

THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS

PREAMBLE

Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution.

History

Each Texas State Constitution has been preceded by a brief preamble. Until 1876 the wording was essentially that of 1845 if we subtract the transitional clause (in brackets below) which refers to the admission of Texas to the federal union. The 1845 preamble read: "We The People of the Republic of Texas, acknowledging with gratitude the grace and beneficence of God, in permitting us to make choice of our form of government, [do in accordance with the provisions of the Joint Resolutions for annexing Texas to the United States, approved March 1st, one thousand eight hundred and forty-five,] ordain and establish this Constitution." In 1861 the "State" was substituted for "Republic" but thereafter constitution makers settled for "people of Texas" until "State" reappeared in the present preamble. Although the 1875 wording differs somewhat from that of earlier preambles the purpose seems to be the same, *i.e.*, a reference or appeal to God.

Explanation

No Texas cases refer to or construe the preamble. We do know from references to the longer preamble of the United States Constitution that a preamble is not a part of the constitution. Literally it goes before. Hence a preamble cannot be an independent source of power although it may help in the definition and interpretation of powers found in the body of the constitution. Chief Justice Marshall used the preamble to the United States Constitution as primary textual proof that, in the federal union, the powers of the national government came not from the states but from the people, the same source which the states acknowledged as the origin of their own governmental powers (*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

The Texas preamble also recognizes the people as the source of state power but the reference is not judicially significant because the fact was never in doubt. Section 2 of the Bill of Rights recognizes popular sovereignty in more explicit terms.

Comparative Analysis

Almost without exception state constitutions are preceded by preambles. They are not the source of great controversy.

Author's Comment

The Texas preamble is succinct and modest. Considering the lack of judicial interest in the past and the limited interest in preambles elsewhere the chance that courts in the future may ascribe some significance to the preamble is minimal. For persons disturbed by the growing secularization prescribed by the United States Supreme Court in church-state relationships this reference to the deity may furnish some solace. Perhaps some parts of the Bill of Rights, which are simply statements of political faith or theory, would fit more appropriately in the preamble.

Article I

BILL OF RIGHTS

Introductory Comment

The bill of rights in a state constitution differs from other parts of the constitution. Typically it appears at the very beginning of the constitution, setting the stage in a sense for what is to come. It may recognize the people as the source of the power that succeeding articles entrust to government. When it expresses basic premises upon which government rests it may sound like an extension of the preamble. The main thrust of the bill, however, is to limit government by recognizing certain rights of the individual which government may not infringe. In the Texas Bill of Rights, the sections, with some exceptions, fall in three main categories: (1) statements of political theory regarding the nature of government and its relationship to the governed or to the federal government; (2) enunciations of substantive rights to liberty and property; and (3) enumeration of procedural rights which are partly civil but mainly involved in criminal proceedings and their preliminaries.

History

Every Texas constitution has contained a bill of rights. A 17-section Declaration of Rights appended to the Constitution of 1836 sets forth most of the guarantees found in the present bill. The Constitution of 1845 began with a 21-section Bill of Rights that has served as a more exact model for the subsequent constitutions of 1861, 1866, 1869, and 1876. Although each of these constitutions reflected the political temper of the time—*i.e.*, secession, the outcome of the Civil War, Reconstruction, and victory over the Reconstruction forces—the bill of rights changed very little through that period. Article I of the present constitution did, however, expand to 29 sections. The 1875 Convention changed the emphasis in Section 1 of the 1869 version from federal supremacy to states' rights and dropped the new 1869 sections on equality and slavery. The Bill of Rights was expanded further through the splitting of several sections as well as by the addition of Section 21 on corruption of the blood, forfeitures, and suicide and of Section 22 on treason. Several old guarantees were elaborated or qualified. On several occasions since 1876 the Bill of Rights has been altered by narrow statute-like amendments, once in 1918, once in 1935, and twice in 1956. In 1972 the voters approved a broadly worded equal protection amendment as an addition to the present Section 3.

Philosophical Sources

The principal philosophical sources of our bills of rights are found in the ramifications of the social contract philosophy. To justify resistance to rulers and to the theory that kingship was of divine origin and hence that kings ruled by divine right, various writers constructed a radically different theory to explain the origin and present status of government. According to this theory, people lived at one time in a state of nature without government. In the state of nature, people were subject to natural law which in turn gave them natural rights. For one reason or another people wished to escape from this state of nature. Hence they entered into a contract to form a society and set up a government. In the contract they gave up some of their natural rights to a government which in turn agreed to govern them justly, but the people retained their other natural rights and these rights were beyond the powers of any government. If a government nevertheless ruled unjustly and infringed these rights it had broken the contract. When it nevertheless

persisted, the government ceased to be legitimate and became tyrannical. Hence the people had a right to overthrow it and substitute another.

However artificial this social contract theory may seem today, it was the common intellectual currency of those people in the western world of the 18th century who opposed oppressive government. American leaders knew this philosophy principally through the writings of John Locke. Thomas Jefferson stated the theory in the Declaration of Independence:

... We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.

Although theorists might talk grandly about natural or unalienable rights, saying precisely what they were presented a more difficult and practical problem. Here Englishmen tied the theory to another tradition, that of the historic rights of Englishmen. These, they said, were natural rights. In fact these rights were recognized in English charters of liberty and in the common law. When the colonists came to North America various colonial charters stated that the colonists brought with them the rights of Englishmen. Hence, when, after the Declaration of Independence, the new states began to draw up constitutions it was not surprising that these constitutions frequently contained bills of rights and that the rights listed turned out to be the historic rights of Englishmen. Nor is it surprising that when the new Constitution of the United States was submitted to the people without a formal bill of rights, opponents made this omission their main argument against ratification of the new document. In the ensuing bargain for ratification struck by proponents and opponents of the new United States Constitution, it was agreed that a bill of rights would be added. When we inspect the resulting federal Bill of Rights we find that it, too, consists to a considerable extent of the historic rights of Englishmen at common law. Fearing that some rights might have been omitted from the list, Congress included the Ninth Amendment, a little cited natural law amendment, which says that the preceding Bill of Rights may not be complete and that other rights, too, are retained by the people.

The concept of natural rights presents us with some difficulties. If such rights are simply moral precepts to be discovered by man's reason then obviously everyone can have his own list. A bill of rights, it has turned out, however, is not simply educational or a moral guide. Rather, it consists of individual rights which can be enforced in a court of law against government itself. For this purpose rights have to be fairly specific, and not simply references to some vague unspecified rights which may have existed in the philosophers' construct of a state of nature.

Nevertheless, the quaint words in parts of Sections 2 and 3 of the Texas Bill of Rights about the social contract remind us of the basic premise that government is limited and that individual rights are precious. Judicial attempts to implement the natural rights theory would of course give judges tremendous powers. Although at one time judicial references to the social contract and natural rights were not infrequent, today we experience only rare throwbacks to such language. A conspicuous example is the dissenting opinion of Justice Smith in 1957 (*State v. Richards*, 157 Tex. 166, 180, 301 S.W.2d 597, 608):

Art. I, Introduction

To secure their property was one of the great ends for which men entered society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty—an expression of his freedom as guaranteed inviolate by every American Bill of Rights.

