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Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement

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NOTE

ADMINISTRATIVE SEARCHES AND THE FOURTH AMENDMENT: AN ALTERNATIVE TO THE WARRANT REQUIREMENT

Government regulation increasingly pervades post-industrial American society.[1] As regulations proliferate, their enforcement requires more government inspection of formerly private activity.[2] Some of the regulated subjects have resisted such inspection, and the fourth amendment[3] provides them with a partial defense by limiting the ways government can intrude upon individual privacy.[4] This tension between regulatory inspections and the fourth amendment has created a problem—how to further the important public policies served by inspection[5] without unduly disrupting individual privacy.

The Supreme Court recently attempted to resolve this dilemma in *Marshall v. Barlow's, Inc.*,[6] the latest of the Court's struggles[7] with the application of the fourth amendment's warrant requirement to inspections and administrative searches.[8] The

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[1] *See, e.g.*, Wyman v. James, 400 U.S. 309, 335 (1971) (dissenting opinion, Douglas, J.); *id.* at 339 (dissenting opinion, Marshall, J.); See v. City of Seattle, 387 U.S. 541, 543 (1967); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 245 (1966).

[2] J. LANDYNSKI, *supra* note 1, at 245; *see also* Wyman v. James, 400 U.S. 309, 339 (1971) (dissenting opinion, Marshall, J.); See v. City of Seattle, 387 U.S. 541, 543 (1967).

[3] 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.

[4] *See* notes 10-15 and accompanying text *infra*.

[5] *See* Camara v. Municipal Court, 387 U.S. 523, 533, 537 (1967); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353-54 (1974).

[6] 436 U.S. 307 (1978).

[7] Previous cases have dealt with the warrant requirement in various contexts. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (checkpoint stop by border patrol); South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search of automobile); United States v. Biswell, 406 U.S. 311 (1972) (inspection of gun dealer's business premises); Wyman v. James, 400 U.S. 309 (1971) (home visit to welfare recipient); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (inspection of liquor dealer's business premises); See v. City of Seattle, 387 U.S. 541 (1967) (inspection of warehouse for fire code violations); Camara v. Municipal Court, 387 U.S. 523 (1967) (inspection of residence for housing code violations); Frank v. Maryland, 359 U.S. 360 (1959) (inspection of residence for housing code violations).

[8] This Note will use the terms "inspection" and "administrative search" interchangeably in referring to routine information-gathering procedures that select their targets

Court's reasoning in these cases is neither consistent nor satisfactory.[9] In attempting to avoid unnecessary limitations on important inspection programs while adequately protecting privacy interests, the Court has obscured the warrant requirement's impact on these programs. This uncertainty may ultimately prove more harmful than an undesirable result in any given case.

This Note will analyze the Court's responses to the conflict between the need to inspect and the right to privacy. This inquiry will show that, rather than focusing on the warrant requirement, the Court should simply examine the reasonableness of particular inspection programs. The proposed approach would solve the problem, not through the judiciary's efforts, but through those of the legislators and administrators who initiated the inspection programs and can better evaluate the policies underlying them.

I

ADMINISTRATIVE SEARCHES AND FOURTH AMENDMENT METHODOLOGY

The fourth amendment protects individual privacy against government intrusion[10] by limiting entries into areas where "a person has a constitutionally protected reasonable expectation of privacy."[11] Although many inspection programs affect only commercial enterprises and not individuals directly, the amendment applies equally to both types of searches.[12] Government inspections will therefore almost always encounter fourth amendment restrictions.[13] The *Barlow's* Court made this all the more

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randomly from predetermined categories of persons or places, as distinguished from essentially *ad hoc* information-gathering procedures aimed at particular persons or places in particular situations. *See* Michigan v. Tyler, 436 U.S. 499, 507 (1978); *In re* Brickner, 453 F. Supp. 91, 93 (E.D. Wis. 1978); United States v. Piner, 452 F. Supp. 1335, 1340 n.9 (N.D. Cal. 1978); Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 571 (1978) (government power "most frightening" when directed at particular individuals rather than groups of citizens or citizenry as a whole).

[9] *See* Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L. J. 329, 329 (1973) ("The fourth amendment cases are a mess!").

[10] Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

[11] Katz v. United States, 389 U.S. 347, 360 (1967) (concurring opinion, Harlan, J.).

[12] *See, e.g.*, See v. City of Seattle, 387 U.S. 541, 543 (1967).

[13] *But see* Wyman v. James, 400 U.S. 309 (1971), where the Court held that a welfare home visit was not a search within the meaning of the fourth amendment. *Id.* at 317. The Court emphasized that such visits were very different from searches "in the traditional criminal law context," and that a recipient's refusal to permit them was not a criminal act. *Id. But see* Camara v. Municipal Court, 387 U.S. 523, 530 (1967) ("It is surely anomalous to

likely by holding that an individual can retain his expectation of privacy as against the government even when he has surrendered it as against other individuals.[14]

The fourth amendment, however, expressly prohibits only "unreasonable" searches.[15] In *Camara v. Municipal Court*,[16] the Supreme Court sought to determine the reasonableness of a particular search[17] by balancing the government's interest in conducting the search and the individual's interest in protecting his privacy.[18] If the interests of the individual outweigh those of the government, the search is unreasonable and therefore constitutionally impermissible.

But the fourth amendment also provides that search warrants may issue only on probable cause.[19] As applied by the Supreme Court, this provision in the amendment's second clause has unnecessarily complicated the law. Interpreting the "reasonableness" requirement of the amendment's first clause, the Supreme Court has held that, apart from certain exceptional classes of cases, a warrantless search is inherently unreasonable.[20] In most cases,

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say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.") Perhaps sensing the weakness of this distinction, the *Wyman* Court offered a second ground for its holding—if home visits were searches, they were nevertheless reasonable and thus constitutionally permissible. 400 U.S. at 318.

