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# What Is the Essential Fourth Amendment?

MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY. By Stephen J. Schulhofer. New York, New York: Oxford University Press, 2012. 216 pages. \$21.95.

Reviewed by Christopher Slobogin\*

## I. Introduction

To the average American, the Fourth Amendment probably brings to mind a jumbled notion of warrants, probable cause, and exclusion of illegally seized evidence. Compared to the First Amendment, *Miranda*'s right to remain silent,<sup>1</sup> the jury trial guarantee,<sup>2</sup> and the Equal Protection Clause's prohibition on racial discrimination,<sup>3</sup> the right to be secure from unreasonable searches and seizures is not well understood by most of the populace, either in its precise scope or its rationale.

Some confusion about specific Fourth Amendment prohibitions is tolerable and understandable. After all, it is the job of the police and judges, not Joe Q. Citizen, to apply search and seizure law, and even these government actors are more than occasionally flummoxed by the rules. Public ignorance about the Amendment's rationale is perhaps just as excusable, but it is much more unfortunate. People do not always understand why the law appears to prefer a judge's opinion over that of the streetwise cop, why a person who has nothing to hide should care about official surveillance, or why a person who does have something to hide should be able to exclude evidence of guilt because the police violated some arcane rule. As a result, citizens are often outraged by judicial opinions that free defendants on "technicalities,"<sup>4</sup> and seldom are bothered by those court decisions—much more prevalent in the past several decades—that curtail liberty and privacy in the name of crime control and national security.

Stephen Schulhofer sees this as a problem, and in *More Essential Than Ever: The Fourth Amendment in the Twenty-First Century*<sup>5</sup> he tries to redress it. Pitched toward a general audience rather than the legally trained, the book

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1. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent . . .").

2. U.S. CONST. amend. VI.

3. *Id.* amend. XIV, § 1.

4. See generally William A. Geller, *Is the Evidence in on the Exclusionary Rule?*, 67 A.B.A. J. 1642, 1645 (1981) (discussing the public policy debate over the exclusionary rule).

5. STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY (2012).

provides a passionate defense of the “essential” Fourth Amendment that, as Schulhofer would have it, the Founders intended but the current Supreme Court has ignored. Much of what is said in this book will not be new to Fourth Amendment scholars. But the work’s straightforward eloquence provides a strong, popularized brief for interpreting the Fourth Amendment as a command that judicial review precede all nonexigent police investigative actions that are more than minimally intrusive. Schulhofer argues that this interpretation is not only consistent with the intent of the Framers, but remains a crucial means of discouraging government officials from harassing innocent people, promoting citizen cooperation with law enforcement efforts, and protecting the speech and association rights that are indispensable to a well-functioning democracy.<sup>6</sup>

Schulhofer’s liberal take on the Fourth Amendment is largely persuasive. This Review points out a few places where Schulhofer may push the envelope too far or not far enough. But, these quibbles aside, *More Essential Than Ever* is a welcome reminder for scholars and the public at large that the Fourth Amendment is a fundamental bulwark of constitutional jurisprudence and deserves more respect than the Supreme Court has given it.

## II. Judicial Review as a Means of Protecting Privacy and Limiting Discretion

*More Essential Than Ever* is composed of eight chapters, the first two of which set up the rest of the book. Chapter 1 sketches out the thesis that was just described. In the course of doing so, Schulhofer describes his views on the core purpose of the Fourth Amendment. While he appears to accept the Supreme Court’s stance that the scope of the Fourth Amendment is defined primarily by reasonable expectations of privacy,<sup>7</sup> he reminds us that the Amendment explicitly speaks not of privacy but of “the right of the people to be *secure* in their persons, houses, papers and effects.”<sup>8</sup> Thus, he reasons, the Fourth Amendment is not about privacy in the sense of keeping secrets, but rather protects privacy as a means of ensuring people are secure in their ability to control information vis-à-vis the government.<sup>9</sup> To the

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6. See *id.* at 6 (“[The Fourth Amendment] offers a shelter from governmental intrusions that unjustifiably disturb our peace of mind and our capacity to thrive as independent citizens in a vibrant democratic society.”).

7. See *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (stating that a Fourth Amendment search occurs if “‘the individual manifested a subjective expectation of privacy in the object of the challenged search,’ and ‘society [is] willing to recognize that expectation as reasonable’” (quoting *California v. Ciraolo*, 476 U.S. 207, 211 (1986))).

