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A WORD ON THE THIRD: THREE APPROACHES TO THE THIRD AMENDMENT'S PLACE IN CONSTITUTIONAL RHETORIC

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"War is not a courtesy but the most horrible thing in life; and we ought to understand that, and not play at war. We ought to accept this terrible necessity sternly and seriously."

"[The Constitutional Amendment prohibiting forced quartering except in times of] War, (ooh, yeah, good God y'all), ***what is it good for?"***

- War & Peace by Leo Tolstoy and Edwin Starr

INTRODUCTION

Substantively? Nothing. The Third Amendment is about as relevant or useful as an umbrella in Death Valley. It is the Constitution's appendix. Like that vestigial organ, the Third Amendment is obsolete and redundant. Adopted in response to egregious abuses of governmental power, it once served a vital purpose, but it simply isn't needed any more. America is no longer the vulnerable, sparsely populated country surrounded by land-based enemies it was at birth. It has grown, and grown, and grown, becoming the last true superpower. Cities and villages no longer need to host and support militias to defend against invasion, a threat now deemed so remote that patrolling the border is left to a civilian law enforcement agency barely capable of repelling desperate migrants, let alone armies. Even if America was invaded, the idea that its military would either need or want to barrack

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* Credentialism is a bad habit, and a lousy source of imagined authority. Instead of Latin honors, I offer a Latin maxim: *res ipsa loquitur*. True, trying to make myself seem more credible in your eyes by parroting some out-of-context Latin and name dropping Cicero is just as bad as listing my academic qualifications, but I don't feel quite as bad about it since *Pro Milone* is actually relevant. All erroneous ideas are my own, except for the ones I've stolen.

soldiers in private homes is ridiculous. The modern American military is a professional force designed to fight multiple wars simultaneously, and redeploy at the drop of a hat. It fields supercarriers, mobile command centers, and special operations groups that are capable of projecting crushing force into the most remote regions on Earth. All this in addition to the roughly 1,000,000 troops housed at any given time in bases scattered across the country—bases operating at less than their full capacity. Excise the Third Amendment and other constitutional provisions (particularly the Fourth and Fifth Amendments) would still provide substantial protection against forced quartering. Basically, arguing that the Third Amendment is all that's stopping the 101st Airborne from bivouacking in guestrooms across the nation is a product of the same sort of delusional paranoia that afflicts birthers and sovereign citizens.

So does it still have *any* value? Possibly. Outside of digestive tracts, an appendix can occasionally be spotted at the back of a book or brief—additional material thrown in by the author to explain or add value to the main text. The Third Amendment's value as a *literary* appendix to the Constitution needs to be judged by the standard lawyers use to evaluate any potential source: *is there something in here that can help me win an argument*?

There is a perpetual argument in American constitutional law between those we might caricaturize respectively as "Absolutists" and "Pragmatists."[1] Every argument about the scope of a fundamental right's protections, be it in the form of a case or an academic disputation, is at some level a debate about the very nature of the rights protected by the Constitution. The Absolutists believe those rights to be without significant limitation: a problem that can't be solved without restricting a right is not a problem that can be solved by the government. The Pragmatists, as their name suggests, take a more goal-oriented approach. The fact that the democratically elected government has judged it necessary to restrict a right is in and of itself sufficient justification for that restriction—otherwise, the government would be unable to function.[2] The debate between Absolutists and Pragmatists is not only a (if not *the*) central conflict of American constitutional law, it is also a uniquely American one, which other liberal democracies have

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1. I hope it's clear from the context that I don't mean to imply any connection between this legal viewpoint and the linguistic methodology.

2. This debate can (and for the sake of clarity should) be thought of as distinct from arguments over the meaning and proper application of context-contingent terms such as reasonable, cruel, and unusual, which are found throughout the Constitution.

preempted by including in their constitutional documents language like Section 1 of the Canadian Charter,[3] the European Convention on Human Rights' Article 10,[4] and Germany's *Grundgesetz*,[5] which expressly limit the rights protected, and establish standards for their curtailment. Deprived of an official answer putting the question beyond debate, American advocates and theorists have spent the last dozen or so decades happily (if not productively) coming up with *arguments*.

