NOTES
THE BORDER SEARCH MUDDLE

Fourth Amendment originalism is hard.¹ But if Fourth Amendment originalism has an easy case, the Supreme Court has sometimes suggested, that case is the border search, an exception to the warrant requirement “as old as the Fourth Amendment itself.”² Shame, then, that the intersection of that history with developments in information storage threatens to produce normatively disastrous results: a sweeping federal entitlement to examine the contents of every phone or computer (and, on some accounts, the data remotely accessible from them³) that happens to enter or exit the United States, all without individualized suspicion.⁴ Some courts of appeals and many commentators have resisted that conclusion,⁵ while others, reiterating what they style the understanding of the First Congress, maintain that “searches at the border of


⁴ See United States v. Touset, 890 F.3d 1227, 1229 (11th Cir. 2018) (concluding as much).

the country ‘never require probable cause or a warrant.’ To an extent, the divide presents as a (familiar) choice-of-authority problem. Does recent Supreme Court precedent — especially *Riley v. California,* the pathbreaking decision that imposed a warrant requirement on cellphone searches incident to arrest — encourage a departure from what was previously constitutional tradition? Or does durable and determinate original meaning trump a subsequent change in circumstance?

This Note argues that the choice framed above, the presumption that underpins much of the argument on each side of a messy circuit split, is a false one. Part I describes the divide’s recent development, as well as the mixed signals in Court precedent that underpin it. Part II debunks the suggestion that the split is fairly framed as a conflict between original meaning and modern difficulties. On its own terms, the law-office history that underpins the border exception to the warrant requirement is very plausibly wrong. What’s more, evidence from the Founding era provides little direct guidance on border search or seizure of papers. If anything, the state of the doctrine is in considerable tension

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10 “[M]uch” because originalist arguments against the application of the border exception to papers are uncommon but not unheard of. *See United States v. Seljan,* 547 F.3d 993, 1017–19 (9th Cir. 2008) (Kozinski, C.J., dissenting); Brief of Constitutional Accountability Center as Amicus Curiae in Support of Plaintiffs at 416, Alasaad v. Nielsen, No. 17-cv-11730 (D. Mass. May 9, 2018). As discussed infra pp. 2284–85, while these arguments highlight important aspects of the history, their claims turn out to be both too strong and too weak.
with the Framers’ special concern for those writings that represent citizens’ “dearest property.”\textsuperscript{11} Part II therefore establishes that the question falls within what some originalist theorists call “the construction zone.”\textsuperscript{12} Part III then concludes, briefly sketching senses in which the values motivating the turn to original meaning might still come into play in choosing between the doctrinally available approaches to the border question.\textsuperscript{13}

I. THE MUDDLE\textsuperscript{14}

A. Border Exceptionalism

The arc of the Supreme Court’s border search jurisprudence has been relatively straightforward. As early as 1886, the Court took note of the potential relevance — as far as the Fourth Amendment’s original meaning was concerned — of a customs statute passed by the First Congress, which authorized the warrantless search of ships for dutiable goods.\textsuperscript{15} The Court would continue over the following decades to gesture toward that statute for the proposition that border searches are different,\textsuperscript{16} and in 1977 squarely held that “[b]order searches . . . , from before the adoption of the Fourth Amendment, have been considered to be reasonable by the single fact that the person or item in question had entered into our country from outside.”\textsuperscript{17} Precedent adverts to just a few limits on that rule. First, some quantum of individualized suspicion might be required for “nonroutine border searches such as strip, body-

\textsuperscript{11} Entick v. Carrington (1765) 95 Eng. Rep. 807, 818 (KB).


\textsuperscript{13} For readers skeptical that historical practice merits a significant role in constitutional adjudication, this Note is in part a guide to arguing more productively with those who find it valuable. Cf. William Baude & Ryan D. Doerfler, \textit{Essay, Arguing with Friends}, 117 MICH. L. REV. 319, 348 (2018) (arguing that judges should give greater weight to the views of those with shared methodological priors). Readers who value history but not originalism should feel free to read this Note through the lens of their preferred interpretive approach. See generally Jack M. Balkin, \textit{The New Originalism and the Uses of History}, 82 FORDHAM L. REV. 641 (2013); Richard H. Fallon, Jr., \textit{The Many and Varied Roles of History in Constitutional Adjudication}, 90 NOTRE DAME L. REV. 1753 (2015).

\textsuperscript{14} This Note borrows the appealing ring of the word “muddle” from Professor Richard Fallon, see Richard H. Fallon, Jr., \textit{The Statutory Interpretation Muddle} (unpublished manuscript) (on file with the Harvard Law Review), to whom gratitude is due for thoughtful comments on an earlier draft of this Note.

\textsuperscript{15} Boyd v. United States, 116 U.S. 616, 623 (1886) (citing Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790)).

\textsuperscript{16} See \textit{5 WAYNE R. LAFAVE, SEARCH AND SEIZURE} § 10.5(a), at 222 & n.5 (5th ed. 2012) (collecting dicta).

\textsuperscript{17} United States v. Ramsey, 431 U.S. 606, 619 (1977) (internal quotation marks omitted).
cavity, or involuntary x-ray searches.”18 Second, search techniques that involve the destruction of property, or are otherwise carried out in a “particularly offensive manner,” might be constitutionally unreasonable.19 Third, the First Amendment might — independently or in conjunction with the Fourth Amendment — constrain the reading of private papers at the border, if not the opening of the containers that carry them.20 Lower courts have run with, and potentially merged, these first two possibilities,21 but they have largely declined to develop the First Amendment line of inquiry.22

Early opinions applying this framework to the manual search23 of electronic devices largely concluded that such examinations are “routine,” analogous to the opening and inspection of any other closed container.24 In 2013 the Ninth Circuit complicated the landscape, holding in United States v. Cotterman25 that a forensic search of a device is non-routine — “essentially a computer strip search”26 — and that reasonable suspicion is therefore required.27 In an influential opinion, the federal district court in Maryland soon adopted the same standard.28 But there was little reason to think privacy rights had room to grow much further, and nontrivial concern that the Supreme Court, if it intervened, would cut back on the protections the lower courts had so far extended.29

