# VERMONT'S MISPLACED APPLICATION OF THE CLOSELY REGULATED INDUSTRY EXCEPTION TO THE WARRANT REQUIREMENT UNDER ARTICLE ELEVEN

## INTRODUCTION

The right of Vermont's people to be free from unreasonable searches and seizures is found in two distinct sources: the Fourth Amendment to the United States Constitution (Fourth Amendment),[1] and Article 11 of the Vermont Constitution (Article 11).[2] While the Fourth Amendment and Article 11 are textually similar, basic principles of federalism make these provisions discrete and independent sources of search and seizure protection.[3]

Both the Fourth Amendment and Article 11 prohibit warrantless searches and seizures[4] and require probable cause for a warrant to issue.[5] Evidence resulting from a warrantless search is typically held inadmissible at trial under the exclusionary rule.[6] However, courts have recognized specifically defined

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1. The Fourth Amendment to the United States Constitution provides:

> [t]he 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.

2. Article 11 of the Vermont Constitution provides:

> [T]he people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or person, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

VT. CONST. ch. I, art. 11.

3. However, because the United States Constitution represents the "supreme law of the land" the Vermont Constitution must be interpreted in a way that does not undermine the protections afforded by the federal document. *See* U.S. CONST. art. VI, cl. 2. "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

4. *See* Katz v. United States, 389 U.S. 347, 356-59 (1967) (finding a Fourth Amendment violation when police listened to the defendant's telephone conversation via electronic surveillance equipment without first obtaining a search warrant); State v. Berard, 154 Vt. 306, 310-11, 576 A.2d 118, 120-21 (1990) (holding that the requirement for a search warrant will be abandoned "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable") (citing O'Connor v. Ortega, 480 U.S. 709, 741 (1987) (Blackmun, J., dissenting)).

5. U.S. CONST. amend. IV. *See also* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 544 (1995) (discussing the probable cause and particularity requirements of the Fourth Amendment); *Berard*, 154 Vt. at 310-11, 576 A.2d at 120-21 (holding that the Vermont Supreme Court "will abandon the warrant and probable cause requirements, which constitute the standard of reasonableness").

6. *See* Weeks v. United States, 232 U.S. 383, 384 (1914) (holding that evidence obtained in violation of the Fourth Amendment cannot be used in a federal criminal trial against the victim of the unlawful search); State v. Ball, 123 Vt. 26, 28-29, 179 A.2d 466, 468 (1962) (holding that Fourteenth Amendment prohibits the admission of evidence obtained in violation of the Fourth Amendment in state prosecutions); State v. Badger, 141 Vt. 430, 451-55, 450 A.2d 336, 348-50 (1982) (holding that the "[i]ntroduction of such evidence at trial eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process,

exceptions to the warrant requirement in an effort to balance one's right to privacy against contemporary societal needs for effective law enforcement. Some of these exceptions include: searches incident to arrest;[7] searches during exigent circumstances;[8] searches of automobiles;[9] searches in areas outside the curtilage of any building;[10] observation and seizure of items in "plain view;"[11] inventory searches;[12] and searches of closely regulated industries.[13]

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distorts any notion of fairness, and encourages official misconduct").

7. *See* United States v. Harris, 331 U.S. 145, 154 (1947) (noting that the Court has "frequently recognized" that evidence may be seized "during the course of a search incident to arrest"); United States v. Robinson, 414 U.S. 218, 227-29 (1973) (holding unlawful the search of defendant's pocket subsequent to his arrest); New York v. Belton, 453 U.S. 454 (1981) (holding unlawful the search of the passenger compartment of an arrestee's car following arrest of the driver). While the issue was raised by defense counsel in *State v. Covino*, the Vermont Supreme Court has not yet addressed the issue of searches "incident to arrest" under Article 11. State v. Covino, 163 Vt. 378, 382, 658 A.2d 916, 918-19 (1995) (declining to decide the issue because it had not been preserved for appeal).

8. *See* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (upholding search of defendant's home after entering in hot pursuit with a scope of search "as broad as may reasonably be necessary to prevent the dangers that the suspect at large . . . may resist or escape"); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (upholding the taking of a blood sample of defendant suspected of drunk driving when waiting for a warrant would have allowed evidence to dissipate); *cf.* State v. Savva, 159 Vt. 75, 87, 616 A.2d 774, 781 (1991) (suggesting that a search which would otherwise be unreasonable under Article 11 could be justified if "factually and narrowly tied to exigent circumstances").

9. *See* California v. Acevedo, 500 U.S. 565, 580 (1991) (holding that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained"); United States v. Ross, 456 U.S. 798, 825 (1982) (holding that "if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search"). *But see Savva*, 159 Vt. at 90, 616 A.2d at 782 (rejecting the federal jurisprudence and holding unconstitutional, under Article 11, the warrantless search of a closed container in an automobile because "a less intrusive option [temporary seizure of the vehicle] was available").

10. *See* Oliver v. United States, 466 U.S. 170, 178-79 (1984) (holding that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. . . . For these reasons, the asserted expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'"). *But see* State v. Kirchoff, 156 Vt. 1, 12-14, 587 A.2d 988, 995-97 (1991) (rejecting the per se rule of *Oliver* requiring "police to obtain a warrant, based upon probable cause, before they enter land where it is apparent to a reasonable person that the owner or occupant intends to exclude the public").

11. *See* Horton v. California, 496 U.S. 128 (1990) (holding that the police may seize items they discover in plain view if the seizable nature of the items is "immediately apparent"); *cf.* State v. Richardson, 158 Vt. 635, 636, 603 A.2d 378, 379 (1992) (mem.) (upholding, limited to the facts of this case, the warrantless seizure under Article 11 of a firearm "exposed to plain view" and left unattended because it "presented an exceptional circumstance that allowed the officers to make a reasonable seizure, without requiring the prior approval of the judiciary").

12. *See* South Dakota v. Opperman, 428 U.S. 364, 384 (1976) (permitting inventory search of an impounded vehicle without a search warrant). While the issue was raised by defense counsel in *State v. Kettlewell*, the Vermont Supreme Court has not yet addressed the constitutionality of inventory searches under Article 11. *See* State v. Kettlewell, 149 Vt. 331, 334 n.1, 544 A.2d 591, 593 n.1 (1987) (declining to address the issue because the "claim was not raised before the trial court except by the passing mention of Article 11").

13. *See* Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970) (upholding a warrantless inspection of a liquor storeroom in a catering establishment because of the broad power assigned to Congress to regulate alcohol and the long history of "close supervision and inspection" of the industry); State v. Welch, 160 Vt. 70, 83-84, 624 A.2d 1105, 1112 (1992) (upholding, under Article 11, the warrantless search of an individual's pharmacy prescription records under the pervasively regulated industry exception). *See also* State v. Sanders, Supreme Court Docket No. 95-265 (March, 1996) (unpublished disposition) (declining to revisit the *Welch* application of the closely regulated industry exception to the warrant

Under the "closely regulated industry" exception, government officials may conduct warrantless searches of businesses which are subject to comprehensive regulatory schemes, as long as the searches can be characterized as routine administrative inspections.[14] Industries recognized by the United States Supreme Court as falling under the "closely regulated industry" exception include: liquor distribution,[15] firearms retail,[16] mining operations,[17] and vehicle dismantling.[18]

The Vermont Supreme Court has recently applied the "closely regulated industry" exception to Article 11's requirement for a warrant.[19] The court applied the exception to a police officer's warrantless search of a private citizen's pharmacy records.[20] The sole purpose of the search was to pursue the officer's hunch that the consumer was abusing the prescription drug system.[21] It is questionable whether probable cause existed prior to the search[22] and no warrant was ever requested.[23]

This Note will trace the development of the closely regulated industry exception by the United States Supreme Court and discuss the Court's rationale for its creation.[24] Next, it will explore the historical background of Article 11 of the Vermont Constitution, survey associated Vermont search and seizure case law and examine the Vermont Supreme Court's adoption of the closely regulated industry exception.[25] It will then ask the following questions: whether applying the closely regulated industry exception to a private consumer's pharmacy records is consistent with the United States Supreme Court's adoption and application of the exception; whether the historical background of Article 11, including its origin and contemporary political

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requirement).

14. *See* United States v. Biswell, 406 U.S. 311, 315-17 (1972).

15. *See Colonnade Catering*, 397 U.S. at 74.

16. *See Biswell*, 406 U.S. at 311.

17. *See* Donovan v. Dewey, 452 U.S. 594 (1981).

18. *See* New York v. Burger, 482 U.S. 691 (1987).

19. *See* State v. Welch, 160 Vt. 70, 75-85, 624 A.2d 1105, 1108-13 (1992); *see also infra* notes 351-64 and accompanying text.

20. *See id.* at 75, 624 A.2d at 1108 (search included defendant's personal prescription records at area pharmacies).

21. *See id.* at 75, 624 A.2d at 1107. "Lt. Gary Boutin, one of Brown's [the investigating officer's] supervisors, suggested a check of area pharmacies to see if defendant was 'doctor shopping'—i.e., securing prescriptions for controlled substances from more than one practitioner." *Id.*

22. *See id.* at 89, 624 A.2d at 1115 (Johnson, J., dissenting). "Today, the majority rules that the police have unlimited access to the prescription records of every pharmacist in the state of Vermont and may, *without warrant or probable cause*, search those records in hopes of finding violations of law . . . ." *Id.* (emphasis added).

23. *See id.* at 73-75, 624 A.2d at 1107-08.

24. *See infra* text accompanying notes 27-193.

25. *See infra* text accompanying notes 194-346.

opinion, justifies adopting the exception under Article 11; and, finally, whether adopting the exception is consistent with recent Article 11 jurisprudence.[26]

## I. THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

### *A. History of the Fourth Amendment*

As judges and practitioners have frequently recognized, "[o]ne's views regarding [exceptions to the warrant requirement] ultimately depend upon one's understanding of the history and the function of the Fourth Amendment."[27] This statement is particularly true in the context of the Fourth Amendment because of the debate regarding the nexus between the "reasonableness" and "warrant" clauses.[28] To resolve this dispute, some commentators have argued that American officials "did not have a broad inherent authority to search and seize; such actions required authorization, and the warrant system was used primarily to confer that authority."[29] Thus, commentators argue, warrantless searches were "virtually non-existent" because American officials looked to the writ of assistance for their authority.[30] Others argue that the "warrant" clause of the Fourth Amendment was drafted to address, by itself, the issue of general writs of assistance leaving only the "reasonableness" clause to regulate the execution of warrantless searches.[31]

Regardless of this debate, commentators seem to agree on the origin of the provision. Concern, in the United States, regarding unreasonable searches began with opposition to the writs of assistance.[32] The writ of assistance was a general warrant used by customs officers to give them broad latitude to search for smuggled goods.[33] One of the primary uses of the writ of assistance

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26. *See infra* text accompanying notes 347-434.

27. Harris v. United States, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting).

28. *See infra* text accompanying notes 77-79.

29. Clancy, *supra* note 5, at 491.

30. *Id.*

31. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 328 (1978) (Stevens, J., dissenting). Justice Stevens argued that the Framers "were not concerned about warrantless searches, but about overreaching warrants." *Id.* at 327. He reasoned, "While the subsequent course of Fourth Amendment jurisprudence in this Court emphasizes the dangers posed by warrantless searches conducted without probable cause, it is the general reasonableness standard . . . not the Warrant Clause, that the Framers adopted to limit this category of searches." *Id.* at 328.

32. *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51 (1937).

33. *See* Clancy, *supra* note 5, at 502-03.

was to conduct broad, non-particularized searches of commercial premises.[34] Thus, it is contrary to Fourth Amendment history to argue that the Framers of the Fourth Amendment did not consider its warrant provision to reach searches of commercial premises.[35] Rather, it was abuse of the writ of assistance against colonial merchants that not only gave rise to the Fourth Amendment, but has often been referred to as the impetus of American independence.[36]

The first hearing in the United States opposing the writs of assistance occurred after the original writs had expired due to the death of the King.[37] A group of merchants from Boston, Massachusetts opposed the new writs that were to be issued and retained James Otis, the former Advocate General, to represent them in court.[38] Otis "electrified" the audience with his condemnation of the general warrant as "the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book."[39] The Boston merchants lost the case, however, and new writs of assistance were issued to "Charles Paxton, the most unpopular man in Boston."[40] However, the opposition to the general writs did not end there.

On March 6, 1762, a bill was passed by the legislature prohibiting the issuance of any writ other than those issued "upon information under oath by any officer of the customs . . . ."[41] While the bill was vetoed by the Governor,[42] most of the colonial courts refused to enforce the general writs and some avoided the problem altogether by issuing only "special writs" based on a notion of probable cause and more particular descriptions of the places to be searched and the things to be seized.[43]

Colonist opposition to the general warrant was also evidenced by the actions of the colonial governments around the time of the American Revolution.[44] A "common theme" of state constitutions composed at this time was their search and seizure provisions which were based on a concept of particularized suspicion—similar to our modern notions of probable cause.[45] For example, Pennsylvania's statement of rights—the state from which

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34. *Barlow's, Inc.*, 436 U.S. at 311. "The particular offensiveness [the general warrant] engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists." *Id.*

35. *See id.*

36. *See Harris*, 331 U.S. at 158-59 (Frankfurter, J., dissenting).

37. *See* Clancy, *supra* note 5, at 503. *See also* LASSON *supra* note 32, at 57-60.

38. *See* LASSON, *supra* note 32, at 58.

39. *Id.* at 59.

40. *Id.* at 63.

41. *Id.* at 66.

42. *See id.*

43. Clancy, *supra* note 5, at 508.

44. *See id.* at 512-13.

45. *See id.* at 513.

Vermont copied its search and seizure provisions[46]—required that there be a "sufficient foundation" for the issuance of a writ and prohibited the issuance of general warrants.[47] Virginia's constitution of 1776 also incorporated a provision that spoke specifically of general warrants saying that they "are grievous and oppressive, and ought not to be granted."[48] Finally, Massachusetts' constitutional search and seizure provision was of a broader scope. Rather than referring to the general warrant, it prohibited "all unreasonable searches and seizures" and declared all warrants to be "contrary to this right" if they were not supported by a "cause or foundation" sworn by "oath or affirmation."[49]

It was this provision of the Massachusetts Constitution from which James Madison borrowed when drafting the Fourth Amendment to the Constitution of the United States.[50] This could prove that in adopting the Fourth Amendment, Congress "meant to give wide, and not limited, scope to [its] protection against police intrusion."[51] Moreover, early searches in Massachusetts were found unreasonable unless supported by a warrant.[52] Thus, while the plain language of the Fourth Amendment supports either the "independent" or "dependent" clause interpretation,[53] it is clear that the colonists opposed searches and seizures of a non-particularized nature and that

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46. *See infra* text accompanying notes 211-22.

47. Clancy, *supra* note 5, at 513.

48. *Harris*, 331 U.S. at 158 (Frankfurter, J., dissenting). Virginia's 1776 constitution provides:

> [G]eneral warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

VA. CONST. § 10 (1776) *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3814 (Francis Newton Thorpe ed., 1993).

49. *Harris*, 331 U.S. at 158-59 (Frankfurter, J., dissenting). Massachusetts' Constitution of 1780 provides:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. CONST. art. XIV (1780) *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1891 (Francis Newton Thorpe ed., 1993).

50. *See Harris*, 331 U.S. at 158-59 (Frankfurter, J., dissenting).

51. *Id.*

52. *See id.* at 161.

53. Resolving this dispute is beyond the scope of this Note. For a more detailed discussion of this issue, see Clancy, *supra* note 5, at 517-26.

at least the Massachusetts colonists opposed warrantless searches and seizures.[54]

### *B. Overview of the Fourth Amendment*

The Fourth Amendment to the United States Constitution is comprised of two clauses connected by the conjunction "and."[55] The first of these is referred to as the "reasonableness clause" because it protects against the execution of "unreasonable searches and seizures."[56] This clause has been interpreted to require a balancing of the individual's right to privacy against societal interests of effective law enforcement.[57] The second clause is known as the "warrant" clause because it establishes the constitutional prerequisites for a warrant to issue.[58] When a warrant is necessary, the requirements of these two clauses combine to require "individualized suspicion" and to limit the scope of government intrusion.[59]

#### 1. The Warrant Requirement

While there is little controversy over the central purpose of the Fourth Amendment, ongoing debate exists among scholars over the nexus between the "reasonableness" and "warrant" clauses.[60] The issue is whether these clauses are dependent or independent and, thus, whether the warrant is a per se requirement of a reasonable search under the Fourth Amendment.[61]
Since its ruling in *Katz v. United States*,[62] the United States Supreme Court has adopted the "dependent" interpretation of these two clauses, generally requiring a warrant to issue before a search or seizure may be conducted.[63] In *Katz*, police officers used electronic surveillance equipment to listen to the

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54. *See Harris*, 331 U.S. at 161-62 (Frankfurter, J., dissenting).

