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Heitman v. State: The Question Left Unanswered.

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HEITMAN V. STATE: THE QUESTION LEFT UNANSWERED

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I. INTRODUCTION

On June 26, 1991, the Texas Court of Criminal Appeals delivered a potentially far-reaching opinion that sent dramatic reverberations

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throughout the legal community of the state.[1] In *Heitman v. State*,[2] the court of criminal appeals appeared to break decisively with the court's prior holdings[3] to announce that it will no longer "automatically adopt and apply"[4] to the search and seizure provision of the Texas Constitution[5] "the Supreme Court's interpretations of the Fourth Amendment."[6]

The reaction to *Heitman* has been immediate and striking. The *Texas Lawyer* proclaimed that "the Texas Court of Criminal Appeals has overruled almost 50 years of precedent and wholeheartedly embraced 'new federalism' for the first time."[7] One law professor enthusiastically described the decision as "a declaration of independence for the Texas judiciary in criminal cases,"[8] while another warned that "[i]t means that all Texas law is up for grabs."[9]

Heitman is obviously a significant decision that could impact Texas criminal jurisprudence for decades to come. It is also a decision that left many questions unanswered. This article will: (1) explore the holding of *Heitman* to ascertain what that opinion did and did not say, (2) examine the text and history of article I, section 9 of the Texas Constitution (the search and seizure provision) for evidence bearing on the issue of whether that provision should be construed as placing greater restrictions upon law enforcement than the Fourth Amendment to the United States Constitution, and finally (3) briefly discuss the potential disadvantages of severing Texas constitutional search and seizure law from well-settled federal constitutional precedent absent clear guidance from the text and history of the Texas Constitution.

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1. *Criminal Court Unfurls New Federalism Banner*, TEXAS LAWYER, July 8, 1991, § 1, at 1.

2. 815 S.W.2d 681 (Tex. Crim. App. 1991).

3. *See, e.g.*, Johnson v. State, 803 S.W.2d 272 (Tex. Crim. App. 1990); Gordon v. State, 801 S.W.2d 899 (Tex. Crim. App. 1990) (plurality); Bower v. State, 769 S.W.2d 887 (Tex. Crim. App. 1989) (plurality);Eisenhauer v. State, 754 S.W.2d 159 (Tex. Crim. App. 1988); Osban v. State, 726 S.W.2d 107 (Tex. Crim. App. 1986); Crowell v. State, 147 Tex. Crim. 299, 180 S.W.2d 343 (1944).

4. *Heitman*, 815 S.W.2d at 682.

5. *See* TEX. CONST. art. I, § 9.

6. *Heitman*, 815 S.W.2d at 682.

7. *Criminal Court Unfurls New Federalism Banner*, TEXAS LAWYER, July 8, 1991, § 1, at 1.

8. *Id.*

9. *Id.* at 34.

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II. THE HOLDING OF *HEITMAN*: WHAT IT SAID, WHAT IT DIDN'T SAY

On January 9, 1984, at around 5:30 a.m., Addison city police officers discovered William Randolph Heitman passed out in his car in front of a convenience store. After discovering a pistol in Heitman's jacket, the officers arrested him for unlawfully carrying a weapon, transported Heitman to the city jail, and impounded his vehicle.

Pursuant to departmental policy, the officers conducted an inventory search of the vehicle during which they discovered a briefcase on the passenger side of the car. The briefcase was unlocked on one side, but the other side was either locked or stuck. The officers jimmied the briefcase open and discovered narcotics inside.

Heitman's motion to suppress the fruits of the search was denied by the trial court. Heitman thereafter plead nolo contendere and was sentenced to five years probation. He appealed.

The course of the case in the appellate courts is long and convoluted. The first time the case came before the Fort Worth Court of Appeals, that court reversed on grounds of a violation of the Texas Speedy Trial Act.[10] The State's petition for discretionary review was granted, and the court of criminal appeals reversed the court of appeals based upon its holding in *Meshell v. State*[11] that the speedy trial act was unconstitutional.

On remand, the Fort Worth Court of Appeals addressed Heitman's search contention. Heitman argued that the search of his partially locked briefcase was unlawful under the court of criminal appeals' decision in *Gill v. State*.[12] On original submission, the court of appeals bought that argument and reversed Heitman's conviction for the second time.

Yet the case was far from resolved. The State filed a motion for rehearing in the court of appeals, pointing out that *Gill* had been overruled by *Osban*.[13] At this point, the court of appeals took the unusual

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10. TEX. CRIM. PROC. CODE ANN. art. 32A.02 (Vernon 1989) (declared unconstitutional in Meshell v. State, 739 S.W.2d 246, 258 (Tex. Crim. App. 1987).

11. 739 S.W.2d 246, 258 (Tex. Crim. App. 1987).

12. 625 S.W.2d 307, 312 (Tex. Crim. App. 1980) (opinion on rehearing). In *Gill*, the court held that the search of a locked automobile trunk was not a lawful inventory search under TEX. CONST. art. I, § 9 or the Fourth Amendment. Gill was expressly overruled in part by Osban v. State, 726 S.W.2d 107, 110 (Tex. Crim. App. 1986).

13. *Osban*, 776 S.W.2d at 110.

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action of abating the cause and remanding to the trial court with orders to hear evidence and make findings "as to whether the Addison Police Department had a policy which mandated the opening of all closed containers in every impounded vehicle and listing their contents."[14] At this hearing, the trial court found that the police department did have such a policy, and the case came back to the court of appeals.

On rehearing, the court of appeals rejected Heitman's argument and, in reliance upon the United States Supreme Court's decision in *Colorado v. Bertine*,[15] held that the search of the partially locked briefcase was a valid inventory search under the United States and Texas Constitutions.[16] The opinion on rehearing did not contain an analysis of the issue under the Texas Constitution, but simply noted that in accordance with previous teachings of the court of criminal appeals, "article I, section 9 of the Texas Constitution and the Fourth Amendment to the United States Constitution are the same in all material respects."[17]

If the Fort Worth Court of Appeals thought that it had finally disposed of Heitman's appeal, it was sorely mistaken. Heitman filed a petition for review in which he argued that the court of appeals had erred in holding the search to have been a lawful inventory search because the record reflected, according to Heitman, that at the time of the search "the police were not engaged in a caretaking activity,"[18] and that "the briefcase was opened for the sole purpose of investigation."[19] Oddly enough, Heitman's petition did not contend that the search and seizure provision of the Texas Constitution should be construed differently than the Fourth Amendment. The petition also did not challenge in any way the court of appeals' assertion that article I, section 9 of the Texas Constitution and the Fourth Amendment "are the same in all material respects."[20]

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14. Heitman v. State, 776 S.W.2d 324, 325 (Tex.App.—Fort Worth 1989, writ granted).

15. 479 U.S. 367 (1987).

16. *Heitman*, 776 S.W.2d at 325.

17. *Id.*

18. Appellant's Petition for Discretionary Review, at 5, *Heitman* (No.1380-89).

19. *Id.*

20. The petition's sole reference to the Texas Constitution is in the following concluding sentence: "It is urged that the opening of the partially locked briefcase constituted a violation of Article I, Section 9, of the Texas Constitution and the Fourth Amendment to the United States Constitution." *Id.*

Nevertheless, the Court of Criminal Appeals granted review, and in Judge Miller's majority opinion[21] framed the issue before it as " whether this Court will automatically adopt and apply to article I, section 9, of the Texas Constitution the Supreme Court's interpretations of the Fourth Amendment."[22]

The *Heitman* opinion makes for interesting reading. The opinion first reviews the established principle that "[u]nder our system of federalism . . . the states are free to reject federal holdings as long as state action does not fall below the minimum standards provided by federal constitutional protections,"[23] but then forthrightly recognizes that "this Court has not chosen to interpret article I, section 9 in a manner that accords the citizens of this State greater protections than those afforded by the Fourth Amendment."[24] After reviewing decades of court of criminal appeals case law construing article I, section 9 in harmony with the Fourth Amendment,[25] the opinion discusses in general terms principles of judicial federalism in support of the abstract proposition that a state's highest criminal court has the power to interpret its constitution as imposing greater restrictions upon law enforcement than does the United States Constitution.[26]

Judge Miller's opinion sets forth various arguments in defense of construing the Texas Constitution independently from the federal constitution. He contended, for example, that (1) the similarity of wording between article I, section 9 and the Fourth Amendment does not indicate that the state constitutional framers desired that the two provisions be construed harmoniously,[27] (2) that "the state courts are better able to approach state constitutional interpretation with a more innovative and responsive approach to local interests than the Supreme Court whose decisions bear the onus of nationwide applicability,"[28] (3) that fully independent constitutional interpretation promotes the laudable "concept of diversity,"[29] and (4) that the placement of the Texas Bill of Rights in the first article of the Texas

21. Six judges joined Judge Miller's majority opinion; Presiding Judge McCormick filed a dissenting opinion in which Judge White joined.
22. *Heitman*, 815 S.W.2d at 682.
23. *Id.*
24. *Id.*
25. *Id.* at 682-85.
26. *Heitman*, 815 S.W.2d at 685.
27. *Id.*
28. *Id.* at 686.
29. *Id.*

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Constitution "indicates the degree of importance of these provisions to the drafters of the constitution and the citizens of this state, as opposed to the federal Bill of Rights which was *amended* to the end of the federal counterpart."[30]

Yet while the concepts and lines of analysis set forth in the body of the opinion are protean and far-ranging, the actual holding of the case is quite circumscribed, limited to the straightforward principle that the court of criminal appeals expressly recognizes its authority to interpret the Texas Constitution independently from the United States Constitution.[31] Upon stating this carefully defined holding, the court remanded the case back to the court of appeals "for consideration of appellant's state constitutional claim in light of this decision."[32] Perceiving itself procedurally bound by its previously enunciated rules governing the assertion of rights under the Texas Constitution,[33] the majority concluded without giving any indication whether the court of criminal appeals interprets the Texas Constitution to contain more onerous restrictions upon law enforcement than the Fourth Amendment in any sense relevant to Heitman's search and seizure claim.

So what did *Heitman* hold? Merely that the court of criminal appeals expressly reserves its right to interpret the Texas Constitution independently.

What did *Heitman* not hold? It did not hold that article I, section 9 of the Texas Constitution is more protective of the rights of the accused than the Fourth Amendment. It did not hold that the framers

30. *Heitman*, 815 S.W.2d at 689 (emphasis in original).

31. *Id.* at 690.

32. *Id.*

33. In DeBlanc v. State, 799 S.W.2d 701, 706 n.4 (Tex. Crim. App. 1990) and McCambridge v. State, 712 S.W.2d 499, 501-02 n.9 (Tex. Crim. App. 1986), the court of criminal appeals stated that briefs asserting independent rights under the Texas Constitution are inadequate if they fail to provide either authority or argument in support of that assertion. In footnote 22 of the *Heitman* opinion, the court again counsels that "[a]ttorneys, when briefing constitutional questions, should carefully separate federal and state issues into separate grounds and provide substantive analysis or argument on each separate ground." It is interesting that Heitman's petition and brief did not set forth argument or authority in support of any independent rights under the Texas Constitution; indeed, neither the petition nor the brief even contain an *assertion* that relevant independent rights *exist* under the Texas Constitution. Consequently, it is even more interesting that in the *Heitman* opinion the court did not hold that Heitman's failure to assert independent rights under the Texas Constitution constituted a waiver of any such rights for purposes of appeal, but instead remanded to the court of appeals with instructions for that court to undertake the task of determining Heitman's rights under article I, section 9. *Heitman*, 815 S.W.2d at 690 n.22.