20 Ramsey, 431 U.S. at 624.
22 See, e.g., United States v. Seljan, 547 F.3d 993, 1005-06 (9th Cir. 2008) (upholding a border search that entailed reading correspondence in a package originally opened to see if it contained contraband monetary instruments); United States v. Ickes, 393 F.3d 501, 507 (4th Cir. 2005) (concluding in the context of a laptop search that, “since Ramsey, the Supreme Court has indicated that should it reach this question” it would decline to find a First Amendment problem); United States v. Arnold, 533 F.3d 1003, 1010 (9th Cir. 2008) (adopting same reasoning). But see Alasaad v. Nielsen, No. 17-cv-11730, 2018 WL 2170323, at *24 (D. Mass. May 9, 2018) (rejecting a motion to dismiss a civil suit challenging device searches because “[p]laintiffs have plausibly alleged that the government’s digital device-search policies substantially burden travelers’ First Amendment rights”).
23 As the Fourth Circuit recently explained, glossing CBP regulations that impose different limits on “basic” and “advanced” device searches at the border, “[b]asic searches (like those we term manual) are examinations of an electronic device that do not entail the use of external equipment or software and may [under the regulations] be conducted without suspicion. Advanced searches (like forensic searches) involve the connection of external equipment to a device . . . in order to review, copy, or analyze its contents.” United States v. Kolsuz, 890 F.3d 135, 146 n.6 (4th Cir. 2018) (internal quotation marks omitted).
25 709 F.3d 952 (9th Cir. 2013) (en banc).
26 Id. at 966.
27 Id. at 968.
28 Saboonchi, 990 F. Supp. 2d at 539.
B. Data Exceptionalism

Then came *Riley*, the case synonymous with technology-driven paradigm shifts in Fourth Amendment law.\(^{30}\) Though limited by its terms to a different warrant exception — searches incident to arrest — *Riley* seemed to offer a blueprint for updating the scope of warrant exceptions generally.\(^{31}\) Articulating at length the extraordinary privacy interests at stake in the contents of digital devices, the Court framed the relevant question as whether the application of a warrant exception to such devices would “untether the rule from the justifications underlying [it].”\(^{32}\) It stressed, crucially, that the application of a warrant exception to digital devices was to be understood as an *extension* of that warrant exception’s traditional sweep, an extension whose justification would have to “rest on its own bottom.”\(^{33}\) Taking up the baton plainly offered, lower courts soon applied *Riley’s* reasoning to limit the reach of other traditionally warrantless searches (vehicle\(^{34}\) and probation searches,\(^{35}\) say), and a number of commentators advocate for a like realignment at the border.\(^{36}\)

Last year, the Fourth Circuit obliged, though only in part. In *United States v. Kolsuz*,\(^{37}\) the court rejected the argument that the border search exception was wholly inapplicable to searches that have no hope of turning up physical contraband (at least on the facts of the case, where the search could — and did — produce evidence of ongoing smuggling activities).\(^{38}\) But within the border search paradigm, the panel concluded,

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\(^{31}\) See, e.g., *United States v. Vergara*, 884 F.3d 1309, 1317–18 (11th Cir. 2018) (J. Pryor, J., dissenting) (disputing the suggestion that *Riley* is limited to the search-incident-to-arrest context and maintaining that faithfully “[a]pplying the Supreme Court’s reasoning in *Riley*” requires inquiring whether “the rationales underlying [a warrant] exception lose force when applied to . . . cell phone searches,” *id.* at 1317).


\(^{33}\) *Id.* at 2489.

\(^{34}\) See, e.g., *United States v. Camou*, 773 F.3d 923, 942 (9th Cir. 2014).

\(^{35}\) See, e.g., *United States v. Lara*, 815 F.3d 605, 611 (9th Cir. 2016).

\(^{36}\) See, e.g., *Park*, *supra* note 5, at 304–06; *Miller*, *supra* note 5, at 1987–96.

\(^{37}\) 890 F.3d 133 (4th Cir. 2018).

\(^{38}\) *Id.* at 142–44. As Kerr promptly noted, it’s not at all obvious that this is how *Riley* contemplated courts analyzing applicability *vel non* of a warrant exception. See Orin Kerr, *Important Fourth Circuit Ruling on Cell Phone Border Searches*, REASON: VOLOKH CONSPIRACY (May 9, 2018, 7:09 PM), https://reason.com/volokh/2018/05/09/important-fourth-circuit-ruling-on-
forensic searches should be considered nonroutine because of the Riley-ratified privacy interests they compromise.\textsuperscript{39} The court avoided the question whether something more than reasonable suspicion might be required by invoking the good faith exception to the exclusionary rule;\textsuperscript{40} it avoided, too, the question whether Riley required a change in the standard for manual searches because Kolsuz never challenged the manual search of his phone.\textsuperscript{41} The opinion drew a sharply critical concurrence in the judgment from Judge Wilkinson, who objected that the rule newly announced broke from “a longstanding historical practice in border searches of deferring to the legislative and executive branches.”\textsuperscript{42}

Judge Wilkinson’s perspective won the day just a few weeks later, albeit in a different court of appeals. In United States v. Ickes,\textsuperscript{43} a panel of the Eleventh Circuit emphasized anew that “searches at the border of the country ‘never require probable cause or a warrant.’”\textsuperscript{44} For this proposition, Judge William Pryor’s opinion promptly cited the usual practice in Fourth Amendment law [as applied in Riley] is to balance the interests at a categorical level instead of case-by-case.)). 46 Applying the border framework, and noting that neither Supreme Court nor Eleventh Circuit precedent had ever required reasonable suspicion

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\textsuperscript{39} Kolsuz, 890 F.3d at 144. The court noted that Kolsuz’s phone was searched while in airplane mode, but its remark that it “decline[d] to distinguish an extensive forensic search of a cell phone from a very extensive forensic search of a cell phone” is somewhat cryptic. See id. at 145 n.4 (quoting United States v. Kolsuz, 185 F. Supp. 3d 843, 857 (E.D. Va. 2016), aff’d, 890 F.3d 133). The district court had made that comment to rebut the government’s suggestion that the search, because it did not involve making a complete bitstream of the contents of the phone, was not as invasive as the one United States v. Saboonchi, 990 F. Supp. 2d 536, 539 (D. Md. 2014), found nonroutine. Kolsuz, 185 F. Supp. 3d at 857. But the panel’s use of the phrase leaves ambiguous whether it would consider requiring a higher standard in reviewing more invasive forms of remote access.

\textsuperscript{40} Kolsuz, 890 F.3d at 146–48. Under the good faith exception, defendants cannot obtain exclusion of evidence that was unconstitutionally obtained if the officers acted “in objectively reasonable reliance on binding appellate precedent.” Davis v. United States, 564 U.S. 229, 249–50 (2011). And there are, as the Kolsuz court noted, no opinions requiring something more than reasonable suspicion for a border search of any kind. Kolsuz, 890 F.3d at 147.

\textsuperscript{41} Kolsuz, 890 F.3d at 146 n.5. This is a bit of an odd reservation, seeing as Riley itself dealt with manual rather than forensic searches. See Riley v. California, 134 S. Ct. 2473, 2480–81 (2014).

\textsuperscript{42} Kolsuz, 890 F.3d at 153 (Wilkinson, J., concurring in the judgment). Judge Wilkinson had also been the author of the Fourth Circuit’s earlier opinion approving suspicionless manual searches. United States v. Ickes, 393 F.3d 501, 502 (4th Cir. 2005).

\textsuperscript{43} 890 F.3d 1227 (11th Cir. 2018).

