



**LEGISLATIVE UPDATE**

# Overview of the 82nd Session

BY ROYCE POINSETT



Republicans and Democrats will disagree on the successes and failures of the 2011 Texas legislative session, but they wholeheartedly agree on one thing: They are glad the session is finally, mercifully over. Texas legislators surely earned their \$600 per month salary as they tackled several immense and painful issues during the 140-day session: a budget shortfall, redistricting, immigration, and environmental regulatory reform, to name a few. Any one of these issues alone could have dominated the session. Addressing these issues at once was downright overwhelming. In fact, legislators needed an additional 30-day special session to complete their work.

The 2011 session had three major themes. “Republican Hegemony” was the session’s political theme. Republicans charged into Austin following a triumphant sweep in the November 2010 elections. Gov. Rick Perry, Lt. Gov. David Dewhurst, and Speaker

Joe Straus all handily won reelection, and they gaveled in the most Republican Texas Legislature in history. Republicans in the Senate retained their comfortable 19-12 majority, while Republicans in the House seized a stunning 101-49 supermajority. Republicans had enough votes to pass most bills without any support from Democrats, who were left with parliamentary tactics as their only tool to slow or divert the Republican legislative steamroller.

“Conservative Uprising” was the session’s ideological theme. Most of the 32 new Republicans in the House were supported by the Tea Party and won their elections on ardently conservative platforms. As they replaced more moderate Republicans and Democrats, the ideological balance of the Legislature swung sharply rightward. Led by Gov. Perry, this energized faction would dominate the 2011 debate on both fiscal and social issues.



“No New Taxes” was the session’s policy theme. The defining challenge facing the Legislature was bridging an historic \$27 billion shortfall in the state budget — a shortfall that amounted to a full 25 percent to 30 percent of current state spending. Most of the 2011 Legislature’s energy was spent debating the various ways to balance the budget. In the end, Gov. Perry and the conservative faction triumphed, and the Legislature relied almost exclusively on tough budget cuts (and some accounting “maneuvers”) while rejecting proposals to raise revenues or utilize reserves. The end result was very deep (and potentially unpopular) cuts across the budgetary spectrum, especially in public education, higher education, and human services.

Looking forward, it is difficult to know what issues will dominate the upcoming 2012 Texas elections and 2013 Texas Legislature, but several important events will help us divine the Texas political future.

First, we may see the largest turnover in Texas political leadership in a decade. A lively game of “musical chairs” will ensue if Gov. Perry and/or Lt. Gov. Dewhurst depart for national office or U.S. Senate because several other statewide Republican officials will finally see an opportunity to move up. Attorney General Greg Abbott, Comptroller Susan Combs, Land Commissioner Jerry Patterson, and Agriculture Commissioner Todd Staples are all expected to seek higher office. And the recent revision of electoral maps through redistricting is expected to provoke competitive races for several congressional and state Senate seats, and perhaps for dozens of state House seats. So it is likely that the 2013 Legislature will see new personalities in charge, promoting new agendas.

Second, we will observe how the Texas public responds to the 2011 budget cuts in education and social services. Although Tea Party-style voters demanded that Texas balance the budget with no new taxes, it will be interesting to see how they react to actual teacher layoffs, scholarship cuts, and nursing home shortages. Democrats hope that Texas voters who favored conservative government in principle will not like it nearly as much in action.

Third, we will look to see whether Straus and the House Republicans preserve their supermajority, or if conservative energy fades and Democrats and moderates regain some measure of seats and influence.

Fourth, we will keep an eye on the economic recovery in Texas. There is hope that the economy rebounds and that sales tax collections revive, but many fear a sluggish recovery and skyrocketing Medicaid costs will result in yet another multibillion-dollar shortfall in 2013. If so, the 2013 Legislature will be forced to debate whether to shrink state government even further or to finally seek new revenues from higher taxes, gaming, or other sources.

### **Major Legislation of the 2011 Session**

Despite the budget shortfall, the Legislature did manage to accomplish its “must-do” work and other primary goals: pass-

ing a balanced state budget, continuing the tax exemption for small businesses under the state business tax, and reforming the Texas windstorm insurance system. And the Legislature still managed to pass 1,458 bills — not far under its average output. Among these thousands of new laws are several that deserve serious attention from the legal community.

#### *The State Budget*

House Bill 1 enacts a two-year balanced budget with \$172.3 billion in overall spending (a decrease of 8.1 percent). This total includes \$86.9 billion in state-level (i.e., non-federal) spending (a decrease of 1.9 percent). The budget does not levy new taxes or tap the state’s Rainy Day Fund. It does, however, rely on some very optimistic Medicaid cost assumptions and several accounting “maneuvers.” Because public education, higher education, and social services make up the largest portions of the state’s budget, they also shouldered the largest cuts. This budget cuts more than 5,700 state government jobs, eliminates financial aid for 29,000 low-income students, makes sharp cuts in Medicaid reimbursement rates, and reduces funding for human services by 17.6 percent.

#### *Public Education*

The state budget decreased public education funding by only \$570 million overall compared with the current budget, but that was a full \$4 billion (or 5.6 percent) less than what was owed to schools under current funding formulas to keep pace with enrollment growth. These cuts will likely lead to layoffs and/or property tax increases in many school districts. Senate Bill 1 in the special session specified how much of that pain will be shouldered by each district, and S.B. 8 in the special session removed a number of statutory mandates in order to provide districts with more flexibility in shifting resources and cutting costs. No one doubts that another round of school finance litigation will commence in the near future.

