitutionally. Texas statutes include a prohibition against discrimination "against any particular school or system of medical practice" (Tex. Rev. Civ. Stat. Ann. art. 4504), and both Section 3 of Article I of the state constitution and the Equal Protection Clause of the Fourteenth Amendment of the

federal constitution probably provide more effective protection against discrimination than does the present Section 31. Finally, this clause "has been productive of some rather specious sophistry by both the courts and the Legislature in their efforts to make reasonable distinctions in applicable law based on substantial fact differences." (3 *Constitutional Revision,* pp. 279-80.)

Sec. 33. SALARY OR COMPENSATION PAYMENTS TO AGENTS, OFFICERS OR APPOINTEES HOLDING OTHER OFFICES; EXCEPTIONS; NONELECTIVE OFFICERS AND EMPLOYEES. The accounting officers in this State shall neither draw nor pay a warrant or check on funds of the State of Texas, whether in the treasury or otherwise, to any person for salary or compensation who holds at the same time more than one civil office of emolument, in violation of Section 40.

History

After four amendments in a period of almost 50 years, and two proposed amendments which were defeated by the voters, this section now reads almost as it did in the original Constitution of 1876. That version read: "The accounting officers of this State shall neither draw nor pay a warrant upon the treasury in favor of any person, for salary or compensation as agent, officer, or appointee, who holds at the same time any other office or position of honor, trust, or profit, under this State or the United States, except as prescribed in this Constitution."

Although one might guess that Section 33 was added as a reaction to "carpetbag" rule, that is not the case. Rather, it was drafted by the "carpetbaggers" themselves. The provision first appeared in the Constitution of 1869 (Art. XII, Sec. 42). The records of the Reconstruction Convention in 1868 reveal nothing about the section's purposes; the provision was adopted without discussion and without a roll call vote. (*Journal of the Reconstruction Convention of Texas, 2d Sess.* (1870), p. 477.)

Two decisions by the court of criminal appeals early in this century apparently prompted the first amendment of Section 33. In *Lowe v. State* (83 Tex. Crim. 134, 201 S.W. 986 (1918)), the court held that a district judge who became an officer in the National Guard and then went on the payroll of the federal government when called into actual military service of the United States vacated his office as judge. Four years later the same court held in Ex parte *Daily* (93 Tex. Crim. 68, 246 S.W. 91 (1922)) that a district judge did not vacate his office by accepting the appointment of captain in the National Guard. *Lowe* was distinguishable, the court held, because in *Dailey* the judge had not been called into "actual military service of the United States." To protect officials who were members of the National Guard, Sections 33 and 40 were amended in 1926 to exclude members of the Guard and reserves from the prohibitions of both sections.

In 1932 additional amendments to both sections exempted retired armed forces officers and enlisted men. An amendment proposed but defeated in 1941 would have made Section 33 inapplicable to "officers of the United States Army or Navy who are assigned to duties in State Institutions of higher education."

The next attempted amendment of Section 33, proposed in 1961, was also defeated. It would have added retired personnel of the Air Force and Coast Guard to the list of exceptions. It also would have allowed state employees to act as consultants or as members of advisory committees with other state agencies, political subdivisions in Texas, or the federal government, or as school board members without forfeiting their state salaries provided they were not teachers. They would have been entitled to expenses for such service. Permission was made contingent upon approval by the employee's administrative head or governing board, and it was required that there be no conflict of interest.

A similar amendment in 1967 was approved. It added the Air Force, Air National Guard, and the Air National Guard Reserve to the military offices excluded from the prohibition, but for reasons that are unclear, it failed to include the Coast Guard (which had been included in the 1961 proposal). The amendment also allowed nonelective state officers and employees to hold other nonelective positions with the state or federal government without loss of salary if these other positions are "of benefit to the State of Texas or are required by State or federal law, and there is no conflict with the original office or position . . . ." This provision relating to nonelective officers and employees was to be operative only until September 1, 1969, unless thereafter authorized by the legislature. The legislature did so by passing a statute in 1969. (Tex. Rev. Civ. Stat. Ann. art. 6252-9a.) The act basically tracks the language of the amendment concerning dual-officeholding by nonelective officers and employees. It provides in addition that the governmental unit by which the person is employed must make a finding that the requirements set forth in the amendment and the act (*i.e.*, beneficial to the state or required by law and compatibility) have been fulfilled.

Finally in 1972 an amendment was adopted which simplified Section 33 to its present form and enumerated in Section 40 the various exceptions to the dual-officeholding prohibition.

Explanation

Unlike Sections 12 and 40 of Article XVI, Section 33 does not prohibit dual-officeholding or employment. Rather, it prohibits the state from compensating a person who holds "more than one civil office of emolument" unless one of the offices is exempted under Section 40. It is not a "dual compensation" provision, because it does not merely prevent payment for the second office; it has been interpreted to mean that one who holds two offices loses *all* of his state compensation. (*E.g.*, Tex. Att'y Gen. Op. No. V-834 (1949).) The section thus may operate more severely than Sections 12 and 40, which merely cause the dual-officeholder to forfeit his first office. (*Pruitt v. Glen Rose I.S.D. No. 1*, 126 Tex. 45, 84 S.W.2d 1004 (1935).) Moreover, there is more certainty of enforcement under Section 33 than under Sections 12 and 40; the comptroller requires that every payroll voucher submitted by any state agency contain an affidavit that none of the persons listed is in violation of Section 33. (See *Comment*, "Constitutional Restraints on Dual Office-holding and Dual Employment in Texas—A Proposed Amendment," 43 *Texas L. Rev.* 943, 950 (1965).) Section 33 therefore may be a more effective deterrent to dual-officeholding than the sections that speak to the question directly.

Until the 1972 amendment, a person who was not in violation of either Section 12 or 40 could still be ineligible for compensation under Section 33. That possibility arose because Section 33 covered "positions" as well as "offices," and the former term was construed more broadly than the latter. For example, the attorney general ruled that a county attorney might lawfully serve, at the same time, as a professor at a state college (because the latter is not an "office" but was prohibited, under Section 33, from receiving any compensation from the state for his teaching. (Tex. Att'y Gen. Op. No. M-297 (1968).) This anomaly apparently has been removed by the 1972 amendment, which prohibits payments only to persons in violation of Section 40. Section 33 now covers only "civil offices of emolument," the same term used in Section 40. The possibility remains, however, that a person might be eligible to hold two offices under Section 40 and be eligible for compensation under Section 33, but still be disqualified from holding one of the offices because of Section 12. This possibility arises because Section 12 uses the

term "office of profit or trust" rather than "civil office of emolument." The latter requires pecuniary profit, gain or advantage (see *Irwin v. State,* 147 Tex. Crim. 6,177 S.W.2d 970 (1944)), while the former expressly includes offices of "trust" as well as offices of "profit."

The term "salary or compensation" apparently does not include expenses. (*Terrell v. King,* 118 Tex. 237, 14 S.W.2d 786 (1929).)

Although Section 33 deals with all "civil offices of emolument"—whether state, federal, or local—it prohibits only payments from the state treasury. Thus a person who holds two "civil offices of emolument" may continue to be paid for one or both of the offices if the source of his salary is private, local, or federal, even though he is in violation of Section 40.

Comparative Analysis

Although most states have provisions comparable to Sections 12 and 40, prohibiting, to varying degrees, dual-officeholding (see the *Comparative Analysis* of Sec. 12 and Sec. 40), no other state has a provision similar to Section 33. The other states apparently feel that prohibiting dual-officeholding is sufficient, without also providing that those who violate the prohibition should not receive compensation. The *Model State Constitution* does not speak to the question.

Author's Comment

As the numerous amendments to Section 33 indicate, an absolute ban on state compensation of persons holding more than one position has proved unduly restrictive and undesirable. There is very little case history on this section, but the large number of attorney general's opinions and the subjects dealt with therein indicate that these sections have caused widespread confusion. For example, the attorney general has been asked whether the state treasurer could lawfully employ a "part time messenger-porter," working regularly in the afternoons, to do extra work in the mornings (Tex. Att'y Gen. Op. No. 0-3293 (1941)), and whether the principal of a small town high school could also work as driver of a school bus transferring children to and from an Indian reservation. (Tex. Att'y Gen. Op. No. 0-7446 (1946).) In both cases the dual employment was ruled lawful, but one may question this use of the attorney general's time.

As pointed out in the previous *Explanation,* Section 33 formerly had a purpose independent of Sections 12 and 40: It prohibited state compensation of persons holding two positions, even though they might not be in violation of either of the dual-officeholding sections. Since the 1972 amendment, however, Section 33 is nothing more than an enforcement provision for Section 40, because it prevents compensation only when there is a violation of Section 40. It is still effective as an enforcement tool, but that does not mean it needs to be retained in the constitution. If it *is* to be retained it should be incorporated in Section 40 and consideration should be given to a revision of the language to prohibit only dual compensation rather than all compensation.

Sec. 37. LIENS OF MECHANICS, ARTISANS AND MATERIAL MEN. Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.

History

The common law recognizes a lien, for the value of services rendered, in favor

of artisans who enhance the value of chattels by labor or materials. There are two prerequisites to the creation of this common-law lien: the artisan must be in possession of the chattel, and he must have added to its value. Most states have considered this lien inadequate, because it only gives the artisan a right to retain possession until payment. (See Woodward, "The Constitutional Lien on Chattels in Texas," 28 *Texas L. Rev.* 305, 305-06 (1950).)

Mechanics' and materialmen's liens, on the other hand, were unknown at common law and have never been recognized in England. They are statutory and originated in Maryland in 1791. (See Youngblood, "Mechanics' and Materialmen's Liens in Texas," 26 *Sw. L. J.* 665 (1972).) Apparently passage of this legislation was prompted by the need for development of the capital at Washington, D.C. "A commission formed for the purpose of encouraging the development of the new capitol [*sic*] city recommended to the Maryland legislature the passage of an act securing to the masterbuilders a lien on houses erected and land occupied." (Comment, "The Constitutional Mechanic's Lien in Texas," 11 *South Texas Law Journal* 101, 102 (1971).) Eventually every state passed mechanics' lien laws as an incentive to development. The first mechanics' lien law in Texas was enacted in 1839, and in 1845 lien benefits were extended to subcontractors. These laws provided only for real property liens; they did not create liens on chattels. (Youngblood, p. 665.)

The Constitution of 1869 provided for a mechanic's and artisan's lien on chattels. "Mechanics and artisans of every class, shall have a lien upon the articles manufactured or repaired by them for the value of their labor done thereon, or materials furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens." (Art. XII, Sec. 47.)

In 1874 the legislature created a statutory artisan's lien on chattels. This did not replace the common-law lien, and if the common-law lien is broader than the statutory right, it is still available. Under either the statutory or common-law lien, however, possession is still a prerequisite. (Woodward, p. 307.)

The present section, included in the Constitution of 1876 and unchanged since that time, added materialmen to the provision; provided for liens on buildings as well as articles, thus adding a real estate lien to the earlier constitutional chattel lien; and replaced the word "manufactured" with "made," a change that seems to broaden its application.

Explanation

A mechanic's or materialman's lien is a device designed to help the mechanic or materialman obtain payment for his work or materials. It entitles him to retain possession of a chattel (*e.g.*, an automobile, a watch, or an appliance) until the owner pays for the work done on it. This section goes even further, however. First, it creates a lien on real estate for improvements placed on the land, such as buildings or fences. Second, it gives a mechanic or materialman a lien on a chattel even though he no longer has possession of the thing. Thus, a jeweler who repairs a watch and returns it to its owner without obtaining payment for the repairs can still go to court and force sale of the watch to secure payment of the debt under this section; at common law and under the applicable statutes, he would have no lien because he surrendered possession.

The leading case construing Section 37 is *Strang v. Pray* (89 Tex. 525, 35 S.W. 1054 (1896)). That case established that the constitutional lien on buildings necessarily includes a lien on whatever interest the owner has in the land on which the building stands. Perhaps more importantly, the court determined that Section 37 is self-executing; the lien "does not depend on the statute, and the legislature

has no power to affix . . . conditions of forfeiture." Since the constitutional lien may operate independently of the statutory provisions, one who has not fulfilled the requirements for a statutory mechanic's lien may still have a constitutional lien. (*Id.*, at 1056.) Professor Woodward has stated that "the Texas decisions are unique . . . in construing the mechanic's lien provision of the constitution to be self-executing. . . ." (Woodward, p. 310.) Subcontractors generally cannot acquire a constitutional lien because they lack what lawyers call "privity of contract" with the owner. (*Horan v. Frank,* 51 Tex. 401 (1879); *First Nat'l Bank v. Lyon-Gray Lumber Co.,* 194 S.W. 1146 (Tex. Civ. App.—Texarkana 1917), *aff'd,* 110 Tex. 162, 217 S.W. 133 (1919).) If the apparent original contractor is deemed to be a "sham contractor" pursuant to statute, however, the technical subcontractor is entitled to the constitutional lien. (See Youngblood, p. 688.)

The constitutional lien on chattels is more than simply a declaration of the common law. The court held in *McBride v. Beakley* (203 S.W. 1137, 1138 (Tex. Civ. App.—Amarillo 1918, *no writ*)) that Section 37 ". . . does not seem to make the existence of the liens therein provided for in any wise dependent upon possession; . . . ." In this respect, Texas again is unique. (Woodward, p. 310.) This constitutional lien is all the more durable because courts rarely find that it has been waived; "it appears that little short of a voluntary and intentional relinquishment of the claim will result in its destruction through this means." (Woodward, p. 311.)

On the other hand, courts have limited the availability of the constitutional lien on chattels by holding that such a lien exists only when the chattel is made to order for a specific customer. Thus, a supplier of ranges and refrigerators for an apartment complex has no constitutional lien on the appliances because they were made for sale to the general public rather than a specific customer. (*First National Bank in Dallas v. Whirlpool Corp.,* 517 S.W.2d 262 (Tex. 1974).)

The constitutional lien, whether on realty or chattels, generally cannot be enforced against a bona fide purchaser (*i.e.,* a third party who buys—or takes a mortgage on—the property without actual or constructive notice of the lien). If two or more contractors have liens on the same property, their priorities are generally governed by statute. Article 5459, governing time of inception of mechanics' and materialmen's liens, was recently amended by the legislature in response to a Texas Supreme Court decision (subsequently withdrawn on rehearing). (See Note, "Mechanics' and Materialmen's Liens," 50 *Texas L. Rev.* 398 (1972).)

A "mechanic" is "a person skilled in the practical use of tools, a workman who shapes and applies material in the building of a house or other structure mentioned in the statutes; a person who performs manual labor"; and the term "artisan" is defined as "one skilled in some kind of mechanical craft; one who is employed in an industrial or mechanic art or trade." (*Warner Memorial University v. Ritenour,* 56 S.W.2d 236, 237 (Tex. Civ. App.—Eastland 1933, *writ ref'd*).) A "materialman" "is a person who does not follow the business of building or contracting to build houses for others, but who manufactures, purchases or keeps for sale materials which enter into buildings and who sells or furnishes such material without performing any work or labor in installing or putting them in place." (*Huddleston v. Nislar,* 72 S.W.2d 959, 962 (Tex. Civ. App.—Amarillo 1934, *writ ref'd*).)

Comparative Analysis

Only about four other states have provisions concerning liens for laborers. California has a provision similar to Section 37. Two states instruct the legislature to provide for adequate liens. The Florida Constitution formerly contained a

similar section, but it was omitted in the recent revision. The Ohio Constitution authorizes the legislature to provide for liens. The *Model State Constitution* is silent on liens.

Author's Comment

Because of the decisions holding that Section 37 creates a constitutional lien independent of statute, this section cannot be deleted without significantly changing existing law. In the absence of this section, artisans, mechanics, and materialmen would have only the common law and statutory liens, which are not as protective as the constitutional lien. However, as the *Comparative Analysis* indicates, the subject is not one that most states consider to be of constitutional importance. Indeed, it is difficult to see why the particular classes of creditors mentioned in this section are more deserving of constitutional assistance in collecting their accounts receivable than are many other types of creditors.

Moreoever, it is anomalous to recognize both a statutory lien and a constitutional lien that is inconsistent with the statutory scheme. To give the mechanic or materialman a lien even though he has failed to meet the prerequisites established by the legislature for a statutory lien thwarts whatever purpose the legislature had in prescribing them. If the statutory lien is considered too restrictive, the solution is to amend the statutes to make it more easily available rather than to create an independent constitutional lien. The only real justification for retaining the constitutional provision would be a belief that the subject is so fundamental it cannot be entrusted to the legislature; but the courts, by permitting the legislature to prescribe a statutory scheme of mechanics' and materialmen's liens, already have entrusted a large portion of this subject to the legislature.

Sec. 39. APPROPRIATIONS FOR HISTORICAL MEMORIALS. The Legislature may, from time to time, make appropriations for preserving and perpetuating memorials of the history of Texas, by means of monuments, statutes, paintings and documents of historical value.

History

This section originated in the Constitution of 1876 and has remained unchanged. It has been suggested that it was included because the framers feared that, absent such a provision, expenditure of public funds for historical purposes might have been prohibited by Article III, Section 48, which limited the legislature's taxing power, and Article XVI, Section 6(a), forbidding appropriation for "private or individual purposes." (See 3 *Constitutional Revision,* p. 289.)

Explanation

Developments since 1876 have removed any basis for apprehension about the constitutionality of appropriations for historical purposes. Article III, Section 48, was repealed in 1969. Insofar as the private purposes prohibition is concerned, "[t]he doctrine is now generally recognized that the reasonable use of public money for memorial buildings, monuments, and other public ornaments, designed merely to inspire sentiments of patriotism or of respect for the memory of worthy individuals, is for a public purpose, and within the power of the state." (Annot., 30 *A.L.R.* 1035, 1036 (1924); see, *e.g., Byrd v. City of Dallas,* 118 Tex. 28, 6 S.W.2d 738 (1928); *Bullock v. Calvert,* 480 S.W.2d 367 (Tex. 1972).) Two other sections of Article XVI deal with the subject of state history. Section 45 commands the legislature to provide for the preservation of historical records, and Section 56

gives the legislature power to appropriate money to promote the state's historical resources for tourism purposes.

Comparative Analysis

About half a dozen other states have provisions related to preservation of historically valuable landmarks and material. The *Model State Constitution* contains no similar provision. All states have statutes relating to historic preservation. (See generally Wilson and Winkler, "The Response of State Legislation to Historic Preservation," 36 *Law and Contemporary Problems* 329 (1971).)

Author's Comment

The power of the legislature to provide for historic preservation is now well established. The perceived need that led to inclusion of this provision in 1876 therefore no longer exists, and the section can be removed without loss.

SECTION 40. HOLDING MORE THAN ONE OFFICE; EXCEPTIONS; RIGHT TO VOTE. No person shall hold or exercise at the same time, more than one civil office of emolument, except that of Justice of the Peace, County Commissioner, Notary Public and Postmaster, Officer of the National Guard, the National Guard Reserve, and the Officers Reserve Corps of the United States and enlisted men of the National Guard, the National Guard Reserve, and the Organized Reserves of the United States, and retired officers of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and retired warrant officers, and retired enlisted men of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and the officers and directors of soil and water conservation districts, unless otherwise specially provided herein. Provided, that nothing in this Constitution shall be construed to prohibit an officer or enlisted man of the National Guard, and the National Guard Reserve, or an officer in the Officers Reserve Corps of the United States, or an enlisted man in the Organized Reserves of the United States, or retired officers of the Unites States Army, Air Force, Navy, Marine Corps, and Coast Guard, and retired warrant officers, and retired enlisted men of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and officers of the State soil and water conservation districts, from holding at the same time any other office or position of honor, trust or profit, under this State or the United States, or from voting at any election, general, special or primary in this State when otherwise qualified. State employees or other individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas and who are not State officers, shall not be barred from serving as members of the governing bodies of school districts, cities, towns, or other local governmental districts; provided, however, that such State employees or other individuals shall receive no salary for serving as members of such governing bodies. It is further provided that a nonelective State officer may hold other nonelective offices under the State or the United States, if the other office is of benefit to the State of Texas or is required by the State or Federal law, and there is no conflict with the original office for which he receives salary or compensation. No member of the Legislature of this State may hold any other office or position of profit under this State, or the United States, except as a notary public if qualified by law.

History

The prohibition against dual-officeholding has its origins in the early common law. Under the common law, however, holding two public offices was not prohibited unless the two were incompatible. (*Milward v. Thatcher,* 2 T.R. 82, 100 Eng. Rep. 45 (K.B. 1787).) The Texas constitutional provision has never been limited to incompatible offices and therefore has always been stricter than the common law.

The Constitution of 1845 provided: "No person shall hold or exercise at the

same time, more than one civil office of emolument, except that of Justice of the Peace." (Art. VII, Sec. 26.) This provision was included, unchanged, in the constitutions of 1861 and 1866. (Art. VII, Sec. 26.) The Constitution of 1869 contained a broader and more detailed prohibition: "No judge of any court of law or equity, Secretary of State, Attorney General, clerk of any court of record, sheriff or collector, or any person holding a lucrative office under the United States, or this State, or any foreign government, shall be eligible to the legislature; nor shall at the same time hold or exercise any two offices, agencies, or appointments of trust or profit under this State: Provided, that offices of militia to which there is attached no annual salary, the office of postmaster, notary public, and the office of justice of the peace, shall not be deemed lucrative; and that one person may hold two or more county offices, if so provided by the legislature." (Art. III, Sec. 30.)

The 1876 version of Section 40, as originally adopted, returned basically to the 1845 formulation, but with the additional exceptions included in 1869: "No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public, and postmaster unless otherwise provided herein." This section was amended in 1926, along with Section 33 of Article XVI, to include members of the national guard and reserves in the list of exceptions. The amendment also added a proviso that "nothing in this Constitution shall be construed to prohibit" these officers or enlisted men from holding at the same time "any other office or position of honor, trust or profit, under this State or the United States." In 1932 Section 33 was further amended to except retired officers and enlisted men of the regular armed forces and to add to the proviso: "or from voting at any Election, General, Special, or Primary, in this State when otherwise qualified."

A 1972 amendment to Section 40 added new exceptions and included some material previously found in Section 33. The provision was updated by the addition of the Air Force and Coast Guard to the list of exceptions, and officers of the state soil and water conservation districts were excepted from the prohibition against dual-officeholding. A new sentence was added allowing state employees and others receiving all or part of their compensation from the state to serve as "members of the governing bodies of school districts, cities, towns, or other local government districts" provided they receive no salary for such positions. Finally, the amendment added two sentences previously included in Section 33, allowing nonelective state officers to hold additional nonelective offices under certain conditions and prohibiting legislators from holding any other position. This final prohibition had previously been absolute, but the 1972 amendment added as an exception the position of notary public.

Explanation

For a discussion of the relationship between this section and others regulating dual-officeholding, see the *Explanation* of Section 12 of this article.

Section 40 applies to "civil offices of emolument." This includes local as well as state offices. (*E.g., Brumby v. Boyd,* 66 S.W. 874 (Tex. Civ. App. 1902, *no writ*).) The legislature obviously has assumed that it also includes federal offices because exemptions of federal officers have been added to this section. Because of the phrase "of emolument," it applies only to persons who receive pecuniary profit, gain, or advantage from their office. (*Irwin v. State,* 147 Tex. Crim. 6, 1977 S.W.2d 970 (1944).)

Generally it has been held that where an officeholder qualifies for and accepts a second office in violation of this section, he automatically vacates the first. (*Pruitt*

v. Glen Rose I.S.D. No. 1, 126 Tex. 45, 84 S.W.2d 1004 (1935).). A member of a city board therefore is not ineligible to run for the city council, because if he is elected to the council he will automatically relinquish his previous position. (*Centeno v. Inselmann,* 519 S.W.2d 889 (Tex. Civ. App.—San Antonio 1975, *no writ*).)

It was determined very early that a person may hold two offices if either of them is among the exceptions listed in Section 40. (*Gaal v. Townsend,* 77 Tex. 464, 14 S.W. 365 (1890).) There is, however, a provision in Section 65 of Article XVI, automatically vacating the office of a county officer who becomes a candidate for another elective office while more than one year remains in the term of his county office. The courts have said that this provision prevails over the more general language of Section 40, so that a county commissioner with more than a year remaining in his term loses his office by becoming a candidate for another office, even though county commissioners are exempted from the dual-officeholding prohibition of Section 40. (*Ramirez v. Flores,* 505 S.W.2d 406 (Tex. Civ. App.—San Antonio 1973, *writ ref'd n.r.e.*).) The federal constitutionality of prohibitions against dual-officeholding (Sec. 33 in particular) has recently been challenged and upheld. (*Boyett v. Calvert,* 467 S.W.2d 205 (Tex. Civ. App.—Austin 1971, *writ ref'd n.r.e.), appeal dism'd,* 405 U.S. 1035 (1972).)