55. U.S. CONST. amend. IV.

56. U.S. CONST. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated." *Id.* (emphasis added).

57. *See* Clancy, *supra* note 5, at 487 (citing United States v. Leon, 468 U.S. 897, 901-14 (1984); Delaware v. Prouse, 440 U.S. 648, 654 (1979); Terry v. Ohio, 392 U.S. 1, 21-27 (1968)).

58. U.S. CONST. amend. IV. "[N]o *Warrants* shall issue, but upon probable cause, describing the place to be searched, and the persons or things to be seized." *Id.* (emphasis added).

59. Clancy, *supra* note 5, at 487-88.

60. A detailed discussion of this controversy is beyond the scope of this Note. For a detailed treatment of the reasonableness/warrant clause debate, see generally *id.* at 517-26.

61. *Id.* at 488.

62. Katz v. United States, 389 U.S. 347, 357-59 (1967).

63. Mincey v. Arizona, 437 U.S. 385, 390 (1978). "[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Id.* (quoting *Katz*, 389 U.S. at 357.).

defendant's conversation held in a telephone booth.[64] The Court characterized the officers' conduct as a search and held that it implicated the defendant's expectation of privacy thereby invoking the protections of the Fourth Amendment.[65] The *Katz* Court reasoned that a warrant was required to ensure a "detached" and "neutral" determination of the existence of probable cause which is necessary for a search to be reasonable under the Fourth Amendment.[66]

*Katz* is also well-known for Justice Harlan's concurring opinion. In this opinion, Justice Harlan established a two step test for determining whether there exists, in any particular situation, an expectation of privacy protected under the Fourth Amendment. Justice Harlan opined, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[67] The Court has embraced both this mode of analysis and the general requirement for a warrant in modern jurisprudence.

### 2. The Probable Cause Requirement

"[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ."[68] While the language of the Fourth Amendment itself requires probable cause only for the issuance of a warrant,[69] using the "dependent clause" approach, the clause requiring probable cause has been interpreted by the United States Supreme Court to apply to searches requiring a warrant, as well as those circumstances in which the Court has determined a warrant is not necessary.[70] In fact, under either the independent or dependent clause approach, the existence of probable cause is often the pivotal criterion "in a court's determination of the constitutionality of a search."[71]

To obtain a warrant, a police officer is required to submit evidence such that a judge or magistrate may, considering the "totality-of-the-

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64. *See Katz*, 389 U.S. at 348.

65. *See id.* "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.*

66. *Id.* at 356. Thus, the Court declared, searches conducted without a warrant are "per se unreasonable under the Fourth Amendment . . . ." *Id.* at 357.

67. *Id.* at 361.

68. U.S. CONST. amend. IV.

69. *See id.*

70. WILLIAM W. GREENHALGH, THE FOURTH AMENDMENT HANDBOOK: A CHRONOLOGICAL SURVEY OF SUPREME COURT DECISIONS 10 (1995).

71. *Id.*

circumstances," determine whether there is sufficient probable cause.[72] The inquiry is whether there is information sufficient to believe that it is a "fair probability that contraband or evidence of a crime will be found in a particular place."[73] A showing of probable cause is sufficient if based on "more than bare suspicion," and if "the facts and circumstances within [the officer's] knowledge and of which they have reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed . . . ."[74] The United States Supreme Court has recognized, however, at least two exceptions to the general probable cause requirement: the "administrative warrant" first recognized by the Court in *Camara v. Municipal Court*[75] and more recently, the "closely regulated industry" exception to the warrant and probable cause requirements.[76]

### 3. The Particularity Requirement

Not only does the Fourth Amendment require probable cause for a warrant to issue, but it also requires that the person and/or place to be searched or seized be described with particularity.[77] This interpretation is consistent with the historical origins of the Fourth Amendment as the provision was intended to prohibit the issuance of general warrants.[78] The United States Supreme Court has, however, created at least two exceptions to the particularity requirement, the administrative warrant—lacking particularity of suspicion—and the closely regulated industry exception—lacking both particularity of suspicion and the requirement for a warrant.[79] This note will now trace the development of these two probable cause and particularity exceptions and examine how the closely regulated industry exception has been applied by the Vermont Supreme Court in the context of a criminal investigation of a private citizen.

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72. Illinois v. Gates, 462 U.S. 213, 230-31 (1983).

73. *Id.* at 238 (noting that the two prongs of the *Aguilar-Spinelli* test are still applicable, the Court held only that they should be relevant, but not dispositive in the determination).

74. Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

75. Camara v. Municipal Court, 387 U.S. 523 (1967).

76. *See infra* text accompanying notes 157-93.

77. *See* Clancy, *supra* note 5, at 542. "And no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

78. *See supra* text accompanying notes 41-54.

79. *See infra* text accompanying notes 80-193; *see also* Clancy, *supra* note 5, at 560-68.

### a. Administrative Warrants: Reduced Probable Cause and Particularity Requirements

The United States Supreme Court has recognized a variety of searches and seizures not requiring "individualized suspicion" and has permitted suspicionless intrusions into many areas of everyday life.[80] While one may argue that these exceptions are necessary for effective law enforcement in our complicated society, commentators have expressed concern that the trend of increasing government intrusion has and will continue to degrade the interests "long considered within the core protections of the Fourth Amendment."[81] The administrative warrant and the closely regulated industry exception to the warrant requirement are two examples of this frightening trend.

The administrative warrant is based on a "non-particularized concept of probable cause"[82]—a standard which permits a general description of the places to be searched and items to be seized—and, in that sense, is somewhat analogous to the general warrant or writ of assistance utilized by customs officials in revolutionary America.[83] For an administrative warrant to issue, only a general area, building, or business need be cited as the location of the search.[84] In addition, the object of the search need only be generally described, provided it is related to the enforcement of an existing regulatory scheme.

The United States Supreme Court first accepted the concept of a non-particularized administrative warrant in *Camara*.[85] In *Camara*, a homeowner was arrested for refusing to permit a housing agent, under the authority of section 503 of the Baltimore City Code, to make a routine annual inspection of his premises without a warrant.[86] Reviewing the purpose of the city's administrative inspections, the Court noted the inherent difference in administrative and criminal investigations and recognized the need for periodic health inspections of all buildings.[87] Thus, while the Court found that a search

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80. Clancy, *supra* note 5, at 486.

81. *Id. See also* Jodi C. Remer, Note, *The "Junking" of the Fourth Amendment: The Closely Regulated Industry Exception to the Warrant Requirement*, 25 AM. CRIM. L. REV. 791 (1988).

82. Clancy, *supra* note 5, at 560-61 (citation omitted).

83. *See supra* text accompanying notes 32-54.

84. *See infra* text accompanying notes 85-156.

85. *Camara*, 387 U.S. at 527.

86. *See id.*

87. *See id.* at 535.

Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety.

warrant was required, it also recognized that the "need for the inspection must be weighed in terms of . . . reasonable goals of code enforcement" in determining the probable cause necessary to support the warrant.[88] Weighing these factors, the Court found that the long history of the housing inspection practice, the public health interests involved, and the non-personal, civil nature of the inspection "support[ed] the reasonableness of area code-enforcement inspections" under a general, rather than particularized, probable cause analysis.[89] The Court reasoned, "[w]here considerations of health and safety are involved," the facts necessary to create an inference of probable cause are "clearly different than those that would justify such an inference where a *criminal* investigation has been undertaken."[90] Thus, the Court held that the same stringent and particularized probable cause findings necessary to support a search warrant for a *criminal* investigation are not necessary for routine *administrative* inspections.[91] Allowing a less stringent probable cause determination, the Court reasoned, "neither endangers the time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in [the administrative inspection] area."[92]

Since *Camara*'s establishment of lower particularity and probable cause requirements, inspections of businesses have become customary in our highly regulated society to ensure compliance with statutes and administrative regulations.[93] Additionally, the Court has stretched the practicality argument for non-particularized suspicion administrative inspections even further when it recently embraced *warrantless* administrative inspections as necessary governmental operations to ensure regulatory compliance in "closely regulated industries."[94]

### b. Development of the Closely Regulated Industry Exception to the Administrative Warrant Requirement

While "[t]he Supreme Court has long expressed a strong preference for searches made pursuant to a search warrant,"[95] the requirement that a

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*Id.*

88. *Id.*

89. *Id.* at 537. "[T]he inspections are neither personal in nature nor aimed at the discovery of evidence of crime . . . ." *Id.*

90. *Id.* at 538-39.

91. *See id.* at 538. (emphasis added). The finding of probable cause, "will not necessarily depend upon specific knowledge of the condition of the particular dwelling." *Id.*

92. *Id.* at 539.

93. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 629 (1987 & Supp. 1995).

94. *See infra* text accompanying notes 157-93.

95. LAFAVE, *supra* note 93, at 118.

government official (including but not limited to a police officer) obtain a warrant prior to conducting a search is not absolute.[96] After being struck down as unconstitutional in *Camara*,[97] the issue of warrantless administrative inspections of businesses was next addressed by the United States Supreme Court just three years later in *Colonnade Catering Corp. v. United States*.[98] *Colonnade Catering* and its progeny created an exception to the administrative warrant requirement which permits warrantless, routine administrative inspections of businesses within closely regulated industries.

In *Colonnade Catering*, the defendant ran a catering business and was licensed to sell alcoholic beverages.[99] While a guest at the establishment, a federal agent of the Internal Revenue Service noticed a potential violation of the federal excise tax law.[100] When federal agents later returned and requested to search the defendant's premises, the defendant refused because they did not have a warrant.[101] Regardless, the agents broke the lock, searched the premises, and removed bottles of liquor suspected of having been illegally refilled.[102]

The issue upon appeal was whether the agents' remedy for the proprietor's refusal to permit entry is solely the imposition of the fine provided for in the statute or whether the agents may force their way into the area desired to be inspected.[103] The government relied on the mode of analysis in *Camara* to justify the requirement for an administrative warrant with a *lesser* showing of probable cause.[104] Thus, the government argued, the search did not violate the Fourth Amendment because the liquor industry has been subject to a long history of regulation under which federal agents of the Internal Revenue Service have been repeatedly granted by Congress "the power to make warrantless searches and seizures of articles under the liquor laws."[105]

Although the Court held that the agents were not permitted by the statute to resort to force when refused entry for a search, the Court declined to apply the administrative warrant requirement established in *Camara*.[106] The Court's reasoning for this divergence included the property-based rationale for which

96. *See supra* text accompanying notes 7-13.
97. *See supra* text accompanying notes 85-92.
98. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).
99. *See id.* at 72-73.
100. *See id.*
101. *See id.* at 73.
102. *See id.*
103. *See id.* at 74.
104. *See id.*
105. *Id.* at 75.
106. *See id.* at 77.

*Boyd v. United States*[107] is so well known, and the long history of regulation associated with the liquor industry.[108] Moreover, the first statute passed by Congress "to regulate the collection of duties" was passed by the same Congress that proposed the adoption of the Fourth Amendment, demonstrating that this type of search was not considered unreasonable by the Framers.[109] Based on this reasoning, the Court upheld the provisions which permit warrantless entries into business premises and found that "Congress has the broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand."[110] This was the Court's first decision in which it recognized an exception to the warrant requirement based solely on the nature and history of the industry's regulation.

In a similar case, *United States v. Biswell*, the "closely regulated industry exception" was expanded to include warrantless searches under the Gun Control Act of 1968,[111] which authorized official entry during business hours of any premises in which guns or ammunition were sold.[112] In *Biswell*, a city policeman and a Federal Treasury agent requested to inspect the locked gun storeroom of a pawn shop.[113] The shop's owner was told that they did not need a warrant and instead was shown a copy of the section of the Gun Control Act.[114] Unlicensed firearms were found and seized from the storeroom, and the shop's owner was convicted for "dealing in firearms without having paid the required special occupational tax."[115]

The United States Supreme Court upheld the warrantless search of the shop owner's storeroom under the "closely regulated industry" exception to the warrant requirement.[116] As in *Colonnade Catering*, the decision was limited

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107. Boyd v. United States, 116 U.S. 616, 624 (1886). In *Boyd*, the Court held that the government has an interest in "excisable or dutiable articles . . . and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment." *Id.*

108. *See Colonnade Catering*, 397 U.S. at 76. The Court noted,

> the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statues for at least two centuries past; and the like have been authorized by our own revenue acts from the commencement of the government.

*Id.*

109. *Id.*

110. *Id.* at 76-77.

111. 18 U.S.C. § 923(g)(1968). The Act provides:

> The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer, or collector under the provisions of this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by any such importer.

*Id.*

112. United States v. Biswell, 406 U.S. 311, 312 (1972).

113. *See id.*

114. *See id.*

115. *Id.* at 312-13.

116. *Id.* at 317.

to searches conducted "in the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope."[117] While noting that federal regulation of the firearm industry is not "as deeply rooted in history as is governmental control of the liquor industry," the Court based its decision on the public safety interests involved in the control of firearm sales and the need for unannounced and frequent inspections to deter illegal gun trafficking.[118] Thus, the Court distinguished *See v. City of Seattle*,[119] noting the inherent difference in the type of activity regulated. *See* concerned building code violations not easily concealed, while *Biswell* emphasized the need for frequent and unannounced inspections.[120] Unlike *See*, the Court noted, the requirement for a search warrant under the Gun Control Act could "easily frustrate" what would otherwise be effective regulatory inspections.[121]

The Court also based its decision in *Biswell* upon the lesser expectation of privacy held by the proprietor of a business in such a closely regulated industry. The Court noted, "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."[122] Moreover, each firearm dealer is actually furnished with a copy of the regulations on an annual basis, such that the "dealer is not left to wonder about the purposes of the inspector or the limits of his task."[123] Thus, the Court upheld the warrantless search of the pawn shop because such searches "pose only limited threats to the dealer's justifiable expectations of privacy."[124]

The applicability of the closely regulated industry exception to other regulatory inspections was limited in *Barlow's, Inc.* when the Court declined to expand the doctrine to inspections authorized by the Occupational Safety and Health Act (OSHA).[125] In *Barlow's, Inc.*, the owner and general manager

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117. *Id.* at 315.

118. *Id.* at 315-16.

119. *See* See v. City of Seattle, 387 U.S. 541 (1967). *See v. City of Seattle* was a companion case to *Camara* because it involved unwarranted building inspections for compliance with building codes. *See id.*; *cf. Camara*, 387 U.S. at

120. *See Biswell*, 406 U.S. at 316.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Marshall v. Barlow's, Inc., 436 U.S. 397, 311 (1978). OSHA provides:

> In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credential s to the owner, operator, or agent in charge, is authorized—(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein,

of an electrical and plumbing installation business refused to admit an OSHA inspector without a search warrant and obtained an injunction from the district court.[126] The Secretary of Labor appealed the injunction to the United States Supreme Court.[127]

The Court affirmed the injunction, declining to apply the closely regulated industry exception to OSHA. Its decision was based on the absence of a long history of close regulation of the type OSHA is designed to enforce, and the availability of ex parte warrants to provide for surprise inspections. Applying the first prerequisite of the closely regulated industry exception to OSHA inspections, the Court noted that historic federal involvement in working conditions has not been specific and pervasive: "[i]t is quite unconvincing to argue that the imposition of minimum wages and maximum hours . . . prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail."[128] Thus, the Court held that warrantless inspections under OSHA are distinguishable because they are not part of a regulatory scheme characterized by a long history of close regulation.[129]

The Court also noted that because OSHA regulations are not *pervasive*, the doctrine of implied consent—as underlay the Court's opinion in *Biswell*—in inapplicable so that one may not say that employers conducting business in interstate commerce have voluntarily consented to the warrantless inspections.[130] The Court further declined to apply the closely regulated industry exception to OSHA inspections because it did not find the warrantless inspections necessary to further the intent of the regulatory scheme.[131] Specifically, the Court stated that the Secretary's argument that warrantless inspections are "essential to the proper enforcement of OSHA because they afford the opportunity to inspect without prior notice and hence to preserve the advantages of surprise" is not satisfactory because using ex parte warrants would yield the same effect.[132] Furthermore, the warrant requirement would not "impose serious burdens on the inspection system or the courts" because most businessmen would consent to the inspection without a warrant.[133] Finally, the Court disagreed with the Secretary when he urged that the "incremental protections afforded the owner's privacy by a warrant are so

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and to question privately any such employer, owner, operator, agent, or employee.

