PENUMBRAS RECONSIDERED[1]: INTERPRETING THE BILL OF RIGHTS THROUGH INTRATEXTUAL ANALYSIS WITH THE THIRD AMENDMENT

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I. INTRODUCTION

The Third Amendment to the United States (U.S.) Constitution provides "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."[2]

Throughout American constitutional history, this "[a]mendment has rest[ed] in obscurity."[3] "It has been called the 'forgotten amendment,'[4]

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1. The term *penumbras* comes from Justice William O. Douglas's opinion in the landmark case of *Griswold v. Connecticut*. Justice Douglas suggested that the Bill of Rights has "penumbras" formed by emanations from the individual amendments, including the Third Amendment specifically, that help give the amendments life and substance. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

2. U.S. CONST. amend. III.

3. James P. Rogers, *Third Amendment Protections in Domestic Disasters,* 17 CORNELL J.L. & PUB. POL'Y 747, 749 (2008) (quoting Editorial, *A Protection Prompted by Colonists' Hardship*, ARIZ. DAILY STAR (July 2, 2006) at H1).

4. *Id*. (quoting ELLEN ALDERMAN & CAROLINE KENNEDY, IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION 107 (1991)).

'undoubtedly obsolete,'[5] at best" "ignored, unloved, unnoticed,"[6] "and at worst 'an insignificant legal fossil.'"[7] According to some legal commentators, the Third Amendment is, to the modern practicing attorney, little other than "yesterday's quaint and curious memento,"[8] which only "protects us from a danger that no longer exists."[9]

However, viewpoints such as these represent a very narrow approach to constitutional interpretation: one in which judges and scholars view the Constitution, and the Bill of Rights in particular, as "broken up into discrete blocks of text, with each segment examined in isolation."[10] This approach is flawed. "A close[r] look at the Bill [of Rights] reveals [it has] structural ideas [that are] tightly interconnected . . . ."[11] One can realize a clearer view of each amendment by studying them all holistically.[12] This holistic approach, known as *intratextual analysis*, is a method by which one "read[s] a contested word or phrase that appears in the Constitution in light of another passage in the Constitution" to better understand its meaning.[13] This is sometimes called "penumbral reasoning," whereby one "look[s] at various constitutional provisions, and how they interact and overlap, and . . . that interaction and overlapping" implies new doctrines.[14] In doing so, one considers both a passage's text and its history.

This holistic approach suggests a modern utility for the Third

5. *Id.* (quoting John S. Baker, Jr., *The Effectiveness of Bills of Rights*, 15 HARV. J.L. & PUB. POL'Y 55, 59 (1992)).

6. Peggy Noonan, *Expect the Unexpected*, PEGGY NOONAN TEST (Dec. 7, 2000), www.peggynoonan.com/tpeggy/125/ [https://perma.cc/2AZM-UVCX].

7. Rogers, *supra* note 3, at 749 (quoting B. Carmon Hardy, *A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment*, 33 VA. CAVALCADE 126, 126 (1984)).

8. William Sutton Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of Soldiers,* 124 MIL. L. REV. 195, 211 (1989).

9. Robert A. Gross, *Public and Private in the Third Amendment,* 26 VAL. U.L. REV. 215, 215 (1991).

10. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xi (1998).

11. *Id.* at xii.

12. *See id.* at xi.

13. Thomas G. Sprankling, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses*, 112 COLUM. L. REV. 112, 133 (2012) (italics omitted) (quoting Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999)).

14. Glenn Harlan Reynolds, *Third Amendment Penumbras: Some Preliminary Observations*, 82 TENN. L. REV. 557, 561 (2015).

Amendment as it does "not do its work alone. Instead, it operate[s] in tandem with other constitutional protections."[15] In other words, although there is no modern "threat of dirty, angry, and ungrateful soldiers knocking on people's doors and demanding to sleep in their spare bedrooms and eat their leftovers,"[16] one can use the text and history of the Third Amendment to better understand the meaning of its more controversial neighbors.[17] Specifically, an analysis of the Third Amendment can be used to unravel one of the enduring paradoxes of modern constitutional law—one that engulfs the Second and Fourth Amendments. The paradox can be summarized as follows.

First, consider the Second Amendment. *Conservative* constitutional thinkers typically believe the Second Amendment's right to keep and bear arms is a broad, individual right, designed to enable the people to protect themselves from an overbearing government.[18] *Progressive* thinkers, on the other hand, tend to argue the Second Amendment is not an individual right at all, but rather a collective right designed for military purposes.[19] Paradoxically, when interpreting the Fourth Amendment, the two viewpoints reverse entirely regarding the extent of the individual right. *Conservatives* tend to believe the Fourth Amendment's individual right against searches and seizures is very limited and subject to many exceptions.[20] Meanwhile, *progressives* maintain the Fourth Amendment provides extensive individual rights to people to protect them from an overbearing government, and its exceptions should be few and far between.[21]

It is paradoxical that both schools of constitutional thought believe individual rights are broad or limited under one amendment and then flip

15. *Id*. at 564.

16. Josh Dugan, *When Is a Search Not a Search? When It's a Quarter: The Third Amendment, Originalism, and NSA Wiretapping*, 97 GEO. L.J. 555, 556 (2009).

17. Intratextual analysis with the Third Amendment to interpret the Bill of Rights is not unprecedented. *See, e.g.*, Sprankling, *supra* note 13, at 143 (arguing that the Third Amendment's protection of houses requires a stricter reading of the Fifth Amendment's Takings Clause when it comes to real property). *See also* Thomas L. Avery, *The Third Amendment: The Critical Protections of a Forgotten Amendment*, 53 WASHBURN L.J. 179, 181 (2014) (Reading the Third Amendment and the Fifth Amendment's self-incrimination clause together calls for a complete bar on military surveillance of the home.).

18. *See infra* Part III.A.

19. *See id.*

20. *See infra* Part III.B.

21. *See id.*

sides under the context of another amendment. How could these two amendments, ratified simultaneously and placed so close to each other in the Constitution, provide such vastly different levels of protection to individual citizens? This Article aims to examine the Third Amendment's history and underlying principles and unravel this paradox through intratextual analysis, specifically by interpreting the Second and Fourth Amendments in light of the Third Amendment.

Part II of this Article surveys the Third Amendment's historical background, from its origins in early England and colonial America up to its inclusion in the U.S. Constitution. Part III examines how the Third Amendment has been utilized, argued, and interpreted (albeit rarely) in American case law. Part IV takes this history and background into account and posits theories as to the Third Amendment's true meaning and underlying principles.[22] Furthermore, using intratextual analysis, this Article attempts to resolve this ideological paradox by considering how the penumbras cast by the Third Amendment aid in the interpretation of the Second and Fourth Amendments.

II. HISTORICAL BACKGROUND OF THE THIRD AMENDMENT[23]

A. Quartering of Soldiers in Early England

During the Middle Ages, it was a common practice of English military leaders to house and feed their soldiers by quartering them in the homes of civilians.[24] Unsurprisingly, English citizens reviled this practice. Therefore, cities in England frequently included anti-quartering

22. Alan Butler, *When Cyberweapons End Up on Private Networks: Third Amendment Implications for Cybersecurity Policy*, 62 AM. U.L. REV. 1203, 1223 (2013) ("The boundaries of the Third Amendment can be better understood in light of the history of its adoption and application . . . .").

