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FRAMING A TEXAS BILL OF RIGHTS ARGUMENT

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I. INTRODUCTION

Texas judges are paying more and more attention to the development of state constitutional law. This is so whether the phenomenon is viewed as a return to the Lone Star State's earlier legal traditions or as a manifestation of the "New Federalism." As federal courts increasingly retreat from protecting individual rights and liberties,[1] the Texas judiciary has joined others throughout the nation in developing state constitutional jurisprudence.

As a result, Texas judges and lawyers often face the daunting task of crafting a cogent and intellectually sound bill of rights analysis for the case at hand, especially when it involves understanding and implementing provisions drafted more than a century and a half ago.[2] How do they, for example, discern and apply the Texas Bill of Rights to questions of privacy, polygraphs, drug testing, wiretapping, computer interfacing and match-ups, equal treatment for women and minorities, education, compulsory medical and psychiatric treatment, retaliatory employment termination, rights of the poor and homeless, prison and jail reform, and the other concerns of modern Texas?[3] In-

1. *See generally* JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 1-15 (Chapter 1, "Emergence of State Bill of Rights Protections").

2. *Id.* at 17-33 (Chapter 2, "The Texas Bill of Rights").

3. A good number of law review articles in recent years have undertaken to explore state constitutional developments in these areas. *See, e.g.*, Harold H. Bruff, *Separation of Powers under the Texas Constitution*, 68 TEX. L. REV. 1337, 1340, 1356 (1990) (examining general separation powers jurisprudence in Texas and limited availability of judicial review of administrative action in Texas); Linda G. Hemphill, *Challenging Conditions of Confinement: A State*

deed, twice now,[4] the Court of Criminal Appeals pointedly has called upon intermediate appellate courts and attorneys to analyze more carefully state constitutional arguments that eventually reach the highest level for decision.[5]

To that end, this article briefly outlines the historical origins of the Texas Bill of Rights and then considers various methods of constitutional inquiry employed by courts in Texas and other states.[6] The article examines modes of state constitutional differentiation, a process that may influence the ultimate result of the case and may reveal the philosophy of the court. Also, the article explains the various rules of construction and then discusses different approaches to analyzing the Texas Bill of Rights, from linguistic variations to historical sources. The final segment suggests a structure that might be helpful in presenting state constitutional arguments.

II. HISTORICAL ORIGINS OF THE TEXAS BILL OF RIGHTS

A. *Earlier Constitutions*

Texans have lived under a total of nine constitutions, with three in effect during the period when Texas formed part of Mexico's northern reaches: the 1812 Spanish Constitution; the 1824 Mexican Republic Constitution; and the 1827 Constitution of the State of Coahuila y

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Constitutional Approach, 20 WILLAMETTE L.J. 409, 409-11 (1984) (summarizing history of federal and state court decisions pertaining to treatment of prisoners); Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOY. L.A. L. REV. 1249, 1249 (1987) (discussing period from 1972 to 1978 as "golden age" of federal litigation regarding mentally disabled).

4. *See* Heitman v. State, 815 S.W.2d 681, 690 n.23 (Tex. Crim. App. 1991) (en banc) (remanding case to court of appeals to consider appellant's state constitutional claim); McCambridge v. State, 712 S.W.2d 499, 501 n.9 (Tex. Crim. App. 1986) (en banc) (remanding to court of appeals question of whether defendant had right to counsel before deciding whether to provide breath sample for intoxilyzer test).

5. Indeed, not properly raising a state constitutional claim may expose a lawyer to a charge of malpractice. State v. Lowry, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., concurring); State v. Jewett, 500 A.2d 233, 234 (Vt. 1985).

6. Although Philip Bobbitt's *Constitutional Fate* and Michael Kent Curtis's *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* address the United States Constitution, they are useful models for the kind of exegesis described in this article. *See generally* PHILIP C. BOBBITT, CONSTITUTIONAL FATE (1982) (analyzing federal constitution); MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (reviewing United States Constitution).

Texas.[7] Of the six organic charters ratified after Texas gained independence from Mexico, the first five—including the Republic's constitution—manifested classic liberal philosophy establishing a benevolent central government. Except for variations in the bill of rights, the constitutions were fairly similar to the United States Constitution and were characteristic of state constitutions of that era. The current Texas Constitution, however, reflects a marked shift in political theory.

Although Sam Houston was not a political philosopher, he served as the leader for the fifty-nine beleaguered delegates who gathered for the 1836 convention at Washington-on-the-Brazos to draft the constitution for the new Republic. Some of the delegates there had helped write constitutions for other states. One of the more prominent delegates was Lorenzo de Zavala, widely respected for his intellectual argument in favor of republican government.[8] The 1836 rights charter was an amalgam of Jacksonian democracy, British common law, Spanish civil law, the ideals in the Magna Charta, the English Bill of Rights, William Penn's Frame of Government, the Charter of Privileges for Pennsylvania, the Declaration of Independence, and George Mason's Virginia Bill of Rights.[9]

The Jacksonian democrats, who formed a majority in the 1836 convention, generally favored greater constitutional guarantees than those provided by the United States Bill of Rights. Jacksonian ideals took a strong, early hold in Texas because, as a new territory, it comprised people who did not have the history of earlier political traditions that had developed along the eastern seashore. Also, Sam Houston and Andrew Jackson, both strong and inspiring leaders, were close personal friends and fellow Tennesseans who shared similar political views.[10]

The Declaration of Rights in the constitution this delegation

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7. TEX. CONST. pmbl., interp. commentary (Vernon 1984); 2 CLARENCE WHARTON, TEXAS UNDER MANY FLAGS 230-31 (1930).

8. J.E. Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457, 466 (1959).

9. Gerald Ashford, *Jacksonian Liberalism and Spanish Law in Early Texas*, 57 SW. HIST. Q. 1, 10, 30-33 (1953); J.E. Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457-59, 461, 466 (1959); Joseph W. McKnight, *Stephen Austin's Legalistic Concerns*, 89 SW. HIST. Q. 240, 265 (1986); Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 96-97 (1988); Rupert N. Richardson, *Framing the Constitution of the Republic of Texas*, 31 SW. HIST. Q. 191, 209-14 (1928).

10. Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 97 (1988).

drafted included seventeen sections and an introductory paragraph forbidding violations "on any pretense whatever."[11] This document provided the model for the bill of rights written in 1845 when Texas applied for statehood; and it set the pattern for its successors in 1861 (Secession), 1866 (post-Civil War), 1869 (Reconstruction), and 1876.

After careful discussion and revision, during final debate by the entire convention, the drafters crafted the 1845 constitution to expand the scope of the bill of rights beyond the 1836 prototype.[12] The 1866 post-Civil War constitution was fashioned like the 1845 predecessor, but abolished slavery and essentially restated the 1845 bill of rights.[13] The 1869 Reconstruction constitution reflected the dominant Republican tenets of the time, provided for a centralized state government, gave extensive appointment powers to the governor, introduced a state-financed public school system, and preserved intact the 1845 bill of rights.[14]

B. *The 1876 Constitution*

The current constitution of Texas was authored by ninety delegates elected to the 1875 constitutional convention which was convened almost in rebellion against Governor Richard Coke. Governor Coke had resisted calling an election to select delegates for the convention because he had his own version of a constitution, a document he strongly supported but was unable to pass. Most of the delegates in 1875 were farmers and lawyers but the group also included merchants, editors, and physicians, as well as some legislators and judges. Five or six delegates were African-American, seventy-five

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11. Constitution of the Republic of Texas, Declaration of Rights (1836), *reprinted in* TEX. CONST. app. 535 (Vernon 1955).

12. DEBATES OF THE TEXAS CONVENTION 302-13 (W.F. Weeks ed., 1846) (available from Texas State Archives); *see* JOURNALS OF THE CONVENTION 33-35, 131-35 (Miner & Cruger eds., 1845) (detailing drafting bill of rights and discussing proposed revisions); J.E. Ericson, *Origin of the Texas Bill of Rights*, 62 SW. HIST. Q. 457, 461-64, 466 (1959) (adding restrictions against religious tests for public offices, ex post facto laws, interfering with right to contract, and limiting power of eminent domain). Although opposing United States annexation of Texas, Senator Daniel Webster praised its constitution as one of the best of existing state constitutions. TEX. CONST. pmbl., interp. commentary (Vernon 1984).

13. *Compare* TEX. CONST. of 1866, arts. I & VIII (providing bill of rights similar to that of Texas Constitution of 1845 and also providing for protection of rights of freedom) *with* TEX. CONST. of 1845, arts. I & VIII (listing enumerated rights and describing legislature's ability to pass laws regarding slavery).

14. *See* Matthew R. Paul & Jeffrey L. Van Horn, Heitman v. State: *The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 952-53 (1992) (describing aspects of 1869 constitution).

were Democrats, and fifteen were Republicans.[15] Thirty-seven belonged to a coalition of farmers, known as the Grange, who fought monopolistic grain transport practices.[16] Contrary to some popular historical views, the 1875 convention reflected less a reaction to Reconstruction and more a movement away from empowered government exemplified by the federal constitution.[17] The convention manifested a desire for a more restrictive, "hands off," even anti-government, approach.[18]

The Grangers wanted a constitution that would curtail government power and prevent economic domination by large monopolies and expansive business interests.[19] Often Republicans voted with the Grangers to prevent Democrats from further ensconcing themselves in the structure of state government. This marriage of convenience frequently resulted in enhanced protection of individual rights and pronounced limitations on state authority.

To the 1875 delegates, there was a significant political difference between the structure of the federal and state constitutions. The delegates saw the United States Constitution as protecting the privileged and moneyed minorities from the democratic majority and the Texas Constitution as shielding the democratic majority from the economically advantaged minorities.[20]

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15. SETH S. MCKAY, MAKING THE TEXAS CONSTITUTION OF 1876 74-75 (1924). *See generally* T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS (1983) (describing history of Texas); JOE BERTRAM FRANTZ, TEXAS: A BICENTENNIAL HISTORY 124 (1976) (outlining Texas history); A. J. Thomas, Jr. & Ann Van Wynen Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 907 (1957) (describing make-up of delegates).

16. Other farmers were also chosen as delegates, giving Grange interests approximately 45 votes. Approximately half the lawyers voted with the Grange. John Walker Mauer, Southern State Constitutions in the 1870's: A Case Study of Texas 204, 211-12 (1981) (unpublished Ph.D. dissertation, on file with *St. Mary's Law Journal*) (comprehensively analyzing historical and political forces behind 1876 constitution).

17. *Id.* at 1-18, 123-26, 185, 203, 205, 210-59. *See generally* 3 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION AND HISTORY OF THE UNITED STATES (1980) (asserting that overall theme of United States Constitution was to confer broad power on government, especially legislative branch, in best interests of people).

18. *Cf.* Samuel D. Myres, *Mysticism, Realism and the Texas Constitution of 1876*, 9 SW. SOC. SCI. Q. 166, 182-83 (1928) (concluding that constitution of 1876 imposed serious limitations upon power of government which rendered it practically government of negation).

19. Mikal Watts & Brad Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 785-91 (1990).

20. *See* John Walker Mauer, Southern State Constitutions in the 1870's: A Case Study of Texas 270-71 (1981) (unpublished Ph.D. dissertation, on file with *St. Mary's Law Journal*) (discussing restrictive document produced at constitutional convention of 1875 which rejected liberal constitutional values).

The one provision of the constitution which departed from the "systematically restrictive approach" of the new organic charter was the hotly debated judiciary article in which the delegates ultimately deferred to the comprehensive role of the courts "charged with high and holy duties."[21] The delegates had more faith that the courts, rather than other state authorities, would protect individual liberties. The delegates sought to ensure judicial accountability and prevent misuse of power through direct election of judges and, at the district court level, use of single-member districts. This action accentuated the already sharp contest over the suffrage provisions of the new constitution. Besides trying to limit the influence of the African-American vote through appointing rather than electing judges,[22] the Democratic establishment under Governor Coke suggested a variety of electoral impediments: a poll tax, literacy tests, registration, and property taxes, as well as multi-member congressional and judicial districts.[23]

The delegates consistently rejected these schemes to limit suffrage, although not because of any generous impulses of equality. Rather, the Grangers understood that these Democratic devices for denying the franchise to African-Americans would inevitably deprive the Grangers of the political power they needed to break the state government's support of big business, railroads, and monopolies.[24] Ultimately, the unlikely but pragmatic convention alliances resulted in Texas having some of the broadest suffrage rights in the nation[25] and an organic law of reform that limited government.[26] The 1876 consti-

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21. *Id.* at 246-48.

22. *Id.* at 236.

23. *Id.* at 191-92, 236, 242-43.

24. *See* John Walker Mauer, Southern State Constitutions in the 1870's: A Case Study of Texas 16-17, 191, 201, 225-26, 237-40 (1981) (unpublished Ph.D. dissertation, on file with *St. Mary's Law Journal*) (citing DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 149 (Seth S. McKay ed., 1920)).

