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FOURTH AMENDMENT GLOSS

Aziz Z. Huq*

Abstract

Conventional wisdom suggests that a constitutional right will constrain government actors. But a right defined in terms of what the state routinely does would impose in practice no brake on state action—and so seem pointless. Nevertheless, in defining Fourth Amendment rights, the Supreme Court frequently draws on the practice of regulated government actors to define the constitutional floor for police action. This Article is the first to isolate and analyze this seemingly paradoxical judicial practice. It labels it “Fourth Amendment gloss,” after an analogous mode of reasoning in separation-of-powers cases. 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 gloss as a source of law in constitutional interpretation. These can be called gloss as acquiescence, gloss as Burkean wisdom, and gloss as settlement. A careful examination of the empirical and theoretical contexts of the Fourth Amendment suggests, however, that none of these three justifications can be extended to support gloss’s use as a way to define lawful searches and seizure. 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.

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Introduction

Constitutional rights supposedly constrain government actors.¹ 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.² 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 meaningful gain in liberty.³ Why, one might plausibly wonder, would anyone bother to write down such a right in the first place?⁴ Under what circumstances, one might ask, would such a right likely be violated?

This Article concerns a zone of constitutional rights that disobey this seemingly foundational presupposition. The Supreme Court frequently draws on the official practice of regulated government actors as a source of Fourth Amendment law. I call this reliance on official practice “Fourth Amendment gloss,” by analogy to the judicial practice of looking to interbranch dynamics as a source of “historical gloss” in separation-of-powers disputes.⁵ A first aim of this Article is descriptive: I want to isolate the significant role that gloss, or official practice, plays in our constitutional law of policing. I want to throw 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 that 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 concerning 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 kind roles it can play.

First, in the 2018 case of *Carpenter v. United States*, the Court faced the question whether government acquisition of cell-site locational data from a suspect’s

¹ Thus, Ronald Dworkin’s canonical formulation of rights as “trumps.” RONALD DWORCKIN, *TAKING RIGHTS SERIOUSLY* 184-205 (1977); *see also* ROBERT NOZICK, *ANARCHY, STATE, UTOPIA* 29 (1974) (describing rights as “side constraints”).

² 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.”).

³ 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.”).

⁴ A right defined in its of government practice at a specific point in time, such as the Founding, would in contrast constrain innovations with libertarian externalities.

⁵ *See* Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517, 1523 (2018) (discussing the role of “historical gloss” in separation of powers jurisprudence); *see also infra* Part I.A. (exploring the scholarly literature on separation-of-powers gloss).

telecommunications provider counted as a “search” under the Fourth Amendment.⁶ 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.”⁷ Chief Justice Roberts’s 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.⁸ History thus had no bite.

In contrast, the main dissent by Justice 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 in his opening paragraphs, was both “reasonable” and “accepted.”⁹ 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.”¹⁰ Such use of compulsory disclosure was “well established,” explained Justice Kennedy, “even when the records contain private information.”¹¹ 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.”¹² Hence, the sheer fact of continuance usage legitimated a state practice under the Fourth Amendment for Justice Kennedy, 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 a recognition of a technological rupture informs the various opinions in *United States v. Jones*, a second case concerning new technologies.¹³ *Jones* unanimously held that police could not engage in warrantless placement and tracking of a global positioning system (“GPS”) device on a vehicle.¹⁴ Whereas Justice Scalia’s majority opinion framed the case as the application of a longstanding trespass rule, the concurring opinions of Justices Sotomayor and Alito stressed the issue’s novelty—and, critically, the absence of any tradition of analogous police

⁶ 558 U.S. ___, 2018 WL 3073916, at*6- *7 (June 22, 2018) (considering whether acquisition of cell-site locational data from a third-party data provider constitutes a “search”).

⁷ *Id.* at *9.

⁸ *Id.*

⁹ *Id.* at *16 (Kennedy, J., dissenting).

¹⁰ *Id.* at *21 (Kennedy, J., dissenting).

¹¹ *Id.*

¹² *Id.* at *22 (Kennedy, J., dissenting) (quotations omitted).

¹³ *United States v. Jones*, 565 U.S. 400, 405-11 (2012).

¹⁴ *Id.* at 405.

practice.¹⁵ Stated otherwise, for the concurring Justices in *Jones* and *Carpenter* the absence of an analogous historical gloss was fatal to the government's case for the validity of GPS tracking.

Jones and *Carpenter* are not methodological outliers: Gloss plays a central role across a large swathe of Fourth Amendment law. 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 both to justify and also to constrain the supply of remedies for constitutional violations in the context of criminal trials.¹⁶ In these cases, its relevant has often impinged more acutely than in *Jones* and *Carpenter*.

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, where the idea of 'gloss' has received far more sustained attention. Borrowing from the growing scholarship on historical gloss in the separation-of-powers context, I posit three theoretical grounds forgiving weight to official practice as a source of constitutional meaning. 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 views is an appropriate implication of 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 serves as a *settlement* to enable coordination around the defense of constitutional norms.

These three theoretical foundations for the use of official practice as a source of constitutional meaning, however, largely fail to provide a satisfying foundation for Fourth Amendment gloss. The argument from acquiescence works in the separation of powers context because coordinate branches of the federal government can provide legitimating acquiescence to each other's practices. But in the Fourth Amendment context, it is not easy to identify a class of official actors charged with making careful determinations of *constitutionality* in response to new forms of search and seizure. The dialogic process of acquiescence, therefore, simply does not happen in the necessary way. The argument from Burkean wisdom, 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. And yet just because all three

¹⁵ 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 in the judgment) (“[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 the judgment) (accusing the Court of “disregard[ing] what is really important” in the use of a GPS device by focusing on the trespass).

¹⁶ These points of doctrine are developed *infra* in Part II.

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

Despite its pervasive use, 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."¹⁷ The latter topic tends to receive the lion's share of scholarly attention. Less well studied are the far more unglamorous procedural questions of what steps the Government must take a search lawful, and what remedies follow when these steps are not taken. Whatever the reason for the lacuna, there is at present no sustained or careful consideration of how official practice does, or should, configure the reach and operation of Fourth Amendment protections. A major element of the doctrine, therefore, hence operates largely in the scholarly dark.

While legal scholars have not addressed Fourth Amendment gloss systematically, my analysis here draws inspiration from, and extends, earlier scholarship on searches ad seizures. One path-marking precursor is David Sklansky's work on the role of common law concepts from the time of Fourth Amendment's ratification in the Fourth Amendment law of the 1990s.¹⁸ As I detail below,¹⁹ gloss is distinct from the common law materials with which Sklansky reckoned. But his general approach of situating the Fourth Amendment in the larger body of constitutional doctrine is admirable and merits attention. Another precursor to my analysis is Anna Lvovsky's recent historicizing intervention, which focuses on the midcentury origins of judicial deference to police expertise.²⁰ She approaches some of the same issues as my analysis here—in particular the epistemic arguments for gloss—but does so from a very different perspective and with a different scope of historical coverage. Sklansky's and Lvovsky's work provide intellectual coordinates from which the present inquiry presses forward.

¹⁷ A sampling of the most prominent scholarship includes Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409 (2018); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1877 (2016); Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 SUP. CT. REV. 205 (2015); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 Stan. L. Rev. 503 (2007); 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).

¹⁸ 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'" (citation omitted)).

¹⁹ See *infra* text accompanying notes 78 to 83.

²⁰ 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.").

My analysis proceeds in four steps. In the first Part, I set out the uses of gloss in other domains of constitutional law. In particular, 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 makes a detailed 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 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. Gloss, I suggest will continue to be employed for ideological and institutional reasons. But there are ways to mitigate its downside costs.

I. Using Gloss in Constitutional Interpretation

This Part develops the scope and function of “gloss” 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 Frankfurter's concurrence in the so-called Steel Seizure case.²¹ In his concurrence, 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.”²² This definition is not without its ambiguities.²³ Still, Frankfurter's idea of “gloss” can be usefully decomposed into three constituent parts solely using his own verbal formulation: (1) a historical practice by an official actor; (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. I assume for the balance of this Article that this definition captures the meaning of “gloss.” I shall also use the terms “gloss” and “practice” interchangeably to capture this tripartite idea.

The concept 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

²¹ 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, 413-14 (2012).

²² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring).

²³ See *infra* text accompanying notes 36 to 40 (documenting ambiguities).

after the founding era.”²⁴ For instance, gloss plays a role in the Court’s judgments on recess appointments,²⁵ interbranch condominiums (such as the U.S. Sentencing Commission),²⁶ the pocket veto,²⁷ the unwritten executive power to preempt state laws on foreign affairs grounds,²⁸ and the executive’s power to “recognize” other nations.²⁹ In all these jurisprudential domains, post-ratification practice of executive branch actors—if open, notorious, and wanting for objections—does double-duty as evidence of how a constitutional ambiguity should be resolved.

In all these instances, gloss operated as positive evidence of constitutionality. At other times, courts take the absence of historical practice as proof of constitutional authority’s absence. 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 re-open a federal court’s final judgment the Court has observed that there was “no [other] instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation,” a “prolonged reticence” that “would be amazing if such interference were not understood to be constitutionally proscribed.”³⁰ 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 lent credence to a constitutional challenge.³¹ 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 federal commandeering efforts.³²

The positive and negative uses of gloss are not wholly identical, although they are closely related enough to warrant being considered in tandem. The inference taken from an absence of practice tends to be more narrowly gauged than the inference drawn from

²⁴ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

²⁵ *Id.*

²⁶ *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”).

²⁷ *The Pocket Veto Cases*, 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.”).

²⁸ *American Insurance Association v. Garamendi*, 539 US 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.’” (quotation omitted)).

²⁹ *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, *Historical Gloss, the Recognition Power, and Judicial Review*, 109 AM. J. INT’L L. 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.”).

³⁰ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

³¹ See *New York v. United States*, 505 U.S. 144, 175-76 (1992); *Printz v. United States*, 521 U.S. 898, 905 (1997). Similar arguments are to be found in Commerce Clause jurisprudence. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (“[T]he lack of historical precedent” is a “telling indication of [a] severe constitutional problem.”).

³² *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1476 (2018)

practice. The absence of practice is generally taken solely as circumstantial evidence that many generations of political leaders believed a power to be beyond Congress's reach. As a species of circumstantial evidence, it is considered in light of other potential reasons for congressional inaction.³³ Further, 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 the Frankfurter argument in the Steel Seizure case that the mere persistence of desuetude can directly create a new species of institutional power that did not previously exist. It has never suggested, that is, that the failure to act creates power in the way that action can do.