The Federal Problem

How does the Bill of Rights in the United States Constitution affect state government and state bills of rights? John Marshall answered the question in 1833 in the case of *Barron v. Baltimore* (32 U.S. (7 Pet.) 243). The United States Bill of Rights, he said, operated as a limitation upon only the United States government. This has all been changed through judicial interpretation of the Due Process Clause of the Fourteenth Amendment: "No state shall deprive any person of life, liberty or property without due process of law." Here is a national guarantee, ultimately enforceable by the United States Supreme Court, of the individual's rights against his own state government. By writing these limitations the framers of the Fourteenth Amendment signaled a radical shift in the intergovernmental relations within the federal system. How radical the shift would be in practice depended upon what specific limitations upon state activity the United States Supreme Court found within the vague contours of "due process of law."

Answers to this question were slow in coming at first but during the last 50 years and particularly during the years of the Warren Court judicial responses have been increasingly rapid and expansive. They have worked a revolution in judicial endorsement of individual rights against state government, shifting the burden of leadership and definition from the states to the United States Supreme Court. Leaders in the doctrinal conflict regarding the meaning of due process in the Fourteenth Amendment were Justices Frankfurter and Black. For the former, due process had no fixed meaning; rather it represented the evolving fundamental concepts of liberty, justice, and fairness essential to our society. Because judicial guidelines for such determination were necessarily vague, he believed that the court should show deference to the states in their application of these concepts. Justice Black, however, discovered to his own satisfaction that those who adopted the Fourteenth Amendment intended to reverse *Barron v. Baltimore* (32 U.S. (7 Pet.) 243 (1833)) and to make the first eight amendments of the Bill of Rights applicable to the states. Hence Black needed only to look at the first eight amendments, discover the meaning which the federal courts had given to them, and apply that meaning to the states. This was called the "doctrine of total incorporation."

In fact, the United States Supreme Court has not opted entirely for either point of view. While some controversy continues, the present answer is mainly that of selective incorporation. As determined from case to case, nearly all of the guarantees in the United States Bill of Rights now apply to the states with the same meaning and form as they apply to the United States government. However, the door remains open to apply less than the full set of federal interpretations regarding a clause of the Bill of Rights or conversely to discover new rights implied from those specifically listed in the first eight amendments. Thus some of the vagueness in the Frankfurter test persists. Indeed, in *Griswold v. Connecticut* (381 U.S. 479 (1965)), a majority of the justices found a right of marital privacy implied in the special guarantees of the first eight amendments and thus applicable to the states. Some of the justices found partial support for this idea of implied rights in the Ninth Amendment, the natural rights character of which has been previously noted. At present, however, the idea of implied federally protected rights against state action is more interesting for its speculative potential than for practical effect. Nevertheless, when the Supreme Court declared the Texas abortion law unconsti-

Art. I, Introduction

tutional recently, Justice Blackmun did not close the door on Ninth Amendment arguments. (See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).)

The doctrine of widespread selective incorporation has presented state courts with special problems. Litigants rely upon similar federal and state guarantees, cite both, and indeed the federal and state guarantees overlap to a very considerable extent. If the state court interprets the state guarantee to mean less than the similar "incorporated" federal guarantee, the result is meaningless, for the litigant must triumph under the federal right because of federal supremacy (U.S. Constitution, Art. VI). Of course, a state court can find greater protection in the state bill of rights, but with an exception to be noted later, state courts have tended to be less generous. Hence not surprisingly state courts have followed the leader, the United States Supreme Court.

There are many reasons why state courts have applied federal interpretations to provisions in state bills of rights similar in wording to the provisions in the United States Bill of Rights. There is the well-established principle of federal supremacy. In addition, the United States Supreme Court is to a considerable extent a constitutional court which year after year during the past generation has spent a considerable part of its energies elaborating the constitutional law of the Bill of Rights. State courts deal with a broad array of subjects in which the law of their bills of rights is a very minor part. Indeed, state courts are often criticized for not even being innovative in the areas of law which they monopolize. One answer is the pressure of time. Thus, following federal interpretation avoids conflict and conserves energy. In recent years the United States Supreme Court has led the way in expanding individual protection against government and the greater conservatism of state courts has left little room for them to outdo their federal counterpart. In Texas, accepting the federal standard has the added advantage of avoiding conflicting interpretations of the state's two highest courts, the Supreme Court of Texas and the Court of Criminal Appeals. Furthermore, it is harder on another score for state courts to develop an independent body of constitutional law. Since state courts are closer to their coordinate branches of government and to their state politics, they may not have the independence that the United States Supreme Court has developed over the years. Any decision may set off a reaction in the state legislature where "corrective" legislation may be passed or a constitutional amendment proposed easily and swiftly. An interpretation of the United States Constitution, so rarely amended, is almost completely immune from reversal by amendment. In contrast, Texas presents a conspicuous example of easy and frequent change by amendment.

Education itself undergirds federal leadership in constitutional interpretation. Of course, there is general talk about states' rights and state independence. Educational specifics, however, focus on the federal example. In the law schools themselves future lawyers and judges typically study United States constitutional law. They learn how great and lesser justices of the United States Supreme Court have interpreted the United States Constitution and they dip into the great mass of literature which deals with these subjects. But where are the courses in state constitutional law, where are the twentieth century treatises on state constitutions, and where are the articles explaining them? The answer is that, with very rare exception, they simply do not exist.

Recent Texas Developments

A review of recent court of criminal appeals decisions reveals an interesting phenomenon in federal/state constitutional relations. In cases of criminal procedural due process the court frequently fails to refer to the appropriate section of

Art. I, Introduction

the Texas Bill of Rights; case after case turns on the appropriate amendment of the United States Constitution as interpreted by the United States Supreme Court. In some instances it seems probable that neither the attorneys involved nor the court considered the Texas Constitution. This is surely the case in questions of obscenity versus freedom of the press. (See, for example, *Goodwin v. State*, 514 S.W.2d 942 (Tex. Crim. App. 1974); *West v. State*, 514 S.W.2d 433 (Tex. Crim. App. 1974); *Soto v. State*, 513 S.W.2d 931 (Tex. Crim. App. 1974). See also *Locke v. State*, 516 S.W.2d 949 (Tex. Civ. App. — Texarkana 1974, *no writ*.) None of these cited cases mentions the Texas Constitution.

In some cases it is unclear whether the court of criminal appeals is using federal cases as examples of the interpretation to be given to the applicable Texas provision or is simply following the United States Supreme Court. (See, for example, *McDaniel v. State*, 524 S.W.2d 68 (Tex. Crim. App. 1975) (self-incrimination); *Jones v. State*, 514 S.W.2d 255 (Tex. Crim. App. 1974) (double jeopardy); *Ex parte Scelles*, 511 S.W.2d 300 (Tex. Crim. App. 1974) (same).)

On occasion, the court of criminal appeals carefully distinguishes between the procedural requirements of the United States Constitution and the requirements of the Texas Constitution. In *Abron v. State* (523 S.W.2d 405 (Tex. Crim. App. 1975)), the question was whether a defendant's attorney must be allowed to inquire of prospective jurors whether they were prejudiced against a particular race. The state contended that the trial judge had met the requirements imposed by the United States Supreme Court, but the court of criminal appeals observed that, "even if the State's contention is valid . . . , there remains the issue of whether our constitutional and statutory standards were met" (p. 408). The court held for the defendant.

