

## THE TEXAS EXPERIENCE: A CASE FOR THE LOCKSTEP APPROACH

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### I. INTRODUCTION<sup>1</sup>

The general debate among judges, legal scholars, and lawmakers about the benefits and drawbacks of the doctrine of independent state constitutional grounds is well-documented.<sup>2</sup> But this article focuses on the use of the doctrine in search and seizure law and, specifically, the interplay between the Fourth Amendment to the United States Constitution and Texas's corollary provision—Article I, Section 9 of the Texas Constitution—in the context of the exclusionary rule.

Although providing greater protection under state constitutions than that which is required under the Fourth Amendment has gained popularity in some state courts in recent years, I believe that the interpretations of the Fourth Amendment protections by the Supreme Court of the United States adequately balance the right to be free from unreasonable searches and seizures and the need to protect society from criminal behavior.

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<sup>1</sup> I would like to express my deep appreciation to April Strahan, my former law clerk, for her invaluable assistance in preparing this article.

<sup>2</sup> See generally Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41 (2006) (describing arguments in favor of state constitutionalism); Catherine Greene Burnett & Neil Colman McCabe, *A Compass in the Swamp: A Guide to Tactics in State Constitutional Law Challenges*, 25 TEX. TECH L. REV. 75 (1993) (describing the debate over state constitutional law challenges).

## II. A BRIEF HISTORY OF THE EXCLUSIONARY RULE

The common-law rule was that, if the tendered evidence is important, the method of obtaining it is unimportant. And until the late 1880s, both American state and federal courts adhered to it. But the Fourth Amendment's prohibition against unreasonable searches and seizures led to the creation of the exclusionary rule, which "prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search . . . ."<sup>3</sup>

In 1886 in *Boyd v. United States*, the Supreme Court of the United States first applied the exclusionary rule to unlawful searches and seizures in civil cases.<sup>4</sup> And twenty-eight years later, in *Weeks v. United States*, the Court extended the rule to federal criminal cases.<sup>5</sup> "The striking outcome of the *Weeks* [c]ase and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction, if obtained by government officers through a violation of the amendment."<sup>6</sup> The Court has explained: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."<sup>7</sup> "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."<sup>8</sup>

In 1949 in *Wolf v. Colorado*, the Supreme Court had determined that the Fourth Amendment exclusionary rule did not apply to a prosecution in a state court for a state crime.<sup>9</sup> But in 1961, in the seminal case of *Mapp v. Ohio*, the Supreme Court

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<sup>3</sup> *Murray v. United States*, 487 U.S. 533, 536 (1988) (citing *Weeks v. United States*, 232 U.S. 383 (1914) (citations omitted)).

<sup>4</sup> 116 U.S. 616, 638 (1886).

<sup>5</sup> 232 U.S. 383, 398 (1914).

<sup>6</sup> *Olmstead v. United States*, 277 U.S. 438, 462 (1928).

<sup>7</sup> *Elkins v. United States*, 364 U.S. 206, 217 (1960).

<sup>8</sup> *United States v. Calandra*, 414 U.S. 338, 348 (1974).

<sup>9</sup> 338 U.S. 25, 33 (1949).

extended the Fourth Amendment and the exclusionary rule to the states by way of the Fourteenth Amendment.<sup>10</sup> In *Mapp*, three Cleveland police officers arrived at the home of Dollree Mapp.<sup>11</sup> The police had information that “a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing[.]”<sup>12</sup> The police also had information that a large amount of gambling paraphernalia was being hidden in the house.<sup>13</sup> The police officers knocked and demanded entrance, but Mapp refused to allow them inside without a search warrant.<sup>14</sup> The police advised headquarters of the situation and then began conducting surveillance of Mapp’s home.<sup>15</sup>

Three hours later, four additional police officers arrived, and they again demanded entrance.<sup>16</sup> When Mapp did not answer the door immediately, the police officers forcibly entered her home.<sup>17</sup> Mapp’s attorney arrived shortly after the police gained entry, but the police refused to allow her attorney to enter the home or speak with Mapp.<sup>18</sup> When Mapp demanded to see the search warrant, an officer held up a piece of paper that he claimed was a warrant.<sup>19</sup> Mapp took the paper and “placed it in her bosom.”<sup>20</sup> The officers struggled with Mapp, recovered the piece of paper, and handcuffed Mapp for being “belligerent.”<sup>21</sup> The officers then took Mapp upstairs to her bedroom and searched a dresser, chest of drawers, closet, and some suitcases.<sup>22</sup> The search ultimately encompassed almost the entire house, during which the officers discovered obscene materials.<sup>23</sup>

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<sup>10</sup> 367 U.S. 643, 655 (1961).

<sup>11</sup> *Id.* at 644.

<sup>12</sup> *Id.* (alteration in original).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 644-45.

<sup>22</sup> *Id.* at 645.