\textsuperscript{44} Id. at 1232 (internal quotation marks omitted) (quoting United States v. Vergara, 884 F.3d 1309, 1312 (11th Cir. 2018)).

\textsuperscript{45} Id. (first citing Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790); and then citing Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164–65 (repealed 1799)).

\textsuperscript{46} Id. at 1234.
for a search of property,\textsuperscript{47} the panel declined to "create special protection for the property most often used to store and disseminate child pornography" (the offense at issue).\textsuperscript{48} The court thus rejected a reasonable suspicion requirement,\textsuperscript{49} closing by reiterating Judge Wilkinson’s reminder as to "longstanding historical practice."\textsuperscript{50} In each of these respects, the decision was congruent with Judge Pryor’s previous, concise opinion in United States v. Vergara,\textsuperscript{51} which had rejected a probable cause requirement (without answering the reasonable suspicion question) after about one page’s discussion of the border exception’s pedigree and Riley’s irrelevance.\textsuperscript{52} Touset and its reasoning have been praised in these pages for their "faithful\[ness\] to the original understanding of the Fourth Amendment."

C. Experiencing a Significant Gravitas Shortfall

The Fifth and Seventh Circuits have nibbled at the edge of this question,\textsuperscript{53} as have a handful of district courts.\textsuperscript{54} But safe to say Kolsuz and Touset are representative of the battle lines — on the one hand the

\textsuperscript{47} Id. at 1233.

\textsuperscript{48} Id. at 1235. Judge Pryor included a paragraph dedicated to the harms of child pornography and suggested that applying any degree of judicial scrutiny to device searches at the border would amount to "inven[ying] heightened constitutional protection for travelers who cross our borders with this contraband in tow." Id. at 1236. Though the pattern is hardly uniform, it’s hard not to notice that many of the opinions rejecting the privacy and First Amendment interests at stake in border searches of papers involve child pornography defendants, while those that reach more rights-protective outcomes involve comparatively sympathetic litigants. \textit{Compare, e.g., id. at 1229} (child pornography), United States v. Seljan, 547 F.3d 993, 998 (9th Cir. 2008) (child pornography), and United States v. Ickes, 393 F.3d 501, 502 (4th Cir. 2005) (child pornography), \textit{with United States v. Kolsuz}, 890 F.3d 133, 136 (4th Cir. 2018) (export violations), United States v. Kim, 103 F. Supp. 3d 32, 34 (D.D.C. 2015) (export violations), and United States v. Saboonchi, 990 F. Supp. 2d 536, 539 (D. Md. 2014) (export violations). Though not a final judgment, the most rights-solicitous border search opinion to date was issued in a civil suit involving civil society groups. See Alasaad v. Nielsen, No. 17-cv-11730, 2018 WL 2170323, at *1 (D. Mass. May 9, 2018). For a detailed discussion — and critique — of the extent to which defendants’ underlying criminal conduct shapes Fourth Amendment law, see Anna Lvovsky, \textit{Fourth Amendment Moralism}, 166 U. PA. L. REV. 1189 (2018).

\textsuperscript{49} Touset, 890 F.3d at 1229.

\textsuperscript{50} Id. at 1237 (quoting Kolsuz, 890 F.3d at 153 (Wilkinson, J., concurring in the judgment)).

\textsuperscript{51} 884 F.3d 1309 (11th Cir. 2018).

\textsuperscript{52} Id. at 1312–13.

\textsuperscript{53} Recent Case, supra note 6, at 1112.

\textsuperscript{54} \textit{See United States v. Molina-Isidoro}, 884 F.3d 287, 289 (5th Cir. 2018) (dodging the question via the good faith exception); United States v. Wanjiku, 919 F.3d 472, 479 (7th Cir. 2019) (same).

attitude that Fourth Amendment time is measured “before . . . Riley”\textsuperscript{56} and “after Riley,”\textsuperscript{57} on the other the view that original meaning continues to trump. And each opinion is, along one key axis or another, fairly unsatisfying.

\textit{Kolsuz} has a fundamentally arbitrary aspect, cast in stark relief by the failure to choose between (let alone justify the choice between) competing degrees of regulation that are equally available.\textsuperscript{58} This kind of reasoning inevitably strikes some judges as necessarily unjudicial,\textsuperscript{59} and already too endemic in Fourth Amendment decisionmaking. As Justice Gorsuch recently objected in \textit{Carpenter v. United States},\textsuperscript{60} these exercises “often call[] for a pure policy choice, many times between incommensurable goods — between the value of privacy in a particular setting and society’s interest in combating crime.”\textsuperscript{61} No wonder the courts have, as discussed in detail below, often looked for historical guardrails.

Even on its face, though, the turn to history only partially solves the judicial-discretion objection. Consider the dissonance produced by \textit{Touset}’s refusal to take persuasive guidance from \textit{Riley}, the paradigmatic example of a “signal[]” from the Justices to the lower courts.\textsuperscript{62} The Eleventh Circuit panel suggested that it couldn’t impose a more rigorous standard for phones than for ship cabins (which amount to homes, doctrinally),\textsuperscript{63} notwithstanding \textit{Riley}’s observation that “a cell phone search would typically expose to the government far more than the most exhaustive search of a house.”\textsuperscript{64} Where \textit{Riley} emphasized that cell phones are more nearly “an important feature of human anatomy”\textsuperscript{65} than they are “just another convenience,”\textsuperscript{66} the panel instructed travelers to leave

\textsuperscript{56} United States v. Kolsuz, 890 F.3d 133, 144 (4th Cir. 2018).
\textsuperscript{57} Id. at 146.
\textsuperscript{58} See id. at 147 (“[C]ertain searches conducted under exceptions to the warrant requirement may require more than reasonable suspicion.”). Indeed, \textit{Kolsuz} does not even nod at any sources that would structure the choice. See id. Presumably the answer would be a form of balancing.
\textsuperscript{59} Id. at 152 (Wilkinson, J., concurring in the judgment) (“[T]he privacy interest recognized in \textit{Riley} [does not] begin to answer the question of \textit{who} should strike the balance between privacy and security at the border of the country.”).
\textsuperscript{60} 138 S. Ct. 2206 (2018).
\textsuperscript{61} Id. at 2265 (Gorsuch, J., dissenting); cf. Richard M. Re, \textit{Fourth Amendment Fairness}, 116 Mich. L. Rev. 1409, 1411 (2018) (“[T]he Court is not rigorous or consistent in its use of interest aggregation . . . . [a]nd it is unclear what interests count or how they are to be compared”); id. at 1412 & nn.13–14 (collecting critiques of interest aggregation’s, typically negative, consequences for individual privacy rights). For a defense outside the Fourth Amendment context of unconstrained balancing as a mode of legal decisionmaking, see Louis Kaplow, \textit{On the Design of Legal Rules: Balancing Versus Structured Decision Procedures}, 132 Harv. L. Rev. 992 (2019).
\textsuperscript{62} Richard M. Re, \textit{Narrowing Supreme Court Precedent from Below}, 104 Geo. L.J. 921, 971 (2016); id. at 953–56 (offering the example of \textit{Riley}).
\textsuperscript{63} United States v. Touset, 890 F.3d 1227, 1233 (11th Cir. 2018).
\textsuperscript{64} \textit{Riley v. California}, 134 S. Ct. 2473, 2491 (2014).
\textsuperscript{65} Id. at 2484.
\textsuperscript{66} Id. at 2494.
them at home.\textsuperscript{67} And ignoring \textit{Riley}'s rejection of a “pre-digital analogue” into other sources of the same information,\textsuperscript{68} the court concluded that to search a phone was no different than searching “a tractor-trailer loaded with boxes of documents.”\textsuperscript{69}

