RETHINKING CLOSELY REGULATED INDUSTRIES

Information about mental health treatment ranks among the most private and sensitive details of a person’s life. Federal and state laws protect against its disclosure and for good reason: the relationship of trust between a patient and a psychiatrist is built on a foundation of confidentiality. Could the government nonetheless obtain this extremely private information through a statute authorizing warrantless searches of psychiatric clinics and their business records? Or would such a law violate the Fourth Amendment?

The answer depends on whether the statute can be justified under the so-called “closely regulated industry” (or “pervasively regulated industry”) exception to the Fourth Amendment warrant requirement. That exception permits warrantless administrative inspections of businesses operating in certain industries subject to intense regulation. In City of Los Angeles v. Patel, the Supreme Court ended its decades-long silence and sharply restricted the scope of this doctrine. This Note argues that courts should follow Patel’s lead and carefully control the kinds of industries that can be inspected without a warrant. Part I surveys the case law and summarizes the state of the doctrine today. Part II argues in favor of strictly cabining the exception and proposes that courts take into account the privacy interests of the industry’s customers.

I. DOCTRINAL HISTORY: EXPANSIONS AND CONTRACTIONS

The closely regulated industry exception applies to searches of commercial premises for civil purposes. Under the Fourth Amend-
ment, searches of private homes and searches for evidence of crime generally require warrants. For a long time, however, inspections for regulatory purposes were thought not to implicate the Fourth Amendment, and in 1959 the Supreme Court seemed to agree. However, the Court soon reversed its position, holding in *Camara v. Municipal Court* that warrants were necessary for administrative inspections of private residences, but could be issued under a lower probable cause requirement than in criminal cases. Probable cause to issue an administrative warrant exists “if reasonable legislative or administrative standards for conducting an area inspection are satisfied” — the government does not necessarily need “specific knowledge of the condition of the particular dwelling” to be inspected. In *See v. City of Seattle*, decided on the same day, the Court applied the principles of *Camara* to inspections of commercial premises. Today, numerous federal and state statutes provide for inspections by administrative warrants.

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8 During the nineteenth century, courts consistently held that “the Fourth Amendment protected only against criminal searches, and was inapplicable to civil searches.” Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1226 n.7 (2004).

9 See *Frank v. Maryland*, 359 U.S. 360, 367 (1959) (“Inspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, has antecedents deep in our history.”), overruled in part by *Camara v. Municipal Court*, 387 U.S. 523 (1967). *Frank*, by a vote of 5–4, upheld the criminal conviction of a homeowner who refused to permit a warrantless inspection of his premises by a municipal health inspector. *Id.* at 361–62. Lower courts read *Frank* to hold that civil searches never required a warrant even though the opinion did not explicitly adopt that rule. *See Camara*, 387 U.S. at 529.

10 387 U.S. 523.

11 *Id.* at 534, 538–39.

12 *Id.* at 538; see also *id.* (“Such standards . . . may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area . . . .”).


14 “The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.” *Id.* at 543. Moreover, “[t]he agency’s particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved.” *Id.* at 545.

15 See, e.g., 7 U.S.C. § 7731(b) (2012); 49 U.S.C. § 32707 (2012); Nev. Rev. Stat. § 453.266 (2014); N.C. GEN. STAT. § 15-27.2 (2014); 35 Pa. CONS. Stat. § 780-124 (2015). A typical example is 21 U.S.C. § 880 (2012), which deals with inspections of places making, storing, or disposing of controlled substances. Under this statute, an administrative warrant may be issued by “[a]ny judge of the United States or of a State court of record, or any United States magistrate judge” within her territorial jurisdiction, *id.* § 880(d)(1); probable cause means “a valid public interest in the effective enforcement of this subchapter or regulations thereunder sufficient to justify admin-
Despite their lower probable cause requirement, administrative warrants do provide important Fourth Amendment protections. Most significantly, administrative warrants interpose a neutral magistrate between the citizen and the government, ensuring that “the decision to enter and inspect will not be the product of the unreviewed discretion” of an “officer in the field.” By contrast, warrantless searches leave the inspectors free to choose which businesses to inspect, and when and how often to do so.

Administrative warrants are not required, however, when the closely regulated industry exception applies. The subsequent sections discuss the six cases in which the Supreme Court has considered the exception’s scope, purpose, and limits.

A. Creating the Exception

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), and United States v. Biswell, 406 U.S. 311 (1972), are the fountainhead of the closely regulated industry exception. See had said that challenges to “licensing programs” requiring inspections were to be resolved “on a case-by-case basis under the general Fourth Amendment standard of reasonableness.” Colonnade and Biswell dealt with warrantless searches of federally licensed liquor and firearm dealers, respectively. In both cases, the Court held that the Fourth Amendment did not limit Congress’s power to prescribe warrantless searches and seizures of the records and inventories of the businesses operating in these industries.

In Colonnade, a federal revenue agent, acting pursuant to statutory authority but without a warrant, broke the lock to Colonnade Catering’s storeroom, entered, and seized bottles of liquor suspected of being illegally refilled. The business argued that Congress had not authorized forcible, warrantless entry, and the Court agreed. However, the Court noted in dictum that “Congress has broad authority to fashion standards of reasonableness for searches and seizures” of the liquor industry. The long history of English and American regulation of administrative inspections, id.; and inspectors may examine, inter alia, records, premises, and inventory, id. § 880(b)(3).

16 See, 387 U.S. at 545.
19 For a time, courts referred to the “Colonnade-Biswell exception.” See, e.g., Marshall v. Barlow’s, Inc., 436 U.S. 307, 321 (1978); United States v. Jamieson-McKames Pharm., Inc., 651 F.2d 532, 537 (8th Cir. 1981). But very few cases have used this name since the 1980s.
20 387 U.S. at 546.
21 397 U.S. at 72–74.
22 Id. at 77.
23 Id.; see also id. at 78 (Burger, C.J., dissenting) (“The majority sees no constitutional violation; I agree.”).
cohol, including by warrantless inspections, proved that such inspections were not unreasonable in this “closely regulated industry.”

Two years later, the Court upheld a warrantless seizure of firearms in Biswell. The Gun Control Act of 1968 expressly authorized federal inspectors to enter the premises of firearm dealers to examine merchandise and records. Unlike in Colonnade, however, there was no forcible entry, so the only question was the Act’s constitutionality. The Court held that even though “[f]ederal regulation of the interstate traffic in firearms not as deeply rooted in history as . . . governmental control of the liquor industry,” the firearm trade was nonetheless a “pervasively regulated business.”