<sup>23</sup> *Id.*

At Mapp's trial, the State never offered the search warrant or an explanation for its failure to produce one.<sup>24</sup> But the State argued that:

[E]ven if the search were made without authority, or otherwise unreasonably, [the State] is not prevented from using the unconstitutionally seized evidence at trial, in which this Court did indeed hold "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."<sup>25</sup>

In *Mapp*, the Supreme Court acknowledged *Wolf* but nevertheless held that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court."<sup>26</sup> The Court reasoned that "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."<sup>27</sup>

Although the language in *Mapp* was expansive and encouraged broad application of the exclusionary rule,<sup>28</sup> in the years following *Mapp* the Supreme Court has resisted such an expansive application. In *United States v. Leon*, the Court recognized the rule's drawbacks and admitted that its application can generate substantial social costs, such as setting guilty and dangerous people free.<sup>29</sup> In *Sanchez-Llamas v. Oregon*, the Court noted that "[t]he exclusionary rule as we know it is an entirely American legal creation. . . . [t]he automatic exclusionary rule applied in our courts is still 'universally rejected' by other countries."<sup>30</sup>

And in *Hudson v. Michigan*, the Court refused to apply the rule to suppress evidence seized where police officers had violated

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 645-46 (citation omitted) (quoting *Wolf v. Colorado*, 338 U.S. 25, 33 (1949)).

<sup>26</sup> *Id.* at 655.

<sup>27</sup> *Id.*

<sup>28</sup> See *Hudson v. Michigan*, 126 S. Ct. 2159, 2163-64 (2006).

<sup>29</sup> 468 U.S. 897, 907-08 (1984).

<sup>30</sup> 126 S. Ct. 2669, 2678 (2006) (quoting Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 399 (2001)).

the “knock and announce” rule,<sup>31</sup> which is an “ancient” common-law principle that requires officers to “announce their presence and provide residents an opportunity to open the door . . . .”<sup>32</sup> “Suppression of evidence . . . has always been our last resort, not our first impulse.”<sup>33</sup> The Court held that the evidence did not require exclusion because, among other reasons, “exclusion may not be premised on the mere fact that a constitutional violation was a ‘but-for’ cause of obtaining evidence,”<sup>34</sup> “the knock and announce rule has never protected . . . one’s interest in preventing the government from seeing or taking evidence described in a warrant,”<sup>35</sup> and the social costs of applying the exclusionary rule to knock-and-announce violations were significant.<sup>36</sup> And after considering the intent of the rule, the Court recalled the remedies that were available at the time it decided *Mapp v. Ohio* and noted:

Dollree Mapp could not turn to 42 U.S.C. § 1983 for meaningful relief . . . . It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities. Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court’s decision in *Bivens v. Six Unknown Fed. Narcotics Agents* . . . .<sup>37</sup>

More than fifty years earlier, in *Irvine v. California*, Justice Robert Jackson, writing for the majority, had highlighted the problems with the remedies then available for “official lawlessness,” which he asserted were “too often . . . of no practical avail.”<sup>38</sup> But though the exclusionary rule may potentially act as a shield for those who have committed crimes, as Justice Jackson explained, the alternative is even more undesirable:

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<sup>31</sup> *Hudson*, 126 S. Ct. at 2170 (Kennedy, J., concurring).

<sup>32</sup> *Id.* at 2162.

<sup>33</sup> *Id.* at 2163.

<sup>34</sup> *Id.* at 2164.

<sup>35</sup> *Id.* at 2165.

<sup>36</sup> *Id.* at 2165-68.

<sup>37</sup> *Id.* at 2167 (citing *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978)).

<sup>38</sup> 347 U.S. 128, 137 (1954).

Of course, [the Fourth Amendment], like each of our constitutional guaranties, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self respect. They may have overvalued privacy, but I am not disposed to set their command at naught.<sup>39</sup>

Justice John Paul Stevens, however, opined that the exclusionary rule as a remedy is not limited to deterrence of police misconduct:

Both the constitutional text and the history of [the Fourth Amendment and the exclusionary rule's] adoption and interpretation identify a more majestic conception. The Amendment protects the fundamental "right of the people to be secure in their persons, houses, papers, and effects," against *all* official searches and seizures that are unreasonable. The Amendment is a constraint on the power of the sovereign, not merely on some of its agents. The remedy for its violation imposes costs on that sovereign, motivating it to train all of its personnel to avoid future violations.<sup>40</sup>

We must remember the rationale behind the exclusionary rule. Much like a teacher who punishes an entire class for the bad behavior of one student, application of the exclusionary rule could result in the "punishment" of an entire community if an offender is released because the rule required suppression of evidence that positively established the offender's guilt, but was illegally obtained.

### III. NEW FEDERALISM

The Fourth Amendment is not the only source of authority used to justify the exclusionary rule. States have their own constitutions and statutes addressing search and seizure. But it is the relationship between federal and state law that proves interesting. And this is where the doctrine of "new federalism" comes into play.

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<sup>39</sup> *Harris v. United States*, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting).

<sup>40</sup> *Arizona v. Evans*, 514 U.S. 1, 18-19 (1995) (Stevens, J., dissenting) (citation omitted).