The ipse dixit that \textit{Riley} “does not apply to searches at the border”\textsuperscript{70} is inadequate to justify these departures from the structure of its reasoning (as Judge Jill Pryor stressed in dissent in \textit{Vergara}).\textsuperscript{71} And this, too, is a problem that sounds in norms structuring the judicial role.\textsuperscript{72} In a sense the point is a variation on the observation that a sudden repudiation of nonoriginalist authority “would [itself] be inconsistent with the rule of law justification for originalism” if its consequence were to undermine the coherence and consistency of the law.\textsuperscript{73} While \textit{Riley} may not supply a unique answer to the border search question, it amounts to a bold assertion of judicial discretion — especially on the part of an inferior court\textsuperscript{74} — to deny that the precedent represents a source of relevant legal reasons for deciding the dispute one way as opposed to the other.

The best way to excuse each opinion, probably, is to observe that \textit{Touset} reads as if the Eleventh Circuit thought applying \textit{Riley} rather than the traditional rule was forbidden, in the same strong sense that the Fourth Circuit seemed to believe applying \textit{Riley} was not just permissible or desirable but, as it happened, mandatory.\textsuperscript{75} The border search

\textsuperscript{67} \textit{Touset}, \textit{890 F.3d} at 1235.
\textsuperscript{68} \textit{Riley}, \textit{134 S. Ct.} at 2493.
\textsuperscript{69} \textit{Touset}, \textit{890 F.3d} at 1233.
\textsuperscript{70} \textit{Id.} at 1234. The hook for this claim is \textit{Riley}'s observation that other “case-specific exceptions to the warrant requirement, such as the one for exigent circumstances,” might apply even where the search-incident-to-arrest exception does not. \textit{Riley}, \textit{134 S. Ct.} at 2486.
\textsuperscript{71} United States v. Vergara, \textit{884 F.3d} 1309, 1318 (11th Cir. 2018) (J. Pryor, J., dissenting).
\textsuperscript{72} See, e.g., Richard H. Fallon, Jr., \textit{Essay, A Theory of Judicial Candor}, \textit{117 COLUM. L. REV.} 2265, 2293 (2017) (arguing that idealized judicial candor requires not just the articulation of reasons but also the provision of sufficient reason to think those reasons are \textit{adequate} to support the case’s outcome); \textit{Id.} at 2268–69 (highlighting the particular example of unexplained choices between available methodologies, such as originalism and doctrinalism). For overlapping but by no means identical accounts of these candor obligations, see, for example, Micah Schwartzman, \textit{Essay, Judicial Sincerity}, \textit{94 VA. L. REV.} 987 (2008); and David L. Shapiro, \textit{Essay, In Defense of Judicial Candor}, \textit{100 HARV. L. REV.} 731 (1987).
\textsuperscript{74} On evaluating the Supreme Court’s decision to distinguish a precedent, see Richard M. Re, \textit{Essay, Narrowing Precedent in the Supreme Court}, \textit{114 COLUM. L. REV.} 1861, 1874–89 (2014).
\textsuperscript{75} See, e.g., United States v. Koilsz, \textit{890 F.3d} 133, 146 (4th Cir. 2018) (“[T]he impact of \textit{Riley} is plain enough that the government’s brief does not seriously contest this point.”). In characterizing the position of the \textit{Touset} court and originalist supporters of its conclusion, I take for granted that the border search exception would be on weaker constitutional footing if it were justified only by reference to a court’s own sense of the government and individual interests in question, as aggregated by traditional Fourth Amendment doctrine. \textit{Cf.} Richard H. Fallon, Jr., \textit{Arguing in Good Faith}
muddle is the result of this felt collision between an unstoppable force and an immovable object, two sources of legal meaning that both have strong claims to control the outcome of the question at issue, neither of which fits neatly into the other’s paradigm. Phrased that way, the problem is a sort of a cousin to the vexed role of precedent in a constitutional practice that is partly, but very far from entirely, originalist. But as the next Part will argue, the collision between these authorities is fictive. The original meaning of the Fourth Amendment does not determine the *Touset* outcome. Unfortunately, in a sense this point only deepens the muddle, because the original meaning does not clearly require a different one. As Part III will sketch, the sense in which historical evidence might matter in this domain is more subtle. While the instinct to center the value of fidelity in this context isn’t necessarily misplaced, neither is that value easily reduced to, or earned by, citation to the First Congress.

II. AN ORIGINAL INDETERMINACY

The precise place of originalism in Fourth Amendment law is an ambivalent one. Some scholars would, of course, defend the proposition that originalism is mandatory in every domain of constitutional law because it follows from the Constitution’s status as an enacted written text, others that some version of originalism is the best positivist account of our current constitutional practice. Alternatively, one might think original meaning matters to the interpretation of the Fourth Amendment because the Supreme Court has said so in precedential opinions. In its first significant opinion on the amendment, for instance, the Court suggested that “to ascertain the nature of the proceedings intended . . . under the terms ‘unreasonable searches and seizures,’ it is only necessary to recall the contemporary or then recent history of the controversies on the subject.” At different times, the Court has articulated the role of history in terms of the question whether a practice

About the Constitution: Ideology, Methodology, and Reflective Equilibrium, 84 U. CHI. L. REV. 123, 124–25 (2017) (arguing that to reject “the best, most charitable explanation of familiar processes of argument and decision-making . . . would leave no strongly plausible alternative to the Cynical Conclusion — as I call it — that much if not most methodological argumentation in constitutional law is a sham”).

See generally Solm, supra note 73, at 456–67.


“was regarded as an unlawful search or seizure under the common law when the Amendment was framed,” or, alternatively, whether a particular outcome would erode “that degree of privacy against government that existed when the Fourth Amendment was adopted.” Of course, there’s visible tension between a strictly originalist approach and important Fourth Amendment paradigms — the “reasonable expectation of privacy” framework comes to mind — as well as the usual objection that Justices’ voting patterns don’t follow originalism where it leads.