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of the Texas Constitution intended its search and seizure provision to be more restrictive upon law enforcement practices than the Fourth Amendment. It did not hold that article I, section 9 *would be* or *should be* interpreted as embodying rights distinguishable from those contained within the Fourth Amendment.

By its terms, the case stands for the simple proposition that the court of criminal appeals has the power to interpret the Texas Constitution; nothing more, nothing less. As such, *Heitman* left many questions unanswered. One unanswered question seems of paramount importance to any legitimate inquiry into the meaning of the Texas constitutional search and seizure provision, a question to which we now turn.

III. The Salient Issue Left Open in *Heitman*: Is There Any Evidence Which Warrants Differing Interpretations Of Article I, Section 9 and the Fourth Amendment?

The authority of the court of criminal appeals to interpret the Texas Constitution independently from the Supreme Court's interpretation of the Fourth Amendment is obviously not questioned. Clearly, as the final arbiter of Texas constitutional law, the court has the final say as to the scope and meaning of the various provisions of the Texas Constitution.

Yet the court's authority to finally interpret the Texas Constitution is an issue distinct from the question of whether the constitution embodies broader, or even different, individual protections than does the Fourth Amendment. If any such distinguishable intent exists, it must be found in the document itself, its language and history. For the reasons hereinafter set forth, the authors assert that a fair assessment of the text and history of the search and seizure provision of the Texas Constitution reveals no evidence that it embodies values discernably different than those contained in the Fourth Amendment.

A. *Textual Comparison of the Constitutional Provisions*

In determining whether one document grants broader individual protections than the other, one must begin with a comparison of the two texts. The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers,

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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.

Article I, section 9 of the Texas Constitution reads:

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.

Although grammatically different, these constitutional provisions clearly grant the same guarantees and establish the same prerequisites to governmental action regarding search and seizure:

(1) Each provision establishes a general right to a particular form of individual security.

(2) The security afforded by each provision extends to the same subject areas: persons, houses, papers, and effects (or possessions).

(3) Each provision requires the issuance of a warrant to search or seize.

(4) The warrant must particularly describe the person, place, or thing to be searched or seized.

(5) The warrant must be supported by oath or affirmation.

(6) The warrant must be based upon probable cause. Neither provision contains any more or any less subject matter than the other.

Because the language of the two provisions is virtually identical, it would seem that the ball is in the court of those who assert that the two provisions address discernably different interests. Indeed, such textually based arguments have been advanced. The validity of these textual analyses is, however, questionable at best.

For example, in his book on the Texas Bill of Rights,[34] James C.

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34. *See generally* JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS (1987). It should be noted that Harrington's commentary does not purport to be an objective, unbiased treatment of the text and history of the Texas Bill of Rights. In the author's words, the work not only "sound[s] the alarm about diminishing federal protection," *id.* at 9, but was intended as a how-to manual "to provide practical suggestions for successful litigation under the Texas Bill of Rights." *Id.* at 2. The author forthrightly reveals that his analysis is guided by the perceived need to reach a certain ideological result (i.e., the "functional reversal of the nation's highest court," *id.* at 1) based upon the author's disagreement with recent rulings of the United States Supreme Court. *Id.* at 2-5.

In the authors' view, schemes for circumventing recent rulings of the Supreme Court with

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Harrington contends that because the Texas constitutional provision is worded in terms of a grant of an individual right, instead of a limitation upon the exercise of governmental authority (as in the United States Constitution), there is evidence of an intent to extend greater individual protection by the Texas Constitution.[35] Yet divining a significant difference in the meaning of such indistinct text is like conjuring a dramatic distinction between "Stop," on the one hand, and "Don't go," on the other. Indeed, were one seeking to arrive at a different result, one could easily turn Harrington's argument upon its head by contending that the framers of the Fourth Amendment intended to place more onerous burdens upon law enforcement because they chose to word that provision in terms of a limitation upon governmental action. Obviously, the interpretation one gleans from either provision is colored by one's particular bias; such a "discernment" of a difference in meaning is a knife that can cut in either direction according to the ideology of the hand that wields it.

In reality, any line of demarcation between the two constitutional provisions in terms of protection of individual rights and restrictions upon governmental authority is illusory. A grant of individual protection is *necessarily* a limitation upon governmental authority. And a limitation upon governmental authority is *necessarily* a grant of greater individual protection. The two provisions protect identical values.

The court in *Heitman* toys with another suggestion of Harrington's—i.e., that the placement of the Texas Bill of Rights as the first article of the Texas Constitution is also an indication of the intent to provide broader individual guarantees than are contained in the United States Constitution.[36]

The thrust of this contention is difficult to perceive. Is anyone really contending that the fact that the Bill of Rights was incorporated into the United States Constitution by means of constitutional amendments suggests that the Bill of Rights was little more than an *afterthought*? This argument evidences a surprising failure to recognize the centrality of the Bill of Rights to the United States Constitution as

which one does not agree, such as Roosevelt's infamous "court-packing" stratagem, often prove shortsighted. Historical or textual analysis motivated by a perceived need to reach a certain result should not be accepted unless carefully verified and examined in detail for legitimacy in fact and reason.

35. *Id.* at 22-23.

36. *Heitman*, 815 S.W.2d at 689.

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a whole. After all, our nation's history reflects that it was the concern for those very rights that constituted one of the main thrusts of the American Revolution.[37] Furthermore, the framers of the United States Constitution were not delegated merely to the task of establishing guarantees of individual rights against governmental action. They were also immersed in the process of creating a constitutional foundation for a new, republican form of government such that the world had never before seen.[38]

We all know from basic American history that the adoption of the Bill of Rights was an *essential precondition* to the ratification of the United States Constitution by the states.[39] Solid, voluminous histori-

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37. Historian Hugh Brogan has stated:

> [The Bill of Rights] expressed a fundamental part of what the American Revolutionaries had fought for. They were not only democrats, in the sense that they believed in the rights of the people, as opposed to kings and nobles; they were liberals, in the sense that they believed in the inalienable rights proclaimed in the Declaration of Independence—and now these rights were spelled out [in the Bill of Rights]." HUGH BROGAN, THE LONGMAN HISTORY OF THE UNITED STATES OF AMERICA 220 (1985).

38. Indeed, Alexander Hamilton argued against placing the provisions of the Bill of Rights into the body of the Constitution, not because he thought them in any sense less important than other provisions, but rather because he was afraid that including the Bill of Rights in the body of the Constitution might provide a sort of loophole for crafty lawyers seeking to justify illegitimate governmental action by arguing that an express limitation upon governmental power in the body of the Constitution implied a sanction of governmental power not expressly prohibited. *See* THE FEDERALIST, No. 84 (Alexander Hamilton). James Madison and Roger Sherman, along with many others, at first opposed a bill of rights on these same grounds, fearing that "a malevolently inclined government might construe the list as containing the only rights the people had." BRUCE CATTON & WILLIAM B. CATTON, THE BOLD AND MAGNIFICENT DREAM: AMERICA'S FOUNDING YEARS 1492-1815 at 364 (1978); CHARLES L. MEE, JR., THE GENIUS OF THE PEOPLE 271 (1987); WILLIAM PETERS, A MORE PERFECT UNION 200-02 (1987); Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 911-12 (1991).

The contention that the federal Bill of Rights was included as an amendment because the framers thought the values it enshrined were somehow less important than provisions in the body of the document, is thus perfectly backwards. The federal Bill of Rights was not incorporated into the body of the federal Constitution precisely because the federal framers were so devoted to limiting the power of the government, concerned lest the government unwittingly be granted any loophole through which to exert power over the individual, and certainly not because the framers thought protections against governmental actions were somehow less important than other provisions.

39. *See, e.g.*, WILLIAM PETERS, A MORE PERFECT UNION 200-02 (1987); ISAAC ASIMOV, THE BIRTH OF THE UNITED STATES 144-46 (1974); HUGH BROGAN, THE LONGMAN HISTORY OF THE UNITED STATES OF AMERICA 210, 220-21 (1985); JAMES MACGREGOR BURNS, THE VINEYARD OF LIBERTY 42, 50-59, 89-90 (1982); BRUCE CATTON & WILLIAM B. CATTON, THE BOLD AND MAGNIFICENT DREAM: AMERICA'S FOUNDING YEARS 1492-1815 364 (1978); ENCYCLOPEDIA OF AMERICAN HISTORY 118-21 (Richard B. Morris & Jeffrey B. Morris eds., Bicentennial Edition 1976); CHARLES L. MEE, JR., THE

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cal evidence reveals beyond question that without the Bill of Rights, there would have been no United States Constitution, no United States of America as we know it.[40] The argument that, based upon their locations in the respective documents, the federal Bill of Rights was somehow less important to the federal framers than the Texas Bill of Rights was to the Texas framers, is conclusively rebutted by the historical record: there is no provision in the United States Constitution more central to the very existence of that document than its Bill of Rights.[41]

GENIUS OF THE PEOPLE 284-306 (1987); D. Fellman, *Bill of Rights* (United States), *in* 2 THE GUIDE TO AMERICAN LAW, at 95 (1983); Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 912 (1991).

40. The battle for and against ratification of the United States Constitution was waged fiercely by the Federalists and Antifederalists. Some states had a clear Antifederalist majority; Madison, for example, complained frequently that the Federalists were in the minority. 7 VON HOLST, CONSTITUTIONAL HISTORY OF THE UNITED STATES 57 (1889). This strong Antifederalist sentiment was overcome only by the agreement to submit the Bill of Rights for immediate ratification. The decisive turning point in the battle for ratification came when the Federalists and the Anti-Federalists agreed upon what was known as the Conciliatory Proposition, the agreement that the first duty of the first Congress would be to pass the Bill of Rights. CHARLES L. MEE, JR., THE GENIUS OF THE PEOPLE 297 (1987). Indeed, when Thomas Jefferson received a copy of the proposed Constitution, he wrote to Madison from Paris to express some of his objections to the document: "I will now add what I do not like. First the omission of a bill of rights . . . a bill of rights is what the people are entitled to against every government on earth . . . and what no just government should refuse." WILLIAM PETERS, A MORE PERFECT UNION 202 (1987). Brogan writes of the linchpin in the ratification agreement as follows:

> At last Madison let it be understood that when the new government met he would go to work to have a bill of rights passed as a Constitutional Amendment. Such amendment was in every state the honest anti-Federalists chief demand. The promise was enough: by a small margin Virginia voted to ratify (eighty-nine to seventy-nine) and America gave herself up to rejoicing.

HUGH BROGAN, THE LONGMAN HISTORY OF THE UNITED STATES OF AMERICA 210 (1987).

41. Moreover, if Harrington's "location analysis" approach to constitutional jurisprudence—the closer a provision is to the beginning of the document, the more important it was to the framers—is consistently followed, then a constitutional scholar would have to conclude that the right of a well regulated militia to keep and bear arms (Second Amendment) was much weightier in the scales of the federal framers' intent than the relatively trivial right to trial by jury, the comparatively insignificant right to confront the witnesses against you, and the relatively trifling right to counsel (Sixth Amendment). Why else would the framers have made the former the Second Amendment, and the latter only the Sixth Amendment? Yet are we really willing to accept the proposition that, for example, the "sacred" right against quartering of soldiers (Third Amendment) is more significant than the "relatively inconsequential" right to due process of law (Fifth Amendment), simply because the framers chose to place the former before the latter in the federal Bill of Rights?

