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The Third Amendment Incorporated: "Soldiers" and Domestic Law Enforcement

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— Note —

The Third Amendment Incorporated: "Soldiers" and Domestic Law Enforcement

"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]

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1. U.S. Const. amend. III.

INTRODUCTION

In 2013, the Mitchell family sued the City of Henderson for violating their Third Amendment rights.[2] According to the complaint, several police officers forcibly removed Anthony Mitchell and his parents, Linda and Michael, from their respective homes[3] and remained in them for several hours.[4] The police initially asked for the family's cooperation in investigating a domestic violence dispute involving one of their next-door neighbors.[5] Evidently, the nature of the dispute required SWAT team assistance.[6]

When Anthony declined to assist the police, he was forcibly removed from his home and arrested.[7] The officers remained in his home to carry out their surveillance on Anthony's neighbor as planned.[8] After a bizarre turn of events, the officers subsequently arrested Michael and forcibly removed Linda from *their* home, presumably also for surveillance.[9] The officers searched the family house and the cars, spilled condiments from the refrigerator onto the floor, and drank from the Mitchells' cooler, evidenced by fifteen empty plastic cups found in the trashcan.[10] The Mitchell family sued, claiming the officers "quartered themselves in [their home] without their consent, violating their rights guaranteed by the Third and Fourteenth Amendments of the United States Constitution."[11] While the district court allowed some of the family's other claims to proceed on the merits, the court dismissed the family's Third Amendment claim, holding that municipal police officers are not "soldiers" within the meaning of the Third Amendment.[12]

2. First Amended Complaint at 29, Mitchell v. City of Henderson, No. 2:13-cv-01154, (D. Nev. Feb. 2, 2015).

3. Anthony Mitchell and his parents own separate homes on the same street. *Id.* at 6.

4. *Id.* at 36.

5. Mitchell v. City of Henderson, No. 2:13-cv-01154, 2015 WL 427835, at *1 (D. Nev. Feb. 2, 2015).

6. *Id.*

7. *Id.* at *2–4.

8. *Id.* at *3.

9. *Id.*

10. *Id.*

11. First Amended Complaint, *supra* note 2, at 29.

12. *Mitchell*, 2015 WL 427835, at *18.

Of all the provisions contained in the Bill of Rights, the Third Amendment is the least litigated.[13] The contours of Third Amendment's protections are undefined and untested. The first, and only, Third Amendment case to be tried on the merits was in 1981.[14] Since then, only a handful of courts have even considered Third Amendment claims before dismissing the challenges. Significantly, because the Amendment has never been the subject of a U.S. Supreme Court challenge, it has not been incorporated against the states through the Fourteenth Amendment Due Process Clause.[15]

Unfortunately, the case law, as well as most academic literature on the Third Amendment, is without a comprehensive incorporation analysis. As the recent Second Amendment jurisprudence suggests, this is a missed opportunity. That is, *District of Columbia v. Heller*[16] and *McDonald v. City of Chicago*[17] illustrate how the incorporation question involves an analytical framework quite distinct from the framework required to ascertain original meaning. These cases also show how the Supreme Court reinterpreted the Second Amendment, finding that the Amendment's original militia-focused purpose was no longer a limitation to the Amendment's reach.

If the Supreme Court ever considers whether the Third Amendment binds state and local law enforcement, the Court would likely model the analysis on *Heller* and *McDonald*. For protections yet to be authoritatively interpreted by the Supreme Court, like the Third Amendment, the Court will have to undergo two layers of analysis—one to determine original meaning, the other to determine whether the right applies against state and local governments.

First we ask what a constitutional amendment means based on the text, original understanding, and legislative history leading up to ratification in 1789. In this Note, step one will be analyzed through an *originalist* lens,[18] given that method of interpretation's general acceptance by today's Court.[19] Thus, we ask how the Framers' generation

13. Tom W. Bell, Note, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 140 (1993).

14. Engblom v. Carey, 522 F. Supp. 57 (S.D.N.Y. 1981).

15. McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010); *but see* Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982) (affirming the district court's holding that the Third Amendment applies against state governments).

16. 554 U.S. 570 (2008).

17. 561 U.S. 742 (2010).

18. In this Note, I do not intend to consider the various strands of originalism. Rather, I analyze the Third Amendment's meaning, as of 1789, using the originalist model Justice Scalia employed in District of Columbia v. Heller, 554 U.S. 570 (2008).

19. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009) (noting that in *Heller*, "[n]ot only did Justice Scalia secure five votes for

"would have expected the relevant constitutional principles to be articulated and applied,"[20] eschewing any consideration of "current societal values" in favor of an original, "fixed meaning."[21]

Given the interpretation in step one, step two determines whether the right applies to state and local governments—that is, whether the right is "fundamental" and thus applies against the states, through the Fourteenth Amendment's Due Process Clause. Here, the step two analysis is even more malleable than that of step one, and hence, lends itself to alternative interpretations. This is because the analysis calls for two lines of inquiry which can, in theory, lead to different outcomes. On the one hand, we *widen* the inquiry by asking whether the right is "deeply rooted in this Nation's history and tradition."[22] Here, the Court looks to the depths of American history, as well of English common-law history, up until 1868, the year the Fourteenth Amendment was ratified. At the same time, we are asking a more specific question—whether the Framers of the Fourteenth Amendment intended for the right in question to be incorporated against the states. As will be demonstrated, this inquiry—versus the *originalist* inquiry tethered to the time of the Bill of Rights's ratification (step one)—can alter the application, and even the character, of a Bill of Rights protection.

This observation bodes well for the question of the Third Amendment's present-day reach. As will be discussed in this Note, an originalist analysis of the term "soldier," as used in the Third Amendment, is unlikely to be interpreted by a court as applying, or being intended to apply, to municipal police. That is, "soldier" was most certainly understood by the Framers of the Constitution as applying to a narrow class of *federal* governmental actors.[23] Incorporation doctrine, however, allows for a second round of analysis in deriving meaning from a Bill of Rights guarantee, which takes into account American attitudes and understandings during the eighteenth century.

In this Note I argue that future Third Amendment litigants should utilize incorporation analysis to tie "soldiers" to municipal police. That is, the Framers of the *Fourteenth Amendment*, given certain historical developments during the nineteenth century, would have understood

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the most thoroughgoing originalist opinion in the Court's history, but Justice Stevens's dissent appeared to engage rather than challenge the majority's originalist premises").

20. *See* JACK M. BALKIN, LIVING ORIGINALISM 7 (2011) (referring to Scalia's method of originalist interpretation as an "original expected application," which "asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense").

21. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

22. *McDonald*, 561 U.S. at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

23. *See infra* Part III.C.

"soldier" as encompassing local, modern-day state actors including police officers and certainly police paramilitary units like SWAT. I arrive at this conclusion by considering what governmental actors were considered "soldiers" at the time of the Constitution's ratification, and then considering what functions those "soldiers" served during the course of the nineteenth century until Reconstruction. I then analyze the status of local law enforcement in the mid-nineteenth century and how it compares to local law enforcement today. The answers to these questions suggest that an incorporated Third Amendment ought to bind state and municipal law enforcement.

Part I of this Note will discuss what we know about the Third Amendment today, given the sparse case law and scholarly commentary. Part II will illustrate the mechanics required to interpret a Bill of Rights protection and the differences inherent in incorporation analysis. As a guide, I will look to the recent Supreme Court jurisprudence on the Second Amendment. Part III will analyze what the Third Amendment means based on the Framers' intent. In Part IV, I will consider the Third Amendment through incorporation analysis. I conclude that the Framers of the Fourteenth Amendment would have contemplated today's police to fall within the Third Amendment's grasp. Finally, I end by commenting on implications inherent in applying the Third Amendment to state and local law enforcement.

I. What We Know About the Third Amendment

The Third Amendment is the least litigated of the Bill of Rights Amendments.[24] Most of the Third Amendment's treatment by federal courts has consisted of symbolic interpretations contained in dicta. Similarly, the legal scholarship exploring the Third Amendment is wanting. As I argue in this Note, the dearth of scholarly attention paid to the relationship between incorporation and the Third Amendment represents a significant oversight.

A. The Courts

The little attention the Third Amendment has received by the judiciary reveals two distinct treatments of the right. On the one hand, some courts have briefly considered specific Third Amendment claims before promptly dismissing them, with only one notable exception.[25] On the other hand, courts have invoked the Third Amendment as support for the proposition that the concepts of property and privacy interests are embedded in the Constitution.

24. Bell, *supra* note 13, at 140.

25. *See infra* Part I.A.1.