23. This historical survey is brief; deeper discussion is covered extensively elsewhere in the literature. For an outstanding and in-depth overview of the early historical underpinnings of the Third Amendment in both Britain and America, see Tom W. Bell, *The Third Amendment*: *Forgotten But Not Gone*, 2 WM. & MARY BILL OF RTS. J. 117 (1993), and William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History,* 35 AM. J. LEGAL HIST. 393 (1991). For a compendium of the existing scholarship on the Third Amendment, see Scott D. Gerber, *An Unavoidably Brief Historiography of the Third Amendment*, 82 TENN. L. REV. 627, 645–646 (2015).

24. Fields, *supra* note 8, at 196–97.

regulations in their city charters.[25] In the earliest known example, Henry I's London Charter of 1130 provided "no one be billeted within the walls of the city, either of my household, or by force of anyone else."[26] Similar provisions appeared in Henry II's London Charter of 1155 and in John's Ipswich Charter of 1200, both of which also expressly prohibited the unconsented quartering of soldiers in private residences.[27] While such legal restraints on involuntary quartering were applicable only in their respective jurisdictions, popular opposition to quartering was eventually expressed in the Magna Carta of 1215, which reaffirmed "the 'ancient liberties and free customs' of England's cities," towns, and boroughs; and, in doing so, effectively incorporated the anti-quartering provisions from the city charters to all of England.[28]

Despite such express opposition to the practice of quartering, the legal prohibitions against it were consistently violated by the English government.[29] This was because as armies grew larger and became more modernized, the cost of housing and feeding soldiers increased as well.[30] Consequently, it was difficult for the House of Commons "to provide the revenue necessary to pay for adequate barracks or for billeting [soldiers] in inns."[31] With little government funding for housing, soldiers in the field often had "no choice but to seek quarters in private homes."[32]

In 1628, incensed by military quartering and other governmental abuses, the English people, in what came to be known as the "Petition of Right," set forth a specific list of liberties they believed the monarch and his army could not infringe upon.[33] Specifically, the English people "identified 'the problem of quartered troops as a grievance with a legal identity of its own.'"[34] They bemoaned that to their "great grievance and vexation," soldiers were "dispersed into divers counties of the realm, and

25. Sprankling, *supra* note 13, at 123–25.

26. Fields, *supra* note 8, at 196 (quoting DAVID C. DOUGLAS & GEORGE W. GREENWAY, ENGLISH HISTORICAL DOCUMENTS 1042–1189, at 945 (1953)).

27. *Id*. at 196–97.

28. Sprankling, *supra* note 13, at 124 (quoting CARL STEPHENSON & FREDERICK GEORGE MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 118 (1937)).

29. Fields, *supra* note 8, at 197.

30. *Id*. at 197–98.

31. *Id*.

32. *Id*.

33. *See id*. at 198.

34. Sprankling, *supra* note 13, at 124 (quoting B. CARMON HARDY, A FREE PEOPLE'S INTOLERABLE GRIEVANCE: THE QUARTERING OF TROOPS AND THE THIRD AMENDMENT, *in* THE BILL OF RIGHTS: A LIVELY HERITAGE 67, 76 (Jon Kukla ed., 1987)).

the inhabitants, against their wills[,] [had] been compelled to receive them into their houses."[35] When, despite such popular declarations of liberty, the English army continued to quarter its soldiers in private homes with impunity, Parliament passed the Anti-Quartering Act in 1679.[36]

The Anti-Quartering Act prohibited the quartering of soldiers in private homes during times of war and peace, without exception.[37] Nevertheless, the English monarch, James II, ignored the law and continued quartering his soldiers among the citizenry.[38] This monarchical flouting of the popular will led to outrage that ultimately contributed to James II's ouster in 1689 known as the "Glorious Revolution."[39] Shortly thereafter, Parliament drafted the English Bill of Rights, a statement of the people's rights under the new monarch.[40] The English Bill of Rights specifically identified the quartering of soldiers as "contrary to law."[41]

Further asserting the English peoples' anti-quartering resolve, Parliament also passed the Mutiny Act, a law which expressly prohibited "the quartering of soldiers in private homes without the consent of the owner[]."[42] Notably, however, despite the English peoples' own experience under quartering, Parliament did not extend the anti-quartering provisions of the Mutiny Act to the American colonies.[43] While the English peoples' suffering under quartering was coming to an end, it was just beginning for their colonial American subjects.

B. Quartering of Soldiers in Colonial America

The American colonists' first experience with the quartering of British troops in their homes occurred during King Phillip's War in 1675.[44] Unsurprisingly, as with the Englishmen of their heritage, the colonists were outraged with the practice and attempted to prohibit

35. Fields, *supra* note 8, at 198 (quoting 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 20 (1971)).
36. *Id*.
37. *Id*.
38. *Id*.
39. *See id*. at 198–99.
40. *Id*. at 199.
41. Sprankling, *supra* note 13, at 124 (quoting 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 42 (1971)).
42. Fields, *supra* note 8, at 199.
43. Sprankling, *supra* note 13, at 124.
44. Rogers, *supra* note 3, at 751–52.

quartering through their own local legislative enactments. For example, "[i]n 1683, . . . the New York Assembly passed a 'Charter of Libertyes and Priviledges' [sic][,] providing . . . that a 'freeman' could not be forced against his will to quarter a soldier in his house in peacetime."[45] Despite such efforts, the practice of quartering persisted throughout the seventeenth century.[46]

In 1754, with the arrival of thousands of British troops in North America for the French and Indian War and the British government struggling to bear the financial burden of housing and feeding its army, the situation only grew worse.[47] Once again, colonial legislatures attempted to ban the practice, but their efforts were ignored and rebuffed, often flagrantly. For example, in 1755 the Pennsylvania Assembly passed a resolution asserting its colonists had an "undoubted right . . . not to be burdened with the sojourning of soldiers against their will," but British General Edward Braddock quartered his troops in private homes anyway, boasting "that he would 'take care to burthen those colonies the most, that show the least loyalty to his Majesty.'"[48]

After the conclusion of the French and Indian War in 1763, British Parliament continued to face the need to maintain a large number of troops in the colonies for defense purposes—but at the lowest cost possible.[49] The Quartering Act of 1765, "the first explicit Parliamentary authorization for the quartering of soldiers in America," was its answer.[50]

Under the Quartering Act of 1765, colonists were required to quarter British troops in public and private buildings such as "alehouses, stables, and inns."[51] Then, when necessary, they had to open "uninhabited structures, barns, and outhouses" as well.[52] Although the Quartering Act of 1765 did not require them to open their homes to British troops, the

45. Sprankling, *supra* note 13, at 124–25.

46. Fields, *supra* note 8, at 199.

47. *Id*. at 200.

48. Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The "Living Constitution," the Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769, 777 (2000) (quoting Jeffrey L. Scheib, *Barracks for the Borough: A Constitutional Question in Colonial Lancaster*, 87 J. LANCASTER COUNTY HIST. SOC'Y 53 (1983)).

49. *Id*. at 778.

50. *Id*.

51. Rogers, *supra* note 3, at 752.

52. Sprankling, *supra* note 13, at 125 (quoting B. CARMON HARDY, A FREE PEOPLE'S INTOLERABLE GRIEVANCE: THE QUARTERING OF TROOPS AND THE THIRD AMENDMENT, *in* THE BILL OF RIGHTS: A LIVELY HERITAGE 67, 76 (Jon Kukla ed., 1987)).

colonists were furious.[53] Aside from having to quarter the troops on their private property, they had to provide food and other goods for them as well.[54] Therefore, to the colonists, quartering was doubly egregious because it was not only a tremendous imposition on their personal lives but also a terrible financial burden. "By the end of 1767, [New York,] New Jersey, South Carolina, Georgia, and Massachusetts had [all] taken steps to oppose [quartering] in various ways."[55] However, as colonial opposition to the practices of quartering and other abuses grew, so did Britain's need for more troops to quell it.[56]

With more troops, more space was needed to quarter them. Accordingly, Parliament amended the Quartering Act in 1774 to authorize the quartering of soldiers in the private homes of the colonists without regard for the consent of either colonial governments or the private citizens themselves.[57] For the British, the benefits of this act were twofold: first, it again enabled them to house, feed, and supply the maximum number of soldiers at the lowest possible cost; second, it enabled them to more closely suppress the growing opposition of the colonists. The troops were "in the thick of it, living with potential rebels and ready to move if and when trouble began."[58] To many, it seemed that Parliament went "out of its way to irritate the inflamed citizens."[59]

"The colonists [simply] did not appreciate having agents of the very government they wished to [overthrow] reading in the parlor and eating at their table."[60] The British troops were "coarse, often uneducated, occasionally unruly, [and] sometimes alcoholic."[61] Understandably, they were the object of substantial colonial hostility.[62] By 1774, on the eve of war and with colonial opposition to British oppression at fever pitch, the First Continental Congress passed the "Declaration and Resolves, which [decried] 'the [Quartering] [A]ct . . . as an infringement[] and violation[]

53. Dugan, *supra* note 16, at 563.
54. Morriss & Stroup, *supra* note 48, at 779–80.
55. *Id*. at 779.
56. Fields, *supra* note 8, at 200.
57. *Id*. at 201.
58. Noonan, *supra* note 6.
59. Morriss & Stroup, *supra* note 48, at 780 (quoting JAMES PHINNEY MUNROE, LAST CHANCE FOR THE EMPIRE, *in* 2 COMMONWEALTH HISTORY OF MASSACHUSETTS 514, 518 (Albert Bushnell Hart ed., 1966)).
60. Noonan, *supra* note 6.
61. *Id*.
62. Fields, *supra* note 8, at 200–01.

of the rights of the colonists.'"[63] Then in 1776, when the American colonists finally had enough of quartering and other British injustices, they declared their independence.[64] The Declaration of Independence itself listed the "quartering [of] large bodies of armed troops" as one of its main grievances to King George III.[65]

Even after the successful war for independence and the oppressive British rule behind them, many states still took care to pass anti-quartering provisions under their own laws.[66] "Between 1776 and 1787," while states were still sovereigns loosely federated under the Articles of Confederation, Delaware, Maryland, New Hampshire, and New York all declared the right to be free "from forced peacetime quartering and arbitrary wartime quartering" as one of the fundamental rights enjoyed by their citizens.[67] Similarly, "Massachusetts and Pennsylvania . . . put antiquartering [sic] provisions in their state constitutions."[68] When the Articles of Confederation were deemed too weak, the states sent delegates to the Constitutional Convention in Philadelphia to form a new national government under the U.S. Constitution; quartering of soldiers was of prime concern to many of them.[69]

C. The Ratification Debates over Quartering

When the Constitution was first drafted, it expressly granted Congress the power "[t]o raise and support Armies," yet it contained no Bill of Rights and no anti-quartering provision, so quartering was technically legal.[70] This outraged the pro-individual-rights Anti-Federalists, who refused to support any draft of a Constitution without an anti-quartering provision.[71] Exemplifying this position was the "Federal Farmer," an Anti-Federalist writing under a pseudonym, who publicly exhorted the states not to ratify the Constitution specifically because

63. *See* Sprankling, *supra* note 13, at 126 (quoting *Declarations and Resolves of the First Continental Congress* (Oct. 14, 1774), *reprinted in* SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1775, at 360 (Williams MacDonald ed., 1906)).
64. *Id*.
65. *Id*. (quoting THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776)).
66. *Id*.
67. *Id*. at 126–27.
68. *Id*. at 127.
69. *Id*.
70. U.S. CONST. art. I, § 8.
71. Morriss & Stroup, *supra* note 48, at 781.

"there was no 'provision . . . to prevent the quartering of soldiers.'"[72] "Similar sentiments . . . [emanated from] the states' ratifying conventions."[73] In Maryland, delegate Samuel Chase rose to "oppose[] the Constitution because . . . it gave 'Congress . . . [the] right to quarter soldiers in . . . *private* houses, not only in time of war, but also in time of *peace*.'"[74] In Virginia, delegate Patrick Henry opposed the Constitution because it still permitted the British "troops in time of peace . . . [to be] billeted in any manner—to tyrannize, oppress, and crush" the colonists.[75] Despite these objections, the states ratified the Constitution.[76] However, the cacophony of calls for a Bill of Rights from the Anti-Federalists never subsided. During the time between the ratification of the initial Constitution and the addition of the Bill of Rights, eight states held conventions to propose provisions to be included in a Bill of Rights.[77] Of those eight states, five proposed an anti-quartering amendment.[78]

Responding to this outcry and seeking to create unity within the nascent national government, Virginia Representative "James Madison proposed . . . what would become the Third Amendment [to the First] Congress on June 6, 1789"—barely three months after the constitutional government began.[79] His proposal contained a provision which read, "[n]o soldier shall in time of peace be quartered in any house without the consent of the owner; nor at any time, but in a manner warranted by law."[80]

Thomas Sumter of South Carolina saw no need for a distinction between a time of peace and a time of war. He felt that private consent should be required for the quartering of soldiers in private homes at all

72. Sprankling, *supra* note 13, at 127 (quoting *Federal Farmer No. 16* (Jan. 20, 1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 217 (Philip B. Kurland & Ralph Lerner eds., 1987)).

73. *Id*.

74. *Id*. (quoting Samuel Chase, Address at the Maryland Ratifying Convention (Apr. 1788), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 220 (Neil H. Cogan ed., 1997)) (emphasis in original).

75. *Id*. (citing Patrick Henry, Debate in Virginia Ratifying Convention (June 16, 1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 217 (Philip B. Kurland & Ralph Lerner eds., 1987)).

76. *Id*. at 128.

77. *Id*.

78. *Id*.

