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"For the record, many of my colleagues, after learning that I was to speak on the Third Amendment, sheepishly asked me what the Third Amendment is."

—Morton J. Horwitz in *Valparaiso University Law Review*

"The earliest efforts to curb the abuses relating to the involuntary quartering of soldiers appeared in the charters of towns and boroughs. Examples of those early enactments included Henry I's London Charter of 1130, which contained the passage '[l]et no one be billeted within the walls of the city, either of my household, or by force of anyone else . . . .' Those charters were the major legal antecedents of the third amendment."

—William S. Fields & David T. Hardy in *American Journal of Legal History*

"Are red-cockaded woodpeckers sufficiently similar to redcoats that the principles of the Third Amendment apply to woodpeckers as well? We believe so."

—Andrew P. Morriss & Richard L. Stroup in *Environmental Law*

I. INTRODUCTION

The U.S. Supreme Court has never decided a case on Third Amendment grounds. The closest the Court came was *Griswold v. Connecticut*,[1] in which Justice William O. Douglas's majority opinion included the Third Amendment among the provisions of the Bill of Rights whose penumbras identified a constitutional right to privacy.[2]

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* Professor of Law, Ohio Northern University Pettit College of Law. This Article was prepared for a symposium about the "Third Amendment" sponsored by the *Tennessee Law Review*. I thank David Fetrow of Ohio Northern for his typically splendid reference librarian assistance in compiling the bibliography of Third Amendment scholarship that serves as the basis for this historiography.

1. Griswold v. Connecticut, 381 U.S. 479 (1965).
2. *Id.* at 484–85 ("The foregoing cases suggest that specific guarantees in the

A 1982 decision by the U.S. Court of Appeals for the Second Circuit is the lone major decision about the Third Amendment issued by a federal court.[3] The scholarship about the Third Amendment is equally sparse. Indeed, it is not too much of an exaggeration to say that more was written about the First Amendment last week than has ever been written about the Third Amendment. At my count, as of September 2014, only three books—all children's books at that—six book chapters, and seventeen law review articles have been authored about the Third Amendment.[4] Of the seventeen law review articles, nine were penned as student notes or as first articles by recent law school graduates.

The purpose of this Article is to provide a historiography of the existing scholarship about the Third Amendment. As the Article's title indicates, the historiography will be unavoidably brief, which, if nothing else, is a testament to the importance of this symposium about the Third Amendment sponsored by the *Tennessee Law Review*. I will conclude the Article with a few thoughts of my own

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Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of solders 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. . . .' The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

3. *See* Engblom v. Cary, 677 F.2d 957 (2d Cir. 1982).

4. My count does not include entries in reference-style works. *See, e.g.*, COMM'N ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, THE BILL OF RIGHTS AND BEYOND, 1791–1991, at 26–31 (1991); R. B. Bernstein, *Third Amendment*, *in* CONSTITUTIONAL AMENDMENTS, 1789 TO THE PRESENT 59, 59–66 (Kris E. Palmer ed., 2000). Many books about the Bill of Rights, including bicentennial collections, are silent about the Third Amendment. *See, e.g.*, A TIME FOR CHOICES (Claudia A. Haskel & Jean H. Otto eds., First Amendment Congress 1991) (a collection of articles addressing various provisions of the Bill of Rights). Apparently, no scholarship has been published about the Third Amendment in either history or political science journals. Occasionally, a short piece on the subject will appear in the popular press. *See, e.g.*, Radley Balko, *Rise of the Warrior Cop*, 99 ABA J. 44, 47 (2013) (invoking the "spirit" of the Third Amendment to caution against the increasing use of police as a domestic military force armed with assault rifles and other heavy weaponry).

about the significance of the Third Amendment for American constitutionalism.

II. HISTORICAL STUDIES OF THE THIRD AMENDMENT

A perusal of the literature reveals that there are two general categories of Third Amendment scholarship: historical studies of the Amendment and modern applications of it. This section provides a chronological survey of the historical studies. Those histories, in a nutshell, demonstrate that the Third Amendment was the Constitution's response to the Quartering Acts adopted by the British during the American Revolution, which had permitted the British army to house British soldiers in private residences. Of course, there is more to the origins of the Third Amendment than this, and the eleven historical studies that I assess in this section describe those additional events in varying degrees of detail.

Serendipity is alive and well in Knoxville, Tennessee. The first law review article about the Third Amendment was published in the *Tennessee Law Review* in 1949 by Seymour W. Wurfel, a Lieutenant Colonel in the U.S. Army's Judge Advocate General's Corps.[5] At fifteen pages, Wurfel's article is a brief history and it fails to discuss anything prior to England's 1628 Petition of Right. The article does describe at least some of the post-constitutional legal treatment of the Third Amendment, including the fact that the Constitution of the Confederate States of America contained a verbatim copy of the Amendment.[6] Wurfel concludes with a short discussion of "current considerations" and predicts that future litigation about the Third Amendment would turn on what constitutes a "house."[7]

Four decades later, the second historical study appeared in print—a sixteen-page book chapter by B. Carmon Hardy, a history professor at California State University at Fullerton—in a 1987 edited collection about the origins of each of the original ten amendments to the Constitution.[8] Hardy's chapter, which was initially published in a 1984 issue of *Virginia Cavalcade*,[9] traces the origins of the Third Amendment five centuries earlier than Wurfel's

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5. *See* Seymour W. Wurfel, *Quartering of Troops: The Unlitigated Third Amendment*, 21 TENN. L. REV. 723 (1949).

