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Use of a Pen Register May Be a Search within the Purview of Article I, Section 9 of the Texas Constitution.

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CRIMINAL LAW—Search and Seizure—Use of a Pen Register May Be a Search Within the Purview of Article I, Section 9 of the Texas Constitution.

Richardson v. State,
865 S.W.2d 944 (Tex. Crim. App. 1993) (en banc).

In 1988, while Damon Jerome Richardson awaited trial for capital murder in the Lubbock County Jail, officers of the Texas Department of Public Safety investigated a suspected drug ring they believed Richardson controlled by placing calls from the jail telephone to a local motel in Lubbock.[1] To assist in their investigation, the officers obtained a court order[2] authorizing installation of a pen register[3] to monitor the telephone numbers dialed from the local motel.[4] Based on information revealed by the pen register and information contained in a police officer's affidavit, the court authorized a wiretap to record conversations on the line.[5] The wiretap intercepted incriminating telephone conversations, which Department of Public Safety officers subsequently used to obtain search warrants, and the execution of the warrants uncovered other evidence pertaining to the drug ring.[6] Richardson filed several pretrial motions to suppress the evidence obtained from the pen registers,[7] claiming that the use of a pen register without probable cause resulted in an unconstitutional search under Article I, Section 9 of the Texas Constitution (Article

1. Richardson v. State, 865 S.W.2d 944, 946 (Tex. Crim. App. 1993) (en banc).

2. *Richardson*, 865 S.W.2d at 946. The court issued the order pursuant to Article 18.21 of the Texas Code of Criminal Procedure. *Id.* Article 18.21 authorizes the use of pen registers by Texas law enforcement officers, but does not require a showing of probable cause as a prerequisite to the issuance of a court order authorizing such use. TEX. CODE CRIM. PROC. ANN. art. 18.21, §§ 1(2), 2(a) (Vernon Supp. 1994).

3. A pen register is a device that may be attached to a telephone line to record outgoing numbers dialed, but which cannot record the origin of incoming calls to the line or the content of a conversation. TEX. CODE CRIM. PROC. ANN. art. 18.21, § 1(9) (Vernon Supp. 1994).

4. *Richardson*, 865 S.W.2d at 946.

5. *Id.*

6. *Id.*

7. *Id.* Richardson also sought to suppress evidence obtained through a second pen register that authorities subsequently installed on the jail telephone along with the wiretap; however, the second pen register did not provide any basis for probable cause to issue the wiretap that recorded the incriminating conversations. *Id.* at 946, 947 n.2. Richardson further alleged that the pen register on the motel telephone had documented his collect calls, though seemingly outside the scope of pen register capability, and the court accepted this allegation as true for purposes of granting discretionary review. *Id.* at 947 n.2.

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I, Section 9).[8] The 364th District Court of Texas, Lubbock County, denied the motions, and a jury ultimately convicted Richardson of engaging in organized criminal activity.[9] The Texas Court of Appeals for the Seventh Judicial District, Amarillo, affirmed Richardson's conviction, finding that the use of a pen register is not a search under the purview of Article I, Section 9.[10] The Texas Court of Criminal Appeals vacated and remanded to the court of appeals for reconsideration in light of *Heitman v. State*,[11] which provides that Article I, Section 9 may afford greater protection than the Fourth Amendment to the United States Constitution.[12] On remand, the court of appeals reaffirmed its original decision on the basis that, because no reasonable expectation of privacy exists in dialing telephone numbers, the use of a pen register does not constitute a search requiring probable cause under Article I, Section 9.[13] The Texas Court of Criminal Appeals granted Richardson's second petition for discretionary review to determine whether law enforcement's use of a pen register constitutes a search under Article I, Section 9.[14] HELD—*Vacated and remanded.* The use of a pen register may be a search within the purview of Article I, Section 9 of the Texas Constitution.[15]

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures";[16] therefore, protection under the

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8. *Richardson*, 865 S.W.2d at 946.

9. *Id.* Richardson's conviction for engaging in criminal activity stemmed from a violation of Texas Penal Code § 71.02 and resulted in a sentence of life imprisonment and a $10,000 fine. *Id.* at 945; *see* Act of June 10, 1977, 65th Leg. R.S., ch. 346, § 1, 1977 Tex. Gen. Laws 922, 922–24 (amended 1981, 1989, 1991, 1993) (current version at TEX. PENAL CODE ANN. § 71.02 (Vernon 1994)) (criminalizing conspiracy to distribute controlled substances).

10. Richardson v. State, 821 S.W.2d 304, 307 (Tex. App.—Amarillo 1991), *vacated and remanded per curiam*, 824 S.W.2d 585 (Tex. Crim. App. 1992). The court relied on previous decisions holding that Article I, § 9 should not be interpreted more strictly than the Fourth Amendment to the United States Constitution. *Id.* at 307.

11. 815 S.W.2d 681 (Tex. Crim. App. 1991).

12. Richardson v. State, 824 S.W.2d 585, 585 (Tex. Crim. App. 1992); *see* Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (announcing that Texas courts are not bound by Fourth Amendment analogues in interpreting Article I, § 9).

13. Richardson v. State, 831 S.W.2d 78, 80 (Tex. App.—Amarillo 1992), *vacated and remanded*, 865 S.W.2d 944 (Tex. Crim. App. 1993) (en banc).

14. *Richardson*, 865 S.W.2d at 946.

15. *Id.* at 953–54. The court remanded for a determination of whether the pen register search was unreasonable without probable cause. *Id.* at 954.

16. U.S. CONST. amend. IV. The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Ker v. California, 374 U.S. 23, 33 (1963); Mapp v. Ohio, 367 U.S. 643, 655 (1961); Michael Campbell, Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 191 n.1 (1986). The Fourth Amendment only governs searches by those acting on behalf of the government, not private individuals. Burdeau v.

Fourth Amendment necessarily turns on the threshold question of whether a search has occurred.[17] Prior to 1967, the United States Supreme Court defined a search primarily in terms of a physical trespass to an area protected by the Fourth Amendment—persons, houses, papers, or effects.[18] Under this test, Fourth Amendment protection centered around property interests, with privacy interests receiving secondary consideration.[19] The focus on property interests and the re-

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McDowell, 256 U.S. 465, 475 (1921); Charles E. Moylan, Jr. & John Sonsteng, *Fourth Amendment Applicability*, 16 WM. MITCHELL L. REV. 209, 214 (1990); Michael Campbell, Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 191 n.2 (1986).

17. *See, e.g.*, United States v. Karo, 468 U.S. 705, 712 (1984) (considering first if search occurred); United States v. Jacobsen, 466 U.S. 109, 122 (1984) (noting that first determination under Fourth Amendment analysis is whether search occurred); Illinois v. Andreas, 463 U.S. 765, 771 (1983) (recognizing that threshold question is whether search has occurred); *see also* Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 555 (1990) (recognizing that reasonableness standard under Fourth Amendment only applies to searches and seizures); Richard G. Wilkins, *Searches and Surveillance: Defining the "Reasonable Expectation of Privacy,"* 1 CRIM. PRAC. L. REV. 85, 94–95 (1988) (noting that search is needed to trigger Fourth Amendment protections); Wayne R. LaFave, *The Fourth Amendment: "Second to None in the Bill of Rights,"* 75 ILL. B.J. 424, 427 (1987) (stating that police conduct must constitute "search" under Fourth Amendment for probable cause to be required).

18. *See, e.g.*, On Lee v. United States, 343 U.S. 747, 751, 754 (1952) (holding that use of transmitting device was not search because no physical trespass was committed); Goldman v. United States, 316 U.S. 129, 134–35 (1942) (holding that electronic amplifying device on outside of wall did not constitute search because it was not trespass), *overruled by* Katz v. United States, 389 U.S. 347 (1967); Olmstead v. United States, 277 U.S. 438, 464 (1928) (stating that language of Fourth Amendment shows search must be of material things such as persons, houses, papers, and effects), *overruled by* Katz v. United States, 389 U.S. 347 (1967); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1, at 223–24 (2d ed. 1987) (noting that physical intrusion by police into "constitutionally protected area" was previously prerequisite for finding Fourth Amendment search); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356–57 (1974) (referring to "persons, houses, papers, and effects" as words of limitation and discussing Court's prior confinement of search to trespass of these items). *See generally* Michael Campbell, Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 192 (1986) (discussing Court's prior "constitutionally protected area" definition of search).

19. *See, e.g.*, Katz v. United States, 389 U.S. 347, 351 (1967) (recognizing that "constitutionally protected area" definition deflects attention from privacy interests); *On Lee*, 343 U.S. at 751 (noting that trespass is prerequisite to unconstitutional search under Fourth Amendment); *Goldman*, 316 U.S. at 134–35 (upholding use of detectaphone against Fourth Amendment challenges because no trespass had occurred); *Olmstead*, 277 U.S. at 465–66 (asserting that Fourth Amendment should not be expanded to cover anything beyond trespass); *see also* Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 556–57 (1990) (discussing former emphasis on protection of property interests); Michael Campbell, Comment, *Defining a Fourth Amendment Search: A Critique*

quirement of physical trespass became problematic upon the emergence of new technological developments in the communication and surveillance fields, rendering this definition of a search less capable of fully protecting privacy interests.[20] In response to the new surveillance opportunities modern technology provided for law enforcement agencies, the Court began to move away from an identification of Fourth Amendment interests with property and toward a privacy approach.[21]

Ultimately, in the 1967 landmark case of *Katz v. United States*,[22] the Court abandoned its physical trespass or "constitutionally protected area" analysis and adopted its current, more workable definition, which emphasizes the protection of personal privacy over property interests.[23]

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*of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 192 (1986) (commenting that Court's prior definition of search principally protected property interests).

20. *See Katz*, 389 U.S. at 353 (noticing that Fourth Amendment protection can no longer turn on physical intrusion); Lopez v. United States, 373 U.S. 427, 466–69 & nn.14–17 (1963) (Brennan, J., dissenting) (noting pervasiveness of sophisticated surveillance devices by 1950s); *Olmstead*, 277 U.S. at 473, 474 (Brandeis, J., dissenting) (suggesting re-evaluation of Fourth Amendment interpretation due to developing technology's effect on government surveillance potentials). Congress responded to this problem by enacting the Electronic Communications Privacy Act of 1986. *See* HOUSE COMM. ON THE JUDICIARY, ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986, S. REP. NO. 99-541, 99th Cong., 2d Sess. 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3556-57 (explaining that increasing technological developments necessitated Act to curtail overzealous law enforcement). The latter part of the 19th century witnessed the invention of the telephone, microphone, dictograph, and instantaneous photography, each of which provided greater surveillance potentials. *See* Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970s*, 66 COLUM. L. REV. 1205, 1236 (1966) (concluding that technological developments had broken ground rules of surveillance). Electronic eavesdropping, developed in the mid-20th century, further increased surveillance capabilities. *See* Robert B. McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259, 274 (1965) (discussing negative privacy implications of electronic eavesdropping).