25. *Id.* at 191-92. The suffrage provisions allowed non-citizen males to vote if they met the residency requirement and declared their intent to become citizens. TEX. CONST. art. VI, § 2, interp. commentary (Vernon 1955). Even after the poll tax was added in 1902, non-citizens could vote until 1919. John Walker Mauer, Southern State Constitutions in the 1870's: A Case Study of Texas 191-92 (1981) (unpublished Ph.D. dissertation, on file with *St. Mary's Law Journal*). Female suffrage was strongly debated in the 1868 and 1875 conventions and finally realized for primary elections in 1918. *Id.* Texas was the first southern state and ninth state in the nation to ratify the Nineteenth Amendment. *Id. See generally* SETH S. MCKAY, MAKING THE TEXAS CONSTITUTION OF 1876 96-98, 124 (1924) (discussing suffrage in Texas).

26. John Walker Mauer, Southern State Constitutions in the 1870's: A Case Study of

tution proved to be among the first fruits of the profoundly democratic, populist revolt that swept through Texas and many other areas of the country.

C. *The 1876 Bill of Rights*

The 1876 constitution had twenty-nine bill of rights sections, one less than the original proposals introduced at the 1875 convention.[27] Since that time, Texas voters have amended the bill of rights eight times,[28] generally strengthening it.

Unlike the United States Constitution, the Texas Bill of Rights appears in Article I, at the very beginning of the state charter.[29] In fact, Article I introduces the bill of rights as the constitution's means of recognizing and establishing the "general, great and essential principles of liberty and free government."[30] The provisions of Article I divide into three general groupings: political and philosophical utterances concerning the nature of government and its role with respect to individuals,[31] statements of substantive liberties and property rights,[32] and guarantees for civil and criminal procedures.[33] The thrust of the expanded bill of rights which emerged in 1875 exemplifies the effort to limit government by carefully delineating the basic,

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Texas 16-17, 191, 201, 225-26, 237-40 (1981) (unpublished Ph.D. dissertation, on file with *St. Mary's Law Journal*) (citing DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 149 (Seth S. McKay ed., 1920)); *see* Shepherd v. San Jacinto Junior College Dist., 363 S.W.2d 742, 743 (Tex. 1962) (stating that Texas Constitution, "unlike the federal constitution, is in no sense a grant of power but operates solely as a limitation of power").

27. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS, BEGUN AND HELD AT THE CITY OF AUSTIN, SEPTEMBER 6TH, 1875 271-75 (Sept. 6, 1875) (available from Texas State Archives). The original Section 29, which addressed emigration from and immigration to Texas, was not included in the 1876 constitution. *Compare id. with* TEX. CONST. art. I, § 29 (illustrating that section on immigration/emigration not part of 1876 constitution).

28. Those modifications are: in 1918, § 10 (rights of accused in criminal prosecutions); in 1935, § 15 (right of trial by jury); in 1956, § 11a (multiple convictions; denial of bail), in 1956, § 15a (commitment of persons of unsound mind) (and amended in 1977); in 1972, § 3a (equality under the law); in 1985, § 20 (outlawry or transportation offense); and, in 1989, § 30 (rights of crime victims). TEX. CONST. art. I, §§ 3a, 10, 11a, 15, 15a, 20, 30.

29. TEX. CONST. art. I, pmbl.

30. *Id.*

31. TEX. CONST. art. I, §§ 1, 2, 24, 29.

32. TEX. CONST. art. I, §§ 3-4, 6-8, 11-14, 16-23, 25-27.

33. TEX. CONST. art. I, §§ 5, 8-16, 28, 30. *See generally* GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 2-4 (1977) (discussing need to state precisely which "natural and unalienable rights" were fundamental to social contract philosophy).

core rights of individuals which the state cannot abridge[34] and must defend.[35]

III. MODES OF ANALYSIS

State courts typically address bill of rights issues using one of three modes: the "dual reliance," "primacy," and supplemental" or "interstitial" approaches. Each has strengths and weaknesses that suggest a fourth, probably more effective, approach.

A. *Dual Reliance*

"Dual reliance,"[36] a technique often used by the Texas Court of Criminal Appeals[37] and favored by the Vermont[38] and Maryland[39] Supreme Courts, evaluates federal and state constitutional guarantees separately, but in that order. Either the federal or state bill of rights might be applicable. However, both or neither of the documents might control.

The theoretical underpinning of "dual reliance" is that two government structures protect individual rights. However, the analysis is not so successful as its simplicity suggests, primarily because it tends to focus more attention on the federal guarantees. Thus, when a court analyzes the Texas Bill of Rights, the court generally does so in a secondary and cursory fashion, applying federal-like doctrine and

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34. *Ex parte* Brown, 38 Tex. Crim. 295, 304, 42 S.W. 554, 556 (1897) (stating that the "Bill of Rights lays down the ancient limitations which have always been considered essential in a constitutional government").

35. *See* James P. Hart, *The Bill of Rights: Safeguard of Individual Liberty*, 35 TEX. L. REV. 919, 919 (1957) (recognizing that "majorities can be as ruthless as monarchs"); Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 104 (1988) (clarifying that all "free men" have equal rights).

36. *See* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 983-86 (1985) (explaining approach when state courts use both state and federal constitutions when deciding constitutional issues); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1028-29 (1985) (describing approach to interpreting constitutional issues).

37. *See* McCambridge v. State, 712 S.W.2d 499, 502 (Tex. Crim. App. 1986) (considering both Texas and federal constitutional claims in criminal appellate review).

38. *See* State v. Badger, 450 A.2d 336, 346-47 (Vt. 1982) (considering overlapping protections of both Vermont and United States Constitutions in criminal procedural laws).

39. *See* Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 780-81 (Md. 1983) (giving consideration to Federal Equal Protection Clause and Maryland's equal treatment provisions in public school financing case).

often slighting an independent state approach.[40]

B. *Primacy Method*

The supreme courts of Oregon,[41] New Hampshire,[42] Maine,[43] Washington,[44] and Missouri[45]—and sometimes Texas[46]—tend to favor the "primacy" approach. This method essentially assumes that the states are the primary guarantors of individual rights. The approach is grounded in history; most of the original states' charters predated, and some served as models for, the federal version.[47]

The "primacy" method looks first at state constitutional guarantees. If it finds protection, inquiry stops. If the state document does not provide protection, the court proceeds to federal law. Unfortunately, this approach often leaves unexplored the possibility that federal law might offer greater protection than state law in a particular situation. The result is a less-than-complete analysis, creating difficulties when courts try to apply the particular right in a subsequent case. The "primacy" mode also lacks a certain realism by assuming that state constitutions are always, or should always be, the principal guarantors of individual liberty. History and Fourteenth Amendment jurisprudence show otherwise.

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40. *See* Solis v. State, 718 S.W.2d 282, 284-85 (Tex. Crim. App. 1986) (en banc) (considering only federal constitutional issues in claim of right to counsel at probation revocation hearing).

41. Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981) (declaring that state constitutional claims must be considered before federal constitutional claims).

42. *E.g.*, State v. Ball, 471 A.2d 347, 354 (N.H. 1983) (addressing New Hampshire constitutional guarantees before federal constitutional guarantees).

43. *E.g.*, City of Portland v. Jacobsky, 496 A.2d 646, 648 (Me. 1985); State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984).

44. *See, e.g.*, State v. Jackson, 688 P.2d 136, 137 (Wash. 1984) (reviewing validity of search warrant under Washington Constitution).

45. *See, e.g.*, Strahler v. St. Luke's Hosp., 706 S.W.2d 7, 9 (Mo. 1986) (en banc) (illustrating that Missouri Constitution protects some rights not enumerated by United States Constitution).

46. *E.g.*, Haynes v. City of Abilene, 659 S.W.2d 638, 641 (Tex. 1983); Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983).

47. *See generally* Robert Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 371 (1984) (recognizing that "backwards" privileges and immunities clause exists in several state constitutions which predate federal constitution).

C. *Supplemental Approach*

The "supplemental" or "interstitial" method[48] has been adopted by the high courts of New Jersey[49] and Connecticut,[50] and the method is often used by Texas courts.[51] Under this method, the court first examines federal law. If it finds protection, analysis ends. If the court finds no federal protection, it proceeds to the state constitution which may provide relief.

The "interstitial" mode often undermines the integrity of the state court decisional process, resting as it does on federal analysis first. In recent years, the United States Supreme Court increasingly faults and reverses federal law interpretation by state judges. If a remand follows, and if the state court has properly couched its earlier opinion on independent grounds, the state court can then apply state law. If the state court has not used independent grounds, the Supreme Court's construction controls.

The supplemental approach has many faults. Not only does this approach prolong litigation, but it increases the risk that, because of pressure created by the Supreme Court's reversal, the state court might revise its own analysis and essentially reverse itself. Montana,[52]

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48. *See* Robert A. Sedler, *The State Constitutions and the Supplemental Protection of Individual Rights*, 16 U. TOLEDO L. REV. 465, 468 (1985) (discussing function of state constitutions to supplement); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comments on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1028-29 (1985) (describing interstitial model of state constitutional analysis).

49. State v. Williams, 459 A.2d 641, 650 (N.J. 1983); Right to Choose v. Byrne, 450 A.2d 925, 931-32 (N.J. 1982).

50. *E.g.*, Horton v. Meskill, 332 A.2d 113, 118-19 (Conn. 1974) (first looking to federal law and then using own constitution to invalidate school financing system).

51. *E.g.*, Whitworth v. Bynum, 699 S.W.2d 194, 196 (Tex. 1985) (considering Supreme Court handling of statute); Union Cent. Life Ins. Co. v. Chowning, 86 Tex. 654, 656-57, 26 S.W. 982, 983 (1894) (court looking to United States Constitution in its analysis of statute at issue).

52. *See* Ronald K.L. Collins, *Reliance on State Constitutions — The Montana Disaster*, 63 TEX. L. REV. 1095, 1108-10 (1985) (discussing Montana Supreme Court's reversing itself on remand from United States Supreme Court). *But see* State v. Johnson, 719 P.2d 1248, 1254-55 (Mont. 1986) (refusing to "march lock-step" with United States Supreme Court on constitutional issues).

South Dakota,[53] Michigan,[54] and Texas[55] have shared this unfortunate experience. A more philosophical objection to the supplemental approach is its implicit acceptance of federal primacy in protecting personal liberties.

D. *The Federalism Method*

The "federalism" technique is probably the best method of analyzing bill of rights arguments and is similar to that sometimes used by the Texas Court of Criminal Appeals.[56] Under this tack, one separately approaches the problem under both state and national constitutions,[57] in that order. This process is more likely to preserve the integrity of the state decision and recognize the federal-state partnership in guaranteeing individual freedoms and civil rights.

As part of the state analysis, the court must clearly declare that the decision rests wholly upon independent state grounds and that, insofar as the state resolution of the case is concerned, there is no reliance on federal law.[58] The state law discussion should avoid use of federal decisions, even for non-controlling methodology. The United States Supreme Court has shown a willingness to reverse cases where a state judge "misunderstood" or "misapplied" federal analysis that formed an integral part of the state decision.[59] When it is clear that federal

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53. *See* State v. Neville, 312 N.W.2d 723, 725-26 (S.D. 1981) (holding that evidence of defendant's refusal to take blood alcohol test is relevant), *rev'd*, 459 U.S. 553 (1983), *and on remand*, 346 N.W.2d 425, 430 (S.D. 1984) (reasoning that same refusal to take blood alcohol test was inadmissible).

54. *See* Michigan v. Long, 463 U.S. 1032, 1053 (1983) (reversing and remanding case to evaluate permissibility of warrantless search).

55. *See* Brown v. State, 617 S.W.2d 196, 200 (Tex. Crim. App. 1981) (en banc) (using plain view doctrine to determine constitutionality of seizure), *rev'd*, 460 U.S. 730, *and on remand*, 657 S.W.2d 797, 798 (Tex. Crim. App. 1983) (en banc) (relying on United States Constitution to determine constitutionality of seizure).

56. *See* Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc) (declining to follow necessarily United States Supreme Court decisions); McCambridge v. State, 712 S.W.2d 499, 502 (Tex. Crim. App. 1986) (en banc) (requiring separate analysis of federal and state issues); *see also* Long v. State, 742 S.W.2d 302, 313 (Tex. Crim. App. 1987) (en banc) (applying Texas and United States Constitutions to determine right of confrontation).

57. *See, e.g.*, State v. von Bulow, 475 A.2d 995, 1018-19 (R.I.) (examining state's search and seizure law and then determining its constitutionality), *cert. denied*, 469 U.S. 875 (1984).

58. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1038-40 (1983) (verifying decision rests wholly on non-federal grounds); *In re* McLean, 725 S.W.2d 696, 697 (Tex. 1987) (stating that when deciding case on Texas Equal Rights Amendment, United States Constitution does not apply).

