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## **An Original Take on Originalism**

Christopher Slobogin

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## AN ORIGINAL TAKE ON ORIGINALISM

*Christopher Slobogin\**

### I. INTRODUCTION

The argument that Professor Orin Kerr proffers in *An Equilibrium-Adjustment Theory of the Fourth Amendment*<sup>1</sup> is simple: Fourth Amendment law ought to be structured to ensure that the balance of power between government and citizenry remains constant. This equilibrium-adjustment theory is elegant and, because it rests on a relatively “neutral” historical foundation, might be attractive to judges and scholars from different perspectives. Contrary to Kerr’s assertion, however, it does not easily explain many of the Court’s cases, nor does it help address the most difficult Fourth Amendment issues facing the Court today. The historical foundations on which it rests are often shaky or insufficiently cognizant of modern preferences. At bottom, equilibrium-adjustment theory is originalism, and thus suffers from all of the problems associated with that methodology.

### II. THE DESCRIPTIVE POWER OF EQUILIBRIUM-ADJUSTMENT THEORY

Kerr’s main descriptive point is that equilibrium-adjustment theory — which attempts to maintain the government-citizen power balance that existed at some hypothetical “Year Zero”<sup>2</sup> — explains or at least is consistent with many of the Supreme Court’s Fourth Amendment cases.<sup>3</sup> But most of the examples he uses to prove that point do not make a strong case for that proposition.

Take *Kyllo v. United States*,<sup>4</sup> which Kerr views as an “easy starting point” for explaining how the theory works.<sup>5</sup> There the majority held that police must obtain a warrant before using a thermal imager to detect the presence of halide lights (used to grow marijuana) within a

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\* Milton Underwood Professor of Law, Vanderbilt University Law School.

<sup>1</sup> Orin Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011).

<sup>2</sup> *Id.* at 483 (describing the concept of Year Zero).

<sup>3</sup> *Id.* at 481 (“Fourth Amendment caselaw reflects several generations of equilibrium-adjustment.”).

<sup>4</sup> 533 U.S. 27 (2001).

<sup>5</sup> Kerr, *supra* note 1, at 496.

home,<sup>6</sup> while the dissent stated that use of the imager was not a search at all.<sup>7</sup> Kerr asserts that both the majority and dissenting opinions in *Kyllo* focused on whether thermal imaging upset the equilibrium between police and citizen, with the majority deciding that, compared to colonial times, it did, and the dissent concluding, as Kerr puts it, that the thermal imaging device “was not far different from use of other surveillance tools not considered a search” because it provided much less information than actual presence in the home would have.<sup>8</sup>

If the majority and dissent in *Kyllo* were implementing equilibrium-adjustment theory, one problem is immediately apparent: Year Zero can differ depending upon the analyst. The way Kerr describes the case, Justice Scalia’s opinion for the majority looked to primitive colonial practices, whereas Justice Stevens’s dissent used as its reference point modern investigative “tools” similar to thermal imaging in their (non)intrusiveness.<sup>9</sup> Nothing in equilibrium-adjustment theory tells us which baseline to use (although Kerr appears to prefer the Founding era or perhaps an even earlier period).<sup>10</sup>

In any event, contrary to Kerr’s assertion, equilibrium thinking was probably not the driving force behind either opinion. Back when the Fourth Amendment was written, heat was generated by fire, not electric lights, and fires emitted smoke, which *could* be seen without entry. Given the colonial capacity to figure out the warmest parts of the house simply by observing it from the road, Justice Scalia, if he was really trying to mimic colonial culture, should have concluded that a warrant was not required to conduct thermal imaging of a home. In contrast, assuming Justice Stevens’s reference point was the modern abode, the dissent should have been more bothered by the thermal imagers’ ability to identify the location of heat sources, since centrally heated residences can easily hide those sources from the naked eye. Instead of trying to restore equilibrium in accordance with some baseline, both the majority and dissenting opinions seemed to be disagreeing forthrightly on the privacy modern citizens should expect vis-à-vis technologically enhanced surveillance.<sup>11</sup>

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<sup>6</sup> See *Kyllo*, 533 U.S. at 30, 40.

<sup>7</sup> *Id.* at 46 (Stevens, J., dissenting).

<sup>8</sup> See Kerr, *supra* note 1, at 497–98.

