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Scources of Liberty in the Texas Bill of Rights.

Arvel (Rod) Ponton III

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SOURCES OF LIBERTY IN THE TEXAS BILL OF RIGHTS

ARVEL (ROD) PONTON III*

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I. INTRODUCTION

The Texas Bill of Rights guarantees the fundamental rights of all Texans.¹ This declaration of the rights of Texans is unique from those

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1. TEX. CONST. art. I, §§ 1-29.

contained in other state constitutions because it is derived from two things no other state has experienced, a declaration of independence² and a constitution of a free and independent republic — the Republic of Texas.³

The Bill of Rights of the Texas Constitution developed from a unique combination of historical, economic, and philosophical forces, which included influences from the Magna Charta, the natural rights philosophy of the eighteenth century, Spanish civil law, the experience of Texas as an oppressed state under Mexican rule, Texas as an independent republic, the bi-cultural nature of Texas, the revolution and Constitution of the United States, and the Bill of Rights of the early state constitutions.⁴ The inquiry into the origins of the Texas Bill of Rights, must by necessity delve into the history of Texas, initially as a State of Mexico, secondly as an independent republic with its own constitution,⁵ and ultimately as a state of the United States with constitutions adopted in 1845,⁶ 1861,⁷ 1866,⁸ 1869,⁹ and the present Constitution of 1876.¹⁰

II. HISTORY OF THE EVOLUTION OF THE TEXAS BILL OF RIGHTS

The events that led to the forming of Texas as a republic and the demand of Texans in 1836 that their natural rights be forever held inviolate began with many highly independent Anglo-American settlers coming to Texas in the early 1800's, mostly from southern states, to settle alongside the Mexicans already residing here.¹¹ These An-

2. See Declaration of the People of Texas in General Convention Assembled (Tex. 1835). There were two Texas Declarations of Independence. The first was made on November 7, 1835, at San Felipe de Austin, in which declaration, the Preamble stated in part: "Now, the good People of Texas, availing themselves of their natural rights . . ." *Id.* The second formal Declaration of Independence, issued by the drafters of the Constitutional Convention, was made at Washington (on the Brazos) on March 2, 1836. See The Declaration of Independence (Tex. 1836).

3. TEX. CONST. (1836).

4. See, e.g., N.C. CONST. (1776); VA. CONST. (1776); KY. CONST. (1792); TENN. CONST. (1796).

5. See TEX. CONST. (1836).

6. See TEX. CONST. (1845).

7. See TEX. CONST. (1861).

8. See TEX. CONST. (1866).

9. See TEX. CONST. (1869).

10. See TEX. CONST.

11. See T. R. FEHRENBACH, *LONE STAR* (1973); see also TOLBERT, *AN INFORMAL HISTORY OF TEXAS, FROM CABEZA DE BACA TO TEMPLE HOUSTON*, (1961).

glo-American settlers remembered the abuses by England of their ancestors who formed the thirteen original colonies. As a result of these abuses, such as general writs of assistance and the denial of the right to a jury, the thirteen original colonies declared their independence, and upon their successful prosecution of the war with England, adopted the United States Constitution, to which were appended the first ten amendments known as the Bill of Rights.¹²

A. *Natural Rights*

The eighteenth-century theories of natural rights,¹³ as set forth by Montaigne, Montesquieu, Hobbes, Thomas Paine, and others, found flower in the writings of the revolutionaries of the United States and France in the late eighteenth century.¹⁴ These were adopted and affirmed in the Bill of Rights of the state of Texas.¹⁵ The Preamble to the informal Declaration of Independence of the Republic of Texas affirmatively states: "Now, the good People of Texas, availing themselves of their natural rights"¹⁶ The Bills of Rights of many of the states in the early 1800's declared that people had the sole right to govern themselves.¹⁷ This is a reflection and expansion upon the natural rights written so elegantly in the Declaration of Independence of the United States,¹⁸ which included many of the rights written in the

12. See U.S. CONST. amends. 1-10.

13. See TEX. CONST. Declaration of Rights (1836).

14. See The Declaration of Independence (U.S. 1776); French Declaration of the Rights of Man and the Citizen (1789); George Mason's Virginia Bill of Rights (1776). The French Declaration states in part that:

Men are born and remain free and equal in respect of rights . . . Man has natural and imprescriptible rights, — liberty, property, security, and resistance to oppression . . . Everyone is counted innocent until he has been convicted . . . No man is to be interfered with because of his opinions . . . Every citizen may speak, write, and publish freely, provided he be responsible for the abuse of this liberty . . . The right to property is inviolable and sacred and no one shall be deprived of it except in case of evident public necessity and previous just indemnity.

W.O. DOUGLAS, AN ALMANAC OF LIBERTY 87 (1954).

15. TEX. CONST. art. I, §§ 1-29.

16. Declaration of the People of Texas in General Convention Assembled (Tex. 1835).

17. See, e.g., KY. CONST. (1792); N.C. CONST (1776); TENN. CONST. (1796); TEX. CONST. (1836); VA. CONST. (1776). "All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times an inalienable right to alter their government in such manner as they may think proper." TEX. CONST. Declaration of Rights para. 2 (1836).

18. See The Declaration of Independence (U.S. 1776). "We hold these truths to be self-

Magna Charta.¹⁹ Early state constitutions, to which the drafters of the Texas Constitution of 1836 looked,²⁰ spoke of the inherent rights of the citizens of their states and of their natural inalienable rights.²¹ The political power of the state governments was vested in and derived from the people.²²

B. *Jacksonian Movement (1836 Constitutional Convention)*

The first Texas constitution was drafted in 1836, fifty years after the Declaration of Independence of the United States. The Texans who drafted it were part of the Jacksonian movement toward greater democracy.²³ There were 58 delegates to the Constitutional Convention of 1836 for the Republic of Texas.²⁴ Forty were under forty years of age, and nearly all delegates came from southern states.²⁵ There were

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." *Id.*

19. See Magna Charta or the Great Charter of King John (1215). "We also have granted to all the freemen of our kingdom, for us and for our heirs forever, all the underwritten liberties . . ." *Id.* at para. 2.

20. See Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457, 458 (1958); see also HARRINGTON, *THE TEXAS BILL OF RIGHTS 25-28* (1987).

21. KY. CONST. (1792); N.C. CONST. (1776); TENN. CONST. (1796); VA. CONST. (1776). In these Constitutions, including that of the Republic of Texas 1836, it was guaranteed that citizens would not be deprived of liberty except by the law of the land. Trial by jury, and pursuant to the Common Law of England, was guaranteed. No person was to be prosecuted for a crime, except by indictment of a Grand Jury. One would then have the right to counsel, and to be heard, yet be protected against self-incrimination. *Ex post facto* laws, excessive bails and fines, cruel and unusual punishment, general warrants, special privileges, monopolies, titles of nobility, and denial of the right of *habeas corpus* were prohibited. Citizens kept the right to bear arms, and civil power was supreme over the military power. The people had the right to assemble and petition for redress of grievances, and free elections, debates, and freedom of the press and speech were guaranteed. The political power of the state governments was vested in and derived from the people. See, e.g., Ashford, *Jacksonian Liberalism and Spanish Law in Early Texas*, 57 SW. HIST. Q. 1 (1953).

22. See F.M. GREENE, *CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES 1776-1860*, 79-80 (1930).

23. See Ashford, *Jacksonian Liberalism and Spanish Law in Early Texas*, 57 SW. HIST. Q. 1 (1953).

24. See Richardson, *Framing the Constitution of the Republic of Texas*, 31 SW. HIST. Q. 191, 197 (1928); (citing C.R. WHARTON, *THE REPUBLIC OF TEXAS* 117 (1922)).