“The traditional role of ‘federalism’ refers to the coordinate relationship and distribution of power between the individual states and our national government.”<sup>41</sup> But “new federalism”—also called “dual constitutionalism” and “independent state constitutionalism”—refers to a doctrine that “urge[s] state courts to declare their independence from the United States Supreme Court” by “interpret[ing] state constitutions as more protective of individual rights than the Supreme Court had interpreted the Bill of Rights to the United States Constitution.”<sup>42</sup>

Justice William Brennan, who would later become one of the most well-recognized advocates of state constitutional rights,<sup>43</sup> stated in an address delivered to the Conference of Chief Justices three years after *Mapp v. Ohio* that

The Supreme Court of the United States cannot escape its responsibility for the ultimate definition and application of [the equal protection] guarantee. In the same area of responsibility falls, I think, the series of decisions extending some of the guarantees of the first eight amendments to the States. The Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty.<sup>44</sup>

Note that Justice Brennan did not mention anything in his address about the states being laboratories or their “manifest purpose . . . to expand constitutional protections,” as he would later discuss in his 1977 law review article.<sup>45</sup> But he did, after discussing the interplay between federal and state judicial decision-making, comment:

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<sup>41</sup> *Autran v. State*, 887 S.W.2d 31, 36 (Tex. Crim. App. 1994) (en banc) (citing THE FEDERALIST NO. 51, at 523 (J. Madison) (Clinton Rossiter ed. 1961)).

<sup>42</sup> Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals’ Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 6 (1996).

<sup>43</sup> Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 792 (1998) (chronicling Justice Brennan’s advocacy of state constitutional rights and referring to him as “a hero of the constitutions of the United States”).

<sup>44</sup> William J. Brennan, Jr., *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 955 (1964).

<sup>45</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

It is therefore fair to say, I think, that constitutional adjudication now leaves the States the widest latitude to deal with the dynamics of social and economic change in seeking to satisfy their needs and further their progress. Moreover, in all the areas of strictly local concern, the federal courts are required these days to defer to holdings of the state courts to a degree quite unknown before *Erie v. Tompkins*,<sup>46</sup> and even in the area of choice-of-law rules, where competing state interests in a conflicts-of-law case present aspects of the national interest in interstate harmony, our Court no longer suggests that the Constitution dictates the solution. State courts have considerable latitude to experiment with the development of viable rules.<sup>47</sup>

Although there was evidence of the new federalism doctrine in earlier judicial opinions and law review articles,<sup>48</sup> Justice Brennan has been credited with popularizing the doctrine.<sup>49</sup> He led the way in advocating states using their constitutions to protect individual rights, and he appealed to the states to do so in his dissent in *Michigan v. Mosley*<sup>50</sup> and in his 1977 *Harvard Law Review* article.<sup>51</sup> As one scholar put it, Justice Brennan began a “campaign to invite state courts to go further in protecting individual liberties than he finds his brethren willing to go,”<sup>52</sup> and in subsequent opinions, “renewed his plea to the state courts to make creative use of their state constitutions.”<sup>53</sup>

Justice Brennan’s first clear move toward new federalism came in *Michigan v. Mosley* in his dissent to the majority’s holding that “the admissibility of statements obtained after the per-

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<sup>46</sup> 304 U.S. 64 (1938).

<sup>47</sup> Brennan, *supra* note 44, at 954.

<sup>48</sup> See Randall T. Shepard, *The New Judicial Federalism: A New Generation: The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 421-29 (1996) (detailing some of the “impressive attempts at independent state constitutional interpretation before Justice Brennan’s 1975 dissent [in *Michigan v. Mosley*] and his 1977 article”); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>49</sup> Pitler, *supra* note 42, at 6.

<sup>50</sup> 423 U.S. 96, 120 (1975) (Brennan, Marshall, JJ., dissenting).

<sup>51</sup> See generally Brennan, *supra* note 45.

<sup>52</sup> A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 874 (1976).

<sup>53</sup> *Id.* at 875.

son in custody has decided to remain silent depends under *Miranda* on whether his ‘right to cut off questioning’ was ‘scrupulously honored.’”<sup>54</sup> Justice Brennan characterized the holding as “yet another step in the erosion” of *Miranda*<sup>55</sup> and advised state courts:

In light of today’s erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution.<sup>56</sup>

Two years after his dissent in *Mosley*, Justice Brennan’s article—*State Constitutions and the Protection of Individual Rights*—appeared in the *Harvard Law Review*.<sup>57</sup> In his article, he advocated:

[T]he point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.<sup>58</sup>

Justice Brennan further asserted that the Supreme Court’s decisions did not “properly understand the nature of our federalism”.<sup>59</sup>

Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that

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<sup>54</sup> *Mosley*, 423 U.S. at 104.

<sup>55</sup> *Id.* at 112 (Brennan, J., dissenting).

<sup>56</sup> *Id.* at 120.

<sup>57</sup> See Brennan, *supra* note 45.

<sup>58</sup> *Id.* at 491.

<sup>59</sup> *Id.* at 502.

it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.<sup>60</sup>

One scholar challenged Justice Brennan's position, claiming "that his purported concern for state autonomy is inconsistent with the structure of his remaining jurisprudence;" that "his analysis is unsound and perhaps even disingenuous;" and that he defines healthy federalism as a system that enforces the values that he agrees with.<sup>61</sup> These arguments have merit.

Many courts have acknowledged the principle that "the United States Constitution provides the floor for our Constitutional rights while the various State constitutions provide the ceiling."<sup>62</sup> On the other hand, of course, a state may interpret its constitution as providing less protection than the Federal Constitution, but the state must then give force to the broader Federal Constitution.<sup>63</sup>

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<sup>60</sup> *Id.* at 502-03 (citations omitted).

<sup>61</sup> Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988).

