The Right "to Be Secure": *Los Angeles v. Patel*

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I. Introduction

The U.S. Supreme Court addressed the Fourth Amendment rights of hotel and motel operators in *Los Angeles v. Patel*.[1] The Court held that an ordinance requiring operators to make guest registries available to police on demand was facially unconstitutional because it denied them the opportunity for precompliance review.

The decision can be studied on several levels. On a doctrinal level, *Patel* makes notable alterations to the law of search and seizure: first by loosening the restrictions on Fourth Amendment facial challenges; and second, by tightening the administrative exception to the warrant requirement.

Yet the real significance of *Patel* lies in its reasoning. When studied on this level, *Patel* leaves the reader both frustrated and intrigued. It frustrates because it purports to rest on little more than precedent. It omits discussion of Fourth Amendment text and values, and makes only vague, passing references to the practical consequences at stake. With that said, *Patel's* reliance on case law also intrigues, prompting one to reflect on the influences it left unarticulated.[2]

I argue in this short article that the *Patel* majority was quietly influenced by the "to be secure" text of the Fourth Amendment. At the time of the founding, the right "to be secure" guaranteed not simply a right to be "spared" unreasonable searches and seizures, but also a right to be left "tranquil" or "confident" against such

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[1] Los Angeles v. Patel, 135 S. Ct. 2443 (2015).

[2] Jerome Frank, Are Judges Human?, 80 U. Pa. L. Rev. 17, 37, (1931) ("Identity of the language of artificial, rule-worded, published opinions does not mean identity of the undisclosed 'real' reasons for decisions.").

government actions.[3] The influence of the "to be secure" text on *Patel* can be gleaned, I think, from the majority's emphasis on the "relative power" of hotel operators during police encounters, respondents' counsel Tom Goldstein's focus on "tranquility" at oral argument, and the Electronic Frontier Foundation's lengthy discussion as amicus on the original meaning of "to be secure." The upshot is that the original meaning of the Fourth Amendment appears to have played a silent but important role in *Patel*.

II. Facts and Procedural History

The *Patel* litigation involved a Fourth Amendment challenge to Los Angeles Municipal Code § 41.49. Section 41.49 required hotels, motels, and other places of overnight accommodation (hereinafter hotels) to record and keep specific information about their guests for a 90-day period.[4] Subsection (3)(a) of the ordinance authorized police to inspect such records without consent or a warrant: guest records "shall be made available to any officer of the Los Angeles Police Department for inspection . . . at a time and in a manner that minimizes any interference with the operation of the business."[5] The failure of a hotel operator to comply with § 41.49 was a criminal misdemeanor.[6]

The city enacted § 41.49 to "discourag[e] the use of hotel and motel rooms for illegal activities, particularly prostitution and narcotics offenses."[7] It described as "particularly problematic" the "parking-meter motels" where "[g]uests pay small hourly rates, in cash, to conduct their illicit business, and slink in and out anonymously and

[3] See discussion *infra* Part IV.D.

[4] § 41.49(2)(a) (2015) (providing that registries include basic information about guests, including: name; address; make, model, and license plate number of the guest's vehicle; date and time of the guest's arrival and scheduled departure; room number; rate charged; and method of payment for the room).

[5] § 41.49(3)(a). The ordinance is not uncommon. The city's brief makes references to 100 similar laws in cities and counties across the country. Petitioner's Brief at 36-37 n.3, Los Angeles v. Patel, 135 S. Ct. 2443 (2015) (No.13-1175).

[6] § 41.49(3)(a). A hotel operator's failure to make guest records available for police inspection was punishable by up to six months in jail and a $1,000 fine. § 11.00(m) (general provision applicable to entire LAMC).

[7] L.A., Cal., Ordinance No. 177966 (Oct. 6, 2006), available at http://clkrep.lacity.org/onlinedocs/2006/06-0125_ord_177966.pdf.

undetected."[8] But the city also made clear (in a nod to Elliot Spitzer) that illegality thrives in "establishments as reputable as the Mayflower Hotel."[9] In order to stamp out such crime, officers depend on the element of surprise. Criminal activity in hotels cannot be sufficiently deterred, the city argued, without warrantless, on-demand inspections of guest registries: "Prostitutes, johns, dealers, and other criminals who know that the police can scan a hotel's register at any time think twice about conducting their illicit activities in the hotel."[10]

In 2003, a group of hotel operators and a lodging association sued the City of Los Angeles, challenging the constitutionality of § 41.49(3)(a).[11] The parties "agree[d] that the sole issue in the . . . action [would be] a facial constitutional challenge" to § 41.49(3)(a) under the Fourth Amendment.[12] The parties further stipulated that hotel operators had been subjected to warrantless, nonconsensual inspections under the ordinance.[13] Following a bench trial, the district court entered judgment in favor of the city, holding that the hotel operators lacked a reasonable expectation of privacy in the guest registries subject to inspection.[14] On appeal, a Ninth Circuit panel affirmed on separate grounds, holding that the facial challenge failed because the operators "cannot 'establish that no set of circumstances exist under

[8] Petitioner's Brief, *supra* note 5, at 2. Justice Scalia articulated the harms in dissent. Patel, 135 S. Ct. at 2457 (Scalia, J., dissenting) ("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 threats of violence from their procurers." (citations omitted)).

[9] Petitioner's Brief, *supra* note 5, at 2; see also Dana Millbank, At the Mayflower, Client 9's Sinking Ship, Wash. Post, Mar. 11, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/03/10/AR2008031002724.html.

[10] Petitioner's Brief, *supra* note 5, at 2. The city asserts this deterrence has a long tradition. "The City of Los Angeles passed a version of the ordinance more than 100 years ago—long before the emergence of parking-meter motels and, indeed, before common folk had motor vehicles. Throughout, the ordinance has required hotels to make the registers available for police inspection." *Id*.

[11] The plaintiffs sought both declaratory and injunctive relief.

[12] Patel, 135 S. Ct. at 2448.

[13] *Id*. This stipulation satisfied the standing requirements of Article III. See Clapper v. Amnesty Int'l, 133 S. Ct. 1138 (2013) (stating that Article III standing requires an injury that is actual or "certainly impending").

[14] Petitioner's Brief, *supra* note 5, at 9, see also Katz v. United States, 389 U.S. 347 (1967).

which the Act would be valid.'"[15] On rehearing en banc,[16] a majority reversed, holding that a police officer's nonconsensual inspection of hotel records under § 41.49(3)(a) constitutes a Fourth Amendment "search" because "[t]he business records covered by § 41.49 are the hotel's private property" and the hotel operator "has the right to exclude others from prying into the[ir] contents."[17] The majority further held that § 41.49(3)(a) searches are "unreasonable" as they do not afford operators "an opportunity to 'obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.'"[18] The Supreme Court granted certiorari to consider whether hotel operators may bring a Fourth Amendment facial challenge to § 41.49(3)(a), and, if so, whether the warrantless inspections authorized by § 41.49(3)(a) violate the Fourth Amendment.

III. The *Patel* Opinions

The hotel operators won on both issues. Seven justices agreed that the operators could proceed with a facial challenge to § 41.49(3)(a), and five justices held that § 41.49(3)(a) violated the Fourth Amendment.[19] The majority opinion was authored by Justice Sonia Sotomayor, and joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan. Dissenting opinions were authored by Justices Antonin Scalia (joined by Chief Justice John Roberts and Justice Clarence Thomas) and Samuel Alito (joined by Justice Thomas).