The Biswell Court then explained that where “regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.” Even though Camara and See were only five years old, Biswell had moved substantially away from the warrant requirement and toward a reasonableness balancing test that weighed the government’s interest against the intrusiveness of warrantless searches.

That balancing test favored the government in Biswell. “[C]lose scrutiny of [firearm] traffic [wa]s undeniably of central importance to federal efforts to prevent violent crime . . . ” And the regulatory scheme “pose[d] only limited threats to the dealer’s justifiable expectations of privacy” because dealers entered the trade knowing that their “business records, firearms, and ammunition” would be subject to inspections, the scope of which, moreover, was fully set out in statutes

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24 Id. at 75 (majority opinion) (citing a 1660 English statute, a 1692 Massachusetts law, and a 1791 act by the First Congress, all granting warrantless inspection powers).
25 Id. at 74. The Court seemed to use the term “closely regulated” only as a description, without attaching independent doctrinal significance to it. The opinion later noted that the liquor industry had been “long subject to close supervision and inspection.” Id. at 77.
28 Biswell, 406 U.S. at 311–12.
29 See id. at 314.
30 Id. at 315. Justice Douglas, the author of Colonnade, cast the only dissenting vote in Biswell. He did not agree that the principles laid down in Colonnade permitted the warrantless seizure of firearms because, in his view, Colonnade “rested heavily on the unique historical origins of governmental regulation of liquor.” Id. at 318 (Douglas, J., dissenting).
31 Id. at 316 (majority opinion). As with Colonnade’s declaration that the alcohol industry was closely regulated, no analysis accompanied Biswell’s assertion regarding the firearms industry.
32 Id. at 317.
33 Contemporary observers considered Colonnade and Biswell to have established a “licensing exception” to Camara and See. See, e.g., Mark A. Rothstein, OSHA Inspections After Marshall v. Barlow’s, Inc., 1979 DUKE L.J. 63, 70–71.
34 Biswell, 406 U.S. at 315.
Compared to Colonnade’s focus on the industry’s history of regulations, Biswell’s balancing test authorized more wide-ranging use of warrantless inspections as a regulatory tool.  

B. The Exception’s Real-World Effect

The closely regulated industry exception does not give the government license to inspect any business whenever it pleases. First, the exception is not self-executing. While it give legislatures the option to enact statutes authorizing warrantless searches, the people’s representatives must affirmatively decide to do so. Until that happens, inspections of even the most stringently regulated businesses require judicial approval. Furthermore, the legislature can grant inspectors less than the full authority possible under the Fourth Amendment: for instance, authorizing inspections of premises and inventory but excluding business records. Finally, the legislature chooses how the government can compel a business owner to submit to a lawful warrantless inspection: some inspection regimes require the inspector to seek an injunction while others permit the imposition of an immediate penalty. This choice carries significant Fourth Amendment implications.

In the first case, a court will order the business owner to permit the search only if the closely regulated industry exception applies and no other constitutional bar exists. Since this process provides for precompliance judicial review, the exception presents minimal, if any, Fourth Amendment concerns. In other words, if the industry is not closely regulated, then the Fourth Amendment requires a warrant. But even if the industry is closely regulated, the statutory scheme voluntarily provides for judicial oversight.

In the second case, however, the inspector can immediately arrest or issue a citation to business owners who refuse to permit a warrantless inspection. The imposition of an immediate penalty is constitutional only if the closely regulated industry exception applies; otherwise the Constitution bars prosecution for insisting upon one’s rights. By demanding a warrant, business owners seek a judicial forum to protect their right against unreasonable searches and seizures, but the closely

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35 Id. at 316.
36 See United States v. Montrom, 345 F. Supp. 1337, 1339 (E.D. Pa. 1972) (“The very recent case of United States v. Biswell makes it clear that the principles of Colonnade Catering are applicable to all professions in which there is a legitimate public interest in close regulation, as long as the statute authorizing inspection defines with fair specificity the allowable time, place and scope of such an inspection.” (citation omitted)), aff’d without opinion, 480 F.2d 919 (3d Cir. 1973).
regulated industry exception allows the legislature to shut the courthouse doors to such actions (or at least deter them through immediate penalties). To be sure, courts can sometimes review the searches afterward. Some cases, including Colonnade and Biswell, involve the exclusion of evidence discovered during warrantless administrative inspections. Others involve 42 U.S.C. § 1983 claims for violations of plaintiffs’ Fourth Amendment rights. Then again, in both of these situations, courts will not necessarily decide whether the search was actually unconstitutional.

C. Setting the Exception’s Scope

Having created an exception to the Camara-See rule, the Court then had to address how far it extended. The decisions in this area show the Court vacillating between expansive and restrictive interpretations of the closely regulated industry exception.

1. The Pre-Patel Cases. — In the beginning, the Court narrowly defined the exception through a simple test. Six years after Biswell, Marshall v. Barlow’s, Inc. declared unconstitutional the warrantless-inspection provisions of the Occupational Safety and Health Act (OSHA). The case arose when the manager of Barlow’s, Inc., an electrical and plumbing installation business, refused to permit an inspector from the Occupational Safety and Health Administration to search the business’s nonpublic areas without a warrant. Before the Supreme Court, the government argued that a balancing of interests, as was done in Biswell, would show the reasonableness of the OSHA inspection scheme. However, the Court rejected that approach, reiterating that “unless some recognized exception” applies, warrantless inspections are unconstitutional. To the extent that Biswell could be read to mean that reasonableness balancing was the general rule for licensed busi-

39 See, e.g., Rivera-Corraliza v. Morales, 794 F.3d 208, 210 (1st Cir. 2015).
40 See id. at 214–15 (qualified immunity defense prevails if the plaintiff cannot establish that the constitutional right was clearly established); United States v. Warshak, 631 F.3d 266, 282 n.13 (6th Cir. 2010) (“Though we may surely do so, we decline to limit our inquiry to the issue of good-faith reliance. If every court confronted with a novel Fourth Amendment question were to skip directly to good faith, the government would be given carte blanche to violate constitutionally protected privacy rights, provided, of course, that a statute supposedly permits them to do so.” (citation omitted)).
41 436 U.S. 307.
42 See id. at 321–22, 325.
43 Id. at 309–10.
44 See Brief for the Appellants, Barlow’s, 436 U.S. 307 (No. 76-1143), 1977 WL 189618, at *41–47.
45 Barlow’s, 436 U.S. at 313.
nesses, Barlow’s disagreed, referring to Colonnade and Biswell as establishing only an “exception” to the warrant requirement.\footnote{46 Id. at 321.}