21. *See* Wong Sun v. United States, 371 U.S. 471, 485 (1963) (recognizing that Fourth Amendment protects not only seizure of property, but also overhearing of verbal statements); Silverman v. United States, 365 U.S. 505, 511 (1961) (holding that trespass under property law is not necessary to trigger Fourth Amendment); Michael Campbell, Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 193 (1986) (discussing insupportability of Warren Court's property definition of search); James W. Ginocchi, Recent Case, 32 DUQ. L. REV. 897, 903–04 (1994) (noting that new technological advances rendered property rights view of Fourth Amendment outdated); *cf.* Warden v. Hayden, 387 U.S. 294, 304 (1967) (holding that superior property interest does not control government's right to search).

22. 389 U.S. 347 (1967).

23. *See Katz*, 389 U.S. at 351 (recognizing that Fourth Amendment protects people rather than places; therefore, what person intends as private may be protected by Constitution even in public area). The *Katz* Court recognized that its new stance necessarily abrogated its previous decisions requiring a trespass. *Id.* at 353. In addition, the Court expressly overruled *Olmstead v. United States* and *Goldman v. United States*. *Id.* Courts and commentators consider *Katz* a watershed decision for defining a Fourth Amendment

Writing for the majority in *Katz*, Justice Stewart coined the phrase "the Fourth Amendment protects people, not places" and sought to protect the privacy upon which individuals justifiably rely.[24] In his concurrence, Justice Harlan captured the majority's principle in a two-prong, reasonable-expectation-of-privacy test which required (1) that the person seeking constitutional protection "have exhibited an actual [subjective] expectation of privacy," and (2) "that the expectation be one that society is prepared to recognize as reasonable."[25] Courts now use the *Katz* reasonable-expectation-of-privacy test to determine whether a search has occurred under the Fourth Amendment, and the test has also become the inquiry with regard to whether a person has standing to assert a Fourth Amendment claim.[26]

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search. Michael Campbell, Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 193 (1986); *see* California v. Ciraolo, 476 U.S. 207, 218 (1986) (calling *Katz* "landmark decision"); Smith v. Maryland, 442 U.S. 735, 739 (1979) (referring to *Katz* as "lodestar" for determining if search occurred); Note, *From Private Places to Personal Privacy: A Post-Katz Study of the Fourth Amendment Protections*, 43 N.Y.U. L. REV. 968, 968 (1968) (referring to *Katz* as "landmark" case).

24. *See, e.g.*, *Katz*, 389 U.S. at 351–53 (noting that government violated "the privacy upon which [petitioner] justifiably relied" by electronically recording his communications in telephone booth); People v. Edwards, 71 Cal. Rptr. 598, 601–02 (Ct. App. 1968) (concluding that Justice Stewart's language in *Katz* was intended to afford Fourth Amendment protection to public places if a subjective expectation of privacy existed that society would objectively recognize as reasonable), *vacated*, 458 P.2d 713 (Cal. 1969). *See generally* Wayne R. LaFave, *The Fourth Amendment: "Second to None in the Bill of Rights,"* 75 ILL. B.J. 424, 427 (1987) (recognizing *Katz* court's abandonment of "constitutionally protected area" definition).

25. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Justice Harlan's two-part test has become a cornerstone for methodically determining if a search has occurred. *See Smith*, 442 U.S. at 739–40 (applying two-part test in context of pen register "searches"); Richardson v. State, 865 S.W.2d 944, 948–49 (Tex. Crim. App. 1993) (determining that use of pen register is not search under dual test promulgated in *Katz*). *See generally* Richard G. Wilkins, *Searches and Surveillance: Defining the "Reasonable Expectation of Privacy,"* 1 CRIM. PRAC. L. REV. 85, 94–95 (1988) (commenting that two-prong test developed by Justice Harlan in *Katz* "revolutionized fourth amendment search analysis"); Wayne R. LaFave, *The Fourth Amendment: "Second to None in the Bill of Rights,"* 75 ILL. B.J. 424, 427–28 (1987) (summarizing Justice Harlan's twofold requirement and noting that lower courts and Supreme Court often rely on Justice Harlan's test in determining search issues).

26. *See* Rakas v. Illinois, 439 U.S. 128, 139-40, 143 (1978) (holding that inquiry for search and standing is same and pointing to *Katz* reasonable-expectation-of-privacy test as model); United States v. Butts, 729 F.2d 1514, 1519–20 (5th Cir.) (Garwood, J., concurring) (acknowledging that standing inquiry is same as substantive issue of whether search has occurred), *cert. denied*, 469 U.S. 855 (1984); *Richardson*, 865 S.W.2d at 948 (noting that determinations of search and standing under Fourth Amendment have effectively merged); Michael Campbell, Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 212 (1986) (recognizing that reasonable expectation of privacy in information is required to have standing under

Although *Katz* appears to have expanded constitutional guarantees of privacy, a small exception mentioned in the majority opinion has instead enhanced the government's ability to compile information outside the context of a search.[27] This infamous exception emerged from Justice Stewart's recognition in *Katz* that no Fourth Amendment protection exists for things "a person knowingly exposes to the public, even in his own home or office . . . ."[28] One of the most notable and expansive applications of the "knowing exposure" exception to Fourth Amendment protection occurred in *United States v. Miller*,[29] in which the Court concluded that individuals do not have a reasonable expectation of privacy in financial information voluntarily conveyed to a bank.[30] The *Miller* Court es-

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Fourth Amendment); James W. Ginocchi, Recent Case, 32 DUQ. L. REV. 897, 908 (1994) (discussing Supreme Court's abandonment of treating substantive Fourth Amendment privacy claims separate from standing). *See generally* Gerald S. Reamey, *Up in Smoke: Fourth Amendment Rights and the Burger Court*, 45 OKLA. L. REV. 57, 77–80 (1992) (noting that Burger Court used standing as procedural barrier to vindication of Fourth Amendment rights)

27. *See Katz*, 389 U.S. at 351 (creating "knowing exposure" exception by stating: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 563 (1990) (remarking that subsequent misapplication of exception has resulted in exception "swallow[ing] the rule"); Michael Campbell, Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 200 (1986) (concluding that Court has been too quick to equate exposure of information with absence of privacy); *see also Smith*, 442 U.S. at 743-44 (relying on voluntary disclosure rationale to hold that use of pen register is not search); United States v. Miller, 425 U.S. 435, 442 (1976) (restating knowing exposure exception in support of holding that bank depositor has no Fourth Amendment right to privacy in bank records).

28. *Katz*, 389 U.S. at 351; *see Miller*, 425 U.S. at 442 (citing *Katz* for proposition that information knowingly exposed is not protected by Constitution); United States v. White, 405 F.2d 838, 850 (7th Cir. 1969) (Castle, C.J., dissenting) (relying on *Katz* knowing exposure exception to support contention that communications to government informer are not protected), *reversed*, 401 U.S. 745 (1971); *see also* Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 562–63 (1990) (discussing Justice Stewart's exception for matters knowingly exposed to public); Don Mayer, *Workplace Privacy and the Fourth Amendment: An End to Reasonable Expectations?*, 29 AM. BUS. L.J. 625, 637 (1992) (noting that Rehnquist Court has used knowing exposure exception to dismantle basic premises of *Katz*).

29. 425 U.S. 435 (1976).

30. *See Miller*, 425 U.S. at 442-43 (holding that depositor had no reasonable expectation of privacy in bank records because he voluntarily conveyed information to bank); *see also Smith*, 442 U.S. at 744 (citing *Miller* as example of Court's consistency in holding that no expectation of privacy exists in information voluntarily conveyed to third party). The *Miller* decision has not gone without criticism. *See* People v. Jackson, 452 N.E.2d 85, 89 (Ill. 1983) (rejecting *Miller* rationale to hold that bank customer has privacy right in bank records under state constitution); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(c), at 514-15 (2d ed. 1987) (criticizing *Miller* for

sentially followed an assumption-of-the-risk approach, reasoning that depositors risk constitutionally unprotected conveyance of their financial information to the government simply by revealing their affairs to a bank.[31] The Court subsequently employed this rationale to avoid finding that a search had occurred in other situations as well—most significantly with regard to the government's use of pen registers to monitor the telephone numbers dialed by persons suspected of criminal activities.[32]

The United States Supreme Court first addressed the pen register issue in *United States v. New York Telephone Co.*[33] In *New York Telephone Co.*, the Court held that the federal wiretap law did not cover the use of pen registers because such devices cannot record the content of conversations.[34] The Court noted that the legislative history of the wiretap law

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its effect of withholding Fourth Amendment protection of bank records regardless of egregious degree of police conduct); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 570 (1990) (expressing dismay that, following *Miller*, police have virtually untamed access to individuals' bank records).

31. *See Miller*, 425 U.S. at 443 (recognizing risk of conveyance and adding that obtaining information relayed to third party is not prohibited by Fourth Amendment). Perhaps most significantly, the Court noted that Fourth Amendment protection is not available even if a person reveals information in confidence to a third party assuming it will be used for a limited purpose only. *Id.*; *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(c), at 515 (2d ed. 1987) (noting Court's reliance on "false friend" cases for support in *Miller*); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 570 (1990) (concluding that *Miller* holding would shock most people because it allows police to scrutinize bank records at will). Various state courts have used this same rationale to hold that no Fourth Amendment protection existed. *See* State v. Fredette, 411 A.2d 65, 67 (Me. 1979) (relying on *Miller* as support for court's holding that no expectation of privacy exists in bank records); Peters v. Sjoholm, 604 P.2d 527, 529 (Wash. Ct. App. 1979) (following *Miller* by holding that bank customer has no expectation of privacy in bank records), *cert. denied*, 445 U.S. 951 (1980).

32. *See Smith*, 442 U.S. at 744 (relying on *Miller*'s assumption-of-risk rationale to conclude that pen register is not search); *Fredette*, 411 A.2d at 67 (noting that pen register case of *Smith v. Maryland* cited *Miller* with approval). State courts have reached the same conclusion. *See* Yarbrough v. State, 473 So. 2d 766, 767 (Fla. Dist. Ct. App. 1985) (following United States Supreme Court's lead in *Smith* and finding that pen register is not search under Florida Constitution because of electronic conveyance of numbers to telephone company when dialed); *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(b), at 507 (2d ed. 1987) (criticizing *Smith*'s assumption-of-risk rationale); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 570 (1990) (discussing "voluntary conveyance" rationale used by Court in *Smith*).

33. 434 U.S. 159 (1977).