[15] 686 F.3d 1085, 1086 (2012) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). The Ninth Circuit panel held that they "cannot meet the standard for a successful facial challenge." *Id.* Like the district court, the panel found it unnecessary to decide whether the ordinance could also be justified as a "warrantless administrative search under *Burger*." Petitioner's Brief, *supra* note 5, at 10.

[16] Los Angeles v. Patel, 738 F.3d 1058, 1065 (9th Cir. 2013).

[17] *Id.* at 1061.

[18] *Id.* at 1063–65 (quoting See v. City of Seattle, 387 U.S. 541, 545 (1967)). The Ninth Circuit dismissed the claim that hotels were subject to the more lax standard for "closely regulated businesses" in a footnote, stating only that "no serious argument can be made that the hotel industry has been subjected to the kind of pervasive regulation that would qualify it for treatment under the *Burger* line of cases." *Id.* at 1064 n.2.

[19] Justices Thomas and Alito dissented on both issues, while Chief Justice Roberts and Justice Scalia dissented on only the merits issue. Los Angeles v. Patel, 135 S. Ct. at 2457 (Scalia, J., dissenting) ("I assume that respondents may bring a facial challenge to the City's ordinance under the Fourth Amendment.").

A. Fourth Amendment Facial Challenge Permissible

The first holding of *Patel* is that the hotel operators can proceed with a facial challenge to § 41.49(3)(a). To support its holding, the majority placed dictum from *Sibron v. New York* in context, and casted the "no set of circumstances" test from *United States v. Salerno* in broad terms.

1. Giving Context to *Sibron*

The *Patel* majority observed that while facial challenges may be the "the most difficult . . . to mount successfully," the Court has "never held that these claims cannot be brought under any otherwise enforceable provision of the Constitution." [20] It went on to explain that because there is nothing unique about the Fourth Amendment in this regard, facial challenges relating to unreasonable searches and seizures are not "categorically barred or especially disfavored."[21]

The city had argued to the contrary, claiming that Fourth Amendment facial challenges were foreclosed by the Court's 1968 decision in *Sibron v. New York*.[22] In *Sibron*, the Court wrote that "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case."[23] Writing 47 years later for the majority in *Patel*, Justice Sotomayor explained that *Sibron*'s dictum "must be understood in the broader context of that case."[24] She pointed to the fact that the *Sibron* opinion emphasizes that the challenged New York law was relatively ambiguous ("'susceptible of a wide variety of interpretations'") and new ("'passed too recently for the State's highest court to have ruled upon many of the questions involving potential

[20] Patel, 135 S. Ct. at 2449 (citing Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (First Amendment); District of Columbia v. Heller, 554 U.S. 570 (2008) (Second Amendment); Chicago v. Morales, 527 U.S. 41 (1999) (Due Process Clause of the Fourteenth Amendment); Kraft Gen. Foods, Inc. v. Iowa Dep't. of Revenue & Finance, 505 U.S. 71 (1992) (Foreign Commerce Clause).

[21] Patel, 135 S. Ct. at 2449 ("A facial challenge is an attack on a statute itself as opposed to a particular application.").

[22] 392 U.S. 40 (1968).

[23] *Id*. at 59.

[24] Patel, 135 S. Ct. at 2449.

intersections with federal constitutional guarantees.'").[25] The *Patel* majority instructed that when *Sibron* is read in this broader context, it

> stands for the simple proposition that claims for facial relief under the Fourth Amendment are unlikely to succeed when there is substantial ambiguity as to what conduct a statute authorizes: Where a statute consists of "extraordinary elastic categories," it may be "impossible to tell" whether and to what extent it deviates from the requirements of the Fourth Amendment.[26]

To bolster its interpretation, the majority cited several post-*Sibron* instances in which the Court had invalidated statutes on Fourth Amendment grounds.[27]

2. Narrowing "Work Done" Pursuant to *Salerno*

The city contended in the alternative that if the operators' facial challenge is not generally barred by *Sibron*, it is nonetheless precluded by the "no set of circumstances" test from *United States v. Salerno*.[28] *Salerno* is commonly read to bar facial challenges unless a plaintiff can "'establish that no set of circumstances exists under which the [statute] would be valid.'"[29] The city argued that the hotel operators' facial challenge is improper because, even if the operators won on the merits of their claim, § 41.49(3)(a) would still be valid in various alternative circumstances. The city pointed to situations where the police respond to an exigency, where the subject of the search consents to inspection, and where police act pursuant to a warrant.

[25] *Id*. at 2450 (quoting Sibron, 392 U.S. at 60 n.20).

[26] *Id.* (quoting Sibron, 392 U.S. at 59, 61 n.20).

[27] *Id.* (citing Ferguson v. Charleston, 532 U.S. 67, 86 (2001); Chandler v. Miller, 520 U.S. 305, 308–09 (1997); Vernonia Schl. Dist. 47 v. Acton, 515 U.S. 646, 648 (1995); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 633 n.10 (1989); Payton v. New York, 445 U.S. 573, 574, 576 (1980); Torres v. Puerto Rico, 442 U.S. 465, 466, 471 (1979)).

[28] 481 U.S. 739, 745 (1987).

[29] Patel, 135 S. Ct. at 2450 (quoting Salerno, 481 U.S. at 745). *Patel* explains that "[u]nder the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a 'law is unconstitutional in all of its applications.'" *Id*. (quoting Wash. St. Grange v. Wash. St. Republican Party, 552 U.S. 442, 449 (2008)).

The *Patel* majority rejected the city's argument for two reasons. The first focused on its flawed "logic."[30] The city's line of reasoning would allow the state to block any Fourth Amendment facial challenge by simply pointing out that the search or seizure authorized by the challenged statute could be alternatively based on consent, exigent circumstances, or a warrant.[31] "For this reason alone," wrote Sotomayor, "the City's argument must fail."[32]

The "illogic" of the city's argument aside, the majority pressed a second criticism. While *Salerno* asks whether the "work done" by the challenged statute is valid under "no set of circumstances," it is important that courts applying *Salerno* not overstate the amount of "work done."[33] The majority cited *Planned Parenthood of Southeastern Pa. v. Casey*, which instructs that "[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[34] As applied to the Fourth Amendment, the majority explained that:

> [I]f exigency or a warrant justified an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute. Statutes authorizing warrantless searches also *do no work* where the subject of a search has consented. Accordingly, the constitutional "applications" that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute.[35]

Because statutes authorizing warrantless searches "do no work" in situations where the search is based on consent, exigent circumstances, or a warrant, the *Patel* majority concluded that they are not to be counted as alternative "sets of circumstances" under the *Salerno* test. As a result, the majority held that the hotel operators

[30] *Id.*, at 2451.

[31] *Id.* (stating that the city's argument "would preclude facial relief in every Fourth Amendment challenge to a statute authorizing warrantless searches").

[32] *Id.*

[33] *Id.* ("When assessing whether a statute meets this standard, the Court has considered only applications of the state in which it actually authorizes or prohibits conduct.").

[34] 505 U.S. 833, 894 (1992).