8. SCHULHOFER, *supra* note 5, at 7 (citation omitted) (emphasis in original).

9. See *id.* at 10 (arguing that it never would have occurred to Americans in the eighteenth century that “by entering into relationships with others, they had given *the government* unrestricted access to any information they revealed to trusted social and professional associates”). Schulhofer later clarifies that the Fourth Amendment is about “the right to control knowledge about our



argument that innocent people should have nothing to fear from law enforcement discovery of private information, especially when it can be discovered without physical intrusion, Schulhofer has the following riposte: “[S]urveillance can have an inhibiting effect on those who are different, chilling their freedom to read what they choose, to say what they think, and to join with others who are like-minded.”<sup>10</sup> And when this occurs without justification, “[it] undermine[s] politics and impoverish[es] social life for everyone.”<sup>11</sup>

It has become fashionable to criticize the idea that Fourth Amendment search doctrine is meant to protect privacy. Critics claim that the Fourth Amendment is really about government power,<sup>12</sup> protecting property rights,<sup>13</sup> or preventing coercion.<sup>14</sup> But *all* of the guarantees in the Bill of Rights are about restricting government power. The Fourth Amendment focuses on protecting *particular* individual interests from *certain* types of government power, and Schulhofer is right that privacy, construed to mean control of information from unjustified government access, is the dominant focus of Fourth Amendment doctrine,<sup>15</sup> at least as it applies to searches.<sup>16</sup> The Fourth Amendment’s prohibition on unauthorized government monitoring of our activities, thoughts, and plans is a potent limit on official power that protects against trespass and official coercion but also protects against much more.

Chapter 2 provides a survey of the historical conflicts and cases that led to the Fourth Amendment. Schulhofer does a masterful job telling the story of the general warrant. He begins with the sagas of two Englishmen well-

personal lives, the right to decide how much information gets revealed to whom and for which purposes.” *Id.* at 130.

10. SCHULHOFER, *supra* note 5, at 13.

11. *Id.* at 14.

12. See, e.g., Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1338 (2012) (“The new constitutional lodestar, power, is the Fourth Amendment’s third act [after property and privacy]. . . . Power seems to be the amendment’s essence, not merely a proxy for something deeper.”); Raymond Shih Ray Ku, *The Founders’ Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1326 (2002) (“The Fourth Amendment protects power not privacy.”).

13. Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 72 (2005) (arguing for a Fourth Amendment “rooted in property theories” (emphasis added)).

14. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 446 (1995) (contending that the Fourth Amendment is meant to limit “coercion and violence”).

15. See CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 23–26 (2007) (arguing that privacy is a central value protected by the Fourth Amendment).

16. Schulhofer confusingly supports his point about the importance of privacy in search cases by referring to cases involving seizures. SCHULHOFER, *supra* note 5, at 7 (describing cases involving the towing of a mobile home and arrests). Seizures are not governed by the expectation of privacy language used in search cases but rather are defined in terms of interference with property or movement. *Jacobsen v. United States*, 466 U.S. 109, 113 (1984) (seizure of property occurs when there is “some meaningful interference with an individual’s possessory interests”); *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (holding that seizure of a person occurs when he would not “feel free to . . . terminate the encounter”).

known to Fourth Amendment scholars: John Wilkes, a member of Parliament whose office was ransacked by government officials seeking proof of seditious libel under a “nameless warrant,”<sup>17</sup> and John Entick, also suspected of sedition, whose papers were seized pursuant to a warrant issued by an executive official rather than a judge and that failed to describe the items sought.<sup>18</sup> Schulhofer also engagingly describes the hullabaloo in the colonies over the writs of assistance that allowed British officials to search any place they desired for evidence of unspecified offenses,<sup>19</sup> and of course he includes an account of James Otis’s famous denunciation of the writs in 1761.<sup>20</sup> From this type of evidence, Schulhofer concludes that “there is no doubt that resistance to discretion lay at the heart” of the Fourth Amendment.<sup>21</sup>

Schulhofer is right about that. But he moves from that observation to the further conclusion that this resistance to the tyranny of every “common Officer” requires *ex ante* review by a judge for most searches and seizures.<sup>22</sup> Making that connection takes more work. The *Entick* and *Wilkes* cases involved searches for and seizures of papers, and the writs of assistance were aimed primarily at customed goods held by colonial merchants. The Framers, mostly from the middle and upper classes, may not have cared very much about whether seizures of ordinary criminals and searches for evidence of “street crime” were anticipated by a warrant.<sup>23</sup> Schulhofer himself notes that warrantless arrests for routine felonies were permitted upon “reasonable cause”; that warrantless searches pursuant to arrest were routine; and that searches of ships, wagons, and other property outside the home at least “occasionally” took place without judicial authorization.<sup>24</sup> Even warrantless searches of homes occurred in colonial times.<sup>25</sup>

So while the Framers hated the general warrant, they did not necessarily think specific warrants were or should be the primary means of regulating all types of government investigations. Schulhofer indirectly concedes this point,<sup>26</sup> but insists that modern-day resistance to executive discretion requires a preference for warrants even in situations in which they may not have been

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17. SCHULHOFER, *supra* note 5, at 24–26.

18. *Id.* at 26–27.

19. *Id.* at 27–30.

20. *Id.* at 29.

21. *Id.* at 35.

22. *Id.* at 36.

23. Indeed, as Schulhofer points out, James Madison supported the Fourth Amendment because “he feared that popular majorities would enact legislation authorizing broad warrants, to the disadvantage of the new nation’s propertied elite.” *Id.* at 35.

24. *Id.* at 37.

25. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 622 (1999) (stating that during the Framing Era “the initiation of arrests and searches commenced when a crime victim either raised the ‘hue and cry’ or made a sworn complaint,” although also noting that the hue and cry was probably relegated to “fresh” cases by the late eighteenth century).

26. SCHULHOFER, *supra* note 5, at 40–41.



required in colonial times.<sup>27</sup> He gives a number of reasons for this position, but the most prominent of them is the rise of organized police forces, aided by technological advances, that have vastly expanded government search and seizure capacity compared to that possessed by the lonely colonial constable.<sup>28</sup>

More broadly, this huge shift in the relative power structure leads Schulhofer to argue for an analytic approach that focuses on original principles rather than original rules, which is an approach he dubs “adaptive originalism.”<sup>29</sup> On this last point, Schulhofer is in league with a number of scholars. For instance, Donald Dripps has recently argued that trying to tie modern rules to specific practices that existed in the eighteenth century makes no sense in a whole host of uniquely modern situations, including administrative searches, searches of private papers, investigative stops on less than probable cause, wiretapping, and the use of gunfire to effect the arrest of a fleeing felon.<sup>30</sup> Moreover, even the common law rules that can sensibly be applied today were in the process of changing in the eighteenth century and were not necessarily favored by the Framers.<sup>31</sup> So, like Schulhofer, Dripps would ask whether and to what extent a search and seizure threatens “the priority of individual liberty and privacy, as against public security, that the founders aspired to.”<sup>32</sup> The key question remains, however, whether adaptive or aspirational originalism requires the strong warrant requirement that Schulhofer favors.

### III. A Critique of Modern Search and Seizure Rules

Chapters 3 through 7 of *More Essential Than Ever* try to answer that question. They address the Supreme Court’s jurisprudence in five general areas: the overarching rules governing searches and arrests; the special problems that arise in policing on the streets; the law governing administrative searches such as health and safety inspections, roadblocks and drug testing of school children; wiretapping and other electronic searches; and the dilemmas caused by national security concerns. The theme throughout these chapters is that, in generating current rules, the Supreme Court “has increasingly put police convenience above . . . original Fourth

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27. *See id.* at 41 (arguing that though we should respect the Framers’ interpretations of searches and seizures under the Fourth Amendment, “that respect cannot take the form of an unreflective commitment to old rules that now have radically different effects in practice”).

28. *See id.* at 40 (arguing that eighteenth-century law enforcement was “a small, poorly organized, amateur affair, a far cry from the sizeable force of well-armed, full-time police who only a few years later became a constant presence on the streets of American cities and towns”).

29. *Id.* at 39–41.

30. *See generally* Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 *MISS. L.J.* 1085 (2012) (proposing aspirational originalism).

31. *Id.* at 1089.

32. *Id.* at 1128.

Amendment priorities” and thus failed to curb sufficiently the executive branch’s discretion to invade privacy.<sup>33</sup>

In Chapter 3, entitled “Searches and Arrests,” Schulhofer attacks the Court’s unwillingness to exclude evidence when police violate the rule governing no-knock entries,<sup>34</sup> driving home his point with descriptions of several incidents in which residents were killed or harmed when surprised by police.<sup>35</sup> He disagrees with the Court’s decisions allowing pretextual traffic stops and cajoled consents,<sup>36</sup> and partly as a way of undermining those decisions he appears to argue that the police should have to obtain a warrant for all nonexigent arrests, or at least for all nonexigent arrests for crimes that would have been misdemeanors at common law.<sup>37</sup> He also seems to think that warrants should be required for searches of cars in all but the most exigent circumstances, given the much-expanded use we make of vehicles in modern times.<sup>38</sup> Finally, he castigates two of the Court’s rationalizations for its retrenchment on the exclusionary rule—the increased professionalism of the police and the development of alternative remedies<sup>39</sup>—by arguing that neither development has progressed far enough to justify the trust the Court places in law enforcement.<sup>40</sup> In Schulhofer’s mind, the suppression remedy is required in order to deter the police and ensure judicial integrity, and undercutting it as the Court has done breeds lawlessness.<sup>41</sup>

Chapter 4, “Policing Public Spaces,” tackles the special problems that arise in defining seizures of people and the scope of stop-and-frisk doctrine.<sup>42</sup> In contrast to many commentators on the liberal end of the spectrum, Schulhofer would not reverse *Terry v. Ohio*,<sup>43</sup> the Court’s iconic case sanctioning stops and frisks on reasonable suspicion (a level of justification

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33. SCHULHOFER, *supra* note 5, at 44.

34. *See generally* Hudson v. Michigan, 547 U.S. 586 (2006) (holding that violation of the knock-and-announce rule does not require exclusion of evidence seized as a result).

35. SCHULHOFER, *supra* note 5, at 46–47.

36. Whren v. United States, 517 U.S. 806, 817 (1996) (holding that the Fourth Amendment does not recognize pretext arguments when the police action is based on probable cause); Schneekloth v. Bustamonte, 412 U.S. 218, 249 (1973) (holding that individuals need not be told of their right to refuse consent).

