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Given the deep and elaborate doctrines associated with the rest of the first eight amendments to the United States Constitution, the Third Amendment is startling in its obscurity. It is a constitutional enigma, shrouded in eighteenth-century obscurity, and on its face appears to be a quaint historical artifact with little application to the twenty-first century. In this article, we will explore the limited Third Amendment jurisprudence that is available and consider what, if any, application the Third Amendment has in the United States today. The key questions to be considered are four. First, who is a soldier? Second, what constitutes quartering? Third, what is a house? And finally, are the Third Amendment's protections incorporated against the States by the Fourteenth Amendment? In this article we consider the incorporation question with a focus on the grounding of the right in English and colonial history under the doctrinal test for incorporation as it now stands.

We begin with the text of the Third Amendment which is elegant in its simplicity: "No 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."[1] The body of case law construing this language is remarkably thin. This is either because the resources available to the military establishment have rendered the former practice of quartering soldiers in private homes not worth the aggravation or because the prohibition is so clear as to exclude experiment. In either event, the provision looks quaint; even odd. It is hard to imagine the United States Army sending an officer to a citizen's door to inform him that a squad of Rangers is going to be sleeping in the guest room for a few months.

Things were otherwise at the Founding. The Framers were not of one mind with respect to standing armies. The Virginia Declaration of Rights, authored principally by George Mason in 1776, and substantially influencing both the Declaration of Independence and the federal Bill of Rights, contains an article deprecating standing armies:

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1. U.S. CONST. amend. III.

> 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that *standing armies, in time of peace, should be avoided as dangerous to liberty*; and that in all cases the military should be under strict subordination to, and governed by, the civil power.[2]

Even so, Article XIII recognized the public policy permitting standing armies in the time of war and in that respect is harmonious with the Third Amendment. As one early commentator observed:

> Our state bill of rights, conforming to the experience of all nations, declares, that standing armies in time of peace, should be avoided as dangerous to liberty; this article of the constitution, seems by a kind of side wind, to countenance, or at least, not to prohibit them. The billeting of soldiers upon the citizens of a state, has been generally found burthensome to the people, and so far as this article may prevent that evil it may be deemed valuable, but it certainly adds nothing to the national security.[3]

This observation by Tucker, whose edition of Blackstone was published in 1803, shows that even by then, just fifteen years after its adoption, the Third Amendment, while deemed "valuable," had largely become a victim of its own success.

That circumstance leads us to wonder just what were the elements of the right being secured by the Third Amendment? The historical background and the drafting process have been exhaustively treated elsewhere.[4] Here, we briefly describe the high points in order to provide context. The question of quartering troops in private homes is a controversy that came to England with the Norman Conquest.[5] The problem became acute during the Tudor and Stuart Dynasties.[6] This led parliament to pass the following statute in 1679:

> And whereas by the laws and customes of this realme the inhabitants thereof cannot be compelled against their wills to

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2. VIRGINIA DECLARATION OF RIGHTS, IX THE STATUTES AT LARGE, William Waller Hening III (Richmond 1824) (1969 facsimile).

3. St. George Tucker, 1 WILLIAM BLACKSTONE, COMMENTARIES App. Note D, § 12.

4. *See* Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117 (1993).

5. *Id.* at 119.

6. *Id.* at 123.

> receive souldiers into their houses and to sojourne them there Bee it declared and enacted by the authoritie aforesaid that noe officer military or civill nor any other person whatever shall from henceforth presume to place quarter or billet any souldier or souldiers upon any subject or inhabitant of this realme of any degree quality or profession whatever without his consent and that it shall and may be lawfull for every such subject and inhabitant to refuse to sojourne or quarter any souldier or souldiers notwithstanding any command order or billeting whatever.[7]

Interestingly, and with a certain resemblance to contemporary American legislative practices, this language was appended to an appropriation for "paying off and disbanding the Forces raised since the Nine and twentieth of September One thousand six hundred seaventy seaven."[8] It is reported that the Stuarts ignored the statute.[9]