Bracketing the Fourth Amendment, 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. 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."³⁴ In First Amendment cases too, the Court has also weighed "widespread and time-tested" state practice in evaluating the constitutionality of an election regulation.³⁵ Despite being rather theoretically underwhelming—the Court, that is, saying nothing about *why* historical practice is relevant—these isolate 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 salient use of a voter population metric for redistricting extended across every state in the nation, and downward to many substate jurisdictions. The Court, moreover, did not ask for evidence that all these jurisdictions were acting in concert, or speaking from a shared hymnal. The independent, uncoordinated quality of a state practice, that is posed no per se bar to judicial reliance on gloss.

Notwithstanding its diffusion across diverse domains of constitutional law, the idea of "gloss" nonetheless remains imprecise along several margins. First, it is not clear how the relevant institutional practice is defined.³⁶ A state practice can often be defined at different levels of generality. The more general and abstract the description, the wider the shadow cast by 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 term "gloss" or "practice" is 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

³³ 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) (cataloguing alternative causes of novelty).

³⁴ *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

³⁵ *Burson v. Freeman*, 504 U.S. 191, 203–206 (1992) (plurality opinion); see also *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970) ("unbroken practice" followed "openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside").

³⁶ Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 77 (2013).

branch sufficient to induce a practice's ratification. 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.³⁷ Acquiescence by 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 the responsive acquiescence have been defined with sufficient clarity, the question remains 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. In other instances, gloss supplies a complete and dispositive answer to a question left open by constitutional text.³⁸ Rather more subtly, in yet other cases "historical practice can affect perceptions about the clarity or ambiguity of the text."³⁹ How to characterize gloss's relationship to other sources of constitutional meaning, moreover, remains open. Probably the most that can be said now is that courts implicitly weight various sources of constitutional meaning, but do so implicitly and imprecisely. And it is not clear this is 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.⁴⁰

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 it is. Reliance on official practice to resolve a constitutional dispute might first be taken to imply that there is no evidence contemporaneous to the Constitution's enactment that resolves the disputes. Indeed, Justice Frankfurter sliced cleanly between "the words of the Constitution" and "the

³⁷ Bradley & Morrison, *supra* note 21, at 448 ("[I]t 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 executive's capacity to respond to another branches 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").

³⁸ For an instance in which gloss has played a seemingly conclusive role, see *Dames & Moore v Regan*, 453 U.S. 654, 686 (1981).

³⁹ Curtis A. Bradley and Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 41–42 (2014); accord Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 815–16 (2014) (noting that the Court never expressly says it is setting aside constitutional text, even if gloss allows it to find ambiguity).

⁴⁰ 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).

gloss which life has written upon them” as two distinct sources of law.⁴¹ 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.⁴² And when a court relies on gloss to issue a final judgment, it transmutes political actors’ inchoate, perhaps contested, perhaps even inarticulate situation sense into a hard, definite rule of constitutional law.⁴³ 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.⁴⁴

Judicial reliance on officials’ practice, therefore, is in need of justification. Yet the Justices have not tried to explain for why historical gloss can 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 record.⁴⁵) Into this gap, scholars have leapt.⁴⁶ I thus draw on both case law and secondary sources in developing a set of justifications for courts’ use of gloss. Specifically, I perceive three potential justifications for that practice in the literature—gloss as acquiescence, gloss as Burkean wisdom, and gloss as settlement.

First, “courts and other interpreters privilege acquiescence to historical practice” precisely because it reflects an “agreement” among constitutionally relevant actors.⁴⁷ One example of bare acquiescence is *Dames and Moore v. Regan*, where the majority emphasized

⁴¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

⁴² 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. See *infra* text accompanying notes 123 to 124.

⁴³ One way to think about gloss in the absence of judicial ratification is as a form of constitutional “convention.” Keith Whittington, *The Status of Unwritten Constitutional Norms in the United States*, 2013 U. ILL. L. REV. 1847, 1853 (introducing this idea into U.S. constitutional discourse). Hence, Bradley and Siegel suggest that there is an analytic distinction between “practice-based norms that have legal status (in which case they would constitute historical gloss) and those that do not (in which case they would 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 that 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). Bradley and Siegel may thus offer a degree of analytic precision above and beyond what the observed practice of the judiciary 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 the absence of “legal status.” As a result, the distinction that Bradley and Siegel draw becomes even harder to sustain.

⁴⁴ 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).

⁴⁵ See *infra* text accompanying note --.

⁴⁶ The leading piece is Bradley & Morrison, *supra* note 21, at *passim*.

⁴⁷ *Id.* at 433.

that “Congress has accepted the authority of the Executive to enter into settlement agreements.”⁴⁸ The Court did so without alluding to any functional justifications Congress might have had for its agreement. The mere fact of policy dialogue, leading to convergence, was enough.

Acquiescence from nonjudicial actors on 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, such a “departmentalist” view is common among commentators; it also forms a cornerstone of the political question doctrine.⁴⁹ 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.”⁵⁰ In the separation-of-powers context, gloss as acquiescence therefore trades upon the “negotiated” character of certain constitutional rules,⁵¹ a view that takes the original Constitution less as a manifesto of negative restraint and more as 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 might nonetheless take the view that the *practical* wisdom embodied in a series of policy decisions warrants respect. On this “functional” approach, historical gloss comprises a body of “accumulated wisdom” to which courts owe deference.⁵² This justification sounds in a “Burkean” register inasmuch as it looks to what the English politician and political thinker Edmund Burke called “the collected reason of the ages” as more likely to be correct than first-order reasoning by contemporary actors seeking to innovate against the grain of received wisdom.⁵³

Notice that gloss as Burkean wisdom 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, 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.⁵⁴ One Justice has gone so far as to

⁴⁸ *Dames & Moore v. Regan*, 453 U.S. 654, 681 (1981).

⁴⁹ *Id.* at 434 & n.89 (collecting leading departmentalist texts).

⁵⁰ *Id.* at 435.

⁵¹ For a defense of this idea of “negotiated” constitutional positions, see Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014).

⁵² Bradley & Morrison, *supra* note 21, at 435.

⁵³ Edmund Burke, *Reflections on the Revolution in France*, 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, 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).

⁵⁴ See, e.g., *Pereira v. Sessions*, 585 U.S. --, 2018 WL 3058276, at *14 (June 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

suggest that such deference violates the Constitution's separation of powers.⁵⁵ The core concern propelling these critiques, as articulated by then-Judge Gorsuch, speaks in terms of "concentrate[d] federal power" and "the abdication of the judicial duty."⁵⁶ Just this last Term, Justice Kennedy directed concern at a government actor's power to define the scope of her own discretionary authority.⁵⁷

There is a rough analogy between judicial deference to other officials' expertise-backed judgments about the Constitution (at issue in gloss), and their expertise-backed judgments about the meaning of federal statutes (at issue in the deference debate). The Justices have not noticed this analogy. But there is also a gap in the judicial treatment of these similar species 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 what the prohibition on unreasonable searches and seizures requires 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 can be justified is terms of settlement rather than wisdom. Where a practice has emerged as a stable equilibrium solution to constitutional ambiguity, the mere fact of its stability 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," that is, the bare fact of functionality suffices to trigger judicial respect.⁵⁸

Justice Frankfurter supplied an example of gloss as settlement in his *Youngstown* concurrence. There, he discussed *United States v. Midwest Oil*,⁵⁹ a dispute concerning presidential withdrawals of public land from the real-estate market.⁶⁰ The *Midwest Oil* Court, explained Frankfurter, had authorized a practice that extended "over a period of 80 years

judgment); *id.* at 1211 (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 joined Chief Justice Roberts's opinion); *id.* at 616 (Scalia, J., concurring in part and dissenting in part).

⁵⁵ *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.").

⁵⁶ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1152, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

⁵⁷ *Pereira*, 585 U.S. --, 2018 WL 3058276, at *14 (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").

⁵⁸ *Bradley & Morrison*, *supra* note 21, at 434.

⁵⁹ *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

⁶⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring) (discussing *Midwest Oil*).

and in 252 instances, and *by Presidents learned and unlearned in the law.*⁶¹ 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."⁶²

The idea of gloss as settlement can be normatively fortified by drawing upon the positive political theory literature on constitutions as focal points. 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."⁶³ 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 about government overreaching or illegality.⁶⁴ Like a proverbial red line, the focal point supplies "diffuse social and political actors with a coordinating signal that [constitutional] norms are imperiled."⁶⁵ 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."⁶⁶ The court, acting as that third party, reduces uncertainty and elicits legal compliance and predictably 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.

Gloss as settlement is subtly different from gloss as acquiescence or gloss as Burkean wisdom. It is less dependent on the fact of officials' agreement, and so less sensitive to the possibility 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 in order 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. Gloss as settlement, therefore, may be the least profound and the most instrumental of all three theoretical grounds for gloss.

⁶¹ *Id.* (emphasis added).

⁶² *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2573 (2014).

⁶³ 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).

⁶⁴ 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 (1997) (developing a formal model of focal points).

⁶⁵ Huq & Ginsburg, *supra* note 64, at 110.

⁶⁶ Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 *U. ILL. L. REV.* 1043, 1048 (2005).

II. The Varieties of Fourth Amendment Gloss

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

A complicating factor is that Fourth Amendment gloss arises at distinctive vertices of an elaborate jurisprudential terrain. To understand the role of gloss, it is useful to begin by mapping the terrain in which the use of gloss arises, and identifying what kind of Fourth Amendment questions it illuminates. Fourth Amendment analysis has three steps.⁶⁷ First, a court must determine whether a particular state action is a ‘search’ or ‘seizure.’⁶⁸ 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. The Fourth Amendment, using grammatically disjunctive terms, talks of “warrants” and then disavows “unreasonable” searches and seizures.⁶⁹ In practice, courts can impose one of a range of different procedural rules on a covered action, ranging from a requirement of a warrant based on probable cause to permission to engage in searches without any warrant requirement (or any other form of ex ante superintendence) or any evidentiary predicate. This range is illustrated in microcosm by the Court’s treatment of searches incident to arrest. For most objects, arrest triggers authority to search without any warrant or quantum of suspicion.⁷⁰ But for cellphones, it displaces neither the warrant nor the probable cause requirement.⁷¹ Finally, after a court has found that an official has violated the procedural terms of the Fourth Amendment, it must still determine whether a remedy in the form of damages or exclusion is warranted. In both damages actions and suppression motions, however, the Court has fashioned screening rules that preclude remediation absent a showing of “fault” on the part of the state official.⁷² In the damages context, this is a function of qualified immunity.⁷³ In the suppression context, it follows from the good faith exception to suppression.⁷⁴

⁶⁷ 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.”)