In the context of the First Amendment, the Absolutist position is famously represented by Justice Black's argument that the authors of the Bill of Rights were "able men" who knew exactly what they were doing when they adopted unequivocal language forbidding the government from limiting free speech. "No law abridging" means "no law abridging," and with those words the First Amendment "fixed its own value on freedom of speech and press by putting these freedoms

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3. Canadian Charter of Rights and Freedoms, § 1. "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

4. European Convention on Human Rights, art. 10, § 2.

> The exercise of these freedoms [speech and expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

To translate, under the ECHR, you *totally* have a right to speak your mind, unless the government tells you not to. *Cf. id.* at art. 9, § 2:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

5. *See, e.g.*, GRUNDSGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, art. 5, § 2, providing that the freedoms of expression, science, and the arts, "shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour," and art. 2(2), which declares freedom of the person to be "inviolable," recognizes a right to "life and physical integrity" but provides that "[t]hese rights may be interfered with only pursuant to a law." *Id.* That's a *big* "only."

wholly 'beyond the reach' of federal power to abridge."[6] This prompted a Pragmatic response from Solicitor General Erwin Griswold: it is "obvious that 'no law' does not mean 'no law,' . . . [T]here are other parts of the Constitution that grant powers and responsibilities to the [Government], and . . . the First Amendment was not intended to make it impossible for the [Government] to function or to protect the security of the United States."[7]

To summarize, the text of the Constitution unambiguously forbids the government from limiting speech, but only an idiot thinks that it would be unconstitutional for the government to criminalize communicating classified information to enemy combatants. This is more or less the pattern that the argument takes: Absolutists focus on the unequivocal wording of the text, while Pragmatists appeal to common sense ("the Constitution is not a suicide pact"), and to historical precedent (the practice of pretty much every President and Congress, as ratified by the Supreme Court, over the last 200 years). The Supreme Court has embraced neither view, opting for an ill-defined mid-ground of its own devising, represented by tiered scrutiny and the myriad other right-specific balancing tests.

If the Third-Amendment-as-appendix has any rhetorical value, it ought to add something to these arguments. Rather than submitting a paper making an actual claim about the Third Amendment's impact on the broader constitutional debate (an unappetizing project in that it would require me to a) pick a side, b) do actual research, and c) greatly exceed the word limit), I've opted instead to offer sketches of three arguments that the Third Amendment could be made to support—one for the Absolutists, one for the Pragmatists, and one for those who find themselves in the disputed middle.

I. TEXT MESSAGING: THE ABSOLUTIST ARGUMENT

For the Absolutists, the argument begins with the text. While we tend to think and speak of the Bill of Rights as creating, guaranteeing, or protecting certain freedoms, that isn't how it's worded. Like the Decalogue used to represent it on the Supreme Court's east wall, the Bill of Rights consists mostly of a set of negative commands—"thou shalt not's"—directed at the government: thou shalt not restrict the freedom of speech, thou shalt not conduct unreasonable searches, thou shalt not inflict cruel and unusual

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6. Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring).

7. New York Times Co. v. United States, 403 U.S. 713, 718 (1971) (Black, J., concurring) (quoting the oral arguments of the Solicitor General).

punishments, et cetera. Whatever its name, functionally the Bill of Rights isn't about any rights the citizenry has, but about what rights (in the manorial sense) the government *doesn't* have. It's the Bill of Things the Government Can't Do.

Against that backdrop, the form of Third Amendment is exceptional: "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." It has the negative command—thou shalt not quarter troops without the homeowner's consent—but then there's a second clause, a caveat, making clear that the command is not unconditional, and there are circumstances in which troops *may* in fact be quartered over a homeowner's objections.

That is the very kind of exigency-based limitation that Pragmatists argue is implicit in the entire Constitution. What then, can the committed Absolutist make out of the fact that such a caveat is explicitly included in the Third Amendment,[8] but not the First, Second, Fourth, and so on?

The most obvious starting point is the rule of construction which says that where you have a list, a sub-clause or sub-heading applies only to the entry in which it appears. If you were presented with the following list of rules,

1. You Can't Wear Black Shirts.
2. You Can't Wear Blue Pants.
3. You Can't Wear Yellow Shoes, Except on Fridays.
4. You Can't Wear Bowties.

it would be unreasonable of you to assume that the rules permitted you to wear your favorite blue pants, black shirt, and bowtie to work next Friday, along with your yellow shoes. So if the "Fridays" exception clearly only modifies the prohibition on wearing yellow shoes, how can Pragmatists argue that the "Time of War" exception applies to anything other than the prohibition of forced quartering?