59. David A. Schlueter, *Judicial Federalism and Supreme Court Review of State Court*

law does not apply, it is best to note that[60] or avoid mentioning it altogether, adding in either case the independent state grounds disclaimer.

The chief benefit of the "federalism" method is that it affords state courts the opportunity to apply both state and federal constitutions separately, according to the history, purpose, and development of each. Not only will this yield a coherent state jurisprudence, but it will attract the respect of other judiciaries.

IV. DIFFERENTIATING STATE CONSTITUTIONAL GUARANTEES

Interpreting a state bill of rights document requires discerning the intent of the framers and voters regarding the provision in question. This involves analyzing textual, structural, historical, and comparative factors, as well as exploring policy rationales behind the provision.[61]

Oliver Wendell Holmes's comments in 1914 are as applicable to the Texas Constitution as they are to the federal:

> The provisions of the Constitution are not mathematical formulas having their essence in their form: they are organic living institutions. . . . Their significance is vital, not formal: it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.[62]

Thus, for Texans, one must not only decipher the intent of Jefferson, Madison, Washington, Franklin, and Hamilton, but also of Houston, Rusk, Ellis, de Zavala, Navarro, Hogg, Ochiltree, Throckmorton, Johnson, the Grangers, and those other earlier Texans who sought a land where they would be treated fairly and could live with few government intrusions.[63]

Decisions: A Sensible Balance Emerges, 59 NOTRE DAME L. REV. 1079, 1095 (1984); Ronald K. L. Collins, *Plain Statements: The Supreme Court's New Requirement*, A.B.A. J. Mar. 1984, at 92-94 (1984).

60. *E.g.*, Whitworth v. Bynum, 699 S.W.2d 194, 196 (Tex. 1985).

61. *See* Mumme v. Marrs, 120 Tex. 383, 394, 40 S.W.2d 31, 35 (1931) (giving effect to constitutional provision in light of policy goals at time of adoption and general rules of construction). Professor Bobbitt would also urge doctrinal, prudential, and ethical analyses. PHILIP C. BOBBITT, CONSTITUTIONAL FATE 34-37, 93-119 (1982).

62. Gompers v. United States, 233 U.S. 604, 610 (1914).

63. *See* Bell v. Indian Live-Stock Co., 11 S.W. 344, 345 (Tex. 1889) (referencing intentions of framers as inuring benefits to Texas residents and non-residents); *see also* Eisenhauer v. State, 754 S.W.2d 159, 166-76 (Tex. Crim. App. 1988) (en banc) (Clinton, J., dissenting) (referencing intentions of early Texans).

Using a historical perspective, one must also reflect on what a constitutional guarantee was designed to accomplish. The specific protection must be respected not just for itself standing alone, but also in the context of the entire bill of rights.[64]

V. RULES OF CONSTRUCTION

A. *General Principles*

Along with selecting a mode of analysis, differentiating a constitutional provision entails applying the general rules of construction that Texas courts have devised over the years as they interpreted state constitutional provisions. These rules call for a liberal construction of the bill of rights.[65] The rules also incorporate the basic premise that the Texas Constitution is "a chart containing limitations on power."[66] The fundamental thrust of constitutional construction is to ascertain and give effect to the intent of the framers, considering when necessary the (1) conditions, (2) general spirit, and (3) overall sentiments of the people when the provision was adopted.[67] If the constitutional convention addressed a specific topic in the document itself, the lan-

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64. *See, e.g.*, Pierson v. State, 147 Tex. Crim. 15, 19, 177 S.W.2d 975, 977 (1944) (reviewing intentions of framers); Jones v. Williams, 121 Tex. 94, 102, 45 S.W.2d 130, 133 (1931) (reasoning that judicial interpretation of constitutional provision may be guided by legislative action contemporaneous with constitutional provision); State v. Gunwall, 720 P.2d 808, 812-813 (Wash. 1986) (en banc) (setting out six criteria for determining whether state constitution extends broader rights than federal). Washington's Supreme Court considered the following factors: (1) the state constitution's explicit language; (2) textual differences between parallel state and federal constitutions; (3) state common law and constitutional history; (4) pre-existing state case and statutory law; (5) structural differences between the state and federal constitutions such as grants of enumerated powers, limitations on sovereign power, and affirmation of fundamental rights; and (6) matters of local and state interests. *Id.*; *see also* State v. Hunt, 450 A.2d 952, 965-67 (N.J. 1982) (Handler, J., concurring) (considering same factors in *Gunwall*, as well as state traditions, legislative history, and public attitudes).

65. *Ex parte* Brown, 38 Tex. Crim. 295, 304, 42 S.W. 554, 556 (1897).

66. *Ex parte* Myer, 84 Tex. Crim. 288, 297, 207 S.W. 100, 104 (1918); *see* Friedman v. American Surety Co. of N.Y., 137 Tex. 149, 166, 151 S.W.2d 570, 580 (1941) (stating that constitutional provisions may be submitted to voters to enable legislature to interpret people's will); Ferguson v. Wilcox, 119 Tex. 280, 289, 28 S.W.2d 526, 530 (1930) (discussing limits on state government); *Brown*, 38 Tex. Crim. at 303, 42 S.W. at 555 (citing with approval State v. Gilman, 10 S.E. 283, 284 (W. Va. 1889) and finding that under constitution, government may prescribe restraints for general good); Watts v. Mann, 187 S.W.2d 917, 923 (Tex. Civ. App.—Austin 1945, writ ref'd) (finding that act of state legislature is legal when not constitutionally prohibited).

67. *See* Cramer v. Sheppard, 140 Tex. 271, 285, 167 S.W.2d 147, 154 (1942) (finding that constitutional provision should not be given technical construction which would defeat its purpose); *see also* Mumme v. Marrs, 120 Tex. 383, 393, 40 S.W.2d 31, 36 (1931) (interpreting

guage selected by the framers of the constitution, when its meaning is clear, controls the court's interpretation.[68] This rule allows particular and specific intention to guide the decision when it is plainly expressed.[69]

Whenever the constitution declares how power may be exercised over a specific subject, no power can be exercised other than that "clearly within the plain import" of the constitutional language.[70] The same guiding principles apply to constitutional amendments upon which the people have clearly expressed their will: "[T]hose who are called upon to construe the Constitution are not authorized to thwart the will of the people by reading into the Constitution language not contained therein, or by construing it differently from its plain language adopted by them."[71] In fact, some amendments have been submitted to the voters, not "to create a legislative power," but to ascertain the will of the people regarding a governmental policy.[72] Ideally, the significance of a phrase or clause will be "plainly discoverable" from the words themselves. The language will be considered to have been used "in [its] natural sense and ordinary significance unless the context indicates the contrary."[73] Also, one must presume that the words were carefully selected and used as people generally understood them at the time of adopting the constitution.[74]

One should also consult common law that "limits and determines the meaning of words and phrases used in the Constitution when the context or some other provision of the instrument or some previous enactment existing when the Organic Law was framed does not deter-

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constitutional provisions in light of time of their adoption, policy goals, and general rules of construction).

68. Gallagher v. State, 690 S.W.2d 587, 591 (Tex. Crim. App. 1985) (en banc); *Myer*, 84 Tex. Crim. at 296, 207 S.W. at 103.

69. *See* County of Harris v. Sheppard, 156 Tex. 18, 25-26, 291 S.W.2d 721, 726 (1956) (stating that constitutional provisions delineating particular intention would be classified as exception to general provision).

70. *Myer*, 84 Tex. Crim. at 297, 207 S.W. at 104; *Ex parte* Foster, 44 Tex. Crim. 423, 428, 71 S.W. 593, 596 (1903).

71. *Cramer*, 140 Tex. at 283-84, 167 S.W.2d at 154.

72. *Friedman*, 137 Tex. at 166, 151 S.W.2d at 580.

73. *Gallagher*, 690 S.W.2d at 592.

74. *Id.* at 592 (citing *Cramer*, 140 Tex. at 283-84, 167 S.W.2d at 154); *Ferguson*, 119 Tex. at 289, 28 S.W.2d at 530; Kemper v. State, 63 Tex. Crim. 1, 29-40, 138 S.W. 1025, 1039-45 (1911).

mine them."[75] It is also proper to use a law dictionary, like Black's or Ballentine's, for a definition of commonly understood terms.[76] Often, generic terms, like "insurance," "search," and "seizure," were intended to include future things not within human experience or knowledge.[77]

Likewise, courts must assume that the people, in adopting constitutional texts, carefully selected the language and intended to give each text its own effect.[78] Thus, a court must construe all the constitutional provisions together and, if possible, give effect to all of them.[79] One may not assume that "separate and distinct provisions were intended to have the same and no other effect that one of them has, unless the language used, when considered in connection with the whole instrument," demonstrates this must have been the intent.[80] Judges may not question the wisdom of a constitutional provision, and must, where the language is "plain," give it "full effect without regard to the consequences"[81] and must protect its dignity.[82]

What is the approach, however, when the language is not plain? First, constitutional provisions may not be given a "technical construction which would defeat their purpose."[83] When a provision is open to more than one understanding, it "will not be so construed or

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75. Morrow v. Corbin, 122 Tex. 553, 564, 62 S.W.2d 641, 647 (1933); Chapin v. State, 107 Tex. Crim. 477, 479-80, 296 S.W. 1095, 1097 (1927).

76. *See Gallagher*, 690 S.W.2d at 592 (relying on Ballentine's definition of "official misconduct"); *see* RONALD D. ROTUNDA, ET AL., TREATISE ON CONSTITUTIONAL LAW § 23.24, at 668 (1992) (stating words in constitution have normal and ordinary meaning).

77. *See* Koy v. Schneider, 110 Tex. 369, 465, 221 S.W. 880, 918 (1920) (recognizing that generic terms may include classes not yet devised).

78. Hanson v. Jordan, 145 Tex. 320, 323, 198 S.W.2d 262, 263 (1946); Mellinger v. City of Houston, 68 Tex. 37, 44, 3 S.W. 249, 252 (1887); *see* San Antonio & A.P. Ry. v. State, 128 Tex. 33, 35, 95 S.W.2d 680, 687 (1936) (recognizing that legislative intent should govern statutory construction).

79. *See* Duncan v. Gabler, 147 Tex. 229, 234, 215 S.W.2d 155, 159 (1948) (recognizing established rule for interpreting constitutional provisions together).

80. *Mellinger*, 68 Tex. at 44, 3 S.W. at 252.

81. *Gallagher*, 690 S.W.2d at 591; *see Cramer*, 140 Tex. at 285, 167 S.W.2d at 154 (observing that interpretation of constitutional provision should not defeat its own purpose); Lewis v. Independent Sch. Dist. of Austin, 139 Tex. 83, 88, 161 S.W.2d 450, 452-53 (1942) (applying "clear & unambiguous" constitutional language); *Koy*, 110 Tex. at 413, 221 S.W. at 891 (construing ordinary words in light of historical use and meaning); Keller v. State, 87 S.W. 669, 676 (Tex. Crim. App. 1905) (stating that plain and definite constitutional language should be taken on ordinary meaning and acceptance). *Koy*, *Myer*, *Cramer*, and *Gallagher* are four leading cases on constitutional construction.

82. *In re* McLean, 725 S.W.2d 696, 698 (Tex. 1987).

83. *Cramer*, 140 Tex. at 284-85, 167 S.W.2d at 154.

interpreted as to lead to absurd conclusions, if any other construction or interpretation can reasonably be indulged in."[84] And the court should avoid, whenever possible, construing a constitutional section so as to render it ambiguous or contradictory to another section.[85]

The same standards apply when interpreting different constitutional provisions that appear to conflict with each other. The court must first determine that it is impossible to harmonize the provisions by a reasonable construction.[86] If a subsequent constitutional amendment is involved, the presumption is that the latter controls since it is the "latest expression of the will of the people."[87] The courts view an amendment as an integral part of the original constitution which explains and qualifies every other part of the constitution.[88]

One should also consider legislative interpretation and court decisions rendered during the period between one constitution and the adoption of a successor. If there were no textual changes, the legislative and judicial gloss placed on the earlier version becomes part of the subsequent document[89] because the "voters are presumed to have adopted the construction of a word or phrase which has been placed thereon by the courts."[90] When a specific legal phrase or term received a judicial construction prior to its incorporation into the constitution, the inference is that the construction continues to bear the

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84. *See id.* at 294, 167 S.W.2d at 159 (Alexander, C.J., dissenting) (citing *Koy*, 110 Tex. at 369, 221 S.W. at 880).

85. *Gallagher*, 690 S.W.2d at 591-92.

