
DEFENDING EQUILIBRIUM-ADJUSTMENT

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I thank Professor Christopher Slobogin for responding to my recent Article, *An Equilibrium-Adjustment Theory of the Fourth Amendment*.¹ My Article contended that much of today's Fourth Amendment law can be understood as the product of equilibrium-adjustment. When changing technology and social practice threaten to considerably expand or restrict government power, courts tighten or loosen Fourth Amendment restrictions to restore the status quo level of government power. That is, courts account for changing technology by adjusting rules in an effort to restore the prior equilibrium of government power. Existing Fourth Amendment doctrine therefore reflects many decades of equilibrium-adjustment over time.

Professor Slobogin's response, *An Original Take on Originalism*,² rests on a simple premise suggested by its title. In Slobogin's view, equilibrium-adjustment is originalism.³ Slobogin believes that colonial times provide the reference point for equilibrium-adjustment.⁴ On this basis, any judge who engages in equilibrium-adjustment advocates an originalist vision of the Fourth Amendment. After characterizing the theory of equilibrium-adjustment as originalism, Slobogin argues that the theory is inaccurate, unworkable, and unhelpful. The theory is inaccurate because existing Fourth Amendment doctrine does not in fact track originalism.⁵ And it is unworkable and unhelpful for all the reasons that Slobogin finds originalism unworkable and unhelpful.⁶

I fear Professor Slobogin has misunderstood my argument. Equilibrium-adjustment is not originalism. It is a theory of maintaining the status quo balance of power, not an effort to restore eighteenth-century rules. That understanding explains why living constitutionalists and pragmatists alike have embraced equilibrium-adjustment, and why the chief attack on it has been launched on originalist grounds. It is true,

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¹ 125 HARV. L. REV. 476 (2011).

² 125 HARV. L. REV. F. 14 (2011).

³ *Id.* at 14.

⁴ *See id.* at 15 (considering the concept of "Year Zero" by considering "colonial times" as "[b]lack when the Fourth Amendment was written").

⁵ *See id.* at 14-18.

⁶ *See id.* at 14 ("[E]quilibrium-adjustment theory is originalism, and thus suffers from all of the problems associated with that methodology.").

as Slobogin says, that the theory “harks back to some earlier time.”⁷ But that does not make it originalist. The relevant “earlier time” is a time before a triggering technological development, but it need not be the year the Fourth Amendment was ratified.

To be sure, it is possible for originalists to adopt the method of equilibrium-adjustment. But nonoriginalists can adopt it, too. In my view, its widespread appeal is what makes equilibrium-adjustment a valuable tool for understanding Fourth Amendment law: Justices from very different interpretive schools use it. It operates equally well within all of the different theories of interpretation. Different Justices might tailor the method based on their interpretive commitments. But they all can engage in equilibrium-adjustment, and almost all do. The Supreme Court’s recent decision in *United States v. Jones*⁸ provides a revealing illustration of how equilibrium-adjustment can occur in both originalist and nonoriginalist forms.

I will develop my reply in three parts. First, I will show how the theory of equilibrium-adjustment differs from originalism. Second, I will examine the Supreme Court’s recent decision in *United States v. Jones*. Finally, I will address Professor Slobogin’s criticism that the theory of equilibrium-adjustment does not necessarily determine how the Supreme Court should rule in difficult cases. I concede the point, but challenge the assumption that a theory of Fourth Amendment law should provide such answers.

I. EQUILIBRIUM-ADJUSTMENT IS NOT “ORIGINALISM IN DISGUISE”

Professor Slobogin construes my argument as having a secret originalist agenda: “At bottom,” he writes, “equilibrium-adjustment theory is originalism.”⁹ As Slobogin sees it, Year Zero refers to “colonial times,” “back when the Fourth Amendment was written.”¹⁰ The theory of equilibrium-adjustment thus posits that courts try to restore the originalist Fourth Amendment. Slobogin then argues that my argument fails because Fourth Amendment case law departs from originalism, which in any event is a problematic theory of constitutional interpretation.