25. *Id.*; see T.R. FEHRENBACH, *FIRE AND BLOOD* 350-69 (1973). "There were two major irritations which led to Texas' declaration of independence. Mexico had no trial by jury, which offended the colonists' sense of justice, and justice and government were administered out of Coahuila, to which the province was attached." *Id.* at 379. Article II of the Constitution of the State of Coahuila and Texas declared that "every man . . . shall enjoy the imprescriptible rights of liberty, security, property, and equality . . . These universal rights of men."

only two native Texans, Navarro and Ruiz from Bexar, in the delegation which included eleven delegates from the Carolinas, an Englishman, a Canadian, a Spaniard, an Irishman, and a Scotsman.²⁶ Many of the delegates to this convention had served in the United States Congress or in legislatures of other states.²⁷ The principal state constitutions to which the drafters of the Constitution of the Republic of Texas looked were those of Virginia,²⁸ the Pennsylvania Constitutions of 1776 and 1790,²⁹ Kentucky,³⁰ and Tennessee.³¹ The delegates to the Constitutional Convention of the Republic of Texas also looked to the Constitution of the United States and its Bill of Rights,³² which was based upon the Bill of Rights of other state constitutions, including that of Virginia.³³

The fusion of Jacksonian democracy, Spanish civil law, the American revolution, English common law, and the abuses inflicted upon the settlers of Texas by the government of General Santa Anna prompted Texans in 1836 to demand greater protection of their rights than what had been written into the United States Constitution and its Bill of Rights.³⁴ The present Texas Bill of Rights is, for the most part, a reproduction of the Bill of Rights of the Texas Constitution of 1845, which, in turn, came from the Constitution of the Republic of Texas of 1836.³⁵

C. Trial By Jury

The Republic of Mexico was established under the Mexican Constitution of 1824, which was modeled after the United States Constitu-

CONST. OF THE STATE OF COAHUILA AND TEXAS (1827). However, the Roman Catholic Church was the state religion, and trial by jury was not established, although Congress' attention was directed to adopting it, there was no trial or appeal of non-capital crimes. *Id.*

26. See Richardson, *Framing the Constitution of the Republic of Texas*, 31 SW. HIST. Q. 191, 197 (1928)(citing C.R. WHARTON, *THE REPUBLIC OF TEXAS* 117 (1922)).

27. See *id.* at 194-95. Richard Ellis had participated in the Alabama Constitutional Convention of 1819. See *id.* Robert Potter had served in the North Carolina Assembly. Samuel Carson had served four terms in Congress from North Carolina. Martin Parmer sat in the Missouri Constitutional Convention of 1819. See *id.*

28. See VA. CONST. (1776); see also N.C. CONST. (1776).

29. See PA. CONST. (1776); see also PA. CONST. (1790).

30. See KY. CONST. (1792).

31. See TENN. CONST. (1796).

32. See U.S. CONST. amends. I-X.

33. See C.E. STEVENS, *SOURCES OF THE CONSTITUTION OF THE UNITED STATES* (1864).

34. See T.R. FEHRENBACH, *FIRE AND BLOOD* 350-69 (1973).

35. See TEX. CONST. (1836).

tion. The Constitution of the State of Coahuila and Texas was adopted on March 11, 1827.³⁶ There was no trial by jury in either criminal or civil cases,³⁷ although such was to be established in the future. The right to trial by jury was never established in Texas prior to its independence in 1836.³⁸ The legislature of the State of Coahuila and Texas was dominated by the Mexican voters in Coahuila, resulting in inadequate representation of the citizens of Texas.³⁹ Texas continually met with the state government in Coahuila to try to amend the Constitution of the State of Coahuila and Texas, so as to provide for a separate state of Texas under the Mexican Republic, but to no avail. Stephen F. Austin found himself imprisoned in Mexico City on his last trip to Mexico to try to obtain separate statehood for Texas.⁴⁰ Finally, on November 7, 1835, an informal Texas Declaration of Independence was issued.⁴¹ At that time, the few rights Texans had enjoyed under the Constitution of the State of Coahuila and Texas were no longer available, since General Santa Anna had overthrown the federal government and dissolved the federal system in Mexico.⁴²

Although there was no formal Bill of Rights in the Articles forming the provisional government of the Republic of Texas, it stated that all trials shall be by jury, and in criminal cases, the proceedings shall be regulated and conducted upon the principles of English common law, and the penalties prescribed by said law, in case of conviction, shall be inflicted.⁴³ This was in response to the "arbitrary acts of oppression and tyranny" of the Mexican government.⁴⁴ This designation of rights was promptly set forth in the Constitution of the Republic of Texas, which was adopted by the Constitutional Convention on March 16, 1836, two weeks after the adoption of the formal Declara-

36. See CONST. OF THE STATE OF COAHUILA AND TEXAS (1827). The State of Coahuila and Texas was divided into three departments: Bexar (present day Texas); Monclova; and Saltillo.

37. See CONST. OF THE STATE OF COAHUILA AND TEXAS art. 181 (1827).

38. See *id.* at art. 192.

39. See *id.* at art. 7.

40. See T.R. FEHRENBACH, FIRE AND BLOOD 382 (1973). Austin was thrown into the prison of the Inquisition, held there without formal charges, without bail, and without trial, for eighteen months, before being released. See *id.* Paragraph 1 of the Texas Declaration of Independence which states that "the agents who bear [petitions . . . and remonstrances] are thrown into dungeons . . ." references Austin's treatment in Mexico City. See *id.*

41. Declaration of the People of Texas in General Convention Assembled (Tex. 1835).

42. See T.R. FEHRENBACH, FIRE AND BLOOD 350-369 (1973).

43. Plan and Powers of the Provisional Government of Texas (Tex. 1835).

44. See The Declaration of Independence (Tex. 1836).

tion of Independence.⁴⁵

One of the main complaints that caused the citizens of Texas to declare their independence from Mexico was the lack of trial by jury, and the failure of Mexico to protect the rights secured to citizens by English common law.⁴⁶ Thus, the core of the Bill of Rights of the Constitution of the Republic of Texas would be the rights guaranteed by English common law, first espoused in the Magna Charta,⁴⁷ and the Bill of Rights of the United States.⁴⁸ There is a distinct and important difference, however, between the Constitution of the State of Texas, as derived from the Constitution of the Republic of Texas and the Bill of Rights of the United States. The Bill of Rights of the United States is, for the most part, couched negatively,⁴⁹ whereas the Bill of Rights of the Republic of Texas and the Bill of Rights of the 1876 Constitution of the State of Texas has positive guarantees of certain rights to the citizens.⁵⁰ For instance, the Eighth Amendment to the United States Constitution states that excessive bail shall not be required.⁵¹ Although this is also stated in the eleventh paragraph of the Declaration of Rights of the Republic of Texas,⁵² the tenth paragraph states that all persons shall be bailable by sufficient security unless they are being held for capital crimes.⁵³ Thus, one can see at this early stage in the evolution of the present Texas Constitution, that the framers intended to provide stronger guarantees of individual rights than provided for in the Constitution of the United States, by guaranteeing these rights in mandatory, positive language.⁵⁴

D. *Mexican Use of Religion to Control*

Not only did the Constitution of the Republic of Texas of 1836 guarantee freedom of religion,⁵⁵ but the Constitution remedied the

45. See Declaration of Independence (Tex. 1836); see also Proceedings of the Convention at Washington (Austin 1836); Debate on Tex. Const. (1845)(July 1845).

46. See T.R. FEHRENBACH, FIRE AND BLOOD 350-369 (1973); see also The Declaration of Independence (Tex. 1836).

47. See Magna Charta or the Great Charter of King John (1215).

48. See U.S. CONST. amends. I-X.

49. See U.S. CONST. amends. I-X.

50. See Long v. State, 742 S.W.2d 302, 309 n.9 (Tex. Crim. App. 1987).

51. See U.S. CONST. amend. VIII.

52. See TEX. CONST. Declaration of Rights para. 11 (1836).

53. See *id.* at para. 11.

54. Compare TEX. CONST. Declaration of Rights (1836) with U.S. CONST. amends. I-X.

55. See TEX. CONST. Declaration of Rights para. 3 (1836). "No preference shall be given

hated use by the Mexican government of the Roman Catholic Church as a governmental means of controlling the population.⁵⁶ The Constitution's prohibition against ministers in government service was followed in the 1845 Constitution.⁵⁷ Thus, there always has been, by virtue of the unique character of the people of Texas, a difference in both the text, intent, and philosophy between the Constitution and Bill of Rights of the United States and the Constitution and Bill of Rights of Texas.

