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# Articles

## FOURTH AMENDMENT GLOSS

*Aziz Z. Huq*

**ABSTRACT**—Conventional wisdom suggests that a constitutional right should be defined so as to effectively constrain government actors. A right defined in terms of what state actors routinely do would seem to impose in practice an ineffectual brake on much intrusive state action—and so seems pointless. Nevertheless, in defining Fourth Amendment rights, the Supreme Court frequently draws on the practice of contemporaneous government actors to define the constitutional floor for police action. The actions of the regulated thus define the content of regulation. This Article isolates and analyzes this seemingly paradoxical judicial practice, which it labels “Fourth Amendment gloss,” by analogy to methodological practices elsewhere in constitutional law. The latter is examined through a comparison to a similar, albeit not identical, mode of reasoning used in separation of powers cases. The justifications for gloss in the latter domain are more fully developed and hence provide useful benchmarks for evaluation of Fourth Amendment gloss. The Article’s first aim is descriptive—to catalog the various ways in which “gloss,” or official practice, is deployed across the Court’s search and seizure case law. This exercise shows that many frequently exercised search and seizure powers have been constitutionally defined in terms of official practice. The Article’s second aim is to ask whether judicial reliance on such gloss can be justified. There are three general justifications for the use of official practice as a source of law in constitutional interpretation. These can be labeled the acquiescence, Burkean, and settlement justifications. A careful examination of the empirical and theoretical contexts of the Fourth Amendment suggests, however, that none of these three justifications supports gloss’s use as a way to define lawful searches and seizures. If gloss persists today, therefore, it is for institutional and ideological reasons—not because it is theoretically warranted. Given this conclusion, the Article offers ways to limit the error costs associated with the use of Fourth Amendment gloss.

**AUTHOR**—Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School. My thanks to Brandon Garrett, Orin Kerr, and John Rappaport for terrific comments, and to Kendra Doty, Jacob

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## INTRODUCTION

Constitutional rights supposedly constrain government actors.<sup>1</sup> To restrain the state in some meaningful way, a right must place out of lawful bounds some activities that government would otherwise do or else require some action that government would otherwise abjure. The U.S. Constitution largely enumerates the first, negative, kind of right against government interference.<sup>2</sup> So to define those constitutional rights in terms of what the government ordinarily does might seem an exercise in futility. After all, a right defined in terms of ordinary state practice would engender no

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<sup>1</sup> This explains Professor Ronald Dworkin’s canonical formulation of rights as “trumps.” RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 184–205 (1977); *see also* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 29 (1974) (describing rights as “side constraints”).

<sup>2</sup> The U.S. Constitution largely adumbrates negative rights. *But cf.* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986) (“From the beginning there have been cases in which the Supreme Court, sometimes very persuasively, has found in negatively phrased provisions constitutional duties that can in some sense be described as positive.”).

meaningful gain in liberty.<sup>3</sup> Why, one might plausibly wonder, would anyone bother to write down such a right in the first place? Under what circumstances, one might ask, would such a right likely be violated?

This Article concerns a zone of constitutional rights jurisprudence that seems to disobey this seemingly foundational presupposition. When delineating the Fourth Amendment rights against unreasonable searches and seizures, the Supreme Court frequently draws on the official practice of regulated government actors today as a source of constitutional meaning. I call this reliance on official practice “Fourth Amendment gloss,” by rough analogy to the judicial practice of looking to post-ratification interbranch dynamics as a source of “historical gloss” in separation of powers disputes.<sup>4</sup>

The analogy is not, to be clear, an exact one. There are important differences in the circumstances in which Fourth Amendment issues arise. Whereas the structural constitutional context typically involves a small number of institutions engaged in iterated interactions, the Fourth Amendment concerns thousands of dispersed officers and magistrates acting in disarticulated parallel. But the analogy between doctrinal fields is still a useful one, and the contextual differences are easy to exaggerate. Some structural constitutional issues arise in dispersed and iterative contexts—questions of removal authority and commandeering, for example—so the contextual difference should not be overstated. Moreover, it is hard to see why there should be an acoustic separation between the methodological foundations of different veins of constitutional interpretation. Choices of hermeneutic method are generally conceived as general—not clause-specific—in character. By analyzing how the precisely honed and extensively analyzed justifications for judicial reliance on official practice in the separation of powers context translate across those differences to the Fourth Amendment context, it is possible to gain new perspective on the epistemic and legal value of official practice as a guide to search and seizure law.

That perspective yields deflationary results: The analogies and parallels explored here provide powerful reasons to conclude that judicial reliance on “gloss” in the Fourth Amendment context is not as well supported as it is in other domains. If the notion of Fourth Amendment gloss seems counterintuitive, then that is as it should be.

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<sup>3</sup> Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1315 (1984) (“Having a constitutional right to perform a given act means, at least, that one may perform that act without governmental interference.”).

<sup>4</sup> See Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517, 1523 (2018) (book review) (discussing the role of “historical ‘gloss’” in separation of powers jurisprudence); see also *infra* Section I.A (exploring the scholarly literature on separation of powers gloss).

My first aim in this Article is thus descriptive: I want to isolate the significant role that official practice plays in one vital part of our constitutional law of policing.<sup>5</sup> I also want to cast a spotlight on how the Court defines what the state *can* do in terms of what the state in fact *does*. Official practice as a basis for Fourth Amendment protection has played a pivotal role in recent cases concerning the interaction of new technologies and the law of search and seizure. Although I will substantiate this point by a careful analysis of the overall doctrine, it is useful to introduce the idea of Fourth Amendment gloss with two recent examples, both of which concern the impact of technology on constitutional protection from state searches and seizures. Although Fourth Amendment gloss did not prevail in both cases, they still crisply illustrate the kinds of roles that it can play.

First, in *Carpenter v. United States*, the Court considered whether government acquisition of cell-site locational data from a suspect's telecommunications provider counted as a "search" under the Fourth Amendment.<sup>6</sup> For a majority of the Court, the case concerned "a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals."<sup>7</sup> Chief Justice John Roberts's majority opinion hinged on a distinction between cell-site locational data and other kinds of information historically obtained by the government without a warrant. He stressed that "novel circumstances" required a fresh consideration of the principle that records held by third parties fell outside the Fourth Amendment's scope.<sup>8</sup> History thus had no bite.

In contrast, the main dissent by Justice Anthony Kennedy viewed the essential continuity of warrantless acquisition of cell-site data and previous investigative practices as a legitimating basis for the government's action. Cell-site acquisition, Justice Kennedy stressed, was both "reasonable" and "accepted."<sup>9</sup> He then placed emphasis on "the longstanding rule that the Government may use compulsory process to compel persons to disclose documents and other evidence within their possession and control."<sup>10</sup> Such use of compulsory disclosure was "well established," explained Justice

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<sup>5</sup> I am focused here on the Fourth Amendment. Official practice plays a role in other criminal procedure domains. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (relying on the American Bar Association Standards for Criminal Justice to define constitutionally adequate defense counsel conduct in a capital case). The analysis here might be extended to those domains, but I do not pursue that possibility here.

<sup>6</sup> 138 S. Ct. 2206, 2214–15 (2018) (considering whether acquisition of cell-site locational data from a third-party data provider constitutes a "search").

<sup>7</sup> *Id.* at 2216.

<sup>8</sup> *Id.* at 2217.

<sup>9</sup> *Id.* at 2223 (Kennedy, J., dissenting).

<sup>10</sup> *Id.* at 2228.

Kennedy, “even when the records contain private information.”<sup>11</sup> Indeed, this practice was so entrenched that it had created a “reliance” interest on the part of police, “state and federal grand juries, state and federal administrative agencies, and state and federal legislative bodies.”<sup>12</sup> Hence, for Justice Kennedy, the sheer fact of continuous usage legitimated a state practice under the Fourth Amendment, notwithstanding intervening technological change.

A central difference between the *Carpenter* majority and its dissent was the extent to which the Justices were willing to perceive warrantless acquisition of cell-site data as a (necessarily legitimate) extension of an older practice, as distinct from a novelty requiring fresh thinking. *Carpenter* is unusual only insofar as the argument from historical practice failed.

A similar choice between the embrace of historical continuity and the recognition of a technological rupture informs the various opinions in *United States v. Jones*, a second case concerning new means of information acquisition.<sup>13</sup> *Jones* unanimously held that police could not engage in the warrantless placement and tracking of a global positioning system (GPS) device on a suspect’s vehicle because, as in *Carpenter*, such conduct constituted a “search” under the Fourth Amendment.<sup>14</sup> Whereas Justice Antonin Scalia’s majority opinion framed the case as an application of a longstanding trespass-based rule, the concurring opinions of Justices Sonia Sotomayor and Samuel Alito stressed the issue’s novelty—and, critically, the absence of any tradition of analogous police practice.<sup>15</sup> Stated otherwise, for the concurring Justices in *Jones*, as for the majority in *Carpenter*, the absence of an analogous historical gloss was fatal to the government’s case for the validity of warrantless GPS tracking under the Fourth Amendment.

*Jones* and *Carpenter* are not methodological outliers. Official practice plays a central role across a large swath of Fourth Amendment law in three different ways. First, it has played a central role in titrating the authority that police have to make arrests without a warrant. Second, it has configured the path of Fourth Amendment law in respect to vehicular stops. And third, it has been invoked to justify and also to constrain the supply of remedies for

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<sup>11</sup> *Id.* at 2228–29.

<sup>12</sup> *Id.* at 2229 (citations omitted).

<sup>13</sup> 565 U.S. 400, 404–11 (2012).

<sup>14</sup> *Id.* at 404.

<sup>15</sup> Compare *id.* at 405 (“[O]ur Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.”), with *id.* at 415 (Sotomayor, J., concurring) (“[T]he same technological advances that have made possible nontrespassory surveillance techniques . . . also affect the [Fourth Amendment threshold] test by shaping the evolution of societal privacy expectations.”), and *id.* at 424–25 (Alito, J., concurring in judgment) (accusing the Court of “disregard[ing] what is really important”: the use of a GPS device, by focusing on the trespass).

constitutional violations in the context of criminal trials.<sup>16</sup> In these cases, practice's relevance has often impinged more acutely than in *Jones* and *Carpenter*. Or at least this is what the descriptive element of my project suggests.

The Article's second contribution is evaluative—Is Fourth Amendment gloss, I ask, a good idea? To analyze that question, I draw on larger methodological debates in structural constitutional law. Here, the idea of gloss has received far more sustained attention. Of course, the kind of official practice at issue in structural constitutional cases is quite distinct from the sort at stake in Fourth Amendment cases. But the *justifications* for reliance on practice have been much more extensively studied in respect to the separation of powers. And there is no reason to think that interpretive foundations should vary between constitutional provisions.

My aim here is to benefit from that growing scholarship on historical gloss in the separation of powers context by asking whether the justifications identified there can be translated over to the (less well explored) Fourth Amendment context. To this end, I identify three theoretical grounds for giving weight to official practice as a source of constitutional meaning. All three justifications are quite general in form. First, gloss might be evidence of *acquiescence* to a practice by official actors who have freestanding authority to interpret the Constitution. Giving weight to their judgments appropriately implicates the Constitution's distribution of interpretive authority across distinct institutions. Second, gloss may be the distillate of experience over years and generations. As such, it may represent a kind of *Burkean wisdom* not to be lightly dismissed. Third, gloss may be valuable simply because it represents a focal equilibrium for officials and citizens. As such, it may serve as a *settlement* to enable coordination around the defense of constitutional norms. If after having accounted for the three broad grounds of acquiescence, epistemic value, and settlement value as justifications for Fourth Amendment gloss, there remains an explanatory gap, it might be plausible to conclude that such a gap cannot be filled.

These three theoretical foundations for the use of official practice as a source of constitutional meaning largely fail, I conclude, to provide a satisfying foundation for the practice of Fourth Amendment gloss. The acquiescence justification works in the separation of powers context because coordinate branches of the federal government can provide legitimating acquiescence to each other's practices.<sup>17</sup> But in the Fourth Amendment context, it is not easy to identify a class of official actors charged with

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<sup>16</sup> These points of doctrine are developed *infra* in Part II.

<sup>17</sup> See *infra* Section III.A.

making careful determinations of *constitutionality* in response to new forms of search and seizure. The dialogic process of acquiescence, therefore, falls short in this context. The Burkean justification, in contrast, proves to be incompatible with the political economy, information economy, and history of the actors regulated by the Fourth Amendment. Finally, the possibility that gloss might serve as coordinating settlement fails to fit observed usages of official practice presently found in the law reports.

Just because all three of the most plausible justifications for Fourth Amendment gloss fail does not mean that judges will cease to engage in the practice. Indeed, powerful institutional and ideological compulsions support the practice, quite independent of its merits. Given the likelihood that courts will continue to rely on gloss, even when doing so is normatively unjustified, I conclude by sketching how the practice's error costs might at least be cabined.

Despite its pervasive use, the practice of Fourth Amendment gloss remains peripheral to scholarly debates. Perhaps this relative marginality arises because gloss matters most to the mechanics of Fourth Amendment law only after the Court has determined what counts as a "search." The threshold topic tends to receive the lion's share of scholarly attention.<sup>18</sup> Less well studied are the rather unglamorous procedural questions of what steps the Government must take to make a search lawful and what remedies follow when these steps are not taken.

While legal scholars have not addressed Fourth Amendment gloss systematically, my analysis here draws inspiration from, and extends, earlier scholarship on searches and seizures. In 1974, Professor Anthony Amsterdam expressed "hope for the prospect of police self-regulation through the process of departmental rulemaking," but cautioned that "considerable nudging" from the courts would be required for this to

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<sup>18</sup> A sampling of the most prominent scholarship includes William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1877 (2016) (reasoning that, under the positive law model, a court may decide to apply the waiver of positive law rights to Fourth Amendment protections for threshold search and seizure questions); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 122 (2002) (asking "what is a search?" when determining what Fourth Amendment protections apply based on "reasonable expectation[s] of privacy"); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 528 (2007) (explaining Fourth Amendment doctrine as including two questions: (1) what is a search, and (2) under what circumstances is a search reasonable); Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 SUP. CT. REV. 205, 211 (including "perceived intrusiveness" of a search as relevant to reasonable expectations of privacy per Fourth Amendment doctrine); and Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409, 1413 (2018) (contending "a search or seizure is unreasonable when any principle that permitted it would be one that a Fourth Amendment rights holder could reasonably reject").



happen.<sup>19</sup> Professor Amsterdam was not concerned, though, with practice as opposed to formal rulemaking and so does not provide an exact precursor to my contribution (although his seminal paper casts a necessarily long shadow over any academic inquiry into the Fourth Amendment). A more closely path-marking antecedent is Professor David Sklansky's work on the role of common law concepts from the time of the Fourth Amendment's ratification in the Fourth Amendment law of the 1990s.<sup>20</sup> As I detail below, gloss is distinct from the common law materials with which Professor Sklansky reckoned.<sup>21</sup> But his general approach of situating the Fourth Amendment in the larger body of constitutional doctrine is admirable and merits attention. A more recent precursor to my analysis is Professor Anna Lvovsky's recent historicizing intervention, which focuses on the midcentury origins of judicial deference to police expertise.<sup>22</sup> She approaches some of the same issues as my analysis here—in particular the epistemic arguments for gloss—but does so from a historical perspective rather than a doctrinal one. Her interest is in understanding the origins of certain judicial practices and not analyzing their coherence within the larger fabric of constitutional doctrine. Professors Sklansky's and Lvovsky's works provide intellectual coordinates from which the present inquiry presses forward.<sup>23</sup>

The paper proceeds in four steps. In the first Part, I set out the uses of gloss in other domains of constitutional law. I tease out three distinct rationales for turning to observed practice as a source of constitutional meaning. These rationales are intended to serve as a framework for evaluating Fourth Amendment gloss. The second Part then makes a detailed

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<sup>19</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 379–80 (1974). But Professor Amsterdam's project is rather different from mine. He expressed the hope that the Court would require policing be “conducted pursuant to and in conformity with either legislation or police departmental rules and regulations” to comply with the Fourth Amendment. *Id.* at 416. I am focused here on the actual (rather than recommended) use of practice (rather than regulation) in the doctrine. Hence, my project here is quite different from Professor Amsterdam's.

<sup>20</sup> David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1743 (2000) (noting that the Court “has made the principal criterion for identifying violations of the Fourth Amendment ‘whether a particular governmental action . . . was regarded as an unlawful search or seizure under the common law when the Amendment was framed’” (alteration in original) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999))).

<sup>21</sup> See *infra* text accompanying notes 82–91.

<sup>22</sup> Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1998–99 (2017) (“Starting in the 1950s, judges came to rely on the promise of police expertise—the notion that trained, experienced officers develop rarefied and reliable insight into crime—to expand police authority in multiple areas of the law.”).

<sup>23</sup> Another more recent article takes up the question of how and when local government practice should be relevant to constitutional adjudication. See Brandon L. Garrett, *Local Evidence in Constitutional Interpretation*, 104 CORNELL L. REV. (forthcoming 2019) (documenting ways in which the courts have looked at local practice to define constitutional norms).

descriptive case for the pivotal role that gloss has played across the Fourth Amendment jurisprudential waterfront. I aim to show that gloss shapes many commonly employed rules of Fourth Amendment law—in particular those concerning warrantless arrests, searches of individuals, and vehicular stops; it also shapes the Court’s remedial choices. Part Three considers whether the available theoretical rationales for gloss—identified in other domains of constitutional law—support its use in the Fourth Amendment context. The result here is largely negative: few normatively persuasive grounds exist for using gloss in the Fourth Amendment context. Finally, I turn in Part Four to the question of what follows from this negative assessment. I suggest that courts will continue to employ gloss for ideological and institutional reasons, but there are ways to mitigate the associated costs.

### I. USING GLOSS IN CONSTITUTIONAL INTERPRETATION

This Part explores the scope and function of gloss as evidence of meaning in constitutional jurisprudence. This entails first offering a definition of gloss as it has emerged in other domains of constitutional law. I develop this definition through an explication of the reasons the Court and sympathetic scholars have tendered for reliance on historical practice.

#### A. *Gloss as a Source of Constitutional Meaning*

The idea of a post-ratification institutional practice as an illuminating gloss on open-textured constitutional provisions is most closely associated with Justice Felix Frankfurter’s concurrence in the *Steel Seizure* case.<sup>24</sup> In that opinion, Justice Frankfurter defined gloss as “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution.”<sup>25</sup> This definition is not without its ambiguities.<sup>26</sup> Still, Justice Frankfurter’s idea of gloss can be usefully decomposed into three constituent parts using his own verbal formulation as a starting point: (1) a historical practice by an official actor akin to the President; (2) that is temporally durable rather than momentary and fleeting; and (3) that has been recognized and endorsed by other official institutions, such as Congress. This definition is best understood as a core case of gloss or practice that is useful to orient discussion as an initial matter. It is not meant to exclude the

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<sup>24</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring). For an account of the provenance of the term, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413, 418 (2012).

<sup>25</sup> *Steel Seizure*, 343 U.S. at 610 (Frankfurter, J., concurring).

<sup>26</sup> See *infra* text accompanying notes 41–46 (documenting ambiguities).

possibility that an official practice be legally relevant even if it lacks one of the three conditions. Indeed, an important implication of Part II is that official practice can turn out to count as gloss without strictly satisfying all of Justice Frankfurter’s requirements. At the same time, the definition is useful insofar as it clarifies that gloss should be understood as distinct from the ideas of deference, which does not turn on the observation that a practice of some sort exists, or cognate notions.

