CHAPTER 2: CONSTITUTIONAL LIMITATIONS

INTRODUCTION

Like the U.S. government, every state government has a Constitution which contains grants of constitutional rights to the people. A state's constitution is the supreme form of state law. All states laws must thus conform to two constitutions, the U.S. Constitution and the state constitution. The Texas Constitution contains many provisions which are similar but not identical to provisions in the U.S. Bill of Rights.

This chapter will focus primarily on limits imposed by the Texas Constitution on Texas criminal statutes. It will also cover some of the more important cases where a Texas criminal law was found to be in violation of the U.S. Constitution.

Cases where the Texas Court of Criminal Appeals (CCA) has struck down a Texas criminal statute because it violated the Texas Constitution are relatively rare. There are a number of reasons for this. First, the CCA is typically dominated by conservatives who are not inclined to give expansive readings to most of the Texas Bill of Rights. Second, for many years, it was generally assumed by lawyers and judges in Texas that the CCA would interpret the Texas Bill of Rights in the same manner as the U.S. Supreme Court interpreted the federal Bill of Rights. Frequently if a law or conviction were challenged on both state and federal constitutional grounds, the CCA would use the federal constitutional provision to invalidate or reverse and not get to the state constitutional issue. For a variety of reasons, including the wealth of case law on the federal Bill of Rights, and little case law on the Texas Bill of Rights, there was little legal discussion of the Texas Bill of Rights.

Texas is currently operating under the state constitution adopted in 1876. Like the U.S. Constitution and that of every state, government power is divided between three branches (legislative, executive and judicial). Article I of that Constitution is the Bill of Rights. A number of provisions have been added to the Bill of Rights since 1876. The Texas Constitution and Bill of Rights can be found at. http://www.capitol.state.tx.us/txconst/toc.html

HEITMAN AND HULIT DECISIONS

One of the trends in many states has been to use the state constitution to provide greater rights than are provided by the similar provision in the U.S. Constitution. Two cases from the CCA discussed below answer the question of whether the Texas Bill of Rights grants more, less or equal protection than the corresponding provision in the U.S. Constitution's Bill of Rights

Heitman v. State 815 S.W.2d 681 (Tex.Crim.App. 1991), and *Hulit v. State*, 982 S.W.2d 431 (Tex.Crim.App. 1998) are landmark cases in the interpretation of the Texas Constitution and it's relation to the U.S. Constitution. Both *Heitman* and *Hulit* involved a warrantless search and seizure. Although this is a criminal procedure case, the principle arguably applies to all provisions in the Texas Bill of

Rights, and challenges to substantive law such as the TPC. In both cases, defendants challenged the police action under the Art. I., sec. 9 of the Texas Constitution:

> Sec. 9. The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

The Fourth Amendment reads:

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

Note that although the wording of sec. 9 is similar to that of the Fourth Amendment, there are some wording differences. This is true of most provisions in the Texas Constitution when compared to their federal counterpart. The important point is that the two provisions are not identical.

Prior to *Heitman v. State* 815 S.W.2d 681 (Tex.Crim.App. 1991), Article 1 sec. 9 was interpreted to mean the same as the Fourth Amendment. Many other provisions in the Texas Constitution that were similar to a provision in the U.S. Constitution were interpreted to mean the same thing as their federal counterpart. In *Heitman*, the CCA rejected the position that provisions in the Texas Constitution were always to be interpreted to mean the same as their federal counterpart. The CCA concluded that the Texas provision provided more protection than the Fourth Amendment. The CCA stated that it would now feel free to find that provisions in the Texas Constitution provided equal or more protection than the analogous federal provision.

> . . . this Court, when analyzing and interpreting Art. I, § 9, Tex. Const., will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue. In reaching this conclusion, we recognize that state constitutions cannot subtract from the rights guaranteed by the United States Constitution, but they can provide additional rights to their citizens. The decisions of the Supreme Court represent the minimum protections which a state must afford its citizens. "The federal constitution sets the floor for individual rights; state constitutions establish the ceiling." LeCroy v. Hanlon. 713 S.W.2d at 338. 815 S.W.2d at 690.

In *Hulit*, the CCA again interpreted Art. I, sec. 9 independently of the Fourth Amendment. The CCA rejected the traditional Fourth Amendment preference for warrants. In doing so it added a new twist to the Texas Constitution.