The latter approach—the symbolic application—has been invoked *sua sponte* by the U.S. Supreme Court on a few limited occasions. For example, in the context of a landlord-tenant dispute involving *civilian* parties, the U.S. Supreme Court invoked the Third Amendment in 1921.[26] The Court noted that the Third Amendment was added to the Constitution "in recognition of the purpose to protect property and the rights of its owner from governmental aggression."[27]

Forty years later, the U.S. Supreme Court twice invoked the Third Amendment, in the context of contraception, as a symbol of the Founding Fathers' commitment to privacy. In *Poe v. Ullman*,[28] for example, Justice Harlan dissented, interpreting the Third Amendment, in light of the Fourth Amendment, as embracing "the concept of the privacy of the home."[29] Subsequently, Justice Douglas reiterated the Court's position in *Griswold v. Connecticut*[30] where he said that the Third, along with the Fourth, Fifth, and Ninth Amendments, created a "zone of privacy."[31] Some recent courts have echoed this sentiment.[32]

Conversely, courts that have considered *literal* Third Amendment claims have interpreted the Amendment narrowly. In *Custer County Action Ass'n v. Garvey*,[33] for example, the Tenth Circuit declined to apply the Third Amendment's protections to Colorado homeowners seeking to have the airspace above their homes free from military aircraft travel.[34] Similarly, in *Jones v. U.S. Secretary of Defense*,[35] a federal court denied the plaintiff's motion to enjoin, on Third Amendment grounds, commanders of the United States Army from requiring army reservists to participate in a military parade.[36] The first case to

26. Block v. Hirsh, 256 U.S. 135 (1921).

27. *Id.* at 165.

28. 367 U.S. 497 (1961).

29. *Id.* at 549 (Harlan, J., dissenting).

30. 381 U.S. 479 (1965).

31. *Id.* at 484.

32. *See, e.g.*, United States v. Warras, No. 2:13-cr-439-LDG-VCF, 2015 WL 6736981, at *6 (D. Nev. May 18, 2015) (noting that the Third, like the First and Fifth Amendments, protects the home, which "occupies a special place in the pantheon of constitutional rights" (quoting United States v. Craighead, 539 F.3d 1073, 1082 (9th Cir. 2008))).

33. 256 F.3d 1024 (10th Cir. 2001).

34. *Id.* at 1043.

35. 346 F. Supp. 97, 98–100 (D. Minn. 1972).

36. *Id.* at 98–100.

begin to identify the Third Amendment's contours was *Engblom v. Carey* in 1981.[37]

1. *Engblom v. Carey*

The *Engblom* plaintiffs were corrections officers at a prison in New York.[38] The plaintiffs rented, and used as their residences, on-site dormitory-style housing, made available by the prison for a monthly rate.[39] One morning in 1979, most of the corrections officers at the prison skipped work in favor of partaking in a statewide union strike.[40] In response, the Governor called forth the New York National Guard to assist with peacekeeping at the prison.[41] Over 200 National Guardsman, with permission of the prison superintendent, occupied the plaintiff's dormitories at the prison, staying there for ten days.[42]

The district court dismissed the plaintiffs' section 1983 claim on the grounds that they lacked sufficient possessory interests in the dormitories to render them a "house" within the meaning of the Third Amendment.[43] Nonetheless, it is noteworthy that the court, without getting into much detail,[44] found that the Third Amendment was incorporated against the states through the Fourteenth Amendment's Due Process Clause.[45] Further, the court held that National Guardsmen are "soldiers" within the meaning of the Third Amendment.[46] The court reasoned that the National Guardsmen are the modern-day successors to the Militias reserved to the states through the Constitution,[47] and

37. *See* Engblom v. Carey, 522 F. Supp. 57, 59 (S.D.N.Y. 1981) ("From the time of [the Third Amendment's] adoption until September 10, 1979, the date of the filing of this action, as far as can be determined, no citizen has found it necessary to invoke the Amendment to protect his dwelling from use by the military. In an extraordinary demonstration of the vitality and versatility of our Constitution, just such a claim is here made for the first time, albeit unsuccessfully.").

38. *Id.*

39. *Id.*

40. *Id.* at 62.

41. *Id.*

42. *Id.* at 63.

43. *Id.* at 67–68.

44. *Id.* at 65 (stating that "[h]ere it should not be necessary to wander too far into the thicket of incorporation jurisprudence").