The 1972 amendment, permitting state employees to serve on local governing boards, may have created more problems than it solved. The amendment was a response to a decision holding that a college professor could serve as a city councilman but could not receive his state salary as a teacher while doing so. (*Boyett v. Calvert.*) That decision, however, did not require an amendment to Section 40; a college professorship is not an "office," and Section 40 therefore was not violated by a professor who also held the office of city councilman. The problem in that case was caused solely by Section 33, which at that time covered "positions" as well as "offices." Since a professorship is a "position," the professor was precluded by Section 33 from receiving a state salary while serving as a city councilman. Nevertheless, the legislature proposed, and the voters approved, an amendment to Section 40 as well as Section 33.

This may have been unfortunate, because it brought state employees, who are not "officers," under Section 40. As a result of the 1972 amendment, the following argument can be made: Section 40 now permits state employees to hold a few specified offices (namely, local governmental offices); that implies that state employees may not hold offices other than those specified because if they could there would have been no reason to amend the section; therefore a state employee may not hold any "civil office of emolument" other than those specified in the amendment. This argument need not prevail; a court might reason that despite the implications of the amendment, there was no intention to exclude state employees from governmental jobs other than those specified. Nevertheless, the problem could have been avoided simply by confining the amendment to Section 33.

It is also probable that the 1972 amendment impliedly repealed article 6252-9a of the civil statutes, and the attorney general has recently so ruled. (Tex. Att'y Gen. Op. No. H-5 (1973).) Article 6252-9a provided a procedure for determining whether a person in a nonelective state office can hold another nonelective state or federal office without conflict of interest, and whether his doing so will benefit the state or is required by state or federal law. The statute was enacted to implement an earlier, more restrictive version of Section 33 (see the *History* of that section) and simply does not speak to either section since the 1972 amendment.

A recent opinion of the attorney general states that dual-officeholding is restricted not only by Sections 12, 33, and 40 of Article XVI, but also by the

separation of powers provision, Section 1 of Article II. The question was whether a college teacher who receives a salary from the state could also serve as a county commissioner and receive a salary for that job. The attorney general conceded that Section 40 does not prevent the teacher from doing so, because it specifically exempts the office of county commissioner from the prohibition against dual-officeholding. But the attorney general said the separation of powers provision prohibits the teacher from holding the office of county commissioner unless he renounces the salary for the latter position. The separation of powers divides the state government into executive, legislative, and judicial branches and then states that "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." (Art. II, Sec. 1.) The attorney general concluded that a county commissioner is a member of the judiciary, and a college teacher is a member of the executive for purposes of the separation of powers clause and therefore decided that the teacher was barred by Section 1 of Article II from serving as county commissioner. However, he construed the 1972 amendment to Section 40 to operate also as an exception to the separation of powers clause, thus permitting the teacher to serve as county commissioner by renouncing the salary for that post. (Tex. Att'y Gen. Op. No. H-6 (1973).)

This reasoning seems questionable in several respects. First, a county commissioner is a member of the judiciary only in the most technical sense; he exercises no significant judicial powers. (See *Explanation* of Art. V, Sec. 18.) Secondly, it is difficult to see how a college teacher can realistically be considered a member of the executive branch within the meaning of the separation of powers doctrine. The purpose of that doctrine presumably is to assure that the checks and balances sought to be provided by the separation of powers will not be undermined by having one individual exercising powers of two branches. A college teacher hardly exercises any powers that might interfere with that purpose. Thirdly, Section 1 of Article II speaks only to the "powers of the Government of the State of Texas." Its concern obviously is with separation of powers among coordinate branches of government at the state level. It is true, of course, that the power exercised by the commissioners court is power delegated by the state. But the purpose of the separation of powers doctrine is not to regulate relations between state and local governments, but between coordinate branches of the state government. It is difficult to see how a college teacher's service as county commissioner could interfere with the separation of powers between the judicial and executive branches of the state government. Finally, even if the attorney general is correct in concluding that the separation of powers provision is applicable, the result he reaches seems inconsistent with that conclusion. If a college teacher's service as a county commissioner threatens the separation of powers, that would seem to be true whether or not he receives a salary as commissioner. Yet the opinion holds the dual service unconstitutional only if the teacher receives two salaries.

The result reached by the attorney general probably is sound; it would be anomalous if state employees who serve as county commissioners were allowed to receive two salaries while employees who serve on other local governing boards were not. But that result can be reached without invoking the separation of powers doctrine. The problem arises because Section 40 arguably contains two different exceptions for county commissioners: the first sentence makes them wholly exempt from the dual-office holding prohibition, and the new sentence added in 1972 allows state employees to serve as members of the governing bodies of "school districts, cities, towns, or other local governmental districts" (presumably including county commissioners courts) "provided, however, that such State

employees or other individuals shall receive no salary for serving as members of such governing bodies." The attorney general apparently assumed that this proviso does not apply to county commissioners. That assumption is consistent with the syntax of the section, but it is not inescapable. It appears that what the drafters of the 1972 amendment sought to do was permit state employees to serve on local governing boards without receiving a salary for such service. There is no reason to believe that the drafters intended to treat county commissioners differently from other local governing boards. By interpreting the proviso as applying to county commissioners, the uniformity of result sought by the attorney general can be achieved without injecting the separation of powers doctrine into a subject that already is confusing enough.

Comparative Analysis

The Pennsylvania and Wyoming constitutions authorize the legislature to determine what offices are incompatible. Five states—Delaware, Maine, Massachusetts, New Hampshire, and Vermont—enumerate in their constitutions specific offices which are considered incompatible. Sixteen other states have more general provisions similar to Section 40 prohibiting dual-officeholding and naming certain exceptions, most frequently justice of the peace, notary public, postmaster, and members of the militia. Michigan has prohibitions directed specifically at members of the legislative apportionment commission and at public servants "carrying out agreements, financing or execution of governmental functions." The *Model State Constitution* is silent on the whole issue of dual-officeholding.

Author's Comment

If Section 33 is to be retained at all, it should be included in this section. (See the *Author's Comment* on Section 33.) Section 12 also can be incorporated into this section. (See the *Author's Comment* on Section 12.) Thus, in any event, the constitution need not contain more than one section dealing with dual-officeholding. It is doubtful, however, that any section is necessary or desirable.

As the *History* of this section indicates, inclusion in the constitution of a flat prohibition against dual-officeholding is likely to lead to frequent amendments excepting certain kinds of offices. And as the *Explanation* indicates, the amendments have not always accomplished exactly what their drafters intended.

The legislature needs no specific authorization to enact statutes dealing with dual-officeholding, and there is no apparent reason to doubt the legislature's ability or willingness to do so in most cases. If there is a reluctance to trust the legislature with the subject of dual-officeholding by legislators, Section 40 is still unnecessary because that subject is covered by Sections 19 and 20 of Article III.

If all provisions dealing with this subject were removed from the constitution, there would still be a prohibition against holding two incompatible offices, because the courts have held that the common-law rule is still effective in Texas. (*Thomas v. Abernathy County Line School Dist.*, 290 S.W. 152 (Tex. Comm'n App. 1927, *jdgmt adopted*).) The numerous amendments to these sections in effect have been attempts by the legislature and the voters to grapple with this problem of incompatibility; the amendments created exceptions for offices not thought to be incompatible. By removing these provisions from the constitution, the definition of compatibility would be left to the courts and the legislature. There is a large body of case law in Texas and other jurisdictions defining incompatibility.

In the past these sections have stood in the way of many sensible arrangements by which one person could have effectively served more than one governmental

entity. They have prevented doctors employed by one local governmental unit from also serving another. (Tex. Att'y Gen. Op. Nos. 0-5525, 0-5349 (1943).) They have impeded cooperation and exchange of information between various governmental agencies and various levels of government. Some of these problems were solved by the 1972 amendments, but as the discussion above indicates, additional problems have been created.

If some constitutional provision against dual-officeholding is to be retained, consideration should be given to a brief statement authorizing or directing the legislature to prohibit the holding of incompatible offices. (See, *e.g.*, Pa. Const. art. XII, sec. 2; Wyo. Const. art. VI, sec. 19.)

Sec. 41. BRIBERY AND ACCEPTANCE OF BRIBES. Any person who shall, directly or indirectly, offer, give, or promise, any money or thing of value, testimonial, privilege or personal advantage, to any executive or judicial officer or member of the Legislature to influence him in the performance of any of his public or official duties, shall be guilty of bribery, and be punished in such manner as shall be provided by law. And any member of the Legislature or executive or judicial officer who shall solicit, demand or receive, or consent to receive, directly or indirectly, for himself, or for another, from any company, corporation or person, any money, appointment, employment, testimonial, reward, thing of value or employment, or of personal advantage or promise thereof, for his vote or official influence, or for withholding the same, or with any understanding, expressed or implied, that his vote or official action shall be in any way influenced thereby, or who shall solicit, demand and receive any such money or other advantage matter or thing aforesaid for another, as the consideration of his vote or official influence, in consideration of the payment or promise of such money, advantage, matter or thing to another, shall be held guilty of bribery, within the meaning of the Constitution, and shall incur the disabilities provided for said offenses, with a forfeiture of the office they may hold, and such other additional punishment as is or shall be provided by law.

History

The constitutions of 1845, 1861, and 1866 each contained two provisions on the subject of bribery. One stated that no one could hold an office of trust in the government who had been convicted of giving or offering a bribe in order to be elected. The other was a more general provision instructing the legislature to enact laws imposing civil disabilities upon those convicted of bribery, perjury, forgery, or other high crimes. Both of those provisions are contained in the present constitution, the former as Section 5 and the latter as Section 2, of Article XVI. (See the *Explanation* of these two sections.)

The 1869 Constitution added a third provision stating that it was the legislature's duty to immediately expel any member who received or offered a bribe. That provision was apparently expanded and modified into present Section 41 to embrace bribes given or offered by any public servant. There is no recorded debate on the section but apparently its detail is a result both of the widespread corruption in the Reconstruction government and of the intense pressures exerted by railroad lobbyists on members of the 1875 Convention.

Explanation

There is no significant case law construing this section, probably because it duplicates the penal law.

Comparative Analysis

Nine other states have provisions similar to this section, all of which also

entity. They have prevented doctors employed by one local governmental unit from also serving another. (Tex. Att'y Gen. Op. Nos. 0-5525, 0-5349 (1943).) They have impeded cooperation and exchange of information between various governmental agencies and various levels of government. Some of these problems were solved by the 1972 amendments, but as the discussion above indicates, additional problems have been created.

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Explanation

There is no significant case law construing this section, probably because it duplicates the penal law.

Comparative Analysis

Nine other states have provisions similar to this section, all of which also

provide that the convicted person is either partially or totally ineligible to hold legislative office. A half dozen states also call for some form of ineligibility for future officeholding and several others contain provisions stating merely that bribery is a felony or that it is punishable by fine or imprisonment. The *Model State Constitution* is silent on the subject.

Author's Comment

Bribery has always been a felony under Texas penal law and the new Penal Code even expands the concept to cover various forms of corrupt influence-peddling. (See Penal Code Ch. 36 (1974).) Obviously there is no need to define bribery in the constitution.

The removal-from-office provision of Section 41 duplicates Section 2 of Article XVI, so it too is unnecessary.

Sec. 43. EXEMPTIONS FROM PUBLIC DUTY OR SERVICE. No man, or set of men, shall ever be exempted, relieved or discharged, from the performance of any public duty or service imposed by general law, by any special law. Exemptions from the performance of such public duty or service shall only be made by general law.

History

Apparently this provision first made its appearance in the Constitution of 1875. A resolution, very similar in language to the section as finally adopted, was introduced early in the convention. (*Journal,* p. 124.) It was proposed as Section 42 of the article on general provisions and adopted without change except to renumber it "43." (*Id.,* p. 559.)

Explanation

The section seems to have gone unnoticed since 1876. It is absolute in its prohibition, but it is difficult in specific situations to distinguish special from general laws. The courts have never determined what "special law" means for purposes of this section. Presumably the term means the same here as in Section 56 of Article III. If so, the prohibition is much less strict than it sounds, because Section 56 has been construed to authorize many varieties of local or special legislation. (See the *Explanation* of that section.)

Section 43 does not apply to offices created by special law. (See *Bonner v. Belsterling,* 137 S.W. 1154 (Tex. Civ. App.) *aff'd,* 104 Tex. 432, 138 S.W. 571 (1911).) A statute requiring a city to assume a water district's bonded indebtedness and flat rates on the district's territory annexed to the city did not violate Section 43. (*Wheeler v. City of Brownsville,* 148 Tex. 61, 220 S.W.2d 457 (1949).)

Comparative Analysis

No other state has a provision like Section 43, though most have some prohibition against enactment of special or local laws.

Author's Comment

This section should be deleted because it duplicates Section 56 of Article III.

Sec. 44. COUNTY TREASURER AND COUNTY SURVEYOR. The Legislature shall prescribe the duties and provide for the election by the qualified voters of each county in this State, of a County Treasurer and a County Surveyor, who shall have an office at the county seat, and hold their office for four years, and until their

successors are qualified; and shall have such compensation as may be provided by law.

History

Neither of these offices appeared in any earlier constitution, although both are traditional county offices in Texas. The surveyor's office was part of the General Land Office in each county under the Republic, and the office of county treasurer was created by statute in 1840, the county clerk having performed the duties of treasurer before that enactment. Although originally appointive, both offices were soon made elective and the present constitution of course preserves this feature.

Section 44 has been amended only once, in 1954, as part of the omnibus amendment extending the terms of all district, county, and precinct offices from two to four years. (See the annotation of Sec. 65 of Art. XVI.)

Explanation

There has been no significant interpretation of this section.

Comparative Analysis

Seventeen states mention county treasurers in their constitutions, and 13 mention county surveyors. Only Virginia appoints its county surveyor, with all the other states electing that officer and the county treasurer as well. Both officers serve two-year terms in about half these states and four-year terms in the other half.

Of the states adopting new constitutions since 1960, only two, Michigan (1964) and Illinois (1971), preserved the constitutional office of county treasurer; none preserved the county surveyor. The *Model State Constitution* does not mention either.

Author's Comment

Despite the change to four-year terms in 1954, the two Texas statutes implementing Section 44 still provide for two-year terms for county treasurer and county surveyor. (See Tex. Rev. Civ. Stat. Ann. arts. 1703, 5283.) The real issue, however, is whether these offices ought to be frozen in the constitution.

The Texas Association of Surveyors estimates that fewer than half the 254 Texas counties elect a surveyor. One must stress "estimates," however, because the secretary of state does not always receive notice of surveyor elections and, according to the association, does not always pass it on. Nevertheless, it is probably a safe assumption that many counties have little need for an elective surveyor, or any surveyor at all, but that when they do they can hire a registered public surveyor for the particular job.

Each Texas county has an elected treasurer (see *Texas Almanac* (1972-73), pp. 581-86), but the questions remain (1) whether he ought to be in the constitution and (2) whether he ought to be elected. Nearly three-fourths of the other states have answered both questions in the negative, and any real commitment to local government autonomy argues strongly for leaving to each local governing body the decision about what functionary offices to create and how to fill them.

Sec. 47. CONSCIENTIOUS SCRUPLES AS TO BEARING ARMS. Any person who conscientiously scruples to bear arms, shall not be compelled to do so, but shall pay an equivalent for personal service.

Art. XVI, § 47

History

This provision originated in the Constitution of 1845 and was included in all subsequent constitutions except that of 1869. In the Convention of 1875 it was included in the original proposal of the Committee on General Provisions (*Journal,* p. 559) and apparently was adopted without debate. The practice of permitting a person to escape military service by sending another in his stead was, of course, fairly common in the 19th century.

Explanation

Section 47 apparently has never been construed or even cited by a court or attorney general's opinion. So far as service in the armed forces of the United States is concerned, this provision is ineffectual because federal law controls. Its only possible influence would be on the state militia.

It is possible that there might be a state draft against which this section would protect conscientious objectors. "The Texas National Guard shall consist of . . . such persons as are held to military duty under the laws of this state . . . ." (Tex. Rev. Civ. Stat. Ann. art. 5780(1).) In addition, the reserve militia, which is defined to include "all able-bodied citizens, both male (between the ages of 18 and 60) and female (between 21 and 55), as well as certain resident foreigners," (Tex. Rev. Civ. Stat. Ann. art. 5765(2)) may be "called into the service of this State, in case of war, insurrection, invasion or for the prevention of invasion, the suppression of riot, tumults, and breaches of the peace, or to aid the civil officers in the execution of the laws and the service of process . . . ." (Tex. Rev. Civ. Stat. Ann. art. 5766(1).) The statutes recognize the exemption created by this section; they exempt "(a)ny person who conscientiously scruples against bearing arms." (Tex. Rev. Civ. Stat. Ann. art. 5765(3) (j).) The statute also says (perhaps unconstitutionally) that this exemption is inoperative "in case of war, insurrection, invasion of imminent danger thereof." (Tex. Rev. Civ. Stat. Ann. art. 5765(3) (k).) The exemption created by Section 47 is broader than that granted under federal law, because it does not require that the objection be based on religious belief. (See 50 U.S.C.A. App. Section 456(j).)

In actual practice, however, state control over the organized militia or National Guard is virtually nonexistent. When the guard is called to active duty by the President, it is entirely under federal control. Even when it is not federalized, "the only authority which the states have over the militia that cannot be taken away from them, barring a constitutional amendment, is their power to appoint its officers." (R. Dishman, *State Constitutions: The Shape of the Document* (New York: National Municipal League, rev. ed., 1968), p. 44.) The states cannot draft anyone who is eligible for the federal draft. (Dishman, p. 45.)

Comparative Analysis

About ten other states exempt citizens from state military duty on religious and/or conscientious grounds, without requiring any payment. About ten more states provide a similar exemption but, like Texas, condition it on payment of an "equivalent" sum. At least two states—Illinois and Michigan—have omitted similar sections from recent revisions of their constitutions, but two others—Florida and Pennsylvania—have retained them.

Author's Comment

This section is an anachronism. In the first place, there is hardly any military service left that is not governed by federal, rather than state, law. Second,

conscription into state military service is a remote possibility at best. Third, since this section exempts only those conscientious objectors who can pay the price for a surrogate, it probably violates the Equal Protection Clause of the Fourteenth Amendment. Finally, the only time there is likely to be a state military draft is in the time of war, riot, tumult, etc., and during those times the exemption is unavailable (unless the statute so providing is unconstitutional). Section 47 can be eliminated without loss.

Sec. 48. EXISTING LAWS TO CONTINUE IN FORCE. All laws and parts of laws now in force in the State of Texas, which are not repugnant to the Constitution of the United States, or to this Constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation or shall be amended or repealed by the Legislature.

History

A similarly worded saving provision has appeared in all previous Texas constitutions except the 1869 Reconstruction Constitution. The purpose of a saving provision is to ensure that the business of government will continue with as little interruption as possible even though a new constitution has been adopted.

Two alternative theories are employed to explain the effect of the adoption of a new constitution by a state. One is that it is the equivalent of beginning all over again so that all existing statutory law is abolished. This theory requires that the legislature exercise the new legislative power granted by the new constitution to reenact all laws. The second is that, since adoption of a new constitution does not create a new state, it is actually an amendment of the old constitution so that existing laws continue unless they are inconsistent with some provision of the new constitution.

The framers of the 1876 Constitution included Section 48 to allay any doubt about which theory they were following.

Explanation

No significant case law on this section exists; the few cases citing it applied the section exactly as written. Two other sections in Article XVI, 18 and 53, also contain saving provisions.

Comparative Analysis

All but seven states have included the same or a similar provision in their constitutions. The *Model State Constitution*'s Section 13.02 contains a consolidated saving provision that also preserves writs, judicial proceedings, land titles, contracts, claims, and rights under the old constitution.

Author's Comment

Any new constitution adopted will have its own saving provision—located, one hopes, in a comprehensive transition schedule.

A transition schedule of course deals with more than the preservation of laws, rights, etc., under the old constitution, although preservation is one of its most important functions. A transition schedule is also the appropriate place to deal with the many problems of governmental structure reorganization. For example, if an office created by the old constitution is omitted from the new, the transition schedule should provide for its continuation at least for the remainder of the incumbent's term and perhaps until the legislature by statute abolishes or reorganizes it. Likewise, changes in terms of office should be dealt with in the

transition schedule; Article XVI, Section 65, is a good example of the kind of change that should have been but was not so dealt with.

One of the most important features of a transition schedule is that it be self-destructing. This means that, as its provisions are executed, the executed provisions are omitted from the official publication of the constitution. The new Illinois Constitution's self-destruct provision is a good example.

> The following Schedule Provisions shall remain part of this Constitution until their terms have been executed. Once each year the Attorney General shall review the following provisions and certify to the Secretary of State which, if any, have been executed. Any provisions so certified shall thereafter be removed from the Schedule and no longer published as part of this Constitution. (Ill. Const. Transition Schedule, sec. 1.)

If the 1876 Constitution had contained such a provision, this and similar sections would long ago have been omitted.

A related temporary provision of most new constitutions is an adoption schedule. The usual adoption schedule contains a general effective date for the new constitution (subject, of course, to different effective dates for parts of the constitution, if any, set out in the transition schedule) and prescribes rules for submitting the new constitution to the voters. Again, because the adoption schedule is of temporary application only, it should not clutter the constitution proper.

> Sec. 49. PROTECTION OF PERSONAL PROPERTY FROM FORCED SALE. The Legislature shall have power, and it shall be its duty, to protect by law from forced sale a certain portion of the personal property of all heads of families, and also of unmarried adults, male and female.

History

The origins of this section lie in the Spanish civil law, which prevented creditors from seizing personal property such as clothing, tools, and furniture. The idea found its way into the law of Texas in 1839 when the Congress of the Republic passed a statute giving each citizen or head of family an exemption from creditors for "all household and kitchen furniture (provided it does not exceed in value two hundred dollars), all implements of husbandry (provided they shall not exceed fifty dollars in value), all tools, apparatus and books belonging to the trade or profession of any citizen, five milch cows, one yoke of work oxen or one horse, twenty hogs, and one year's provisions . . . ." (2 *Gammel's Laws,* p. 125.) An exemption for the homestead was included in the constitutions of 1845, 1861, 1866, and 1869 (See the *History* of Sec. 50 of this article), but those documents did not mention personal property.

The personal property exemption reappeared in an 1870 act that obviously was modeled after the original 1839 statute. (Tex. Laws 1870, Ch. 76, 6 *Gammel's Laws,* p. 301.) The 1875 Convention probably had this statute in mind when it adopted the present constitutional language directing the legislature to "protect by law from forced sale a certain portion of the personal property of all heads of families, and also of unmarried adults, male and female."

Explanation

This section is one of the rare instances in which the 1875 Convention did not discriminate against unmarried persons or women; it made the personal property exemption available not only to heads of families, but also to "unmarried adults,

male and female." In this respect, Section 49 differs markedly from the homestead exemption (Sec. 50), which until recently was available only to heads of families. The legislature, however, has not been so evenhanded. The statute exempts up to $15,000 worth of personal property of "persons who are not constituents of a family" but allows up to $30,000 for heads of families. (Tex. Rev. Civ. Stat. Ann. arts. 3832, 3835.) The appellate courts of the state apparently have never been asked to consider whether Section 49 permits the legislature to discriminate in this manner against persons who are not heads of families.

Because the statute describes exempt personal property in rather vague terms (*e.g.*, "implements of farming or ranching"; "apparatus . . . used in any trade or profession"), there has been much difficulty in deciding exactly what items are exempt. Some of the cases seem to be in irreconcilable conflict. (See the cases cited in State Bar of Texas, *Creditors' Rights in Texas* (St. Paul: West Publishing Co., 1963), pp. 51-55.) Fortunately, however, this is one instance in which that difficulty is not a constitutional problem, because the 1875 Convention had the wisdom to leave the description of exempt property to the legislature, rather than attempt to define it constitutionally. The legislature has recently rewritten the exemption statute in an attempt to modernize it somewhat. (*General and Special Laws of the State of Texas,* 63rd Legislature, 1973, Ch. 588,. at 1627, codified as Tex. Rev. Civ. Stat. Ann. art. 3836.)