The new twist added by Hulit was that provisions of the Texas Constitution could be interpreted to provide *less* protection than the analogous provision in the U.S. Constitution:

> It is our holding that Article I, Section 9 of the Texas Constitution [unlike the Fourth Amendment] contains no [general] requirement that a seizure or search be authorized by a warrant, and that a seizure or search that is otherwise reasonable will not be found to be in violation of that section because it was not authorized by a warrant. . . . 982 S.W.2d at 486/

With regard to the relationship between the state and federal constitutions, the CCA wrote:

> We understand that our holding means that Section 9 of our Bill of Rights does not offer greater protection to the individual than the Fourth Amendment to the United States Constitution, and it may offer less protection. But our holding is the construction that is faithful to the Constitution which our people have adopted, and it is our duty to interpret that Constitution independent of the interpretations of federal courts. *Heitman v. State, supra.*
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> As the Court of Appeals noted in this case, *Heitman* does not mean that the Texas Constitution cannot be interpreted to give less protection than the federal constitution. It only means that the Texas Constitution will be interpreted independently. *See Hulit v. State,* 947 S.W.2d at 709. Its protections may be lesser, greater, or the same as those of the federal constitution.
>
> In *Heitman,* we repeated the dictum of our sister court: "The federal constitution sets the floor for individual rights; state constitutions establish the ceiling." *LeCroy v. Hanlon,* 713 S.W.2d 335, 338 (Tex.Sup.1986). With all respect to our Sister Court, we think its metaphor is wrong. The state constitution and the federal constitution are not parts of one legal building; each is its own structure. Their shapes may be different, as may their parts. Each may shield rights that the other does not. The ceiling of one may be lower than the floor of the other. Because of the Supremacy Clause of the United States Constitution, a defendant who is entitled to claim a the protection of a federal provision may receive a greater protection from that floor than the greatest protection that the ceiling of the Texas Constitution would give him. But that does not mean that the Texas Constitution has no ceilings that are lower than those of the federal constitution. *See Welchek v. State,* 93 Tex. Cr. 271, 247 S.W. 524 (1922) (Article I, Section 9 creates no exclusionary rule similar to that found in Fourth Amendment for federal prosecutions). 982 S.W.2d 436.

The CCA also addressed the impact of the U.S. Constitution's Supremacy Clause. That Article provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The CCA wrote:

> In our holding there is no violation of the Supremacy Clause of Article VI of the United States Constitution.
>
> State courts are the final interpreters of state law even though their actions are reviewable under the federal constitution, treaties, or laws. The supreme court of a state is truly the highest court in

> terms of this body of law and it is not a "lower court" even in relation to the Supreme Court of the United States. It must follow the Supreme Court's rulings on the meaning of the Constitution of the United States or federal law, but it is free to interpret state laws or the state constitution in any way that does not violate principles of federal law. John E. Nowak, Ronald D. Rotunda, J. Nelson Young, 1 Treatise on Constitutional Law 31 (1986). We do not make any holding about the appellant's rights under federal law. In this case, the appellant has chosen not to seek any shelter in the federal constitution. (In our architectural metaphor, he may not be able to fit his facts under the federal ceiling.) This case has called on us to decide whether our constitution will give him the shelter he wants. It does not.
>
> The Supremacy Clause means that, in practical terms, persons will always be able to avail themselves of the greater right. This is very important to litigants and their counsel, who are naturally and properly result-oriented. But it does not mean that a court, faithfully interpreting state laws, can only find in them protections that equal or exceed federal laws. 982 S.W.2d at 436-37.

SELECTED PROVISIONS OF THE TEXAS BILL OF RIGHTS

Selected provisions of the Texas Bill of Rights (Art. I. of the Constitution) are found below with brief commentary and an occasional discussion of a relevant Texas court decision.

The Preamble to the Texas Bill of Rights provides: "That the general, great and essential principles of liberty and free government may be recognized and established." This preamble has been interpreted to provide a right of privacy. However, Texas courts have done little to elucidate this state created right of privacy.

> Sec. 3. EQUAL RIGHTS. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.
>
> Sec. 3a. EQUALITY UNDER THE LAW. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative. (Added Nov. 7, 1972.)

Sections 3 and 3a. articulate the same general values as the 14th Amendment's Equal Protection Clause. An example of a case under sec. 3 is *Rucker v. State* 342 S.W.325 (Tex.Crim.App. 1961). Rucker was convicted of violating a city ordinance making it unlawful to enter premises of another and refuse to leave when ordered by owner or occupant to do so. The Court of Criminal Appeals held that the city ordinance violated equal protection of the laws in violation of both state (Art. 1 sec. 3) and federal constitutions (14th Amendment). The Ordinance, by reference to statute, authorized only $25 fine against a peddler, salesman, or solicitor for entering premises of another and refusing to leave, while permitting fine of $200 fine against any other person for the same offense. The CCA found the ordinance unconstitutional because there was no reasonable and substantial basis for such classification.