Justice Frankfurter’s idea of historical gloss has been repeatedly pressed into service in the Court’s separation of powers jurisprudence. It is “an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”<sup>27</sup> For instance, gloss plays a role in the Court’s judgments on recess appointments,<sup>28</sup> interbranch commissions (such as the U.S. Sentencing Commission),<sup>29</sup> the pocket veto,<sup>30</sup> the unwritten executive power to preempt state laws on foreign affairs grounds,<sup>31</sup> and the Executive’s power to “recognize” other nations.<sup>32</sup> In all these jurisprudential domains, the post-ratification practices of Executive Branch actors—provided they are open, notorious, and uncontested—do double-duty as evidence of how constitutional ambiguity should be resolved. In other words, gloss operates as positive evidence of constitutionality.

At other times, courts take the absence of historical practice as proof of the absence of constitutional authority. Examples of gloss’s negative use can be found in the Court’s Article III and anti-commandeering jurisprudences. For example, when considering a federal statute that purported to reopen a federal court’s final judgment, the Court observed that there was “no [other] instance in which Congress has attempted to set aside the final judgment of

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<sup>27</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

<sup>28</sup> *Id.*

<sup>29</sup> *Mistretta v. United States*, 488 U.S. 361, 400–01 (1989) (using gloss to conclude that the Constitution did not bar “judicial participation in certain extrajudicial activity”).

<sup>30</sup> *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”).

<sup>31</sup> *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (“[T]he historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’” (quoting *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring))).

<sup>32</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (“[T]he President since the founding has exercised this unilateral power to recognize new states—and the Court has endorsed the practice.”). For a skeptical view of gloss’s role in *Zivotofsky*, see Curtis A. Bradley, *Agora: Reflections on Zivotofsky v. Kerry: Historical Gloss, the Recognition Power, and Judicial Review*, 109 *AJIL UNBOUND* 2, 2 (2016) (“[W]hereas in some cases historical practice shapes perceptions about other interpretive materials, in *Zivotofsky II* the principal direction of influence was the other way around.”).

an Article III court by retroactive legislation,” a “prolonged reticence” that “would be amazing if such interference were not understood to be constitutionally proscribed.”<sup>33</sup> Similarly, in fashioning an anti-commandeering prohibition to protect states’ sovereign prerogatives from federal takeover, the Court has repeatedly underscored the idea that an absence of historical practice lends credence to a constitutional challenge.<sup>34</sup> Most recently, in a challenge to the Professional and Amateur Sports Protection Act, Justice Alito echoed his *Jones* opinion and reaffirmed the salience of gloss’s absence by drawing attention to the “unprecedented” and “isolated” nature of the federal commandeering at issue there.<sup>35</sup>

Positive and negative uses of gloss are not identical. The inference taken from an absence of practice tends to be more narrowly gauged than the inference drawn from affirmative practice. The absence of practice is generally taken solely as circumstantial evidence that many generations of political leaders believed a power to be without constitutional authority, which must be considered in light of other potential reasons for government inaction.<sup>36</sup> The Court has never even hinted that desuetude might directly *cause* the absence of authority. It has never, that is, made a symmetrical claim to Justice Frankfurter’s assertion in his *Steel Seizure* concurrence that the mere persistence of desuetude can directly create a new species of institutional power that did not previously exist. Inaction, then, is not as powerful a gloss as action.

So deployed, gloss has spilled over only intermittently beyond separation of powers and federalism jurisprudence. In the 2016 case of *Evenwel v. Abbott*, for instance, the Court adjudicated a challenge to states’ reliance on total population, as opposed to the population of eligible voters, for legislative districting.<sup>37</sup> The Court upheld Texas’s practice of using total population by looking to the “settled practice” of “all 50 States and countless local jurisdictions . . . for decades, even centuries.”<sup>38</sup> In First Amendment

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<sup>33</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

<sup>34</sup> *See* *Printz v. United States*, 521 U.S. 898, 905 (1997); *New York v. United States*, 505 U.S. 144, 175–76 (1992). Similar arguments are found in Commerce Clause jurisprudence. *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (plurality opinion) (noting that “the lack of historical precedent” is a “telling indication of [a] severe constitutional problem” (alteration in original) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010))).

<sup>35</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018).

<sup>36</sup> Of course, the absence of legislative action can be explained by many factors in a governmental system characterized by veto-gates and novel policy crises. Leah M. Litman, *Debunking Antinovelty*, 66 *DUKE L.J.* 1407, 1429–48 (2017) (cataloging alternative causes of novelty).

<sup>37</sup> 136 S. Ct. 1120, 1132 (2016).

<sup>38</sup> *Id.*

cases, too, the Court has accounted for “widespread and time-tested” state practice in evaluating the constitutionality of an election regulation.<sup>39</sup> Despite being rather theoretically underwhelming—the Court, that is, saying nothing about *why* historical practice is relevant—these isolated examples imply that an official practice can be constitutionally significant even when it involves the independent, uncoordinated actions of plural sovereigns (i.e., different states) at distinct moments in historical time. In *Evenwel*, for example, the use of a voter population metric for redistricting extended across every state in the nation and downward to many substate jurisdictions.<sup>40</sup> The Court, moreover, did not ask for evidence that all these jurisdictions were acting in concert or speaking from the same hymnal. The independent, uncoordinated quality of a state practice posed no obstacle to judicial reliance on gloss. This should be enough to rebut the notion that official practice counts only when the number of actors involved is small (as in the separation of powers context but not the Fourth Amendment domain).

Notwithstanding its diffusion across diverse domains of constitutional law, the idea of gloss remains imprecise along several margins. First, it is not clear how the relevant institutional practice is defined.<sup>41</sup> An official practice can often be defined at different levels of generality. The more general and abstract the description, the wider the shadow cast by a historical practice on contemporary constitutional meaning. Second, although it is clear that gloss need not be anchored in the early Republic, it is not clear how long a practice must endure before it ripens into significance for constitutional interpretation. How many instances of a discrete action, for instance, must be observed before the terms gloss or practice are warranted? The case law yields no answer. Third, in the separation of powers context, there is a question of what exactly constitutes acquiescence by the coordinate branches sufficient to induce a practice’s ratification.<sup>42</sup> The definition of acquiescence might be thought to vary across different branches of government. Congress, for example, might face transaction costs in overcoming its collective action problems that do not hinder the Executive Branch.<sup>43</sup> Acquiescence by the

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<sup>39</sup> *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality opinion); *see also* *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (observing that an “unbroken practice” followed “openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside”).

<sup>40</sup> 136 S. Ct. at 1132.

<sup>41</sup> Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 77 (2013) (exploring this unit-of-analysis question in a response to Professors Curtis Bradley and Trevor Morrison).

<sup>42</sup> Bradley & Morrison, *supra* note 24, at 440–44 (discussing difficulties that Congress has in manifesting an absence of acquiescence).

<sup>43</sup> *Id.* at 448 (noting that “it is precarious to infer congressional acquiescence” from “the absence of legislation prohibiting the executive action in question”). In contrast, a recent study of nonexecutive foreign relations matters has also underscored the gap between Congress’s and the

latter might therefore be calibrated in less demanding terms in light of the lower risk that inaction or ambiguous action will be mistaken for endorsement.

Finally, assuming the relevant practice and responsive acquiescence are defined with sufficient clarity, we must also decide what weight a federal court will assign to gloss in the process of resolving a constitutional question. A court might treat evidence of historical gloss merely as evidence of historical actors' understanding of the Constitution, as in the commandeering cases.<sup>44</sup> In other instances, gloss supplies a complete and dispositive answer to a question left open by constitutional text.<sup>45</sup> Rather more subtly, in yet other cases "historical practice can affect perceptions about the clarity or ambiguity of the text."<sup>46</sup> How to characterize gloss's relationship to other sources of constitutional meaning, moreover, remains an open question. Probably the most that can be said for now is that courts weigh various sources of constitutional meaning implicitly and imprecisely. This may not be a bad thing. Perhaps it is possible to create a more precise algorithm for deciding how to weigh text, original meaning, precedent, purpose, and gloss. But it is far from clear that routinizing constitutional interpretation in this fashion would have a desirable effect on the ineffable and very human art of judging.<sup>47</sup>

### *B. Justifications for the Use of Gloss as a Source of Constitutional Meaning*

Jurists and scholars alike have become so inured to invocations of gloss in constitutional argument that they have ceased to notice how peculiar they are. Reliance on official practice to resolve a constitutional dispute might first be taken to imply that there is no evidence contemporaneous to the

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Executive's capacity to respond to another branch's practice-based assertions of constitutional authority. Kristen E. Eichensehr, *Courts, Congress, and the Conduct of Foreign Relations*, 85 U. CHI. L. REV. 609, 615 (2018) (positing that "[t]he comparative ease with which the president can respond to actions by the nonexecutive branches suggests that silence by the executive is a more meaningful signal of approval or acquiescence than silence by Congress").

<sup>44</sup> See *supra* note 34.

<sup>45</sup> For an instance in which gloss has played a seemingly conclusive role, see *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981), in which the Court relied upon gloss as a source of authority for a presidential action in the absence of explicit statutory authority.

<sup>46</sup> Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 41–42; accord Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 784 (2014) (noting that gloss has been an important tool in allowing the Court to find and interpret ambiguity in constitutional text).

<sup>47</sup> For a landmark effort to show that "constitutional interpretation is, after all, less free-form an exercise" than some suppose, see Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1227 (1995).

Constitution's enactment that resolves the dispute. Indeed, Justice Frankfurter sliced cleanly between "the words of the Constitution" and "the gloss which life has written upon them" as two distinct sources of law.<sup>48</sup> Historical gloss, moreover, looks at the actions of elected and appointed actors, often pursuing local and idiosyncratic policy agendas, as a source of new meaning of the Constitution *that empowers those subsequent iterations of those officials*. Gloss thus can have an inherent circularity, at least when federal power is at stake.<sup>49</sup> And when a court relies on gloss to reach a final judgment, it transmutes political actors' inchoate, perhaps contested and contestable, perhaps even inarticulate situational sense into a hard, definite rule of constitutional law.<sup>50</sup> This has consequences. Very concretely, violations of a judicially ratified gloss can precipitate damages and injunctive relief; gloss in the absence of judicial endorsement cannot.<sup>51</sup>

Judicial reliance on officials' practice, therefore, requires justification. Yet the Justices have not tried to explain why or when historical gloss should patch gaps in constitutional meaning (although they have offered a reason for using inaction as circumstantial evidence of shared constitutional understanding when evaluating the absence of a historical practice<sup>52</sup>). Into

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<sup>48</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

<sup>49</sup> To the extent that Fourth Amendment gloss is a product of local and state police action, it is not amenable to this circularity critique. Yet to date, gloss in the criminal procedure domain has tended to prioritize the judgments of federal over state actors. *Cf. infra* text accompanying note 131.

<sup>50</sup> One way to think about gloss in the absence of judicial ratification is as a form of constitutional "convention." Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1854–55 (introducing this idea into U.S. constitutional discourse). Hence, Professors Curtis Bradley and Neil Siegel suggest that there is an analytic distinction between "practice-based norms that have legal status (in which case they constitute historical gloss) and those that do not (in which case they constitute constitutional conventions), regardless of whether they are subject to judicial review." Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 267 (2017). I am not convinced, however, that in judicial consideration of gloss courts draw a crisp and clear distinction between patterns of official behavior based on the presence or absence of "legal status" (however that is defined). Professors Bradley and Siegel may thus offer a degree of analytic precision above and beyond what the judiciary's observed practice would support. Where the relevant practice is shared among a highly decentralized and dispersed set of actors—as in the Fourth Amendment context—it becomes even harder to distinguish between the presence and absence of "legal status." As a result, the distinction that Bradley and Siegel draw becomes even harder to sustain.

<sup>51</sup> For a similar intuition, see Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 69, 75 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (noting that "for some customary rules, there is no readily available hook, and as a consequence, political actors may be tempted to violate them" when they would not have violated a constitutional rule).

<sup>52</sup> *See infra* Section II.A.2.

this gap, scholars have leapt.<sup>53</sup> I thus draw on both case law and secondary sources to develop a set of justifications for courts' use of gloss. Specifically, I map out three potential justifications for that practice in the literature: as acquiescence, Burkean wisdom, and settlement.

First, "courts and other interpreters privilege acquiescence to historical practice" as reflecting an "agreement" among constitutionally relevant actors.<sup>54</sup> One example of such bare acquiescence is *Dames & Moore v. Regan*, where the majority emphasized that "Congress has accepted the authority of the Executive to enter into settlement agreements."<sup>55</sup> The Court did so without alluding to any functional justifications Congress might have had for its acceptance. The mere fact of policy dialogue, leading to convergence, was enough to create gloss.

Acquiescence from nonjudicial actors on the constitutionality of an action is relevant if one believes that the Court does not have a monopoly on the power to interpret the Constitution. In the separation of powers context, this kind of so-called "departmentalist" view of interpretive authority is common enough among commentators; it also forms a cornerstone of the political question doctrine.<sup>56</sup> An acquiescence-based view of gloss, as its name suggests, is not predicated simply on the decision of the branch engaged in the relevant conduct. It also reflects the response such behavior elicits from other officials. That response is treated "as a kind of waiver of the affected branch's institutional prerogatives."<sup>57</sup> In the separation of powers context, the acquiescence justification therefore trades upon the "negotiated" character of certain constitutional rules.<sup>58</sup> On this view, the original Constitution is less a manifesto of negative restraint and more a menu of positive governance options to be employed in response to contingencies both known and unexpected.

Second, a court might take the view that it owes no deference to other governmental actors' *constitutional* judgments, but that their *practical* wisdom, embodied in a series of policy decisions, nonetheless warrants respect. On this "functional" approach, historical gloss comprises a body of "accumulated wisdom" to which courts owe deference.<sup>59</sup> This justification

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<sup>53</sup> The leading piece is Bradley & Morrison, *supra* note 24 (defining and providing a clear general roadmap for the analysis of gloss).

<sup>54</sup> *Id.* at 433.

<sup>55</sup> 453 U.S. 654, 681 (1981).

<sup>56</sup> Bradley & Morrison, *supra* note 24, at 434 & n.89 (collecting leading departmentalist texts).

<sup>57</sup> *Id.* at 435.

<sup>58</sup> For a defense of this idea of "negotiated" constitutional positions, see Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1607–10 (2014) (defining and giving examples of interbranch bargaining).

<sup>59</sup> Bradley & Morrison, *supra* note 24, at 427–28, 435.



sounds in a Burkean register inasmuch as it looks to what the English politician and political thinker Edmund Burke called “the collected reason of ages” as more likely to be correct than first-order reasoning by contemporary actors seeking to innovate against the grain of received wisdom.<sup>60</sup>

Notice that the Burkean justification rests on a sort of intellectual parlor trick that, in other contexts, has discomfited the Justices. A policy judgment on the part of nonjudicial actors is metamorphosed into a rule of constitutional law that cannot be derogated by statute or qualified by official discretion. Practical wisdom (or its shadow), that is, is transmuted into law. In a different context, several members of the Court have expressed discomfort about decades-old doctrines of judicial deference to administrative agencies’ expert judgments on the meaning of ambiguous statutes.<sup>61</sup> One Justice has gone so far as to suggest that such deference violates the Constitution’s separation of powers.<sup>62</sup> The core concern propelling these critiques, as articulated by then-Judge Neil Gorsuch, speaks in terms of “concentrate[d] federal power” and “the abdication of the judicial duty.”<sup>63</sup> Just this last Term, Justice Kennedy directed concern at a government actor’s power to define the scope of her own discretionary authority.<sup>64</sup> These worries are worth keeping in mind when one turns to the Fourth Amendment.

A rough analogy exists between judicial deference to other officials’ expertise-backed judgments about the Constitution (at issue in gloss) and to their expertise-backed judgments about the meaning of federal statutes (at issue in the administrative debate). But the Justices have not noticed this analogy. There is also a gap in the judicial treatment of these similar species

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<sup>60</sup> EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790), reprinted in THE PORTABLE EDMUND BURKE 416, 456–57 (Isaac Kramnick ed., 1999). Although the Court has not described gloss in Burkean terms, in the leading scholarly piece on Burkean jurisprudence, Professor Cass Sunstein characterizes the *Steel Seizure* decision as a leading example of the genre. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 & n.11 (2006).

<sup>61</sup> See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring) (Justice Alito joining); *id.* at 616–21 (Scalia, J., concurring in part and dissenting in part).

<sup>62</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (“These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference.”).

<sup>63</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1152, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>64</sup> *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (finding especially “troubling” the “reflexive deference exhibited” to “an agency’s interpretation of the statutory provisions that concern the scope of its own authority”).

of expertise-backed judgment. I flag this gap here because it opens up a productive line of inquiry in respect to Fourth Amendment gloss: Should nonjudicial actors' expertise-backed views of the prohibition on unreasonable searches and seizures receive the same deference as judgments on the separation of power, or is it more akin to judgments about statutes? And should the concerns about concentrated power bear upon the scope of Fourth Amendment gloss? Analogies across doctrinal boundaries make either a positive or a negative answer possible.

A third way that historical gloss may be justified is in terms of settlement rather than wisdom. Where a practice has emerged as a stable equilibrium solution to constitutional ambiguity, the very fact of its stability over time may be sufficient to attract normative freight. Even if it is possible to imagine a better equilibrium, historical practice may warrant courts' respect simply because it comports with all relevant actors' settled expectations. In consequence, any move to a new equilibrium would necessarily be costly. When official actors "settle[] upon an institutional arrangement that they both deem desirable or at least practically workable and acceptable," the bare fact of functionality may suffice to trigger judicial respect.<sup>65</sup>

Justice Frankfurter offered an earlier example of gloss as settlement in his *Steel Seizure* concurrence when he discussed *United States v. Midwest Oil Co.*,<sup>66</sup> a case concerning presidential withdrawals of public land from the real estate market.<sup>67</sup> The *Midwest Oil* Court, explained Justice Frankfurter, had authorized a practice that extended "over a period of 80 years and in 252 instances, and by Presidents learned and unlearned in the law."<sup>68</sup> Justice Frankfurter here is plainly not leaning on the considered legal judgment of past chief executives. Rather, the legal force of gloss in *Midwest Oil* derived from the sheer persistence in time and frequency of the practice. More recently, a majority of the Court in *NLRB v. Noel Canning* endorsed the President's use of the recess appointment power to fill vacancies arising before a Senate recess out of a concern that "upset[ting] this traditional practice . . . would seriously shrink the authority that Presidents have believed existed and have exercised for so long."<sup>69</sup>

The settlement justification can be formulated another way by drawing upon the positive political theory literature on constitutions as focal points.

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<sup>65</sup> Bradley & Morrison, *supra* note 24, at 434.

<sup>66</sup> See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring) (discussing *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915)).

<sup>67</sup> 236 U.S. at 461.

<sup>68</sup> *Steel Seizure*, 343 U.S. at 611 (emphasis added).

<sup>69</sup> 134 S. Ct. 2550, 2573 (2014).

Economists have observed that in situations with multiple potential equilibrium solutions, “players [can] still ‘know’ what to do” based on “knowledge . . . from both directly relevant past experience and a sense of how individuals act generally.”<sup>70</sup> That is, they have an exogenously supplied “focal point.” The theory of focal points is relevant here because one important function of written constitutions is to provide a “crisp focal point” for citizens concerned specifically about government overreaching or illegality.<sup>71</sup> Like a proverbial red line, the focal point supplies “diffuse social and political actors with a coordinating signal that [constitutional] norms are imperiled.”<sup>72</sup> A focal point account helps explain why it makes sense for courts to transform inchoate and atextual understandings shared by political actors into hard-edged, textually precise legal rules. Such a transformation leverages the “expressive power a third party wields when he declares to disputants how they should resolve their dispute.”<sup>73</sup> The court, acting as that third party, reduces uncertainty and elicits legal compliance and predictability by reducing what had previously been an understanding “in the air” to one that can easily be consulted and verified—i.e., a focal point. This interpretation of the settlement justification looks at the manner in which a rule can facilitate coordination among *citizens*. It is in this regard that it is subtly distinct from the version of the settlement justification that looks at whether a practice has become settled among *officials*.

