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 them[3]) 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

[1] The literature on this point is substantial (and diverse in its conclusions). *See* Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1707–08, 1708 n.5 (1996) (reviewing William John Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602–1791 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (available through *ProQuest Dissertations & Theses Global*)); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67; Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895 (2002); Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049 (2011) (reviewing WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791 (2009)); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000); Orin Kerr, *The Challenge of Fourth Amendment Originalism and the Positive Law Test*, REASON: VOLOKH CONSPIRACY (Jan. 19, 2018, 6:39 AM), https://reason.com/volokh/2018/01/19/what-is-fourth-amendment-originalism [https://perma.cc/G7GY-UF9Y] [hereinafter Kerr, *Fourth Amendment Originalism*]. Of course, perhaps every subfield of constitutional law thinks its experience with originalism is especially methodologically troubled. *Cf.* Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 133–36 (2018) (second-guessing suggestions that the amendment is "framed at an unusually high level of generality, or [that] the historical evidence of its original meaning is unusually indeterminate," *id.* at 133).

[2] United States v. Ramsey, 431 U.S. 606, 619 (1977); *see also* Samuel C. Rickless, *The Coherence of Orthodox Fourth Amendment Jurisprudence*, 15 GEO. MASON U. C.R. L.J. 261, 280–81 (2005) (including the border search among the warrant exceptions justified primarily by history).

[3] *See, e.g.*, Nicolette Lotrionte, Note, *The Sky's the Limit: The Border Search Doctrine and Cloud Computing*, 78 BROOK. L. REV. 663, 668, 688–91 (2013) (defending this position). Customs and Border Protection (CBP) regulations require that devices be disconnected from networks to prevent remote searches, but the rules are inconsistently honored. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-19-10, CBP'S SEARCHES OF ELECTRONIC DEVICES AT PORTS OF ENTRY 6 (2018). For the possible legal relevance of disconnecting devices before searches, see *infra* note 39.

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

[5] *See, e.g.*, United States v. Kolsuz, 890 F.3d 133, 144 (4th Cir. 2018); United States v. Cotterman, 709 F.3d 952, 962–68 (9th Cir. 2013) (en banc); Eunice Park, *The Elephant in the Room: What Is a "Nonroutine" Border Search, Anyway? Digital Device Searches Post-*Riley, 44 HASTINGS CONST.

the country 'never require probable cause or a warrant.'"[6] To an extent, the divide presents as a (familiar) choice-of-authority problem. Does recent Supreme Court precedent — especially *Riley v. California*,[7] the pathbreaking decision that imposed a warrant requirement on cellphone searches incident to arrest[8] — encourage a departure from what was previously constitutional tradition? Or does durable and determinate original meaning trump a subsequent change in circumstance?[9]

This Note argues that the choice framed above, the presumption that underpins much of the argument on each side of a messy circuit split,[10] 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

L.Q. 277, 298–303 (2017); Christine A. Coletta, Note, *Laptop Searches at the United States Borders and the Border Search Exception to the Fourth Amendment*, 48 B.C. L. REV. 971, 995–1001 (2007); Thomas Mann Miller, Comment, *Digital Border Searches After* Riley v. California, 90 WASH. L. REV. 1943, 1987–96 (2015).

[6] *Touset*, 890 F.3d at 1232 (internal quotation marks omitted) (quoting United States v. Vergara, 884 F.3d 1309, 1312 (11th Cir. 2018)); *see also* Recent Case, United States v. Touset, *890 F.3d 1227 (11th Cir. 2018)*, 132 HARV. L. REV. 1112, 1116 (2019) ("The *Touset* Panel correctly invoked two Founding-era customs statutes in support of its conclusion that border searches of property do not require suspicion.").

[7] 134 S. Ct. 2473 (2014).

[8] *Id.* at 2493.

[9] Of course, this is an oversimplification. Theories within the family of originalist approaches permit the content of constitutional meaning to evolve according to mechanisms other than formal amendment. *Cf.* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838 (2015) (describing the content of our law as "the Founders' law, as it's been lawfully changed"); William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 n.16 (2015) [hereinafter Baude, *Our Law?*] (concurring in this view). But the precise relevance of sources of authority other than linguistic meaning remains a difficult, contested question. *See, e.g.*, William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (describing James Madison's conception of liquidation by practice, but reserving the question whether Madison's view is part of our law); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate* 12–50 (Duke Law Sch. Pub. Law & Legal Theory Series, No. 2019-15, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3331588 [https://perma.cc/29U4-GJCW] (canvassing "potentially competing approaches to incorporating post-Founding historical practice in constitutional interpretation," *id.* at 12).