[14] 436 U.S. at 314-15.

[15] *See* note 3 *supra*. Unreasonable searches and seizures include those that are unjustified (*see, e.g.*, Delaware v. Prouse, 99 S. Ct. 1391 (1979) (stopping motorist to check license constitutionally impermissible without articulable and reasonable suspicion)), arbitrary (*see, e.g.*, Giancana v. Johnson, No. 63 C 1145 (N.D. Ill. 1963) (continuous surveillance by FBI agents "arbitrary intrusion into plaintiff's right of privacy"), *rev'd on other grounds*, 335 F.2d 366 (7th Cir. 1964), *discussed in* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 213-14 (4th ed. 1974)), or unduly intrusive (*see, e.g.*, Schmerber v. California, 384 U.S. 757 (1966) (minor intrusion into body to test blood alcohol level permissible under strictly limited conditions, but different results possible if "more substantial intrusions" or if under different conditions)). *See generally* Amsterdam, *supra* note 5, at 359, 411.

One member of the Court has suggested that the government first employ "informational sources less drastic than an invasion of the privacy of the home" in order to avoid unreasonable searches. *See* Wyman v. James, 400 U.S. 309, 342-43 (1971) (dissenting opinion, Marshall, J.). The majority has rejected this view. Zurcher v. Stanford Daily, 436 U.S. 547, 559 (1978); Cady v. Dombrowski, 413 U.S. 433, 447 (1973).

[16] 387 U.S. 523 (1967).

[17] *Id.* at 536-37.

[18] *Id.* at 532-35.

[19] *See* note 3 *supra*.

[20] Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). *See also* Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); United States v. United States District Court, 407 U.S. 297, 315 (1972).

the government can intrude on an individual's privacy only after obtaining a search warrant.

By incorporating the second clause of the amendment into the first, the Court has shifted the focus from reasonableness to probable cause.[21] Under this conceptual framework a search is reasonable, and therefore constitutionally permissible, only if probable cause existed to issue a warrant.[22] The Court has continued to balance the government's interest in conducting the search against the individual's interest in protecting his privacy, but this inquiry now determines whether a warrant should issue, not whether the search may be conducted without one.[23]

Critics have sharply attacked the rule that warrantless searches are inherently unreasonable.[24] These assaults have drawn support from the history and structure of the fourth amendment[25] and the undesirable effects of the rule, especially in the context of administrative searches.[26] The amendment's history demonstrates the Framers' concern for the abuse of search warrants, not warrantless searches.[27] Although the second clause

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[21] One commentator, arguing in favor of the Court's approach, has identified three possible interpretations of the relationship between the two clauses:

> (1) that the "reasonable" search is one which meets the warrant requirements specified in the second clause; (2) that the first clause provides an additional restriction by implying that some searches may be "unreasonable" and therefore not permissible, even when made under warrant; or (3) that the first clause provides an additional search power, authorizing the judiciary to find some searches "reasonable" even when carried out *without* warrant.

J. LANDYNSKI, *supra* note 1, at 42-43 (emphasis in original). The Court appears to have adopted the first of these three interpretations. *See* text accompanying note 20 *supra*. *Cf.* Rochin v. California, 342 U.S. 165 (1952) (intrusion so shocking that it violates due process); Adams v. State, 299 N.E.2d 834 (Ind. 1973) (despite authorization by court, operation to remove bullet prohibited by fourth amendment as unreasonable). The Court's approach has been attacked on numerous occasions. *See* notes 24-29 and accompanying text *infra*.

[22] *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 535 (1967).

[23] *Id.* at 534-35. *See also* Grano, *Foreword—Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425, 445 (1978) (comparing approaches of majority and dissent in *Barlow's*).

[24] One commentator has severely criticized the Court's construction of the amendment, saying that it stands the fourth amendment "on its head." T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-24 (1969).

[25] Marshall v. Barlow's, Inc., 436 U.S. 307, 326-28 (1978) (dissenting opinion, Stevens, J.); See v. City of Seattle, 387 U.S. 541, 547-48, 554-55 (1967) (dissenting opinion, Clark, J.); T. TAYLOR, *supra* note 24, at 21.

[26] Marshall v. Barlow's, Inc., 436 U.S. 307, 329-34 (1978) (dissenting opinion, Stevens, J.); See v. City of Seattle, 387 U.S. 541, 554-55 (1967) (dissenting opinion, Clark, J.).

[27] *See* T. TAYLOR, *supra* note 24, at 41.

of the amendment carefully limits the circumstances under which a warrant may issue, it does not expressly require a warrant for all searches.[28] Warrantless searches are explicitly limited only by the requirement in the first clause that they not be unreasonable.[29] The judicially created rule that warrantless searches are inherently unreasonable has brought administrative searches, which had not traditionally required warrants,[30] within the scope of the warrant clause. This rule has burdened inspection programs, while giving little protection to individual privacy. In extending the warrant requirement to administrative searches, the Supreme Court simultaneously diluted the meaning of probable cause in order to make these searches possible.

Traditionally, probable cause exists if "the facts and circumstances within [an officer's] knowledge and of which [he has] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that the item or condition he seeks is in the place he intends to search.[31] If this were the standard for administrative searches, very few would occur because administrative searches by definition[32] focus on broad groups or areas, not on specific persons or places. For example, the *Camara* Court concluded that the effective enforcement of housing codes requires periodic inspections of all residences within particular geographic areas.[33] Yet without some

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[28] *See* note 3 *supra*.