34. *New York Tel. Co.*, 434 U.S. at 165-68. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the federal wiretap law) addresses wire and oral communications, providing in pertinent part:

> "[W]ire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or

indicated that Congress did not consider pen registers a significant threat to privacy, but the Court did not specifically address the question of whether the use of a pen register results in a search under the Fourth Amendment.[35] Immediately prior to the Court's decision in *New York Telephone Co.*, however, some lower courts held that the use of pen registers is subject to Fourth Amendment scrutiny.[36] Recognizing the confusion among the lower courts, the Court, two years after its decision in

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other like connection between the point of origin and the point of reception . . . [and] "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

18 U.S.C. § 2510(1), (4) (1988). The Court noted that law enforcement officials could not confirm that a communication occurred by using a pen register because a pen register cannot record the contents of a telephone conversation. *New York Tel. Co.*, 434 U.S. at 167; *see* Smith v. Maryland, 442 U.S. 735, 748 n.1 (1979) (Stewart, J., dissenting) (noting that Court in *New York Telephone Co.* did not consider pen registers "interception" under Title III because they cannot record contents of calls); *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(b), at 405 (2d ed. 1987) (commenting that *New York Telephone Co.*'s holding—that Title III does not govern pen registers—increased significance of whether pen register is Fourth Amendment search); Robert W. Kastenmeier et al., *Communications Privacy: A Legislative Perspective*, 1989 WIS. L. REV. 715, 730–31 (recognizing that *New York Telephone Co.* is only case, other than *Smith v. Maryland*, in which court considered pen register issue, and summarizing *New York Telephone Co.*'s holding); Karen L. Stanitz, Note, State v. Rothman*: Expanding the Individual's Right to Privacy Under the Hawaii Constitution*, 13 U. HAW. L. REV. 619, 622 (1991) (noting that *New York Telephone Co.* was first case in which Court considered pen register issue).

35. *See Smith*, 442 U.S. at 738 n.3 (noticing that Court had not previously considered whether use of pen register is search under Fourth Amendment); *New York Tel. Co.*, 434 U.S. at 167-68 (discussing legislative history of wiretap law); Smith v. State, 389 A.2d 858, 864 (Md. 1978) (noting that Supreme Court in *New York Telephone Co.* did not decide question of whether pen register is search), *aff'd*, 442 U.S. 735 (1979); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(b), at 404–05 (2d ed. 1987) (noting Court's reliance on legislative history of Title III in *New York Telephone Co.*); Karen L. Stanitz, Note, State v. Rothman*: Expanding the Individual's Right to Privacy Under the Hawaii Constitution*, 13 U. HAW. L. REV. 619, 622–23 (1991) (discussing Court's analysis of legislative intent of Title III in *New York Telephone Co.*).

36. *See, e.g.*, Application of the United States for Order Authorizing Installation and Use of a Pen Register, 546 F.2d 243, 245 (8th Cir. 1976) (deciding that use of pen register must comply with Fourth Amendment), *cert. denied*, 434 U.S. 1008 (1978); Application of the United States in the Matter of an Order Authorizing the Use of a Pen Register, 538 F.2d 956, 960 (2d Cir. 1976) (holding that issuance and use of pen register is subject to Fourth Amendment requirements), *rev'd sub nom.* United States v. New York Tel. Co., 434 U.S. 159 (1977); State v. Ramirez, 351 A.2d 566, 568 (Del. Super. Ct. 1976) (assuming pen register is search under Fourth Amendment and addressing only probable cause issue); *see also Smith*, 442 U.S. at 738 (explaining conflict among lower courts regarding Fourth Amendment restrictions on pen registers); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(b), at 505 (2d ed. 1987) (recognizing assumption of lower courts that pen register involves Fourth Amendment search).

New York Telephone Co., directly addressed the question of whether the use of a pen register constitutes a search under the Fourth Amendment.[37]

In *Smith v. Maryland*,[38] the Court extended its reasoning in *United States v. Miller*, further limiting individual privacy rights by holding that the use of a pen register does not require a warrant because a pen register does not constitute a Fourth Amendment search.[39] Applying the two-prong test set out in *Katz v. United States*, the Court utilized its rationale in *Miller* to conclude that (1) individuals probably have no subjective expectation of privacy in the numbers they dial on the telephone because people realize that the telephone company documents this information, and (2) even if some subjective expectation of privacy exists, society would not recognize such an expectation as objectively reasonable because telephone users voluntarily convey information to the telephone company, thereby assuming the risk of disclosure.[40] Some state courts

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37. *See Smith*, 442 U.S. at 738 (indicating that court granted certiorari to resolve conflict in lower courts regarding pen registers); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(b), at 505 (2d ed. 1987) (explaining that *Smith* was decided subsequent to lower court assumptions regarding pen registers). Prior to *Smith*, some legal commentators and lower courts had concluded that the use of a pen register is not a search under the Fourth Amendment. *See, e.g.*, Hodge v. Mountain States Tel. Co., 555 F.2d 254, 257 (9th Cir. 1977) (holding that information recorded by pen register is not protected by Fourth Amendment); *Smith*, 389 A.2d at 867 (determining that no Fourth Amendment search is implicated by use of pen register); Victor S. Elgort, Note, *The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool*, 60 CORNELL L. REV. 1028, 1044–45 (1975) (analogizing to previously unprotected toll call records and concluding that Fourth Amendment does not restrict use of pen registers).

38. 442 U.S. 735 (1979).

39. *Smith*, 442 U.S. at 745-46. The holding in *Smith* has been highly criticized and rejected by many state courts. *See, e.g.*, People v. Sporleder, 666 P.2d 135, 141 (Colo. 1983) (en banc) (finding that expectation of privacy exists in dialing telephone numbers); State v. Rothman, 779 P.2d 1, 7–8 (Haw. 1989) (deciding that warrant is required to authorize use of pen register); State v. Thompson, 760 P.2d 1162, 1167 (Idaho 1988) (rejecting *Smith* to hold that pen register is search under Idaho Constitution); Commonwealth v. Beauford, 475 A.2d 783, 789 (Pa. Super. Ct. 1984) (departing from reasoning and holding in *Smith*). Furthermore, many professors and commentators have taken exception to the case's holding. *See, e.g.*, CLIFFORD S. FISHMAN, WIRETAPPING AND EAVESDROPPING § 28.1, at 266 (Supp. 1993) (warning of negative effects on privacy from unrestricted use of pen registers); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(b) at 507 (2d ed. 1987) (contending that people have reasonable expectation of privacy in telephone records); John Applegate & Amy Grossman, *Pen Registers After* Smith v. Maryland, 15 HARV. C.R.-C.L. L. REV. 753, 758–59 (1980) (criticizing *Smith* for disregarding privacy interests in dialing telephone numbers). *See generally* Karen L. Stanitz, Note, State v. Rothman*: Expanding the Individual's Right to Privacy Under the Hawaii Constitution*, 13 U. HAW. L. REV. 619, 625–27 (1991) (discussing state court rejections of *Smith* rule).

40. *Smith*, 442 U.S. at 742-44; *see* Indiana Bell Tel. Co. v. State, 409 N.E.2d 1089, 1090 (Ind. 1980) (recognizing voluntary conveyance rationale employed in *Smith*); State v.

adopted the *Smith* Court's reasoning and held that the use of pen registers fails to activate Fourth Amendment protections.[41] Other state courts, however, afforded more expansive protection under their state constitutional privacy provisions and concluded that the use of a pen register is a search requiring probable cause.[42]

Valenzuela, 536 A.2d 1252, 1259 (N.H. 1987) (discussing application of *Katz* test in *Smith*), *cert. denied*, 485 U.S. 1008 (1988); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15–16 (2d ed. 1988) (commenting on assumption of risk notion underlying *Smith* and *Miller*); Karen L. Stanitz, Note, State v. Rothman: *Expanding the Individual's Right to Privacy Under the Hawaii Constitution*, 13 U. HAW. L. REV. 619, 623–25 (1991) (noting Court's expression of doubt in *Smith* regarding telephone users' expectation of privacy). With respect to the subjective prong of *Katz*, the *Smith* Court explained that all people who use telephones realize that the telephone company makes records of their customers' calls because the calls must be completed through telephone switching equipment. *Smith*, 442 U.S. at 742. The Court further noted the public's common knowledge that the telephone company's electronic equipment is also used to monitor calls from telephones subject to special rate structures, and that pen registers specifically have been employed to check for overbilling, defective dials, and home telephones being used for business purposes. *Id.* Regarding the objective prong, the Court cited its decision in *Miller* for the proposition that no reasonable expectation of privacy exists concerning records of telephone numbers voluntarily conveyed to third parties. *See id.* at 743-44 (citing United States v. Miller, 425 U.S. 435, 442–44 (1976).

41. *See, e.g.*, Shaktman v. State, 529 So. 2d 711, 714–15 (Fla. Dist. Ct. App. 1988) (following *Smith* to hold that use of pen register is not unconstitutional search under state constitution), *aff'd*, 553 So. 2d 148 (Fla. 1989); Yarbrough v. State, 473 So. 2d 766, 766–67 (Fla. Dist. Ct. App. 1985) (finding that use of pen register is not unconstitutional search based on *Smith*); People v. Guerra, 478 N.E.2d 1319, 1321 (N.Y. 1985) (citing *Smith* as authority and finding that use of pen registers is not search under Fourth Amendment); *cf. Valenzuela*, 536 A.2d at 1256-58 (ignoring subjective prong of *Katz* and assumption-of-risk rationale employed in *Smith*, but relying on *Katz* and agent-informer cases to hold that pen register is not search under state constitution). *See generally* Karen L. Stanitz, Note, State v. Rothman: *Expanding the Individual's Right to Privacy Under the Hawaii Constitution*, 13 U. HAW. L. REV. 619, 625 (1991) (noting that several state courts have followed *Smith*). The United States Court of Appeals for the Tenth Circuit has expanded the *Smith* Court's reasoning to hold that a "mail cover" does not violate the Fourth Amendment. *See* Vreecken v. Davis, 718 F.2d 343, 347-48 (10th Cir. 1983) (holding that act of recording information on outside of defendant's incoming mail is analogous to pen register and is, therefore, not search under Fourth Amendment); John W. Kastelic, *Investigation and Police Practice, Electronic Surveillance, Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-1989*, 73 GEO. L.J. 225, 361 (1984) (discussing Tenth Circuit's analogy to pen registers in mail cover case).

42. *See, e.g.*, *Thompson*, 760 P.2d at 1167 (holding that use of pen register is search under Idaho Constitution's privacy provision); *Beauford*, 475 A.2d at 789 (extending state constitutional privacy rights beyond Fourth Amendment to protect information obtainable through pen register); State v. Gunwall, 720 P.2d 808, 815-16 (Wash. 1986) (en banc) (broadening individual privacy rights under Washington Constitution to find that use of pen register is search requiring probable cause); *see also* Kenneth R. Wallentine, *Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14*, 17 J. CONTEMP. L. 267, 285-86 (1991) (discussing Colorado's expansion of privacy rights

Affording greater protection under state constitutions, otherwise known as "new federalism," allows states to avoid the automatic adoption and application of the Supreme Court's interpretation of the United States Constitution, including the Court's interpretation of the Fourth Amendment.[43] New federalism is, however, not necessarily a novel concept, and state courts have employed the doctrine to expand the privacy rights of state citizens in many varied instances.[44] Unlike other states, Texas was slow to recognize greater protections under its state constitutional search and seizure provision than those existing under the Fourth Amendment; until the recent decision of *Heitman v. State*,[45] the state had expressly refused to do so.[46] In *Heitman*, the Texas Court of Criminal

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regarding pen registers under state constitution); Karen L. Stanitz, Note, State v. Rothman: *Expanding the Individual's Right to Privacy Under the Hawaii Constitution*, 13 U. HAW. L. REV. 619, 626-27 (1991) (noting that some states have broadened privacy rights of their citizens under state constitutions). *But see Guerra*, 478 N.E.2d at 1321 (denying request to afford greater protection under state constitution regarding use of pen registers).

43. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (recognizing sovereign right of states to adopt more expansive individual liberties in their own constitutions than those provided by United States Constitution); *Sporleder*, 666 P.2d at 140 (noting that states are not bound by Supreme Court's interpretation of Fourth Amendment in construction of state constitutions); *Beauford*, 475 A.2d at 788 (discussing right of states to provide more protection under state constitutions); Robin B. Johansen, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 297 (1977) (referring to states' ability to expand on United States Constitution as "new federalism"); Note, *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1367 (1982) (commenting that state constitutions may serve as "independent source of supplemental rights unrecognized by federal law").

44. *See, e.g.*, Ravin v. State, 537 P.2d 494, 503–04 (Alaska 1975) (determining that state constitution could afford broader civil liberties than federal constitution); People v. Longwill, 538 P.2d 753, 758, 758 n.4 (Cal. 1975) (rejecting Supreme Court holdings regarding rules of search incident to arrest to find greater protection under state constitutional provision); State v. Henderson, 756 P.2d 1057, 1063 (Idaho 1988) (using state constitutional provision in place of Fourth Amendment to find reasonable suspicion prerequisite to use of roadblock); Kenneth R. Wallentine, *Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14*, 17 J. CONTEMP. L. 267, 283–87 (1991) (discussing greater protections available to states by departing from federal constitutional interpretations); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (remarking that Supreme Court decisions are not dispositive of rights provided by state law).

45. 815 S.W.2d 681 (Tex. Crim. App. 1991).

46. *Heitman*, 815 S.W.2d at 682, 690; *see* Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State: *The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 930 (1992) (noting Texas Court of Criminal Appeals' departure in *Heitman* from prior holdings); Terry Young, Comment, *Responding to* Heitman v. State: *Will Texas Courts Apply a More Restrictive Standard for Inventory Searches?*, 18 T. MARSHALL L. REV. 285, 303–05 (1993) (discussing court's reasons in *Heitman* for departing from prior decisions interpreting Texas and federal constitutions identically). Initially, the issue in *Heitman* was limited to whether a search of a locked briefcase found in the defendant's car was a lawful inventory

Appeals expressly announced its authority to interpret Article I, Section 9 independent of the Fourth Amendment to the United States Constitution, but declined to actually exercise such authority.[47] Two years later, in *Richardson v. State*,[48] the Texas Court of Criminal Appeals exercised this authority in the context of pen register "searches."[49]

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search within the meaning of the United States and Texas constitutions. *Heitman*, 815 S.W.2d at 682. Surprisingly, the Texas Court of Criminal Appeals did not answer this question, but instead stated that it was granting review to determine whether the United States Supreme Court's interpretation of the Fourth Amendment must be automatically adopted and applied to Article I, § 9. *Id.* Texas cases prior to *Heitman* had found no greater protection under Article I, § 9 than that provided by the Fourth Amendment. *E.g.*, Johnson v. State, 803 S.W.2d 272, 288 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259 (1991), *overruled by* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991); Gordon v. State, 801 S.W.2d 899, 912 (Tex. Crim. App. 1990) (en banc), *overruled by* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991); Bower v. State, 769 S.W.2d 887, 903 (Tex. Crim. App.) (en banc), *cert. denied*, 492 U.S. 927 (1989); Eisenhauer v. State, 754 S.W.2d 159, 162–64 (Tex. Crim. App.), *cert. denied*, 488 U.S. 848 (1988), *overruled by* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991); Osban v. State, 726 S.W.2d 107, 111 (Tex. Crim. App. 1986), *overruled by* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991); Brown v. State, 657 S.W.2d 797, 798 (Tex. Crim. App. 1983), *overruled by* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991); Crowell v. State, 147 Tex. Crim. 299, 180 S.W.2d 343, 346 (1944).

47. *Heitman*, 815 S.W.2d at 690. The court remanded the case to the court of appeals for consideration of the state constitutional claim. *Id. Heitman* has been criticized for failing to provide adequate guidance with respect to whether Article I, § 9 *should* be interpreted as more restrictive on police or as providing more rights than the Fourth Amendment. *See* Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 934–35 (1992) (listing what *Heitman* did *not* hold). In contrast, other states' courts have not only recognized their authority to expand privacy rights under state constitutions, but also have explained the specific application of their holdings. *See* State v. Hunt, 450 A.2d 952, 955–57 (N.J. 1982) (explaining that decision to provide greater protection under state constitution for procurement of toll records should be applied in all future toll billing records cases); *Gunwall*, 720 P.2d at 812–13 (listing six criteria to consider in determining whether state constitution contains broader rights than federal constitution in given situations); Karen L. Stanitz, Note, State v. Rothman*: Expanding the Individual's Right to Privacy Under the Hawaii Constitution*, 13 U. HAW. L. REV. 619, 627 (1991) (discussing six criteria set forth in *Gunwall*).

48. 865 S.W.2d 944 (Tex. Crim. App. 1993) (en banc).

49. The court did not exercise this authority in *Heitman*. *See Heitman*, 815 S.W.2d at 690 (remanding case to court of appeals to decide whether Article I, § 9 should be interpreted more broadly than Fourth Amendment in petitioner's situation); Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 934–35 (1992) (discussing what *Heitman* court failed to address); Terry Young, Comment, *Responding to* Heitman v. State*: Will Texas Courts Apply a More Restrictive Standard for Inventory Searches?*, 18 T. MARSHALL L. REV. 285, 305 (1993) (noting that question remained after *Heitman* regarding whether Article I, § 9 provides more protection than Fourth Amendment). Before *Heitman*, Texas courts had assumed they were bound to follow United States Supreme Court interpretations of the Fourth Amendment in determining search issues. *See Brown*, 657 S.W.2d at 798 (deciding not to find more re-

In *Richardson v. State*,[50] the Texas Court of Criminal Appeals reviewed whether the use of a pen register equates to a search under Article I, Section 9 despite the United States Supreme Court's determination in *Smith v. Maryland*[51] that the use of a pen register does not constitute a search under the Fourth Amendment.[52] Judge Clinton, writing for the majority, prefaced the court's inquiry by noting the court's authority, recognized in *Heitman v. State*,[53] to construe the protections set out in Article I, Section 9 independent of Supreme Court decisions interpreting the Fourth Amendment.[54] Judge Clinton recognized that the language and meaning of Article I, Section 9 are materially similar to those of the Fourth Amendment, but stated that Fourth Amendment analogues and constructions of state constitutions by other states merely act as guidance for the court rather than as controlling authority.[55] Judge Clinton explained that the two-prong test set out in *Katz v. United States*[56] remains the "litmus" for determining whether a search has occurred within the meaning of both the Texas and federal constitutions.[57] Based on the *Katz* test, Judge Clinton articulated the relevant inquiry with respect to the use of pen registers to be whether individuals expect the telephone numbers they dial to be free from governmental intrusion and, if so, whether society recognizes such an expectation as reasonable.[58]

Judge Clinton began this line of inquiry with a discussion of the controlling decision for Fourth Amendment search analysis, *Smith v. Maryland*,[59] and the critical responses to *Smith* by commentators and state courts.[60] In *Smith*, he explained, the Supreme Court based its decision primarily on an assumption-of-the-risk rationale drawn from the Court's

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strictive protection under Article I, § 9 than that provided under Fourth Amendment); Richardson v. State, 821 S.W.2d 304, 307 (Tex. App.—Amarillo 1991) (following automatically Supreme Court's interpretation of Fourth Amendment regarding use of pen registers), *vacated and remanded per curiam*, 824 S.W.2d 585 (Tex. Crim. App. 1992).

50. 865 S.W.2d 944 (Tex. Crim. App. 1993) (en banc).

51. 442 U.S. 735 (1979).

52. *Richardson*, 865 S.W.2d at 946–49.

53. 815 S.W.2d 681 (Tex. Crim. App. 1991).

54. *Richardson*, 865 S.W.2d at 948.

55. *Id.*

56. 389 U.S. 347 (1967).

57. *Richardson*, 865 S.W.2d at 948; *see supra* note 25 and accompanying text. The test regarding standing to raise a Fourth Amendment claim requires the same determination of whether a reasonable expectation of privacy exists. Rakas v. Illinois, 439 U.S. 128, 143 (1978).

58. *Richardson*, 865 S.W.2d at 949.

59. 442 U.S. 735 (1979).

60. *Richardson*, 865 S.W.2d at 949-51.

prior decision in *United States v. Miller*.[61] Judge Clinton reiterated the *Smith* Court's reasoning that because individuals realize that they convey, and the telephone company documents, numerical information with respect to their telephone calls, such individuals assume the risk that the telephone company will reveal the numbers they dial to the police.[62] Judge Clinton devoted two entire pages of the majority opinion to criticism of the *Smith* case by legal commentators and rejection of that case by state courts.[63] Judge Clinton acknowledged the findings of other states' courts that the use of a pen register is not a search, but concluded that most of those courts either had based their decisions directly on *Smith* or had considered cases requiring construction of the Fourth Amendment.[64]

Accepting the reasoning of *Smith*'s critics, Judge Clinton delineated the majority's additional justifications for finding a reasonable expectation of privacy in the telephone numbers dialed by individuals.[65] First, the disclosure of telephone numbers dialed to a telephone company involves a purely automated process via switching equipment and, therefore, does not preclude a finding that telephone customers harbor a subjective ex-

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61. *Id.* at 949; *see* United States v. Miller, 425 U.S. 435, 443 (1976) (stating that obtaining information relayed to third party is not forbidden by Fourth Amendment).

62. *Richardson*, 865 S.W.2d at 949.

63. *See id.* at 949-51 (relying on opinions of seven different state courts and two notable professors—Fishman and LaFave). Judge Clinton first noted criticism by one professor regarding the unreasonableness of finding that a limited disclosure of telephone numbers for business purposes opens the door for unrestrained police scrutiny of that information. *See id.* at 949-50 (citing 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(b), at 507-08 (2d ed. 1987)). Judge Clinton also recognized criticism respecting the negative privacy implications of such unrestricted use of pen registers because of the amount of information about a person a pen register may reveal. *See id.* at 950 (citing CLIFFORD S. FISHMAN, WIRETAPPING AND EAVESDROPPING § 28.1(2), at 251-52 (Supp. 1992)). The state court cases Judge Clinton referred to in his majority opinion provided examples of other states rejecting *Smith* and finding more protection under state constitutions. *See* People v. Blair, 602 P.2d 738, 746 (Cal. 1979) (finding that hotel guest has reasonable expectation of privacy in numbers dialed from hotel room); People v. Sporleder, 666 P.2d 135, 144 (Colo. 1983) (holding that Colorado Constitution requires search warrant to install pen register); State v. Rothman, 779 P.2d 1, 7–8 (Haw. 1989) (concluding that government's seizure of numbers called by persons with private telephone lines requires warrant); State v. Thompson, 760 P.2d 1162, 1164–67 (Idaho 1988) (deciding that use of pen register is search under Idaho Constitution); State v. Hunt, 450 A.2d 952, 957 (N.J. 1982) (determining that New Jersey Constitution protects toll billing records for home telephones); Commonwealth v. Beauford, 475 A.2d 783, 791 (Pa. 1984) (holding that individuals have reasonable expectation of privacy in telephone numbers dialed); State v. Gunwall, 720 P.2d 808, 813 (Wash. 1986) (finding protection under Washington's state constitution for information obtainable through pen registers).