Whatever the best account of history’s Fourth Amendment significance, this Note makes a weak claim for the importance of reviewing the relevant evidence: on even the thinnest views of the role of historical fact in constitutional adjudication, a litigant challenging an investigative practice should be reluctant to stand up in court and admit that original meaning is to the contrary. This Part demonstrates that the materials are more equivocal than courts typically recognize, and that the question falls squarely in an underdetermined “construction zone.”

A. An Ambiguity: What to Make of Ship Searches?

The universe of sources most relevant to the Fourth Amendment’s original meaning is, most accounts agree, manageable in scope. The
list usually begins with *Entick v. Carrington*,⑧7 *Wilkes v. Wood*,⑧8 and the Writs of Assistance Case, “a trio of 18th century cases ‘well known to the men who wrote and ratified the Bill of Rights, [and] famous throughout the colonial population.’”⑧9 The list includes, too, the drafting history of the amendment itself and its state constitutional predecessors, as well as the ratification debates associated with each.⑧9 And it includes the search and seizure statutes enacted by the First Congress,⑧1 chief among them the Collection Act of 1789（the Collection Act), which Professor William Cuddihy has called “nothing less than a statutory exegesis on the Fourth Amendment.”⑧9（One can add to the catalog the content of contemporary common law, though this risks begging an important, contested question about the extent to which the Fourth Amendment’s original meaning in fact relied by reference on the common law.⑧4）

If this collection sounds more than ample enough to go on, it bears emphasizing the wariness with which Fourth Amendment scholars have learned to approach it. As Cuddihy puts it: “Not only are the most obvious indices of [original] meaning few and uninformative, they often lead down blind alleys.”⑧5

Thankfully, the task of double-checking the border exception’s “impressive historical pedigree”⑧6 is simplified by the fact that the Court has relied almost exclusively on the Collection Act in articulating it. That statute authorized customs officers to board and search “any ship or vessel, in which they shall have reason to suspect any goods, wares or

investigative contexts (like the border), id. at 619. That assumption seems justifiable if “[w]hat ‘unreasonable’ meant in the seventeenth century was ‘against reason,’ which translated into ‘against the reason of the common law’” — particular practices either would or would not have been lawful in 1789. Laura K. Donohue, The Original Fourth Amendment, 83 U. CHI. L. REV. 1181, 1192 (2016). The needle is tougher to thread if the original public meaning of “unreasonable” was, say, “not a very good idea,” in which case later courts clearly need to come up with implementing rules to decide which contemporary searches are not good ideas. See Lee J. Strang, An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent, 2010 BYU L. REV. 1729, 1772 (offering the Fourth Amendment as an example of a zone in which courts must play an active role in articulating “intermediate legal norms”).

⑧7 (1765) 95 Eng. Rep. 807 (KB).
⑧8 (1763) 98 Eng. Rep. 489 (KB).
⑧1 Id. at 735–39.
⑧2 Act of July 31, 1789, ch. 5, 1 Stat. 29 (repealed 1790).
⑧3 Cuddihy, supra note 1, at 739.
⑧5 Cuddihy, supra note 1, at 727.
merchandise subject to duty shall be concealed”,97 a related measure passed in 1790 gave authorities power to board vessels without suspicion “for the purposes of demanding the[i]r manifests . . . and of examining and searching the said ships.”98 The Collection Act’s search and seizure provisions lack meaningful legislative history.99 Having quoted the language above, then, United States v. Ramsey100 announced that “[t]he historical importance of the enactment of this customs statute by the same Congress which proposed the Fourth Amendment is, we think, manifest”: it stood for the rule that the border is categorically different where searches are concerned.101

The Court’s confidence on that point is surprising. In Cuddihy’s The Fourth Amendment: Origins and Original Meaning, 602–1791, which is often described as the most thorough exegesis of the historical materials,102 the rationale for exempting ship searches from the warrant requirement appears as the very first example of the “[a]reas of ambiguity [that] remain even after the surviving evidence has been exhausted.”103 In a sense this should be obvious: even if the statute is conclusive evidence for the constitutionality of searches with several characteristics — that is, searches 1) of ships 2) at the border 3) for dutiable goods — some evidence other than the fact of the statute is necessary to clarify which of these characteristics is necessary or sufficient to establish the search’s validity. Professor Jacob Landynski, writing in 1966, criticized as “faulty” history any reliance on the statute that failed to distinguish between searches for evidence and “a hunt for goods . . . on which duty had not been paid.”104 Professor David Sklansky, more recently, notes that the law is “doubtful precedent for border searches not involving vessels, and for searches of vessels away from the

97 Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790).
99 See Cuddihy, supra note 1, at 737 n.257 (“The documentation on the Collection Act mentions no debates of its sections concerning search and seizure. In other words, that act does not offer a back-stairs approach to the original meaning of the Fourth Amendment because debates of those sections either never occurred or were not recorded.”).
101 Id. at 616–17.
102 See, e.g., Cloud, supra note 1, at 1710 (describing the work as “the most ambitious history of the Fourth Amendment’s origins yet undertaken by a professional historian”). Elevated to prominence in an opinion by Justice O’Connor, id. at 1712 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 649, 669–73 (1995) (O’Connor, J., dissenting)), it has remained a favorite citation for Justices of the Supreme Court, see, e.g., Carpenter v. United States, 138 S. Ct. 2206, 2243 (2018) (Thomas, J., dissenting); id. at 2264 (Gorsuch, J., dissenting).
103 Cuddihy, supra note 1, at 767.
104 Jacob W. Landynski, Search and Seizure and the Supreme Court 90 (1966).
And none of Cuddihy’s possible rationales for exempting ship searches, for what it’s worth, relies on a rule of border exceptionalism. Instead, Cuddihy hypothesizes that “(1) the mobility of a ship facilitated the removal of evidence or contraband while a warrant was being sought; or (2) like distilleries, ships were less places of habitation than of commerce; or (3) the concentration of numerous crewmen in a confined space eradicated the expectation of privacy.” Id. Indeed, it seems plausible that Carroll v. United States, 267 U.S. 132 (1925) — the origin of the automobile exception to the warrant requirement, and an opinion that also features much-cited dicta on the rights of travelers, see, e.g., United States v. Flores-Montano, 541 U.S. 149, 154 (2004) (citing Carroll, 267 U.S. at 154) — only meant to invoke the Collection Act for the first of Cuddihy’s propositions, Carroll, 267 U.S. at 151 (“[C]ontemporaneously with the adoption of the Fourth Amendment we find in the first Congress . . . a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant.”). The Court’s brief discussion of travelers’ rights only cites “national self protection,” not the Collection Act, in support of the notion that the border is different. Id. at 154.

Key points in support of Davies’s case involve the jurisdictional assignment of ship seizures to admiralty law and the absence of any Fourth Amendment discussion in any of the nineteenth-century ship-seizure cases. Id.