[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 410, 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."[11] Part II therefore establishes that the question falls within what some originalist theorists call "the construction zone."[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.[13]

I. THE MUDDLE[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.[15] The Court would continue over the following decades to gesture toward that statute for the proposition that border searches are different,[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."[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-

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[11] Entick v. Carrington (1765) 95 Eng. Rep. 807, 818 (KB).

[12] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458 (2013). The existence of a construction zone is itself contested. *See id.* at 503–23 (discussing the contrary views of Professors John McGinnis, Michael Rappaport, Gary Lawson, and Michael Stokes Paulsen); *cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1084–85 (2017) (urging greater attention to the positive law of interpretation, in part because of its potential to constrain construction). That debate is far too large to settle here, and this Note will set it aside.

[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, 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, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013); Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015).

[14] This Note borrows the appealing ring of the word "muddle" from Professor Richard Fallon, *see* Richard H. Fallon, Jr., 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.

[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)).

[16] *See* 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.5(a), at 222 & n.5 (5th ed. 2012) (collecting dicta).

[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 search[23] 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. Cotterman*[25] 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]

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[18] United States v. Montoya de Hernandez, 473 U.S. 531, 541 n.4 (1985).

[19] United States v. Flores-Montano, 541 U.S. 149, 155 n.2 (2004) (quoting *Ramsey*, 431 U.S. at 618 n.13).

[20] *Ramsey*, 431 U.S. at 624.

[21] *See, e.g.*, United States v. Alfaro-Moncada, 607 F.3d 720, 729 (11th Cir. 2010) (collecting cases).

[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 133, 146 n.6 (4th Cir. 2018) (internal quotation marks omitted).

[24] *See* United States v. Saboonchi, 990 F. Supp. 2d 536, 552 (D. Md. 2014) (collecting cases).

[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.

[29] *See, e.g.*, Samuel A. Townsend, Note, *Laptop Searches at the Border and* United States v. Cotterman, 94 B.U. L. REV. 1745, 1746 & n.7 (2014) (noting repeated reversals of the Ninth Circuit's border search decisions).

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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[30] *See, e.g.*, Orin S. Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 TEX. TECH L. REV. 1, 10 (2015) [hereinafter Kerr, *The Case for Use Restrictions*] (defining "judicial adoption of a new rule to adjust the equilibrium for computer searches [as] a '*Riley* moment'"). *Riley* may soon be supplanted by *Carpenter v. United States*, 138 S. Ct. 2206 (2018), on this point, since that case represents the Court's most express engagement with what Professor Orin Kerr calls the "equilibrium-adjustment" theory of the Fourth Amendment. Orin Kerr, *Understanding the Supreme Court's* Carpenter *Decision*, LAWFARE (June 22, 2018, 1:18 PM), https://www.lawfareblog.com/understanding-supreme-courts-carpenter-decision [https://perma.cc/ZJ3G-RLZB] (citing Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011)).

[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).

[32] Riley v. California, 134 S. Ct. 2473, 2485 (2014) (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009)).

[33] *Id.* at 2489.

[34] *See, e.g.*, United States v. Camou, 773 F.3d 932, 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.[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;[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.[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."[42]

Judge Wilkinson's perspective won the day just a few weeks later, albeit in a different court of appeals. In *United States v. Touset*,[43] a panel of the Eleventh Circuit emphasized anew that "searches at the border of the country 'never require probable cause or a warrant.'"[44] For this proposition, Judge William Pryor's opinion promptly cited the authority of the First Congress.[45] And *Riley*, he asserted, was baldly inapplicable because it dealt with a different warrant exception.[46] Applying the border framework, and noting that neither Supreme Court nor Eleventh Circuit precedent had ever required reasonable suspicion

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cell [https://perma.cc/ZCN9-KTWZ] ("[T]he Fourth Circuit appears to be requiring the government to identify the border-search-related interest justifying that particular search in order to rely on the border search exception. . . . 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.").

[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.