Any such contention should be of great concern to those who strongly support the precious values embodied the in federal Bill of Rights.

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Another example of an attempt to formulate a textual argument in favor of the proposition that the Texas and the federal search and seizure provisions embody definably different interests is found in Arvel (Rod) Ponton's article wherein he asserts that Texas has a more specific warrant requirement than does the Fourth Amendment, because article I, section 9 requires that the person, place, or thing be described "as near as may be," whereas the Fourth Amendment requires the person, place or thing to be "particularly describ[ed]."[42] Yet it is hardly self-evident as a matter of usage, common or otherwise, that describing something "particularly" is somehow less rigorous in terms of specificity than is describing something "as near as may be." Indeed, were one inclined to play such semantic games, one could well argue that a glance at the dictionary would lead one to believe that a requirement of describing "particularly" is a *more* specific requirement than is the requirement of merely describing something "as near as may be." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "particularly" as: "in a special or unusual degree."[43]

Which is more specific, "as near as may be," or "a special or unusual degree"?

Moreover, in 1950 the court of criminal appeals interpreted the phrase "as near as may be" in such manner that, if there was any material difference between the wordings of the Texas and federal provisions, the Texas constitutional provision required *less* specificity. In *Parrack v. State*,[44] the court held that the phrase "as near as may be," only requires a "general description of the property to be searched."[45]

In sum, attempts to find a textual basis for "discerning" an identifiable distinction between the almost identically worded search and seizure provisions of the Texas and federal Constitutions are less than convincing. There being no real evidence from the texts of the two constitutional provisions that different interests are contemplated, the next step is to consider the history of the Texas constitutional enactments.

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42. Arvel Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 107-08 (1988).

43. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1647 (1966).

44. 154 Tex. Crim. 532, 228 S.W.2d 859 (1950).

45. *Id.* at 862.

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B. *Historical Analysis of Article I, Section 9 of the Texas Constitution*

1. Constitution of the Republic of Texas

Beginning Tuesday, March 1, 1836, a General Convention of the Free, Sovereign, and Independent People of Texas assembled at Washington on the Brazos in accordance with an ordinance passed by the General Council of the Provisional Government of Texas on December 11, 1835, and sanctioned by Governor Henry Smith on December 13, 1835.[46] The purpose of this called convention was to adopt a new form of government for the people of Texas. The convention met until its final adjournment sixteen days later, on March 17, 1836. At that time, the convention had adopted a proposed constitution for the new Republic of Texas, and on the first Monday of September 1836, the proposed constitution was confirmed by the people.

During the opening session of the convention, a committee of five delegates was appointed to draft a declaration of independence. The document produced by the committee was, in the words of one historian, "lifted wholesale from the U.S. Declaration of Independence and endowed with as many complaints as could be invented overnight."[47] On the following day, March 2, the committee reported to the convention a proposed declaration of independence, which was unanimously adopted by the convention in less than one hour.[48] Also, on March 2, a committee of twenty-one delegates, consisting of one member from each municipality represented in the convention, was appointed for the purpose of drafting a constitution for Texas.

On Wednesday, March 9, only *seven days* after receiving its directive, the Committee on the Constitution reported a proposed constitution to the convention. The proposed constitution was composed of six articles, a schedule, a declaration of rights, a division on general provisions, and a division on slaves. Included within said constitution

46. Unless noted otherwise, all references *infra* to Texas constitutional convention proceedings are derived from the official journals of the different conventions.

47. JEFF LONG, DUEL OF EAGLES 208 (1990).

48. According to William Gray's chronicle of the convention, the Declaration of Independence "was received by the house, committed to a committee of the whole, reported without amendment and unanimously adopted, all within less than one hour. It underwent no discipline, and no attempt was made to amend it." *See* WILLIAM GRAY, FROM VIRGINIA TO TEXAS 1835 at 126 (1965) *quoted in* JEFF LONG, DUEL OF EAGLES 208 (1990).

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were 120 separate sections. Section 6 of the declaration of rights provided as follows:

> The people shall be secure in their person, houses, papers and possessions, from any unreasonable search or seizures; and no warrant to search any place or to seize on any person or things, shall issue, without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.

On several occasions during the sessions following the committee's report of the proposed constitution, the convention resolved itself into a committee of the whole house to take up the report. Also, during this time many amendments to the provisions of the proposed constitution were offered, many of which were adopted. However, none of the suggested amendments related to section 6 of the declaration of rights. The final version of the constitution adopted by the convention contained virtually the same provision relating to search and seizure as was contained in the proposed constitution originally reported.[49]

As one reads the journal of the proceedings of the convention, it becomes more and more apparent that the dominant concern of the convention was not the delicate balance between individual rights and governmental functions, or even the proposed constitution generally. Instead, the proceedings were pervaded by distress over the impending military action by the Mexican government. In fact, on March 10, a motion was made to suspend a rule that prevented taking up any further business until the completion of the constitution, in order to consider an ordinance addressing the militia and physical force of the country.

The distinguished Texas historian T. R. Fehrenbach noted this exigency in his history of Texas:

> Now, the next step was to make a constitution. This was done again at

49. This provision was contained in the fifth section of the declaration of rights in the final version adopted by the convention. The fifth section of the declaration of rights in the final version read as follows:

> Fifth. The people shall be secure in their persons, houses, papers, and possessions, from all unreasonable searches and seizures, and no warrant shall issue to search any place or seize any person or thing, without describing the place to be searched or the person or thing to be seized, without probable cause, supported by oath or affirmation.

The grammatical changes contained in the final version were probably the workings of a select committee of five appointed on March 14, 1836, directed to correct errors and phraseology in the provisions of the constitution.

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breakneck speed; again, the delegates had a model they knew and loved. Zavala, who had a broad education and the knowledge of the centuries, at one point tried to begin a speech: *"Mr. President, an eminent Roman statesman once said —"* But he was cut off abruptly by Tom Rusk, one of whose descendants would one day be the American Secretary of State. Less diplomatic than his descendant, Rusk snapped that the problem was not dead Romans but live Mexicans. Spurred by such directness, the Constitutional Convention adopted a document on March 16.[50]

Another historian concluded that the framers of the 1836 constitution chose to embody well settled values in that document precisely because they were under such pressure from the advancing Mexican army, and wanted to set down principles that had already been clarified and defined. "[I]n borrowing these terms and expressions from the older constitutions they were getting material that they understood and which had been clarified by decades of court interpretation. It was not a time for experimenting; they did not even have time for much deliberation."[51]

Indeed, J. E. Ericson, a historian cited by both Ponton and Harrington, stated that "The 1836 Declaration of Rights is substantially the same as that of any state constitution and of the federal instrument."[52] And again: "It may be said, therefore, that the Texas Bill of Rights bears a striking resemblance to that attached to any American constitution written in the nineteenth century."[53]

What was the general attitude of the people of Texas toward crime

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50. T. R. FEHRENBACH, LONE STAR 222 (1968); *see also* the contemporary comments of William Gray: "What with the advance of the Mexicans on one side and the Indians on the other, and the organization of a new government, this Convention would seem to have enough on their hands to do." WILLIAM GRAY, FROM VIRGINIA TO TEXAS 1835, at 126-27 (1965), quoted in JEFF LONG, DUEL OF EAGLES 210 (1990).

51. Rupert N. Richardson, *Framing the Constitution of the Republic of Texas*, 31 SW. HIST. Q. 191, 214 (1928).

52. J. E. Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457 (1958).

53. *Id.* at 465-66. It should be noted that Ericson maintains that the basic framework for the Texas Bill of Rights is identical to that found in all other American constitutions of the period, with only a few exceptions for certain matters modified "by the advanced thinking of the Jacksonian period and further modified by the traditions of Spanish law and custom." *Id.* at 458. Ericson goes on to set out in detail those matters so modified, and their legal and philosophical antecedents. Significantly, the search and seizure provision of the Bill of Rights is not considered by Ericson as one of the provisions altered or modified by the framers of the Texas Constitutions. Thus, it could well be said that in Ericson's view, the Texas search and seizure provision "is substantially the same as that of any state constitution and of the federal instrument." *Id.* at 457.

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and law enforcement at the time of the framing of the 1836 constitution? Some insight can be gleaned from the punishment attending certain criminal offenses enacted by the Congress of Texas in that same year. Some examples are the following:

(1) Treason - death.

(2) Murder - death.

(3) Manslaughter - 1 to 10 years imprisonment, and may be branded with the letter M, in such place as the court shall direct.

(4) Arson - death.

(5) Stealing or enticing a slave - death.

(6) Rape - death.

(7) Robbery - death.

(8) Burglary - death.

(9) Accessary before the fact to murder, arson, rape, robbery or burglary - death.

(10) Accessary after the fact to murder, arson, rape, robbery or burglary - fine not exceeding $1,000, and may receive 39 lashes on the bare back.

(11) Petit Larceny - restitution, and not exceeding 39 lashes on the bare back.

(12) Grand Larceny - restitution, 39 lashes on the bare back, be branded in the right hand with the letter T, and may be imprisoned not exceeding one year.

(13) Horse Theft - restitution, fine not exceeding $1,000, 39 lashes on the bare back, shall be branded with the letter T, in such place as the court shall direct, and may be imprisoned not exceeding one year.

(14) Receiving Stolen Horse - same as Horse Theft, except no restitution and imprisonment not to exceed six months.

(15) Theft of Neat Cattle, Hog, Sheep or Goat - restitution and 39 lashes on the bare back.

(16) Perjury - fine not exceeding $1,000, 50 lashes on the bare back, and thereafter incapable of giving testimony in any court until the judgment be removed.

(17) Subornation of Perjury - same as Perjury.

(18) Counterfeiting - death.

(19) Forgery - death.

(20) False Branding - fine not to exceed $50 and 50 lashes on the bare back.

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(21) Altering or Defacing Animal Brand - fine not to exceed $50 and 30 lashes on the bare back.

(22) Bearing False Witness to Take a Life - death, if victim dies; otherwise, same as Perjury.

(23) Stealing or Selling a Free Person for a Slave - death.

(24) Cutting, Felling, Altering or Removing a Boundary, Tree, or Landmark - fine from $50 to $500, and any number of lashes on the bare back, not exceeding 39.[54]

Also, Section 42 of the act provided that "[n]o person accused of any criminal offence shall be set at liberty before his trial, on account of any irregularity or informality, in the warrant of commitment."[55]

The authors have found no reason to believe that the men who passed these harsh criminal statutes harbored an unenunciated desire to place more restrictions upon law enforcement than had the Northeastern framers and interpreters of the United States Constitution. Indeed, those who complain about "diminishing federal protection"[56] in such areas as search and seizure law and capital punishment,[57] are attempting to "overrule" the federal courts by a curious mechanism: the "discovery" of new impediments to law enforcement and capital punishment in a document framed by men who felt perfectly comfortable imposing a mandatory death penalty for such crimes as forgery or stealing a slave.

2. Texas Constitution of 1845

One of the conditions for admitting of the Republic of Texas into the United States of America was the adoption by Texas of a constitution embodying a republican form of government. Thus, delegates from the then Republic of Texas convened in Austin beginning Friday, July 4, 1845, for the purpose of adopting such a constitution. Fifty-five days later, on August 28, 1845, the Texas Constitution was passed by the convention.