E. *Derivation of Bill of Rights*

The initial Bill of Rights of the Constitution of the Republic of Texas was a product of the mostly Southern immigrants, the free-thinking farmers, individualists, and adventurers that composed the Texas colony in 1836 who were invested with the idea that they possessed certain inalienable rights which they would allow no man to abridge.⁵⁸ They were determined to set up a separate republic, rather than find themselves subservient to a tyrannical government which did not respect rights they considered naturally to be their own, such as the right to be free, to a trial by jury, to due process of law, and to require a search warrant. General Martin Perfecto de Cos, the Military Commandant of Coahuila y Texas, found that the innate natural rights of the Texas colonists were not only stronger than his proclamations, but the Texans were determined not to knuckle under to an oppressive Mexican government and their belief in their natural rights would become the foundation by which an army of farmers would defeat General Santa Anna in 1836.⁵⁹ General Cos said: "Whatever constitution governs Mexicans is the Constitution the colonists of

by law to any religious denomination or mode of worship over another, but every person shall be permitted to worship God according to the dictates of his own conscience." *Id.* See also TEX. CONST. art. I, § 4 (1845); TEX. CONST. art. I, §§ 4-7.

56. See T.R. FEHRENBACH, *FIRE AND BLOOD* 199-212 (1973); see also CONST. OF THE STATE OF COAHUILA AND TEXAS arts. 9, 10 (1827); CONSTITUTIVE ACTS OF THE MEXICAN FEDERATION art. 4 (1824)(Roman Catholic religion established as religion of nation and state). See also TEX. CONST. art. V, § 1 (1836); TEX. CONST. art. III, § 27 (1845).

Ministers of the gospel being, by their profession, dedicated to God and the care of souls, ought not to be diverted from the great duties of their functions: therefore no minister of the gospel, or priest of any denomination whatever, shall be eligible to the office of the Executive of the Republic, nor to a seat in either branch of the Congress of the same. TEX. CONST. art. V, § 1 (1836).

57. See TEX. CONST. art. III, § 27 (1845).

58. See *The Declaration of Independence* (Tex. 1835).

59. See T.R. FEHRENBACH, *FIRE AND BLOOD* 374 (1973).

Texas must obey, and it makes no difference whatever what kind of principles form this constitution.”⁶⁰ Texans, not liking General Cos’ constitution, made their own.

F. *Natural Rights in Other State Constitutions*

The early state constitutions demonstrated in their Bills of Rights the natural rights philosophy of the late eighteenth century.⁶¹ Echoing the inherent rights philosophy of the time, the preamble to the Declaration of Rights to the Texas Constitution of 1836 states as follows:

This declaration of rights is declared to be a part of this Constitution, and shall never be violated on any pretence whatever. And in order to guard against the transgression of the high powers which we have delegated, we declare that everything in this bill of rights contained, and every other right not hereby delegated, is reserved to the people.⁶²

The basic premise on which the Declaration of Independence of the United States rests is that men are “endowed by their Creator with certain unalienable Rights.”⁶³ That means that the source of these rights of man is God, not government. When a state protects civil liberties, it does not confer rights, but merely confirms rights that belong to man as the son of God.⁶⁴

The Bill of Rights of the United States Constitution was enacted at

60. *Id.* at 374 (from a proclamation of General Martin Perfecto de Cos, Military Commandant of Coahuila and Texas, 1835).

61. *See, e.g.*, KY. CONST. (1792); N.C. CONST. (1776); TENN. CONST. (1796); TEX. CONST. (1836); VA. CONST. (1776).

62. *See* TEX. CONST. Declaration of Rights (1836); *see also* TEX. CONST. art. I, § 29.

63. *See* The Declaration of Independence (U.S. 1776). The Texas Constitution of 1876, in article 1, section 2, states as follows:

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.

TEX. CONST. art. I, § 2.

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

Declaration of Independence (U.S. 1776).

64. *See* W.O. DOUGLAS, AN ALMANAC OF LIBERTY 5 (1954).

Therein lies the basic difference between democratic and totalitarian governments. In fascist, communist, and monarchical states, government is the source of rights: govern-

the insistence of the several states, who wanted specific provisions preventing the Federal government from taking certain rights away from citizens. In contrast, the Bills of Rights of the states, enacted before 1836, were meant to illustrate the positive grant to their citizens of certain inalienable rights and powers.⁶⁵ The Declaration of Rights of the Texas Constitution of 1836 included many rights not specifically enumerated in the Bill of Rights of the United States Constitution, exemplifying a positive grant of power to the citizens.⁶⁶ For instance, the 1836 Texas Constitution stated that truth is admissible as a defense in a libel case.⁶⁷ Texas also ensured that no person would be imprisoned for debt.⁶⁸

G. *Source of Rights*

A direct source of the natural rights and enhanced political powers clause of article 1, section 2 of the 1876 Texas Constitution, is the Virginia Bill of Rights of 1776.⁶⁹ The identical language found in article 1, section 2 of the 1876 Texas Constitution, is also found in the Constitution of the Republic of Texas of 1836 and the Constitutions of 1845, 1861, and 1866.⁷⁰ The source of this provision, as well as for most of the rest of the Bill of Rights of the Texas Constitution of 1876, may be found in the Declaration of Rights of the Constitution

ment grants; government withdraws rights. In our scheme of things, the rights of man are inalienable. They come from the creator, not from a President, a legislator, or a Court.

Id.

65. See, e.g., KY. CONST. (1792); N.C. CONST. (1776); PA. CONST. (1776 and 1790); TENN. CONST. (1796); VA. CONST. (1776).

66. See TEX. CONST. Declaration of Rights (1836).

67. *Id.* at para. 4.

68. *Id.* at para. 12. At the time of the enactment of the Constitution of the Republic of Texas, numerous state constitutions upheld the power of the state to imprison citizens for debt. See W.O. DOUGLAS, AN ALMANAC OF LIBERTY 5 (1954). Many Texans, being debtors, insisted that such not be permitted in Texas.

69. See VA. CONST. §§ 2, 3 (1776); see also Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457, 458 (1958).

70. See TEX. CONST. art. 1, § 2.

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.

Id.; see also TEX. CONST. art. 1, § 1 (1866); TEX. CONST. art. 1, § 1 (1861); TEX. CONST. art. 1, § 1 (1845); TEX. CONST. Declaration of Rights (1836).

of the Republic of Texas.⁷¹ This Declaration of Rights found its way, almost unchanged, into the first constitution of the state of Texas adopted in 1845.⁷² In the Texas Constitutional Convention of 1875, W.N. Ramey of Panola, Texas, expressed the sentiment of following the principles already established:

Everyone here knows very well that the great and leading principles of our American Constitutions are in substance almost the same, and in none of them are these settled principles better expressed than in the Texas Constitution of 1845. We certainly don't expect to change the fundamental principles of government established by our fathers. The Constitution of 1836 was made by able men, many of them from the leading states of the Union. They compiled their Constitution from that of the United States, and from the leading State Constitutions.⁷³

Mr. West, at the Texas Constitutional Convention of 1875, continued the fervor of the populace demanding recognition of natural rights:

The status of this power [of this convention] is in that section of the Bill of Rights to be found in the Constitutions of 1845 and 1866, that constitutes the ground work of every free government and is found in the fact that the people have an indefeasible and an inalienable right to alter or abolish their form of government in such a manner as the people may select.⁷⁴

H. *Independent Self-government*

Article 1, section 1, of the Texas Constitution of 1876, granting Texas the right of independent self-government, is not found in the Texas Constitution of 1845.⁷⁵ The first sections of the constitutions of 1866 and 1869 recognized that the Constitution of the United States was the supreme law of the land.⁷⁶ However, section 1 of the 1876 constitution appears to reflect the states' rights sentiments of Texas as

71. See TEX. CONST. Declaration of Rights (1836).

72. See TEX. CONST. (1845); see also *Journals of the Convention* (1845); see also *Debates of the Texas Convention* (1846).

73. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 43 (1930). Daniel Webster was quoted as saying that the 1845 Texas Constitution was the best of the State Constitutions. *Id.*

74. See W.O. DOUGLAS, AN ALMANAC OF LIBERTY 56 (1954).

75. TEX. CONST. art. I, § 1. "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." *Id.*

76. Compare U.S. CONST. art. VI with U.S. CONST. amend. X.

a defeated southern state, still bristling over Reconstruction.⁷⁷

Article 1, section 3 of the 1876 Texas Constitution states that:

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.⁷⁸

This provision was the first paragraph of the Declaration of Rights of the Constitution of the Republic of Texas,⁷⁹ and has been found in all prior Texas constitutions.⁸⁰ It is to be noted that initially in 1836, it stated that "all men . . . have equal rights,"⁸¹ but from 1845 forward, it was only declared that "all *freemen* . . . have equal rights."⁸² This illustrates the fact that Texas came into the Union as a slave state in 1845, and similar declarations were also found in the Bills of Rights of Virginia and North Carolina of 1776.⁸³

I. *Equal Rights Amendment*

Article 1, section 3A, the Texas Equal Rights Amendment, was adopted in 1972.⁸⁴ The Texas Constitutional Convention of 1875 hotly debated women's suffrage, and turned it down.⁸⁵ The addition of this provision to the Texas Bill of Rights not only provides greater protection to equal rights than found in the Fourteenth Amendment to the United States Constitution,⁸⁶ but shows that Texans, one hundred years after adopting their present Constitution, are still demand-

77. See TEX. CONST. art. I, § 21.

78. See TEX. CONST. art. I, § 3.

79. See TEX. CONST. Declaration of Rights para. 1 (1836).

80. See, e.g., TEX. CONST. art. I, § 2 (1845); TEX. CONST. art. I, § 2 (1861); TEX. CONST. art. I, § 2 (1866); TEX. CONST. art. I, § 2 (1869).

81. See TEX. CONST. Declaration of Rights para. 1 (1836).

82. See TEX. CONST. art. I, § 2 (1845).

83. See N.C. CONST. (1776); see also VA. CONST. (1776).

84. See TEX. CONST. art. I, § 3a (amended 1972). "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative." *Id.* See generally Schoen, *The Texas Equal Rights Amendment After the First Decade: Judicial Development 1978-1982*, 20 HOUS. L. REV. 1321 (1982); Harrington, *The Texas Bill of Rights and Civil Liberty*, 17 TEX. TECH L. REV. 1487, 1512, 1516-17 (1986); Schoen, *Texas Equal Rights Amendment in the Courts: A Review and Proposed Principles of Interpretation*, 15 HOUS. L. REV. 537 (1978).

85. See MCKAY, *DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875* 142-43 (1930).

86. See Schoen, *The Texas Equal Rights Amendment After the First Decade: Judicial Development 1978-1982*, 20 HOUS. L. REV. 1321, 1359-1360 (1982).

ing that their rights be afforded greater protection than that afforded under the federal Bill of Rights.

J. *Religious Rights*

The religious rights clauses were a divisive issue during the 1875 Constitutional Convention, and the proper relationship between government and religion continues to be divisive today. However, the current constitution provides for religious freedom.⁸⁷ The Constitution of the Republic of Texas had only one paragraph addressing religion in its Declaration of Rights,⁸⁸ but the 1876 Constitution has four sections, forbidding the disqualification of witnesses on the basis of religious beliefs,⁸⁹ guaranteeing freedom of worship,⁹⁰ forbidding religious tests as a qualification to hold an office,⁹¹ and banning appropriations for sectarian purposes.⁹² These sections were a reaction by the delegates to the 1875 Constitutional Convention to the former practice of the state giving aid to private and parochial schools.⁹³ The demand that the state not provide money for religious purposes, nor involve itself in the establishment of religion, also goes back to Texas' abhorrence of the practice in Mexico and under Spanish rule, where the Catholic Church was the state religion.⁹⁴

The Pennsylvania Constitution of 1776, the Delaware Constitution of 1776, and the Massachusetts Constitution of 1780 required public officials to swear their belief in God.⁹⁵ Although the Texas Constitu-

87. See TEX. CONST. art. I, §§ 4-7.

88. See TEX. CONST. Declaration of Rights para. 3. "No preference shall be given by law to any religious denomination or mode of worship over another, but every person shall be permitted to worship God according to the dictates of his own conscience." *Id.* Cf. U.S. CONST. amend. I (forbidding government's establishment of religions and permitting free exercise of religion).

89. See TEX. CONST. art. I, § 5.

90. See TEX. CONST. art. I, § 6.

91. See TEX. CONST. art. I, § 4.

92. See TEX. CONST. art. I, § 7.

93. See MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 365-66 (1930); see also *id.* at 142-43; see MCKAY, MAKING OF THE TEXAS CONSTITUTION OF 1876 (1924).

94. See The Declaration of Independence (Tex. 1836). The drafter complained that the Army and the priesthood were eternal enemies of civil liberty and that the government of Mexico had denied Texans "the right of worshipping the Almighty according to the dictates of [their] own conscience, by the support of a national religion, calculated to promote the temporal interest of its human functionaries, rather than the glory of the true and living God." *Id.*

95. See, e.g., PA. CONST. art. 9, § 4 (1776); MASS. CONST. art. 1, §§ 2, 3 (1780).

tion of 1836 was silent in this regard, the Constitution of 1845 contained such a provision.⁹⁶ By 1845, the United States Constitution and eight state Constitutions prohibited religious tests for public officials.⁹⁷ Although the 1836 and 1845 Constitutions were silent, in 1876 it was provided that professing a belief in God was no longer a prerequisite to be a witness although that had been part of the common law.⁹⁸

K. *Freedom of Speech and Press*

The provision in the Texas Bill of Rights protecting freedom of speech and of the press is more expansive than that provided by the first amendment of the United States Constitution.⁹⁹ The Texas provision mandates the right that: "[e]very person shall be at liberty to speak, write or publish his opinions on any subject"¹⁰⁰ The Texas provision echoes the first amendment of the United States Constitution that "Congress shall make no law . . . abridging the freedom of speech or of the press."¹⁰¹ However, the Texas provision goes further in its protection of the free speech rights of citizens by stating that the truth of any matter may be given in evidence and that the jury shall determine both the law and the facts of a libel case.¹⁰²

96. See TEX. CONST. art. I, § 3 (1845).

97. See Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457, 461 n.24 (1958)(including Pennsylvania, Kentucky, Delaware, Tennessee, Ohio, Indiana, Illinois, and Texas).

98. See TEX. CONST. art. I, § 5.

99. Compare TEX. CONST. art. I, § 8 ("[e]very person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press") with U.S. CONST. amend. I ("[c]ongress shall make no law . . . abridging the freedom of speech, or of the press . . .").

100. See TEX. CONST. art. I, § 8.

101. See U.S. CONST. amend. I.

102. See TEX. CONST. art. I, § 8.

In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Id. It is interesting to note the 1845 Constitutional Convention debated, and did not pass, the following Article: "In all publications injurious to female reputation, the facts thereof shall not be enquired into, but shall be deemed false and libelous." *Debates of the 1845 Constitutional Convention*, 94 (1846). See also Paxson, *The Constitution of Texas, 1845*, 18 SW. HIST. Q. 386, 395 (1915).