Slobogin’s argument misfires with the first step: his assumption that “Year Zero” is 1791, and that a judge engaging in equilibrium-adjustment must try to restore the original Fourth Amendment. Not

⁷ *Id.* at 19.

⁸ 132 S. Ct. 945 (2012).

⁹ Slobogin, *supra* note 2, at 14.

¹⁰ *Id.* at 15.

so. The theory of equilibrium-adjustment posits that existing Fourth Amendment doctrine reflects generations of past adjustments based on new technologies. We don't easily see those generations because the new technologies of the past appear to us as simply part of the present status quo. I introduced "Year Zero" to help reveal the past generations of change. Starting with a hypothetical baseline when no technologies existed makes it easier to see the previous generations of technological change, and the responses to them, embedded in existing doctrine.

Slobogin assumes that this backward-looking approach must be originalist. "Because it harks back to some earlier time," he writes, "equilibrium-adjustment theory is essentially originalism in disguise."¹¹ There are two problems with Slobogin's assumption. First, originalist approaches generally focus on the semantic meaning of text at the time of enactment.¹² The theory of equilibrium-adjustment does not do this: it is not a theory of interpreting text or original meaning. The theory focuses on maintaining levels of police power, not text or original meaning.

Second, harking back to some earlier time does not necessarily mean looking back to 1791. It merely means looking back to a period before the relevant technological change occurred. Courts engaging in equilibrium-adjustment aim to return to the status quo level of police power before the triggering event. While it is *possible* to use 1791 as the reference point, judges can use any reference point before the technological change. So while equilibrium-adjustment may be reliably Burkean,¹³ it is not particularly originalist.

This difference explains why many leading examples of equilibrium-adjusting judicial opinions were authored on nonoriginalist grounds by Justices not thought of as originalists. Prominent examples discussed in my paper include Justice Brandeis's dissent in *Olmstead v. United States*,¹⁴ Justice Stewart's majority opinion in *Katz v. United States*,¹⁵ Justice Brennan's majority opinion in *Warden v. Hayden*,¹⁶ and Justice Brown's majority opinion in *Hale v. Henkel*.¹⁷ I will refer the reader to the discussion of these cases in my paper.¹⁸ Here I mere-

¹¹ *Id.* at 19.

¹² See, e.g., Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 7 (2011).

¹³ See generally Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

¹⁴ 277 U.S. 438 (1928).

¹⁵ 389 U.S. 347 (1967).

¹⁶ 387 U.S. 294 (1967).

¹⁷ 201 U.S. 43 (1906).

¹⁸ See Kerr, *supra* note 1, at 509–16.

ly point out that all four opinions reflect equilibrium-adjustment but none can be considered originalist.

Indeed, several of these leading examples of equilibrium-adjustment have been opposed on originalist grounds.¹⁹ Justice Black's dissent in *Katz v. United States* provides the most stark example. The *Katz* majority engaged in equilibrium-adjustment by holding that attaching a listening device to a phone booth constituted a Fourth Amendment search. In dissent, Justice Black condemned the majority for "rewriting . . . the Fourth Amendment."²⁰ The Fourth Amendment was not originally intended to apply to eavesdropping, Justice Black insisted.²¹ As a result, the Court could not properly regulate eavesdropping under the Fourth Amendment no matter how much technology had changed:

I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.²²

To be clear, equilibrium-adjustment does not necessarily conflict with originalism. As my Article explains, prominent originalists like Justice Scalia accept equilibrium-adjustment.²³ But the theory of equilibrium-adjustment is a theory of responding to change rather than a theory of original meaning.

II. EQUILIBRIUM-ADJUSTMENT IN *UNITED STATES V. JONES*

The recent opinions filed in *United States v. Jones*²⁴ provide a helpful demonstration of how equilibrium-adjustment can appear both in originalist and nonoriginalist forms. The Supreme Court handed down *Jones* just a few weeks after my Article appeared, and the case divided the Court into two main camps. One adopted an originalist methodology; the other explicitly rejected originalism. But both approaches relied heavily on equilibrium-adjustment.