The significance of carefully distinguishing between the constitutional protections imposed by the United States Constitution as interpreted by the United States Supreme Court and the protections guaranteed by a state constitution has recently been stressed by Mr. Justice Marshall. In *Texas v. White* (423 U.S. 67), decided on December 1, 1975, the Supreme Court reversed a Fourth Amendment search and seizure holding by the court of criminal appeals because the latter had misunderstood an opinion of the former. Mr. Justice Marshall concluded his dissent by observing that "it should be clear to the court below that nothing this Court does today precludes it from reaching the result it did under applicable state law." (p. 72. Note that the state petitioned for certiorari in this case. This aspect of the case is discussed in the *Explanation* of Sec. 26 of Art. V, which prohibits state appeals in criminal cases.) Justice Marshall is saying, in effect, that if the United States Supreme Court drops the torch of freedom, state courts are free to pick it up and carry it forward. Interestingly enough, Mr. Justice Brennan made the same plea a week later. ". . . it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution." (See *Michigan v. Mosley*, 423 U.S. 96 (dissenting).) Justice Klingeman of the court of civil appeals in San Antonio recently made a similar observation in a case involving a juvenile offender certified as an adult for trial in a criminal district court. The state relied on the due process requirements of *In re Gault* (387 U.S. 1 (1967)). Justice Klingeman held for the juvenile, observing: "While *Gault* establishes a rudimentary floor of due process guarantees with respect to adequate and proper notice, it in no way restricts the legislature from going beyond this and achieving a higher plane by enacting additional notice requirements aimed at further protecting a juvenile's due process rights." (See *R_____ K_____ M_____ v. State*, 520 S.W.2d 878,880 (Tex. Civ. App. — San Antonio 1975) (footnote omitted) *aff'd*, 535

S.W.2d 676 (Tex. 1976). It is to be noted, of course, that Justice Klingeman spoke only of the legislature's power; whether he would have gone beyond *Gault* in the name of the Texas Bill of Rights is another question.

The foregoing discussion has been limited to cases involving "procedural" due process. This is where the action is these days in the United States Supreme Court. What is known as "substantive" due process is different. Forty years ago the Supreme Court abandoned substantive due process in the area of economic regulation. Here state courts pretty much have to rely on a state due process clause if they wish to hold economic regulation invalid. (See the *Explanation* of Sec. 19 of Art. I.)

Options Open

What then should be done about the Texas Bill of Rights? Both the recent Constitutional Revision Commission and the Constitutional Convention of 1974 adhered so strictly to the constitutional command—"The Bill of Rights of the present Texas Constitution shall be retained in full."—that not a comma was changed. Any further revision effort should exclude this command or at least express the sentiment in a more flexible formulation. The experience of recent constitutional conventions in the United States demonstrates that there is no danger that the Bill of Rights will be weakened. (Dropping provisions like Secs. 20 and 21 would hardly be considered weakening the Bill of Rights.) The normal revision effort in other states has produced a stronger bill of rights.

If, in the course of a new revision effort, the Bill of Rights is to be subjected to the same scrutiny as any other article of the constitution, there are several options open to the drafters:

(1) *Eliminate the Bill of Rights.* Since the protection of fundamental individual rights has been nationalized by the doctrine of incorporation, it is argued, a state bill of rights has become unnecessary. Several responses are in order. As the tide of constitutional adjudication has recently brought ever increasing federal protection of individual rights and liberties so the tide might recede. If the United States chose to protect fewer rights on a national basis, the Texas courts might wish to continue the protection at the state level. Indeed, the United States Supreme Court, which protected economic interests on a large scale before 1937, has left this function to other branches of the government unhindered by national judicial interference. Texas courts, however, have continued to exercise some judicial review in these areas. Furthermore, not every guarantee in the Texas Bill of Rights has an incorporated federal counterpart.

(2) *Rewrite the Texas Bill of Rights in exactly the same language as the federal Bill of Rights.* This proposal involves a number of considerations. It would reinforce the tendency to treat state guarantees, even though drawn in different language, the same as the federal guarantees. It would eliminate neglected differences in language which might be seized upon by persuasive litigants and open the door to unexpected and unwanted judicial decisions. It would improve style by substituting the concise language of the federal bill for the often rambling, overlapping, and sometimes unclear wording of the Texas bill. It would remedy the results of past Texas practice, which has seemed to be: add to the Bill of Rights if you wish but never eliminate a section or a word. If the state courts have attached their own special interpretations, as that of protecting property rights, to different language in the Texas bill they could continue such interpretation under the new wording. Such rewriting would eliminate narrow, statute-like sections and make it easier to

Art. I, Introduction

avoid overlap with other parts of the constitution in such areas as taxation and jury guarantees.

Some arguments run against this change. Although the opportunity has apparently been neglected in Texas, a state bill of rights different from the federal bill has educational value. The opportunity to teach these special values and their history might be lost if the state language were repealed. Moreover, making the state bill the same might increase the tendency of state courts to follow the United States Supreme Court. In some areas and at some future time the Texas courts might be encouraged to strike out for themselves if the old language were retained. Then, too, as we have noted, the Texas bill does guarantee some values not covered by the federal bill. These might be lost, although using federal language would not preclude additional articles.

(3) *Improve style.* Under this option the reviser would retain the substance of the present Bill of Rights but rewrite and rearrange it. This would mean shifting to the preamble statements of general purpose or theory which are or should be no more than aids to construction. It would also mean the elimination of overlap between different sections within the Bill of Rights and between the bill and other articles of the constitution. Certainly the substance of many rights could be stated in simpler and more understandable terms. A reviser might consider whether phrases or sentences which have not been construed by Texas courts as protections for litigants in a hundred or more years are redundancies or anachronisms. If words of the Bill of Rights do not mean something specific and independent to the reviser, their retention is an invitation to future judges and lawyers to invent their own meaning. Fears that elimination of language might wash out valuable substance can be adequately met by using committee reports to make a clear record that no substantive change is intended.

(4) *Do nothing.* This is always easy although it may be shirking responsibility. Certainly rearrangement and stylistic changes would improve the quality of the bill but political caution may lead one to shy away from change. One may argue that the bill expresses rights so basic that even though society changes, the rights remain the same. Still, some rights seem to be more basic than others and when inspecting each guarantee one might ask whether its words and interpretation contribute to the success of our society as we wish it to be today and in the future.

(5) *Make additions.* Whatever the decision on the Bill of Rights as it stands, consideration should be given to additions in light of the changes in Texas during the century which has elapsed under the present constitution. A Bill of Rights, it may be argued, suffers because it deals more with the past than present controversies. One kind of argument would note that in the simple society of 1876 as in that of 1790, people were interested in protection *against* government and the guarantees in the constitution are designed to offer that protection. In our present highly interdependent society a convention might wish to consider guarantees *from* government, *i.e.*, guarantees of positive governmental action rather than previous guarantees of governmental nonaction. New guarantees might take the form of a right to a certain amount of educational opportunity or to a job. Beyond guarantees *vis á vis* government, some recent constitution-makers have considered limitations upon private action, *e.g.*, certain types of private discrimination.

In addition, changes in society present new problems which might call for new guarantees against government. These might include such invasions of privacy as electronic surveillance, data collection, or psychological surveillance.

Art. I, § 1

Sec. 1. FREEDOM AND SOVEREIGNTY OF STATE. Texas is a free and independent State, subject only to the Constitution of the United States, and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the States.