The settlement justification (in either of its two flavors) is subtly different from its acquiescence and Burkean confreres. It is less dependent on the fact of officials’ agreement and so less sensitive to the prospect of protest, explicit or implicit, against an official position on the scope of legal powers. Further, whereas the argument from Burkean wisdom would seem to demand some durable pattern of behavior to draw an inference of wisdom accrued, the argument for settlement might be predicated on a briefer span of conduct. Something can serve as a focal point, that is, even if it has not been implemented iteratively over a long time. The settlement justification, therefore, may be the least profound and the most instrumental of all three theoretical grounds for gloss.

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<sup>70</sup> DAVID M. KREPS, *GAME THEORY AND ECONOMIC MODELING* 101 (1990). The seminal discussion of focal points is THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 54–58 (1960).

<sup>71</sup> Aziz Huq & Tom Ginsburg, *How to Lose A Constitutional Democracy*, 65 *UCLA L. REV.* 78, 119 (2018); see also Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 *AM. POL. SCI. REV.* 245, 246 (1997) (developing a formal model of focal points).

<sup>72</sup> Huq & Ginsburg, *supra* note 71, at 110.

<sup>73</sup> Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 *U. ILL. L. REV.* 1043, 1048.

## II. THE VARIETIES OF FOURTH AMENDMENT GLOSS

I turn now from the justifications for gloss to the ways in which gloss is employed in the Fourth Amendment context. There are three categories of usage that describe how gloss is used in search and seizure law: *gloss as substantive content*, *gloss as benchmark*, and *gloss as substitute*. (A caution—these categories do not map neatly onto the three justifications for gloss described in Part I. Uses and justifications are subtly different matters.)

Fourth Amendment gloss emerges at distinct points of an elaborate jurisprudential terrain. Thus, to understand the role of gloss, it is useful to begin by mapping the terrain in which its use arises and identifying what kind of Fourth Amendment questions it illuminates. Fourth Amendment analysis has three steps.<sup>74</sup> First, a court must determine whether a particular state action is a “search” or “seizure.”<sup>75</sup>

Second, assuming that the state action is a search or seizure such that the Fourth Amendment is even triggered, then there is a question of what follows procedurally from that determination. At this stage, the court must determine what quantum of suspicion the state must demonstrate to justify its intrusion. This step hinges on the Fourth Amendment’s text, which consists of two grammatically disjunctive clauses: the first talks of “warrants” and the second disavows “unreasonable” searches and seizures. Recently, the Court has embraced an open-textured reasonableness standard, the demands of which depend on the severity of the intrusion.<sup>76</sup> Thus in practice, courts can impose a range of different procedural rules on different types of intrusions, from a warrant based on probable cause for the most intrusive to no justification at all for the least. This range is illustrated in microcosm by the Court’s treatment of searches incident to arrest. For most objects, a lawful arrest triggers authority to search without any warrant or quantum of suspicion.<sup>77</sup> But for the data contained within cell phones, it displaces neither the warrant nor the probable cause requirement.<sup>78</sup>

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<sup>74</sup> Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 U. PA. L. REV. 591, 610 (2016) (“The Fourth Amendment prohibition on unreasonable searches and seizures can be divided into three questions . . .”).

<sup>75</sup> See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018) (considering whether acquisition of cell-site locational data from a third-party data provider constitutes a “search”).

<sup>76</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (noting that a judge must consider the “Amendment’s words and take them seriously: they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable”).

<sup>77</sup> *United States v. Robinson*, 414 U.S. 218, 224 (1973) (“[A] search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment.”).

<sup>78</sup> *Riley v. California*, 134 S. Ct. 2473, 2495 (2014) (“Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”).

Finally, if a court has found that an official has executed an unreasonable search or seizure, it must determine whether a remedy, in the form of damages in the civil context or exclusion of the evidence obtained in the criminal context, is warranted. In both contexts, the Court has fashioned screening rules that preclude remediation absent a showing of “fault” on the part of the state official.<sup>79</sup> In the damages context, this is a function of qualified immunity.<sup>80</sup> In the suppression context, it follows from the good faith exception to the exclusionary rule.<sup>81</sup>

Where in this complex structure does the Court inject official practice as a source of law? Gloss is generally not invoked to ascertain what counts as a search or seizure. The most common invocation of gloss instead occurs at the second stage, when a court considers what kind of process officials must follow to justify an intrusion. As noted above, the Court has repeatedly framed this inquiry in terms of “reasonableness.”<sup>82</sup> At one point, the Justices equated reasonableness with a presumptive warrant requirement.<sup>83</sup> Subsequently, the Court stated that “reasonableness” would be glossed in terms of the common law circa 1791.<sup>84</sup> But this “originalist” analysis—which I shall explore in more detail momentarily—proved insufficient,<sup>85</sup> leaving room for an inquiry into gloss.<sup>86</sup> The final use of “gloss as substitute”

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<sup>79</sup> Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1547–50 (2018); see also Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on Camreta v. Greene and Davis v. United States*, 2010 CATO SUP. CT. REV. 237, 237–39 (discussing convergence in these two lines of Fourth Amendment remedies).

<sup>80</sup> *Pierson v. Ray*, 386 U.S. 547, 555–57 (1967).

<sup>81</sup> *United States v. Leon*, 468 U.S. 897, 924–25 (1984); *id.* at 906 (defining the exclusionary rule as “precluding the use of evidence obtained in violation of [the Fourth Amendment’s] commands”).

<sup>82</sup> See, e.g., *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (“[R]easonableness is always the touchstone of Fourth Amendment analysis . . .” (quoting *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016))); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (“[T]he ultimate touchstone of the Fourth Amendment is ‘reasonableness’ . . .”).

<sup>83</sup> Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 559 (1999) (“For most of [the twentieth] century, the Supreme Court has endorsed what is now called the ‘warrant-preference’ construction of Fourth Amendment reasonableness, in which the use of a valid warrant . . . is the salient factor in assessing the reasonableness of a search or seizure.”).

<sup>84</sup> *United States v. Jones*, 565 U.S. 400, 406 (2012) (“At bottom, we must ‘assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” (alteration in original) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2011))); see also *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) (“In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”).

<sup>85</sup> See Sklansky, *supra* note 20, at 1762–70 (developing powerful criticisms of the originalist approach).

<sup>86</sup> On the wide and varied use of the term “reasonableness” across heterogeneous fields of law, see Benjamin C. Zipursky, *Reasonableness in and out of Negligence Law*, 163 U. PA. L. REV. 2131,

occurs in the third, remedial step of the Fourth Amendment inquiry, where it supplies a reason to deny remedies.

It is worth pausing here to clarify the distinction between Fourth Amendment gloss and the Court's use of eighteenth-century common law. These appeals to authority are distinct, although both partially look at official behavior. In the 1990s, the Supreme Court began invoking with increasing frequency the notion that "the common law when the Amendment was framed" was a reference point for reasonableness.<sup>87</sup> For instance, the Court looked to common law trespass to determine whether the placement of a GPS device on the chassis of a vehicle was a "search."<sup>88</sup> Building on this precedent, Justice Clarence Thomas recently invoked the "common law" as a basis for condemning the exclusionary rule.<sup>89</sup> These arguments are methodologically distinct from gloss arguments. Rather than looking to *what state officials do*, they focus on the *content of the law*. No question of acquiescence or the duration of behavior arises. Moreover, rather than ranging across time, these common law cases train resolutely on the 1790s.<sup>90</sup> Finally, common law originalism remains at best an occasional touchstone in Fourth Amendment cases. The recent *Carpenter* decision, holding that acquisition of cell-site locational data from telephone providers constituted a search, did not even attempt to find analogies in eighteenth-century tort or contract law.<sup>91</sup> Gloss, by contrast, is far more pervasive.

With this analytic foundation in place, I now turn to the three ways in which courts deploy gloss in Fourth Amendment arguments: as substantive content, as benchmark, and as substitute.

#### A. Gloss as Substantive Content

Of the three varieties of gloss in the search and seizure context, by far the most prevalent is the first. Gloss is used quite simply to define the content

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2135 (2015) ("The range of uses of 'reasonableness' in law is so great that a list is not an efficient way to describe and demarcate it.").

<sup>87</sup> *Houghton*, 526 U.S. at 299; *accord* *Florida v. White*, 526 U.S. 559, 563 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

<sup>88</sup> *Jones*, 565 U.S. at 404.

<sup>89</sup> *Collins v. Virginia*, 138 S. Ct. 1663, 1677 (2018) (Thomas, J., concurring) (noting that "the common law sometimes reflected the inverse of the exclusionary rule" as a ground for abandoning the latter).

<sup>90</sup> See Sklansky, *supra* note 20, at 1743 (describing the common law approach as "reading eighteenth-century common law into the Fourth Amendment"). The criticisms of the common law method that Professor Sklansky develops, therefore, do not translate to the Fourth Amendment gloss context. *Id.* at 1762–70.

<sup>91</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2214–15 (2018) (describing the question presented as standing at "the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake").

of the constitutional rule—or, more accurately, to define one element of the constitutional regime. That is, rather than measure observed official conduct against an extrinsic legal benchmark, the Court has *endogenized* the constitutional rule—which defines the minimum procedural obligations of officials regulated by the Fourth Amendment—to what officials do. In a variant of this approach, it has also looked at the absence of a state practice as dispositive of the constitutional rule. I consider each of these possibilities in turn.

*I. The Affirmative Use of State Practice*

Perhaps the apogee of gloss as substantive content is the Court’s 2001 decision in *Atwater v. City of Lago Vista*, which authorized an arrest pursuant to a misdemeanor traffic offense that did not itself allow jail time.<sup>92</sup> Justice David Souter’s majority opinion invoked a historical narrative that began with “pre-founding English common law,” including “divers Statutes” from the 1285 Statute of Winchester onward, to “the historical record as it has unfolded since the framing.”<sup>93</sup> In the modern era, Justice Souter cited treaties published between 1884 and 1967 and also appealed to “statutes in all 50 States and the District of Columbia [that] permit warrantless misdemeanor arrests,” as well as “a host of congressional enactments” that do the same.<sup>94</sup> *Atwater* thus developed a historical gloss argument that transcended common law arguments, extending both backward and forward in time. Proof of this extended historical arc served to demonstrate that arrests for misdemeanors that did not authorize jail time were “reasonable” under the Fourth Amendment by repudiating the petitioner’s contention that such arrests had never been allowed. The Court found not only that such arrests had always been allowed but that this practice proved their reasonableness.

Twenty-five years earlier, the same joint appeal to a common law history and parallel contemporary practice characterized Justice Byron White’s majority opinion in *United States v. Watson* affirming “the ancient common-law rule that a peace officer was permitted to arrest . . . for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.”<sup>95</sup> As in *Atwater*, the Court in *Watson* took pains to underscore the persistence of the common law rule, which remained “substantially intact”

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<sup>92</sup> 532 U.S. 318, 323 (2001). The relevant Texas law at issue in *Atwater* was a misdemeanor offense “punishable by a fine not less than \$25 or more than \$50.” *Id.* (citing TEX. TRANSP. CODE ANN. § 545.413(d) (West 1999)). The same statute, however, also authorized officers to make arrests for violations. *Id.* (citing TEX. TRANSP. CODE ANN. § 543.001 (West 1995)).

<sup>93</sup> *Id.* at 327–40.

<sup>94</sup> *Id.* at 343–44.

<sup>95</sup> 423 U.S. 411, 418 (1976).

until the time of the decision.<sup>96</sup> Justice White cited the American Law Institute’s proposed (but not enacted at the time) Model Code of Pre-Arrest Procedure and federal statutes as evidence of “the judgment of the Nation and Congress . . . to authorize warrantless public arrests on probable cause.”<sup>97</sup> *Watson* nicely illustrates the oddness of the gloss approach. The Court explicitly cited the very existence of the practice challenged on constitutional grounds as evidence of its constitutionality.

The fraught and complex domain of automobile searches provides a third illustration of gloss as substantive content. Traffic stops made up 42% of all police–citizen interactions in 2011 (the last year for which data is available at the time of this writing), and roughly 26.4 million persons age sixteen or older indicated that their last contact with police occurred during a traffic stop.<sup>98</sup> Hence, gloss has far-reaching consequences for many individuals, since it regulates their modal interactions with police.

In the Court’s first encounter with searches of automobiles, *Carroll v. United States*, the Justices relied on gloss to define the procedural requisites of such searches to render the warrant requirement unnecessary.<sup>99</sup> Writing for the majority, Chief Justice William Howard Taft began by invoking customs statutes enacted “contemporaneously with the adoption of the Fourth Amendment.”<sup>100</sup> But, as in *Atwater* and *Watson*, the Court was at pains to show that the practice extended into the contemporary period, citing a 1917 federal statute and an 1899 Alaska statute that allowed for warrantless vehicular searches to demonstrate that the norm was unbroken “practically since the beginning of the Government.”<sup>101</sup> Obviously, the references to these later statutes cannot be explained in terms of common law originalism.

*Carroll*’s account of continuity contrasted with contemporaneous federal courts’ conclusion that the Eighteenth Amendment ruptured the constitutional fabric and so necessitated a rethinking of the Fourth Amendment’s constraints on vehicular searches.<sup>102</sup> Those courts were also

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<sup>96</sup> *Id.* at 421–22.

<sup>97</sup> *Id.* at 422–23.

<sup>98</sup> *Traffic Stops*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?tid=702&ty=tp> [<https://perma.cc/G3BU-BU7Y>].

<sup>99</sup> 267 U.S. 132 (1925).

<sup>100</sup> *Id.* at 150–51 (citing a 1789 statute permitting the search of “any ship or vessel” in relation to customs violations).

<sup>101</sup> *Id.* at 152–53.

<sup>102</sup> *See, e.g.*, *United States v. Bateman*, 278 F. 231, 234 (S.D. Cal. 1922) (arguing that “the Eighteenth Amendment would have been stillborn” had warrantless vehicular searches been barred). This was not the only reason for concern about automobiles. Sarah A. Seo, *The New Public*, 125 *YALE L.J.* 1616, 1635 (2016) (documenting judicial anxieties about automobiles’ riskiness to the general public in the 1920s).



surely cognizant of the dramatic increase in automotive usage in the 1910s.<sup>103</sup> At least for Chief Justice Taft, however, Prohibition and the rise of automobile usage did not change the analysis. In his private correspondence, Chief Justice Taft stressed a quite different instrumental justification for the result in *Carroll*. The automobile, he noted, was “the greatest instrument for promoting immunity of crimes of violence that I know of in the history of civilization.”<sup>104</sup> The Court’s subsequent decisions endorsed and enlarged the *Carroll* rule to encompass containers found in a vehicle. They again stressed the historical continuity of vehicle-related searches and the absence of legitimate reliance interests on the part of drivers.<sup>105</sup> The amalgam of eighteenth-century common law and post-ratification gloss thus proved a durable foundation for the automobile exception to the warrant requirement.

Finally, a variant on gloss as substantive content is the possibility of looking to legislative action as a source of Fourth Amendment meaning. In two recent cases concerning new technologies of locational tracking and cell phone data, Justice Alito suggested that the Court should attend—and even pay heightened deference—to legislative judgments on the Fourth

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<sup>103</sup> Between 1910 and 1924, the number of registered passenger automobiles in the United States increased from 500,000 to 15,500,000. ROBERT S. LYND & HELEN MERRELL LYND, MIDDLETOWN: A STUDY IN CONTEMPORARY AMERICAN CULTURE 253 n.3 (1929).

<sup>104</sup> Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 125 n.408 (2006). Historian Sarah Seo argues that a shift did occur in suspects’ ability to evade arrest as a consequence of automobiles’ mass availability. Before 1913, when mass production of vehicles took off, “[i]f a law officer had reason to believe that a suspect was skipping town or fleeing with a cargo of illegal or stolen goods, he usually had ample time to obtain a warrant for search and arrest”—an impossibility once flight by automobile became available. Sarah A. Seo, *Antinomies and the Automobile: A New Approach to Criminal Justice Histories*, 38 L. & SOC. INQUIRY 1020, 1031 (2013).

<sup>105</sup> *United States v. Ross*, 456 U.S. 798, 824 (1982) (finding “no legitimate reliance interest” and noting that “the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history”); *id.* at 820 n.26 (“During virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.”); *see also* *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) (noting the same rationale). In another line of cases, the Court has relied on the sheer frequency of police contact with automobiles as a justification for permitting warrantless searches. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (“As a result of our federal system of government, however, state and local police officers, unlike federal officers, have much more contact with vehicles for reasons related to the operation of vehicles themselves.”). While largely a decision based on the eighteenth-century common law, *Wyoming v. Houghton* contains a brief reference to post-ratification “practice under [customs] statutes.” 526 U.S. 295, 302 (1999). I do not think this is enough to rank it as a gloss case. The Court’s most recent decision on the automobile exception does not dwell on historical continuity. *See Collins v. Virginia*, 138 S. Ct. 1663, 1669 (2018) (identifying two policy justifications for warrantless automobile searches). Since those two justifications were found not to apply to the facts of the case, whereas the historical basis for the rule would have applied, it should perhaps be unsurprising that *Collins* was the rare automobile case in which the defendant prevailed.

Amendment’s implementation.<sup>106</sup> There is no logical reason this analytic frame should be limited to new enactments. If legislation has already created a basis for stable practice, Justice Alito’s reasoning would suggest deference. There are, however, few federal enactments regulating searches and seizures outside the context of electronic communications<sup>107</sup> and national security.<sup>108</sup> The former, however, is a response to a Supreme Court decision (albeit one that supplements its response with a good deal more regulatory detail),<sup>109</sup> while the latter is rarely subject to challenge. Nevertheless, Justice Alito’s suggestions are a useful reminder that a gloss argument need not be cabined to executive officials. It can also encompass legislative actors.

Across all these cases, the Court treated the Fourth Amendment’s procedural element as endogenous to—indeed, as derivative of—the current and historical practice of police. It leaned heavily on gloss, particularly in practically significant cases, such as those involving vehicular stops and misdemeanor arrests. Indeed, in the absence of gloss as substantive content, it seems plausible to think that Fourth Amendment law on the ground today would look very different.

## 2. *The Absence of Gloss as the Absence of Constitutional Authority*

In the jurisprudence of structural constitutionalism, the absence of historical precedent can serve as a predicate for finding that an official practice falls outside constitutional bounds. The starkest example of this reasoning, as noted, occurs in the federalism jurisprudence of anti-

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<sup>106</sup> *Riley v. California*, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring) (“I would reconsider the question presented here if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.”); *United States v. Jones*, 565 U.S. 400, 429 (2012) (Alito, J., concurring) (“In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative.”). Justice Alito cited an important article by Professor Orin Kerr on institutional competence and technological change in the Fourth Amendment domain. See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805 (2004) [hereinafter Kerr, *Constitutional Myths*] (“[C]ourts should place a thumb on the scale in favor of judicial caution when technology is in flux, and should consider allowing legislatures to provide the primary rules governing law enforcement investigations involving new technologies.”). Professor Kerr himself has subsequently taken a different tack. Orin S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1117, 1121 (2017) (“Structural differences between the Fourth Amendment and investigative legislation make legislation a poor signal of constitutionally relevant judgments.”).

<sup>107</sup> See, e.g., 18 U.S.C. §§ 2510–22 (2012) (governing electronic surveillance during ordinary criminal investigations).

<sup>108</sup> See, e.g., Foreign Intelligence Surveillance Act of 1978 § 105(a)(2)(A), 50 U.S.C. § 1805(a)(2)(A) (2012) (regarding the “electronic surveillance [of] a foreign power or an agent of a foreign power”).