<sup>62</sup> *See, e.g.*, *Autran v. State*, 887 S.W.2d 31, 34 (Tex. Crim. App. 1994) (citing *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991)); *see also* Stewart G. Pollock, *The Emergence of State Constitutional Law: Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 980 (1985); *cf.* Garrett T. Reece, Comment, *Securing One's Fourth Amendment Rights Through Issue Preclusion: Assessing Texas's Application of Collateral Estoppel to Multiple Suppression Motions Filed in Separate Courts*, 37 ST. MARY'S L.J. 241 (2005) (describing alternate approaches to protecting an individual's constitutional rights where both the federal and Texas constitutions fall short).

<sup>63</sup> *Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998); *see also* Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 86 (1996).

Scholars have recognized that states typically use one of three approaches when deciding a case based on a state constitutional law claim. Some states use the “dual reliance” method in which the “court analyzes the case in terms of both federal and state constitutional claims.”<sup>64</sup> Under the second approach—the “supplemental” or “interstitial” approach—a court looks first to federal constitutional law and considers state constitutional law only if federal law fails to provide sufficient protection for the right at issue.<sup>65</sup> Under the final approach—the “primacy” approach—the court looks at its own constitutional law first.<sup>66</sup> And Texas, the focus of this article, has inconsistently used all three approaches throughout the history of its search and seizure jurisprudence.

#### IV. THE TEXAS EXPERIENCE

Before the Supreme Court extended the exclusionary rule to the states in *Mapp v. Ohio*, Texas had enacted a statutory exclusionary rule in Article 38.23 of the Texas Code of Criminal Procedure.<sup>67</sup> The language of Article 38.23 has remained largely the same since its adoption<sup>68</sup> and currently provides:

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the

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<sup>64</sup> Patricia Fahlbusch & Daniel Gonzalez, Case Comment, *Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds*, 42 U. MIAMI L. REV. 159, 188 (1987).

<sup>65</sup> *Id.* at 188-89.

<sup>66</sup> *Id.* at 189.

<sup>67</sup> *Heitman v. State*, 815 S.W.2d 681, 684 n.3 (Tex. Crim. App. 1991) (en banc).

<sup>68</sup> See Nathan L. Mechler, Comment, *Texas's Statutory Exclusionary Rule: Analyzing the Inadequacies of the Current Application of "Other Person(s)" Pursuant to Article 38.23(a) of the Texas Code of Criminal Procedure*, 36 ST. MARY'S L.J. 195, 199 & n.15 (2004).

provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

(b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.<sup>69</sup>

As one scholar explained, the Fourth Amendment and the Texas Constitution “together only supply the framework for the Texas exclusionary rule. Article 38.23 is the addition upon this framework that affords greater protections against unreasonable searches and seizures than what federal law requires.”<sup>70</sup>

Before 1991, the Texas Court of Criminal Appeals had repeatedly asserted that Article I, Section 9 of the Texas Constitution and the Fourth Amendment are the same in all material respects.<sup>71</sup> For example, in *Texas v. Brown*, a plurality of the Supreme Court of the United States determined that the Texas Court of Criminal Appeals had incorrectly held that the search at issue was invalid and remanded the case for further proceedings.<sup>72</sup> On remand, the court of criminal appeals considered the appellant’s two issues: (1) whether the court had relied on the Fourth Amendment or the Texas Constitution in its original decision; and (2) whether the Texas Constitution provides “an independent basis” that would support the court’s original holding that the search at issue was illegal.<sup>73</sup>

The court asserted that its original decision “rested squarely on the interpretation of the Fourth Amendment . . . .”<sup>74</sup> And the court “decline[d] [the appellant’s] invitation to attach to Article I, Section 9 of our Texas Constitution a more restrictive standard of protection than that provided by the Fourth Amendment.”<sup>75</sup> “[T]his Court has opted to interpret [the Texas] Constitution in harmony with the Supreme Court’s opinions interpreting the

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<sup>69</sup> TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 2005).

<sup>70</sup> Mechler, *supra* note 68, at 198.

<sup>71</sup> Crowell v. State, 180 S.W.2d 343, 346 (Tex. Crim. App. 1944).

<sup>72</sup> Texas v. Brown, 460 U.S. 730, 744 (1983).

<sup>73</sup> Brown v. State, 657 S.W.2d 797, 798 (Tex. Crim. App. 1983) (en banc), *overruled* by Heitman v. State, 815 S.W. 2d 681 (Tex. Crim. App. 1991).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

Fourth Amendment. [The court of criminal appeals] shall continue on this path until such time as we are statutorily or constitutionally mandated to do otherwise.”<sup>76</sup>

Three judges, however, concurred only in the result and called the court’s second holding—that it would construe the Texas Constitution “in harmony with the Supreme Court’s opinions”—a “dangerous abdication of judicial duties and responsibilities as Judges of this Court.”<sup>77</sup> Judge Clinton, writing for the concurring judges, warned that

merely to parrot opinions of the Supreme Court of the United States interpreting the Fourth Amendment is to denigrate the special importance our Texan forbearers attached to their rights to privacy and other guarantees vouchsafed by the Bill of Rights they first declared and then insisted on retaining in every successive Constitution.<sup>78</sup>

Eight years later, in *Heitman v. State*, the court of criminal appeals considered a case in which the appellant, Heitman, appealed the trial judge’s ruling on his motion to suppress evidence seized during an inventory search of his vehicle.<sup>79</sup> Heitman argued that the search violated his rights under the Fourth Amendment and Article I, Section 9 of the Texas Constitution.<sup>80</sup> The Second Court of Appeals construed Heitman’s Article I, Section 9 claim “in harmony with the Fourth Amendment.”<sup>81</sup> Citing the court of criminal appeals’s opinion in *Brown v. State*,<sup>82</sup> the court reasoned that because “we find in this case that the Fourth Amendment to the United States Constitution was not violated, following *Brown* we determine that article I, section 9 of the Texas Constitution was not violated.”<sup>83</sup>

The Texas Court of Criminal Appeals granted review to determine if Heitman’s claim was meritorious under either the fed-

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<sup>76</sup> *Id.* at 799.