> Sec. 6. FREEDOM OF WORSHIP. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.
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> Sec. 7. APPROPRIATIONS FOR SECTARIAN PURPOSES. No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.

Sec. 6 and 7mirror the Free Exercise and Establishment clauses of the U.S. Constitution's First Amendment. Sec. 7 was the basis of a challenge to a criminal conviction in *Hanson v. State.*

Ryan Hanson was convicted of capital murder but was sentenced to life. One of his arguments on appeal was that the Texas' capital murder laws violated the state version of the federal Establishment Clause in the First Amendment. The Court of Appeals, *Hanson v. State*, 55 S.W.3d 681 (Texas App. Austin [10th Dist., 2001, petition for discretionary review denied) affirmed the conviction. Hanson argued

> that section 19.03 of the penal code and article 37.071 of the code of criminal procedure violate the United States and Texas Constitutions. *See* Tex. Penal Code Ann. § 19.03; Tex.Code Crim. Proc. Ann. art. 37.071. Specifically, he asserts that these statutes violate the Establishment Clause of the United States Constitution and article I, section 7 of the Texas Constitution because the author and sponsors of the bill creating those statutes "could not articulate a reasonable secular purpose for their enactment *but* did articulate, at length, the religious purpose for [capital] punishment while siding, in fact, with the viewpoint of a particular and identifiable religious sect." *See* U.S. Const. amend. 1; Tex. Const. art. I, § 7.
>
> The court of criminal appeals has addressed the Establishment Clause argument in *Holberg v. State*, 38 S.W.3d 137 (Tex.Crim.App.2000). The court rejected the argument, holding the statutes constitutional. *Id.* at 140. However, the defendant in *Holberg* did not raise the issue under the Texas Constitution as appellant has here.
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> Appellant argues that the capital-murder statutes enacted in 1973 in House Bill 200 "endorse the beliefs of fundamentalist Texas protestants over the beliefs of many other [religions]," thus violating the Texas Constitution. Article I, section 7 prohibits the expenditure of public funds to support a religion. Tex. Const. art. I, § 7. We find the court's discussion in *Holberg* the legislative history of House Bill 200 instructive. *See id.* at 139. The bill's chief sponsor, Representative Cobb, stated that it should be enacted "because the people of Texas wanted the death penalty." Representative Leland, opposing passage of the bill, argued that "state executions violate the Ten Commandments' prohibition on killing." The co-sponsors of the bill, Representatives Cobb,

> Williamson, and Hollowell, responded with citation to biblical passages that they asserted supported the death penalty. *Id.*
>
> In the court's view, it is at least as likely that the Legislature's actual purpose in enacting the statutes was the secular one of establishing the appropriate penalty for certain heinous crimes, and that the legislators acted as they did because they held one or more of the following reasonable, secular beliefs: (1) the death penalty is the only proportional punishment for certain crimes; (2) the death penalty ensures, at a minimum, that the offender will never harm anyone again; (3) the death penalty may deter some persons (professional criminals and those already imprisoned for life), and possibly others, from committing murder; and (4) life imprisonment without parole is not a viable alternative to the death penalty because (a) capital offenders are a danger to others in the prison environment, (b) persons imprisoned literally for life have little incentive to behave properly, and (c) it is undesirable, costly, and possibly inhumane to keep persons in prison until they actually die from old age or disease. *Id.* at 140.
>
> We find the reasoning of the court of criminal appeals applicable to the issue of constitutionality under the Texas Constitution; there are ample secular purposes supporting the enactment of the code provisions at issue and their enforcement does not result in public funds being used for religious purposes. We overrule appellant's thirty-sixth point of error. 553 S.W.2d at 695-96

The *Holberg* case is discussed in ch. 11 *infra*. The CCA refused to hear Hanson's appeal.

> Sec. 8. FREEDOM OF SPEECH AND PRESS; LIBEL. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

First Amendment freedom of speech is discussed in your text in the section entitled "Freedom of Speech." Much of the Texas case law indicates that courts believe this provision state provides more protection than the First Amendment. How much more, if any, was one of the issues decided in *Zarsky v. State* 827 S.W.2d 408 (Tex.App.-Corpus Christi, 1992, petition for discretionary review denied, cert. den.). There is no doubt that freedom of speech applies on government property. The issue here was whether freedom of speech applied on private property.