<sup>109</sup> Kerr, *Constitutional Myths*, *supra* note 106, at 847–51 (describing the legislative history of the Wiretapping Act).

commandeering.<sup>110</sup> A similar analytic move is found in Fourth Amendment cases, where the absence of a practice is taken as evidence that the practice is not constitutional.

The absence of gloss was central in the Court's very first landmark Fourth Amendment decision, the 1886 judgment in *Boyd v. United States*.<sup>111</sup> *Boyd* arose out of a seizure of goods alleged to have been imported without payment of duties.<sup>112</sup> Exercising an authority first granted by a June 1874 federal statute, the U.S. Attorney had demanded that the importer (Boyd) produce certain invoices at peril of having the facts at issue in the case found against him.<sup>113</sup> The Court held that this "compulsory production of a man's private papers . . . to forfeit his property, is within the scope of the Fourth Amendment."<sup>114</sup> As in other "gloss as substantive content" cases, the *Boyd* Court relied on both "[t]he views of the first Congress"<sup>115</sup> and subsequent practice—or rather the lack thereof. Specifically, the *Boyd* Court observed that the statutory authority at issue "was the first legislation of the kind that ever appeared on the statute book of the United States, . . . as seen from its date."<sup>116</sup> The Court further stressed the "total unlikeness" of the 1874 provisions to any earlier customs-related legislation.<sup>117</sup> In these passages, *Boyd* can be fairly read to say that the shape of governmental practice in the past determines the boundaries of present legal authority: Absence begets absence, just as usage begets authority. *Boyd*'s logic is therefore the inverse of precedent such as *Atwater*, *Watson*, and *Carroll*.

More recently, the absence of analogous historical practice has played a role in decisions concerning the interaction of new technologies with the Fourth Amendment. Recall that in *United States v. Jones*, a unanimous Court held that the placement of a GPS device on the undercarriage of a suspect's vehicle constituted a search under the Fourth Amendment.<sup>118</sup> (*Jones*, I note, is the rare case in which gloss played a role in defining the threshold scope of the Fourth Amendment's operation.) The majority opinion by Justice Scalia noted, and the concurring opinion of Justice Alito underscored, the

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<sup>110</sup> See *supra* text accompanying notes 33–35; see also, e.g., *New York v. United States*, 505 U.S. 144, 175–76 (1992).

<sup>111</sup> 116 U.S. 616 (1886).

<sup>112</sup> *Id.* at 617–18.

<sup>113</sup> *Id.* at 619–20.

<sup>114</sup> *Id.* at 622, 630. The Court also noted that the Fifth Amendment applied. *Id.* at 630.

<sup>115</sup> *Id.* at 630.

<sup>116</sup> *Id.* at 621. The Court further observed that this was a moment "of great national excitement, when the powers of the government were subjected to a severe strain to protect the national existence." *Id.*

<sup>117</sup> *Id.* at 624.

<sup>118</sup> 565 U.S. 400, 404–05 (2012).

disanalogy between the kinds of surveillance available to the police during earlier periods of American history and GPS vehicular tracking.<sup>119</sup> Two years later, in *Riley v. California*, the Court held that a warrant was required to search a cell phone's contents even when police had acquired it pursuant to a search incident to arrest.<sup>120</sup> Again, the Court underscored the disjunction between the kind of evidence that might have been found on a suspect's person in the past and the data accessible via a cell phone.<sup>121</sup> Equating the two was "like saying a ride on horseback is materially indistinguishable from a flight to the moon."<sup>122</sup> In both *Jones* and *Riley*, the Court thus pointed to the absence of any analogous historical practice as a reason for tougher Fourth Amendment scrutiny.

But technological leaps do not always defeat arguments from gloss. In *Maryland v. King*, the Court held that taking a buccal swab for DNA during an arrest and using that DNA to match the suspect to evidence from older "cold" cases was reasonable.<sup>123</sup> The Court drew an analogy between DNA identification and the practice of fingerprinting all suspects that developed in "the middle of the 20th century."<sup>124</sup> It reasoned that because DNA identification was merely "an advanced technique superior to fingerprinting in many ways," it "would make little sense to either the forensic expert or a layperson" to distinguish them for Fourth Amendment purposes.<sup>125</sup> The practical continuity between different means of suspect identification, the Court reasoned, vouchsafed the legality of DNA testing despite technological change.<sup>126</sup>

Uniting the lines of cases described in the last two Sections is the Court's attention to durable historical practice as a touchstone for determining which police practices count as "reasonable." History can play

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<sup>119</sup> *Id.* at 406 n.3 (discussing the analogy between a constable concealing himself in a coach in the eighteenth century and twenty-first-century GPS tracking); *id.* at 420 (Alito, J., concurring in the judgment) (same).

<sup>120</sup> 134 S. Ct. 2473, 2495 (2014).

<sup>121</sup> *Id.* at 2488–89 ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.").

<sup>122</sup> *Id.* at 2488.

<sup>123</sup> 569 U.S. 435, 447 (2013) (affirming reasonableness as the touchstone of the Fourth Amendment).

<sup>124</sup> *Id.* at 459.

<sup>125</sup> *Id.* Underscoring the importance of continuity over time, the Court further rejected the defendant's argument that DNA identification took far longer than fingerprinting by looking forward in time to new technologies that would expedite genetic testing. *Id.* at 460.

<sup>126</sup> The analogy is problematic, however, insofar as few attempts have been made to empirically confirm the predicate assumption of individual uniqueness that animates fingerprinting or to examine error rates. Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 *SCIENCE* 892, 894 (2005). That is, the historical practice on which the *King* Court hung its hat may be problematically error-prone.

both a positive and a negative role for the Court: it can authorize as much as it can undermine the state's claim to power. It makes sense, therefore, to treat these two lines of cases under the same analytic rubric because history is playing the same function in both, albeit with different valences.

*B. Gloss as Benchmark*

A further, distinct judicial use of state practice is as a benchmarking source of “best practices.” By examining variation in the policing and prosecutorial practices of different jurisdictions, the Court can draw inferences about whether a challenged state action is necessary to achieve public order and safety. The distinctive trait of gloss as benchmark is interjurisdictional comparison. Gloss as benchmark does not have an easy parallel in other domains of constitutional law, but it does resemble the practice of “norming” in administrative law. According to Professors Jonathan Masur and Eric Posner, an agency engaged in norming picks “a level of strictness that puts significant burdens on industry outliers—the firms with the worst practices—while putting limited burdens or none at all to the firms whose practices are of average quality or better”; as a result, the “actual practices of industries” provide a measure of “the regulatory standard.”<sup>127</sup>

Perhaps the most practically important use of gloss as benchmark arose in a case about remedies rather than the meaning of “reasonableness”—the 1961 landmark decision in *Mapp v. Ohio*, which extended the exclusionary rule to the states.<sup>128</sup> An exclusionary rule remedy for Fourth Amendment violations had been obtained in federal court since 1914,<sup>129</sup> but when the Court incorporated the Fourth Amendment against the states in 1949, it declined to extend the exclusionary rule to state criminal trials.<sup>130</sup> *Mapp*, therefore, did not need to explain why the exclusionary rule was warranted. Rather, the Court faced the problem of explaining why the factual landscape had changed since 1949 so as to legitimate the expansion of the Fourth Amendment to state courts.

Pivotal to the majority's explanation was a benchmarking argument drawing on federal practice. Citing a speech by none other than FBI Director J. Edgar Hoover, the *Mapp* Court pointedly observed that “it has not been suggested either that the Federal Bureau of Investigation has . . . been

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<sup>127</sup> Jonathan S. Masur & Eric A. Posner, *Norming in Administrative Law*, 68 DUKE L.J. (forthcoming 2019) (manuscript at 2), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3132881](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132881) [<https://perma.cc/S38N-7G8D>].

<sup>128</sup> 367 U.S. 643, 657 (1961).

<sup>129</sup> *Weeks v. United States*, 232 U.S. 383, 398 (1914).

<sup>130</sup> *Wolf v. Colorado*, 338 U.S. 25, 26–27 (1949).

rendered ineffective” by the imposition of the exclusionary rule in federal prosecutions.<sup>131</sup> Moreover, the Court pointed to its abrogation of the “silver platter” doctrine, which had allowed federal officials to share unlawfully secured information with state counterparts for introduction into a state tribunal.<sup>132</sup> Again, the Court suggested that expanding the exclusionary rule in this fashion had not compromised law enforcement. Ordinary policing, the Court implied, not only could coexist happily with the exclusionary rule but already did so without sacrificing public safety to any palpable degree.

A second use of gloss as benchmarking is found in the Court’s consideration of deadly police force as a form of “seizure.” In *Tennessee v. Garner*, the Court held that “[deadly] force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”<sup>133</sup> *Garner* framed the question of whether deadly force could be employed in terms of “balancing” the suspect’s interest in staying alive against the state’s interest in public order and safety.<sup>134</sup> To evaluate the state’s interests, Justice White’s majority opinion recognized the “fact . . . that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects.”<sup>135</sup>

*Garner* is notable for the level of detail with which the Court conducted this inquiry. The Court reviewed policies adopted by both states and the federal government, it considered requirements for accreditation by the Commission on Accreditation for Law Enforcement Agencies, and it discussed an empirical study by the International Association of Chiefs of Police.<sup>136</sup> It further cited an amicus brief joined by the Police Foundation, nine national and international associations of police and criminal justice professionals, the chiefs of police associations of two states, and thirty-one law enforcement chief executives—all of whom attested to deadly force’s inefficacy in practice.<sup>137</sup> This corpus of evidence about actual practice permitted the Court to reason that “[i]f those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting

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<sup>131</sup> *Mapp*, 367 U.S. at 660 (footnote omitted) (quoting *Elkins v. United States*, 364 U.S. 206, 218 (1960)).

<sup>132</sup> *Id.* at 653.

<sup>133</sup> 471 U.S. 1, 3 (1985).

<sup>134</sup> *Id.* at 7–8 (explaining that the Court, by “balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted”).

<sup>135</sup> *Id.* at 10–11.

<sup>136</sup> *Id.* at 18.

<sup>137</sup> *Id.* at 19; *see also* Brief for the Police Foundation et al. as Amici Curiae in Support of the Respondent-Appellee at 27–40, *Garner*, 471 U.S. 1 (Nos. 83-1035, 83-1070), 1984 WL 566025.

nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases.”<sup>138</sup> In effect, the Court surveyed the field of policing practices and determined that Tennessee was an outlier whose practices warranted no respect.<sup>139</sup>

A third, more recent example of gloss as benchmark can be found in the recent decision excluding cell-phone contents from the scope of warrantless searches incident to arrest.<sup>140</sup> In *Riley v. California*, the Court sought to respond to the concern that an arrestee’s cell phone might pose a risk to officer safety because it could be used to alert compatriots in crime.<sup>141</sup> As in *Garner*, the Court again engaged in a comparative analysis of policing practices. It discerned “a number of law enforcement agencies around the country [that] already encourage the use of Faraday bags,” aluminum bags (akin to sandwich wrapping) that can simply and quickly be used to isolate a phone.<sup>142</sup> The *Riley* Court could have made this point without benchmarking, yet it felt compelled to go beyond its bare intuition to make a comparative argument—which itself is a telling sign of the importance of gloss in the Fourth Amendment context.

Finally, gloss as benchmark can be fleetingly glimpsed in the related jurisprudence of street stops. The landmark *Terry v. Ohio* opinion—holding that investigative stops are permitted on a showing of reasonable articulable suspicion—turned largely on the pragmatic need for such stops.<sup>143</sup> Chief Justice Earl Warren, however, noted that street stops were a kind of “swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been . . . subjected to the warrant procedure.”<sup>144</sup> This suggests at least awareness of historical practice.

More interestingly, the Court’s resolution of the case—splitting the victory by allowing investigative stops without probable cause while still requiring the lower reasonable articulable suspicion standard—was anticipated by an amicus brief submitted by the National District Attorneys

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<sup>138</sup> *Garner*, 471 U.S. at 11.

<sup>139</sup> *Garner*, though, is an outlier in its comparative method in this area of Fourth Amendment law. Subsequent decisions offered more inchoate and ambiguous formulations of the relevant legal rule, such that in general police are not “on notice of whether a particular use of force is constitutional.” Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1143 (2008) (developing an extensive critique of the doctrine’s underspecification).

<sup>140</sup> The leading case for the doctrine more generally is *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.”).

<sup>141</sup> 134 S. Ct. 2473, 2485 (2014).

<sup>142</sup> *Id.* at 2487.

<sup>143</sup> 392 U.S. 1 (1968).

<sup>144</sup> *Id.* at 20.

Association (NDAA).<sup>145</sup> The NDAA recommended the Court follow California’s recently adopted rule, which turned upon whether “a reasonable man” would believe, based on the “circumstances,” that a stop was “‘necessary to proper discharge’ of an officer’s duties.”<sup>146</sup> Because Chief Justice Warren did not cite the NDAA brief, it is impossible to be certain that *Terry* in fact relied on this benchmark. But its presence in the briefing is evidence that the Court could have inferred the absence of a compelling need for police power to make stops without any level of suspicion by reference to California’s practice.<sup>147</sup>

As I have described it, gloss as benchmarking is a varied phenomenon. On the one hand, *Mapp* and *Garner* invalidate practices in what Professor Justin Driver calls “holdout” jurisdictions.<sup>148</sup> The states chastised by those decisions were laggards in relation to an otherwise uniform trend of increasing professionalization and sophistication in police practices.<sup>149</sup> In contrast, *Riley* and *Terry* rest on comparisons between jurisdictions but do not suggest that the favored states are a majority or follow a dominant practice. The logic of *Riley* and *Terry* is not the logic of holdouts but is rather more akin to a search for what environmental law calls the “best available technology.”<sup>150</sup> In short, gloss as benchmarking can have both a diachronic (development) and a synchronic form, depending on the set of comparators used.

### C. Gloss as Substitute

Finally, gloss might be employed as a substitute for constitutional protection. More specifically, the Court’s belief that officials generally engage in certain rights-protecting practices can support the conclusion that the imposition of consequences for a Fourth Amendment violation—typically, the suppression of inculpatory evidence—is unjustified. This is an argument offered at the third and, also, final stage of Fourth Amendment

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<sup>145</sup> RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S*, at 206 (Oxford Univ. Press 2016).

<sup>146</sup> *Id.* (citing Brief of National District Attorneys Association, Amicus Curiae, in Support of Respondent at 35, *Terry*, 392 U.S. 1 (No. 67), 1967 WL 113688).

<sup>147</sup> For a similar argument of practicality from observed policing practices, see, for example, Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 873–74 (2014), discussing the practicality of administering warnings during automobile stops by drawing on training manuals and state practice.

<sup>148</sup> Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 937 (2014) (“An outlier that is a holdout involves a state law or practice that, although perhaps once prevalent, has now receded and exists in, at most, a few remaining jurisdictions.” (emphasis omitted)).

<sup>149</sup> *Id.* at 952 (describing the elimination of holdouts as “extinguishing practices that time has left behind”).

<sup>150</sup> 33 U.S.C. § 1311(b)(2)(A)(i) (2012).



analysis, where the question is whether exclusion is warranted. But the elimination of the exclusionary rule means there is no meaningful way to enforce the right against unreasonable searches and seizures. For where there is no exclusionary remedy, but where state law still requires a warrant, empirical studies suggest that police “pretty much completely ignored the warrant requirement.”<sup>151</sup> Gloss as substitute, in short, has powerful practical repercussions for legal compliance.

This deployment of gloss arises in case law extending and amplifying the Court’s 1984 decision in *United States v. Leon*, which had fashioned a “good-faith exception” to the exclusionary rule for “searches conducted pursuant to warrants.”<sup>152</sup> *Leon*’s exception initially applied only to searches based on warrants that were erroneously issued by a magistrate, unless it was “‘entirely unreasonable’ for an officer to believe, in the particular circumstances of this case, that there was probable cause.”<sup>153</sup> But *Leon* has subsequently been extended piecemeal to cover a far larger fraction of unlawful searches.<sup>154</sup> It is here that gloss has played a major role.

Two extrusions of *Leon* rely on gloss as substitute. First, in *Hudson v. Michigan*, the Court considered and rejected exclusion as a remedy for violations of the “knock and announce” rule, which requires officers to knock before entering a home to execute a warrant.<sup>155</sup> Explaining this remedial rationing, Justice Scalia pointed to what he called “the increasing professionalism of police forces” and to a “new emphasis on internal police discipline” as a result of “wide-ranging reforms in the education, training, and supervision of police officers.”<sup>156</sup> Given these changes in policing, Justice Scalia reasoned, “modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect.”<sup>157</sup> Unlike *Garner*, the *Hudson* Court did not rely on amicus briefing or empirical evidence of changed practices. Rather, it cited one historical source and several training manuals as evidence

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<sup>151</sup> David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580 (2008) (describing the experience of California, which requires a warrant for a search of garbage, but which has had no exclusionary rule since a 1982 referendum). For an early recognition of the remedial vacuum created by the good faith exception to suppression as a remedy, see Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 907 (1986) (“[T]he *Leon* majority has withdrawn that remedy in a class of cases for which no other remedy is available.”).

<sup>152</sup> 468 U.S. 897, 923–24 (1984).

<sup>153</sup> *Messerschmidt v. Millender*, 565 U.S. 535, 549 (2012).

<sup>154</sup> See Huq & Lakier, *supra* note 79, at 1550–51 (describing *Leon*’s expansion).

<sup>155</sup> 547 U.S. 586, 590–94 (2006).

<sup>156</sup> *Id.* at 598–99 (quoting SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990*, at 51 (Oxford Univ. Press 1993)).

<sup>157</sup> *Id.* at 599.

of a trend of increasing professionalization.<sup>158</sup> It further assumed—without either anecdotal or quantitative evidence—that increasing professionalization necessarily translated into lower rates of Fourth Amendment violations.

The second extension of *Leon* to rely on gloss as substitute is a touch more subtle. In *Herring v. United States*, the Court declined to require exclusion when a negligent record-keeping error led to a mistaken arrest, which in turn revealed contraband.<sup>159</sup> Chief Justice Roberts’s majority opinion did not rely on gloss to reach the result that exclusion was “not worth the cost.”<sup>160</sup> But the conclusion that negligent errors did not warrant deterrence through exclusion is hardly self-evident. To the contrary, it “flies squarely in the face of a host of legal frameworks that presume negligence to be amenable to deterrence—not the least of which is the predominant theory of tort remedies.”<sup>161</sup>

As Justice Ruth Bader Ginsburg observed in her perceptive dissent, the best explanation for the Court’s odd assumption that negligence cannot be deterred through institution-wide policies or safeguards is the majority’s unstated premise that “police departments have become sufficiently ‘professional’ that they do not need external deterrence to avoid Fourth Amendment violations.”<sup>162</sup> The practice of professionalism, in short, was implicitly treated as a “substitute good for the exclusionary rule.”<sup>163</sup> Hence, although *Herring* is not a case in which the Court leaned explicitly and heavily on gloss as substitute, the premise of professional police functioned as a necessary background assumption for a dialing back of the exclusionary rule.

Developments in the practice of policing, in short, can obviate as well as extend the Fourth Amendment’s reach. By no measure is this development the only means of limiting constitutional protections. Justice Thomas, for example, has recently invoked formalist and originalist grounds to argue that the exclusionary rule should be abandoned in state courts<sup>164</sup>—a move that would effectively eliminate the Fourth Amendment as a practical consideration for most policing. If that were to happen, gloss would no

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<sup>158</sup> *Id.* at 598–99.

<sup>159</sup> 555 U.S. 135, 137–38 (2009).

<sup>160</sup> *Id.* at 144 n.4.

<sup>161</sup> Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 682–83 (2011) (“The Court’s assignment of a value of near-zero to the potential of deterring negligent police conduct amounts to an ipse dixit premise.”).