<sup>9</sup> See *id.* The dissent referenced modern investigative tools involving use of pen registers (designed to intercept phone numbers dialed), subpoenas for utility records, and dogs to sniff for drugs, as well as going through garbage. *Kyllo*, 533 U.S. at 44, 47–48 (Stevens, J., dissenting).

<sup>10</sup> See Kerr, *supra* note 1, at 483 (imagining a Year Zero “without tools”); *id.* at 525 (referencing a Year Zero without walls or fences).

<sup>11</sup> Compare *Kyllo*, 533 U.S. at 35 n.2 (Scalia, J.) (“On the night of January 16, 1992, no outside observer could have discerned the relative heat of *Kyllo*’s home without thermal imaging.”), with *id.* at 44 (Stevens, J., dissenting) (“The equipment in this case did not penetrate the walls of petitioner’s home, and while it did pick up ‘details of the home’ that were exposed to the public, . . . it

Kerr's theory also fails to jibe with *Kyllo's* statement, albeit in dictum, that technology that is in "general public use" may be used to look inside a home without a warrant.<sup>12</sup> This principle allows police to use flashlights, binoculars, and perhaps even telescopes to observe activities inside the home that they would never have been able to see back in colonial times, and thus the majority should have been reticent about adopting it.<sup>13</sup> In contrast, equilibrium-adjustment theory would predict that the dissent's more modern perspective should have had no difficulty with the general public use concept, and yet here too the dissent took the majority opinion to task.<sup>14</sup>

Other examples Kerr proffers to illustrate the predictive accuracy of his theory are, upon close examination, similarly unsupportive of it. For instance, he suggests that both *United States v. Knotts*,<sup>15</sup> which immunized technological surveillance of public travels from Fourth Amendment regulation,<sup>16</sup> and *Smith v. Maryland*,<sup>17</sup> which withheld Fourth Amendment protection for phone numbers maintained by the phone company,<sup>18</sup> are consistent with the idea that eighteenth-century investigators working in small colonial communities could easily keep tabs on who conspired with whom.<sup>19</sup> But that analogy works only if we attribute superhuman qualities to those investigators or assume there were hundreds of them. Global positioning devices planted on phones or cars can follow travelers continuously for months on end, and pen registers and trap and trace devices can download every phone number and email address one contacts.<sup>20</sup>

A few more examples will suffice to bring home the point. Kerr asserts that, because eighteenth-century wagons and buggies were probably subject to search at any time, today's car-search jurisprudence, which allows a car to be stopped and searched almost at will (given the ubiquity of traffic laws and the law enforcement orientation of

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did not obtain 'any information regarding the interior of the home,' [but only an inference about the interior.]).

<sup>12</sup> *Id.* at 40 (majority opinion).

<sup>13</sup> See generally Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393, 1402-06 (2002).

<sup>14</sup> *Kyllo*, 533 U.S. at 47 (Stevens, J., dissenting).

<sup>15</sup> 460 U.S. 276 (1983).

<sup>16</sup> See *id.* at 280-81.

<sup>17</sup> 442 U.S. 735 (1979).

<sup>18</sup> See *id.* at 745-46.

<sup>19</sup> See Kerr, *supra* note 1, at 500 (arguing that *Knotts* "tries to preserve the same basic balance of Fourth Amendment protections in a world of beepers as existed without them"); *id.* at 517 (arguing that *Smith* "maintains the equilibrium of privacy that existed with the physical meeting for the telephone equivalent").

<sup>20</sup> See CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK* 7-8, 11 (2007). Kerr recognizes this point and suggests the equilibrium-adjustment theory can deal with it, Kerr, *supra* note 1, at 501, but his explanation has its own problems. See *infra* text accompanying notes 27-30.

consent and search incident to arrest doctrine), maintains the government-citizen balance at “Year Zero.”<sup>21</sup> Similarly, he states that informants were essentially unregulated in the colonial period, thus justifying under equilibrium-adjustment theory the Supreme Court’s hands-off approach to informants in modern times.<sup>22</sup> The historical facts underlying these assertions can be challenged (and I do so below). But for now let us assume that we know how eighteenth-century common law dealt with searches of vehicles and use of informants, and that history shows government had broad discretion in both situations.