The Court then rejected the government’s sweeping argument that the closely regulated industry exception saved the statute because “all businesses involved in interstate commerce ha[d] long been subjected to close supervision of employee safety and health conditions.”\footnote{47 Id. at 314.} The Court explained that the exception rested on two related rationales: First, Colonnade and Biswell involved industries with “such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise.”\footnote{48 Id. at 313 (citation omitted).} Second, “when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.”\footnote{49 Id.; see also Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973) (“[B]usinessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade . . . [and] in effect consent[] to the restrictions placed upon [them].”).} OSHA satisfied neither the diminished-expectation-of-privacy nor the implied-consent rationale because the statute applied too broadly; instead, a history of distinctivergulation of the particular industry was necessary.

The tight standard drawn by Barlow’s was short-lived, however, and the next two cases gave the exception room to expand. Just three years later, Donovan v. Dewey\footnote{50 452 U.S. 594 (1981).} promptly abandoned the focus on a long tradition of close government regulation. While the duration of the regulatory scheme would often be an “important factor” in the pervasiveness inquiry, it could not be determinative — otherwise, “new or emerging industries . . . could never be subject to warrantless searches even under the most carefully structured inspection program.”\footnote{51 Id. at 606.}

With this broader understanding, Dewey upheld the warrantless-inspection provisions of the Federal Mine Safety and Health Act of 1977,\footnote{52 Pub. L. No. 91-173, 83 Stat. 742, as amended by Pub. L. No. 95-164, 91 Stat. 1290 (codified as amended in scattered sections of 30 U.S.C.).} which required at least four inspections of underground mines and two inspections of surface mines each year.\footnote{53 Dewey, 452 U.S. at 596.} Downplaying the regulatory scheme’s recent enactment, the Court emphasized instead that the regulations were “sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he ‘will be subject to effective inspection.’”\footnote{54 Id. at 603 (quoting United States v. Biswell, 406 U.S. 311, 316 (1972)).} Furthermore, Dewey introduced a new factor: whether the “certainty and regularity” of the inspection scheme
sufficiently checked the inspector’s discretion and thus “provide[d] a constitutionally adequate substitute for a warrant.”\(^{55}\) Here, the Act achieved a “predictable and guided federal regulatory presence” by requiring periodic inspections of all mines and establishing guidelines for inspectors.\(^{56}\) In sum, *Dewey’s* inquiry into “pervasiveness and regularity”\(^{57}\) differed markedly from the history-driven test of *Barlow’s*.\(^{58}\)

The expansion of the closely regulated industry exception continued with *New York v. Burger*,\(^{59}\) which held that the automobile-junkyard and vehicle-dismantling industry in New York was closely regulated.\(^{60}\) The Court noted that the applicable regulations were “extensive”: they included a licensing and registration requirement, a recordkeeping requirement with an obligation to permit police inspection, and penalties for failure to comply.\(^{61}\) The “similarly extensive regulations on automobile junkyards”\(^{62}\) in other states further supported the Court’s finding.\(^{63}\) Acknowledging that the regulations were “of fairly recent vintage,”\(^{64}\) the Court explained that the automobile-junkyard industry was an offshoot of the much older (and long-regulated) secondhand-shop or general-junkyard industry.\(^{65}\) In its analysis, *Burger* thus focused on the regulations’ extensiveness and minimized their lack of longevity.

After concluding that automobile junkyards were closely regulated, *Burger* made two further holdings. First, each of the three additional criteria that are necessary for constitutional reasonableness, even for

\(^{55}\) *Id.* The problem in *Barlow’s*, as the *Dewey* Court saw it, was that the statute “fail[ed] to tailor the scope and frequency of such administrative inspections to . . . particular health and safety concerns” and thus granted inspectors too much discretion. *Id.* at 604.

\(^{56}\) *Id.* at 604.

\(^{57}\) *Id.* at 606.

\(^{58}\) *See id.* at 607 (Stevens, J., concurring) (“The rationale of today’s decision is much closer to the reasoning in my dissent than to the reasoning in the majority opinion in *Barlow’s*, Inc.”); *id.* at 611 (Stewart, J., dissenting) (“The *Colonnade-Biswell* exception . . . applies to businesses that are both pervasively regulated and have a long history of regulation. Today the Court conveniently discards the latter portion of the exception.”).


\(^{60}\) *See id.* at 712. *Burger* reviewed a state law, whereas the previous four cases reviewed federal laws. Thus, its holding formally applies only in New York but effectively determines the issue nationwide. Naturally, regulations can differ across states, and state courts interpreting their own laws can reach different conclusions. *See Gora v. City of Ferndale*, 576 N.W.2d 141, 151 (Mich. 1998) (Kelly, J., dissenting) (“A finding that the massage parlor industry is pervasively regulated in Indiana does not dictate that regulation is pervasive in Michigan, or in any other state.”). *Compare* Lundeen v. Wis. Dep’t of Agric., Trade & Consumer Prot., 525 N.W.2d 758, 761 (Wis. Ct. App. 1994) (holding that dairy farming is closely regulated in Wisconsin), with *Solem v. Courter*, No. CH01-12059, 2001 WL 34038620, at *4 (Va. Cir. Ct. Nov. 21, 2001) (“The manufacture and sale of goats’ cheese is not a ‘pervasively regulated industry’ in Virginia . . . .”).

\(^{61}\) *Burger*, 482 U.S. at 704.

\(^{62}\) *Id.* at 705.

\(^{63}\) *Id.*

\(^{64}\) *Id.* at 706.
closely regulated industries, was satisfied here: (1) the warrantless-search regime advanced a substantial government interest; (2) warrantless inspections were a necessary component of the regulatory scheme; and (3) the inspection program provided a constitutionally adequate substitute for a warrant by providing notice to the owner and by limiting the police’s discretion. Second, the Court rejected Burger’s argument that the administrative scheme was merely a pretext to help the police investigate crimes, holding that “a State can address a major social problem both by way of an administrative scheme and through penal sanctions” and that New York’s regulatory scheme had a valid administrative purpose.

