

RELIGIOUS FREEDOM TEXAS STYLE

THE RELIGION CLAUSES IN THE TEXAS BILL OF RIGHTS

T

he fact that Voltaire's sardonic observation about religious intolerance now seems humorous is a great testament to the religious freedom enjoyed by Americans today. More than one Texan, however, has discovered the folly in taking religious freedom for granted. Take, for example, the case of Dr. Levi Russell.¹ Born in Georgia in 1831, Dr. Russell went to the California gold fields at age 19. Two years later he earned his M.D. at Pennsylvania College. After another attempt to strike it rich mining gold, he returned to Georgia to practice medicine. In 1868, he moved his family to Texas and bought a farm in Bell County. Dr. Russell became a medical botanist, much interested in the fauna and flora of Texas. He was, however, perhaps too public with his views on religion. In 1875, the Masons and the Knights of Pythias expelled him for heresy after he was elected president of the Association of Freethinkers of Bell County.

At midnight on October 6, 1877, Dr. Russell was called out after being told a sick woman needed his assistance. He had unwittingly fallen into a trap and was severely flogged. His tormentors lashed his naked body one hundred times. Reports revealed two men were whipped that night because of their religion. Dr. Russell, identified as an "infidel," was whipped because he had no religion, and another man, who was a member of Belton's "Sanctified Band," was whipped because he had too much.

Our forebears recognized the threat of intolerance and sought to guarantee religious

freedom in the Texas Bill of Rights. More recently, the Texas Supreme Court has given notice that the Texas Constitution is still viable and is not a stepchild to the Federal Constitution:

Our constitution has independent vitality, and this court has the power and duty to protect the additional state guaranteed rights of all Texans. By enforcing our constitution, we provide Texans with their full individual rights and strengthen federalism...Recently, state courts have not hesitated to look to their own constitutions to protect individual rights. This court has been in the mainstream of this movement.²

Given the sentiments expressed in *Lecroy* and the United States Supreme Court's apparent retreat from the expansive interpretation of the First Amendment embraced by the Warren Court and to some extent the Burger Court, Texans may begin to press claims under the Bill of Rights in the State Constitution with much greater frequency than in the past.³

This article provides a brief overview of the religion clauses in the Texas Bill of Rights.⁴ Concededly, most practitioners will never be asked to assert or defend a claimed violation of the religion clauses. Believers and non-believers alike, however, have a stake in the preservation of the religious freedoms deemed so fundamental by our forebears. The religion clauses in the Texas Bill of Rights are contained in Sections Four, Five, Six, and Seven of Article One of the Texas Constitution.

"Since the whole
affair had
become one of
religion, the
vanquished
were of course
exterminated."

—Voltaire

2. *LeCroy v. Hanlon*, 713 S.W.2d 335, 338-39 (Tex. 1986); see also *Heitman v. State*, 815 S.W.2d 681 (Tex.Crim.App. 1991).
3. Texans hold a wide variety of religious beliefs. In fact, one the nation's most forceful advocates of separation of church and state, Madilyn Murray O'Hair, resides and headquarters her organization in the State's capital city.
4. The primary resource and starting place for any treatment of the Texas Constitution is George Braden's treatise titled *The Constitution of the State of Texas: An Annotated and Comparative Analysis*, which was published in 1977. This article is no exception, and much of what is stated here was drawn from Braden's treatise.
5. Braden at 21.
6. *Id.*
7. *Id.*
8. *O'Hair v. Hill*, 641 F.2d 307 (5th Cir. 1981), opinion on rehearing, 675 F.2d 680 (1982) (en banc).
9. *Id.* at 684.
10. Telephone interview with Madilyn M. O'Hair, and with Assistant Attorney General