[35] Patel, 135 S. Ct. at 2451 (emphasis added).

met the "no set of circumstances" test from *Salerno* and were able to proceed with their facial challenge to § 41.49(3)(a).

3. Concurring Views on Fourth Amendment Facial Challenges

Dissenting on the merits, Justice Scalia nonetheless assumed that the hotel operators "may bring a facial challenge to the City's ordinance under the Fourth Amendment."[36] His opinion provides "a few thoughts" on how courts have imprecisely discussed "facial invalidations."

> [T]he facial invalidation of a statute is a logical consequence of the Court's opinion, not the immediate effect of its judgment. Although we have at times described our holdings as invalidating a law, it is always the application of a law, rather than the law itself, that is before us.
>
> The upshot is that the effect of a given case is a function not of the plaintiff's characterization of his challenge, but the narrowness or breadth of the ground that the Court relies upon in disposing of it. . . . I see no reason why a plaintiff's self-description of his challenge as facial would provide an independent reason to reject it unless we were to delegate to litigants our duty to say what the law is.[37]

Scalia's point is that "facial invalidation" occurs only when a court's reasoning is sufficiently broad such that that none of the "work done" by the statute can, as a practical matter, withstand constitutional scrutiny in future litigation.[38] His understanding that

[36] *Id*. at 2457 (Scalia, J., dissenting). Justice Scalia's opinion is styled as a dissent because he sides against the hotel operators on the question of whether the ordinance violated their Fourth Amendment rights.

[37] *Id.* at 2457–58.

[38] The more abstract the Court's ruling, the more likely no set of circumstances exists under which the law would be valid and, in turn, the more likely the authorizing statute is, as a practical matter, "facially" invalid. See, e.g., Citizens United v. FEC, 558 U.S. 310, 331 (2010) (explaining that the distinction between facial and as-applied challenges hinges on "the breadth of the remedy employed by the Court, not what must be pleaded in a complaint"); Richard Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1324 (arguing that facial challenges are not "a distinct category of constitutional litigation" but are instead "best conceptualized as incidents or outgrowths of as-applied litigation").

"facial invalidation" is a mere "practical effect of judicial reasoning" challenges the wisdom of treating *Salerno*'s "no set of circumstances" test as an independent ground for dismissal.[39] Put simply, it should make no difference to courts whether a plaintiff styles his complaint "as-applied" or "facial."[40]

4. Dissenting Views on Fourth Amendment Facial Challenges

Justices Alito and Thomas dissented from the Court's holding on facial challenges. Justice Alito wrote that "the Fourth Amendment's application to warrantless searches and seizures is inherently inconsistent with facial challenges."[41] As support, he cited to *Sibron's* dictum that "the constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case."[42]

Assuming such facial challenges "ever make sense conceptually," the dissenters went on to criticize the *Patel* majority for misapplying the "no set of circumstances" test from *Salerno*.[43] In response to the majority's claim that the challenged ordinance "does no work" when inspections are based on exigent circumstances or a warrant, Alito wrote that the Los Angeles ordinance created a unique legal sanction for hotel operators who failed to comply with an officer's demand for an inspection.[44] Because this sanction extended to refusals to comply with exigency- or warrant-based inspections, the dissent claims the majority was wrong to conclude that § 41.49(3)(a) "does no work" during such inspections.[45] Alito concluded that *Salerno* prohibits the respondents' facial challenge because even if they prevailed on their

[39] Cf. Chem. Waste Mgmt., Inc. v. EPA, 56 F.3d 1434, 1437 (D.C. Cir. 1995) (applying *Salerno* and concluding that "we … are unable to reach the merits because petitioners have not made a proper facial challenge. . . . [I]f petitioners are to succeed, they must bring a constitutional challenge as applied specifically to them.").

[40] See Alex Kreit, Making Sense of Facial and As-Applied Challenges, 18 Wm. & Mary Bill Rts. J. 657, 659–61 (2010) (discussing the contending views on facial challenges).

[41] Patel, 135 S. Ct. at 2466 (Alito, J., dissenting).

[42] *Id.* (citing Sibron v. New York, 392 U.S. at 59, 62).

[43] *Id*.

[44] *Id*. at 2464–65.

[45] *Id.*

Fourth Amendment claim, some of the "working" parts of § 41.49(3)(a) would remain valid.[46]

B. Section 41.49(3)(a) Violates the Fourth Amendment

The second holding of *Patel* is that § 41.49(3)(a) violates the Fourth Amendment. By a 5–4 vote the Court held that the warrantless inspections authorized by § 41.49 are "unreasonable" because (1) the ordinance does not provide an opportunity for precompliance review; and (2) hotels do not fall within the exception for "closely regulated businesses."

1. Precompliance Review Necessary for Administrative Searches

The Fourth Amendment provides, in relevant part, that "[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."[47] The Fourth Amendment warrant requirement is subject, however, "to a few specifically established and well-delineated exceptions."[48] Warrantless search regimes may be "reasonable," for instance, where "'special needs . . . make the warrant and probable-cause requirement impracticable,'" and where the "'primary purpose'" of the searches is "'[d]istinguishable from the general interest in crime control.'"[49] As applied to the case at hand, the *Patel* majority wrote:

> [W]e assume that the searches authorized by § 41.49 serve a "special need" other than conducting criminal investigations. They ensure compliance with the record-keeping requirement, which in turn deters criminals from operating on the hotels'

[46] *Id.* at 2466 ("Under threat of legal sanction, this law orders hotel operators to do things they do not want to do."). The majority responded to Justice Alito's point in summary fashion: "An otherwise facially unconstitutional statute cannot be saved from invalidation based solely on the existence of a penalty provision that applies when searches are not actually authorized by the statute." Los Angeles v. Patel, 135 S. Ct. at 2451 n.1.

[47] U.S. Const. amend. IV.

[48] Arizona v. Gant, 556 U.S. 332, 338 (2009).

[49] Los Angeles v. Patel, 135 S. Ct. at 2452 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); Indianapolis v. Edmond, 531 U.S. 32, 44 (2000)).

> premises. The Court has referred to this kind of search as an "administrative search."[50]

After classifying § 41.49 inspections as administrative searches, the majority explained that the subjects of administrative searches "must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker."[51] "Precompliance review" is essential, wrote the majority, because it "alters the dynamic" between police and hotel operators.[52] More specifically, it reduces the "intolerable risk" that searches "will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests."[53] The majority explained that the opportunity for precompliance review imposes only *de minimis* burdens on law enforcement. First, actual judicial review is only required in those cases when the subject of a search objects.[54] Second, in the event that an "officer reasonably suspects that a hotel operator may tamper with the registry while the [precompliance review] is pending, he or she can guard the registry until the required hearing can occur."[55]

The *Patel* majority concluded that § 41.49(3)(a) failed to provide hotel operators with an opportunity for precompliance review. Justice Sotomayor explained that "[w]hile the Court has never attempted to prescribe the exact form an opportunity for precompliance review must take, the City does not even attempt to argue that § 41.49 affords hotel operators any opportunity whatsoever."[56] For example, under the ordinance "[a] hotel owner who refuses to give an officer access to his or her registry can be arrested on the spot."[57] This is the case even "if a hotel has been searched 10 times a day, every day,

[50] *Id.* at 2452 (quoting Camara v. Mun. Ct. of City & County of San Francisco, 387 U.S. 523, 534 (1967)).