*Id.* at 309 n.1. (quoting 29 U.S.C. § 657 (a) (1985)).

126. *See Biswell*, 406 U.S. at 310.

127. *See id.*

128. *Id.* at 314.

129. *See id.* at 313.

130. *See id.* at 314.

131. *See id.* at 315-21.

132. *Id.* at 316-17.

133. *Id.* at 316.

marginal that they fail to justify the administrative burdens that may be entailed."[134] Instead, the Court held that the warrant would assure the owner "that the inspection is reasonable under the Constitution" and would "advise the owner of the scope and objects of the search . . . ."[135]

The *Colonnade Catering-Biswell* closely regulated industry doctrine, as limited by *Barlow's, Inc.*, was applied in *Donovan v. Dewey* in 1981 to the mining industry under the Federal Mine Safety and Health Act of 1977.[136] Under the Federal Mine Safety and Health Act, no advance notice is required before a search.[137] The Act also provides for the imposition of civil fines for lack of cooperation by property owners.[138] In *Dewey*, a federal mine inspector requested access to properties owned by the appellee.[139] After requesting a warrant, which was not produced, the appellee refused the agent access to the mine, and was thereafter issued a citation.[140] Finally, the agent filed an action to enjoin appellee from refusing to permit the inspection, but the lower court upheld appellee's refusal.[141]

In allowing the warrantless inspections of appellee's property, the Supreme Court summarized *Camara* and its progeny finding that a warrant was not required if the following two prerequisites were met: the "warrantless searches are necessary to further a regulatory scheme, and the federal regulatory presence is sufficiently comprehensive and defined such that the owner of [the] commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."[142] Then, applying the first prong of this test, the Court found the warrantless inspections necessary to further the regulatory scheme for two reasons.[143] First, the Court noted, there was a "substantial federal interest in improving the health and safety conditions" of the Nation's mines.[144] Second, *warrantless* inspections were necessary because of the "notorious ease with which many safety or health hazards may be concealed if advance warning of inspection [were to be] obtained . . . ."[145]

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134. *Id.* at 324.

135. *Id.* at 323. The Court also noted the importance of defining the scope of a search when it deals with documents and the broad language of the OSHA regulations. *Id.* at 324 n.22.

136. *See* Donovan v. Dewey, 452 U.S. 594, 596-98 (1981). The Act authorizes warrantless inspections of underground mines four times annually and surface mines twice annually. *See id.* at 596 (citing 30 U.S.C. § 813(a) (1976 ed., Supp. III)).

137. *See id.*

138. *See id.* at 597 n.3.

139. *See id.* at 597.

140. See *id.*

141. *See id.*

142. *See id.* at 600.

143. *See id.* at 606.

144. *Id.* at 602.

145. *Id.* at 603.

The second prong of the Court's test—that the regulatory scheme was sufficiently defined that the owner of the property cannot help but be aware that periodic inspections would be implemented for specific purposes—was also met for two reasons.[146] First, the Federal Mine Safety and Health Act permitting the searches was "specifically tailored" to address the "notorious history of serious accidents and unhealthful working conditions" associated with the mining industry.[147] Second, the "pervasive" nature of the regulations imposed by the Act—four mandatory annual inspections of underground mines and two mandatory annual inspections of surface mines—make it such that the owner of the mining company would be aware that his company would be subject to such inspection.[148]

Finally, in addition to the two prerequisites for warrantless searches, the Court found the inspections to be reasonable because the Act protects any "special privacy concerns" by prohibiting forceful entries.[149] "Under these circumstances, it is difficult to see what additional protection a warrant requirement would provide."[150] Thus, the Court concluded, it is not just the history of regulation that supports application of the closely regulated industry exception, but also the "pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary . . . ."[151]

Justice Stewart dissented, however, because he felt the Court had abandoned one of the basic principles of the closely regulated industry exception.[152] The Court, he said, has long held that the closely regulated industry exception "applies to businesses that are both pervasively regulated and have a long history of regulation."[153] "The rationale for the exception, was unmistakably the doctrine of implied consent, . . . 'the businessman [in an industry with a long tradition of close government supervision] in effect consents to the restrictions placed upon him.'"[154] "Today the Court conveniently discards the latter portion of the exception."[155] Finally, Justice Stewart dissented from the majority's determination that a warrant is not

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146. *See id.* at 600.

147. *Id.* at 603.

148. *See id.* at 603-04. The Act also requires that all mining companies that "generate explosive gases" be inspected at five to fifteen day intervals. *Id.* at 604.

149. *Id.* at 604-05.

150. *Id.* at 605.

151. *Id.* at 606.

152. *See id.* at 611 (Stewart, J., dissenting).

153. *Id.* (emphasis omitted).

154. *Id.* (quoting Marshall v. Barlow's Inc., 436 U.S. 307, 313 (1978) (alteration in original)). Justice Stewart notes, however, that in *Dewey* the "Court . . . does not . . . rid its reinterpretation of *Colonnade Catering* and *Biswell* of all traces of implied consent" because the Court itself points out that 'the owner . . . cannot help but be aware that his property will be subject to periodic inspections for specific purposes." *Id.* at 611-12 n.3.

155. *Id.* at 611.

required because the necessity for surprise inspections could be met with ex parte warrants.[156]

*New York v. Burger*, the most recent case discussing the closely regulated industry exception, expands the exception to businesses less "closely" regulated than as previously applied.[157] In *Burger*, the respondent was the owner of a vehicle dismantling business in Brooklyn, New York.[158] All such businesses are subject to inspection under section 415-a5 of the New York Vehicle and Traffic Law without prior notification and/or a search warrant.[159] Five members of the Auto Crimes Division of the New York City Police Department entered the vehicle dismantling business and requested to see a journal which the Act required such establishments to keep for inspection purposes.[160] After being informed that respondent did not have the mandatory ledger book, the officials inspected the yard and recorded the vehicle identification numbers of several automobiles.[161] Several of these vehicles were found to have been stolen and respondent was charged with criminal possession of stolen property and "one count of unregistered operation as a vehicle dismantler . . . ."[162]

Three issues were to be decided upon appeal to the Supreme Court: (1) whether the respondent's business was in a closely regulated industry; (2) whether the inspection of respondent's business and the statute under which it was conducted met the requirements of the closely regulated industry warrant exception;[163] and (3) whether it was constitutional to apply the closely regulated industry exception to inspections which would produce evidence of criminal offenses.[164] The Court answered all three questions in the affirmative.[165]

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156. *Id.* at 612-13 n.5.

157. New York v. Burger, 482 U.S. 691 (1987).

158. *See id.* at 693.

159. *See id.* at 694. The statute provides, in part:

> Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or policed officer to examine them and any vehicles or part of vehicles which are subject to the record keeping requirements of this section and which are on the premises. . . . The Failure to produce such records or to permit such inspection . . . as required by this paragraph shall be a class A misdemeanor.

*Id.* at n.1 (quoting N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986)).

160. *See id.* at 693-95. The purpose of the book is to keep track of vehicle identification numbers, thereby maintaining proof of ownership of the vehicles, so they can be checked against police computer records of stolen vehicles. *See id.* at 694 n.1.

161. *See id.* at 695.

162. *Id.* at 695-96.

163. *See id.* at 708.

164. *See id.* at 708, 712.

165. *See id.* at 707, 708, 716.

The first issue addressed by the Court was whether the vehicle dismantling industry was a closely regulated industry within the meaning of the closely regulated industry exception.[167] In answering this question, the Court looked to the extent of the regulations regarding the activity, including the type of penalties available for violations and the duration of the regulatory scheme.[168] First, because of the extensive nature of the regulatory scheme, the Court found the respondent's vehicle dismantling business to be within a closely regulated industry.[169] The Court based this determination on the fact that a license was required to be in business, records were required to be maintained, and the business' registration number was required to be displayed.[170] Moreover, the Court noted that the operator is subject to criminal penalties and civil fines for violating any of the regulation's provisions.[171] Additionally, the Court found respondent's business to be within a closely regulated industry because of the long history of junkyard business regulation.[172]

Justice Brennan aggressively dissented, finding the regulations regarding the vehicle dismantling industry "simply not extensive," as they were no more extensive than the regulations regarding "a myriad of trades and businesses" in New York.[173] Moreover, Justice Brennan noted a "marked contrast" in the pervasiveness of the vehicle dismantling regulations when compared to the regulations at issue in *Dewey* and other precedent.[174]

The Court next inquired whether the respondent's business would meet the definition of a closely regulated industry for which the warrant exception applied. Reviewing precedent, the Court brought the applicable requirements together into one cohesive test:[175] whether there is a "substantial government interest" promoted by the warrantless inspection;[176] whether the warrantless

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167. *See id.* at 703.

168. *See id.* at 703-07.

169. *Id.* at 704.

170. *See id.*

171. *See id.* at 704-05.

172. *See id.* at 705-06.

173. *Id.* at 720 (Brennan, J., dissenting).

174. *Id.* at 721. "Few substantive qualifications are required of an aspiring vehicle dismantler; no regulation governs the condition of the premises, the method of operation, . . . the equipment utilized, etc. This scheme stands in marked contrast to, e.g., the mine safety regulations relevant in *Donovan v. Dewey*." *Id.* (citations omitted).

175. For the opinion of one commentator suggesting that the *Burger* decision did not add any substance to the law regarding the closely regulated industry exception—it merely reiterated what was held previously and applied the precedent to the facts at hand—see Remer, *supra* note 81. "The *Burger* Court merely paid lip service to the established standards, probably for the purpose of expanding the exception. *Burger* did not change or refine the standards, but merely restated them." Remer, *supra* note 81, at 808 (citations omitted).

176. *Burger*, 482 U.S. at 702.

inspections are "necessary to further [t]he regulatory scheme;"[177] and whether the inspection program, "in terms of the certainty and regularity of its application, [provides a] constitutionally adequate substitute for a warrant."[178]

Applying this refined test to the facts of *Burger*, the Court found the prerequisites met. First, the Court found that the State had a substantial interest in regulating the vehicle-dismantling industry as a way of decreasing the state's problem of motor vehicle theft which causes "economic and personal burdens on the citizens of different States."[179] Next, due to the nature of the vehicle dismantling industry, warrantless searches were found to be "necessary to further the regulatory scheme."[180] Finally, the Court found Section 415-a5 to be a sufficient substitute for a warrant because "the statute informs the operator of a vehicle dismantling business that inspections will be made on a regular basis . . . [and] sets forth the scope of the inspection and, accordingly, *places the operator on notice* as to how to comply with the statute."[181] Thus, by limiting the "time, place, and scope" of the inspection, the statute adequately restrains the inspecting officers such that their discretion is limited.[182] Justice Brennan also dissented on this point, finding that neither the statute nor the regulations set procedures for "the selection of the vehicle dismantlers for inspection," for the number of searches to be conducted, or for which agents may search.[183] Moreover, Justice Brennan noted that "a statute authorizing a search which can uncover *no* administrative violations is not sufficiently limited in scope to avoid the warrant requirement."[184]

Finally the Court asked whether it is constitutional to apply the closely regulated industry exception to inspections which could discover evidence of crimes and not simply violations of the regulatory scheme itself.[185] Answering in the affirmative, the Court noted that it already addressed in *Biswell*, whether "administrative and penal schemes can serve the same purposes."[186] Thus, consistent with *Biswell,* the Court held that the closely regulated industry exception could be applied to businesses even when the focus of the inspection

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177. *Id.* (citing *Dewey*, 452 U.S. at 600).

178. *Id.* at 703 (citing *Dewey*, 452 U.S. at 600).

179. *Id.* at 708.

180. *Id.* at 710. "Because stolen cars and parts often pass quickly though an automobile junkyard, frequent and unannounced inspections are necessary in order to detect them." *Id.*

181. *Id.* at 711 (emphasis added).

182. *Id.*

183. *Id.* 722-23.

184. *Id.* at 723 (Brennan, J., dissenting). Justice Brennan noted that aside from the requirement for display of the registration number and the keeping of records, the remainder of the statute has as its purpose facilitating the discovery of evidence of criminal violations by the business owner. *See id.* at 726. Thus, to continue the search beyond the owners admission of the administrative violations was a violation of the Fourth Amendment. *See id.*

185. *See Burger*, 482 U.S. at 716.

186. *Id.* at 713.

may result in the discovery that the *proprietor* was guilty of a criminal violation.

Justice Brennan offered the final, and perhaps most vehement, portion of his dissenting opinion in response to this issue.[187] Precedent, Justice Brennan argued, does not support applying the closely regulated industry exception to inspections with the *sole* purpose of obtaining evidence of criminal violations.[188] Because the search conducted in *Burger* was not necessary to ascertain the existence of administrative violations under the statute—the failure to post a registration number and the failure to keep a record book—the sole purpose of the search, Justice Brennan argued, was to obtain evidence of criminal violations.[189] Justice Brennan noted that the Court has "properly recognize[d] that a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions."[190] However, he emphasized, the Court has never "allowed the state to conduct an 'administrative search' [for acts] which violated no administrative provision and had no possible administrative consequences."[191] Thus, he implored that "[i]f the Fourth Amendment is to retain meaning in the commercial context, it must be applied to searches for evidence of criminal acts even if those searches would also serve an administrative purpose, unless that administrative purpose takes the concrete form of seeking an administrative violation."[192]

Thus, while the Supreme Court has long expressed a strong preference for probable cause, particularity, and a warrant for a search to be found reasonable under the Fourth Amendment, development of the administrative warrant and closely regulated industry exception to the warrant requirement has eliminated these requirements in certain situations. As established by *Camara*,[193] routine administrative inspections may be conducted with a lesser degree of particularity and probable cause via an administrative warrant supported by an existing regulatory scheme. In the case of an inspection under the closely regulated industry exception to the warrant requirement, however,

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187. *See id.* at 724-28.

188. *See id.* at 724. (Brennan, J., dissenting). "The fundamental defect in § 415-a5 is that it authorized searches intended solely to uncover evidence of criminal acts." *Id.*

189. *See id.* at 725-26. Justice Brennan noted:

> [I]t is factually impossible that the search was intended to discover wrongdoing subject to administrative sanction. Burger stated that he was not registered to dismantle vehicles . . . and that he did not have a police book, as required by § 415-a5(a). At that point he had violated every requirement of the administrative scheme. There is no administrative provision forbidding possession of stolen automobiles or automobile parts.

*Id.* (footnote omitted).

190. *Id.* at 727.

191. *Id.* at 728.

192. *Id.*

193. *See supra* text accompanying notes 85-94.

neither the probable cause nor the particularity requirement of the Fourth Amendment must be met.

An inspection is permitted under the closely regulated industry exception so long as the business to be inspected operates within a closely regulated industry. The primary justification for this exception is the doctrine of implied consent. That is, by entering into business in a closely regulated industry, the proprietor consents to the regular inspections provided for by the applicable statute. Moreover, as a result of the pervasive regulations regarding the industry, the proprietor is left with a lesser expectation of privacy, thereby justifying the exception to the warrant requirement. The United States Supreme Court has stated, through *Colonnade Catering* and its progeny,[194] that the closely regulated industry exception is applicable only if: (1) the inspected business is "closely regulated" with a "long tradition of close governmental supervision" or in the case of a new and emerging industry, there is a "pervasiveness and regularity" of regulation; (2) the regulatory scheme advances a societal interest; (3) the warrantless inspections are necessary because to notify the business prior to inspection would frustrate its effectiveness; and (4) the statute or regulation permitting the warrantless search provides an adequate substitute for a warrant limiting the discretion of the inspectors regarding the time, place, and scope of the searches.

The Vermont Supreme Court has recently adopted the "closely regulated industry" exception to the warrant requirement under Article 11. In adopting this exception, however, the Vermont Supreme Court applied it to a police officer's warrantless search of a private citizen's pharmacy records. Not only is this application inconsistent with the exception as it has been developed by the United States Supreme Court, but it is also inconsistent with Vermont's long history of protecting its citizens from unreasonable—including warrantless—searches and seizures. Thus, it is instructive, before we move on, to examine the history of Article 11, Vermont's search and seizure law, as it applies to warrantless investigations by government officials.

## II. ARTICLE 11 OF THE VERMONT CONSTITUTION

### *A. A Brief History*

"The federal constitution was not the beginning but the climax of American institutional development."[195] Constitutional law in the United

194. *See supra* text accompanying notes 95-191.