[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.

[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).

[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).

[43] 890 F.3d 1227 (11th Cir. 2018).

[44] *Id.* at 1232 (internal quotation marks omitted) (quoting United States v. Vergara, 884 F.3d 1309, 1312 (11th Cir. 2018)).

[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)).

[46] *Id.* at 1234.

for a search of *property*,[47] the panel declined to "create special protection for the property most often used to store and disseminate child pornography" (the offense at issue).[48] The court thus rejected a reasonable suspicion requirement,[49] closing by reiterating Judge Wilkinson's reminder as to "longstanding historical practice."[50] In each of these respects, the decision was congruent with Judge Pryor's previous, concise opinion in *United States v. Vergara*,[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.[52] *Touset* and its reasoning have been praised in these pages for their "faithful[ness] to the original understanding of the Fourth Amendment."[53]

C. *Experiencing a Significant Gravitas Shortfall*

The Fifth and Seventh Circuits have nibbled at the edge of this question,[54] as have a handful of district courts.[55] But safe to say *Kolsuz* and *Touset* are representative of the battle lines — on the one hand the

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[47] *Id.* at 1233.

[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 "invent[ing] 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. *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), *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, *Fourth Amendment Moralism*, 166 U. PA. L. REV. 1189 (2018).

[49] *Touset*, 890 F.3d at 1229.

[50] *Id.* at 1237 (quoting *Kolsuz*, 890 F.3d at 153 (Wilkinson, J., concurring in the judgment)).

[51] 884 F.3d 1309 (11th Cir. 2018).

[52] *Id.* at 1312–13.

[53] Recent Case, *supra* note 6, at 1112.

[54] *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).

[55] *See, e.g.*, Alasaad v. Nielsen, No. 17-cv-11730, 2018 WL 2170323, at *24 (D. Mass. May 9, 2018); United States v. Kim, 103 F. Supp. 3d 32, 35 (D.D.C. 2015). The litigation in *Alasaad v. Nielsen*, No. 17-cv-11730, 2018 WL 2170323, is still unfolding, and the opinion in *United States v. Kim*, 103 F. Supp. 3d 32, was heavily criticized for its unstructured, fact-sensitive balancing exercise. *See* Orin Kerr, *Every Computer Border Search Requires Case-by-Case Reasonableness, D.C. Court Holds*, WASH. POST: VOLOKH CONSPIRACY (May 12, 2015), https://wapo.st/1cLOHGP [https://perma.cc/9XFL-PRZZ] (characterizing *Kim*'s new framework as "highly problematic").

attitude that Fourth Amendment time is measured "before . . . *Riley*"[56] and "[a]fter *Riley*,"[57] on the other the view that original meaning continues to trump. And each opinion is, along one key axis or another, fairly unsatisfying.

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.[58] This kind of reasoning inevitably strikes some judges as necessarily unjudicial,[59] and already too endemic in Fourth Amendment decisionmaking. As Justice Gorsuch recently objected in *Carpenter v. United States*,[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."[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 *Touset*'s refusal to take persuasive guidance from *Riley*, the paradigmatic example of a "signal[]" from the Justices to the lower courts.[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),[63] notwithstanding *Riley*'s observation that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house."[64] Where *Riley* emphasized that cell phones are more nearly "an important feature of human anatomy"[65] than they are "just another convenience,"[66] the panel instructed travelers to leave

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[56] United States v. Kolsuz, 890 F.3d 133, 144 (4th Cir. 2018).

[57] *Id.* at 146.

[58] *See id.* at 147 ("[C]ertain searches conducted under exceptions to the warrant requirement may require more than reasonable suspicion."). Indeed, *Kolsuz* does not even nod at any sources that would structure the choice. *See id.* Presumably the answer would be a form of balancing.

[59] *Id.* at 152 (Wilkinson, J., concurring in the judgment) ("[T]he privacy interest recognized in *Riley* [does not] begin to answer the question of *who* should strike the balance between privacy and security at the border of the country.").

[60] 138 S. Ct. 2206 (2018).

[61] *Id.* at 2265 (Gorsuch, J., dissenting); *cf.* Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409, 1411 (2018) ("[T]he Court is not rigorous or consistent in its use of interest aggregation . . . [, and 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, *On the Design of Legal Rules: Balancing Versus Structured Decision Procedures*, 132 HARV. L. REV. 992 (2019).