86. Pool v. Ford Motor Co., 715 S.W.2d 629, 633-35 (Tex. 1986); *Duncan*, 147 Tex. at 233, 215 S.W.2d at 159; Collingsworth County v. Allred, 120 Tex. 473, 481, 40 S.W.2d 13, 16 (1931); *see Sheppard*, 156 Tex. at 26, 291 S.W.2d at 726 (stating if section of constitution expresses general intention and another section expresses particular intention incompatible with general, particular is to be considered exception to general); *San Antonio & A.P. Ry. Co.*, 128 Tex. at 42, 95 S.W.2d at 685 (holding that where provisions cannot be harmonized, more specific provision controls); *cf.* Conley v. Daughters of the Republic, 106 Tex. 80, 92, 156 S.W. 197, 201-02 (1913) (stating that statutes relating to same subject are to be taken together so effect may be given to each); Pittman v. Byars, 112 S.W. 102, 106 (Tex. Civ. App. 1908, no writ) (reasoning that similar language in present and prior constitutions gives rise to presumption that prior interpretations of language control).

87. Farrar v. Board of Trustees of Employment Retirement Sys. of Tex., 150 Tex. 572, 577, 243 S.W.2d 688, 692 (1951); *Cramer*, 140 Tex. at 280, 167 S.W.2d at 152; State v. Brownson, 94 Tex. 436, 440, 61 S.W. 114, 115 (1901); Gulf C. & S.F. Ry. Co. v. Rainbolt, 67 Tex. 654, 656, 4 S.W. 356, 357 (1887).

88. *Allred*, 120 Tex. at 479, 40 S.W.2d at 15.

89. LeCroy v. Hanlon, 713 S.W.2d 335, 340 (Tex. 1986).

90. City of El Paso v. El Paso Community College Dist., 729 S.W.2d 296, 299 (Tex. 1986) (citing Richey v. Moor, 112 Tex. 493, 497, 249 S.W. 172, 173 (1923)); *Pittman*, 112 S.W. at 103.

same significance.[91] These rules also hold for constitutional provisions adopted from other states or countries such as Mexico or England.[92] Some deference is paid to these other jurisdictions' judicial interpretations issued subsequent to Texas's own adoption of the provision.[93]

Contemporaneous legislative and executive interpretations of a constitutional provision are also persuasive[94] and carry great weight when they go unchallenged for a long period of time, particularly if the provision is less than clear.[95] Nonetheless, no amount of acquiescence can legalize an usurpation of power or thwart the will of the people which is plainly expressed in the constitution.[96]

Often, constitutional provisions are viewed as "organic codifications" of common law principles. In such cases, the common law tradition may help guide the exegesis.[97]

Another crucial step is to examine state statutory and case law predating Federal Supreme Court cases that construed comparable federal constitutional protections and required their observance in the states. For example, Texas courts interpreted the state's free speech and assembly provisions long before the First Amendment applied to the states. How Texas courts and citizens understood the tradition behind those guarantees prior to the extension of the First Amendment is critical in discerning constitutional intent.[98]

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91. *El Paso Community College*, 729 S.W.2d at 299 (citing *Richey*, 112 Tex. at 497, 249 S.W. at 173); *Gallagher*, 690 S.W.2d at 592; *Chapin*, 107 Tex. Crim. at 486, 296 S.W. at 1100; Carr v. Tucker, 42 Tex. 330, 332-35 (1875); *Pittman*, 112 S.W. at 106.

92. *Koy*, 110 Tex. at 409-10, 221 S.W. at 889-90; Robertson v. State, 63 Tex. Crim. 216, 241, 142 S.W. 533, 546 (1912); State v. Coe, 679 P.2d 353, 359-60 (Wash. 1984).

93. *Koy*, 110 Tex. at 410, 221 S.W. at 890.

94. *Id.* at 401, 221 S.W. at 885.

95. Markowsky v. Newman, 134 Tex. 440, 449, 136 S.W.2d 808, 813 (1940); *Allred*, 120 Tex. at 480, 40 S.W.2d at 16.

96. *See, e.g.*, City of Fort Worth v. Howerton, 149 Tex. 614, 620, 236 S.W.2d 615, 618 (1951) (holding that legislature cannot pass laws which are contrary to constitution); *Ex parte* Heyman, 45 Tex. Crim. 532, 543, 78 S.W. 349, 354 (1904) (acquiescence cannot legalize usurpation of power); Kimbrough v. Barnett, 93 Tex. 301, 313, 55 S.W. 120, 123 (1900) (stating that court bound to follow constitution framed by people).

97. *See, e.g.*, Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989) (free speech); Austin & N.W. Ry. Co. v. Cluck, 97 Tex. 172, 176, 77 S.W. 403, 404 (1903) (privacy); *see also* Ellen A. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, 53 ALB. L. REV. 259, 261 (1989) (explaining that many constitutional rights had common law antecedents).

98. *See, e.g.*, Davenport v. Garcia, 834 S.W.2d 4, 7-10 (Tex. 1992) (discussing free expression tradition in Texas); Joseph H. Hart, *Free Speech on Private Property: When Fundamental*

B. *Specific Rules of Construction for the Bill of Rights*

Four important rules apply to construing bill of rights guarantees. First, courts must construe the bill of rights liberally.[99] The second rule recognizes the unique role of the bill of rights in protecting personal freedoms: when personal liberties guaranteed by the constitution are at stake, courts must apply "an individual rights perspective," rather than "a societal perspective."[100] Third, the bill of rights is not "a series of one-dimensional rules to be applied blindly," but is "a guiding norm and principle to be applied and interpreted by the courts."[101] Finally, at least as to some bill of rights protections, the courts should liberally apply remedial relief.[102] This is a well-recognized and time-honored exception to the general principles of Texas constitutional construction. The Texas Equal Rights Amendment[103] is a classic remedial example, and its required liberality might strengthen arguments in favor of the per se or "plain language" rule. Banning discrimination without qualification might also support the contention that the amendment should be extended to some non-government sectors or should be applied using less rigorous tests, such as requiring only a showing of discriminatory effect rather than discriminatory intent.[104]

Rights Collide, 68 TEX. L. REV. 1469, 1475 (1990) (stating that framers of Texas Constitution wanted greater speech protection).

99. *See generally* Brown v. State, 617 S.W.2d 196, 200 (Tex. Crim. App. 1981) (en banc) (holding search and seizure unlawful because balloon is not inherently suspicious), *rev'd*, 460 U.S. 730 (1983).

100. LeCroy v. Harlon, 713 S.W.2d 335, 342 (Tex. 1986); *see* DuPuy v. Waco, 396 S.W.2d 103, 106 (Tex. 1965) (reasoning that individual property rights must be protected and society must equally bear cost of progress).

101. *In re* McLean, 725 S.W.2d 696, 698 (Tex. 1987); *see* State v. Brownson, 94 Tex. 436, 440, 61 S.W. 114, 115 (1901) (holding that even though no express provision exists, legislature can create school districts).

102. Koy v. Schneider, 110 Tex. 369, 448, 221 S.W. 880, 909 (1920) (discussing liberal rule for construing remedial relief provisions in statutes and constitutions).

103. "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin . . . ." TEX. CONST. art. I, § 3a.

104. *See* JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 72 (stating that "the plain wording of the equal rights amendment prohibits discrimination without qualification"); *see also* Guadalupe Mena v. Ann Richards, No. C-454-91-F (Dist. Ct. of Hidalgo County, 332d Judicial Dist. of Tex., Findings of Fact and Conclusions of Law, Sept. 27, 1991) (copy on file with *St. Mary's Law Journal*) (finding redistricting plans violate Texas Equal Rights Amendment because plans had discriminatory impact); Enrique Lopez v. Del Valle Indep. Sch. Dist., No. 475,874 (Dist. Ct. of Travis County, 261st Judicial Dist. of Tex., Findings of Fact and Conclusions of Law, May 21, 1991) (copy on

C. *Rule of Statutory Construction*

The Texas Government Code sets out principles that, though applicable to construing statutes, may be helpful, at least by analogy, when courts interpret constitutional provisions.[105] Most of these rules are similar to those devised by the courts for constitutional interpretation.

VI. TEXTUAL ANALYSES

A. *Variations of Text*

It is now axiomatic that the United States Constitution sets the "floor" of constitutional protection and the Texas Constitution sets the "ceiling."[106] The state constitution can give "protection to rights . . . which the constitution of the United States does not give;"[107] and that additional protection is often indicated, and required, by the very language of the Texas Bill of Rights.[108]

The most common textual approach is to compare variations between the national and state constitutions.[109] State bills of rights typically have unique guarantees not found in their federal counterpart, evidencing greater protection.[110] For example, Texas has an equal rights amendment flatly prohibiting discrimination on the basis of race, ethnic origin, color, sex, or creed, but the United States Consti-

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file with *St. Mary's Law Journal*) (concluding school district's election system violates Texas Equal Rights Amendment because of discriminatory impact).

105. TEX. GOV'T CODE §§ 311.021-311.032, 312.001-312.013 (Vernon 1988 & Vernon Supp. 1991).

106. *See* LeCroy v. Harlon, 713 S.W.2d 335, 338 (Tex. 1986) (explaining that "while state constitutions cannot subtract from rights guaranteed by the United States Constitution, state constitutions can and often do provide additional rights for their citizens"); *but see* Andrews v. State, 652 S.W.2d 370, 372 (Tex. Crim. App. 1983) (en banc) (suggesting that state can find less-than-federal protection).

107. Whitworth v. Bynum, 699 S.W.2d 194, 196 (Tex. 1985); *see also* Mellinger v. City of Houston, 68 Tex. 37, 44, 3 S.W. 249, 252 (1887) (holding that rights protected by United States Constitution are as fully protected by state constitutions).

108. *See, e.g.*, Leander Indep. Sch. Dist. v. Cedar Park Water Supply Corp., 479 S.W.2d 908, 912 (Tex. 1972) (enforcing higher burden than United States Constitution by requiring that property exempted under Texas Constitution be used for public purposes and be "public property"); Cramer v. Sheppard, 140 Tex. 271, 281-82, 167 S.W.2d 147, 152-53 (1942) (holding that state statute prohibiting state officer from holding more than one position does not conflict with United States Constitution); *Mellinger*, 68 Tex. at 44, 3 S.W. at 252 (finding that Texas Constitution prohibits ex post facto law in contracts but United States Constitution does not address issue).

109. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE 25-38 (1982) (presenting overview of textual analysis approach).

110. *LeCroy*, 713 S.W.2d at 338.

tution has no parallel provision.[111] The Texas Bill of Rights also has two due process guarantees.[112] Texas provides significantly different, and arguably greater, constitutional rights for the free exercise of religion[113] and against the entanglement of church and state.[114] Conversely, the Texas Constitution often requires a generalized belief in "a Supreme Being."[115]

A second textual method is to examine linguistic structure.[116] For example, various states like Texas have free speech and assembly protections framed as affirmative rights rather than simply as restrictions on government power.[117] These more expansive guarantees, which are recognized by the Federal Supreme Court to be within a state's "sovereign right," offer a significant distinction upon which judges rely to construe state constitutions.[118]

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111. TEX. CONST. art. I, § 3a. Texas did ratify the Federal Equal Rights Amendment in 1972, but a majority of states failed to adopt it. *See* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1212, 1212-14 (1985) (discussing state equal rights provisions).

112. TEX. CONST. art. I, §§ 13, 19; *see LeCroy*, 713 S.W.2d at 340-41 (discussing separate guarantees provided by §§ 13 and 19).

113. TEX. CONST. art. I, §§ 4-7; *see Ex parte* Luehr, 159 Tex. Crim. 566, 569, 266 S.W.2d 375, 377 (1954) (invalidating ban on door-to-door proselytizing); Juarez v. State, 102 Tex. Crim. 297, 305, 277 S.W. 1091, 1094-95 (1925) (prohibiting exclusion of Catholics from grand juries).

114. *See* Bullock v. Texas Monthly, Inc., 731 S.W.2d 160, 166-67 n.1 (Tex. App.—Austin 1987, writ ref'd n.r.e.) (Carroll, J., dissenting) (providing textual and historical analyses of Texas Constitution), *rev'd sub nom.* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989) (noting overriding interest in keeping government out of religious matters).

115. *See, e.g.*, TEX. CONST. art I, § 4 (providing that no one be excluded from holding office on account of religious sentiment provided person acknowledges existence of Supreme Being).

116. *E.g.*, *LeCroy*, 713 S.W.2d at 339 (stating, "all-inclusive language contrasts with qualifying language used in other sections").

117. *See, e.g.*, Nuclear Weapons Freeze Campaign v. Barton Creek Square Shopping Ctr., No. 349,268 (Dist. Ct. of Travis County, 126th Judicial Dist. of Tex., letter decision, July 13, 1983) (copy on file with *St. Mary's Law Journal*) (stating that Texas Constitution grants affirmative rights); James C. Harrington, *Free Speech, Press, and Assembly Liberties under the Texas Bill of Rights*, 68 TEX. L. REV. 1435, 1443 (1990) (discussing First Amendment as limit on government censorship versus Texas Constitution conferring affirmative communicative rights); *see also* Jones v. Memorial Hosp. Sys., 746 S.W.2d 891, 893 (Tex. App.—Houston [1st Dist.] 1988, no writ) (stating difference between free speech in United States Constitution and free speech in Texas Constitution is affirmative versus negative terms); Right to Life Advocates, Inc. v. Aaron Women's Clinic, 737 S.W.2d 564, 567 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (stating affirmative right of individual free speech), *cert. denied*, 102 U.S. 47 (1988).

118. PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74, 81 (1980); O'Quinn v. State Bar of Tex., 763 S.W.2d 397, 402-03 (Tex. 1988); *see also* Long v. State, 742 S.W.2d 302, 308-10

A third textual process is to consider the phrasing of the language. The federal ban on "cruel *and* unusual" punishment differs from the disjunctive "cruel *or* unusual" punishment in various state charters, including the Texas Constitution. The California Supreme Court relied on that variance to abolish capital punishment,[119] although United States Justices reached a different conclusion when analyzing the federal "cruel and unusual" phrase.[120] Alaska similarly interpreted its search and seizure provision more expansively, though, except for the phrase "and other property," the Alaskan provision is identical to the Fourth Amendment.[121]

It is often helpful to examine how a sister-state has interpreted a similar constitutional provision,[122] especially if that provision and the Texas version share a common origin or were drafted near the same time.[123]

B. *Non-Variations in Text*

Obviously, when the language of the Texas Constitution differs from its federal counterpart, it is usually easier "to ascertain and give effect to the plain intent and language of the framers of a constitutional amendment and of the people who adopted it."[124] But how

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n.9 (Tex. Crim. App. 1987) (en banc) (applying right to confrontation under Texas Constitution as compared to United States Constitution); *LeCroy*, 713 S.W.2d at 339 (noting that state constitution provides additional rights for state citizens).

119. People v. Anderson, 493 P.2d 880, 883 (Cal. 1972) (later overturned by constitutional amendment). Texas, however, has upheld capital punishment. *See* Black v. State, 816 S.W.2d 350, 360-62 (Tex. Crim. App. 1991) (en banc) (noting that death penalty was not imposed arbitrarily).

120. *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 268 (1976) (rejecting argument that death penalty is cruel and unusual punishment for the reasons stated in Gregg v. Georgia, 428 U.S. 153, 168-87 (1976)).

121. Ellison v. State, 383 P.2d 716, 718 (Alaska 1963).

122. *E.g.*, White v. White, 108 Tex. 570, 585-86, 196 S.W. 508, 512 (1917) (looking to language of sister-state constitutions to uphold right to trial by jury); Robertson v. State, 63 Tex. Crim. 216, 226-28, 142 S.W. 533, 534 (1912) (noting Texas confrontation provision was borrowed from other state constitutions); Bell v. Indian Livestock Co., 11 S.W. 344, 345-46 (Tex. 1889) (comparing garnishment provision to similar laws of other states).

123. *See, e.g.*, Steddum v. Kirby Lumber Co., 110 Tex. 513, 519-21, 221 S.W. 920, 921-22 (1920) (addressing due process provision as construed by state and federal governments); *Robertson*, 63 Tex. Crim. at 226-228, 142 S.W. at 533-34 (first analyzing cross-examination rule of 33 states and then reviewing federal rule); *Bell*, 11 S.W. at 345 (comparing due process laws of several states with United States Constitution).

124. Gragg v. Cayuga Indep. Sch. Dist., 539 S.W.2d 861, 865-66 (Tex.), *appeal dism'd*, 429 U.S. 973 (1976); *see also* Gallagher v. State, 690 S.W.2d 587, 592 (Tex. Crim. App. 1985) (considering intent and language of framers).

should a court interpret language that is close to or apparently inconsequentially different from the Federal Bill of Rights? Or how should a court react when the documents share similar language in one section but the documents are significantly dissimilar overall? Would it make sense, historically or conceptually, to argue that because the wording of the Texas and United States search and seizure protections are similar, judges must apply uniform interpretation?[125]

Such a concession to uniformity lacks appreciation for the federalism that binds the nation together, and it deprives Texas judges and legal scholars of the opportunity to fashion case law that might address problems of Texans better than might federal decisions.[126] After all, federal doctrines evolved over scores of years and carry their own historical encrustation. Why assume that Texas courts would not learn from that experience and craft their own constitutional jurisprudence? Our forebears surely would have rejected the notion that the fundamental state charter, drafted after years of rugged experience and molded after reflection on the constitutions of other states, could diminish in meaning each time the United States Supreme Court issued a new ruling.[127] Moreover, the Federal Bill of Rights was not originally intended to apply to the day-to-day relations between the people and the state, but to their relation with the federal government. Indeed, many state bills of rights predated and set the model for the United States Constitution.[128]

Textual similarity should mean nothing more, and nothing less, than that the words are alike. The meaning and application of the rights behind the language are left to the wisdom and jurisprudence of the courts.[129] Former Justice Hans Linde addressed the same issue

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125. The Texas Court of Criminal Appeals, in a well-reasoned and comprehensive opinion, has indicated that the time has come to construe the Texas and federal search and seizure provisions independently, although phrased alike. Heitman v. State, 815 S.W.2d 681, 691 (Tex. Crim. App. 1991) (en banc).

126. *See* George E. Dix, *Judicial Independence in Defining Criminal Defendants' Texas Constitutional Rights*, 68 TEX. L. REV. 1369, 1370-71 (1990) (discussing individual state's needs to reflect own tradition and heritage).

127. *See* Osban v. State, 726 S.W.2d 107, 119 (Tex. Crim. App. 1986) (en banc) (Miller, J., dissenting) (arguing for interpreting Texas Constitution independently of United States Constitution); Kemper v. State, 63 Tex. Crim. 1, 41, 138 S.W. 1025, 1044 (1911) (noting that rights of Texas citizens must be recognized).

128. *See* Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1081-83 (1985) (noting, "The States' Early Primacy").

129. *See, e.g., Osban*, 726 S.W.2d at 110-11 (discussing scope of search and seizure protection); Thomas v. State, 723 S.W.2d 696, 702-04 (Tex. Crim. App. 1986) (en banc) (inter-

for the State of Oregon:

> The state argues that when the Oregon Constitution employs terms "substantially identical" to those in the constitutions of the United States or of other states, the framers of the Oregon Constitution should be presumed to have sought to achieve the same objectives. That they sought the same objectives is generally true in the absence of contrary evidence. This does not, however, say much toward demonstrating the correct application of such a constitutional text. In particular, the proposition does not support the non sequitur that the United States Supreme Court's decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions.[130]

Retired Justice William Brennan made a similar observation: "More and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their state even more protection than the federal provisions, even those identically phrased."[131]

Further, Texas courts have long recognized that simply because certain words are chosen for a constitutional text does not necessarily mean that the words would forever have a fixed meaning:

> On the contrary, it does sometimes happens that a certain word . . . may be found to have been used in a sense broad enough to include things not then within the human experience or knowledge; and especially is that true of words of generic import—such, for illustration, as "insurance," which may include classes of insurance not yet devised.[132]

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preting constitutional self-incrimination protection); *see also* State v. Johnson, 719 P.2d 1248, 1254-55 (Mont. 1986) (comparing self-incrimination rights provided by Montana and United States Constitutions); Deras v. Meyers, 535 P.2d 541, 549 (Or. 1975) (stating United States Constitution not controlling when state constitution provides broader protection).

130. State v. Kennedy, 666 P.2d 1316, 1322 (Or. 1983); *see, e.g.*, *Heitman*, 815 S.W.2d at 689-90 (holding that even if state and federal constitutions have same language, state document can give more protections); Koy v. Schneider, 110 Tex. 369, 411, 221 S.W. 880, 890 (1920) (holding that where similar clauses imported into constitution from other state, any subsequent construction thereof by courts of such state merely persuasive); Mellinger v. City of Houston, 68 Tex. 37, 42, 3 S.W. 249, 252-53 (1887) (where section of constitution not fully construed when adopted, later interpretations not held to be people's intent when adopted); *see also* State v. Newman, 696 P.2d 856, 861 n.6 (Idaho 1985) (stating that federal principles are equally sound under state's constitution); Pfost v. State, 713 P.2d 495, 500-01 (Mont. 1985) (requiring that statute meet strict scrutiny standards under state and federal constitutions).

131. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

132. *See* Collingsworth County v. Allred, 120 Tex. 473, 480, 40 S.W.2d 13, 16 (1931) (discussing broad powers in authorization of agencies); *see Koy*, 110 Tex. at 401, 221 S.W. at 885 (construing word "election" beyond its common meaning).

Thus, even when federal and state texts read alike, state courts may presume correctly that the voters intended different protections simply based upon the plain meaning of the language itself. That approach should not be turned about-face by assuming that, if the language is the same, case law must be identical. No real justification lies for presuming that construction of specific language in the United States Constitution should control the meaning of like language in the Texas Constitution.[133] As former Justice Franklin Spears once observed: "By enforcing our constitution, we provide Texans with their full individual rights and strengthen federalism."[134]

C. *Internal Structure*

The structure of a bill of rights within a state constitution often reflects a critical difference from the federal version.[135] For example, a structural argument might focus on the prominent placement of the Texas Bill of Rights at the very beginning of the constitution.[136] Such an argument might also note the declaration contained within the preamble of Article I that the rights charter recognizes and establishes "the general, great and essential principles of liberty and free government."[137] The Federal Bill of Rights, by contrast, was appended in late 1791, more than two years after ratification of the Constitution.

In fact, the Article I preamble has provided an independent source for the right of privacy which is not enumerated in the Texas Bill of Rights.[138] The supreme court of Texas found privacy to be a fundamental right, one of those " 'general, great, and essential principles of

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133. *See Allred*, 120 Tex. at 401, 40 S.W.2d at 16 (reasoning that language of constitution may be given various interpretations); *see also* State v. Kaluna, 520 P.2d 51, 58 (Hawaii 1974) (rejecting United States v. Robinson, 414 U.S. 218 (1973) and providing more protection even though wording of Hawaiian provision was identical to Fourth Amendment).

134. LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1986) (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-603 (1977)).

135. Koy v. Schneider, 110 Tex. 369, 401, 221 S.W. 880, 885 (1920).

136. Davenport v. Garcia, 834 S.W.2d 4, 8 (Tex. 1992); Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc).

137. TEX. CONST. art. I., pmbl. Another sign of the preeminent importance of the 1876 bill of rights to the voters of Texas was reflected in the 1972 constitutional amendment allowing the assembly of the unsuccessful 1974 constitutional convention. The amendment provided that, regardless of the form of a new constitution, the "Bill of Rights of the present [1876] Texas Constitution shall be retained in full." TEX. CONST. art. XVIII, § 2(g).

138. *See* Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987) (illustrating right to privacy is penumbral); James C.

liberty and free government' established by the Texas Bill of Rights" which the other more specific provisions in Article I were designed to protect.[139] Some private matters are not considered fundamental rights under the United States Constitution.[140]

Other signals of structural variance—such as limits on government spending—can be observed in constitutional provisions that narrow the role of government. The Texas Constitution fashions a decentralized government with diffused power[141] but which expansively guarantees certain rights to the people. This document is demonstrably different from the United States Constitution which empowers the operation of the federal government but limits that power through the Bill of Rights and other provisions. Section 29 of the Texas Bill of Rights is a singular guarantee that sharpens the structural difference between the federal and state documents and rejects any state hegemony or encroachment on individual rights "which shall forever remain inviolate."[142] Whatever it means exactly, Section 29 clearly has independent vitality.[143]

The Texas Constitution is extremely cumbersome and is much more detailed than the federal version. These qualities are not the result of unartful drafting or inferior importance, but are caused by the underlying purpose of the document. The constitution imple-

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Harrington, *Privacy and the Texas Constitution*, 13 VT. L. REV. 155, 169-70 (1988) (discussing right to privacy in Texas Constitution).

139. *Texas State Employees Union*, 746 S.W.2d at 205.

140. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (stating that there is no fundamental right to engage in homosexual sodomy).

141. *See* Vinson v. Burgess, 773 S.W.2d 263, 265-67 (Tex. 1989) (discussing intention of Texas Constitution to provide balance of power); Shepherd v. San Jacinto Junior College Dist., 363 S.W.2d 742, 743 (Tex. 1962) (holding that Texas Constitution operates solely as limitation on power); Solon v. State, 54 Tex. Crim. 261, 266, 114 S.W. 349, 354 (1908) (on rehearing) (holds that state constitution is limitation of and not grant of power); Mellinger v. City of Houston, 68 Tex. 37, 42-43, 3 S.W. 249, 252-53 (1887) (stating that civil rights are protected under 14th Amendment of United States Constitution and Article I, § 19 of Texas Constitution); *see also* Pfost v. State, 713 P.2d 495, 500-01 (invalidating state statute on state constitutional grounds) (Mont. 1985), *overruled by* Meech v. Hillhaven West, Inc., 776 P.2d 488, 491 (Mont. 1989); State v. Kennedy, 666 P.2d 1316, 1316 (Or. 1983) (noting state constitutional limitations on power of state).