[29] Marshall v. Barlow's, Inc., 436 U.S. 307, 328 (1978) (dissenting opinion, Stevens, J.); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 120 (1937).

Arguments concerning the interpretation of the fourth amendment based on its history and structure are obscured by the unusual manner in which Congress adopted it. The House of Representatives "never . . . consciously agreed to the Amendment in its present form. As a matter of fact, . . . the House actually voted down a motion to make it read as it does now." *Id.* at 101. The version approved by the House read as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated *by warrants issuing* without probable cause . . . ." *Id.* (emphasis added). The amendment reads as it does today because Representative Benson of New York favored the substitution of the phrase "and no warrant shall issue" for the phrase "by warrants issuing." He forwarded to the Senate his preferred version instead of the version actually adopted by the House. No one seems to have noticed the change. *Id.* at 101-02. If anything, the difference between the final version, with two clauses, and the House version, with one, supports the argument that the first clause of the final version should be read independently of the second. *Id.* at 103.

[30] *See* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960); Frank v. Maryland, 359 U.S. 360 (1959).

[31] Carroll v. United States, 267 U.S. 132, 162 (1925).

[32] *See* note 8 *supra*.

[33] 387 U.S. at 537.

prior examination inspectors rarely possess sufficient information to justify a belief that particular residences contain housing code violations. Under the traditional standard of probable cause, an inspector could almost never obtain a warrant; under a combination of that standard and the rule that warrantless searches are inherently unreasonable, he could never perform an inspection without the consent of the occupants.[34] For these reasons, the *Camara* Court found that probable cause to search for housing code violations exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[35] And most recently the *Barlow's* Court required only "[a] warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources."[36]

Criticism of this redefinition of probable cause does not stem primarily from a concern that it will "lead to a weakening of the fourth amendment's requirements in criminal cases."[37] Rather, the critics have assailed the utility of warrants issued on a reduced showing of probable cause. The Court has merely added an additional step to the inspection procedures without increasing protection for fourth amendment values.[38] When the inspector seeks a warrant, the magistrate weighs the governmental and individual interests involved to determine whether probable cause exists.[39] But he could perform the same task by determining simply whether the inspection was reasonable. In the context of administrative searches, the warrant requirement adds little or no protection of privacy beyond that already provided by the fourth amendment's reasonableness requirement.

The Supreme Court, however, views the warrant requirement as performing several functions in the context of administrative searches. Most importantly it limits the discretion of the inspector to decide when, where and whom to search by committing this decision to a neutral judicial officer.[40] The warrant also gives the

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[34] *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[35] 387 U.S. at 538.

[36] 436 U.S. at 321.

[37] J. LANDYNSKI, *supra* note 1, at 261.

[38] *See* See v. City of Seattle, 387 U.S. 541, 547-48 (1967) (dissenting opinion, Clark, J.) (condemning majority's authorization of "paper warrants" rubber-stamped by magistrate).

[39] *See* note 23 and accompanying text *supra*.

[40] *See* Delaware v. Prouse, 99 S. Ct. 1391, 1396-97 (1979); Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978); United States v. United States District Court, 407 U.S. 297, 316-17 (1972); N. LASSON, *supra* note 29, at 79-105.

individual subject to inspection notice of the legality and scope of the inspection[41] and may reduce the inspection's subjective intrusiveness.[42] Finally, requiring a warrant for administrative searches avoids the anomaly of providing greater protection to those suspected of crime than to ordinary citizens.[43]

Unfortunately, a warrant requirement for administrative searches fails to perform all these functions. In particular, the balance between the need to inspect and an individual's privacy may result in such reduced standards for finding probable cause that the magistrate can issue the warrant as a matter of course.[44] Moreover, the frequency of inspections performed by even a single agency may encourage the use of routine procedures for issuing inspection warrants, further reducing leeway for the magistrate to exercise his independent judgment in individual cases.[45] Some courts, attempting to avoid this result, have required the warrant application to contain a detailed description of the reasons justifying an inspection.[46] However, in light of the

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[41] Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978); Camara v. Municipal Court, 387 U.S. 523, 532 (1967).

[42] For a discussion of the distinction between objective and subjective intrusiveness, see United States v. Martinez-Fuerte, 428 U.S. 543 (1976). Objective intrusiveness may be measured by such factors as whether the premises inspected are commercial or residential, whether the inspection involves visual observation or physical examination, and whether the inspection occurs during the day or at night. Subjective intrusiveness may be measured by the degree of concern or fright a search is likely to generate in the person searched. *Id.* at 558.

When confronted at the door by an inspector, many Americans are likely to demand a warrant. Such demands ultimately led to the Supreme Court's decisions in *Barlow's, Camara,* and *See.* If the inspector produces one, the ensuing search will probably seem less intrusive because it bears the stamp of judicial approval.

[43] *See* Camara v. Municipal Court, 387 U.S. 523, 530 (1967); LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases,* 1967 SUP. CT. REV. 1, 18 (1967).

[44] *See* text accompanying note 38 *supra*; *see also In re* Establishment Inspection of Gilbert & Bennett Mfg. Co., 589 F.2d 1335, 1341-43 (7th Cir. 1979) (mere reference in warrant application to plan designed to reduce high incidence of occupational injuries in foundry industry sufficient to establish probable cause for OSHA inspection); Marshall v. Weyerhaeuser Co., 456 F. Supp. 474, 484 n.9 (D.N.J. 1978) (dictum) (suggesting that random selection of businesses for OSHA inspection sufficient to establish probable cause).