[51] *Id.* (citing See v. Seattle, 387 U.S. 541, 545). Precompliance review for administrative searches differs from a traditional warrant. It does not, for example, require a judicial finding of probable cause. See *id.*

[52] *Id.* at 2454.

[53] *Id.* at 2452–53.

[54] *Id*. at 2453.

[55] *Id*.

[56] *Id.* at 2452.

[57] *Id.*

for three months, without any violation being found."[58] The operator of a hotel faced with such harassment could "only refuse to comply with an officer's demand to turn over the registry at his or her own peril."[59]

2. Hotels Not "Closely Regulated Businesses"

The city argued that it need not provide hotel operators with opportunities for precompliance review because hotels are "closely regulated businesses." In rejecting the argument, Justice Sotomayor wrote that the Supreme Court has only applied the "closely regulated business" exception to four industries: liquor sales, mining, firearms dealing, and automobile junkyards.[60] Unlike these industries, wrote Sotomayor, "nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare."[61] Moreover, the sum of regulations imposed on the hotel industry (e.g., requiring a license, collection of taxes, posting of rates, certain sanitary requirements) does not "establish a comprehensive scheme of regulation that distinguishes hotels from numerous other businesses."[62] As a result, classifying the hotel industry as pervasively regulated "would permit what has always been a narrow exception to swallow the rule."[63]

The *Patel* majority went on to explain that even if hotels fell within the "closely regulated business" exception, § 41.49(3)(a) would still violate the Fourth Amendment. To ensure nonarbitrary enforcement,

[58] *Id*. 2453.

[59] *Id*.

[60] *Id*. at 2454–55 (citing Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Biswell, 406 U.S. 311, 311-12 (1972); Donovan v. Dewey, 452 U.S. 594 (1981); New York v. Burger, 482 U.S. 691 (1987)).

[61] *Id*. (citing Burger, 482 U.S. at 709 ("Automobile junkyards and vehicle dismantlers provide the major market for stolen vehicles and vehicle parts."); Dewey, 452 U.S. at 602 (explaining that the mining industry is "among the most hazardous in the country.")); see also Brief for the Cato Institute as Amicus Curiae in Support of Respondents at 15, Los Angeles v. Patel, 135 S. Ct. 2443 (2015) (No.13-1175) ("Provision of lodging does not have the predisposing relationship to crime that pursuits such as auto dismantling have, so hotels are inapt candidates for 'administrative search.'").

[62] *Id.* at 2455.

[63] *Id.* Moreover, while history is relevant when determining whether an industry is closely regulated, the historical record is not clear in this case.

statutes authorizing warrantless searches of "closely regulated businesses" have long had to satisfy three criteria:

> (1) [T]here must be a "substantial government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be 'necessary' to further [the] regulatory scheme"; and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."[64]

The majority concluded that § 41.49(3)(a) failed both the second and third criteria.[65] In relation to the second prong, the city argued that "surprise" inspections pursuant to § 41.49(3)(a) are necessary to deter hotel operators from falsifying guest records. The *Patel* majority disagreed, observing that its holding would not prevent surprise inspections in those situations where the police secured an *ex parte* warrant or identified an exigent circumstance.[66] The majority further explained that officers can make surprise demands without a warrant or an exigency and, should hotel operators request judicial review, the officers can "guard the registry pending a hearing."[67] As to the third prong, the *Patel* majority observed that while the Court had upheld statutes calling for searches "at least four times a year" and on a "regular basis," § 41.49(3)(a) imposed "no comparable standard."[68]

3. Dissenting Views on Constitutionality of § 41.49(3)(a)

Four justices dissented on the merits. They concluded that § 41.49(3)(a) complied with the Fourth Amendment because it met the three criteria for warrantless searches of "closely regulated businesses." Justice Scalia's dissent first attacks the majority's characterization of

[64] *Id.* at 2456 (quoting Burger, 482 U.S. at 702–703).

[65] *Id.* The majority did, however, assume the city had a substantial interest in ensuring that hotels keep complete registries. *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* Justice Sotomayor explained that the holding does not call into question those parts of § 41.49 requiring hotel operators to keep records. Nor does it prevent police from obtaining access to such records with a warrant, consent, or based on exigent circumstances. *Id.* at 2452.

the "closely regulated business" exception. The exception, he wrote, is based not on the "dangerousness" of the targeted industry, but rather on the "expectations of privacy" of its operators and owners.

> The reason closely regulated industries may be searched without a warrant has nothing to do with the risk of harm they pose; rather, it has to do with the expectations of those who enter such a line of work.[69]

To assess expectations of privacy in this context, Scalia pointed to three factors: the length of the regulatory tradition, the comprehensiveness of regulation, and the imposition of similar regulations by other jurisdictions.[70] Each factor, wrote Scalia, leans toward classifying hotels as "closely regulated." At the time of the founding, warrantless searches "of inns and similar places of public accommodation were commonplace."[71] Moreover, hotels are currently subjected to a vast number of regulations, including requirements to maintain a license, collect taxes, conspicuously post their rates, and meet certain sanitary standards.[72] Lastly, he explained that there are "more than 100 similar register-inspection laws in cities and counties across the country."[73]

The fact that the Court had previously classified only four industries as "closely regulated" mattered little to the dissenters. Scalia explained that the number four says "more about how this Court exercises its discretionary review than it does about the number of industries that qualify as closely regulated."[74] He explained that lower courts which lack discretion to select their cases have extended the "closely regulated business" exception to countless industries (including pharmacies, massage parlors, commercial fishing operations, day-care facilities, nursing homes, jewelers, barbershops, and rabbit dealers).[75]

[69] *Id.*, at 2461 (Scalia, J., dissenting).

[70] *Id.* at 2459–60.

[71] *Id.* at 2459 (citing William Cuddihy, Fourth Amendment: Origins and Original Meaning 602–1791, 743 (2009) ("[T]he state code of 1788 still allowed tithingmen to search public houses of entertainment on every Sabbath without any sort of warrant.")).

[72] *Id.*

[73] *Id.* at 2460.

[74] *Id.* at 2461.

[75] *Id.*

After concluding that hotels are "closely regulated," Justice Scalia went on to explain that § 41.49(3)(a) meets the three criteria for warrantless searches of such businesses.[76] First, the city's interest in deterring criminal activity in hotels is "substantial."[77] Second, the warrantless inspections authorized by § 41.49(3)(a) are "necessary" to advance this interest.[78] On this point the dissenters disagreed with the majority's claim that the element of surprise could be preserved without the ordinance. Scalia explained that hotel searches based on exigent circumstances are rare,[79] reliance on *ex parte* warrants is cost-prohibitive,[80] and inviting police to "guard the registry pending a hearing" is "equal parts 1984 and Alice in Wonderland."[81] By this he meant that "[i]t protects motels from government inspection of their registers by authorizing government agents to seize the registers . . . or to upset guests by a prolonged police presence at the motel."[82] The third criterion for warrantless searches of a "closely regulated business" is also met, wrote Scalia, because § 41.49 served as an adequate substitute for a warrant. The ordinance limited warrantless police searches to "pages of a guest register in a public part of a motel," which "circumscribe[d] police discretion in much more exacting terms than the laws we have approved in our earlier cases."[83]

IV. Observations on *Patel*

The *Patel* decision can be assessed on a couple of levels. This section provides a brief survey of *Patel*'s doctrinal implications before turning to a more detailed discussion of the majority's reasoning.