History

Section 1 of the Constitution of 1845 was similar to the present Section 2. Only later, when Texas joined the other states of the Confederacy in asserting a right of secession, did an elaboration of federal-state relationships appear in the Bill of Rights. This the Constitution of 1861 did by adding the following words to the then Section 1: "no government or authority can exist or exercise power within the state of Texas, without the consent of the people thereof previously given; nor after that consent be withdrawn." With the failure of secession, the Constitution of 1866 simply omitted these words and reverted to the form of 1845.

That change did not satisfy Reconstruction politicians when they drafted the Constitution of 1869. Thus, they began the Bill of Rights with the following preface and inserted a new Section 1 which stressed federal supremacy in sweeping terms. They said:

That the heresies of nulification and secession which brought the country to grief, may be eliminated from future political discussion; that public order may be restored; private property and human life protected, and the great principles of liberty and equality secured to us and our posterity, We declare that:

Section 1. The Constitution of the United States, and the laws and treaties made, and to be made, in pursuance thereof, are acknowledged to be supreme law; that this Constitution is framed in harmony with and in subordination thereto; and that the fundamental principles embodied therein can only be changed, subject to the national authority.

This sweeping denunciation of secession and assertion of federal supremacy served as an obvious target for the constitution drafters of 1875. They celebrated their victory over Reconstruction by deleting the introduction to the Bill of Rights and writing the present Section 1 with its states' rights overtones.

Explanation

Section 1 has been infrequently cited and no significant judicial interpretation has been based upon it. The reason is obvious. The United States Constitution in Article VI, Section 2, established the principle of federal supremacy so far as the constitution, laws, and treaties of the United States reach. Specifically, the clause says:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

It is the business of the federal courts to say ultimately what the constitution, laws, and treaties of the United States mean. If state law conflicts, the authority of the United States is supreme and state judges are bound by oath to uphold it. Of course, the Tenth Amendment to the United States Constitution recognizes that national powers are enumerated and state powers residual when it says "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Still, it is for the federal courts to say what is granted and with the early establishment of the doctrine of implied powers in *McCulloch v. Maryland* (17 U.S. (4 Wheat.) 316

Art. I, § 1

(1819)), the assertion of federal power has been an expansive one. Mr. Justice Stone added in 1941 that the Tenth Amendment is not a limitation on the United States government but merely states “a truism that all is retained which has not been surrendered” (*United States v. Darby*, 312 U.S. 100, 124). Of course, large areas of activity remain for the states. As Chief Justice Chase said in *Texas v. White*, “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states” (74 U.S. (7 Wall.) 700, 725 (1869)).

Nevertheless, Section 1 did not entirely escape judicial attention. In fact, shortly after the turn of the century, Texas courts became embroiled in the same controversy which had raged between the famous Judges Dillon and Cooley. Cooley had urged a right of self-government for municipalities amounting to a sort of federal system within the states while Dillon insisted upon legislative supremacy (See Ruud, “Legislative Jurisdiction of Texas Home Rule Cities” 37 *Texas L. Rev.* 682 (1959)). When, after the Galveston disaster, the Texas Legislature provided Galveston with a government by gubernatorial appointment, the court of criminal appeals found that the legislation instituting such a government violated the right of local self-government set out in Section 1. Hence, all ordinances passed by the Galveston government were invalid and criminal prosecutions under them had to fail. (Ex parte *Lewis*, 45 Tex. Crim. 1, 73 S.W. 811 (1903).) Soon after this decision, the court of criminal appeals was even more emphatic when it commented on the position taken by the Texas Supreme Court as follows:

The rule of omnipotence announced in *Brown v. Galveston* . . . was never intended, nor could it be true if intended, to authorize the Legislature to destroy the right of self-government, or the idea of a republican form of government, nor can it take from the people the power of control over local affairs, and centralize the power in the general government, or some central authority created by the Legislature. The application of the rule of *Brown v. Galveston*, supra, carried to its legitimate effect, would absolutely centralize the authority at Austin over all municipal and subordinate divisions of the state, and destroy the idea of decentralization and representative democracy, which permeates the entire fabric of American constitutional law, and erect instead a highly centralized government (Ex parte *Anderson*, 46 Tex. Crim. 372, 380, 81 S.W. 973, 976 (1904)).

The Texas Supreme Court, following Judge Dillon, had emphatically disagreed with the court of criminal appeals in *Brown v. City of Galveston* (97 Tex. 1, 15, 75 S.W. 488, 495 (1903)), remarking “in Section 2, it is said that ‘all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit.’ This is a true declaration of the principles of republican state governments; however, it does not mean that political power is inherent in a part of the people of a state, but in the body, who have the right to control by proper legislation the entire State and all its parts.”

Despite its spirited rejoinder, the court of criminal appeals soon began to back-track and any survival of the controversy between the highest courts ended in 1912 when Section 5 of Article IX, the Home Rule Amendment, provided for legislative supremacy. The section provides that “no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; . . .”

Comparative Analysis

Few state constitutions contain state sovereignty provisions. These few include the Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784, both of which predate the supremacy clause of the United States Consti-

tution. State sovereignty clauses also are found in the constitutions of New Mexico (1911) and Missouri (1945).

Author's Comment

Section 1 serves no useful purpose. As previously noted, intergovernmental relationships in the federal system are regulated by the United States Constitution. A desire to strike back at the Reconstruction government was understandable, but now, a century later, rhetoric regarding "states' rights" only confuses the issue of state power. There is an overwhelming amount for the states to do but only within the framework of the federal system. Any principle of popular self-government which, in the future, could be found by the courts to inhere in Section 1 could certainly be based better upon some other section of the Bill of Rights, such as Section 2.

Sec. 2. INHERENT POLITICAL POWER; REPUBLICAN FORM OF GOVERNMENT. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

History

As noted in the discussion of the previous section, Section 2 of the Constitution of 1876 was the opening section in the Bill of Rights of 1845. Issues involved in Secession and Reconstruction resulted in an elaboration of the principles stated in Section 1 of the 1845 Bill and the eventual insertion of a new Section 1. The basic ideas expressed in Section 2 derive from a political tradition current in colonial America, a tradition eventually expressed in the Declaration of Independence and carried on in whole or in part in early American constitutions. The *Introductory Comment* offers further background.

Explanation

Section 2 states three basic principles of American government: (1) popular sovereignty, *i.e.*, the people are the source of all legitimate governmental power and hence government exists for their benefit; (2) the derivative right to change or replace existing government (even by revolution according to some statements, including that in the Declaration of Independence); and (3) *republicanism*, which strictly speaking is representative, nonmonarchical government.

However important these principles may be, they have not been explained or applied in many cases. Cases which do cite Section 2 frequently couple it with other sections. Extrajudicially, Section 2 has been cited to prove that Texas may call a constitutional convention to revise the constitution although the constitution says nothing on the subject of revision. Indeed, the Convention of 1875 seems to have agreed. The debates in the Constitutional Convention of 1875 (*Debates*, pp. 140-141) contain the following interchange:

President Pickett moved to strike out Section 1, and supported his motion with a speech. The effect of the section was to provide the means of calling a convention by two-thirds of the Legislature voting for such a call. This was the only mode of calling one. He denied the right of the Convention to bind the people of Texas, or to take from them the liberty to alter, amend, or abolish their Constitution.