142. TEX. CONST. art. I, § 29.

143. *See* Travelers Ins. Co. v. Marshall, 124 Tex. 45, 51, 76 S.W.2d 1007, 1009-10 (1934) (holding that § 29 will not allow legislature to go beyond limits set in constitution); *see also* Gold v. Campbell, 117 S.W. 463, 465 (Tex. Civ. App. 1909, no writ) (discussing importance and role of bill of rights); Louis Karl Bonham, Note, *Unenumerated Rights Clauses in State Constitutions*, 63 TEX. L. REV. 1321, 1332-33 (1985) (stating that subscribing to idea of limited power in state constitution will probably require unenumerated rights clause).

ments a different political philosophy concerning the function of government and individual rights. That philosophy is reflected in the dramatic contrast between the overall restrictiveness of the Texas Constitution and the expansiveness of its bill of rights. Generally, textual and structural analyses go hand-in-hand in providing insight into the drafters' and voters' intent.

VII. OTHER MEANS OF DISCERNING THE INTENT OF THE FRAMERS AND VOTERS

A. *Primary and Secondary Sources*

Various other methods help ascertain intent when it is not self-evident from the text or interpretive case law. One important step is to consult primary sources, such as journals and records of the particular constitutional convention which approved the provision in question.[144] Unfortunately, official convention records are sparse, reflecting a deliberate desire to avoid lengthy, verbatim reporting of debates and proceedings, often for reasons of economy. There are journals for some conventions,[145] however, which are available in the Lorenzo de Zavala state archives building and other libraries with significant Texas history holdings. The journals are the daily summaries of the events at the respective convention and often report the general parameters of debates.

Other sources are newspaper accounts of the conventions and diaries or notes of individuals involved in drafting the constitution. One of the more respected newspapers during the 1875 convention was the *Galveston Daily News*. The *Daily News* summarized the editorial positions of other newspapers and reported the diverse points made during the debate over the drafting and ratification of the 1876 constitution. Other important contemporary chronicles were the *Austin Daily Democratic Statesman*, *Houston Daily Telegraph*, *Panola Watchman*, San Antonio's *Herald and Daily Express*, *Waco Weekly*

144. *E.g.*, LeCroy v. Hanlon, 713 S.W.2d 335, 339-40 (Tex. 1986) (discussing 1875 constitutional convention's journal to ascertain intent of open courts provision in Texas Constitution).

145. *E.g.*, DEBATES OF THE TEXAS CONVENTION 302-13 (W.F. Weeks ed., 1846); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS BEGUN AND HELD AT THE CITY OF AUSTIN, SEPTEMBER 6TH, 1875 271-75 (Sept. 6, 1875) (available from Texas State Archives); JOURNALS OF THE CONVENTION 131-35 (Miner & Cruger eds., 1845); *see also* SETH S. MCKAY, MAKING THE TEXAS CONSTITUTION OF 1876 149 (1924) (providing history of Texas constitutional development).

Examiner and Patron (the Grange newspaper), *Dallas Herald*, and *Georgetown Democrat*. These sources help evaluate the debates concerning particular constitutional provisions. These debates typically occurred when a provision's "prototype" was first introduced, when the provision was discussed in committee, and when it was considered for final passage at the convention.[146]

If a section remained unchanged when a constitution was redrafted, it is presumed that the framers and the voters intended its meaning to be the same as that of the original provision.[147] If the provision was debated and the debate recorded, intent is easily discernible and, if ascertained, may not be thwarted by a rule of construction.[148] Once found, the intent is "regarded [to be] as good as written into the enactment."[149] In gleaning intent, "very great weight" is assigned to the argument of the leading proponents of the measure.[150] If there was no debate in the convention over the provision, then the plain meaning of the provision is presumed.[151]

The next step is to look at the public debate during the ratification process in an attempt to reveal the voters' intent. The fact that the 1836 constitution was "the only constitution accepted without acrimony in the history of Texas"[152] underlines the people's scrutiny of the constitution's language, structure, and intent. Analyzing the development of Texas free speech and assembly rights provides a good model of how to approach this subject area.

Every constitution of Texas since 1836 has explicitly cast the com-

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146. *See, e.g.*, Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bills of Rights*, 41 BAYLOR L. REV. 629, 665-69 (1989) (discussing 1875 constitutional convention).

147. Koy v. Schneider, 110 Tex. 369, 466, 221 S.W. 880, 918 (Tex. 1920); *see LeCroy*, 713 S.W.2d at 339 (stating, "Every Texas Constitution has contained an open courts provision with the identical wording").

148. Cramer v. Sheppard, 140 Tex. 271, 283-84, 167 S.W.2d 147, 154 (1943); *see* RAOUL BERGER, GOVERNMENT BY JUDICIARY 45 (1977) (stating rules of construction not meant to extinguish intent of framers).

149. RAOUL BERGER, GOVERNMENT BY JUDICIARY 137 (1977).

150. *Id.* at 136-37; MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 120 (1986).

151. *LeCroy*, 713 S.W.2d at 340 (noting, "Apparently, the open courts provision was uncontroversial"). *See generally* A.J. Thomas, Jr. & Ann Van Wynen Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 913 (1957) (reviewing history of Texas Constitution that was proposed by common men distrustful of delegating excessive power to public officials).

152. JOE BERTRAM FRANZ, TEXAS: A BICENTENNIAL HISTORY 75 (1976).

municative rights as affirmative guarantees and has proscribed government interference with the liberty to speak, write, publish, and assemble. This dual protection is no happenstance creation. Besides the intent discernible from the overall thrust and structure of the state constitution—especially the 1876 version—there are specific historical indicators that the framers of the Texas Constitution sought to protect free expression beyond the guarantees in the federal charter.

Portions of the 1836 Declaration of Rights were at first influenced by but soon developed beyond the First Amendment. As originally proposed, the first sentence of Section 5 closely reflected the First Amendment: "No law shall ever be passed to curtail the liberty of speech or the press." This statement was followed by: "In all prosecutions for libels, the truth may be given in evidence, and the jury shall have the right to determine the law and the fact, under the direction of the court."[153] Before the constitution was submitted to the citizens of the Republic for ratification, the delegates added a sentence to the beginning of the text: "Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege."[154]

The version which emerged was adopted virtually verbatim in every subsequent constitution,[155] although its content was debated anew in the 1845 and 1875 conventions. In the 1845 convention, the delegates, expressing dismay and alarm at the First Amendment's failure to prevent Federalist suppression of speech, flatly rejected a proposal which would have deleted the affirmative language from the free speech provision.[156]

Similarly, on the convention floor in 1875, the delegates soundly defeated an effort to base the new charter on prior constitutions, turn-

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153. 1 H. GAMMEL, LAWS OF TEXAS 859, 868 (1898).

154. *Id.* at 1082. The sections in the Declaration of Rights were renumbered between the time of their proposal and their adoption; the free speech provision became Section 4. For discussion of the "responsibility" clause, see Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989) (explaining that "responsibility clause" does not require different standard of summary judgment for defamation cases); *Ex parte* Jimenez, 159 Tex. 183, 188, 317 S.W.2d 189, 194 (Tex. 1958) (rejecting argument that restrictions included in Election Code were violation of state constitutional right to free speech).

155. *See* Houston Chronicle Publishing Co. v. Shaver, 630 S.W.2d 927, 928 (Tex. Crim. App. 1982) (en banc) (discussing conflict between the constitutional rights of for trials and free press); DEBATES OF THE TEXAS CONVENTION 77 (W.F. Weeks ed., 1846) (debating gag rule on newspapers).

156. DEBATES OF THE TEXAS CONVENTION 77-95 (W.F. Weeks ed., 1846).

ing aside arguments that American constitutions are substantively the same.[157] Not only do Sections 8 and 27 of the Texas Bill of Rights confer affirmative communicative rights on Texans and impose stringent prohibitions on their government, but together with the general structure of the bill of rights and the constitution, they suggest that state government may have the affirmative duty to ensure citizens' ability to invoke such rights of expression and assembly. The First Amendment imposes no such obligation.

In any respect, the speech, press, and assembly protections in the Texas Constitution depart significantly from the classic eighteenth century model reflected in the First Amendment.[158] Texas judges zealously guarded these protections long before the Supreme Court obligated the states to extend First Amendment guarantees to their citizens in 1925.[159]

Most appellate courts in Texas, including the high court,[160] with few exceptions[161] have historically understood that Texas extends greater freedom than does the First Amendment.[162] The Texas Supreme Court has expressly stated that Section 8 of Article I grants greater liberty.[163] The courts have also understood that in implementing such enhanced protections, the "principle encouraging the free exchange of information and ideas" should guide their deci-

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157. *See* SETH S. MCKAY, MAKING THE TEXAS CONSTITUTION OF 1876 43-45 (discussing constitutional development).

158. *See* Jerome A. Barron, *Access to the Press-A New First Amendment Right*, 80 HARV. L. REV. 1642-43 (1967) (reflecting romantic view of First Amendment that without government intervention there is "free market" mechanism for protecting ideas).

159. Gitlow v. New York, 268 U.S. 652, 666 (1925); *see* Stromberg v. California, 283 U.S. 359, 368 (1931) (stating that due process liberty includes free speech); Fiske v. Kansas, 274 U.S. 380, 386 (1927) (holding that language of manifesto protected under *Gitlow* test).

160. *E.g.*, Davenport v. Garcia, 834 S.W.2d 4, 7-10 (Tex. 1992); *Casso*, 776 S.W.2d at 556; O'Quinn v. State Bar of Texas, 763 S.W.2d 397, 402-03 (Tex. 1988); Express Printing Co. v. Copeland, 64 Tex. 354, 359 (1885).

161. *E.g.*, Reed v. State, 762 S.W.2d 640, 644 (Tex. App.—Beaumont 1988, pet. ref'd); Lindsay v. Papageorgiou, 751 S.W.2d 544, 549 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

162. *See, e.g.*, *Ex parte* Meckel, 87 Tex. Crim. 120, 125-26, 220 S.W. 81, 84 (1920) (discussing state power in conjunction with bill of rights); *Ex parte* Tucker, 110 Tex. 335, 337-38, 220 S.W. 75, 76 (1920) (acknowledging that federal and state constitutions protect "freedom of speech" and "freedom of the press"); *Ex parte* Neill, 32 Tex. Crim. 275, 275, 22 S.W. 923, 923 (Tex. Crim App. 1893) (applying § 8 of state bill of rights to nullify ordinance that declared newspaper was nuisance).

163. *Davenport*, 834 S.W.2d at 7-10 (containing history of Texas free speech doctrine and discussing Texas constitutional protections).

sions.[164] In fact, a few appellate decisions have even suggested that the affirmative structure of the "highly valued" Texas rights of speech, expression, and petition might also prevent private parties from abridging these rights in some situations.[165]

For modern-day provisions, it is appropriate to examine whatever summary or description was placed on the ballot proposal that the voters ratified as well as any official state-sponsored analysis of the amendment and how it would function.[166] One should also consider the reports or summaries of the Texas Legislative Council.

One of the more complete composite studies of the current constitution is George Braden's *The Constitution of the State of Texas: An Annotated and Comparative Analysis*,[167] written as part of the unsuccessful attempt to pass a new constitution in 1974. However, Braden's examination of the bill of rights must be taken with a caveat because his overall agenda was to restructure the Texas Bill of Rights to appear more like its federal counterpart, although the amendment permitting the 1974 convention prohibited amending the bill of rights.[168]

B. *Historical Approaches*

To decipher intent, the history of the era in which the constitutional provision developed and the social and political problems those Texans faced may be very important.[169] The historical development

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164. Garcia v. Peeples, 734 S.W.2d 343, 349 (Tex. 1987).

165. *See Shaver*, 630 S.W.2d at 928-29 (explaining Texas perspective on free expression); Houston Chronicle Publishing Co. v. McMaster, 598 S.W.2d 864, 867-68 (Tex. Crim. App. 1980) (en banc) (making defendant's hearing for writ of habeas corpus open to public); *Neill*, 32 Tex. Crim. at 275-76, 22 S.W. at 923-24 (finding ordinance that made newspaper public nuisance in violation of bill of rights); Jones v. Memorial Hosp. Sys., 746 S.W.2d 891, 894 (Tex. App.—Houston [1st Dist.] 1988, no writ) (finding affirmative guarantees of free speech under Texas Constitution support cause of action against some private parties).

166. *Cf.* White v. Davis, 533 P.2d 222, 234 n.11 (Cal. 1975) (using election brochure to interpret legislative measures and constitutional amendments).