⁶⁸ See, e.g., *Carpenter v. United States*, 558 U.S. --, 2018 WL 3073916, at*6- *7 (June 22, 2018) (considering whether acquisition of cell-site locational data from a third-party data provider constitutes a “search”).

⁶⁹ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (noting that “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”)

⁷⁰ *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.”)

⁷¹ *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.”)

⁷² Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1547 (2018); see also Orin Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on Camreta v. Greene and Davis v. United States*, 2011 CATO SUP. CT. REV. 237, 237-39 (discussing convergence in these two lines of Fourth Amendment remedies),

⁷³ *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

⁷⁴ *United States v. Leon*, 468 U.S. 897, 924-25 (1984).

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. The Court has repeatedly framed this inquiry in terms of “reasonableness.”⁷⁵ At one point, the Justices equated reasonableness with a presumptive warrant requirement.⁷⁶ Subsequently, the Court “reasonableness” would be glossed in terms of the common law circa 1791.⁷⁷ But this ‘originalist’ analysis—which I shall explore in more detail momentarily—proved insufficient,⁷⁸ leaving room for an inquiry into gloss.⁷⁹ The final use of ‘gloss as substitute’ occurs in the third, remedial step of the Fourth Amendment inquiry, where it supplies a reason not to award 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 arguments are distinct, although both partially look at official behavior. In the 1990s, the Supreme Court began invoking with increasingly frequency the notion that “the common law when the Amendment was framed” was a reference point for reasonableness.⁸⁰ For instance, the Court has looked to common-law trespass law to determine whether the placement of a GPS device on the chassis of a vehicle was a “search.”⁸¹ Building on this precedent, Justice Thomas recently invoked the “common law” as a basis for condemning the exclusionary rule.⁸² 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,

⁷⁵ 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, Utah v. Stuart*, 547 U.S. 398, 398 (2006) (“The Fourth Amendment’s ultimate touchstone is ‘reasonableness’ . . .”).

⁷⁶ 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.”).

⁷⁷ *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.’” (citation omitted)); see also *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (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.”).

⁷⁸ See Sklansky, *supra* note 18, at 1762-70 (developing powerful criticisms of the originalist approach).

⁷⁹ 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, 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.”).

⁸⁰ *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); accord *Florida v. White*, 526 U.S. 559, 563 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

⁸¹ *United States v. Jones*, 565 U.S. 400, 404 (2012).

⁸² *Collins v. Virginia*, 138 S. Ct. 1663, 1677 (2018) (Thomas, J., dissenting) (noting that “the common law sometimes reflected the inverse of the exclusionary rule” as a ground for abandoning the latter).

these common-law cases train resolutely on the 1790s.⁸³ 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, hence did not even attempt to find analogies in eighteenth-century tort or contract law.⁸⁴ Gloss, by contrast, is far more pervasive.

With this analytic foundation in place, I can turn to the three ways in which gloss is used deployed 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 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.

Perhaps the apogee of gloss as substantive content is the Court’s 2001 decision in *Atwater v. Lago Vista*, which authorized an arrest pursuant to a misdemeanor traffic offense that did not itself allow jail time.⁸⁵ Justice Souter’s majority opinion in *Atwater* invoked a historical narrative that began with “pre-founding English common law,” including “divers Statutes” from the 1285 Statute of Winchester onwards, to “the historical record as it has unfolded since the framing.”⁸⁶ In the modern era, Justice Souter then 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.”⁸⁷ *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 two ends. First, it served to repudiate *Atwater*’s contention that warrantless misdemeanor arrests had never been allowed. Second, it was deployed to substantially undermine the notion that such arrests traduced the “reasonableness” standard of the Fourth Amendment.

⁸³ See Sklansky, *supra* note 18, 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 Sklansky develops, therefore, do not translate to the Fourth Amendment gloss context. *Id.* at 1762-70.

⁸⁴ *Carpenter v. United States*, 558 U.S. --, 2018 WL 3073916, at *7 (June 22, 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”).

⁸⁵ The relevant Texas law at issue in *Atwater* was a misdemeanor offense “punishable by a fine not less than \$25 or more than \$50.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (citing Tx. Transp. Code Ann. § 545.413(d)). The same statute, however, authorized officers to make arrests for violations. *Id.*

⁸⁶ *Id.* at 327-40.

⁸⁷ *Id.* at 343-44.

Twenty-five years earlier, the same joint appeal to a common-law history and a parallel contemporary practice characterized Justice 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."⁸⁸ As in *Atwater*, the Court in *Watson* took pains to underscore the persistence of the common-law rule "substantially intact" until the time of decision.⁸⁹ Justice White thus cited the American Law Institute's proposed (but not enacted) Model Code of Pre-Arrest Conduct as well as federal statutes as evidence of "the judgment of the Nation and Congress ... to authorize warrantless public arrests on probable cause."⁹⁰ *Watson* nicely illustrates the oddness of the gloss approach. The Court very explicitly cited the very existence of the practice challenged on constitutional grounds as evidence as the constitutionality of that practice.

The fraught and complex domain of automobile searches provides a third illustration of gloss as substantive content. Traffic stops made up 42 percent of all police-citizen interactions in 2011 (the last year for which data is available) and roughly 26.4 million persons age 16 or older indicating that their last contact with police came during a traffic stop.⁹¹ Hence, gloss context has far-reaching consequences for many individuals, since it regulates their modal interaction with police.

In the Court's very first encounter with searches of automobiles, *Carroll v. United States*, the Justices relied on gloss to define the procedural requisites of such searches to exclude the warrant requirement.⁹² Writing for the Court in *Carroll*, Chief Justice Taft began his analysis by invoking customs statutes enacted "contemporaneously with the adoption of the Fourth Amendment."⁹³ 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."⁹⁴ 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.⁹⁵ Those courts were also surely cognizant of the dramatic increase in automotive usage in the

⁸⁸ 423 U.S. 411, 418 (1976).

⁸⁹ *Id.* at 422.

⁹⁰ *Id.* at 423-24.

⁹¹ Bureau of Justice Statistics, *Traffic Stops*, available at <https://www.bjs.gov/index.cfm?tid=702&ty=tp>

⁹² 267 U.S. 132 (1925).

⁹³ *Id.* at 151.

⁹⁴ *Id.* at 152-53.

⁹⁵ See, e.g., *United States v. Bateman*, 278 F. 231, 233 (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).

1910s.⁹⁶ At least for Chief Justice Taft, Prohibition and the rise of common automobile usage did not change the analysis. In his private correspondence, 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.”⁹⁷ 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 vehicular-related searches, and the absence of legitimate reliance interests on the part of drivers.⁹⁸ The amalgam of eighteenth century common-law and post-ratification gloss hence proved a duration 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 process. In two recent cases concerning new technologies of locational tracking and cell phone data, Justice Alito has suggested that the Court should attend, and even pay heightened deference, to legislative judgments on the Fourth Amendment’s implementation.⁹⁹ There is no logical reason this analytic frame should

⁹⁶ Between 1910 and 1924, the number of registered passenger automobiles in the United States changed from five hundred thousand to fifteen million five hundred thousand. ROBERT S. LYND & HELEN MERRELL LYND, *MIDDLETOWN: A STUDY IN CONTEMPORARY AMERICAN CULTURE* 253 n.3 (1929).

⁹⁷ 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) (citation and quotation omitted). Historian Sarah Seo argues that a shift did occur in suspects’ ability 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 LAW & SOC. INQUIRY 1020, 1031 (2013).

⁹⁸ *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.”); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) (same). 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 postratification “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.

⁹⁹ *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.”); *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.”). Justice Alito cited an important article by Orin Kerr on institutional competence and technological change in the Fourth Amendment domain. *See* Orin S. Kerr, *The Fourth Amendment and New*

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 enactment regulating searches and seizures outside the context of electronic communications¹⁰⁰ and national security.¹⁰¹ The former, however, is itself a conforming response to a Supreme Court decision,¹⁰² 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, to the Court has treated the Fourth Amendment's procedural element as endogenous to—indeed, as derivative of—the current and historical practice of the police. In particular, it leaned heavily on gloss in practically significant cases, such as those involving vehicular stops and misdemeanor arrests. Indeed, based on those precedents, it seems plausible to think that in the absence of gloss as substantive content (and without nothing to serve in its stead), the ordinary law of the Fourth Amendment on the ground would look very different today.

B. The Absence of Gloss as the Absence of State Authority

In the jurisprudence of structural constitutionalism, the absence of historical precedent can serve as a ground for a judicial finding that an official practice falls outside constitutional bounds. The most stark example of this reasoning, as noted, occurs in the federalism jurisprudence of anticommandeering.¹⁰³ A similar analytic move is found in Fourth Amendment cases, where the absence of practice is taken as evidence that an action 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*.¹⁰⁴ *Boyd* arose out of a seizure of goods alleged to have been imported without payment of duties.¹⁰⁵ 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.¹⁰⁶ 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,” as well as

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.”), 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.”).

¹⁰⁰ See, e.g., 18 U.S.C. §§ 2510-22 (governing electronic surveillance during ordinary criminal investigations).

¹⁰¹ See, e.g., Foreign Intelligence Surveillance Act of 1978 § 105(a)(3)(A), 50 U.S.C. § 1805(a)(3)(A).

¹⁰² Kerr, *Constitutional Myths*, *supra* note 99, at 847-51 (describing the legislative history of the Wiretapping Act).

¹⁰³ See *supra* text accompanying notes 31 to 32; see, e.g., *New York v. United States*, 505 U.S. 144, 175-76 (1992).

¹⁰⁴ 116 U.S. 616 (1886).

¹⁰⁵ *Id.* at 617-18.

¹⁰⁶ *Id.* at 619-20.

the Fifth Amendment.¹⁰⁷ As in other ‘gloss as substantive content’ cases, the *Boyd* Court relied both on “[t]he views of the first congress,”¹⁰⁸ and also subsequent practice—or rather the lack thereof. Specifically, the *Boyd* Court observed that the statutory authority at issue in that case “was the first legislation of the kind that ever appeared on the statute book of the United States, and, as seen from its date.”¹⁰⁹ The Court further stressed the “total unlikeness” of the 1874 provisions to any earlier customs-related legislation.¹¹⁰ 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 practices has played a role in decisions concerning the interaction of new technologies with the Fourth Amendment. Hence, recall that in *Jones v. United States*, 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.¹¹¹ (*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 disanalogy between the kinds of surveillance available to the police during earlier periods of American history and GPS vehicular tracking.¹¹² Two years later, in *Riley v. California*, the Court held that a warrant was required to search a cell phone even when it had been acquired pursuant to a search incident to arrest.¹¹³ Again, the Court underscored the disjunction between the kind of searches that might have been found on a suspect’s person in the past, and the data accessible via a cell-phone. Equating the two was “like saying a ride on horseback is materially indistinguishable from a flight to the moon.”¹¹⁴ 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 a buccal swab for DNA during an arrest, and the use of that evidence to match a suspect against evidence from older ‘cold’ cases was reasonable.¹¹⁵ The Court drew an analogy between DNA identification and the practice of fingerprinting all suspects that developed in “the middle of the 20th century.”¹¹⁶ It reasoned that because

¹⁰⁷ *Id.* at 622, 630.