That knowledge only explains the Supreme Court’s current car search and informant jurisprudence if we stretch the relevant analogies beyond recognition. Cars are much more closely associated with intimate activities than wagons and buggies are, particularly if one defines cars to include motor homes, as the modern Supreme Court does.<sup>23</sup> And even if one is willing to conclude that an informant’s report of a conversation is not that different from an absent third party hearing the conversation verbatim over an informant’s body bug, as the Court has done,<sup>24</sup> it is a very long leap from that position to holding that government use of institutional informants — banks, phone companies, credit card companies, and the like — is not regulated by the Fourth Amendment. Yet *Smith* (the phone number case) and other modern decisions like *United States v. Miller*<sup>25</sup> (holding that bank records are not associated with a reasonable expectation of privacy) do just that.<sup>26</sup> These latter decisions were not inept attempts at restoring the government-citizen balance at the time of the framing (when records of most transactions were simply not maintained) but rather reflect the Court’s willingness to equate human acquaintances with commercial contacts in terms of privacy expectations.<sup>27</sup>

In short, as a descriptive matter, many of the Court’s cases do not come out the way equilibrium-adjustment theory predicts. Compared

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<sup>21</sup> Kerr, *supra* note 1, at 508 (suggesting that stops of cars are no different than stops of wagons and buggies in colonial times in terms of “[t]he basic level of police power”).

<sup>22</sup> *Id.* at 519 (“In eighteenth-century England, private citizens were empowered to investigate crimes in exchange for money; prisoners were offered pardons to become informers.”).

<sup>23</sup> See *California v. Carney*, 471 U.S. 386, 393–94 (1985).

<sup>24</sup> See *United States v. White*, 401 U.S. 745, 752–53 (1971). But see *id.* at 787 (Harlan, J., dissenting) (arguing that use of electronic intercept on informant “goes beyond the impact on privacy occasioned by the ordinary type of ‘informer’ investigation”).

<sup>25</sup> 425 U.S. 435, 443 (1976).

<sup>26</sup> See *id.* at 443 (holding that the Fourth Amendment does not apply to prosecutorial requests for bank records because “[t]he depositor takes the risk” that the bank will disclose that information to the state).

<sup>27</sup> See, e.g., *id.* (stating that past cases holding that the Fourth Amendment does not govern use of human informants extend to government use of *any* third party to obtain information “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed”).

to “Year Zero,” they either give citizens too much privacy, as in *Kyllo*, or give the state too much power, as in *Knotts*, *Smith*, *Miller* and the car stop and search cases.

### III. THE NORMATIVE ARGUMENT FOR EQUILIBRIUM-ADJUSTMENT THEORY

The normative case Kerr makes in favor of equilibrium-adjustment theory focuses on its purported ability to stabilize Fourth Amendment doctrine.<sup>28</sup> But it is not clear how it would do so, given the way he sees it working. Consider again the *Smith* and *Miller* cases. Above it was suggested that, by providing modern police with far more power to obtain personal information than earlier police enjoyed, these cases are inconsistent with equilibrium-adjustment theory. Kerr recognizes this possibility and suggests that lower court decisions finding that *prolonged* tracking and *dragnet* accessing of phone numbers are searches that could be seen as attempts to align better with Year Zero (in)capacities.<sup>29</sup> The Court has an opportunity to engage in this fine-tuning this Term in *United States v. Jones*,<sup>30</sup> which involves GPS-tracking that lasted over a month. But note that, regardless of how that decision turns out, Kerr describes equilibrium-adjustment theory in a way that makes it consistent with either result. Given that fact, in stability terms the theory does not appear to improve on other Fourth Amendment theories — for instance, those based on privacy or property analysis<sup>31</sup> — that are also coherent in principle but produce varied results depending upon one’s underlying attitudes toward law enforcement and government power. Add to that the aforementioned problem that the appropriate baseline for Year Zero can change from Justice to Justice and the hope for a stable jurisprudence becomes even more ephemeral.