6. *Id.* at 730.

7. *Id.* at 733.

8. *See* 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 (Jon Kukla ed., Library of Virginia 1987).

9. *See* B. Carmon Hardy, *A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment*, 33 VA. CAVALCADE 126 (1984).

account. Hardy writes: "Efforts to regulate the quartering of troops first appeared in town and borough charters. These documents, which sometimes predated Magna Carta itself, are the major legal antecedents of the Third Amendment."[10]

William Sutton Fields, a lawyer with the U.S. Department of the Interior, wrote two articles about the Third Amendment. The first, an eighteen-page sole-authored piece for the 1989 issue of the *Military Law Review*,[11] is not as rigorous as his 1991 co-authored article with David T. Hardy for the *American Journal of Legal History*,[12] and I will reserve my assessment of Fields's work on the Third Amendment until I discuss his longer piece. It is worth mentioning here, however, that Fields points out in his *Military Law Review* article—as others have done before and since—that the "amendment is the only passage in the Constitution that is directly concerned with the rights of the individual vis-a-vis the military in both war and peace, and the right it secures for Americans still remains virtually nonexistent in much of the world."[13]

The Bill of Rights' 1991 bicentennial witnessed the publication of three articles about the Third Amendment, two of which appeared in the *Valparaiso University Law Review*. The first, a public lecture by Bancroft Prize winning legal historian Morton J. Horwitz, poses the question: "Is The Third Amendment Obsolete?"[14] Six short pages later, Horwitz answers that it is.[15] He closes his whirlwind tour through the history of the Third Amendment with the following explanation as to why:

> If the Fourth Amendment had never been enacted, the Third Amendment might have provided the raw material for generating something like an anti-search and seizure principle. This is similar to the seemingly innocuous language of the Ninth Amendment which has produced a constitutional guarantee of privacy in our own time. Or if the opposition to standing armies had remained firm through

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10. Hardy, *supra* note 8, at 68.

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

12. 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).

13. Fields, *supra* note 11, at 195.

14. Morton J. Horwitz, *Is The Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209 (1991). Horwitz won the Bancroft Prize for *The Transformation of American Law, 1780–1860. See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977).

15. Horwitz, *Is The Third Amendment Obsolete?*, *supra* note 14, at 214.

> Jefferson's administration, the anti-quartering position might have produced a constitutional bar to standing armies in peacetime. But none of this occurred, and, as a result, the Third Amendment was consigned to the graveyard of history, to be remembered only on occasions like this one, when we seek to recapture the world of the founding fathers for its own sake.[16]

A second article about the Third Amendment appeared in the same 1991 symposium about the Bill of Rights that included Horwitz's article. This second article was an eight-page impressionist history of the Third Amendment by Robert A. Gross, a historian at the College of William and Mary.[17] Gross emphasizes the privacy interest at the heart of the Third Amendment and applauds Justice Douglas for recognizing it in *Griswold*.[18] According to Gross, "In its time, the article [the Third Amendment] turned opposition to an anachronistic military practice into a statement of general principle—a claim to a right of domestic privacy—that reverberates down to our own."[19]

What I consider the best of the histories of the Third Amendment likewise appeared during the bicentennial of the Bill of Rights, William S. Fields and David T. Hardy's thirty-nine-page article for the *American Journal of Legal History*.[20] Fields and Hardy, both of whom were lawyers for the U.S. Department of the Interior at the time of their article, couple impressive historical detail with a provocative intellectual history twist. They trace the divergent influences of Harringtonian ideas about the virtues of standing armies and the increasing emphasis on individual rights from the Norman Conquest in 1066 to James Madison's original, and eventually successful, proposal that in 1791 became the Third Amendment to the U.S. Constitution.[21] As Fields and Hardy put it: "Madison substituted the mandatory imperative 'shall' for the 'oughts' that had characterized those earlier documents; thus making the provision a true 'right. . . .' The third amendment would recognize and protect an individual right, not a political theory on the most appropriate form of national defense."[22]

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16. *Id.*
17. *See* Robert A. Gross, *Public and Private in the Third Amendment*, 26 VAL. U. L. REV. 215 (1991).
18. *Id.* at 221.
19. *Id.*
20. *See* Fields & Hardy, *supra* note 12.
21. *Id.* at 395–430.
22. *Id.* at 425–26.

The bicentennial of the Bill of Rights also witnessed the publication of Burnham Holmes's children's book on the Third Amendment.[23] Although I am reluctant to say much about a children's book in a historiography for a law review symposium, I feel compelled to do so on the grounds that: (1) all three of the books about the Third Amendment are children's books; (2) Holmes's book is the best of the three;[24] (3) Warren E. Burger, the former Chief Justice of the United States and Chairman of the Commission on the Bicentennial of the United States Constitution at the time Holmes's book was published,[25] wrote an Introduction to Holmes's book;[26] and (4) Holmes's one hundred twenty-seven-page book provides several details that the other article-length histories tend to omit.