[62] Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 971 (2016); *id.* at 953–56 (offering the example of *Riley*).

[63] United States v. Touset, 890 F.3d 1227, 1233 (11th Cir. 2018).

[64] Riley v. California, 134 S. Ct. 2473, 2491 (2014).

[65] *Id.* at 2484.

[66] *Id.* at 2494.

them at home.[67] And ignoring *Riley*'s rejection of a "pre-digital analogue" into other sources of the same information,[68] the court concluded that to search a phone was no different than searching "a tractor-trailer loaded with boxes of documents."[69]

The ipse dixit that *Riley* "does not apply to searches at the border"[70] is inadequate to justify these departures from the structure of its reasoning (as Judge Jill Pryor stressed in dissent in *Vergara*).[71] And this, too, is a problem that sounds in norms structuring the judicial role.[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.[73] While *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[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 *Touset* reads as if the Eleventh Circuit thought applying *Riley* rather than the traditional rule was forbidden, in the same strong sense that the Fourth Circuit seemed to believe applying *Riley* was not just permissible or desirable but, as it happened, mandatory.[75] The border search

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[67] *Touset*, 890 F.3d at 1235.

[68] *Riley*, 134 S. Ct. at 2493.

[69] *Touset*, 890 F.3d at 1233.

[70] *Id.* at 1234. The hook for this claim is *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. *Riley*, 134 S. Ct. at 2486.

[71] United States v. Vergara, 884 F.3d 1309, 1318 (11th Cir. 2018) (J. Pryor, J., dissenting).

[72] *See, e.g.*, Richard H. Fallon, Jr., Essay, *A Theory of Judicial Candor*, 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 *adequate* to support the case's outcome); *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, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008); and David L. Shapiro, Essay, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

[73] Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 462 (2018) (book review); *see also* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 46–53 (2010) (arguing that, at the Supreme Court level, narrowing without persuasive distinction undermines rule of law values, including doctrinal clarity and executive compliance with the best reading of current law).

[74] On evaluating the Supreme Court's decision to distinguish a precedent, see Richard M. Re, Essay, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1874–89 (2014).

[75] *See, e.g.*, United States v. Kolsuz, 890 F.3d 133, 146 (4th Cir. 2018) ("[T]he impact of *Riley* is plain enough that the government's brief does not seriously contest this point."). In characterizing the position of the *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. *Cf.* Richard H. Fallon, Jr., *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.[76] 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,[77] others that some version of originalism is the best positivist account of our current constitutional practice.[78] 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."[79] At different times, the Court has articulated the role of history in terms of the question whether a practice

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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").

[76] *See generally* Solum, *supra* note 73, at 456–67.

[77] *See, e.g.*, Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 859 (2009). *But see, e.g.*, Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1025 (2010).

[78] *See* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. (forthcoming 2019) (manuscript at 3–4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3324308 [https://perma.cc/LQ2J-PPV8].

[79] Boyd v. United States, 116 U.S. 616, 624–25 (1886) (quoting U.S. CONST. amend. IV). The Supreme Court had previously and briefly discussed the Fourth Amendment in *Ex parte Jackson*, 96 U.S. 727, 733 (1878), though only in dicta, *see* Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 575 (2007).

"was regarded as an unlawful search or seizure under the common law when the Amendment was framed,"[80] or, alternatively, whether a particular outcome would erode "that degree of privacy against government that existed when the Fourth Amendment was adopted."[81] 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[82] — as well as the usual objection that Justices' voting patterns don't follow originalism where it leads.[83]

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.[84] This Part demonstrates that the materials are more equivocal than courts typically recognize, and that the question falls squarely in an underdetermined "construction zone."[85]

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.[86] The

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[80] Wyoming v. Houghton, 526 U.S. 295, 299 (1999).

[81] United States v. Jones, 565 U.S. 400, 406 (2012) (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)). On the question whether this sort of balance-of-power maintenance is necessarily an attempt at originalism, compare Christopher Slobogin, *An Original Take on Originalism*, 125 HARV. L. REV. F. 14, 14 (2011) — yes — with Orin S. Kerr, *Defending Equilibrium-Adjustment*, 125 HARV. L. REV. F. 84, 86 (2012) — no. At minimum, Kerr is clearly correct that his articulation of this principle does not purport to be an interpretation of the Fourth Amendment's original public meaning. *See* Kerr, *supra*, at 86.