Assume, however, that Kerr is right that the Court’s cases adhere to (or at least could adhere to) what we know about eighteenth-century

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<sup>28</sup> Although his normative defense of equilibrium-adjustment theory spreads over several pages and titled sub-sections, it sounds the same theme throughout. Kerr asserts that equilibrium theory ensures “that the role of Fourth Amendment protection remains stable over time,” Kerr, *supra* note 1, at 528; “provides the meta-doctrine that guides the outcomes of the open-ended tests,” *id.* at 530; “offers a new approach to constitutional fidelity,” *id.* at 531; “facilitates the coherence of group decisionmaking,” *id.* at 533; “leads to a more coherent body of law,” *id.* at 534; “provides a baseline for which we have information to estimate the impact of a new rule to regulate a new set of facts,” *id.* at 536–37, and “maximizes legal stability,” *id.* at 537.

<sup>29</sup> *Id.* at 500–01.

<sup>30</sup> 131 S. Ct. 3064 (2011) (grant of petition for writ of certiorari).

<sup>31</sup> See, e.g., SLOBOGIN, *supra* note 20, at 21–47 (developing a Fourth Amendment theory based on privacy); Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 72 (2005) (describing a property-based model of the Fourth Amendment).

practice or some other baseline, and thus could afford some common thread in Fourth Amendment jurisprudence. A second normative problem is that this type of consistency is probably not a good thing. Because it harks back to some earlier time, equilibrium-adjustment theory is essentially originalism in disguise, and thus brings with it all the concerns associated with that interpretive methodology. Although these concerns are numerous, only three will be highlighted here.

First among them is the fact that in many areas relevant to search and seizure we do not have a good historical account. Consider the vehicle and informant illustrations discussed earlier. As Kerr admits, we do not have much information about how wagons and carriages were treated under the common law.<sup>32</sup> Nor do we know, despite Kerr's suggestion otherwise,<sup>33</sup> that the colonials viewed the practice of using informants with equanimity. Thief-takers — the predecessor to today's informants — were roundly despised by common law courts and eventually fell out of favor,<sup>34</sup> and our forebears routinely sued Peeping Toms and eavesdroppers who trespassed upon the privacy of the home.<sup>35</sup>

A second normative concern about originalism, and thus equilibrium-adjustment theory as Kerr tends to apply it, is that it does not help us with the many types of cases that do not have analogues, even tenuous ones, in the colonial period. Most prominent among these are, as Kerr recognizes, the so-called "special needs cases," involving a wide range of regulatory intrusions such as drug testing and searches of students and employees, roadblocks set up to detect illegal immigrants, and anti-terrorist checkpoints at airports, subways, ferries, and dams.<sup>36</sup> These cases raise the most contentious and important Fourth Amendment issues courts are addressing today.<sup>37</sup> Kerr tries to deal with this problem by proposing a "new crimes and new practices" cat-

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<sup>32</sup> Kerr, *supra* note 1, at 508 ("[T]he rules on [stops and searches of carts, carriages and wagons] are not clearly known.")

<sup>33</sup> *Id.* at 519–20.

<sup>34</sup> See JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW 677–681 (2009) (describing scandals in England connected with thief-takers, noting "a persistent concern among law enforcement authorities" that juries would distrust testimony by thief-takers, and even suggesting that the right to counsel developed because "judges had learned how profoundly the reward system could compromise the integrity of the prosecution evidence in the trials coming before them").

<sup>35</sup> SLOBOGIN, *supra* note 20, at 68–69 (describing eighteenth- and nineteenth-century common law cases involving suits against those who surreptitiously listened to conversations or observed activities inside the home).

<sup>36</sup> Kerr, *supra* note 1, at 495–96 ("The special needs and administrative search doctrines . . . [are] outside the dynamic of equilibrium-adjustment.")

<sup>37</sup> See generally Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107, 113–23 (2010).



egory.<sup>38</sup> But other than creating a box into which special needs and other nontraditional situations might be thrown, this move provides the courts with no guidance as to how to analyze such cases.

The only example of the new crimes–new practices category to which Kerr devotes any analysis is the investigation of twentieth-century white-collar crime cases.<sup>39</sup> In this setting, courts have pretty much adopted a hands-off attitude because regulation of corporations is perceived to be an important government interest and because individualized suspicion is said to be very difficult to develop in these cases.<sup>40</sup> Most of the special needs cases — involving, for instance, drug use in the schools, illegal immigration, or attempts by terrorists to use transportation — could also be said to involve situations where government has a strong crime-control interest but would have difficulty developing individualized suspicion. If these are “new crime or practice” scenarios like white-collar crime, then are they too immune from constitutional regulation? For that matter, why is investigation of white-collar crime given so much slack? Because there is no Year Zero baseline for either special needs situations or white-collar crime investigations, there is nothing in equilibrium-adjustment theory that answers these questions; rather, courts are left to their own devices.