<sup>162</sup> *Herring*, 555 U.S. at 156 n.6 (Ginsburg, J., dissenting).

<sup>163</sup> Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 422 (2013).

<sup>164</sup> *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018) (Thomas, J., concurring).

longer be the most consequential valve for adjusting the strength of the Fourth Amendment's friction on official behavior. Until then, gloss is likely to be a consequential element of the Fourth Amendment's remedial jurisprudence.

*D. Summarizing the Role of Gloss in Fourth Amendment Jurisprudence*

Judicial invocations of gloss pervade Fourth Amendment doctrine. Yet gloss has not yet been properly noticed or analyzed as a Fourth Amendment phenomenon. In my view, there are two reasons for this. First, a great deal of scholarly energy in the Fourth Amendment domain is concentrated on the question of what counts as a "search" such that constitutional protection is triggered.<sup>165</sup> This threshold question attracts scholars because it is complex and elusive. Fourth Amendment law covers a wide and heterogeneous landscape of interactions between police and private individuals. The Court must formulate a rule that addresses chattels, real property, physical touching, electronic searches, communications acquisition, thermal scans, metadata acquisition, and more.<sup>166</sup> The threshold rule must be alive to the broad array of individual interests in play and the many ways in which government can impinge on those interests. Given the theoretical and normative complexity of this task, it is no surprise scholars have found it so alluring.

Nevertheless, it is a mistake to think that the definition of search and seizure exhausts the stock of important Fourth Amendment questions: The issues of what government action is "reasonable" and of what remedy attaches to a constitutional violation are in practice just as important. They are also just as pivotal to whether Fourth Amendment interests are vindicated. An excessive focus on the question of search—and a relative inattention to the legal infrastructure that follows—risks missing much that is of vital practical importance.

Second, because gloss has three different strands and hence can be used to bolster or alternatively sap the strength of Fourth Amendment protections, it has no single normative valence. While gloss as content and gloss as

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<sup>165</sup> See *supra* note 18.

<sup>166</sup> Another reason that the definition of "search" has received so much attention, in my view, is that it is the natural berth from which to consider questions of technology—which are of obvious and immediate interest to many. Yet it is a mistake to think about the interaction of technology and the Fourth Amendment in isolation. At a very minimum, a natural and perhaps inevitable response to greater judicial regulation of technologies such as cell-phone data and locational trackers is a more aggressive approach to searches and seizures of individuals in the real world. *Carpenter*, for example, creates an incentive for officials to seek consent to search suspects' phones and to acquire historical locational data in at least some cases in which they otherwise would have approached a telecommunications company (even if this option is by no means always available).

substitute seem to have a generally statist orientation, the absence of gloss can undermine state power. Gloss as benchmark is also ambiguous. It was used to constrain state power in *Garner* but in *Terry* enabled more invasive interventions into urban life.<sup>167</sup> As a result of this shifting valence, Justices of different ideological colors can invoke gloss to their own ends. In contrast, scholars who argue for either consistently broad or consistently narrow accounts of the Fourth Amendment cannot simply champion or condemn gloss. Lacking any simple ideological coding, gloss falls through the cracks.

With that in mind, it has been my aim in this Part to offer a thick description of the major, if ignored, role that gloss has come to play in this area of constitutional law. Having installed that account, it is time to consider whether gloss's outsized rule in the jurisprudence can be justified.

### III. THE JUSTIFICATIONS FOR FOURTH AMENDMENT GLOSS

It is one thing to say that gloss is ubiquitous. It is another to say that its use is justified. The Supreme Court has said dismayingly little about the underlying legal and normative justifications for relying on gloss in the Fourth Amendment context. This Part therefore asks whether the grounds for gloss's relevance that have been identified in the larger constitutional law literature—as acquiescence, Burkean wisdom, or settlement—provide normative ballast here. Working through each of the three possible grounds of justification that were identified in Part I, I suggest that there is only limited justification for the judicial use of gloss in the Fourth Amendment context. Indeed, application of constitutional law's larger theoretical framework for the evaluation of gloss arguments provides reason to resist many of the ways in which the Court has come to rely upon official practice in the Fourth Amendment domain. If gloss's use persists, therefore, it is likely not on any principled ground but rather as a function of considerations not directly tied to the values and goals of the Fourth Amendment itself.

I examine in turn each of the three main justifications for giving weight to official practice or gloss in constitutional analysis. This assumes that the reasons for giving weight to gloss in the Fourth Amendment context are a subset of those the courts have for attributing significance to gloss more generally across constitutional law. Since the Court has never given bespoke reasons for Fourth Amendment gloss, this seems a reasonable assumption. Out of an abundance of caution, though, I have taken a capacious view of

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<sup>167</sup> Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2429–40 (2017) (documenting costs of stop, question, and frisk programs and suggesting that these substantially outweigh the programs' benefits).

each justification. This means casting a wide net to consider all possible grounds for relying upon official practice in the Fourth Amendment context.

*A. The Acquiescence Justification*

The acquiescence justification for gloss imagines a dialogic process between multiple institutional actors exercising coordinated constitutional powers in a context of dynamic and iterative interaction. Treating the resulting practice as gloss requires the assumption that those actors are themselves responsible for the constitutional judgments behind different policies. It also assumes a dialogic process in which the constitutionality of a practice is recognized, and thus legitimated, by a second actor.

There is simply no good way to fit gloss into this dialogic model in the Fourth Amendment context. Fourth Amendment law is an interaction between courts and a highly diffuse and fragmented array of institutions—police departments, magistrates, and federal investigative entities. State and local law enforcement agencies alone employed about 1,133,000 persons on a full-time basis in 2008.<sup>168</sup> Those agencies, moreover, vary greatly in size and capacity.<sup>169</sup> As a result, police practice is quite different from the fifty-state practice recognized in *Evenwel v. Abbott*<sup>170</sup>—far too diffuse and heterogeneous to support facile generalizations about trends or consensus. Hence, the implicit dialogic process of acquiescence at work in the separation of powers context has no precise analog in the Fourth Amendment context. Further, there is no colorable argument that the diffuse aggregate of law enforcement bodies covered by the Fourth Amendment are engaged in collective or parallel constitutional judgments because they are coordinate departments that are coequal in authority to the judicial branch.<sup>171</sup> The acquiescence justification, therefore, is poorly matched to the Fourth Amendment, whether gloss is being used as substantive content, benchmark, or substitute.

The heterogeneity of policing raises particularly difficult questions about the manner in which the Court has enlarged the scope of the good faith exception to the exclusionary rule. Recall that, in cases such as *Hudson v.*

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<sup>168</sup> BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 1 (2011), <https://www.bjs.gov/content/pub/pdf/csllea08.pdf> [<https://perma.cc/HCT7-LB9T>].

<sup>169</sup> About half (49%) of all agencies employed fewer than ten full-time officers. Nearly two-thirds (64%) of sworn personnel worked for agencies that employed 100 or more officers. *Id.*

<sup>170</sup> 136 S. Ct. 1120 (2016); *see supra* text accompanying notes 37–38.

<sup>171</sup> Can widely used policing manuals be used as evidence of acquiesced-to practice in the policing context? *Cf.* Stoughton, *supra* note 147, at 874–75; Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1530–37 (2008) (discussing police training manuals' instructions on interrogations and suggesting that those instructions influence practice on the ground).

*Michigan*<sup>172</sup> and *Herring v. United States*,<sup>173</sup> the Court predicated this expansion on a generalization about increasing levels of professionalism within police departments. But even within a given jurisdiction, it has long been known that the quality of policing delivered to different neighborhoods varies dramatically, often along racial or ethnic lines.<sup>174</sup> Given *intra*jurisdictional disparities in service quality and given the likely exacerbation of such disparities across departments of different sizes, different sociopolitical environments, and different criminological conditions, generalizations about policing are difficult to draw. *Hudson*'s assertion that "wide-ranging reforms in the education, training, and supervision of police officers" resulted in "the increasing professionalism of police forces" is hard to substantiate.<sup>175</sup> As I develop further below, the available empirical evidence suggests we should be very skeptical.<sup>176</sup>

Worse, the Court's good faith jurisprudence not only lacks a clear theoretical account of gloss but also has no stable empirical methodology to evaluate how to establish the veracity of a general descriptive claim about policing. Hence, the Court has no way to determine how many police departments fall at the lower end of the professionalism spectrum or to ascertain whether these departments are concentrated in impoverished or racially segregated communities (as is likely the case).<sup>177</sup> Instead, cases such as *Hudson* and *Herring* manifest at best an indifference to the plight of communities that remain still burdened by suboptimal policing.

Despite these limits to the application of the acquiescence justification here, there is a dialogic process of interbranch deliberation at work in Fourth Amendment law. But it is not one that supports an inference of gloss in any of the forms observed in the current case law—and it is one that undermines any further doctrinal accounting for other actors' acquiescence. The Fourth

<sup>172</sup> 547 U.S. 586 (2006).

<sup>173</sup> 555 U.S. 135 (2009).

<sup>174</sup> One of the first studies to show this was Kenneth R. Mladenka & Kim Quaille Hill, *The Distribution of Urban Police Services*, 40 J. POL. 112, 121–24 (1978).

<sup>175</sup> *Hudson*, 547 U.S. at 599 (quoting SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990*, at 51 (Oxford Univ. Press 1993)).

<sup>176</sup> See *infra* text accompanying notes 220–250.

<sup>177</sup> One measure of differences in quality is public trust in the police. Careful ecological studies find that "race remains a significant predictor of perceptions of unjust police practices, even after taking into account the ecological structuring of neighborhoods and their perceived environmental context." John MacDonald et al., *Race, Neighborhood Context and Perceptions of Injustice by the Police in Cincinnati*, 44 URB. STUD. 2567, 2567–68 (2007); see also Elaine B. Sharp & Paul E. Johnson, *Accounting for Variation in Distrust of Local Police*, 26 JUST. Q. 157, 157–58 (2009) (finding racial differences after controlling for individual- and neighborhood-level explanations of trust in police). These studies suggest that differences in police quality disproportionately impact minority groups. *Hudson* and *Herring*, in this light, are, at a minimum, instances of judicial indifference to the state's treatment of minorities.

Amendment already draws upon the substantive judgments of state and national legislatures to calibrate its protections because it implicitly relies on the substantive ambit of the criminal law.<sup>178</sup> Definitions of probable cause and reasonable articulable suspicion, that is, already depend on the range of crimes that a legislature chooses to enact. Narrowing the scope of substantively criminal behavior makes it more difficult (all else being equal) for police to conduct searches and make seizures. For example, criminal conspiracies, even if they are costly to investigate and prosecute,<sup>179</sup> may be a boon to police because their undemanding *actus reus* requirements make it easier to obtain a warrant or otherwise justify a search. The incorporation of substantive criminal law into the Fourth Amendment calculus means that legislators already have a say about the strength of constitutional protections. Hinging a judgment of what is reasonable on their acquiescence, therefore, is in effect a way of giving legislatures two bites at the Fourth Amendment apple.

In recent decades, moreover, legislatures have not used their discretionary influence over Fourth Amendment law in a wise fashion, or in a way that furthers the Amendment's normative goals. At the federal level, where the scope of criminal law is most closely studied, it is estimated that Congress adds about fifty new criminal statutes each year, without necessarily removing any old ones from the books.<sup>180</sup> Crime rates have not followed the same steady upward path. Quite the contrary.<sup>181</sup> Legislative acquiescence to increasing police power is thus not a rational response to changes in crime rates. Rather, it flows from a bidding war between political parties striving to compete for a punitive public's affections.<sup>182</sup> It seems no coincidence that public attitudes toward crime, and in particular the public's

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<sup>178</sup> William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 802 (2006) (noting that constitutional law makes crime definition "politically easier" than other mechanisms for altering the nature and scope of the criminal justice process).

<sup>179</sup> Cf. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2028 (2008) ("[Conspiracy] crimes are more costly to investigate and prosecute than one-on-one criminal transactions . . .").

<sup>180</sup> Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1198 (2015).

<sup>181</sup> *Crime in the United States, 2014: Table 1*, FBI: UCR, (Fall 2015), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1> [<https://perma.cc/Q9TR-TMX8>] (describing an overall decline in violent crimes—murder, rape robbery, aggravated assault—and nonviolent crimes—property crimes, burglary, larceny, and motor vehicle theft—between 1995 and 2014). There is little correlation, however, between the rate of legislative supplementation of the criminal code and changes to the crime rate. This should not surprise: Most crime is likely to be of a familiar (and already prescribed) kind. By and large, new criminal offenses are not likely to influence such behavior.

<sup>182</sup> For a summary of evidence of the public's punitive preferences and the bidding war dynamic, see Huq & Lakier, *supra* note 79, at 1584–85.

fear of crime, have not declined—again, quite the contrary.<sup>183</sup> It seems likely that national politicians’ reckless rhetorical choices have played a large role in this development.<sup>184</sup> It thus seems most plausible to categorize legislative behavior as “pathological,” to use a term first deployed by Professor Bill Stuntz.<sup>185</sup>

If one is cynical about the reasons that legislators have for enlarging each year the scope of substantive criminal law—and there is no shortage of reasons for cynicism—then the correct response might be to extend Professor Orin Kerr’s equilibrium-adjustment theory to encompass legislative changes. Professor Kerr argues that courts should strive to maintain an equilibrium between the scope of police power and the domain of individual privacy. He applies his equilibrium-adjustment model to “changing technology and social practice,” contending that if “new tools and new practices threaten to expand or contract police power in a significant way, courts [do and should] adjust the level of Fourth Amendment protection to try to restore the prior equilibrium.”<sup>186</sup> There is no reason, though, to cabin the analysis in this way. If courts respond to exogenous shocks such as technology and diffuse social practice, they should also compensate for legislative changes to the scope of criminal law. On this view, the appropriate judicial response to legislative changes in crime policy is not so much to acquiesce as to resist the pressure imposed on the criminal justice system by the one-way legislative hydraulic. Such resistance would entail a *countervailing Fourth Amendment ratchet* that responds to the dynamic legislative and presidential politics of crime by incrementally circumscribing the reach of police power.

It is obvious that this is not the Fourth Amendment that we have. Rather, our Fourth Amendment has gradually *lost* force through time, in particular through the expansion of the good faith exception to the exclusionary rule, even as the scope of criminal law has expanded. Given the way in which the

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<sup>183</sup> In the election year of 2016, for example, fear of crime was at rates that had not been seen since 2001. Alyssa Davis, *In U.S., Concern About Crime Climbs to 15-Year High*, GALLUP (Apr. 6, 2016), <http://www.gallup.com/poll/190475/americans-concern-crime-climbs-yearhigh.aspx> [<https://perma.cc/AF4F-NYQK>].

<sup>184</sup> John J. Donohue, *Comey, Trump, and the Puzzling Pattern of Crime in 2015 and Beyond*, 117 COLUM. L. REV. 1297, 1302 (2017) (concluding that “Comey and Trump probably contributed to the increase in the public’s apprehension of crime, which likely aided Trump’s law-and-order candidacy”).

<sup>185</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513–18 (2001) (offering a now-classic political economy account of the inflationary dynamics of criminal legislation).

<sup>186</sup> Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011).



federal judiciary closely tracks contemporary political preferences,<sup>187</sup> it seems fair to doubt that a contrapuntal Fourth Amendment law is politically plausible. Indeed, even at its most seemingly countermajoritarian, the Supreme Court itself stuck closely to broadly shared views of appropriate policing.<sup>188</sup> In sum, if we do have a doctrine that moves in rough lockstep with the increasing punitiveness of legislatures, this is not an example of “acquiescence”: It is rather a failure of institutional design flowing from the tight linkage between judicial preferences and the policy judgments of nationally elected officials.

### B. *The Burkean Justification*

The second argument for using gloss in the Fourth Amendment context is epistemic. Official practice merits judicial respect, on this account, because it is a distillation of hard-won wisdom about the tools needed to suppress crime. Recognition of this epistemic asymmetry requires judges not merely to adopt a posture of deference regarding specific policy arguments proffered by the police but also to incorporate the collective, hard-won wisdom of police agencies into the very fabric of the doctrine. This line of argument can be discerned in cases that employ gloss as substantive content—including the misdemeanor warrantless arrest and vehicular search lines of precedent—as well as those that use gloss as substitute. Even the gloss as benchmark cases rest on an assumption that wisdom is to be derived from police practice, but they assume that the wisdom is not evenly spread across policing agencies.

As plausible as these arguments sound at first blush, they are beset by deep theoretical and empirical difficulties. To see this, it is necessary to start with a definition of reasonableness against which the Court’s judgments can be measured. Consider one possibility<sup>189</sup>: An official practice such as warrantless misdemeanor arrests or warrantless vehicular searches can be plausibly ranked as reasonable only if its net social benefits are positive. Under this definition, a policing practice that externalizes greater costs than

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<sup>187</sup> On the weakness of judicial independence from contemporary political control, see Aziz Z. Huq, *Democratic Erosion and the Courts: Comparative Perspectives*, 93 N.Y.U. L. REV. ONLINE 21, 28 (2018).

<sup>188</sup> Even in the supposedly halcyon days of the Warren Court, constitutional criminal procedure doctrine was substantially less countermajoritarian than commonly assumed. See Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1379–82, 1394, 1411 (2004).

<sup>189</sup> To be clear, I am not asserting that this is the definition used by the Court, which does not tend to formulate its analysis in this domain in welfarist terms. Rather, it is *my* position that net social gain seems a plausible minimal threshold for what counts as “reasonable” policing. An alternative formulation might be that the police could reasonably have believed that a practice’s benefits outweighed its costs.

its benefits is not reasonable. A decision to forego such a practice would improve social welfare.<sup>190</sup> To demand that policing practices advance social welfare (however defined) is not to demand that they achieve the maximum amount of crime suppression, or that they be the best “feasible” approach to the problem of maintaining social order.<sup>191</sup> It is simply to ask that they help more than they hurt. It is thus a plausible way of giving some minimal and uncontroversial content to the inchoate term “reasonable” against which the Court’s use of gloss can be compared.

With this benchmark in mind, there are three reasons for rejecting the Burkean justification. First, the political economy of policing—as shaped in particular by influential actors such as police unions, insurers, and municipal governments—is inconsistent with the production and sustaining of behavior that produces greater net benefits than costs. Second, the descriptive premise of police expertise—which is distinct from police professionalism—is questionable. To the extent that the case for gloss is epistemic in character, it requires that officials themselves acquire information upon which to make sensible judgments. There is scant reason to believe this occurs in the policing context.

Finally, to the extent that it is the historical durability of a police practice that attracts judicial deference, the argument from Burkean wisdom fails to account for the shifting assumptions and justifications that animate police practice. What seems like a stable practice from one perspective can, when viewed in light of the changing missions and priorities of police, appear instead as a multiplicity of tactics sharing only a superficial connection. Together, these three points substantially undermine the persuasiveness of a Burkean justification for judicial reliance on gloss.

### *1. Gloss and the Political Economy of Policing*

An unstated assumption of the argument from Burkean wisdom is that the political economy of policing—that is, the network of social, political, and institutional vectors that generate police practice—will not predictably

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<sup>190</sup> I assume a capacious account of costs and benefits that includes the nonmonetized privacy and dignity values that different jurists have perceived as furthered by the Fourth Amendment. Compare *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (noting privacy as the touchstone of the Fourth Amendment), *with id.* at 369–72 (Black, J., dissenting) (focusing on “physical” or “actual intrusion” and dealing with seizures of “tangible[]” items), and *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”).