2. Further Expansion in the State and Lower Federal Courts. — Meanwhile, state and lower federal courts have found many industries to be pervasively regulated. These decisions can be divided into a few categories. First, many cases involved industries with obvious potential risk to public health and safety: pharmaceuticals, the medical profession, food, nuclear power, storing and dispensing gasoline, construction, day cares and nursing homes, asbestos removal, and solid waste disposal. Alcohol, firearms, and mining also fall into this category.

65 Id. at 702–03. Necessity was satisfied because the element of surprise was crucial given how quickly stolen automobile parts could pass through junkyards. Id. at 710. Furthermore, the procedural protections of the inspection regime adequately limited the “time, place, and scope” of the warrantless regime to searches of vehicle parts and records during regular business hours. Id. at 711 (quoting United States v. Biswell, 406 U.S. 311, 315 (1972)).

66 Id. at 712.

67 This expansion began after the Dewezy decision in 1981, see Remer, supra note 3, at 800 (collecting post-Dewezy cases), and accelerated after Burger came down in 1987.


70 United States v. Bus. Builders, Inc., 354 F. Supp. 141, 143 (N.D. Okla. 1973) (“It would be an affront to common sense to say that the public interest is not as deeply involved in the regulation of the food industry as it is in the liquor and firearms industries.”).


72 United States v. V-1 Oil Co., 63 F.3d 909, 911 (9th Cir. 1995) (holding that the gasoline industry is closely regulated because it involves “transport[ing] and sell[ing] hazardous materials”); V-1 Oil Co. v. Wyo. Dep’t of Envtl. Quality, 902 F.2d 1482, 1486 (10th Cir. 1990).

73 Frey v. Panza, 621 F.2d 596, 598 (3d Cir. 1980) (per curiam).

74 Rush v. Ohleod, 756 F.2d 713, 720 (9th Cir. 1985).


Next, some cases dealt with commerce: credit unions,78 pawnshops,79 banking,80 insurance,81 commercial trucking,82 purchase of precious metals and gems,83 and foreign trade zone storage.84

Industries involving animals were also often found to be pervasively regulated: commercial fishing,85 dog breeding,86 deer breeding,87 horse racing,88 hunting,89 taxidermy,90 and the sale of rabbits for research.91

Finally, a few industries — casinos,92 adult entertainment stores,93 and massage parlors94 — seem to have been the target of morality legislation.

The upshot is that many industries have been found to fall within the closely regulated industry exception. That these industries span much of the commercial world highlights the exception’s transformation from a limited and narrow doctrine to the default rule in searches of businesses.

3. Reversing the Tide: City of Los Angeles v. Patel. — Even as state and lower federal courts recognized this large class of pervasively regulated industries, the Supreme Court said nothing on the subject for nearly three decades. Then, in City of Los Angeles v. Patel, the Court struck down a city ordinance requiring hotels to allow police officers to

80 United States v. Chuang, 807 F.2d 646, 651 (2d Cir. 1990).
81 United States v. Gordon, 655 F.2d 478, 483 (2d Cir. 1981); De La Cruz v. Quackenbush, 96 Cal. Rptr. 2d 92, 98 (Ct. App. 2000).
82 United States v. Delgado, 545 F.3d 1195, 1201–02 (9th Cir. 2008) (finding commercial trucking to be pervasively regulated and citing similar holdings from the First, Sixth, Eighth, and Tenth Circuits).
84 United States v. 4,432 Mastercases of Cigarettes, More or Less, 448 F.3d 1168, 1177–78 (9th Cir. 2006).
85 United States v. Raub, 637 F.2d 1205, 1209 n.5, 1211 (9th Cir. 1980).
86 Prof’l Dog Breeders Advisory Council v. Wolff, No. 1:CV-09-0258, 2009 WL 2948527, at *9 (M.D. Pa. Sept. 11, 2009) (”Dog breeding is a pervasively regulated activity and has been the subject of federal and state regulation since at least 1976 and 1982 respectively.”).
87 Anderton v. Tex. Parks & Wildlife Dep’t, 605 F. App’x 339, 343–44 (5th Cir. 2015) (per curiam).
89 People v. Perez, 55 Cal. Rptr. 2d 596, 600 (Ct. App. 1996).
91 Lesser v. Espy, 34 F.3d 1301, 1307 (7th Cir. 1994).
92 In re Martin, 447 A.2d 1290, 1299 (N.J. 1982).
inspect their guest registries even absent a warrant. In two ways, this decision exhibited a narrower understanding of the closely regulated industry exception as compared to Dewey and Burger. First, Patel noted that, unlike the four industries the Court had previously said were pervasively regulated, “nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare,” implying that the exception reaches only those industries posing such risks.

Second, Patel arguably required a more comprehensive regulatory regime. Emphasizing that closely regulated industries are the exception, not the rule, Patel held that the “hodgepodge of regulations” applicable to Los Angeles hotels failed to show pervasiveness because “numerous other businesses” were subject to similar kinds of regulations. Even the few regulations directed toward only a small set of businesses could not save the ordinance. The Court found them “more akin to the widely applicable minimum wage and maximum hour rules” that Barlow’s rejected than to a comprehensive scheme that put business owners on notice of possible warrantless inspections.

4. Tensions in the Current Doctrine. — Judicial efforts to define the exception’s scope have produced much doctrinal confusion. The Court has considered three factors in the pervasiveness inquiry — history, comprehensiveness, and riskiness. These factors are unranked and unweighted, and the analysis of each lacks clarity. Because these factors are intended to shed light on the ultimate consideration — the business owner’s reasonable expectation of privacy — they should be interpreted to help discern when the owner’s expectation of privacy has truly been diminished.