45. *Id.*

46. *Id.*

47. U.S. CONST. art. I, § 8, cls. 15, 16 ("The Congress shall have Power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To Provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be

that National Guardsmen are employees of the state under control of the Governor, except when federalized by unit.[48]

On appeal, the Second Circuit remanded the case for trial on the Third Amendment claim.[49] The court agreed with the district court that the Third Amendment is incorporated against the states.[50] Second, the court confirmed that National Guardsman are "soldiers" within the meaning of the Amendment and are state employees under the Governor's direction.[51] Third, the court reaffirmed that the Third Amendment was "designed to assure a fundamental right to privacy."[52]

In terms of the word "house," the court rejected the "formalistic construction" employed by the district court.[53] The court found that "house" is not limited to residences "arising out of fee simple ownership but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others."[54]

In short, by allowing the claim to proceed, the Second Circuit recognized a contemporary application of the Third Amendment that, arguably, expanded the Amendment's scope. Nonetheless, on remand the district court declined to hold the defendants liable for Third Amendment violations because, being state actors, they were protected by qualified immunity.[55] Because the Third Amendment rights were not "clearly established" at the time of the encroachment, the government was shielded from liability.[56]

2. *Estate of Bennett* and *Mitchell*

Finally, there have been two federal cases within the last ten years in which litigants sought application of the Third Amendment to

employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.").

48. *Engblom*, 522 F. Supp. at 65.

49. Engblom v. Carey, 677 F.2d 957, 966 (2d Cir. 1982).

50. *Id.* at 961.

51. *Id.*

52. *Id.* at 962.

53. *Id.*

54. *Id.*

55. Engblom v. Carey, 572 F. Supp. 44, 49 (S.D.N.Y. 1983).

56. *Id.* at 46 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known." (emphasis added))).

municipal law enforcement. In *Estate of Bennett v. Wainwright*,[57] the dismissal was a foregone conclusion given what the judge described as "less than illuminating" allegations in the complaint.[58] Nonetheless, regarding the plaintiff's attempt to link the Third Amendment to municipal police, the judge made two legal findings about the definitions of "soldiers" and "quartering." Referring to the claim as a "far-fetched, metaphorical" application, the court said that "[t]here is no sense in which a single state trooper and several deputy sheriffs can be considered 'soldiers' . . . nor in which the use of a house . . . for a period of fewer than 24 hours could be construed as 'quartering.'"[59]

The *Mitchell* court reached the same conclusion. As mentioned in the Introduction, the Mitchell family filed a section 1983[60] suit against their city's municipal police claiming a Third Amendment violation.[61] The police had removed the family members from their homes to gain a "tactical advantage" over the family's neighbor, whom the police were investigating on a domestic violence call.[62] The officers ended up forcibly removing both Anthony and Linda Mitchell from their homes, and thereafter using their places to aid in their investigation.

The *Mitchell* court identified the rights protected by the Third Amendment: "[U]nder *Griswold,* the Third Amendment protects private citizens from incursion by the military into their property interests, and guarantees the military's subordinate role to civil authority."[63] The court held that a municipal police officer is not a "soldier" under the Third Amendment.[64] The court stated this "squares with the purpose of the Third Amendment because this was not a military intrusion into a private home, and thus the intrusion is more effectively protected by the Fourth Amendment."[65] Given this preliminary conclusion, the court never reached the question of what constitutes "quartering."[66] The court also did not address whether the incorporation question could alter the inquiry. This is not particularly surprising, however, given

57. No. 06-28-P-S, 2007 WL 1576744 (D. Me. May 30, 2007).

58. *Id.* at *7.

59. *Id.*

60. *See* 42 U.S.C. § 1983 (2012) (providing civil remedies for constitutional violations by governmental actors).

61. Mitchell v. City of Henderson, No. 2:13-cv-01154, 2015 WL 427835, at *5 (D. Nev. Feb. 2, 2015).

62. *Id.* at *1.

63. *Id.* at *18.

64. *Id.*

65. *Id.*

66. *Id.* ("I need not reach the question of whether the occupation at issue in this case constitutes quartering, though I suspect it would not.").

that the Mitchell family didn't make any incorporation-based argument.[67] Nor did the family attempt to argue the link between "soldiers" and municipal police.[68]

B. The Gap in Scholarly Commentary

Scholarly treatment of the Third Amendment, like treatment from the judiciary, is wanting.[69] Much of the Third Amendment legal commentary has revolved around unique ways in which Third Amendment violations may be currently taking place. Some have advanced arguments characterizing federal government wiretapping as "quartering."[70] One scholar has urged that the Third Amendment is violated in current schemes under which the federal government financially induces private universities to accept on-campus military recruiting.[71] Another scholar has cautioned about the potential for Third Amendment violations during domestic natural disasters, like