With respect to Burger's Introduction, the late Chief Justice reminds young readers that:

> The philosophy embodied in the Third Amendment is derived from the American colonists' fear of British military power. Though that danger is long past, the Third Amendment still embodies the same basic principles: that the military must be subject to civilian control, and that the government cannot intrude into private homes without good reason.[27]

A volume in the Young Adult American Heritage series on the history of the Bill of Rights, Holmes's book is divided chronologically into seven chapters, opening with "The English Attitude Toward Quartering Soldiers,"[28] and closing with a discussion of "The Security of the Home."[29] The book describes the English statutory precursors to the Third Amendment—the Petition of Right of 1628 and the English Bill of Rights of 1689—as well as the Quartering Act of 1765 that resulted from the French and Indian War and which was so widely condemned in the American colonies.[30] Holmes quotes

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23. *See* BURNHAM HOLMES, THE AMERICAN HERITAGE HISTORY OF THE BILL OF RIGHTS: THE THIRD AMENDMENT (1991).

24. The other two children's books about the Third Amendment are JASON PORTERFIELD, THE THIRD AMENDMENT: THE RIGHT TO PRIVACY IN THE HOME (2011) and RICH SMITH, SECOND AND THIRD AMENDMENTS: THE RIGHT TO SECURITY (2008).

25. Warren E. Burger served as Chairman of the Commission on the Bicentennial of the United States Constitution from 1985–1991.

26. Warren E. Burger, *Introduction* to BURNHAM HOLMES, THE AMERICAN HERITAGE HISTORY OF THE BILL OF RIGHTS: THE THIRD AMENDMENT 6 (1991).

27. *Id.*

28. HOLMES, *supra* note 23, at 29.

29. *Id.* at 81.

30. *See id.* at 29–46.

a famous essay by John Dickinson as an expression of the American mind on the subject:

> If the *British* parliament has legal authority to issue an order that we shall furnish a single article for the troops here, and to compel obedience to *that* order, they have the same right to issue an order for us to supply those troops with arms, cloth[e]s, and every necessary; and to compel obedience to *that* order also; in short, to lay any burthens [burdens] they please upon us. What is this but taxing us at a certain sum, and leaving to us only the manner of raising it? How is this mode more tolerable than the Stamp Act?[31]

Holmes then discusses how a second Quartering Act was adopted in 1774 as part of Parliament's program for punishing the American colonists for the Boston Tea Party.[32] In 1776, of course, the Declaration of Independence listed the "quartering of large Bodies of Armed Troops among us"[33] as one of the grievances against the King that justified separation from Great Britain and, later that same year, both Delaware and Maryland included prohibitions against the quartering of troops in their respective Declarations of Rights.[34] Holmes's concluding chapter discusses how, after the Third Amendment went into effect, President George Washington was careful not to quarter any troops when quelling the Whiskey Rebellion of 1794 and that the quartering of Union troops in the South during the Civil War was justified on the ground that the South claimed that it was not subject to the laws of the United States.[35]

In 1992, Susan Ford Wiltshire, a classical studies professor at Vanderbilt University, published a book about the U.S. Bill of Rights as part of a University of Oklahoma Press series in classical culture.[36] Wiltshire devotes chapter seven of her book to the Second and Third Amendments, and suggests that the "Third Amendment recalls one of the many strategies by which Rome managed the peoples it conquered, that of conferring on favored cities the privilege

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31. *Id.* at 44–45 (quoting John Dickinson) (alterations added by HOLMES).

32. *Id.* at 64–67.

33. THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776).

34. *See* DEL. DECLARATION OF RIGHTS, § 21 (1776); MD. CONST. art XXVIII (1776).

35. *See* HOLMES, *supra* note 23, at 82–83.

36. *See* SUSAN FORD WILTSHIRE, GREECE, ROME, AND THE BILL OF RIGHTS (1992).

of not having to quarter Roman soldiers."[37] Non-classicists will likely find Wiltshire's discussion both curious and informative.[38]

Tom W. Bell, a libertarian law professor at Chapman University and one of the other contributors to this symposium about the Third Amendment, published two prior articles on the subject. He penned his first, a thirty-four-page piece in the *William and Mary Bill of Rights Journal*, while he was a law student at the University of Chicago.[39] Bell hoes familiar historical ground in the article, albeit in more detail than several of the preexisting histories. He points out, for example, that New York's 1683 Charter of Libertyes and Privileges contained the initial anti-quartering provision in colonial America: "Noe Freeman shall be compelled to receive any Marriners or Souldiers into his house and there suffer them to Sojourne, against their willes provided Alwayes it be not in time of Actuall Warr within this province."[40] Moreover, he devotes a section of his article to whether the Third Amendment applies to "civil unrest," and insists that it does not.[41] But in a precursor to his second article on the subject, he maintains that the Third Amendment, when read in conjunction with the Fifth and Ninth Amendments, protects private property as well as privacy.