79. Rogers, *supra* note 3, at 753.

80. *Id*. (quoting THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 215 (Neil H. Cogan ed., 1997)).

times.[81] Accordingly, he moved to strike the "time of peace" language so the amendment would simply read, "[n]o soldier shall be quartered in any house without the consent of the owner."[82] Responding to this motion, Roger Sherman of Connecticut argued in favor of Madison's draft as it was, noting that "one individual should not be allowed to obstruct the public safety" during war if quartering of soldiers was absolutely necessary for the national defense.[83] In keeping with the tradition that some individual rights must necessarily be sacrificed during times of war, Sumter's version was ultimately defeated.[84]

Offering a different viewpoint to Madison's original draft, Elbridge Gerry of Massachusetts wanted to see more "civilian control over the quartering of soldiers . . . during time[s] of war."[85] His proposal suggested that the amendment read, "[n]o soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but by a civil magistrate in a manner prescribed by law."[86] Opposing this motion was Thomas Hartley of Pennsylvania.[87] Hartley retorted "that matters relating to the quartering of soldiers [needed to] be entrusted to [the people through] the legislature."[88] Hartley's argument prevailed, and Gerry's motion to alter Madison's proposed quartering amendment, like Sumter's proposal before it, was defeated.[89]

Two other formal proposals also arose during the ratification debates.[90] One version, proposed by Maryland and New Hampshire, banned "quartering without consent in times of peace, but [made no mention of] quartering at other times."[91] Another version, proposed by Virginia, New York, and North Carolina, forbade unconsented quartering in times of peace and added a provision to permit wartime quartering subject to legal controls.[92]

Ultimately, only one minor change was made to Madison's original proposed quartering amendment, and it was taken from the Virginia,

81. Fields, *supra* note 8, at 203.
82. *Id*. (quoting I ANNALS OF CONG. 752 (1789) (Joseph Gales ed., 1834)).
83. *Id*.
84. *Id*.
85. *Id*.
86. *Id*. (quoting I ANNALS OF CONG. 752 (1789) (Joseph Gales ed., 1834)).
87. *Id*.
88. *Id*.
89. *Id*.
90. Bell, *supra* note 23, at 129–30.
91. *Id*.
92. *Id*. at 130.

New York, and North Carolina proposal.[93] While Madison's original proposal distinguished between "times of peace" and other times generally, the final version changed the words "nor at any time" to "nor in time of war," creating a clear distinction between the permissibility of quartering during times of peace and times of war.[94] In the end, Congress settled on the final language of the quartering amendment on August 24, 1789,[95] after just one day of debate in each chamber.[96] On December 15, 1791, it was ratified by the states as the Third Amendment.[97] It read, "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."[98]

III. THE THIRD AMENDMENT IN AMERICAN CASE LAW

A. *Novel Third Amendment Claims*

The Third Amendment has never been directly interpreted by, or litigated before, the United States Supreme Court; however, litigants in the lower courts have periodically attempted to cite it as part of novel constitutional claims.[99] These claims have occasionally focused on highlighting the constitutional checks placed on the military or on restricting the role of the military in private life, but they have primarily focused on limiting the government's reach into the home as well as limiting the government's reach into private conduct.[100] All have been unsuccessful on Third Amendment grounds.

In a 1972 Minnesota case, nine Army medics of the Army Ready Reserve, using the military-centered approach toward the Third Amendment, sought to enjoin their commanding officers from ordering them to march in a parade at a Veterans of Foreign Wars Convention.[101] They asserted that the parade was a partisan, pro-Vietnam War affair—to

93. *Id*. at 135.
94. *See* Morriss & Stroup, *supra* note 48, at 782.
95. *Id*.
96. Rogers, *supra* note 3, at 753.
97. Earl F. Martin, *America's Anti-Standing Army Tradition and The Separate Community Doctrine*, 76 MISS. L.J. 135, 189, 191 (2006).
98. U.S. CONST. amend. III.
99. Fields, *supra* note 8, at 204.
100. Rogers, *supra* note 3, at 754.
101. Jones v. U.S. Sec'y of Def., 346 F. Supp. 97, 98 (D. Minn. 1972).

which they were opposed—and by being forced to participate in it, their Third Amendment right not to have the military intrude upon their private lives was violated.[102] Reading the text of the Third Amendment strictly as a ban on quartering, the district court found the medics' claim "inapposite" and denied the motion for an injunction.[103]

Another military-centered case arose out of the Tenth Circuit in 2001.[104] In that case, some Colorado landowners tried to preclude the Air Force from flying training missions over their property, arguing that the missions effectively appropriated their property interests and invaded their "privacy for military purposes during peacetime without their consent" in violation of their Third Amendment rights.[105] The Tenth Circuit disagreed.[106] The court held that it was unreasonable "to expect privacy from the lawful operation of military aircraft in public navigable airspace"[107] and that it went against common sense to believe that the term *house* "extend[s] to the periphery of the universe."[108]

Exemplifying the argument that government regulations should not reach into a private residence, in 1951 a defendant out of California resisted a government action brought against him under the House and Rent Act of 1947 by asserting the regulation of rent rates effectively allowed "swarms of bureaucrats to be quartered as storm troopers upon the people in violation of [the Third] Amendment."[109] The district court rejected this claim, noting there was no basis in precedent for extending Third Amendment protections to housing regulations.[110] In 1977, a defendant in New York attempted a similar claim after he was held in contempt of federal court for failing to respond to a subpoena.[111] He asserted that the service of the subpoena violated his Third Amendment rights.[112] As with the House and Rent Act before it though, the district court discounted this claim.[113] Recently, a Nevada homeowner claimed a

102. *Id*.
103. *Id*. at 100.
104. Custer Cty. Action Ass'n v. Garvey, 256 F.3d 1024 (10th Cir. 2001).
105. *Id*. at 1030.
106. *Id*. at 1043–44.
107. *Id*. at 1043.
108. *Id*. at 1043–44 (quoting United States v. Causby, 328 U.S. 256, 260–61 (1946)).
109. United States v. Valenzuela, 95 F. Supp. 363, 366 (S.D. Cal. 1951).
110. *Id*.
111. Sec. Inv'r Prot. Corp. v. Exec. Sec. Corp., 433 F. Supp. 470, 472 & 473 n.2 (S.D.N.Y. 1977).
112. *Id*. at 472.
113. *Id*. at 474.

local police department violated his Third Amendment rights by occupying his home to monitor criminal activity at his next-door neighbor's house for nine hours without his consent.[114] The district court rejected the Third Amendment claim on the ground "that municipal [police] officers are not soldiers for the purposes of" the Third Amendment, which only protects against military intrusions into the home.[115]

Others have claimed the Third Amendment represents a limit on the government's ability to regulate private conduct in general. For example, a public-school teacher in Texas, who was fired for engaging in private outside employment, claimed the school district's rule violated her right to privacy, which she asserted emanated from the penumbra of rights—including the Third Amendment.[116] This claim was also rejected.[117]

B. *A Third Amendment Case on Point:* Engblom v. Carey[118]

While the aforementioned attempts to use the Third Amendment were mostly rejected as "farfetched assertions,"[119] another case in a lower federal court actually addressed the Third Amendment head-on.[120] In *Engblom v. Carey*, a court directly applied the Third "[A]mendment in a meaningful context requiring the interpretation of its 'quartering' provisions" for the first and only time in American constitutional history.[121] Two New York State Corrections Officers accused the State of New York of violating their Third Amendment rights when it quartered National Guardsmen in their dormitory residences during a statewide strike by corrections officers.[122]

The events leading up to the suit originated on April 18, 1979, when

114. Mitchell v. City of Henderson, No. 2:13-CV-01154-APG-CWH, 2015 WL 427835, at *1–5, *14 (D. Nev. Feb. 2, 2015).

115. *Id.* at *14. In reaching this conclusion, the court cited a factually similar case from Maine in which the district court rejected a Third Amendment claim as a "far-fetched, metaphorical application" of the amendment. Estate of Bennett v. Wainwright, No. 06-28-P-S, 2007 WL 1576744, at *7 (D. Me. May 30, 2007).