67. Plaintiffs' Combined Opposition to: (1) Defendants City of Henderson, Nevada, Jutta Chambers, Garrett Poiner, Ronald Feola, Ramona Walls, Angela Walter, Christopher Worley & Janette R. Reyes-Speer's Motion to Dismiss First Amended Complaint (CR17); and (2) Defendants City of North Las Vegas, Joseph Chronister, Michael Waller, Drew Albers, David Cawthorn, Eric Rockwell & Travis Snyder's Joinder Thereto (CR23) at 57, Mitchell v. City of Henderson, 2015 WL 427835 (D. Nev. Feb. 2, 2015) (No. 2:13-cv-01154-APG-CWH).

68. *Id.* at 55–58.

69. One scholar recently endeavored to canvas all of the scholarly literature on the Third Amendment in less than twenty pages. Scott D. Gerber, *An Unavoidably Brief Historiography of the Third Amendment*, 82 TENN. L. REV. 627 (2015).

70. *See, e.g.*, Mike Gatto, Opinion, *A Redcoat Solution to Government Surveillance*, L.A. TIMES (Sept. 29, 2015, 5:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-gatto-surveillance-3rd-amendment-20150929-story.html [https://perma.cc/J7WU-R8S5] (suggesting that the "federal government's military-run surveillance" may constitute a "modern form of quartering troops in our homes"); Glenn Harlan Reynolds, *Quartering Spyware Troops in the Digital Age*, USA TODAY (Mar. 2, 2015, 1:55 PM), https://www.usatoday.com/story/opinion/2015/03/01/constitutional-law-third-amendment-quartering-column/24220593/ [https://perma.cc/M3AF-AD5R] (explaining that the Third Amendment extends beyond its literal meaning of having troops move into one's home); Josh Dugan, *When Is a Search Not a Search? When It's a Quarter: The Third Amendment, Originalism, and NSA Wiretapping*, 97 GEO. L.J. 555 (2009) (arguing that the Founders used the word "quartering" expansively to refer to substantial governmental intrusions that threatened the rule of law).

71. Geoffrey M. Wyatt, *The Third Amendment in the Twenty-First Century: Military Recruiting on Private Campuses*, 40 NEW ENG. L. REV. 113 (2005) (challenging federal programs requiring universities to host military recruiters in order to receive certain types of federal funding).

Hurricane Katrina, where National Guardsmen might, out of necessity, commandeer private establishments.[72]

As of late, the *Mitchell* case has engendered renewed interest in the Third Amendment.[73] Perhaps driven by the heightened scrutiny placed on police departments within the last few years, some have been eager to tie the Third Amendment's prohibitions to police abuses through a dynamic interpretation of "soldier."[74] None of them, however, sufficiently appreciate incorporation and the way it can expand the inquiry. Similarly, while a team of scholars has recently written about Third Amendment incorporation,[75] they did not consider it in light of the *police-as-soldiers* question. These omissions are mistaken, for incorporation serves as a mechanism by which the U.S. Supreme Court could find that the Third Amendment restricts America's state and local law enforcement forces.

II. THE SIGNIFICANCE OF THE INCORPORATION QUESTION

Should the Supreme Court consider whether "soldier," as used in the Third Amendment, encompasses municipal police, the Court would have to undertake a two step analysis. That is, the Third Amendment would have to be interpreted in two distinct historical contexts. At step one, the Court would likely interpret the text of the Third Amendment, as understood by the Framers of the Constitution. At step two, the inquiry is significantly expanded. We consider whether the Fourteenth Amendment's Due Process Clause incorporates the Third Amendment

72. James P. Rogers, Note, *Third Amendment Protections in Domestic Disasters*, 17 CORNELL J. L. & PUB. POL'Y 747, 748–49 (2008).

73. *See, e.g.*, Ilya Somin, *A Real Live Third Amendment Case*, VOLOKH CONSPIRACY (July 4, 2013, 6:16 PM), http://volokh.com/2013/07/04/a-real-live-third-amendment-case/ [https://perma.cc/G7L6-M6MK] (discussing recent Third Amendment litigation).

