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

Comparative Analysis

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

Author's Comment

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

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

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

History

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

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

Explanation

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

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

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

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

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

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

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

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

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

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

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

Comparative Analysis

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

Author's Comment

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

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

History

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

Explanation

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

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

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

Comparative Analysis

Forty state constitutions forbid imprisonment for debt.

Author's Comment

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

Sec. 19 DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW.

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

History

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

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

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

Explanation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Art. I, § 19

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

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

It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. (*Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955).)

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

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

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

Art. I, § 20

Comparative Analysis

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

Author's Comment

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

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

History

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

Explanation

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

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

Comparative Analysis

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

Art. I, § 21

Author's Comment

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

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

History

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

Explanation

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

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

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

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

Art. I, § 22

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

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

Comparative Analysis

A total of 28 states prohibit corruption of the blood.

Author's Comment

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

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

History

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

Explanation

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

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

Art. I, § 23

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

Comparative Analysis

Over 30 states' constitutions contain treason provisions.

Author's Comment

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

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

History

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

Explanation

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

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

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

Comparative Analysis

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

Author's Comment

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

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

History

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

Art. I, § 25

Explanation

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

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

Comparative Analysis

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

Author's Comment

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

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

History

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

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

Art. I, § 26

Explanation

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

Comparative Analysis

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

Author's Comment

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

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

History

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

Explanation

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

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

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

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

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

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

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

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

Art. I, § 27

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

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

Comparative Analysis

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

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

Author's Comment

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

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

History

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

Explanation

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

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

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

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

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

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

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

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

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

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

Comparative Analysis

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

Author's Comment

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

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

History

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

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

Explanation

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

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

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

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

Comparative Analysis

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

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Author's Comment

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

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

History

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

Explanation

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

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

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

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

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

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

Comparative Analysis

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

Author’s Comment

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

Author’s Concluding Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) Section 24 which is simply stated might be retained.
- (b) Section 23, in the interest of crime control, should be repealed in favor of legislative regulation.
- (c) Section 17 might be replaced with a simple statement that just compensation is due when private property is taken for public use (as in the Fifth Amendment to the United States Constitution). The details could be left for legislative regulation.