[76] See *supra* text accompanying note 68 (stating three guidelines from *Burger* to determine if an industry is "closely regulated).

[77] Patel, 135 S. Ct. at 2461 (Scalia, J., dissenting).

[78] *Id.* at 2464 ("The Court concludes that such minor intrusions, permissible when the police are trying to tamp down the market in stolen auto parts, are 'unreasonable' when police are instead attempting to stamp out the market in child sex slaves.").

[79] *Id.* at 2461 ("[T]he whole reason criminals use motel rooms in the first place is that they offer privacy and secrecy, so that police will never come to discover these exigencies.").

[80] *Id*. 2462.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 2463 (citing Colonnade Catering Corp. v. United States, 397 U.S. 72, 73 n.2 (1970); New York v. Burger, 482 U.S. 691, 694 n.1 (1987); Donovan v. Dewey, 452 U.S. 594, 596 (1981); United States v. Biswell, 406 U.S. 311, 312 n.1 (1972)).

A. Patel*'s Doctrinal Implications*

The *Patel* decision makes several alterations to Fourth Amendment doctrine. First, it loosens the restrictions on Fourth Amendment facial challenges by giving context to *Sibron* and by strictly assessing the "work done" by an authorizing statute in the "no set of circumstances" test from *Salerno*. The practical effect of this doctrinal shift is unclear in light of the Court's 2013 decision in *Clapper v. Amnesty International*.[84] *Clapper* reaffirms that Fourth Amendment litigants lack Article III standing unless they can show they were subjected to an illegal search or seizure that has occurred or is "certainly impending."[85] To meet this standard, Fourth Amendment litigants (including those seeking to make a facial challenge) must allege government action beyond the mere enactment of an authorizing statute. They must allege particularized executive action which will, as a general matter, approximate the facts sufficient to support a conventional as-applied Fourth Amendment challenge. Given the choice between an as-applied and a facial challenge, most plaintiffs and judges will tend to emphasize the former. By framing a challenge as-applied, a plaintiff can avoid scrutiny under *Salerno* yet still invite a judicial holding broad enough to practically invalidate the related statute. Judges in turn tend to prefer as-applied challenges because they can be resolved on narrower constitutional grounds. Since plaintiffs and judges tend to emphasize as-applied challenges, and because any plaintiff able to meet the standing requirements of Article III will almost certainly have the option of an as-applied challenge, it's unlikely that *Patel* will lead to a significant increase in the number of statutes invalidated on Fourth Amendment grounds.

The second doctrinal implication of *Patel* is that it strengthens the protections afforded to businesses under the administrative search doctrine. It does so by reaffirming the importance of precompliance review and by limiting the "closely regulated business" exception to "inherently dangerous" industries. This aspect of *Patel* constitutes a small win for the hundreds of thousands of individuals working in pharmacies, massage studios, day care facilities, nursing homes, jewelry stores, and barbershops. Assuming these businesses are not found "inherently dangerous" in subsequent litigation, statutes

[84] 133 S. Ct. 1138 (2013).

[85] *Id.* at 1150.

authorizing regulatory searches of such workplaces will now have to provide their operators with opportunities for precompliance review.

B. Patel *and* Stare Decisis

The holdings of *Patel* purport to rest on little more than case law. In loosening the restrictions on Fourth Amendment facial challenges, the majority opinion offers up a detailed discussion of *Sibron*'s contested dictum, a string citation to facial challenges previously permitted by the Court, and a survey of prior cases applying *Salerno*'s "no set of circumstances" test.[86] *Patel* provides no discussion of how facial challenges (either generally or in the context of the Fourth Amendment) were viewed by the Framers. Nor does it include any pragmatic discussion of how its holding will impact courts and litigants going forward.

The majority's holding on the merits appears similarly reliant on case law. To establish the constitutional value of precompliance review, *Patel* cites precedent and makes a passing reference to the importance of "alter[ing] the dynamic" between police and hotel operators.[87] Moreover, its conclusion that only "inherently dangerous" businesses fall within the "closely regulated business" exception is not attributed to Fourth Amendment text, history, or values, but simply to the fact that the four industries previously classified by the Court as "closely regulated" were each "inherently dangerous."

The majority's disregard for Fourth Amendment text and history was not lost on Justice Scalia:

> The Court reaches its wrongheaded conclusion not simply by misapplying our precedent, but by mistaking our precedent for the Fourth Amendment itself. Rather than bother with the text of that Amendment, the Court relies exclusively on our administrative-search cases. But the Constitution predates 1967, and it remains the supreme law of the land today.[88]

[86] Patel, 135 S. Ct. at 2450–51.

[87] *Id.* at 2454. The majority spends several paragraphs, however, explaining the *de minimis* burdens imposed on law enforcement by its precompliance requirement. *Id.* at 2453–54.

[88] *Id.* at 2464 (Scalia, J., dissenting) (citations omitted).

Patel's heavy reliance on case law stands in marked contrast to the Court's recent Fourth Amendment opinions in *Riley v. California* and *United States v. Jones*.[89] In limiting searches of cell phones following an arrest, eight justices in *Riley* affirmed the importance of original constitutional meaning to Fourth Amendment decisionmaking. *Riley* teaches that in the absence of "more precise guidance" from the text,[90] courts should look to Founding-era values:

> The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.[91]

Two years earlier, a majority of the Court relied on Founding-era trespass law to assess the constitutionality of attaching GPS tracking devices to vehicles. Holding that the practice violates the Fourth Ammendment, *Jones* explains that "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."[92]

C. Patel*'s Unstated Influence*

Although *Patel* omits reference to constitutional text and history, there is likely more to the majority opinion than meets the eye. I believe that an unstated influence on *Patel* can be gleaned from the majority's reference to "alter[ing] the dynamic" between hotel operators and police. In discussing the value of precompliance review, the majority wrote that

> the availability of precompliance review *alters the dynamic* between the officer and the hotel to be searched, and reduces the risk that officers will use administrative searches as a pretext to harass business owners.[93]

[89] Riley, 134 S. Ct. 2473 (2014); Jones, 132 S. Ct. 945 (2012).

[90] Riley, 134 S. Ct. at 2484.

[91] *Id.* at 2495.

[92] Jones, 132 S. Ct. at 949 (citing Entick v. Carrington, 95 Eng. Rep. 807 (C. P. 1765)).

[93] Patel, 135 S. Ct. at 2454; *id*. at 2452 ("Absent an opportunity for precompliance review, the ordinance creates an intolerable risk that searches authorized by it will ex-

Here *Patel* suggests that the opportunity for precompliance review is constitutionally significant not simply because it results in fewer unreasonable searches. Rather, it is constitutionally significant because it "alters the dynamic" between the individual and the state. In other words, precompliance review matters because it strengthens the relative power of hotel owners during police encounters.

Patel's emphasis on "relative power" hints at its unarticulated premise: that the Fourth Amendment guarantees not simply a right to be *spared* unreasonable searches and seizures, but moreover a right to be *confident* against such government illegalities. In other words, the government does not fully comply with the Fourth Amendment by simply not undertaking intrusive searches or seizures (and providing remedies when it does). It must do more. It must not behave in a way that makes the people anxious or fearful about being subjected to such searches or seizures.