54. 1 H. GAMMEL, LAWS OF TEXAS 1247-55 (1898).

55. *Id.*

56. JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS 9 (1987).

57. In his book advocating a "return" to the liberties embodied in the Texas Constitution, Harrington complains about the United States Supreme Court's capital punishment jurisprudence in the following language: "And with respect to capital punishment, the Court declines to interfere with execution after execution, even in cases raising serious doubts about juries and procedural fairness." JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS 5 (1987) (footnotes omitted).

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Thomas J. Rusk of Nacogdoches County was elected as president of the 1845 Constitutional Convention. In his opening address to the entire body on July 4, 1845, President Rusk talked of the clear mandate which would guide the convention's deliberations. He said, in part:

> The formation of a State Constitution upon republican principles, is the only act to be performed to incorporate us into the American Union. While we insert those great principles which have been sanctioned by time and experience, *we should be careful to avoid the introduction of new and untried theories,—we should leave those who are to follow us, free to adopt such amendments to the system, as their experience and intelligence shall suggest, and their circumstances render necessary.*[58]

On July 8, 1845, the convention adopted a resolution that the Committee on General Provisions be instructed to report a "Bill of Rights" to be prefixed to the constitution. On Friday, July 11, 1945, one week after the convention assembled and *just three days after adoption of the resolution*, the Committee on the Bill of Rights and General Provisions reported back to the convention a proposed bill of rights containing twenty-two different articles. Article 7 of the proposed bill of rights provided:

> 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 following Tuesday, July 15, 1845, the report of the Committee on the Bill of Rights and General Provisions of the Constitution was taken up. During that day the convention resolved itself into a Committee of the Whole on the Bill of Rights. Various amendments were considered, none of which related to proposed article 7. The Committee of the Whole reported the bill of rights, with the various amendments, to the convention and asked to be discharged from their further consideration. The committee's report was adopted.

The bill of rights was then taken up by the convention. The amendments of the committee as a whole were first considered and adopted by the convention. Several proposed amendments were then offered. Again, none of the proposed amendments related to proposed article

58. JOURNALS OF THE CONVENTION 5-6 (1845) (emphasis added).

7. The convention then adjourned for the day without any further action on the bill of rights.

On the following day, Wednesday, July 16, other amendments to the bill of rights were considered. None of the proffered amendments related to proposed article 7. The bill of rights was then ordered to lay on the table. The next day, Thursday, July 17, the bill of rights was recommitted to the Committee on Bill of Rights and General Provisions. The proposal stayed in this committee until July 28.

On Monday, July 28, 1845, the committee reported back to the convention recommending an amendment unrelated to proposed article 7. The committee's report was laid on the table, and no further action was taken by the convention that day.

The following Wednesday, July 30, the bill of rights was again taken up by the convention. Several amendments were again offered. Again, none of these amendments related to proposed article 7. The convention then ordered the bill of rights to be engrossed.

No further action on the bill of rights was taken by the convention until Tuesday, August 19, 1845, when certain other proposed amendments, unrelated to proposed article 7, were considered. The bill of rights was then considered on third reading and passed by the convention. That action constituted the final consideration of the bill of rights until the entire proposed constitution was passed by the convention on Thursday, August 28, 1845.

Clearly, there were never any proposed amendments offered to the committee's article 7, as it was reported to the convention on July 11, 1845, a mere three days after the convention resolved that a "bill of rights" be prefixed to the constitution. Although there was much discussion concerning other proposed articles, such as article 5 relating to freedom of speech and freedom of the press, there is no mention of proposed article 7 in the recorded debates of the 1845 Constitutional Convention.[59] Instead, proposed article 7 apparently was not the subject of any controversy or disagreement during the entirety of the 1845 Constitutional Convention.

3. Texas Constitution of 1861

In 1861, the people of the State of Texas elected delegates to a con-

59. *See generally* DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1845 (1845).

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vention (known as the "secession convention") called for the purpose of considering secession of the state from the United States. Although this convention was not authorized by the governor or the legislature, the people believed that article 1 of the bill of rights conferred upon the people the sovereign right "to alter, reform, or abolish their form of government in such manner as they may think expedient."

This convention assembled on January 28, 1861 in Austin. Four days later, on February 1, the convention adopted an ordinance for withdrawing Texas from the Union. This ordinance of secession was to take effect on March 2, 1861, unless rejected by the people at an election to be held on February 23, 1861.

Also, at this time several southern seceded states had appointed delegates to meet at Montgomery, Alabama on February 4, 1861, to form a provisional government and to prepare and submit a constitution for the government of a permanent confederacy. On February 4, the secession convention elected seven delegates to that proposed convention. These delegates were to act in an advisory capacity, protecting the interests of Texas until the consummation of its separation, and then to participate as equal delegates. The convention then adjourned until March 2, 1861. During this eight-day period from January 28 until February 4, 1861, the only issues discussed at the convention were those relevant to the state's secession from the United States of America.

On February 9, Governor Sam Houston issued a proclamation ordering an election to be held February 23, 1861, for ratifying or rejecting the ordinance of secession. On February 23, the citizens voted in favor of the ordinance. On March 4, Governor Houston issued a proclamation declaring that Texas had seceded from the United States.

The convention had reassembled on March 2, 1861. On March 5, after Governor Houston's proclamation the previous day, the convention adopted an ordinance uniting Texas with the Confederate States of America and approving the provisional constitution of the Confederate States of America. Prior to the adjournment of the convention on March 25, 1861, the body also passed ordinances to amend certain provisions in the Texas Constitution. Also, the permanent Constitution of the Confederate States of America was approved.

Article I, section IX, subsection 15 of the Constitution of the Confederate States of America provided:

> 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 warrant 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.

Although one would be foolish to discount the influence of slavery upon the origins of the War Between the States in general, and Texans' decision to side with the Confederacy in particular, the perceived necessity of protecting states' rights against the encroachments of the federal government seemed to predominate over the less noble desire to preserve slavery in this State. Fehrenbach writes: "The institution of Negro slavery was not really popular with the more than 400,000 white Texans—ninety-five percent of the population—who owned none, although they had grown up with it and considered it normal."[60] Texas' decision to secede from the Union was based primarily in its ingrained spirit of self-determination and resistance to the boot of a foreign invader. This viewpoint is highlighted by the fact that while only three out of four Texans voted for disunion, nine out of ten agreed that the cause of "Yankee aggression" could not be supported.[61]

It is thus quite revealing that Texans, taking the ominous step of severing themselves from the United States for the principle of protecting their state's right to self-governance, did not view the provisions of their constitution relating to individual liberties as ideologically distinct from similar provisions in the United States Constitution. Those who seek to paint the "discovery" of new restrictions on law enforcement in the Texas Constitution as an exercise in "states' rights" should find it ironic that the men who fought and died for their concept of "states' rights" in the War Between the States used virtually the *same language* as was contained in the Fourth Amendment to the United States Constitution in the Constitution of the Confederate States of America. Moreover, during the entirety of the proceedings of the 1861 Texas secession convention, the delegates paid homage to the wisdom contained within the United States Constitution. Again, there was no action or discussion taken regarding article 7 of the Texas Bill of Rights during this convention. In fact, the only changes to the Texas Constitution were those believed neces-

60. T. R. FEHRENBACH, LONE STAR 328 (1968).
61. *Id.* at 348.

sary to adapt the constitution to the separation from the United States of America and the union with the Confederate States of America.

The perception of the convention regarding both the Confederate and Texas Constitutions was expressed by a three-man committee of the convention appointed to provide information to the people of Texas regarding the activities of the convention. Regarding the provisional Constitution of the Confederacy, the committee reported:

> The Convention found that the constitution for the provisional government of the Confederacy was well adapted to the emergency, *without departing from any essential principle of the Union constitution*, and the measures of the provisional government appeared to be well adapted to circumstances. . . . The Convention had no hesitation in expressing a formal approval of the constitution and administration of the provisional government, which was not to continue longer than one year and was to be superseded within that time by a permanent government.[62]

The committee also explained the convention's views regarding the permanent Constitution of the Confederate States of America, as well as the relationship of that constitution to the Texas Constitution:

> At length the "Constitution of the Confederate States of America," for the permanent government was received. The convention had previously declared in its ordinance directing the delegates from this state to participate in forming such a constitution that it should "not become obligatory on this State till approved by the people in such way as should be determined upon." That the people might approve by the existing Convention, or that it might provide for another popular election, remained for determination on the arrival of the constitution. Had it contained any unexpected principle, so as to make a new case in substance on which the public mind had not been ascertained, the importance of prompt ratification could have yielded to the paramount necessity for another election. But no such necessity appeared in any part of the constitution, which did not depart from the general expectation unless it did so in the excellence of its conformity with the best hope of the people.
>
> The people will see that the constitution of the Confederate States of America is copied almost entirely from the constitution of the United States. The few changes made are admitted by all to be improvements. *Let every man compare the new with the old and see for himself that we still cling to the old constitution made by our fathers.*
>
> But the connection of Texas with the Confederacy involved a neces-

62. WINKLER, JOURNAL OF THE SECESSION CONVENTION 256 (1912) (emphasis added).

sity for modifications of our State constitution, so that it should be in conformity with our new relation, and another consequent necessity required that the legislature should have some extension of power to raise funds within bounds and on terms that would be safe and beneficial to the State. Such modifications were made. The Convention realized that other changes of the State constitution were desirable, *but its amendments were confined to particulars which were considered to be necessary parts of the great political change.*[63]

Clearly, the framers of the 1861 Texas Constitution did not see the "search and seizure" clause of that instrument, virtually identical to the provision in the 1836 and 1845 Constitutions, as embodying protections of individual liberty distinguishable from those contained in the federal Bill of Rights.

4. Texas Constitution of 1866

After the War Between the States ended, it became necessary for Texas to adopt a constitution rescinding its act of secession in order to be re-established as a state of the United States. Thus, another Constitutional Convention assembled on February 7, 1866.

On February 10, a resolution was offered that the convention should alter or amend the present constitution only so far as was actually necessary to enable the state to resume its former friendly relations with the United States, as a member of the Federal Union, and no further. This resolution was referred to a Committee on the Condition of the State. No further action was taken on this resolution during the convention.

However, on February 13, a similar resolution was offered. This resolution, offered by delegate Paschal, provided that the convention re-establish the Constitution of the State of Texas in force immediately before February 1, 1861, with such amendments only as may be necessary to conform it to the existing order of things, growing out of the late war. The Paschal resolution was referred to a special committee.

On February 15, a majority of the special committee reported to the convention against the adoption of the Paschal resolution and offered a substitute resolution. The majority report recommended that the convention entertain all proposed constitutional amendments

63. *Id.* at 257-58 (emphasis added).

deemed sufficiently important. The committee's majority believed it to be improvident to limit, in advance, the action of the convention. Also offered was a minority committee report, which effectively re-offered the Paschal proposal.

Subsequently, the convention tabled the majority report of the special committee and passed a substitute to the minority report. Yet, the resolution adopted by the convention was more similar to the majority report than it was to the minority report. It provided that the convention would act upon and make such amendments to the constitution that were deemed expedient and that such amendments would be submitted to the people for their ratification.