<sup>77</sup> *Id.* at 800 (Clinton, J., concurring).

<sup>78</sup> *Id.* at 807.

<sup>79</sup> 815 S.W.2d at 682.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*; *Heitman v. State*, 776 S.W.2d 324, 325 (Tex. App.-Fort Worth 1989), *rev’d en banc*, 815 S.W.2d 681 (Tex. Crim. App. 1991).

<sup>82</sup> 657 S.W.2d 797 (Tex. Crim. App. 1983) (en banc).

<sup>83</sup> *Heitman*, 776 S.W.2d at 326.

eral or the state provision.<sup>84</sup> Noting the intermediate appellate court's "cursory treatment" of Heitman's Article I, Section 9 claim, the court stated that it would "reserve for ourselves the power to interpret our own constitution."<sup>85</sup> The court then "confront[ed] the question of whether this Court will automatically adopt and apply to Art. I, § 9, of the Texas Constitution the Supreme Court's interpretations of the Fourth Amendment."<sup>86</sup> The court recognized that the Texas Constitution and the Fourth Amendment were "the same in all material aspects," but explained that principles of federalism allow states to "reject federal holdings as long as state action does not fall below the minimum standards provided by federal constitutional protections."<sup>87</sup> Although the court admitted that it "has not chosen to interpret Art. I, § 9 in a manner that accords the citizens of this State greater protections than those accorded by the Fourth Amendment[.]"<sup>88</sup> after a review of its prior cases, the court determined that "there are several reasons and situations other than similarity of wording or absence of statutory or constitutional mandates which justify, if not compel, a state court to independently judicially interpret its own state constitutional provisions."<sup>89</sup>

Defending its holding, the court adopted Justice Brennan's argument, noting that "[s]tate courts have . . . been considered 'laboratories' of constitutional law. State courts have the opportunity to experiment with constitutional rights and lay potential guidelines for future constitutional decisions of not only state courts but the Supreme Court as well."<sup>90</sup> The court "expressly conclude[d] that [the] Court, when analyzing and interpreting Art. I, § 9, Tex. Const., will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue."<sup>91</sup> The court then remanded the case to the court of appeals for consideration of Heitman's state constitutional claim.<sup>92</sup>

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<sup>84</sup> *Heitman*, 815 S.W.2d at 682.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 683.

<sup>89</sup> *Id.* at 685.

<sup>90</sup> *Id.* at 686.

<sup>91</sup> *Id.* at 690.

<sup>92</sup> *Id.*

Three years later, in *Autran v. State*, a three-judge plurality answered the question left open in *Heitman* by holding that the Texas Constitution provides greater protection than the Fourth Amendment for searching containers in automobiles.<sup>93</sup> The court explained that “to determine whether the Texas Constitution provides greater protection than the United States Constitution in the context of inventories, we must first determine what protection is provided by the Fourth Amendment.”<sup>94</sup> Turning to the Supreme Court’s Fourth Amendment jurisprudence, the Texas Court of Criminal Appeals noted that “an inventory has long been recognized as a valid exception to the warrant requirement of the Fourth Amendment.”<sup>95</sup> “The Fourth Amendment requires only that an inventory not be a ‘ruse for a general rummaging in order to discover incriminating evidence.’”<sup>96</sup> So, as the court noted, “inventories conducted pursuant to an established departmental policy have generally been constitutional.”<sup>97</sup> Defining the Supreme Court’s position on inventory searches, the court stated, “[T]he Fourth Amendment permits the inventory of a closed container so long as the officer follows departmental policy or, in the officer’s opinion, the search furthers the purposes of an inventory search.”<sup>98</sup>

Because the inventory search conducted in *Autran* was done pursuant to an established departmental policy, because the officer could not determine the contents of the containers by examining their exteriors, and because there was no evidence that the inventory was a ruse, the court held that the search did not violate the Fourth Amendment.<sup>99</sup>

So the court turned to the issue left open in *Heitman*—whether the Texas Constitution provides more protection than the Fourth Amendment in the context of inventory searches. To answer that question, the court considered five factors: “(A) a textual examination of the constitutional provision; (B) the Framers’

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<sup>93</sup> 887 S.W.2d 31, 41-42 (Tex. Crim. App. 1994) (en banc) (plurality opinion).

<sup>94</sup> *Id.* at 34.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)).

<sup>97</sup> *Id.* (citing *South Dakota v. Opperman*, 428 U.S. 364 (1976)).

<sup>98</sup> *Id.* at 35-36.