96 Id. at 2454.
97 Id. at 2455. The state and local regulations applicable to hotels included procedures governing the eviction of guests, health and cleanliness standards, and a requirement to post room rates. See Brief for Petitioner at 33–34, Patel, 135 S. Ct. 2443 (No. 13-1175).
98 For instance, California requires apartment houses and hotels to ensure that their bedding is clean. See CAL. CODE REGS. tit. 25, § 40 (2015), cited in Patel, 135 S. Ct. at 2455.
99 Patel, 135 S. Ct. at 2455. The Court further held that even if hotels were pervasively regulated, the Los Angeles ordinance failed two of the three Burger criteria. First, warrantless inspections were not necessary to further the regulatory scheme: in order to maintain surprise and to prevent falsification of the records, the police could obtain an ex parte warrant beforehand or, if necessary, seize the hotel registry while applying for a warrant. Id. at 2456. Second, the ordinance “fail[ed] sufficiently to constrain police officers’ discretion as to which hotels to search and under what circumstances” and thus did not provide a constitutionally adequate substitute for a warrant. Id.
100 Burger also briefly noted that the prevalence of similar regulations in other jurisdictions could be relevant, but the point was not further explained and did not factor into Patel’s analysis.
101 Patel, 135 S. Ct. at 2459 (Scalia, J., dissenting) (“These factors are not talismans, but shed light on the expectation of privacy the owner of a business may reasonably have, which in turn affects the reasonableness of a warrantless search.”).
(a) History. With respect to a history of close regulation, one can say no more than that it is “relevant.”102 The Court’s cases have treated this factor inconsistently. In *Barlow’s*, the single, dispositive factor — satisfied by the alcohol and firearm industries — was whether an industry had “such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise.”103 Had the Court firmly adhered to this demanding standard, the exception likely would not have expanded so far. But *Dewey* found it “absurd” that lack of historical precedent would preclude warrantless inspections in nuclear power and other “new or emerging industries.”104 *Burger* then made this factor of indeterminate weight even more difficult to analyze by characterizing the novel regulations of automobile junk yards as heirs to the older regulations of secondhand shops or general junkyards.105 *Patel* added a modicum of clarity by explaining that only those “laws subjecting [businesses] to warrantless searches” are relevant.106 But it remains impossible to say whether a long history of warrantless inspections is necessary or sufficient (or even important) for an industry to be closely regulated.107

(b) Comprehensiveness. *Patel* seemed to impose stricter comprehensiveness standards than *Burger*. Recall that *Burger* upheld a scheme containing the following requirements: obtaining a license by meeting registration requirements and paying a fee, keeping a record and making it available for police inspection, and displaying the registration number.108

Los Angeles’s regulations arguably subjected hotels to each of these elements, but some of the cited regulations were not industry specific. For example, New York junkyards had to obtain a license from the Commissioner of the Department of Motor Vehicles, who required the applicant to disclose all “convictions relating to the illegal sale or pos-

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102 Id. at 2455 (majority opinion).
106 Patel, 135 S. Ct. at 2455. In other words, it is not enough that an industry has been long regulated; the industry must also have been historically subject to inspections.
107 Abandoning history as a requirement unmoores the doctrine from its original rationale. Implied consent requires business owners to enter a closely regulated industry despite recognizing the cost of being subject to inspections. See *Barlow’s*, 436 U.S. at 313; Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973). However, in some cases a regulatory scheme may even come into being after the business owner has made his choice to enter an industry, making fictional any implied consent. *Donovan*, 452 U.S. at 612 (Stewart, J., dissenting).
108 See *Burger*, 482 U.S. at 704; see also *Patel*, 135 S. Ct. at 2460 (Scalia, J., dissenting) (noting that in *Burger* “licensing, inventory-recording, and permit-posting requirements were found sufficient to qualify the industry as closely regulated”).
session of a motor vehicle or motor vehicle parts. 109 By contrast, Los Angeles hotels needed only a license from the Fire Department, which did not require hoteliers to submit to background checks in order to determine their fitness to run hotels. 110

Additionally, the Patel Court had to overcome the fact that Los Angeles hotels were subject to more regulations than New York vehicle dismantlers. And some of these regulations (such as the clean-linen requirement) were applicable to only a few businesses. 111 Patel quickly dismissed them as similar to “the widely applicable minimum wage and maximum hour” rules found insufficient in Barlow’s. 112 However, it is not obvious why cleanliness requirements for apartments and hotels are too widely applicable while Burger’s registration requirements for salvage pool operators, mobile car crushers, itinerant vehicle collectors, vehicle rebuilders, scrap processors, and scrap collectors and repair shops were not. 114 Perhaps the Court meant that the regulations of automobile junkyards were codified together while regulations of hotels were found in separate parts of state and local codes and regulations. But such a test would elevate form over substance: state and local legislative bodies would be incentivized simply to collect all regulations of an industry in a single statute.

To be sure, giving “a precise and all-encompassing definition of what constitutes a ‘pervasive’ regulatory scheme” is probably impossible, 115 and case-by-case development may be more appropriate. But Patel’s mode of analysis is not conducive to building coherent common law: Patel did not expressly distinguish Burger and indeed made a slippery slope argument that parroted the Burger dissent. 116 Consequently, it will be difficult for lower courts to say whether regulations comparable to those in Burger are sufficient to constitute a comprehensive scheme. In particular, some of the lower court decisions cited above found an industry to be closely regulated simply by comparing the comprehensiveness of the industry’s regulations with New York’s automobile-junkyard requirements. 117 Rather than mechanical-

109 Burger, 482 U.S. at 704 n.15.
110 See Brief for the Respondents at 32 n.13, Patel, 135 S. Ct. 2443 (No. 13-1175).
111 Patel, 135 S. Ct. at 2455.
112 Id.
114 See Burger, 482 U.S. at 705 n.16.
116 Compare Patel, 135 S. Ct. at 2455 (“If such general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify.”), with Burger, 482 U.S. at 721 (Brennan, J., dissenting) (“In sum, if New York City’s administrative scheme renders the vehicle-dismantling business closely regulated, few businesses will escape such a finding.”).
117 See, e.g., Lesser v. Espy, 34 F.3d 1301, 1307 (7th Cir. 1994) (“The regulations governing the sale of rabbits for research appear to be comparatively as extensive as the regulations governing
ly applying the Burger checklist, however, comprehensiveness may be better evaluated holistically: do the applicable regulations control enough aspects of the business’s operations so as to meaningfully diminish its expectation of privacy?

(c) **Intrinsically Dangerous.** The Patel opinion itself leaves two ambiguities with respect to intrinsic dangerousness: whether this factor is necessary and what sorts of risks are covered. Recall that Patel distinguished hotels from liquor stores, gun shops, mines, and automobile junkyards on the ground that “nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare.”118 In a footnote, the opinion further explained that unlike those other industries, “hotels are not intrinsically dangerous.”119 Although Patel never explicitly said that any closely regulated industry must be intrinsically dangerous, its analysis signals such a rule. After all, the Court could have resolved the question on comprehensiveness grounds alone and never even raised the issue of dangerousness.