[45] In fiscal year 1977, the Occupational Safety and Health Administration inspected 59,932 workplaces. [1977] U.S. DEP'T OF LABOR ANN. REP. 48. In fiscal year 1976, the figure was 90,369. [1976] U.S. DEP'T OF LABOR ANN. REP. 37. *Cf.* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 5 (4th ed. 1974) (Detroit police obtain fewer than 2,000 search warrants annually); *id.* at 266 (San Francisco police obtained only 17 search warrants in 1966). These figures suggest that the vast majority of searches in the criminal context are made under the various exceptions to the warrant requirement.

[46] *See* Weyerhaeuser Co. v. Marshall, 592 F.2d 373 (7th Cir. 1979); *In re* Establishment Inspection of Northwest Airlines, Inc., 587 F.2d 12 (7th Cir. 1978).

reduced probable cause standard applied to most administrative searches,[47] this requirement seems largely a formality.[48] At most, it forestalls inspections authorized by the legislature only until inspectors learn what language to include in warrant applications. Therefore, the discretion of the officer in the field has remained effectively unhampered. In addition, if subjects of administrative searches know how readily a warrant can be obtained under current standards, their sense of subjective intrusiveness probably remains high. Finally, the less stringent probable cause requirement for administrative search warrants preserves the anomaly of greater protection for the criminal than for the ordinary citizen.

Difficulties with the warrant requirement arise in the context of administrative searches because the requirement, even with a flexible definition of probable cause, provides a relatively "monolithic" response to the often delicate problem of balancing governmental and individual interests.[49] A response better tailored to all of society's needs seems possible. Because the Supreme Court has emphasized the warrant as the primary criterion for a constitutionally permissible search, it has ignored alternative safeguards that might fairly protect privacy interests without burdening inspection programs. Likewise, in the few cases in which the Court has concluded that administrative searches do not require warrants, it has failed to consider the possibility of alternative safeguards. The development of a fresh response to the problems presented by administrative searches, however, requires an examination of the cases dealing with fourth amendment limitations on these searches.

II

ADMINISTRATIVE SEARCHES AND THE SUPREME COURT

The Supreme Court's decisions concerning fourth amendment limitations on administrative searches fall into three

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[47] *See* notes 35-36 and accompanying text *supra*.

[48] The *Barlow's* Court indicated that probable cause for OSHA inspections could rest either on evidence of an existing violation, or on reasonable legislative or administrative standards. 436 U.S. at 320. The rule evolving in the Seventh Circuit appears to be that when an inspector relies on the first of these two possible grounds, his application must allege more details than if he had relied on the second. *Compare* Weyerhaeuser Co. v. Marshall, 592 F.2d 373, 377-78 (7th Cir. 1979) *with In re* Establishment Inspection of Gilbert & Bennett Mfg. Co., 589 F.2d 1335, 1338-43 (7th Cir. 1979). If so, inspectors will naturally rely more on the second ground, and thus avoid the more stringent requirements of the first.

[49] *See* Amsterdam, *supra* note 5, at 388-90, 461 n.370.

categories. The first category includes *Camara*,[50] *See v. City of Seattle*,[51] and *Barlow's*.[52] In these cases, the Court held that government inspectors must generally obtain search warrants before they may compel an individual to submit to inspection. The second category includes *Colonnade Catering Corp. v. United States*[53] and *United States v. Biswell*.[54] Both cases involved inspections of closely regulated businesses and the Court excepted the inspection of these types of businesses from the warrant requirement. In the third category, including *United States v. Martinez-Fuerte*[55] and *South Dakota v. Opperman*,[56] the Court found an exception to the warrant requirement when administrative safeguards afford protection for privacy interests.

A. *The Administrative Warrant Requirement—Camara, See, and Barlow's*

The first category of decisions illustrates the Supreme Court's expansion of the warrant requirement into the field of administrative searches.[57] At one time, government inspections did not require warrants if they were otherwise reasonable.[58] Then the *Camara* Court held that the government could not require an individual to submit to a warrantless inspection of his residence for housing code violations. In *See*, the warrant requirement was extended to inspections of business premises. Both cases employed a balancing test in determining that a showing of "administrative" probable cause would support issuance of a warrant and that the warrant requirement would therefore not unduly burden the inspection programs.[59] *Barlow's* extended the warrant requirement of *Camara* and *See* to inspections made under the Occupational Safety and Health Act of 1970 (OSHA).[60]

In requiring a warrant for administrative searches, the Court has glossed over some serious practical and theoretical problems,

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[50] 387 U.S. 523 (1967).
[51] 387 U.S. 541 (1967).
[52] 436 U.S. 307 (1978).
[53] 397 U.S. 72 (1970).
[54] 406 U.S. 311 (1972).
[55] 428 U.S. 543 (1976).
[56] 428 U.S. 364 (1976).
[57] *See* text accompanying note 30 *supra*.
[58] Frank v. Maryland, 359 U.S. 360 (1959). *See also* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960).
[59] *See* notes 16-35 and accompanying text *supra*.
[60] 29 U.S.C. § 657(a) (1976).

as discussed above.[61] In addition, the *Barlow's* Court discounted Congress' finding that the success of OSHA depended upon surprise inspections,[62] creating an obvious disincentive for businessmen to consent to warrantless inspections.[63] The Court disregarded the argument of the *Barlow's* dissent that the need for warrantless inspections is empirical and that the Court should therefore defer to Congress.[64] It also shunned the arguments that "it is the general reasonableness standard in the first Clause, not the Warrant Clause, that the Framers adopted to limit" administrative searches,[65] and that requiring a "new fangled inspection warrant" would provide little added protection to privacy interests of employers subject to OSHA inspections.[66]

Despite their flaws, *Camara, See,* and *Barlow's* represent the prevailing rule on the application of the warrant requirement to administrative searches.[67] Their failings appear more clearly through a review of the exceptions to this general rule. Such a review also serves to illustrate the advantages of focusing on the reasonableness of a given search rather than on the warrant requirement for administrative searches.