167. GEORGE BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS (1977).

168. TEX. CONST. art. XVII, § 2(g).

169. *See generally* PHILIP C. BOBBITT, CONSTITUTIONAL FATE 9-24 (1982) (discussing historical argument concerning constitution); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 513-14 (1974) (rejecting theory that framers considered prospective consequences of their rules and thus changed from instrumentalism to formalistic approach).

of Texas is significantly different from that of the eastern United States. That diversity often reflects itself in constitutional exegesis.

First, Texans faced problems with the central government in Mexico when Texas formed that country's northern frontier. Mexico City's lack of responsiveness and its arbitrary conduct pushed the Texans toward regional autonomy[170] and Texas moved to become a republic, and later a state. The reasons for these actions and the goals of the respective founders of the republic must be considered to determine the intent behind constitutional safeguards. The new republic also faced difficulties integrating the Mexicans who became Texans when Texas gained its independence. Racial and ethnic polarization was often exacerbated, but the people recognized the need to structure a *modus vivendi* to establish stability.

The Civil War and the reaction of different areas of the state to secession and slavery affected Texas decisively. In the areas of the state that were predominantly Mexican-American, the residents were unsympathetic to slavery and regarded it as immoral. Some areas, like Austin, were influenced by Governor Houston and rejected separation from the Union. After the war came Reconstruction and the controversial tenure of Governor Richard Davis. It would be a mistake to view the people's rejection of Davis simply as an anti-Reconstruction event, though this was certainly a strong factor. Rather, the rejection of Davis reflected the reaction of the era to (1) rule by a dominant central government that was often allied with large moneyed interests and (2) control by an executive with broad powers of appointment that were often used to override local autonomy.[171]

One must also study the view of history, political philosophy, legal thought and theories, and understanding of individual rights held by those drafting and ratifying the constitution.[172] For example, the structural divergence between the 1876 constitution and its predecessors is significant because of the substantially different political philosophies the document incorporates.

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170. *See* J.E. Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457, 463 (1959) (noting Mexican influence in Texas history).

171. *See generally* A.J. Thomas, Jr. & Ann Van Wynen Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 913 (1957) (stating one flagrant violation of ideal of local self-government was governor's appointment power infiltrating governing bodies of towns and cities).

172. *See* White v. White, 108 Tex. 570, 586, 196 S.W. 508, 515 (1917) (requiring jury trial for sanity hearing because such right existed at time of constitutional provision's adoption).

The current constitution reflects a dramatic shift in political attitudes from an ever-expanding central government to a more populist concept of limited government. This government allowed greater local autonomy and fostered individual rights and equality, but primarily for white males.[173] To achieve these egalitarian goals, a coalition of delegates—primarily Grangers—allied with the Republican and African-American delegates to enact constitutional guarantees protecting themselves against the designs of the "centrist Democrats." This mutual accommodation reflected Benjamin Franklin's admonition to risk hanging together simply because of the certainty of hanging separately. The pre-populist climate which manifested itself in the 1876 constitution advanced individual economic rights and protections, and promoted restrictions on big business.[174]

Besides economic conditions, one must examine the social history of the time when the constitutional provision was developed. Courts should evaluate Texas societal diversity, culture, traditions, racial and ethnic make-up, culture, and emphasis on individuality when the provision was written.[175] Texas has typically characterized itself in terms of rugged individualism and egalitarian fairness. Although that fairness may not have extended to minorities and women, it is nevertheless the collectively-proclaimed model. An argument can be made that Texas was fairer to minorities in the late 1800s than in the early twentieth century, when the Ku Klux Klan took hold in the South and disenfranchising mechanisms were instituted.[176] Fairness, in

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173. For a thorough analysis of historical and political forces driving the 1876 constitutional convention, see John Walker Mauer, Southern State Constitutions in the 1870's: A Case Study of Texas (1981) (unpublished Ph.D. dissertation, copy on file with *St. Mary's Law Journal*) and *Seth McKay's, Making the Texas Constitution of 1876. See also* John Walker Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 TEX. L. REV. 1615, 1626-27 (1990) (discussing restrictive constitution of 1876 which broke liberal tradition exemplified in previous constitutions); Mikal Watts & Brad Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 789 (1990) (stating that Grange delegates imposed strict constitutional constraints upon government power).

174. Mikal Watts & Brad Rockwall, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 787 (1990).

175. LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1986) (stating, "The powers restricted and the rights guaranteed in the present constitution reflect Texas values, customs, and traditions"); *see* Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 973-76 (1985) (explaining impact that state diversity—such as regional history, social experience, structures of government and finance, demography, and geography—has upon creation of constitutional rules).

176. *See* Chandler Davidson & George Korbel, *At-Large Elections and Minority Group*

qualitative terms, did not approach equality, but it did reflect a better approach than that of many states at the time.

T.R. Fehrenbach's *Lone Star: A History of Texas and the Texans*[177] and Rupert Norval Richardson's *Texas: The Lone Star State*,[178] two of the most widely respected general histories of Texas, provide valuable historical insight into the constitutional development of Texas. The *Southwestern Historical Quarterly* and its predecessor, *Quarterly of the Texas State Historical Association* (1897-1912), are excellent scholarly periodicals on Texas history. Arnoldo DeLeon's *They Called Them Greasers: Anglo Attitudes Toward Mexicans in Texas, 1821-1900*[179] furnishes a superb historical perspective from the Mexican-American community and is an equally worthy bibliography.[180] Alwyn Barr has written a thorough historical account of the poor treatment of African-American Texans in the last quarter of the 1880's, *Black Texans: A History of Negroes in Texas, 1528-1971*.[181]

Regional history also carries weight. How did the history of the surrounding states, territories, and countries affect Texas constitu-

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Representation: A Reexamination of Historical and Contemporary Evidence, in MINORITY VOTE DILUTION 67-71 (Chandler Davidson ed., 1984) (addressing how poll tax effectively disenfranchised minorities and poor whites), *cited with approval in* Thornburg v. Gingles, 478 U.S. 30, 49 (1986); *see also* CHANDLER DAVIDSON, RACE AND CLASS IN TEXAS POLITICS 249 (1990) (focusing on increasing representation of minorities since 1970); DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS 27-28 (1979) (discussing attempts to diminish African-Americans' right to vote); DELBERT A. TAEBEL & LUTHER W. ODOM, THE IMPACT OF THE TEXAS CONSTITUTION ON SUFFRAGE 14-15 (1973) (discussing various restraints obstructing minority suffrage).

177. Fehrenbach's book also contains a section indicating further historical sources, "Bibliographical Notes and Suggestions for Further Reading." T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 721-29 (1983). *See generally* JOE BERTRAM FRANTZ, TEXAS: A BICENTENNIAL HISTORY (1976) (discussing constitutional development).

178. RUPERT NORVAL RICHARDSON, TEXAS: THE LONE STAR STATE (1943).

179. ARNOLD DELEON, THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821-1900 (1983).

180. *See generally* MARIAN BONER, A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY (2d ed. 1987) (providing historical perspective); ARNOLDO DELEON, THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821-1900 (1983) (providing perspective of Mexican-American community); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS 1836-1986 (1987) (providing perspective of Mexican-Americans).

181. *See generally* ALWYN BARR, BLACK TEXANS: A HISTORY OF NEGROES IN TEXAS, 1528-1971 (1973) (providing perspective of African-Americans); MERLINE PITRE, THROUGH MANY DANGERS, TOILS AND SNARES: THE BLACK LEADERSHIP IN TEXAS, 1868-1900 (1985) (providing African-American perspective).

tional law? What influence did Oklahoma, the Native Americans, Mexico, New Mexico, and Louisiana exert on the Lone Star state?

Several other factors can influence constitutional development. Courts should consider the demography of the Texas people and the geography of the state. Texas had a large Mexican population, with old roots and customs, when it became a republic and then a state. The state also attracted great numbers of other ethnic groups, such as the Irish and Germans, who brought their own customs and beliefs. Sometimes the geography of the state helps explain constitutional development,[182] such as the establishment of a centralized police force in West Texas to maintain security. Finally, peculiar local or state interests may influence the drafting of a constitutional provision and may give it a meaning different from that suggested by a comparable federal provision.

Texans' lifestyle, public attitudes, and approaches to government, which they reflected in their constitutions, were different from that of the aristocratic Virginians and the New England merchants who penned the United States Constitution. Certainly, then, the most important factor to consider when gleaning the intent of the drafters and voters who created the Texas Constitution is the uniqueness of Texas.

VIII. POLICY RATIONALES

A. *Current Values*

At various times, state supreme courts tend to give a more expansive reading to their rights charter for policy reasons. These courts understand that rights guarantees should reflect current values.[183] For example, a state supreme court could interpret a bill of rights as banning capital punishment except for the crime of murder, though executions were common for a variety of crimes when the bill of rights was drafted. Although the authors and ratifiers of a bill of rights would have sanctioned more capital punishment, public policy has changed and so have the courts' constitutional interpretations. This current-values method of analysis may be admired for its flexibility but could be criticized for being open-ended.

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182. *See generally* DONALD WILLIAM MEINIG, IMPERIAL TEXAS: AN INTERPRETIVE ESSAY IN CULTURAL GEOGRAPHY (1969) (containing helpful bibliography).

183. *See* Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 585 (1986) (suggesting that state constitutional law analysis involves examination of text, intent of framers, and current values).

B. *The Federalist "Laboratory"*

Some courts approach their bill of rights under Justice Louis Brandeis's "state laboratory" concept: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risks to the rest of the country."[184] As it plays out in day-to-day life, the laboratory model has much merit. Between the founding of the United States and implementation of the Fourteenth Amendment, the states were the primary guarantors of individual rights.[185] Often, the United States Supreme Court would look to state constitutional jurisprudence in applying the Federal Bill of Rights.[186] An excellent example is the exclusionary rule, which many states had adopted long before the mandate of *Mapp v. Ohio*.[187] Indeed, *Mapp* shows that the Justices examined the states' actual experiments with the exclusionary rule in order to show its viability and acceptance.[188] The same is true of the right to appointed counsel in *Gideon v. Wainwright*.[189] *Mapp* and *Gideon* are not the only instances in which the states provided guidance to the federal high court in construing the United States Bill of Rights, nor will they be the last.[190]

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184. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see* Heitman v. State, 815 S.W.2d 681, 686 (Tex. Crim. App. 1992) (discussing that "state courts have thus been considered 'laboratories' of constitutional law").

185. LeCroy v. Hanlon, 713 S.W.2d 335, 338 n.3 (Tex. 1986). For an excellent overview of historical reasons, federalism concerns, and procedural considerations in construing state constitutions, see Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 956 (1982) (finding that individual state constitutions offer citizens protection against local and state governments). *See also* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1028-29 (1985) (allowing that state courts can mold decisions to anticipate evolution of federal constitutional rights).

186. *Heitman*, 815 S.W.2d at 686.

187. *See* Mapp v. Ohio, 367 U.S. 643, 656-57 (1961) (requiring exclusion of coerced confession).

188. *Id.* at 651-52.

189. Gideon v. Wainwright, 372 U.S. 335, 338, 345 (1963).

190. *Gideon*, 372 U.S. at 335; *Mapp*, 367 U.S. at 643; *see also* Batson v. Kentucky, 476 U.S. 79, 100 (1986) (reversing state action preventing black jurors from serving in trial of black defendant); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (finding state denial of permit to distribute printed material violated United States Constitution); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 721 (1931) (reversing state action invading liberty of press and due process under United States Constitution).

C. *Dual Protection*

A third policy approach favored by some state courts is that individuals' liberties have greater protection when guaranteed by two separate sources.[191] This method has a subset: a state constitution is designed to protect those interests not safeguarded by the federal government, such as equal rights. Thus, it becomes a function of the state court to make corrections in favor of protecting freedoms when federal law is deficient.

D. *Caveat*

Each of these policy processes has its disadvantages and benefits. One must avoid the temptation to seize upon a particular method only to reach a certain result. Each issue should be evaluated with intellectual integrity and a principled commitment to discern what the law is, or should be, on a particular subject.[192]

IX. FUNCTIONAL REASONS

Four other arguments counsel state court vigilance over individual freedoms. Their genesis lies in the unique functional role which the framers and voters historically assigned to state courts to interpret and develop Texas law. The 1875 convention delegates clearly intended judges to have plenary power to protect the people's civil rights. The delegates distrusted the legislative and executive branches and deliberately diffused and narrowly circumscribed their powers in the 1876 constitution.[193] The delegates placed checks on judicial power by requiring judges to be popularly elected[194] and requiring the

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191. *See* Heitman v. State, 815 S.W.2d 681, 687 (Tex. Crim. App. 1992) (claiming that United States Constitution coupled with state constitution provide citizens with "double security"). *See generally* Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 708 (1983) (discussing evolution of state constitutional law in affording greater protections under Federal Bill of Rights).