195. William Clarence Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 ANNALS AM. ACAD. POL. & SOC. SCI. (3) 416 (1897).

States began with the states. "The chief cause which led to the formation of the first state constitutions was, of course, the conflict between the colonies and the English king; and especially the hostile attitude assumed by the royal governors."[196] While this attitude was likely present in Vermont, promulgation of Vermont's Constitution was also in large part instigated by ongoing land disputes with New York.[197] The general need for state constitutions became apparent to the Continental Congress "after the breaking out of open hostilities" with England even before Congress' Declaration of Independence.[198] To address this concern, Congress issued formal recommendations in 1775 and 1776 to the different colonies suggesting that they develop independent governments.[199] The Vermont and Pennsylvania Constitutions are two of the earliest in America.[200] Thus, "constitutional protection against unreasonable searches and seizures existed in [Vermont[201] and] Pennsylvania more than a decade before the adoption of the Federal Constitution, and fifteen years prior to the promulgation of the Fourth Amendment."[202]

Pennsylvania's constitution was promulgated as a result of a secret request by the Second Continental Congress.[203] The citizens of Pennsylvania responded favorably, and over four thousand people appeared at the public meeting to approve a resolution to adopt their own constitution.[204] The

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196. William C. Morey, *The First State Constitutions*, 4 ANNALS AM. ACAD. POL. & SOC. SCI. (2) 218 (1893).

197. *See* Jeff Potash, Vermont's Amendment XI: An Historical Perspective, at Part II(a) (Sept. 1985) (on file with *Vermont Law Review*).

> It is common knowledge than [sic] Dr. Thomas Young, a friend of Ethan, offered the recently completed Pennsylvania document to the Vermonters with the advice that [it was] 'close to perfect.' The origins of the Penn. amendment may be traced to the earlier Virginia document. The radical language employed against search and seiqure [sic] spoke directly to the writs of assistence [sic] exercised by the British indiscriminately to deny colonials of what they construed to be common law privileges.

*Id.*

198. Morey, *supra* note 195, at 218.

199. *See* Ken Gormley, *A New Constitutional Vigor for the Nation's Oldest Court*, 64 TEMP. L. REV. 215, 215-16 (1991).

200. *See id.*

201. Vermont's Constitution was adopted in July of 1777. *See infra* text accompanying notes 211-15.

202. Commonwealth v. Sell, 470 A.2d 457, 466 (Pa. 1983). For the search and seizure language of the 1776 Pennsylvania Constitution see *infra* note 208. The current language of section I, article 8 of the Pennsylvania Constitution reads:

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

PA. CONST. art. I, § 8 (1776).

203. *See* Gormley, *supra* note 198, at 215.

204. *See id.* at 216.

Constitutional Convention began on July 15, 1776[205] and adjourned in less than three months.[206] Thus, the Pennsylvania Constitution and its declaration of rights became a model for numerous other state constitutions[207] and, in fact, was the document from which Vermont's constitution and declaration of rights was derived.[208] Pennsylvania's "Declaration of Rights" was located in Chapter I of its constitution and was comprised of fifteen articles of individual rights.[209] This bill of rights, as well as Vermont's and the five other bills of rights of the American revolutionary age, embodied a "clearer and more comprehensive definition of individual rights than had ever before been made in practice" as they were "declared to be beyond legislative and executive interference, and judiciaries . . . were created for their just interpretation."[210] Unfortunately, no details are given of the proceedings or debate of the Convention of 1776 in relation to the Pennsylvania Constitution, as the journals of the convention say only "[t]hat the house resumed the consideration of the frame of government, and after some time adjourned."[211]

Vermont's Constitution was drafted by convention beginning on July 2, 1777, when forty delegates were called to Windsor from approximately thirty Vermont towns.[212] One might wonder how any convention could draft a constitution in such a short time. The fact is that it did not. The Vermont 1777 Convention adopted Pennsylvania's 1776 constitution changing the name "Pennsylvania" to "Vermont," adding its own preamble and inserting a few clauses providing for greater individual liberties—including, but not limited to, universal suffrage and the first prohibition of slavery in this country.[213] No

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205. *See* John S. Wiestling, THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790 at 54 (1825).

206. *See* Gormley, *supra* note 198, at 216.

207. *See id.* The Pennsylvania Constitution, however, was not an entirely unique document. Rather, the revolutionary bills of rights are "only a link in a long chain of institutional development, running back through the English Bill of Rights and Petition of Rights to Magna Charta [sic] . . . ." Webster, *supra* note 194, at 384.

208. *See* 12 STAE [SIC] PAPERS OF VERMONT 4 (Allen Soule ed., 1964).

209. *See* Wiestling, *supra* note 204, at 55-57. Article X of this chapter provided the citizens of Pennsylvania protection from arbitrary searches and seizures and read:

> That the people have a right to hold themselves, their houses, papers and possessions free from search and seizure; and therefore warrants, without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property not particularly described, are contrary to that right, and ought not to be granted.

*Id.* at 56.

210. Webster, *supra* note 194, at 385.

211. *See* Wiestling, *supra* note 204, at 53.

212. *See* 12 STATE PAPERS OF VERMONT 3 (Allen Soule ed., 1964).

213. *See* 12 STATE PAPERS OF VERMONT 5 (Allen Soule ed., 1964). Other important additions to the Pennsylvania Constitution for purposes of adoption in Vermont included Article II, compensation for takings; Articles 3 and 9, "Security of Protestants against civil disabilities on account of religion;" Article IV, "The right to govern internal police inherent in the people of the State solely;" Article 11, the requirement of an oath

complete official or even unofficial accounts of the Vermont Convention of 1777 exist and no records of the deliberations over Article 11, if any occurred, have ever been found.[214] In fact, the circumstances surrounding adoption of the Vermont Constitution—including Ira Allen's account of the need for the militia to go to Ticonderoga and the description of the ensuing thunderstorm[215]—and the absence of significant changes to the Pennsylvania template suggest that "little care was given to the particulars of [the bill of rights]."[216]

One ingredient unique to the Pennsylvania and Vermont Constitutions is the provision for a quasi-judicial body known as the Council of Censors.[217] In Pennsylvania, the Council of Censors was comprised of "two persons from each city and county" and in Vermont by "thirteen persons."[218] The Councils were entrusted with the responsibility of inquiring into the constitutionality of the various acts of the legislatures, as well as proposing amendments to the constitutions.[219] Thus, looking at the Councils' journals could prove useful in determining original interpretation of the various constitutional provisions.

The journals of Vermont's Council of Censors, however, are more a listing of the events that occurred than they are an account of the actual debate that took place. That is, the journals record when and what motions were

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prior to the issuance of a writ of debt; Article 19, prohibiting transport of someone out of state for a trial of an offense committed therein; Section VI of Plan or Frame of Government, form of freeman's oath; Section XIV of Plan or Frame of Government, provisions against hasty law-making and restrictions of the Governor and the Council; and Section XXXIV of the Plan or Frame of Government, power of the General Assembly to regulate fishing. 17 STATE PAPERS OF VERMONT 54 (John A. Williams ed., 1969).

214. *See* RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT vii (Paul S. Gillies & D. Gregory Sanford eds., 1991) [hereinafter RECORDS OF THE COUNCIL OF CENSORS]. "There is no journal for the Conventions of 1777 or 1786, and the journal of 1793 is available only by happenstance." *Id.* at n.1. *See also* Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 30 n.43 (1988).

215. *See* STAE [SIC] PAPERS OF VERMONT, *supra* note 207. Ira Allen's account of the convention was as follows:

> A draft of a constitution was laid before the Convention, and read. The business being new, and of great consequence, required serious deliberation. The Convention had it under consideration when the news of the evacuation of Ticonderoga arrived, which alarmed them very much, as thereby the frontiers of the State were exposed to the inroads of an enemy. The family of the President of the Convention, as well as those of many other members, were exposed to the foe. In this awful crisis the Convention was for leaving Windsor, but a severe thunderstorm came on, and gave them time to reflect, while other members, less alarmed at the news, called the attention of the whole to finish the Constitution, which was then reading paragraph by paragraph for the last time. This was done, and the Convention then appointed a Council of Safety to act during the recess, and the Convention adjourned.

*Id.* (quoting Ira Allen's account of the 1776 convention printed in 1 GOVERNOR AND COUNCIL 62 (E.P. Walton ed., 1873)).

216. *See* Potash, *supra* note 196, at Part II(d).

217. *See* Webster, *supra* note 194, at 413.

218. *Id.*

219. *See* Webster, *supra* note 194, at 413. By a two-thirds vote, the Councils of Censors could call constitutional conventions for the purpose of amending the constitution. *See id* at 414.

made and if they were passed but include little account of the actual dialogue.[220] In fact, the Council of Censors did not originally intend for its journals to be published, and when they began to be published in 1813 the minutes were revised and edited by the Council prior to publication.[221] As a result, records of the actual deliberations and draft reports of the Council of Censors were never published and, unfortunately, not even preserved.[222] Thus, a frustrated practitioner attempting to ascertain the intent of the framers of the Vermont Constitution has very little information to evaluate.[223]

A brief look at the contemporary practices of Vermont's officials is instructive in deciphering Vermont's interpretation of its constitution. Based on these practices, one could conclude that the framers of the Vermont Constitution did not place very much weight on the Declaration of Rights or on the Vermont Constitution in general.[224] For instance, in focusing on the need to secure Vermont's borders from the British, New York, and Yorker sympathizers, one of the first acts of the General Assembly—under the new constitution—was to create "confiscation courts" with the duty and discretion of seizing the property of any enemy sympathizers.[225] Additionally, in March of 1778, the General Assembly passed legislation entitled *An Act to Prevent Traitorous Conspiracies Against This and the United States of America.*[226] This Act, virtually ignoring Article 11, permitted officials to stop and examine, with or without a warrant, all people traveling within the state.[227] Moreover, petitioners submitting grievances to the Council of Censors made no mention of the liberties enumerated in the Declaration of Rights.[228] This failure of government officials and citizens alike to consider the constitution strongly suggests that the framers may not have realized the significance of the Declaration of Rights or simply refused to implement it.

However, this phenomena of ignoring the requirements of the Vermont Declaration of Rights may simply have been the result of an undeveloped understanding of the role of constitutional law. Thus, as a result of this incomplete understanding, the early days of Vermont statehood were characterized by a concept of legislative supremacy clearly reflected by the

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220. *See generally* RECORDS OF THE COUNCIL OF CENSORS, *supra* note 213.

221. *See id.* at vii.

222. *See id.*

223. Sources consulted were the State Library of Vermont, the Vermont State Archive, and the Vermont Historical Society. *See also* RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT (E.P. Walton ed., 1875).

224. *See* Potash, *supra* note 196, at Part II(e).

225. *Id.*, Part II(a). Ira Allen recounts that the language of the act was purposefully ambiguous to allow Vermont's officers to use their discretion in ridding Vermont of Yorker sympathizers. *See id.*

226. *See id.* (citing WILLIAM SLADE, 6 VERMONT STATE PAPERS 414 (Middlebury, 1823)).

227. *See id.*

228. *See id.* (citing WILLIAM SLADE, 6 VERMONT STATE PAPERS 21-23 (Middlebury, 1823)).

legislative actions of the first septenary.[229] This idea of legislative supremacy, and not a disavowal of the concepts of liberty embodied in the constitution, may have led to the septenary of non-constitutionalism. This theory is reinforced by the account of Reverend Pliny White that the judiciary was also considered subordinate to the legislature and would have been considered to be acting outside its power had it attempted to set aside a legislative act.[230]

By the end of the first septenary, however, a change was beginning to occur in Vermont's understanding of the role of its constitution. In response to the past "constitutionless" septenary in 1785, the first Council of Censors proposed what would prove to be quite a comprehensive list of actions of the Vermont Legislature which were found to be contrary to the constitution.[231] Additionally, in its "Address to the Freemen of the State of Vermont" on February 14, 1786, the Council chastised the legislative and executive branches for "transgressing the limits" set out to them by the Vermont Constitution.[232] The Council also proposed some amendments to the constitution—the deletion of Chapter One, Article Twelve[233] of the 1777 Vermont Constitution and the amendment of Article 11.[234] The proposed version of Article 11 would have read:

> Warrants, without oaths or affirmations first made, affording sufficient foundation for them, whereby any officer or messenger may be authorised or required to search suspected places, or to seize any person or persons,

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229. *See* John W. Rowell, *Constitutional History of Vermont in* 3 THE NEW ENGLAND STATES THEIR CONSTITUTIONAL, JUDICIAL, EDUCATIONAL, COMMERCIAL, PROFESSIONAL AND INDUSTRIAL HISTORY 1397-98 (William T. Davis, ed., 1897).

230. *See* Reverend Pliny White, *The Windsor Convention, in* 1 COLLECTIONS OF THE VERMONT HISTORICAL SOCIETY 65 (1870). Reverend White writes:

> Written constitutions were then new things, and principles of constitutional law, which now are familiar to every intelligent man, were then quite unknown. . . . The judiciary was considered as a subordinate department of the government, and an attempt by courts to set aside an act of the legislature would have been deemed a gross usurpation of power. The idea that the constitution was paramount both to legislatures and to courts had not been "dreamed of in their philosophy." Nor was it till after the constitution of the United States was adopted, in 1787, and declared to be "the supreme law of the land," that the modern science of constitutional law began to have existence. . . ."

*Id.*

231. *See* RECORDS OF THE COUNCIL OF CENSORS, *supra* note 213, at 37-42.

232. *Id.* at 60.

233. Chapter I, Article Twelve of the 1777 Vermont Constitution provided:

> [N]o warrant or writ to attach the person or estate of any freeholder within this state, shall be issued in civil action, without the person or persons, who may request such warrant or attachment, first make oath, or affirm, before the authority who may be requested to issue the same, that he, or they, are in danger of losing his, her or their debts.

VT. CONST. (1777) ch. I, art. 12 *reprinted in* RECORDS OF THE COUNCIL OF CENSORS, *supra* note 213, at 7.

234. *See* RECORDS OF THE COUNCIL OF CENSORS, *supra* note 213, at 718.

> his, her, or their property, not therein particularly described, ought not to be granted in any criminal matter or complaint.[235]

Thus, the primary difference between the 1777 version of Article 11 and the wording of the proposed search and seizure provision was the removal of two phrases: (1) the phrase—located at the very beginning of the 1777 provision—reading, "[t]hat the people have a right to hold themselves, their houses, papers and possessions, free from search and seizure," and (2) the phrase "are contrary to that right" located at the end of the 1777 provision.[236] Additionally, the amended provision would include an addition of the phrase "in any criminal matter or complaint," whereas the 1777 provision appeared to refer to both civil and criminal investigations.[237]

Pondering the reasoning behind the Council's proposed amendments, one could conclude that the 1785 Council of Censors believed that the creation of a "right" to be free from searches and seizures had resulted in too great an inhibition on law enforcement. This interpretation is consistent with the other proposed amendment to the constitution's search and seizure provision—addition of the phrase "in any criminal matter or complaint"—which would have limited the provision's applicability to searches and seizures for criminal purposes, thus liberalizing searches and seizures performed in civil investigations. As there are no records regarding the Council's debates or reasoning,[238] one must rely on educated conjecture by comparing the existing and proposed amendments.[239] Moreover, no records of the 1786 Vermont Constitutional Convention debate have survived.[240] Therefore, all that is known is that the 1786 Convention dismissed the Council's proposal to amend Chapter One, Article 11 and adopted the Council's proposal to delete Article Twelve.[241] This is significant, as the amendments made at the Convention of 1786 represent the "most

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235. *Id.*

236. *Compare* VT. CONST. ch. I, art. 11 as adopted in 1777 and printed on page 7 of the RECORDS OF THE COUNCIL OF CENSORS *with* VT. CONST. ch. I, art. 13 as proposed by the Council of Censors in 1785 and printed on page 45 of the RECORDS OF THE COUNCIL OF CENSORS, *supra* note 213.

237. *Id.*

238. There does exist a copy of the Counsel of Censors' address to the state regarding the proposed amendments. The address does not, however, give any reasoning for the proposed amendments to Article 11. *See* RECORDS OF THE COUNCIL OF CENSORS, *supra* note 213, at 58-73. At least one commentator has suggested that the fact that the Council did not address the public regarding the proposed amendment of Article 11 could indicate that the proposed changes were thought of as mere modernization of the words with no significant change in meaning. *See* Potash, *supra* note at 196, Part II(d).