The mandatory grant to citizens, of having the liberty to speak, write or publish their opinions on any subject, in addition to the prohibition against the passing of any law curtailing the same, was found in the Declaration of Rights of the Constitution of 1836.¹⁰³ The greater grant of freedom of speech and of the press in the 1836 Texas Constitution may have been both a reaction against the Alien and Sedition Acts of 1798,¹⁰⁴ which made it a crime to publish any false, scandalous, malicious writings against the government, Congress, or the President and to the abuses borne upon the citizens of Texas by the Mexican government prior to the Texas revolution, such as the imprisoning of Stephen F. Austin in Mexico City when he travelled to Mexico to request an amendment of the Constitution of Coahuila and Texas. Not only does the Texas provision go beyond that provided for in the first amendment to the United States Constitution, but it also is far more protective of the individual rights of speech and the press than protected by the common law of England adopted by Texas in 1840.¹⁰⁵ Similar provisions were also found in other state constitutions by the 1830's.¹⁰⁶

L. *Search and Seizure*

The search and seizure article of the 1876 Constitution¹⁰⁷ is identical to that found in the Declaration of Rights of the Constitution of the Republic of Texas of 1836.¹⁰⁸ Overall, the search and seizure article of Texas Constitution follows the language of the fourth amendment to the U.S. Constitution,¹⁰⁹ except that Texas has a more specific warrant requirement, that the person or thing be described

103. TEX. CONST. Declaration of Rights para. 4 (1936).

104. 50 U.S.C.A. §§ 21-24 (1932).

105. See TEX. CONST. Declaration of Rights para. 4 (1836).

106. See, e.g., DEL. CONST. art. 1, § 5 (1792) ("in prosecutions . . . where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury may determine the facts and the law, as in other cases"); KY. CONST. art. 10, § 7 (1792) ("free communication of thoughts and opinions is one of the invaluable rights of man . . ."); VA. CONST. (1776).

107. See TEX. CONST. art. I, § 9.

108. See TEX. CONST. Declaration of Rights para. 5 (1836).

109. See U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

"as near as may be."¹¹⁰ The primary difference between the two is that the federal provision is phrased negatively, whereas the Texas provision is mandatory in its language, stating that the people shall be secure against unreasonable searches and seizures.¹¹¹ Not only did Texans desire greater protection of their rights against unreasonable search and seizure than the federal minimums, reflecting Texas' constitutional prohibition against unreasonable searches and seizures,¹¹² but Texas also enacted a statutory exclusionary rule in 1925.¹¹³

M. *Philosophical Differences Between United States and Texas*

The philosophical difference between the Bill of Rights to the U.S. Constitution and the Bill of Rights of the Texas Constitution, is that the federal provisions state minimums beyond which the government may not infringe, and the Texas provisions grant and reinforce certain natural rights held by citizens of Texas to clearly define the outer limits of rights granted to citizens of Texas.¹¹⁴

While state constitutions cannot subtract from the rights guaranteed by the United States Constitution, state constitutions can and often do provide additional rights to their citizens. The federal constitution sets the floor for individual rights; state constitutions establish the ceiling.¹¹⁵

The Committee on General Provisions was charged with writing the Bill of Rights.¹¹⁶ The Bill of Rights was painstakingly worded and was debated from July 4, 1845, until August 19, 1845, when the

110. TEX. CONST. art. I, § 9. This provision was not found in the 1836 Constitution, but was added in 1845. TEX. CONST. art. I, § 7 (1845). "The people shall be secure in their [persons] houses, papers, and possessions from all unreasonable seizures or sea[r]ches; and no warrant to search any place or to seize any person or thing; shall issue, without describing them as near as may be, nor without probable cause supported by oath or affirmation." *Id.*

111. TEX. CONST. art. I, § 9.

112. *Compare* TEX. CONST. art. I, § 9 with U.S. CONST. amend. IV.

113. *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986). *Compare* TEX. CONST. art. I with U.S. CONST. amends. I-X.

114. MINER AND CRUGER, JOURNALS OF THE CONSTITUTIONAL CONVENTION OF 1845 (1845).

115. *Id.* at vii.

116. *Id.* Mr. Hemphill offered the following resolution:

Resolved, that it is expedient to insert in the Constitution,, the following clause: "No provision of this Constitution shall be so construed as to authorize the passage of any law by which a citizen of either of the States of the Union shall be excluded from the enjoyment of any of the immunities and privileges to which he is entitled under the Constitution of the United States."

Id.

Bill of Rights was ultimately passed.¹¹⁷ It is interesting to note that a proposal by the respected Mr. John Hemphill, a delegate from Washington County, which would have demonstrated the intent of the framers of the 1845 Constitution that it be construed *in pari materia* with the Bill of Rights to the United States Constitution, was not adopted.¹¹⁸ This shows the intent of the framers not to limit the rights of citizens of Texas to that which protects them under the United States Constitution.

N. *Rights of Accused*

Article I, section 10 of the 1876 Texas Constitution protects the rights of the accused in criminal prosecutions.¹¹⁹ This type of protection was first seen in the Constitution of the Republic of Texas of 1836,¹²⁰ which followed, in large part, the language of the fifth and sixth amendments to the United States Constitution.¹²¹ The writers of the 1836 Constitution were acutely aware of the hazards they had faced under Mexican rule, of being accused and imprisoned without the benefit of these basic rights. The failure of Mexico to provide due course of law, particularly in criminal prosecutions, was one of the most detestable abuses leading to the Texas Declaration of Independence.¹²²

Texas insured the right to trial by jury in 1836 and again in 1876.¹²³

117. TEX. CONST. art. I, § 9.

118. TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1979). See also Dawson, *State Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191 (1981).

119. See TEX. CONST. art. I, § 10.

120. TEX. CONST. Declaration of Rights para. 6 (1836).

In all criminal prosecutions the accused shall have the right of being heard, by himself, or counsel, or both; he shall have the right to demand the nature and cause of the accusation, shall be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor

Id.

121. See U.S. CONST. amends. V-VI. For instance, the Texas provision provides that an accused criminal has the right to be heard "by himself or counsel or both." TEX. CONST. Declaration of Rights para. 6 (1836). The sixth amendment to the United States Constitution states that an accused criminal is to "have the assistance of counsel for his defense." See U.S. CONST. amend. VI.

122. The Declaration of Independence (Tex. 1836). "[Mexico has] exercise[d] arbitrary acts of oppression and tyranny, thus trampling upon the most sacred rights of the citizen" *Id.*

123. Compare TEX. CONST. Declaration of Rights para. 6 (1836) with TEX. CONST. art. 1, § 10.

Considering Texas' unique experience, and the more positive grant of rights in the Texas Bill of Rights, Texas courts continue to interpret the Texas Constitution so as to ensure that the framers' intention to protect an expansive view of rights is followed.¹²⁴ Illustrating its importance to the drafters of the constitution, the right to trial by jury in Texas is contained within its own section of the Bill of Rights.¹²⁵ The right of trial by jury was part of the English common law¹²⁶ and its absence was one of the major complaints of the citizens who declared Texas independent from Mexico:

[Mexico] has failed and refused to secure, on a firm basis, the right of trial by jury, that palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizen.¹²⁷

O. Bail

The guarantees of bail for all prisoners, except in capital offenses where the proof is evident,¹²⁸ and the prohibition against excessive bail¹²⁹ were originally found in the Constitution of the Republic of Texas of 1836.¹³⁰ These provisions of the Texas Constitution amplify the eighth amendment of the United States Constitution, which only

124. See, e.g., *Long v. State*, 742 S.W.2d 302, 309 (Tex. Crim. App. 1987)(syntax of Texas confrontation clause susceptible to a more affirmative interpretation than comparable clause in United States Sixth Amendment); *Brown v. State*, 657 S.W.2d 797, 807 (Tex. Crim. App. 1983)(Clinton, J. concurring)(expressing independent nature of Texas Bill of Rights, when he spoke about "the special importance our Texas forebearers attached to their rights to privacy and other guarantees vouchsafed by the Bill of Rights they first declared and then insisted on retaining in every successive constitution"); *Gillett v. State*, 588 S.W.2d 361, 364-71 (Tex. Crim. App. 1979)(Roberts, J., dissenting) ("in our determination of the admissibility of evidence acquired by private persons, we are not limited by Fourth Amendment doctrines if state law establishes stricter standards"). See also Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1168 (1985)(some critics view states' strict conformity to federal constitutional law as contrary to federal and state constitutions).