The facts of *Jones* are simple. Investigators installed a GPS device on Jones's car and monitored the car's location for twenty-eight days.²⁵ As I detailed in my Article, GPS monitoring provides a plausible trig-

¹⁹ For example, the adjusting opinion in *Katz* drew an originalist dissent from Justice Black, and the adjusting opinion in *Warden v. Hayden* drew an originalist dissent by Justice Douglas, see *Hayden*, 387 U.S. at 313–20 (Douglas, J., dissenting).

²⁰ *Katz*, 389 U.S. at 373 (Black, J., dissenting).

²¹ *Id.*

²² *Id.*

²³ Kerr, *supra* note 1, at 531 ("[A]n originalist such as Justice Scalia can see equilibrium-adjustment as an originalist method that ensures that the privacy protection at the time of the Framing is not eroded by technology.")

²⁴ 132 S. Ct. 945 (2012).

²⁵ *Id.* at 948.

ger for equilibrium-adjustment. “GPS devices permit significantly more surveillance than beepers: they allow monitoring with much greater detail, less cost, less oversight, and over a longer period of time than beepers.”²⁶ In his brief, Jones relied on these differences to argue that GPS monitoring should be treated as a search: such a holding was needed to rein in the new technology that threatened privacy protections.²⁷ All nine Justices agreed with Jones that the facts of his case included some kind of Fourth Amendment “search.” They disagreed, however, on which facts and why.

The majority opinion by Justice Scalia engaged in equilibrium-adjustment using an originalist framework. When the Government argued that Jones had no reasonable expectation of privacy in the public location of the car, Justice Scalia responded that the Fourth Amendment should be read to protect rights *beyond* the reasonable expectation of privacy test. Quoting from his opinion in *Kyllo v. United States*,²⁸ Justice Scalia reasoned that the Fourth Amendment must be interpreted to “assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”²⁹ To assure preservation of that privacy, Justice Scalia interpreted the Fourth Amendment as protecting against common law trespasses. The installation of the GPS device with intent to use it to obtain information was a common law trespass, and therefore a Fourth Amendment search.³⁰

Justice Alito filed an opinion concurring in the judgment, joined by Justices Ginsburg, Breyer, and Kagan. Justice Alito criticized the majority’s originalist approach as inconsistent with precedent and unworkable.³¹ Instead, Justice Alito engaged in equilibrium-adjustment using the *Katz* “reasonable expectation of privacy” framework.³² He explained that “[i]n the pre-computer age,” surveillance that could reveal information as extensive as GPS monitoring was impractical in most cases.³³ It would require “a large team of agents, multiple vehicles, and perhaps aerial assistance.”³⁴ Changing technology had expanded government power by making such monitoring “relatively easy and cheap.”³⁵ Accordingly, Justice Alito interpreted the Fourth

²⁶ Kerr, *supra* note 1, at 500.

²⁷ See Brief for Respondent at 24–30, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259).

²⁸ 533 U.S. 27 (2001).

²⁹ *Jones*, 132 S. Ct. at 950 (quoting *Kyllo*, 533 U.S. at 34) (internal quotation marks omitted).

³⁰ See *id.* at 949–52.

³¹ See *id.* at 958–62 (Alito, J., concurring in the judgment).

³² See *id.* at 958.

³³ *Id.* at 963.

³⁴ *Id.*

³⁵ *Id.* at 964.