In spite of the convention's rejection of the efforts of some delegates to limit constitutional amendments to only those necessary to restore the State's status in the Union, amendments to the bill of rights by the convention were nominal, as compared to amendments to other sections of the constitution. No amendment was made, or even offered, to article I, section 7, the "search and seizure" provision of the constitution. In fact, only three amendments were made to provisions within the bill of rights: (1) language relating to the existence of any government or authority within the state without the consent of the people was deleted from section 1; (2) a clause was inserted into section 8 limiting the right to trial by jury in certain cases; and (3) a clause was added to section 9 authorizing the return of a writ of habeas corpus to counties agreed upon by the parties. So unconcerned were the convention delegates about the text of the bill of rights that on February 17 the convention *rejected* a resolution to establish a committee on the bill of rights.

The amended constitution was adopted by the convention on April 2, 1866, and approved by the citizens on the fourth Monday in June of 1866.

5. Texas Constitution of 1869

The new Texas government was declared illegal by the United States Congress in the First Reconstruction Act of 1867, and as a result, Texas became a military occupational district. In order for Texas to be readmitted into the Union, the Reconstruction Act required that a new constitution and certain other political concessions be enacted.

Thus, new delegates were elected to another constitutional convention that convened in Austin on June 1, 1868. This convention

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worked until August 31, at which time it adjourned until the first Monday in December. On December 7 the convention reconvened and met until its final adjournment on February 7, 1869. At the conclusion of the convention, a new proposed constitution had been adopted, and it was ratified by the people in the latter part of 1869.

The entire proceeding of this constitutional convention was dominated by competing political factions of conservatives who, while embracing the principle of Negro enfranchisement, still desired to maintain some aspects of pre-Civil War society, and radicals who were firmly dedicated to the principles of reconstruction and to the disenfranchisement of the former Confederates. Proposals relating to any individual guarantees, except those relating to subjects of Civil War strife, did not exist. During the early part of the convention, on June 5, 1868, this convention rejected a resolution to appoint a special committee on the bill of rights. And, except for some minor grammatical changes, the only amendments to the bill of rights were the following:

(1) The Preamble to the Bill of Rights was amended to scorn the "heresies of nullification and secession."
(2) Section 1, which was the clause relating to the sovereignty of the people relied upon by the delegates to the Secession Convention, was abolished, and, in its place, was inserted a new clause acknowledging the sovereignty of the Constitution and laws of the United States.
(3) A clause was added to section 2, excluding disentitlement to public emoluments or privileges in consideration of public services.
(4) The clause added to section 8 in 1866 removing the right to jury trial for certain offenses was eliminated.
(5) The convention also removed the clause added to section 9 in 1866 authorizing venue of a writ of habeas corpus in counties agreed to by the parties.
(6) The words "or limb" were removed from section 12, the double jeopardy clause.
(7) A clause was added to section 13 limiting the right to keep and bear arms to such regulations as prescribed by the legislature.
(8) A clause was added to section 14 specifically relating to the continued enforceability of contractual rights existing at the time the contract was made.
(9) New sections 21 and 22, relating to equal protection of all persons and abolition of slavery, were added.
(10) Former section 21 was renumbered Section 23.

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Section 7, relating to search and seizure, was modified only by striking out the word "them" and inserting the words "such place, person, or thing" as follows:

> 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 *such place, person, or thing*, as near as may be, nor without probable cause, supported by oath or affirmation.

6. Texas Constitution of 1876

In the years immediately following Reconstruction, the agrarian society of Texas began asserting its political influence via the Democratic party. As a result, Governor Richard Coke issued a proclamation on August 23, 1875, calling for yet another constitutional convention.

The delegates elected to the 1875 Constitutional Convention began meeting on September 6 in Austin. Certain delegates expressly stated they had no intention of altering the principles embodied in all of the American constitutions in our history. Consider, for example, the statement of W. N. Ramey of Panola, Texas:

> Everyone here knows very well that the great and leading principles of our American Constitutions are in substance almost the same, and in none of them are these settled principles better expressed than in the Texas Constitution of 1845. We certainly don't expect to change the fundamental principles of government established by our fathers.[64]

One of the standing committees of the convention was a Committee on the Bill of Rights. From the time of the committee's creation until October 2, 1875, when the committee reported its proposed bill of rights, there were eighteen different resolutions concerning proposed provisions (excluding those relating to the preamble and to state boundaries) referred to the committee. *None* of those proposals involved protection against illegal searches and seizures.

Section 9 of the committee's report, relating to the guarantee against unreasonable searches and seizures, read as follows:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to

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64. DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 at 43 (Seth S. McKay ed., 1930).

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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.[65]

After the committee's report, the convention began its consideration of the bill of rights on October 12 and continued for parts of three days, with a bill of rights being engrossed on October 14. During this three-day period, over forty amendments or substitutes were offered to the different provisions contained in the committee's recommendation. Again, *none* of the amendments or substitutes involved proposed section 9, which was the search and seizure provision.

The bill of rights was considered on third reading on October 21. Again, several amendments and substitutes were offered, *none* of which related to proposed section 9. On that day the bill of rights was finally passed. The committee's proposed section 9 was adopted as part of the bill of rights, with no other action having been taken on such. Finally, on November 24, 1875, the entire constitution was adopted by the convention.[66]

The constitution was ratified by the people on February 15, 1876. Since that time, the text of section 9 of the Bill of Rights has remained unchanged.

In sum, the search and seizure provision of the Texas Constitution has remained virtually the same from the creation of the Republic of Texas until the present. Indeed, although some historians have pointed out certain genuine differences in the provisions of the Texas Constitutions and their counterparts in the United States Constitution,[67] the authors have found no historian who asserts that the Texas search and seizure provision embodies distinguishable values from those contained in the Fourth Amendment.

Clearly, the history of the various Texas Constitutions provides no

65. The committee's proposed section 9 did not include the amendment made by the 1869 Constitution Convention replacing the word "them" with the words "such place, person, or thing." Thus, this proposed section more resembled the pre-1869 constitutions.

66. The convention's proceedings, as evidenced by the convention's journal, provide a picture that appears to be somewhat contrary to the blanket assertion made by James Harrington: "The drafters of the 1876 Constitution likewise carefully drew and debated article I's sections from the day of its submission to the Bill of Rights Committee through the 'third reading' by the whole assembly, when the habeas corpus provision was again argued." JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS 22 (1987).

67. *See generally*, J. E. Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457 (1958); F. Paxson, *The Constitution of Texas 1845*, 18 SW. HIST. Q. 386 (1916).

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support for the proposition that the present article I, section 9 or its predecessors were intended to place more restrictions on law enforcement than are found within the Fourth Amendment.

7. Court Decisions

If the true intent of the framers of the Texas Constitution was to erect a higher standard than that embodied in the Fourth Amendment for determining the lawfulness of governmental searches and seizures, then evidence of such intent should be present in case decisions. There is no such evidence. In fact, there is evidence to the contrary: to the extent that evidence of differing interpretations exists, that evidence suggests that the court of criminal appeals has viewed article I, section 9 as imposing *fewer* restrictions on the admission of evidence of crime than the Fourth Amendment as construed by the Supreme Court.

In *Weeks v. United States*,[68] the Supreme Court established the federal exclusionary rule. It was not until 1961, however, in the case of *Mapp v. Ohio*[69] that the exclusionary rule became applicable to the states. Therefore, prior to *Mapp* each state was free to admit evidence obtained in violation of the Fourth Amendment.

In 1925 the Texas Legislature enacted a statutory exclusionary rule.[70] Prior to that enactment, however, Texas courts were limited only by the provisions of article I, section 9 in determining the admissibility of evidence illegally obtained. And, if greater individual protection was contained within article I, section 9 than within the Fourth Amendment, there would have been no need to enact a statutory exclusionary rule, since the Supreme Court had announced 11 *years earlier* that this rule was within the Fourth Amendment jurisprudence. Moreover, one would expect to have found Texas courts, at the very least, following the lead of the Supreme Court in *Weeks* from the time of that decision in 1914 until the enactment of article 727a in 1925. However, that was not the case.

In *Welchek v. State*,[71] the court of criminal appeals was provided the opportunity to apply article I, section 9 in the same manner that the Fourth Amendment had been applied in *Weeks*, but it declined.

68. 232 U.S. 383 (1914).
69. 367 U.S. 643 (1961).
70. TEX. CRIM. PROC. CODE ANN. art. 38.23 (Vernon 1981).
71. 93 Tex.Crim. 271, 247 S.W. 524 (1922).

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Instead, the Texas constitutional provision was interpreted in such a way as to provide *less* individual protection and *fewer* restrictions on the admission of evidence of crime. In *Welchek* the appellant was convicted of transporting intoxicating liquor. Necessary to the conviction was the admittance of three jugs of whiskey which had been unlawfully seized, without a warrant. Although the Court stated that the Fourth Amendment to the federal Constitution is "substantially the same"[72] as article I, section 9, it specifically refused to apply the doctrine of *Weeks* to article I, section 9. The court stated:

> In our judgment, however, the proper decision of the question before us rests on the fact that there is nothing in the constitutional provision inhibiting unreasonable searches and seizures which lays down any rule of evidence with respect to the evidential use of property seized under search without warrant, nor do we think anything in said constitutional provision can be properly construed as laying down such rule. It seems to us that it is going as far as the provision of said Constitution demands to admit that one whose property is wrongfully obtained in any manner is entitled to his day in some court of competent jurisdiction and to a hearing of his claim for the restoration of such property, and for the punishment of the trespasser or the announcement that the citizen may defend against such intrusion. . . . Nor can the rejection of the proffer in testimony of such property be soundly sustained upon the theory that the officer or person who removed such property having evidential value from the house or curtilage of its owner should be punished for an entry into said premises without search warrant. To reject such evidence for such reason or to completely return same to the owner and relinquish jurisdiction over same would in no wise be a punishment to the officer, but would rather be a hurt inflicted upon the people, whose interest in the punishment of crime suffers because the court may think the officer should be rebuked for the manner in which he obtained the evidence.
>
> We believe that nothing in section 9, art. 1, of our Constitution, supra, can be invoked to prevent the use in testimony in a criminal case of physical facts found on the person or premises of one accused of crime, which are material to the issue in such case, nor to prevent oral testimony of the fact of such finding which transgresses no rule of evidence otherwise pertinent.[73]

As a result of the refusal of the court of criminal appeals in

72. *Welchek*, 93 Tex. Crim. 271, 247 S.W. at 526.
73. *Welchek*, 93 Tex. Crim. 271, 247 S.W. at 528-29.

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Welchek to hold that an exclusionary rule similar to that announced in *Weeks* was included within article I, section 9, the legislature in 1925 enacted certain statutes, one of which was Article 727a. Earlier, in 1919, the legislature had also enacted Texas Penal Code art. 691, which set forth certain requirements for an application for the issuance of a search warrant for intoxicating liquor.