Furthermore, it is unclear which risks to the public welfare count. The phrase “intrinsically dangerous” suggests that the risk must consist of bodily harm,120 which alcohol, firearms, and mining clearly threaten. But automobile junkyards present only a threat to property.121 Thus, the relevant risks to the public welfare must include economic harms (or at least, economic harms that result from criminal activities) to accommodate Burger.122 The distinction between hotels and automobile junkyards, then, is that the former does not “rais[e] a comparable degree of risk”123 of illegal activity. Because Patel simply asserted

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118 *Patel*, 135 S. Ct. at 2454.
119 *Id.* at 2455 n.5.
120 See *Dangerous*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/dangerous [http://perma.cc/T4HU-8E2S] (defining dangerous as “involving possible injury, harm, or death” or “able or likely to cause injury, pain, harm, etc.”).
121 *Patel*, 135 S. Ct. at 2454 (quoting *Burger*, 482 U.S. at 709) (describing automobile junkyards as “provid[ing] the major market for stolen vehicles and vehicle parts”).
122 See, e.g., *State v. Larsen*, 650 N.W.2d 144, 153 (Minn. 2002) (en banc) (stating that the exception applies to industries “where, absent regulations and readily ascertainable compliance, serious personal safety concerns or felony level criminal conduct could reasonably be expected”); see also Pinney v. Phillips, 281 Cal. Rptr. 904, 912 (Ct. App. 1991) (“high risk of illegal conduct or of serious danger to the public”).
123 *Patel*, 135 S. Ct. at 2455 n.5. Alternatively, one could interpret a requirement of hazardousness as ramping up the first Burger criterion, in effect adopting Justice Brennan’s dissenting position in Burger that warrants should be required “for inspections in closely regulated industries unless the inspection scheme furthers an urgent governmental interest” rather than merely a “substantial state interest.” *Burger*, 482 U.S. at 721 n.7 (Brennan, J., dissenting). Indeed, after Patel,
that hotels are relatively risk-free, subsequent cases may find it difficult to determine precisely which industries present enough of a risk to the public welfare. The best approach may be to ask whether the risk is of the kind and degree that invites government regulation, including through warrantless inspections, and hence would reduce a business owner’s expectation of privacy.

II. CIRCUMSCRIBING THE EXCEPTION

Part I traced the development of the closely regulated industry exception and described its present, unsettled state. This Part advocates confining the exception by limiting the set of industries it can reach. Unchecked expansion of the exception is contrary to both precedent and Fourth Amendment values. Moreover, analyzing relevant characteristics of the regulated industry, rather than analyzing only the characteristics of the regulatory scheme, will more effectively contain the exception. In particular, this Note proposes that courts take into account the privacy expectations of an industry’s customers.

A. The Need for a Limit

Before discussing proposals for limiting the closely regulated industry exception, there is the antecedent question of why courts should not interpret it expansively. This proposition is not self-evident: no matter how broadly the exception applies, the result is no less protective of businesses than when civil searches were thought not to trigger Fourth Amendment protections. Nonetheless, precedent and general Fourth Amendment values counsel in favor of strict containment of the exception.

First, the Court’s cases have stated that the exception is a narrow one. See explained that the business owner “has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property,” which is “placed in jeopardy” when

the first Burger criterion becomes superfluous: surely there always exists a substantial state interest in minimizing clear and significant risks to the public welfare.

124 The dissenting Justices in Patel strongly disagreed with the Court’s characterization of hotels: “Motels . . . are also a particularly attractive site for criminal activity ranging from drug dealing and prostitution to human trafficking. Offering privacy and anonymity on the cheap, they have been employed as prisons for migrants smuggled across the border and held for ransom and rendezvous sites where child sex workers meet their clients on threat of violence from their procurers.” Patel, 135 S. Ct. at 2457 (Scalia, J., dissenting) (citations omitted); see also Brief for Petitioner, supra note 97, at 2.

125 See supra note 8. Many learned jurists thought warrantless inspections were generally constitutional. Among them are Justice Frankfurter, the author of the Frank decision, see Frank v. Maryland, 359 U.S. 360 (1959), and Justices Stevens, Blackmun, and then-Justice Rehnquist, see Marshall v. Barlow’s, Inc., 436 U.S. 307, 328 (1978) (Stevens, J., dissenting, joined by Blackmun & Rehnquist, JJ.).
regulatory inspections are permitted without prior judicial approval. 126 Failure to guard the exception carefully would place the constitutional right invoked in See at the mercy of the legislature. 127 Thus, Barlow’s said and Patel reaffirmed that pervasively regulated industries are “the exception,”128 and warrantless searches of businesses are permitted only as “responses to relatively unique circumstances.”129 Not only would these cases be undermined, but See would also be “constructively overruled”130 if most industries could be forced to accept warrantless inspections as a cost of doing business.

Second, the closely regulated industry exception, like all warrant exceptions, denies access to the Fourth Amendment’s core procedural mechanism for enforcing privacy and property rights. As explained above, the exception permits legislatures to provide for the arrest and criminal prosecution of business owners who refuse warrantless inspections. This framework bypasses the fundamental Fourth Amendment protection of interposing a detached, neutral magistrate between citizen and government. Moreover, unlike other warrant exceptions such as exigent circumstance or search incident to arrest, the applicability of the closely regulated industry exception does not require the occurrence of atypical situations; once the inspection scheme has been enacted, the exception is always available.