[82] *See* Carpenter v. United States, 138 S. Ct. 2206, 2236–44 (2018) (Thomas, J., dissenting).

[83] *See generally* Rosenthal, *supra* note 1, at 80–102.

[84] *Cf.* Sachs, *supra* note 9, at 871 ("[I]f you go into court in a constitutional case and say, 'well, Judge, the original Constitution is against us, but we superseded it through an informal amendment in 1937,' *you will lose*."). Tellingly, every opinion in *Carpenter* save Justice Kennedy's claimed to benefit from the authority of the Framers. *See Carpenter*, 138 S. Ct. at 2214 (citing "Founding-era understandings"); *id.* at 2238 (Thomas, J., dissenting) (objecting that "[t]he *Katz* test distorts the original meaning" of the Fourth Amendment); *id.* at 2251 (Alito, J., dissenting) (objecting that there is no "reason to believe that the Founders intended the Fourth Amendment to regulate courts' use of compulsory process"); *id.* at 2264 (Gorsuch, J., dissenting) (objecting along the same lines as did Justice Thomas). Tellingly, too, even those opinions that agree on the correct disposition disagree what principles to draw from the Framing-era materials. Nor do they seem to converge on a single methodological strand of originalism. Justice Alito evoked intent (expected applications); Justice Thomas stressed linguistic meaning.

[85] Solum, *supra* note 12, at 458 (defining the construction zone as an ineliminable domain in which "the constitutional text does not provide determinate answers to constitutional questions").

[86] *Cf.* CUDDIHY, *supra* note 1, at 727 ("Conventional historiographical techniques disclose little of the Fourth Amendment's original meaning."); Kerr, *Fourth Amendment Originalism*, *supra* note 1 (calling the materials "very sparse"). In what follows, this Note proceeds on the assumption, reflected in *United States v. Ramsey*, 431 U.S. 606 (1977), that the original public meaning of Fourth Amendment "reasonable[ness]" can speak directly to individual investigative practices, or at least

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.[90] And it includes the search and seizure statutes enacted by the First Congress,[91] chief among them the Collection Act of 1789[92] (the Collection Act), which Professor William Cuddihy has called "nothing less than a statutory exegesis on the Fourth Amendment."[93] (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.[94]) 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."[95]

Thankfully, the task of double-checking the border exception's "impressive historical pedigree"[96] 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

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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).

[89] *Carpenter*, 138 S. Ct. at 2264 (Gorsuch, J., dissenting) (alteration in original) (quoting William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 397 (1995)).

[90] CUDDIHY, *supra* note 1, at 729–35.

[91] *Id.* at 735–39.

[92] Act of July 31, 1789, ch. 5, 1 Stat. 29 (repealed 1790).

[93] CUDDIHY, *supra* note 1, at 739.

[94] *See* Orin Kerr, *Originalism and the Fourth Amendment*, VOLOKH CONSPIRACY (Aug. 19, 2013, 6:24 PM), http://volokh.com/2013/08/19/originalism-and-the-fourth-amendment-2/ [https://perma.cc/8BRE-RHRV] (emphasizing "the uncertain relationship between then-existing search and seizure law and the Fourth Amendment itself"); *see also supra* note 86.

[95] CUDDIHY, *supra* note 1, at 727.

[96] United States v. Flores-Montano, 541 U.S. 149, 153 (2004) (quoting United States v. Villamonte-Marquez, 462 U.S. 579, 585 (1983)).

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[ir] 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. Ramsey*[100] 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

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[97] Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790).

[98] Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164 (repealed 1799).

[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.").

[100] 431 U.S. 606 (1977).