239. *See* RECORDS OF THE COUNCIL OF CENSORS, *supra* note 213, at 80.

240. *See id.*

241. *See id.* "Unfortunately, no copy of the journal of Constitutional Convention has survived, so what we know of what the Convention did comes solely from a comparison of the Censors' proposals and the 1786 Constitution." *Id.*

comprehensive changes made to the Vermont Constitution,"[242] thus, one would expect more significant changes to have been proposed to Article 11 if it had been proven unworkable or unfulfilling of the framers' intent. Also significant is the addition of a new article providing enhanced protection of the individual rights of Vermont's citizens by assuring them some redress for violations of the other constitutional provisions.[243] This represents a recognition that the constitution had been, until this time, a document of theory with ineffective and disparate implementation.[244]

This trend of active involvement by the Council of Censors in constitutional interpretation continued into the beginning of the next century, when the fifth Council of Censors met in 1813 to undertake its duty of assessing the constitutionality of the laws of Vermont. This particular convening of the Council helps to shed some light on early interpretation of Chapter One, Article 11 of the Vermont Constitution. One of the acts reviewed by the Council was passed by the Vermont General Assembly on November 6, 1812 during the climate of the War of 1812 with Great Britain at which time some of the fighting was taking place in Canada.[245] The act was entitled *An Act to Prevent Intercourse with the Enemies of this and the United States*[246] and a reading of the preamble reveals that its purpose was to protect the security of Vermont and the United States by preventing enemy infiltration.[247] To this end, the second and fourth sections of this Act provided for the detention of any citizen suspected of committing or being about to commit a crime, and for the search or seizure of the trunks, papers, and/or person of any traveler to or from Canada.[248]

Upon reviewing this act, the 1813-14 Council of Censors found it repugnant to Article 11 of the Vermont Constitution.[249] The Council concluded:

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242. *Id.*

243. *See* VT. CONST. ch. I, art. 4 (1786) which provides:

> Every person within this commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character: he ought to obtain right and justice freely, and without being obliged to purchase it—completely and without any denial, promptly and without delay; conformably to the laws.

*Id.*

244. *See supra* text accompanying notes 223-29.

245. *See* RECORDS OF THE COUNCIL OF CENSORS, *supra* note 213, at 197.

246. *See id.*

247. *See* ACTS AND LAWS PASSED BY THE LEGISLATURE OF THE STAE [SIC] OF VERMONT, AT THEIR SESSION AT MONTPELIER, ON THE SECOND THURSDAY OF OCTOBER ch. 102, 141 (1812).

248. *See* RECORDS OF THE COUNCIL OF CENSORS, *supra* note 213, at 198.

249. *See id.*

> We find by the second section of the said act, that any citizen of this or the United States, while about his lawful and necessary business, may on the suspicion, or pretended suspicion, of any one, be deprived of his liberty, and held in durance until a warrant can be obtained to take him before a magistrate; *there*—not to answer for any crime committed, but to give security that he will not be guilty of the crime, which the person apprehending him, suspected he was about to commit. We find the fourth section of the act under consideration, that every person traveling through this state, under suspicious circumstances, is liable to have his trunk opened and searched—his papers, of whatever kind, searched and seized, by any and every justice of the peace, within whose jurisdiction he may happen to be; and this without any warrant obtained therefor.
>
> We need only refer you to the eleventh article of the bill of rights to prove the repugnancy of this act to our sacred constitution.
>
> This council, acting as faithful censors and guardians of the liberties of the people, cannot refrain from observing, that such acts of the legislature have a demoralizing influence on society—tend to let loose one class of citizens against the other—to produce recriminations and revenge; and to introduce discord and confusion in this once happy and peaceful state. Therefore,
>
> *Resolved,* That the speedy and unqualified repeal of said act, be recommended to the legislature; and that the secretary to this board be directed to transmit a copy hereof to the speaker of the house of assembly, to be laid before that honorable body.[250]

Upon receipt of this report, the Vermont General Assembly repealed the Act.[251] Thus, while commentators have suggested that accounts of the early days of the statehood of Vermont demonstrate an ambivalence to the individual liberties conceived by the constitution,[252] it is quite clear that by this time in 1813, the Vermont Council of Censors had begun to understand the role of the constitution in protecting the individual liberties of its citizens and the importance of a warrant in achieving this goal.

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250. *Id.* at 205-06. Additional reasons for suggesting the repeal of the Act included the Act's interference with Congress' power to regulate interstate commerce, the interference of the Act with the right to trial by jury, and the right to detain a person on mere suspicion. *See id.*

251. *See id.* at 229; *see also* Journal of the Vermont General Assembly 193 (Nov. 16, 1813).

252. *See supra* text accompanying notes 223-29.

Vermont's careful protection of individual liberties is also demonstrated in early opinions of the Vermont Supreme Court.[253] This tendency is evident in the court's Article 11 jurisprudence which implicitly recognized the general requirement for a search warrant and expressly prohibited the issuance of general warrants.[254] Thus, the most common question before the Vermont Supreme Court was not whether a warrant was required but rather, whether the issued warrant was valid.[255] For instance, in early opinions, the Vermont Supreme Court held that a valid warrant requires a written oath or affirmation,[256] a basis in probable cause, and a particular description of the place to be searched and the items or person to be seized.[257] Moreover, the court noted that a warrant for an arrest was not necessary in only "that class of cases where delay would be perilous."[258] Thus, while the primary purpose of Article 11—according to these early interpretations—is the avoidance of general warrants,[259] early jurisprudence seemed to recognize the need for most, if not all, searches to be conducted pursuant to a warrant.

Anomalous in the early cases, however, was the fact that the Vermont Supreme Court did not embrace the judicially-created exclusionary rule, and thus admitted illegally obtained evidence at trial.[260] But, in 1969 the United States Supreme Court mandated that the exclusionary rule be applied to the states when dealing with the Fourth Amendment.[261] Thus, Vermont's practice of admitting illegally obtained evidence was reversed when the Vermont Supreme Court upheld the suppression of evidence obtained in violation of the United States and Vermont constitutions.[262] Unfortunately, this reversal led the Vermont Supreme Court to abandon its independent analyses of the Fourth Amendment and Article 11, not to return to this practice until 1982.

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253. *See* Charles C. Soltan, Note, *Precedent and the Jewett Admonition*, 10 VT. L. REV. 447, 448 (1985).

254. *See* State Treasurer v. Rice, 11 Vt. 339, 343-44 (1839); Lincoln v. Smith, 27 Vt. 328, 347 (1855).

255. *See* Soltan, *supra* note 252, at 448.

256. *See Rice*, 11 Vt. at 343-44.

257. *See* Lincoln v. Smith, 27 Vt. 328, 347 (1855).

258. *In re* Powers, 25 Vt. 261, 266 (1853).

259. *See id.* at 265-66. "[Article 11] seems to be directed against general warrants, and general search warrants in particular, not specifically describing the persons, places, or property to be searched or arrested." *Id.* at 266.

260. *See* Soltan, *supra* note 252, at 447. Vermont was not alone in this practice, however, as it was one of twenty-four states, including Pennsylvania, that admitted evidence in a criminal trial without regard to how it was obtained, so long as it was "relevant, not privileged, and otherwise not competent." RICHARD LOWE, A SUMMARY OF PENNSYLVANIA LAW ON SEARCH AND SEIZURE 2-4 (1975).

261. *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961).

262. *See* Soltan, *supra* note 252, at 455 (citing State v. Miner, 128 Vt. 55, 70-71, 258 A.2d 815, 824 (1969)). The court continues to embrace this exclusionary rule in modern jurisprudence. *See* State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982).

### *B. Modern Vermont Supreme Court Jurisprudence*

In 1982, the Vermont Supreme Court began a new line of Article 11 jurisprudence when it returned to the practice of independently interpreting the Vermont Constitution in *State v. Badger*.[263] The *Badger* Court noted that the Vermont Constitution is the "fundamental charter of [the] state" with its own authority of "equal importance with the federal charter" and, therefore, it is the court's duty to enforce it.[264] Moreover, the court noted, the role of the Vermont Supreme Court in our federal system is to "consider the availability of state grounds before federal appeal."[265] The *Badger* court explained:

> [Although] the Vermont and federal constitutions have a common origin and similar purpose, [the Vermont Constitution] is not a mere reflection of the federal charter. Historically and textually, it differs from the United States Constitution. It predates the federal counterpart, as it extends back to Vermont's days as an independent republic. It is an independent authority, and Vermont's fundamental law.
>
> Although we have frequently treated parallel state and federal provisions in a similar manner, particularly in the area of criminal procedure, [the court] has never intimated that the meaning of the Vermont Constitution is identical to the federal document.[266]

This determination to properly address state constitutional issues was perhaps best expressed by the court three years later in *State v. Jewett*, when the court simply refused to decide an issue of state constitutional law as a result of inadequate briefing by the parties.[267] The Court further opined, "[w]e have an opportunity to develop a sound jurisprudence of state constitutional law that will serve not only this generation of Vermonters but those who will come after us in the decades yet to be."[268] And, until recently when it adopted the closely regulated industry exception to the warrant requirement, this is just what the court did.

One example of the Vermont Supreme Court's tendency to find greater protection under Article 11 than the Fourth Amendment is the court's refusal in *State v. Wood* to adopt the federal doctrine of standing.[269] The trial court held that the defendant did not have standing to make the claim under either the

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263. State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982).
264. *Id.* at 448, 450 A.2d at 347.
265. *Id.* at 430, 450 A.2d at 347.
266. *Id.* at 448-49, 450 A.2d at 347 (citations omitted).
267. *See* State v. Jewett, 146 Vt. 221, 229, 500 A.2d 233, 239 (1985).
268. *Id.* at 229, 500 A.2d at 238.
269. *See* State v. Wood, 148 Vt. 479, 536 A.2d 902 (1987).

Fourth Amendment or Article 11.[270] However, upon appeal the Vermont Supreme Court reversed and granted standing under Article 11.[271] In coming to such a conclusion, it was necessary for the Vermont Supreme Court to expressly decline to follow federal precedent, because the United States Supreme Court had earlier established—in *Rakas v. Illinois*—that the test for standing is whether the defendant has "demonstrated a privacy interest sufficient to come within protection of the Fourth Amendment."[272]

In declining to follow this federal precedent, the court noted that Article 11 "plays a crucial role" in "qualifying" the powers of the Government and that it is "the authority upon which the judiciary acts to protect the people from unlawful searches and seizures."[273] Thus, the court opined, "limiting the class of defendants who may invoke the right . . . frustrates the design of Article 11."[274] Moreover, the court noted that the language in Article 11—to hold themselves, their houses, papers and possessions, free from search or seizure—"creates a possessory interest such that a defendant need only assert a possessory, proprietary or participatory interest in the item seized or the area searched to establish standing to assert an Article 11 challenge."[275] Thus, in rejecting the United States Supreme Court standing requirements, the Vermont Supreme Court created a standing rule more forgiving than that of federal precedent, thereby providing greater protection from unreasonable searches and seizures.

A second instance in which the Vermont Supreme Court expanded the doctrine of standing in order to permit a complainant to reach the merits of his case occurred in *State v. Berard* in 1990, where the court refused to adopt the United States Supreme Court's per se rule against granting prisoners standing.[276] As previously discussed, to establish an unreasonable search or seizure under the Fourth Amendment, one must first establish that there existed a reasonable expectation of privacy in the area searched or from which the evidence was seized.[277] For example, in *Hudson v. Palmer*, the United States Supreme Court held that a prisoner retains *no* privacy or possessory rights such that they "have no legitimate expectation of privacy and that the Fourth Amendment's prohibition on unreasonable searches does not apply . . . ."[278]

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270. *See id.* at 480, 536 A.2d at 902-03.

271. *See id.* at 491, 536 A.2d at 909.

272. *Id.* at 483, 536 A.2d at 904 (interpreting Rakas v. Illinois, 439 U.S. 128 (1978)).

273. *Id.* at 487-89, 536 A.2d at 907-08.

274. *Id.* at 488, 536 A.2d at 908.

275. *Id.* Moreover the court found that "[t]he preliminary inquiry . . . looks no further than to determine whether the protected interest exists. If that interest is established, the reviewing court shifts its focus to the primary assessment of the substantive Article 11 challenge." *Id.* at 490, 536 A.2d at 908.

276. *See* State v. Berard, 154 Vt. 306, 576 A.2d 118 (1990).

277. *See* Katz v. United States, 389 U.S. 347, 361 (1967).

278. Hudson v. Palmer, 468 U.S. 517, 530 (1984).

Thus, under federal precedent, a prisoner would never reach the merits of his case. Declining to adopt the federal rule, the Vermont Supreme Court held,

> Whatever the evolving federal standard, when interpreting Article 11, this Court will "abandon the warrant and probable-cause requirements, which constitute the standard of reasonableness for a government search that the Framers established, only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . ."[279]

Thus, the court upheld the applicability of Article 11 to searches of prisoners' cells and granted them standing under Article 11.[280] To address the administrative needs of prison officials, however, the court conducted a balancing test and devised a scheme under which a warrant and probable cause would not be necessary for routine prison cell inspections.[281] The court held that a random warrantless search of a prison cell does not violate Article 11 only if: there are clear, objective guidelines established by administrative officials, those guidelines are implemented, and the system prevents a "systematic singling out of inmates in the absence of probable cause or articulable suspicion."[282] Thus, the Vermont Supreme Court granted the prisoners standing—not provided under the Fourth Amendment—while preserving the administrative integrity of Vermont's prisons.

The Vermont Supreme Court also expressed its willingness and commitment to find greater protections under Article 11 than provided under the Fourth Amendment in *State v. Oakes*[283] when it declined to adopt the *United States v. Leon* "good faith exception" to the exclusionary rule.[284] In *Leon*, the United States Supreme Court held the exclusionary rule inapplicable when a police officer reasonably relies on a search warrant later held to be invalid.[285] The reasoning behind the *Leon* exception is that while the purpose of the exclusionary rule is to dissuade police officers from conducting searches which are unlawful under the Fourth Amendment, a police officer reasonably relying on a warrant has acted consistent with the spirit of the Fourth Amendment because he believed the warrant to be valid.[286] Thus, excluding

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279. *Berard*, 154 Vt. at 310-11, 576 A.2d at 120 (citing O'Connor v. Ortega, 480 U.S. 709, 741 (1987)).

280. *See id.* at 311, 576 A.2d at 121.

281. *See id.* at 313-17, 576 A.2d at 122-24.

282. *Id.* at 314, 576 A.2d at 122.

283. *See* State v. Oakes, 157 Vt. 171, 173, 598 A.2d 119, 121 (1991) (rejecting the *Leon* good faith exception to the exclusionary rule).

284. *See Oakes*, 157 Vt. at 173, 598 A.2d at 121.

285. *See* United States v. Leon, 468 U.S. 897, 922 (1984).

286. *See id.*

evidence obtained during a warrant-based search would provide only marginal benefit to society and would result in a substantial "interference with the criminal justice system's truthfinding function."[287]

When refusing to adopt the good faith exception, the Vermont Supreme Court summarized the approach taken by the United States Supreme Court and noted that its duty is to assess the Court's reasoning and to decline to adopt it if it finds it flawed.[288] Thus, the Vermont Supreme Court held that the Court's determination concerning the exclusionary rule's costs to society are "substantial" were inaccurate.[289] The court noted that the deterrent effect of excluding evidence obtained under an invalid warrant is not substantial because the

> exclusionary rule's deterrent effect . . . does not rest primarily on 'penalizing' an individual officer into future conformity with the Constitution. Rather, it rests on 'its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.'[290]

Thus, the Vermont Supreme Court opined that to adopt the "good faith" exception would promote sloppy applications for warrants and magistrate shopping.[291] Such an adoption, the court noted, would fail to give officers guidance as to what level of probable cause is necessary to support an application for a search warrant.[292]

Thus, in *Oakes* the court conducted its own, independent, empirical analysis of the merits of the "good faith" exception to the exclusionary rule referencing the federal analysis only to determine if it was a logical and desirable rule for adoption in Vermont. Finding that the Court's analysis inadequately supported the exception, the Vermont Supreme Court declined to

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287. *Id.* at 907.

288. *See Oakes*, at 174-75, 598 A.2d at 122.