Beyond that, there's the canon against surplusage, which assumes that a legal document was written with the utmost economy, and contains no extra and unnecessary words, phrases, terms, clauses, or inkblots.[9] If the Pragmatists argue that common

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8. And, less clearly in the first clause of the Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, **except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .**" U.S. CONST. amend. V (emphasis added).

9. Unlike this paper.

sense demands that anyone who reads the Bill of Rights understands it to contain a general ". . . except when following this rule would be dangerously stupid" clause, why does it waste words spelling out a "Time of War" exception in the Third Amendment—and in the Third Amendment alone? If honoring homeowners' desire to be left alone during a war would be dangerously stupid, then that general exception would apply, and any interpretation which says that half an Amendment is a meaningless redundancy cannot possibly be correct.[10]

Finally, there's the rule of interpretation which says that a thing that means one thing, means that thing, and that thing alone, unless all things considered, it's clear that that thing was supposed to mean something else.[11] Generally, this rule is interpreted as having two parts: First, when a law creates a specific right or obligation, it cannot be read as creating similar or analogous rights or obligations if it would have made sense for those other rights and obligations to be included in the same law, but they weren't. So, if a statute allows parents, children, and spouses to bring wrongful death suits, it means that no similar right inheres in the decedent's siblings. Second, if a law lists the circumstances in which it applies, or the objects of its beneficence (or wrath), then there are no extra-textual circumstances which may trigger the law's application, and no unlisted objects that may benefit (or suffer) as a result. For example, "[c]onsider the sign at the entrance to a beachfront restaurant: 'No shoes, no shirt, no service.' By listing some things that will cause a denial of service, the sign implies that other things will not. One can be confident about not being excluded on grounds of not wearing socks."[12]

The first rhetorical consequence of this rule's application to the Third Amendment is simply to reinforce what has already been claimed. The second half of the Third Amendment specifies that the government can ignore *the prohibition against forced-quartering* in a time of war, and that specification means that it does not apply to the other limits on governmental power imposed by the Bill of Rights.

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10. Except for the Second Amendment.

11. More often described as an instance of the Omitted Case canon, or the related but distinct rule expressed in Latin as *expressio unius est exclusio alterius*, which translates as "if Shylock had become a doctor like his mother wanted, and learned to tie a ligature or use a caustic pencil, *The Merchant of Venice* would have a very different ending."

12. ANTONIN SCALIA AND BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (Kindle Locations 1751–57), (Thompson West 2012).

The rule can also be used to undercut another part of the opposition's argument. The Pragmatists claim that the Bill of Rights, as a general rule, cannot be read or applied to hinder and frustrate benign government action: if there is a danger that must be prevented, or a goal which must be achieved, the Bill of Rights can't be allowed to shackle the government.

But if that's the case, why is the Third Amendment's caveat—the one explicit provision in the Bill of Rights allowing the government a freer hand to act in exigent circumstances—limited to times of war? Why not domestic rebellions, or civil unrest? What about natural disasters, or outbreaks of disease? If, during peacetime (and winter), an army base in Alaska burns to the ground, and the only available shelters are private homes, could the government order soldiers to find refuge there, even if the owners objected?

"Of course," answer the Pragmatists, because it would be *necessary*. But the Third Amendment's caveat doesn't apply when necessary, convenient, or in "dangerous times" generally. It quite clearly applies only in times of war. And it isn't as if Americans living at the tail-end of the 18th Century couldn't imagine circumstances beyond "war" in which it would be useful (or even prudent) to allow for forced quartering. As Professor Bell documents, there was substantial debate at the time over whether the Amendment's exception should apply to "imperfect wars" like border skirmishes and revolts, as well as during times of civil unrest.[13]

Pulling it all together, here's how the Third Amendment might change how an Absolutist argues about the nature of constitutional rights:

"Well," says the Absolutist, "the First Amendment says 'no law' and that means no law."

"You can't actually believe that," says the frustrated Pragmatist. "It's absurd. What about [libel/hate speech/true threats/child pornography/espionage/copyright infringement]?"