Finally — and of increasing relevance in this digital age — the exception, when combined with the third-party doctrine,131 enables broad governmental surveillance of information that citizens routinely turn over to businesses,132 which raises grave First Amendment concerns. As Justice Sotomayor recently explained, “[a]wareness that the Government may be watching chills associational and expressive free-

127 See Burger, 482 U.S. at 729 (Brennan, J., dissenting) (“No State may require, as a condition of doing business, a blanket submission to warrantless searches for any purpose.”).
128 Patel, 135 S. Ct. at 2455 (quoting Barlow’s, 436 U.S. at 313).
129 Barlow’s, 436 U.S. at 313; see also Patel, 135 S. Ct. at 2454–55.
130 Burger, 482 U.S. at 721 (Brennan, J., dissenting).
132 See Conor Friedersdorf, A Motel-Sized Victory for Privacy at the Supreme Court, THE ATLANTIC (June 23, 2015), http://www.theatlantic.com/politics/archive/2015/06/an-motel-sized-victory-for-privacy-at-the-supreme-court/396442 [http://perma.cc/2U3A-YK8D] (“The third-party information precedent is problematic on its own. But it is devastating to privacy when paired with laws that compel businesses to collect detailed information on customers and to turn it over to police without warrants, destroying the ability to enter voluntary transactions that include discretion.”).
And the Government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse.” 133 Thus, strictly limiting the exception will help protect the First Amendment rights of consumers as well as the Fourth Amendment rights of both customers and businesses.

In reply, one might argue that the pervasiveness requirement is superfluous because any warrantless-inspection scheme satisfying Burger’s three additional criteria — substantial government interest, necessity, and sufficient certainty and regularity of inspections — is reasonable under the Fourth Amendment. 134 After all, together the three prongs ensure that warrantless inspections are necessary to further a substantial government interest and that the statute already provides a constitutionally adequate substitute for a warrant. Why can’t the legislature subject any industry to warrantless inspections if the regulations are so carefully drawn?

The response is twofold. First, no matter how carefully the law limits the discretion of inspectors, there are still certain protections that only a neutral decisionmaker can provide (prevention of harassing or pretextual searches, for example). As Camara said, “broad statutory safeguards are no substitute for individualized review.” 135 Second, practically speaking, the three criteria can be applied quite loosely. For example, without providing any evidence, Burger asserted that New York law informed vehicle dismantlers that inspections would be made “on a regular basis.” 136 Patel then accepted Burger’s statement as true and juxtaposed the Los Angeles hotel ordinance as “impos[ing] no comparable standard” 137 — even though neither statute says anything about how often inspections would take place. 138 Reliance on the three Burger criteria alone is therefore insufficient.

133 Jones, 132 S. Ct. at 956 (Sotomayor, J., concurring).

134 See De La Cruz v. Quackenbush, 96 Cal. Rptr. 2d 92, 97 (Ct. App. 2000) (“The Supreme Court has taken a liberal view of what constitutes ‘close regulation,’ putting the teeth of the analysis in the reasonableness requirement instead.”).


136 New York v. Burger, 482 U.S. 691, 711 (1987). A perusal of the statute does not reveal where the Court obtained this information. See N.Y. VEH. & TRAF. LAW § 415-a (1987), reprinted in Brief for the Petitioner, Burger, 482 U.S. 691 (No. 86-80), 1986 WL 728365, at *1a; Burger, 482 U.S. at 722 (Brennan, J., dissenting) (“The statute does not inform the operator of a vehicle-dismantling business that inspections will be made on a regular basis; in fact, there is no assurance that any inspections at all will occur.”).


138 A similar inconsistency plagues the Court’s analysis of the necessity prong. In Dewey and Burger, the Court argued that the need for surprise made obtaining warrants impossible, but the dissents respond that warrants may be issued ex parte. Compare Burger, 482 U.S. at 710, and Donovan v. Dewey, 452 U.S. 594, 603 (1981), with Burger, 482 U.S. at 722 n.8 (Brennan, J., dissenting), and Dewey, 452 U.S. at 612 n.5 (Stewart, J., dissenting). In Patel, however, the majority pointed to ex parte warrants to say that necessity was not met. See 135 S. Ct. at 2456.
B. Evaluating Industries in Addition to Regulations

If limiting the exception is necessary, how should courts go about it? This Note argues that courts ought to restrict the set of industries to which the exception could apply.\textsuperscript{139} First, it will help to divide the set of factors that should logically affect the closely regulated inquiry into \textit{attributes of the regulatory scheme} and \textit{characteristics of the regulated industry} (regulation attributes and industry characteristics for short). Regulation attributes are assessments of the regulatory scheme as written or as applied. For example, they include how comprehensive the regulations are, how much warrantless searching is prescribed, and how regularly inspections are actually undertaken. Importantly, because the government can always impose more regulations, conduct more frequent inspections, and so on, these factors do not limit the government’s power to create warrantless inspection schemes (as long as it does so properly).\textsuperscript{140}

By contrast, industry characteristics include the type of business conducted, the level of risk created, and the length of time the industry has been subject to warrantless inspections. Unlike regulation attributes, industry characteristics are fixed by conditions outside of the government’s control: for instance, regardless of what the statute says, a business either presents a significant risk to public health and safety or it does not.\textsuperscript{141}

Thus, the more courts focus on industry characteristics rather than regulation attributes, the smaller the exception’s scope. Conversely, placing undue focus on the regulatory scheme to the detriment of industry characteristics enables the government to subject any industry to warrantless inspections through a sufficiently well-crafted statute. When \textit{Burger} evaluated New York’s automobile-junkyard regulations, each of the Burger criteria — substantial government interest and necessity of warrantless inspections — are industry characteristics. These factors are more logically evaluated at the preliminary step of determining whether an industry can be closely regulated. Moreover, substantial interest is not a high standard, and as explained above, the Court’s treatment of the necessity prong has been inconsistent.
it emphasized their comprehensiveness (a regulation attribute) and downplayed their novelty (an industry characteristic). As detailed above, lower courts following this approach generally interpreted the exception broadly.

But a few courts took another path and demonstrated the potential worth of industry characteristics. Recreational ice fishing, electrical contracting, and retail car dealerships were each held to be not risky or dangerous enough to qualify for the closely regulated industry exception. These decisions confirm that industry characteristics can provide an effective means of curbing the exception.