<sup>191</sup> That is, the constitutional analysis is distinct from feasibility analysis in the regulatory context, in which an agency will “examine only whether a particular level of regulation is technologically and economically feasible: whether the technological means exist to implement the regulation, and whether the regulation will cause significant economic harm.” Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657, 663 (2010).

embrace practices that impose costs larger than their benefits. My aim in this Section is to cast doubt on that assumption by focusing on the key institutional actors whose interests determine the shape of policing. The observed preferences and incentives of these actors do not conduce, I argue, to cost-justified policing measures, but rather to measures that predictably externalize costs without commensurate gains in public safety.

A caution is warranted up front: The idea that policing measures might be unjustified in pure cost–benefit terms has recently been applied to specific policing measures, such as stop-and-frisk,<sup>192</sup> and also to the criminal justice system as a whole.<sup>193</sup> My approach here is *not* to analyze discrete practices. Rather, I focus on the incentives of pivotal actors in the criminal justice system. I suggest that the incentives of these actors are to “overuse the most punitive and immediately rewarding criminal justice tools . . . and underuse others . . . which probably generate positive externalities.”<sup>194</sup>

The core of my argument here can be stated succinctly: The practice of policing responds to pressures from police unions, which represent the rank-and-file officers themselves; from the management and political leadership of municipalities (or whatever other jurisdictional unit police are organized by); and (outside of large cities at least) from insurers.<sup>195</sup> None of these forces conduces clearly toward compliance with constitutional rules. Indeed, none of them has a clear incentive to press toward cost-justified policing measures. As a result, it is exceedingly unlikely that police departments—even if subject to contemporary forms of management and political oversight—will endeavor to maximize compliance with constitutional rights or even to minimize the negative externalities of policing.

Let us start with unions. These have long been understood to be a major influence on the forms and practices of policing.<sup>196</sup> Rejuvenated police unions emerged in the 1970s, mobilizing around demands for contractual

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<sup>192</sup> Huq, *supra* note 167, at 2413–20.

<sup>193</sup> Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 189 (2017) (“In economic terms, criminal justice presents a classic case of *externalities*, particularly negative externalities. Individual actors, agencies, and different levels of government benefit from pursuing individually rational actions but do not suffer the costs they individually and collectively impose upon others.”).

<sup>194</sup> *Id.*

<sup>195</sup> I focus here on the structural, organized forces that shape police behavior. Another lens would train on demographic changes, although it is not clear that recent changing racial patterns in hiring have made much of a difference. See David Alan Sklansky, *Not Your Father’s Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1210 (2006).

<sup>196</sup> Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 720 (2017) (flagging “a general scholarly consensus that police unions play an important role in policing and politics”).

protections for officers charged with disciplinary offenses.<sup>197</sup> The collective bargaining agreements (CBAs) reached by police unions now often contain procedural protections for internal investigations that impede all efforts to verify the facts of discrete incidents. Among other measures, these agreements often delay misconduct-related interviews, allow the accused access to evidence before being interviewed, bar the investigation of anonymous complaints, and limit the duration of investigations.<sup>198</sup> These procedural protections collectively reduce the rate at which allegations of unconstitutional conduct are identified, increase the cost of investigating such allegations, and reduce the extent to which police management are both aware of illegalities and capable of responding to them.<sup>199</sup> Beyond these systemic effects, there is some evidence that unionization is associated with a stricter, more coercive form of policing.<sup>200</sup> In short, available quantitative and qualitative studies of police unionization suggest that this powerful institutional force will press for institutional practices that maximize the extent to which the costs of policing are externalized to the public, minimize information about those externalities, and elicit more aggressive and coercive tactics.

One might ask whether these forces can be controlled by either expertise or democratic politics. Managerial controls on the behavior of rank-and-file officers, to be sure, might in theory be expected to constrain some of these tendencies. But in practice they are not likely to do so to any great extent.<sup>201</sup> Empirical studies suggest that management is distrusted by

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<sup>197</sup> Samuel Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing*, 9 POLICE PRAC. & RES. 95, 97 (2008); see also Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2207 (2014) (discussing the spread of collective bargaining among police and noting that only six states now prohibit such bargaining).

<sup>198</sup> Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEGAL F. 213, 224–26; Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 243 (2005); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1222 (2017).

<sup>199</sup> Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 798–99 (2012) (“Collective bargaining rights deter department-wide changes intended to prevent constitutional violations.”); Huq & McAdams, *supra* note 198, at 237 (“Delay privileges suppress that information even within the police department. Absent strong leadership from police management, it is likely that the signal of low rates of problematic police force will be treated as evidence that police comply with relevant limits on the use of force.”).

<sup>200</sup> John M. Magenau & Raymond G. Hunt, *Police Unions and the Police Role*, 49 HUMAN REL. 1315, 1330–31 (1996).

<sup>201</sup> On the acute separation of rank-and-file from management within police departments, see Akiva M. Liberman et al., *Routine Occupational Stress and Psychological Distress in Police*, 25 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 421, 423, 432 (2002), documenting a lack of rapport and trust. On street policing culture, see JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF*

rank-and-file officers, especially when it comes to matters of discipline.<sup>202</sup> The dispersed and largely unobservable character of street policing also means that management often lacks information about street-level behavior, where the majority of costly police action occurs. As Professor Wesley Skogan has observed, “[m]ost police officers work alone or with a partner, and the top brass know little about what they do out there except what they report on pieces of paper that they sometimes fill out to document their activities.”<sup>203</sup> Typically management responds to this epistemic dilemma by tracking only outcomes, such as the volume of arrests, that are only loosely correlated with the cost-justified creation of public order.<sup>204</sup> This is a deeply perverse metric by which to measure the success of police practice. Arrests for minor infractions in particular—quite apart from the costs they impose on suspects—may be unjustified solely in terms of “lost crime prevention opportunities.”<sup>205</sup> Moreover, there is good reason to believe that the kind of misdemeanor arrests embraced on the basis of gloss in *Atwater* have no deterrent effect on serious crime.<sup>206</sup>

The existence of pervasive deficiencies of trust and information implies that managerial control is likely to be incomplete. There is every reason to anticipate that information will not be candidly conveyed by the rank-and-file, especially when it concerns potentially tortious behavior that externalizes costs to civilians.<sup>207</sup> Consistent with this prediction,<sup>208</sup> larger

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LAW AND ORDER IN EIGHT COMMUNITIES 33–34 (1968) (finding that police had “a preoccupation with maintaining self-respect, proving one’s masculinity, ‘not taking any crap,’ and not being ‘taken in’”).

<sup>202</sup> See MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* 9 (1981) (noting that patrol officers “must cope not only with the terror of an often hostile and unpredictable citizenry, but also with a hostile—even tyrannical—and unpredictable bureaucracy”). Early sociological work found that street police viewed themselves as a “conflict group,” working in isolation, and likely came to “regard the public as an enemy” with great speed. William A. Westley, *Secrecy and the Police*, 34 *SOC. FORCES* 254, 256 (1956). The development of a “quasi-military” style of management in the twentieth century, moreover, has had the “insidious” effect that managers are perceived as “mere disciplinarians.” EGON BITTNER, *ASPECTS OF POLICE WORK* 136, 143 (1990).

<sup>203</sup> Wesley G. Skogan, *Why Reforms Fail*, 18 *POLICING & SOC’Y* 23, 24 (2008).

<sup>204</sup> See Michael Tonry, *From Policing to Parole: Reconfiguring American Criminal Justice*, 46 *CRIME & JUST.* 1, 12 (2017) (stating that police forces often prioritize arrests over other measures of performance); accord Stuntz, *supra* note 185, at 538 (“[P]olice are more likely to maximize arrests.”).

<sup>205</sup> Cynthia Lum & Daniel S. Nagin, *Reinventing American Policing*, 46 *CRIME & JUST.* 339, 344–45 (2017).

<sup>206</sup> *Id.* at 353.

<sup>207</sup> See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 *GEO. WASH. L. REV.* 453, 501 (2004).

<sup>208</sup> See Ulrika Haake et al., *Police Leaders Make Poor Change Agents: Leadership Practice in the Face of a Major Organisational Reform*, 27 *POLICING & SOC.: INT’L J. RES. & POL’Y* 764, 764

police departments seem to experience higher rates of misconduct than small ones.<sup>209</sup> Larger departments, all things being equal, have more difficulty in monitoring and regulating the discretionary decisions of line officers. All else being equal, therefore, we should not anticipate that management will intervene and limit conduct that is unjustified because it externalizes more costs than the benefits it creates.

These limits of managerial influence on police rank-and-file, coupled with the sway of police unions, also constrain the effect of elected officials' policy preferences on police behavior. Elected officials, after all, whether at the state or local level, must work through management to influence the contours of street policing. Today, state laws "cover at best only a small portion of police management issues and day-in day-out police activities."<sup>210</sup> In contrast, the historical record of local political control of police departments demonstrates that police departments were functionally "[a]djunct[s] of the [political] [m]achine," and as such were empowered by patronage and graft.<sup>211</sup> Celebrations of local, democratic influence on policing fail to grapple with this recalcitrant record, which undercuts optimism about the valence of democratic policing.<sup>212</sup> Neither state nor local control of policing, therefore, appears to be robustly welfare enhancing.

Moreover, where we are able to observe directly elected officials' influence on policing, we do not see a tendency to gravitate toward cost-justified outcomes. Rather, there is a bent toward regressive and unjustified decision-making. A particularly salient body of evidence concerns the distribution of fiscal resources within states. Spending patterns, which reflect the aggregate views of many local leaders, can be examined to determine whether they are better explained by patterns of crime or by the concentration of racial and ethnic groups. Even in areas where a racial or ethnic minority has a measure of political control, such as in the American Southwest, studies

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(2017) (finding, based on twenty-eight case studies, that "the idea that police leaders will be able to function as agents of change promoting organizational reform is highly uncertain").

<sup>209</sup> David Eitle et al., *The Effect of Organizational and Environmental Factors on Police Misconduct*, 17 POLICE Q. 103, 112–14 (2014).

<sup>210</sup> Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 621.

<sup>211</sup> See ROBERT M. FOGELSON, *BIG-CITY POLICE* 13–19 (1977).

<sup>212</sup> For a more optimistic picture of "local justice" that does not pay careful attention to countervailing evidence, see Stuntz, *supra* note 179, at 1982–97. Professor Stuntz's account mentions the effect of machine politics on urban policing but bizarrely spins these as positive effects. *Id.* at 1995–96. The main body of historical evidence, however, "shows in convincing depth and detail that informal administration, localized politics, and freedom from professional norms produced dysfunctional systems," in stark contrast to Professor Stuntz's partial picture. Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1050 (2013).

have found socioeconomic class and proximity to the border—and not crime—best predict the fiscal allocation of policing resources.<sup>213</sup> More generally, “empirical research also provides considerable support for the argument that both the resources and the coercive strategies of policing are distributed in accordance with the racial and ethnic makeup of communities.”<sup>214</sup>

This does not mean that minority communities obtain more or better protection than majority ones. To the contrary, the rate of civil rights complaints against police is also a function of the minority (black and Hispanic) share of the population.<sup>215</sup> Although not dispositive, these patterns of reported complaints suggest that political control of policing, even if possible to extend beyond relatively coarse metrics such as funding, would not necessarily result in cost-justified tactics. Democratic control of policing more generally cannot be expected to yield cost-justified measures where there is an observable minority that can be expected to bear the brunt of negative externalities without being able to change electoral outcomes.<sup>216</sup>

Recent literature has turned to the role of insurance companies in supplying the incentives for police to behave in cost-justified ways. One commentator suggests that “an insurer writing police liability insurance may profit by reducing police misconduct” and that “the insurer may be better positioned than the government to reform police behavior.”<sup>217</sup> But insurers

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<sup>213</sup> See Malcolm D. Holmes et al., *Minority Threat, Crime Control, and Police Resource Allocation in the Southwestern United States*, 54 *CRIME & DELINQ.* 128, 128 (2008).

<sup>214</sup> *Id.* at 129; see also Robert J. Kane, *The Social Ecology of Police Misconduct*, 40 *CRIMINOLOGY* 867, 867, 887–88 (2002) (discussing distributions of police force in New York City between the 1970s and the 1990s and finding increasing usage of disproportionate police force in minority neighborhoods, particularly when that minority was perceived as a demographic threat to the majority).

<sup>215</sup> Malcolm D. Holmes, *Minority Threat and Police Brutality: Determinants of Civil Rights Criminal Complaints in U.S. Municipalities*, 38 *CRIMINOLOGY* 343, 344–45 (2000); see also Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Uses of Force* 3–4, 7 (July 2016), [http://scholar.harvard.edu/files/fryer/files/main-july\\_2016.pdf](http://scholar.harvard.edu/files/fryer/files/main-july_2016.pdf) [<https://perma.cc/M9ZC-FU9Z>] (finding “large racial differences” in police use of “non-lethal force,” including slapping, grabbing, and pushing individuals into a wall or onto the ground in the *Terry* stop-related records of New York’s police).

<sup>216</sup> This is true even in minority-majority jurisdictions, where elected and appointed leaders can be driven by the sheer scale of violence to adopt ineffectual policies, such as massive numbers of investigative car searches that have “racial discrimination inherent in the[ir] structure.” JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 202 (2017); see *id.* at 215 (noting the many alternative policies that could have yielded public safety with fewer externalities). Professor Forman’s larger theme concerns the way in which even well-meaning minority leaders can be constrained by a variety of exogenous legal and institutional forces and are thereby forced into deeply harmful policing choices.

<sup>217</sup> John Rappaport, *How Private Insurers Regulate Public Police*, 130 *HARV. L. REV.* 1539, 1543–44 (2017).

are motivated to install loss prevention programs only to the extent that they anticipate liability. Most cost-unjustified behavior—such as minor uses of force that leave no broken bones or visible marks or unlawful searches that generate no lasting damage—will typically not yield tort suits. It seems likely that many who experience compensable harms do not sue because of the transaction costs of the civil justice system, to say nothing of qualified immunity and other bespoke barriers to relief in the constitutional tort context.<sup>218</sup> If insurers’ incentives to reform are circumscribed by the shadow of liability, and liability often does not extend very far, then the case for thinking that insurers will ameliorate unjustified police behavior is necessarily too weak to be convincing.<sup>219</sup>

In short, the assumption that police will elect cost-justified tactics is in tension with the preferences of rank-and-file police as articulated by their union representatives in CBAs, the weakness of managerial oversight, and the limited incentives of both political and private actors to ameliorate socially unjustified patterns of policing. These forces tend to externalize social cost in particular to racial and ethnic minorities, rather than pressing toward cost-justified policing. As a result, the official practice covered by the Fourth Amendment will often fail to break even in social welfare terms. If that practice often imposes greater costs than benefits, it is hard indeed to see why it should be ranked as “reasonable” under any plausible definition of that term. Observed policing practice is not a reliable source of information about what is a “reasonable” search or seizure because there is no reason to believe it will systematically gravitate toward cost-justified norms. This suggests that the gloss as substantive content cannot be predicated on Burkean grounds.

## 2. *The Elusive Concept of Police Expertise*

A second basis for treating gloss as a distillate of Burkean wisdom would look to the ability of the police to accumulate and act on information that only they have access to about the costs and benefits of their policy choices. The problem with this argument is that its central premise of epistemic competence is false.

Police departments simply do not collect the information necessary to make informed judgments on what policies are cost-justified. Rather, as

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<sup>218</sup> Huq & Lakier, *supra* note 79, at 1548–56 (documenting barriers to suit).

<sup>219</sup> The leading work recognizes the “theoretical indeterminacy and the lack of any confident answers to the related empirical questions” of the welfarist claim. Rappaport, *supra* note 217, at 1596; see also John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL F. 369, 370 (“prob[ing] the *limits* of the insurance mechanism—the places where the effects of insurance on policing are likely weak or even perverse, suggesting a need for insurance reform or other, more familiar regulatory interventions”).



Professor Rachel Harmon has documented, police departments tend to “limit rather than promote information availability,” and often fail to create or publicize information that is necessary for sensible regulation of policing.<sup>220</sup> She explains this in terms of the “significant counterincentives” related to liability and negative publicity that lead police management to “underinvest in research” that could improve the quality of policing.<sup>221</sup> Even records generated internally, such as disciplinary documentation, are often hedged with legal constraints, such as CBA-mandated expungement regimes, that limit their utility.<sup>222</sup> For example, the authority of internal affairs units to generate reliable information about police conduct is often constrained by rules that require them to elicit information only in writing and only after giving suspects up to a week to respond.<sup>223</sup>

Another potential source of information about externalities is the body of lawsuits filed against police based on federal or state law violations. Because these suits tend almost uniformly to be indemnified,<sup>224</sup> it would in theory be simple for the indemnifying government to evaluate how much police misconduct is costing—although note that even this is just a lower bound on *actual* costs, since not all constitutional tortfeasors will be sued. But even in respect to this one limited set of data, municipalities often fall short. Extensive research by Professor Joanna Schwartz has demonstrated that most departments ignore lawsuits that do not generate negative publicity; that municipal counsel defend most suits without regard to their merits; that settlements and judgments are paid by the municipalities and not the department; and that departments fail to keep track of officers named as defendants, evidence presented against them, or even payouts.<sup>225</sup> Hence,

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<sup>220</sup> Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1129 (2013). For example, more than 40% of police departments nationwide, according to one 2009 study, do not require any written report when officers use a “twist lock or wristlock” on a civilian. CHARLES R. EPP, *MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE* 251 (2009) (also noting that only 32% of departments required a report after using a “firm grip” on a civilian).

<sup>221</sup> Harmon, *supra* note 220, at 1131.

<sup>222</sup> Rushin, *supra* note 198, at 1222.

<sup>223</sup> Craig B. Futterman et al., *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department’s Broken System*, 1 DEPAUL J. SOC. JUST. 251, 275 (2008). On the weakness of such units, see G. Flint Taylor, *A Litigator’s View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 756 (1999).

<sup>224</sup> Study after study finds pervasive indemnification of individual officers. See, e.g., Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014); Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810–12 (1979) (reporting government defense and indemnification of police officers in Connecticut).

<sup>225</sup> Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1037–40 (2010). Professor Schwartz’s

even when there is a ready, if incomplete, record of actions that plainly fail to comply with existing legal standards and that externalize costs, police departments routinely fail to acquire or use that information. The assumption of epistemic competence upon which the Burkean justification is based, therefore, falls woefully short of reality.

The fragility of police claims to epistemic advantage is consistent with recent historical work exploring the origins of judicial deference in the criminal justice space. The bold assertion of police “expertise” is a historical artifact of the police professionalism movement of the 1950s.<sup>226</sup> As Professor Lvovsky’s recent historical scholarship demonstrates, judicial decisions invoked “the police’s criminological insights as grounds for deference under the Fourth Amendment” despite a “wealth of research questioning the value of police judgment.”<sup>227</sup> She describes the emergence of a judicial understanding of police work “as a task capable of producing rarified and systematic ‘expert’ knowledge” as a result of judges’ exposure to police as putative experts and reformers across a range of contexts.<sup>228</sup> On Professor Lvovsky’s account, the presumption of police expertise has never been based on a demonstration of *actual* expertise.

The Burkean justification, in short, can no more be vindicated on the basis that police are more knowledgeable than on the basis that they are motivated, all else being equal, by socially desirable incentives and organizational forces.

### 3. *The Evolving Modalities of Policing*

A final problem impedes the Burkean justification. The standard Burkean argument hinges on the idea that “the past has an authority of its own which, however circumscribed, is inherent and direct rather than derivative.”<sup>229</sup> As Burke himself put it, when making “practical” decisions about “the science of government,” one should be aware that

however sagacious and observing he may be, it is with infinite caution than any man ought to venture upon pulling down an edifice which has answered in any

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subsequent research shows that in a small number of jurisdictions, including Los Angeles, Seattle, Portland, Denver, and Chicago, such information was used as a “valuable source of information about police-misconduct allegations.” Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 845 (2012). There is nothing inevitable, therefore, about the failure to use information that is on hand concerning police wrongdoing.