Mr. McCormick offered the following as a substitute for the Section: "The people

Art. I, § 2

of this State may call a constitutional convention at any time and in any manner in which the majority of them may express by their voice at the ballot box, and no law shall be passed curtailing or preventing the exercise of this great and inalienable right.”

President Pickett accepted the substitute.

Mr. Flournoy offered a substitute providing that the question of convention or no convention should be submitted to the people once in every ten years, the mode of ascertaining their will to be in such a manner as prescribed by law, but the foregoing not to be construed as interfering with the right of the people to assemble in convention whenever they so will it.

Mr. Martin, of Navarro, moved as an amendment to the above to strike out “ten years” and insert “twenty years.”

Judge Reagan followed with an able speech in support of the amendment of President Pickett. He said it was the inalienable right of the people to meet in assembly or convention whenever they so desired, and that it was not within the power of any Legislature to limit them in this right.

Mr. Nunn opposed striking out Section 1 . . .

Mr. Asa Holt, of Van Zandt, called for the previous question, which was ordered.

Mr. Martin’s amendment was lost.

Mr. Flournoy’s substitute was lost.

Mr. McCormick withdrew his substitute by leave.

President Pickett’s motion to strike out the section carried by a vote of 49 to 24.

The earliest judicial controversy involving Section 2 turned on the issue of municipal self-government. It involved ideas of the people as the source of power, the republican form of government, and the specific local self-government statement in Section 1. That controversy and its outcome which negated the Bill of Rights claims are discussed in the *Explanation* of Section 1.

Later another controversy between the two highest courts of Texas arose on the subject of direct democracy and the republican form of government. Since Article IV, Section 4, of the United States Constitution guarantees to every state a republican form of government, a Texas equivalent would seem to be pure surplusage. The outcome of the two sections, however, has been different. In the early case of *Luther v. Borden*. (48 U.S. (7 How.) 1 (1849)), the United States Supreme Court refused to decide whether Rhode Island had a republican form of government. The court held that the political branches of government were better equipped to make these decisions. Later, in *Pacific States Tel. & Tel. Co. v. Oregon* (223 U.S. 118 (1912)), the United States Supreme Court refused to decide whether the Oregon initiative and referendum as an expression of direct democracy rendered the state government nonrepublican. The issue was political and hence nonjusticiable.

Prior to the *Pacific States* case, the court of criminal appeals had determined that initiative and referendum violated Section 2 because it was “directly subversive of our constitutional form of government.” The court explained, “Ours is also a representative democracy; that is, it is republican in form of government as contra-distinguished from a social or pure democracy on the one hand, and a government by the minority on the other, and excludes all others save and except one by the people through their selected representatives.” (Ex parte *Farnsworth*, 61 Tex. Crim. 342, 347, 135 S.W. 535, 537 (1911).) Soon afterwards the Texas Supreme Court disagreed when it found that popular recall did not change the republican form of government. The court quoted from Jefferson regarding republican form as follows: “I would say purely and simply it means a government by its citizens in mass, acting directly and not personally, according to rules established by the majority; and that every other government is more or less republican in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens.’ ” (*Bonner v. Belsterling* (104 Tex. 432, 437, 138 S.W. 571,

Art. I, § 3

574 (1911).) Although the court of criminal appeals seemed prepared to strike down state initiative and referendum even if adopted as a constitutional amendment, the Home Rule Amendment adopted in 1912 presumably settled the issue of municipal direct democracy along the line taken by the supreme court. (State initiative and referendum was proposed as an amendment to the constitution; it was voted down in November 1914.)

In some recent election cases the litigants have cited Section 2 but the cases have been disposed of on other grounds. A dictum in *Lydick v. Chairman of Dallas County Republican Executive Committee* (456 S.W.2d 740 (Tex. Civ. App.—Dallas 1970, *no writ*)) upheld against a challenge under Section 2 and other related sections of the Bill of Rights, a statute which prohibits write-in votes at a primary election for offices other than county chairman and precinct chairman.

Comparative Analysis

All 50 states guarantee popular sovereignty. Thirty-nine states recognize the right of the people to alter their governments but only a minority, those with older bills of rights, speak in such strong language as Section 2.

Author's Comment

Section 2 is essentially a statement of political theory. As such it would operate best as a guide to the interpretation of other constitutional provisions rather than the basis for decision making itself. Hence it might appear more appropriately in the preamble.

Sec. 3. EQUAL RIGHTS. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

History

Couched in language reminiscent of the United States Declaration of Independence, Section 3 is the natural-rights section of the Texas Bill of Rights. The framers of the Constitution of 1836 placed this section first in the Declaration of Rights. In the 1845 version the statement of equality shifted from "all men" to "all freemen" and the final phrase was added to note that the prohibition against exclusive public privilege or emolument did not preclude compensation for *public* services. While the section continued substantially unchanged in subsequent constitutions, the final phrase disappeared in 1869 and reappeared in 1876. In the present constitution "freemen" becomes "free men."

Explanation

This amendment seems to express at least two ideas: (1) that equal rights are based upon natural law and (2) that since these natural rights have been carried over into government, government shall not discriminate between men.

Texas courts wisely have not used the social compact phraseology of Section 3 as the basis of independent constitutional limitations. In fact the courts have been at pains to label Section 3 an "equal rights" clause and to treat concluding statements regarding separate public emoluments and privileges as illustrative of these "equal rights," in which there can be no governmental discrimination. Hence, Texas courts have considered Section 3 to be the Texas expression of these words in the Fourteenth Amendment to the United States Constitution: "no state shall deny to any person within its jurisdiction the equal protection of the laws." Frequently the

Art. I, § 3

two constitutional guarantees are cited together and federal cases are treated as dispositive of both constitutional claims.

This homogenization process has a certain appeal. Since the state may not violate the Equal Protection Clause of the Fourteenth Amendment anyway, why not treat the apparently narrower equal rights clause of the Texas Constitution as the same thing and let the federal courts work out the construction? In the process of making the federal and state provisions mean the same thing, Texas courts have cleared what might have seemed to be an insurmountable hurdle. Long ago the United States Supreme Court performed a considerable feat of construction in finding that corporations are "persons" within the meaning of the Equal Protection Clause. (See *Santa Clara County v. Southern Pacific RR.*, 118 U.S. 394, 396 (1886) (statement by Chief Justice Waite speaking for the court at oral argument).) Section 3, however, does not refer to "persons" but to "men." Nevertheless, corporations are covered by Section 3. "It is well settled that a corporation is a 'person' within the meaning of section 3, art. 1, of the Constitution of this state and of section 1 of the fourteenth amendment of the Constitution of the United States." (*Beaumont Traction Co. v. State*, 122 S.W. 615, 616 (Tex. Civ. App. 1909, *no writ*.) Note, however, that this is only a matter of definition. A corporation may be covered but still treated differently from "natural" persons. Likewise, aliens, or nonresidents, are obviously "men," or "persons," but may sometimes be treated differently from citizens. (See *Pintor v. Martinez*, 202 S.W.2d 333, 335 (Tex. Civ. App.—Austin 1947, *writ ref'd n.r.e.*.) In both instances the question will be the reasonableness of differences in treatment as discussed below.