#### *Redistricting*

Republicans successfully redistricted state House and congressional districts in order to reflect population shifts, and with hopes of cementing Republican gains for years to come. Texas gained four new congressional districts as a result of its population growth relative to other states. However, all of these new maps still face review by the Obama Administration and countless court challenges.

#### *Small Business Tax Exemption*

S.B. 1 of the special session continues the tax exemption under the state’s relatively new business franchise tax for the 28,000 small businesses with less than \$1 million in annual revenue. The continued exemption obviously pleases small businesses, but concerns larger businesses that fear a gradual “burden shift” of the tax onto their shoulders.



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**Windstorm Insurance Reform**

Windstorm insurance issues became the primary proxy fight between trial lawyers and tort reform advocates in 2011. Under current law, policyholder plaintiffs can win treble damages and penalties of 18 percent per year from the state-run Texas Windstorm Insurance Agency. H.B. 3 of the special session seeks to stabilize the agency’s finances by allowing only double damages and eliminating all penalties.

**Tort Reform**

H.B. 274 is touted by supporters as “loser pays” legislation, but the final version of this heavily negotiated bill does not go as far as some might hope (or fear). The bill allows judges to rule on motions to dismiss much earlier in the court process and to award costs and attorney’s fees to the prevailing party in such a case. The bill also expedites suits under \$100,000, amends the law related to the allocation of attorney’s fees following an offer of settlement, and adjusts the law related to joining third-party defendants to suits.

**“Amazon Tax” Issue**

S.B. 1 of the special session requires certain online retailers to collect tax from online sales that involve Texas consumers. The

new law clarifies and expands the definition of “nexus” to reach online retailers that pay in-state marketers to advertise for them.

**“Hot Button” Conservative Issues**

Republicans passed a whole host of bills supported by the conservative base. Under S.B. 14 most voters will have to show photo identification to cast a ballot. H.B. 15 requires physicians to provide a sonogram to a pregnant woman 24 hours before performing an abortion, and a combination of new laws defunds Planned Parenthood from various government programs. S.B. 18 further restricts eminent domain powers, and S.B. 332 reaffirms that landowner’s own groundwater below the surface of their land as real property.

**Unfinished Work for 2013**

**Franchise Tax Reform**

There are many criticisms of the state’s current franchise tax system, and there were many bills filed to shift, lower, or raise the levy. No significant reforms passed in 2011, but the Legislature will begin a wholesale review of the tax during the legislative interim and may attempt a wholesale rewrite in 2013. Sophisticated industries and their advocates will spend the interim organizing advocacy teams and political allies, appearing before tax-writing committees, and marshalling their arsenal of policy arguments and fiscal analyses.

**Railroad Commission and Public Utilities Commission Reform**

Both the Railroad Commission and the Public Utilities Commission underwent sunset review in 2011, but neither reform bill was enacted so these industries must undergo review again in 2013. Railroad Commission critics will once again seek to rename the agency, restructure its governing structure, and reform its procedures.

**Immigration Reform**

Surprisingly, conservative Republicans were unable to deliver on their campaign pledge to enact Arizona-style laws to ban so-called “sanctuary cities,” reduce illegal immigration, and penalize employers who hire illegal workers. A coalition of moderates, Democrats, and some influential business groups stalled almost all of these measures, except for a new requirement to show proof of citizenship or legal residency to obtain a driver’s license.

**Gaming**

Various bills were proposed to let Texas voters decide whether to legalize slot machines or even full-scale casinos, but none passed.

**New Laws that Affect the Real World**

As lawyers, we are relatively isolated from the real world but should at least feign some familiarity with it. So that we can answer the legal questions posed by the real people we interact with at our church, water cooler, or dinner table, we should know about these new laws passed by the legislature:

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**Top Gear**

H.B. 1353 eliminates lower nighttime speed limits and also allows transportation officials to raise speed limits to 75 miles per hour on a greater number of rural roads.

**Kids 'R' Us**

H.B. 358 requires parents to give written approval before a school may use corporal punishment on their child. S.B. 198 is "Romeo & Juliet" legislation that prevents a defendant 19 years or younger from having to register as a sex offender if he or she has consensual sex with someone 15 or older, as long as the defendant is not more than four years older than their paramour. S.B. 407 gives prosecutors the flexibility to pursue misdemeanor, as opposed to felony, convictions against minors who text illicit images of other minors.

**Guns Galore**

S.B. 321 allows concealed weapon license holders to keep their guns in their cars while on an employer's private parking lot, even if the employer objects. H.B. 25 allows Texans to have guns on their boats under the same rules as in their cars.

**Animal House**

With the passage of H.B. 2189, Texans can now legally fish for catfish using their hands — better known as "noodling." H.B. 1806 makes it a third-degree felony to cheat during a fishing tournament with a prize of \$10,000 or more. H.B. 716 permits landowners to rent seats to hunters seeking to shoot feral hogs and coyotes from a helicopter. Animals did win one battle: S.B. 279 allows courts in domestic disputes to issue protective orders for pets.

**Maybe Next Time**

The Legislature did not pass proposed laws to ban texting while driving, establish a statewide smoking ban in restaurants and other workplaces, or allow concealed weapon license holders to carry guns on university campuses.

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