The personal property exemption mentioned in Section 49 is complementary to the homestead exemption created by Sections 50 and 51. For a discussion of the history, purpose, and operation of exemptions generally, see the annotations of those two sections.

Comparative Analysis

About 11 other state constitutions provide for an exemption of personal property from forced sale. All but three of these place some monetary limit on the personal property exemption. At least two states distinguish constitutionally between heads of families and others, providing larger exemptions for the former. The *Model State Constitution* contains no comparable provision.

Author's Comment

This is one of the all-too-rare instances in which one cannot complain that the subject should have been left to the legislature; this section does that. The question here is whether the section is necessary at all. It is not needed to give the legislature power to create such an exemption. As the *History* above demonstrates, Texas had a statutory personal property exemption, under both the 1839 and 1870 statutes, long before there was any constitutional authorization for it.

As a directive to the legislature to act, this section is no more or less effective than all such directives; if the legislature simply refuses to act, there is little anyone can do about it. It might be argued that this section now prevents the legislature from abolishing the personal property exemption; the courts could hold that because of the duty imposed on the legislature by this section, any act repealing the statutes would be invalid. If that is the intended effect of the section, it should be reworded so that the section itself creates the exemption, subject only to legislative regulation.

Sec. 50. HOMESTEAD, PROTECTION FROM FORCED SALE; MORTGAGES, TRUST DEEDS AND LIENS. The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the

taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

History

The homestead exemption first appeared in the statutes of the Republic of Texas. (2 *Gammel's Laws,* p. 125.) It has been described as a Texas innovation created as a reaction to the Panic of 1837, in which many families lost their homes through foreclosure. It is probably more accurate, however, to describe the homestead exemption as merely an extension of well-established Spanish law. Under Spanish (and later Mexican) law, certain items of clothing, furniture and tools were exempt from seizure for payment of debts. The 1839 statute codified this list of exemptions of personal property and simply added realty ("fifty acres of land or one town lot, including his or her homestead, and improvements not exceeding five hundred dollars in value. . . .") to the list.

The 1839 statute was repealed, possibly inadvertently, in 1840 but was reenacted later the same year. Perhaps because of this legislative history of repeal and reenactment, the homestead provision was included in the Constitution of 1845 (Art. VII, Sec. 22). The constitutional section was similar to the 1839 statute, except that all mention of personal property was deleted and the maximum exemption was increased to 200 acres of rural land or city lots not exceeding $2,000 in value. The section was repeated without change in the 1861 and 1866 constitutions (Art. VII, Sec. 22) and reworded in the 1869 Constitution to increase the exemption for city lots to $5,000. In 1875 the section was again rewritten with the provisions defining the scope of the homestead moved to a separate section, Section 51.

The 1839 statute made the homestead exemption applicable to "every citizen or head of a family." The 1845 Constitution and all subsequent constitutions, however, limited the provision to heads of families. An amendment approved on November 6, 1973 made the provision applicable to "a single adult person" as well as to families and made other language in the section applicable to both spouses.

Explanation

The Texas Constitution creates three quite different types of homestead protection. One is an exemption from taxation, provided for by Sections 1-a and 1-b of Article VIII. The homestead exemption created by Section 50 has nothing to do with taxation but rather is an exemption from forced sale for payment of debts. The third variety of homestead provision is that contained in Section 52 of Article XVI, which preserves the homestead for the use of the surviving spouse, minor children, or unmarried daughters after the death of one of the spouses.

The homestead exemption created by Section 50 formerly was available only to "families." That term was not limited to parents and children; the exemption could be claimed by a single adult who had dependent relatives, such as siblings or grandchildren. (*American National Bank v. Cruger,* 71 S.W. 784 (Tex. Civ. App.

1902, *writ ref'd*).) The 1973 amendment eliminated the family requirement entirely, making the homestead exemption available to single adults.

Once the homestead is established, it continues to be exempt even though all of those who are dependent on the claimant for support die or cease to be dependent. (*Woods v. Alvarado State Bank,* 118 Tex. 586, 19 S.W.2d 35 (1929).)

The homestead exemption created by Section 50 is designed to place the family homestead beyond the reach of creditors, with three exceptions. The exceptions permit forced sale of the homestead for unpaid taxes levied against it and to pay debts incurred to obtain money used to purchase the homestead property or to improve it. The last sentence of the section provides that all mortgages, liens, and trust deeds against homestead property are invalid unless they fall within one of these three exceptions. The type of property exempt and the extent of the exemption are defined in Section 51 and discussed in the *Author's Comment* on that section. It should be noted, however, that the exemption is not strictly limited to a "homestead," since it can also include business property.

The exception "for work and material used in constructing improvements" on the homestead has caused considerable difficulty. Section 50 provides that a lien for such a purpose is valid "only when the work and material are contracted for in writing." The courts have held that this means no valid lien can be created until the improvements are completed in accordance with a written contract. (*Murphy v. Williams,* 103 Tex. 155, 124 S.W. 900 (1910).) In practice this precludes use of financing methods such as the "open-ended mortgage" that are designed to permit the homeowner to increase the amount of his home improvement loan over a period of time. Lenders are reluctant to make such loans, because they have no valid lien until the work is done.

Another difficulty arises from the "written contract" phrase. A homeowner who wants to do his own improvement work may encounter difficulty in obtaining a loan because he cannot enter into a written contract with himself, and therefore a lender who lends directly to the homeowner has no valid lien on the homestead.

Although this section permits forced sale of homestead property for payment of taxes, the attorney general has said that the provision does not require such forced sales. Thus, the legislature is free to defer foreclosure on homesteads owned by persons over age 65 even though Section 50 would permit foreclosure. (Tex. Att'y Gen. Op. No. H-364 (1974).)

The provision in Section 50 preventing either spouse from selling the homestead without the other's consent supplements the protection given the wife by the community property system; the wife's consent is required whether the homestead is separate or community property. (*Torres v. Gersdorff,* 287 S.W. 668 (Tex. Civ. App.—San Antonio 1926), *aff'd,* 293 S.W. 560 (Tex. Comm'n App. 1927, *holding approved*).)

The last clause of Section 50 makes the homestead exemption applicable not only to outright security transactions, such as mortgages, but also to "all pretended sales of the homestead involving any condition of defeasance." The courts have interpreted this provision broadly, holding that even though a conveyance is on its face an absolute deed, it is void if the effect is in fact to secure repayment of a loan. (*O'Shaughnessy v. Moore,* 73 Tex. 108, 11 S.W. 153 (1889).)

For a discussion of the possible effect of the Texas Equal Rights Amendment on homestead law, see Comment, "The ERA and Texas Marital Law," 54 *Texas L. Rev.* 590 (1976).

Comparative Analysis

About half of the states, all in the Midwest, South, or West, provide

constitutionally for some kind of homestead exemption. Most of these states specify the same exceptions—purchase money, improvements, and taxes—as Texas does. A few specify additional exceptions. For example, Arkansas and Virginia permit forced sale of the homestead to pay judgments against persons such as guardians, attorneys, and public officers for moneys collected by them. (See Ark. Const. art. IX, sec. 3; Va. Const. art. XIV, sec. 90.)

About half of the states that have homestead exemptions also have a constitutional provision prohibiting the husband from selling or encumbering the homestead without the wife's consent. A few states—Kansas, Nevada, Tennessee, and Wyoming, for example—apply this prohibition to both spouses. The scope of the homestead protection in other states is discussed in the *Comparative Analysis* of Section 51.

Author's Comment

Inclusion of homestead provisions in the Texas Constitution has been under attack for over 50 years. (See Cole, "The Homestead Provisions in the Texas Constitution," 3 *Texas L. Rev.* 217 (1925).) Critics of the present constitutional provision point out that about half of the states apparently have found it possible to protect the family home without benefit of any constitutional provision on the subject, while half a dozen others include only a directive to the legislature to provide for such an exemption.

These critics assert that in addition to being unnecessary, the present homestead provisions are undesirable from the standpoint of both debtors and creditors. As pointed out earlier, the section inhibits a homeowner's financing options and makes it difficult for him to be his own home improvement contractor. The provision creates uncertainty for lenders, who risk losing their security if they err in determining whether the property is homestead, whether it is within one of the three exceptions, or whether both spouses have effectively consented to the encumbrance. Defining the type and extent of the homestead exemption creates additional difficulties and inequities.

It has been suggested that homestead claimants in some circumstances might be better protected without any homestead exemption at all. For example, the present provision effectively prevents mortgaging the homestead to meet a financial emergency; the only source of funds thus may be outright sale of the homestead—a result that certainly does not accomplish the goal of preserving the family home. The section's efficacy in protecting the wife from her husband's improvidence also has been questioned. (Comment, "The Wife's Illusory Homestead Rights," 22 *Baylor L. Rev.* 178 (1970).)

As noted above, some state constitutions treat the matter of homesteads by simply directing the legislature to provide for them. It has been pointed out that Texas could accomplish this merely by amending present Section 49 of Article XVI. That section gives the legislature the power and duty "to protect by law from forced sale a certain portion of the personal property of all heads of families, and also of unmarried adults, male and female." This section could be amended to speak to "personal and real property." The efficacy of such a provision may be doubted, however, since there is no sure way to enforce such a command if the legislature chooses not to comply with it.

Sec. 51. AMOUNT AND VALUE OF HOMESTEAD; USES. The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot, or lots, not to exceed in value Ten Thousand Dollars, at the time of their designation as the homestead, without reference to the value of any

improvements thereon; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

History

The nature of the homestead was defined in the section creating the exemption until 1875, when the definition was moved to its own separate section, this Section 51. (See the *History* of Sec. 50.) The rural homestead acreage limit was increased from 50 to 200 acres, the present figure, by the Constitution of 1845.

The limit on urban homesteads has undergone qualitative as well as quantitative change. The 1839 statute placed no limit on the overall value of the urban homestead but protected improvements on the homestead only up to $500. The 1845 Constitution eliminated this limitation on the value of improvements and instead imposed a $2,000 limit on the value of the lot or lots claimed as the urban homestead. This figure was increased to $5,000 in the 1869 Constitution and was raised to $10,000 by an amendment adopted in 1970.

The requirement that city lots be valued "at the time of their designation as the homestead, without reference to the value of any improvements thereon" was added in 1869. This was a response to a decision holding that urban homesteads were to be measured at current value, including value of improvements, and that any excess over the constitutional limit could be subjected to forced sale. (*Wood v. Wheeler,* 7 Tex. 13 (1851).)

There was an attempt in the 1875 Constitutional Convention to limit the exemption in any event to $10,000, but it was defeated. (*Journal,* pp. 711-12.)

The 1973 amendment described in the annotation of Section 50 also amended this section to make a business homestead available to single adults as well as heads of families.

Explanation

What is or is not homestead property under this section is a rather intricate question. The basic rule is that the debtor's property is subject to forced sale to the extent that it exceeds the stated acreage or value limits. In the case of a rural homestead, the excess acreage over 200 is severed from the rest and sold. The homestead claimant, however, has the right to decide which 200 acres to retain as his homestead. He is permitted to carve out a 200-acre tract of any shape, or even several separate tracts, and thus may select only the most valuable portions of his land as the homestead. (See *Cotten v. Friedman,* 158 S.W. 780 (Tex. Civ. App.—Galveston 1913, *no writ*).) And there is no limit on the value of the rural homestead.

When the property claimed as the homestead is located in a town or city, the limitations are entirely different. There is no limit on the size of an urban homestead, but to the extent that its value exceeds $10,000 (at the time of designation), it is not exempt. The value of improvements is excluded from this calculation of value. If the value exceeds $10,000, the excess can be reached in one of two ways. If the property is subject to partition (for example, if it consists of two lots, one of which is within the value limit), it will be divided and only part of it will be sold, just as in the case of a rural homestead. But if it is incapable of partition (for example, a single lot occupied by a residence), the entire property will be sold. A portion of the proceeds goes to the debtor as a sort of allowance in lieu of his homestead. That portion is a fraction whose numerator is the maximum exemption

and whose denominator is the value of the lot (less improvements) at the time of designation. For example, if the value of the lot without improvements was $15,000 at the time of designation, and if the maximum exemption at that time was $10,000, the exempt portion is two-thirds. (*Hoffman v. Love,* 494 S.W.2d 591 (Tex. Civ. App.–Dallas), *writ ref'd n.r.e. per curiam,* 499 S.W.2d 295 (Tex. 1973).) The nonexempt portion of the proceeds is applied to the debt, and if there are still proceeds left after that, they go to the debtor. If the property does not bring at least $10,000 plus the present value of the improvements, the sale is nullified and the debtor retains title. The reasoning is that in such a case there is no excess over the constitutional limit–*i.e.,* $10,000 excluding the value of improvements. (*Whiteman v. Burkey,* 115 Tex. 400, 282 S.W. 788 (1926).)

The value of urban lots is determined "at the time of their designation as the homestead." Although there is no authoritative decision on the point, the general rule seems to be that this means the time at which the property first takes on the character of a homestead. This in turn means the time at which the claimant begins to occupy it as a homestead, or take some action indicating his intent to do so. (See *Boerner v. Cicero Smith Lumber Co.,* 298 S.W. 545 (Tex. Comm'n App. 1927, *jdgmt adopted*).)

The statutes provide a procedure for formally designating the homestead. By this means, a claimant may choose whether to select as his homestead his rural property or his city lots and may decide which 200 acres of his rural property he wants to make exempt. (Tex. Rev. Civ. Stat. Ann. arts. 3841-3843.) No formal designation of the homestead is required, however. Property is exempt if it is in fact a homestead, and if the claimant owns more than 200 acres of rural land, or both rural and urban land, he is free at any time to select the land he wants to protect or change a designation already made. (*Green v. West Texas Coal Mining & Development Co.,* 225 S.W. 548 (Tex. Civ. App.–Austin 1920, *writ ref'd*).)

A debtor may be entitled to homestead protection even if he owns no realty in fee simple. The exemption applies not only to ownership in fee simple, but to any possessory interest in land. A tenant, therefore, can claim a homestead in his leasehold interest. (*Cullers & Henry v. James,* 66 Tex. 494, 1 S.W. 314 (1886).) This is significant primarily in the case of business and agricultural leases, since a residential leasehold rarely has enough value to interest a creditor in seizing it.

Texas is unique in permitting a "homestead" exemption for business property. A single adult or head of a family who owns a lot or lots in a city or town, upon which he operates a business, may claim a homestead exemption for those lots. If the combined value of his business lots and residential lots does not exceed $10,000 (again, calculated at time of designation and without regard to value of improvements), he may also claim an exemption for his residential property. (*Rock Island Plow Co. v. Alten,* 102 Tex. 366, 116 S.W. 1144 (1909).) The owner of a rural homestead, however, cannot also claim a business homestead. (*Rockett v. Williams,* 78 S.W.2d 1077 (Tex. Civ. App.–Dallas 1935, *writ dism'd*).) The business homestead is a form of urban homestead, and the courts have held that the homestead may consist of either rural property or lots in a city or town, but not both. (See *Keith v. Hyndman,* 57 Tex. 425 (1882).)

The owner of an urban homestead may rent a portion of it temporarily without losing his exemption, but if the property takes on a permanent rental character, inconsistent with its use as a homestead, it loses its exempt status. (*Scottish American Mortgage Co. Ltd. v. Milner,* 30 S.W.2d 582 (Tex. Civ. App.–Texarkana 1930, *writ ref'd*); *Blair v. Park Bank & Trust Co.,* 130 S.W. 718 (Tex. Civ. App. 1910, *writ ref'd*).) The owner of a rural homestead or an urban business homestead apparently also may lease it for a term of years without losing the homestead exemption, provided he intends to reoccupy it as a homestead. (*E.g., Alexander v.*

Lovitt, 56 S.W. 685 (Tex. Civ. App. 1900, *no writ*); In re *Buie,* 287 F. 896 (N.D. Tex. 1923).)

Comparative Analysis

The constitutions of California, Washington, Nevada, Wyoming, North Dakota, and South Dakota permit the legislature to determine how much property is eligible for homestead protection. Most of the states that provide constitutionally for a homestead exemption, however, also prescribe a maximum homestead size or value. The constitutional homestead limits in Texas are more generous than those of any other state. Eight states have monetary limits of $2,500 or less, and six have acreage limits of 160 acres or less. No other state prescribes an urban homestead maximum as great as $10,000 or a rural homestead as large as 200 acres.

Oklahoma is the only other state whose constitutional homestead provision mentions business, but it does not create a business homestead in the sense that the Texas Constitution does; it refers rather to property used as a combination business and residence. (See Okla. Const. art. XII, secs. 1, 3).

Author's Comment

The present constitutional definition of the homestead creates a number of difficulties and inequities. These are elaborated in Cole, "The Homestead Provisions in the Texas Constitution," 3 *Texas L. Rev.* 217 (1925), and Woodward, "The Homestead Exemption: A Continuing Need for Constitutional Revision," 35 *Texas L. Rev.* 1047 (1957).) One inequity arises from the absence of any limit on the value of the 200-acre rural homestead. As a result, the exemption of rural property bears no relation to the claimant's needs. The owner of a rural homestead may be judgment-proof even though he occupies an elaborate country estate worth hundreds of thousands of dollars. To a lesser extent, the same problem arises in the case of an urban homestead because its value is fixed at the time the homestead is designated and does not include the value of improvements. Thus a $100,000 home on a city lot now worth $30,000 may be totally exempt from forced sale if the lot was worth less than $10,000 at the time of designation as a homestead.

The definitions of business and rural homesteads go far beyond the original intent of preserving the family home. The rural homestead may include not only the home site and surrounding land, but also separate parcels of land many miles away, so long as the total does not exceed 200 acres. The business exemption bears little relation to the goal of preserving the home. Rather, it seems more nearly akin to such provisions as the prohibition against garnishment of wages. (Sec. 28, Art. XVI.) Like the garnishment prohibition, its goal is protection of one's means of livelihood rather than protection of the family home. No other state exempts a "business homestead," and exempting a business in addition to a residence is hard to justify. As interpreted, the provision discriminates against a person who lives in the country but operates a business in the city: He cannot have both a rural and an urban homestead even though a city dweller can.

These difficulties could be alleviated, if not eliminated, by removing from the constitution all language describing and limiting the homestead, leaving its nature and the extent of the exemption to be defined by the legislature. At least six state constitutions now do so. The major objection to this approach is that it permits the legislature to effectively abolish the homestead exemption by narrowing its definition or creating additional exceptions. Distrust of the legislature may be more understandable here than in other contexts. The economic interests that would benefit from restriction of the homestead exemption are a fairly well-defined and influential group and might be in a better position to secure passage of legislation

than the more diffuse and disparate interests that benefit from the exemption.

The 1963 Michigan Constitution illustrates a compromise that insures some homestead protection without preventing the legislature from adjusting the extent of protection. Instead of fixing a maximum homestead amount, as Texas and most other states do, the Michigan Constitution fixes a minimum ("of not less than $3,500") and permits the legislature to define the kinds of liens excepted from homestead protection. (See Mich. Const. art. X, sec. 3.)

Sec. 52. DESCENT AND DISTRIBUTION OF HOMESTEAD; RESTRICTIONS ON PARTITION. On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.

History

The 1845 Constitution contained a general provision exempting the homestead of a family from forced sale to pay debts (see also the *History* of Sec. 50 of Art. XVI), but it did not mention the fate of the homestead after the claimant's death. The supreme court held that the homestead exemption created by the 1845 Constitution expired on the death of the person claiming it and did not apply to his heirs. (*Tadlock v. Eccles,* 20 Tex. 782 (1858).) The legislature, however, created a statutory exemption for widows and minor children. (Tex. Laws 1848, Ch. 157, 3 *Gammel's Laws,* p. 249.) The supreme court held that under this statute, the homestead property of an insolvent husband passed to his widow and children rather than to other heirs to whom the property otherwise would have passed. (*Green v. Crow,* 17 Tex. 180 (1856).)

Section 52 was added by the 1875 Convention, apparently in an attempt to abrogate this statute and ensure that homestead property would pass to the heirs in the same manner as other property. (See *Ford v. Sims,* 93 Tex. 586, 57 S.W. 20 (1900).) The second clause apparently was added to give the surviving spouse and minor children some protection in lieu of that previously available to them by statute. After adoption of the 1876 Constitution, the statute giving the widow and minor children the homestead to the exclusion of other heirs was held unconstitutional on grounds that it violated Section 52. (*Zwernemann v. von Rosenburg,* 76 Tex. 522, 13 S.W. 485 (1890).)

Explanation

Section 52 does three things. First, it prevents the legislature from prescribing rules of inheritance for homestead property different from those that govern other property. This means that title to homestead property ultimately passes by will or by the rules of descent and distribution to whomever would have taken it had it not been a homestead. For example, if a man dies leaving a will that gives his home to a church, the church eventually will get the property, even though it is homestead property. Although this section prevents the legislature from treating homestead property differently from other property for purposes of inheritance, it does not prevent the legislature from treating homestead property differently with respect to creditors. The legislature has done so; it has provided that if the owner of a homestead dies survived by a widow, minor children, or an unmarried daughter who lives with the decedent's family, the homestead property passes free of the decedent's debts. (Probate Code secs. 271, 179.) This is true even if the heir who

thus acquires the homestead is not the widow, minor child, or unmarried daughter; the mere existence of one of those persons is enough to permanently free the homestead from the debt. (*Zwernemann v. von Rosenburg, supra.*)

Second, Section 52 gives the surviving spouse, or the minor children and their guardian, a right to occupy the homestead. In the case of a spouse, this right to occupy continues until the spouse dies or abandons the homestead. In the case of a minor child, it continues until the child dies or abandons the homestead, or until the court determines that the child no longer needs the homestead. Thus, since the survivor's interest can be terminated by events other than his death, it is not accurate to describe his interest as a life estate. The courts have been quite reluctant to find that the survivor has abandoned the homestead; they will find abandonment only if the occupant has not only moved from the homestead but also shown an intention not to return. (*La Brier v. Williams,* 212 S.W.2d 828 (Tex. Civ. App.–San Antonio 1948, *no writ*).) For example, the survivor does not lose his right to occupy the homestead by offering to sell it, leasing part of the premises, or temporarily vacating the premises. (See *Perkins v. Perkins,* 166 S.W. 915 (Tex. Civ. App.—Galveston 1914, *writ ref'd*); *Smith v. Simpson,* 97 S.W.2d 522 (Tex. Civ. App.—Eastland 1936, *writ ref'd*); *Hoefling v. Thulemeyer,* 142 S.W. 102 (Tex. Civ. App.–San Antonio 1911), *aff'd,* 106 Tex. 350, 167 S.W. 210 (1914).)

Section 52 does not speak of a "right to occupy"; it merely prohibits partition among the other heirs so long as the survivor chooses to occupy. But the courts have interpreted this as creating a right to occupy. (See *Rancho Oil Co. v. Powell,* 142 Tex. 63, 175 S.W.2d 960 (1943).) The language about partition simply means that the homestead cannot be divided among the heirs until the survivor's right to occupy ends. (See *George v. Taylor,* 296 S.W.2d 620 (Tex. Civ. App.–Fort Worth 1956, *writ ref'd n.r.e.*).)

The third effect of Section 52 is to continue the homestead exemption even after the claimant's death. This means not only that the homestead cannot be subjected to forced sale to pay the debts of the decedent, but also that it is exempt from forced sale to pay debts incurred by the survivor after the death of the original homestead claimant. This is true even if the survivor would not himself qualify for a homestead exemption under Section 50 (*i.e.,* is neither the head of a family nor a single adult). (See *Kessler v. Draub,* 52 Tex. 575 (1880).)

For purposes of this section, the scope of the homestead is the same as that defined by Section 51. That means it is limited to 200 acres if rural and $10,000 if urban and may be a "business homestead" as well as a residence. (*Evans v. Pace,* 51 S.W. 1094 (Tex. Ct. App. 1899); see also the annotation of Sec. 51.) It is also subject to the exceptions of Section 50, so the surviving spouse or children have no protection against debts for the purchase money, taxes, or improvements on the homestead. (*E.g., Robinson v. Seales,* 242 S.W. 754 (Tex. Civ. App.–Galveston 1922, *no writ*); *Sargeant v. Sargeant,* 19 S.W.2d 382 (Tex. Civ. App.–Fort Worth 1928, *no writ*).)