In 1689, parliamentary supremacy was secured through the Glorious Revolution and the deposition of James II. The ensuing English Bill of Rights did not expressly address the question of quartering, but it did speak to the closely-related question of standing armies: "That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law."[10] Parliament proceeded to pass the first version of the Mutiny Act in 1689, which contained a provision preventing the quartering of soldiers in private homes absent consent.[11] Ominously, however, the protection did not extend to the American colonies.[12]

Thus, in the wake of the Glorious Revolution, the right to be free from the forced quartering of soldiers in one's home was declared on the face of statutory authority as being among the rights that were enjoyed by Englishmen. Later developments in the North American Colonies, however, made it clear that this right was not enjoyed by the colonials. In 1765, in connection with the French and Indian War, Parliament passed the first of Two Quartering Acts directed

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7. 31 Charles II, ch. 1 (1679).
8. *Id.*
9. Bell, *supra* note 4, at 124.
10. ENGLISH BILL OF RIGHTS (1689).
11. William S. Fields, et al., *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 406 (1991).
12. *Id.*

specifically at the American colonies.[13] The 1765 Act was remarkably unintrusive in its policy. The Act provided:

> [S]uch constables, tythingmen, magistrates, and other civil officers as aforesaid are hereby required to billet and quarter the officers and soldiers, in his Majesty's service, in the barracks provided by the colonies; and if there shall not be sufficient room in the said barracks for the officers and soldiers, then and in such case only, to quarter and billet the residue of such officers and soldiers, for whom there shall not be room in such barracks, in inns, livery stables, ale-houses, victualing-houses, and the houses of sellers of wine by retail to be drank in their own houses or places thereunto belonging, and all houses of persons selling rum, brandy, strong water, cyder, or metheglin, by retail, to be drank in houses; and in case there shall not be sufficient room for the officers and soldiers in such barracks, inns, victualing and other publick ale-houses, that in such and no other case, and upon no other account, it shall and may be lawful for the governor and council of each respective province in his Majesty's dominions in America, to authorize and appoint, and they are hereby directed and impowered to authorize and appoint, such proper person or persons as they shall think fit, to take, hire and make fit, and in default of the said governor and council appointing and authorizing such person or persons, or in default of such person or persons so appointed neglecting or refusing to do their duty, in that case it shall and may be lawful for any two or more of his Majesty's justices of the peace in or near the said villages, towns, townships, cities, districts, and other places, and they are hereby required to take, hire, and make fit for the reception of his Majesty's forces, such and so many uninhabited houses, out-houses, barns, or other buildings, as shall be necessary to quarter therein the residue of such officers and soldiers for whom there should not be room in such barracks and publick houses as aforesaid, and to put and quarter the residue of such officers and soldiers therein.[14]

It is noteworthy that the 1765 Act made no provision whatsoever for the quartering of troops in the private homes of the colonists. The preferred option was for the troops to stay in barracks provided by the colonies. If those were full then the troops were to be quartered in inns and public houses. Other provisions of the Act make it clear

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13. 5 Geo. III, c. 33.
14. *Id.*

that the proprietors were to be duly compensated.[15] Only if both the barracks and the public accommodations proved insufficient was there to be recourse to the use of uninhabited private buildings, and then there was included among the procedural safeguards a requirement that the governor and his council appoint a person to make such arrangements.

Interestingly, while the 1774 Quartering Act,[16] which was deemed one of the "intolerable Acts" by colonial revolutionaries, streamlined the procedure, it still made no provision for the quartering of troops in occupied private homes:

> [I]f it shall happen at any time that any officers or soldiers in His Majesty's service shall remain within any of the said colonies without quarters for the space of twenty four hours after such quarters shall have been demanded, it shall and may be lawful for the governor of the province to order and direct such and so many uninhabited houses, outhouses, barns, or other buildings as he shall think necessary to be taken (making a reasonable allowance for the same) and make fit for the reception of such officers and soldiers, and to put and quarter such officers and soldiers therein for such time as he shall think proper.