Of course the government can ease such anxieties through a remedial scheme (such as the exclusionary rule). But remedial schemes provide only limited degrees of confidence. For instance, the likelihood (even the high likelihood) of a remedy may bring small comfort to a hotel operator worried about private information being revealed during an unreasonable inspection. Sensing a need to bolster the confidence of hotel operators, the *Patel* majority "alters the dynamic" of police encounters, thereby granting operators the power to obtain judicial review before any regulatory inspection takes place.

The claim that Fourth Amendment "confidence" influenced the *Patel* majority finds additional support in the *Patel* briefs and oral arguments. At three points during oral argument, Tom Goldstein (representing the respondents) referenced a Fourth Amendment guarantee of "tranquility." Goldstein argued:

> [W]e make pre-enforcement judicial review [] available, and the reason is the Fourth Amendment protects our sense of *tranquility*. The hotel owners, individuals in other contexts,

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ceed statutory limits, or be used as a pretext to harass hotel operators and their guests. Even if a hotel has been searched 10 times a day, every day, for three months, without any violation being found, the operator can only refuse to comply with an officer's demand to turn over the registry at his or her own peril."); see also Patel v. City of Los Angeles, 738 F.3d 1058, 1064 (9th Cir. 2013) (en banc) ("Hotel operators are thus subject to the 'unbridled' discretion of officers in the field, who are free to choose whom to inspect, when to inspect, and the frequency with which these inspections occur.").

> businesses in other contexts, need to know that beat officers aren't going to, at their whim, conduct these searches.[94]
> . . .
> But the prospect that there can be an objection and that you can go to a judge is what protects the sense of *tranquility* of the business owner.[95]
> . . .
> That's—in fact, the principal thing that this Court's precedents have pointed to—and just look at what's missing in this—in this ordinance. Every time the other side will say to you, look, we identified specifically the records. But the question isn't what the records are, it's the loss of the sense of *tranquility* provided by the Fourth Amendment, that we don't know how frequently and for what harassing purpose and how—and for what reasons at all that a police officer is just going to come in over and over again.[96]

Goldstein's repeated references to Fourth Amendment "tranquility" eventually drew questions from Chief Justice Roberts:

> C.J. Roberts: Have we used that phrase before?
>
> Mr. Goldstein: Which one, Your Honor?
>
> C.J. Roberts: *Tranquility*.
>
> Mr. Goldstein: I don't think that word is –
>
> C.J. Roberts: We talk about privacy and all that, but I'm not sure that the Fourth Amendment should be expanded to protect the sense of *tranquility*.
>
> Mr. Goldstein: I'm trying to—
>
> J. Scalia: I have a problem imagining *tranquil* hotel owners. It's not what I associate with owning a hotel.
>
> Mr. Goldstein: It is the sense of certainty that the Fourth Amendment provides that you do know is that there are going to be limits on when the

[94] Transcript of Oral Argument at 30, Los Angeles v. Patel, 135 S. Ct. at 2443 (2015) (No.13-1175) (emphasis added).

[95] *Id.* at 33–34 (emphasis added).

[96] *Id.* at 48–49 (emphasis added).

> police come in and say, show us your papers. Okay? And that's what we're talking about.[97]

A further variation of the "confidence" argument was developed by the Electronic Frontier Foundation (hereinafter EFF) as amicus in *Patel*. The EFF brief argued that the Fourth Amendment is a "shield" which offers "preventative" assurance to individuals.

> The Constitution's framers originally intended the Fourth Amendment to serve as a shield against freestanding authority to conduct general searches. Facial challenges, which can ensure that a statute is struck before the government relies on it to effect an unconstitutional search, support this intent; they ensure the Fourth Amendment does not merely remedy constitutional violations but also prevents them in the first place.
> . . .
> The Fourth Amendment, like the Establishment Clause, operates as a shield against certain government conduct—*i.e.*, unconstitutional searches.
> . . .
> The very text and history of the Amendment thus calls for a protective buffer against unreasonable governmental intrusion to ensure that constitutional violations are prevented—not merely dealt with after the fact.[98]

Unlike Goldstein's oral argument, the EFF brief explicitly rooted its claim in the text of the Fourth Amendment.

> Indeed, the Fourth Amendment is not merely a "right" against unreasonable searches, it is also a "right . . . *to be secure*" against unreasonable searches. *See* U.S. Const., amend. IV (emphasis added). The inclusion of this phrase—"to be secure"—demonstrates the Founders' intent for the Amendment to prevent, not merely redress, violations.[99]

Although Fourth Amendment "confidence" was not explicitly referenced in the *Patel* decision, its influence can be inferred from the majority's emphasis on "alter[ing] the dynamic," Tom Goldstein's

[97] *Id.* at 49 (emphases added).

[98] Brief of Electronic Frontier Foundation as Amicus Curiae in Support of Respondents and Affirmance at 30–31, Los Angeles v. Patel, 135 S. Ct. at 2443 (2015) (No.13-1175).

[99] *Id.* at 30–31.

arguments about "tranquility," and the EFF's claim that the Fourth Amendment is a "preventative shield."

D. Textual Foundation for "Confidence"

The EFF brief in *Patel* locates Fourth Amendment "confidence" in the textual right "to be secure."[100] The Fourth Amendment provides, in pertinent part, for "the right of the people *to be secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures."[101] Unfortunately, the courts have never explicitly discussed the meaning of "to be secure," and commentators (absent a few exceptions) have shown little interest in the original meaning of these words.[102]

Turning to the dictionaries, "secure" is defined as "free from fear or anxiety" and, alternatively, "sure, not doubting."[103] These meanings closely approximate that of "confidence" ("the mental attitude of trusting in or relying on a person or thing").[104] The interchangeability of "secure" and "confidence" is further demonstrated by influential pre-ratification discourse regarding searches and seizures. In the wake of James Otis's landmark condemnation of the writs of assistance in *Paxton's Case*,[105] it was written anonymously (most likely by Otis):[106]

[100] *Id*. at 30–31.

[101] U.S. Const. amend. IV (emphasis added).

[102] See Lawrence Rosenthal, Seven Theses in Grudging Defense of the Exclusionary Rule, 10 Ohio St. J. Crim. L. 523, 536 (2013) ("The term 'secure' is often ignored in discussions of the Fourth Amendment."). But see Thomas Clancy, The Fourth Amendment as a Collective Right, 43 Texas Tech L. Rev. 255, 262 n.57 (2010) (describing the right to be secure as "the right to exclude"); Luke M. Milligan, The Forgotten Right to Be Secure, 65 Hastings L.J. 713, 735–37 (2014) (defining the right "to be secure" as one to be "protected" or "free from fear").

[103] Oxford English Dictionary (2nd ed. 1989), vol. XIV at 851 (defining "secure" as: "free from . . . danger, safe"; "protected from or not exposed to danger"; or being "free from fear or anxiety"); Johnson's Dictionary (W. Strahaned. 1755), at 1777 (defining "secure" as "free from danger, that is safe"; "to protect"; "to insure"; "free from fear"; or "sure, not doubting").