Davies has suggested elsewhere that analogous British authority to search ships for dutiable goods may have been granted “because of the strong governmental authority to enforce the border, and because ships were not entitled to any privileged treatment at common law.” Thomas Y. Davies, How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power, LAW & CONTEMP. PROBS., Summer 2010, at 1, 33.

To exacerbate the point, there is no universally agreed upon standard for the point at which an inference as to legal meaning is sufficiently plausible to amount to law. Compare, e.g., GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 75 (2017) (“[A claim] is deemed correct if it is better, meaning more plausible, than its available alternatives.”), with Richard H. Fallon Jr, The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation,
Part of the problem, probably, is elision of the provisions of the Collection Act, which speaks only to ships and vessels, with an expanded authority passed in 1815, which applied to “any carriage or vehicle . . . [or] any person travelling on foot, or beast of burden.”\footnote{\textit{United States v. Weil}, 432 F.2d 1320, 1323 (9th Cir. 1970).} Whatever the merits of attributing constitutional judgment to the \textit{First} Congress, the Thirteenth Congress doesn’t have quite the same ring to it. (Awkwardly enough, the 1815 act’s statutory text is by no means limited to the border, and has had to be so constrained by judicial construction to avoid a graver apparent conflict with the Fourth Amendment.\footnote{\textit{Act of March 3, 1815}, ch. 94, § 2, 3 Stat. 231, 232; see also \textit{Jules D. Barnett, A Report on Search and Seizure at the Border}}, 1 CRIM. L.Q. 36, 40 (1962) (noting that the 1815 statute “was the first extension of the border search principle beyond water craft to land conveyances, beasts of burden, and people”). It might just as well be said that the 1815 law transformed what had been a ship search statute into a border search statute. \textit{See \textit{Cuddihy}, supra note 1, at 768} (noting that if the searches are explainable by reference to a feature unique to ships, the best inference to be drawn would be that “the authors of the amendment permitted only ships to be searched without warrant in the Collection Act because they wished to exempt no other class of vehicle from the warrant requirement”).

Collapsing all of these extensions into a single historical moment obscures just how specific the original 1789 enactment was, and the extent to which it might be amenable to interpretations other than the one that eventually took hold of it in the Court.

This may seem like nitpicking. So what if the inference from the Collection Act is nonobvious, or even second best? Except on fairly pure accounts of text’s primacy and determinacy,\footnote{\textit{Michael Stokes Paulsen, The Intrinsically Corrupting Influence of Precedent}, 22 CONST. COMMENT. 280, 289 (2005) (“Whatever one’s theory of constitutional interpretation, a theory of \textit{stare decisis}, poured on top and mixed in with it, \textit{always corrupts the original theory}.”).} historical practice and precedent can play legitimate roles in originalist adjudication too,\footnote{\textit{See supra note 9; Solum, supra note 73, at 462. For the case that distinctively originalist precedent should enjoy special weight within this practice, see generally Strang, supra note 86.} and perhaps those authorities supply the border exception with the kind of sound foundation that the First Congress failed to. But the key point, for these purposes, is that there are reasons to doubt that the determinate original meaning embedded in the Collection Act is distinctively sweeping. And that doubt only sharpens when we move to the more precise question considered in the next section: whether the Fourth Amendment’s original public meaning is clear on the question of \textit{papers} at borders.

\footnote{\textit{See United States v. Weil}, 432 F.2d 1320, 1323 (9th Cir. 1970).}
B. A Lacuna: Papers at Borders

By its terms, the Collection Act speaks only to “goods, wares and merchandise.”117 It says nothing about papers or their equivalent, nor, as the Fifth Circuit’s Judge Costa highlighted in a recent concurring opinion, did it authorize “obtain[ing] evidence of crimes other than the contraband itself.”118 Indeed, to my knowledge, there is no direct evidence of the fashion in which searches of papers at the border were handled at the Founding. None of the small clutch of originalist arguments for excluding papers from the border exception cites any,119 nor do the replies to them. In a recent article, Professor Maureen Brady notes a modest collection of pre-Revolutionary objections to ship seizures “that resulted in the uncovering or seizure of personal goods owned by crewmembers or intended for the crew’s use (rather than examination and seizure of items that were being imported for sale),” but acknowledges that the interpretive upshot of these complaints is ambiguous.120 And this silence makes a degree of sense, seeing as there would be no specific statutory authority for the search or the seizure of papers until 1863.121

A bit more evidence might be inferred from the experience of international mail.122 As Professor Anuj Desai has documented, the modern Fourth Amendment owes a great deal to the early American solicitude for postal privacy.123 The significance of that solicitude for the meaning of the original Fourth Amendment is unclear, both because postal privacy was never discussed in constitutional (as opposed to statutory or regulatory) terms124 and because it’s unclear how familiar the Framers were with British practices of postal surveillance.125 Still, as discussed in some detail in Ramsey, on no account did Congress authorize the government to open international letters without a warrant prior to 1866,126 and the Department of the Treasury did not assert authority to

117 Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790).
119 See sources cited supra note 10.
120 Maureen E. Brady, The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection, 125 YALE L.J. 946, 989 (2016); see also id. at 988–90.
122 It bears observing, in this vein, that applying the border search exception to data transmitted across the border would substantially vitiate the Fourth Amendment. See Orin S. Kerr, The Fourth Amendment and the Global Internet, 67 STAN. L. REV. 285, 318–22 (2015) (arguing against such a rule while reserving the question how a border exception should apply to devices, id. at 320 n.174).
123 See Desai, supra note 79, at 558–83.
124 Id. at 568.
125 See id. at 559–62.
126 United States v. Ramsey, 431 U.S. 606, 611–12, 612 n.8; id. at 626 (Stevens, J., dissenting).
do so until 1971. Indeed, mid-nineteenth-century opinions by both Attorney General Caleb Cushing and the Postmaster General seem to contemplate that opening sealed letters from abroad would be unlawful even in cases implicating customs or national security. While there is room to argue about the state (and modern relevance) of post-1866 practice, the claim that *Ramsey*’s extension of the border exception to international mail reflected original understanding seems much harder to credit. There is no historical pedigree associated with searches of papers, as opposed to containers capable of concealing physical contraband, at the border.

Of course, the decision to make this distinction between papers and other objects of Fourth Amendment protection requires a bit of motivation. Contemporary Fourth Amendment law gives little independent significance to “papers” as distinct from, say, “effects.” Though the Court routinely emphasizes the historical connection between the First

127 *Id. at 625; see also* United States v. Beckley, 335 F.2d 86, 88 (6th Cir. 1964) (“There seem to be no adjudicated cases dealing with the necessity of probable cause and search warrants for inspection of imports by mail.”).