Amendment to limit the government's new powers. Although Justice Alito's opinion is not a model of clarity, he seems to have interpreted the reasonable expectation of privacy test to lock in prior understandings of how invasive police investigations might be. Long-term use of GPS monitoring constituted a Fourth Amendment search because it exceeded pre-GPS societal expectations that such invasive monitoring was unlikely or even impossible.³⁶

Justice Sotomayor joined the majority opinion and filed a concurrence agreeing with and going beyond Justice Alito's rationale. Like the opinions filed by Justices Scalia and Alito, Justice Sotomayor's opinion engaged in equilibrium-adjustment. GPS monitoring "may alter the relationship between citizen and government,"³⁷ Justice Sotomayor reasoned, and the Fourth Amendment had to be interpreted to limit use of "a tool so amenable to misuse."³⁸ Justice Sotomayor also expressed a need to revisit the third-party doctrine, the rule that information disclosed to third parties does not receive Fourth Amendment protection. That doctrine is "ill suited to the digital age," Justice Sotomayor reasoned, given that now "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."³⁹

The three opinions in *Jones* proceed from different premises. One is originalist; two are not. But all three opinions rest on the principle of equilibrium-adjustment. All three opinions interpret the Fourth Amendment to counter technology's ability to narrow privacy. The majority opinion seeks to preserve the privacy protections that existed in 1791; the concurring opinions seek to preserve the privacy protections that existed in the "pre-computer age" (in Justice Alito's words) or before "the digital age" (in Justice Sotomayor's). But all three opinions interpret the Fourth Amendment to restore a prior level of government power. All three opinions engage in equilibrium-adjustment.

III. WHAT SHOULD A THEORY OF THE FOURTH AMENDMENT DO?

Explaining the differences between equilibrium-adjustment and originalism addresses the bulk of Slobogin's response. But it leaves one major criticism unanswered, and I want to respond to that here. Slobogin contends that the theory of equilibrium-adjustment fails be-

³⁶ *See id.*

³⁷ *Id.* at 956 (Sotomayor, J., concurring) (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)) (internal quotation mark omitted).

³⁸ *Id.*

³⁹ *Id.* at 957.

cause it lacks “strong predictive power.”⁴⁰ The theory provides an approach, but it does not indicate which side should win when the Supreme Court resolves difficult cases. According to Slobogin, the theory can “differ depending upon the analyst,”⁴¹ and at least in some cases it is possible to make equilibrium-adjustment arguments that are “consistent with either result.”⁴²

This observation is true. Equilibrium-adjustment frames the debate, but it does not necessarily answer which side is right or what rule judges should announce. Different judges can use different reference points for adjustment. They can assess the need for adjustment differently, and can adjust in different ways. But is this a weakness of the theory, or a strength? Fourth Amendment law is not mathematics, and judges are not computers. No descriptive theory of the Fourth Amendment can uncontroversially explain every case. And no normative theory can announce correct outcomes every time. Our messy world of generalist judges deciding thousands of cases over many decades requires a more modest goal. In my view, any descriptive theory of the Fourth Amendment must account for that messy reality.

The common wisdom found in the scholarship has taken this principle too far, I think. The law is a “mess”⁴³ and a “mass of contradictions,”⁴⁴ scholars often say, suggesting that no theory at all can explain it. One goal of my Article was to rescue Fourth Amendment law from this anarchic narrative and show that amidst the din there is a surprisingly helpful theory that explains what judges do when they apply the Fourth Amendment. It does not provide exact answers in every case. But I think it frames the debate and explains a great deal of how Fourth Amendment case law came to look as it does.

In my view, identifying that dynamic and explaining its usefulness has significant value. Beyond explaining existing law, identifying the adjustment dynamic helps set a goal for today’s judges. It teaches that every age has its new technologies that threaten to disrupt the prior equilibrium. The 1920s had the automobile. Almost a century later, we have computers and the Internet. Understanding equilibrium-adjustment help us see that today’s cutting-edge Fourth Amendment questions are not very different from those in the past. And it also reveals a path forward for courts seeking answers that both respond to today’s problems and remain consistent with historical practice.

⁴⁰ Slobogin, *supra* note 2, at 22.

⁴¹ *Id.* at 15.

⁴² *Id.* at 18.

⁴³ Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN’S L. REV. 1149, 1149 (1998).

⁴⁴ Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985).