¹⁰⁸ *Id.* at 630.

¹⁰⁹ *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.*

¹¹⁰ *Id.* at 624.

¹¹¹ *United States v. Jones*, 565 U.S. 400 (2012).

¹¹² *Id.* at 405 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 958 (Alito, J., concurring in the judgment) (same).

¹¹³ 134 S. Ct. 2473, 2495 (2014).

¹¹⁴ *Id.* at 2488.

¹¹⁵ *Maryland v. King*, 569 U.S. 435, 447 (2013) (affirming reasonableness as touchstone of Fourth Amendment validity).

¹¹⁶ *Id.* at 459.

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.¹¹⁷ The practical continuity between different means of suspect identification, the Court reasoned, vouchsafed the legality of DNA testing despite technological change.¹¹⁸

Uniting the lines of cases described in the last two sections is the Court’s attention to durable historical practices as a touchstone for determining which police practice counts as “reasonable.” History can play both a positive and a negative role: 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 role in both.

C. Gloss as Benchmark

A further, distinct judicial use of state practice is as a benchmarking source of ‘best practices.’ Examining variation in the policing and prosecutorial practices of different jurisdictions, the Court can draw an inference 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 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” provides a measure of “the regulatory standard.”¹¹⁹

Perhaps the most practically important use of gloss as benchmark is a case about remedies rather than the meaning of “reasonableness.” It is the 1967 landmark decision in *Mapp v. Ohio*, which extended the exclusionary rule to the states.¹²⁰ An exclusionary rule remedy for Fourth Amendment violations had obtained in federal court since 1914.¹²¹ When the Court incorporated the Fourth Amendment against the states in 1949, however, it declined to extend the exclusionary rule to state criminal trials.¹²² *Mapp* hence did not need to explain why the exclusionary rule was warranted at all. Rather, the Court faced the problem

¹¹⁷ *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.

¹¹⁸ 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.

¹¹⁹ Jonathan Masur & Eric Posner, *Norming in Administrative Law*, -- *DUKE L. J.* -- (forthcoming 2019) (manuscript at 2).

¹²⁰ 367 U.S. 643 (1961).

¹²¹ *Weeks v. United States*, 232 U.S. 383 (1914).

¹²² *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

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 rendered ineffective" by the imposition of the exclusionary rule in federal prosecutions.¹²³ Moreover, the Court pointed to its abrogation of the 'silver platter' doctrine,¹²⁴ which had allowed federal officials to share unlawfully secured information with state counterparts for introduction into a state tribunal.¹²⁴ 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—it already did coexist with that remedy without public safety being compromised.

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."¹²⁵ *Garner* framed the question whether deadly force could be employed in terms of a "balancing" of the individual suspect's interests at issue on one side, as against the state's interests in public order and safety on the other.¹²⁶ 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."¹²⁷

Garner is notable for the level of detail with which this inquiry was conducted. 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.¹²⁸ It further cited an animus brief joined by 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.¹²⁹ This corpus of evidence 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 nondangerous felons, there is a substantial basis for doubting that

¹²³ *Mapp*, 367 U.S. at 660 (footnote and citation omitted).

¹²⁴ *Id.* at 652.

¹²⁵ *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

¹²⁶ *Id.* at 7-8 (explaining that the reasonableness of a policing measure is determined 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").

¹²⁷ *Id.* at 10.

¹²⁸ *Id.* at 18.

¹²⁹ *Id.*; see also Amicus Brief of Police Foundation et al., in *Tennessee v. Garner*, 471 U.S. 1, 3, 1984 Westlaw 566025 (1985).

the use of such force is an essential attribute of the arrest power in all felony cases.”¹³⁰ In effect, the Court surveyed the field of policing practice and determined that Tennessee was an outlier whose practices warranted no respect.¹³¹

A third, more recent, example of gloss as benchmark can be found in the recent decision excluding cell-phones from the general scope of warrantless searches incident to arrests.¹³² 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.¹³³ 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.¹³⁴ The *Riley* Court could have made this point without benchmarking. Yet the Court felt compelled to go beyond its bare intuition to make a comparative argument—which itself is a telling sign of the importance of gloss arguments in this 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 were permitted on a showing of reasonable articulable suspicion—turned largely on the pragmatics of street stops.¹³⁵ Chief Justice 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.”¹³⁶ 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, but still requiring the lower reasonable articulable suspicion standard—was anticipated by an amicus brief from the National District Attorney’s Association (“NDAA”).¹³⁷ The NDAA recommended the Court follow California’s recently adopted rule, which turned on whether “a reasonable man” would believe, based on the “circumstances,” that a stop was “necessary to proper discharge” of the officer’s duties.¹³⁸ 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

¹³⁰ *Garner*, 471 U.S. at 10-11.

¹³¹ *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).

¹³² 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.”).

¹³³ *Riley v. California*, 134 S. Ct. 2473, 2487 (2014).

¹³⁴ *Id.*

¹³⁵ 392 U.S. 1 (1968).

¹³⁶ *Id.* at 20.

¹³⁷ RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S*, at 205 (2016).

¹³⁸ *Id.* (citation omitted).

compelling need for police power to make stops without suspicion by reference to California's practice.¹³⁹

As I have described it, gloss as benchmarking is a varied phenomenon. On the one hand, *Mapp* and *Garner* invalidate practices in what Justin Driver calls “holdout” jurisdictions.¹⁴⁰ The states chastised by those decisions were laggards in relation to an otherwise uniform time trend of increasing professionalization and sophistication.¹⁴¹ 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 more akin to a search for what in environmental law is called a “best available technology.”¹⁴² In short, gloss as benchmarking can have both a diachronic (development) and a synchronic form, depending on the set of comparators used.

D. Gloss as Substitute

Finally, gloss can 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 final stage of Fourth Amendment 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.”¹⁴³ 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 fashioned a “good-faith exception” to the exclusionary rule for “searches conducted pursuant to warrants.”¹⁴⁴ *Leon*'s exception to suppression 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

¹³⁹ For a similar argument from practicality from observed policing practices, see, e.g., Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 873 (2014) (discussing the practicality of warnings during automobile stops by drawing on training manuals and state practice).

¹⁴⁰ 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.”).

¹⁴¹ *Id.* at 953 (describing the elimination of holdouts as “extinguishing practices that time has left behind”).

¹⁴² 33 U.S.C. § 1311(b)(2)(A)(i).

¹⁴³ 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.”).

¹⁴⁴ 468 U.S. 897, 920-21 (1984).

particular circumstances of this case, that there was probable cause.”¹⁴⁵ But *Leon* has been extended piecemeal to cover a far larger fraction of unlawful searches.¹⁴⁶ And here 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 the “knock and announce” rule for home searches.¹⁴⁷ Explaining this remedial rationing, Justice Scalia invoked “the increasing professionalism of police forces” and pointed to a “new emphasis on internal police discipline” as a result of “wide-ranging reforms in the education, training, and supervision of police officers.”¹⁴⁸ 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.”¹⁴⁹ 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 of an empirical trend of increasing professionalization.¹⁵⁰ It further assumed—without either anecdotal or quantitative evidence—that increasing professionalization necessarily translated into lower rates of Fourth Amendment.

The second extension of *Leon* to rely on gloss as substitute is subtler. 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.¹⁵¹ Chief Justice Robert’s majority opinion did not rely on gloss to reach the result that exclusion was “not worth the cost.”¹⁵² But the conclusion that negligent errors did not warrant deterrence 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.”¹⁵³ As Justice Ginsburg observed in her dissent, the best explanation for the Court’s odd assumption that negligence cannot be deterred though 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.”¹⁵⁴ The practice of professionalism, in short, was sub silencio treated as a “substitute good for the exclusionary rule.”¹⁵⁵ Hence, although *Herring* is not a case in which the Court leaned explicitly and heavily on gloss as substitute, the premise of

¹⁴⁵ *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1246 (2012).

¹⁴⁶ See Huq & Lakier, *supra* note 72, at 1550-51 (describing *Leon*’s expansion).

¹⁴⁷ *Hudson v. Michigan*, 547 U.S. 586 (2006).

¹⁴⁸ *Id.* at 599 (quoting S. WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990*, p. 51 (1993)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Herring v. United States*, 555 U.S. 135 (2009).

¹⁵² *Id.* at 144, n.4.

¹⁵³ Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 683 (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.”).

¹⁵⁴ *Id.* at 156 n.6 (Ginsburg, J., dissenting).

¹⁵⁵ Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 421 (2013).

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 inform Fourth Amendment analysis. 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 courts¹⁵⁶—a move that would, in effect, eliminate the Fourth Amendment as a practical consideration for most policing.¹⁵⁷ If that were to happen, gloss would no 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 remedies jurisprudence.

E. 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.¹⁵⁸ 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.¹⁵⁹ 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.

Still, 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, is a recipe for a vapid and ultimately meaningless body of doctrine.

¹⁵⁶ *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018) (Thomas, J., concurring).

¹⁵⁷ See *supra* text accompanying note 143.

¹⁵⁸ See *supra* sources cited in note 17.

¹⁵⁹ 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).

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 valance. While gloss as content and gloss as 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 constraint state power in *Garner*, but in *Terry* enabled more invasive interventions into urban life.¹⁶⁰ As a result of this shifting valance, Justices of different ideological colors can invoke gloss to their own ends. In contrast, scholars who wish to 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 outsize 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—gloss as acquiescence, gloss as Burkean wisdom, and gloss as settlement—provide normative ballast here. Working through each of the three possible grounds of justification 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 reasons to *resist* many of the specific 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 Amendment itself.

I examine in turn each of the three standard 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 each justificatory category. This means casting a wide net to consider all possible grounds for relying upon official practice in the Fourth Amendment context.

¹⁶⁰ Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk As A Modality of Urban Policing*, 101 MINN. L. REV. 2397 (2017) (documenting costs of stop, question, and frisk programs, and suggesting that these substantially outweigh the program's benefits).