"Oh, I agree. That kind of speech can be really negative and harmful. But I'm just one man—and that's just my opinion. What matters is the meaning of the First Amendment. And it says that 'Congress shall make no law' – not 'no law except for laws against [libel/hate speech/true threats/child pornography/espionage/copyright infringement].' If you want to call

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

an Article V Convention to change the Constitution, I fully support you, but for now —no law means no law."

"That-that. No. That's ridiculous. No sane person could think the First Amendment was absolute. Are you calling the Framers insane? There's no way that Madison &co. believed all rights could be protected absolutely. There have to be reasonable restric---"

"Of course not," says the Absolutist. "I could never argue that. The Third Amendment's restriction of the protection against forced quartering to times of peace is clear evidence that the Framers understood that some rights, if protected absolutely, could endanger the community as a whole. All I'm saying is that the Framers clearly didn't think that an absolute right to speak freely was too great a danger, because if they did, they easily could have included an exception for [libel/hate speech/true threats/child pornography/espionage/copyright infringement] in the First Amendment, like they did for wartime emergencies in the Third Amendment."

EXEUNT.

As to why the Bill of Rights may offer less than absolute protection only to the right protected by the Third Amendment, it wouldn't be unreasonable for Absolutists to claim that having just fought a long and taxing war for independence in their own backyards (and though victorious, still surrounded by more numerous and powerful enemies to the north, south, and west), as much as early Americans disliked the idea of being forced to put up soldiers, they weren't willing to let that dislike get in the way of winning the next war. As the Pragmatists are so fond of pointing out, the Framers were intelligent men fully capable of understanding the concept of an unpleasant necessity.

II. YEAH, BUT STILL: THE PRAGMATIC RESPONSE

As compelling as the Absolutist argument may seem at times, the Pragmatists can always take refuge in the obvious fact that anyone who believes that the Bill of Rights applies absolutely (and without exception) is absolutely (and without exception) *nuts*.

The Pragmatists can answer (or dismiss) many of the questions raised by the Absolutists, and make a substantive argument of their own, by agreeing with their foes that the Third Amendment is in fact exceptional. But where the Absolutists view the Third Amendment as offering exceptionally less protection than the rest of the Bill of Rights, the Pragmatic argument is that it offers exceptionally *more*.

A central plank of the Pragmatic Manifesto is the claim that the Bill of Rights did not originate, and does not exist, in a void. Rather

it is part of a vast legal tradition, a tradition which, like the Talmud, provides the necessary background principles of interpretation, and certain clarifications, that allow the written law of the Constitution to function properly. This is not a claim that is seriously disputed, and the text of the Constitution itself recognizes and incorporates that tradition.[14]

What *is* seriously disputed is which (if any) of that legal tradition's rules survived the ratification of the Constitution and Bill of Rights, and which were abrogated. For example, the doctrine of legislative supremacy, which has been a central part of the English legal system since at least the Restoration, did not survive Article I's creation in Congress of a primary legislative body with limited and enumerated powers, but the doctrine of sovereign immunity *did* carry over despite the fact that it wasn't expressly mentioned in the Constitution.

One of that legal tradition's more venerable principles, dating back over two thousand years, is the Latin maxim that *inter arma enim silent leges*:[15] When a nation is at war, its ordinary laws, statutes, rights, and restrictions do not apply. While the maxim's continued validity is contested,[16] the Supreme Court has in the past recognized that it is a part of American law, in war it operates to suspend not just all "conventional and legislative laws and enactments," but also the "peace provisions of the Constitution," including the majority of the Bill of Rights.[17]

It is the existence of the *inter arma* maxim in the Anglo-American legal tradition, and the Framer's desire to thwart (or at least moderate) its application to the Third Amendment's main prohibition, that provide the Pragmatists' answers to the Absolutists' questions: First, the caveat in the Third Amendment only addresses "war" (and not danger, rebellion, or necessity generally), because it was only intended to modify the application of the *inter arma* "exception" to the Bill of Rights' applicability, not the broader principle allowing for infringements born out of a more general necessity. Second, the caveat was included only in the Third Amendment, because that was the only Amendment that the Framers wished to prevent from being totally suspended in wartime.

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14. *See, e.g.*, the Seventh Amendment's incorporation of the common law's rules concerning jury trials.

15. *Lit.* "Never bring a lawyer to a gunfight."

16. *See generally* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (Vintage Books 1998).