> By treating the federal exclusionary rule as a judicially created remedy rather than a constitutional right, the Supreme Court's decision focuses, not on interpretation of the Federal Constitution, but on an attempted empirical assessment of the costs and benefits of creating a good faith exception to the federal exclusionary rule. This empirical assessment can inform this court's decision on the good faith exception only to the extent that it is persuasive. If the assessment is flawed, this court cannot simply accept the conclusion the Supreme Court draws from it. To do so would be contrary to our obligation to ensure that our state exclusionary rule effectuates Article 11 rights, and would disserve those rights.

*Id.*

289. *See id.* at 183-84, 598 A.2d at 126.

290. *Id.* at 180, 598 A.2d at 125 (citations omitted).

291. *See id.* at 181, 598 A.2d at 125. This would be so, the court noted, because the applicability of the exclusionary rule would be in no way tied to the officer's diligence in determining probable cause—any warrant would do whether appropriately or inappropriately issued. *See id.*

292. *See id.*

adopt it for Article 11 search and seizure violations, thereby affording Vermont citizens the right to apply the exclusionary rule when a search is conducted under an invalid search warrant.[293]

The Vermont Supreme Court applied a similar mode of analysis and rationale in *State v. Kirchoff* when it declined to adopt the federal "open fields" doctrine which permits warrantless searches of areas outside the curtilage of any house or dwelling.[294] The defendant claimed this warrantless search was a violation of his Article 11 rights to be free from unreasonable searches and seizures.[295] The Vermont Supreme Court noted that under the federal open fields doctrine, the officers search would be lawful because the area where the evidence was found was located outside the curtilage of any building.[296] It declined, however, to adopt the federal precedent and created its own, modified version of the open fields doctrine.[297] The proper inquiry, the court explained, is "whether a reasonable person should know that the occupant has sought to exclude the public."[298] Moreover, the burden is on the State to prove that a warrantless search is not prohibited under Article 11.[299] Thus, noting the importance of "No Trespassing" signs in achieving this goal, the court held that the defendant's intent to preserve his privacy was obvious and, thus, the officers' search had violated Article 11.[300]

Most important to the *Kirchoff* case, however, is not the court's final holding, but the reasoning by which the court arrived at its decision. First, the court conducted a textual analysis of the two applicable clauses of the Fourth Amendment and Article 11.[301] Through this analysis, the court noted, that an important textual difference is that Article 11 protects "persons, houses, papers, and *possessions*, while the Fourth Amendment protects persons, houses, papers and *effects*."[302] Recognizing that no record of Vermont's constitutional debate exists to shed light on the framers rationale for using the term "possessions," the court conducted an historical examination of the terms.[303] The term "possessions," the court noted, may have had a broader meaning

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293. *See id.* at 184, 598 A.2d at 127.

294. *See* State v. Kirchoff, 156 Vt. 1, 587 A.2d 988 (1991) (holding that there exists no *reasonable expectation of privacy* in such areas) (emphasis added).

295. *See id.* at 2, 587 A.2d at 990.

296. *See id.* at 3, 587 A.2d at 990. *See also* Oliver v. United States, 466 U.S. 170, 178 (1984) (holding that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home").

297. *See Kirchoff*, 156 Vt. at 10-14, 587 A.2d at 994-97.

298. *Id.* at 10, 587 A.2d at 994.

299. *See id.* at 13, 587 A.2d at 996.

300. *See id.* at 14, 587 A.2d at 998.

301. *See id.* at 4-7, 587 A.2d at 991-92.

302. *Id.* at 4, 587 A.2d at 991.

303. *See id.* at 5-6, 587 A.2d at 991-92.

during the eighteenth century than did the term "effects."[304] This is possible because some of Vermont's sibling states—with similar constitutional language—have previously so held.[305]

Second, the court noted that a textual analysis is not dispositive when interpreting a constitution.[306] Rather, the court opined that it is the duty of the court to "honor not merely the words but the underlying purposes of constitutional guarantees, and to give meaning to the text in light of contemporary experience."[307] Thus, the duty of the court, they found, is to "discover and protect the core value that gave life to Article 11."[308] Therefore, the court conducted an independent assessment of the quality of the federal jurisprudence and concluded that it does not adequately protect the values of Article 11.[309] The court reasoned "constitutional rights should not succumb to waning expectations or fluctuations in the degree of government intrusion 'society' is willing to condone."[310] Furthermore, the court noted:

> As the reasonable-expectation-of-privacy test is applied in federal law, constitutional rights diminish with advances in technology . . . our role is to protect constitutionally guaranteed privacy, not to acquiesce in its erosion if and as people's expectations ebb. 'We strive, when interpreting these seminal constitutional provisions, to effectuate their purposes—to lend them meanings to ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials.'[311]

Thus, the *Kirchoff* opinion not only illustrates the Vermont Supreme Court's tendency to grant more protection under Article 11 than provided by the Fourth Amendment, but it also demonstrates the type of analysis used by the court to achieve this end. As is it difficult to find significant textual or historical differences between the Fourth Amendment and Article 11, the court is left with only the less desirable alternative of simply disagreeing with the basic reasoning of the federal doctrine. The *Kirchoff* decision therefore represents the Vermont Supreme Court's general willingness to go this far when the court feels that the core values of Article 11 are in jeopardy.

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304. *See id.*
305. *See id.* at 6, 587 A.2d at 992.
306. *See id.*
307. *Id.*
308. *Id.*
309. *See id.* at 7-10, 587 A.2d at 993-94.
310. *Id.* at 8, 587 A.2d at 993.
311. *Id.* at 12, 587 A.2d at 996 (quoting *Oliver*, 466 U.S. at 187 (Marshall, J., dissenting)).

Finally, the Vermont Supreme Court recently reinforced the value of a warrant in protecting Vermont's citizens against unreasonable searches and seizures under Article 11. In *State v. Savva* the Vermont Supreme Court declined to adopt the federal automobile exception to the warrant requirement.[312] In *Savva*, the defendant was stopped for traveling at speeds of eighty to eighty-five miles per hour.[313] After approaching the vehicle, the police officer requested the defendant to exit the car and, smelling marijuana, the officer searched the entirety of the car including a closed paper bag containing marijuana.[314] This search is justified under the Fourth Amendment "automobile exception" to the warrant requirement which permits police officers to search the entirety of a vehicle and its contents once there is probable cause to believe the vehicle contains evidence of a crime.[315] No warrant is required. Thus, the sole question in *Savva* was whether the Vermont Supreme Court would adopt the "automobile exception" by applying it to the warrant requirement under Article 11.[316]

First, the Vermont Supreme Court traced the long and confusing line of Fourth Amendment "car cases" and, disagreeing with the Court's reasoning for the exception, declined to adopt it.[317] Generally, the court noted, federal precedent recognizes a per se diminished expectation of privacy associated with vehicles which dispenses with the need for a warrant even for objects within the car that are not in plain view.[318] The United States Supreme Court's reasoning for this rule is to prevent "'nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages . . . .'" which get in the way of effective law enforcement.[319] This conclusion, the Vermont Supreme Court reasoned, "is an ironic twist in fourth amendment jurisprudence [as] it has long been established that the 'mere fact that law enforcement may be made more efficient can *never* by itself justify

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312. State v. Savva, 159 Vt. 75, 616 A.2d 774 (1992).

313. *See id.* at 77, 616 A.2d at 775.

314. *See id.* at 77-78, 616 A.2d at 775.

315. *See* United States v. Ross, 456, U.S. 798, 825 (1982). "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* This doctrine is based in part on the creation of an exigency inherent in the mobility of the vehicle. *See id.* at 806-07. Additionally, it is based on the Court's finding of a lesser expectation of privacy in a vehicle because they are in plain view and subject to "pervasive and continuing governmental regulation and controls." *Savva*, 159 Vt. at 81, 616 A.2d at 777.

316. *See Savva*, 159 at 77, 616 A.2d at 775.

317. *See id.* at 79-85, 616 A.2d at 776-79.

318. *See id.* at 80, 616 A.2d at 777 (citing, among others, *Ross*, 456 U.S. at 825; South Dakota v. Opperman, 428 U.S. 364 (1976); Cardwell v. Lewis, 417 U.S. 583 (1974)). "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross*, 456 U.S. at 825.

319. *Savva*, 159 Vt. at 83, 616 A.2d at 778 (citing *Ross*, 456 U.S. at 842.).

disregard of the Fourth Amendment.'"[320] Thus, the Vermont Supreme Court declined to apply this federal precedent to Article 11.

At the outset of its Article 11 analysis, the Vermont Supreme Court noted the independent nature of the Vermont Constitution and its role in protecting the individual rights of Vermont citizens.[321] Then the court established the value of a warrant in protecting the citizens of Vermont from unreasonable searches and seizures.[322] "The warrant requirement," the court noted, "is a 'sound policy judgment that, absent exceptional circumstances, the decision to invade the privacy of an individual's personal effect should be made by a neutral magistrate rather than an agent of the Executive.'"[323] Thus,

> a warrant requirement is not a starting point for deriving exceptions that balance citizens' interests in privacy against law enforcement's interest in expeditious searches. Rather, it is the balance reached by the constitutional drafters, a balance in which the individual's interest in privacy outweighs the burdens imposed on law enforcement, such that those subjected to searches must be protected by advance judicial approval.[324]

With this statement in mind, the court adopted the general warrant requirement which holds warrantless searches per se unreasonable except in "a few specifically established and well-delineated exceptions."[325] To this end, the court declared "[w]e are convinced that the warrant requirement is a must and must remain a central part of Article 11."[326]

Finally, the court noted that regardless of the general requirement for a warrant, some circumstances would justify a warrantless search.[327] However, the court reinforced that these searches must be conducted in the least intrusive manner possible and may only be permitted in exigent circumstances.[328] Thus,

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320. *Id.* at 83, 616 A.2d at 778-79 (citing Mincey v. Arizona, 437 U.S. 385, 393 (1978)) (emphasis added).

321. *See id.* at 84, 616 A.2d at 779.

322. *See id.* at 85, 616 A.2d at 779.

323. *Id.* (citing California v. Acevedo, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting)).

324. *Savva*, 159 Vt. at 85-86, 616 A.2d at 780 (citing United States v. Harris, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting)).

325. *Id.* at 86, 616 A.2d at 780 (quoting Katz v. Unites States, 389 U.S. 347, 357 (1967)).

326. *Id.* at 87, 616 A.2d at 781.

327. *See id.* at 88, 616 A.2d at 781.

328. *See id.* at 90, 616 A.2d at 781. Summarizing its position regarding the warrant requirement the Vermont Supreme Court opined:

> How often we hear the clamor of the moment that Article 11 is used as a barrier to effective law enforcement, and how often people forget that Article 11 *is* the balance struck between liberty for the individual (privacy and sense of security) and the convenience of unchecked crime detection. That balance requires authorities to have good cause to invade privacy and to filter decisions through a judicial process. When legitimate exigencies make the judicial process

the court held unconstitutional the warrantless search of the closed container in defendant's vehicle unconstitutional under Article 11 because it not only implicated privacy interests, but also failed to justify the search under the exigent circumstance exception.[329]

In each of these cases, the Vermont Supreme Court has rejected federal precedent and adopted alternative approaches resulting in greater protection from arbitrary search and seizure. In some of these cases, prior to adopting its own rule, the court attempted to ascertain textual or historical reasons for the proposed divergence. Generally, however, these approaches have failed because of the textual similarity of the provisions and the paucity of historical information regarding the promulgation of the particular provisions of the Vermont Constitution. The lack of textual and historical support, however, has not prevented the Vermont Supreme Court diverging from federal precedent when it finds it repugnant. The Vermont Supreme Court is not unique in this approach; Pennsylvania Supreme Court jurisprudence is characterized by the same trend. Because the Vermont Constitution is a direct descendant of the Pennsylvania Constitution, a brief look at recent Pennsylvania constitutional jurisprudence is instructive.

### *C. Article One, Section Eight of the Pennsylvania Constitution: A Brief Overview of Recent Jurisprudence*

The Pennsylvania Supreme Court tends to conduct independent analyses under the Pennsylvania Constitution[330] and has "not hesitated to interpret Section Eight as affording greater protection to defendants than the Federal Constitution."[331] For instance, in *Commonwealth v. Sell*, the Pennsylvania Supreme Court expressly declined to attach the federal definition of "a legitimate expectation of privacy" to a Section Eight determination of standing

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> impractical (not merely inconvenient), common sense dictates reasonable accommodations. But the exigencies and assessment . . . must be real, not legal figments or fictions designed to mask the values and purposes of Article 11.

*Id.* at 91-92, 616 A.2d at 783 (emphasis added).

329. *See id.* at 91, 616 A.2d at 783.

330. *See* Gormley, *supra* note 198, at 218. Although the language of Pennsylvania's search and seizure provision has been modified twice since its promulgation and moved around in the constitutional document, the Pennsylvania Supreme Court has found the current text to embody the same principles on which the language was first adopted. *See* Commonwealth v. Sell, 470 A.2d 457, 467 (Pa. 1983).

> In construing article I, section 8, we find it highly significant that the language employed in that provision does not vary in any significant respect from the words of its counterpart in our first constitution. . . . Rather, the survival of the language now employed in article I, section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as a part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.

*Id.*

331. *Sell*, 470 A.2d at 467.

because the United States Constitution did not adequately protect the rights embodied in Section Eight of the Pennsylvania Constitution.[332] In reaching this conclusion, the Pennsylvania Supreme Court opined that Section Eight "mandates greater recognition of the need for protection from illegal governmental conduct offensive to the right of privacy."[333]

*Commonwealth v. Edmunds* is another example of the Pennsylvania Supreme Court's divergence from federal precedent to afford its citizens greater protection.[334] In *Edmunds*, the court declined to adopt the federally created good faith exception to the warrant requirement. In determining whether Section Eight affords greater protection to Pennsylvania's citizens, the Pennsylvania Supreme Court considered the history and text of Section Eight.[335] While noting that it was not bound to follow federal precedent,[336] the court found that Section Eight was drafted in response to "sweeping searches" conducted by the British; "the issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen."[337] This history suggests a different purpose behind the Pennsylvania exclusionary rule than the purpose recognized by federal precedent: rather than just deterring the individual actions of police officers, the Pennsylvania exclusionary rule "insulates [its citizens] from dictatorial and tyrannical rule . . . and [thereby] preserves the concept of democracy . . . ."[338]

In interpreting Article 11 of the Vermont Constitution as it applies to inspections of closely regulated industries, it is also instructive to look to the Pennsylvania Supreme Court's treatment of the closely regulated industry exception under Section Eight of the Pennsylvania Constitution. Unfortunately, while the Pennsylvania Supreme Court has frequently applied the closely regulated industry exception as it relates to the Fourth Amendment, no Pennsylvania court has yet conducted an independent analysis of the

332. *See id.* at 457-68.
333. *Id.* at 468.
334. *See* Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991).
335. *See id.* at 895-96.
336. *See id.*
337. *Id.* at 897.
338. *Id.* at 899 (quoting Commonwealth v. Miller, 513 Pa. 118, 127 (1986)).

exception under Section Eight of the Pennsylvania Constitution.[339] Thus, the unreasonableness of the search under Section Eight has never been decided.

One Pennsylvania Supreme Court case could, however, shed some light on the court's likely holding, should the exception be applied against an individual consumer of a closely regulated industry. In *Commonwealth v. DeJohn*, the Pennsylvania Supreme Court was faced with the question of whether to afford standing to a defendant claiming an unconstitutional search of her bank records.[340] Expressly rejecting the federal precedent, the Pennsylvania Supreme Court upheld the defendant's claim for standing.[341] The court adopted the California Supreme Court's reasoning in *Burrows v. Superior Court of San Bernadino County*, and granted standing:

> It cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations, will remain private, and that such expectation is reasonable. . . . For all practical purposes the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account.[342]

Moreover, the court opined that allowing police access to bank records without a warrant would "open the door to a vast and unlimited range of very real abuses of police power."[343] Judicial enforcement must keep up with the pace of society and protect individual privacy even in the face of new intrusions.[344] Noting the limited purpose for which the defendant had revealed her information to the bank, the court held that the defendant did not waive her right to privacy or in any way consent to the search.[345] Thus, the court declined to follow federal precedent—which denies a person standing over his

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339. *See e.g.*, Commonwealth v. Slaton, 608 A.2d 5 (Pa. 1992); Commonwealth v. Lutz, 516 A.2d 339 (Pa. 1986); Commonwealth v. Buckman, 574 A.2d 697 (Pa. Super. Ct. 1990); Commonwealth v. Person, 560 A.2d 761 (Pa. Super. Ct. 1989); Commonwealth v. Black, 530 A.2d 423 (Pa. Super. Ct. 1987); Forsythe v. Commonwealth, 601 A.2d 864 (Pa. Commw. Ct. 1992); Luzzi v. State Horse Racing Comm'n, 548 A.2d 659 (Pa. Commw. Ct. 1988); Peterson v. Pennsylvania State Horse Racing Comm'n, 449 A.2d 774 (Pa. Commw. Ct. 1982); In re Catering Club Liquor License No. CC-4837, 438 A.2d 662 (Pa. Commw. Ct. 1981). *But see* Commonwealth v. Santner, 454 A.2d 24 (Pa. Super. Ct. 1982) (holding in the case of an administrative warrant, Section Eight requires at least as much particularity in the description of things to be searched or seized as required under the Fourth Amendment).