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[61] *See* notes 10-49 and accompanying text *supra*.

[62] 436 U.S. at 317. *See generally* 29 U.S.C. § 666(f) (1976) (imposing penalties for giving advance notice of inspection).

[63] 436 U.S. at 316 n.11. The Court has indicated that even where a warrant is required for an administrative search, the inspector should generally seek a warrant only after a request for entry has been refused. Camara v. Municipal Court, 387 U.S. 523, 539 (1967). If an individual consents to a search, no warrant need be obtained, even in a criminal investigation. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[64] Justice Stevens, in dissent, chastised the majority for its position. 436 U.S. at 329-30. The Court responded that it could only "await the development of evidence not present on this record to determine how serious an impediment to effective enforcement [the lack of surprise inspections] might be." *Id.* at 316-17 n.11.

[65] 436 U.S. at 328. The *Barlow's* majority did suggest that the reasonableness of warrantless searches depends upon "the specific enforcement needs and privacy guarantees of each statute," (*id.* at 321), thus appearing to qualify the rule that warrantless searches are inherently unreasonable (*see* text accompanying notes 17-20 *supra*).

[66] *Id.* at 331-32.

[67] Justice Powell has suggested extending the warrant procedure beyond its present scope. In Almeida-Sanchez v. United States, 413 U.S. 266 (1973), he advocated the issuance of area search warrants permitting the Border Patrol "to conduct roving searches on a particular road or roads for a reasonable period of time." *Id.* at 283 (concurring opinion). Such warrants seem indistinguishable from the general warrants the fourth amendment was meant to prohibit. *See, e.g.,* J. LANDYNSKI, *supra* note 1, at 45-46; N. LASSON, *supra* note 29, at 120.

B. *An Exception for Closely Regulated Activity—Colonnade Catering and Biswell*

The second category of decisions concerning administrative searches represents an exception to the warrant requirement for searches of individuals and businesses already closely regulated or supervised by the government. In these cases, the Court has recognized that the warrant requirement cannot apply to all administrative searches without seriously impairing government interests. In *Colonnade Catering Corp. v. United States,*[68] the Court upheld a warrantless search of a liquor dealership because of the long history of government regulation of the liquor industry.[69] In *United States v. Biswell,*[70] the Court relied on *Colonnade Catering* in upholding the warrantless search of a gun dealership. Conceding that interstate traffic in guns had a relatively short history of regulation, the Court instead emphasized the pervasiveness of the regulation.[71] It concluded that anyone who enters into such a business must know that he will be subject to inspection, and can therefore be considered to have consented to it.[72] The Court also stressed that a statute specifically authorized warrantless inspections of gun dealers[73] and that alternative safeguards protect the dealers.[74] Each of these factors reduced the need for a warrant by duplicating the functions a warrant would have performed. Simultaneously, each factor increased the reasonableness of the warrantless inspection by limiting its infringement on individual privacy.[75] The government also possesses a greater need to inspect without a warrant than it did in either *Camara* or *See.*[76]

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[68] 397 U.S. 72 (1970).

[69] *Id.* at 77.

[70] 406 U.S. 311 (1972).

[71] *Id.* at 315-16. *See generally* 18 U.S.C. §§ 921-928 (1976) (Gun Control Act of 1968).

[72] 406 U.S. at 316.

[73] *Id.* at 317. *But see* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (holding statute authorizing warrantless OSHA inspections unconstitutional).

[74] The Court noted that each licensed dealer was "annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority." 406 U.S. at 316.

[75] *See* notes 15-18 and accompanying text *supra.*

[76] *See* 406 U.S. at 316. The violations the inspectors were searching for in *Camara, See,* and *Barlow's* were relatively difficult to conceal or correct quickly. Moreover, their correction would have accomplished the purposes of the codes and statutes the inspectors sought to enforce, thus eliminating the need for inspection. In *Biswell,* on the other hand, the violations for which the inspectors were searching, such as the possession and sale of unregistered firearms, could be concealed quickly, and could be resumed immediately after the inspector had left. Therefore, the need for surprise was great.

Therefore, the Court found a warrant unnecessary for this type of inspection.[77]

The exception conceived of in *Colonnade Catering* and *Biswell* was initially a narrow one. In both cases the Court could point to restrictions imposed upon the inspections by statute or rule, which contributed to their reasonableness.[78] However, lower courts applying the exception have often failed to look beyond the mere presence of extensive regulation. For example, *Pollard v. Cockrell*[79] involved an ordinance authorizing the police to make warrantless searches of massage parlors "for safety of structure and adequacy of plumbing, ventilation, heating and illumination."[80] The court upheld the ordinance on the ground that massage parlors are pervasively regulated and that their owners, who must be licensed to operate them, impliedly consent to such searches.[81]

The *Pollard* decision seems unsound for a number of reasons. The court looked only to the extent of regulation and the fact of licensing. Without further analysis, it rested its holding on the fiction of implied consent. However, both *Colonnade Catering* and *Biswell* demonstrate that more is required for warrantless inspections to be reasonable.[82] The *Pollard* court glossed over the failure of the ordinance to limit the discretion of the police to select the time of inspection; it simply assumed that the police would