<sup>99</sup> *Id.* at 36.

intent; (C) history and application of the constitutional provision; (D) comparable jurisprudence from other states; and (E) the practical policy considerations behind the constitutional provision.”<sup>100</sup>

As to the first factor, the court explained that the textual similarity between the Fourth Amendment and Article I, Section 9 “appears to be merely a coincidence of historical fact.”<sup>101</sup> The court reasoned that the similarities in the text were due to a common origin, not due to their intended meanings.<sup>102</sup> The court could not find evidence of the second factor—the Framers’ intent in enacting Article I, Section 9—as to whether the Framers intended to give broader protection than that given by the Fourth Amendment.<sup>103</sup>

The court then turned to the third factor and considered the history and application of Article I, Section 9. The court noted that it was “unclear whether the Framers looked to the Fourth Amendment for guidance in drafting art. I, §9, [but] it is clear that the Fourth Amendment was derived from the Massachusetts State Constitution.”<sup>104</sup> And the court recognized that the Massachusetts Supreme Court had held that its constitution provided greater protection than the Fourth Amendment.<sup>105</sup> “Consideration of the history of the Fourth Amendment, art. XIV of the Massachusetts Constitution, and the similarities between art. I, § 9 and the Massachusetts Constitution, provides evidence that art. I, § 9 was intended to provide broader protection as well.”<sup>106</sup>

As to the fourth factor—comparable jurisprudence—the court explained that “a growing number of state courts have opted for judicial independence.”<sup>107</sup> Although the “common denominator” among the states that followed the Supreme Court’s interpretation of the Fourth Amendment was “a desire to maintain uniformity among those decisions from the United States

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<sup>100</sup> *Id.* at 37.

<sup>101</sup> *Id.* at 38. (citing *Eisenhauser v. State*, 754 S.W.2d 159 (Tex. Crim. App. 1988)).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 39 (citing *Harris v. United States*, 331 U.S. 145 (1947)).

<sup>105</sup> *Id.* (citing *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1367 (Mass. 1992); *Commonwealth v. Upton*, 476 N.E.2d 548, 556 (Mass. 1985)).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 39-40.

Supreme Court and those from the states' highest courts[,]”<sup>108</sup> the court commented that “such reasoning conflicts with [a state’s highest court’s] sworn duty to preserve, protect and defend the constitution and laws of [that state].”<sup>109</sup> After reviewing several cases from other states, the court observed that several of the states that had found greater protection under their constitutions than that provided by the Fourth Amendment “specifically considered the protection to be provided” in the context of inventory searches.<sup>110</sup>

Turning to the final factor—the practical policy considerations behind the constitutional provision—the court explained that there are three rationales behind an inventory search:

First, an accurate inventory provides protection to the owner whose property is in police custody. Second, the preparation of an accurate inventory protects the officers and their agency from claims of, or disputes concerning, property being lost or stolen. Finally, allowing the officers to impound and inventory property protects the officers and others from potential danger.<sup>111</sup>

Taking all five factors into account, the court held “that art. I, § 9 provides a privacy interest in closed containers which is not overcome by the general policy considerations underlying an inventory.”<sup>112</sup> Offering a way to preserve that protection, the court stated: “The officer’s interest in the protection of [Autran’s] property, as well as . . . the protection of the agency from claims of theft, can be satisfied by recording the existence of and describing and/or photographing the closed or locked container.”<sup>113</sup> But the court cautioned:

This is not to say that officers may never search a closed or locked container, only that the officers may not rely upon the inventory exception to conduct such a warrantless search. We

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<sup>108</sup> *Id.* at 40.

<sup>109</sup> *Id.* (quoting *Eisenhauer v. State*, 754 S.W.2d 159 (Tex. Crim. App. 1988) (Clinton, J., dissenting)).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (citations omitted).

<sup>112</sup> *Id.* at 41-42.

<sup>113</sup> *Id.* at 42.

refuse to presume the search of a closed container reasonable under art. I, § 9 simply because an officer followed established departmental policy.<sup>114</sup>

Presiding Judge McCormick, joined by Judge White, vehemently dissented to the majority's holding:

Today, the plurality attempts to lead this Court down the slippery slope of judicial activism by legislating in this particular case a constitutional rule of unprincipled, result-oriented decision-making as a means for judges to impose their views on others. It should not be this Court's role to correct the perceived injustice here by judicially legislating what it considers to be a socially or politically desirable result. . . . [T]he plurality attempts to make this Court's voice one of power, not reason. The plurality opinion applies no objective criteria, and ignores relevant historical precedents in reaching a result it deems socially desirable for the "unenlightened masses." The constitutional rule advocated by the plurality today is the Texas Constitution means whatever five elected judges to this Court says it means.<sup>115</sup>

But since *Autran* was decided, the Texas Court of Criminal Appeals has repeatedly ignored it, returning to its original position in search and seizure cases—interpreting the United States and Texas Constitutions to have the same meaning.

The year after *Autran*, in *Crittenden v. State*, the court considered how to "review claims of pretextual seizure brought pursuant to Article I, § 9 of the Texas Constitution[.]"<sup>116</sup> In adopting the same objective approach for claims under the Texas Constitution as the court had previously adopted for claims brought under the Fourth Amendment, the court explained that

we can hardly justify concluding otherwise for purposes of Article I, § 9. Indeed, we would abuse our prerogative to construe even like provisions of the state and federal constitutions differently and stretch judicial credibility to the breaking point, were we somehow to hold that what "makes more sense" for purposes

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 43, 49 (citation omitted).