[104] Oxford English Dictionary, *supra* note 103, vol. III at 705.

[105] See generally Boyd v. United States, 116 U.S. 616, 625 (1886) ("'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'").

[106] See Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 562 n.20 (2000) (claiming that the article was "probably authored by James Otis").

> [E]very hous[e]holder in this province, will necessarily become less *secure* than he was before this writ had any existence among us; for by it, a custom house officer or any other person has a power given him, with the assistance of a peace officer, to enter forcibly into a dwelling house, and rifle any part of it where he shall please to suspect uncustomed goods are lodg[e]d!—Will any man put so great a value on his freehold, after such a power commences as he did before? . . . . Will any one then under such circumstances, ever again boast of [B]ritish honor or [B]ritish privilege?[107]

The author's choice of the terms "less secure" and "every householder" is instructive. When he wrote that "every householder . . . will necessarily become less secure," he did not mean that every householder will necessarily be subjected to more actual searches than before the writ was issued. By "less secure" the author likely meant that every householder will necessarily be less confident in relation to such searches. The "confidence" reading of "secure" in this instance is further supported by the author's statement that the cost of being "less secure" is incurred at the moment the "writ had any existence among us." If the author had intended "less secure" to mean "subjected to more actual searches," he would have assigned the *execution* of the writ—not the moment of its mere existence—as the moment when costs were incurred. As a final point, the author makes clear that it is the writ's "power" (rather than its execution) that devalues "freeholds" and silences "boasts of British honor."[108]

The structure of the Fourth Amendment lends further support to the "confidence" interpretation of "to be secure." The amendment is naturally read in two parts: the Reasonableness Clause and the Warrant Clause. The first salient element of the Reasonableness Clause is that it guards the "right of *the people* to be secure."[109] The

[107] Josiah Quincy, Jr., Reports of Cases Argued and Adjudged in the Superior Court of the Province of Massachusetts Bay Between 1761 and 1772 (Boston: Little, Brown, & Co. 1865) p. 489 (quoting Boston Gazette, Jan. 4, 1762) (emphasis omitted).

[108] Along these lines, Otis argued that the writs were "most destructive of English liberty" not because of the frequency of their use but rather because they could be used at the whim of government officials: the "liberty of every man [is placed] in the hands of every petty officer." Charles Francis Adams, ed., The Works of John Adams (1850) vol.2 at 523–25.

[109] U.S. Const. amend. IV (emphasis added). Courts and most commentators today treat the Fourth Amendment as safeguarding an individual right. See Dist. of Colum-

term "the people" proves awkward for those who read the Fourth Amendment as a guarantor of the mere right to be "spared" unreasonable searches. For example, one might question when exactly "the people" are no longer "spared" unreasonable searches and seizures. If the government's very first illegal search or seizure is a violation of the collective right to be spared, then the amendment strains common sense: one search or seizure does not cause the people *as a whole* to be searched or seized. But on the other hand, if a critical mass of the population must be illegally searched or seized to trigger a violation, then the amendment serves no practical purpose, for it would not be offended under any plausible scenario.[110] Interpretive frustrations like these are avoided, however, when one reads "secure" as "confident." It is not hard to conceive of a government leaving the people "unconfident" against unreasonable searches and seizures.

The second part of the Fourth Amendment—the Warrant Clause—similarly supports the "confidence" interpretation. The text and drafting history of the amendment indicate that the Framers understood the *issuance* of a general warrant to constitute a violation of the "right to be secure."[111] Yet the mere issuance of a general warrant does not in all cases result in an actual unreasonable search or seizure.[112] Because the issuance of a general warrant necessarily offends the right to be secure, and because such warrants do not always lead to unreasonable searches or seizures, reason demands that the right "to be secure" meant something more than the mere right to be "spared" an unreasonable search or seizure. It is far more

bia v. Heller, 554 U.S. 570, 579 (2008) (stating that the Fourth Amendment "unambiguously refer[s] to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body."); Donald L. Doernberg, "The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment, 58 N.Y.U. L. Rev. 259, 270 (1983) ("These cases clearly contemplate that the rights secured by the [F]ourth [A]mendment are individual rather than a 'right of the people' collectively held."); Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 367 (1974) ("Plainly, the Supreme Court is operating on the atomistic view.").

[110] Due to constraints on government resources, it is difficult to imagine the situation in which a substantial percentage of the population would be subjected to actual unreasonable searches and seizures.

[111] U.S. Const. amend. IV (stating that "no Warrants shall *issue*, but upon probable cause.") (emphasis added).

[112] The general warrant could, of course, issue but not be executed.

logical to interpret "secure" to mean something akin to "confident." The simple issuance of a general warrant, after all, can make persons less confident against unreasonable searches and seizures.

Interpreting "secure" to mean merely "spared" presents one final structural issue: it suggests the "to be secure" text is a grammatical excess. Had the Framers sought to safeguard a right to be "spared," they could have omitted the "to be secure" language and drafted the amendment to provide for a "right against unreasonable searches and seizures." But if "secure" meant "confidence," then the inclusion of the "to be secure" text would have been essential to give the amendment its intended meaning. Customary rules of interpretation therefore lend further support to the claim that "secure" meant "confident."[113]

The "confidence" interpretation is further substantiated by a study of Founding-era discourse about the harms caused by the *potentiality* of unreasonable searches and seizures. Pre-ratification arguments regarding "potentiality" centered on "risks of exposure," and in turn, criticized the "power," "existence," or "issuance" (rather than "execution") of general warrants. For example, in 1582 an anonymous Catholic documented the anxiety that comes with arbitrary searches: "[F]ellow believers could not enjoy so much as an hour's assurance against sudden, forcible invasion, even in their own dwellings."[114] William Cuddihy has observed that after the 1640s, general warrants attracted criticism because "they furnished an infinite *power* of surveillance" that "*exposed* every Englishman's dwelling to perpetual, capricious intrusion."[115] Examples are many. In 1688, Parliament criticized a tax on stone fireplaces as "a badge of slavery upon the whole people" for it "*expos*[*ed*] every man's house" to search.[116] In the 1763 decision *Huckle v. Money*, Judge Pratt wrote that a government with the power of general warrants is a government "under which no Englishman would wish to live an hour."[117] The "Inhabitants of Boston" published a report criticizing general

[113] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect.").

[114] Cuddihy, *supra* note 71, at 7.

[115] *Id.* at 122 (emphases added).

[116] *Id.* (emphasis added).

[117] *Id.* at 445; see also Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763).

warrants in part because "our Houses, even our Bed-Chambers, are *exposed* to be ransacked."[118] James Otis claimed that the writs placed the "liberty of *every* man in the hands of every petty officer."[119] And John Wilkes asserted "the security" of his own house "for the sake of *every* one of my English fellow subjects."[120] Because neither Wilkes nor Otis believed that *every* individual would be subjected to more searches pursuant to general warrants, it seems reasonable to infer that they were warning of the harms that would be incurred by the mere potential for unreasonable searches and seizures.

Of course appeals to the harms of potentiality are not always genuine. Sometimes they are simply a rhetorical means to draw attention to the harms caused by actualities.[121] But Founding-era references to the harms incurred by the risks of unreasonable searches and seizures appear to be genuine, particularly when read in the light of the era's more generalized discourse on searches and seizures. The following paragraphs introduce two relevant strains of pre-ratification discourse: the castle metaphor and allied rights of free expression.