C. Considering Consumer Privacy

If industry characteristics are useful, the natural question is whether courts should analyze characteristics other than inherent dangerousness. Currently the doctrine takes into account the government’s interest in conducting warrantless inspections and the business owner’s expectation of privacy. Absent from this inquiry is consideration of the other party to commercial transactions: the customer. The customer’s expectation of privacy is an industry characteristic; the average person expects more privacy in her medical records than in her restaurant orders (to take an easy example). This Note closes by arguing that the closely regulated industry exception should not apply to businesses whose consumers reasonably expect informational privacy, unless there is a compelling governmental need for conducting warrantless inspections. The warrant procedure is especially im-

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142 State v. Larsen, 650 N.W.2d 144, 152–53 (Minn. 2002) (en banc).
143 Pinney v. Phillips, 281 Cal. Rptr. 904, 912 (Ct. App. 1991) (finding that the electrical contracting industry lacks the “high risk of illegal conduct or of serious danger to the public such that frequent, unannounced inspections are essential for the protection of the public or for the enforcement of the statutory purpose”).
144 Terry York Imps., Inc. v. Dep’t of Motor Vehicles, 242 Cal. Rptr. 790, 797 (Ct. App. 1987) (noting that dealerships do not, “by their very nature, require unannounced visits from government agents”); see also id. at 798 (“Closely regulated businesses ordinarily share a common circumstance: they engage in transactions or sales of products which directly affect the public health and safety.”).
146 The customer’s expectation of privacy may have been recognized by law. See, e.g., DeMassa v. Nunez, 770 F.2d 1505, 1506 (9th Cir. 1985) (per curiam) (“We hold that clients of an attorney maintain a legitimate expectation of privacy in their client files.”). To trigger the proposed rule, such recognition (whether constitutional, judicial, or statutory) is sufficient but not necessary.
147 Compelling need is a higher standard than Patel’s clear and significant risk. Only where death or injury is likely to result does a compelling need exist. To illustrate, although most consumers may expect their pharmaceutical information to remain private, the government’s compelling need to prevent the sale of adulterated drugs means that the exception still applies.
important for these businesses, and they should not be subject to immediate penalties for seeking judicial review before turning over sensitive consumer information, especially given that the government’s need is not compelling. Such industries include, for instance, those where a duty of confidentiality has traditionally attached: law, medicine, psychiatric treatment, banking, and accounting.

The suggested approach — explicitly considering the consumer’s expectation of privacy — represents a natural evolution of the doctrine. When Colonnade and Biswell were decided, businesses generally stored smaller amounts of less intrusive information about their customers, and so warrantless inspections presented a smaller threat to consumer privacy interests. Today, however, that threat has grown more serious, thanks in part to consumer willingness to divulge greater amounts of information. Furthermore, many businesses have a significant interest in protecting their customers’ information from government spying: “[T]he privacy of such information is important to a business’s customers, and a business has an interest in protecting that information in order to retain the trust of its customers.” That interest is likely greater today than in the past given the government’s recent surveillance practices.

Some courts have already hinted at looking into consumer expectation of privacy in cases dealing with the medical industry, where...
strong confidentiality norms have protected physician-patient relationships. In *Tucson Woman’s Clinic v. Eden*, the Ninth Circuit held that abortion clinics are not a closely regulated industry because in the clinics “the expectation of privacy is heightened,” not diminished. That is so for two reasons: first, “all provision of medical services in private physicians’ offices carries with it a high expectation of privacy for both physician and patient,” and second, abortion clinics in particular “provide[] a service grounded in a fundamental constitutional liberty.” Thus, abortion clinics are a poor fit for “the theory behind the closely regulated industry exception.” The Ninth Circuit’s analysis discussed the heightened privacy interests of both physicians and patients, but the court understandably did not isolate the Fourth Amendment implications of the patients’ privacy interests alone, as the current doctrine does not provide a clear basis for its assessment.

*Tucson Woman’s Clinic* suggests a generalizable principle: in some industries, heightened expectations of privacy by customers and/or businesses can render the exception inapplicable regardless of how satisfactory comprehensiveness may be. Further support for this idea appears in a 2006 decision by the Kentucky Supreme Court, which considered it “by no means clear” whether the medical profession falls within the exception because, although “the medical profession is one of the most pervasively regulated industries in the Commonwealth,” it also seemed “self-evident that some degree of privacy exists in the procurement of health care.” Again, this reference is ambiguous: the privacy interest could belong to either the physician or the patient.

Future cases should consciously and explicitly analyze consumer privacy interests. As Patel has shown, analysis of industry characteris-

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152 379 F.3d 531 (9th Cir. 2004).
153 Id. at 550. The regulations at issue “require[d] the providers to submit to warrantless, unbounded inspections of their offices and provide DHS inspectors access to unredacted medical records.” Id. at 537.
154 Id. at 550. Just as substantive due process protections for abortion may have played a role in the court’s decision, other constitutional guarantees also may supplement the Fourth Amendment’s protections. For instance, a warrantless inspection of an attorney’s offices could impinge upon the Sixth Amendment right to counsel. See *DeMassa v. Nunez*, 770 F.2d 1505, 1507 (9th Cir. 1985) (per curiam).
155 *Tucson Woman’s Clinic*, 379 F.3d at 550.
156 *Williams v. Commonwealth*, 213 S.W.3d 671, 675–76 n.3 (Ky. 2006); see also *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (“The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.”). When evaluating a search only of misbranded drugs, the First Circuit similarly declined to decide “[w]hether the practice of medicine in general” is closely regulated. *United States v. Gonsalves*, 435 F.3d 64, 67 (1st Cir. 2006); see also *id.* (noting that patient records were not at issue). And in a related context, a federal district court held that prescription records are protected by “a heightened privacy interest” that “render[ed] the use of administrative subpoenas unreasonable.” *Or. Prescription Drug Monitoring Program v. DEA*, 998 F. Supp. 2d 957, 967 (D. Or. 2014).
tics is proper, and the Court has never said that the factors in its six cases on the closely regulated industry exception are exclusive. In determining whether a warrantless inspection is “unreasonable,” few inquiries seem more natural than whether the privacy interest of the consumer — an important third party to government regulation of businesses — indicates the need for a warrant.

CONCLUSION

To return to the hypothetical that opened this Note, could mental health clinics be a closely regulated industry? Under Burger, the answer depended on how well crafted the inspection statute is. Under Patel, it also depends on if the industry presents a clear and significant risk to the public welfare. Whether there exists a long history of warrantless inspections of mental health clinics will also play some role.

Yet those three factors do not take into account the vital question of how such a statute would affect the patient’s expectation of informational privacy. Indeed, they do not even fully capture the doctor’s expectation of privacy. While the answer to the hypothetical is unclear under current doctrine, the more inclusive analysis proposed here indicates that the closely regulated industry exception should not apply to mental health providers. In this context, the customer’s privacy interest is very much heightened (and recognized by law), and the government probably cannot provide a persuasive reason that obtaining a warrant would stymie its regulatory goals.