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[77] *See also* Wyman v. James, 400 U.S. 309 (1971). *Wyman* involved a home visit to a welfare recipient. Welfare recipients are subject to extensive government supervision, and the Court therefore concluded that home visits have such a minor impact on privacy interests that they are not searches restricted by the fourth amendment. *Id.* at 317-18. Assuming alternatively that the visit was equivalent to a search, the Court found it to be a reasonable one. *Id.* at 318. The Court emphasized that the visit was not a criminal investigation, and was not made by the police, but by "a friend to one in need." *Id.* at 322-23. It also emphasized the government's interest in assuring that the recipient used the assistance he received for the purposes for which it was intended. *Id.* at 318-19. Finally, the Court noted that "Mrs. James has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid ... flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved." *Id.* at 324. Thus relying on a notion of consent similar to that in *Colonnade Catering* and *Biswell*, the Court held that a warrant for such visits was unnecessary.

[78] *See, e.g.*, Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (although warrant not required for inspection, statute does not permit forcible entry without warrant).

[79] 578 F.2d 1002 (5th Cir. 1978). *See also* United States v. Warren, 578 F.2d 1058 (5th Cir. 1978) (upholding warrantless search of vessel by Coast Guard). *But see* United States v. Piner, 452 F. Supp. 1335 (N.D. Cal. 1978) (suppressing evidence obtained through warrantless search of vessel by Coast Guard).

[80] 578 F.2d at 1014.

[81] *Id.* (quoting City of Indianapolis v. Wright, 371 N.E.2d 1298, 1302 (Ind. 1978)).

[82] *See* note 78 and accompanying text *supra*.

not abuse this discretion.[83] Similarly, the court nearly ignored the seeming anomaly of allowing the police to perform routine safety inspections and the possibility that the true purpose of the searches was not limited to their supposed administrative nature. In any event, inspections by police officers inevitably involve greater subjective intrusiveness than inspections by other government officials,[84] and the court failed to address this issue.

By considering only the presence of regulation and licensing, the *Pollard* court overlooked several factors suggesting that the intrusiveness of these inspections outweighed the government's need to inspect and that the inspections were therefore unreasonable. Clearly, focusing on the degree of regulation alone provides inadequate protection for privacy interests. In addition, it raises a significant practical problem—numerous statutes authorize inspections in the context of widely differing regulatory programs.[85] To determine whether these inspections may be performed without a warrant, courts must decide whether each industry is sufficiently regulated for the *Colonnade Catering-Biswell* exception to apply. Such an approach produces inconsistency, or at least uncertainty.[86] Focusing on the elements of the inspec-

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[83] 578 F.2d at 1014-15. *See* note 42 *supra* (time of search as a measure of objective intrusiveness).

[84] *See* Wyman v. James, 400 U.S. 309, 322-23 (1971) (emphasizing that home visits not made by police).

[85] *See, e.g.*, 7 U.S.C. § 243 (1976) (authorizing inspection of licensed warehouses); 7 U.S.C. § 2046 (1976) (authorizing inspection of records of farm labor contractors); 10 U.S.C. § 2313(a) (1976) (authorizing inspection of plant and records of government contractors and subcontractors); 15 U.S.C. § 1270(b) (1976) (authorizing inspection of establishments involved in manufacturing, processing, or handling of hazardous substances); 15 U.S.C. §§ 1915(b), 2005(c) (1976) (authorizing inspection of automobile factories); 15 U.S.C. § 2065(a) (1976) (authorizing inspection of establishments involved in manufacturing consumer products); 16 U.S.C. § 956 (1976) (authorization to inspect catch and records of fishing boats); 21 U.S.C. § 374 (1976) (authorizing inspection of establishments involved in manufacturing, processing, or handling food, drugs, or cosmetics); 30 U.S.C. §§ 813(a), 1267(b) (1976) (authorizing inspection of coal mines); 42 U.S.C. § 262(c) (1976) (authorizing inspection of establishments involved in manufacturing serum, toxin, antitoxin, vaccine); 49 U.S.C. § 1377(e) (1976) (authorization to inspect buildings, equipment, and records of air carriers).

[86] *Compare* United States v. Consolidation Coal Co., 579 F.2d 1011 (6th Cir. 1978) (requiring warrants for search of coal mine office in light of *Barlow's*), *cert. denied*, 99 S. Ct. 836, 837 (1979) *with In re* Surface Mining Regulation Litigation, 456 F. Supp. 1301 (D.D.C. 1978) (upholding federal statute permitting warrantless searches of surface coal mining operations and premises where records are required to be maintained because coal industry more pervasively regulated than industries involved in *Barlow's*) *and* Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973) (warrantless coal mine safety inspections constitutional because of pervasive regulation of industry);

tions themselves, rather than on the vagaries of regulatory programs, could alleviate this problem.[87]

C. *An Exception for Administrative Safeguards—Martinez-Fuerte and Opperman*

The third category of decisions concerning administrative searches stands as another exception to the warrant requirement. These cases suggest an approach to the problem that avoids the difficulties of the exception for regulated activity. They focus not on the extent of government regulation, but on the existence of alternative administrative safeguards that protect privacy interests as would a warrant.