74. *See, e.g.*, Elizabeth Price Foley, *The "War" Against Crime: Ferguson, Police Militarization and the Third Amendment*, 82 TENN. L. REV. 583 (2015) (considering police as "soldiers" in the context of the Third-Amendment); Sandra Eismann-Harpen, Note, *Rambo Cop: Is He a Soldier Under the Third Amendment*, 41 N. KY. L. REV. 119 (2014) (suggesting that police may "fall within the meaning of soldier under the Third Amendment"); Samantha A. Lovin, Note, *Everyone Forgets About the Third Amendment: Exploring the Implications on Third Amendment Case Law of Extending Its Prohibitions to Include Actions by State Police Officers*, 23 WM. & MARY BILL RTS. J. 529 (2014) (discussing the protections available to the general public when police officers "go beyond their constitutionally established boundaries").

75. E. Duncan Getchell, Jr., Matthew D. Fender & Michael H. Brady, *Are the Rights Guaranteed by the Third Amendment Sufficiently Deep Rooted and Fundamental to Be Incorporated into the Fourteenth?*, 82 TENN L. REV. 575 (2015) (examining the contemporary application of Third Amendment jurisprudence).

against state and local governments. This inquiry concerns whether the Framers of the *Fourteenth Amendment* viewed the right in question as fundamental.

In this Part, I will explain how the incorporation analysis can alter the meaning of an *unincorporated* protection within the Bill of Rights. Then I will illustrate my point by recounting how incorporation significantly expanded application, and perhaps the meaning, of the Second Amendment.

A. Incorporation and the Bill of Rights

Two features of incorporation provide potential avenues for expanding the Third Amendment's protections. First, incorporation expands the universe of subjects bound by the prohibitions contained in the Bill of Rights, namely state and local governmental actors. While intuitive, this feature cannot be overstated. After all, incorporation made the First Amendment applicable to state and local governments[76] despite the Amendment's explicit language ("*Congress* shall make no law . . ."),[77] which would appear to preclude such application. Second, courts ask whether a given right or protection in the Bill of Rights is *fundamental*, and hence ought to apply to state and local governments. That question is answered by looking to congressional attitudes at the time of the Fourteenth Amendment's ratification rather than at the time of the Bill of Rights.[78]

Thus, application of a Bill of Rights protection to state actors, coupled with the distinct emphasis on 1868, can result in constitutional protection that is different than the Framers intended. Crucially, the incorporation question is likely to lend itself to more flexible interpretations than analysis of original intent would. The most recently incorporated amendment of the Bill of Rights—the Second Amendment—provides an illustration of the potential that the incorporation doctrine holds.

76. *See, e.g.*, Kunz v. New York, 340 U.S. 290, 295 (1951) (finding a municipal ordinance unconstitutional under the First Amendment).

77. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

78. *See* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 223 (1998) ("Mechanical incorporation . . . made it easy to forget that when we 'apply' the Bill of Rights against the states today, we must first and foremost reflect on the meaning and the spirit of the amendment of 1866, not the Bill of 1789.").

B. Incorporation and the Second Amendment

Heller is a crucial consideration to the present Third Amendment inquiry, as it showcases how the contemporary U.S. Supreme Court interprets an amendment of the Bill of Rights (step one). *McDonald* is even more significant, for it illustrates how the incorporation question (step two) calls for analysis distinct and separate from that of step one. Together, they expose how the Court crafted a new interpretation of an arguably antiquated right—the Second Amendment—and divorced the protection from its original militia-related purpose.

1. *Heller* and Step One

Prior to *Heller*, the Second Amendment[79] was scrutinized by the U.S. Supreme Court only a handful of times.[80] In those cases, the Court reaffirmed time and again that the Second Amendment only guarantees an individual a right to keep and bear firearms *in connection with service in the militia.*[81] Given the Amendment's uncontested militia-related purpose, the U.S. Supreme Court declared the Second Amendment "must be interpreted and applied with that end in view."[82]

In 2008, the *Heller* Court took many constitutional scholars[83] by surprise when it recognized that the Second Amendment to the Constitution confers an *individual right* to bear arms for self-defensive

79. The Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

80. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542, 553 (1875) (explaining that the Second Amendment shall not be infringed by Congress); Presser v. Illinois, 116 U.S. 252, 264–65 (1886) (holding that state law prohibiting citizens from drilling or parading with arms in cities and towns does not infringe the right of the people to keep and bear arms); United States v. Miller, 307 U.S. 174, 178 (1939) (holding that because a shotgun with a barrel less than eighteen inches in length did not have a reasonable relationship to the preservation of a well regulated militia, the Second Amendment did not guarantee a right to keep and bear such a weapon).