Comparative Analysis

Other state constitutions that deal with this problem do not address themselves to the question of rules governing inheritance of homestead property, nor to the question of partitioning the homestead. Rather, they speak directly to the question of continuing the homestead exemption after its claimant's death. About seven state constitutions contain language giving the benefit of the homestead exemption to the spouse or other survivors of the deceased claimant.

Since the *Model State Constitution* contains nothing about homestead exemptions, it of course contains nothing comparable to this section.

Author's Comment

The retention or deletion of this section is inextricably tied to the decision to retain or delete Sections 49, 50, and 51. If the subject of homestead exemptions is to be removed from the constitution entirely, or left by the constitution to the legislature, there would be little point in retaining a section dealing with treatment of the homestead after the death of its original claimant.

If the homestead exemption is retained in the constitution, a good case can still be made for deleting or revising this section. There is no apparent reason to prohibit the legislature constitutionally from adopting special rules of distribution and descent for homestead property while leaving it free to adopt special rules with respect to any other classification of property. Neither of the other two major effects of the section is made clear by its language. The section does not in specific terms give the spouse and minor children a right to occupy the homestead, and the continued exemption of the homestead from forced sale is not mentioned at all. Both of those results are achieved rather obliquely by the prohibition against partition.

The major objectives of Section 52 could be accomplished simply by including in Section 50 a provision directing the legislature to provide for continuing homestead protection for the surviving spouse and minor children of the original claimant.

Sec. 53. PROCESS AND WRITS NOT EXECUTED OR RETURNED AT ADOPTION OF CONSTITUTION. That no inconvenience may arise from the adoption of this Constitution, it is declared that all process and writs of all kinds which have been or may be issued and not returned or executed when this Constitution is adopted, shall remain valid, and shall not be, in any way, affected by the adoption of this Constitution.

History

All prior constitutions except that of 1869 contained a provision similar to Section 53. In the 1875 Convention it was proposed, together with many other sections, in the report of the Committee on General Provisions and was apparently adopted without debate. (See also the *History* of Sec. 48 of this article.)

Explanation

See the *Explanation* of Section 48.

Comparative Analysis

It is difficult to state how many other state constitutions have provisions similar to Section 53 because the *Index Digest of State Constitutions* does not contain transitional provisions. (See also the *Comparative Analysis* of Sec. 48.)

Author's Comment

See the *Author's Comment* on Section 48.

Sec. 56. APPROPRIATIONS FOR DEVELOPMENT AND DISSEMINATION OF INFORMATION CONCERNING TEXAS RESOURCES. The Legislature of the State of Texas shall have the power to appropriate money and establish the procedure necessary to expend such money for the purpose of developing information about the historical, natural, agricultural, industrial, educational, marketing, recreational and living resources of Texas, and for the purpose of informing persons and corporations of other states through advertising in periodicals having national circulation, and the dissemination of factual information about the advantages and economic resources

offered by the State of Texas; providing, however, that neither the name nor the picture of any living state official shall ever be used in any of said advertising, and providing that the Legislature may require that any sum of money appropriated hereunder shall be matched by an equal sum paid into the State Treasury from private sources before any of said money may be expended.

History

In the 1876 Constitution, Section 56 provided: "The Legislature shall have no power to appropriate any of the public money for the establishment and maintenance of a Bureau of Immigration, or for any purpose of bringing immigrants to this State."

The continuation of a bureau to encourage immigration was the subject of passionate debate at the convention. The Constitution of 1869 had authorized creation of a Bureau of Immigration supported by public funds; among the appropriations authorized by the constitution was "the payment in part or in toto of the passage of immigrants from Europe to this State, and their transportation within this State." (Art. XI.)

Opposition at the Convention of 1875 to the expenditure of public funds to attract new settlers to Texas seems to have been based mainly on the belief that the Bureau of Immigration had spent too much. (*Debates,* pp. 239, 273, 283.) Many delegates also opposed the idea of paying immigrants to come to Texas. (*Debates,* pp. 275, 284-85.) The Committee on the Bill of Rights proposed a section in that article affirming the right of emigration from the state, but prohibiting "appropriation of money . . . to aid immigrants to the State." (*Journal,* p. 274.) This section, however, was eventually stricken. (*Debates,* p. 242.)

The Committee on Immigration concluded in its report that "the people ought not to *be taxed for any such purposes. . . .*" (*Journal,* p. 275 (emphasis in original).) Two minority reports were submitted. One proposal was essentially the same as the 1869 provision, except that it omitted the authorization for paying transportation costs. (*Journal,* pp. 300-02.) The other minority report, which apparently received more attention, favored creation of a Bureau of Agriculture, Statistics and Immigration to gather and disseminate information on the state and encourage immigration. (*Journal,* pp. 288-90.)

When the majority and minority reports were taken up, a resolution was offered proposing a section, to be included in the article on general provisions, which would prohibit the use of public funds for the establishment of a Bureau of Immigration or bringing immigrants into the state. (*Journal,* p. 402.) In the ensuing debate, supporters of the minority report (favoring creation of a bureau) stressed the long-standing tradition of openness to immigration, fearing the proposed section would make it appear that the state was discouraging new settlers. (*Debates,* pp. 272-86.) They also pointed out the sparse population of the state, particularly in the west, and argued that increased population would bring with it increased wealth and prosperity. They urged that a state agency was needed to disseminate correct information, both to Texans and others, on the advantages and resources of the state. Eloquent speeches were made for both sides. Speaking for the minority report, one delegate asserted that ". . . this Convention, holding within its hands in so great a measure the future welfare and destiny of the State, has before it no greater work, no nobler or wiser policy, than that which looks to peopling this immense territory with those who will bring willing hearts and strong arms to till the fertile soil and develop the magnificent but almost untouched resources of wealth with which Heaven has so lavishly blessed Texas." (*Debates,* pp. 277-78.)

Proponents of the majority report (against the bureau) did not oppose immigration and spoke glowingly, as had their opponents, of the past contributions

of immigrants, especially the Germans in Central Texas. They were opposed, however, to the spending of state funds to aid in immigration. They felt there was no need to actively encourage immigration and preferred instead to let it take its natural course. A particularly passionate speech included this tribute to the state: "*Advertise Texas.* Why, sir, her name, fame, and territory are parts of the world's greatest history; her natural resources, her fertility, her broad, rich prairies, her magnificent forests of all the useful trees of the temperate zone, her wonderful and various agricultural resources, her mountains of iron, coal, granite, marble, silver, gold, copper, and gypsum, her splendid rivers, running from these mountains and flashing across her bosom to the sea, are known wherever civilization extends or American liberty has ever been heard of." (*Debates,* p. 285 (emphasis in original).) Following this speech the vote was taken. The minority proposal was defeated, and the proposed majority section, which became Section 56, passed by a vote of 44 to 39. (*Journal,* p. 403.)

The 1876 language survived until 1958 when, apparently due to a realization of the need for promotion of investment and tourism, it was amended to its present form. The section now states in substance what the minority wanted to say in 1875.

Explanation

Apparently neither the original nor the present version of Section 56 has ever been construed by the courts. In 1963 the attorney general determined that the phrase "advertising in periodicals having national circulation" does not limit the choice of media to periodicals, but only requires that if the medium chosen is a periodical, it must be one of national circulation. (Tex. Att'y Gen. Op. No. C-25.) This ruling was reaffirmed in a later opinion stating that money may be expended for advertising in other media, such as radio, television, and billboards, without regard to the limitation of "national circulation." (Tex. Att'y Gen. Op. No. C-216 (1964).) Laws relating to the Texas Tourist Development Agency appear in Tex. Rev. Civ. Stat. Ann. art. 6144f.

The prohibition against use of the name or picture of "any living state official" in advertising is rather curious. Presumably, if the person is no longer living, he also is no longer a state official. A living person who no longer holds state office is not a state official, and therefore his name and likeness arguably could be used to advertise the state. The language probably was meant to include any state official or any former state official still living; whether the courts will so interpret it remains to be seen.

Despite the authorization in Section 56 to do so, the legislature does not require that all state monies expended under this section be matched by private funds. (See Tex. Rev. Civ. Stat. Ann. art. 6144e.)

Comparative Analysis

About eight states have constitutional provisions dealing with departments or bureaus of immigration, frequently combined with agriculture, statistics, and labor.

Other state constitutions contain no authorization comparable to the present Section 56, simply because they did not have the peculiar history that led to the 1876 ban on promotion of Texas and therefore did not need an equivalent of the 1958 amendment restoring the state's power to promote itself.

The *Model State Constitution* contains no comparable provision.

Author's Comment

Now that the prohibition contained in original Section 56 has been repealed, the

state needs no specific authorization to spend money for promotion. (See the annotation of Art. III, Secs. 50 and 51.) The only other purposes served by the present language are to prevent advertising in periodicals of less than national circulation and to prevent use in advertising of the name and likeness of state officials. Neither of these is a matter of constitutional importance, and the former seems questionable as a matter of policy as well, especially since a national audience is not required in other advertising media.

Sec. 59. CONSERVATION AND DEVELOPMENT OF NATURAL RESOURCES; CONSERVATION AND RECLAMATION DISTRICTS. (a) The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

(b) There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

(c) The Legislature shall authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment, and all such indebtedness may be evidenced by bonds of such conservation and reclamation districts, to be issued under such regulations as amy [may] be prescribed by law and shall also, authorize the levy and collection within such districts of all such taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of such bonds; and also for the maintenance of such districts and improvements, and such indebtedness shall be a lien upon the property assessed for the payment thereof; provided the Legislature shall not authorize the issuance of any bonds or provide for any indebtedness against any reclamation district unless such proposition shall first be submitted to the qualified property tax-paying voters of such district and the proposition adopted.

(d) No law creating a conservation and reclamation district shall be passed unless notice of the intention to introduce such a bill setting forth the general substance of the contemplated law shall have been published at least thirty (30) days and not more than ninety (90) days prior to the introduction thereof in a newspaper or newspapers having general circulation in the county or counties in which said district or any part thereof is or will be located and by delivering a copy of such notice and such bill to the Governor who shall submit such notice and bill to the Texas Water Commission, or its successor, which shall file its recommendation as to such bill with the Governor, Lieutenant Governor and Speaker of the House of Representatives within thirty (30) days from date notice was received by the Texas Water Commission. Such notice and copy of bill shall also be given of the introduction of any bill amending a law creating or governing a particular conservation and reclamation district if such bill (1) adds additional land to the district, (2) alters the taxing authority of the district, (3) alters the authority of the district with respect to the issuance of bonds, or (4) alters the qualifications or terms of office of the members of the governing body of the district.

(e) No law creating a conservation and reclamation district shall be passed unless, at the time notice of the intention to introduce a bill is published as provided in Subsection (d) of this section, a copy of the proposed bill is delivered to the commissioners court of each county in which said district or any part thereof is or will be located and to the governing body of each incorporated city or town in whose jurisdiction said district or any part thereof is or will be located. Each such commissioners court and governing body

may file its written consent or opposition to the creation of the proposed district with the Governor, Lieutenant Governor, and Speaker of the House of Representatives. Each special law creating a conservation and reclamation district shall comply with the provisions of the general laws then in effect relating to consent by political subdivisions to the creation of conservation and reclamation districts and to the inclusion of land within the district.

History

In 1904 Article III, Section 52, was amended by the addition of Subsection (b) to authorize political subdivisions of the state to borrow and tax for "the improvement of rivers, creeks, and streams . . . ." However, the amendment limited the amount of debt permitted for this purpose and for roads to one-fourth of the assessed valuation of the real property in the subdivision. (See the *History* of Art. III, Sec. 52.)

This debt limitation hampered effective conservation programs. Texas experienced destructive floods during 1913 and 1914, and public sentiment began to favor a better conservation and flood control program. In 1917, an amendment comprising what are now Subsections (a), (b), and (c), and known as the "Conservation Amendment," was adopted to authorize unlimited borrowing and taxing by conservation districts and to mandate the conservation and development of all the state's natural resources, especially water resources. (See 3 *Interpretive Commentary,* p. 465.)

Subsection (d) was added in 1964 to require notice of a proposed district in the affected area and a recommendation on the proposal by the Texas Water Commission (now the Texas Water Rights Commission). Subsection (e) was added in 1973 to require notice of a proposed district to local governments within the district and to authorize written comment by the local governments on such proposals.

Explanation

The legislature has enacted numerous local and general laws creating and authorizing creation of water districts. Professor W. G. Thrombley estimated there were 524 such districts as of February 1959. Of these, 115 were authorized by local law and 409 were created under some 13 general laws on water districts. The largest water district is the Brazos River Authority, encompassing approximately one-sixth of the state (42,000 square miles). It is a "master" district with some 97 separate water districts within it and subject to its authority. The Lower Colorado River Authority (LCRA), another giant, has jurisdiction over ten counties and has the most comprehensive program and organization. The LCRA is authorized to control, store, and preserve the waters of the Colorado River and its tributaries; sell the water; and generate and sell electricity. (See W. Thrombley, *Special Districts and Authorities in Texas* (Austin: Institute of Public Affairs, The University of Texas, 1959).)

In 1918 the legislature enacted the "Canales Act" (now Water Code sec. 55.021) to authorize districts previously organized under Article III, Section 52(b), to switch to Section 59 status and thus avoid the former section's borrowing limitation. Most but not all districts originally organized under that section have elected to do so.

Taxes levied by conservation districts must be equitably distributed, but this has been construed to mean taxation either according to property value or on the basis of the degree of benefit each property owner receives from the district's improvements. (*Dallas County Levee Dist. No. 2 v. Looney,* 109 Tex. 326, 207 S.W. 310 (1918).) The various statutes authorize one method or another and some districts utilize a combination.

Not surprisingly, these districts' taxing and borrowing powers have produced considerable litigation. For example, landowners along rivers have objected to paying taxes to water districts on the theory that they have preexisting riparian (*i.e.*, river bank ownership) rights to the river water. The courts have held that riparian landowners may not be charged for their use of the normal river flow but must pay district ad valorem taxes. (*Parker v. El Paso County Water Imp. Dist. No. 1,* 116 Tex. 631, 297 S.W. 737 (1927).)

Creation of a conservation and reclamation district without taxing power does not violate this section. Issuance of bonds secured by revenue rather than taxes does not require a vote of the taxpayers of the district since revenue bonds are not "indebtedness" within the meaning of Subsection (c). (*Lower Colorado River Authority v. McCraw,* 125 Tex. 268, 83 S.W.2d 629 (1935).)

In *Austin Mill & Grain Co. v. Brown County Water Imp. Dist. No. 1* (128 S.W.2d 829 (Tex. Civ. App.–Austin 1939), *aff'd,* 135 Tex. 140, 138 S.W.2d 523 (1940)), the court held that a vote by taxpayers authorizing construction bonds would not suffice to authorize application of bond proceeds to pay operation and maintenance costs. Taxes for operation and maintenance could be levied, but only upon favorable vote of the district's taxpayers. However, in *Matagorda County Drainage District v. Commissioners Court of Matagorda County* (278 S.W.2d 539 (Tex. Civ. App.–Galveston 1955, *writ ref'd n.r.e.*)), the court concluded that a district organized under Article III, Section 52(b), could levy a tax for maintenance of drainage ditches without a vote of the taxpayers. In *Matagorda* a statute authorized the drainage district to tax in order to pay off bonds and maintain the improvements while the bonds were being retired. The attorney general had ruled that when the bonds were paid off, a tax for continued maintenance was no longer authorized by the statute, with or without a vote of the taxpayers. Noting that the drainage system would quickly deteriorate without maintenance, the court "reinterpreted" the statute to authorize a tax for maintenance after retirement of the bonds and treated the original vote permitting the bonds as authorizing a perpetual maintenance tax.

In a recent case the Texas Supreme Court dealt with the relationship between the requirement for voter approval of a maintenance tax and the necessity for levying a tax to pay a judgment obtained by virtue of the Tort Claims Act. On the one hand, the court assumed, the legislature could not require the levy of a tax solely to pay a tort judgment. On the other hand, the court noted, a tax had been authorized for maintenance operations, thus making the tort judgment simply another cost of operations. In a way the court brought the two hands together by expressing bewilderment at how a tort judgment under the Tort Claims Act could ever arise unless operations were being carried on. (See *Harris County Flood Control Dist. v. Mihelich,* 525 S.W.2d 506 (Tex. 1975).)

The effect of the lien purportedly created by Subsection (c) is unclear. In *Hidalgo & Cameron Counties Water Control and Imp. Dist. No. 9 v. American Rio Grande Land & Irrigation Co.* (103 F.2d 509 (5th Cir. 1939)), a federal court said that the subsection does not create a tax lien in favor of the district. In a later case the same court held that the subsection likewise does not create a lien against district property to secure the bondholders. (*Borron v. El Paso National Bank,* 133 F.2d 298 (5th Cir. 1943).)

No Texas court opinion interpreting the lien language was found, but it appears superfluous in light of Article VIII, Section 15, which creates a special tax lien on assessed property generally. (See also Tex. Tax.–Gen. Ann. art. 1.07.)

Comparative Analysis

The Massachusetts Constitution has a provision similar to Subsection (a) of this

section. Several states have constitutional provisions touching on one or more topics covered by this section, but comparison is difficult. The *Model State Constitution* has no similar provision. The Michigan, Illinois, and Montana constitutions, all recently revised, have provisions proclaiming the public policy of the state to protect air, water, and other natural resources and to maintain a healthful environment.

Author's Comment

The opening words of this section are in many ways decades ahead of the times. As the *Comparative Analysis* notes, putting affirmative words favoring the environment into a constitution is a most recent development. Texas, almost 60 years ago, made a declaration in favor of the environment in the first sentence of Section 59. The breadth of the concern is much narrower than a contemporary statement of concern for the environment; but the problems then were not so widespread as they are today. Certainly, in any revision of the constitution a much broader and stronger statement of environmental policy is a certainty.

So far as the balance of the section is concerned, Subsection (b) serves no constitutional purpose and Subsection (c) would be unnecessary if there were no constitutional limitations on the power of the legislature to authorize political subdivisions to incur debt. Finally, the struggle over who may control the creation, expansion, etc. of these districts—the legislature or the units of general local government—continues, with the latter apparently victorious in the latest round through the addition of Subsection (e) in 1973. (The notice and comment requirements could—and should—all be handled by statute, which is much easier to amend—to require notice of a district's proposed dissolution, for example, a requirement not now made by Sec. 59.)

The struggle for control is symptomatic of the larger debate now raging over the merits of special-purpose governmental districts. This debate is summarized in the *Author's Comment* on Article IX, Section 9.

Sec. 61. COMPENSATION OF DISTRICT, COUNTY AND PRECINCT OFFICERS; SALARY OR FEE BASIS; DISPOSITION OF FEES. All district officers in the State of Texas and all county officers in counties having a population of twenty thousand (20,000) or more, according to the then last preceding Federal Census, shall be compensated on a salary basis. In all counties in this State, the Commissioners Courts shall be authorized to determine whether precinct officers shall be compensated on a fee basis or on a salary basis, with the exception that it shall be mandatory upon the Commissioners Courts, to compensate all justices of the peace, constables, deputy constables and precinct law enforcement officers on a salary basis beginning January 1, 1973; and in counties having a population of less than twenty thousand (20,000), according to the then last preceding Federal Census, the Commissioners Courts shall also have the authority to determine whether county officers shall be compensated on a fee basis or on a salary basis, with the exception that it shall be mandatory upon the Commissioners Courts to compensate all sheriffs, deputy sheriffs, county law enforcement officers including sheriffs who also perform the duties of assessor and collector of taxes, and their deputies, on a salary basis beginning January 1, 1949.

All fees earned by district, county and precinct officers shall be paid into the county treasury where earned for the account of the proper fund, provided that fees incurred by the State, county and any municipality, or in case where a pauper's oath is filed, shall be paid into the county treasury when collected and provided that where any officer is compensated wholly on a fee basis such fees may be retained by such officer or paid into the treasury of the county as the Commissioners Court may direct. All Notaries Public, county surveyors and public weighers shall continue to be compensated on a fee basis.

History

The practice of compensating local officials from fees of office can be traced back at least six centuries in the Anglo-American system. As early as 1338, for example, justices of the peace were paid from fees collected by sheriffs. (See W. Holdsworth, *A History of English Law* (London, 1956), p. 288.) All of the early Texas constitutions, including that of 1876, were silent on the subject of compensating county and precinct officers, probably because it was simply assumed that they would be paid on the familiar fee basis.

The fee system came under attack in the early part of the 20th century, however, because of the potential conflict of interest it created. In 1927, the United States Supreme Court held unconstitutional a state statute that permitted a defendant in a criminal case to be tried by a judge who would receive a fee if the defendant were convicted, but nothing if he were acquitted. (*Tumey v. Ohio,* 273 U.S. 510 (1927).)

In 1935 the legislature submitted the first version of this section to the electorate with the stated objective of abolishing the fee system and replacing it with a system in which district officers would be compensated by salary. (See S.J.R. 6, 44th Legislature, Tex. Laws 1935, *Senate Journal,* p. 23.) That amendment required that all district officers, and all county officers in counties of 20,000 population or more, be compensated on a salary basis. In counties under 20,000, the commissioners court was authorized to determine whether to compensate county officers by fee or by salary. In all counties, the commissioners court was authorized to determine whether to compensate precinct officers by fee or by salary. The county treasury was to receive all fees except those to be paid to county and precinct officers still paid on a fee basis.

Another amendment in 1948 added constables, deputy constables, "precinct law enforcement officers," sheriffs, deputy sheriffs, and "county law enforcement officers" to the list of officers required to be compensated by salary regardless of the population of the county. Two opinions of the attorney general, however, stated that justices of the peace were not "law enforcement officers" within the meaning of the 1948 amendment and therefore could continue to be compensated on the fee basis in counties under 20,000 population. (Tex. Att'y Gen. Op. Nos. V-750, V-748 (1948).) This situation continued until January 1, 1973, the effective date of a 1972 amendment adding justices of the peace to the list of officials who must be compensated by salary, regardless of the county's population.

Explanation

Under this section, certain named officers must be compensated on a salary basis in every county, regardless of its population. These officers are justices of the peace, constables, deputy constables, "precinct law enforcement officers," sheriffs, deputy sheriffs, and "county law enforcement officers." It is not clear what officers, if any, are covered by the two phrases referring to law enforcement officers; the attorney general has said the term does not include justices of the peace, county judges, county attorneys, or district clerks. (Tex. Att'y Gen. Op. No. V-748 (1948).) The only real county law enforcement officers are the sheriff and his deputies, and the only precinct officials actually engaged in law enforcement are the constable and his deputies; but these officials are named specifically, so the phrase "law enforcement officers" presumably does not refer to them either.

If an officer is not among those specifically named, his method of compensation depends on two variables: (1) population of the county and (2) whether the office is district, county, or precinct.

District officers (*e.g.,* district judges, district clerks, district attorneys) must be compensated on a salary basis regardless of the county's population. All county

officers (*e.g.*, county judges, county clerks, county commissioners, county attorneys, county tax assessor-collectors, sheriffs) must be compensated by salary in counties of 20,000 population or more. In counties of less than 20,000, the method of compensating county officers (except, of course, those specifically required to be compensated by salary) is left to the commissioners court. In all counties the method of compensating precinct officers is left to the commissioners court—again, subject to the exception that justices of the peace, constables, deputy constables, and "precinct law enforcement officers" must be salaried. It is not at all clear whether there are any precinct officers other than those named; the statutes on the subject mention only the justice of the peace, constable, and deputy constables. (See Tex. Rev. Civ. Stat. Ann. art. 3912.) If these three are the only "precinct officers" within the meaning of this section, then the language permitting commissioners courts to determine the method of compensating precinct officers is meaningless, because all are required by this section to be compensated by salary.

When an officer is required by this section to be compensated on a salary basis, the supreme court has held that the legislature may not permit that official to also receive compensation from fees. (*Wichita County v. Robinson,* 155 Tex. 1, 276 S.W.2d 509 (1954).) Presumably this rule also applies in the opposite direction, so that notaries public, county surveyors, and public weighers, who are required by this section to be compensated on a fee basis, cannot also be paid a salary. That question apparently has not been authoritatively decided, however.