A. Fourth Amendment Gloss and Institutional Acquiescence

The acquiescence model of gloss assumes 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 the Court 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 2008.¹⁶¹ Those agencies, moreover, vary greatly in size and capacity. About half (49%) of all agencies employed fewer than 10 full-time officers. Nearly two-thirds (64%) of sworn personnel worked for agencies that employed 100 or more officers.¹⁶² As a result, police practice is quite different from the 50 state practice recognized in *Evenwel v. Abbott*¹⁶³: It is too diffuse and heterogeneity to support facile generalizations about trends or consensus. Hence, the implicit dialogic process of acquiescence at work in the separation of powers context simply has no analog in the Fourth Amendment context. Further, there is no colorable ‘departmentalist’ argument that the diffuse aggregate of law enforcement bodies covered by the Fourth Amendment are engaged in collective or parallel constitutional judgments.¹⁶⁴ The gloss as acquiescence template, therefore, is ill fitted to the Fourth Amendment, whether gloss is being used as substantive content, benchmark, or substitute.

The heterogeneity of policing raises difficult questions in particular about way 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. Michigan*¹⁶⁵ or *Herring v. United States*,¹⁶⁶ the Court has predicated that exception’s expansion upon an empirical generalization about increasingly levels of professionalism within police departments. But even within a given jurisdiction, it has long been known that the policing service delivered to different neighborhoods can vary dramatically (often along racial or ethnic lines).¹⁶⁷ Given *intra*jurisdictional disparities in service quality, and given the likely exacerbation of such

¹⁶¹ Brian A. Reaves, *Census of State and Local Law Enforcement Agencies 1* (2016), available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2216>.

¹⁶² *Id.*

¹⁶³ *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); see *supra* text accompanying note 34.

¹⁶⁴ Can widely used policing manuals be used as evidence of acquiesced-to practice in the policing context? *Cf.* Stoughton, *supra* note 139, at 874-5 & n.185; see also Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1530-37 (2008) (discussing police training manuals’ instructions on interrogations, and suggesting that those instructions influence practice on the ground).

¹⁶⁵ 547 U.S. 586 (2006).

¹⁶⁶ 555 U.S. 135 (2009).

¹⁶⁷ One of the first studies to show this was Kenneth R. Mladenka and Kim Quail Hill, *The Distribution of Urban Police Services*, 40 J. POL. 112, 122-24 (1978).

disparities across departments of different sizes, different sociopolitical environments, and different criminological conditions, generalizations about policing are difficult. In particular, *Herring's* claim that “wide-ranging reforms in the education, training, and supervision of police officers” had across the board resulted in “the increasing professionalism of police forces” is hard to substantiate.¹⁶⁸ As I develop further below, the available empirical evidence suggests we should be very skeptical of that claim.¹⁶⁹

Worse, the Court’s good faith jurisprudence not only lacks a clear theoretical account of gloss, it also has no stable empirical methodology to evaluate how to establish the veracity of a general descriptive claim about police in general. 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 they are concentrated in impoverished or racially segregated communities (as is indeed likely the case.)¹⁷⁰ Instead, cases such as *Hudson* and *Herring* manifest at best an indifference to the plight of communities that are still burdened by suboptimal policing.

Despite these limits to the application of gloss as acquiescence here, there is a dialogic process of interbranch deliberation at work in Fourth Amendment law. But it is not one that would support 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 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.¹⁷¹ 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 different (all else being equal) for police to conduct searches and make seizures. For example, criminal conspiracies, even if they are in some respects costly to investigate and prosecute,¹⁷² 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

¹⁶⁸ *Hudson v. Michigan*, 547 U.S. 586 (2006).

¹⁶⁹ See *infra* text accompanying notes 212 to 242.

¹⁷⁰ 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 URBAN 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.

¹⁷¹ William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 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).

¹⁷² Cf. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2028 (2008) [hereinafter “Stuntz, *Unequal Justice*” (“[Conspiracy] crimes are more costly to investigate and prosecute than one-on-one criminal transactions.”)].

constitutional protections. Hinging a judgment of what is “reasonable” on their acquiescence, therefore, is in effect to give 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 necessarily wise fashion. 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.¹⁷³ Crime rates have not followed the same steady upward path—quite the contrary.¹⁷⁴ Acquiescence by legislators to increasing police power is thus not a rational response to changes in the crime rate. It rather flows from a bidding war between political parties striving to compute for a punitive public’s affections.¹⁷⁵ It seems no coincidence that public attitudes to crime, and in particular the public’s fear of crime, has not declined—again, quite the contrary.¹⁷⁶ It seems likely that national politicians’ reckless rhetorical choices have played a large role in this development.¹⁷⁷ Hence, it seems most plausible to categorize legislative behavior as “pathological,” to use a term first deployed by Bill Stuntz.¹⁷⁸

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 extend Orin Kerr’s equilibrium-adjustment theory to encompass legislative changes. Kerr argues that courts should strive to maintain an equilibrium between the scope of police power and the domain of individual privacy. While Kerr applies his equilibrium-adjustment model to “changing technology and social practice,” by 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,”¹⁷⁹ there is no reason to cabin the analysis in this way. If courts respond to exogenous shocks such as technology and diffuse social practice, there is no reason they should not also compensate for legislative changes to the scope of criminal law. On this view, the appropriate judicial response to legislative changes

¹⁷³ Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1198 (2015).

¹⁷⁴ Fed. Bureau Investigation: Uniform Crime Reporting, Crime in the United States (2014), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1> (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).

¹⁷⁵ For a summary of evidence of the public’s punitive preferences, and the bidding war dynamic, see Huq & Lakier, *supra* note 72, at 1584–85.

¹⁷⁶ 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>.

¹⁷⁷ 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”).

¹⁷⁸ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513-18 (2001) [hereinafter “Stuntz, *Pathological Politics*”] (offering a now classic political economy account of the inflationary dynamics of criminal legislation).

¹⁷⁹ Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011) [hereinafter “Kerr, *Equilibrium Adjustment*”].

in crime policy is not so much acquiescence. Rather, courts should offer an equal and opposition resistance to the pressure imposed on the criminal justice system by the one-way legislative hydraulic. This would mean a *countervailing Fourth Amendment ratchet* that responded 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 federal judiciary closely track contemporary political preferences,¹⁸⁰ it seems fair to doubt that a contrapuntal constitutional law is even plausible. Indeed, even as its most seemingly countermajoritarian, the Supreme Court itself stuck closely to broadly shared views of appropriate policing.¹⁸¹ 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. Fourth Amendment Gloss as Burkean Wisdom

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 in respect to 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—and 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 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. I use here a relatively undemanding and uncontroversial one: An official practice such as warrantless misdemeanor arrests or warrantless vehicular searches can be plausibly ranked as reasonable, I posit, only if its net social benefits are positive. A practice that externalized greater costs than the benefits it generated could not plausibly be ranked as reasonable: A decision to forego that practice

¹⁸⁰ On the weakness of judicial independence from contemporary political control, see Aziz Z. Huq, *Democratic Erosion and the Courts: Comparative Perspectives*, 93 NYU L. REV. ONLINE 21, 28 (2018).

¹⁸¹ 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).

would improve social welfare—which is what a constitutional rule would entail.¹⁸² To demand that policing practices advance social welfare (however defined) is not to demand that they achieve the maximum amount of crime suppression a given expenditure, or that they be the best “feasible” approach to the problem of maintaining social order.¹⁸³ It is more modestly to ask that they help more than they hurt. It is thus an appropriate 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 gloss as Burkean wisdom. I spell each out in brief first, and then develop them in detail below. First, the political economy of policing—as shaped in particular by influential actors such as police unions, insurers, and municipal governments—is not consistent with the production and sustaining of behavior that on net produces greater benefits than costs. Second, the descriptive premise of police expertise—which is a distinct concept 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 any historical durability to a police practice that attracts judicial deference, the argument for gloss as Burkean wisdom fails to account for the shifting assumptions and justifications that animate the practice of police. 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 similarity. Together, these three points substantially undermine the force of judicial reliance on official practice on Burkean wisdom grounds.

1. *Gloss and the Political Economy of Policing*

An unstated assumption of Burkean accounts of Fourth Amendment gloss is that the political economy of policing—that is, the network of social, political, and institutional vectors that generate policing practice—will not predictably embrace practices that impose costs larger than the benefits they create. My aim in this section is to cast doubt on that assumption by focusing attention on the key institutional actors whose preference determine the shape of policing. The observed preferences and incentives of these actors will not conduce, I argue, to cost-justified policing measures, but rather to measures that predictably externalize costs without commensurate gains in public safety.

¹⁸² I assume a capacious account of costs and benefits that includes the non-monetized 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) (privacy as touchstone of Fourth Amendment analysis), *with id.* at 369-72 (Black, J., dissenting) (focusing on “physical” or “actual intrusion” and dealt 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.”)

¹⁸³ 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).

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,¹⁸⁴ and also to the criminal justice system as a whole.¹⁸⁵ 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.”¹⁸⁶

The practice of policing responds to pressures from police unions (who represent the rank and file officers themselves); the management and political leadership of a municipality (or whatever other jurisdictional unit police are organized); and (outside of large cities at least) insurers.¹⁸⁷ 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.¹⁸⁸ Rejuvenated police unions emerged in the 1970s, mobilizing around demands for contractual protections for officers charged with disciplinary offenses.¹⁸⁹ 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.¹⁹⁰ The net effect of these bespoke procedural protections is to reduce the rate

¹⁸⁴ Huq, *Disparate Consequences*, *supra* note 160, at 2413-20.

¹⁸⁵ 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.”).

¹⁸⁶ *Id.* at 189.

¹⁸⁷ 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, 1209 (2006).

¹⁸⁸ 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”).

¹⁸⁹ Samuel Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing*, 9 POLICE PRAC. & RES. 95, 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 five states now prohibit such bargaining).

¹⁹⁰ Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1222 (2017); Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI.

at which allegations of unconstitutional conduct are identified, to increase the cost of investigating such allegations, and in net to reduce both the extent to which police management are aware of illegalities and the extent to which they are capable of responding to them.¹⁹¹ Beyond these systemic effects, there is some evidence that unionization is associated with a stricter, more coercive form of policing.¹⁹² In short, the available quantitative and qualitative studies of police unionization suggest that this powerful 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.

Can these forces be controlled by either expertise or democratic politics, though? 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.¹⁹³ Empirical studies suggest that management is distrusted by rank-and-file officers, especially when it comes to disciplinary factors.¹⁹⁴ The dispersed and largely unobservable character of street policing also means that management often lack information about street-level behavior, where the majority of costly police action occurs. As 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.”¹⁹⁵ 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.¹⁹⁶ This is a deeply perverse quality to an arrest metric for policing success. Arrests for minor

LEGAL F. 213, 226 (2016); 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. 18, 2435 (2005).