81. *See Miller*, 307 U.S. at 178 (stating that the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia"); *see also Presser*, 116 U.S. at 265 (stating that the Second Amendment "is a limitation only upon the power of Congress and the National government, and not upon that of the States").

82. *Miller*, 307 U.S. at 178.

83. *See, e.g.*, Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413 (2008) (finding that historical evidence in the form of various documents shows that Congress intended to employ the right to bear arms in a military sense only); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000) (finding that

purposes, *unconnected* to service in the militia.[84] Prior to that holding, John Hart Ely observed that, because the Second Amendment's prefatory clause contains an explicit purpose—that is, the end of a "well regulated militia"—the Framers apparently sought to foreclose alternative interpretations.[85] Similarly, Akhil Amar wrote, "to see the [Second] Amendment as primarily concerned with an individual right to hunt, or protect one's home, is like viewing the heart of the speech and assembly clauses [of the First Amendment] as the right of persons to meet to play bridge, or to have sex."[86]

Writing for the majority, Justice Scalia made his case by looking to the Amendment's text, English history, legislative history, commentary by scholars, and legislative treatment by individual states in the wake of the Constitution's ratification.[87] In doing so, Scalia distinguished between reasons for codification on the one hand, and underlying rationale behind the right on the other. Despite the Court's 5–4 divide, both dissenting opinions and the majority agreed that the *codification* of the Amendment was about preventing the federal government from disarming state militias.[88] Where the majority and dissenting opinions disagreed is on whether self-defense is "the *central component* of the right itself."[89] Given this distinction, Justice Scalia framed the right by

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an interpretation of the Second Amendment's doctrine, text, original understanding, structural inference, post-adoption history, and normative considerations all suggest that the Second Amendment is not to be expanded to an individual's right to bear arms in a non-military sense); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000) (finding that the revisionist view of the Second Amendment's right to bear arms for an individual purpose departs from the Founders' original intent).

84. District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

85. JOHN HART ELY, DEMOCRACY AND DISTRUST 95 (1980).

86. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991).

87. *Heller*, 554 U.S. at 576–603.

88. *See id.* at 599 ("[T]he threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution."); *id.* at 637 (Stevens, J., dissenting) ("[The Second Amendment] was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States.").

89. *Id.* at 599; *see also id.* at 681 (Breyer, J., dissenting) ("[T]he Second Amendment protects militia-related, not self-defense-related interests. These two interests are sometimes intertwined . . . But self-defense alone, detached from any militia-related objective, is not the Amendment's concern.").

emphasizing the broader concept of self-defense, thus dispensing with the need to be restrained by the Amendment's militia-centered intent.

2. *McDonald* and Step Two

Two years after *Heller*, the Supreme Court considered whether the Second Amendment was incorporated through the Fourteenth Amendment and, if so, what the content and scope of the right is, as applied to the states and municipalities.[90] The magnitude of this inquiry cannot be overstated. Once the *Heller* Court declared that the Second Amendment protects an individual right from federal interference, the incorporation question left open a range of possibilities for what the right might look like, as applied to municipalities and other subdivisions. First, however, it is important to consider the doctrinal boundaries of incorporation, as discussed in *McDonald*.

The *McDonald* majority affirmed the Court's central holding in the *Slaughter-House Cases*.[91] Namely, the Fourteenth Amendment's Due Process Clause, and not the Privileges or Immunities Clause, is the vehicle through which incorporation operates.[92] The majority noted that, while Justice Hugo Black's theory of "total incorporation"[93] was never adopted, the Court has nonetheless moved in that direction through "selective incorporation."[94] That is, the Court doesn't merely assume that each protection within the Bill of Rights applies against the states. Rather, each unincorporated provision will require its own Fourteenth Amendment Substantive Due Process Analysis.[95]

Second, the Court affirmed that it would continue to abandon a "two-track" approach under which "the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights."[96] Rather, the rights contained in the Bill of Rights apply to the states "according to the same

90. McDonald v. City of Chicago, 561 U.S. 742 (2010).

91. *Id.* at 758 (holding that the Fourteenth Amendment's Privileges and Immunities Clause does not protect rights given by individual states—only those provided by the federal government).

92. *Id.*; All of the Justices agree on this point, with the exception of Justice Thomas. *See id.* at 811 (Thomas, J., concurring) (concluding that the Second Amendment was incorporated against the states through the Fourteenth Amendment's Privileges or Immunities Clause and not the "legal fiction" of the Court's Substantive Due Process analysis).

93. *See* Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., concurring) ("I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of this nation the complete protection of the Bill of Rights.").