64. *Richardson*, 865 S.W.2d at 951 n.5.

65. *Id.* at 951.

pectation of privacy in the numbers they dial.[66] Moreover, the court reasoned that this subjective expectation of privacy would be considered objectively reasonable by society because telephone companies presently go to great lengths to protect the privacy of their customers.[67] Thus, having determined that telephone customers have a subjective expectation of privacy in the numbers they dial and that society recognizes such an expectation as reasonable, Judge Clinton concluded that the use of a pen register may be a search under Article I, Section 9.[68]

Judge Miller joined Judge Clinton's majority opinion with note.[69] Although Judge Miller apparently agreed with the conclusion of the majority, he wrote separately to express his dissatisfaction with the majority's failure to conclusively answer the general question of whether a search occurs when pen registers are used.[70] Judge Miller contended that the majority, presumably by remanding the case to the court of appeals to determine if a pen register search without probable cause was reasonable under the facts of the present case, had neglected to answer the broad question presented—whether an expectation of privacy exists in dialing telephone numbers.[71]

Judge Campbell, in a dissent joined by Presiding Judge McCormick, considered the true question to be whether Richardson, in his particular position as a detainee awaiting trial in county jail, proved that he possessed a reasonable expectation of privacy in the numbers he dialed on the jail's telephone.[72] Although Judge Campbell agreed with the method of inquiry employed by the majority, he believed Richardson had the burden of proving the existence and reasonableness of his expectation of privacy.[73] Judge Campbell was convinced that Richardson had failed to show that he possessed a subjective expectation of privacy, as Richardson had offered no argument or evidence at trial to support such an expecta-

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66. *Id.* at 952 n.6.

67. *Id.* at 953. In support of this conclusion, Judge Clinton pointed out the difficulty involved in obtaining another customer's telephone bill and quoted a portion of the Austin, Texas telephone directory which evidenced an intent to protect the privacy of telephone customers. *Id.* at 953, 953 n.8. Judge Clinton also considered certain subjective expectations of privacy that society views as legitimate despite limited disclosure, specifically with regard to doctor-patient communications, but conceded that the analogy was neither exact nor conclusive. *Id.* at 952-53. Judge Clinton acknowledged that no physician-patient privilege exists in criminal cases, but concluded that a duty of confidentiality nevertheless exists either by statute or for ethical reasons. *Id.* at 953 n.7.

68. *Richardson*, 865 S.W.2d at 953.

69. *Id.* at 954 (Miller, J., concurring).

70. *Id.*

71. *Id.*

72. *Richardson*, 865 S.W.2d at 954 (Campbell, J., dissenting).

73. *Id.* at 956.

tion.[74] Judge Campbell also contended that Richardson had failed to show that his expectation of privacy, if any, would be recognized by society as reasonable.[75] Based on other court decisions concluding that jail inmates cannot reasonably expect privacy in their calls on jail telephones to non-attorneys, Judge Campbell deduced that society would not consider such an expectation reasonable.[76]

Richardson v. State[77] is a significant case, not so much for its holding that a pen register may be a search under the Texas Constitution, but because it represents the first time the Texas Court of Criminal Appeals has actually exercised its authority, announced in *Heitman v. State*,[78] to find more privacy protection under Article I, Section 9 than that provided by the Fourth Amendment.[79] Although the court's conclusion—that the use of a pen register may constitute a search—is probably sound for a variety of reasons, the court's decision to exercise its authority to provide more rights under the Texas Constitution than those found in the Fourth Amendment is not as sound.[80] The methodology employed by the court

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74. *Id.* Judge Campbell further noted that evidence at trial showed Richardson gave the telephone numbers to two jail inmates and had them call the motel for him. *Id.* Judge Campbell then recognized authority holding that information a person knowingly reveals to others is not protected by Article I, § 9. *Id.* (citing Green v. State, 566 S.W.2d 578, 582 (Tex. Crim. App. 1978)).

75. *Id.*

76. *Richardson*, 865 S.W.2d at 957 (Campbell, J., dissenting) (citing United States v. Amen, 831 F.2d 373 (2d Cir. 1987); United States v. Clark, 651 F. Supp. 76 (M.D. Pa. 1986); United States v. Vasta, 649 F. Supp. 974 (S.D.N.Y. 1986); and State v. Fox, 493 N.W.2d 829 (Iowa 1992)); *see* Hudson v. Palmer, 468 U.S. 517, 525-29 (1984) (considering whether inmate has reasonable expectation of privacy in cell and concluding that society would not recognize such expectation as reasonable).

77. 865 S.W.2d 944 (Tex. Crim. App. 1993) (en banc).

78. 815 S.W.2d 681 (Tex. Crim. App. 1991).

79. *See* Aitch v. State, 879 S.W.2d 167, 171 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (noting that *Richardson* is only instance since *Heitman* in which Texas Court of Criminal Appeals has rejected traditional Fourth Amendment analysis); Aycock v. State, 863 S.W.2d 183, 185 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (recognizing that, as of September 1993, Court of Criminal Appeals had interpreted Article I, § 9 and Fourth Amendment conterminously, even after *Heitman*); Catherine G. Burnett & Neil C. McCabe, *A Compass in the Swamp: A Guide to Tactics in State Constitutional Law Challenges*, 25 TEX. TECH L. REV. 75, 110 n.224 (1993) (stating that Court of Criminal Appeals departed from Fourth Amendment doctrine in *Richardson*); Terry Young, Comment, *Responding to* Heitman v. State*: Will Texas Courts Apply a More Restrictive Standard for Inventory Searches?*, 18 T. MARSHALL L. REV. 285, 305 (1993) (finding no interpretations of Article I, § 9 before *Richardson* to be more expansive than Fourth Amendment); *see also* Johnson v. State, 864 S.W.2d 708, 723 (Tex. App.—Dallas 1993, pet. granted) (refusing, post-*Heitman*, to depart from United States Supreme Court's interpretation of Fourth Amendment in deciding when seizure occurs under Article I, § 9).

80. *See* Richardson v. State, 865 S.W.2d 944, 953 (Tex. Crim. App. 1993) (en banc) (holding that law enforcement's use of pen register "may well constitute a 'search' under

in finding greater protection is also questionable, as it provides no real guidance for attorneys and courts in future cases to determine when Article I, Section 9 should be interpreted as providing more protection than the Fourth Amendment.[81]

Considering the broad issue of whether the use of a pen register is ever a search deserving constitutional protection in and of itself and without regard to which constitution provides that protection, the court's finding that such use may constitute a search is logical and may be further supported on policy grounds.[82] First, in considering the majority's statement that a pen register reveals a tremendous amount of information about a caller, justices of other courts have similarly concluded that the numbers a person dials from a private telephone "are not without 'content'" and

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Article I, § 9 of the Texas Constitution"). Other states have reached the same conclusion under their state constitutions. *See, e.g.*, State v. Thompson, 760 P.2d 1162, 1167 (Idaho 1988) (concluding that use of pen register is search under Idaho Constitution's search and seizure provision); Commonwealth v. Beauford, 475 A.2d 783, 789 (Pa. 1983) (protecting information obtained through pen registers under Pennsylvania Constitution). Some have argued, however, that any decision to depart from a traditional Fourth Amendment analysis is questionable. *See* Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1501–02 (1990) (describing new federalist approach as "judicial legislation" and warning of potentially catastrophic effects); Michael D. Weiss & Mark W. Bennett, *New Federalism and State Court Activism*, 24 MEM. ST. U. L. REV. 229, 260 (1994) (asserting that judicial conservatism is favored and relying on stare decisis in support of conclusion).

81. *See Richardson*, 865 S.W.2d at 948 (announcing simply that authority exists under *Heitman* to interpret Article I, § 9 differently than Fourth Amendment and proceeding with discussion of Supreme Court case on Fourth Amendment). Courts and commentators have criticized this cursory type of approach because it provides no explanation that can be used in subsequent cases to support such a departure. *See* State v. Gunwall, 720 P.2d 808, 811-12 (Wash. 1986) (en banc) (noticing that when courts simply announce their decision without explanation, attorneys have no way to predict future state decisional law); Autran v. State, 830 S.W.2d 807, 817 (Tex. App.—Beaumont 1992) (Walker, C.J., concurring) (asserting that new federalist approach, absent direction from Texas Court of Criminal Appeals, creates confusion among courts of appeals), *rev'd*, 887 S.W.2d 31 (Tex. Crim. App. 1994) (en banc); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 772 (1992) (criticizing state courts that reject federal decisions merely because they disagree with reasoning); Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1505–06 (1990) (discussing prior Texas case that departed from Sixth Amendment analysis regarding right to counsel and criticizing decision for failing to provide any explanation or future guidance); *see also* Forte v. State, 759 S.W.2d 128, 137–38 (Tex. Crim. App. 1988) (rejecting United States Supreme Court case interpreting Sixth Amendment because of mere disagreement with Court's rationale).

82. *See Richardson*, 865 S.W.2d at 953 (finding that use of pen register may be search under Texas Constitution). *But see* Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (holding that use of pen register is not search under Fourth Amendment). Courts and commentators have criticized *Smith*. *See supra* note 39 and accompanying text.

can amount to a "virtual mosaic" of an individual's private life.[83] In addition, the amount of information about a person that a pen register may reveal necessitates protection from law enforcement's unrestrained use of pen registers, as such use might inhibit freedom of association and hurt even those with nothing to hide such as journalists and members of political organizations.[84] Finally, by finding that the use of a pen register may constitute a search, the majority in *Richardson* has diminished the fears of the *Smith v. Maryland*[85] critics that police would abuse the unrestricted use of pen registers.[86]

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83. *See Richardson*, 865 S.W.2d at 950 (recognizing that pen register reveals much about person (citing CLIFFORD S. FISHMAN, WIRETAPPING AND EAVESDROPPING § 28.1(2) (Supp. 1992))); *see also Smith*, 442 U.S. at 748 (Stewart, J., dissenting) (noting that telephone numbers person dials "are not without content" and can reveal intimate details of person's life); State v. Valenzuela, 536 A.2d 1252, 1269 (N.H. 1987) (Batchelden, J., dissenting) (concluding that collection of telephone numbers dialed is private matter because it can provide "virtual mosaic" of person's private life), *cert. denied*, 485 U.S. 1008 (1988). Commentators have likewise argued that the use of a pen register should constitute a search because of the vast amount of information pen registers may reveal. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15–16, at 1391 (2d ed. 1988) (agreeing with Justice Stewart's dissent in *Smith* regarding threat of revealing intimate details posed by use of pen registers); John Applegate & Amy Grossman, *Pen Registers After* Smith v. Maryland, 15 HARV. C.R.-C.L. L. REV. 753, 766 (1980) (asserting that knowing time, date, and parties to telephone conversation may often lead to knowledge of conversation and using example of call from bookie to racetrack as example).

