

Statement of the Center for Public Policy Priorities
Regarding the Constitutionality of CSHB 3
July 8, 2005

The Center *for* Public Policy Priorities has serious concerns about the constitutionality of the Senate's Committee Substitute to House Bill 3, which will be debated on Sunday. We are raising these issues so that they may be considered before the Senate votes. While we are prepared to be corrected, the proposed statewide referendum, an essential feature of CSHB 3, appears to us to violate settled constitutional law.

Under the Texas Constitution, the process of enacting a law is expressly set out. That process does not allow a voter referendum. As held by the Supreme Court of Texas *in State v. Swisher*, 17 Tex. 441 (1856), the legislature cannot enact a state law contingent upon approval of the state's voters. The Attorney General of Texas relied upon *State v. Swisher* in giving his opinion to the same effect in Attorney General Opinion 0-489 (1939). These authorities have not been overruled. Indeed, they are soundly reasoned.

The Supreme Court wrote in *State v. Swisher*:

The mode in which the acts of the Legislature are to become laws is distinctly pointed out by our Constitution. After an act has passed both houses of the Legislature, it must be signed by the speaker of the house and the president of the senate. It must then receive the approval of the Governor. It is then a law. But should the Governor veto it and send it back, it can only become law by being passed again by both houses, by a constitutional majority. There is no authority for asking the approval of the voters at the primary elections in the different counties. It only requires the votes of their representatives in a legislative capacity. But, besides the fact that the Constitution does not provide for such reference to the voters to give validity to the acts of the Legislature, we regard it as repugnant to the principles of the representative government formed by our Constitution. Under our Constitution the principle of lawmaking is that laws are made by the people, not directly, but by and through their chosen representatives. By the act under consideration this principle is subverted, and the law is proposed to be made at last by the popular vote of the people, leading inevitably to what was intended to be avoided, confusion and great popular excitement in the enactment of laws.

Thus, under our constitution, the only time the people vote to make a law is when they vote to amend the constitution.

And the people have amended the constitution to provide for a voter referendum in one situation—a personal income tax. This is the commonly called Bullock Amendment, added in 1993. The amendment is found in the Texas Constitution, Article 8, Section 24, entitled “Personal Income Tax; Dedication of Proceeds.”

Thus, for a voter referendum to be constitutional, it must come within the terms of the Bullock Amendment. CSHB 3 runs afoul of the amendment by being overbroad.

Look at the Bullock Amendment, Subdivision (a):

A general law enacted by the legislature that imposes a tax on the net incomes of natural persons, including a person's share of partnership and unincorporated association income, must provide that the portion of the law imposing the tax not take effect until approved by a majority of the registered voters voting in a statewide referendum held on the question of imposing the tax. The referendum must specify the rate of the tax that will apply to taxable income as defined by law.

Now look at what CSHB 3 proposes:

ARTICLE 5. STATEWIDE REFERENDUM

SECTION 5.01. (a) At the general election to be held on November 8, 2005, the voters shall be permitted to vote in a referendum as provided by this article.

(b) The ballot shall be printed to provide for voting for or against the proposition: "Imposition of the franchise tax on all business entities, other than sole proprietorships, at a rate of 4.25 percent of earned surplus to provide for an additional 19-cent reduction in the maximum school district maintenance and operations property tax rate, beginning in tax year 2006."

....

SECTION 5.03. (a) It is the intention of the legislature that, although a referendum on matters of statewide importance is rarely conducted, the will of the people in relation to this particular issue should be honored.

(b) If a majority of the votes cast in the referendum oppose the proposition, Part E of Article 2 of this Act does not take effect.

(c) If a majority of the votes cast in the referendum favor the proposition, Part E of Article 2 of this Act takes effect January 1, 2007.

Notice that rather than asking the voters to approve a tax on the net incomes of natural persons, CSHB 3 asks the voters to approve a tax “on all business entities,” which includes other than natural persons, for example, corporations. This makes CSHB 3 overbroad because, under *State v. Swisher* and the Bullock Amendment, submitting any tax for voter approval other than a tax on the net incomes of natural persons is unconstitutional.

In our judgment, were the Legislature to enact CSHB 3, and were the Governor to sign it into law, litigation would certainly follow to prohibit an election or the collection of any tax. If the Supreme Court and the Attorney General follow their precedents, an election or the collection of this franchise tax would be enjoined.

The center does support submission of a personal income tax to the voters. With a below-average rate, personal-income tax, such as the Kansas tax, our analysis shows Texas could: 1) lower school district M&O property tax rates to \$0.50, rather than merely to \$1.05; 2) give a net tax cut to the 60% of Texas families with the lowest incomes, rather than to the 20% of Texas families with the highest incomes; and 3) increase our investment in public education by \$6 billion a year, rather than nothing. For more information on a better plan see *The Best Choice for a Prosperous Texas*, <http://www.cppp.org/research.php?aid=99>.

By:

A handwritten signature in black ink that reads "F. Scott McCown". The signature is written in a cursive, slightly slanted style.

F. Scott McCown
Executive Director