Salaried officials are required to turn over to the county treasury all fees collected in their official capacity. (*State v. Glass,* 167 S.W.2d 296, (Tex. Civ. App.– Galveston), *writ ref'd n.r.e. per curiam,* 170 S.W.2d 470 (Tex. 1942).) The attorney general has said this includes such incidental fees as payments received by a county clerk for sending mortgage lists to banks and commissions received by a district attorney for making collections. (Tex. Att'y Gen. Op. Nos. V-1460 (1952), V-882 (1949).) The rule is not as inclusive as it sounds, however; for example, justices of the peace are allowed to keep fees they receive for performing marriages, acting as ex officio notaries public, and reporting to the board of vital statistics. (See Tex. Rev. Civ. Stat. Ann. art. 3912-2a.)

Comparative Analysis

State constitutional provisions on compensation of local officers vary widely. Approximately nine states give the legislature or some agency such as a board of supervisors general power to regulate compensation of officers. About six states prohibit fee compensation altogether, requiring that officers be paid fixed salaries; but at least three of these have exceptions permitting constables and/or justices of the peace to receive fees.

At least four constitutions direct that fees be paid into the county treasury, and three others require that fees in excess of amounts authorized as salaries be paid into the treasury.

The *Model State Constitution* does not mention the method of compensation of local officials.

Author's Comment

Despite its length and complexity, Section 61 really accomplishes only one thing: It prohibits fee compensation of most county officials and all precinct and district officials. This could, of course, be accomplished by statutes; in fact, the entire subject already is fully covered by statute. (See Tex. Rev. Civ. Stat. Ann. arts. 3882-3912.)

Since the exceptions in Section 61 have largely swallowed the rule, if the section is to be retained at all, it should be rewritten to specify the officers who *may* be compensated by fees, rather than listing those who may not.

Sec. 62. STATE AND COUNTY RETIREMENT, DISABILITY AND DEATH COMPENSATION FUNDS. (a) The Legislature shall have the authority to levy taxes to provide a State Retirement, Disability and Death Compensation Fund for the officers and employees of the state, and may make such reasonable inclusions, exclusions, or classifications of officers and employees of this state as it deems advisable. The Legislature may also include officers and employees of judicial districts of the state who are or have been compensated in whole or in part directly or indirectly by the state, and may make such other reasonable inclusions, exclusions, or classification of officers and employees of judicial districts of this state as it deems advisable. Persons participating in a retirement system created pursuant to Section 1-a of Article V of this Constitution shall not be eligible to participate in the Fund authorized in this subsection; and persons participating in a retirement system created pursuant to Section 48-a of Article III of this Constitution shall not be eligible to participate in the Fund authorized in this subsection except as permitted by Section 63 of Article XVI of this Constitution. Provided, however, any officer or employee of a county as provided for in Article XVI, Section 62, Subsection (b) of this Constitution, shall not be eligible to participate in the Fund authorized in this subsection, except as otherwise provided herein. The amount contributed by the state to such Fund shall equal the amount paid for the same purpose from the income of each such person, and shall not exceed at any time six per centum (6%) of the compensation paid to each such person by the state.

There is hereby created as an agency of the State of Texas the Employees Retirement System of Texas, the rights of membership in which, the retirement privileges and benefits thereunder, and the management and operations of which shall be governed by the provisions herein contained and by present or hereafter enacted Acts of the Legislature not inconsistent herewith. The general administration and responsibility for the proper operation of said system are hereby vested in a State Board of Trustees, to be known as the State Board of Trustees of the Employees Retirement System of Texas, which Board shall be constituted and shall serve as may now or hereafter be provided by the Legislature. Said Board shall exercise such powers as are herein provided together with such other powers and duties not inconsistent herewith as may be prescribed by the Legislature. All moneys from whatever source coming into the Fund and all other securities, moneys, and assets of the Employees Retirement System of Texas shall be administered by said Board and said Board shall be the trustees thereof. The Treasurer of the State of Texas shall be custodian of said moneys and securities. Said Board is hereby authorized and empowered to acquire, hold, manage, purchase, sell, assign, trade, transfer, and dispose of any securities, evidences of debt, and other investments in which said securities, moneys, and assets have been or may hereafter be invested by said Board. Said Board is hereby authorized and empowered to invest and reinvest any of said moneys, securities, and assets, as well as the proceeds of any of such investments, in bonds, notes, or other evidences of indebtedness issued, or assumed or guaranteed in whole or in part, by the United States or any agency of the United States, or by the State of Texas, or by any county, city, school district, municipal corporation, or other political subdivision of the State of Texas, both general and special obligations; or in home office facilities to be used in administering the Employees Retirement System including land, equipment, and office building; or in such corporation bonds, notes, other evidences of indebtedness, and corporation stocks, including common and preferred stocks, of any corporation created or existing under the laws of the United States or of any of the states of the United States, as said Board may deem to be proper investments; provided that in making each and all of such investments said Board shall exercise the judgment and care under the circumstances then prevailing which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as probable safety of their capital; and further provided, that a sufficient sum shall be kept on hand to meet payments as they become

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Sec. 62. STATE AND COUNTY RETIREMENT, DISABILITY AND DEATH COMPENSATION FUNDS. (a) The Legislature shall have the authority to levy taxes to provide a State Retirement, Disability and Death Compensation Fund for the officers and employees of the state, and may make such reasonable inclusions, exclusions, or classifications of officers and employees of this state as it deems advisable. The Legislature may also include officers and employees of judicial districts of the state who are or have been compensated in whole or in part directly or indirectly by the state, and may make such other reasonable inclusions, exclusions, or classification of officers and employees of judicial districts of this state as it deems advisable. Persons participating in a retirement system created pursuant to Section 1-a of Article V of this Constitution shall not be eligible to participate in the Fund authorized in this subsection; and persons participating in a retirement system created pursuant to Section 48-a of Article III of this Constitution shall not be eligible to participate in the Fund authorized in this subsection except as permitted by Section 63 of Article XVI of this Constitution. Provided, however, any officer or employee of a county as provided for in Article XVI, Section 62, Subsection (b) of this Constitution, shall not be eligible to participate in the Fund authorized in this subsection, except as otherwise provided herein. The amount contributed by the state to such Fund shall equal the amount paid for the same purpose from the income of each such person, and shall not exceed at any time six per centum (6%) of the compensation paid to each such person by the state.

There is hereby created as an agency of the State of Texas the Employees Retirement System of Texas, the rights of membership in which, the retirement privileges and benefits thereunder, and the management and operations of which shall be governed by the provisions herein contained and by present or hereafter enacted Acts of the Legislature not inconsistent herewith. The general administration and responsibility for the proper operation of said system are hereby vested in a State Board of Trustees, to be known as the State Board of Trustees of the Employees Retirement System of Texas, which Board shall be constituted and shall serve as may now or hereafter be provided by the Legislature. Said Board shall exercise such powers as are herein provided together with such other powers and duties not inconsistent herewith as may be prescribed by the Legislature. All moneys from whatever source coming into the Fund and all other securities, moneys, and assets of the Employees Retirement System of Texas shall be administered by said Board and said Board shall be the trustees thereof. The Treasurer of the State of Texas shall be custodian of said moneys and securities. Said Board is hereby authorized and empowered to acquire, hold, manage, purchase, sell, assign, trade, transfer, and dispose of any securities, evidences of debt, and other investments in which said securities, moneys, and assets have been or may hereafter be invested by said Board. Said Board is hereby authorized and empowered to invest and reinvest any of said moneys, securities, and assets, as well as the proceeds of any of such investments, in bonds, notes, or other evidences of indebtedness issued, or assumed or guaranteed in whole or in part, by the United States or any agency of the United States, or by the State of Texas, or by any county, city, school district, municipal corporation, or other political subdivision of the State of Texas, both general and special obligations; or in home office facilities to be used in administering the Employees Retirement System including land, equipment, and office building; or in such corporation bonds, notes, other evidences of indebtedness, and corporation stocks, including common and preferred stocks, of any corporation created or existing under the laws of the United States or of any of the states of the United States, as said Board may deem to be proper investments; provided that in making each and all of such investments said Board shall exercise the judgment and care under the circumstances then prevailing which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as probable safety of their capital; and further provided, that a sufficient sum shall be kept on hand to meet payments as they become

due each year under such retirement plan, as may now or hereafter be provided by law. Unless investments authorized herein are hereafter further restricted by an Act of the Legislature, no more than one per cent (1%) of the book value of the total assets of the Employees Retirement System shall be invested in the stock of any one (1) corporation, nor shall more than five per cent (5%) of the voting stock of any one (1) corporation be owned; and provided further, that stocks eligible for purchase shall be restricted to stocks of companies incorporated within the United States which have paid cash dividends for ten (10) consecutive years or longer immediately prior to the date of purchase and which, except for bank stocks and insurance stocks, are listed upon an exchange registered with the Securities and Exchange Commission or its successor; and provided further, that not less than twenty-five per cent (25%) at any one time of the book value of investments of said Fund shall be invested in Government and Municipal Securities as enumerated above. This Amendment shall be self-enacting and shall become effective immediately upon its adoption without any enabling legislation.

(b) Each county shall have the right to provide for and administer a Retirement, Disability and Death Compensation Fund for the appointive officers and employees of the county; provided same is authorized by a majority vote of the qualified voters of such county and after such election has been advertised by being published in at least one newspaper of general circulation in said county once each week for four consecutive weeks; provided that the amount contributed by the county to such Fund shall equal the amount paid for the same purpose from the income of each such person, and shall not exceed at any time five per centum (5%) of the compensation paid to each such person by the county, and shall in no one year exceed the sum of One Hundred and Eighty Dollars ($180) for any such person.

All funds provided from the compensation of each such person, or by the county for such Retirement, Disability and Death Compensation Fund, as are received by the county, shall be invested in bonds of the United States, the State of Texas, or counties or cities of this State, or in bonds issued by any agency of the United States Government, the payment of the principal of and interest on which is guaranteed by the United States, provided that a sufficient amount of said funds will be kept on hand to meet the immediate payment of the amount likely to become due each year out of said Fund, such amount of funds to be kept on hand to be determined by the agency which may be provided by law to administer said Fund; and provided that the recipients of benefits from said Fund shall not be eligible for any other pension retirement funds or direct aid from the State of Texas, unless the Fund, the creation of which is provided for herein, contributed by the county, is released to the State of Texas as a condition to receiving such other pension.

(c) The Texas Legislature is authorized to enact appropriate laws to provide for a System of Retirement, Disability and Death Benefits for all the officers and employees of a county or other political subdivision of the state, or a political subdivision of a county; providing that when the Texas Legislature has passed the necessary enabling legislation pursuant to the Constitutional authorization, then the governing body of the county, or other political subdivision of the state, or political subdivision of the county shall make the determination as to whether a particular county or other political subdivision of the state, or subdivision of the county participates in this System; provided further that such System shall be operated at the expense of the county or other political subdivision of the state of political subdivision of the county electing to participate therein and the officers and employees covered by the System; and providing that the Legislature of the State of Texas shall never make an appropriation to pay the costs of this Retirement, Disability and Death Compensation System.

The Legislature may provide for a voluntary merger into the System herein authorized by this Constitutional Amendment of any System of Retirement, Disability and Death Compensation Benefits which may now exist or that may hereafter be established under subsection (b) of Section 62 of Article XVI of the Texas Constitution; providing further that the Texas Legislature in the enabling statute will make the determination as to the amount of money that will be contributed by the county or other political subdivision of the state or political subdivision of the county to the State-wide System of Retirement, Disability and Death Benefits, and the Legislature shall further provide that the amount of money contributed by the county or other political

subdivision of the state or subdivision of the county shall equal the amount paid for the same purpose from the income of each officer and employee covered by this State-wide System.

It is the further intention of the Legislature, in submitting this Constitutional Amendment, that the officers and employees of the county or other political subdivision of the state or political subdivision of a county may be included in these systems regardless of whether the county or other political subdivision of the state or political subdivision of the county participates in the Retirement, Disability and Death Benefit System authorized by this Constitutional Amendment, or whether they participate in a System under the provisions of subsection (b) of Section 62 of Article XVI of the Texas Constitution as the same is herein amended.

History

The original Section 62 as adopted in 1946 consisted of the present Subsection (b) and a Subsection (a) that tracked the language of the original Section 48a of Article III. (See *History* of that section.) In 1949 the voters turned down a proposed Section 63 which would have supplemented Subsection (b) with an authorization for a statewide system comparable to the municipal system authorized by Section 51-f of Article III. Two years later the legislature tried again, but again the voters turned it down. This time the legislature included a clause that had been omitted in 1949—a prohibition against appropriating state moneys to pay county pensions.

Subsection (a) was amended in 1957. The first paragraph read as it does today except for the maximum allowable contribution, which remained at 5 per cent. The second paragraph was amended more or less to track the wording of the 1956 amendment of Section 48a of Article III. (See *History* of that amendment.)

In 1958 the voters again turned down an amendment of Subsection (b). This amendment would have removed the first semicolon in the first paragraph and inserted the words "or precinct or for the appointive and elective officers and for the employees of the county or precinct." The amendment would have changed the maximum allowable contribution from 5 per cent to 7½ per cent and removed the $180 maximum. In 1962, there was still another effort to include elected county officials. To make the idea palatable, it was proposed that an elected official would have to serve at least 12 years to be eligible for benefits. (This is probably what was intended, but the drafting was ambiguous.) The proposal reverted to the 5 per cent maximum but removed the $180 maximum. This proposal went beyond "county or precinct" by covering "each county and any other political subdivision of this State." The voters rejected the amendment.

In 1963, the legislature tried something new—a "local" amendment. This proposal applied only to appointed officials and employees of the political subdivisions within Jefferson County. In one respect this proposal represented ridiculous drafting; it literally provided that *each* subdivision would have the right to provide for a pension fund for *all* appointed officers and employees of *all* political subdivisions within the county. The voters of the entire state turned down this local amendment in November 1964.

Finally, in 1966 the voters accepted Subsection (c). It is ironic that in most respects Subsection (c) is broader than the various amendments rejected between 1949 and 1964. In 1968 the present wording of Subsection (a) was adopted. The first paragraph was changed only by substituting 6 per cent for 5 per cent in the last sentence. Except as discussed later, the second paragraph tracks the 1966 Teachers' Retirement System Fund set out in Section 48b of Article III.

In 1975 Section 62 was repealed. (See the *History* of Section 67.)

Explanation

In discussing other pension sections it has been pointed out again and again that there is no need for a constitutional grant of power to provide pensions for government employees. This observation creates a bit of a problem in the case of Subsection (b), what with all those unsuccessful attempts to broaden county coverage. Whatever the legislature's power, once an amendment is proposed and defeated, one could hardly expect the legislature to act without a new mandate. Indeed, this history of Section 62 may lend support to the observation of Justice Critz quoted in the *Author's Comment* on this section.

Subsection (a). The first paragraph of this subsection is a strange combination of grants of flexibility to the legislature and limitations on that flexibility. On the one hand, words in the second sentence like "who are or have been compensated in whole or in part directly or indirectly by the state" avoid problems of interpreting the meaning of "officers and employees" of the state. On the other hand, the third and fourth sentences are designed to prevent the legislature from permitting someone to collect a double pension for the same service. Although this is an understandable bit of caution, such limitations create problems. In 1970 the attorney general was asked for an opinion on the pension consequences of converting domestic relations and juvenile courts into district courts. Judges of the former participate in the Subsection (c) plan whereas if they became judges of state district courts they would come under the judicial plan of Section 1-a, Article V. The attorney general ruled that the limitation of Subsection (a) precluded any preservation of county pension rights if the judges became district judges. (Tex. Att'y Gen. Op. No. M-830 (1971).) There is reason to question the soundness of the opinion. Subsection (a) has nothing to do with Subsection (c). Moreover, the opinion quoted from the *Farrar* case (see Sec. 63 of this article), which dealt with different provisions with different wording. This is a tail-wagging-the-dog situation. A proposed judicial reform fails because of an inability to adjust two government pension systems.

The second paragraph with one major exception is substantially the same as Section 48b of Article III. The major change was to remove what has been described previously as a "weird" restriction. (See the *Explanation* of that section.) In Subsection (a), the restriction on diversification of investments is a straightforward requirement that 25 per cent be in government obligations. For reasons set out earlier, this is not necessarily a good rule for a tax-exempt fund.

Subsection (b). This subsection is probably obsolete. Under Subsection (c) and the implementing statute (Tex. Rev. Civ. Stat. Ann. art. 6228g, secs. 10 and 11), county and district pension plans can be folded into the statewide system. In any event, an old plan could live on if Subsection (b) were repealed. It is inconceivable that anyone would want to create a Subsection (b) plan in preference to joining the Subsection (c) system.

Subsection (c). The thrust of this subsection has already been set forth. (See the *Explanations* of Secs. 51-e and 51-f of Art. III.) It was noted that Subsection (c) includes political subdivisions of the state and that this literally includes cities and towns. The implementing statute excludes them. (Tex. Rev. Civ. Stat. Ann. art. 6228g, sec. 2, subs. 3.)

There are two drafting ambiguities in the second paragraph of the subsection. The paragraph opens with a reference to merging Subsection (b) plans with the Subsection (c) system. Under ordinary usage the balance of the paragraph, particularly since it consists of "providing that" and "further provide that," should

concern only the elements of the merging process. It is clear, however, that the balance of the paragraph relates back to the first paragraph.

The second drafting ambiguity concerns the two provisos. The first states that the legislature "will make the determination as to the amount of money that will be contributed by the county"; the second states that the legislature "shall further provide that the amount of money contributed by the county . . . shall equal the amount paid for the same purpose from the income of each officer and employee . . . ." (One wonders why the use of "will" in the first proviso and "shall" in the second.) These two provisos seem mutually exclusive. What was probably in somebody's mind was that current contributions for current service had to be on the usual 50-50 basis, but that the legislature should set up rules for determination of prior service credit for work performed before the pension plan came into existence. In any event, the implementing statutes provide for prior service credit and for its financing by the government alone. (Tex. Rev. Civ. Stat. Ann. art. 6228g, sec. 4, subs. 2(d).)

The final paragraph of Subsection (c) may be unique. It is not normal for a constitutional provision adopted by the voters to state: "It is the further intention of the Legislature, in submitting this Constitutional Amendment, that . . . ." (The word "further" is particularly mystifying.) What the paragraph means is not at all clear. One way to read the paragraph is that the first and second paragraphs of the subsection mean what they say. Another reading is that Subsection (c) does not repeal Subsection (b), which is obvious. Still another possibility is that it does not mean anything except that the legislature hoped that the people would adopt the amendment.

Comparative Analysis

See *Comparative Analysis* of Section 67 of this article.

Author's Comment

In *Friedman v. American Surety Co.*, Justice Critz, speaking for the supreme court, observed:

> It is argued that because the Legislature saw fit to submit to the people for adoption Sections 48 [sic], 51a, 51b, 51c, and 51d, and the Confederate aid provisions of Section 51, all of Article III of our State Constitution, it is indicated that the Legislature was of the opinion that such amendments were necessary . . . . We are not called upon, and never will be called upon, to pass on the necessity for the above amendments, ... We will say, however, that the history of the submission of constitutional amendments in this State will prove that not all of them have been submitted in order to create a legislative power. Some few have undoubtedly been submitted to ascertain the will of the people, and to enable them to express such will regarding a governmental policy. (137 Tex. 149, 166, 151 S.W.2d 570, 580 (1941). Section "48" should read "48a." In 1941, Sections 51a, 51b, 51c, and 51d all dealt with welfare. See *History* of Sec. 51-a.)

Justice Critz was answering an argument put forth by Chief Justice Alexander in dissent. It is possible that Justice Critz was overstating the case in order to answer the dissent. But, assuming that he was not overstating it, using the constitution as a vehicle for a popular referendum simply adds to the muddle, to say nothing of abusing the amending process and burdening the constitution. Moreover, did Justice Critz mean that if an unnecessary amendment was voted down, the legislature lost the existing power to legislate?

In any event, it is clear that there have been unnecessary amendments. Section 48a of Article III is one example. It follows that all subsequent amendments

concerning pensions—except Section 66, Article XVI—were equally unnecessary. (Sec. 63 is a little different; it was necessary to "overrule" a court decision construing an unnecessary constitutional provision.)

All of the many pension provisions could be repealed safely. Under the rule of the *Byrd* case (see *Explanation* of Sec. 48a), anything can be done in the pension area except to increase the pensions of those already retired. (See the *Author's Comment* on Sec. 44 of Art. III. But see the *Explanation* of Sec. 67 of this article.) Even that should be permissible. There have been instances where public employee pension systems have gotten out of hand but only by profligate increases in pensions to be paid in the future. (This is a device for granting a "pay increase" without having to raise taxes now.) Giving some relief to those who retired on inadequate pensions is not likely to be abused.

There are, of course, practical problems in abandoning all pension provisions. In any event, this has not happened. Section 67 has taken over the subject.

Sec. 63. TEACHERS AND EMPLOYEES RETIREMENT SYSTEMS, SERVICE CREDIT. Qualified members of the Teacher Retirement System, in addition to the benefits allowed them under the Teacher Retirement System shall be entitled to credit in the Teacher Retirement System for all services, including prior service and membership service, earned or rendered by them as an appointive officer or employee of the State. Likewise, qualified members of the Employees Retirement System of Texas, in addition to the benefits allowed them under the Employees Retirement System of Texas shall be entitled to credit in the Employees Retirement System of Texas for all services, including prior service and membership service, earned or rendered by them as a teacher or person employed in the public schools, colleges, and universities supported wholly or partly by the State.

History

This section was added in 1954 and repealed in 1975 when Section 67 of this article was adopted.

Explanation

In 1951 the supreme court invalidated a statute authorizing the transfer of service credits between the teachers' pension plan and the state employees' pension plan. (*Farrar v. Board of Trustees,* 150 Tex. 572, 243 S.W.2d 688 (1951).) This section "overrules" the *Farrar* case. (Apparently, the case is not dead; the attorney general made use of it recently. See Tex. Att'y Gen. Op. No. M-830 (1971) discussed in the *Explanation* of Sec. 62.)

Comparative Analysis

No other state has a comparable provision. Obviously, many states have many provisions designed to "overrule" a specific judicial interpretation of the state constitution.

Author's Comment

The irony of this section is that an eminently sensible policy had to be adopted by constitutional amendment because of the details in two constitutional provisons that were unnecessary anyway.

Sec. 64. TERMS OF OFFICE, CERTAIN OFFICES. The office of Inspector of Hides and Animals, the elective district, county and precinct offices which have heretofore had terms of two years, shall hereafter have terms of four years; and the holders of such offices shall serve until their successors are qualified.

Art. XVI, § 64

History

This section was added to the constitution in 1954. Terms of district, county, and precinct officials could not be lengthened without a constitutional amendment because Section 30 of Article XVI limits to two years the duration of all offices not fixed by the constitution. Section 64 extended the terms of nonconstitutional officers; other constitutional provisions were also amended at the same time to extend the terms of various constitutional offices from two to four years. (See, *e.g.*, Art. V, Secs. 9 (district clerk), 15 (county judge), 18 (justice of the peace and constable), 20 (county clerk), 23 (sheriff), and 21 (county and district attorney).)

In all constitutions prior to 1876, terms of offices not fixed by the constitution were limited to four years. Section 30 of Article XVI of the 1876 Constitution reduced the term to two years.

Explanation

This section is straightforward and apparently has generated little litigation.

One question has arisen because the section speaks of district, county, and precinct offices generally, while Section 65, which is the transitional provision for this section, lists specific offices. The attorney general ruled that Section 64 was not intended to cover any office not specifically named in Section 65 and therefore does not apply to the office of county school trustee because the latter is not named in Section 65. (Tex. Att'y Gen. Op. No. WW-1110A (1962).) As an exercise in constitutional construction, this may be an example of allowing the "tail to wag the dog", but it is at least an illustration of the need for consistency in draftsmanship.

It is not clear why the office of "Inspector of Hides and Animals" is mentioned specifically in Section 64. Article 6972 of the civil statutes, which creates the office, provides that each county shall constitute an inspection district and shall elect an "Inspector of Hides and Animals." The office therefore would seem to be either a county or district office (or both) and thus covered by the general language of Section 64 without need for specific identification.