192. *See, e.g.*, Eisenhauer v. State, 754 S.W.2d 159, 166-76 (Tex. Crim. App. 1988) (Clinton, J., dissenting) (contrasting application of Fourth Amendment of United States Constitution and Article I, § 9 of Texas Constitution).

193. *See* John Walker Mauer, Southern State Constitutions in the 1870's: A Case Study of Texas 188-89, 204, 221-22, 246-48 (1981) (unpublished Ph.D. dissertation, on file with *St. Mary's Law Journal*) (analyzing historical and political forces behind 1876 constitution).

194. *Id.* at 192, 236, 246-48; *cf.* Samuel D. Myres, *Mysticism, Realism and the Texas Constitution of 1876*, 9 SW. SOC. SCI. Q. 166, 182-83 (1928) (concluding that constitution of 1876 imposed serious limitations upon power of government which rendered it practically government of negation).

trial bench to be elected directly from single-member districts.[195]

There are several arguments in favor of the popular election of judges. The election of judges creates an accountability that lends their office to constitutional development. If a judge vigorously construes the state constitution, the voters can accept or reject that interpretation through the electoral process.[196] The direct participation of the electorate in selecting judges is vital to the development of Texas constitutional law. Consequently, the election of judges is not a happenstance event.

The difference in institutional roles between the state and federal judiciaries provides a second argument in favor of the popular election of judges.[197] Federal courts possess circumscribed jurisdiction and the fact that they set nationally observed norms serves as a conservative influence. State courts, on the other hand, historically have had jurisdiction over virtually all matters: landlord-tenant law, property rights, family law, contracts, water rights, criminal law, and so on. Their day-to-day expertise supports the contention that state judges should play a substantial role in protecting constitutional rights, particularly "within a subject area uniquely appropriate for a state's judiciary."[198]

A third structural argument for state court vigilance is that if a judge hands down an undesirable ruling, the legislature can address the ruling either by statute[199] or by initiating the constitutional amendment process. The Texas experience has shown it much easier to amend the state constitution than to amend the federal constitu-

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195. *See* John Walker Mauer, Southern State Constitutions in the 1870's: A Case Study of Texas 188-89, 221-22, 246-48 (1981) (unpublished Ph.D. dissertation, on file with *St. Mary's Law Journal*) (analyzing historical and political forces that served as basis of 1876 constitution).

196. *Cf.* Heitman v. State, 815 S.W.2d 681, 688 (Tex. Crim. App. 1991) (holding that failure to independently construe state constitutional provisions places decision in hands of Supreme Court which is not responsible to electorate).

197. *See* Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 647 (1983) (providing argument in favor of primacy of Oregon Constitution); Robert F. Utter & Sanford E. Pitler, *Speech: Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 636 (1987) (describing relationship between state and federal constitutions).

198. Whitworth v. Bynum, 699 S.W.2d 194, 196 (Tex. 1985); *see Heitman*, 815 S.W.2d at 686 (discussing state's judiciary as traditional protector of individual's constitutional rights).

199. *Compare* TEX. GOV'T CODE ANN. §§ 51.317, 51.318 (Vernon 1988) (reinstating revised Omnibus Fee Bill) *with* LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986) (finding original Omnibus Fee Bill unreasonably interfered with right of access to court).

tion. This "legislative oversight" function favors activist courts because it presents the judiciary as a partner with the other branches of Texas government in protecting individual rights.[200]

The constitutional amendment that allows a direct appeal to the Texas Supreme Court on constitutional issues provides another structural rationale for state judicial oversight.[201] This mechanism facilitates quick resolution of important questions and indicates that the drafters and voters expect the courts to play a vigorous role in constitutional development.

X. BRIEFING A STATE LAW QUESTION

What follows is a suggested approach to analyzing and briefing a state constitutional law question.

A. The Texas Approach

The initial step is to suggest to the court what approach it should take with respect to state law, that is, the primacy, dual reliance, supplemental, or federalism model. Unless the current direction of the Texas courts changes, it is probably more helpful to use the federalism model. The attorney should analyze both state and federal law, presenting the state law argument first and then federal precedent, even if at the outset federal law seems favorable. This method helps attune the court to the importance and usefulness of the state constitution and demands clearer analytical precision, especially in crafting the applicable tests. It also lessens the inclination to abbreviate state analysis by appending a few comments about state authorities at the end of an exhaustive federal law discussion. Besides, given its increasing decisional flux, federal law may change during the course of litigation. Finally, utilizing independent state constitutional grounds should discharge the United States Supreme Court from reviewing, and possibly overturning, the decision.

This is not to suggest, however, that the attorney should avoid federal decisions altogether. Often, the federal opinions provide an ana-

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200. *See* Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 976 (1985) (discussing that state judiciaries have been more willing to exercise the legislative oversight function than federal courts).

201. TEX. CONST. art. V, § 3-b; TEX. GOV'T CODE ANN. § 22.001(c) (Vernon 1987); TEX. R. APP. P. 140.

lytical model that may be modified and transposed into state constitutional arguments. Perhaps even more important are Federal Supreme Court dissents that would have provided the relief now sought under the state constitution. State courts often take their cue from thoughtful and well-reasoned dissents. These dissents may be a gold mine for an alert practitioner.

B. *Methodology*

Because Texas courts prefer to apply statutory authority or common law before construing the constitution,[202] one should consider, in order, the applicability of:

1. state agency rules or regulations;
2. state statutes or code sections;
3. the common law; and
4. a state constitutional provision (always including a Section 29 argument).[203]

C. *Stating the Constitutional Argument*

If the constitutional question must be reached, then at its beginning the brief should set out:

1. a succinct outline of the facts and legal issues;
2. a concise statement of the proposed constitutional rule, using state vocabulary;[204]
3. a brief summary of suggested tests relevant to the rule, also using state vocabulary;
4. a synopsis of the rule's application to the case; and
5. a short discussion of why federal law may be unsatisfactory in the case or why the court should not consider federal law.

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202. *See* San Antonio Gen. Drivers, Local No. 657 v. Thornton, 156 Tex. 641, 647, 299 S.W.2d 911, 915 (1957) (refusing to construe constitutionality of senate bill because legislative history made it unnecessary to do so).

203. Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 51, 76 S.W.2d 1007, 1011 (1934).

204. The proposed rule and suggested tests should utilize their own vocabulary in order to avoid confusion with federal law and to limit federal review. *Compare* United States v. Sperry Corp., 493 U.S. 52, 53 (1969) (utilizing "due process") *with In re* Carpenter, 835 S.W.2d 760, 763 (Tex. App.—Amarillo 1992, n.w.h.) (using "due course of law"); *and compare* Bowen v. Gillard, 483 U.S. 587, 597 (1987) (referring to "equal protection") *with* Weaver v. State, 823 S.W.2d 371, 374 (Tex. App.—Dallas 1992, writ ref'd) (discussing "equal rights").

D. *Exegesis*

Not all the following steps may be applicable or helpful in a specific problem area, but they should be considered.

1. Analyze Texas case law.
   a. Consider especially those decisions which predate the applicability of the federal provision to the state and qualify dicta which are both prevalent and expansive in earlier cases.
   b. Apply accepted rules of construction.
      (1) General rules
      (2) Specific rules relating to the bill of rights
2. Formulate textual arguments.
   a. Review unique provisions.
      (1) For example, the open courts provision
      (2) Always include a Section 29 argument
   b. Analyze linguistic structure.
      (1) For example, affirmatively phrased rather than negatively phrased language
      (2) For example, the use of "or" rather than "and"
   c. Consider similarities or variations with federal text.
3. Consider structural arguments.
   a. Point out the prominent placement of rights guarantees in the Texas Constitution (Article I).
   b. Note the limitations on government power, diffusion of power, liberal rights guarantees, etc.
   c. Contrast the structure of the state text with the structure of the federal text.
4. Determine the intent of the framers and ratifiers.
   a. Review historical origins.[205]
      (1) Constitutional convention records, journals, news accounts
      (2) Legislative debates
      (3) Information on ratification ballot
      (4) Ratification debates
   b. Describe contemporaneous legislative and executive interpretation.
   c. Note the readoption of same text in subsequent constitution.
      (1) Intervening court interpretations presumed incorporated
      (2) Intervening legislative interpretations

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205. *See generally* BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971) (discussing history of Federal Bill of Rights); WILLIAM F. SWINDLER, 9 SOURCES & DOCUMENTS OF UNITED STATES CONSTITUTIONS 219-351 (1979) (containing various historical documents which provided foundation for Texas Constitution).

d. Outline the history of the era.
(1) Social, economic, and political history
(2) Political philosophy, legal thought and theories
(3) Regional history
(4) Demography of era
(5) Geography
e. Explain the function of the judiciary.
(1) Role of courts (for example, expansive jurisdiction)
(2) Areas particularly appropriate for state bench (such as common law)
(3) Procedural arguments (direct appeal to Texas Supreme Court on constitutional issues)
(4) Potential of legislative correction
f. Note that textual similarity does not mean identical intent.

5. Compare constitutional texts of other states.
a. Textual similarities and variations[206]
b. Similar origins or source as Texas Constitution
c. Comparable purpose or intent of the constitution

6. Compare constitutional decisions of other states, especially those decisions predating application of federal guarantees to the states.

7. Analyze the policy reasons.
a. Current values
b. Federalist "laboratory"
c. Dual protection

E. *Argument*

The brief should accomplish the following three tasks in its argument.

1. State the proposed constitutional rule.
a. Avoid federal terminology
b. Because the courts have held that Section 29 is itself a rights guarantee, one should always rely on that section in addition to other provisions, as part of the rule or argument.
2. Summarize the tests suggested for applying the rule.
3. Apply the rule to facts and legal issues of case.

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206. *See generally* CONSTITUTIONS OF THE UNITED STATES: NATIONAL & STATE (F. Grad. 2d ed. 1982); CONSTITUTIONS OF THE UNITED STATES: NATIONAL & STATE — FUNDAMENTAL LIBERTIES & RIGHTS, A 50-STATE INDEX (1980).

F. *"Plain Statement" Request*

As part of the brief, it is important to remind the court to include the necessary "plain statement" in the judgment to make clear that the decision is based on independent and adequate state grounds. For example:

> We make it clear that, when this court cites opinions from federal courts and from courts of other states in construing provisions of the Texas Constitution, we look at those precedents merely for reference. We do not consider our results bound by those decisions. Our decision here is [alternatively] based on separate, adequate, and independent grounds, namely, the [law and] Constitution of the State of Texas.[207]

G. *Conclusion and Prayer*

The brief ends with a very short summary of the argument and description of the relief sought.

XI. CONCLUSION

No historian or legal scholar would deny that courts have expanded constitutional doctrine to problem areas never contemplated by our forebears. Nor would many dispute that our forebears certainly envisioned that result and, for that reason, penned general statements of principle rather than specifics. They intended to create a constitution "to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs . . . to provide . . . for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."[208]

The genius of constitutional government is to adapt a bill of rights

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207. *See* Michigan v. Long, 463 U.S. 1032, 1037-44 (1983) (holding that lack of "plain statement" signaled Michigan Supreme Court's failure to decide case on independent state constitutional grounds); State v. Ball, 471 A.2d 347, 351 (N.H. 1983) (noting that court must consider state constitutional guarantees); State v. Kennedy, 666 P.2d 1316, 1321 (Or. 1983) (distinguishing between persuasive federal authority and interpretation of state law); State v. von Bulow, 475 A.2d 995, 1020 (R.I. 1984) (finding that state may not infringe on constitutional rights); Long v. State, 742 S.W.2d 302, 323 (Tex. Crim. App. 1987) (basing holding on decisions of Texas Court of Criminal Appeals); *see also* Whitworth v. Bynum, 699 S.W.2d. 194, 197 (Tex. 1985) (finding that decision under state constitution rendered decision under federal constitution unnecessary); Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983) (stating that additional protection afforded by state constitution made decision under federal constitution unnecessary)

208. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

to modern-day life so that its "purposes" and "policies"[209] protect us and future generations regardless of scientific advances or sophistication of government.[210] Justice John Paul Stevens echoed those sentiments: "We . . . read the Constitution in the only way we can, as 20th century Americans. . . . The ultimate question must be, what do the words of the text mean in our time?"[211] The task of applying lofty constitutional ideals is difficult. The burden falls on the bar's creativity and principled scholarship to assist the state courts with the tools to develop Texas constitutional jurisprudence. It is hoped that this article will be of some help in that endeavor.

209. California v. Byers, 402 U.S. 424, 450 (1971) (Harlan, J., concurring).

210. *Id.* at 454. The *Byers* Court stated, "As uncertain as [is] the constitutional mandate derived from . . . the Bill of Rights, it is the task of this Court to seek that line of accommodation which will render [it] relevant to contemporary conditions." *Id.*

211. *Justice Answers Attack from Attorney General*, AUSTIN AMERICAN-STATESMAN, Oct. 26, 1985, at A12, col. 1.