37. *See* SCHULHOFER, *supra* note 5, at 52 (arguing that the common law exception permitting warrantless arrest for felonies “should be interpreted narrowly”).

38. Schulhofer states that “[m]ost Fourth Amendment experts find it hard to reconcile the warrant requirement for homes, suitcases, and paper bags with the no-warrant rule for cars,” and dismisses “the practical challenges involved in immobilizing cars on the roadside while waiting for a search warrant” by noting the availability of telephonic warrants. *Id.* at 57.

39. Hudson, 547 U.S. at 598–99.

40. *See* SCHULHOFER, *supra* note 5, at 67 (commenting that the premise that “executive officers can be trusted to exercise search-and-seizure powers fairly, in the absence of judicial oversight, is precisely the assumption that the Fourth Amendment rejects”).

41. *See id.* at 69 (“[T]he evidence shows that official disregard for fair procedure weakens public willingness to respect legal requirements and cooperate with law enforcement efforts to apprehend offenders.”).

42. *Id.* at 71–92.

43. 392 U.S. 1 (1968).



short of probable cause).<sup>44</sup> He states that “it is hard to imagine how the Court could have done better” in light of the need to give police flexibility in dealing with “fast-breaking police actions on the street.”<sup>45</sup> However, he believes that the Court’s subsequent application of *Terry* and related rules—ranging from declarations that seizures do not occur when police chase fleeing inner-city youth or confront factory workers and bus passengers<sup>46</sup> to its holding that reasonable suspicion exists when individuals in high-crime areas run from the police<sup>47</sup>—“bears little relationship to social or psychological reality.”<sup>48</sup> These decisions, he argues, have acquiesced in the creation of racially tinged “police states” that “affect thousands of citizens every year, undermining their security, their respect for authority, their sense of acceptance in the wider community, and even their willingness to assist law enforcement efforts to control crime.”<sup>49</sup> He urges reversal of these decisions and commends the Court for striking down vagrancy laws that give police discretion to harass people pretextually.<sup>50</sup>

Chapter 5, on “The Administrative State,” takes on the most difficult area of Fourth Amendment jurisprudence—searches and seizures that fall outside the paradigmatic investigation of street crime because they focus on garnering evidence for regulatory rather than criminal purposes (as with health and safety inspections of homes) or on special populations (such as drug testing of school children).<sup>51</sup> In these situations the Court has either diluted the warrant requirement by permitting “area warrants” that are not based on individualized suspicion or has done away with the warrant and probable cause requirements altogether on the assumption that “special needs beyond those of ordinary law enforcement” are involved.<sup>52</sup> Following the dissents in these cases, Schulhofer argues instead that departures from the judicial review requirement be permitted only when: (1) the objective of the government’s enforcement program is important; (2) normal investigative methods cannot achieve it; (3) the program is implemented through neutral

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44. See SCHULHOFER, *supra* note 5, at 77 (arguing that the Court in *Terry* “established a pragmatic framework of relatively flexible powers in order to preserve police capacity to maintain order in public spaces”).

45. *Id.*

46. *United States v. Drayton*, 536 U.S. 194, 200 (2002) (holding that the Fourth Amendment is not implicated when police confront bus passengers and ask for consent to search their luggage); *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (holding that chasing a fleeing person is not a seizure); *INS v. Delgado*, 466 U.S. 210, 218 (1984) (holding that questioning of factory workers is not a seizure).

47. *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000).

48. SCHULHOFER, *supra* note 5, at 84.

49. *Id.* at 92.

50. See, e.g., *Chicago v. Morales*, 527 U.S. 41, 63–64 (1999) (striking down a statute criminalizing failure to disperse upon a police command).

51. SCHULHOFER, *supra* note 5, at 93–114.

52. See generally Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254 (2011).

criteria applicable to all; and (4) the primary purpose of the program is not “prosecutorial.”<sup>53</sup> Thus, for instance, Schulhofer believes the Court was correct in holding that a drug testing program aimed at political candidates was unconstitutional<sup>54</sup> (because the government interest was not substantial enough);<sup>55</sup> incorrect in upholding sobriety checkpoints,<sup>56</sup> suspicionless searches of probationers,<sup>57</sup> drug testing of students in nonathletic activities,<sup>58</sup> and spot inspections of junkyards for stolen parts<sup>59</sup> (because less intrusive investigative alternatives were available);<sup>60</sup> and correct in rejecting drug checkpoints<sup>61</sup> and programs designed to test pregnant women for cocaine<sup>62</sup> (because of their dominant prosecutorial purpose).<sup>63</sup> In contrast, health and safety inspections conducted according to neutral criteria<sup>64</sup> and airport checkpoints that monitor everyone do pass muster with Schulhofer.<sup>65</sup>

“Wiretapping, Eavesdropping and the Information Age” is the title of Chapter 6. Schulhofer’s primary target here is the Court’s so-called “third-party doctrine,” which holds that when one knowingly exposes information to others one assumes the risk the government will acquire the information.<sup>66</sup> Relying on this rationale, the Court has concluded that the Fourth Amendment does not apply to government surveillance of travel on public roads and government acquisition of phone logs and bank records.<sup>67</sup> As have many others,<sup>68</sup> Schulhofer notes that under the Court’s third-party doctrine,

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53. SCHULHOFER, *supra* note 5, at 97–98.