130 This line may seem too clean, since some papers themselves amount to contraband; child pornography, of course, looms large in this context. *See supra* note 48. A border-specific response to this observation would be that excluding data by searching specific devices is nonsensical. *See United States v. Vergara, 884 F.3d 1309, 1317 (11th Cir. 2018) (J. Pryor, J., dissenting) (“Unlike physical contraband, electronic contraband is borderless and can be accessed and viewed in the United States without ever having crossed a physical border.”); cf. Kerr, *supra* note 122, at 321. But the papers-as-contraband point also raises a much broader, more difficult question: If the government is at least justified in seizing unlawful papers, is it entitled to examine all of an individual’s papers to determine which fall within the justification? (A version of this issue would arise even pursuant to a warrant requirement, see Kerr, *The Case for Use Restrictions, supra* note 50, at 3, and was a source of consternation under other warrant exceptions even when paper warrants were unavailable, *see Dripps, supra* note 121, at 106–09.) The sharpest version of the question, with gratitude to Professor Daphna Renan, would be whether a hash search that can only offer a “yes/no” answer as to the presence of known child pornography files falls squarely within the contraband-detection rationale for the border search exception. Cf. Jonathan Zittrain, *A Few Keystrokes Could Solve the Crime. Would You Press Enter?,* JUST SECURITY (Jan. 12, 2016), https://www.justsecurity.org/28752/keystrokes-solve-crime-press-enter/ [https://perma.cc/4NTY-WSEE]. For purposes of this Note’s narrower project, the point to emphasize is that Founding-era evidence does not clearly resolve how the common law would have addressed this problem for paper searches at the border.

and Fourth Amendments — between paper searches and laws against seditious libel — has been reluctant to conclude that the risk a search will compromise expressive interests justifies imposing something more stringent than an ordinary warrant requirement. In the device-search context, lower courts have used this observation to defuse Ramsey’s suggestion that border searches might run afoul of the First Amendment absent a prohibition on reading communications. But regardless whether that conclusion is a fair reading of precedent (the point is arguable), it squares uneasily with the historical materials, which reflected a special concern for papers over other objects of the search and seizure power. Indeed, there’s considerable irony in border search advocates’ reliance on Boyd v. United States as an early recognition of the prerogative since Boyd announced, too, that “[t]he search for and seizure of stolen or forfeited goods . . . are totally different things from a search for and seizure of a man’s private books and papers.”

The originalist argument that papers ought to enjoy distinctive status is (even setting aside their separate enumeration in the constitutional text) a fairly straightforward one. Judge Kozinski and the Constitutional Accountability Center have both levied versions of it in an effort to narrow the reach of the border exception, relying on substantially the same conceptual beats, and the outline of the case goes as follows. First, the English opinion condemning one of the anticanonical searches that inspired the Fourth Amendment, Entick v. Carrington, discussed the evils posed by warrants to search papers, as distinct from the evil of general warrants generally. Lord Camden said there:

133 See, e.g., New York v. P. J. Video, Inc., 475 U.S. 868, 875 (1986) (“[A]n application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally.”); Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978) (“Properly administered, the preconditions for a warrant . . . should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.”).
134 See United States v. Ickes, 393 F.3d 501, 507 (4th Cir. 2005) (concluding in the context of a laptop search that, “since Ramsey, the Supreme Court has indicated that should it reach this question it would decline to find a First Amendment problem); United States v. Arnold, 533 F.3d 1003, 1010 (9th Cir. 2008) (adopting same reasoning).
135 The crucial elision: to say that the First Amendment does not require more than a warrant isn’t to say that the First Amendment cannot require more than the Fourth Amendment does where the Fourth would not require a warrant. For an account of these hybrid questions more generally, see Michael Coenen, Combining Constitutional Clauses, 164 U. PA. L. REV. 1067 (2016).
136 116 U.S. 616, 623 (1886).
137 Id. at 623 (emphases added).
138 United States v. Seljan, 547 F.3d 993, 1017–19 (9th Cir. 2008) (Kozinski, C.J., dissenting); Brief of Constitutional Accountability Center as Amicus Curiae in Support of Plaintiffs, supra note 10, at 4–10.
Papers are the owner’s goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.\textsuperscript{139}

There is some dispute how well known Lord Camden’s comments on paper warrants would have been; they appear in only one of two published reports of the case,\textsuperscript{140} and scholars disagree how widely each version circulated.\textsuperscript{141} But regardless, as Professors Donald Dripps and Eric Schnapper have detailed at length, contemporary debates figured \textit{Entick} as having established a rule about papers above and beyond its relevance to general, or otherwise procedurally defective, warrants.\textsuperscript{142} Indeed, the \textit{Entick} warrant was particularized by the day’s standards.\textsuperscript{143}

Second, nothing in the statutory or common law of the early United States contradicts the suggestion that this rule was received. As referenced above, no statutory authority to search papers existed prior to 1863.\textsuperscript{144} As Dripps documents, neither do the manuals written to advise justices of the peace document any common law authority to search papers.\textsuperscript{145} Indeed, some expressly gloss \textit{Entick} as holding “[t]hat a warrant to seize and carry away papers in the case of a seditious libel was illegal and void,” without any reference to the warrant’s generality.\textsuperscript{146} Most telling, perhaps, is Dripps’s observation that even enforcement of the infamous Sedition Act did not seem to entail warrants for seditious papers.\textsuperscript{147} There was, therefore, no contrary practice standing in the way of the \textit{Boyd} Court’s declaration that the original meaning of the Fourth Amendment categorically forbade searches of citizens’ private papers.\textsuperscript{148}