17. *Ex parte* Milligan, 71 U.S. 2, 20 (1866) (argument of the United States); *accord id.* at 127 (judgment of the Court); *id.* at 140 (concurrence of the Chief Justice).

As to why the Bill of Rights may offer greater protection only to the right protected by the Third Amendment, it wouldn't be unreasonable for Pragmatists to claim that, having just thrown out what they perceived to be a hostile occupying army that was forcibly quartered among them, the early Americans had no desire to allow history to repeat itself.[18] Having had their hospitality abused by military commanders in the past, the citizens of the nascent nation took steps to protect themselves from future abuse.

For the Pragmatists, the exceptional thing about the Third Amendment is not that it provides for different levels of protection in times of peace and war, but that it provides *any* wartime protections at all. The key words come at the very end: "but in a manner to be prescribed by law." With these words, the Third Amendment ensured that even in the fog of war, when no other laws apply, homeowners could only be forced to quarter troops by a deliberative and deliberate act of the legislature—not the mere whim of a local military officer.

This is the very effect the government considered the caveat to have when it argued in *Milligan* that the Third Amendment is the "the only expressed constitutional restraint upon the President as to the manner of carrying on war."[19] The next sentence in the government's argument ("There would seem to be no implied one; on the contrary, while carefully providing for the privilege of the writ of habeas corpus in time of peace, the Constitution takes it for granted that it will be suspended 'in case of rebellion or invasion (i.e., in time of war), when the public safety requires it.'"[20]) suggests that Pragmatists' theory as to the meaning of the caveat also operates more generally to turn the canons of textual interpretation[21] back against the Absolutists.

If there is a presumption against surplus words, then the caveat must mean *something*, and according to this theory it is meant to moderate the application of the *inter arma* maxim. Therefore, for the

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18. William Fields & David Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 4, 393–94 (Oct. 1991) ("Although the third amendment is today widely taken for granted, to many in the revolutionary generation, its protections were a matter of great importance. The grievance which the amendment sought to address, the abuses of persons and property resulting from the involuntary quartering of soldiers was one of the major problems associated with the presence of British soldiers in the colonies prior to and during the Revolutionary War.").

19. *Milligan*, 71 U.S. at 21 (argument of the United States).

20. *Id.*

21. Which are themselves principles belonging to the same legal tradition as the *inter arma* maxim.

caveat *not* to be redundant, it must be accepted not only that the *inter arma* maxim exists, but that it would have applied with full force to the Third Amendment in the caveat's absence.

Applying both the assumption that a sub-clause in a list applies only to that specific entry, and the omitted case canon, that caveat can only be understood as applying to the Third Amendment, which means that it does not modify the *inter arma* maxim's effect on the other Amendments. So, whether or not the Absolutists are correct in claiming that the other provisions of the Bill of Rights are absolute in times of peace—the claim that those rights are "absolutely absolute" is wrong to the extent that they are suspended during wartime.

The Pragmatists' position then, is that the protection afforded homeowners by the Third Amendment is the most extensive and absolute protection afforded by any provision of the Constitution, and even that protection can be overridden by Congress in at least *some* circumstances.

III. AND NOW FOR SOMETHING COMPLETELY DIFFERENT: THE ARGUMENT FOR THE DISPUTED MIDDLE

If you possess both a scrap of common sense (and therefore cannot accept the Constitution at face value when it says "no law"), and a modicum of legal learning (and so understand the necessity and value of entrenched constitutions, and reject the claim that the Bill of Rights is merely a polite suggestion), you find yourself surrounded by friends (and foes) somewhere in the no-man's land between the Absolutists and the Pragmatists, where the only fortified position is the Supreme Court's Tiered Tower of Scrutiny.[22] Here, the object of one's rhetorical endeavors is not to disprove the claims of the Absolutists or Pragmatists (who from this vantage may be dismissed as irrelevant lunatics), but to stake out and defend a novel position of your own, or attack the position taken by the Supreme Court.