116. Gosney v. Sonoa Indep. Sch. Dist., 430 F. Supp. 53, 60 (D. Tex. 1977).

117. *Id.*

118. 677 F.2d 957 (2d Cir. 1982).

119. Fields, *supra* note 8, at 204.

120. *Id.*

121. *Id.*

122. *Engblom*, 677 F.2d at 958–59.

New York State Corrections Officers initiated a statewide strike.[123] In an effort to maintain order at the state's correctional facilities, New York's Governor called in the National Guard.[124] The striking officers were permitted to remove their belongings from their dormitories at the penitentiary and were then barred from the facilities so the Guardsmen could be housed in the dormitories for the duration of the strike.[125] Due to this dispossession of their dormitories, the officers alleged a violation of their Third Amendment rights in federal district court.[126] In response, the state moved for summary judgment.[127]

While the district court found that the Guardsmen were "Soldiers" for Third Amendment purposes and that the Third Amendment is a fundamental right incorporated to the states via the Fourteenth Amendment, it nevertheless granted summary judgment for the state.[128] In so doing, the district court found the officers' "possessory interests in their residences were not sufficient to come within the protection of the [T]hird [A]mendment . . . because [New York was] the 'Owner'" of the dormitories and had granted consent to the quartering of the Guardsmen.[129] Dissatisfied, the officers appealed to the United States Court of Appeals for the Second Circuit.[130]

On appeal, the court of appeals reversed.[131] It found the district court erred in granting summary judgment because there was a genuine dispute of material fact over the officers' possessory interest in the dormitory.[132] Specifically, it noted the Third Amendment "protects the fundamental right to privacy that arises from the use and enjoyment of property."[133] Furthermore, the court found the officers' possessory interests "were sufficient to entitle them to the fundamental right of privacy protection."[134] The court of appeals "rejected [the district court's] literal interpretation of the [Third Amendment's words] 'house' and 'Owner'"

123. *Id*. at 960.
124. *Id*.
125. *Id*.
126. *Id*. at 958–59.
127. *Id*. at 959.
128. *Id*. at 959, 961.
129. Ann Marie C. Petrey, *The Third Amendment's Protection Against Unwanted Military Intrusion*, 49 BROOK. L. REV. 857, 861 (1983).
130. *Engblom*, 677 F.2d at 959.
131. *Id*.
132. *Id*. at 959, 964.
133. Petrey, *supra* note 129, at 863.
134. *Engblom*, 677 F.2d at 963.

and "found that [T]hird [A]mendment protection will be afforded to one who has both a legitimate expectation of privacy in one's property-based interest and a legal right to exclude others."[135] In so doing, the court of appeals pointed to the U.S. Supreme Court case of *Rakas v. Illinois*,[136] wherein the U.S. Supreme Court found that privacy interests protected by the Fourth Amendment do not need to be based on common-law interest in real or personal property and that "one who . . . lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy."[137] Then, applying that line of reasoning to the Third Amendment, the court of appeals held "that the property-based privacy interests protected by the Third Amendment are not limited solely to those arising out of fee simple ownership but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others."[138] In addition to relying on the U.S. Supreme Court's Fourth Amendment jurisprudence, the court of appeals also pointed to New York's property law and observed that the officers' housing agreement "was tantamount to a lease."[139] Thus, having found the corrections officers' "interest in their living quarters was analogous to a tenancy interest that reasonably entitled them to a legitimate expectation of privacy,"[140] the court of appeals remanded the case to the district court for further action on the Third Amendment violation.[141]

C. The Third Amendment in U.S. Supreme Court Dicta

As indicated above, the U.S. Supreme Court has never directly

135. Petrey, *supra* note 129, at 863–64.
136. 439 U.S. 128 (1978).
137. *Id*. at 144 n.12.
138. *Engblom*, 677 F.2d at 962.
139. *Id*. at 963.
140. Fields, *supra* note 8, at 207.
141. *Engblom*, 677 F.2d at 966. On remand, the district court again granted summary judgment for the state. Engblom v. Carey, 572 F. Supp. 44, 49 (S.D.N.Y. 1983). This time, the district court cited a rule that granted government officials immunity from civil liability when its conduct did "not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known." *Id.* at 46 (emphasis in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 802 (1982)). Pointing to the absolute dearth of Third Amendment precedent, the district court concluded the State of New York could not reasonably have known that quartering National Guardsmen in state-owned dormitories, under the exigent circumstances of a strike, would violate anyone's Third Amendment rights. *Id.* at 47–49. As such, the district court found the officers' Third Amendment rights were not "clearly established" and granted them no relief. *Id.* at 49.

interpreted the Third Amendment; however, Supreme Court litigants have periodically cited it while arguing for analogous rights.[142] Accordingly, there are several major cases that mention the Third Amendment in dicta as an illustration of "constitutional restrictions on military power"[143] or as a "facet of the right to privacy."[144]

1. The Third Amendment as a Restriction on Military Power

With regard to restrictions on military power, some Supreme Court opinions have suggested the Third Amendment stands for the "underlying American values, such as the traditional separation between the civilian and military spheres" in American government.[145] For example, in *Youngstown Sheet & Tube Co. v. Sawyer*[146] the nation's steelworkers went on strike during the Korean War.[147] Fearing a reduction in steel production would hamper the war effort and threaten national security, President Truman issued an executive order directing the federal government to take possession of and operate the nation's steel mills throughout the strike.[148] Based on his authority as Commander in Chief, Truman maintained that he could take such bold action without congressional approval.[149] The Court disagreed.[150] In finding the executive order outside the bounds of presidential authority, even during wartime, the Court cited the Third Amendment to emphasize the limitation of military intrusion into civilian life.[151] In his famous concurring opinion, Justice Robert Jackson noted that "in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment [requires that] . . . even in war time, his seizure of needed military housing must be authorized by Congress."[152] Accordingly, the Court refused to let the President seize the steel mills under the Commander in

142. Rogers, *supra* note 3, at 754.
143. Sprankling, *supra* note 13, at 128.
144. Fields, *supra* note 8, at 204.
145. Sprankling, *supra* note 13, at 128.
146. 343 U.S. 579 (1952).
147. *Id*. at 583.
148. *Id*.
149. *Id*. at 582. The President's constitutional authority as Commander in Chief derives from U.S. CONST. art. II, § 2.
150. *Youngstown*, 343 U.S. at 589.
151. *Id*. at 644 (Jackson, J., concurring).
152. *Id*.