340. *See* Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979).

341. *See id.* at 1291.

342. *Id.* at 1289 (quoting Burrows v. Superior Court of San Bernadino County, 529 P.2d 590, 593 (Cal. 1974)).

343. *Id.* at 1290.

344. *See id.*

345. *See id.*

bank records because they are in the hands of a third party[346]—and granted the defendant standing because his privacy rights under Section Eight of the Pennsylvania Constitution were implicated.[347] While it is not evident from *DeJohn* whether the Pennsylvania Supreme Court would have found the warrantless search of the defendant's bank records to be unconstitutional, it is clear that the court diverged from federal precedent when it recognized a legitimate expectation of privacy in documents held by a third party for a limited purpose.

## III. APPLICATION OF THE CLOSELY REGULATED INDUSTRY EXCEPTION IN VERMONT

This Note has traced the development of the closely regulated industry exception by the United States Supreme Court[348] and the historical background of Article 11 of the Vermont Constitution.[349] Additionally, it has surveyed Vermont search and seizure case law examining the Vermont Supreme Court's trend in granting greater protection against unreasonable searches and seizures under Article 11[350] than otherwise available under the Fourth Amendment. Because the Vermont Supreme Court has recently adopted the closely regulated industry exception to the warrant requirement under Article 11 of the Vermont Constitution, this Note will now ask whether applying this exception to a private consumer's pharmacy records is consistent with the Fourth Amendment and Article 11.

### *A. State v. Welch—Factual Summary*[351]

It was the evening of October 5, 1988 when a nurse working at a Vermont county correctional facility was first suspected of diverting two Vicoden tablets from the pharmacy's supply.[352] An internal investigation culminated in the nurse's confession.[353] However, the confession was given only pursuant to an agreement between the nurse and the correction center,

346. *See* United States v. Miller, 425 U.S. 435 (1976).
347. *See DeJohn*, 403 A.2d at 1291.
348. *See supra* notes 24-193 and accompanying text.
349. *See supra* notes 194-261 and accompanying text.
350. *See supra* notes 329-46 and accompanying text.
351. *See* State v. Welch, 160 Vt. 70, 624 A.2d 1105 (1992).
352. *See id.* at 73-74, 624 A.2d at 1107.
353. *See id.* at 74, 624 A.2d at 1107.

known as a *Garrity*[354] warning, and could not be used as evidence in any subsequent criminal proceeding.[355]

In March of 1988 another employee at the correctional facility sent a letter regarding these events to the Vermont State's Attorney. The Vermont State Police Drug Task Force began a criminal investigation.[356] The investigatory steps taken by the task force were as follows: first, the investigating officer contacted one of the suspect's co-workers and learned about the events of the day on which Vicoden pills were taken, including the nurse's subsequent confession; next the officer contacted her supervisor who confirmed that she had admitted to taking the tablets; finally the officer attempted to interview the nurse but she refused and only gave him a prepared statement which did not refer to the stolen Vicoden tablets.[357]

Upon reviewing this information, the State's attorney decided not to pursue criminal proceedings.[358] However, the Vermont State Police Drug Task Force continued its investigation.[359] The investigating officer's supervisor commenced a second investigation of the nurse's personal records at area pharmacies for evidence of "doctor shopping—i.e., securing prescriptions for controlled substances from more than one practitioner."[360] Without a search warrant, the officer visited several area pharmacies obtaining the original prescriptions tendered by the nurse.[361] The State used evidence obtained from the pharmacies to charge the nurse with the criminal offense of "concealing material facts in obtaining prescriptions for regulated substances."[362]

At trial, the defendant claimed that the investigation at the area pharmacies violated her Article 11 right to be free from unreasonable searches and seizures.[363] The trial court found that the defendant had an expectation of privacy in her pharmacy records, but upheld the search under the closely regulated industry exception to the warrant requirement.[364] The Vermont Supreme Court affirmed.[365]

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354. *See* Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (holding that such an agreement prohibits the admission from being used against her in any criminal proceeding).

355. *See Welch*, 160 Vt. at 74, 624 A.2d at 1107.

356. *See id.*

357. *See id.* at 75, 624 A.2d at 1107.

358. *See id.*

359. *See id.*

360. *Id.*

361. *See id.* at 75, 624 A.2d at 1108.

362. *Id.*

363. *See id.*

364. *See id.* at 75-76, 624 A.2d at 1108.

365. *See id.* at 89, 624 A.2d at 1115.

### *B. The Inapplicability of the Closely Regulated Industry Exception to Individual Consumers of the Pharmacy Industry in Vermont*

Applying the closely regulated industry exception to a private consumer's pharmacy records in Vermont is inconsistent with the federal doctrine for four reasons: (1) the consumer is not on notice that his records will be subject to such a warrantless inspection and, thus, has not impliedly consented; (2) the closely regulated industry exception does not apply to inspections solely for evidence of criminal violations; (3) the Vermont statute authorizing inspection of the pharmacy records does not authorize a warrantless inspection; and (4) the warrantless inspection is not necessary to serve the government's interest.

#### 1. Applying the Exception to the Pharmacy Records of a Private Citizen Ignores the Driving Rationale for the Exception—Implied Consent

Since its 1967 ruling in *Katz v. United States*, the United States Supreme Court has recognized the general requirement for a warrant in order for a search to be considered reasonable under the Fourth Amendment.[366] Moreover, the Court has frequently opined that warrantless searches are per se unreasonable unless they fit into one of the "specifically established and well-delineated exceptions."[367] Thus, the Court has, on occasion, recognized exceptions to the two requisites of a reasonable search—the existence of probable cause and a particular description of the things to be seized or searched—which are embodied in the warrant requirement of the Fourth Amendment. One of these exceptions is the closely regulated industry exception which is, in fact, an exception to the requirement for an "administrative" search warrant.[368]

The closely regulated industry exception to the warrant requirement permits inspections of businesses without the administrative warrant which was established and required in *Camara v. Municipal Court*.[369] The closely regulated industry exception was first established by the Court in *Colonnade Catering Corp. v. United States* in recognition of modern pressures for effective inspection and compliance with administrative regulations.[370] The driving rationale for creating the closely regulated industry exception was the

366. *See* Katz v. United States, 389 U.S. 347 (1967); *see also supra* text accompanying notes 62-67.

367. *Katz*, 389 U.S. at 357.

368. *See* Potash, *supra* note 196, at Part I.B.3.b.

369. *See* Camara v. Municipal Court, 387 U.S. 523 (1967); *see also supra* text accompanying notes 85-92.

370. *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); *see also supra* text accompanying notes 99-110.

need for widespread administrative enforcement of business entities and the doctrine of implied consent.[371] The Court observed that by entering into business in a closely regulated industry, a proprietor is impliedly giving his consent to the searches required and established within the associated statute or administrative regulations.[372] In support of this doctrine of implied consent, the Court has frequently noted: the long history of regulating the industry and the pervasiveness of this historical regulation.[373] For instance, in *Colonnade Catering*, the Court noted that a long history of regulation of the liquor distribution industry and tax collection was enough to support the warrantless inspection of a liquor distributor's storeroom.[374]

Since *Colonnade Catering*, however, the Court has held that the history of the regulations involved are not dispositive on the issue of whether a proprietor has impliedly consented to the warrantless administrative search. Rather, in *United States v. Biswell*[375] and *Donovan v. Dewey*,[376] the Court held that the current pervasiveness of the regulations would also be considered when determining whether the proprietor was on notice that his business would be subjected to—and that he, thus, impliedly consented to—warrantless inspections. For instance, in *Biswell*, although recognizing that the firearm industry is not characterized by a long history of regulation, the Court found the requirement for a federal license and the furnishing of the proprietor of a copy of the regulations on an annual basis enough to infer that the proprietor was aware that the inspections were required by regulation and that he had, thus, impliedly consented to the warrantless inspections.[377] Additionally, the Court noted in *Dewey* that the requirements under the Federal Mine Safety and Health Act of 1977 were sufficiently pervasive such that the proprietor of the mine was on notice of the regulations, and thus, by entering into the business, impliedly consented to the warrantless inspections.[378] Finally, in *New York v. Burger*, the Court found that the long history of regulating junkyards, including the regulations requiring that a proprietor obtain a license, maintain a record book for police inspection, and display a registration number, were enough that the proprietor was on notice of, and consented to warrantless inspections.[379]

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371. *See supra* text accompanying notes 95-193.
372. *See Colonnade Catering*, 397 U.S. at 76-77.
373. *See id.*
374. *See id.*
375. *See* United States v. Biswell, 406 U.S. 311 (1972); *see also supra* text accompanying notes 111-24.
376. *See* Donovan v. Dewey, 452 U.S. 594 (1981); *see also supra* text accompanying notes 136-56.
377. *See Biswell*, 406 U.S. at 317; *see also supra* text accompanying notes 111-24.
378. *See Dewey*, 452 U.S. at 600-01; *see also supra* text accompanying notes 136-56.
379. *See BurgeSr*, 482 U.S. at 706-07; *see also supra* text accompanying notes 157-91.

Application of the closely regulated industry exception to a private consumer's records is inconsistent with the United States Supreme Court's rationale for creating the exception. Clearly, the doctrine is based on the concept of implied consent. Whether it is the historic nature of the regulations associated with the industry in question or the current pervasive nature of the regulations, the assumption is that these characteristics make it such that the proprietor of the business is on notice of the requirement for the warrantless inspections and has impliedly consented to them by entering into the business. Thus, the closely regulated industry exception was developed to apply to the owner or proprietor of a business and not the business' consumers.

More specifically, application of the closely regulated industry exception to the records of a private consumer of a pharmacy is anomalous because inherent in the doctrine of implied consent is the concept of choice. For instance, in *Colonnade Catering*, inherent in the Court's holding that the licensed liquor distributor had impliedly consented to the warrantless search by entering into the liquor distribution business, was the notion that the proprietor had a choice whether or not to enter into the business.[380] The same notion was inherent in the Court's decisions in *Biswell*,[381] *Dewey*,[382] and more recently in *Burger*.[383] A pharmaceutical consumer has no choice but to enter into the relationship with the closely regulated industry if a prescription drug is necessary to cure his illness. This phenomenon was recognized by the Pennsylvania Supreme Court in the context of the banking industry when it noted that the choice to enter into the closely regulated industry of banking by maintaining a checking account is, in our modern society, no choice at all.[384] In holding that a private citizen using the services of a closely regulated industry, such as a pharmacy, has entered that industry and consented to warrantless inspections of her records, the Vermont Supreme Court has neglected to recognize that there can be no implied consent where there is no choice.

### 2. The Exception is Not Intended to Apply to Investigations Solely for Evidence of Criminal Violations

Since its conception, the purpose of the closely regulated industry exception to the warrant requirement has been to facilitate the execution of

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380. *ee Colonnade Catering*, 397 U.S. at 72; *see also supra* text accompanying notes 99-110.

381. *See Biswell*, 406 U.S. at 311; *see also supra* text accompanying notes 111-24.

382. *See Dewey*, 452 U.S. at 594; *see also supra* text accompanying notes 136-56.

383. *See Burger*, 482 U.S. at 691; *see also supra* text accompanying notes 157-91.

384. *See* Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979); *see also supra* text accompanying note 339.

inspections necessary to ensure compliance with modern society's myriad of administrative regulations. For instance, in *Colonnade Catering*, the Court upheld the warrantless inspection of a liquor dealer's storeroom for compliance with the federal excise tax law.[385] Similarly, in *Dewey*, the purpose of the inspection was to ensure compliance with the Federal Mine Safety and Health Act of 1977.[386] As these statutes are civil in nature, it cannot be said that these cases support a contention that the United States Supreme Court intended to condone warrantless criminal investigations under the closely regulated industry exception.

However, the purposes of the inspections in *Biswell* and *Burger* are unclear, as the statutes being enforced by the inspections—the federal Gun Control Act of 1968 and the New York Vehicle and Traffic Law—contained both civil and criminal provisions.[387] For instance, failing to comply with the administrative requirements of the New York Vehicle and Traffic Law was classified as a class A misdemeanor.[388] Thus, upholding the warrantless inspection of the defendant's storeroom and salvage yard could be considered a Supreme Court sanction of warrantless criminal investigations. The *Burger* Court, however, answered this question by noting that the "administrative and penal schemes can serve the same purposes."[389] Therefore, the closely regulated industry exception does apply when the evidence discovered could support the prosecution of a crime as well as violations of the regulatory scheme itself.[390]

The Vermont Supreme Court has missed the mark because it has applied the closely regulated industry exception to an inspection conducted for the sole purpose of finding evidence of a criminal violation. In *Welch*, the Vermont Supreme Court applied the closely regulated industry exception to the criminal investigation of a particular individual already suspected of a criminal activity.[391] While this suspicion may not have risen to the level of probable cause,[392] it is clear that the *sole* purpose of inspecting the pharmacy records was to obtain evidence to support a criminal investigation of a particular individual. No routine administrative search was conducted.[393] As developed by the United States Supreme Court, the closely regulated industry exception does not intend this use. Rather, the purpose of the exception as it was first

385. *See Colonnade Catering*, 397 U.S. at 72-73; *see also supra* text accompanying notes 157-91.
386. *See Dewey*, 452 U.S. at 596-98; *see also supra* text accompanying notes 136-56.
387. *See Biswell*, 406 U.S. 311; *see also Burger*, 482 U.S. at 691.
388. *See Burger*, 482 U.S. at 704-05.
389. *Id.* at 713.
390. *See id.*
391. *See Welch*, 160 Vt. 70, 624 A.2d 1105. *See also supra* text accompanying notes 350-64.
392. *See Welch*, 160 Vt. at 89, 624 A.2d at 1115 (Johnson, J., dissenting).
393. *See id.*

created in *Colonnade Catering* and most recently applied in *Burger*, is to facilitate the enforcement of administrative regulations.

### 3. The Vermont Statute Does Not Authorize a Warrantless Inspection

Throughout the exception's development, inspections permitted under the closely regulated industry exception have always been attached to an existing regulatory scheme. That is, they have always been inspections whose authority was established in an existing statute.[394] Thus, one of the questions addressed by the United States Supreme Court in assessing whether the exception should apply to a particular inspection has always been whether the search was conducted within the confines established by the regulation. Indeed, inherent in classifying an industry as closely regulated is the requirement that there be some regulation under which it must operate.

To determine whether the warrantless inspection of a private citizen's pharmacy records in Vermont is consistent with the closely regulated industry exception to the warrant requirement, it is necessary to analyze the applicable Vermont statute. Title 18, section 4211 of the Vermont Statutes, entitled *Records Confidential*, provides:

> Prescriptions, orders and records required by this chapter, and stocks of regulated drugs, shall be open for inspection only to federal or state officers or their specifically authorized agent whose duty it is to enforce the federal drug laws or this chapter, or to authorized agents of professional licensing boards, as that term is defined under 3 V.S.A. chapter 5. No person having knowledge by virtue of his office of any such prescription, order or record shall divulge such knowledge, except in connection with a prosecution, or proceeding before the board or another licensing or registration board, to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party.[395]

Section 4211 applies to pharmacists and appears to place them on notice that their records are subject to administrative inspection. However, it is not clear that the statute dispenses with the warrant requirement.[396] Moreover, the plain

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394. *See supra* text accompanying notes 95-193.