54. *Chandler v. Miller*, 520 U.S. 305, 323 (1997).

55. *See* SCHULHOFER, *supra* note 5, at 100–01 (praising the Court for assessing the significance of the State’s interest in drug testing political candidates and for determining that it was not substantial enough to outweigh the privacy interests at stake); *Chandler*, 520 U.S. at 318.

56. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

57. *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987).

58. *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

59. *New York v. Burger*, 482 U.S. 691, 717 (1987).

60. SCHULHOFER, *supra* note 5, at 101.

61. *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

62. *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001).

63. SCHULHOFER, *supra* note 5, at 108; *Ferguson*, 532 U.S. at 83.

64. *See Camara v. Mun. Court*, 387 U.S. 523, 534 (1967) (holding that the Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence).

65. Schulhofer also appears to be comfortable with border searches and does not discuss checkpoints for licenses. SCHULHOFER, *supra* note 5, at 105. *Cf. Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (permitting such checkpoints in dictum). Since these seizures might be said to have a dominant “prosecutorial purpose,” it is not as clear how they fare under his model.

66. *See generally* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009) (offering a defense of the often-criticized doctrine).

67. *Smith v. Maryland*, 442 U.S. 735, 745 (1979) (holding that there is no reasonable expectation of privacy in phone numbers dialed); *United States v. Miller*, 425 U.S. 435, 442 (1976) (holding that there is no reasonable expectation of privacy in information surrendered to banks).

68. *See* Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L.J. 1239, 1239 (2009) (arguing against the “current



one cannot reasonably expect privacy from government discovery of information given to a third party even when the disclosure to that party occurs with the understanding it is confidential, is made for a specific purpose only, or is unavoidable if one wants to live in modern society.<sup>69</sup> Schulhofer's adaptive originalism leads him to reject this result.<sup>70</sup> He points out that "[t]he colonists who conferred with friends while planning the American revolution did not think that by sharing confidential information they had lost their right to exclude strangers,"<sup>71</sup> and they certainly did not think they had thereby lost their right to exclude the government.<sup>72</sup> Furthermore, he continues, the Court's equation of citizen or institutional third parties with government agents is nonsensical in the modern age.<sup>73</sup> Schulhofer points out that "we routinely deny government the power to pursue actions that are freely available to individuals"—such as practicing a particular religion—and, more importantly, "[t]he extraordinary resources available to the government give it unique power and unique potential to threaten the liberty and autonomy of individuals."<sup>74</sup>

Thus, Schulhofer believes that the tracking of a car using a GPS device, as occurred in the recent case of *United States v. Jones*,<sup>75</sup> is a Fourth Amendment search that requires a warrant based on probable cause even when it is not effectuated by a trespass on the car<sup>76</sup> (the limitation on the definition of search endorsed by the majority in *Jones*).<sup>77</sup> He strongly endorses Justice Sotomayor's concurring opinion in that case voicing concern that even brief locational tracking can chill freedoms,<sup>78</sup> and he rejects the gist of Justice Alito's concurring opinion, which would apply the

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configuration" of the third-party doctrine rule that holds that "information disclosed to third parties receives no Fourth Amendment protection").

69. SCHULHOFER, *supra* note 5, at 126–34.

70. See also Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEXAS L. REV. 147, 154 (2012) (noting that "[a]most all originalists agree that courts should view themselves as constrained by original meaning and that very good reasons are required for legitimate departures from that constraint").

71. SCHULHOFER, *supra* note 5, at 130.

72. *Id.*

73. See *id.* at 128–32 (critiquing the notion that citizens have the option of communicating by means other than the internet or telephone and arguing that those communications should be protected).

74. *Id.* at 136.

75. 132 S. Ct. 945 (2012).

76. See SCHULHOFER, *supra* note 5, at 139 (citing *Jones*, 132 S. Ct. at 960 (Alito, J., concurring)) (expressing agreement with Justice Alito's concurring opinion that the police tactics at issue in *Jones* were unacceptable interferences with privacy rights).

77. See *Jones*, 132 S. Ct. at 954 ("It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.").

78. *Id.* at 956–57 (Sotomayor, J., concurring) (stating that "[a]wareness that the Government may be watching chills associational and expressive freedoms" and also stating "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties").