84. *See Smith*, 442 U.S. at 751 (Marshall, J., dissenting) (explaining that unrestricted use of pen registers could reveal membership in unpopular political organizations or confidential sources of journalists, thus implicating First Amendment concerns); Smith v. State, 389 A.2d 858, 874 n.4 (Md. 1978) (Cole, J., dissenting) (fearing potential of pen registers to inhibit freedom of association), *aff'd*, 442 U.S. 735 (1979); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(b), at 507 (2d ed. 1987) (noting that allowing unrestrained use of pen registers results in uncovering of private relationships); John Applegate & Amy Grossman, *Pen Registers After* Smith v. Maryland, 15 HARV. C.R.-C.L. L. REV. 753, 767 (1980) (arguing that general surveillance via pen registers inhibits freedom of association). The United States Supreme Court has noted the importance of protecting the privacy of group affiliations to preserve the constitutional freedom of association. *See* NAACP v. Alabama, 357 U.S. 449, 462 (1958) (protecting members of NAACP from being forced to disclose their membership in that organization), *rev'd on other grounds*, 360 U.S. 240 (1959).

85. 442 U.S. 735, 745–46 (1979).

86. *See Smith*, 389 A.2d at 874 (Cole, J., dissenting) (warning that pen registers are subject to abuse by police because they can be easily converted to wiretaps to record conversations); Note, *Circumventing Title III, The Use of Pen Register Surveillance in Law Enforcement*, 1977 DUKE L.J. 751, 759 n.45 noting that some modern pen registers automatically record conversations through voice activation (citing Brief for Appellant at 10, United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976) (No. 75-1909)). Congress apparently shared this fear because not long after *Smith* declared that probable cause was not required to use a pen register, it enacted legislation requiring that "the information likely to be obtained [be] relevant to an ongoing criminal investigation. . . ." 18 U.S.C.

More important than the issue of whether a search occurs when a pen register is used, however, is the question of whether any support exists for the court's decision to ignore United States Supreme Court precedent and provide more protection under Article I, Section 9 than that provided by the Fourth Amendment.[87] The answer to this question is most likely in the negative; as such, it should have had the outcome-determinative effect of precluding the court from considering whether the use of a pen register should be a search.[88] A textual comparison of the Texas and

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§ 3122(b)(2) (Supp. V 1987); *see* Robert W. Kastenmeir et al., *Communications Privacy: A Legislative Perspective*, 1989 WIS. L. REV. 715, 732 (describing procedural restrictions that Congress placed on installation and use of pen registers). Others have argued, however, that requiring probable cause for the use of pen registers would unduly restrict law enforcement officers. *See* People v. Sporleder, 666 P.2d 135, 148 (Colo. 1983) (en banc) (Erickson, C.J., dissenting) (arguing that probable cause requirement for pen registers would cripple law enforcement efforts to prosecute those who make obscene telephone calls); *Valenzuela*, 536 A.2d at 1260 (asserting that mandating probable cause for use of pen registers would always require warrant to obtain information from agents or informers).

87. *See* State v. Hunt, 450 A.2d 952, 955 (N.J. 1982) (discussing importance of state departures from federal provisions because of adverse effect on uniformity). The Supreme Court has recognized the power of the states to rely on their own constitutions in determining the scope of civil liberties. *E.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); Oregon v. Hass, 420 U.S. 714, 719 (1975). The real debate, however, concerns when and if states should exercise this power. *Compare* Shirley S. Abrahamson, *Reincarnation and Reawakening: Long Forgotten by Civil Libertarians, State Courts Are Now Getting the Respect They Deserve*, HUM. RTS. Winter 1992, at 29 (asserting that new federalism encourages state courts to develop new approaches that Supreme Court may later apply nationwide) *with* Michael D. Weiss & Mark W. Bennett, *New Federalism and State Court Activism*, 24 MEM. ST. U. L. REV. 229, 232 (1994) (arguing that state court activism is not justified by new federalism). *See generally* Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1499 (1990) (observing that center of debate is whether and when state courts should exercise power to grant broader protections under state constitutions).

88. *See Richardson*, 865 S.W.2d at 951-54 (considering reasons why use of pen register may constitute search). A finding that Article I, § 9 provides no greater protection than the Fourth Amendment would have been outcome determinative in *Richardson* because the Supreme Court already had decided the issue of whether pen register use constitutes a search under the Fourth Amendment. *See Smith*, 442 U.S. at 745-46 (finding that Fourth Amendment does not require probable cause for use of pen registers). This precedent determined the outcome of *Richardson* the first time it was considered by the court of appeals. *See* Richardson v. State, 821 S.W.2d 304, 307 (Tex.App.—Amarillo 1991) (describing *Smith* as persuasive and compelling), *vacated and remanded per curiam*, 824 S.W.2d 585 (Tex. Crim. App. 1992). The *Smith* holding has also determined the outcome of cases in other states regarding pen registers. *See* Yarbrough v. State, 473 So. 2d 766, 767 (Fla. Dist. Ct. App. 1985) (deciding that *Smith* dictates parameters of Florida constitutional protection); Karen L. Stanitz, Note, State v. Rothman: *Expanding the Individual's Right to Privacy Under the Hawaii Constitution*, 13 U. HAW. L. REV. 619, 625 (1991) (recognizing that several state courts have followed reasoning in *Smith*). In Texas, the Court of Criminal Appeals has relied to a great extent on United States Supreme Court decisions inter-

federal search and seizure provisions, as well as the legislative history and case law interpreting Article I, Section 9, provides virtually no support for such an expansion of privacy rights under the Texas Constitution.[89]

First, the language of the Texas and federal search and seizure provisions is virtually identical, seemingly precluding any attempt to distinguish the intent of the two provisions on a textual basis.[90] Although courts and commentators have attempted to textually distinguish Article

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preting the federal constitution to determine the protection provided by the Texas Constitution. *See* Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1481 n.4 (1990) (listing Texas cases interpreting "due course of law" provisions in Texas and federal constitutions coextensively).

89. *See* Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 935 (1992) (concluding that no evidence exists that Texas search and seizure provision embodies different values than those in Fourth Amendment). Textual comparisons, constitutional history, and prior court decisions are relevant considerations for evaluating the protections afforded under state constitutions. *See Hunt*, 450 A.2d at 955 (considering prior state case law in deciding to provide more privacy protection under state constitution); Heitman v. State, 815 S.W.2d 681, 688, 690 (Tex. Crim. App. 1991) (discussing briefly Texas constitutional history before announcing that Supreme Court decisions interpreting Fourth Amendment are not determinative of protections under Article I, § 9); *Gunwall*, 720 P.2d at 811 (including textual comparisons, constitutional history, and pre-existing state law in list of relevant criteria for determining whether Washington Constitution extends broader rights than federal constitution); Terry Young, Comment, *Responding to* Heitman v. State*: Will Texas Courts Apply a More Restrictive Standard for Inventory Searches?*, 18 T. MARSHALL L. REV. 285, 304 (1993) (noting *Heitman* court's reliance on Texas constitutional history).

90. *See* Eisenhauer v. State, 754 S.W.2d 159, 162 (Tex. Crim. App.) (noting that Texas and federal provisions are "in all material aspects, the same"), *cert. denied*, 488 U.S. 848 (1988), *overruled by* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991). The federal search and seizure provision is embodied in the Fourth Amendment to the United States Constitution, which provides:

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

U.S. CONST. amend. IV. The Texas search and seizure provision is contained in Article I, § 9 and provides:

> 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.

TEX. CONST. art. I, § 9; *see also* Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1513 (1990) (referring only to *significant* textual differences as occasion justifying state court departure from federal constitutional analogues); Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 936 (1992) (asserting that language of Article I, § 9 and Fourth Amendment is "virtually identical"); Paul R. Stone & Henry de la Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S

I, Section 9 and the Fourth Amendment based on placement of and minor differences in wording, these arguments have been heavily criticized and they fail to provide logical support for a broader interpretation of Article I, Section 9.[91] In addition, rather than supporting a finding of broader individual protections under the Texas search and seizure provision, the legislative history of Article I, Section 9 reveals that the framers of the Texas Constitution intended to bestow no greater liberties on Texas citizens than those already provided in the federal Bill of Rights.[92] This

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L.J. 443, 450 (1993) (recognizing that language of Texas search and seizure provision differs only slightly from Fourth Amendment).

91. *See* Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 936–40 (1992) (discussing and discrediting attempts at textual distinctions). For example, the *Heitman* court found the placement of the state bill of rights as the first article in the Texas Constitution to be a significant textual difference from the Fourth Amendment. *Heitman*, 815 S.W.2d at 690. *Contra Johnson*, 864 S.W.2d at 719 (deciding that placement of Texas Bill of Rights was not significant textual difference from Fourth Amendment). This argument fails, however, because to accept it would render the federal Bill of Rights less significant, though the Bill of Rights contains what probably the most central provisions in the United States Constitution. *See Johnson*, 864 S.W.2d at 719 (noticing that placement argument absurdly implies that amendments to federal constitution are not as important as its original text); Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 937-39 (1992) (discussing counterintuitiveness of placement argument). Additionally, one commentator has contended that the wording of Article I, § 9 as a grant of a right, rather than a limitation of governmental authority, evidences an intent to provide more protection under the Texas Constitution. *See* JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 8:2 (2d ed. 1993) (arguing that grant language in Article I, § 9 demonstrates intent to provide broader protection). However, common sense discredits this argument because a grant of a right is necessarily a limitation on the government's authority and vice versa. *See* Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 937 (1992) (criticizing Professor Harrington's argument because grant necessarily includes resulting limitation). Finally, another commentator has asserted that Article I, § 9 contains a more specific warrant requirement than the Fourth Amendment in light of the Texas provision's mandate that the item searched be described "as near as may be" as opposed to the federal provision's "particularly describ[ed]" requirement. Arvel Ponton, III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 107–08 (1988). The Texas Court of Criminal Appeals disproved this theory when it held that only a "general description of the property to be searched" is required by the phrase "as near as may be." Parrack v. State, 228 S.W.2d 859, 862 (Tex. Crim. App. 1950). Notwithstanding these attempts at textual distinctions, the Texas Court of Criminal Appeals recently recognized that a textual comparison of the Texas and federal search and seizure provisions is not helpful in supporting a finding of greater protection under Article I, § 9. *See* Autran v. State, 887 S.W.2d 31, 38 (Tex. Crim. App. 1994) (en banc) (considering textual similarities and concluding that further analysis of framers' intent and history and application of Article I, § 9 is needed to find support for broader rights under Texas Constitution).

92. *See Autran*, 887 S.W.2d at 38 (stating that evidence of framers' intent to provide more protection under Article I, § 9 is lacking). *See generally*, Matthew W. Paul & Jeffrey

lack of intent is further evidenced by the 1861 Texas Secession Convention's admission that the Constitution of the Confederate States of America, from which the Texas Constitution, including what is now Article I, Section 9, was derived, was copied almost entirely from its federal counterpart.[93] Finally, prior decisions of the Texas Court of Criminal Appeals fail to support a finding that Article I, Section 9 places greater re-

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L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 941–56 (1992) (discussing evolution of Article I, § 9 and concluding that history of provision does not evidence intent of framers to provide greater protection than Fourth Amendment). For instance, in 1836, the Congress of Texas authorized punishment of death for crimes such as stealing a slave and counterfeiting, demonstrating that the people of Texas did not place great emphasis on restricting law enforcement at the time of the framing of the 1836 constitution. *See* 1 H.P.N. GAMMEL, LAWS OF TEXAS 1247–55 (1898) (listing punishments enacted by Congress of Texas in 1836); Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 944–45 (1992) (concluding that harsh punishments for crimes evidenced framers' lack of intent to place greater restrictions on law enforcement in 1836). *But see* James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 402 (1993) (contending that majority of 1836 convention favored broader constitutional guarantees than federal constitution provided).