[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. 646, 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).

border."[105] And none of Cuddihy's possible rationales for exempting ship searches, for what it's worth, relies on a rule of border exceptionalism.[106]

Professor Thomas Davies, in a competing account, advances the stronger claim that the Collection Act says *nothing at all* about the meaning of the Fourth Amendment because ship seizures were never thought to be governed by the Fourth Amendment in the first place.[107] Davies's argument on this point is detailed, and this Note would struggle to do it justice.[108] In its simplest form, though, the claim is commonsensical: "In late eighteenth-century thought, ships were neither 'houses, papers, and effects [nor possessions]' nor 'places.' They were ships."[109] Again, nowhere does Davies suggest the possible relevance of the border, except to list *Ramsey* among the cases that embrace a "generalized-reasonableness" approach "accord[ing] the modern police officer far greater authority to arrest or search than the Framers ever intended or anticipated."[110] The point is not that one of these possible inferences from the Collection Act is the best one, but that judicial articulations of the border exception uniformly fail to acknowledge — let alone rebut — the suggestion that there might *be* competing inferences.[111]

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[105] Sklansky, *supra* note 1, at 1806.

[106] CUDDIHY, *supra* note 1, at 767–68. 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.

[107] Davies, *supra* note 1, at 604–08.

[108] 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.*

[109] *Id.* at 605–06 (alteration in original) (quoting U.S. CONST. amend. IV).

[110] *Id.* at 737; *see also id.* at 737 n.542. 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.

[111] 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."[112] Whatever the merits of attributing constitutional judgment to the *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.[113]) That statutory authority, too, was distinct from the generalized authority to search individuals "coming into the United States from foreign countries," which seems to first appear in the statute books in 1866.[114] 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,[115] historical practice and precedent can play legitimate roles in originalist adjudication too,[116] 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 *papers* at borders.

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82 U. CHI. L. REV. 1235, 1305 (2015) ("[I]n any case in which there is more than one linguistically and legally plausible referent for claims of legal meaning . . . , interpreters should choose the best interpretive outcome as measured against the normative desiderata of substantive desirability, consistency with rule of law principles, and promotion of political democracy, all things considered.").

[112] Act of March 3, 1815, ch. 94, § 2, 3 Stat. 231, 232; *see also* 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. *See* 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").

[113] *See* United States v. Weil, 432 F.2d 1320, 1323 (9th Cir. 1970).

[114] Act of July 18, 1866, ch. 201, § 3, 14 Stat. 178, 178.

[115] *See, e.g.*, Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) ("Whatever one's theory of constitutional interpretation, a theory of *stare decisis*, poured on top and mixed in with it, *always corrupts the original theory*.").

[116] *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.

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) terms[124] 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

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[117] Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790).

[118] United States v. Molina-Isidoro, 884 F.3d 287, 295 (5th Cir. 2018) (Costa., J., specially concurring).

[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.

[121] *See* Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49, 77–79 (2013).

[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.[127] 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.[128] While there is room to argue about the state (and modern relevance) of post-1866 practice,[129] 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.[130]

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."[131] Though the Court routinely emphasizes the historical connection between the First

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[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.").

[128] *See* Yazoo City Post Office Case, 8 Op. Att'y Gen. 489, 495 (1857) (distinguishing, for purposes of a postmaster's power to detain allegedly "insurrection[ary]" material, sealed and unsealed matter); U.S. Postmaster-Gen., Opinion Letter on Opening Mail Matter (July 28, 1876), *reprinted in* OFFICE OF THE ASSISTANT ATTORNEYS-GEN. FOR THE POST-OFFICE DEP'T, 1 OFFICIAL OPINIONS OF THE ASSISTANT ATTORNEYS GENERAL FOR THE POST-OFFICE DEPARTMENT 266, 266 (Francis C. Huebner ed., 1905) (rejecting the opening of potentially dutiable merchandise in packages "transmitted by post from a foreign country" as "conflict[ing] with the spirit of the law").

[129] *See generally* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017) (discussing the role of historical gloss in separation of powers questions); Bradley & Siegel, *supra* note 9, at 12–50.

[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 30, 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.

[131] *See* Michael W. Price, *Rethinking Privacy: Fourth Amendment "Papers" and the Third-Party Doctrine*, 8 J. NAT'L SECURITY L. & POL'Y 247, 249 (2016).

and Fourth Amendments — between paper searches and laws against seditious libel[132] — it has been reluctant to conclude that the risk a search will compromise expressive interests justifies imposing something more stringent than an ordinary warrant requirement.[133] 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.[134] But regardless whether that conclusion is a fair reading of precedent (the point is arguable),[135] 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*[136] 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*."[137]

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,[138] 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:

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[132] *See, e.g.*, Stanford v. Texas, 379 U.S. 476, 482 (1965) (noting that the Fourth Amendment grew out of "a history of conflict between the Crown and the press").