Fourth Amendment only to “prolonged tracking” and only as long as the public does not itself begin engaging in such tracking for convenience or security purposes.<sup>79</sup> Schulhofer would not always require a warrant when government seeks information from third parties or in every case of knowing exposure, however.<sup>80</sup> For instance, he endorses the practice of obtaining records via a subpoena, challengeable by the target.<sup>81</sup> And even in the case of surveillance, Schulhofer would only dictate that a search has occurred when police use “technology that is not widely available,”<sup>82</sup> suggesting that he believes nontechnological surveillance or surveillance with technology that is in “general public use” can escape Fourth Amendment regulation.<sup>83</sup>

Chapter 7 deals with “The National Security Challenge,” a development that has threatened to undercut Fourth Amendment principles even further.<sup>84</sup> Schulhofer reminds us that we have come to deeply regret past overreactions to outside dangers and suggests we will similarly end up ruining post-9/11 phenomena such as the detentions in Guantanamo Bay, the Patriot Act’s sneak-and-peek warrants,<sup>85</sup> National Security Letters authorizing FBI agents to gather up any records that are useful in “criminal, tax, and regulatory matters,”<sup>86</sup> and the expansion of electronic surveillance powers under the Foreign Intelligence Surveillance Act.<sup>87</sup> To Schulhofer, these departures from the norm can actually have a negative effect on national security because they overwhelm the government with information, distract officials from more effective methods of protecting the country, and discourage cooperation by those groups in society most likely to have information about potential foreign threats.<sup>88</sup>

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79. *Id.* at 962–64 (Alito, J., concurring) (“New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile . . . [or] reconcile themselves to this development as inevitable.”).

80. *See infra* notes 81–82 and accompanying text.

81. SCHULHOFER, *supra* note 5, at 134.

82. *See id.* at 142 (noting that “no one suggests that government data mining should be prohibited altogether” and that the Fourth Amendment is only intended to “assure that invasive methods of investigation are subject to oversight”).

83. The “general public use” nomenclature comes from dictum in *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

84. SCHULHOFER, *supra* note 5, at 144–69.

85. 18 U.S.C. § 3103(a) (2006). Schulhofer would not object to all sneak-and-peek warrants, however. *See* SCHULHOFER, *supra* note 5, at 48.

86. 12 U.S.C. § 3414(a)(5)(A) (2006); 18 U.S.C. § 2709(b) (2006).

87. 50 U.S.C. §§ 1801–1885c (2006 & Supp. IV 2011).

88. *See* SCHULHOFER, *supra* note 5, at 168 (arguing that “[p]roposals . . . to relax Fourth Amendment requirements and ‘trade-off’ liberty for security . . . make counterterrorism efforts more difficult, not less”). He goes on to discuss the ways in which Muslim Americans are less likely to cooperate with authorities if they believe the police are targeting their communities without explanation. *Id.*



#### IV. A Critique of the Critique

Schulhofer makes a compelling case for privacy as the linchpin of Fourth Amendment protection and for making *ex ante* review of police search and seizure decisions the default regulatory stance. Also persuasive is his position that the Amendment should be viewed as a crucial means of preserving democracy, encouraging diversity of views, and promoting citizen respect for and cooperation with police work. Finally, adaptive originalism makes eminent sense in a country with a strong foundational document that is over two hundred years old. In short, I am in agreement with the broad strokes of the book. I'm not as sure about all the particulars.

For instance, many vibrant Western democracies have been able to control their police without the draconian remedy of exclusion.<sup>89</sup> Contrary to Schulhofer's assertion,<sup>90</sup> routine suppression of evidence found through a Fourth Amendment violation probably *delegitimizes* the legal system in the eyes of most citizens,<sup>91</sup> and thus may contribute to the dissatisfaction with government that Schulhofer wants to avoid. Furthermore, in many situations—for instance, the violence and property damage that sometimes accompany illegal no-knock entries—monetary restitution is a more commensurate response than exclusion of evidence, as well as more satisfying when the victim of such acts is innocent of the crime and thus cannot resort to exclusion. Properly constructed, an action for damages<sup>92</sup>—the only remedy for illegal searches available in colonial times<sup>93</sup>—is more likely to accomplish all of the goals Schulhofer seeks: respect for government (because it punishes the true perpetrators of the illegality, not the prosecutor); deterrence of misconduct (especially in pretextual traffic and suspect drug possession cases, which wallet-conscious police will decide are not worth pursuing); improved professionalism (resulting from police departments literally having to pay the cost of bad training); and greater use of warrants (which police will realize immunizes them from liability).<sup>94</sup> While Schulhofer argues that an effective damages remedy would foreclose

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89. See generally Craig Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375 (2001) (recounting resistance to, or significant limitations on, the exclusionary remedy in Europe, Australia, and Canada).

90. See SCHULHOFER, *supra* note 5, at 69 (arguing that “judicial tolerance for Fourth Amendment violations” creates problems for law enforcement because it “discourages law-abiding citizens from offering the cooperation needed to catch and convict offenders in future cases”).

91. As Schulhofer admits, “Fourth Amendment requirements often garner little public support [because] [t]hey seem like a gift to those bent on wrongdoing.” *Id.* at 171.

92. See, e.g., 42 U.S.C. § 1983 (2006) (providing a civil action for the deprivation of constitutional rights); *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390–97 (1971) (recognizing an action for damages when a plaintiff's injuries resulted from federal agents' violation of the Fourth Amendment).