<sup>226</sup> Lvovsky, *supra* note 22, at 1999–2000.

<sup>227</sup> *Id.* at 2025.

<sup>228</sup> *Id.* at 2053–67; *see also id.* at 2067–68 (describing the “foundations of judicial deference” to police as “numerous structural presumptions and aggregate biases refracted through the judicial process”).

<sup>229</sup> Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047 (1990).

tolerable degree for ages the common purposes of society, or on building it up again without having models and patterns of approved utility before his eyes.<sup>230</sup>

It is, though, to be doubted whether policing is “an edifice which has answered in any tolerable degree for ages the common purposes of society.” Police roles have not been fixed over time, and they have not been focused on a “common” purpose over their history. Rather, the central task of police is to solve “problems” in public order as they arise.<sup>231</sup> The nature of the problems that policing aims to solve, though, has changed dramatically over time.<sup>232</sup> Consequently, the substance of policing has an evolving, mutative quality. This is evident from even a rapid summary of the development of policing since its advent some 180 years ago.

The first police forces, which emerged in cities like Philadelphia and Charleston in the 1820s and 1830s, took very different trajectories.<sup>233</sup> In Southern cities, police were primarily tasked with maintaining the practice of slavery.<sup>234</sup> Through the end of Jim Crow in the 1960s, Southern police “represented the South’s repressive civil order and the ideology of white supremacy.”<sup>235</sup> In Northern cities, through much of the nineteenth century, there were no criteria for becoming a police officer—only “having the right political connections”—and no training for the job.<sup>236</sup> Urban police undertook a vast hodgepodge of activities “unexpected by their original creators,” including returning lost children, shooting stray dogs, enforcing sanitation laws, inspecting boilers, and conducting censuses.<sup>237</sup> Their roles were also shaped by national events. We have already seen hints of how

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<sup>230</sup> Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 834 (2008) (quoting BURKE, *supra* note 60, at 443).

<sup>231</sup> David H. Bayley, *Police Function, Structure, and Control in Western Europe and North America: Comparative and Historical Studies*, 1 CRIME & JUST. 109, 113 (1979).

<sup>232</sup> ROBERT C. WADHAM & WILLIAM THOMAS ALLISON, TO PROTECT AND TO SERVE: A HISTORY OF POLICE IN AMERICA, at xi (2004) (“[T]he development of American policing is filled with paradigm shifts . . .”); accord THE FUTURE OF POLICING (Jennifer M. Brown ed., 2014) (examining current understandings of policing’s function).

<sup>233</sup> SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 51–52 (2d ed. 1998).

<sup>234</sup> Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51, 51–53 (1988).

<sup>235</sup> WADHAM & ALLISON, *supra* note 232, at 41 (noting that, after the American Civil War, “modern principles of police officer discipline and discretion” did not apply in the South, but “the work of the slave patrols evolved into the primary purpose of Southern police”); Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 161 (2001).

<sup>236</sup> WALKER, *supra* note 233, at 54–55.

<sup>237</sup> Eric H. Monkkonen, *History of Urban Police*, 15 CRIME & JUST. 547, 554 (1992).

Prohibition influenced the Fourth Amendment in cases such as *Carroll*.<sup>238</sup> Policing more generally changed character both with Prohibition and also with the early twentieth century's "rise of a national security apparatus to ward off external threats and the churn of disorder from anarchists and criminals."<sup>239</sup>

It was only in the post-World War II years that "police professionalism" emerged as a dominant approach, with some departments making "notable progress in raising recruitment and training standards."<sup>240</sup> Part of the professionalism movement was a resistance to having police undertake tasks other than crime control.<sup>241</sup> Advocates of professionalism argued for a more centralized, quasi-military structure. As a result, the twentieth century saw changes to police forces' typical command structures, their core routine tasks (for example, the decline of foot patrols in favor of motorized patrols and the specialization by unit within larger police forces), their information systems, and their demographic composition.<sup>242</sup> This is not to say that professionalism was an unqualified success. To the contrary, professionalized police proved quite "unable to respond" to the Civil Rights Movement's demands for racial justice.<sup>243</sup> The "primarily reactive" character of professionalized policing yielded to an embrace of some sort of community policing in the 1960s.<sup>244</sup> Today, policing is changing once again as new big-data technologies alter its deployment and even its aims.<sup>245</sup> Perhaps in another decade or two, what it means to be police will once again be fundamentally quite different.

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<sup>238</sup> WALKER, *supra* note 233, at 158–62; *see also supra* text accompanying notes 99–105 (discussing origins of the automobile search exception).

<sup>239</sup> SARAH E. IGO, *THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA* 48 (2018).

<sup>240</sup> WALKER, *supra* note 233, at 170; *see* FOGELSON, *supra* note 211, at 167–92; WADHAM & ALLISON, *supra* note 232, at 82–85; *see also* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1742 (2005). For a critique of the professionalism movement as "naive," *see* BITTNER, *supra* note 202, at 361–63.

<sup>241</sup> William H. Parker, *The Police Challenge in Our Great Cities*, 291 ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1954, at 5, 7–8.

<sup>242</sup> Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, 15 CRIME & JUST. 51, 59–60 (1992).

<sup>243</sup> WALKER, *supra* note 233, at 173.

<sup>244</sup> James J. Willis, *A Recent History of Police*, in *THE OXFORD HANDBOOK OF POLICE AND POLICING* 3 (Michael D. Reisig & Robert J. Kane eds., 2014); *see also* LINDA S. MILLER & KÄREN M. HESS, *COMMUNITY POLICING: PARTNERSHIPS FOR PROBLEM SOLVING* 20 (4th ed. 2005) (finding that, by 2000, some 87% of forces in the United States had adopted some kind of community policing, although precisely what this meant varied). The concept of community policing is poorly defined, and I offer no conclusive definition here.

<sup>245</sup> Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3144831](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3144831) [<https://perma.cc/X9PZ-663N>] (summarizing trends). For a survey of nonalgorithmic, empirical tools used by policing of late, *see* Lawrence W. Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing, and Tracking*, 42 CRIME & JUST. 377 (2013).

Given the historical contingency of the policing function, it should be no surprise that policing organizations now take highly varied forms,<sup>246</sup> much as they have taken divergent forms over time.<sup>247</sup> The fiscal resources available for the policing of similar populations in different parts of the United States can also differ by an order of magnitude.<sup>248</sup> This variance in underlying fiscal realities directly impinges on the style and manner of policing. In Ferguson, Missouri, to pick a well-publicized example, court fines and fees were the second largest source of municipal income. As a consequence of this reliance, in 2013, Ferguson's municipal court issued some 32,975 arrest warrants for nonviolent offenses within a population of around 21,000.<sup>249</sup> Ferguson is not unique in its reliance on fines and fees generated by policing activity.<sup>250</sup> But because not all jurisdictions follow Ferguson's example, it is wrong to think about policing as a monolithic species of behavior. Rather, it is to be expected that policing strategies will vary greatly between different jurisdictions depending on their policing histories, racial composition, and economic condition.

#### 4. *Implications for Fourth Amendment Gloss*

A careful accounting of the political, economic, and information-gathering practices of police forces, along with a consideration of both the historical and current heterogeneity of policing, undermines the case for Fourth Amendment gloss from Burkean wisdom. Indeed, it suggests that all three ways in which gloss has been deployed—as substance, as benchmark, and as substitute—are ultimately theoretically unsatisfying.

To begin with, the objections raised in this Section suggest that official practice should not be employed as substantive content in the Fourth Amendment context. The political, economic, informational, and historical perspectives on policing practices are not consistent with the conclusion that policing will necessarily involve cost-justified measures. Stable and

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<sup>246</sup> PETER K. MANNING, *POLICING CONTINGENCIES* 43–45 (2003) (documenting variations).

<sup>247</sup> WADHAM & ALLISON, *supra* note 232, at 15 (“A modern police department and a nineteenth century department may not seem comparable at first glance.”).

<sup>248</sup> David Thacher, *The Distribution of Police Protection*, 27 J. QUANTITATIVE CRIMINOLOGY 275, 291 (2011) (noting disparities and measuring the extent to which they are dampened by federal subsidies).

<sup>249</sup> *Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1724 (2015); see also CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9 (2015), [https://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/78FK-6555>] (“City officials have consistently set maximizing revenue as the priority for Ferguson’s law enforcement activity.”).

<sup>250</sup> Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1098 (2015) (noting that “many lower courts and municipalities depend heavily on revenues from fines and fees imposed on minor offenders”).

commonly used forms of policing, such as the warrantless misdemeanor stops or the warrantless vehicular searches, cannot be reliably ranked as cost-justified merely because they have a long historical pedigree or because they are commonly used today. In the absence of incentives or institutions to root out inefficient tactics, there is no reason to think the stock of enduring policing practices will include only cost-justified measures.<sup>251</sup>

These three critiques also suggest a limit to the utility of gloss as benchmark. To be sure, the mere existence of historical and synchronic variance in policing practices<sup>252</sup> is not alone enough to preclude an inference from gloss, as *Evenwel v. Abbott* suggested.<sup>253</sup> And at first blush, it would seem to invite the benchmarking inquiry. But as Professors Masur and Posner have pointed out in the administrative law context, the mere fact that there is variance among regulated entities does not mean that it is possible to isolate cost-justified tactics merely by eliminating some outlier practices.<sup>254</sup> In both the administrative and the policing contexts, it may well be that an overwhelming majority of regulated entities are engaged in actions that are cost-unjustified. In the policing context this seems quite likely. If almost all police departments are dominated by unions, if they use performance metrics that are misleading proxies for cost-justified policies (such as the volume of arrests), and if they fail to acquire or analyze even basic performance-related data, then I think we should be skeptical of Fourth Amendment gloss as a measure of minimally good policing.

Worse, when the Court makes the assumption that the modal (or median) form of policing is a socially desirable one, as in cases such as *Mapp v. Ohio*<sup>255</sup> and *Tennessee v. Garner*,<sup>256</sup> we might be concerned that the imprimatur of constitutional approval is so persuasive to officials and the public that it ends reform conversations prematurely. Gloss as benchmarking, that is, may not only be based on a false premise of epistemic competence. It may also simultaneously dangerously enervate local reform impetus.

Historical change in the objects and social understandings of policing, moreover, poses challenges to the Court's endorsement of new practices, such as DNA testing in *Maryland v. King*, on the theory that they are

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<sup>251</sup> Many of these critiques apply also to equilibrium accounts of the Fourth Amendment. See Kerr, *supra* note 186, at 480.

<sup>252</sup> See *supra* text accompanying notes 233–247.

<sup>253</sup> 136 S. Ct. 1120 (2016); see *supra* text accompanying note 37.

<sup>254</sup> Masur & Posner, *supra* note 127, at 30–33.

<sup>255</sup> 367 U.S. 643 (1961).

<sup>256</sup> 471 U.S. 1 (1985).

genealogically rooted in established practices, such as fingerprinting.<sup>257</sup> The Court’s gloss analogy omits important details that might cast doubt on the strength of the normative inference that may be drawn from historical identification practices. The Court did not mention that fingerprinting was initially adopted by the FBI, and then by police departments, as a way to manage the new “racially unfamiliar” masses perceived as a menace to early twentieth-century American society.<sup>258</sup> Nor did it mention the resistance to fingerprinting as a new intrusion on privacy. In 1920, a Cleveland, Ohio, ordinance mandating fingerprinting, for example, generated a cab drivers’ strike, with hundreds manning “antifingerprint picket lines.”<sup>259</sup> The *King* Court’s analysis instead simply assumed that fingerprinting is now and always has been a neutral, technocratic tool with no racial overtones and no popular resistance. Yet with a dose more history to hand, DNA sampling may well be understood in different terms. Like fingerprinting, its initial use may have racially disparate effects.<sup>260</sup> The earlier discomfort with sharing fingerprints may be paralleled today by a similar discomfort with sharing DNA.<sup>261</sup> The Court’s failure to account for these historical parallels—which would undermine its use of gloss to support lower Fourth Amendment protections against DNA collection in *King*—suggest that its use of gloss is both descriptively and normatively problematic.<sup>262</sup>

Finally, many of these same criticisms can be extended to gloss as substitute. In particular, the variance in the quality of police departments and the likely persistence of many costly and hence unjustified police practices

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<sup>257</sup> 569 U.S. 435, 461 (2013) (affirming touchstone of reasonableness); *see supra* text accompanying notes 123–26.

<sup>258</sup> SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 3, 119–20 (2001).

<sup>259</sup> CHRISTIAN PARENTI, THE SOFT CAGE: SURVEILLANCE IN AMERICA: FROM SLAVERY TO THE WAR ON TERROR 52–57 (2003).

<sup>260</sup> Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 189 (2013) (expressing concern about how DNA testing of arrestees will interact with the “highly disproportionate enforcement of especially low-level offenses”).

<sup>261</sup> For some evidence of that discomfort, see *Carpenter v. United States*, 138 S. Ct. 2206, 2262–63 (2018) (Gorsuch, J., dissenting), where Justice Gorsuch discussed governmental acquisition of DNA from third parties as something that would violate reasonable expectations of privacy.

<sup>262</sup> Judicial opinions can also be responses to problems that are unmentioned in the text of the opinion but are important chapters in American policing. The failure to understand these hidden transcripts can lead to systematic error in glossing cases. Professor Sklansky has demonstrated, for example, that *Katz v. United States*, 389 U.S. 347 (1967), responded “to the widespread use of a particularly troubling investigative technique, unrelated to telephone eavesdropping, without ever mentioning the technique itself. The technique was patrolling for homosexual sodomy by spying on men in toilet stalls.” David Alan Sklansky, “*One Train May Hide Another*”: *Katz*, *Stonewall*, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875, 879 (2008). This understanding puts new light on the idea of “reasonable” expectations of privacy, yet Professor Sklansky’s vital insight is largely missed in the current scholarship.

undermine the rationales for across-the-board remedial withdrawal by the Court in *Hudson v. Michigan*<sup>263</sup> or *Herring v. United States*.<sup>264</sup> If police practice is often cost-unjustified, if assumptions about police expertise are muddled and in conflict with the facts, and if the wide variance in police departments precludes broad generalizations, the Court's blind reliance in *Hudson* and *Herring* on a happy story of ever-increasing professionalism is unjustified and perhaps even irresponsible.

The Burkean case for Fourth Amendment gloss, therefore, fails. Whether viewed across time or just today, official police practice cannot be taken as a normatively justified gloss relevant to the Fourth Amendment's interpretation.

### C. The Settlement Justification

The *settlement justification* turns on the social value of a stable, clear, and readily available focal point to facilitate coordination and evaluation of government behavior in light of ambiguous constitutional standards. Because a constitutional focal point can usefully be derived from well-known historical practice, gloss provides a logical, low-cost coordinating point to generate a stable constitutional equilibrium. A focal point plays one function for officials, who must operate within the frame of constitutional institutions. It has a different function for citizens, who can use gloss to evaluate whether those actors remain faithful to their constitutional obligations. In addition, a case for gloss as a well-publicized and readily referenced benchmark of constitutionality can be derived independently of any assertion about the quality, or epistemic content, of official practice.

The focal point model of constitutional enforcement *by citizens* closely fits the original function of the Fourth Amendment. At its core, the focal point model addresses a central problem of political theory: A sovereign must “retain sufficient political support” to remain stable, but in order to do so, it must persuade citizens that it is not abusing its delegated authorities.<sup>265</sup> Because citizens may disagree on what constitutes abuse, they face a coordination dilemma: Unless there is agreement on the legitimate bounds of the state, they will be unable to act together to limit state abuses. Focal points “resolve [such] coordination dilemmas about the appropriate limits on the state,” often in terms that generally redound to the benefit of political “elites,” who are central to political contestation and opposition.<sup>266</sup> The focal

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<sup>263</sup> 547 U.S. 586, 599 (2006).

<sup>264</sup> 555 U.S. 135, 147–48 (2009).

<sup>265</sup> Weingast, *supra* note 71, at 246.

<sup>266</sup> *Id.* (“To the extent that solutions to the coordination dilemma occur, it is elites who construct them, often through pacts.”).



point theory can also be profitably read in tandem with Professor Ran Hirschl's influential theory of constitutional design as "hegemonic preservation."<sup>267</sup> On this view, elites maintain wealth and privileges even after ceding political power in a constitutional moment by crafting negative rights that limit the newly formed state.<sup>268</sup>

As originally conceived, the Fourth Amendment is plausibly viewed as a solution to precisely this problem of elite–public coordination over the appropriate limits of state power. The two English legal precedents that provided the impetus and template for that provision hinged on state efforts to use home searches to harass and disrupt political opponents. These aversive precedents both involved civil actions by opposition parliamentarians challenging searches of homes and offices by agents of the secretary of state in search of evidence of sedition.<sup>269</sup> Seditious libel investigations often relied upon such "general searches for documentary evidence."<sup>270</sup> Given this history of policing political dissent through paper searches,<sup>271</sup> it was eminently sensible for American political elites to agree on the Fourth Amendment's prohibition on unreasonable searches. Anticipating the prospect of time in opposition, those elites could look to the Fourth Amendment as a protection against the specific instrument of political oppression that (to their minds) was most immediately available and effective. The Amendment is in a sense "really about the protection of political dissent,"<sup>272</sup> with gloss providing the focal point for social coordination in the event that elected leaders target such dissent.

If the settlement justification explains the original thrust of the Fourth Amendment, it does little to explain its operation now. The English precedents are a gloss that has largely been abandoned. The Court briefly resurrected the paper searches rule at the end of the nineteenth century in

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<sup>267</sup> RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 11 (2004); *see also* MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY* 197–201 (2010) (developing a notion of "pacted constitution-making" pursuant to which powerful interest groups treat the constitution as a coordinated truce).

<sup>268</sup> HIRSCHL, *supra* note 267, at 89, 91–92.

<sup>269</sup> *See* *Entick v. Carrington* (1765) 19 Howell's State Trials 1029, 1066, 1073 (Eng. C.P.); *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 489 (C.P.); *see also* William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393, 397–404 (1995) (discussing the significance of *Wilkes* and *Entick*).

<sup>270</sup> ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868*, at 18 (2006).

<sup>271</sup> *See Entick*, 19 Howell's State Trials at 1066, 1073 (noting that papers are a person's "dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection").

<sup>272</sup> Stuntz, *supra* note 269, at 447.

*Boyd v. United States*.<sup>273</sup> *Boyd*, however, proved to have a limited shelf life and is no longer compelling as a Fourth Amendment precedent.<sup>274</sup> As a result, the fact that a search incident to arrest yields intimate papers, such as a diary, rather than narcotics would have no bearing on the resulting analysis.

Contemporary Fourth Amendment law sharply diverges from the model of gloss as settlement. To begin with, settlement implies a static model of official practice that can be used as a basis for drawing Fourth Amendment law. But when Fourth Amendment gloss is used as a benchmark or a substitute, official practice has not been treated as static and unchanging. Rather, the Court treats such practice as dynamic, varying between jurisdictions and over time. It is only when gloss is used as substantive content that the settlement explanation is even available: Longstanding practices accepted as baseline for lawful searches and seizures might provide focal points for individuals, unschooled in the law, to signal when government was overstepping its authority.

And yet the Court has not deployed gloss as substantive content in ways that facilitate coordination among citizens when government oversteps constitutional bounds. The primary examples of gloss as substantive content, to the contrary, concern the *authorization* of practices such as warrantless arrests based on misdemeanors and warrantless searches of automobiles.<sup>275</sup> Neither of these lines of cases provides citizens with clear information about the *limits* of state power. To the extent that they rely on the settlement justification, *Atwater*, *Watson*, *Carroll*, and their progeny might be understood as focal points for police who are uncertain of their authority. These decisions thus provide a license for such officers to rely on longstanding policing habits and practices without reflecting on their constitutionality. The cases in which I have identified gloss as substantive content probably lower the cost of policing insofar as they enable junior officers to rely on the intuitions and habits of older officers. All else being equal, they allow police to rest on traditional practices. They drain law enforcement's incentive to innovate and learn, and—at least to the extent that the Court has become a primary regulator of the police<sup>276</sup>—they undermine the incentive to innovate and improve policing. A judicial thumb is placed

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<sup>273</sup> 116 U.S. 616, 633 (1886) (holding that *any* “seizure of a man’s private books and papers” violates the Fourth (and Fifth) Amendment(s)).