In *Chapin v. State*,[74] the court of criminal appeals was faced with the issue of whether the requirements of article 691 necessitated that the facts and circumstances upon which probable cause was based be set forth in the application. Although the court's decision that it was necessary to set forth such facts and circumstances in the application is not important to our issue, its reasoning is revealing. In *Chapin* the court said:

> In passing articles, 4, 4a, 4b, and article 727a, supra, the Legislature indicated the desire to disapprove the refusal of this court to follow the federal courts in holding by this court that evidence obtained through an illegal search could be used in a criminal trial. Thus, by implication, the Legislature sanctioned the construction by the federal courts of the search and seizure clause of the Constitution.
>
> In passing the present law on searching a private dwelling embraced in article 691, supra, the Legislature used language incompatible with the validity of such a search warrant on information and belief, thus indicating that the language used in the statute of 1907 (criticized by the Supreme Court in the Dupree Case, supra) was not expressive of the legislative intent, but that, by the use of the word "show," it was intended that the facts upon which the belief was based would be necessary to a valid search warrant of a private dwelling. *Such interpretation of the legislative intent brings the state law in harmony with the federal decisions and statutes on the subject of search and seizure*, so far as they relate to the search of a private dwelling and the enforcement of the Eighteenth Amendment to the National Constitution.
>
> Upon the considerations hereinabove stated, and in light of the history of the search and seizure law of this state giving effect to the rule which we understand governs in the interpretation of statutes, the writer believes it to be the duty of this court to declare that, in the enactment of article 691, supra, stating the conditions upon which a private dwelling occupied as such may be searched, *the Legislature did not intend to give a meaning to the term "probable cause" embraced in the Bill of Rights different from that prevailing in the Supreme Court of*

74. 107 Tex. Crim. 477, 296 S.W. 1095 (1927).

the United States, announced in the statutes of the United States, and adopted by practically all of the states of the Union where the subject has been discussed.[75]

The decision in *Chapin* involves a question of legislative intent rather than constitutional intent. Nonetheless, it is revealing that the legislature felt it was necessary to enact a statute to place more limitations upon the admission of evidence of crime, and thus to bring Texas search and seizure law in harmony with Fourth Amendment jurisprudence.[76]

Several years later, in 1944, the court of criminal appeals in *Crowell v. State*[77] again stated that article I, section 9 of the Texas Constitution, and the Fourth Amendment to the United States Constitution are, "in all material aspects, the same."[78]

In 1960, in *Stevenson v. State*,[79] the court of criminal appeals refused to follow the Supreme Court's decision in *Jones v. United States*,[80] which established the "automatic standing" rule for all persons legitimately on the premises searched.[81] Individual protection under article I, section 9 was thus held to be *more confined* in scope than was the protection afforded by the Supreme Court under the Fourth Amendment.

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75. *Chapin*, 107 Tex. Crim. 477, 296 S.W. at 1100 (emphasis added).

76. In the wake of *Heitman*, one intermediate appellate court has already recognized that the Texas exclusionary rule is of statutory, not constitutional origins. In Imo v. State, 816 S.W.2d 474 (Tex.App.—Texarkana 1991), *reversed on other grounds*, __ S.W.2d __ (Tex. Crim. App. No. 1101-91, December 11, 1991), the defendant argued for the exclusion of evidence upon federal and state constitutional grounds. The court of appeals rejected Imo's state constitutional claim, citing *Welchek* for the proposition that the Texas exclusionary rule is statutory, not constitutional, in nature:

> [I]t would appear that the exclusionary rule in Texas came into being not pursuant to the Texas Constitution, but pursuant to the Texas Code of Criminal Procedure.
>
> Article I, § 9 of the Texas Constitution was never interpreted to provide for the exclusion of evidence except when it was applied in conjunction with the fourth amendment of the United States Constitution. . . .
>
> . . . If we look at the historic interpretation of this section of the Texas Constitution, we would not find a basis for applying the exclusionary rule.

Imo, 816 S.W.2d at 479. On December 11, 1991, the court of criminal appeals reversed the decision of the Court of Appeals on grounds that the lower court had erred in holding that the appellant had waived his claim based upon the Texas statutory exclusionary rule.

77. 142 Tex. Crim. 600, 180 S.W.2d 343 (1944).

78. *Id.* at 346.

79. 169 Tex. Crim. 431, 334 S.W.2d 814 (1960).

80. 362 U.S. 257 (1960).

81. *Jones* was overruled in United States v. Salvucci, 448 U.S. 83 (1980).

In *Aguilar v. State*,[82] the appellant argued a violation of both federal and state search and seizure provisions. The court of criminal appeals, when deciding the sufficiency of the affidavit on federal grounds, noted its belief that "if we have properly decided this case under our Constitution and statutes then it has been properly decided under the Constitution of the United States and the holding in Mapp v. Ohio, supra."[83] Of course, the decision of the court of criminal appeals was ultimately reversed by the United States Supreme Court on federal grounds. However, the decision remains instructive regarding the manner in which the court of criminal appeals viewed the two constitutional provisions.

Again, in *Giacona v. State*,[84] the court of criminal appeals said that "there is little, if any difference," between the Fourth Amendment and article I, section 9 of the Texas Constitution.

In *Hall v. State*[85] the appellant claimed that the affidavit to authorize the issuance of a search warrant was insufficient. The only provision to which the court looked for a possible constitutional violation was article I, section 9 of the Texas Constitution. The court did not mention any possible violation of the Fourth Amendment. However, the court relied upon the decision of the United States Supreme Court in *Aguilar v. Texas*[86] as the basis for its holding that the affidavit was insufficient under the Texas constitutional provision.

Cases involving the seizure of "mere evidence" during a search are also illuminating. For many years, the court of criminal appeals held that officers could not seize items which were only of evidential value, as opposed to implements of crime.[87] However, in *Warden v. Hayden*,[88] the United States Supreme Court held that it was not a violation of the Fourth Amendment to seize items of "mere evidence." The *Hayden* decision had a dramatic impact upon the court of criminal appeals' interpretation of the Texas Constitution. In *Haynes v. State*,[89] the court explicitly followed the Supreme Court's *Hayden* de-

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82. 362 S.W.2d 111 (Tex. Crim. App. 1962) (opinion on rehearing).
83. *Id.* at 113.
84. 372 S.W.2d 328, 333 (Tex. Crim. App. 1963) (opinion on rehearing).
85. 394 S.W.2d 659 (Tex. Crim. App. 1965).
86. 378 U.S. 108 (1964).
87. *See* LaRue v. State, 149 Tex. Crim. 598, 197 S.W.2d 570, 571 (1946); Cagle v. State, 142 Tex. Crim. 663, 180 S.W.2d 928, 937-38 (1944).
88. 387 U.S. 294 (1967).
89. 475 S.W.2d 739 (Tex. Crim. App. 1971).

cision, and abandoned its prohibition upon the seizure of "mere evidence." In *Haynes*, the court clearly viewed the two search and seizure provisions as embodying the same values, i.e., "to safeguard the privacy and security of individuals against arbitrary invasion by government officials."[90]

Similarly, with the abandonment by the Supreme Court of the *Aguilar-Spinelli*[91] two-prong test for determining an affidavit's sufficiency, Texas either could apply to state law issues the new standard of *Illinois v. Gates*,[92] or it could continue to apply the more onerous requirements of *Aguilar-Spinelli*. Instead of applying a different state standard, the court of criminal appeals adopted the new test set out in *Gates*.[93]

In *Gearing v. State*,[94] the court of criminal appeals held that it would interpret article I, section 9 to require no more than the Fourth Amendment in determining whether a seizure of the person has occurred in the context of an officer approaching an individual to determine his willingness to answer questions.[95] Indeed, the Court expressly stated: "We do not interpret article I, section 9, Texas Constitution, to require more than the Fourth Amendment in [this] situation."[96]

The *Heitman* opinion itself recognizes the language utilized in several other cases interpreting the Texas Constitution in harmony with the United States Constitution.[97] While *Heitman* is correct in its observation that the language in cases such as *Brown* and *Eisenhauer* regarding harmonious interpretations of both constitutions was not concurred with by a majority of the court,[98] the same cannot be said for the converse. There does not appear to be any case in which the court of criminal appeals has held that our state constitutional provi-

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90. *Id.* at 741.

91. *See generally* Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

92. 462 U.S. 213 (1983).

93. *See generally* Whaley v. State, 686 S.W.2d 950 (Tex. Crim. App. 1985).

94. 685 S.W.2d 326 (Tex. Crim. App. 1985).

95. *See generally* Florida v. Royer, 460 U.S. 491 (1983).

96. *Gearing* 685 S.W.2d at 329.

97. Eisenhauer v. State, 754 S.W.2d 159 (Tex. Crim. App. 1988); Osban v. State, 726 S.W.2d 107 (Tex. Crim. App. 1986); Heitman v. State, 815 S.W.2d 681, 683-84 (Tex. Crim. App. 1991) *citing, e.g.*, Brown v. State, 657 S.W.2d 797 (Tex. Crim. App. 1983).

98. *Heitman*, 815 S.W.2d at 683-84.

sion on search and seizure is to be interpreted as *more restrictive* upon law enforcement than the Fourth Amendment.

If article I, section 9 of the Texas Constitution does impose greater restrictions upon law enforcement than the Fourth Amendment, then such has been the case since its enactment in 1876 (or before). Greater restrictions did not just mystically appear on June 26, 1991—the date of the *Heitman* opinion. And if article I, section 9 does in fact impose heavier burdens upon law enforcement, then one would expect to find in the cases handed down between 1876 and 1991 some indication from our state's highest criminal court that, while a particular search or seizure might have satisfied the Fourth Amendment, it nevertheless failed to comply with the "stricter standards" of article I, section 9 of the Texas Constitution. The fact that no such indication exists would appear to be strong evidence that throughout the history of Texas, article I, section 9 and the Fourth Amendment have been viewed as embodying quite similar values, and to the minimal extent that differing interpretations have existed, article I, section 9 has been viewed as placing *fewer* restrictions upon admission of evidence of crime than does the Fourth Amendment.

8. An Example of Historical Analysis By a Proponent of the "New Federalism"

A fair reading of the historical evidence does not appear to support the proposition that the Texas constitutional framers intended the search and seizure provision of the Texas Constitution to place more restrictions upon law enforcement than does the Fourth Amendment. Nevertheless, proponents of severing Texas' jurisprudence from settled federal precedent assert that they have found such evidence in the historical record.

An example of an authority cited by the Court in *Heitman* purporting to find evidence supporting the proposition that the framers of the search and seizure provisions of the Texas Constitution intended to place greater restrictions upon law enforcement than did the framers of the Fourth Amendment is Arvel (Rod) Ponton's *Sources of Liberty in the Texas Bill of Rights*,[99] in which the author asserts:

The fusion of Jacksonian democracy, Spanish civil law, the American

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

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revolution, English common law, and the abuses inflicted upon the settlers of Texas by the government of Santa Anna prompted Texans in 1836 to demand greater protection of their rights than what had been written into the United States Constitution and its Bill of Rights.[100]

As authority for this bold assertion, the author asks the reader to refer to T. R. Fehrenbach's book FIRE AND BLOOD at pages 350-69. Yet when one turns to pages 350-69 of either edition[101] of Fehrenbach's excellent chronicle of the modern history of Mexico, one finds that it contains no reference to the framing of the Texas Constitution of 1836 or any other year. Pages 350-69 of FIRE AND BLOOD are a quite interesting and informative account of Mexico winning its independence from Spain, General Iturbide's assumption of control over the new Mexican government, and the accompanying civil discord and economic dislocation in the Mexican nation during the 1820s. The passage does not discuss "Jacksonian democracy, Spanish civil law, the American Revolution, English common law," or "the abuses inflicted upon the settlers of Texas by the government of Santa Anna."[102] The passage does not refer to the Texas Constitution of 1836, the Texas Declaration of Independence, Washington-on-the-Brazos, or the Texas Revolution. According to the index in both editions, Fehrenbach does not make any reference to "Texas" anywhere in pages 350-69 of FIRE AND BLOOD![103]

Ponton also purports to quote another passage from Fehrenbach in an effort to shore up his version of the historical background for the framing of the 1836 constitution. In an apparent attempt to portray the citizens of what would become the Republic of Texas as deeply

100. *Id.* at 97.