- John Vinson on March 2, 1994. The author expresses his appreciation to former assistant attorney general Susan O. Bradshaw, who represented the State against O'Hair, for her assistance in confirming the existence of the settlement.
11. *Torasco v. Watkins*, 367 U.S. 488 (1961); Braden at 21.
 12. Tex. Educ. Code. §§ 4.07, 4.08 (Vernon 1991).
 13. Braden at 21.
 14. *Id.*
 15. *Tirmenstein v. Allain*, 607 F.Supp. 1145 (S.D. Miss. 1985).
 16. 97 C.J.S. Witnesses 62 (1957).
 17. *Id.*
 18. Tex. Const. Art. 1, 5, Interpretive Commentary (Vernon 1984).
 19. Tex.R.Civ.Evid. 603; Tex.R.Crim.Evid. 603.
 20. Tex.R.Civ.Evid. 610; Tex.R.Crim.Evid. 615.
 21. 109 S.W. 115, 117 (Tex. 1908).
 22. *Marsh v. Chambers*, 463 U.S. 783 (1983).
 23. *Engel v. Vitale*, 370 U.S. 421 (1962).
 24. *Alaniz v. Alaniz*, 867 S.W.2d 54

- (Tex.App.—El Paso 1993, no writ); *Matter of Marriage of Knighton*, 723 S.W.2d 274 (Tex.App.—Amarillo 1987, no writ).
25. *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692 (Tex. 1984).
 26. *State Emp. Union v. Dept. of Mental Health*, 746 S.W.2d 203, 205 (Tex. 1989).
 27. Tex. Const. Art. I, 7 Interpretive Commentary (Vernon 1984).
 28. *Id.*
 29. Op. Tex. Att'y Gen. No. H-1267 (1978).
 30. Op. Tex. Att'y Gen. No. M-1255 (1972).
 31. Op. Tex. Att'y Gen. No. H-1087 (1977).
 32. Op. Tex. Att'y Gen. No. M-1074 (1972).
 33. For example, Hare Krishnas are active in Texas. See Op. Tex. Att'y Gen. No. DM-64 (considering but declining to answer the question whether the Texas Department of Public Safety may prevent Hare Krishnas from distributing religious literature on DPS property).
 34. In 1977, the Texas Senate proposed to add a section to the Texas Education Code permitting a moment of silence for silent prayer or meditation. Tex. SB 86, 65th Leg., R.S. (1977). The education committee requested an AG opinion, and Attorney General Hill opined that "both the United States and Texas Supreme Courts would probably hold that Senate Bill 86 does not on its face violate the First or Fourteenth Amendments to the U.S. Constitution or Section 6 or 7 of article 1 of the Texas Constitution." Op. Tex. Att'y Gen. No. LA-128 (1977). Senate Bill 86 was never enacted, and the U.S. Supreme Court has since held that an Alabama law permitting silent prayer violated the First Amendment. *Wallace v. Jaffree*, 105 S.Ct. 2749 (1985) (indicating laws permitting silent prayer and/or meditation in public schools may not be *per se* unconstitutional).

AUTHOR ROBERT GILBREATH IS AN ASSOCIATE AT THE DALLAS FIRM OF VIAL, HAMILTON, KOCH & KNOX, L.L.P.

GET TEXAS SIZE SAVINGS WITH NO INITIAL FEE ON WEST CD-ROM LIBRARIES!



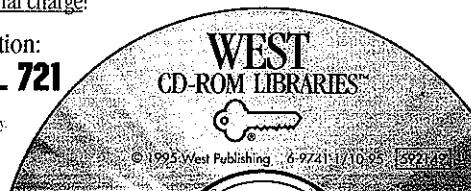
Now it's sweet and simple to get West's Texas CD-ROM Libraries! Subscribe today and you can get *Texas Cases*™ for no initial fee and a simple low monthly payment. *Vernon's® Texas Statutes and Codes Annotated*™—“The Black Statutes” and *West's® Texas Digest CD-ROM Edition*™ also have no initial fee and low monthly pricing.

Plus, daily online updates give you unlimited access to the latest Texas case law and statutes at no additional charge!

Call now for more information:
1-800-255-2549, EXT. 721

Some restrictions apply.

West. An American company serving the legal world.



© 1995 West Publishing. 4-97211/10/95 1372142