Thus, both the Equal Protection Clause and Section 3 forbid the denial of equal protection whether to citizen or alien, resident or nonresident, or natural person or corporation or other legal entity. (Except a governmental entity. A government is not a "person" under either provision. See *Harris County v. Dowlearn*, 489 S.W.2d 140, 145 (Tex. Civ. App.—Houston (14th Dist.) 1972, *writ ref'd n.r.e.*.) Yet the homogenization is not total. A state law that is unconstitutional under the Equal Protection Clause cannot be enforced in Texas notwithstanding a Texas court's opinion that the law does not violate Section 3. But a Texas court may find that a law is invalid under Section 3, in which case it is irrelevant whether the United States Supreme Court would invalidate the law under the Equal Protection Clause. Thus, a Texas court may control the meaning of Section 3 by relying only on the Equal Protection Clause if a statute is invalid under the Fourteenth Amendment but, in the Texas court's eyes, ought not to be invalid under Section 3 and by relying only on Section 3 when the Texas court thinks the statute ought to be invalid no matter what the United States Supreme Court thinks.

Until about 40 years ago homogenization was complete in theory simply because the rule of equal protection/equal rights was deceptively simple in the abstract: equality was not required but unequal treatment had to be reasonable. This rule is frequently cast in terms of "classification." For example, if a law regulating hours of work provides that men may work no more than twelve hours a day and women no more than eight hours, working people have been divided into two classes, each treated differently. If the classification is reasonable, Section 3 is satisfied. (Note that whether a law may regulate hours of work at all is a different question. This is a matter of substantive due process of law that is dealt with under Sec. 19. Note also that reasonableness of classification of governments is a constitutional issue but only in connection with general and local laws. This is dealt with under Sec. 56 of Art. III.)

The traditional rule of equal protection may be simple, but there is a catch in it. What is one man's "reason" is another man's "insanity." "Reasonable" is one of those accordion words of the law that permit a great range of different results in

Art. I, § 3

different factual situations. In the constitutional world of days past, there seemed to be a subtle transference of "reasonable" and "unreasonable" into "good" and "bad." If judges thought a particular law involving unequal treatment was a bad idea, they found the unequal treatment unreasonable. Or at least this was what critics of the courts argued. Dissenting judges also argued this way frequently; naturally, the majority always denied it.

All this seemed to be true notwithstanding the rule that a law is presumed to be constitutional, which is to say that one who attacks a statute has the burden of proof. Moreover, the presumption of constitutionality traditionally has meant that unequal treatment is permissible—or a classification valid—if "there is any basis for the classification which could have seemed reasonable to the Legislature." (*San Antonio Retail Grocers, Inc. v. Lafferty*, 156 Tex. 574, 577, 297 S.W.2d 813, 815 (1957).) Taken literally, this rule erects an almost insuperable burden of proof, for one must prove that there is no reasonable argument in support of the law. Actually, as the subsequent discussion shows, the courts do not apply the rule literally.

Until about 40 years ago the rule of reasonable classification applied universally in the sense that it made no difference whether classification dealt with race, voting, education, the regulation of business, or any other subject. But, as mentioned above, critics of the court maintained that the rule was not followed, that the courts were acting as a superlegislature by finding no reasonable classification when, in the courts' eyes, the classification was not fair. This criticism was aimed principally at judicial invalidation of legislation regulating business. (It must be noted that the Due Process Clause of the Fourteenth Amendment was used more frequently than the Equal Protection Clause. See Sec. 19.) Beginning in 1934 the United States Supreme Court began to retreat from invalidating statutes regulating business. The court simply took the presumption of constitutionality literally. The retreat has been so complete that since about 1940 only one economic regulation has been invalidated under the Equal Protection Clause. In *Morey v. Doud*, the court struck down an Illinois licensing statute because it exempted the American Express Co. by name (354 U.S. 457 (1957) three justices dissenting).

This retreat created a problem for the court because it simultaneously began to strike down statutes in the areas of civil and social rights. In many cases a specific right—freedom of speech or press, peaceable assembly, double jeopardy, self-incrimination, right to counsel, for example—could be carried into the Fourteenth Amendment and protected without regard to the presumption of constitutionality simply because the right was specific. But in other cases there was nothing more specific to rely upon than the Equal Protection Clause. In order to avoid the consequences of the presumption of constitutionality, the court created a classification system of its own, so to speak. The principal device was to single out certain classifications as "suspect" and to shift the burden of proof by requiring the state to justify the classification. The most significant suspect classification is race. Indeed, the Fourteenth Amendment was adopted as one of the devices to wipe out any vestiges of the unequal racial treatment that was slavery. But as early as 1886 the Supreme Court extended the Equal Protection Clause to Chinese laundrymen who were discriminated against solely because they were Chinese (*Yick Wo v. Hopkins*, 118 U.S. 356). Classifications based on citizenship and residency are also suspect though perhaps not to the same degree as race.

The United States Supreme Court has also indicated that some things are more "fundamental" than others and that unequal treatment in a fundamental area is suspect. Voting is an example. The court looks closely at statutes that make it harder for some people to vote than for others or that make it more difficult for some people to run for office than for others. (For two examples arising out of

Art. I, § 3

Texas, see *Carrington v. Rash*, 380 U.S. 89 (1965) (right to vote of military personnel stationed in Texas), and *Bullock v. Carter*, 405 U.S. 134 (1972) (high filing fees for running in a primary).)

In many areas, the “fundamental rights” cases are closely related to poverty. In many instances a governmental requirement results in unequal treatment only because poor people are at a disadvantage under the requirement. This was the significant point about requiring payment of a poll tax in order to vote. (A poll tax as such is not unconstitutional. See Art. VII, Sec. 3, *Explanation*, Taxes.) This was also the point of *Tate v. Short* (401 U.S. 395 (1971)), holding unconstitutional the Texas requirement that an indigent person unable to pay a fine could be jailed for a period not exceeding one day for every \$5 of unpaid fine. Likewise, equal protection may demand that the state provide free some of the rights guaranteed to those accused of committing crimes. For example, it does an indigent little good to be guaranteed a right to have a lawyer represent him if he has to pay the lawyer.

In the field of education the court came within one vote of finding a denial of equal protection under a system of financing that favored wealthy school districts. (The famous *Rodriguez* case (*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)) is discussed elsewhere. See *Explanation*, Sec. 1, Art. VII.) Obviously, the court will never reach the point of requiring absolute equality regardless of wealth. But it is equally obvious that legislation that puts the poor at a disadvantage is suspect, especially if the purpose of the legislation appears to be discrimination against the poor. Under the traditional presumption of constitutionality, the true purpose of—or the motivation for—legislation is irrelevant, for any reason that could have motivated the legislature is adequate to support the legislation. But once the classification becomes “suspect,” the burden shifts to the state to justify the classification. (In this context, of course, treating rich and poor alike is a “classification” for equal protection purposes.)

These are seminal days in the United States Supreme Court. It is neither easy nor wise to predict the future development of cases under the Equal Protection Clause. In any event, an exhaustive review would be out of place in this limited Annotation. Moreover, the United States Supreme Court has recently revived substantive due process (See *Explanation*, Sec. 19), which may mean that the court will use that clause in some instances that, in earlier days, would have been shoved under equal protection.