One last criticism about the normative foundation of equilibrium-adjustment theory, again often levied at originalism theory as well, is its static nature. Consider government use of surveillance technology to carry out large-scale data mining programs and observation of public travels.<sup>41</sup> Although one might characterize these programs as a “new practice,” Kerr appears to believe, for reasons indicated earlier, that these investigative techniques are governed by equilibrium-adjustment theory and that the theory exempts them from Fourth Amendment regulation; he would probably argue that, despite their global nature, data-mining endeavors and surveillance of public activity are necessary to make up for technology’s enhancement of citizens’ ability to hide their criminal activity (through, for example, phones, email, and cars).<sup>42</sup> If that approach is the right way to apply equili-

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<sup>38</sup> Kerr, *supra* note 1, at 495, 508–12. Although Kerr does not state that special needs cases fall in this category, they would seem to involve either a new crime (drug use, terrorism) or new investigative practices (searches of schools or offices; use of syringes or breathalyzers to test for drugs), so it is not clear why he does not discuss them in this section.

<sup>39</sup> *Id.* at 509 (discussing “the rise of financial frauds and white-collar crimes”).

<sup>40</sup> See, e.g., *Hale v. Henkel*, 201 U.S. 43, 70, 73–77 (1906) (holding that the Fifth Amendment does not limit subpoenas for business records and that the Fourth Amendment merely prevents subpoenas that are “too sweeping,” because otherwise it would be “utterly impossible to carry on the administration of justice”).

<sup>41</sup> Slobogin, *supra* note 37, at 121–22 (describing such techniques).

<sup>42</sup> Kerr, *supra* note 1, at 507–08, 516–17; see also Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 573–81 (2009) (making this argument).

brium-adjustment theory, then whatever its ability to take into account and accommodate changing *circumstances* (which Kerr touts as the primary advantage of his theory<sup>43</sup>), it locks us in to a view of privacy and autonomy interests that does not take into account changing *norms*.

The problem for equilibrium-adjustment theory is that norms do change. In many domains relevant to search and seizure law, our obsessions today are quite different from the preoccupations of colonists and common law judges. For instance, given our recent experience with police states, the modern polity may be much more concerned about data aggregation and undercover agents than the colonials were. The framers could not have imagined anything as oppressive or ominous as George Orwell's 1984. At the same time, people today might be much less convinced than our eighteenth-century ancestors were that "mere evidence" — that is, evidence that is not contraband or a fruit or instrumentality of crime — requires absolute protection, given the disappearance of the political and religious persecution that prompted that early line of cases.<sup>44</sup> Indeed, I would argue that the disappearance of the mere evidence rule, something that Kerr attributes to the advent of white-collar crime,<sup>45</sup> is just as likely due to changing norms about the interests underlying the Fourth Amendment. As Justice Brennan stated in the case that eliminated the rule, "[t]he premise that property interests control the right of the Government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."<sup>46</sup>

Those differences between early and modern norms, if they do exist, should count for something in modern day Fourth Amendment jurisprudence. Yet equilibrium-adjustment theory apparently makes them irrelevant.

#### IV. CONCLUSION

On the surface, equilibrium-adjustment theory is very attractive. It claims to aim merely at maintaining the balance of power between

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<sup>43</sup> Kerr, *supra* note 1, at 480 (calling equilibrium-adjustment theory a "correction mechanism" for "circumstances" involving either changes in citizen ability to hide evidence or police ability to discover it).

<sup>44</sup> See generally William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 397–411 (1995) (detailing how the early English and colonial cases dealing with warrants and searches did not deal with "run-of-the-mill" crimes, but rather sedition and customs violations that put a premium on government access to private documents).

<sup>45</sup> Kerr, *supra* note 1, at 512.

<sup>46</sup> *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

government and its citizens, and it purports to provide a way of dealing with modern developments both in investigative technology and crime commission. But it lacks strong predictive power and manifests many of the flaws associated with originalism, which it closely resembles. That does not necessarily make it any worse than many of the other theories that Kerr and others have criticized. But it should not be taken for something better.