¹⁹¹ Huq & McAdams, *supra* note 190, 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.”); Harmon, *supra* note 131, at 799 (“Collective bargaining rights deter department-wide changes intended to prevent constitutional violations”).

¹⁹² J. M. Magenau & R.G. Hunt, *Police Unions and the Police Role*, 49 HUMAN REL. 1315, 1330-31 (1996).

¹⁹³ On the acute separation of rank-and-file from management within police departments, see ELIZABETH REUSS-IANNI, *TWO CULTURES OF POLICING: STREET COPS AND MANAGEMENT COPS* (1983); *see also* Akiva M. Liberman et al., *Routine Occupational Stress and Psychological Distress in Police*, 25 POLICING 421, 423, 432 (2002) (documenting lack of rapport and trust). On street policing culture, *see* JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* 33-34 (1968) (finding police had “a preoccupation with maintaining self-respect, proving one’s masculinity, ‘not taking any crap,’ and not being ‘taken in.’”).

¹⁹⁴ *See* MICHAEL K. BROWN, *WORKING THE STREET* 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 view themselves as a “conflict group,” working in isolation, likely to come 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).

¹⁹⁵ Wesley G. Skogan, *Why Reforms Fail*, 18 POLICING & SOC’Y 23, 24 (2008).

¹⁹⁶ Michael Tonry, *From Policing to Parole: Reconfiguring American Criminal Justice*, 46 CRIME & J. 1, 12 (2017); *accord* Stuntz, *Pathological Politics*, *supra* note 178, at 538 (“[P]olice are more likely to maximize arrests.”).

infractions in particular—quite apart from the costs they impose on suspects—may be unjustified solely in terms of “lost crime prevention opportunities.”¹⁹⁷ Of particular relevance here, there is good reason to believe that the kind of misdemeanor warrant arrests embraced on the basis of gloss in *Atwater* have no deterrence effect on serious crime.¹⁹⁸

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.¹⁹⁹ Consistent with this diagnosis of limited managerial control because of the distance between managers and their subordinates,²⁰⁰ larger police departments experience higher rates of misconduct than small ones.²⁰¹ Larger departments, all things being equal, are likely to have greater agency slack, so this is not surprising. 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 to the sway of police unions, also constrain the effect of elected officials’ preferences on police behavior. Elected officials, after all, work through management to influence the contours of street policing. Political control can be exercised at either a state or a local level. Today, state laws “cover at best only a small portion of police management issues and day-in day-out police activities.”²⁰² In contrast, the historical record of local political control of police departments finds that the latter were functionally “adjunct[s] of the [political] machine,” and as such powered by patronage and graft.²⁰³ Celebrations of local, democratic influence of policing fail to grapple with this recalcitrant record, which undercuts optimism about the valence of democratic policing.²⁰⁴ Neither state nor local control of policing, therefore, appears to be robustly welfare enhancing.

¹⁹⁷ Cynthia Lum & Daniel S. Nagin, *Reinventing American Policing*, 46 CRIME & J. 319, 344-45 (2017).

¹⁹⁸ *Id.* at 353.

¹⁹⁹ Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 501 (2004).

²⁰⁰ Ulrika Haake, Oscar Rantatalo, and Ola Lindberg, *Police leaders make poor change agents: leadership practice in the face of a major organisational reform*, 27 POLICING & SOC. 764, 764 (2017) (finding, based on 28 case studies that “the idea that police leaders will be able to function as agents of change promoting organisational reform is highly uncertain”).

²⁰¹ David Eitle, Stuart J. D’Alessio and Lisa Stolzenberg, *The Effect of Organizational and Environmental Factors on Police Misconduct*, 17 POLICE Q 103, 113 (2014).

²⁰² Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 620 (2016).

²⁰³ ROBERT M. FOGELSON, *BIG-CITY POLICE* 13-19 (1977).

²⁰⁴ For a more optimistic picture of “local justice” that does not carefully attention to countervailing evidence, see Stuntz, *Unequal Justice*, *supra* note 172, at 1982-97. Stuntz’s account mentions the effect of machine politics on urban policing, *id.* at 1995-96, but rather bizarrely spins these as positive effects. Rather, the main body of historical evidence “shows in convincing depth and detail that informal administration, localized politics, and freedom from professional norms produced dysfunctional systems” in stark contrast to Stuntz’s partial picture. Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1050 (2013).

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 these 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 have found socioeconomic class and proximity to the border—and *not crime*—best predict the fiscal allocation of policing resources.²⁰⁵ 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.”²⁰⁶

This does not mean that minority communities obtain more or better protection than majority ones. Indeed, the rate of civil rights complaints against police is also a function of the minority (black and Hispanic) share of the population.²⁰⁷ Although not dispositive, these patterns suggest that political control of policing, even if possible to extend beyond relatively coarse metrics such as funding, would not necessarily result the choice of 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.²⁰⁸

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.”²⁰⁹ But insurers 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

²⁰⁵ Malcolm D. Holmes et al., *Minority threat, crime control, and police resource allocation in the Southwestern United States*, 54 CRIME & DELINQUENCY 128 (2008).

²⁰⁶ *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)

²⁰⁷ Malcolm D. Holmes, *Minority threat and police brutality: Determinants of civil rights criminal complaints in US 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 (July 2016), http://scholar.harvard.edu/files/fryer/files/main-july_2016.pdf (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)..

²⁰⁸ 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 th[eir] 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). Foreman’s larger theme is the way in which even well-meaning minority leaders can be constrained by a variety of exogenous legal and institutional forces, and thereby forced into deeply harmful policing choices.

²⁰⁹ John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1543-44 (2017).

broken bones or visible marks, or unlawful searches that generate no lasting damage—will 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.²¹⁰ 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.²¹¹

In short, the assumption that police will elect cost-justified tactics is in tension with the preferences of line police as manifested by their union representatives in CBAs, the weakness of managerial reform power, and the limited incentives of political actors to ameliorate socially unjustified patterns of policing. These forces will tend to externalize social cost in particular to racial and ethnic minorities, rather than pressing toward cost-justified policing. Insurers' intervention is unlikely to ameliorate the police tendency to externalize social cost. As a result, the official practice covered by the Fourth Amendment will often not 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. That is, 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 based on Burkean

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 central 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 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.²¹² She explains this in terms of the "significant counter-incentives" related to liability and negative publicity that lead police management to "underinvest in research" that could improve the quality of policing.²¹³ Even records generated internally,

²¹⁰ Huq & Lakier, *supra* note 72, at 1548-56 (documenting barriers to suit).

²¹¹ 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 209, at 1596.

²¹² Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQUETTE L. REV. 1119, 1129 (2013) [hereinafter "Harmon, *Why Do We (Still) Lack Data?*"]. 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).

²¹³ Harmon, *Why Do We (Still) Lack Data*, *supra* note 212, at 1131.

such as disciplinary documentation, are often hedged with legal constraints, such as CBA-mandated expungement regimes, that limit their utility.²¹⁴ 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.²¹⁵

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,²¹⁶ it would in theory be simple for that 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 cost data, municipalities often fall short. Extensive research by 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 track of officers named as defendants, evidence presented against them, or even payouts.²¹⁷ Hence, 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 gloss as Burkean wisdom is based, therefore, falls woefully short of reality.

The fragility of police claims to epistemic advantage is consistent with recent historical work exploring of 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.²¹⁸ As Anna 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 evidence questioning the value of police expertise.”²¹⁹ She describes the emergence of a judicial understanding of police work “as a

²¹⁴ Rushin, *supra* note 190, at 1222.

²¹⁵ 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).

²¹⁶ Study after study finds pervasive indemnification of individual officers. See, e.g., Joanna C. Schwartz, *Police Indemnification*, 89 NYU L. REV. 885, 890 (2014); Lant B. Davis et al., *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810–12 (1979) (reporting government defense and indemnification of police officers in Connecticut); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987).

²¹⁷ Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1037–40 (2010). Schwartz’s subsequent research shows that in a small number of jurisdictions, including Los Angeles, Seattle, Portland, Denver, and Chicago, such information used 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.

²¹⁸ Lvovsky, *supra* note 20, at 1999–2000.

²¹⁹ *Id.* at 2025.

task capable of producing ratified and systematic ‘expert’ knowledge as a result of judges exposure to police as putative experts and reformers across a range of contexts.”²²⁰ On Lvovsky’s accounts, the presumption of police expertise has never been based on a demonstration of *actual* expertise.

Gloss as Burkean wisdom, in sort, can no more be justified on the basis that police are more knowledgeable than on the basis that they are motivated by socially desirable incentives and organizational forces.

3. *The Evolving Modalities of Policing*

A final problem impedes the argument for gloss as Burkean wisdom. The standard Burkean account hinges on the idea that “the past has an authority of its own which, however circumscribed, is inherent and direct rather than derivative.”²²¹ 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 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.”²²² 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.²²³ The nature of the problems that policing is supposed to solve, though, has changed dramatically over time.²²⁴ As a result, the substance of police has an evolving, mutative quality. This is evident from even a rapid summary of the development of policing since it’s 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.²²⁵ In southern cities, police were primarily tasked with maintaining the peace of slavery.²²⁶ Through the end of Jim Crow in the 1960s, southern police “represented the South’s repressive civil order and the ideology of white supremacy overall.”²²⁷ In northern cities, through much of the nineteenth century,

²²⁰ *Id.* at 2053-67; *id.* at 1067-68 (describing the “foundations of judicial deference “ to police as “numerous structural presumptions and aggregate biases refracted through the judicial process”).

²²¹ Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047 (1990).

²²² *Id.* at 451. I have not corrected the gendered word usage in Kronman, but it should be understood that I do not endorse its sexist assumption.

²²³ D.H. Bayley, *Police function, structure, and control in Western Europe and North America: Comparative and Historical Studies*, 1 Crime & Just. 109, 113 (1979).

²²⁴ 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 POLICE (Jennifer Brown, ed. 2014) (examining current understandings of policing’s function).

²²⁵ SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 51-52 (2d ed. 1998).

²²⁶ Philip L. Reichel, *Southern slave patrols as a transitional police type*, 7 AM. J. POLICE 51, 51-53 (1988).