Yale Law School Professor Akhil Reed Amar dedicates a chapter in his 1998 book *The Bill of Rights: Creation and Reconstruction* to what he calls "The Military Amendments": the Second and Third Amendments.[42] Only five of the chapter's eighteen pages are about the Third Amendment.[43] Amar maintains that, "[l]ike the Second, the Third centrally focuses on the structural issue of protecting civilian values against the threat of an overbearing military" and that the Third was designed to protect against the "psychological guerrilla warfare" of having soldiers brainwash families with whom

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37. *Id.* at 5.

38. *See also* JOSEPH PLESCIA, THE BILL OF RIGHTS AND ROMAN LAW: A COMPARATIVE STUDY 63–65 (1995) (investigating whether the ancient Romans had anything akin to the rights protected by the U.S. Bill of Rights and devoting all of seven lines to the Third Amendment).

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

40. *Id.* at 125 (quoting the colonial New York provision).

41. *Id.* at 131–40.

42. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION ch. 3 (1998). Amar previewed his ideas about the Third Amendment in the *Yale Law Journal*. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1174–75 (1990). He repeated them in a co-authored reference book about the Bill of Rights. *See* AKHIL REED AMAR & LES ADAMS, THE BILL OF RIGHTS PRIMER: A CITIZEN'S GUIDEBOOK TO THE AMERICAN BILL OF RIGHTS 99–103 (2013).

43. *See* AMAR, THE BILL OF RIGHTS, *supra* note 42, at 59–63.

they reside.[44] "Hence the Third Amendment was needed to deal with military threats too subtle and stealthy for the Second's 'well regulated Militia,'" he concludes.[45]

Thomas L. Avery, a recent law school graduate from American University Washington College of Law, penned the last of the historical studies of the Third Amendment, a twenty-eight-page article in the *Washburn Law Journal*.[46] After providing the standard account of the origins of the Amendment, Avery's article takes an innovative turn by contending that the Amendment should be interpreted today as a complete bar on the use of military power into the home in the absence of war and congressional authorization.[47] He argues against a literal reading of the Third Amendment, because that renders it meaningless in modern times and also runs counter to the privacy principle that motivated the Framers.[48] He invokes *Miranda v. Arizona*[49] as an example of the Fifth Amendment's commitment to the privacy principle that he insists the Third Amendment shares.[50] In short, Avery makes the plausible claim that the Third Amendment, like many of the others (e.g., the Fourth Amendment), should be interpreted to take account of modern technology.[51]

III. MODERN APPLICATIONS OF THE THIRD AMENDMENT

As Avery's article suggests, a number of the historical accounts of the Third Amendment touch upon modern applications of it. However, thirteen were devoted almost exclusively to modern applications. The first was a fourteen-page law student case comment about *Engblom v. Carey*[52] in the *Brooklyn Law Review* in 1982 by Ann Marie C. Petrey.[53] *Engblom v. Carey*, issued by the U.S. Court of Appeals for the Second Circuit, is the only federal court case decided on Third Amendment grounds.[54] *Engblom* addressed

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44. *Id.* at 59.

45. *Id.*

46. *See* Thomas L. Avery, *The Third Amendment: The Critical Protections of a Forgotten Amendment*, 53 WASHBURN L.J. 179 (2013).

47. *Id.* at 203–04.

48. *Id.* at 204.

49. Miranda v. Arizona, 384 U.S. 436 (1966).

50. Avery, *supra* note 46, at 198–200.

51. *Id.* at 204–05.

52. Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982).

53. Ann Marie C. Petrey, Comment, *The Third Amendment's Protection against Unwanted Military Intrusion*, 49 BROOK. L. REV. 857 (1982).

54. *See Engblom*, 677 F.2d at 957. Litigants occasionally have pled the Third

whether New York State's quartering of National Guardsmen in the residences of striking correction officers at a correctional facility violated the correction officers' Third Amendment rights.[55] The Second Circuit held, two to one, that the district court erred in granting the state's motion for summary judgment, because sufficient questions of fact existed concerning the officers' possessory interests in their residences and, consequently, their entitlement to Third Amendment protection.[56] The Second Circuit ruled that tenants were included in the Third Amendment's conception of "owner," that National Guardsmen were "soldiers," and that the Third Amendment applied to the states via the Fourteenth Amendment.[57]

Petrey is critical of the Second Circuit's decision, preferring instead the oft-quoted dissenting opinion of Irving R. Kaufman:

> After the Framers forged the Constitution, the memory of an oppressive military presence lingered among the people. Emanating from the first Congress in 1789 as part of the proposed Bill of Rights to meet the widespread popular demand for safeguards for individual rights and subsequently ratified by the States, the Third Amendment to the United States Constitution prohibited the often distrusted Federal Government from the peacetime quartering of soldiers in any house without the consent of the owner. With the help of the Fourth Amendment, the Third Amendment thus constitutionalized the maxim, "every man's home is his castle." The Founding Fathers, I am certain, could not have imagined with this history that the Third Amendment could be used to prevent prison officials from affording necessary housing on their own property to those who were taking the place of striking guards.
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> . . . .
>
> Although a man's home is his castle under the Third Amendment, it is not the case, as Gertrude Stein might say, that a house is a house is a house. A reasonable analysis of Engblom's and Palmer's possessory interest in their rooms at the Mid-Orange Correctional Facility, the relationship between their possession of the rooms and their employment as correction officers, and a realistic acknowledgment that the physical context of their possessory interest was a *prison*,

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Amendment in other cases, but those cases were summarily dismissed. *See, e.g.*, Custer Cnty. Action Ass'n v. Garvey, 256 F.3d 1024 (10th Cir. 2001); United States v. Valenzuela, 95 F. Supp. 363 (S.D. Cal. 1951).