> Appellant [Zarsky]was arrested at the Stonegate Professional Office Complex in Corpus Christi . . ., while anti-abortion protestors sat on a walkway outside an abortion clinic, blocking its doors. Appellant, who was described as part of the protest leadership, was arrested as he stood in the parking lot, about eight feet from one of the clinic's doors, next to a pole which supported the roof covering the walkway. Appellant was not personally blocking the clinic's door. Less than a half-hour before his arrest, William Hopkins, the owner of the complex, notified appellant at a face-to-face meeting to leave the premises. Appellant was charged with violating Texas' trespass

> law by remaining on Hopkins' property without Hopkins' consent after he had notice to depart but failed to do so. . . (827 S.W.2d at 410)

A jury found Zarsky guilty of criminal trespass, and the trial court assessed punishment at thirty days in jail. Zarsky argued that his conviction violated the free-speech and assembly provisions of both the United States and Texas Constitutions.

The court found no violations of the U.S. Constitution's First Amendment. Zarsky also argued that the Texas Constitution provided greater protection that the U.S. Constitution and relied on cases from California, whose constitutional provision was similar to that of Texas'

> We thus turn to the protections afforded appellant by the Texas Constitution. The Texas Constitution's affirmative grant of free speech is more broadly worded than the First Amendment's proscription of Congress from abridging freedom of speech. . . .
>
> In *Robins,* the Supreme Court of California concluded that its State Constitution protected speech and petitioning, reasonably exercised, in a *large*, privately-owned shopping center. *Robins,* 592 P.2d at 347. Our research reveals that a number of states have constitutional provisions worded similarly to those of Texas and California. Only a handful of those states have adopted positions consistent with California's decision in [citations omitted]. Most states having constitutions similar to California's and Texas' have refused to adopt California's approach. [citations omitted]. In these states, the business property owner has a right to exclude third-parties from exercising forms of speech on the property.
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> The few states which have followed *Robins* to permit an exercise of free speech at large shopping malls have refused to extend the same speech protections to protestors at abortion clinics. [citations omitted] In *Sunnyside,* the Court held, "the center is private property and its owners may bar the exercise of free speech regardless of its nature or whether it is possible to reasonably regulate it." *Sunnyside,* 751 P.2d at 319. Even California has refused to extend *Robins* to private abortion clinics. [citations omitted].
>
> Our review thus shows that no state with a constitution similar to ours has been willing to extend speech protections to the extent which appellant advocates. In the states which have recognized speech protections greater than the First Amendment, all have declined to extend such protections to property like that in the present case. The courts, in rejecting the free-speech claims, have considered factors such as the size of the shopping center, the amount of disruption to the business entities caused by the speech activity, the degree of public invitation extended by the center, the degree that the property has been dedicated to public use, safety matters, and the owner's property rights. 827 S.W.2d at 411-12

Zarsky's conviction was affirmed, and both the CCA and U.S. Supreme Court refused to hear Zarsky's appeal.

> Sec. 9. SEARCHES AND SEIZURES. The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Sec. 9 on "Searches and Seizures" was presented and discussed above in the treatment of the *Heitman* and *Hulit* decisions. This provision may provide less, more or equal protections that the Fourth Amendment.

> Sec. 10. RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger. (Added Nov. 5, 1918.)

These provisions are almost entirely procedural in nature but are similar to the Fifth and Sixth Amendments to the U.S. Constitution.

> Section 13 - EXCESSIVE BAIL OR FINES; CRUEL AND UNUSUAL PUNISHMENT; REMEDY BY DUE COURSE OF LAW. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

This section is similar to the Eighth Amendment and due process clauses in the U.S. Constitution. Note that this provision prohibits cruel "or" unusual punishment, while the Eighth Amendment prohibits cruel "and" unusual punishment. This language difference could be used to justify providing greater protection than the Eighth Amendment. However, the CCA has not done so. The CCA is extremely reluctant to find punishments excessive (cruel or unusual) as long as they are within the statutory limits. This approach seems to defeat the purpose of having a constitutional provision. Sex offender registration laws and habitual criminal statutes have also been upheld.

> Sec. 16. BILLS OF ATTAINDER; EX POST FACTO OR RETROACTIVE LAWS; IMPAIRING OBLIGATION OF CONTRACTS. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

This provision is similar to Article I sec. 9 of the U.S. Constitution which also prohibits bills of attainder and *ex post facto* laws. These are discussed in your text in the section entitled "Bills of Attainder and *Ex Post Facto laws. Ex Post Facto law* challenges frequently involve changes in sentencing, good time, and parole eligibility laws.