²²⁷ Sandra Bass, *Policing space, policing race: Social control imperatives and police discretionary decisions*, 28 SOC. JUST. 156, 161 (2001); WADHAM & ALLISON, *supra* note 224, at 41 (noting that after the Civil war, “modern principles of

there were no criteria for becoming a police officer—only “having the right political connections”—and no training for the job.²²⁸ Urban police undertook a vast hodgepodge range of activities “unexpected by their original creators,” including returning lost children, shooting stray dogs, enforcing sanitation laws, inspecting boilers, and conducting censuses.²²⁹ Their roles were also shaped by national events. We have already seen hints of how Prohibition influenced Fourth Amendment in cases such as *Carroll*.²³⁰ Policing more generally changed character both with Prohibition, and also with the early twentieth century “rise of a national security apparatus to ward off external threats and the churn of disorder from anarchists and criminals.”²³¹

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.”²³² Part of the professionalism movement was a resistance to having police undertake tasks other than crime control.²³³ Advocates of professionalism argued for a more centralized, quasi-military structures. As a result, the twentieth century saw changes to police typical command structures, to their core routine tasks (e.g., the decline of foot patrols in favor of motorized patrols; specialization by unit within larger police forces); to their information systems, and to their demographic composition.²³⁴ This is not to say 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.²³⁵ The “primarily reactive” character of professionalized policing yielded to an embrace of community policing therefore in the 1960s.²³⁶ Today, policing is changing once again as new big-data technologies alter its deployment, and even its aims.²³⁷ It seems plausible that in a decade or two, what it means to be police will once again be fundamentally quite different.

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”).

²²⁸ WALKER, *supra* note 225, at 54-55.

²²⁹ Eric H. Monkonnen, *History of Urban Policing*, 15 CRIME & JUST. 547, 554 (1992)

²³⁰ WALKER, *supra* note 225, at 158-62; *see also supra* text accompanying notes 92 to 95 (discussing origins of the automobile search exception).

²³¹ SARAH IGO, *THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA* 48 (2018).

²³² WALKER, *supra* note 225, at 170; FOGELSON, *supra* note 203, at 167-92; WADHAM & ALLISON, *supra* note 224, 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 “naïve,” *see* BITTNER, *supra* note 194, at 361-63.

²³³ William H. Parker, *The Police Challenge in Our Great Cities*, 291 ANNALS AM. ACAD. POL. & SOC. SCI. 5, 7-8 (1954).

²³⁴ Albert J. Reiss, *Police Organization in the Twentieth Century*, 15 CRIME & JUST. 51, 59-60 (1992).

²³⁵ WALKER, *supra* note 225, at 173.

²³⁶ James J. Willis, *A Recent History of Police*, in *THE OXFORD HANDBOOK OF POLICE AND POLICING* (Michael D. Reisig & Robert J. Kane, eds. 2014); *see also* LINDA S. MILLER & KAREN M. HESS, *COMMUNITY POLICING: PARTNERSHIPS FOR PROBLEM SOLVING* 20 (4th ed. 2005) (finding that by 2000, some 87 percent of forces in the United States had adopted some kind of community policing).

²³⁷ Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. – (forthcoming 2019) (summarizing trends). For a survey of non-algorithmic, 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,²³⁸ much as they have taken divergent forms over time.²³⁹ The fiscal resources available for the policing of similar populations in different parts of the United States can also differ by an order or magnitude.²⁴⁰ 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 against its population of around 21,000.²⁴¹ Ferguson is not unique in its reliance on fines and fees generated by policing activity.²⁴² But because not all jurisdictions follow Ferguson's example, it is erroneous to think about policing as a monolithic species of behavior. Rather, it is to be expected that policing strategies will vary greatly between diffident jurisdictions depending on their policing histories, racial composition.

4. *Implications for Fourth Amendment Gloss*

A consideration of the political economic, information-gathering practices, and both historical and also current heterogeneity of policing undermines the case for Fourth Amendment gloss. Indeed, it suggests that all three ways in which gloss has been deployed—as substance, as benchmark, and as substitute—should be abandoned. 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 economy, informational, and historical perspectives on policing practices are inconsistent with the conclusion that policing will necessarily involve cost-justified measures. Stable and commonly used forms of policing, such as the warrantless misdemeanor stop or the warrantless vehicular search, cannot be reliably evaluated as cost-justified merely because they have a long historical pedigree and 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.²⁴³

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 practices²⁴⁴ is not

²³⁸ PETER K. MANNING, *POLICING CONTINGENCIES* 43-45 (2003) (documenting variations).

²³⁹ WADHAM & ALLISON, *supra* note 224, at 15 (“A modern police department and a nineteenth century department may not seem comparable at first glance.”).

²⁴⁰ David Thacher, *The Distribution of Police Protection*, 27 J. QUANTITATIVE CRIMINOLOGY 275, 291 (2010) (noting disparities, and measuring the extent to which they are dampened by federal subsidies).

²⁴¹ *Policing and Profit*, 128 HARV. L. REV. 1723, 1724 (2015); *see also* DEPARTMENT OF JUSTICE, *THE FERGUSON REPORT* 17-25 (2015) (“City officials have consistently set maximizing revenue as the priority for Ferguson’s law enforcement activity.”).

²⁴² 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”).

²⁴³ Many of these critiques apply also to equilibrium accounts of the Fourth Amendment, *see* Kerr, *Equilibrium Adjustment*, *supra* note 179, at 480.

²⁴⁴ *See supra* text accompanying notes 161 to 162.

alone enough to preclude an inference from gloss, as *Evenwel v. Abbott* suggested.²⁴⁵ And at first blush, it would seem to invite the benchmarking inquiry. But as 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.²⁴⁶ In both the regulatory and the policing context, it may well be that an overwhelming majority of regulated entities are engaged in actions that are cost-unjustified. In the policing context, indeed, this seems quite likely. If almost all police departments are dominated by unions, use performance metrics that are misleading proxies for cost-justified policies (such as the volume of arrests), and 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 that assumption in cases such as *Mapp v. Ohio*²⁴⁷ and *Tennessee v. Garner*,²⁴⁸ 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 genealogically rooted in established practices, such as fingerprinting.²⁴⁹ The Court's gloss analogy omits important details that might cast doubt on the strength of the normative inference that can be drawn from historical identification practices. Hence, it does 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.²⁵⁰ Nor does it mention the resistance to fingerprinting as a new intrusion on privacy. In 1920, a Cleveland, OH, ordinance mandating fingerprinting, for example, generated a cab drivers' strike, with hundreds manning "antifingerprint picket lines."²⁵¹ The *King* Court's analysis instead assumed that fingerprinting is now and always has been a neutral, technocratic measure with no racial overtones and no popular resistance. But with more history in mind, DNA sampling may be understood in different terms. Like fingerprinting, its initial use may have racially disparate effects.²⁵² The earlier discomfort with sharing fingerprints may be

²⁴⁵ *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); see *supra* text accompanying note 34.

²⁴⁶ Masur & Posner, *supra* note 119, at 30-33.

²⁴⁷ 367 U.S. 643 (1961).

²⁴⁸ 471 U.S. 1 (1985)

²⁴⁹ *Maryland v. King*, 569 U.S. 435, 459 (2013) (affirming touchstone of reasonableness); see *supra* text accompanying notes 115 to 116.

²⁵⁰ SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 3, 119-20 (2001).

²⁵¹ CHRISTIAN PARENTI, THE SOFT CAGE: SURVEILLANCE IN AMERICA: FROM SLAVERY TO THE WAR ON TERROR 43-60 (2004).

²⁵² Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 189 (2013) (developing the concern about how DNA testing of arrestees will interact with the "highly disproportionate enforcement of especially low-level offenses").

paralleled today by a similar discomfort with sharing DNA today.²⁵³ 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.²⁵⁴

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 policing practices undermine the rationales for across-the-board remedial withdrawal by the Court in *Hudson v. Michigan*²⁵⁵ or *Herring v. United States*.²⁵⁶ 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 citationless reliance of the Court *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 normative justified gloss relevant to the Fourth Amendment's interpretation.

C. Fourth Amendment Gloss as Settlement

The use of *gloss as settlement* 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 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 are tasked with coordinating their activities within the frame of constitutional institutions. It has a different function for citizens, who can use gloss to evaluate whether state actors remain faithful to the original compact. 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.

²⁵³ For some evidence of that discomfort, see *Carpenter v. United States*, -- S. Ct. --, 2018 WL 3073916, at *56 (June 22, 2018) (Gorsuch, J., dissenting) (discussing governmental acquisition of DNA from third parties as something that would violate reasonable expectations of privacy).

²⁵⁴ Judicial opinions can also be responses to problems that are unmentioned in the text of the opinion, but that important chapters in American policing. The failure to understand these hidden transcripts can lead to systematic error in glossing cases. David 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 Sklansky's vital insight is largely missed in the current scholarship.

²⁵⁵ 547 U.S. 586 (2006).

²⁵⁶ 555 U.S. 135 (2009).

The focal point model of constitutional enforcement closely fits the original function of the Fourth Amendment. At its core, the focal point model concerns a central problem of political theory: A sovereign must “retain sufficient political support” to remain stable, but in order to do so must persuade citizens that it is not abusing its delegated authorities.²⁵⁷ Because citizens can 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.²⁵⁸ The focal point theory can be profitably read in tandem with Ran Hirschl’s influential theory of constitutional design as “hegemonic preservation.”²⁵⁹ 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.²⁶⁰

As originally conceived, the Fourth Amendment is plausibly viewed as a solution to precisely this problem of elite 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 precedent 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.²⁶¹ Seditious libel investigations often relied upon “general searches for documentary evidence.”²⁶² Given this history of policing political dissent through “paper searches,”²⁶³ it is eminently sensible for political elites to agree to the Fourth Amendment. 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 thus “really about the protection of political dissent,”²⁶⁴ with gloss providing the focal point for social coordination in the event that elected leaders target such dissent.

²⁵⁷ Weingast, *supra* note 64, at 246.

²⁵⁸ *Id.* (“To the extent that solutions to the coordination dilemma occur, it is elites who construct them, often through pacts.”).

²⁵⁹ 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 COMMUNITIES 185-209 (2010) (developing a notion of “pacted constitutionalism” pursuant to which powerful interest groups treat the constitution as a coordinated truce).

²⁶⁰ HIRSCHL, *supra* note 259, at 89-97.

²⁶¹ *See* Entick v. Carrington, 19 Howell’s State Trials 1029, 1066, 1073 (CP 1765); *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), 19 Howell’s State Trials 1153; *see also* William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393, 396-403 (1995) [hereinafter “Stuntz, *Substantive Origins*”] (discussing the significance of *Wilkes* and *Entick*).

²⁶² ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868, at 18 (2006).

²⁶³ *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”).

²⁶⁴ Stuntz, *Substantive Origins*, *supra* note 261, at 447.