125. TEX. CONST. art. I, § 10.

126. See Plan and Powers of the Provisional Government of Texas art. VII (Tex. 1835). "All trials shall be by jury, and in criminal cases the proceedings shall be regulated and conducted upon the principles of the common law of England . . ." *Id.*

127. The Declaration of Independence (Tex. 1836).

128. TEX. CONST. art. I, § 11. Texas has amended its constitution, providing for pre-trial detention of certain repeat offenders. See TEX. CONST. art. I, § 11a. "The right to bail was a valued right under English Common Law. The holding of persons without bail was a major grievance of the citizens of England, of the 13 original colonies of American, and of Texans under Mexican rule." See W.O. DOUGLAS, AN ALMANAC OF LIBERTY 198 (1954).

129. TEX. CONST. art. I, § 13.

130. TEX. CONST. Declaration of Rights paras. 10, 11 (1836).

prohibits excessive bail.¹³¹ The drafters of the 1836 Constitution were well aware that many of their fellow citizens, including Stephen F. Austin, had been imprisoned without bail by the Mexican government.¹³²

P. *Habeas Corpus*

Texas guarantees the writ of *habeas corpus*.¹³³ The drafters of the 1876 Constitution, having endured the reconstruction government's suspension of the writ, wrote: "[t]he writ of habeas corpus is a writ of right, and shall never be suspended."¹³⁴ This is in contrast to the 1836 and 1845 Declarations of Rights that provided for the suspension of the writ of habeas corpus in cases of rebellion or invasion.¹³⁵ The Democrats and Grangers who wrote the Constitution of 1876 never wanted to permit another suspension of the writ of habeas corpus, as had been done in Texas by Governor Davis after the Civil War.¹³⁶

Q. *Double Jeopardy*

The Texas double jeopardy provision is more inclusive than the fifth amendment double jeopardy provision of the United States Constitution, which was the basis of the double jeopardy article in the Constitution of 1836.¹³⁷ The writers of the 1845 Constitution added a clause that "nor shall a person be again be put upon trial for the same offence after a verdict of not guilty," which was continued in the 1876 Constitution.¹³⁸ The only addition in the 1876 constitution is that "[n]or shall a person be again put upon trial for the same offence,

131. See U.S. CONST. amend. VIII. Congress has recently enacted pre-trial detention provisions, providing for the pre-trial detention of prisoners in non-capital crimes, on certain conditions. See 18 U.S.C. § 3142 (1985).

132. See The Declaration of Independence (Tex. 1836). "[Mexico] incarcerated in a dungeon, for a long time, one of our citizens, for no other cause but a zealous endeavor to procure the acceptance of our Constitution, and the establishment of a State government." *Id.*

133. See TEX. CONST. art. I, § 12.

134. *Id.*

135. Compare TEX. CONST. Declaration of Rights para. 10 (1836) with TEX. CONST. art. I, § 10 (1845). "Article 1, section 9 of the U. S. Constitution also provides that the writ of *habeas corpus* may be suspended in case of rebellion or invasion." MCKAY, DEBATES OF TEXAS CONSTITUTIONAL CONVENTION OF 1875 43 (1930).

136. See MCKAY, MAKING THE TEXAS CONSTITUTION OF 1876 121 (1924).

137. See TEX. CONST. art. I, § 14.

138. TEX. CONST. art. I, § 12 (1845).

after a verdict of not guilty *in a court of competent jurisdiction*" (emphasis added).¹³⁹ The other major change is that, like the fifth amendment to the United States Constitution, the Constitutions of Texas of 1836 and 1845 protected a person's "life and limb" against double jeopardy, whereas the Texas Bill of Rights to the Constitution of 1876 protects a person's liberty as well as his life.¹⁴⁰

R. *Due Course of Law*

The Texas Constitution of 1836, went on to state that an accused shall not be deprived of life, liberty, and property, except by due course of law.¹⁴¹ Due course of law was guaranteed in three separate sections.¹⁴² The Texas Constitution of 1876, in demonstrating the importance of due course of law protection to Texans, enacted two provisions, one substantive and one procedural, to ensure that Texans would never have to confront arbitrary acts such as those perpetrated by Mexican generals or radical Republican Reconstruction governors without due course of law.¹⁴³ The Texans had vivid memories of the arbitrary acts of the Mexican dictatorship in taking property and imprisoning its opponents without due course of law.

The fact that Texas adopted its "due course of law" article some thirty-five years prior to the enactment of the 14th Amendment to the United States Constitution, illustrates the importance Texans attached to this freedom.¹⁴⁴ By 1845, the protection of due course of law was found in the fifth amendment to the United States Constitution and the constitutions of at least five other states.¹⁴⁵

The first Texas due course of law article, section 13, guarantees open courts and due course of law.¹⁴⁶ The open courts provision was

139. TEX. CONST. art. I, § 14.

140. Compare TEX. CONST. art. I, § 14 with U.S. CONST. amend. V; TEX. CONST. art. I, § 12 (1845); TEX. CONST. Declaration of Rights para. 9 (1836).

141. TEX. CONST. Declaration of Rights paras. 6, 7, 11 (1836).

142. *Id.*

143. TEX. CONST. art. I, §§ 13, 19.

144. See Hart, *The Bill of Rights: Safeguard of Individual Liberty*, 35 TEX. L. REV. 919, 921 (1957); see also Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

145. See Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457, 464 n.21 (1958)(including Maryland Declaration of Rights, section 7; North Carolina Declaration of Rights, section 12; Tennessee Constitution, article 11, section 17; Illinois Constitution, article 8, section 12).

146. See TEX. CONST. art. I, § 13. See Harrington, *The Texas Bill of Rights and Civil Liberties*, 17 TEX. TECH L. REV. 1487, 1520 (1986). "While it is true that [section 13] is

first found in the 1836 Constitution¹⁴⁷ and was a well-founded reaction to Texas' experience under Spanish civil law and the arbitrary acts of the Mexican government, particularly under Santa Anna.¹⁴⁸ These were originally found in the Magna Charta,¹⁴⁹ and "due process" was found in the fifth amendment to the United States Constitution.¹⁵⁰ This article guarantees due course of law as a substantive right.

The second due course of law article, section 19, guarantees procedural due process as a protected right, independent of section 13.¹⁵¹ This provision was first included in the Texas Constitution of 1845, which predates the 14th amendment to the United States Constitution.¹⁵² In contrast to the federal protection, section 19 does not merely restrict government activity, but also grants rights directly to the people and extends the grant of power beyond "life, liberty, and property" to protect privileges, immunities, or any other manner in which citizens may be disenfranchised.¹⁵³

Due course of law in Texas, as well as all other provisions of the Bill of Rights, may never be suspended. Article I, section 29 forever excepted the provisions of the Bill of Rights from the powers of government, and stated that "all laws contrary thereto shall be void."¹⁵⁴ This provision holding the provisions of the Bill of Rights forever in-

sometimes referred to as the 'Open Courts Provision,' it is, quite plainly, a due process guarantee." *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983).

147. TEX. CONST. Declaration of Rights para. 11 (1836).

148. The Declaration of Independence (Tex. 1836). "It has suffered the military commandants, stationed among us, to exercise arbitrary acts of oppression and tyranny, thus trampling upon the most sacred rights of the citizen, and rendering the military superior to the civil power." *Id.*

149. See Magna Charta or the Great Charter of King John (1215).

150. See U.S. CONST. amend. V; see also *Morrison v. Chan*, 699 S.W.2d 205, 207 (Tex. 1985); Note, *The Discovery Rule Dies in a Medical Malpractice Case: Morrison v. Chan*, 17 TEX. TECH. L. REV. 1009, 1010 n.11 (1986).