55. *Engblom*, 677 F.2d at 958–59.

56. *Id.* at 966.

57. *Id.* at 961–62.

> support the district court's conclusion that Engblom and Palmer did not have the kind of property right that warrants protection under the Third Amendment.[58]

Nearly two decades elapsed before the next modern application of the Third Amendment appeared in the law reviews, Andrew P. Morriss and Richard L. Stroup's forty-two-page article about the Endangered Species Act for *Environmental Law*.[59] In one of the strangest articles I have ever read, Morriss, a law professor and associate dean at Case Western Reserve University at the time, and Stroup, an economics professor at Montana State University, contend that the Endangered Species Act is unconstitutional because it violates the Third Amendment. They write:

> Our conclusion is that, under a "living Constitution" theory, the Endangered Species Act (ESA) is unconstitutional because, through the ESA, the federal government "quarters" living creatures on privately held land, a position analogous to—and sometimes more serious than—the explicit textual ban on the peacetime quartering of soldiers imposed by the Third Amendment.
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> Although some readers may at first find the suggestion that the Third Amendment applies to the ESA humorous or silly, we think it is no sillier than many of the "living Constitution" interpretations offered in the past for other portions of the Constitution's text.[60]

Several of the modern applications of the Third Amendment were inspired by the post-9/11 War on Terror. The first was an eighty-two-page behemoth in the *Saint Louis University Law Journal* by Christopher J. Schmidt, at the time a recent graduate of Widener University School of Law.[61] Schmidt's article is a law

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58. *Id.* at 967–68 (Kaufman, J., concurring in part and dissenting in part) (emphasis in original). The district court dismissed the case on remand on the ground that state officials could not have known about the interpretation of the Third Amendment articulated by the Second Circuit. *See* Engblom v. Carey, 572 F. Supp. 44 (S.D.N.Y. 1983).

59. *See* Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The "Living Constitution," the Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769 (2000).

60. *Id.* at 770–71. Others read the Morriss and Stroup article as satire. *See, e.g.*, JAY WEXLER, THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS 190 (2011).

61. *See* 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.

professor's dream, centered as it is around a provocative hypothetical: "[W]hat if CIA and FBI agents' personal residences, offices and other government buildings were subjected to terrorist or military threats, leaving agents with no place to live or work? At that point, could CIA or FBI agents be quartered in your house?"[62] Approximately eighty pages later, Schmidt concludes that these hypothetical Carrie Mathisons[63] and Jack Bauers[64] could not be quartered in our homes unless we consent because they are "soldiers" under the Third Amendment and the United States is not at war until Congress formally declares it.[65]

Geoffrey M. Wyatt, a recent Harvard Law School graduate and federal law clerk at the time of his article, responded to a different modern controversy in a fifty-two-page piece in the 2005 issue of the *New England Law Review*: that involving the Solomon Amendment.[66] Enacted in 1996, the Solomon Amendment authorizes the Secretary of Defense to deny federal grants to any American college and university that prohibits or prevents ROTC or military recruitment on campus.[67] Wyatt's article was published shortly before the U.S. Supreme Court ruled unanimously against a series of First Amendment challenges by an association of American law schools,[68] and Wyatt correctly predicted that the First Amendment arguments would be unsuccessful.[69] He insisted, however, that a Third Amendment challenge would prevail. He writes:

> We continue to place our trust in the military to determine its own affairs only because we know that it is powerless to enact its vision of society in the civilian sphere. The Third Amendment was designed in part to bar our representatives from deciding to empower the military to cross that line. It accomplished that protection by vesting power in individual citizens to make their own decisions about whether to keep the military out. Although the federal government is free to open its own property to facilitate military recruiting, it is

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587 (2004).

62. *Id.* at 589.

63. Carrie Mathison is the CIA agent portrayed by Claire Danes on the TV series *Homeland*.

64. Jack Bauer is Kiefer Sutherland's character on *24*.

65. Schmidt, *supra* note 61, at 664–65.

66. *See* Geoffrey M. Wyatt, *The Third Amendment in the Twenty-First Century: Military Recruiting on Private Campuses*, 40 NEW ENG. L. REV. 113, 113–14 (2005).

67. 10 U.S.C.A. § 983(b)(1) (West 1998 & Supp. 1995).

68. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006).