Comparative Analysis

About 11 states have constitutional provisions stating that terms of office not established by the constitution shall be provided for by law. Hawaii has a similar provision concerning specific offices. (Hawaii Const. art. IV, sec. 6.) About five states provide that the legislature may not create offices with terms exceeding four years. At least two state constitutions provide that certain officers shall hold office during the term of (and/or at the pleasure of) the governor. Four other state constitutions contain general provisions that, like this section, limit terms of office to a specific number of years. The *Model State Constitution* provides in separate sections for the terms of specific state offices but does not fix terms for precinct, county, or district offices.

Author's Comment

It has been suggested that some of the elective offices covered by this section should be made appointive instead, thus eliminating the "long ballot" which confronts Texas voters. (Cofer, "Suffrage and Elections—Constitutional Revision," 35 *Texas L. Rev.* 1040, 1044-45 (1957).) Even if the offices continue to be elective, however, many of the terms of office now provided for by the constitution, especially for lower-echelon positions, could be fixed by statute. Terms of most of the offices covered by Section 64 are also provided for in other sections dealing specifically with those offices. At the very least, consideration should be given to

combining Sections 30, 30a, 30b, 64 and 65 of Article XVI.

Sec. 65. TRANSITION FROM TWO-YEAR TO FOUR-YEAR TERMS OF OFFICE. Staggering Terms of Office—The following officers elected at the General Election in November, 1954, and thereafter, shall serve for the full terms provided in this Constitution:

(a) District Clerks; (b) County Clerks; (c) County Judges; (d) Judges of County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; (e) County Treasurers; (f) Criminal District Attorneys; (g) County Surveyors; (h) Inspectors of Hides and Animals; (i) County Commissioners for Precincts Two and Four; (j) Justices of the Peace.

Notwithstanding other provisions of this Constitution, the following officers elected at the General Election in November, 1954, shall serve only for terms of two (2) years: (a) Sheriffs; (b) Assessors and Collectors of Taxes; (c) District Attorneys; (d) County Attorneys; (e) Public Weighers; (f) County Commissioners for Precincts One and Three; (g) Constables. At subsequent elections, such officers shall be elected for the full terms provided in this Constitution.

In any district, county or precinct where any of the aforementioned offices is of such nature that two (2) or more persons hold such office, with the result that candidates file for "Place No. 1," "Place No. 2," etc., the officers elected at the General Election in November, 1954, shall serve for a term of two (2) years if the designation of their office is an uneven number, and for a term of four (4) years if the designation of their office is an even number. Thereafter, all such officers shall be elected for the terms provided in this Constitution.

Provided, however, if any of the officers named herein 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.

History

This section, with the exception of the proviso, was added to the constitution by amendment in 1954 along with Section 64 extending the terms of certain offices from two to four years. Its function was to stagger the effect of this extension so that some county, district, and precinct offices would be filled each two years. The proviso was added in 1958.

Explanation

Except for the proviso, this section appears to be a transitional provision applying only to the 1954 general election. The supreme court, however, has ruled that Section 65 also controls the sequence of terms for offices created after 1954. (See *Fashing v. El Paso County Democratic Executive Committee,* 534 S.W.2d 886 (Tex. 1976).) Thus, terms for a domestic relations court created in 1971 run in four-year intervals dating back to 1954, rather than four-year intervals beginning when the court was created. A judge elected in 1972 therefore is up for re-election in 1974 (the fifth four-year interval after 1954), rather than 1976.

The federal constitutionality of Section 65 was upheld, both on its face and as applied, in a case brought by voters who would have been entitled to vote for county commissioners at the next election but who, because of redistricting, were transferred to districts in which they would not be entitled to vote for these officers until the subsequent election. (*Pate v. El Paso County,* 337 F. Supp. 95 (W.D. Tex.), *aff'd without opinion,* 400 U.S. 806 (1970).) However, in a case involving a similar situation, it was held that where less than 50 percent of the residents had

had a chance to vote, equities favored reordering the election. (*Dollinger v. Jefferson County Commissioners Court,* 335 F. Supp. 340 (E.D. Tex. 1971).)

Significantly, neither this section nor any comparable provision has ever been applied to district judges. As a result, there is no systematic staggering of terms of district judges in areas where there is more than one district judge. Unless the dates of creation of new courts happened to occur in such a way that the judges' four-year terms overlap, it is possible that no district judge may be up for election in a county for four years.

The effect of the proviso is to forfeit automatically the office of a precinct, county, or district official who seeks other office when more than one year remains in his term. This is true even when the two offices in question would not violate the dual-officeholding provisions of Section 40 of Article XVI. (*Ramirez v. Flores,* 505 S.W.2d 406 (Tex. Civ. App.–San Antonio 1973, *writ ref'd n.r.e.*).)

Comparative Analysis

Although several states have provisions limiting terms of office, no other state has a provision comparable to Section 65, nor does the *Model State Constitution.*

Author's Comment

Section 65, excluding the proviso, served its purpose 20 years ago and is now meaningless. The Texas Legislative Council has suggested that Sections 30, 30-a, 30-b, 64 and 65 of this article should be combined in one general provision governing terms of office. (3 *Constitutional Revision* (Austin: Texas Legislative Council, 1959), p. 278) If that is done, all of Section 65 except the proviso should be deleted because it is superfluous.

The proviso discriminates, with no apparent legitimate reason, against elected precinct, county, and district officials. (See also Art. XI, Sec. 11, which contains an identical proviso applicable to municipal officials.) If it is thought generally that officeholders should forfeit their positions when they announce for other office, the provision should apply to members of the legislature and statewide elected officials as well as to those named in this section.

If the officeholder waits until the last year of his term to announce for the new office, his old office is not forfeited. This one-year period might be unrealistic if applied to statewide and federal offices, in view of the trend in recent years toward longer campaigns for those offices.

Sec. 66. TEXAS RANGERS; RETIREMENT AND DISABILITY PENSION SYSTEM FOR RANGERS INELIGIBLE FOR MEMBERSHIP IN EMPLOYEES RETIREMENT SYSTEM. The Legislature shall have authority to provide for a system of retirement and disability pensions for retiring Texas Rangers who have not been eligible at any time for membership in the Employees Retirement System of Texas as that retirement system was established by Chapter 352, Acts of the Fiftieth Legislature, Regular Session, 1947, and who have had as much as two (2) years service as a Texas Ranger, and to their widows; providing that no pension shall exceed Eighty Dollars ($80) per month to any such Texas Ranger or his widow, provided that such widow was legally married prior to January 1, 1957, to a Texas Ranger qualifying for such pension.

These pensions may be paid only from the special fund created by Section 17, Article VII for a payment of pensions for services in the Confederate army and navy, frontier organizations, and the militia of the State of Texas, and for widows of such soldiers serving in said armies, navies, organizations or militia.

History

This section was added in 1958.

Explanation

Of all the many pension and related sections in the constitution, this is the only clearly necessary one. Any pension, insurance, medical assistance, workmen's compensation, or death benefit plan for government employees operating prospectively should be recognized as compensation. There is no constitutional prohibition against compensating employees. But if a pension is initially awarded after employment has ended, a prohibition against grants to people as in Section 51 of Article III or against extra compensation as in Section 44 of that article may be applicable. A prohibition against appropriating money for a private purpose as in Section 6 of Article XVI is not applicable, however, for a pension for faithful service can be viewed as a form of welfare or as a recognition of the unfairness of ignoring retired employees when instituting a pension plan for present employees.

Section 66 is not self-executing. The legislature promptly implemented the section by providing the maximum pension permitted by the section. In addition to the other limitations contained in the section, the legislature ruled out rangers who had been dismissed for cause and set the starting age for a pension at 60 years old. (Tex. Rev. Civ. Stat. Ann. art. 6228e.) There does not appear to have been any litigation concerning the section. There are two attorney general opinions, one that permits a widow who remarries to continue to receive her pension and one that ruled against a pension for a former ranger who later worked for the state, contributed to the Employees Retirement System but withdrew his contributions when he left. (Tex. Att'y Gen. Op. Nos. WW-686 (1959) and M-1181 (1972), respectively.)

Comparative Analysis

No other state has a comparable provision. (But see the *Comparative Analysis* of Sec. 67.)

Author's Comment

It is worthy of note that the joint resolution submitting the new pension section (Section 67 of this article) repealed all pension sections except Section 66. This is understandable, for Section 66 is a "transition" section covering a limited and "frozen" number of people which will eventually reach zero. It is also worthy of note that, paradoxically, Section 66 is both the only pension section not repealed and the only pension section, as noted earlier, that was constitutionally necessary in the first place. It may be that more sections like this one will be required if the legislature some day wants to do something for retired personnel. (For further discussion of this point, see the *Author's Comment* on Sec. 67.)

Sec. 67. STATE AND LOCAL RETIREMENT SYSTEMS. (a) General Provisions (1) The Legislature may enact general laws establishing systems and programs of retirement and related disability and death benefits for public employees and officers. Financing of benefits must be based on sound actuarial principles. The assets of a system are held in trust for the benefit of members and may not be diverted.

(2) A person may not receive benefits from more than one system for the same service, but the Legislature may provide by law that a person with service covered by more than one system or program is entitled to a fractional benefit from each system or program based on service rendered under each system or program calculated as to amount upon the benefit formula used in that system or program. Transfer of service credit between the Employees Retirement System of Texas and the Teacher Retirement System of Texas also may be authorized by law.

(3) Each statewide benefit system must have a board of trustees to administer the system and to invest the funds of the system in such securities as the board may consider prudent investments. In making investments, a board shall exercise the judgment and

care under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as the probable safety of their capital. The Legislature by law may further restrict the investment discretion of a board.

(4) General laws establishing retirement systems and optional retirement programs for public employees and officers in effect at the time of the adoption of this section remain in effect, subject to the general powers of the Legislature established in this subsection.

(b) State Retirement Systems. (1) The Legislature shall establish by law a Teacher Retirement System of Texas to provide benefits for persons employed in the public schools, colleges, and universities supported wholly or partly by the state. Other employees may be included under the system by law.

(2) The Legislature shall establish by law an Employees Retirement System of Texas to provide benefits for officers and employees of the state and such state-compensated officers and employees of appellate courts and judicial districts as may be included under the system by law.

(3) The amount contributed by a person participating in the Employees Retirement System of Texas or the Teacher Retirement System of Texas shall be established by the Legislature but may not be less than six percent of current compensation. The amount contributed by the state may not be less than six percent nor more than 10 percent of the aggregate compensation paid to individuals participating in the system. In an emergency, as determined by the governor, the Legislature may appropriate such additional sums as are actuarially determined to be required to fund benefits authorized by law.

(c) Local Retirement Systems. (1) The Legislature shall provide by law for:

(A) the creation by any city or county of a system of benefits for its officers and employees;

(B) a statewide system of benefits for the officers and employees of counties or other political subdivisions of the state in which counties or other political subdivisions may voluntarily participate; and

(C) a statewide system of benefits for officers and employees of cities in which cities may voluntarily participate.

(2) Benefits under these systems must be reasonably related to participant tenure and contributions.

(d) Judicial Retirement System. (1) Notwithstanding any other provision of this section, the system of retirement, disability, and survivors' benefits heretofore established in the constitution or by law for justices, judges, and commissioners of the appellate courts and judges of the district and criminal district courts is continued in effect. Contributions required and benefits payable are to be as provided by law.

(2) General administration of the Judicial Retirement System of Texas is by the Board of Trustees of the Employees Retirement System of Texas under such regulations as may be provided by law.

(e) Anticipatory Legislation. Legislation enacted in anticipation of this amendment is not void because it is anticipatory.

History

Section 67 was adopted by a vote of 399,163 to 142,790 at a special election held on April 22, 1975. (Sec. 24 of Art. III was amended at the same election. See the *History* of that section.) Almost as important as the adoption of the new section was the repeal of Sections 48a, 48b, 51e, and 51f of Article III and Sections 62 and 63 of Article XVI. Actually, Section 67 is substantially the same pension revision drafted by the 1974 Convention and later submitted to the voters in November 1975 as part of a general revision of the constituion. Since the November vote was unfavorable, Section 67 is now the only product of the long revision effort that made it into the constitution.

Why Section 67 and the 1974 Convention proposal are not exactly the same rather than just substantially the same is not clear. The differences are not earthshaking. Section 67 provides in Subsection (b)(3) that the state may not contribute to a pension fund more than 10 percent of current compensation whereas the convention's proposal contained no maximum. The same subsection permits the legislature to appropriate additional necessary sums but only in "an emergency as determined by the governor" whereas the convention's proposal did not require an "emergency" and did not mention the governor. This all seems a little strange, for both versions are, in effect, limitations on the power of the legislature to appropriate more than is "actuarially determined to be required to fund benefits authorized by law." The inclusion of the governor's power to determine that there is an emergency seems to do nothing except give him the power to prevent the legislature from appropiating what is actuarially needed. This seems to translate into a power of the governor to refuse to act and thereby really create an emergency. In the event of a real emergency that the governor would not recognize, the legislature might have to reduce future benefits in order to preserve actuarial soundness. All in all, this particular gubernatorial power gives the governor an absolute veto over legislative policymaking, something that the traditional veto power does not include.

It should be noted that Section 1-a(1) of Article V, providing for a compensation plan for retired judges, was not included among the sections repealed when Section 67 was adopted. (See the *Explanation* of Sec. 1-a and the *Explanation* of this section.)

Explanation

In view of the short period of time since Section 67 was adopted, it is not surprising that there is little in the way of judicial or other gloss on the section. The big question is whether Section 67 has simplified the previously existing mishmash enough to obviate the necessity for judicial and other gloss. To put it another way, is Section 67 simple enough to leave the legislature with the necessary flexibility to solve all pension problems by legislation, including legislation that "overrules" a judicial decision? (See the *Explanation* of Sec. 63 of this article for an example of a constitutional amendment that was required to "overrule" a decision.) The analysis that follows is devoted principally to this question.

In the discussions of the several pension sections that were repealed at the time Section 67 was adopted, three fundamental propositions were stressed. First, no constitutional amendment was ever necessary in order to create a pension system. Second, none of the constitutional provisions prevented the legislature from discontinuing a pension system. Third, the legislature could discontinue a system, but whatever existed at the time of discontinuance was frozen so that employees in the system at the time of discontinuance had a "vested" right to whatever had been funded up to that time. (If the legislature had ever taken such a politically suicidal step, a litigating donnybrook would have ensued, principally devoted to what, if anything, the legislature had to continue to do to preserve the financial integrity of the existing system in order to meet the "vested" rights at the time of discontinuance.)

The drafters of Section 67 obviously intended to create some judicially enforceable obligation on the government to continue to provide for pensions for government employees. The section clearly does not go so far as the pension section in the New York Constitution discussed in the *Author's Comment* on this section. But how far does Section 67 go?

Subsection (a), General Provisions. Subdivision (1) of the subsection contains an

unnecessary and redundant grant of legislative power and two limitations on the legislature's power, one of which is of dubious significance and the other of which is of great significance. The grant of power to establish pension systems is unnecessary for the reasons mentioned earlier; the grant is redundant because the legislature has long since exercised the power. Indeed, Subdivision (4) of this subsection recognizes this. The dubious limitation requires financing based on sound actuarial principles. The limitation is of dubious significance because it is doubtful that a court would mandamus the legislature to appropriate more money if the court found that the financing was inadequate. Moreover, notwithstanding the wording of this limitation, the legislature could uphold actuarial principles by cutting back future benefits instead of increasing appropriations to the various pension funds. (This is probably not what potential pensioners think is the significance of the limitation.) The enforceable and important limitation is the last sentence of the subdivision. It tells the legislature to keep its "cotton-picking hands" off the pension funds. (As a minor practical matter, this sentence protects a member of a pension system from an attempt by others, usually creditors of one kind or another, to get at the pension money. See, for example, *Prewitt v. Smith,* 528 S.W.2d 893 (Tex. Civ. App.–Austin 1975, *no writ*).)

Subdivision (2) is of minimal significance. With one exception the subdivision simply preserves legislative freedom that should have existed in the old days except for the earlier unnecessary detail that produced a court decision that had to be "overruled" by constitutional amendment. (See the *Explanation* of Sec. 63 of this article.) The exception is the prohibition against permitting double benefits for the same service. It seems doubtful that the legislature would do this on purpose, but pension laws can get so complicated that a double benefit can show up by accident. The prohibition should serve as an item on a checklist for bill drafters working on pension legislation. (Interestingly enough, the subdivision does not prevent all double benefits. If, as is frequently the case, state or local pension credits are given for military service and the ex-military personnel eventually qualify for a military pension and a state or local pension, they receive money from both pension systems for "the same service.")

Subdivision (3) is an improvement over Section 48b of Article III and the comparable portion of Section 62 of this article. At least a great deal of detail has been omitted. Even so, the subdivision is relatively insignificant and in one respect is internally inconsistent. The first sentence, calling for a board of trustees, is hardly necessary. Since the first subdivision states that the funds are held in trust, it follows that there has to be one or more trustees. The second sentence simply restates the common-law rule of prudent investment. This would automatically follow from the existence of a trust. The final sentence is a little inconsistent. If the board is required to follow the universally accepted standard for maintaining a trust fund, there seems no point in permitting the legislature to require the board to be even more prudent than is required of the prudent man. (For a speculation about how this legislative power might be construed to cover a peripheral investment issue, see Tex. Att'y Gen. Op. No. H-681 (1975).)

Subdivision (4) was probably meant to guarantee that the state will continue to provide pensions for its employees and for teachers. Actually, the subsection taken as a whole does not guarantee this, but if Subdivision (4) is read with Subsection (b), the guarantee is there. Subsection (b) commands the legislature to provide pensions. This might not be of much value if there were no existing pension systems since courts do not ordinarily order a legislature to act. But there are pension systems and Subdivision (4) preserves them. It is a matter of simple logic to conclude that the command in Subsection (b) combined with the constitutional continuation

of existing law in Subdivision (4) prevents the legislature from abolishing pensions. (A different question is presented if the existing legislation that is continued by Subdivision (4) contains within itself a provision that permits discontinuation of the plan. See, for example, Tex. Att'y Gen. Op. No. H-903 (1976) (citing a provision that permits a county participating in the statewide county and district retirement system to discontinue enrollment of new members).)

Subsection (b), State Retirement Systems. As just noted, Subdivisions (1) and (2) of this subsection are redundant in the sense that the systems already exist but are of value in prohibiting the legislature from abandoning state pension systems. Subdivision (3) is a strange provision. One of the strange aspects was discussed in the *History* of this section. A second strange aspect is that the subdivision assumes the existence of the two systems that the preceding subdivisions command the legislature to create.

Subdivision (3) does have some important teeth in it, however. The subdivision clearly prohibits a noncontributory pension system. The subdivision also strongly implies that the employees and the state are to contribute roughly equivalent amounts to the pension fund. This implication flows from the 6 per cent minimum contribution required of both the employee and the state and from the 10 per cent maximum for the state. (As the *History* notes, the 1974 Convention's provision had no maximum.) Behind all this probably lie two thoughts. One is that a pension plan ought to include the concept that an employee should save something for his old age. Otherwise, though an employee would bridle at the suggestion, a noncontributory pension plan, particularly one financed by taxpayers, becomes a welfare program. The second thought is that, to the extent that it was not hemmed in by restrictions, the legislature might be tempted to sweeten the employees' fringe-benefit pot in a manner that avoided an increase in taxes. A pay increase requires more money right now; an unfunded increase in pension benefits does not. Some future legislature has to reap that whirlwind. Even though the fundamental concept is that equality of contribution is required, some leeway is necessary; a host of changes—actuarial errors, inflation, investment errors, past service requirements, to name but a few—may require adjustments to protect the promises made to employees. For this reason, the legislature has to be permitted to increase its contributions. It is arguable, of course, that none of this belongs in a constitution. But if something is to go into the constitution, the combination of powers and limitations contained in this subdivision makes good sense.

Subsection (c), Local Retirement Systems. This is another strange subsection. It commands the legislature to do what in fact has already been done. The subsection also sets up an illogical command, but the command is nothing more than the permission previously unnecessarily granted by Sections 51e and 51f of Article III and Section 62 of this article. What is illogical is that cities and counties may create their own pension systems or may join a statewide system whereas other political subdivisions may only join a statewide system. (A nice theoretical constitutional question would be whether a newly formed school district could opt to join a "local" statewide system rather than the state teachers' system.) Of course, this illogical command serves the same purpose as Subsection (b). When put together with Subdivision (4) of Subsection (a), the legislature is stuck with continuing all existing pension systems involving local governments. This is quite a confused mess. There are a great many local pension systems created by local laws that have been upheld as "general" laws under the population-bracket device. (See the *Explanation* of Sec. 56 of Art. III. For a particularly interesting "local" pension law, see *Board of Managers of the Harris County Hospital District v. Pension Board of the Pension*

System for the City of Houston, 449 S.W.2d 33 (Tex. Civ. App.–Austin 1975, *no writ*).) One may speculate whether, in the light of the wording of Subsection (c), the legislature has the power to bring order out of what could become a chaotic mess of underfunded and mismanaged local pension systems. To conclude that the legislature cannot may be only to conclude that Section 67 preserves the previous constitutional situation that could also have made it impossible to bring order out of chaos; but then again, perhaps Subsection (c) creates a barrier that did not exist before. The earlier sections were unnecessary grants of permissive power; perhaps the courts would have permitted the legislature to withdraw its permission and to replace all local pensions by a statewide system. It is doubtful that Subsection (c) would permit this.

Subdivision (2) of Subsection (c) is a fascinating provision. One might speculate that Section 67 was drafted by people who were interested primarily in the two state systems. On the one hand, Subsection (b) says nothing about tenure but has considerable detail about contributions whereas Subdivision (2) simply says that benefits under local systems "must be reasonably related to participant tenure and contributions." Is this a viable requirement that is judicially enforceable? More important, does this subdivision permit the legislature to ride herd on local pension plans that may, in the long run, threaten local governments with bankruptcy? Again, it is important to keep one's eye on the constitutional ball. The only reason that one has to raise the question whether this subdivision permits the legislature to ride herd on mishandled local pension plans is the rigidity that the constitutional language of the rest of the subsection and subdivision (4) of Subsection (a) appear to create. At this early date in the life of Section 67, there are no answers to these questions. Indeed, no one knows whether they are questions that will ever arise.

Subsection (d), Judicial Retirement System. As noted in the *History* of this section, the comparable retirement provision in the constitution concerning judges was not repealed when Section 67 was adopted. The reason for this is that Section 67 was originally drafted for a new constitution and would have included within the section everything concerning pensions. When it came time to propose the section as part of the existing constitution, it was easy to repeal the various sections that dealt only with pensions but not so easy to excise the pension part of a lengthy section in Article V dealing with much more than retirement pay. Hence Subsection (d) in part duplicates Subsection (1) of Section 1-a of Article V. (See also the *Explanation* of Sec. 1-a.)

All of this makes Subsection (d) a little strange. For example, the subsection refers to the system "heretofore established by constitution or by law" and states that the system is continued in effect. This would mean something only if Section 1-a had been repealed and if someone thought that the statute carrying out the policy of Section 1-a could not stand without the underlying constitutional provision. (As stated so many times, there never was a need for a constitutional provision to permit the payment of pensions. There is, however, the problem whether an "unnecessary" provision once included in the constitution turns into a limitation. The words quoted earlier–"by constitution or by law"–in effect ratify anything in the pension act that was arguably broader than permitted by Sec. 1-a.)

Another strange element of the subsection are the opening words: "Notwithstanding any other provision of this section, ..." This should alert the reader that there is something about the subsection that is inconsistent with the rest of the section. The inconsistency is that the judicial retirement program is the only one that is not funded. There is no board of trustees, no pension fund, no regular contribution by the state. Judges are required to contribute to the system, but their contributions go into the general fund. The legislature simply appropriates enough

each budget period to pay pensions of retired judges. (See Tex. Rev. Civ. Stat. Ann. art. 6228b.) So long as the program operates this way, it must be excepted from the standards set forth in Subsection (a).

The question raised at the beginning of this *Explanation* was whether Section 67 is simple enough to avoid constitutional litigation. Although several fundamental questions have been raised, on balance it would appear that most litigation in the future will turn on statutory, not constitutional, provisions. With rare exceptions, the constitutional confusion pointed out would arise only if the legislature undertook some drastic revamping of the entire pension system. So long as the legislature works within the parameters of the present pension programs, the constitutional sailing should be smooth.