101. FIRE AND BLOOD was originally published by Macmillan Publishing Company in 1973; a reprint was later published by Bonanza Books in 1985.

102. Santa Anna did not become president of Mexico until 1832, which was some time after the period covered by Fehrenbach in pages 350-69 of FIRE AND BLOOD. *Id.* at 371.

103. The authors trust that Ponton's citation to FIRE AND BLOOD was simply the result of an editing error. Yet that error is repeated on page 99 of his article, where the author asserts that "[o]ne of the main complaints that caused the citizens of Texas to declare their independence from Mexico was the lack of trial by jury, and the failure of Mexico to protect the right secured to citizens by English common law."

The authority the author cites in support of this proposition is, again, Fehrenbach's FIRE AND BLOOD at pages 350-69. That section of Fehrenbach's book makes no reference to Texans' complaints against the Mexican government or the Texans' motivations for declaring their independence. The cited passage does not use the words "Texan" or "Texas" at all.

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offended by certain provisions of the Mexican Constitution, Ponton "quotes" page 379 of Fehrenbach's FIRE AND BLOOD:

> There were two major irritations which led to Texas' declaration of independence. Mexico had no trial by jury, which offended the colonists' sense of justice, and justice and government were administered out of Coahuila, to which the province was attached.[104]

That is not how the passage on page 379 of FIRE AND BLOOD reads. An accurate quote of Fehrenbach's entire paragraph, with the sentences left out by Ponton in italics, the word deleted from a sentence in italics and bold, and the language added to Fehrenbach's words in brackets and marked through reads:

> *Stephen Austin, leader of the North American colonists, was a man of conscience, who understood the Mexican mind, and while he was not over-admiring of Mexicans he was loyal to the Republic. Most of the colonists were satisfied in a country that gave each family head four thousand acres virtually free and collected no taxes.* There were ***only*** two major irritations [which led to Texas' declaration of independence]. Mexico had no trial by jury, which offended the colonists' sense of justice, and justice and government were administered out of Coahuila, to which the province was attached. *Austin worked to overcome these irritants with some success, and he and most settlers sincerely believed that Texas was heading toward self-government as a Mexican state under the 1824 Constitution. While the colonists were not assimilating, they were causing no trouble.*[105]

The gist of the above-quoted passage is that the Texas colonists were basically happy living under the Mexican Constitution at that time, and that Austin had in general succeeded in overcoming whatever irritants existed.[106] Yet by ignoring the bulk of the paragraph, leaving out a word here and adding a phrase there, Fehrenbach's words are transformed to make it appear that Fehrenbach was stating that the colonists were chafing under the constraints of the Mexican Constitution, all in order to support Ponton's

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104. Arvel Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 96 n.25 (1988).

105. T.R. FEHRENBACH, FIRE AND BLOOD, 378-79 (1985) (paragraph is identical in both original 1973 edition and 1985 reprint).

106. Interestingly, historian Jeff Long views the complaint about the absence of trial by jury in the Declaration of Independence as "absurd," since at the time the Declaration was adopted, "Mexico was already introducing trial by jury into Texas." *See* JEFF LONG, DUEL OF EAGLES 208 (1990).

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version of the "sources of liberty in the Texas Constitution."[107]

Such speaks volumes on the paucity of genuine evidence supporting Ponton's views on the intent of the Texas framers.

The *Heitman* opinion also cites Ponton's article in support of the assertion that there is "direct evidence" which indicates the framers of the 1845 constitution did not intend for our state constitution to be interpreted in harmony with the federal constitution. The court of criminal appeals stated the following:

> Further, there is *direct* evidence which indicates the framers of the 1845 constitution did not intend for our state constitution to be interpreted in lock-step with the federal constitution. A Washington County constitutional delegate proposed that the 1845 document be construed *in pari materia* with the Bill of Rights to the United States Constitution. This proposal was not adopted, thus indicating the framers did not intend to limit the rights of citizens of this State to that which protects them under the federal constitution.[108]

When the proposed resolution relied upon by Ponton (and adopted by the court in *Heitman*) is carefully scrutinized, one receives a lesson in the art of fervent and biased advocacy aimed at justifying a preconceived view—and not a good lesson, at that. The resolution offered by delegate John Hemphill, a lawyer from Washington County, read as follows:

> *Resolved*, That it is expedient to insert in the Constitution, the following clause: "No provision of this Constitution shall be so construed as to authorize the passage of any law by which a citizen of either of the States of the Union shall be excluded from the enjoyment of any of the immunities and privileges to which he is entitled under the Constitution of the United States.[109]

This resolution was laid on the table one day for consideration, pursuant to the rules of the convention. No further action was taken upon the resolution until August 9, 1845, when it was referred to the Committee on the Judiciary - not the Committee on Bill of Rights and General Provisions.[110] The proposal was never reported out of the

107. We trust that this editing of Fehrenbach's language was unintentional. Yet intentional or not, the result is the same: historical accuracy takes a back seat to the effort to "find" new restrictions on law enforcement in the Texas Constitution.

108. Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991), *citing* Arvel Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 109 (1988).

109. Journal of the Convention 131.

110. *Id.* at 199.

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committee.

Clearly, it would necessitate an expansive stretch of the imagination to read into this proposed resolution an attempt on the part of delegate Hemphill to have construed the 1845 Texas Constitution *in pari materia* with the Bill of Rights to the United States Constitution. In fact, Hemphill's resolution, if it had been adopted, would have had absolutely no bearing upon the rights of citizens of Texas. Hemphill's resolution would have inserted a "privileges and immunities" clause into the Texas Constitution similar to the "privileges and immunities" clause found in article IV, section 2 of the federal document. The "privileges and immunities" clause in article IV, section 2, of the United States Constitution was intended only to prohibit the states from discriminating against out-of-staters.[111] The clause does not address a state's grant of rights to its own citizens, or a state's limitations upon the rights of its own citizens.

Thus, while the 1845 convention's rejection of Hemphill's resolution may provide fertile ground for the fanciful "discovery" of the framers' views on the rights of citizens of other states, it has nothing to say about the framers' views on the rights of Texas citizens.

In short, Ponton's assertion that the framers rejected a resolution "which would have demonstrated the intent of the framers of the 1845 Constitution that it be construed *in pari materia* with the Bill of Rights to the Texas Constitution"[112] is factually incorrect. No such resolution was proposed. No such resolution was rejected. No such resolution ever existed. What the convention rejected was a resolution to incorporate a "privileges and immunities" clause into the Texas Constitution. It is difficult to conceive of how the rejection of such a resolution demonstrates the framers' intent to place more onerous restrictions upon law enforcement than those contained in the Fourth Amendment.

The analyses "finding" historical evidence in support of the proposition that the framers of the Texas Constitution intended its search and seizure provision to place greater restrictions upon law enforcement than does the Fourth Amendment are quite weak at best. More-

111. THE SLAUGHTERHOUSE CASES, 16 WALL. 36, 77 (1873); JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 23 (1980); ROBERT H. BORK, THE TEMPTING OF AMERICA 181 (1990).

112. Arvel Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 109 (1988).

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over, neither the proponents of such a view nor the *Heitman* opinion itself have openly considered some of the potentially dramatic consequences of overturning decades of settled precedent absent clear guidance from the text or history of the document itself.

IV. Consequences of the Application of Different State and Federal Standards to Search and Seizure Issues

As stated initially, the authors are of course in agreement with the principle that the court has the authority to construe the Texas Constitution independently from the United States Supreme Court's construction of the United States Constitution. Since the Texas Court of Criminal Appeals is the highest criminal court in Texas, it is almost tautological to assert that it has final say over the interpretation of the Texas Constitution in criminal matters.

The real question is not the court's *power* to interpret our constitution but the *wisdom* of cutting our jurisprudence adrift from settled search and seizure precedent in the absence of clear and solid directives from the text and history of that document to provide guidance in distinguishing our search and seizure provision from the Fourth Amendment. The court's judicial acumen in applying the values embodied in the Texas Constitution is not questioned. However, it is questionable to create a new body of search and seizure law, not by discerning the principles contained within the document itself, but merely by imposing an appellate court's own notions of what search and seizure law *ought* to be.

To put it another way: A legal or ideological disagreement with recent decisions of the United States Supreme Court is not a valid basis for "finding" principles in the Texas Constitution which are distinguishable from the principles embodied in the United States Constitution. Construction of the Texas Constitution must come from the text and history of the document itself, and not from mere ideological disappointment of the moment over the perceived leanings of the Supreme Court as presently constituted. To invite legal scholars, advocates and judges to recast the law as they think it should be is to open a Pandora's box of uncertainty, illegitimacy, and endless litigation that may well be difficult to close.

In fact, this point has been made eloquently in the court of criminal

appeals' own recent decisions in *Forte v. State*[113] and *McCambridge v. State*.[114]

A. *The Teachings of Forte and McCambridge*

In focusing upon the wisdom of cutting our jurisprudence adrift from centuries of settled search and seizure jurisprudence, the late Judge Rusty Duncan's opinions in *Forte v. State* and *McCambridge v. State* provide insightful guidance. The course of Judge Duncan's thought revealed in those two opinions is quite instructive here, particularly in light of Judge Duncan's prominence as an eloquent advocate of the "new federalism."[115]

In *Forte*, the Court announced that the right to counsel provision found in article I, section 10 of the Texas Constitution was distinct from the right to counsel provision of the Sixth Amendment to the United States Constitution. *Forte* thus did for the right to counsel provision of article I, section 10 precisely what *Heitman* does for the search and seizure provision of article I, section 9. *Forte* asked: Does the court of criminal appeals have the power to construe article I, section 10 independently from the Supreme Court's construction of the Sixth Amendment? *Forte* answered that question with a resounding "YES," and was undoubtedly correct as a matter of basic legal principle.

But, *Forte* went one step further and asked an additional, more interesting question; one not broached in the court's opinion in *Heitman*. In the context of determining the timing of the attachment of the constitutional right to counsel, is it wise or desirable for the court of criminal appeals to use its power to interpret the Texas Constitution to divorce our jurisprudence from federal precedent?

Forte again said "YES," that it was indeed advantageous for the court to employ its authority over Texas constitutional jurisprudence to sever itself from the Supreme Court's rulings on the attachment of the right to counsel. The court grounded this answer upon two primary considerations: (1) the court's conclusion that the decisions of the Supreme Court on this issue were incorrect and unpersuasive;[116]

113. 759 S.W.2d 128 (Tex. Crim. App. 1988).

114. 778 S.W.2d 70 (Tex. Crim. App. 1989).

115. *See generally* M.P. Duncan III, *Terminating the Guardianship: A New Role for State Courts*, 19 ST. MARY'S L.J. 809 (1988).

116. "We believe that the basis and rationale of [Supreme Court precedent on this issue]

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and (2) the perceived need to provide more "flexibility" in this area of the law beyond the bounds of federal case law.[117] The court thus separated itself from federal precedent on the timing of the attachment of the right to counsel, in favor of a more free-floating standard which would, in the court's view, more accurately assess the contours of that right in each specific case at hand.

Is it wise for the Court of Criminal Appeals to interpret the right to counsel under the Texas Constitution independently from federal precedent with regard to the attachment of that right? Judge Duncan's *Forte* opinion said "YES."