69. Wyatt, *supra* note 66, at 119, 153.

> powerless to pry open the doors of the nation's private universities for that purpose. Well before any determination needed to be reached about whether the military's message confounds the expressive intent of these schools, Solomon went too far when it marched unwanted recruiters even one step beyond the schoolhouse door.[70]

The year 2008 witnessed the publication of two law student notes about the Third Amendment. In the first, James P. Rogers explores, in a thirty-four-page piece in the *Cornell Journal of Law and Public Policy*, "the possibility that Third Amendment violations occurred in Louisiana or Mississippi in the aftermath of Hurricane Katrina."[71] Rogers does *not* conclude that there was quartering of National Guardsmen in private homes, or that any quartering that did occur was *not* consensual. Rather, the point of his student note seems to be to remind readers that the Third Amendment is a viable constraint on the government when domestic disasters arise.[72]

The second law student note about the Third Amendment published in 2008 originated as a paper for Louis Michael Seidman's Constitutional Theory seminar at Georgetown University Law Center, Josh Dugan's thirty-four-page piece entitled "When is a Search Not a Search? When It's a Quarter: The Third Amendment, Originalism, and NSA Wiretapping."[73] Whereas Professor Amar reads the Third Amendment in conjunction with the Second Amendment, Dugan joins the list of writers who view it as a companion to the Fourth Amendment.[74] As such, he insists, NSA wiretapping violates the Third Amendment: "It embodies [Patrick] Henry's fear, shared by [James] Madison, that military law enforcement is dangerous and should be categorically banned during peacetime, while also embodying Madison's recognition that the new government should have the flexibility to use this power during war."[75]

Conservative journalist and author Frank Miniter includes a chapter on the Third Amendment in his 2011 book *Saving the Bill of Rights: Exposing the Left's Campaign to Destroy American*

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70. *Id.* at 163.

71. James P. Rogers, Note, *Third Amendment Protections in Domestic Disasters*, 17 CORNELL J.L. & PUB. POL'Y 747, 750 (2008).

72. *Id.* at 750–51.

73. Josh Dugan, Note, *When is a Search Not a Search? When It's a Quarter: The Third Amendment, Originalism, and NSA Wiretapping*, 97 GEO. L.J. 555 (2008).

74. *Id.* at 559.

75. *Id.* at 570.

Exceptionalism.[76] Miniter chronicles the case of Jerrold and Ellen Ziman, who got caught up in the byzantine world of New York City housing law for nearly a decade merely because they wanted to evict tenants from a new home they had purchased.[77] Although the Zimans eventually prevailed, it was on financial hardship grounds rather than via the Third Amendment.[78] Miniter, however, encourages future litigators to invoke the Third Amendment in similar cases:

> [P]erhaps it's time attorneys representing owners in rent-controlled areas took their noses out of the DHCR's regulations and made a constitutional challenge with regards to the Third Amendment. The Supreme Court might just reach down and snag the case to adjudicate an area of law that has not yet been defined. After all, even if justices decide against tearing down the private property burdens of rent control, a case in the high court would at least bring the injustice of the laws to the awareness of the American public.[79]

The final chapter of Jay Wexler's 2011 book, *The Odd Clauses: Understanding the Constitution through Ten of Its Most Curious Provisions*,[80] provides a convenient juxtaposition to Miniter's call to arms of the same year. Wexler, a liberal law professor at Boston University, is renowned in American legal education for his sense of humor[81] and his gift for grins is on full display in his chapter about the Third Amendment.[82] After providing a standard history of this "odd" Amendment, Wexler asks: "So, the Third Amendment? It's probably the clause in the Constitution that people make fun of the most (the slavery portions are too distressing to make real fun of), but is it really a constitutional dodo bird?"[83] Perhaps surprisingly, Wexler's answer is no. Unlike Miniter, who apparently wants conservative litigators to file a flood of Third Amendment lawsuits until the U.S. Supreme Court decides one on *cert.*, Wexler insists

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76. *See* FRANK MINITER, SAVING THE BILL OF RIGHTS: EXPOSING THE LEFT'S CAMPAIGN TO DESTROY AMERICAN EXCEPTIONALISM 127–39 (2011).

77. *Id.*

78. *Id.* at 136–39.

79. *Id.* at 139.

80. *See* WEXLER, *supra* note 60, at 177.

81. *See, e.g.*, Jay Wexler, *Laugh Track*, 9 GREEN BAG 2d 59 (2005) (a comical piece written by Wexler in *Green Bag*, the "Entertaining Journal of Law").

82. *See* WEXLER, *supra* note 60, at 177.

83. *Id.* at 192.

that the dearth of Third Amendment litigation is a testament to the Amendment's effectiveness. He writes:

> The article in the *Onion* is obviously meant to be funny, but I think there is something serious to be said for the fact that the government has not quartered any troops in private homes for at least 145 years. Just because the Third Amendment hasn't come up much doesn't mean that it hasn't done any work. Maybe the amendment isn't hibernating at all. Maybe it is more accurate to say that it is just quietly doing its job, making it simply impossible to imagine under current circumstances that the army or National Guard or any other military organization could take shelter in private homes. Who knows how our history would have been different were it not for the Third Amendment?[84]

The next two modern applications of the Third Amendment appeared in 2012, one by a law student and the other by a law professor who had previously published an article about the Third Amendment as a law student. Thomas G. Sprankling's forty-page student note for the *Columbia Law Review* invokes the theories of "intratexualism" and "constitutional construction" to link the Third Amendment to the Fifth Amendment's Takings Clause.[85] After providing a revisionist history of the Third Amendment, Sprankling turns to a very modern concern: the U.S. Supreme Court's much-reviled five to four decision in *Kelo v. City of New London*[86] permitting the seizure of owner-occupied homes as part of a municipal economic redevelopment plan.[87] Sprankling concludes that, had the Court bothered to consider the Third Amendment and properly understood that the Third and Fifth Amendments are the only two provisions of the Bill of Rights primarily concerned with protecting private property, the City of New London's seizures would

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84. *Id.* at 188.