\begin{thebibliography}{99}
\bibitem{Entick} Entick v. Carrington, 19 Howell’s State Trials 1029, 1066 (CP 1765).
\bibitem{Compare} Compare id. (including the comments), with Entick v. Carrington (1765) 95 Eng. Rep. 807 (KB) (omitting them).
\bibitem{Compare Thomas Y. Davies} Compare Thomas Y. Davies, \textit{Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law” — “Fourth Amendment Reasonableness” Is Only a Modern, Destructive, Judicial Myth}, 43 TEX. TECH. L. REV. 51, 118 \& n.347 (2010) (”[B]ecause it is unlikely that the later report would have been imported in significant numbers during the remainder of the framing era, it seems highly doubtful Americans would have become familiar with Camden’s notion that a search warrant for papers was inherently illegal . . . .” Id. at 118.), with Dripps, supra note 121, at 65–66, 66 n.82 (collecting contrary evidence), and Roger Roots, \textit{The Framers’ Fourth Amendment Exclusionary Rule: The Mounting Evidence}, 15 NEV. L.J. 42, 52–58 (2014).
\bibitem{Schnapper} Schnapper, supra note 142, at 881.
\bibitem{See supra note 121 and accompanying text.} See supra note 121 and accompanying text.
\bibitem{See Dripps, supra note 121, at 75–77.} See Dripps, supra note 121, at 75–77.
\bibitem{William Waller Hening} \textit{William Waller Hening, The New Virginia Justice} 404 (1795); see also Dripps, supra note 121, at 76 (quoting Hening, supra, at 404).
\bibitem{Dripps} Dripps, supra note 121, at 82–83.
\bibitem{Boyd} Boyd v. United States, 116 U.S. 616, 634–35 (1886).
\end{thebibliography}
Of course, there have been challenges to the rigor of Boyd’s originalism too—though originalism it certainly purported to be. And if a person were to argue that the original meaning of the Fourth Amendment flatly forbids paper searches at borders, the level-of-generality objection could be turned right around: privacy advocates have no evidence that speaks directly to the question of papers at borders. (It might be tempting to ask whether there are examples of the application of other warrant exceptions to papers. But there appear to be no constitutional controversies involving, say, searches of papers incident to arrest in the early Republic, a fact that could be read in either interpretive direction.) Interestingly, though, no one actually argues for this rule—at least not in the context of the border search debate. Judge Kozinski left his preferred framework unstated, and the Constitutional Accountability Center seems to concede the validity of Boyd’s gradual erosion and reversal. As Professor Aziz Huq has recently observed, the Supreme Court has shown “no appetite for trying to circumscribe some domain of absolutely private papers or things that under no circumstances can be elicited by the state.” Dripps, too, concludes that “[e]ven if Boyd offers the most plausible historical reading of private papers under the Fourth Amendment, there is zero practical prospect of a return to a per se ban on seizing private papers.” From the perspective of too many institutional actors, few of whom are committed surveillance abolitionists, the original meaning is simply a bad one.

149 See, e.g., Davies, supra note 141, at 117–19 (sugesting the view of Lord Camden was idiosyncratic). But see Roots, supra note 141, at 52–58.


151 See United States v. Seljan, 547 F.3d 993, 1017–19 (9th Cir. 2008) (Kozinski, C.J., dissenting).

152 See Brief of Constitutional Accountability Center as Amicus Curiae in Support of Plaintiffs, supra note 10, at 10 (noting “developments establish[ing] that papers, like the home, are not categorically exempt from searches”).

153 Huq, supra note 151, at 147.

154 Dripps, supra note 121, at 106.

III. ADJUDICATION IN THE BORDER ZONE

What to do? A determinate originalist resolution to the border search controversy is doubly, maybe triply foreclosed. The quality of the interpretation underpinning the very existence of the border exception is contestable. The claim that the original meaning speaks directly to papers at borders seems to be descriptively false, whether advanced in support of a no-suspicion standard, reasonable suspicion, or a warrant requirement. And the claim with the strongest originalist support—that papers are categorically unsearchable, no matter the process obtained—is felt to be so practically undesirable that no one advances it.

What a determined originalist ought to do when determinate original meaning runs out is a hotly contested question, one that won’t be answered in any satisfying fashion here. But at the very least it bears observing that the instincts (and values) that drive the turn toward Fourth Amendment history hardly fall away when original meaning turns out to be less than fully determinate. There remain judges who “would like to be able to apply the law without importing nonlegal considerations and [are] searching for a method that will help [them] do it.” For a litigant challenging the federal claim to a border prerogative, it would be a mistake to think that, having “[fought] the original-meaning question to a draw,” there is no room left to evaluate arguments in terms of greater or lesser consistency with the normative commitments often bundled with originalism. It would be a mistake to throw the historical record in the dustbin if it records distinctions that retain functional — and Burkean — appeal today. Most of all, it

157 See Randy E. Barnett & Evan D. Bernick, The Letter and the Spirit: A Unified Theory of Originalism, 107 GEO. L.J. 1, 1 (2018) (calling the topic “underdeveloped and controversial”); Lawrence B. Solum, Originalist Methodology, 84 U. CHI. L. REV. 269, 294 (2017) (“Theorizing the construction zone is a large task”). Professors Randy Barnett and Evan Bernick have recently argued that judges are bound by a provision’s “spirit” where its “letter” fails to answer the question at hand. Barnett & Bernick, supra, at 1–2. Whatever the general merits of that suggestion, it seems hopelessly indeterminate as applied to the Fourth Amendment, where there is bedrock disagreement among scholars as to the best restatement of the provision’s “original function.” Id. at 1.


159 Baude, Our Law?, supra note 9, at 2380.

160 See Solum, supra note 157, at 294–95 (emphasizing that an originalist approach to the construction zone must be consistent with the normative justifications offered for the Constraint Principle,” namely, “democratic legitimacy and the rule of law”).

161 See Bradley & Siegel, supra note 9, at 16–17. It bears emphasizing here that while a rights-protective distinction — such as the one between papers and effects — may draw legitimacy from such a tradition, the post-Ramsey trend away from that framework does not necessarily defeat it. As Professors Curtis Bradley and Neil Siegel note, “governmental actors in the rights context interact with those who possess far less power than the government to push back or advance contrary understandings . . . [so] the institutional deference and Burkean consequentialist justifications for relying on practice are weaker in that context” than they might be when, say, Congress declines to challenge the President on the separation of powers. Id. at 28; see also Aziz Z. Huq,
would be a mistake to concede that, on these facts, the only approach to delivering the suite of constitutional values originalism originally promised is deference to the political branches. As Professor Randy Kozel puts it, “not every constitutional lawyer who comes to originalism through devotion to popular sovereignty must seek to optimize that value at the expense of all others.” And a judge who does not defer is not rejecting the values of restraint and legitimacy — is not on any fair account exercising unstructured policy judgment — where precedent and history form a thick network of distinctly legal constraints.

In this respect, as Professor Stephen Sachs has recently observed, “[h]ard cases often involve, not a shortage of legal reasons, but a surplus; the cases are hard because too many legal reasons are in play at the same time.” So too at the border. Riley, Ramsey, and Boyd; the First Amendment and the Fourth; the Collection Act and the historical arc of customs searches — all of these are plausibly relevant, even if none is determinative. And so the idealized responsibility of the judge, originalist or no, is to assign weights to each that are reasoned and plausible. Grading the argument for a warrant requirement along this dimension is an exercise left to the reader. But as this Note has tried to demonstrate, the evaluation will have to be one of degree — a choice not between determinate original meaning and some bogeyman vision of unmoored normativity, but among shades of success in the usual, workaday project of “arguing in good faith about the Constitution.”

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Fourth Amendment Gloss, 113 NW. U. L. REV. 701, 703 (2019) (arguing that the Supreme Court’s reliance on contemporary government practices in articulating Fourth Amendment rights is especially strange).


See id. at 143–45. Kozel calls this approach to construction “the precedent fallback,” a view that would “entail[] that when the Constitution’s linguistic meaning is indeterminate, courts should act in a manner that is heavily constrained by external sources and that enhances systemic stability, resists disruption, and draws together individual judges as part of a cohesive whole.” Id. at 144.


See sources cited supra note 72.

Fallon, supra note 75, at 123.