Discourse on general warrants during the Founding era relied on a preferred metaphor: the inhabitant of his home is the king of his castle.[122] "The house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law . . . if thieves come to a man's . . . house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not a felony, and he shall lose nothing . . . every one may assemble his friends and neighbours . . . to defend his house against violence.[124]

> [T]he house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law . . . if thieves come to a man's . . . house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not a felony, and he shall lose nothing . . . every one may assemble his friends and neighbours . . . to defend his house against violence.[124]

[118] Cuddihy, *supra* note 71, at 445 (emphasis added). The "Inhabitants of Boston" was a committee appointed in 1772 to "state the Rights of the Colonists." *Id*. It counted James Otis as a member. *Id.*

[119] 2 The Works of John Adams, *supra* note 108, at 524–25 (emphasis added).

[120] Peter D.G. Thomas, John Wilkes: A Friend to Liberty 32 (1996) (emphasis added).

[121] This rhetorical device is used regularly to get an audience "to relate."

[122] See generally Thomas K. Clancy, The Framers' Intent: John Adams, His Era, and the Fourth Amendment, 86 Ind. L.J. 979, 1021–25 (2011).

[123] Semayne's Case, 77 Eng. Rep. 194, 194 (K.B. 1604); 5 Coke's Rep. 91 a.

[124] *Id*. at 195.

Moreover, the castle metaphor anchored William Pitt's famous address to Parliament:

> The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement![125]

In the colonies, James Otis used the castle metaphor in his 1761 criticism of the writs of assistance: "A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle."[126]

The prevalence of the castle metaphor in pre-ratification discourse provides us with insight into the meaning of "to be secure." For some Fourth Amendment scholars, the comparison between the home and the castle is evidence that the Fourth Amendment prohibited only actual intrusions.[127] Yet pre-ratification allusions to "castles" almost certainly evoked an image grander than a dwelling that happened to be spared an actual intrusion. Rather, a "castle" was understood as a place where inhabitants enjoyed a substantial degree of confidence against unreasonable searches and seizures. "Castle" is defined as a building "fortified for defense against an enemy."[128] John Adams realized the centrality of "confidence" to the castle metaphor. He wrote that the home provides "as compleat a security, safety and Peace and Tranquility as if it was surrounded with Walls of Brass, with Ramparts and Palisadoes and defended with a Garrison and Artillery."[129] In this context it seems worth noting that the castle's archetypical inhabitant (the king) enjoyed unique protections from *potential* harms under the common law.[130]

[125] Henry Peter Brougham, Historical Sketches of Statesmen Who Flourished in the Time of George III, Vol. 1 41–42 (1839).

[126] Clancy, Collective Right, *supra* note 102, at 258 (quoting 2 The Works of John Adams *supra* note 108, 142–44).

[127] See Thomas K. Clancy, What Does the Fourth Amendment Protect: Property, Privacy, or Security?, 33 Wake Forest L. Rev. 307, 353–54 (1998).

[128] Oxford English Dictionary, *supra* note 103, vol. II at 956.

[129] L. Kinvin Wroth & Hiller B. Zobel, eds., Legal Papers of John Adams, vol. 1 137 (1965).

[130] For a discussion of the protections of the king and the emergence of attempt law, see generally Jerome Hall, Criminal Attempt—A Study of Foundations of Criminal Liability, 49 Yale L.J. 789 (1940). Since the 14th century, "compassing" the death of the

Sensitivity to the harms caused by the mere potential for unreasonable searches and seizures is also reflected in pre-ratification discourse on the relationship between general warrants and the exercise of speech and religious rights. Going back to at least the 16th century, general warrants had been used in England to suppress religious and political dissent.[131] The papers of Sir Edward Coke, for example, were seized during his 1621 imprisonment.[132] *Entick v. Carrington* involved a warrant ordering the king's messengers "to make strict and diligent search for . . . the author, or one concerned in the writing of several weekly very seditious papers."[133] James Otis explicitly referenced searches relating to "breach of Sabbath-day acts."[134] The historical connection between general warrants and freedom of expression has not been lost on the Supreme Court. In *Marcus v. Search Warrant*, the Court observed that "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."[135] More recently, in *United States v. Jones*, Justice Sotomayor explained that "[a]wareness that the Government may be watching chills associational and expressive freedoms."[136]

King constituted treason even without an overt act. *Id*. at 795 (stating that treason required "[f]ailure to reveal knowledge about a plot against the king") (citing 21 Richard 2 (1397)).

[131] Cuddihy, *supra* note 71, at 8.

[132] *Id*. at 140–42.

[133] See Entick v. Carrington, 95 Eng. Rep. 807, 807 (K.B. 1765); see also Wilkes v. Wood, 19 Howell St. Trials 1153 (K.B. 1763).

[134] 2 The Works of John Adams, *supra* note 108, at 524–25.

[135] 367 U.S. 717, 729 (1961).

[136] 132 S. Ct. at 956 (Sotomayor, J., concurring) (quoting United States v. Cuevas-Perez, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)); see also Camara v. Mun. Court, 387 U.S. 523, 531 (1967) (stating that "*possibility* of criminal entry under the guise of official sanction is a serious threat to personal and family security" (emphasis added)); Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting) ("The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of *Entick v. Carrington*. These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" (citation omitted)); Brinegar v. United States 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting) ("Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. . . . And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and

An individual's decision to speak or worship often turns, as a practical matter, on a rough assessment of its expected costs and benefits. And one of the risks of engaging in expressive behavior is unwelcomed exposure through government searches or seizures. Here is the critical point: it is the *potential* for an unreasonable search or seizure—not simply its actuality—that affects an individual's decision to exercise his speech or religious rights. This suggests that Founding-era warnings about the harms of potentiality were more than just a rhetorical means to draw attention to the harms resulting from actual unreasonable searches and seizures. Rather, the warnings reflected genuine concerns about the harms caused by the *mere risk* of unreasonable searches and seizures. These concerns for the harms of potentiality ultimately manifested themselves in the text of the Fourth Amendment, which protects not simply the right to be spared unreasonable searches and seizures, but also the right "to be secure" against such government illegalities.

V. Conclusion

The *Patel* decision affects Fourth Amendment doctrine in two notable ways. It loosens the restrictions on Fourth Amendment facial challenges and narrows the administrative search exception to the warrant requirement. Yet the real significance of *Patel* lies in its reasoning. This brief article argues that the *Patel* majority was influenced by the "to be secure" text of the Fourth Amendment. This influence can be gleaned from the majority's emphasis on the "relative power" of hotel operators during police encounters, Tom Goldstein's focus on "tranquility" at oral argument, and the EFF's lengthy discussion as amicus on the original meaning of "to be secure." The upshot is that the original meaning of the Fourth Amendment appears to have played a silent but important role in *Patel*.[137]

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dignity and self-reliance disappear where homes, persons and possessions are *subject at any hour* to unheralded search and seizure by the police." (emphasis added)).

[137] Assuming this textual influence, the majority's failure to formally discuss the "to be secure" text comes as no surprise. The Supreme Court, after all, has never interpreted the "to be secure" text, and to break such ground in *Patel* would have seemed both onerous and needless to the justices in the majority.