At the beginning of this *Explanation* it was noted that Texas courts have to follow the United States Supreme Court in invalidating laws but need not stop there. Under Section 3 a Texas court can find invalid laws that the United States Supreme Court would not invalidate under the Fourteenth Amendment. A study of recent Texas cases indicates that the Texas courts use Section 3 in cases involving economic regulation, the area that the United States Supreme Court has walked away from. In the areas where that court is active, the Texas courts appear to do only what they are forced to do. That is, they do not independently consider Section 3. For example, in *Gonzalez v. Texas Employers Ins. Ass'n*, (509 S.W.2d 423 (Tex. Civ. App.—Dallas 1974, *writ ref'd n.r.e.*)), the question was whether an illegitimate child could receive a death benefit under the workmen's compensation law. The decision was in favor of the child but only because of a United States Supreme Court ruling in an analogous situation arising in Louisiana (*Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972)). One may assume that the Texas court would not have so held except for the *Weber* case because no mention was made of Section 3.

Economic regulation is a different matter. Consider the case of *Humble Oil and Refining Co. v. City of Georgetown* (428 S.W.2d 405 (Tex. Civ. App.—Austin 1968, *no writ*)). Georgetown adopted an ordinance restricting to 1,400 gallons the

Art. I, § 3

capacity of trucks delivering gasoline to filling stations. The probable reason for adopting the ordinance was to protect the business of local commission agents who would receive large shipments for storage and then deliver the gasoline to filling stations. Humble alleged that this was the purpose of the ordinance. Georgetown denied it, and the court never talked about it. The court accepted the standard rule that the ordinance was to be sustained if the city council could have had any reasonable basis for the restriction. (The discussion was cast in terms of "classification" because Humble proposed to deliver gasoline to its filling stations from an 8,000 gallon truck, the size truck that it would use to deliver to the commission agent's storage tanks.) The court could find no reasonable basis for the classification and invalidated the ordinance. The way in which this was done was to ignore the real reason for the ordinance and to concentrate on Georgetown's argument that the ordinance was to promote safety by decreasing the hazard of fire. On this basis the ordinance was not defensible because for a variety of technical reasons the larger trucks were safer and because, obviously, there would be less transportation and dispensing of gasoline if larger trucks were used.

In the old days the United States Supreme Court might very well have held the same way under the Fourteenth Amendment. Today the court would probably say that it would not concern itself with the validity of the reasons given for adopting the ordinance. Recently, the Oregon Supreme Court upheld a comparable city ordinance notwithstanding many cited state cases like the *Georgetown* case. "We believe that the reason for our disagreement with them is that we have felt bound, under the more recent decisions of the United States Supreme Court interpreting and applying the Due Process and Equal Protection Clause of the Fourteenth Amendment, to accord a wider latitude to the discretion of state legislative bodies in determining the propriety of measures deemed necessary to promote the safety, health and welfare of the community, than might have been considered permissible 30 or 40 years ago." (*Leathers v. City of Burns*, 251 Ore. 206, 213, 444 P.2d 1010, 1019 (1968).) Interestingly enough, the Oregon Supreme Court did not refer to the Oregon Constitution. Its Bill of Rights does not have a due process clause but does have a section comparable to Section 3. The court of civil appeals, by way of contrast, cited no United States Supreme Court cases and referred to the Fourteenth Amendment only when stating the grounds of attack put forth by Humble Oil.

A key to the difference in approach between the United States Supreme Court and state courts is the concept of the police power. In the area of economic regulation, the United States Supreme Court is content if the legislature had a rational basis for classification. "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." (*Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).) State courts tend to say that the classification must be a reasonable exercise of the police power—that is, a regulation to promote the health, safety, or morals of the public. (Sometimes, "welfare" is substituted for "morals" as in the quotation from the *Leathers* case set out earlier.) This means that an economic regulation designed to help one segment of the business community at the expense of another cannot stand unless a rational argument can be made in the name of health, safety, or morals. Although the court of civil appeals in the *Georgetown* case did not reason this way explicitly, its approach to the ordinance was implicitly based on this theory of the police power.

Yet this explanation of the difference in approach between the United States Supreme Court and state courts should not be overly relied upon. Consider the matter of statutes prohibiting sales below cost. They are designed to protect the small, independent retailers against the competition of the large chain stores. The United States Supreme Court unanimously upheld such an Oklahoma statute

Art. I, § 3

(*Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n*, 360 U.S. 334 (1959)), whereas the Texas Supreme Court unanimously struck down a comparable Texas statute (*San Antonio Retail Grocers, Inc. v. Lafferty*, 156 Tex. 574, 297 S.W.2d 813 (1957)). In neither case was the police power mentioned. In the Oklahoma case the court was content to observe that it would "not interpose its own economic views or guesses when the State has made its choice" (p. 341) and that it was "not concerned with the soundness of the distinctions drawn" (p. 342). In the Texas case the court started with the standard rule quoted earlier (156 Tex. at 578, 297 S.W.2d at 816), but then found that there was no reasonable basis for limiting the statute to "grocery stores." In support of its finding the court noted that a "grocery store" was assumed to be any store that sold groceries and that a department store with a grocery department would come under the statute for all its departments whereas other department stores would not. The court further noted that a regular grocery store sells things also sold at drug stores and other places which would not be covered by the statute. It is not clear whether the Texas Supreme Court would have gone the same way as the United States Supreme Court had the Texas statute applied to all kinds of stores as in Oklahoma. Nor is it clear whether a carefully limited definition of "grocery store" would have saved the statute. It seems likely, however, that in the long run the Texas courts will move away from the concept of regulatory power limited to the health, safety, morals, or welfare of the public. (But see *Explanation*, Sec. 19.)

It must be conceded that generalizations are most dangerous when talking about broad, vague constitutional provisions like equal protection and due process. The recent case of *Texas Optometry Board v. Lee Vision Center, Inc.* (515 S.W.2d 380 (Tex. Civ. App.—Eastland 1974, writ *ref'd n.r.e.*)) seems to go as far as the United States Supreme Court does in upholding economic regulations against an attack under equal protection and due process. In the course of its opinion the court stated that "Texas courts when confronted with questions involving the Due Course of Law and Equal Rights Clause of the Texas Constitution consistently apply the reasoning and rationale announced by the United States Supreme Court on questions of due process and equal protection" (p. 386).

The discussion so far—and in connection with due process—has flatly contradicted the court's observation. It has also been argued that in noneconomic matters Texas courts tend to follow the United States Supreme Court only to the extent required. Yet in 1967 the court of civil appeals in El Paso struck down Section 8 of Article 46a of the Revised Civil Statutes which provided: "No white child can be adopted by a negro person, nor can a negro child be adopted by a white person." (In re *Adoption of Gomez*, 424 S.W.2d 656 (Tex. Civ. App.—El Paso 1967, *no writ*.) The court did not do this because the United States Supreme Court had struck down a comparable statute but because the Texas statute was inconsistent with the trend of United States cases in matters of racial discrimination. Even more startling is the fact that the appealing party argued only that the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment. The court agreed but went on specifically to hold that the statute violated Section 3.

In sum, then, one can only say that equal protection in Texas is at least what the United States Supreme Court requires under the Equal Protection Clause in the areas of "suspect" classifications and fundamental rights. In the area of economic matters, Section 3 may or may not require more justification for discriminatory treatment than the United States Supreme Court requires under the Fourteenth Amendment. The rules set out earlier are clear enough. How courts will apply them in all situations is neither clear nor predictable.