151. See TEX. CONST. art. I, § 19; see also *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984). "The numerous decisions of this court construing article I, section 13 establish that the guarantee of a remedy by due course of law is a substantial right, independent of other constitutional provisions. Although sections 13 and 19 of article I both guarantee due process . . . the two Texas due course of law provisions are not coterminous." *Id.*

152. TEX. CONST. art. I, § 16 (1845).

153. TEX. CONST. art. I, § 19. See *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982). "It is first noteworthy that the language of [article I, section 19] is different from, and arguably significantly broader than, the language of the corresponding federal provisions." *Id.*

154. TEX. CONST. art. I, § 29. Substantially similar language is found in the Kentucky Constitution. KY. CONST. art. 10, § 29 (1792).

violate, was not found in the Constitution of the Republic of Texas of 1836, but was included in the Texas Constitution of 1845, in the same language later found in the 1876 Constitution.¹⁵⁵ This is an extension of the natural rights declaration found in the Texas Declaration of Independence.¹⁵⁶

At the time of the writing of the 1845 Constitution, several other states had excepted from alienation the natural rights of their citizens, as expressed in their Bills of Rights.¹⁵⁷ There is no similar provision in the Bill of Rights in the United States Constitution, excepting them from the general powers of government. This provision, therefore, further accentuates the idea that the Texas Bill of Rights is an affirmative grant of power, defining the natural rights of the citizens of Texas and expressing the broad liberties enjoyed by its citizens, forever to be held inviolate.¹⁵⁸

S. *Other Rights*

The prohibition against the bills of attainder, *ex post facto* laws, retroactive laws, or laws impairing the obligation of contracts first appeared in 1845,¹⁵⁹ not being present in 1836. The Texas language is very similar to that of article I, section 10 of the United States Constitution.¹⁶⁰ Likewise, the prohibition against taking private property for public use without adequate compensation derives from the 1845

155. TEX. CONST. art. I, § 21 (1845)(Bill of Rights to remain inviolate); *see also* TEX. CONST. art. I, § 29 (Bill of Rights declared inviolate).

156. Declaration of the People of Texas in General Convention Assembled (Tex. 1836). "Now, the good People of Texas, availing themselves of their natural rights . . ." *Id.*; *see also* The Declaration of Independence (Tex. 1836). "[T]he people of Texas do now constitute a FREE, SOVEREIGN, and INDEPENDENT REPUBLIC, and are fully invested with all the rights and attributes which properly belong to independent nations . . ." *Id.*

157. Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457, 464 n.21 (1958)(Pennsylvania, Kentucky, Mississippi, Alabama, and Florida); *see also Ex parte Brown*, 38 Tex. Cr. R. 295, 297, 42 S.W. 554, 556 (1897). The Texas Court of Criminal Appeals has eloquently expressed these natural rights:

These are inalienable and indefeasible rights, which no man, or set of men, by even the largest majority, can take from the citizen. They are absolute and inherent in the people, and all free governments must recognize and respect them. Therefore it is incumbent upon the courts to give the constitutional provisions which guaranty them a liberal construction, and to hold inoperative and void all statutes which attempt to destroy or interfere with them.

Ex Parte Brown, 38 Tex. Cr. R. 295, 297, 42 S.W. 554, 556 (1897).

158. TEX. CONST. art. I, § 29.

159. *See* TEX. CONST. art. I, § 14.

160. *Compare* TEX. CONST. art. I, § 16 with U.S. CONST. art I, § 10.

Constitution,¹⁶¹ as well as the 1836 Constitution,¹⁶² which reflected the anger Texans felt when their property was subject to seizure by corrupt friends of the Mexicans in power.¹⁶³

The prohibition against imprisonment for debt is first found in the Constitution of the Republic of Texas,¹⁶⁴ continued in the Constitution of 1845,¹⁶⁵ and retained in the present constitution.¹⁶⁶ Many settlers came to the original thirteen colonies to escape debtors' prison in England, yet the practice continued in the colonies. Many settlers similarly came to Texas to escape debts.¹⁶⁷ Spanish law, under which Texas lived prior to 1824, had also not prohibited imprisonment for debt, but had protected most physical property from seizure in order to satisfy debts.¹⁶⁸ The statutes of the state of Coahuila and Texas continued the Spanish practice of allowing imprisonment for debt.¹⁶⁹

The Bill of Rights forbids outlawry or transportation for an offense.¹⁷⁰ This was first found in article 39 of the Magna Charta.¹⁷¹ The 1845 Constitution forbade outlawing or exiling any citizen, except by due course of law.¹⁷² When one was outlawed under English common law, England withdrew all legal rights and protection from the outlaw as punishment, including preventing the outlaw from bringing a suit to court.¹⁷³ Transportation consisted of taking a criminal to another county or country to prison.¹⁷⁴ This provision comes from the prohibition in the 1836 Constitution against a citizen being outlawed or exiled, except by due course of law,¹⁷⁵ and from the Con-

161. See TEX. CONST. art. I, § 14 (1845).

162. See TEX. CONST. Declaration of Rights para. 13 (1836).

163. See The Declaration of Independence (Tex. 1836). "[Mexico] has suffered the military commandants . . . to exercise arbitrary acts of oppression and tyranny. *Id.*

164. See TEX. CONST. Declaration of Rights para. 12 (1836).

165. See TEX. CONST. art. I, § 15 (1845).

166. See TEX. CONST. art. I, § 18.

167. See T.R. FEHRENBACH, *LONE STAR — A HISTORY OF TEXAS AND THE TEXANS* 622 (1983).

168. See *RECOPIACION DE LEYES DE LOS REINOS DE LAS INDIAS* (Four VOLS. Madrid 1841) (TOMO I, LIBRO II, TITULO I, LEY II) quoted in Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457, 460 n.14 (1958).

169. See CONST. OF THE STATE OF COAHUILA AND TEXAS art. 22, § 3 (1827).

170. See TEX. CONST. art. I, § 20 (1845).

171. See Magna Charta or the Great Charter of King John para. 39 (1215).

172. See TEX. CONST. art. I, § 16 (1845).

173. See TEX. CONST. art. I, § 20, interp. commentary (Vernon 1984).

174. *Id.*

175. See TEX. CONST. Declaration of Rights para. 7 (1836).

stitution of 1845.¹⁷⁶ This section was amended in 1985, to permit Texas to contract under the interstate compact for the confinement of other states' inmates in Texas, and vice versa.¹⁷⁷

The Texas Bill of Rights provides that conviction of a felony would not act to forfeit one's estate, nor would an estate be forfeited in case of suicide.¹⁷⁸ This is a derivation of English common law, and is found in the 1836 Constitution, that no citizen be disenfranchised, except by due course of law,¹⁷⁹ and followed in the 1845 Constitution.¹⁸⁰ This was placed into its own article in the 1876 Constitution, becoming mandatory that corruption of blood or forfeiture of estate may not be done even by due course of law.¹⁸¹

Treason is defined strictly, as well as its manner of trial.¹⁸² This was addressed in the 1836 Constitution, but was not part of the 1845 Constitution.¹⁸³ The sensitivity to the use of treason as a criminal accusation illustrates the experience of Texans under Mexican rule, when those accused of treason would be imprisoned without trial or bail.¹⁸⁴

In 1876, Texas still had a vast lawless frontier, the policing of which was extensively debated during the constitutional convention.¹⁸⁵ The Texas Bill of Rights guarantees every citizen's right to

176. See TEX. CONST. art. I, § 16 (1845).

177. See TEX. CONST. art. I, § 20 (1876, amended 1985).

178. See TEX. CONST. art. I, § 21. "No conviction shall work corruption of blood, or forfeiture of estate, and the estates of those who destroy their own lives shall descend or vest as in case of natural death." *Id.*

179. See TEX. CONST. Declaration of Rights para. 7 (1836). "No citizen shall be deprived of privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land." *Id.*