In *United States v. Martinez-Fuerte,*[88] the Court upheld the Border Patrol's practice of routinely stopping vehicles at fixed checkpoints located near the border, and also held that the practice did not require a warrant.[89] The Court emphasized the importance of the checkpoint stops to the enforcement of the immigration laws. It also stressed their limited intrusiveness, which was due to the quite limited discretion of the officers in the field. The location of the fixed checkpoints was not determined by these officers, "but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources."[90] The Court also noted that "the visible manifestations of the field officers' authority at a checkpoint provide substantially the same assurances" as would a warrant.[91] Signifi-

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compare United States v. Stanack Sales, 387 F.2d 849 (3d Cir. 1968) (holding *Colonnade Catering-Biswell* exception inapplicable to FDA's warrantless searches of prescription drug repackagers) *and* United States v. Roux Laboratories, 456 F. Supp. 973 (M.D. Fla. 1978) (holding *Colonnade Catering-Biswell* exception inapplicable to FDA's warrantless search of hairdye manufacturer) *with* United States v. Business Builders, Inc., 354 F. Supp. 141 (N.D. Okla. 1973) (*Colonnade Catering-Biswell* exception applies to FDA's warrantless search of warehouse for contaminated food) *and* United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371 (D. Del. 1972) (*Colonnade Catering-Biswell* exception applies to search of bakery because food industry is pervasively regulated).

[87] *See* text accompanying note 108 *infra.*

[88] 428 U.S. 543 (1976). *Martinez-Fuerte* was the last in a series of cases involving challenges to different aspects of the Border Patrol's operations along the Mexican border. *See* United States v. Ortiz, 422 U.S. 891 (1975) (checkpoint searches permissible only on probable cause); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (roving patrol stops permissible only on reasonable suspicion); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (roving patrol searches permissible only on probable cause).

[89] 428 U.S. at 545.

[90] *Id.* at 559.

[91] *Id.* at 565.

cantly, the Court found that when such alternative protections exist, "deference is to be given to the administrative decisions of higher ranking officials."[92]

South Dakota v. Opperman[93] adopted a similar approach in upholding inventory searches of automobiles in police custody. Noting that "[t]he probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions,"[94] the Court emphasized that such inventories were conducted according to standard procedures, presumably adopted by higher ranking officials in the police department.[95] The existence of such procedures gives courts a framework for determining whether searches conducted according to them are likely to exceed the bounds of reasonableness. If not, the additional protection of a warrant seems unnecessary.

In this third category of decisions, courts permit warrantless administrative searches if administrative procedures that limit the possibility of arbitrariness otherwise assure their reasonableness. This exception focuses on the reasonableness requirement itself, rather than on the warrant requirement as does the first category of decisions,[96] or on extensive regulation as does the second.[97] In *Delaware v. Prouse*,[98] the Supreme Court recently noted that:

> [T]he reasonableness standard usually requires . . . that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field" . . . .[99]

A rule permitting such alternative safeguards offers several advantages. First, it avoids imposing the warrant requirement when it is unnecessary. In addition, it encourages the development of alternative safeguards even for cases falling within the

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[92] *Id.* at 566.
[93] 428 U.S. 364 (1976).
[94] *Id.* at 370 n.5.
[95] *Id.* at 374-75.
[96] *See* notes 57-67 and accompanying text *supra*.
[97] *See* notes 68-86 and accompanying text *supra*.
[98] 99 S. Ct. 1391 (1979).
[99] *Id.* at 1396-97 (footnotes omitted).

exception for regulated activity. Ultimately it promotes fourth amendment values by bringing coherence to this area of the law, because it, when combined with the views of the *Barlow's* dissenters, provides the basis for a general alternative to the warrant requirement in the context of administrative searches.

III

A Proposed Alternative to the Warrant Requirement

The fourth amendment prohibits unreasonable searches.[100] If warrantless searches are inherently unreasonable, the task of deciding which searches are reasonable and thus permissible falls exclusively to the courts, because only courts issue warrants. If, however, searches conducted according to procedures affording alternative safeguards are also reasonable, the legislature and administrative agencies would play a role in deciding what searches would take place.

That role would be determined by the superior fact-finding capabilities of legislatures and agencies. Not only is a legislature generally better equipped than a court to find facts,[101] but it is also better equipped to characterize them and to strike a balance between conflicting interests based on this characterization.[102] The legislature would be free to decide whether a particular safeguard, such as the warrant requirement, is in fact reasonable, or whether other safeguards might also make the search reasonable. The courts would exercise ultimate control over the extent of government intrusion on individual privacy by defining the term "unreasonable search."[103]

Instead of requiring a warrant for all administrative searches, the courts should do so only when advance judicial approval is essential to make the search reasonable. Searches that are especially intrusive would require this approval.[104] In effect, the courts would hold that no degree of administrative safeguards could outweigh the intrusiveness of searches falling into this category.[105]

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[100] *See* notes 15-18 and accompanying text *supra*.

[101] Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 209 (1971).

[102] *Id.* at 234.

[103] The interpretation of the language of the Constitution is the role assigned to the courts in the constitutional plan. *See id.* at 199-200.

[104] *See* notes 8, 21 *supra*.

[105] *See* Bacigal, *supra* note 8, at 568-73. Bacigal identifies three categories of searches: "Searches Applied Openly and Uniformly to All Citizens"; "Searches Focused on an Indi-

Because of their routine character, however, most administrative searches would not fall into this category. Therefore, in the context of these searches, the courts should abandon the view that warrantless searches are inherently unreasonable. Instead, they should identify the proper functions of a warrant, and determine whether these functions are performed by other safeguards contained in the statute or regulation authorizing the search. If they are, the search is a reasonable one and is permissible. If not, the courts should still refrain from imposing a warrant requirement. Instead, they should simply rule that the search as presently limited is an unreasonable one, and then permit the legislature to devise protections making the search a reasonable one.