But, in his subsequent *McCambridge* opinion, Judge Duncan came up with a different answer. In the authors' view, Judge Duncan's *McCambridge* opinion provides impressive evidence of that jurist's intellectual integrity, judicial courage, and basic good sense. That decision is also extremely instructive here.

In *McCambridge*, Judge Duncan in no way departed from the view that the court has the power to interpret independently the Texas Constitution, or that the Supreme Court's decisional law on the initiation of the right to counsel is flawed. Yet, upon further reflection, Judge Duncan had come to recognize that the potential benefits of "correcting" Supreme Court precedent in this area by "finding" distinguishable rights in the Texas Constitution were outweighed by the tremendous costs inherent in such a dramatic departure from settled principles of law. Judge Duncan best explains:

> Having rejected as artificial the determination that a critical stage in the process occurs only after the filing of a complaint, we instead decided that the "critical stage" in the criminal process should be determined on a case by case basis and "must be judged on whether the pretrial confrontation presented necessitates counsels' presence as to protect a known right or safeguard."
>
> Since making that determination, however, we have concluded that the classification of a period in the criminal process as "critical" on a case by case basis is ambiguous, vague, and thus unworkable. Consis-

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become difficult if not impossible to reconcile, especially when one considers the realities of the criminal investigatory procedures utilized by most law enforcement agencies." *Forte*, 759 S.W.2d at 134.

117. "We therefore conclude that the creation of an artificially created time designation is an unacceptable resolution of the issue. . . . [R]ather than state that under all circumstances the right to counsel vests at a certain point we will instead adopt a more flexible standard under Art. I, Sec. 10 of the Texas Constitution." *Forte*, 759 S.W.2d at 138.

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tency is the objective of any legal standard. If consistency can be achieved it benefits both law enforcement and the public. Consequently, although we do not depart from our conclusion that the reasoning in *Kirby* cannot be logically reconciled with the converse reasoning in *Wade* and *Gilbert*, we are nonetheless persuaded that by adopting a bright line rule establishing when the critical stage in the criminal process occurs the public will ultimately benefit.

The intent of the Supreme Court in *Edwards v. Arizona*, 451 U.S. 477 (1981) was to create a conclusive rule that would be immune from the vagaries that invariably accompany diverse factual encounters. By establishing a hard and fast rule in Edwards, the Court was striving to not only insure a suspect's Fifth Amendment rights, but also give to law enforcement authorities a distinct and definable boundary beyond which they cannot legitimately venture.

Establishing a bright line rule relative to when a "critical stage" of the criminal process arises under article I, section 10 of the Texas Constitution will have similar beneficial consequences. Further, the creation of a bright line rule results in predictability. In addition, judicial review can be more precise, but, most important, it gives law enforcement authorities the parameters within which they can legally operate. At the present time law enforcement has to speculate whether a stage in the process is critical so as to compel the necessity of counsel. Speculation about one's legal right is a burden law enforcement should not have to carry.

Therefore, we now hold in the context of this case that under article I, section 10 of the Texas Constitution, a critical stage in the criminal process does not occur until formal charges are brought against a suspect. The language in *Forte v. State*, supra, to the contrary is overruled.[118]

Judge Duncan thus perceived that there are two issues working here that must be sharply distinguished: *Issue Number 1*: Does the court have the authority to independently interpret the Texas Constitution? *Issue Number 2:* Is it *wise* for the court to sever itself from federal precedent on the specific issue in question?

The answer to Issue Number 1 is easy. The court has the raw power to construe the Texas Constitution any way it wants.

The answer to Issue Number 2 is much more complex. And Judge Duncan's insightful *McCambridge* opinion teaches that in answering that question it is not wise to lightly depart from well-established con-

118. McCambridge v. State, 778 S.W.2d 70, 75-76 (Tex. Crim. App. 1989).

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stitutional precedent where that departure will create uncertainty and ambiguity in the law that must be applied—on a daily basis, in the real world—by police officers, lawyers, and judges all over this state.

Judge Duncan's practical inquiry in *McCambridge* is quite relevant to the issue left open by *Heitman*: What would be the practical results of a separate interpretation of the Texas constitutional search and seizure provision? The present body of search and seizure jurisprudence is vast (probably more so than "right to counsel" jurisprudence of *McCambridge*), already necessitating much prediction and speculation on the part of law enforcement officials. A decision by the court to add yet another vast body of jurisprudence to that already existing would truly render the standards "vague, ambiguous and thus unworkable" for law enforcement. One must also consider that the "legality" or "illegality of the police officers' decisions whether to search or seize could ultimately be determined soley upon the fortuitous future circumstance of the situs of the prosecution—either in federal court or in state court.[119]

If the Constitution of Texas, by its terms and history, dictates that it should be interpreted differently from the United States Constitution on a given issue, then by all means it is the duty of the courts to so interpret it. But if no evidence of distinguishable principles or intent exists, Judge Duncan's opinion in *McCambridge* persuasively counsels restraint. The supposed benefits of "correcting" the United States Supreme Court's "erroneous" (but well-settled) precedent do not always outweigh the costs.

B. *Some Final Thoughts on the "New Federalism"*

Advocates of the "new federalism" engage, either consciously or unconsciously, in one common assumption: that legal scholars and judges should be able to "discover" within any constitution forming the foundation for a democratic form of government all individual

119. *See* California v. Greenwood, 486 U.S. 35, 43 (1988) (evidence seized in violation of state court's interpretation of its constitution is not thereby rendered inadmissible under the federal Constitution); United States v. Glasco, 917 F.2d 797, 799-800 (4th Cir. 1990) (violation of state wiretap law by state law enforcement officers does not require suppression of fruits of search in federal prosecution); United States v. D'Antoni, 874 F.2d 1214, 1219 (7th Cir. 1989) (court rejected argument that federal courts should apply state law to evidence gathered by state officials in violation of state law); United States v. Nelligan, 573 F.2d 251, 254 (5th Cir. 1978) (court rejected argument that a violation of state law by state officers rendered the evidence obtained inadmissible in federal prosecution).

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rights which they view as inherently fundamental and just—particularly such individual rights which might come into some form of conflict with recognized governmental functions, e.g., law enforcement, protection of public health, public education, regulation of commerce. In contrast, the authors do not believe that the framers of the various constitutions were either blessed with such perfection or gifted with such foresight. Neither do the authors believe that the people's sense of justice should be supplanted by a judge's creative "discernment" of new constitutional dogmas unsupported by the document itself, no matter how wise and learned that judge may be.

For example, what if some emerging democratic nation decided to adopt a constitution similar to the United States Constitution, but omitted, either intentionally or otherwise, a provision similar to our Fifth Amendment protection against compelled self-incrimination? Would that mean that the emerging nation's judiciary should fill the "void" with its own individual notions of fairness? No. Such action would be tantamount to displacement of the people's wishes with those of the judiciary.[120] Instead, any individual rights against self-incrimination should be left to the people, to be determined either legislatively or by means of constitutional amendment.[121]

Certain proponents of the "new federalism" are understandably uncomfortable with a straightforward inquiry into the history of the state constitution and textual comparison with its federal counterpart, precisely because such an approach would "deprive" legal scholars

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120. What other source of guidance could the judiciary call upon except for its own sense of fairness and justice? But that is simply an alluring call to the suppression of the people's right to impose their own sense of justice. If there is anything that we should have learned from our nation's history, it is that reasonable persons may differ on questions of policy and justice, and that those differences must be settled not by the decrees of the "enlightened" few, but by the expressed will of the many.

121. *See generally* Mark Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogation*, 24 UNIV. MICH. J. LAW REFORM 1, 3 (1990), in which the author contrasts Great Britain's statutory approach to the regulation of police interrogation practices with the American constitutionalization of such procedures.

> The constitutional law focus of the American confession law debate has diverted attention from the substantive police interrogation issues that society should address. Instead of considering what police may or may not do to question criminal suspects, courts have had to evaluate what the judicial system can and cannot do to supervise practices in police stationhouses.

Id. The author also suggests that attempting to define specific required procedures from broad constitutional provisions "deters legislative attempts to control the police interrogation process." *Id.*

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and judges of the power to impose their own notions of justice upon the "unenlightened" masses. For example, Harrington forthrightly decries the validity of conclusions drawn from a comparison of the text of the Texas Constitution with the text of the United States Constitution, on grounds that such an approach "effectively deprives the state's judges and legal scholars of the opportunity to fashion their own case law, which might address the people's problems more effectively than federal law."[122]

Harrington does not explain why the people cannot address their own problems effectively in the conventional democratic method (i.e., by supporting legislation or constitutional amendments which they feel are in their best interests), or why legal scholars and judges must step in to "find" new legal dogmas where none before existed, as if the people themselves had no mechanism for expressing their will.

Fortunately, the framers were sufficiently wise to provide mechanisms for conforming our constitutional and statutory framework to the evolving needs and concepts of justice in society. In fact, our history indicates that the people of Texas know how to utilize such mechanisms. For example, the framers of the 1876 Constitution vigorously debated, and ultimately rejected, a provision providing for women's suffrage.[123] By 1972, however, the people's sense of justice had changed, and the people amended their constitution accordingly by passing article I, section 3A—the Texas Equal Rights Amendment. Interestingly, Ponton writes that the passage of the Texas Equal Rights Amendment "shows that Texans, one hundred years after adopting their present Constitution, are still demanding that their rights be afforded greater protection than that afforded under the federal Bill of Rights."[124]

Yes, and it also demonstrates that, one hundred years after adopting their present constitution, Texans know how to effectuate such demands in accordance with democratic procedures, and do not require the "help" of legal scholars who would "discover" new impediments to law enforcement in emanations of penumbras. The people know how to speak. Could it be that the proponents of "discovering"

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122. JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS 40-41 (1987).

123. DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 at 142-43 (Seth S. McKay ed. 1930).

124. Arvel Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 104-05 (1988).

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new constitutional rights simply do not like what the people are saying? Is it possible that the people of Texas are actually less concerned with "demanding" new restrictions on law enforcement than they are with "demanding" that something be done about the curse of drug abuse, and the sexual assaults and murders and burglaries that impact directly upon their lives?

While there is no question that the various state constitutions, the Texas Constitution included, do not constitute "mirror images" of the United States Constitution, that difference does not extend an "open door" to the judiciary of this state to find within the Texas Constitution an assimilation of the judiciary's own sense of justice. Constitutional provisions consistent with the judiciary's sense of justice either are there or they are not there. If they are there, then they should be applied. But if they are not there, then the question of whether they *should* be there is a matter to be decided by *the people*, either through action or inaction. Those who search for "sources of liberty" in the Texas Constitution would do well to recall that the bedrock fountainhead of freedom preserved in that document can be found in article I, section 2.

> All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their benefit.[125]

As recent world events make ever more graphic, governance by the "ignorant" masses is preferable to governance by an "all wise" committee of bureaucrats or lawyers. That is why, under the democratic form of government established by the Texas Constitution, a judge—no matter how wise—cannot validly conceive of his own idea of justice and then impose that conception on the people. Under the Texas Constitution, the people are the bosses. The people tell judges what justice is. Judges listen carefully and then apply in particular cases the people's justice—from the bottom up, not from the top down.

125. TEX. CONST. art. I, § 2; *see also* TEX.CONST. art. I, § 1, which expressly requires deference to the federal Constitution.