

The Originalist Case for the Fourth Amendment Exclusionary Rule

Roger Roots

The Fourth Amendment exclusionary rule has been the law of the land in all federal jurisdictions since 1914 and in all American state jurisdictions since 1961. Yet critics continue to question the rule's constitutional pedigree. Generations of conservative jurists and scholars have called for the rule's abolition on "originalist" grounds. These scholars argue that the rule is of recent vintage, unsupported in the Fourth Amendment's text, and disloyal to the Amendment's original intent. In this paper, the author argues that exclusion is actually an ancient remedy, widely applied by courts in various contexts since the dawn of American history. Contrary to the writings of anti-exclusion scholars, the basic framework for the exclusionary rule was well established in the regular practices of Founding-era judges and lawyers. Indeed, the idea that exclusion or exclusion-like remedies were required by the search and seizure protections of the Founding period almost certainly predates by many years the earliest American holdings opposing exclusion.