If gloss as settlement explains well the original thrust of the Fourth Amendment, it does little to explain the clause's 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 *Boyd v. United States*.²⁶⁵ *Boyd*, however, proved to have a limited shelf life, and is not longer compelling as a Fourth Amendment precedent.²⁶⁶ 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 basis for drawing a 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 that 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.²⁶⁷ Neither of these lines of cases provides citizens with clear information about the *limits* of state power. To the extent that they rely on gloss as settlement, *Atwater*, *Watson*, *Carroll*, and their progeny might be understood as focal points for police who are uncertain of their authority. These decisions 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. They enable junior officers to rely on the intuitions and habits of older officers. All else being equal, these cases 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 primary regulator of the police²⁶⁸—they undermine the incentive to innovate and improve policing. 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

²⁶⁵ 116 US 616, 633 (1886) (holding that *any* "seizure of a man's private books and papers" violated the Fourth (and Fifth) Amendment).

²⁶⁶ See 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).

²⁶⁷ See *supra* text accompanying notes 85 to 98.

²⁶⁸ 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).

seizures inside a home without a warrant are presumptively unreasonable.”²⁶⁹ 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.²⁷⁰ These cases sound more in “a nostalgia subsidy for home ownership” rather than any understanding of what has historically operated as an effective policing.²⁷¹

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 adopt of gloss as settlement likely engenders worse rather than better policing by crowding out other reform efforts.

* * *

Gloss has been an unacknowledged, if important, element of Fourth Amendment jurisprudence. It shapes the law of misdemeanor arrests, traffic stops, deadly force, the scope of the suppression remedy. My aim in this Part has been to show that the justifications for these deployments of official practice in the Fourth Amendment domain are thin and 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 justifying accounts of gloss as acquiescence, Burkean wisdom, or settlement can explain the use of official practice to define search and seizure minima. Such reliance cannot be explained on the standard grounds for folding in official practice into constitutional law.²⁷² Fourth Amendment gloss, in short, is a practice that 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

²⁶⁹ *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Grob v. Ramirez*, 540 U.S. 551, 559 (2004)); accord *Kentucky v. King*, 563 U.S. 452, 459 (2011)

²⁷⁰ 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 US 603, 612 (1999))).

²⁷¹ Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 157 (2016)

²⁷² 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.

Amendment gloss is best thought of as a “second best problem.”²⁷³ 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 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 for judicial deference to gloss is quite simple: The Supreme Court has been tacking rightward since the beginning of the 1970s and President Nixon’s explicit commitment to appoint Justices who shared his views on crime.²⁷⁴ Today, the Court’s median lies far to the right of where it has been for most of the twentieth century.²⁷⁵ 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 as an institution. The federal courts have “accreted gradually a great deal of autonomous discretion to pursue institutional interests” by lobbying Congress, by securing functional autonomy from immediate legislative control, and by crafting doctrinal rules.²⁷⁶ Hence, it has room to pursue those interests. Those

²⁷³ 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 & K. 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. Aziz Z. Huq, *Structural Constitutionalism As Counterterrorism*, 100 CAL. L. REV. 887, 905 (2012). More modestly, the theory implies that when institutions are imperfect, a range of possible countervailing adjustments must be considered.

²⁷⁴ KEVIN J. MCMAHON, NIXON’S COURT 3-4 (2011); 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 164, 168 (1983).

²⁷⁵ Cf. Alicia Parlapiano and Karen Yourish, *Where Neil Gorsuch would fit on the Supreme Court*, N.Y. TIMES, Feb 1, 2017, <https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html>.

²⁷⁶ Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 53 (2015) [hereinafter “Huq, *Judicial Independence*”]; 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).

interests, moreover, may illuminate many doctrinal decisions with cross-partisan support, decisions that appear otherwise mysterious.²⁷⁷

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, 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,²⁷⁸ which are hard for outsiders to grasp or evaluate. If departmental management have difficulty determining what happens in the context of dispersed, highly discretionary police-citizen encounters,²⁷⁹ federal courts are unlikely to do better. Indeed, evidence of pervasive misrepresentation by police in suppression hearings suggests an additional barrier to judicial enforcement.²⁸⁰ Federal courts, further, would have some difficulty tamping down on pervasive misbehavior by police. In effect, their physical and institutional removal from police (who are mostly state and local employees) means that they must rely on indirect and highly imperfect measures, such as suppression and damages remedies, to elicit needful incentives among 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. Hence, the courts are under some pressure to curtail and control Fourth Amendment rights because of the institutional costs of Fourth Amendment remediation.²⁸¹

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. Anna 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.”²⁸² 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. The latter 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 best

²⁷⁷ Huq, *Judicial Independence*, *supra* note 276, at 53-56 (developing this point).

²⁷⁸ On the notion of tacit understandings, see Michael Polanyi, *The logic of tacit inference*, 41 PHILOSOPHY 1, 2-3 (1966).

²⁷⁹ See *supra* text accompanying notes 193 to 194.

²⁸⁰ Christopher Slobogin, *Testifying: 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).

²⁸¹ Formal law and economics work models judicial oversight as a solution to an agency cost problem faced by the public that employ police, and that face the risk of creating police forces with excessively punitive incentives. Dhammika Dharmapala, Nuno Garoupa, & Richard H. McAdams, *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.

²⁸² Lvovsky, *supra* note 20, at 2079.

understood in terms of the pressure on the courts as an institution to cabin Fourth Amendment remedies, 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 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,”²⁸³ the 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.²⁸⁴

Although 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. The Mitigation of Gloss’s Costs

The standard account of why Fourth Amendment law falls short focuses on the limits of the courts’ institutional competence.²⁸⁵ An implication of my analysis is that problem lies as much in the sources upon which judges rely, as 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 an opinion of the Court, from highlighting the limits of policing practice. The federal judiciary might be an effective shield against unreasonable searches and seizures; it has simply 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 Fourth Amendment minima represent even cost-justified policing measures. Even common measures, such as warrantless misdemeanor arrests,²⁸⁶ may be unjustified simply because their crime-suppression benefits are smaller than the social good possible if police invest their time

²⁸³ 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”).

²⁸⁴ For an illuminating discussion of how police unions in California have mobilized against that state’s Supreme Court, see Katherine J. Bies, *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).

²⁸⁵ See, e.g., Friedman & Ponomarenko, *supra* note 268, 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.”).

²⁸⁶ *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

otherwise.²⁸⁷ 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 proposed 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.²⁸⁸ 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. 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 can take two forms. First, judges might accept freestanding evidence that a proposed policing measure is cost effective. Police now rarely generate such data.²⁸⁹ 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.²⁹⁰ A judicial demand for the epistemic basis of 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 produced at suboptimal rates.

An alternative to this approach would be follow Barry Friedman and Maria Ponomarenko’s proposal to “defer to police decisions about enforcement methods only to the extent that those decisions represent considered, fact-based judgments formulated with democratic input.”²⁹¹ Friedman and Ponomarenko’s 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 “Courts need not judge the police, at least in the first instance. They need only assure that someone is filling the regulatory void.”²⁹² 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

²⁸⁷ See *supra* text accompanying note 185 to 186.

²⁸⁸ 134 S. Ct. 2473, 2495 (2014).

²⁸⁹ See *supra* text accompanying note 217. States such as Washington have generated benefit-cost evaluations of policing tactics. Steve Aos, Polly Phipps, Robert Barnoski, and Roxanne Lieb, *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 (Brandon Welsh, ed., 2000).

²⁹⁰ For a recent survey, see Lum & Nagin, *supra* note 197, at 344. For a compelling analysis of best practices in street policing, see Anthony A. Braga et al. *The Effects of Hot Spot Policing on Crime: An Updated Systemic Review and Meta-Analysis*, 31 JUST. Q. 633, 640 (2014).

²⁹¹ Friedman & Maria Ponomarenko, *supra* note 268, at 1892.

²⁹² *Id.*

when 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.²⁹³

Third, in other constitutional domains, the Court has acknowledged that formally neutral policies can be rooted historically in invidious beliefs about regulated populations.²⁹⁴ In the policing context, the Court has not evaluated long-standing practices in light of their racialized origins. It has not considered, for example, the relationship between vagrancy laws and programmatic stop and frisk. Nor has it questioned whether its endorsement on 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.²⁹⁵ 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. Doing so would be a return to, rather than a break from tradition. In the interwar years, the Court faced several “egregious exemplars of Jim Crow justice,” and used those extreme facts as the basis for “landmark criminal procedure rulings” with the aim of limiting the excesses of Jim Crow criminal justice.²⁹⁶

Finally, the case against a mechanistic reliance on gloss is at its acme in cases such as *Riley* and *Carpenter v. United States*, which concern new technologies.²⁹⁷ 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*²⁹⁸—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.²⁹⁹ 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 policing practice.

²⁹³ Indeed, in other work, Friedman and Ponomarenko have insightfully detailed the ways in which cost-benefit analysis of policing now falls short, and how it can be improved. Maria Ponomarenko and Barry Friedman, *Benefit-Cost Analysis of Public Safety: Facing the Methodological Challenges*, 8 J. BENEFIT-COST ANALYSIS 305, 308-16 (2017).

²⁹⁴ See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding that provision in Alabama Constitution disenfranchising persons convicted of crimes involving moral turpitude violated equal protection where, even though on its face it was racially neutral, original enactment was motivated by desire to discriminate against blacks).

²⁹⁵ See *supra* text accompanying note 235 (noting criticisms of professional policing for its insensitivity to racial concerns).

²⁹⁶ Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 49 (2000).

²⁹⁷ 558 U.S. --, 2018 WL 3073916 (June 22, 2018).

²⁹⁸ 569 U.S. 435 (2013); see *supra* text accompanying notes 250 to 251 (flagging racialized history of fingerprinting as an investigative tool).

²⁹⁹ Cf. *United States v. Jones*, 565 U.S. 400, 420 (2012) (Alito, J., concurring) (noting that it is “almost impossible” to imagine an analog to GPS vehicle tracking).

Conclusion

Judicial reliance on ongoing police practice is a commonplace in the Fourth Amendment doctrine. Yet to date it has been neither theorized nor adequately justified. Drawing upon analogies to “historical gloss” in structural constitutional law, and “norming” in the administrative law scholarship, I have argued that the standard grounds for reliance on observed institutional practice do not extend to the Fourth Amendment context. There is, in short, 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 whose costs must be mitigated rather than a virtue to be celebrated. The range of cautionary nudges with which I conclude is necessarily incomplete: Indeed, one implication of my analysis is that there is much work still to be done thinking through the complex ways federal courts receive and transform flawed policing practice into the basic law of the land.