Comparative Analysis

Approximately nine other states have one or more provisions authorizing a retirement plan for public employees. In many instances the provisions are obviously an exception to a "gifts" prohibition like Section 51 of Article III or to an extra compensation prohibition like Section 44 of that article. It seems likely that all of the other instances were adopted to get around a comparable limitation. Several states have provisions like the one in the New York Constitution designed to prevent diminution in pension rights. (See the *Author's Comment* below.) A couple of states prohibit any use of pension funds for any other purposes. Interestingly enough, a handful of states have provisions prohibiting or limiting the payment of pensions. New Hampshire's 1784 provision is particularly endearing:

> Economy being a most essential virtue in all states, especially in a young one; no pension shall be granted, but in consideration of actual services; and such pensions ought to be granted with great caution, by the legislature, and never for more than one year at a time. (Art. 36, Part I.)

Neither the *Model State Constitution* nor the United States Constitution has a provision concerning retirement or pension plans.

Author's Comment

Public pension systems are a hot political problem these days. In many parts of the country state and local governments for years kept pay low but offset this by fringe benefits, one of which was a munificent pension plan. The trouble was that frequently the government neglected to fund the plan—that is, appropriate adequate sums for a trust fund to cover payments in the future. (Many private employers followed the same negligent practice.) This fiscal error could be compounded if employees began to demand noncontributory pensions. This would increase the government's future liability while decreasing whatever funding came from contributions.

One possible way to solve the problem of gross underfunding is to start reneging on the pension promises. In anticipation of this possiblity public employees develop an interest in securing permanent protection. This, in our system of government, can be guaranteed only through a constitutional provision protecting the promises. The model for this is a provision adopted by New York in 1938. It reads:

> After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired. (Art. V, Sec. 7.)

New York now finds that this provision has created difficulties. When people woke up to how munificent the pensions had become, they found that any reform of the pension system could apply only to employees hired after the effective date of a statutory revision. This is acceptable, perhaps, in the case of a fundamental change such as switching from a noncontributory to a contributory pension. But frequently there are minor elements in the program the effect of which is either unknown or unanticipated at the time of initiation. For example, if a person's pension is based on his last year's pay and if pay is defined to include overtime, it is easy to juggle work schedules so that employees within one year of retirement build up a large overtime record. Apparently, some people in New York have retired on an annual pension larger than their highest straight-time earnings. A constitutional provision that prevents correction of errors like this is obviously too broad.

Section 67 clearly leaves the legislature the flexibility needed to keep control over the several public employee pension plans in the state. For their part, public employees appear to have a guarantee that the state and its policial subdivisions must continue to provide pensions for their employees. All in all, Section 67 strikes a happy medium. It is fair to note, however, that the short form recommended by the Constitutional Revision Commission in 1973 struck the same happy medium at least as well as Section 67 does. That provision read:

> Any pension or retirement system of this State, or of any political subdivision thereof, or of any governmental agency of either, now in effect shall be continued. No funds held pursuant to any such system shall be used for any purposes inconsistent therewith.

ARTICLE XVII

MODE OF AMENDING THE CONSTITUTION OF THE STATE

Sec. 1. PROPOSED AMENDMENTS; PUBLICATION; SUBMISSION TO VOTERS; ADOPTION. The legislature, at any regular session, or at any special session when the matter is included within the purposes for which the session is convened, may propose amendments revising the constitution, to be voted upon by the qualified electors for statewide offices and propositions, as defined in the constitution and statutes of this state. The date of the elections shall be specified by the legislature. The proposal for submission must be approved by a vote of two-thirds of all the members elected to each House, entered by yeas and nays on the journals.

A brief explanatory statement of the nature of a proposed amendment, together with the date of the election and the wording of the proposition as it is to appear on the ballot, shall be published twice in each newspaper in the state which meets requirements set by the legislature for the publication of official notices of offices and departments of the state government. The explanatory statement shall be prepared by the secretary of state and shall be approved by the attorney general. The secretary of state shall send a full and complete copy of the proposed amendment or amendments to each county clerk who shall post the same in a public place in the courthouse at least 30 days prior to the election on said amendment. The first notice shall be published not more than 60 days nor less than 50 days before the date of the election, and the second notice shall be published on the same day in the succeeding week. The legislature shall fix the standards for the rate of charge for the publication, which may not be higher than the newspaper's published national rate for advertising per column inch.

The election shall be held in accordance with procedures prescribed by the legislature, and the returning officer in each county shall make returns to the secretary of state of the number of legal votes cast at the election for and against each amendment. If it appears from the returns that a majority of the votes cast have been cast in favor of an amendment, it shall become a part of this constitution, and proclamation thereof shall be made by the governor.

History

Provision for amending the constitution by legislative proposal has been included in all Texas constitutions, including that of the Republic. Under the constitution of 1836 (General Provisions, Sec. 11), the amendment process was begun when a "majority of the members elected" to both houses of the congress approved a proposed constitutional amendment and referred it to the congress "next to be chosen." If the proposed amendment gained approval in the succeeding congress by a two-thirds majority, the proposal was submitted to the people for ratification, which required a simple majority of those voting on the amendment. Section 11 included two features that have characterized analogous articles in all subsequent Texas constitutions: first, there was no limitation on the number of amendments a congress could propose or refer to the people for ratification in any given year (referral was limited, however, to "no . . . oftener than once in three years"); and, second, publication of each proposed amendment was required.

The Constitution of 1845 (Art. VII, Sec. 37) began a period during which the process of constitutional amendment by legislative initiative was made more rigorous. The policy of requiring two separate legislative passages of a proposed amendment was continued, but the process for constitutional amendment was altered in several significant ways. The 1845 provision increased the initial legislative approval required to a two-thirds majority of both houses; the necessity of a second legislative passage by a two-thirds majority was retained, but this stage of the process was shifted to the next legislature after an intervening general election of representatives, at which proposed amendments were submitted to the voters. Amendment was made more difficult by the requirement that "a majority of all

citizens . . . voting for representatives" in the general election (rather than voting on the amendment itself) ratify a proposed amendment.

The method employed in the Constitution of 1845 of proposal by a two-thirds legislative majority, voter ratification at the intervening general election, and subsequent legislative approval by a two-thirds majority established the pattern adopted for the Constitutions of 1861 (Art. VII, Sec. 37), 1866 (Art. VII, Sec. 38), and 1869 (Art. XII, Sec. 50). In all three the difficulty of amendment was ameliorated somewhat by requiring voter ratification by a majority of those voting on the amendment, rather than in the election, and all three added the provision that a proposed amendment be read on three separate days in each house. The Constitutions of 1861 and 1866 limited proposal of amendments to regular biennial sessions of the legislature.

The issue of how the constitution should provide for amendment was vehemently argued at the Convention of 1875 between those favoring easy and those favoring difficult amendment; both camps regarded the question as one of the most important to come before the convention. (See *Debates*, pp. 135-42.) The committee version reported to the convention copied Article VII, Sections 37 and 38, of the Constitution of 1866 verbatim. But after considerable debate the convention adopted a substitute for Section 38 (pertaining to amendment by legislative proposal) by the narrow margin of 39 to 34. That substitute provided for relatively easy amendment to the constitution, a process that has remained essentially unchanged from 1876 to the present: An amendment is proposed by a two-thirds vote of each house and subsequently ratified by a majority vote of those voting on the amendment.

The original version of present Article XVII, Section 1, limited legislative proposal of amendments to regular biennial sessions. Since 1876 only three attempts have been made to amend this section, and all three represented moves to eliminate the regular session limitation. The first, in 1935, would have allowed the governor to submit proposed amendments to the legislature in special session "in cases of extraordinary emergency affecting the State as a whole." The 1935 amendment was rejected by the voters, as was the second attempt, almost 40 years later, in 1971. A close reading of the 1971 proposal is required to discern the change it would have made: the deletion of the limiting phrase "at any biennial session" in the first line. A more straightforward proposal to amend Article XVII was submitted to the voters in November 1972, one that permitted the legislature to propose constitutional amendments "at any regular session, or at any special session when the matter is included within the purposes for which the session is convened." The voters ratified this amendment. The recently amended version of Section 1 also introduced more detailed provisions relating to the official publicity required for proposed amendments.

Explanation

The process of constitutional amendment by legislative proposal has been comparatively simple in Texas since the adoption of the present constitution. Before November 1972, Section 1 provided that the legislature could propose amendments by a vote of two-thirds of the members of each house at any regular session; the 1972 amendment authorized limited proposal at special sessions. The proposed amendment is then submitted to the people for ratification, which requires a majority vote of those "qualified electors for statewide offices and propositions" who vote on the amendment. Under this section the legislature fixes the time of the election, which has normally coincided with the next general election following legislative passage of the proposal. The proposed amendments are usually placed at the bottom of the

same ballot containing the names of the candidates.

The 1972 amendment also provided more detailed publication requirements than did its immediate predecessor, the 1876 version. Three changes regarding the method of publishing notice of a proposed amendment were made: (1) instead of publishing the amendment text verbatim, publication of a brief explanatory statement, date of election, and wording of the proposition as it will appear on the ballot is required; (2) publication in every Texas newspaper that qualifies for publication of public notices is required, rather than publication in one newspaper in each county; and (3) the requirement of four weekly insertions beginning at least three months before the election is changed to two insertions, one between the 60th and 50th days before the election and the second one week after the first. A fourth requirement, pertaining to rates that can be charged for publication, was added by the 1972 amendment. Previously publication rates were regulated by statute (Tex. Rev. Civ. Stat. Ann. art. 29), but the amended Section 1 sets a ceiling on the rate different from that prescribed by statute. The publication requirements have been ruled mandatory, but substantial compliance with them suffices to preserve an amendment from invalidation. (*Manos v. State,* 98 Tex. Crim. 87, 263 S.W. 310 (1924); *Whiteside v. Brown,* 214 S.W.2d 844 (Tex. Civ. App.–Austin 1948, *writ dism'd*).)

An amendment is adopted upon approval by the voters, and the effective date of adoption is the date of the official canvass of returns showing that the amendment received a majority of the votes cast, not the date of the governor's proclamaion of adoption. (*Torres v. State,* 161 Tex. Crim. 480, 278 S.W.2d 853 (1955); *Texas Water & Gas Company v. City of Cleburne,* 21 S.W. 393 (Tex. Civ. App. 1892, *no writ*).) Moreover the attorney general has determined that the governor does not have the power to veto a proposed constitutional amendment (Tex. Att'y Gen. Op. No. M-874 (1971)).

As no version of Section 1 has ever placed an express limitation on the number or scope of amendments that may be proposed, the question arises of how much of the constitution may be changed in a single amendment or election. Courts in other states have split over whether a legislature may propose an entirely new or revised constitution in a single amendment. Two older cases, *Ellingham v. Dye* (178 Ind. 336, 99 N.E. 1 (1912)) and *Livermore v. Waite* (102 Cal. 113, 36 Pac. 424 (1894)), are commonly cited for the negative position. The basis for denying the legislature such authority is generally predicated on one or several of three principles: that a constitutional provision specifically providing for legislative "amendments" precludes the legislature from exercising the broader power of "revision;" that the power to propose amendments is not within the general range of legislative powers but rather is a limited power delegated by the people through the constitution and must be narrowly construed; or that the traditional and only acceptable method for "revising" a constitution or proposing a new one is through a constitutional convention, not legislative amendment. However, several recent court decisions have upheld the legislature's authority to submit a new constitution. (See *Smith v. Cenarrusa,* 475 P.2d 11 (Idaho 1970); *Gatewood v. Matthews,* 403 S.W.2d 716 (Kentucky 1966).) Between 1966 and 1974 at least six state legislatures submitted new or significantly revised constitutions as amendments for approval by the voters. The proposed documents were approved in Florida (1968), North Carolina (1970), and Virginia (1970) but were defeated in Kentucky (1966), Idaho (1970), and Oregon (1970). Although several states have used the amendment process for submitting a new constitution, such action is often criticized as being "politically unwise" and susceptible to abuse by a legislature eager to increase its own powers. (See Keeton, "Methods of Constitutional Revision in Texas," 35 *Texas L. Rev.* 901, 903 (1957); Comment, "Legislature May Disregard Prescribed Revision Procedure

As Long As the Proposed Constitution is Submitted for Popular Ratification," 81 *Harv. L. Rev.* 693 (1968).)

No Texas court has considered whether Section 1 permits the legislature to frame an entirely new constitution and submit it as a single amendment. The nearest a Texas court has come to defining the permissible scope of amendments occurred in *Whiteside v. Brown* (214 S.W.2d 844 (Tex. Civ. App.–Austin 1948, *writ dism'd*)), in which the court upheld an amendment that made changes in two sections of the education article, Article VII. The court noted that the one-subject-per-bill requirement in Section 35 of Article III did not apply to constitutional amendments and indicated that

> The Constitution has vested in the legislature a discretion as to the form in which constitutional amendments may be proposed and submitted to the people. (*Id.*, at 850.)

The court went on to observe that the legislature could abuse its discretion, but that it did not do so in an amendment that dealt with "different subjects or issues" that "are interrelated and germane to the general purpose and object of the amendment" and in which "the plan of the amendment was comprehensive, closely knit, and each major provision dependent upon the other." (*Id.*, at 850-51.)

Whatever discretion the legislature had when *Whiteside v. Brown* was decided in 1948 was probably increased by the 1972 amendment of Section 1. As mentioned above, the apparent purposes of the 1972 amendment were to authorize the submission of amendments by special sessions of the legislature and to provide changes in the publication procedure. However, the first sentence of the section also was changed to authorize the legislature to propose amendments "revising" the constitution. This subtle addition to the language of the amendment provision probably removes any doubt concerning the ability of the Texas legislature to propose amendments which change more than one section of the constitution and may permit a single amendment revising the entire document.

Although the courts have had few opportunities to consider the permissible scope of amendments, the legislature has not refrained from exercising its discretion in utilizing a variety of forms in proposed amendments. In 1891, an amendment was proposed and adopted revising virtually all of Article V, the judiciary article, of the constitution. In 1969, a single amendment repealed more than 50 "unnecessary" sections scattered throughout the constitution. On at least two occasions the legislature has proposed at the same election two amendments to the same section of the constitution. This occurred for the November 7, 1972, election when two of the proposed amendments each amended Sections 33 and 40 of Article XVI on dual-officeholding and dual compensation. A similar event occurred in 1935 when the legislature offered voters a choice of two approaches to ending prohibition. Both proposed amendments were to Article XVI, Section 20. One proposed substituting a proscription against "open saloons" in lieu of outright prohibition, while the other proposed a state owned dispensary system for alcoholic spirits. It would have been possible each time for the voters to have approved both amendments. Fortunately, in both 1935 and 1972 the voters adopted only one of the two proposed amendments.

The most ambitious effort at amendment was the attempt in 1975 to completely revise the constitution by means of eight separate amendments submitted at the same election. Each amendment revised all provisions of the constitution relating to a single subject. Each amendment also contained an elaborate schedule for transitions in state law if the amendment were adopted and for making the changes necessary in the constitution to compensate for the adoption or rejection of other amendments. (See Bickerstaff and Yahr, "Multi-Amendment Revision of the Texas Constitution, 38 *Texas Bar Journal* 705 (1975).) All eight amendments were

defeated.

Finally with regard to the legislature's power to propose amendments, it should be noted that the ballot need not contain the entire proposed amendment nor a complete summary of its effect. In *Hill v. Evans* (414 S.W.2d 684 (Tex. Civ. App.–Austin 1967, *writ ref'd n.r.e.*)), the court noted that a voter is presumed to be familiar with the proposed amendment before actually voting and that the purpose of the ballot proposition is to identify the amendment and to show its "character and purpose" in such a manner as to avoid confusing, misleading, or deceiving the voter. In *Hill,* the ballot failed to mention that a new annual voter registration system went along with repeal of the poll tax. The court upheld the amendment.

Comparative Analysis

Amendment by Legislative Proposal. The constitutions of every state except New Hampshire provide for amendment by legislative proposal. Texas is one of some 35 states that permit an amendment to be submitted to the voters after only one passage through the legislature. Eleven states require two passages, most with the requirement that a general election for the legislature intervene. Three states, Connecticut, Hawaii, and New Jersey, have alternative requirements: either two passages by a simple majority or one passage by an extraordinary majority. Delaware requires a two-thirds vote by two consecutive legislatures but no ratification by the people.

The size of the requisite vote to propose an amendment by the legislature in those states requiring only one legislative passage varies. Eighteen states including Texas require a two-thirds majority, eight require a three-fifths, and nine require a simple majority. In the nine states requiring a simple majority, however, an extraordinary majority is required for amendments concerning certain subjects. For example, New Mexico requires a three-fourths majority if the amendment concerns suffrage or education. All but three of the states requiring double passage call for only a simple majority vote each time around.

Forty states including Texas require public notice by publication of proposed amendments, but there is considerable variation in the amount of detail included in the requirement. California's provision is a model of simplicity, requiring only "such publication as may be deemed expedient." Texas, on the other hand, may be counted among those states with more detailed requirements.

Like Texas, most states do not limit the frequency of amending the same article. Four states do, however: Kentucky and Pennsylvania (every five years), Illinois (every four years), and New Jersey (every three general elections). Five states limit the number of amendments that may be submitted at any one election: Arkansas, Kansas, and Montana (three), Colorado (six), and Kentucky (two). The new Illinois Constitution forbids the legislature to propose amendments to more than three articles at the same session. Three states, Florida, Missouri, and Oklahoma, have an equivalent of the "one-subject-per-bill" rule–*i.e.*, a single amendment may apply to only one article or one general subject. Vermont permits the legislature to propose amendments only every tenth year.

About 30 states including Texas call for ratification by a majority of those voting on the amendment itself, while 11 appear to require a majority of those voting in the election. Illinois has alternative ratification requirements: the amendment must receive approval of a majority of those voting in the election or of three-fifths of the electors voting on the amendment. Rhode Island requires a 60 percent majority of those voting on the amendment and Hawaii and Nebraska require a majority on the question, which majority must be at least 35 percent of the total vote. New Mexico allows ratification by a majority of those voting on the amendment, except

amendments pertaining to suffrage or education, which three-fourths of those voting in the election and two-thirds of those voting in each county must ratify.

The *Model State Constitution* provides for legislative proposal of amendments by a simple majority of all the members of the legislature and ratification in a referendum by a majority of those voting on the amendment. Article V of the United States Constitution provides that congress, by a two-thirds vote of each house, may propose amendments subject to ratification by the legislatures or conventions of three-fourths of the states, "as the one or the other Mode of Ratification may be proposed by the Congress . . . ."

Amendment by Initiative. A second method of amendment is by the initiative petition; 14 states authorize this method. There is, of course, wide variation possible in an initiative system. For the purpose of illustration the language of the *Model State Constitution* is quoted:

> Sec. 12.01: *AMENDING PROCEDURE: PROPOSALS*
> (a) Amendments to this constitution may be proposed by the legislature or by the initiative.
> (b) An amendment proposed by the legislature shall be agreed to by record vote of a majority of all the members, which shall be entered on the journal.
> (c) An amendment by the initiative shall be incorporated by its sponsors in an initiative petition which shall contain the full text of the amendment proposed and which shall be signed by qualified voters equal in number to at least ____percent of the total votes cast for governor in the last preceding gubernatorial election. Initiative petitions shall be filed with the secretary of the legislature.
> (d) An amendment proposed by initiative shall be presented to the legislature if it is in session and, if it is not in session, when it convenes or reconvenes. If the proposal is agreed to by a majority vote of all the members, such vote shall be entered on the journal, and the proposed amendment shall be submitted for adoption in the same manner as amendments proposed by the legislature.
> (e) The legislature may provide by law for a procedure for the withdrawal by its sponsors of an initiative petition at any time prior to its submission to the voters.
>
> Sec. 12.02: *AMENDMENT PROCEDURE: ADOPTION*
> (a) The question of the adoption of a constitutional amendment shall be submitted to the voters at the first regular or special statewide election held no less than two months after it has been agreed to by the vote of the legislature and, in the case of amendments proposed by the initiative which have failed to receive such legislative approval, not less than two months after the end of the legislative session . . . .

Author's Comment

Although the constitutions of some states are easier to amend, few can compare with the Texas record for frequency of amendment. (See J. May, *Amending The Texas Constitution: 1951-1972* (Austin: Texas Advisory Commission on Intergovernmental Relations, 1972).) It has been argued that a decision on whether to make the amendment process difficult or easy depends upon whether a constitution is limited to truly fundamental matters or includes statutory detail. It has also been said, in effect, that this argument confuses cause with effect, that constitutions with statutory detail are frequently amended whether or not the process is difficult, and that "true" constitutions do not get amended as often regardless of how easy amendment is. However, both arguments are conjectural, and it is far more important, regardless of the process of amendment adopted, to ensure that the constitution contains only the state's fundamental law. At this point it is worthy of note that none of those states with the most facile amendment procedure is among those states with the highest rates of amendment. (Grad, *The Drafting of State*

Constitutions (New York: National Municipal League, 1967), p. 24.)

It is at once fortunate and unfortunate that the Texas Constitution of 1876 provides for relatively easy amendment. It is fortunate because, as the public soon learned, a constitution so restrictive that it inhibits the daily operation of government needs an easy amendment process to meet pressing needs. It is unfortunate for several reasons. First, if an unduly restrictive constitution is difficult to amend, the time will soon arrive when the need for a thorough overhaul will become apparent. With easy amendment the document can be patched and plugged to function well beyond its useful life. Second, easy amendment combined with frequent amendments results in a deterioration of public respect for the constitution. It is obvious that a voter will weigh more carefully a constitutional amendment when he is faced with only one every several years than if he is called to vote on anywhere from 4 to 16 lengthy and complex amendments every other year. Finally, easy and frequent amendment quickly blurs the distinction between fundamental and statutory material, and as statutory material accumulates, so does the need for increasingly more frequent amendment.

It is well known that the story of amendments to the Texas Constitution of 1876 is the story of large numbers. At the end of 1975, the voters had considered some 354 amendments, adopting 218. Every legislature except the first and fifth following adoption of the present constitution has proposed amendments. The number of amendments has just about doubled every 30-year period beginning in 1881: the period 1881-1910 saw 27 amendments adopted and 23 rejected; 1911-1940 saw 57 adopted and 47 rejected; and 1941-1970 saw 115 adopted and 47 rejected. Dr. May estimates the constitution by 2001 will contain 345 amendments. (May, *Amending The Texas Constitution*, p. 1.)

In considering the method of amendment, it must always be remembered that artificial barriers in the amendment process will not, in and of themselves, preserve constitutional stability. Constitutions that have been confined primarily to "core" matters have not, in the main, suffered from excessive amendment.

Section 1, itself, contains too much statutory detail, especially on notice and publication rates. Despite their detail, the publication requirements do not ensure adequate publicity, and in fact seldom do proposed amendments receive a fraction of the media coverage afforded gory murders or political scandal.

One final comment on amendments is in order. The New York Constitution (Art. XIV, Sec. 1) requires a step in the amendment process that should be considered for a new constitution: A proposed amendment must be referred to the attorney general for a written opinion on its need and implications before the legislature votes on the proposal. Few legislators are constitutional scholars—nor are they expected to be—and the demands of regular business often prevent the kind of extensive study a proposed amendment should get. An attorney general's opinion would serve to more fully apprise the legislators of the consequences of an amendment. Of course, it would also reduce unnecessary clutter, of which Article IX, Section 1-A, is a prime example. (See the *Explanation* and the *Author's Comment* on that section.)

Sec. 2. CONSTITUTIONAL REVISION COMMISSION; CONSTITUTIONAL CONVENTION. (a) When the legislature convenes in regular session in January, 1973, it shall provide by concurrent resolution for the establishment of a constitutional revision commission. The legislature shall appropriate money to provide an adequate staff, office space, equipment, and supplies for the commission.

(b) The commission shall study the need for constitutional change and shall report its recommendations to the members of the legislature not later than November 1, 1973.

(c) The members of the 63rd Legislature shall be convened as a constitutional convention at noon on the second Tuesday in January, 1974. The lieutenant governor

shall preside until a chairman of the convention is elected. The convention shall elect other officers it deems necessary, adopt temporary and permanent rules, and publish a journal of its proceedings. A person elected to fill a vacancy in the 63rd Legislature before dissolution of the convention becomes a member of the convention on taking office as a member of the legislature.