Art. I, § 3a

Comparative Analysis

Nine states have an equal protection clause as such. (The *Model State Constitution* also has one.) Most of these are constitutions adopted or revised in the last two decades. Another 22 states have an equal rights section comparable to Section 3. There is no reason to believe that the courts in the other 19 states rely only upon the Fourteenth Amendment; some appropriate state constitutional provision is undoubtedly used to provide equal protection. For example, in Illinois prior to the adoption of its new constitution, equal protection was provided through the section prohibiting special laws on the theory that an unreasonable classification turned a "general" law into a "special" law. Note also that the United States Supreme Court uses the Due Process Clause of the Fifth Amendment to enforce equal protection in the District of Columbia and under acts of congress. The Equal Protection Clause as such applies only to the states.

Author's Comment

In the light of judicial equating of Section 3 and the Equal Protection Clause, it would seem sensible to rewrite Sections 3 and 3a along these lines:

No person may be denied the equal protection of the laws or discriminated against by law because of sex, race, color, creed, or national origin.

Sec. 3a. EQUALITY UNDER THE LAW. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

History

Section 3a was added in 1972. It was one of 14 amendments voted upon at the general election. Of the 11 that passed, Section 3a received the largest majority—2,156,536 to 548,422.

Explanation

It is arguable that this section adds little or nothing to Section 3 construed as the Texas equivalent of the Equal Protection Clause. (It is obvious that the word "men" in Section 3 means "men" and "women"—and "children," for that matter.) But it is equally arguable that Section 3 means only what the courts say it means and that they might or might not continue to read it as broadly as they now do. (The same argument applies to the proposed Equal Rights Amendment. See *Comparative Analysis* following.) Moreover, even the present breadth of Section 3 is obscured by the overriding Equal Protection Clause of the Fourteenth Amendment. As noted in the *Introductory Comment*, Texas courts frequently decide cases on the basis of the Fourteenth Amendment without indicating how they would read the Texas Bill of Rights. Of course, Section 3a also means what the courts say it means, but the area for judicial maneuver is more restricted than under Section 3. At the very least a court can hardly come out and say that equality may be denied on the basis of sex, race, color, creed, or national origin whereas under the vague "equal protection of the laws" rubric a court can rationally permit inequalities.

In any event, there have been no Texas cases finding a violation of Section 3a. The section has been invoked, of course, but the argument has been far-fetched and unsuccessful. (For a recent example, see *Friedman v. Friedman*, 521 S.W.2d 111 (Tex. Civ. App.—Houston (14th Dist.) 1975, *no writ*.) It is likely that future equal protection cases will invoke the Equal Protection Clause of the Fourteenth Amendment, Section 3, and Section 3a. If the case involves sex, race, color, creed,

Art. I, § 4

or national origin and if the court does not rely on the Fourteenth Amendment, the case will surely be decided on the basis of Section 3a and not Section 3.

Comparative Analysis

Approximately 14 states have an equal protection provision that speaks to one or more of the bases of discrimination enumerated in Section 3a. With the exceptions of Arkansas and Wyoming, these provisions have been adopted within the last quarter century. The 1874 Arkansas Constitution prohibits discrimination on the basis of race, color, or previous condition of servitude. The 1890 Wyoming Constitution provides that laws affecting political rights and privileges are to "be without distinction of race, color, sex, or any circumstance of condition whatsoever other than individual incompetence, or unworthiness duly ascertained by a court of competent jurisdiction." (Art. I, Sec. 3. It should be remembered that when Wyoming became a state in 1890, it made history by providing that the right to vote and hold office "shall not be denied or abridged on account of sex." Art. VI, Sec. 1.)

Most of the recent provisions cover only race, color, and religion; a few add national origin. Hawaii, Montana, and Virginia add sex. (Virginia provides further that "the mere separation of the sexes shall not be considered discrimination." Art. I, Sec. 11.) The 1970 Illinois Constitution prohibits discrimination in employment and housing on the basis of race, color, creed, national ancestry, or sex (Art. I, Sec. 17) and also provides that equal protection is not to be denied or abridged on account of sex (Sec. 18). Colorado has the same sex equality provision; New York has a similar provision concerning discrimination in employment but not housing and not including sex.

The first section of the proposed "Equal Rights Amendment" to the United States Constitution reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." As with Section 3a, it is arguable that this amendment adds nothing to the Equal Protection Clause of the Fourteenth Amendment. But it is equally arguable that the United States Supreme Court, which has read the Equal Protection Clause to prohibit discrimination on account of sex, could hardly overrule that line of cases in the face of an Equal Rights Amendment.

Author's Comment

The genius of "judicial supremacy" in our constitutional system has been the ease with which change can be accommodated. There is a danger in using the amending process to express disapproval of a single judicial ruling or even a line of cases. Section 3a is not an example of the danger. But it is an example of specifying detailed meaning in place of a general principle. Caution is advisable in getting too specific in a bill of rights. A democratic society survives only if there is a consensus on overriding general principles and if some relatively detached arbiter protects those principles. Hasty and emotional tampering with the details flowing from those principles can easily undermine a delicate consensus.

Sec. 4. RELIGIOUS TESTS. No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.

History

Freedom from religious test oaths for office is part of the American tradition of

Art. I, § 5

religious freedom. At one time such oaths had been instruments for the oppression of dissenters. Thus Article VI of the United States Constitution, prohibiting test oaths for federal officers in language identical to the first part of Section 4, betrays the origin of this section. All Texas bills of rights prior to 1876 repeated the guarantee against religious test oaths in identical form until, in 1875, the framers added the words of Section 4 after the semicolon.

Explanation

Very few cases refer to Section 4. Obviously public officials have not been required to take religious test oaths, hence there has been no ground for litigation. Section 4 has been cited, along with succeeding sections dealing with religion, in some child custody cases. Conceivably the award of child custody is a public trust within the meaning of this section but those seeking such awards are not required to take religious oaths. Indeed the courts steer clear of any inquiry into the applicant's religious beliefs.

When in 1876 Section 4 grew from a simple prohibition to include the proviso regarding belief in a Supreme Being, the guarantee was weakened. In fact, a bill was introduced in the Fifty-sixth Legislature requiring public school teachers to swear that they believed in a Supreme Being. The proviso seemed to authorize this mild test oath. While the bill was under consideration the United States Supreme Court handed down a decision declaring the Maryland test oath for public officers unconstitutional when it was applied to an atheist (*Torcaso v. Watkins*, 367 U.S. 488 (1961)). This and subsequent decisions indicate that the Supreme Being proviso violates the religious liberties guarantees embodied in the Fourteenth Amendment and is unconstitutional.

Comparative Analysis

A total of 26 states prohibit religious tests for public office. Only two states other than Texas contain the proviso that tests not be required so long as a belief in a Supreme Being is acknowledged. Recent constitutions have not included sections on these subjects.

Author's Comment

Protection against religious test oaths for public offices or public trusts is a basic protection which might be invaded by zealous pressure groups. Since the addendum of 1876 to Section 4 does seem to dilute the broad guarantee and presumably violates the United States Constitution, it should be deleted.

Sec. 5. WITNESSES NOT DISQUALIFIED BY RELIGIOUS BELIEFS; OATHS AND AFFIRMATIONS. No person shall be disqualified to give evidence in any of the Courts of this State on account of his religious opinions, or for the want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.

History

The common law required a witness to take an oath which would bind him to tell the truth for fear of supernatural punishment. Hence persons without the requisite religious beliefs could not serve as witnesses. Section 5, which has no predecessor in previous Texas constitutions, permits such persons to testify and hence it represents a departure from the common law rule. Presumably "reference