Since storming someone else's snow-fort is always more fun than building your own, I'll focus on that. Here too, the Third Amendment can be of use. But while both the Absolutists' and Pragmatists' arguments depend on presenting the Third Amendment as the exception that proves *their* rule, moderates of all stripes may be

22. From whose heights the justices taunt us with their claims to possess the jurisprudential Holy Grail of a clear and universally applicable set of principles for balancing the rights of the individual against the needs of the many (and occasionally bombard us with a wide variety of dead livestock mutually incompatible and often incoherent tests, formulae, exceptions, restrictions, and doctrines).

better served by claiming that the Amendment is *not* exceptional, and is instead representative of a broader constitutional principle. If one assumes that there is a principle embedded in the Constitution that controls when the government can ignore an individual's rights in order to serve communal interests, then the one provision of the Bill of Rights which expressly authorizes that kind of abrogation ought to be of help in identifying that principle.

So what evidence of that principle, if any, can be extracted from the Third Amendment, and can it be used to challenge the Court's central claim that the government can restrict or ignore constitutionally protected rights if doing so serves a sufficiently important (read: legitimate, substantial, or compelling) state interest and the government has taken steps to limit the collateral damage? I can see it being used to critique as inconsistent with the Constitution the Court's judgment as to both *why* and *how* the government may infringe on a right.

Start by considering just a few of the ends that the Court has judged to be compelling enough justify upholding the abrogation of a right under strict scrutiny: ameliorating the effects of past discrimination, avoiding the potential appearance of quid-pro-quo corruption in the political system, protecting minors from vulgar speech, and fighting a "war" against certain recreational drugs.

By contrast, the Constitution (through the Third Amendment) only explicitly recognizes a single justification for abridging a right — the demands of war. There will obviously be different ways of interpreting that discrepancy. At the most extreme end of the spectrum, crypto-Absolutists will see it as a mere codification of the *inter arma* principle: War, and war alone, allows the government to disobey constitutional commands. This has the virtue of requiring very little to be read into the text, but it's vulnerable to the same common sense critiques as the "true" Absolutists' position. A more politically palatable interpretation would see the Third Amendment's explicit reference to war not as an exhaustive list of compelling interests—but merely indicative of the characteristics that make an interest compelling.

So how is "war" different from those interests the Court has deemed compelling? It's an existential threat. A state which loses a war (especially a war fought in its own territory — as the Third Amendment envisions), will likely cease to be a state or be reduced to a position of vassalage. The right of self-preservation is generally recognized as allowing for the violation of the rights of innocent third parties, so long as the harm done to them is less than that which would have otherwise befallen the actor. This utilitarian principle underpins the defenses of duress and necessity, is implicit in the *inter arma* maxim, and seems to be implied by the Third Amendment. If the law would allow a private citizen trespassory

entrance to another's home to save himself during a blizzard, shouldn't the state be allowed to make similar trespasses to save itself from annihilation during war?

To borrow a page from Alan Gewirth,[23] if you have two conflicting rights claims, that which is more necessary or basic must be given primacy. The most basic or necessary right is "life" or existence, because without it, no other rights may be exercised. The Third Amendment seems to agree with the Court that national security—protecting the state from severe or existential threats—should generally be seen as a compelling enough reason to justify necessary civil rights violations. You can outlaw "verbal espionage." For the same reasons, we might agree with the Court that self-preservation justifiably "compels" the government to ensure the tax system functions. And of course, the state may act to preserve the existence (or other necessary rights) of third parties (like us!).[24] Even though falsely shouting "fire" in a crowded auditorium doesn't endanger the existence of the state, it is legitimately forbidden because it endangers the lives (and bodily integrity) of the audience.

By contrast, protecting children from vulgar content, and consumers from false commercial speech, or combating the legacy of state-sponsored discrimination, don't seem "necessary" in the sense that failing to do so imperils the survival of the state. That failure might make things more unpleasant, but while the justification of necessity might allow you to steal a baguette if you're starving to death, it doesn't justify stealing a Maserati because you think life will be less pleasant without one. Libel is an interesting example. There's clearly a right to free speech which is restricted by libel laws. What right, if any, on the part of the potentially defamed is served by these laws—and why should we think it more "necessary" than the right to speak?

Judged by the standard set by the Third Amendment, the interests the Court considers merely "important" or "legitimate" seem laughably insufficient justifications for the Constitution's abrogation, and many of those it considers "compelling" are only marginally better.

Moving from the "why" to the "how," the "in a manner prescribed by law" requirement suggests that there may be something missing

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23. Alan Gewirth, *Are There Any Absolute Rights?*, THE PHILOSOPHICAL QUARTERLY, Vol. 31, No. 122, Jan. 1981, at 1–16.