(d) Members of the convention shall receive compensation, mileage, per diem as determined by a five member committee, to be composed of the Governor, Lieutenant Governor, Speaker of the House, Chief Justice of the Supreme Court, and Chief Justice of the Court of Criminal Appeals. This shall not be held in conflict with Article XVI, Section 33 of the Texas Constitution. The convention may provide for the expenses of its members and for the employment of a staff for the convention, and for these purposes may by resolution appropriate money from the general revenue fund of the state treasury. Warrants shall be drawn pursuant to vouchers signed by the chairman or by a person authorized by him in writing to sign them.

(e) The convention, by resolution adopted on the vote of at least two-thirds of its members, may submit for a vote of the qualified electors of this state a new constitution which may contain alternative articles or sections, or may submit revisions of the existing constitution which may contain alternative articles or sections. Each resolution shall specify the date of the election, the form of the ballots, and the method of publicizing the proposals to be voted on. To be adopted, each proposal must receive the favorable vote of the majority of those voting on the proposal. The conduct of the election, the canvassing of the votes, and the reporting of the returns shall be as provided for elections under Section 1 of this article.

(f) The convention may be dissolved by resolution adopted on the vote of at least two-thirds of its members; but it is automatically dissolved at 11:59 p.m. on May 31, 1974, unless its duration is extended for a period not to exceed 60 days by resolution adopted on the vote of at least two-thirds of its members.

(g) The Bill of Rights of the present Texas Constitution shall be retained in full.

History

This section was added to the constitution by amendment in 1972. To its sponsors it represented the culmination of efforts to call a constitutional convention that had begun almost simultaneously with adoption of the 1876 Constitution. However, the convention that convened in 1974 did not produce a revised constitution. Instead, it adjourned after six months without approving a new constitution or amendments to the old one.

Until the 1972 amendment added this section to the constitution, no Texas constitution has contained a provision on how constitutional conventions were to be called or convened. Despite this lack of express authority, each of the six Texas constitutions was written at a convention called for that purpose.

The Constitution of the Republic of Texas was adopted March 17, 1836, by the same convention at Washington-on-the-Brazos that had declared independence 15 days earlier. In anticipation of annexation, a second constitution was written in a convention that met from July 4 to August 27, 1845. When Texas seceded to join the Confederacy, a new constitution was drafted by a convention meeting in Austin from March 2 to March 25, 1861. After the Confederacy surrendered, a convention met in Austin beginning February 7, 1866, and lasting until the middle of April. However, the constitution written by that convention and adopted by Texas voters in June of 1866 was put aside under congressionally controlled reconstruction and a new convention met in Austin on June 1, 1868. The convention dragged on until February 6, 1869, when it adjourned leaving completion of the task of drafting a new constitution to the secretary of state. The present Texas Constitution was drafted at a convention meeting in Austin from September 6 to November 4, 1875.

Perhaps the reason no previous constitution included a provision on constitutional conventions is reflected in the action of the 1875 Convention. During the

convention, the matter was considered and debated at length. A proposed provision specifying a mode of calling a convention was striken from the draft on a motion by the President of the Convention, E. B. Pickett, who argued that the effect of including such a provision would be to provide the sole method for calling the convention. "He denied the right of the Convention to bind the people of Texas, or to take from them the liberty to alter, amend, or abolish their Constitution." Judge John H. Reagan argued in favor of President Pickett's motion, on the grounds that "it was the inalienable right of the people to meet in convention whenever they so desired, and that it was not within the power of the Legislature to limit them in this right." (See *Debates*, pp. 140-41.)

Almost as soon as the present constitution was adopted in 1876, there were efforts to call a new convention to revise it. In the same year, Governor Richard Coke, in his message to the legislature, spoke of the need for constitutional amendments, particularly in the judiciary article. Between 1879 and 1890, numerous unsuccessful attempts were made to create a joint committee to prepare a resolution encompassing suggested changes in the new constitution. The movement to change the judiciary article succeeded in 1891 when a single amendment substantially revising the entire article was adopted by the voters.

The first recorded legislative attempt to call a constitutional convention occurred 11 years after the ratification of the 1876 Constitution. A joint resolution, introduced in 1887, was the first of many joint or concurrent resolutions proposing a constitutional convention. However, not until 1917 did both houses of the legislature succeed in passing a resolution that called for a convention. This senate concurrent resolution called the convention without a vote of the people but instructed the governor to issue a proclamation for the election of delegates and required submission of any proposed document to the voters for ratification. Governor James Ferguson refused to issue the proclamation calling the election of delegates, thereby aborting the election and the convention.

In an effort to remove objections raised by Governor Ferguson, the legislature in 1919 passed a senate concurrent resolution providing for the submission of the question of a constitutional convention to a public referendum. In November of 1919, the voters overwhelmingly defeated the proposition by a vote of 23,549 to 71,376 with approximately 10 percent of the voters going to the polls.

Between 1919 and 1949, the legislature regularly considered proposals for a constitutional convention—four house concurrent resolutions, three senate concurrent resolutions, eight house joint resolutions, and four senate joint resolutions were introduced. In addition, beginning in 1941, proposals for creation of a revision commission were regularly introduced. But no resolution calling a constitutional convention or creating a revision commission received legislative approval.

In 1949 Governor Beauford Jester called together a group of citizens to form the Citizens Committee on the Constitution. The committee recommended to the legislature that a commission be created to study the need for constitutional revision. A resolution embodying this recommendation and appropriating money to fund the proposed commission died in a committee of the house.

In 1957, a concurrent resolution was passed requiring the Texas Legislative Council to undertake a study of the 1876 Constitution and to submit its recommendations concerning revision of the document. Although the legislature did not provide supplemental appropriations for the council until 1959, an unpaid 18-member Citizens Advisory Committee was authorized, with the governor, lieutenant governor, and the speaker of the house each appointing six members. The council submitted a report to the 57th Legislature in 1961 generally indicating that no constitutional convention or revision commission was necessary.

In 1966, Governor John Connally announced his interest in calling a constitutional convention. In 1967, a resolution was passed calling for creation of a Constitutional Revision Commission. The commission was made up of 25 members, ten appointed by the governor and five each by the chief justice, lieutenant governor, and speaker of the house. When the lieutenant governor refused to appoint any members, the other appointing officers filled the vacancies. The commission, in 1969, presented a draft of a revised and simplified constitution to the 61st Legislature for approval and ratification by the voters. The only affirmative action taken by the legislature was an amendment that was approved by the voters in August of 1969 repealing 56 obsolete sections of the constitution.

In 1971, the legislature passed a joint resolution proposing the constitutional amendment that was adopted by the voters in November 1972 as Section 2 of this article. In 1973, the legislature acted in accordance with the new section and established and funded a commission for studying the need for constitutional change. This commission of 37 members, the Texas Constitutional Revision Commission, was headed by the former Speaker of the Texas House of Representatives and Chief Justice of the Texas Supreme Court, Robert W. Calvert. The commission submitted its report to the legislature on November 1, 1973, recommending a new constitution for the state of Texas.

Beginning January 8, 1974, the legislature met as a constitutional convention. Speaker of the House of Representatives, Price Daniel, Jr., was elected president of the convention. On July 30, 1974, as required by Section 2, the convention was dissolved. Despite numerous and frantic efforts toward the end of the convention to obtain the two-thirds vote required by Section 2 for approval of a new constitution, the convention ended without approving either a new constitution or amendments to the old one. In 1975 the legislature submitted the convention's proposed constitution, substantially unchanged to the voters as a series of eight amendments. All were defeated in November 1975.

Explanation

Section 2 no longer serves any purpose. However, an examination of the section provides a study of the issues surrounding the calling and convening of a constitutional convention in Texas.

The initial issue is whether any provision is actually necessary to allow a convention. Texas legislators may have felt that because the Texas Constitution failed to provide expressly for a constitutional convention, an amendment was necessary. However, writers are in agreement that the power to call a constitutional convention for a state resides in the legislature without specific mention of such a power in the constitution.

> It requires no provision in the existing Constitution to authorize the calling of a convention for the purpose of revising the fundamental law. The legislative department of the government is alone empowered to take the initiative in calling a constitutional convention, unless a different mode of procedure is laid down in the Constitution. And such action may be taken in the form of a joint resolution; a formal statute is not required in order to provide for a lawful convention. (*6 Am. & Eng. Ency. of Law 896.*)

(See also 16 C.J.S. 8; J. A. Jameson, *Constitutional Conventions,* (4th ed., 1887), at 211; W. Dodd, *The Revision and Amendment of State Constitutions* (1910), at 44.)

Several writers have concluded that Section 1, authorizing the legislature to propose constitutional amendments, does not eliminate the right of Texans to act through a constitutional convention to change their constitution. (See Keith, *Methods of Constitutional Revision* (1949), p. 22; Keeton, "Methods of Constitu-

tional Revision in Texas," 35 *Texas L. Rev.* 901, 904 (1957); Hendricks, "Some Legal Aspects of Constitutional Conventions," 2 *Texas L. Rev.* 195 (1924); Comment, "Can a State Legislature Call a Constitutional Convention Without First Submitting the Question to the Electorate?," 1 *Texas L. Rev.* 329 (1923).) The method by which the people of Texas may exercise this power of revision is through acts of the legislature:

> But the will of the people to this end can only be expressed in the legitimate modes by which such body politic can act, and which must either be prescribed by the Constitution whose revision or amendment is sought, or by an act of the legislative department of the state, which alone would be authorized to speak for the people upon this subject, and to point out a mode for the expression of their will in the absence of any provision for amendment or revision contained in the Constitution itself. (*Cooley's Const. Lim.*, (6th ed.), p. 42.)

There is some support for the right of citizens to convene a convention without legislative action, but such a convention would be "revolutionary" in nature. (See Bebout and Kass, "How Can New Jersey Get a New Constitution?" 6 *U. of Newark L. Rev.* 1, 34-49 (1941).)

In 1924, Homer Hendricks posed and answered the question of whether an amendment was necessary in Texas to call a constitutional convention.

> The first question to arise is whether a convention can be held at all in this state without amending the present Constitution. Provision is made for amendments to be proposed to the people by a regular session of the legislature and it is thinkable that such a provision would inhibit all other means of changing the organic law. And the Supreme Court of Rhode Island has so decided this very question. [In re *The Constitutional Convention*, 14 R.I. 649 (1883).] The decision, however, has been generally discredited and the weight of opinion is that notwithstanding such a provision in the existing constitution, a popular convention can be duly called for revising the fundamental law. This view is probably sustained by the weight of judicial authority.
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> . . .
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> . . . It may be said safely that constitutional conventions may be held legally in every state in the Union with exception of Rhode Island and possibly Indiana. As for the State of Texas, the validity of the popular convention of 1875 has never been questioned. (Hendricks, "Some Legal Aspects of Constitutional Conventions," 2 *Texas L. Rev.* 195, 196-97 (1924).)

Hendricks indicated that in 1924 there were two states, Indiana and Rhode Island, in which the state constitution might not allow the legislature to call a constitutional convention. In Rhode Island, the view that amendment was required was discarded entirely by the Rhode Island Supreme Court in 1935 in a lengthy and oft-cited decision; In re *Opinion to the Governor* (178 A. 433 (R.I. 1935)). Rhode Island has held six constitutional conventions since 1935, each called without constitutional amendment although the state constitution continues to provide only for legislative amendment. No constitutional convention has been held in Indiana since 1851, but in *Ellingham v. Dye*, 99 N.E. 1 (Ind. 1912), the Indiana Supreme Court by way of dictum acknowledged that the sound rule was the one stated in the *American & English Encyclopedia of Law* (2d ed.), p. 902, that:

> On the other hand, long-established usage has settled the principle that a general grant of legislative power carries with it the authority to call conventions for the amendment or revision of the Constitution; and, even where the only method provided in the Constitution for its own modification is by legislative submission of amendments, the better doctrine seems to be that such provision, unless in terms restrictive, is

permissive only, and does not preclude the calling of a constitutional convention under the implied powers of the legislative department. (99 N.E., at 18.)

Currently, eight states other than Texas have constitutions that provide for legislative amendment but do not provide for the calling of a constitutional convention (1976-1977 *Book of the States,* p. 177). In most of these states, the right of the legislature to call a constitutional convention without constitutional amendment has been established by court decision, attorney general opinion, or through the legislature's unchallenged assumption of the power. (Arkansas–Convention called in 1968; Indiana–*Ellingham v. Dye* (dictum), 99 N.E. 1 (1912); Pennsylvania –*Stander v. Kelley,* 250 A.2d 474 (1969); Vermont–Opinion of the Attorney General; Massachusetts–Conventions in 1853 and 1917; North Dakota–*North Dakota v. Dahl,* 68 N.W. 418 (1896); New Jersey–Conventions in 1944, 1947, 1966.)

Despite the lack of court opinions on the subject in Texas, it is clear that the legislature may call a constitutional convention without amending the constitution. A thorough review of the question is presented in the Texas Legislative Council Office of Constitutional Research report, *Authority of the Texas Legislature to Call a Constitutional Convention* (Oct. 1974), available through the Legislative Reference Library at the Texas Capitol. The unresolved legal issue is whether the legislature may call a convention without voter approval.

Respectable legal authority is available for either of two conflicting positions. One view is that the power to call a constitutional convention is inherent in the legislature as part of that body's plenary legislative authority–it being a matter of policy whether the question should be submitted to the voters. The opposing view is that the power of the legislature to change a constitution must be explicitly provided in that document or must be derived by ascertaining from the people their desires in connection with the holding of a constitutional convention–a favorable vote in a public referendum being a necessary prerequisite to the legislature's calling of the convention. A third but not so authoritative view is that even if the power arises because of the reservation of power by the people, the legislature, as agents of the people, could call a convention without submitting the question to the voters in certain extraordinary circumstances.

The 1875 Constitutional Convention in Texas was called by a resolution submitted to and approved by the voters. In 1917, the legislature passed a concurrent resolution that would have called a constitutional convention without a public referendum but required that any document proposed by the convention be submitted to the voters for ratification. As noted in the *History* above, the governor refused to issue the proclamation calling the election of convention delegates and consequently no convention was held. In 1919 a senate concurrent resolution was passed providing for submission of the question of a constitutional convention to a public referendum. The voters overwhelmingly defeated the proposition at the election in November of the same year.

In 1923, the Attorney General of Texas concluded that the Legislature of Texas was "without authority to call a convention without an affirmative popular vote . . . ." (*1923 Report of Tex. Att'y Gen.,* at 208.) The attorney general did not dispute the right of the legislature to call a convention without constitutional amendment but insisted that public approval of the convention must be obtained.

Ordinarily the Legislature can do whatever is not inhibited by the Federal or State Constitution. But whatever it does must be in the nature of legislative power unless there is some express grant in the Constitution conferring additional power. The authorities are overwhelming to the effect that submitting amendments and initiating proceedings

looking to revising the Constitution is not legislative power as that term is ordinarily understood. As stated above, it is only from necessity and custom that the Legislature may even submit to the people the question of calling a constitutional convention; and this only because necessary in order to allow the exercise of a sovereign power reserved to the people. The power of the Legislature ought not to go beyond this necessity until the people have seen fit to make an express grant increasing the Legislature's power in this regard. (*1923 Report of Tex. Att'y Gen.*, at 208.)

One legal writer, Charles Haines, immediately took issue with the attorney general on the need for voter approval:

It would seem, therefore, that though the opinion against the calling of a convention without submission to popular vote may be correct from the standpoint of policy, it raises serious difficulties from the standpoint of the interpretation of state laws and constitutions . . . . It seems strange, indeed, that state governments originally conceived as retaining all reserved powers not granted to the federal government and state legislatures regarded as the residuary legatees of the reserved powers not otherwise provided for or not prohibited in the express language of the Constitution are now to be considered as authorities of delegated powers. (Comment, "Can a State Legislature Call a Constitutional Convention Without First Submitting the Question to the Electorate," 1 *Texas L. Rev.* 329, 335 (1924).)

But in 1924, another writer, Homer Hendricks, reached a conclusion similar to that of the attorney general:

The legislature not possessing the power itself to call a convention, either expressly, or impliedly as arising from the grant of general legislative powers, it should be said definitely that it is for the people themselves, not the legislature; to say whether or not a constitutional convention shall be held. Indeed, the only reason the legislature can submit the matter to the people is that such power exists *ex necessitate* in order to allow the people to act by and through a regular and legal election for ascertaining their will. (Hendricks, "Some Legal Aspects of Constitutional Conventions," 2 *Texas L. Rev.* 195, 202 (1924).)

A more recent writer concluded that the 1923 opinion is contrary to the weight of authority, but went on to state that, from the standpoint of policy, it is wise to submit the question of constitutional revision to the people before calling a convention. (See Keith, *supra* at 25. Dean Page Keeton of The University of Texas School of Law, writing in 1957, acknowledged the disagreement between authorities and attempted no definitive answer, but observed, "It would seem desirable in any event that the question be submitted to the voters before any convention is attempted." (Keeton, "Methods of Constitutional Revision in Texas," 35 *Texas L. Rev.* 901, 905 (1957).)

Like their counterparts in Texas, writers in other states have split over the legality and propriety of a state legislature calling a convention without voter approval. The opinion most often cited for the proposition that voter approval is necessary is the 1917 majority opinion of the Indiana Supreme Court in *Bennett v. Jackson,* 116 N.E. 921 (Ind. 1917). In 1913, the Indiana legislature submitted the question of calling a convention to the voters. By 338,947 to 235,140, the call for a convention was defeated. The Indiana legislature disregarded the outcome of the referendum and proceeded in 1917 to pass an act providing for the election of delegates to a constitutional convention. The Indiana Supreme Court declared the act invalid. The court did not dispute the authority of the legislature to call a convention if authorized to do so by a favorable public referendum but held that the legislature had no inherent right to change or make a constitution and must find a

positive warrant of authority, "if not in the Constitution, then directly from the people."

A lengthly dissent in *Bennett v. Jackson* argued:

> If the Legislature has power to provide for the submission of the desirability of a new Constitution to a vote of the people and may afterward call a convention, why deny that it has the power to call the constitutional convention first and provide that the desirability of the new Constitution shall be submitted to the people afterward? Neither of such powers is expressly granted by the Constitution, and neither of such acts is prohibited by it. (116 N.E., at 924.)

The opinion commonly cited as authority for a legislature to call a constitutional convention without voter approval is the 1935 majority opinion of the Rhode Island Supreme Court referred to earlier. The governor requested an opinion as to whether it would be a valid exercise of legislative powers for the general assembly to provide by law for a constitutional convention, with the submission to the people of any constitution or amendments proposed by the convention. The court answered in the affirmative. The court acknowledged the holding of the Indiana Supreme Court in *Bennett* but criticized the opinion as being too affected by the policy issues created by the Indiana legislature's effort to call a convention so soon after the people had refused to call one. The view of the Rhode Island court was that the legislature was possessed of all powers not expressly or impliedly withheld by the federal or state constitution. The court concluded that although it might be wasteful or inexpedient to call a convention without popular consent, the issue was left to legislative discretion.

A dissenting opinion voiced basically the same view of legislative authority as the majority in *Bennett* concluding:

> It is largely from this general reservation of power [to the people to change or alter their constitution] that we find the authority to hold a convention at all under the Constitution; the latter being otherwise silent on the matter of calling a convention . . . . The language and intent of the reservation seems wide enough to require that the sovereign people be consulted and their favorable opinion obtained before the Legislature proceeds to call a constitutional convention. (178 A., at 460.)

A number of states have held constitutional conventions without first submitting the question for voter approval. Between 1966-1974, the state legislatures of New Jersey (1966) and Louisiana (1973) called constitutional conventions by legislative act alone. In each state, the convention proposed a constitution that was subsequently submitted to and approved by the voters. A challenge of the Louisiana Convention on the grounds that it was being held without voter approval was denied by the state supreme court and the federal courts. (See *Bates v. Edwards,* 294 S.2d 532 (1974); *Driskell v. Edwards* 518 F.2d 890 (5th Cir. 1975).)

Texas legislators may find adequate rationale, precedent, and authority for proceeding to call a constitutional convention without submitting the question for voter approval. Any such legislation would run head-long into the 1923 attorney general opinion. But sufficient question has been raised concerning the accuracy of the 1923 opinion that the present Attorney General of Texas easily could reach a different conclusion and remain consistent with existing legal authorities. In any event, the legislature could substitute its opinion for that of the attorney general.

If it is clear that a constitutional convention can be called in Texas without constitutional amendment, why was Section 2 added to the constitution? One likely reason is that no effort was made to determine whether the legislature possessed the authority without a constitutional amendment. However, Section 2 did serve several identifiable constitutional functions. It may have been necessary to

authorize the 63rd Legislature to serve as a constitutional convention. There are a number of authorities for the proposition that a legislature may not act as a constitutional convention. (See, generally, *Ellingham v. Dye,* 99 N.E. 1 (Ind. 1912); *Livermore v. Waite,* 36 P. 424 (Cal. 1894).) Moreover, the 1972 amendment specifically exempted legislators from the dual compensation proscription of Section 33 of Article XVI that otherwise might have affected their eligibility to receive compensation as delegates to a convention called by another method.

Comparative Analysis

As noted earlier, Texas is one of nine states without a general provision for constitutional conventions in its constitution. Only one other state, North Dakota, adopted a provision similar to Section 2 calling for a specific constitutional convention.

In approximately a dozen states, there is a mandatory requirement that every so often, usually every ten or 20 years, the question of whether to hold a convention goes on the ballot automatically. In Maryland this is the only road to a convention; in other states this method is in addition to conventions called by the legislature. Five states permit the legislature to call a convention without a referendum.

Legislative initiative for calling a convention usually requires a two-thirds vote, but a half-dozen states require only a simple majority. In Kentucky a simple majority is required of two successive legislatures.

In most states the referendum on whether to hold a convention must take place at a general election. The states are about equally divided between those requiring approval by a majority of those voting on the question and those voting at the election. In Kentucky the majority must equal at least 25 percent of the total vote cast at the preceding gubernatorial election, and in Nebraska the majority must equal at least 35 percent of the votes cast in the general election.

There are so many variations among the states in the amount of convention detail specified that only a few generalizations can be made. The new Connecticut Constitution simply says that the legislature, by a two-thirds vote, shall prescribe by law the manner of selecting delegates, the date of convening a convention, and the date of final adjournment. The New York Constitution goes to the other extreme and provides so much detail that an enabling act almost seems unnecessary. A good many states specify the size of the convention or a maximum and minimum number of delegates, but only a few identify the districts from which the delegates are to be chosen. Two states, Missouri and New York, provide for election of 15 delegates at-large, a number that is 18 percent of the size of a Missouri convention but only 8 percent of the New York membership.

The United States Constitution provides that "on Application of the Legislatures of two-thirds of the several States" Congress shall call a convention for proposing amendments.

The ratification requirements for convention proposals are spelled out in detail in some states, left up to the convention in others, and in still others are prescribed in part and in part left up to the convention.

There are several interesting suggestions in the *Model State Constitution.* Section 12.03 provides for legislative proposal of a referendum for a convention and also for automatic submission of the question, but only if 15 years have passed since the last referendum. Then appears this subsection:

> (b) The legislature, prior to a popular vote on the holding of a convention, shall provide for a preparatory commission to assemble information on constitutional questions to assist the voters and, if a convention is authorized, the commission shall be continued for the assistance of the delegates. If a majority of the qualified voters voting on the

question of holding a convention approves it, delegates shall be chosen at the next general election not less than three months thereafter unless the legislature shall by law have provided for the election of the delegates at the same time that the question is voted on at a special election.

The *Model* makes every qualified voter eligible as a delegate and provides for a single delegate from each district of the (unicameral) legislature. The *Model* also sets forth a limited number of convention rules, such as that proposals must be upon the desks of delegates three days before final passage and a self-executing provision for adoption of convention proposals.

Author's Comment

The constitutional convention is the traditional method of revising or writing a new constitution. There are some who would suggest that the Texas Constitution should have a general provision for constitutional conventions. However, the more appropriate view is the one expressed in Article I, Section 2 of the Texas Constitution:

> All political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

The presence of a provision on constitutional conventions only serves to limit the alternatives for reform or revision that otherwise are available to Texans through their legislature. Section 2 should be eliminated from the constitution because it no longer serves any purpose. However, care should be taken to assure that the goal of eliminating the useless section does not become one of replacing it with an unnecessary and limiting general provision for constitutional conventions. This is one area in which constitutional silence is preferable to constitutional specifics.

TABLE OF CASES

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

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Index