[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.[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,[140] and scholars disagree how widely each version circulated.[141] But regardless, as Professors Donald Dripps and Eric Schnapper have detailed at length, contemporary debates figured *Entick* as having established a rule about papers above and beyond its relevance to general, or otherwise procedurally defective, warrants.[142] Indeed, the *Entick* warrant was particularized by the day's standards.[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.[144] As Dripps documents, neither do the manuals written to advise justices of the peace document any common law authority to search papers.[145] Indeed, some expressly gloss *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.[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.[147] There was, therefore, no contrary practice standing in the way of the *Boyd* Court's declaration that the original meaning of the Fourth Amendment categorically forbade searches of citizens' private papers.[148]

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[139] Entick v. Carrington, 19 Howell's State Trials 1029, 1066 (CP 1765).

[140] *Compare id.* (including the comments), *with* Entick v. Carrington (1765) 95 Eng. Rep. 807 (KB) (omitting them).

[141] *Compare* Thomas Y. Davies, *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, *The Framers' Fourth Amendment Exclusionary Rule: The Mounting Evidence*, 15 NEV. L.J. 42, 52–58 (2014).

[142] *See* Dripps, *supra* note 121, at 69–75; Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 880–84 (1985).

[143] Schnapper, *supra* note 142, at 881.

[144] *See supra* note 121 and accompanying text.

[145] *See* Dripps, *supra* note 121, at 75–77.

[146] WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 404 (1795); *see also* Dripps, *supra* note 121, at 76 (quoting HENING, *supra*, at 404).

[147] Dripps, *supra* note 121, at 82–83.

[148] Boyd v. United States, 116 U.S. 616, 634–35 (1886).

Of course, there have been challenges to the rigor of *Boyd*'s originalism too[149] — 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,[150] 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.[151] Judge Kozinski left his preferred framework unstated,[152] and the Constitutional Accountability Center seems to concede the validity of *Boyd*'s gradual erosion and reversal.[153] 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."[154] 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."[155] From the perspective of too many institutional actors, few of whom are committed surveillance abolitionists,[156] the original meaning is simply a bad one.

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

[150] *See* Dripps, *supra* note 121, at 108.

[151] *But see* Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 147 (2016) (noting "[p]eriodic calls for the revival of the *Boyd* rule" (citing Schnapper, *supra* note 142, at 873–74)).

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

[153] *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").

[154] Huq, *supra* note 151, at 147.

[155] Dripps, *supra* note 121, at 106.

[156] *Cf.* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015). Though much prison abolitionist scholarship is careful to oppose substitution from detention toward surveillance, *see, e.g.*, *id.* at 1219 n.296, some reform efforts place the values in tension, *see, e.g.*, *#ChallengingEcarceration: The Problem*, CTR. FOR MEDIA JUST., https://centerformediajustice.org/our-projects/challengingecarceration-electronic-monitoring/the-problem/ [https://perma.cc/N7KS-EB9L] (condemning monitoring during pretrial release as "Ecarceration"). The nature of the link between racial justice and antisurveillance is also contestable. *Cf.* I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. (forthcoming Apr. 2019) (manuscript at 143), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3331295 [https://perma.cc/4C9J-SLR5] (arguing that "an Afrofuturism and [Critical Race Theory–]informed future is likely to embrace surveillance technology" as a substitute for traditional policing). Regardless, it remains intriguing that there seems to be little such standalone thing as "surveillance abolitionism": privacy demands often hit a dead end at "get a warrant."

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,[157] 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."[158] 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,"[159] there is no room left to evaluate arguments in terms of greater or lesser consistency with the normative commitments often bundled with originalism.[160] It would be a mistake to throw the historical record in the dustbin if it records distinctions that retain functional — and Burkean — appeal today.[161] 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.

[158] William Baude, Essay, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2224 (2017).

[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 pack 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."[162] 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.[163]

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."[164] 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.[165] 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."[166]

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).

[162] Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 130 (2015).

[163] *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.

[164] Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. (forthcoming Apr. 2019) (manuscript at 46), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064443 [https://perma.cc/ZK49-2K2W].

[165] *See* sources cited *supra* note 72.

[166] Fallon, *supra* note 75, at 123.