# 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

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.

## Art. XVI, § 26

### 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

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

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

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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> . . . 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.