<sup>274</sup> See generally Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 915–23 (1985) (analyzing, and decrying, post-*Boyd* changes to the law).

<sup>275</sup> See *supra* text accompanying notes 92–105.

<sup>276</sup> The role of the Court looms large because relevant “legislation is episodic.” Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1844 (2015).

instead on the status quo, no matter how dysfunctional. It is hard to see how this can be justified as a normative matter in the name of settlement.

This is not to say that *no* paths of Fourth Amendment jurisprudence operate as focal points for potentially effective social coordination in response to state illegality. The Court has repeatedly flagged a “basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.”<sup>277</sup> Home exceptionalism under the Fourth Amendment, however, is not based on any historical practice. Rather, it seems to be predicated on an inchoate sense that homes are distinctive as a cultural or normative matter.<sup>278</sup> These cases sound more in “a nostalgia subsidy for home ownership” rather than any understanding of what has historically operated as effective policing.<sup>279</sup>

In sum, the settlement function of the law is not well served by the current doctrine. Although the historical practice that once provided the touchstone of the Court’s analysis could have provided an effectual focal point, the Court has abandoned that practice as a doctrinal pivot. Its turn to other forms of entrenched policing practice cannot be justified on settlement grounds. Indeed, to the extent the Court has become a dominant regulator of national, state, and local law enforcement, its adoption of the settlement justification likely engenders worse rather than better policing by crowding out other reform efforts.

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Gloss has been an unacknowledged, yet important, element of Fourth Amendment jurisprudence. It shapes the law of misdemeanor arrests, traffic stops, deadly force, and the scope of the suppression remedy. My aim in this Part has been to demonstrate that the most powerful justifications for these deployments of official practice in the Fourth Amendment domain are thin and ultimately unpersuasive. Separation of powers scholars have shown that there are persuasive general reasons for relying on interbranch interactions to formulate constitutional rules. Some of these reasons spill naturally over into federalism, a congruent domain of structural constitutional law. But none of the three justifications for gloss can explain the use of official

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<sup>277</sup> *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Groh v. Ramirez*, 540 U.S. 551, 559 (2004)); *accord Kentucky v. King*, 563 U.S. 452, 459 (2011).

<sup>278</sup> *Cf.* Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 913 (2010) (describing the home as a “sacred site” (quoting *Wilson v. Layne*, 526 U.S. 603, 612 (1999))).

<sup>279</sup> Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 157 (2016).

practice to define search and seizure minima. Such reliance cannot be explained on the standard grounds for folding in official practice into constitutional law.<sup>280</sup> Fourth Amendment gloss, in short, stands on fragile theoretical ground.

#### IV. THE FUTURE OF FOURTH AMENDMENT GLOSS

If the justifications for Fourth Amendment gloss fail, what consequences should this have for the actual doctrine? This Part explains first why Fourth Amendment gloss will persist notwithstanding its lack of firm normative foundation. Powerful institutional and ideological motives sustain the judicial practice, I contend, even in the absence of a persuasive normative justification. In practical terms, this means the problem of Fourth Amendment gloss is best thought of as a “second-best” problem.<sup>281</sup> Assuming that the Court will not switch to the optimal epistemological strategy of limited and careful reliance on official police practice, it raises the question whether there are measures that can be adopted to constrain the resulting welfare loss. In the concluding section of this Part, I therefore consider steps to cabin the deleterious effect of Fourth Amendment gloss’s place in the jurisprudence.

##### A. *The Peculiar Persistence of Gloss*

Since it lacks compelling normative foundations, why does gloss persist as a central tenet of Fourth Amendment analysis? The Court does not explain why it employs gloss, so it is necessary to infer the Justices’ reasons for relying on official practice by drawing on circumstantial evidence. I offer two hypotheses for why gloss has come to play so large a role in the jurisprudence.

The first reason is quite simple: The Supreme Court has been tacking rightward since the beginning of the 1970s and President Nixon’s explicit

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<sup>280</sup> Might there be other wholly new theoretical grounds for using gloss that obtain in the Fourth Amendment context but not elsewhere? This is theoretically possible, but I can imagine no such grounds at present.

<sup>281</sup> The formal theorem of the second best states that “if there is introduced into a general equilibrium system a constraint which prevents the attainment of one of the Paretian conditions [i.e., the circumstances that generate Pareto optimal outcomes], the other Paretian conditions, although still attainable, are, in general, no longer desirable.” R. G. Lipsey & Kelvin Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11, 11 (1956). Strictly speaking, the theory of the second best implies that deviations from optimality undermine the possibility of firm prescriptions. See Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 904–05 (2012). More modestly, the theory implies that when institutions are imperfect, a range of possible countervailing adjustments must be considered.

commitment to appoint Justices who shared his views on crime.<sup>282</sup> Today, the Court’s median lies far to the right of where it has been for most of the twentieth century.<sup>283</sup> Whatever one thinks of this ideological status quo, it should be no surprise that the Justices are heavily disinclined to challenge the authority and competence of the police. Ideological preferences no doubt make the institutional reasons for folding gloss into Fourth Amendment jurisprudence more compelling. Hence, they are likely to amplify the neutral grounds that all judges have for deference to longstanding police practice.

The second hypothesis turns on institutional reasons. Constitutional jurisprudence is not formulated in the abstract. It is shaped and channeled by its institutional circumstances and, in particular, by the priorities of the judiciary. The federal courts have “accreted gradually a great deal of autonomous discretion to pursue institutional interests” by lobbying Congress, securing functional autonomy from immediate legislative control, and crafting doctrinal rules.<sup>284</sup> These interests, moreover, may illuminate many doctrinal decisions with cross-partisan support, decisions that appear otherwise mysterious.<sup>285</sup>

The Supreme Court depends on police for the implementation of its Fourth Amendment rules. When the Court announces a rule that governs street-level police, judicial enforcement of that rule depends initially on whether officers truthfully report compliance or noncompliance. Much policing practice is embedded not in formal rules but in “tacit” routines,<sup>286</sup> which are hard for outsiders to grasp or evaluate. If departmental management has difficulty determining what happens in the context of dispersed, highly discretionary police–citizen encounters,<sup>287</sup> federal courts are unlikely to do better. Evidence of pervasive misrepresentation by police in suppression hearings suggests an additional barrier to judicial

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<sup>282</sup> Jon Gottschall, *Carter’s Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 168 (1983). See generally KEVIN J. MCMAHON, NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 3–5 (2011).

<sup>283</sup> Cf. Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES (updated Feb. 1, 2017), <https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html> [<https://perma.cc/73WQ-VZ4U>].

<sup>284</sup> Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 53 (2015); see also David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 7–8 (2018) (enumerating institutions in which institutional interests have prevailed over immediate ideological concerns).

<sup>285</sup> Huq, *supra* note 284, at 53–56 (developing this point).

<sup>286</sup> On the notion of tacit understandings, see Michael Polanyi, *The Logic of Tacit Inference*, 41 PHILOSOPHY 1, 2–3 (1966).

<sup>287</sup> See *supra* text accompanying notes 201–203.

enforcement.<sup>288</sup> Federal courts, further, would have some difficulty tamping down on pervasive misbehavior by police. In effect, their physical and institutional removal from police means that they must rely on indirect and highly imperfect measures, such as suppression and damages remedies, to elicit compliance from the police. Both of these remedies also curb local governments' efficacy as a guarantor of public safety. Remediation thus comes bundled with its own negative spillovers. Further, it exposes the courts to political criticism.<sup>289</sup> Hence, the courts are under some pressure to curtail and control Fourth Amendment rights because of the institutional costs of Fourth Amendment remediation.<sup>290</sup>

To this end, it is in the institutional interest of the federal judiciary to find an accommodation—a *modus vivendi* of sorts—with the police. The judicial embrace of gloss can be usefully understood as one element of that accommodation. One reason for accommodation is the brute force of familiarity. Professor Lvovsky has observed that “judges routinely engage in a casual form of systemic factfinding, synthesizing their discrete encounters with officers in multiple sites of the justice system [with police] into broader assumptions about police competence.”<sup>291</sup> Professor Lvovsky's explanation may be most plausible for judges who have moved up through the judicial hierarchy. It may have less explanatory force for Justices of the Supreme Court, who are quite removed from the daily dynamics of district court litigation, especially after years and decades confined in the marble precincts of the apex tribunal.

In my view, the emergence of Fourth Amendment gloss is well understood in terms of the political pressures on the courts as an institution to cabin Fourth Amendment remedies,<sup>292</sup> a pressure that obtains even if a judge has not had a career moving up through the judicial hierarchy. Gloss purchases breathing room for judges from the costs of Fourth Amendment remediation (and perhaps because this breathing room is not needed as

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<sup>288</sup> Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1042–44 (1996) (discussing a number of related types of police misconduct in connection with Fourth Amendment requirements, including police perjury at suppression hearings and at trial, misstatements in police reports, and fraudulent representations in sworn warrant applications).

<sup>289</sup> I am not sure whether it is *ipso facto* undesirable for the Court to be subject to political criticism. Where, as here, the objects of judicial solicitude have been politically vulnerable groups, though, such criticism may be as inevitable as it is undesirable.

<sup>290</sup> Formal law and economics work models judicial oversight as a solution to an agency cost problem faced by the public that employs police and that faces the risk of creating police forces with excessively punitive incentives. Dhammika Dharmapala et al., *Punitive Police? Agency Costs, Law Enforcement, and Criminal Procedure*, 45 J. LEGAL STUD. 105, 106–07 (2016). The point here is that judicial oversight of the police embeds its own agency slack problem.

<sup>291</sup> Lvovsky, *supra* note 22, at 2079.

<sup>292</sup> The canonical example is President Nixon's attack on the Warren Court. *See supra* note 282.

acutely in respect to other constitutional rights, we do not see gloss being used with frequency outside the Fourth Amendment to other elements of the Bill of Rights). By demonstrating respect and endorsement of familiar policing tools, courts mitigate the potential for conflict with regulated actors. By making it easier to maintain police “folkways,”<sup>293</sup> courts purchase a measure of credibility that perhaps makes other rules easier to enforce. If courts do not have other rules they wish to see enforced against police, they have neutralized the possibility of pushback from police and their political allies.<sup>294</sup>

Although these institutional and ideological grounds are unlikely to be formally recognized, they are likely to have powerful shaping effects on the doctrine. The survival of gloss as a central element of Fourth Amendment law is one of them.

### B. *Toward the Mitigation of Gloss’s Costs*

The standard account of why Fourth Amendment law falls short focuses on the limits of courts’ institutional competence.<sup>295</sup> An implication of my analysis is that the problem lies as much in the sources upon which judges rely as it does with the institutional limitations of the federal courts themselves. There is nothing that prevents the federal judiciary from examining official practice more closely and critically; nothing prevents Justices who do not obtain a majority, or who are preparing an opinion that points out weaknesses in the majority opinion, from highlighting the limits of policing practice. The federal judiciary has the potential to be an effective shield against unreasonable searches and seizures; it has just chosen not to play this function. With that in mind, four general lessons might be drawn to blunt the error-generating effects of gloss in this domain. These lessons are less costly to implement than a full-scale abatement of gloss arguments; hence, they are at least plausible reform proposals given the institutional and ideological dynamics I have identified.

First, it is a mistake for scholars and citizens to conclude that the Fourth Amendment floor comprises a set of cost-justified policing measures. Even

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<sup>293</sup> Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 594 (1998) (“Police departments and prosecutor’s offices have folkways and patterns of behavior . . .”).

<sup>294</sup> For an illuminating discussion of how police unions in California have mobilized against the state’s supreme court, see Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL’Y REV. 109, 130–32 (2017).

<sup>295</sup> See, e.g., Friedman & Ponomarenko, *supra* note 276, at 1865 (“Even in the case of traditional, investigative policing, judicial review fails to do its job, the result of which is countless unremedied rights violations.”).

common measures, such as warrantless misdemeanor arrests,<sup>296</sup> may be unjustified simply because their crime-suppression benefits are smaller than the social good possible if police were to invest their time otherwise.<sup>297</sup> If it is to operate as a source of Fourth Amendment law, judges should acknowledge that gloss should never be sufficient in isolation to vindicate a challenged search or seizure. This intuition is not wholly missing from the Court's approach. In cases such as *Riley v. California*, for example, the majority opinion declined to assume that a practice was cost-justified merely because some analog to the practice had long been employed by police.<sup>298</sup> The need for judicial consideration of costs and benefits should not be limited to instances of technological change. All policing tactics are "technologies" in the most general sense of that term. All were once new. If no court has ever engaged in the sort of careful analysis that characterized the *Riley* Court's approach, there is simply no reason to assume that longstanding practice is wise or cost-justified.

Second, and more ambitiously, judges should accept gloss solely if accompanied either by evidence that the policy is in fact cost-justified, or that it was adopted through a process whereby its likely costs have been recognized and acknowledged. This evidence might take one of two forms. First, judges might accept freestanding evidence that a proposed policing measure is cost-effective. Police now rarely generate such data.<sup>299</sup> Calibrating the deference accorded to different policing measures based on their empirical support is one way to incentivize the production of such evidence. In the interim, however, police are not without recourse. Criminologists have generated an impressive body of empirical scholarship about the kinds of policing measures that produce gains in public safety that outweigh the costs externalized onto citizens.<sup>300</sup> A judicial demand for the actual effect of different search and seizure measures could also serve the salutary information-forcing function of eliciting more such studies. The latter are a public good. As such, they are likely to be produced at suboptimal rates.

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<sup>296</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

<sup>297</sup> See *supra* text accompanying notes 189–92.

<sup>298</sup> 134 S. Ct. 2473, 2493 (2014).

<sup>299</sup> See *supra* text accompanying note 220. States such as Washington have generated benefit–cost evaluations of policing tactics. Steve Aos et al., *The Comparative Costs and Benefits of Programs to Reduce Crime: A Review of Research Findings with Implications for Washington State*, in COSTS AND BENEFITS OF PREVENTING CRIME 149, 149 (Brandon Welsh et al. eds., 2001).

<sup>300</sup> For a recent survey, see Lum & Nagin, *supra* note 205, at 344. For a compelling analysis of best practices in street policing, see Anthony A. Braga et al., *The Effects of Hot Spots Policing on Crime: An Updated Systematic Review and Meta-Analysis*, 31 JUST. Q. 633 (2014).



An alternative to this approach would be to follow the proposal of Professors Barry Friedman and Maria Ponomarenko to “defer to police decisions about enforcement methods only to the extent that those decisions represent considered, fact-based judgments formulated with democratic input.”<sup>301</sup> This proposal is not free of ambiguity. On the one hand, their demand for “fact-based judgments” seems to require that the policies adopted by police reach a certain quality threshold. On the other hand, they contend that “[c]ourts need not judge the police, at least in the first instance. They need only assure that someone is filling the regulatory void.”<sup>302</sup> In my view, the process by which a policy is generated is an imperfect proxy for the quality of the policy itself. Where courts can ascertain whether a policing measure is likely to be cost-justified, I am not sure why they should fall back on the second-best proxy of procedure.<sup>303</sup>

Third, courts should recognize the racial origins of many policing measures and consider whether those origins are consistent with the assumption of Burkean wisdom or acquiesced-to settlement. In other constitutional domains, the Court has acknowledged that formally neutral policies can be rooted historically in invidious beliefs about regulated populations.<sup>304</sup> In the policing context, the Court has not evaluated longstanding practices in light of their racialized origins. It has not considered, for example, the relationship between vagrancy laws and programmatic stop-and-frisk.<sup>305</sup> Nor has it questioned whether its endorsement of professionalized policing in decisions such as *Hudson* and *Herring* is also an endorsement of the racial politics of professional policing as originally articulated in the 1950s.<sup>306</sup> To finally recognize the racial origins of many police practices would be a return to, rather than a break from, tradition. In the interwar years, the Court faced several “egregious exemplars

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<sup>301</sup> Friedman & Ponomarenko, *supra* note 276, at 1892.

<sup>302</sup> *Id.* at 1891.

<sup>303</sup> Indeed, in other work, Professors Ponomarenko and Friedman have insightfully detailed the ways in which cost-benefit analyses of policing now fall short and how they can be improved. Maria Ponomarenko & Barry Friedman, *Benefit-Cost Analysis of Public Safety: Facing the Methodological Challenges*, 8 J. BENEFIT-COST ANALYSIS 305, 309–10, 312–16 (2017).

<sup>304</sup> See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 227–29 (1985) (holding that a provision in the Alabama Constitution disenfranchising persons convicted of crimes involving moral turpitude violated equal protection where, even though on its face it was racially neutral, its original enactment was motivated by a desire to discriminate against Blacks).

<sup>305</sup> For a fascinating consideration of the historical relationship of these two bodies of law, see Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1386 (2010) (asserting that the Justices perceived them as linked species of policing practice).

<sup>306</sup> See *supra* text accompanying note 243 (noting criticisms of professional policing for its insensitivity to racial concerns).

of Jim Crow justice” and used those extreme facts as the basis for “landmark criminal procedure decisions,” with the aim of limiting the excesses of Jim Crow criminal justice.<sup>307</sup>

Finally, the case against a mechanistic reliance on gloss is at its acme in cases such as *Riley v. California* and *Carpenter v. United States*, which concern new technologies.<sup>308</sup> Given the variance in the historical functions and present capacities of police, claims that there is a functional continuity between earlier policing tools and new technologies are almost always flawed. Even when such continuities exist—as in the case of fingerprinting and the DNA analysis authorized in *Maryland v. King*<sup>309</sup>—the Court is prone to miss the most salient ones. At the same time, the mere fact that a form of information acquisition was unknown before—and rendered possible by a new technology—should not suffice to signal its unconstitutionality.<sup>310</sup> The foundation of Fourth Amendment gloss is sufficiently unstable and the supply of easy analogies so compromised that new investigative devices should be judged on their own terms, not by the unreliable and haphazard project of imagining continuities in the plural, complex worlds of historical and contemporary police practices.

#### CONCLUSION

Judicial reliance on actual police practice is commonplace in Fourth Amendment doctrine. Yet to date it has been neither theorized nor adequately justified by the Court. Drawing upon analogies to “historical gloss” in structural constitutional law—and “norming” in the administrative law scholarship—I have argued that the standard theoretical grounds for reliance on observed institutional practice do not apply seamlessly in the Fourth Amendment context. There is, in other words, no strong normative justification for judicial reliance on police practice to establish Fourth Amendment rules. To the extent that Fourth Amendment gloss survives, therefore, it is a mistake, the costs of which must be mitigated, rather than a virtue to be celebrated. The range of cautionary nudges with which I conclude is necessarily incomplete. Rather, one implication of my analysis is that there is much work still to be done thinking through the complex ways

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<sup>307</sup> Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 49 (2000).

<sup>308</sup> See *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *supra* notes 118–22 and accompanying text.

<sup>309</sup> 133 S. Ct. 1958, 1965–66 (2013); see *supra* text accompanying notes 258–259 (flagging the racialized history of fingerprinting as an investigative tool).

<sup>310</sup> Cf. *United States v. Jones*, 565 U.S. 400, 420 (2012) (Alito, J., concurring) (noting that it is “almost impossible” to imagine a historical analog to GPS vehicle tracking).

federal courts receive and transform flawed policing practice into the basic law of the land.

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