Chief power alone, emphasizing instead that congressional authority was necessary.[153]

Another case limiting military intrusion into civilian affairs is *Laird v. Tatum*.[154] *Tatum* arose after it was uncovered that the U.S. Army was gathering "information relating to potential or actual civil disturbances [or] street demonstrations" for intelligence purposes during the Vietnam War era.[155] The plaintiffs, private citizens, sought to enjoin the Army from conducting such "surveillance of lawful and peaceful . . . political activity."[156] Although the Court ultimately denied the injunction based on evidentiary reasons, it sternly criticized the Army's surveillance activities as contrary to the "traditional and strong resistance of Americans to any military intrusion into civilian affairs," as exemplified by the Third Amendment.[157]

2. The Third Amendment as a Basis for a Right to Privacy in the Home

In addition to claiming the Third Amendment restricts military influence over civil affairs, some Supreme Court opinions have also suggested it stands for a right to privacy, particularly with regard to the home. In fact, the most notable citation to the Third Amendment might be from Justice William O. Douglas's opinion in *Griswold v. Connecticut*, which struck down a Connecticut law forbidding the use of contraceptives by married couples.[158] In that decision, Justice Douglas found the law to be an intrusion upon the right of marital privacy in the bedroom, a right which, according to him, emanated from the "penumbras" of the Bill of Rights—including the Third Amendment.[159] Justice Douglas wrote that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[160] He went on to write that "[v]arious guarantees create zones of privacy" and that the "Third Amendment . . . is [a] facet of that privacy."[161] This argument echoed another Justice

153. *Id*. at 589.
154. 408 U.S. 1 (1972).
155. Tatum v. Laird, 444 F.2d 947, 949 (1971).
156. Laird v. Tatum, 408 U.S. 1, 2 (1972).
157. *Id*. at 15.
158. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).
159. *Id*. at 485–86.
160. *Id*. at 484.
161. *Id*.

Douglas opinion where he railed against a prohibition on the use of contraceptives by married couples in the home.[162] In the 1961 case of *Poe v. Ullman*, he suggested that there is no doubt "that a Bill of Rights that in time of peace bars soldiers from being quartered in a home without the consent of the Owner should also bar the police from investigating the intimacies of the marriage relation."[163]

Another important right-to-privacy case that cited the Third Amendment was *Katz v. United States*.[164] In that case, the U.S. Supreme Court held the government needed a warrant to search any area in which a person has a "reasonable expectation of privacy."[165] In reaching this conclusion, the Court noted that many provisions of the Constitution, including the Third Amendment, "protects . . . [personal] privacy from governmental intrusion."[166]

IV. AN INTRATEXTUAL ANALYSIS: THE UNDERLYING PRINCIPLES OF THE THIRD AMENDMENT AND WHAT THEY SUGGEST ABOUT THE MEANING OF THE SECOND AND FOURTH AMENDMENTS

Some constitutional scholars suggest the Third Amendment's principles are limited to those found in its very specific terms, and extensive analysis as to its broader implications is unnecessary.[167] However, this viewpoint is of questionable validity. After all, if the Third Amendment stands only for the principle that soldiers cannot seize a citizen's home and rifle through his personal property, then it is constitutionally superfluous in light of the Fourth Amendment's protection against unreasonable searches and seizures.[168] The Third Amendment must stand for more.

As outlined above, the Third Amendment's history reveals it has two distinct underlying principles: the limitation of military power on the lives of individual citizens and the limitation of government intrusions

162. *See* Poe v. Ullman, 367 U.S. 497, 522 (1961) (Douglas, J., dissenting).
163. *Id.* (quoting U.S. CONST. amend. III).
164. 389 U.S. 347 (1967).
165. *See id*. at 350–53, 360 (Harlan, J., concurring).
166. *Id*. at 350 n.5.
167. *See, e.g.*, SAMUEL F. MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES (1893); Morton J. Horwitz, *Is the Third Amendment Obsolete?,* 26 VAL. U. L. REV. 209, 209 (1991).
168. Dugan, *supra* note 16, at 576.

into the privacy of an individual's home.[169] From early English and American experiences under quartering to modern interpretations of the Third Amendment in American courts of law, these two principles have shone throughout. With these principles in mind, this section now takes what is known about the Third Amendment and conducts an intratextual analysis to interpret the Second and Fourth Amendments in light of the Third.

A. The Second Amendment Right to Keep and Bear Arms

The Second Amendment to the U.S. Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[170] Though the meaning of this provision was apparently settled with the U.S. Supreme Court's 2008 ruling in *District of Columbia v. Heller*,[171] in which the Court held the Second Amendment "confer[s] an individual right to keep and bear arms,"[172] the debate over the amendment's meaning remains hugely controversial.[173] Five conservatives and four progressives authored the opinion.[174] Consequently, the Court was just one justice away from reversing *Heller*.[175] Therefore, despite *Heller*, it

169. *See supra* Parts I & II. *See also* Padilla v. Rumsfeld, 352 F.3d 695, 714–15 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004) ("The Third Amendment's prohibition on the quartering of troops during times of peace reflected the Framers' deep-seated beliefs about the sanctity of the home and the need to prevent military intrusion into civilian life.").

170. U.S. CONST. amend. II.

171. 554 U.S. 570 (2008).

172. *Id*. at 595.

173. In *Voisine v. United States,* 136 S.Ct 2272 (2016), during oral arguments, the U.S. Supreme Court considered the matter of a criminal defendant who was convicted of illegally possessing a firearm after a prior misdemeanor conviction. Justice Clarence Thomas noted "possession of a gun . . . at least as of now, is still a constitutional right." Garrett Epps, *Clarence Thomas Breaks His Silence*, (Feb. 26, 2016), www.theatlantic.com/politics/archive/2016/02/clarence-thomas-supreme-court/471582/ [https://perma.cc/JBG7-KWA9]. Most interesting about Justice Thomas' remark is his use of the phrase "as of now," as he was apparently observing the fact that the longevity of the *Heller* decision remains very much in doubt. *Id*.

174. *See id.*

175. In a 2016 interview with the *New York Times*, Justice Ruth Bader Ginsburg said *Heller* was a "very bad decision" and suggested her desire to overturn it the next time the Court considers a challenge to a gun control law. Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term,* (July 10, 2016) www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-

remains important to consider the true meaning of the Second Amendment. As indicated above, the debate

> pits those who believe that the Second Amendment protects an expansive, fundamental individual right to keep and bear arms for personal use . . . against those who maintain that [it] secures only a limited right of the people—individually or collectively—to be armed as part of an organized and well-regulated State militia.[176]

As shown by Justice Antonin Scalia's majority opinion in *Heller*,[177] *conservative* constitutional thinkers embrace the expansive, fundamental-individual-right interpretation of the Second Amendment.[178] *Progressives*, on the other hand, take the opposite position, believing the Second Amendment only "protects the right to keep and bear arms for certain military purposes."[179] So which side is right? Can an analysis of the Third Amendment shed any light on the meaning of the Second Amendment?