93. See SCHULHOFER, *supra* note 5, at 67 (“[J]udicial oversight originally did not involve an exclusionary rule; the deterrent to an illegal search was the victim's ability to sue for damages”).

94. See generally Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 445–46 (summarizing the advantages of a damages remedy).

just as many prosecutions as the exclusionary rule, he may be wrong on that score;<sup>95</sup> in any event, a damages remedy would not flaunt the costs of the Fourth Amendment in the delegitimizing way the rule does, or involve judges, lawyers, and juries in trials they know are charades. As an alternative to attacking police abuse of discretion on the street by vastly reducing arrests for minor crimes (which is the effect of Schulhofer's more stringent arrest warrant requirement), the exclusionary remedy might best be reserved in such cases for evidence not related to the purpose of the search and seizure, a move that should maximize deterrence of pretextual actions and spurious consents.<sup>96</sup>

The procedural justice literature upon which Schulhofer relies to make many of his arguments may also undercut some of his conclusions, especially in connection with regulation of large-scale crime-control efforts.<sup>97</sup> Schulhofer is right that parts of our cities, especially those occupied by minority groups, mimic police states, and the Court's willingness to blink at this state of affairs is outrageous, as well as complicit in discouraging cooperation with the authorities. At the same time, these communities are rife with crime, and their efforts to deal with that problem—through appropriately limited loitering statutes, camera surveillance, drug checkpoints, and the like—should not be foreclosed when they are the product of local democratic deliberations.<sup>98</sup> After all, the Framers themselves passed statutes permitting suspicionless inspections and searches, some of which were aimed at obtaining evidence of crime.<sup>99</sup> The principal defect of most of the administrative search and seizure cases heard by the Supreme Court to date is that they involved ad hoc programs established by the executive branch.<sup>100</sup> If instead authorization from a representative legislative body is required, if the legislation does not single out a discrete

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95. *Id.* at 444 (“With an effective deterrent in place, police who lack probable cause will not necessarily give up; the more reasonable assumption is that they will simply get more cause.”).

96. Ricardo J. Bascuas, *Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 787–90 (2007) (making this argument).

97. Schulhofer's most explicit work on this subject is Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335 (2011).

98. See Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 410–13 (2000) (using loitering statutes to illustrate the importance of involving the community in devising effective law enforcement strategies in order to enhance legitimacy).

99. See Fabio Arcila, *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1304–10 (2010) (discussing various Revolutionary period statutes that permitted suspicionless searches).

100. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 71–72 (2001) (scrutinizing a policy authorizing drug testing of pregnant women formulated by hospital officials and local police); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (involving a highway sobriety checkpoint established by the police department); *City of Indianapolis v. Edmond*, 531 U.S. 32, 34–35 (2000) (reviewing a drug roadblock established by local police); *New York v. Burger*, 482 U.S. 691, 693–94 (1987) (examining a junkyard inspection program established by legislation but providing no limits on police discretion); *Skinner v. R'y Labor Execs. Ass'n*, 489 U.S. 602, 608–12 (1989) (analyzing a drug testing program for railway workers authorized by legislation that provided no standards for implementation).



and insular minority, and if it is implemented in a nondiscriminatory fashion (e.g., across-the-board or randomly), a better balance between crime control and individual rights might be achieved.<sup>101</sup> Nullification of such legislation probably would have more community-denigrating effects than the Court's current jurisprudence.

The same types of points can be made about national security surveillance endeavors, often aimed at accumulating information about thousands or hundreds of thousands of people (virtually all of whom are innocent of any wrongdoing).<sup>102</sup> If, before voting, legislators are required to imagine application of these programs to themselves and all of their constituents, they are not likely to approve 1984-type laws, as evidenced by Congress's resistance to post-9/11 efforts to expand wiretapping authority<sup>103</sup> and its defunding of the infamous Total Information Awareness data-mining program.<sup>104</sup> And while courts are capable of figuring out when the legislative process is defective or when the police are unfairly implementing a legislatively authorized program, they are not equipped to make the nuanced determination, required by Schulhofer's approach, as to which law enforcement techniques are the most effective, least intrusive, most feasible means of achieving government aims.<sup>105</sup> Schulhofer's added stipulation that prosecution not be the dominant purpose of these programs has the ironic consequence, as he acknowledges, of providing more privacy protection for those who may be engaged in criminal activity than those who are not.<sup>106</sup>

Conversely, when law enforcement has targeted a specific individual, whether for prosecutorial or other reasons, the legislative process cannot work and judicial review before the search and seizure takes place is crucial. For this reason, Schulhofer's disdain for the third-party and knowing-exposure doctrines, which often work to vitiate *ex ante* review, is well-grounded. What is not as clear is why he would require probable cause for technologically sophisticated tracking of any length while permitting the government to obtain bank, credit card, and phone records with a subpoena (which at most requires a showing that the records are somehow relevant to

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101. This approach, based on political process theory, was first proposed by Richard Worf in *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93, 197-98 (2007), and is developed further in Christopher Slobogin, *Government Dragnets*, 73 *LAW & CONTEMP. PROBS.* 107, 143 (2010).