> Sec. 19. DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

This section is similar to the due process clauses of the Fifth and Fourteenth Amendments. There is some authority in Texas that, like the due process clauses of the U.S. Constitution, the Texas "due course" provision also includes a limitation on substantive law (substantive due process). However, Texas courts have rarely utilized the substantive due process aspect of sec. 19.

> Sec. 20. OUTLAWRY OR TRANSPORTATION FOR OFFENSE. No citizen shall be outlawed. No person shall be transported out of the State for any offense committed within the same. This section does not prohibit an agreement with another state providing for the confinement of inmates of this State in the penal or correctional facilities of that state. (As amended Nov. 5, 1985.)

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

For an analysis of this provision see Stephen Halbrook's article at
http://www.stephenhalbrook.com/law_review_articles/texas.PDF

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

This provision's wording is similar to the U.S. Constitution's First Amendment. Texas courts generally treat this provision as being identical to the First Amendment.

TEXAS PENAL CODE AND THE U.S. CONSTITUTON

Two high-profile cases in recent years where the U.S. Supreme Court struck down portions of the Texas Penal Code were Texas *v. Johnson* and *Lawrence v. Texas*. These are both discussed in your text.

In *Texas v. Johnson*, 491 U.S. 397 (1989) the U.S. Supreme Court agreed with the CCA that Texas' statute making it a crime to desecrate the U.S. flag violated First Amendment freedom of speech and press when the desecration was part of a political protest or otherwise constituted symbolic speech. The U.S. Supreme Court's decision can be found at
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=491+&page=397

In *Lawrence v. Texas*, 124 S.Ct. 2472 (2003), The Court struck down Texas' "Homosexual Conduct" statute TPC sec. 2106 at least to the extent it applied to private, adult, consensual homosexual conduct.. This statue is still in the TPC and can be found at
http://www.capitol.state.tx.us/statutes/docs/PE/content/htm/pe.005.00.000021.00.htm#21.06.00

The CCA had upheld the statute based on the U.S. Supreme Court's decision in *Bowers v Hardwick*, which was overruled in *Lawrence.*

The U.S. Supreme Court's decision can be found at
http://a257.g.akamaitech.net/7/257/2422/26jun20031200/www.supremecourtus.gov/opinions/02pdf/02-102.pdf

or at
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=02-102

Two portions of the decision could have long-term implications for state authority to ban certain crimes involving sex. First, the Court wrote

> "Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.*, at 851. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:
>
> > "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Ibid.*"123 S.Ct. at 2481

Second:

> The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers Justice Stevens* came to these conclusions:
>
> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as

> married persons." . . . *Justice Stevens*' analysis, in our view, should have been controlling in *Bowers* and should control here. 124. S.Ct. at 2483-84.

Like most, if not all states, Texas has a statute against incest (sec. 25.02) and statutes against prostitution (sec. 43.02). If the incest or prostitution involves private, adult, consensual, conduct, can the application of these two statutes in those situations survive the constitutional right to privacy? Further, what about the bigamy statute (sec. 25.01)?

REVIEW QUESTIONS

Multiple Choice (Answers are found at the end of this chapter)

1. In the *Hietman* and *Hulit* decisions, the Texas Court of Criminal Appeals concluded that provisions of the Texas Constitution can be interpreted _____ protection than the corresponding provision of the U.S. Constitution.
   a. only to provide less
   b. only to provide greater
   c. to provide only equal or greater
   d. to provide only less or equal
   e. to provide less, equal or greater

2. The Texas Bill of Rights has a provision on freedom of speech. This is similar to the _____ Amendment in the U.S. Constitution.
   a. First
   b. Second
   c. Third
   d. Fourth
   e. Fifth

3. Section 19 of the Texas Bill of Rights does not require due "process" of law, it requires due _____ of the law.
   a. obedience
   b. conformity
   c. congruence
   d. comity
   e. course

4. Which of the following is a U.S. Supreme Court decision on a section of the Texas Penal Code?
   a. Texas v. Johnson.
   b. Wilbur v. Mullaney
   c. Collins v. Texas
   d. James v. State of Texas
   e. Wilson v. People

5. Texas is currently operating under the Constitution first ratified in

a. 1776
b. 1846
c. 1876
d. 1899
e. 1974

6. The provision in the Texas Constitution that is similar to the Fourth Amendment is Article I. sec.
a. 6.
b. 7.
c. 8.
d. 9
e. 10

REFERENCES AND RESOURCES

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Harrington, J. C. (1993). The Texas Bill of Rights, 2nd ed. Clearwater, FL: Butterworth.

ANSWER KEY, CH. 2, CONSTITUTIONAL LIMITATIONS

1. e
2. a
3. e
4. a
5. c
6. d