<sup>116</sup> 899 S.W.2d 668, 671 (Tex. Crim. App. 1995).

of the Fourth Amendment does not also “make more sense” under our own state constitutional analog.<sup>117</sup>

Asserting that the majority was simply “[u]nwilling to expend the effort necessary to conduct the proper analysis[,]”<sup>118</sup> Judge Baird (the author of the *Autran* opinion) dissented and claimed that the Court improperly relied on two prior cases—*Goodwin v. State*<sup>119</sup> and *Hamilton v. State*<sup>120</sup>—to justify its insistence that the Court had already implicitly adopted the objective approach under the Texas Constitution.<sup>121</sup> Concluding, Judge Baird complained that “[t]he majority’s intentional misreading of our precedent, and its elevation of the Court’s convenience as the primary factor in an independent state constitutional analysis is a transparent attempt to avoid mature deliberation and thoughtful resolution of the issue presented.”<sup>122</sup>

In *Johnson v. State*, the Texas Court of Criminal Appeals considered whether the Texas Constitution requires the court to

find that a seizure has taken place at the time a reasonable person facing a show of authority believes he or she is not free to leave . . . or, instead, at the time the suspect has actually yielded to the show of authority or been physically forced to yield . . . .<sup>123</sup>

The court explained that its decision rested on its determination of

whether seizure is to be defined as it was under both the Fourth Amendment and Art. I, § 9 prior to [*California v.*] *Hodari, D.*,<sup>124</sup> thereby maintaining for the people of Texas a broader definition of seizure under Art. I, § 9, or will seizure be defined under Art. I, § 9 as the Supreme Court in *Hodari, D.* defined it under the Fourth Amendment.<sup>125</sup>

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<sup>117</sup> *Id.* at 673 (citing *Richardson v. State*, 865 S.W.2d 944 (Tex. Crim. App. 1993)).

<sup>118</sup> *Id.* at 675 (Baird, J., dissenting).

<sup>119</sup> 799 S.W.2d 719 (Tex. Crim. App. 1990).

<sup>120</sup> 831 S.W.2d 326 (Tex. Crim. App. 1992).

<sup>121</sup> *Crittenden*, 899 S.W.2d at 675 (Baird, J., dissenting).

<sup>122</sup> *Id.* at 681.

<sup>123</sup> 912 S.W.2d 227, 232 (Tex. Crim. App. 1995) (plurality opinion).

<sup>124</sup> 499 U.S. 621 (1991).

<sup>125</sup> *Johnson*, 912 S.W.2d at 232.

The court adopted “the latter interpretation of Art. I, § 9” and reasoned that “[a] plain reading . . . of the language of the Fourth Amendment and Art. I, § 9 reveals no substantive difference.”<sup>126</sup> Although the court recognized that it was not bound to apply the Supreme Court’s interpretation of the Fourth Amendment, nor was it “obliged to be different[,]”<sup>127</sup> the court held that the Texas Constitution did not provide greater protection than the Fourth Amendment under the circumstances.<sup>128</sup> But the court claimed that its holding did “not mean that this Court’s decision in *Heitman* is to be reversed, or that there will be a reversion to interpreting Art. I, § 9 in lock-step with the Supreme Court’s interpretation of the Fourth Amendment.”<sup>129</sup> Judge Clinton dissented, asserting that the plurality’s reason for adopting the Supreme Court’s definition from *Hodari, D.* was “shallow and, ultimately, indefensible. . . . Today the Court all but abdicates its role—its only role as a discretionary review court—as ‘the caretaker of Texas law.’”<sup>130</sup>

But in *Hulit v. State*, the Texas Court of Criminal Appeals departed from Supreme Court precedent when it was asked to determine whether a peace officer violated the appellant’s rights under Article I, Section 9 of the Texas Constitution when the officer asked him to step out of his truck upon finding him unconscious in his truck on a highway, and the officer observed that the appellant was disoriented and smelled of alcohol.<sup>131</sup> The appellant urged the court not to adopt, as the court of appeals did when affirming the trial judge’s decision to deny his motion to suppress, the community caretaking exception to the warrant requirement of Article I, Section 9 as the appellant asserted had been adopted in *Harris v. United States*<sup>132</sup> by the Supreme Court.<sup>133</sup> The court considered the appellant’s arguments and held that

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 233.

<sup>128</sup> *Id.* at 233-34.

<sup>129</sup> *Id.* at 234.

<sup>130</sup> *Id.* at 237 (Clinton, J., dissenting) (quoting *Arcila v. State*, 834 S.W.2d 357, 360 (Tex. Crim. App. 1992)).

<sup>131</sup> 982 S.W.2d 431, 432 (Tex. Crim. App. 1998).

<sup>132</sup> 331 U.S. 145 (1947).

<sup>133</sup> *Hulit*, 982 S.W.2d at 434.