395. VT. STAT. ANN. tit. 18, § 4211 (amended 1991).

396. Research into the legislative history of this statute is beyond the scope of this note as the legislative debates have not been transcribed and are preserved only on audio tape with the Vermont General Assembly. Interview with Kerry A. McDonald, Intern with the Vermont Senate and House Judiciary Committee, in Montpelier, Vt. (Feb. 22, 1996).

language of the statute brings a different concept to the forefront; it suggests that the legislature was intent on emphasizing the importance of confidentiality of such records and ensuring that agents with official access to the records would not abuse the privilege.[397] Finally, the federal counterpart to the Vermont law, 21 U.S.C. §§ 879-880, would require that an administrative warrant be issued and would limit the scope of the search to a routine administrative inspection of the business' compliance with applicable regulations.[398]

### 4. The Warrantless Inspection is Not Necessary to Further the State's Interest

Since the inception of the closely regulated industry exception to the warrant requirement, the United States Supreme Court has indicated that the warrantless inspection must be *necessary* to the achievement of the state's goal.[399] Thus, in the case of conducting a warrantless inspection of a private consumer's pharmacy records, the court must determine that there is no other way for effective drug enforcement investigations to be conducted in the state. For instance, in *Biswell*, the United States Supreme Court noted the need for unannounced and frequent inspections of gun dealers to deter illegal gun trafficking.[400] Moreover, the Court noted that the federal inspection process would be "frustrated" without such inspections.[401] In *Dewey* the Court noted the "notorious ease" in which the proprietor of a mine could hide violations of the Federal Mine Safety and Health Act should the proprietor be warned of the inspection.[402] Finally, the Court noted the same concerns regarding the New York Vehicle and Traffic Law in *Burger*.[403]

There is, however, no government necessity in conducting a warrantless investigation of a suspect's pharmacy records as it is unlikely that the suspect could work quickly with the pharmacy to remove the incriminating documents. Furthermore, the Vermont Supreme Court's majority opinion in *Welch* fails to

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397. *See infra* note 411.

398. 21 U.S.C. § 880(b)(3)(B) reads:

> to inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished drugs, listed chemicals, and other substances or materials, containers, and labeling found therein, and, . . . (including records, files, papers, processes, controls and facilities) appropriate for verification of this title, . . .

21 U.S.C. § 880 *amended* 1990, P.L. 101-647, Title XXXV, § 3599M, 104 Stat. 4932; Dec. 17, 1993, P.L. 103-200 § 6 107 Stat. 2340).

399. *See supra* text accompanying notes 118-21, 145, and 179.

400. *See Biswell*, 406 U.S. 315-16; *see also supra* text accompanying note 118.

401. *See id.* at 316; *see also supra* text accompanying note 121.

402. *Dewey*, 452 U.S. at 603; *see also supra* text accompanying note 145.

403. *See Burger*, 482 U.S. at 710; *see also supra* note 179 and accompanying text.

describe any exigent circumstances justifying the need for a warrantless search.[404] Finally, as the United States Supreme Court noted in *Marshall v. Barlow's, Inc.* there is no reason why the police department can not complete the procedure necessary to obtain an ex parte warrant thereby maintaining the element of surprise.[405]

### *C. The Inconsistency of Adopting the Closely Regulated Industry Exception to the Warrant Requirement Under Article 11*

#### 1. Applying the Exception is Inconsistent with Historic Interpretations of Article 11

Adopting the closely regulated industry exception to the warrant requirement in Vermont is inconsistent with both the historical underpinnings of Article 11 and the Vermont Supreme Court's trend in providing greater protection against unreasonable searches and seizures. It is inconsistent with the historical background of Article 11 for three reasons: (1) it is inconsistent with the historical reasons for adopting Article 11; (2) it is inconsistent with early interpretation of Article 11 by the Council of Censors; and (3) it is inconsistent with early interpretations of Article 11 by the Vermont Supreme Court.

Adopting the closely regulated exception to the warrant requirement is inconsistent with the historical reasons for adopting Article 11 because the exception will expose Vermont citizens to the danger of broad and sweeping searches which occurred under the general warrant of colonial America. It has long been established that the formation of the first state constitutions was a result of the conflict between the colonies and Britain, and its royal governors over the general writs of assistance.[406] No evidence exists to suggest that the reason for promulgating Vermont's constitution was any different.[407] Thus, because adopting the closely regulated industry exception to the warrant requirement could provide officials with a tool by which they could conduct pretextual inspections in hope of finding evidence of criminal activities, its adoption is contrary to Vermont's historical repugnance of the general warrant. Maintaining the requirement for an administrative warrant would help prevent pretextual inspections by requiring the assessment of an objective and unbiased magistrate.

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404. *See Welch*, 160 Vt. at 84, 624 A.2d at 1105-14.

405. *See* Marshall v. Barlow's, Inc., 426 U.S. 307 (1978); *see also supra* text accompanying note 132.

406. *See* Morey, *supra* note 195, at 218; *see also supra* text accompanying notes 32-54.

407. *See supra* text accompanying notes 194-261.

Adopting the closely regulated industry exception to the warrant requirement is also contrary to early interpretations of Article 11 by the 1813-14 Council of Censors. The Council, the body entrusted with assessing the constitutionality of the acts of the Vermont General Assembly, interpreted Article 11 of the Vermont Constitution to prohibit the arbitrary and warrantless searches of individuals. This is evident in the Council's suggestion to the Vermont General Assembly that it repeal *An Act to Prevent Intercourse with the Enemies of this and the United States*, because the Act would have authorized the warrantless inspections of the person and effects of any traveler coming from or traveling to Canada.[408] After reviewing the Act, the Council stated, "[w]e need only look to the eleventh article of the bill of rights to prove the repugnancy of this Act to our sacred constitution."[409] While the Council's opinion of the Act does not expressly condemn all warrantless searches, it is significant that around the time of the War of 1812 and the accompanying unrest in Vermont and the nation, that the Council would suggest repealing an act intended to protect its citizens from the enemy. This can only suggest the fervor with which the early interpreters of Article 11 intended to protect Vermont citizens from the oppressive power of arbitrary governmental intrusions.

Finally, adopting the closely regulated industry exception is contrary to early interpretations of Article 11 by the Vermont Supreme Court. This is evident in the court's opinions which recognize the general requirement of a warrant for a reasonable search. For instance in *In re Powers*, the Vermont Supreme Court noted that Article 11 is "directed against general warrants" but also opined that Article 11 "has never been supposed to prohibit arrests . . . without a warrant, *in that class of cases where delay would be perilous*."[410] Moreover, in *Lincoln v. Smith* the Vermont Supreme Court held that Article 11 is "directed against the uses of general warrants; and it is the searches and seizures under such warrants which are pronounced unreasonable."[411] Thus, while early Vermont Supreme Court interpretations of Article 11 begrudge the use of general warrants, implicit in these opinions is the understanding that an unsupported general warrant would be abhorred even more.

For these reasons, adopting the closely regulated industry exception in the State of Vermont is contrary to the historical underpinnings of Article 11. Not only does it contravene the interpretation of Article 11 by the 1813-14 Council

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408. *See supra* text accompanying notes 244-51.

409. *See* RECORDS OF THE COUNCIL OF CENSORS, *supra* note 213, at 205-06; *see also supra* text accompanying note 249.

410. *In re* Powers, 25 Vt. at 266 (emphasis added).

411. Lincoln v. Smith, 27 Vt. 328 (1855).

of Censors, but it is also contrary to an implicit understanding within the early interpretations of Article 11 by the Vermont Supreme Court.

### 2. Adopting the Exception is Inconsistent with the Modern Trend in Vermont and Pennsylvania

Adopting the pervasively regulated industry exception to the warrant requirement is inconsistent with recent Article 11 precedent because it is contrary to the trend within Vermont and Pennsylvania to afford their citizens greater protection from unreasonable searches and seizures under their respective state constitutions.[412] The Vermont Supreme Court has consistently interpreted Article 11 to provide greater protection against unreasonable searches and seizures than that provided by the Fourth Amendment.[413] This has been a consistent trend in the court since its return to independent interpretation of the Vermont Constitution following the United States Supreme Court's ruling in *Mapp v. Ohio* in 1961.[414] Since *State v. Badger*[415] and *State v. Jewett*,[416] the Vermont Supreme Court has succeeded in creating its own, independent line of search and seizure jurisprudence. Generally, this line of precedent has resulted in greater protection of individual rights than would otherwise be provided under the Fourth Amendment.[417] This is evidenced by the court's frequent willingness to diverge from federal jurisprudence to protect the core values of Article 11, including its repeated refusals to adopt federally recognized exceptions to the warrant requirement.

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412. Moreover, adopting the pervasively regulated industry exception to the warrant requirement is inconsistent with the expectations of privacy held by Vermont citizens in their medical information. This is evidenced by a draft bill currently before the Senate Judiciary Committee. This bill is entitled "An Act Relating to Health Care Information" and emphasizes the general right to privacy that should be enjoyed by a Vermont citizen in his/her health care records. The purpose of the Act Relating to Health Care Information is:

> to update the laws that establish the legal responsibilities of persons, including health care providers, health care facilities, insurance companies and employers, to maintain the security and confidentiality of individually identifiable health care information during its acquisition, storage, disclosure and disposition.

S. 78 § 9460 (b)(2), 64 Leg., (Vt. 1997) (unpublished draft, on file with the *Vermont Law Review*) (emphasis added). Moreover the proposed bill prohibits the release of medical information in criminal proceedings except when authorized by a court with appropriate jurisdiction to "initiate or substantiate any criminal charges against an individual, or to conduct any investigation of an individual . . . ." S. 78 § 9460(d).

413. *See supra* text accompanying notes 262-328.

414. *See id.*

415. *See* State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982); *see also supra* text accompanying notes 262-65.

416. *See* State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985); *see also supra* text accompanying notes 266-74.

417. *See supra* text accompanying notes 268-328.

For instance, on two occasions the Vermont Supreme Court declined to follow federal precedent and created its on jurisprudence regarding the doctrine of standing.[418] In *State v. Wood*, the court declined to follow federal precedent which holds that a defendant temporarily residing in an acquaintance's trailer does not have standing to claim an unlawful search of the vehicles stored on the property. Additionally, in *State v. Berard*, the Vermont Supreme Court declined to follow federal precedent and found that a prisoner does retain an expectation of privacy, albeit a lower expectation, and, thus, maintains standing under Article 11 to challenge the constitutionality of a search or seizure.[419] In *Wood*, the court emphasized the "crucial role" that Article 11 plays in "qualifying" the powers of otherwise potentially oppressive governmental powers and noted that "limiting the class of defendants who may invoke the right . . . frustrates the design of Article 11."[420] In *Berard*, the Vermont Supreme Court held that it would not abandon the probable cause and warrant requirement "except in those exceptional circumstances in which special needs *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable."[421]

The Vermont Supreme Court has also declined to follow federal precedent when it would have meant adopting an exception to the warrant requirement. In *State v. Kirchoff*, the court refused to adopt the federal version of the open fields doctrine.[422] Instead, the court adopted its own version which, rather than a per se exception to the warrant requirement, was based on the actions of the landowner.[423] Additionally, in *State v. Savva*, the court refused to adopt the federal exception to the warrant requirement for searches of closed containers when there is probable cause to search the automobile they are in.[424] In each of these decisions, the court emphasized the independent authority provided by Article 11 to protect the defendant's right to be free from unreasonable searches and seizures, noting that the role of the Vermont Supreme Court is to protect those values.[425] Inherent in these opinions is the court's recognition of the need to diverge from federal jurisprudence when the

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418. *See* State v. Wood, 148 Vt. 479, 491, 536 A.2d 902, 909 (1987); *see also supra* text accompanying notes 268-74.

419. *See* State v. Berard, 154 Vt. 306, 311, 576 A.2d 118, 121 (1991); *see also supra* text accompanying notes 275-81.

420. *Wood*, 148 Vt. at 488, 536 A.2d at 907-08; *see also supra* text accompanying notes 268-74.

421. *Berard*, 154 Vt. at 310-11, 576 A.2d at 120 (citing O'Connor v. Ortega, 480 U.S. 709, 741 (1987) (emphasis added)); *see also supra* text accompanying note 278.

422. *See* State v. Kirchoff, 156 Vt. 1, 4-12, 587 A.2d 988, 991-96 (1991); *see also supra* text accompanying notes 293-310.

423. *Id.*

424. *See* State v. Savva, 159 Vt. 75, 91, 616 A.2d 774, 783 (1992); *see also supra* text accompanying notes 311-28.

425. *See supra* text accompanying notes 262-328.

failure to do so would yield results repugnant to the Vermont Constitution. Thus, the *Kirchoff* court noted that it is the duty of the court "not to succumb to waning expectations or fluctuations in the degree of government intrusion 'society' is willing to condone" and declined to adopt the federal open fields doctrine.[426] Finally, the *Savva* court acknowledged that the Vermont Supreme Court has never established that the mere facilitation of law enforcement can justify abandoning the warrant requirement.[427]

In each of these cases the Vermont Supreme Court has recognized the need to diverge from federal precedent when it deems it is necessary to protect the core values of Article 11. While the court has attempted to find justification for this divergence in the historical underpinnings of the Vermont Constitution, historical information regarding the constitution is sparse. Therefore, the court generally resorts to plain statements regarding the nature of our federal system and conducts an assessment of the quality of the federal precedent as if it were a sister state. Following this rationale, the court has frequently provided greater protections to Vermont citizens under Article 11 than would otherwise be available under the Fourth Amendment.

Similarly, the Pennsylvania Supreme Court has not hesitated to find greater protection under Chapter One, Section Eight of the Pennsylvania Constitution than otherwise provided by the Fourth Amendment.[428] For instance in *Commonwealth v. Sell*, the Pennsylvania Supreme Court declined to follow the federal doctrine of standing.[429] Additionally, in *Commonwealth v. Edmunds*, the Pennsylvania Supreme Court declined to adopt the federal good faith exception to the warrant requirement.[430] In both of these cases, the court followed a mode of analysis similar to that generally conducted by the Vermont Supreme Court. The court first looked to the text and historical background of Section Eight of its constitution in hopes of finding some textual or historical reason for diverging from the federal precedent. Next, when little of either could be found, the court simply conducted an independent analysis of the federal doctrine and, disagreeing with the United States Supreme Court's reasoning, declined to adopt it.

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426. *Kirchoff*, 156 Vt. at 12, 587 A.2d at 996 (quoting *Oliver*, 466 U.S. at 187 (Marshall, J., dissenting)).

427. *See Savva*, 159 Vt. at 83, 616 A.2d at 778-79.

428. *See* Commonwealth v. Sell, 470 A.2d 457, 467 (Pa. 1983); *see also supra* text accompanying notes 331-32.

429. *See Sell*, 470 A.2d at 467.

430. *See* Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991); *see also supra* text accompanying notes 333-38.

The Pennsylvania case most pertinent to the issue at hand is *Commonwealth v. DeJohn*.[430] In *DeJohn*, the Pennsylvania Supreme Court refused to adopt the federal *Miller*[431] doctrine which permitted the disclosure of bank records because bank customers do not have a reasonable expectation of privacy in their records. The Pennsylvania Supreme Court reasoned that the defendant's disclosure of the information was not entirely volitional, and thus, could not be considered consensual.[432] Moreover, the court noted, the judicial enforcement of Section Eight must keep up with modern society.[433]

## CONCLUSION

The right of the people of Vermont to be free from unreasonable searches and seizures rests in the Fourth Amendment to the United States Constitution and Chapter One, Article 11 of the Vermont Constitution. Generally, both of these provisions require a search warrant supported by probable cause and particularity of description for a search to be held constitutional. However, exceptions to the warrant requirement have been recognized under each of these constitutional provisions in an attempt to balance the individual's right to privacy against the need for effective law enforcement in our complicated society. One of these exceptions is the closely regulated industry exception created by the United States Supreme Court.

The Vermont Supreme Court has recently adopted the closely regulated industry exception to the warrant requirement applying it, as the United States Supreme Court never seemed to intend, to the criminal investigation of a private citizen. The modern Vermont Supreme Court, however, failed to follow the historical trend of both Vermont and Pennsylvania when it adopted the closely regulated industry exception to the warrant requirement without conducting an independent analysis of the quality of the United States Supreme Court's rationale for its creation. Moreover, the Vermont Supreme Court misapplied the federal doctrine. Not only does the Vermont Supreme Court's application of the closely regulated industry exception represent a misunderstanding of the rationale behind the federal exception, but it may also represent the court's intent to begin to turn back the hands of time to the period when Vermont Supreme Court jurisprudence had forsaken the unique and

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430. Pennsylvania has yet to address the closely regulated industry exception under its own constitution. *See supra* text accompanying notes 339-46.

431. United States v. Miller, 425 U.S. 435 (1976).

432. *See DeJohn*, 403 A.2d 1291; *see also supra* text accompanying notes 339-46.

433. *See DeJohn*, 403 A.2d at 1291.

independent protections of civil liberties provided by the Vermont Constitution.[434]

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434. *See supra* text accompanying notes 260-61.