It took more than 200 years after the War for Independence for the courts to issue a noteworthy decision. That leading case on the Third Amendment is *Engblom v. Carey*.[17] *Engblom* is of particular interest because it presents a set of facts in a modern context where the Third Amendment was, in our view, actually, literally and properly implicated. The decision was handed down by the Second Circuit in 1982, and, in a footnote, the court observed that: "Aside from the lower court's opinion in this case, there are no reported opinion involving the literal application of the Third Amendment."[18] The plaintiffs in *Engblom* were two corrections officers at the Mid-Orange Correctional Facility in Warwick, New York.[19] Following a strike of corrections officers the National Guard occupied the private apartments of the officers which were deemed to fall within the definition of a house for purposes of the Third Amendment. On the way to deciding the case, the Second Circuit found the Third Amendment incorporated against the States by way of the Fourteenth Amendment.

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15. *Id.* at V.
16. 14 Geo. III, c. 54.
17. 677 F.2d 957 (2d Cir. 1982).
18. *Id.* at 959 n.1.
19. *Id.* at 958.

This too seems correct. In *MacDonald v. City of Chicago*[20] the Supreme Court made its most recent pronouncement on the issue of incorporation, holding there that the Second Amendment applies to the States via selective, due process incorporation grounded in the Fourteenth Amendment. "Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States."[21] Because at the Founding nonquartering was viewed as fundamental and has been so non-controversial as to produce little opportunity for its application, the Third Amendment would seem to satisfy the *MacDonald* analysis. However, because the Third Amendment was already receding in importance by the time the Fourteenth Amendment was ratified, non-incorporation under the selective incorporation doctrine is a possible outcome. According to Calabresi and Agudo this was the historical situation as of July 9, 1868:

> Twenty-seven states–or two-thirds but not an Article V consensus of three-quarters–had provisions in their state constitutions that prohibited the quartering of soldiers in private homes without the consent of the owner in times of peace. These clauses usually provided, "No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war except in the manner to be prescribed by law." A supermajority of the population in 1868–72% of the American people, but not an Article V three-quarters supermajority–lived in states with constitutions that prohibited quartering soldiers in private homes. Such prohibitions could be found in 80% of the Northeastern state constitutions, in 75% of the Midwestern-Western state constitutions, and in 67% of the Southern state constitutions in 1868. Clauses forbidding the quartering of solders in private homes were somewhat more common in older state constitutions in 1868 than in newer ones, suggesting that this may have been an evil whose time was past. Quartering clauses were present in 83% of the pre-1855 but in only 63% of the post-1855 constitutions.[22]

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20. 561 U.S. 742 (2010).

21. *Id.* at 750.

22. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 56 (2008). Although the Supreme Court seems unlikely to revisit the question anytime soon

> [a]s a matter of history, Justice Thomas had the better side of the argument in *MacDonald v. City of Chicago*, when he maintained that the privileges or

Since *Engblom*, the U.S. District Court for the District of Maine, has decided in summary fashion that the Third Amendment was not implicated when three state law enforcement officers took possession of the plaintiff's house for "fewer than 24 hours."[23]

The Tenth Circuit has held that military aircraft flying over the plaintiffs' house was not a violation.[24] With so little to go on even if the Third Amendment is ultimately deemed incorporated into the Fourteenth, in this period of highly militarized police, the meaning of the terms quarter and soldier, in particular, await future explication.

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immunities clause of the Fourteenth Amendment was intended to protect fundamental rights against state infringement and that the rights deemed fundamental included the first eight amendments.

E. Duncan Getchell, Jr. & Michael H. Brady, *How the Constitutions of the Thirty-Seven States in Effect when the Fourteenth Amendment was Adopted Demonstrate that the Governmental Endorsement Test in Establishment Clause Jurisprudence is Contrary to American History and Tradition*, 17 TEX. REV. L. & POL. 125, 126 (2012).

23. Estate of Bennett v. Wainwright, 2007 WL 1576744, at *7 (D. Me. May 30, 2007).

24. Custer Cnty. Action Ass'n v. Garvey, 256 F.3d 1024, 1043 (10th Cir. 2001).