180. See TEX. CONST. art I, § 16 (1845). "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." *Id.*

181. See TEX. CONST. art. I, § 21. "No conviction shall work corruption of blood, or forfeiture of estate, and the estates of those who destroy their own lives shall descend or vest as in case of natural death." *Id.*

182. See TEX. CONST. art. I, § 22. "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." *Id.*

183. See TEX. CONST. Declaration of Rights para. 16 (1836).

184. See The Declaration of Independence (Tex. 1836). "[Mexico] incarcerated in a dungeon . . . one of our citizens, for . . . a zealous endeavor to procure acceptance of our Constitution, and the establishment of a State government." *Id.*

185. See MCKAY, DEBATES OF THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 156-61 (1930).

keep and bear arms, limited by regulations regarding the wearing of arms.¹⁸⁶ A similar article was in the Constitutions of 1836¹⁸⁷ and 1845.¹⁸⁸ The language is very similar to the second amendment to the United States Constitution.¹⁸⁹

The framers of the Texas Constitution demanded that the military be subordinate to civil authority.¹⁹⁰ This was followed in the 1836 Constitution,¹⁹¹ as well as the Constitution of 1845.¹⁹² This demonstrates the Texas experience under the military despotism of General Santa Anna, who suspended the Constitution of the Republic of Mexico¹⁹³ and the military reconstruction rule after the Civil War. The prohibition against quartering soldiers in houses¹⁹⁴ was not found in the constitutions of 1836 and 1845. It is similar to that found in the third amendment to the United States Constitution.¹⁹⁵

The prohibition against monopolies, primogeniture, or entailments is a collection of common law reforms and was found in the 1836 Constitution¹⁹⁶ and the 1845 Constitution.¹⁹⁷ The Jacksonian, democratic dislike of monopolies in the 1830's would have been reinforced by the democratic, Granger, populist sentiments of the drafters of the

186. See TEX. CONST. art. I, § 23. "Every citizen shall have the right to keep and bear arms in the lawful defence 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." *Id.*

187. See TEX. CONST. Declaration of Rights para. 14 (1836). The provision in the 1836 Constitution was in response to Mexican oppression. See The Declaration of Independence (Tex. 1836). "[Mexico] has demanded us to deliver up our arms, which are essential to our defence — the rightful property of freemen — and formidable only to tyrannical governments." *Id.*

188. See TEX. CONST. art I, § 13 (1845).

189. Compare U.S. CONST. amend. II ("[a] well regulated militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed") with TEX. CONST. art. I, § 23 ("[e]very citizen shall have the right to keep and bear arms in the lawful defence of himself or the State . . .").

190. See TEX. CONST. art. I, § 24.

191. See TEX. CONST. Declaration of Rights para. 14 (1836).

192. See TEX. CONST. art I, § 17 (1845).

193. See The Declaration of Independence (Tex. 1836). "[Mexico] has suffered the military commandants, stationed among us, to exercise arbitrary acts of oppression and tyranny, thus trampling upon the most sacred rights of the citizen, and rendering the military superior to the civil power." *Id.*

194. See TEX. CONST. art. I, § 25.

195. See U.S. CONST. amend. III. "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." *Id.*

196. See TEX. CONST. Declaration of Rights para. 17 (1836).

197. See TEX. CONST. art. I, § 18 (1845).

1876 Constitution. The ban against primogeniture and entailments illustrates Texas' democratic rule against perpetuities and the populist antipathy against any aristocracy, which many had fled. Mr. Weaver's statement at the Constitutional Convention of 1875 exemplified this sentiment:

. . . [that] . . . Life, liberty, and the pursuit of happiness are the inalienable rights which men possess, and not whether they were born free and equal, [have] as much potency now as when it was first inscribed by [Jefferson] in the Declaration of Independence. The question argued at that time was the right of the people to be freed from taxation without representation, free from tyranny. It was argued that men possessed these rights, and out of these alienable rights, grew the American idea of government. It was an idea of democracy and political equality, not one of monied aristocracy.¹⁹⁸

Permitting the free transfer of property was designed to remedy not only the abuses of English feudal rights, but also the hidebound, royalist property decrees which Texas experienced under Spanish law.

The right of Texans to petition for a redress of their grievances,¹⁹⁹ was not specifically guaranteed in the 1836 Constitution. However, the Texas Declaration of Independence states that "petitions and remonstrances being [dis]regarded, the agents who bear them are thrown into dungeons" ²⁰⁰ The right to petition their government was affirmatively granted to citizens in the 1845 Constitution²⁰¹ and 1876 Constitution.²⁰² These follow the first amendment of the United States Constitution, that Congress shall make no law abridging "the right of the people peacefully to assemble, and to petition the government for redress of grievances."²⁰³ Texas further provides for the right of remonstrance.²⁰⁴

198. See MCKAY, DEBATES OF THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 170 (1930).

199. See TEX. CONST. art. I, § 27.

200. The Declaration of Independence (Tex. 1836).

201. See TEX. CONST. art. I, § 19 (1845).

202. See TEX. CONST. art. I, § 27.

203. U.S. CONST. amend. I.

204. See TEX. CONST. art. I, § 27. "The citizens shall have the right, in a peaceful 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." *Id.* See Professional Ass'n of College Educators v. El Paso Community College Dist., 678 S.W.2d 94, 97 (Tex. App.—El Paso 1984, no writ)(written remonstrance is document formally stating points of opposition or grievance). The Kentucky Constitution contains an identical provision. See KY. CONST. art. 10, § 22 (1792).

The Bill of Rights takes the power of suspending laws in the state away from the governor, and states that such power can only be exercised by the legislature.²⁰⁵ This was not found in the 1836 Constitution, but was addressed in almost identical form in the 1845 Constitution.²⁰⁶ This exemplifies the distaste of the delegates to the 1875 Constitutional Convention of the tactics of Texas' Reconstruction Governor Davis in suspending laws to suit his own purposes.

The last section of the Texas Bill of Rights is, in many respects, the most important provision. It provides that the provisions of the Bill of Rights "shall forever remain inviolate, and all laws contrary thereto . . . shall be void."²⁰⁷ This was a recognition by the drafters of the Bill of Rights "that certain rights are inalienable, that man is not capable of divesting himself or his posterity of them even by consent."²⁰⁸ The Declaration of Independence of the People of Texas was the initial embodiment of this ideal.²⁰⁹

III. CONCLUSION

The Texas Bill of Rights was originally drafted in 1836, during the ascendancy of Jacksonian democracy, following the successful revolt from the military dictatorship of General Santa Anna. Texans had lived under Spanish civil law, Mexican constitutional law, a Mexican military dictatorship, English common law, and the Bill of Rights of the United States. Many were debtors. Based upon their collective experiences and the denial of rights to many, they wanted greater protection afforded to them than that found in the Bill of Rights to the United States Constitution. The drafting of the 1836 and 1845 Bill of Rights was greatly influenced by President Jackson's close friend, General Sam Houston, and Texas' ten years as an independent republic. The absorption of the 1845 Constitution into the 1876 Constitution was also filtered through Texas' experience in the Civil War, and of the chafing Texas felt under military reconstruction and radical Republican rule.

The sources of liberty in the Texas Bill of Rights are many, including the Magna Charta, English common law, Spanish civil law, Mexi-

205. See TEX. CONST. art. I, § 28.

206. See TEX. CONST. art. I, § 20 (1845).

207. TEX. CONST. art I, § 29.

208. TEX. CONST. art. I, § 29, interp. commentary (Vernon 1984).

209. Declaration of the People of Texas in General Convention Assembled (1835).

can constitutional law, natural rights philosophy, the American Revolution, the American Bill of Rights, the Texas Revolution, Texas as a frontier state, Texas during the Civil War and under military reconstruction, and, most uniquely, the rights Texans have always cherished. The affirmative grant of power to citizens of these inherent rights, rather than the mere prohibition on the state to restrict the rights, reflects Texans' choice that their Bill of Rights is expansive and definitive.