85. 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, 137–38 (2012). Intratexualism is when the interpreter reads "a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase." Akhil Reed Amar, *Intratexualism*, 112 HARV. L. REV. 747, 748 (1999). Constitutional construction is the process of determining the legal effect given the text, including by judges and other government officials. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 457 (2013).

86. Kelo v. City of New London, 545 U.S. 469 (2005).

87. Sprankling, *supra* note 85, at 118; *see Kelo*, 545 U.S. at 472.

have been adjudged unconstitutional because of the special place identified for a person's home in the Third Amendment.[88]

Chapman University School of Law Professor Tom W. Bell followed up a 1993 article about the Third Amendment that he published in the *William and Mary Bill of Rights Journal* while he was a law student at the University of Chicago with a second article in the *William and Mary Bill of Rights Journal*, 2012's "'Property' in the Constitution: The View from the Third Amendment."[89] Bell's thirty-four-page 2012 article, like Sprankling's of that same year, reads the Third Amendment in conjunction with the Fifth Amendment's Takings Clause.[90] But while Sprankling focuses on the specific context of owner-occupied homes such as those at issue in *Kelo*, Bell makes the larger claim that, when construed in light of the Third Amendment, the Takings Clause of the Fifth Amendment covers both real and personal property broadly construed.[91] Bell invokes the largely unknown World War II episode in which the U.S. government forcibly evacuated the natives of the Aleutian Islands and quartered soldiers in private homes to illustrate how a broader reading of the Takings Clause—one that takes the Third Amendment seriously—would have addressed the matter.[92]

In 2013, Alan Butler, an attorney with the Electronic Privacy Information Center, published a forty-page article about Third Amendment implications for cybersecurity in an *American University Law Review* symposium about cybersecurity.[93] Butler maintains that military software placed on home or business networks amounts to a "quartering" of a "soldier" for Third Amendment purposes, and that the Third Amendment confers not merely the narrow right to exclude the military from one's house, but the broader right to exclude the military from "private property," including computers and network infrastructure.[94] Butler closes his intriguing article by suggesting ways to design a national cyberoperations strategy that is consistent with Third Amendment principles.[95]

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88. Sprankling, *supra* note 85, at 151.

89. *See* Tom W. Bell, *"Property" in the Constitution: The View from the Third Amendment*, 20 WM. & MARY BILL RTS. J. 1243 (2012).

90. *Id.* at 1244.

91. *Id.* at 1247.

92. *Id.* at 1244.

93. *See* Alan Butler, *When Cyberweapons End up on Private Networks: Third Amendment Implications for Cybersecurity Policy*, 62 AM. U. L. REV. 1203 (2013).

94. *Id.* at 1230.

95. *Id.* at 1240–41.

Radley Balko, a blogger for the *Huffington Post* and a well-known civil libertarian, devotes a chapter in his 2013 book *Rise of the Warrior Cop: The Militarization of America's Police Forces* to what he calls the "symbolic" Third Amendment. He writes:

> What we might call the "Symbolic Third Amendment" wasn't just a prohibition on peacetime quartering, but a more robust expression of the threat that standing armies pose to free societies. It represented a long-standing, deeply ingrained resistance to armies patrolling American streets and policing American communities. And in that sense, the spirit of the Third Amendment is anything but anachronistic.[96]

Balko returns to that theme from time to time throughout the book to demonstrate how government has dangerously intruded into our lives and homes, especially via the militarization of the police.[97] The book has been praised by many prominent libertarians, including one of the other contributors to this symposium, Glenn Harlan Reynolds.[98]

The final modern application of the Third Amendment available for review at the time of the writing of this historiography is Sandra Eismann-Harpen's 2014 student note in the *Northern Kentucky Law Review*.[99] After briefly summarizing the origins of both the Third Amendment and the police, Eismann-Harpen arrives at Radley Balko's commonsense conclusion that Third Amendment protections should apply to actions taken by the police and not merely the military.[100] She points out:

> [There is] very little distinction between today's police and the military. Not only are the police emulating the military's tactics . . . but they are also taking on the mentality of the military. . . . The Third Amendment was ratified to protect the sanctity of the home from governmental intrusion, and this protection should apply to actions taken by police.[101]

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96. RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 13 (2013).

97. *Id.* at 62–63.

98. *See* Glenn Harlan Reynolds, *Uphold the Third Amendment*, USA TODAY, July 7, 2013, *available at* http://www.usatoday.com/story/opinion/2013/07/07/third-amendment-henderson-nevada-police-column/2496689/.

99. *See* Sandra Eismann-Harpen, *Rambo Cop: Is He a Soldier under the Third Amendment?*, 41 N. KY. L. REV. 119, 119 (2014).

100. *Id.* at 131.