As emphasized before, the Third Amendment's history indicates one of its underlying principles is the need to limit the "enforcement power of the most coercive and dangerous organ of government power: the military."[180] Specifically, the early English history up to and including the English Bill of Rights reveals the concern with quartering was directly tied to more general worries about standing armies, and this sentiment persisted into the American experience with quartering as well.[181] Colonial-legislative enactments, the Declaration of Independence, Revolutionary War-era state constitutions, the quartering proposals of several state ratifying conventions, and even modern cases

critiques-latest-term.html [https://perma.cc/25TJ-WEKD].

176. Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 706 (2002).

177. *Heller*, 554 U.S. at 572.

178. *See id.* at 595 (There is "no doubt, on the basis of both text and history, that the Second Amendment confer[s] an individual right to keep and bear arms.").

179. *See id.* at 638 (Stevens, J., dissenting).

180. Dugan, *supra* note 16, at 587. *See also* Geoffrey M. Wyatt, *The Third Amendment in the Twenty-First Century: Military Recruiting on Private Campuses*, 40 NEW ENG. L. REV. 113, 134 (2005) ("[T]he Third Amendment creates a broad constitutional property right to exclude any member of the military from all private property for any reason or no reason at all.").

181. *See supra* Part I.

interpreting the Third Amendment all evince skepticism of strong military influence on the lives of individual citizens.[182]

Taking this history into account, the collective-right interpretation proffered by *progressive* constitutional thinkers can be foreclosed for two reasons. First, the history of the Third Amendment reveals it undoubtedly protects an individual right.[183] Indeed, several of the other amendments in the Bill of Rights protect individual rights.[184] Therefore, it is implausible the Framers somehow intended for the Second Amendment to be *sui generis* among the Bill of Rights in protecting a collective right. Additionally, the Third Amendment provides that "[n]o *Soldier* shall, in time of peace be quartered in any house."[185] Although "[t]he Constitution provides little guidance for interpreting who qualifies as a soldier,"[186] the Third Amendment's history reveals it is not unreasonable to conclude the Third Amendment's use of the term *Soldier* refers to our modern *Militia*: the National Guard. Indeed, in the only Third Amendment case on point in American history, the Second Circuit Court of Appeals readily concluded National Guardsmen were *Soldiers* for Third Amendment purposes and that the Third Amendment precluded them from being quartered in the homes of individual citizens without Congressional authorization.[187] This view of the Third Amendment's applicability to National Guardsmen has been proffered in the legal literature as well.[188] Therefore, if the Third Amendment protects individual citizens from oppression at the hands of all *Soldiers*, including those in the *Militia*, it is nonsensical to conclude the Second Amendment serves to arm the very organization that the Third Amendment protects

182. *See supra* Parts I & II.

183. Fields & Hardy, *supra* note 23, at 411–12.

184. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 218 (1983). *See also* Gerber, *supra* note 23, at 645–46.

185. U.S. CONST. amend. III (emphasis added).

186. Rogers, *supra* note 3, at 764.

187. Engblom v. Carey, 677 F.2d 957, 961–62 (2d Cir. 1982).

188. *See, e.g.*, Rogers, *supra* note 3, at 765 ("National Guard troops are just as capable of seeking forced quarter in private homes as federal troops. In fact, a Third Amendment violation is even more likely to occur at the hands of the National Guard."); Christopher J. Schmidt, *Could a CIA or FBI Agent be Quartered in Your House During a War on Terrorism, Iraq, or North Korea?*, 48 ST. LOUIS U. L.J. 587, 596 (2004) (asserting that even CIA and FBI Agents are soldiers under the Third Amendment because "a broader meaning applies to soldier," including "[anyone] engaged in military service" and any "militant leader, follower, or worker").

against. The more logical interpretation is that the Second Amendment's reference to the "well-regulated Militia" does not refer to the *Militia* or its modern equivalent—the National Guard—at all, but rather to individual citizens: "the entire able-bodied military-age . . . citizenry of the United States."[189]

In light of this analysis, it is clear the history of the Third Amendment supports the expansive, fundamental individual-right interpretation of the Second Amendment, which is often espoused by *conservative* judges and legal thinkers. The notion that the Second Amendment right to keep and bear arms only applies to lawful police and military purposes is plainly inconsistent with the history of the Third Amendment and is inimical to the Third Amendment's concern with protecting individual citizens from a powerful military.[190] Accordingly, the only sensible reading of the Second Amendment, in light of the history of the Third Amendment, is that it also provides protection for individual citizens against a powerful national government—not that it arms the same national government the Third Amendment protects against.

B. The Fourth Amendment Right to be Secure Against Unreasonable Searches and Seizures

The Fourth Amendment to the U.S. Constitution provides, in part, "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."[191] Although the Framers did not explain what they meant by "unreasonable" in the Fourth Amendment context, courts generally "define it to mean searches [and seizures] conducted without a warrant, unless the search [or seizure] falls within a narrow and clearly established . . . exception."[192] The extent of the individual right granted by the Fourth Amendment tends to hinge on the number and scope of these exceptions.

As described earlier in this Article's introduction, *conservative*

189. Kates, *supra* note 184, at 216.

190. The Third Amendment's other key principle—the sanctity of the home—also supports the individual-right interpretation of the Second Amendment because, read together, the amendments suggest the importance of an individual's ability to protect his own home. Reynolds, *supra* note 14, at 565.

191. U.S. CONST. amend. IV.

192. Dugan, *supra* note 16, at 575.

judges and scholars have exhibited a willingness to grant many exceptions to the warrant requirement and have tended to allow the government wide latitude in conducting searches and seizures.[193] In fact, in the latter quarter of the twentieth century, and into the new millennium, such *conservative* judges addressing the issue of what constitutes an *unreasonable* search or seizure have "rule[d] in favor of the government most of the time, lending its imprimatur to the particular search and seizure practice employed and, in doing so, slanted the Constitution . . . away from individual privacy."[194]

Conversely, *progressive* judges have persistently frowned on exceptions to the warrant requirement, particularly with regard to the home, and have attempted to limit the government's power to conduct searches and seizures to the warrant requirement itself. For example, Justice Ruth Bader Ginsburg, the current leader of the U.S. Supreme Court's *progressive* wing, has written that "[e]xceptions to the warrant requirement . . . must be 'few in number and carefully delineated'" because "[i]n no quarter does the Fourth Amendment apply with greater force than in our homes."[195] So which side is correct? Does an analysis of the Third Amendment shed any light on the true scope of individual rights protected by the Fourth Amendment?