93. *See* JOURNAL OF THE SECESSION CONVENTION OF TEXAS 259 (Ernest W. Winkler ed., 1912) (relating convention's comments regarding copying of Constitution of Confederate States of America from Constitution of United States). A committee of the 1861 Texas Secession Convention, appointed to inform the people of Texas about the convention's activities, explained that the Constitution of the Confederate States of America was copied almost completely from the United States Constitution. *Id.* The Texas Constitution followed the Constitution of the Confederate States of America with only minor changes, one of which was not to include what is now Article I, § 9. *Id.* Therefore, the 1861 committee's comments demonstrate a lack of intent on the part of the 1861 framers to provide more protection than the federal Bill of Rights. *Id.*; *see* Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 951 (1992) (arguing that framers of 1861 Texas Constitution did not view Texas's search and seizure clause as more protective of individual liberties than federal Bill of Rights). Furthermore, in 1875, when the current Article I, § 9 was adopted as part of the Texas Bill of Rights, one of the delegates commented that the Texas Constitution expressed the principles of the American constitution. *See* Seth S. McKay, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 at 43 (1930) (relating comment of delegate regarding American constitutional principles expressed in Texas Constitution). *But see* James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 404 (1993) (arguing that 1875 delegates perceived significant differences in structure of Texas and federal constitutions). The language of the two provisions illustrates that Article I, § 9 was copied nearly verbatim from the Fourth Amendment. *See* TEX. CONST. art. I, § 9 interp. commentary (Vernon 1984) (noting that language of Article I, § 9 and Fourth Amendment is substantially same); *Johnson*, 864 S.W.2d at 708, 719, 723 (relying in part on Article I, § 9's interpretive commentary to find that seizure should be determined consistent with Supreme Court decisions interpreting Fourth Amendment). *But cf. Autran*, 887 S.W.2d at 38–39 (finding framers' reliance on Fourth Amendment for guidance unclear, but suggesting that Fourth Amendment's derivation from Massachusetts Constitution, which provides greater protection than Fourth Amendment, supports finding of greater protection under Article I, § 9).

straints on law enforcement than does the Fourth Amendment; in fact, the court historically has considered Article I, Section 9 to be even *less* restrictive.[94] Because no support for the *Richardson* court's expansive reading of Article I, Section 9 surfaces from textual comparisons, legislative history, or prior Texas case law, no grounded reason for the court's decision to reject Supreme Court precedent interpreting the Fourth Amendment is discernible.[95]

Perhaps the answer to this mystery would be apparent if the *Richardson* majority had employed a more instructive methodology in deciding to potentially place greater restrictions on law enforcement's use of pen registers under the Texas Constitution.[96] The majority in *Richardson* sim-

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94. *See* Welchek v. State, 93 Tex. Crim. 271, 247 S.W. 524, 529 (1922) (finding that Article I, § 9 did not encompass exclusionary rule that Supreme Court read into Fourth Amendment). In reaction to this holding, the Texas Legislature created a statutory exclusionary rule. TEX. CRIM. PROC. CODE ANN. art. 38.23 (Vernon Supp. 1995). Ironically, Judge Clinton, who wrote the majority opinion in *Richardson*, has noted that the legislature had to pass these types of statutes to broaden rights which had been narrowed previously by the Texas Court of Criminal Appeals' interpretations of Article I, § 9. Brown v. State, 657 S.W.2d 797, 804 (Tex. Crim. App. 1983) (Clinton, J., concurring), *overruled by* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991); *see also* Gearing v. State, 685 S.W.2d 326, 329 (Tex. Crim. App. 1985) (finding Article I, § 9 to require no more than Fourth Amendment in determining whether seizure of person has occurred); Crowell v. State, 147 Tex. Crim. 299, 180 S.W.2d 343, 346 (1944) (finding state and federal search and seizure provisions materially same); Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1481 (1990) (noting that Texas criminal courts have interpreted federal and state constitutions consistently for over 100 years); Terry Young, Comment, *Responding to* Heitman v. State*: Will the Texas Courts Apply a More Restrictive Standard for Inventory Searches?*, 18 T. MARSHALL L. REV. 285, 303 (1993) (recognizing that before *Heitman*, Texas Court of Criminal Appeals interpreted Article I, § 9 in harmony with Fourth Amendment interpretations).

95. *See* Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 935 (1992) (asserting that if reasons exist to interpret Article I, § 9 more broadly than Fourth Amendment, they would be found in language and history of state constitutional provision, and arguing that no such reasons can be found); *see also* Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1483 (1990) (concluding that no compelling reasons exist to suddenly change meaning of Texas Constitution). The *Richardson* court's reading of Article I, § 9 was expansive because it found that the use of a pen register may be a search under Article I, § 9 after the Supreme Court had rejected this proposition under the Fourth Amendment. *See supra* notes 38–39, 50–68 and accompanying text. *See generally Aitch*, 879 S.W.2d at 171 (noting that Texas Court of Criminal Appeals departed from traditional Fourth Amendment analysis in *Richardson*).

96. The restrictions on the use of pen registers imposed by the court in *Richardson* are described herein as "potential" because the court merely found that law enforcement's use of a pen register "may well constitute a 'search' under Article I, Section 9 of the Texas Constitution"; the court then remanded the case to the court of appeals to determine if an unreasonable search had in fact occurred. *Richardson*, 865 S.W.2d at 953-54. Regarding methodology, state courts typically approach bill of rights issues by employing one of three

ply reiterated the court's authority, under *Heitman*, to reject Supreme Court precedent interpreting the Fourth Amendment and then exercised this authority for no apparent reason other than the court's disagreement with the reasoning of *Smith v. Maryland*,[97] the Fourth Amendment analogue.[98] In so doing, the *Richardson* court missed the opportunity to explain why and when Texas courts should interpret Article I, Section 9 to provide greater individual liberties than the Fourth Amendment, further confusing the issue rather than providing much-needed guidance to attorneys and courts in future cases.[99] This approach is problematic because,

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methods: the "primacy," "dual reliance," or "interstitial" approaches. James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 407 (1993). The primacy approach looks first to the state constitution for protection and only considers federal law if no protection is found under the state constitution. *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356 (1982). Texas courts have sometimes used the primacy method. *See, e.g.*, Haynes v. City of Abilene, 659 S.W.2d 638, 641 (Tex. 1983) (construing statutory meaning of "special benefits" in eminent domain cases); Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983) (interpreting Texas "Open Courts Provision"). The dual reliance approach evaluates the federal and state constitutional provisions in that order, but separately. James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 407–08 (1993). The interstitial approach provides that states should only look to their state constitutions if the federal law is ambiguous or approves the state action challenged. *See The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356 (1982) (proposing and explaining interstitial model).

97. 442 U.S. 735, 739 (1979).

98. *See Richardson*, 865 S.W.2d at 948-49 (announcing authority under *Heitman* to reject Supreme Court decisions interpreting Fourth Amendment, and beginning discussion with criticism of *Smith*). Other state courts have made this same mistake by simply rejecting federal analogues without explaining why the state constitution provides more protection. *See, e.g.*, People v. Davis, 553 N.E.2d 1008, 1110-11 (N.Y. 1990) (finding greater protection regarding right to counsel under state constitution without explanation); People v. Dunn, 564 N.E.2d 1054, 1056-58 (N.Y. 1990) (finding that search occurred under state constitution, although no search occurred under federal constitutional law, based in part on dissenting opinion in case representing federal precedent), *cert. denied*, 501 U.S. 1219 (1991); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 795-97 (1992) (discussing holdings in *Dunn* and *Davis* and criticizing these types of cases for failing to provide state-specific explanation); *see also* Terry Young, Comment, *Responding to* Heitman v. State*: Will the Texas Courts Apply a More Restrictive Standard for Inventory Searches?*, 18 T. MARSHALL L. REV. 285, 306 (1993) (asserting that courts should be required to explain why rights should be expanded under state constitutions).

99. *See Heitman*, 815 S.W.2d at 686 (recognizing opportunity of state courts to lay guidelines for future state constitutional decisions); Terry Young, Comment, *Responding to* Heitman v. State*: Will the Texas Courts Apply a More Restrictive Standard for Inventory Searches?*, 18 T. MARSHALL L. REV. 285, 306 (1993) (expressing hope that Texas courts in future will seize opportunity to articulate reasons why greater individual liberties exist under state constitutional provisions). Advocates of new federalism argue that refusing to blindly follow Supreme Court precedent is desirable because it allows local experimentation that could foster shifts in legal doctrine. *See* Shirley S. Abrahamson, *Reincarnation and Reawakening: Long Forgotten by Civil Libertarians, State Courts are Now Getting the*

since *Heitman*, confusion has erupted in the Texas courts with respect to when departure from traditional Fourth Amendment analysis is appropriate, and Texas courts have repeatedly concluded that no support for such a departure can be gleaned from either the text of Article I, Section 9 or the historical application of that provision.[100] The *Richardson* court had an opportunity to alleviate critics' concerns regarding its new federalist approach by resolving the confusion in the lower courts, but instead fell prey to the exact method of analysis most criticized by opponents of new federalism by merely disagreeing ideologically with the Supreme Court's Fourth Amendment analysis.[101]

Respect They Deserve, HUM. RTS. Winter 1992, at 29 (advocating that new federalism encourages state courts to experiment with new approaches that Supreme Court may later adopt); *see also* McCray v. New York, 461 U.S. 961, 963 (1983) (allowing experimentation by states with peremptory challenges); New St. Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (recognizing importance of new social and economic experiments). This experimentation, however, loses its utility and may foster unpredictable shifts in legal doctrine if the decisions of state courts are not based on and explained to be due to the unique principles of the individual states. *See* Michael D. Weiss & Mark W. Bennett, *New Federalism and State Court Activism*, 24 MEM. ST. U. L. REV. 229, 234 (1994) (arguing that uniqueness of states defines utility of experimentalism).