101. *Id.*

IV. CONCLUSION: THE THIRD AMENDMENT AND AMERICAN CONSTITUTIONALISM

Until now, I had written only one sentence about the Third Amendment. That sentence was penned as part of a book about the Declaration of Independence's role in interpreting the Constitution of the United States. As the studies of the Third Amendment chronicled in this historiography indicate, one of the Founders' grievances against the King was the "quartering of large Bodies of Armed Troops among us."[102] The sentence I wrote concerned the broader question of what the Third Amendment means for the jurisprudence of the American Founding: "The second and third amendments, which guarantee, respectively, an individual's right to keep and bear arms and to be free from government-imposed quartering of troops in his home, are designed to secure the natural rights of life and liberty."[103]

Succinctly put, the Third Amendment is simply one piece of evidence—overwhelming, in my judgment—of the Framers' continuing commitment to the political philosophy of the Declaration of Independence: a political philosophy that dedicates the American regime to equality, life, liberty, and the pursuit of happiness. "[T]o secure these Rights," the Declaration proclaims, "Governments are instituted among Men."[104] I document in *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation* how a myriad of sources prove invaluable for illuminating that the fundamental purpose of the Constitution is to secure the natural rights identified in the Declaration. Those sources are: the Constitution's preamble; the debates surrounding the framing and ratification of the Constitution; *The Federalist* papers; the personal letters, writings, and speeches of leading Founders and statesmen such as James Madison, Thomas Jefferson, James Wilson,

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102. THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776).

103. SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 69–70 (1995). As part of a larger project about constitutional interpretation and judicial review, Georgetown Law Professor Nicholas Quinn Rosenkranz insists that the Third Amendment's use of the passive voice makes it "grammatically and structurally, a model for the rest of the Bill of Rights." Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1031–33 (2011). For Rosenkranz, what this means in practical terms is that the Third Amendment is a conditional restriction on executive power: "The President can quarter soldiers in American houses without consent, but only if Congress (1) declares war, and (2) provides, by law, for the manner of quartering." Rosenkranz, *supra*, at 1032.

104. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Alexander Hamilton, and John Adams; the Bill of Rights; and early state constitutions.[105] Space constraints permit me to discuss only one of those sources, the Bill of Rights.

Although not included as part of the Constitution drafted in Philadelphia in 1787, the Bill of Rights is an important part of the Constitution as it was finally enacted. The late Herbert Storing, a leading authority on the American Founding, went so far as to say that "it seems quite plausible today, when so much of constitutional law is connected with the Bill of Rights, to conclude that the Antifederalists, the apparent losers in the debate over the Constitution, were ultimately the winners."[106] While Storing's observation appears to overstate the difference of opinion that existed between the Federalists and the Antifederalists on the necessity of securing the rights of the American people, the observation nicely captures the significance of rights in the American regime. To make the point somewhat differently, the Constitution and the Bill of Rights had the same objective for the Framers—the latter merely declared the rights the former was designed to secure.

The Bill of Rights does not seek to protect only natural rights—several provisions merely secure certain common law rights—but natural rights are what the Bill of Rights is most concerned with. The First Amendment embodies the idea of an individual's natural rights to liberty and the pursuit of happiness; guaranteeing as the Amendment does freedom of religion, speech, press, assembly, and access to government by petition. The Fourth Amendment's prohibition against unreasonable or unwarranted government searches and seizures protects the natural right to liberty by proscribing government intimidation and coercion. The Fifth and Sixth Amendments, by detailing a procedural floor to which the government must adhere when prosecuting an individual for offenses against the state, protect the natural rights of life and liberty. The natural right to property is likewise protected by the due process and just compensation clauses of the Fifth Amendment. The Eighth Amendment[107] prohibitions against excessive bail and cruel

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105. *See* GERBER, TO SECURE THESE RIGHTS, *supra* note 103, at ch. 2; *see also* Scott D. Gerber, *Liberal Originalism: The Declaration of Independence and Constitutional Interpretation*, 63 CLEV. ST. L. REV. 1, 4–5 (2014) (invited contribution to a symposium about "History and the Meaning of the Constitution").

106. Herbert Storing, *The Constitution and the Bill of Rights*, *in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 32, 32 (M. Judd Harmon ed., 1978).

107. The Seventh Amendment, which extends the right to trial by jury from criminal to civil matters and incorporates the common law into the law of the land, does not address issues of natural rights. *See* James Madison, Speech to the United

and unusual punishment protect an individual's natural right to be free from inhuman treatment by the government. The Ninth and Tenth Amendments provide that the rights not listed in the preceding eight amendments are still to be given government protection.

To end this Conclusion where I began it, the Second and Third Amendments, which guarantee, respectively, an individual's right to keep and bear arms and to be free from government-imposed quartering of troops in his or her home, are designed to secure the natural rights of life and liberty. As such, the Third Amendment, like all but one of the other original amendments to the Constitution, is a reification of the reasons the United States of America is a nation: our origins, purposes, and ideals.[108] The Third Amendment is, in short, more than deserving of this symposium in its honor.

States House of Representatives on Adopting the Bill of Rights (June 8, 1789), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 168 (Marvin Meyers ed., rev. ed., 1983).

108. *See generally* THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT (Scott Douglas Gerber ed., 2002).