24. There are any number of justifications for this—the simplest being the link between "self defense" and "defense of others." If someone else is freezing to death in a blizzard, and the only way you can save them is by trespassing—you're allowed to do that.

from the Court's strict-scrutiny analysis: a limitation on who can authorize an otherwise unconstitutional act. Under the Court's test, ad-hoc acts by the Executive and bureaucrats can withstand strict scrutiny. Most famously, the internment of Japanese Americans during World War II was done by executive order. Now, if instead of interning Japanese Americans, Executive Order 9066 had directed that one soldier would be quartered in each Japanese American household, would that have been forced quartering "in a manner prescribed by law?" Probably not. Executive Orders are not "laws." Nor are agency regulations, non-binding resolutions, presidential signing statements, or the discretionary enforcement decisions made by prosecutors, law enforcement officers, prison wardens, and other functionaries. Generally, the Court has said that to be a "law" it has to be passed by both houses of Congress, and signed by the President.

It is one thing to do as the Third Amendment does, and vest the legislative and executive branches acting together, with the power to abridge fundamental liberties in exigent circumstances, while requiring them to do so through a deliberative and democratically accountable political process; and an entirely other thing to do as the Supreme Court has done, and allow individual officers and agencies to determine when and how a right should be limited.

If the Third Amendment expects Congress to meet in the middle of the war and pass a law to provide for forced quartering (or, at the very least, to predict the need for such laws and preemptively pass legislation setting out appropriate protocols), then why should the decision to violate other rights be given less consideration? Why should school principals, deans, prison wardens, police officers, agency directors, and pettier bureaucrats—all of whom are far less politically accountable than elected officials—be the ones to decide when and how the Bill of Rights must be ignored?

Moreover, since Congress is vested with the power to declare war, and to make legal provision for forced quartering during a war, those two provisions taken together mean that liberty-infringing actions require the political branches to make and publicize three decisions: 1) that exigent circumstances (here a state of war) exist; 2) that in order to deal with that exigency a specific constitutional right is going to be violated; and 3) the rules governing that violation are X, Y, Z. There's also an implied temporal limit. While Americans have learned the hard way that wars are rarely over by Christmas, and might last indefinitely, the expectation is that wartime is not a permanent state, and when it passes, the restrictions and sacrifices it necessitated will go along with it.

Adding those requirements to strict scrutiny would change the landscape in two key ways. First, it would add serious teeth to Bickel's critique of judicial review. If Congress had to *explicitly* and

deliberately choose to abrogate a right, it's much easier to see how a judge second-guessing that decision is democratically problematic, than it is when the Court is reviewing the decision of a faceless bureaucrat, or even the consequences of an Act of Congress that, on its face, doesn't indicate that Congress intended to infringe a right, or thought it was justified in doing so. Second, and by the same logic, requiring this sort transparency and formality from Congress would likely reduce the number of right-restricting laws, and dramatically increase the popular legitimacy of those that remain. No one wants to be the Congressman who voted to allow waterboarding, but, if they were allowed to see the decision making process at work, and participate in it—even indirectly—the public might be more comfortable with programs like PRISM, at least in times of crisis, and if only because those who are unwilling to sacrifice a little temporary liberty to secure some essential safety deserve the martyrdom they so obviously crave.[25]

CONCLUSION

Having reached none of my own, I'll leave it to the readers to draw what conclusions, if any, they would. At this point, I'll simply reiterate that I make no substantive claims about the meaning of the Third Amendment — this is just a sketch describing possible ways it could be used in broader arguments about the general scope of civil liberties. The one claim I will make is this (and it's really more of a prediction): because of the changing nature of warfare (and the exceptional improbability of a war being fought inside the United States)[26] and the implausibility of the Court enforcing the Third Amendment against the government in the midst of such a war (or that the government would obey the order), the future legacy, if any, of the Third Amendment lies not in the substantive protections it offers, the shadows it casts, or in any creative ways it may be reinterpreted to protect broader rights, but in the use, if any, that advocates make of it as they argue over the rest of the Constitution.

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25. Or to be medicated and put in a nice, safe, room with lots of pillows, if you're the paternalistic type.

26. *But see* Brian Wood & Riccardo Burchielli, *DMZ #1-72*, (Vertigo 2005-2012).