This alternative to the problem of reconciling the need to inspect with the right to privacy has several advantages. As already suggested, it would avoid the inconvenience of requiring unnecessary warrants. In addition, rather than the "all or nothing" results of a warrant requirement,[106] the proposed solution would afford needed flexibility in responding to the problem of balancing the interests of the government and the individual.[107] Thus, the need for a regulated activity exception would diminish; administrative safeguards offering greater protection without the disadvantages of the warrant procedure would replace it. Finally, this approach would bring relative certainty to this area of the law. The proper procedures for conducting an inspection would, in most cases, appear in the statute or rule authorizing it rather than in a court decision that may not apply beyond its own facts.[108] And rather than three different approaches to fourth amendment limitations on administrative searches, there would be only one.

Alternative legislated safeguards could also satisfy the four functions that the Supreme Court has stated an administrative search warrant should perform.[109] First, it would limit the discre-

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vidual Citizen"; and "Searches Directed Against Groups or Classes of Citizens." *Id.* at 565-79. He argues that searches focusing on individual citizens require more justification than the other categories because they are the most likely to be arbitrary and oppressive. *Id.* at 569-72. Therefore, while public opinion may provide sufficient protection against the first category of searches, and administrative rules sufficient protection against the third, only the warrant requirement provides sufficient protection against the second. *Id.* at 571-72.

[106] *See* note 49 and accompanying text *supra*. *Compare* notes 57-67 and accompanying text *supra with* notes 68-86 and accompanying text *supra*.

[107] *See* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L. J. 221, 240 (1973).

[108] *See* notes 85-86 and accompanying text *supra*.

[109] *See generally* notes 40-43 and accompanying text *supra*.

tion of the inspection officer by placing the inspection decision in the hands of senior officials.[110] The officers in the field could receive this decision in the form of a mandatory inspection plan.[111] Second, notice of the inspection's legality could be given by providing the inspector with "visible manifestations" of his authority and by providing an opportunity for the person subject to inspection to check with the inspector's superior.[112] Similarly, notice of the inspection's scope could be afforded by a copy of the officially prescribed limitations.[113] Ideally, the person would also receive this notice of the inspection before it occurs. If surprise is needed, the notice could state that an inspection is planned but omit the date of the inspection. In many cases, such a notice might itself provoke corrective action, thus accomplishing with less effort and confrontation the same objective as would an actual inspection. Moreover, this notice would allow the person subject to inspection an opportunity to obtain a hearing on any objections concerning the proposed inspection without risking possible criminal liability for refusing to permit the inspection.[114] In either event, such a procedure would be more administratively efficient than the search warrant requirement.

The third and fourth functions of an administrative search warrant might prove more difficult to satisfy by alternative means. In most cases, advance notice should reduce the subjective intrusiveness of the inspection, especially if the person subject to inspection receives some choice about the inspection's timing. If in some cases this alternative proves insufficient, only then should the warrant requirement apply. Regarding the fourth function, the proposed approach might afford ordinary citizens fewer protections than suspected criminals. However, it affords them all the protection required under the circumstances. It seems strange to

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[110] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).

[111] *Cf.* Marshall v. Barlow's Inc., 436 U.S. at 320-21 (probable cause established by showing selection of business for inspection on basis of "general administrative plan . . . derived from neutral sources"); Marshall v. Weyerhaeuser Co., 456 F. Supp. 474 (D.N.J. 1978) (describing OSHA plan in detail and indicating plan not always followed).

[112] *See* See v. City of Seattle, 387 U.S. 541, 549 (1967) (dissenting opinion, Clark, J.). Examples of such visible manifestations might be a uniform, a badge, and a copy of the regulations governing searches.

[113] *See* United States v. Biswell, 406 U.S. 311, 316 (1972).

[114] *See* LaFave, *supra* note 43, at 30-34. Under current practice, an inspector must first request permission to enter before applying for a warrant. *See* note 63 *supra*. Such a request also gives the person to be inspected an opportunity to obtain a hearing, assuming he realizes that the inspector will return with a warrant the next time.

insist on greater protection in all cases when such protection is actually necessary only in some.

Admittedly, Congress has not yet adopted any alternative schemes providing safeguards comparable to the ones proposed by this Note.[115] But it has had little incentive to do so. Congress would probably be more responsive if the Court were to rule, as it could have in *Barlow's*, that the legislature has responsibility to adopt such alternative schemes for warrantless inspections.[116] Congress, however, may never have the opportunity to assume this responsibility.

CONCLUSION

In applying the fourth amendment to inspections and administrative searches, the Supreme Court has focused on the amendment's warrant requirement rather than its requirement that searches be reasonable. However, the warrant requirement has proved ill-suited to inspection programs. Exceptions have developed, but these exceptions are inadequate in scope. Furthermore, they do not assure that inspections falling within the excepted categories will be reasonable, and they have led to uncertainty concerning the need for a warrant in particular situations. A solution more consistent with the role of courts and legislatures in our system of government would be to permit reasonable inspections if the legislature provides alternative safeguards to take the place of the warrant requirement.

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[115] *See, e.g.*, 7 U.S.C. §§ 150ff, 2806 (1976) (codifying prevailing rule); 15 U.S.C. § 1990e (1976) (requiring administrative warrants); 15 U.S.C. § 2610 (1976) (requiring that inspection be reasonable); 21 U.S.C. § 880(d) (1976) (defining probable cause); 42 U.S.C. § 3611(a) (1976) (requiring compliance with fourth amendment).

[116] *See* J. LANDYNSKI, *supra* note 1, at 27-30 (historically, judicial decisions provoked Parliamentary action to curtail general warrant); Amsterdam, *supra* note 5, at 379 (suggesting that only courts can provoke legislature to act). *See generally* Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 26-30 (1975).