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."

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.

## Art. III, § 62

### 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 "soverèigns" 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.