102. See, e.g., Timothy B. Lee, *House Approves Another Five Years of Warrantless Wiretapping*, *ARS TECHNICA* (Sept. 12, 2012), <http://arstechnica.com/tech-policy/2012/09/house-approves-another-five-years-of-warrantless-wiretapping> (reporting on the FISA Amendment Act's goal of intercepting American citizens' international communication).

103. SCHULHOFER, *supra* note 5, at 158-59.

104. Department of Defense Appropriations Act of 2004, PUB. L. NO. 108-87, § 8131, 117 Stat. 1054, 1102 (2003).

105. See Slobogin, *supra* note 101, at 127-29 (explaining that while the Court can engage thoughtfully in strict scrutiny analysis in various contexts like time, place, and manner restrictions on speech, it is ill-equipped to analyze the efficacy and necessity of law enforcement techniques).

106. SCHULHOFER, *supra* note 5, at 95-96.

an investigation),<sup>107</sup> or why he would leave entirely unregulated even long-term surveillance with the naked eye or with generally available technology.<sup>108</sup> In terms of intrusiveness and the chilling effect on innocent activity—Schulhofer’s concerns—record acquisition would seem at least as intrusive as tracking.<sup>109</sup> Further, tracking with a GPS would seem to be no more inimical to these interests than monitoring travels with the human senses or technology in general public use.<sup>110</sup> An alternative would be to permit both accessing of single-transaction records and short-term tracking—whether the police use naked-eye observation, primitive technology, or sophisticated devices—on reasonable suspicion, while requiring probable cause for acquisition of records containing substantial personal information and more prolonged surveillance.<sup>111</sup>

It is also not clear how Schulhofer would treat undercover investigations, since he does not discuss the relevant case law in the book. Perhaps he would analogize this popular law enforcement technique to naked-eye and low-tech surveillance, in which case, consistent with Supreme Court decisions on the issue, it would be unregulated by the Fourth Amendment.<sup>112</sup> But the ability of undercover agents to insinuate themselves into personal lives can often result in much more intrusion than even long-term tracking, and thus ought to require at least as much justification (as the eighteenth-century disdain for undercover “thief-takers” suggests).<sup>113</sup> Only

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107. *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991) (stating that a subpoena should only be quashed on irrelevance grounds when “there is no reasonable possibility that the category of materials the government seeks will produce information relevant to the general subject of the grand jury’s investigation”); *United States v. Morton Salt*, 338 U.S. 632, 652 (1950) (stating that administrative subpoenas meet constitutional requisites even if they are meant only to satisfy “nothing more than official curiosity”).

108. Indeed, Schulhofer’s primary concern with data mining appears to be, not its breadth, but its use of technology not widely available to the public. See SCHULHOFER, *supra* note 5, at 142 (making the use of “technology that is not widely available” a critical element of a “search” under the Fourth Amendment).

109. Cf. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727, 737 (1993) (reporting data indicating that perusal of bank records is considered more intrusive, by a significant margin, than tracking a car).

110. Schulhofer notes that, at common law, public movements were not considered private. SCHULHOFER, *supra* note 5, at 123. But research indicates that “conspicuously” following someone down the street is viewed as fairly intrusive, albeit not as intrusive as technological tracking of a car for three days. SLOBOGIN, *supra* note 15, at 112.

111. These points are developed further in Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of “Mosaic Theory,”* DUKE J. CONST. L. & PUB. POL’Y (forthcoming 2012) and Christopher Slobogin, *Is the Fourth Amendment Relevant in a Technological Age?*, in CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE 11 (Jeffrey Rosen & Benjamin Wittes eds., 2011).

112. See, e.g., *Hoffa v. United States*, 385 U.S. 293, 302–03 (1966) (holding that the Fourth Amendment does not apply to evidence voluntarily disclosed to an informant).

113. See JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 677–81 (2009) (describing police and jury distrust of



when the third party is neither an agent of the government nor an impersonal entity like a bank should the third-party doctrine permit government to acquire the third party's information without any Fourth Amendment justification. In other words, the Fourth Amendment would be inapplicable in third-party scenarios only when the third party is independent of the government and can be said to possess a right (as an autonomous being) to disclose to the government any information he or she sees fit to reveal.<sup>114</sup>

Undoubtedly, Professor Schulhofer would have responses to all of these points. In any event, all of them only attack his thesis at the edges, without disturbing the crucial attributes of the Fourth Amendment's principles that he articulates and defends. *More Essential Than Ever* successfully captures the essence of the Fourth Amendment in a way that should bring home to everyone—not just lawyers and judges, but the “I've got nothing to hide” crowd, the “inner-city folks are all criminals” crowd, and the “government can be trusted” crowd—why it is so important.

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thief-takers, who received rewards for turning in thieves that they often enticed into engaging in theft).

114. See Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593, 1643 (1987) (arguing that people in possession of information about others, even information that is “private” and obtained through an intimate relationship, have an “autonomy-based right to choose to cooperate with the authorities”).