100. *See Heitman*, 815 S.W.2d at 691 (McCormick, P.J., dissenting) (criticizing majority for providing no guidance to courts of appeals to formulate state law); *Aitch*, 879 S.W.2d at 172 (holding that Article I, § 9 should be interpreted consistent with Fourth Amendment); *Johnson*, 864 S.W.2d at 723 (adopting Supreme Court's interpretation of Fourth Amendment on seizure issue after considering whether text or history of Article I, § 9 supported broader interpretation); Terry Young, Comment, Responding to Heitman v. State*: Will the Texas Courts Apply a More Restrictive Standard for Inventory Searches?*, 18 T. MARSHALL L. REV. 285, 306 (1993) (asserting that majority in *Heitman* failed to provide formula for guidance). Other Texas courts of appeals have concluded that Article I, § 9 and the Fourth Amendment should be interpreted consistently even when the courts are armed with the power to interpret the two provisions differently. *See* Hernandez v. State, 867 S.W.2d 900, 908 (Tex. App.—Texarkana 1993, no pet.) (recognizing authority under *Heitman* to interpret Texas search and seizure provision more broadly than Fourth Amendment, but refusing to do so); Cook v. State, 832 S.W.2d 62, 65 (Tex. App.—Dallas 1992, no pet.) (finding that Texas search and seizure provision should be interpreted in accordance with Fourth Amendment notwithstanding authority under *Heitman* to hold otherwise). Some commentators predicted this confusion among the courts of appeals after the *Heitman* decision. *See* Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 967 (1992) (predicting uncertainty in future decisions because of lack of guidance in *Heitman* opinion).

101. *See Autran*, 830 S.W.2d at 817 (Walker, C.J., concurring) (stating that "[b]y adopting the doctrine of 'independent state grounds,' without directions, the fourteen courts of appeal have been parachuted into the Okefenokee Swamp, at night, without a compass"); Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1518 (1990) (arguing that state-specific reasons should be articulated in support of divergence from United States Supreme Court precedent to restrain judges from legislating their own views into state constitutions); Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question*

Courts and critics of new federalism have noted the high costs associated with any departure from federal precedent, most significantly the destruction of uniformity and the creation of uncertainty and resulting litigation.[102] Some critics, however, have conceded that these costs can be minimized if state courts articulate state-specific reasons for departing from Fourth Amendment precedent.[103] Such state-specific reasons may include significant textual differences between the provisions of the state

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Left Unanswered, 23 ST. MARY'S L.J. 929, 967 (1992) (asserting that mere ideological or legal disagreement with Supreme Court decisions is not proper basis for "finding" more protection in Texas Constitution, and criticizing such approaches for lack of guidance). Some commentators have asserted, however, that state courts may merely disagree with United States Supreme Court precedent without explanation. *See* M.P. Duncan III, *Terminating the Guardianship: A New Role for State Courts*, 19 ST. MARY'S L.J. 809, 843 (1988) (contending that state court divergence from Supreme Court precedent based simply on disagreement in interpretation is appropriate); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 368 (1984) (asserting that state courts may simply "disagree" with United States Supreme Court precedent, but noting that courts may face criticism for such approach). Others contend that the Texas Court of Criminal Appeals should not be required to prepare a roadmap of state constitutional analysis for lower courts and attorneys because courts of appeal and attorneys may simply compose sound, logical, and rational future arguments based on policy, judicial administration, and fidelity to the meaning of the Texas Constitution. Telephone Interview with Keith Hampton, Austin, Texas criminal defense attorney (Sept. 13, 1994).

102. *See, e.g.*, McCrory v. State, 342 So. 2d 897, 900 (Miss. 1977) (arguing that two different constitutional standards confuse state attorneys, judges, and law enforcement officials); State v. Florance, 527 P.2d 1202, 1209 (Or. 1974) (recognizing confusion caused by differing state and federal search and seizure standards); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 818 (1992) (warning that new federalism threatens sense of community and nationwide stability); Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1511 (1990) (asserting that need for national consensus on personal liberty issues counsels against differing state and federal constitutional constructions). Some state courts that have opted to provide greater rights under their state constitutions have recognized the costs associated with such an approach. *See Hunt*, 450 A.2d at 955 (noting that uniformity is destroyed when different state search and seizure rules apply); *Gunwall*, 720 P.2d at 811 (identifying "constitution shopping," "result oriented decisions," and "super legislature" courts as problems of new federalism).

103. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 799 (1992) (asserting that state courts which independently analyze their state constitutions and use traditional tools to interpret their constitutions come closest to supporting new federalism); Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 935–44 (1976) (listing specific factors that state judges should consider in determining constitutional issues). Many state courts have approached state constitutional interpretation correctly by explaining the state-specific reasons for their decisions. *See, e.g.*, State v. Culotta, 343 So. 2d 977, 981-82 (La. 1976) (basing exclusion of evidence on explicit "standing" language in state constitution); People v. Ohrenstein, 565 N.E.2d 493, 498–99 (N.Y. 1990) (discussing purpose and history of provision forbidding utilization of public funds for private purposes); People v. Kern, 554

and federal constitutions, public policy concerns of state citizens, specific state traditions or laws providing more coverage than the interpretations of the federal constitution, and constitutional history evidencing an intent by the framers of the state constitution to provide broader coverage than the federal provision.[104] Although such support may have been difficult to articulate based on the text, history, and court interpretations of Article I, Section 9, the majority in *Richardson* made no attempt to enunciate any coherent state-specific reasons for its departure from Supreme Court interpretations of the Fourth Amendment and, therefore, failed to justify such a costly departure.[105] Significantly, since *Richardson*, the Texas Court of Criminal Appeals *has* examined the text, history, and application of Article I, Section 9 in search of state-specific support for a broader interpretation of that provision, as it should have done in *Richardson*.[106]

N.E.2d 1235, 1241 (N.Y.) (examining text and history of state constitutional provision), *cert. denied*, 498 U.S. 824 (1990).

104. *See Hunt*, 450 A.2d at 965–67 (Handler, J., concurring) (outlining seven criteria that may justify state court departure from Supreme Court precedent); *Gunwall*, 720 P.2d at 812–13 (including textual comparisons, state constitutional history, prior state law, differences in constitutional structure, and state interests and concerns in list of relevant criteria in deciding whether to provide broader rights under state constitution); James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 418–25 (1993) (suggesting variations of text and internal structure of bill of rights as means of discerning differences in state and federal constitutions); Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1513–14 (1990) (listing referenced occasions when state courts may be justified in determining state constitutional protection). The Texas Court of Criminal Appeals previously has demonstrated its ability to interpret the Texas Constitution and explain that interpretation's bearing on the court's decision. *See* Lanes v. State, 767 S.W.2d 789, 791 n.5 (Tex. Crim. App. 1989) (considering purposes and policies of juvenile justice system in Texas before finding that probable cause requirement extends to juveniles).

105. *See Sporleder*, 666 P.2d at 150 (Erickson, C.J., dissenting) (expressing belief that state courts should be reluctant to interpret identical language in their state constitutions differently than Supreme Court interprets federal constitution); McCambridge v. State, 778 S.W.2d 70, 75-76 (Tex. Crim. App. 1989) (recognizing that potential benefits of finding more protection of individual liberties under state constitution may be outweighed by costs associated with such departure from Supreme Court precedent), *cert. denied*, 495 U.S. 910 (1990); *Gunwall*, 720 P.2d at 811-12 (criticizing courts that do not explain or justify their departure from federal constitutional interpretations for failing to guide counsel in future cases); Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 967 (1992) (warning that judges recasting law without justification found in text and history of Texas Constitution open "Pandora's box of uncertainty, illegitimacy, and endless litigation that may well be difficult to close"); Michael D. Weiss & Mark W. Bennett, *New Federalism and State Court Activism*, 24 MEM. ST. U. L. REV. 229, 261 (1994) (predicting that unexplained and "creative" decisions will threaten security and stability that society requires from courts).

106. *See Autran*, 887 S.W.2d at 37–39 (reviewing text, history, and application of Article I, § 9 before holding more protection exists under Texas search and seizure provision

Dishearteningly, however, the court once again failed to find and articulate these state-specific justifications, instead relying primarily on decisions of other states to support its further broadening of individual rights under Article I, Section 9.[107]

In conclusion, the Texas Court of Criminal Appeals made a valiant effort to protect the privacy rights of Texas citizens in *Richardson v. State*. The court sent a message to Texas law enforcement officials that unreasonable government intrusions will not be tolerated and took a stand on the pen register privacy issue that will no doubt prevent the otherwise inevitable erosion of other constitutional rights such as freedom of association. Despite these potential benefits, the *Richardson* decision failed to

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for inventory searches than that provided by Fourth Amendment). *Autran* involved a vehicle inventory search, which a plurality of the court decided was lawful under Fourth Amendment analysis. *Id.* at 34. After determining no Fourth Amendment violation had occurred, the court considered whether greater protection could be found under Article I, § 9 of the Texas Constitution. *Id.* at 36. The court compared the text of Article I, § 9 to that of the Fourth Amendment and concluded that divergence from Fourth Amendment analysis cannot be supported based on textual construction. *Id.* at 38. The court then searched for evidence of the framers' intent to convey broader rights under Article I, § 9, but found such evidence to be "particularly lacking." *Id.* Next, in what was termed a review of the "history and application" of Article I, § 9, the court determined, through what appears to be circular reasoning, that Article I, § 9 should be interpreted more broadly than the Fourth Amendment. *Id.* at 38–39 The court reached this conclusion by reasoning that, because the Fourth Amendment was derived from the Massachusetts Constitution, and because Article I, § 9, the Fourth Amendment, and the Massachusetts Constitution are similar, Article I, § 9 should provide greater protection since the Massachusetts Constitution has been found to provide greater protection than the Fourth Amendment. *Id.* at 39. Finally, the court considered the decisions of other states that found greater protection for inventory searches under state constitutions and concluded that the Texas search and seizure provision should also provide greater protection. *Id.* at 38–41.

107. *See id.* at 45 (McCormick, P.J., dissenting) (asserting that plurality purported to rely on application and history of Article I, § 9, but actually relied on "'[h]istory and [a]pplication' of something other than relevant Texas constitutional decisions"). In *Autran*, the court relied primarily on decisions from California, South Dakota, and Alaska that found greater protection for inventory searches under state, as opposed to federal, search and seizure provisions. *Id.* at 39–41; *see* State v. Daniel, 589 P.2d 408, 417–18 (Alaska 1979) (recognizing broader protection under Alaska Constitution for search of closed briefcase); People v. Brisendine, 531 P.2d 1099, 1102 (Cal. 1975) (holding that state constitution precluded search of plastic bottle and envelope containing contraband); State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976) (finding greater protection for citizens subject to vehicle inventory searches under South Dakota Constitution). Presiding Judge McCormick, in his dissent in *Autran*, criticized the plurality for disregarding, without urgent reasons, the court's historical interpretation of Article I, § 9 consistent with the Fourth Amendment. *Autran*, 887 S.W.2d at 44 (McCormick, P.J., dissenting). Presiding Judge McCormick further contended that the plurality failed to justify its departure "from U.S. Supreme Court precedent developed over the last 200 years by life-time appointed judges" and from "historical precedents" in Texas case law. *Id.* at 47.

address the question in the minds of lower courts and attorneys across the state—when it is appropriate to take a more protective stance under the Texas Constitution than that taken by the Supreme Court under the federal constitution on privacy issues. Courts of appeals and attorneys will not find the answer to this question in the text or history of the Texas Constitution's search and seizure provision or in historical or recent Texas Court of Criminal Appeals decisions interpreting that provision because no support for a broader interpretation of Article I, Section 9 may be gleaned from these analyses. By passing over the opportunity to clear up this confusion with an instructive, state-specific rationale, the *Richardson* court has unjustly threatened the uniformity of state and federal search and seizure jurisprudence.

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