Article I, Section 9 of the Texas Constitution contains no requirement that a seizure or search be authorized by a warrant, and that a seizure or search that is otherwise reasonable will not be found to be in violation of that section because it was not authorized by a warrant.<sup>134</sup>

The court determined that the arrest was reasonable, stating: “We do this, not by finding that there is a community caretaking exception to a warrant requirement, but by asking whether, from the totality of the circumstances, after considering the public and private interests that are at stake, their action was an unreasonable seizure.”<sup>135</sup> The court then reiterated *Heitman’s* mandate:

*Harris* is about the Fourth Amendment to the United States Constitution, and we have “expressly conclude[d] that this Court, when analyzing and interpreting Art. I, § 9, Tex. Const., will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue.” To decide whether the appellant’s argument is correct, we must decide whether his assertions are true for the Texas Constitution.<sup>136</sup>

The court concluded by highlighting its departure from Supreme Court precedent:

We understand that our holding means that Section 9 of our Bill of Rights does not offer greater protection to the individual than the Fourth Amendment to the United States Constitution, and it may offer less protection. But our holding is the construction that is faithful to the Constitution which our people have adopted, and it is our duty to interpret that Constitution independent of the interpretations of federal courts.<sup>137</sup>

And in *State v. Ibarra*, the Texas Court of Criminal Appeals again deviated from Supreme Court precedent, this time finding greater protection in the Texas Constitution than in the Fourth Amendment.<sup>138</sup> The court echoed *Autran* by holding that the

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<sup>134</sup> *Id.* at 436.

<sup>135</sup> *Id.* at 438.

<sup>136</sup> *Id.* at 434 (citing *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991)).

<sup>137</sup> *Id.* at 436-37.

<sup>138</sup> 953 S.W.2d 242, 243 (Tex. Crim. App. 1997).

Texas Constitution required a higher standard of proof in demonstrating voluntariness of consent than the Supreme Court required under the Fourth Amendment.<sup>139</sup> Although the court had previously determined that voluntariness must be proven by clear and convincing evidence,<sup>140</sup> the State argued in *Ibarra* that, under the *Autran* factors, the court should reevaluate its interpretation of the Texas Constitution and require proof by only a preponderance of the evidence, as the Supreme Court had interpreted the United States Constitution.<sup>141</sup>

The court refused to “undermine years of well-established precedent” by lowering the standard of proof.<sup>142</sup> The court noted that it had consistently applied a higher standard of proof and that, when it had decided earlier cases, the court was likely “well aware that the Supreme Court has held that the burden of preponderance of the evidence does not offend the Fourth Amendment.”<sup>143</sup> After reviewing its concerns about adopting a lower standard, the court determined that the demands of Article I, Section 9 of the Texas Constitution could not be satisfied by a standard lower than clear and convincing evidence, and the State failed to provide “any compelling reason to depart from the standard of proof we have heretofore demanded that the State meet when showing the voluntariness of a consent to search.”<sup>144</sup>

Apart from a few deviations, such as *Ibarra*, the Texas Court of Criminal Appeals has largely interpreted the Texas Constitution in step with the opinions of the Supreme Court of the United States addressing analogous Fourth Amendment search and seizure issues. For the reasons outlined in the following section, I believe this is, overall, the best way to handle similar state and federal constitutional provisions.

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<sup>139</sup> *Id.*

<sup>140</sup> *Paprskar v. State*, 484 S.W.2d 731, 737 (Tex. Crim. App. 1972).

<sup>141</sup> *Ibarra*, 953 S.W.2d at 243 (citing *United States v. Matlock*, 415 U.S. 164 (1974)).

<sup>142</sup> *Id.* at 244.

<sup>143</sup> *Id.* at 245.

<sup>144</sup> *Id.*

## V. JUSTIFICATIONS FOR THE LOCKSTEP APPROACH

“Under ‘lockstep’ analysis[,] state courts bind the meaning of state constitutional provisions to their parallel federal counterparts, either case by case or as a broad rule.”<sup>145</sup> So if a state provision is tantamount to the federal provision, then a violation of one is a violation of the other, and satisfying one is satisfying the other. Because the Supreme Court of the United States is infallible because it is final<sup>146</sup>—and if it says the Federal Constitution is or is not violated—then if equals are equals, it would either be a violation or not of the state constitution. Nevertheless, many judges, legal scholars, and lawmakers zealously encourage states to interpret their constitutions as providing greater protection for individuals than their federal counterpart.

To say that there is a historical basis for state constitutions being more protective than the Federal Constitution is ridiculous. The exclusionary rule started in federal courts and was then expanded to the states. And the foundation of the rule—substantive due process—has been expanded to the states only bit by bit. Now that the federal protection is not continuing to expand, defense attorneys try to argue that states have historically interpreted their constitutions to extend more rights to the accused. This “second bite at the apple” approach to state constitutional interpretation is nothing more than a thinly disguised pretext for exercising “judicial creativity.”

## VI. CONCLUSION

It seems to me that those who advocate state expansion of the protections afforded by the Constitution of the United States often disregard the rights of the victims and potential victims and fail to critically examine the justification for, and ramifications of, the exclusionary rule. They do not consider whether legislation permitting lawsuits against governmental entities serves as more of a deterrent to police misconduct than the exclusionary rule. The United States Constitution as interpreted by the Supreme Court of the United States adequately protects the right of the

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<sup>145</sup> Long, *supra* note 2, at 48-49.

<sup>146</sup> Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result).

individual to be free from unreasonable searches and seizures, while, at the same time, protecting society from predators.