In addition to showing a concern with protecting individuals from military oppression, a reading of the Third Amendment's history also evinces "a widely understood view of property rights when the Bill of Rights was created—[specifically] that the home deserve[s] special

193. *See, e.g.*, Kentucky v. King, 563 U.S. 452, 469–70 (2011) (establishing the "knock and talk" exception to the warrant requirement); Hudson v. Michigan, 547 U.S. 586, 594 (2006) (finding evidence discovered after a "knock and announce" violation will not be excluded); Illinois v. Rodriguez, 497 U.S. 177, 181–82 (1990) (establishing the third-party consent exception to the warrant requirement); United States v. Leon, 468 U.S. 897, 920–21 (1984) (finding evidence discovered during warrantless search will not be excluded if officers acted in good faith); United States v. Calandra, 414 U.S. 338, 350 (1974) (finding evidence discovered during a warrantless search will not be excluded from consideration during grand jury proceedings). Though these cases are *settled*, rapid developments in technology for the government and citizenry keep the question of the breadth of Fourth Amendment protections extremely relevant and at the forefront of constitutional law. *See generally* Butler, *supra* note 22, at 1223.

194. Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 754 (2006).

195. *Kentucky*, 563 U.S. at 473–74 (Ginsburg, J., dissenting) (quoting United States v. U.S. Dist. Court, 407 U.S. 297, 318 (1972)).

protection from government intrusion."[196] This principle is evident not only in the history of the early Englishmen and colonial Americans, who clearly "resented sharing their homes with often rude and boorish strangers,"[197] but also in the modern cases that have considered the Third Amendment and found its protections must be afforded to one who has "a legitimate expectation of privacy in one's property-based interest and a legal right to exclude others."[198] Thus, to the extent the Third Amendment reflects the principle that an individual citizen's home enjoys special solicitude from government intrusion, it is intuitive that the Fourth Amendment provides equally strong protection for the home and that there should be few exceptions for government intrusion into the home beyond the warrant requirement itself.[199]

Some writers have rejected this view of the Third Amendment and suggested the stringency of the Third Amendment's protection of the home from military intrusion does not extend to the Fourth Amendment's protection of the home from civil intrusion because, while the Third Amendment "speaks in absolutes," the Fourth Amendment uses the more equivocal standard of "reasonableness."[200] In effect, this viewpoint argues civil intrusions into the home are somehow more palatable than military intrusions simply because they are conducted by a different authority. This theory is implausible. The Third Amendment's history suggests if one type of government intrusion into the home is unacceptable, then all government intrusions into the home are unacceptable, except as otherwise provided by the Fourth Amendment's warrant requirement.[201] In other words, because the Third Amendment

196. Sprankling, *supra* note 13, at 131.

197. Morriss & Stroup, *supra* note 48, at 783.

198. Petrey, *supra* note 129, at 864.

199. Butler, *supra* note 22, at 1225–27 (arguing the Third Amendment and the Fourth Amendment create "zones of privacy" that are "complimentary" to one another and that, as such, "courts will generally avoid interpretations that would bring them into disharmony").

200. Dugan, *supra* note 16, at 579–80. Also, other writers have rejected the idea that the Third and Fourth Amendments work in conjunction to protect a privacy interest. *See* Wyatt, *supra* note 180, at 123 (rejecting the "thoroughly twentieth-century tendency to think of the amendment in terms of an individual right to privacy" on the grounds that it only secures "what is fundamentally a property right" while privacy is separately protected by the Fourth Amendment).

201. Avery, *supra* note 17, at 194–95. *See also* Samantha A. Lovin, *Everyone Forgets About the Third Amendment*: *Exploring the Implications on Third Amendment Case Law of Extending Its Prohibitions to Include Actions by State Police Officers*, 23 WM & MARY

exemplifies the principle that "[t]he home has a special, almost exalted status,"[202] it is unthinkable that the Fourth Amendment's protection of the home should be riddled with a myriad of exceptions.

Taking this into account, it becomes apparent the history of the Third Amendment supports the *progressive* reading of the Fourth Amendment that is staunchly protective of individual rights.[203] The various exceptions to the Fourth Amendment's warrant requirement that have been propagated by *conservative* jurists and scholars are plainly inconsistent with the underlying principles of the Third Amendment. The history reveals an individual's home is subject to special solicitude, and exceptions to the warrant requirement, particularly regarding government intrusion into the home must be, as Justice Ginsburg put it, "few in number and carefully delineated."[204]

V. Conclusion

The Third Amendment is not merely "an esoteric prohibition on an obscure and outdated inconvenience" or "irrelevant to contemporary constitutional law."[205] Rather, the history of the Third Amendment reveals it stands for the important and enduring constitutional principles of limiting the influence of the military in the lives of individual citizens and protecting the privacy and solicitude of individual citizens' homes from government intrusion.[206] In light of these principles, it is evident that the Third Amendment has the potential to play an important role in

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BILL OF RTS. J. 529, 543–44 (2014). "[I]nstead of being 'redundant,' the Third Amendment serves as a complement to the Fourth Amendment because its originally intended purpose was 'protection against the military conducting [similar] activities' as those prohibited to 'civilian officials.'" *Id.* at 543-44 (quoting Dugan, *supra* note 16, at 559).

202. Sprankling, *supra* note 13, at 151.

203. *See* Reynolds, *supra* note 14, at 565 ("[I]n assessing the legitimacy of [government intrusions into the home], courts should look not only at the protections provided by the Fourth Amendment but also, again, at the Third Amendment's protection of a fundamental right of privacy in one's dwelling.").

204. Kentucky v. King, 563 U.S. 452, 473 (2011) (Ginsburg, J., dissenting) (quoting United States v. U.S. Dist. Court, 407 U.S. 297, 318 (1972)).

205. Dugan, *supra* note 16, at 587.

206. Tom W. Bell, *"Property" in the Constitution: The View from the Third Amendment*, 20 WM & MARY BILL OF RTS. J. 1243, 1276 (2012) (The Third Amendment's role is in "the grand struggle to protect individual rights against government trespass.").

the larger constitutional scheme.[207]

In particular, one can use the Third Amendment as part of an intratextual analysis, taking what we know about the Third Amendment and using it to better understand other constitutional provisions. Demonstrating this modern use of the Third Amendment, this Article has used a Third Amendment-based intratextual analysis in an attempt to resolve a paradox of modern constitutional jurisprudence and to suggest the proper interpretation of the Second and Fourth Amendments. Having done so, the history of the Third Amendment supports a reading that the Second and Fourth Amendments both provide very broad and very strong individual rights to the people designed to preserve their individual liberties and protect them from the threat of an oppressive and overbearing federal government.

Although the Third Amendment may have fallen into virtual obsolescence throughout American constitutional history, its history suggests it need not remain there.[208] As the examples in this Article show, the Third Amendment and its penumbras can provide a textual and historical basis for interpreting and better understanding the meaning of the Second and Fourth Amendments. Specifically, "[t]he penumbras of the Third Amendment, in conjunction with [the Second and Fourth Amendments], may impel stricter limits on official intrusions than would be provided by" either amendment taken alone.[209]

207. Bell, *supra* note 23, at 149–50 (The Third Amendment "can speak volumes—if one takes the time to listen. . . . [I]t still raises interesting theoretical questions about states' powers under federalism, rights to property and privacy, and the interplay of overlapping constitutional protections.").

208. Dugan, *supra* note 16, at 587.

209. Reynolds, *supra* note 14, at 565.