94. *McDonald*, 561 U.S. at 763.

95. *Id.* at 763–65.

96. *Id.* at 765 (quoting Malloy v. Hogan, 378 U.S. 1, 10–11 (1964)).

standards that protect those personal rights against federal encroachment."[97] Similarly, the Court rejected treating the Second Amendment and, presumably other provisions in the Bill of Rights, as being intended only against the federal government.[98] Justice Stevens, in his dissent, argued that certain amendments, due to their nature, should not apply identically to the states, as they do to the federal government.[99] That is, some Bill of Rights amendments are *federalism* protections. Like the Tenth Amendment,[100] the Second Amendment "is directed at preserving the autonomy of the sovereign States, and its logic therefore resists incorporation by a federal court against the states."[101]

Finally, the Court reiterated that the incorporation question proceeds by asking if the right in question is "fundamental to our scheme of ordered liberty."[102] Put another way, the Court asks whether the right is "deeply rooted in this Nation's history and tradition."[103] Simultaneously, however, the *McDonald* Court frames the same inquiry as a question of whether "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[104]

Given *Heller*, the Court frames the "central component" of the Second Amendment as the right to "individual self-defense."[105] The Court sought this route over a more specific framing (for example, asking whether the right to own a firearm in one's home was fundamental). This allowed the Court considerable leeway in expanding the right protected by the Second Amendment. In fact, the Court explicitly

97. *Malloy*, 378 U.S. at 10.

98. *McDonald*, 561 U.S. at 764 ("The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause.").

99. *Id.* at 866–70 (Stevens, J., dissenting); Judge Easterbrook of the 7th Circuit interpreted the Second Amendment this way. *See* Nat'l Rifle Ass'n of Am. v. City of Chicago, 567 F.3d 856, 859 (7th Cir. 2009) (holding that *state* prohibitions on firearms, even those implicating self-defense interests, are not precluded by *Heller*).

100. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

101. *McDonald*, 561 U.S. at 897 (Stevens, J., dissenting) (emphasis omitted).

102. *Id.* at 764 (emphasis omitted).

103. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

104. *McDonald*, 561 U.S. at 778.

105. *Id.* at 767.

conceded that the original basis for adopting the Second Amendment was no longer relevant.[106]

The Court also reconfirmed that the historical analysis of events leading up to ratification of the Fourteenth Amendment was necessary to understanding the nature of the incorporated right. Specifically, the Court looked at American values and practices from the Nation's founding through the Civil War, the legislative history pertaining to the Fourteenth Amendment, and how individual states treated firearm ownership.[107] Thus, as long as the individual right of gun ownership for self-defense predominated in the minds of the Reconstruction Congress, the specific worries of the founding fathers need not hinder the Amendment's reach.

III. THE THIRD AMENDMENT IN 1789: STEP ONE

In this Part, I will demonstrate how the Third Amendment, as understood in 1789, was drafted deliberately with a limited scope. That is, the Amendment was drafted in response to the ubiquitous presence of the British army in the colonies, particularly in Boston, where this brought about the Boston Tea Party and, ultimately, the American Revolution. However, the language of the Amendment only captures a small slice of those colonial grievances—the forced quartering of soldiers during peacetime. Nonetheless, as *Heller* demonstrates, there is both a reason behind codification, on the one hand, and a reason—or perhaps *reasons*—behind the right itself, on the other. Thus, the Third Amendment carries more meaning than its restrictive language suggests at face value. Nonetheless, I will conclude this Part by illustrating the inherent weakness in arguing that the Framers of the Constitution would have interpreted "soldiers" to include municipal police.

A. Original Intent

The Third Amendment provides, "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 prescribed by law."[108] The first clause contains a prohibition on the quartering of soldiers during peacetime. As with a handful of other amendments within the Bill of Rights, the clause's text provides for an absolute prohibition. The second clause

106. *See id.* at 770 ("By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense.").

107. *Id.* at 770–77.

108. U.S. CONST. amend. III.

provides that quartering may be appropriate during wartime, providing it is done so through formal, legal means.

Around the time of the Constitution's ratification, the verb "quarter" was understood to mean "to station or lodge soldiers" and "to lodge; to fix in a temporary dwelling."[109] Soldier was defined as "one who performs military service for pay; a warrior; a common man in a regiment."[110] Thus, the Amendment, based on text alone, provides an absolute protection for homeowners from forced lodging by military personnel. So, what exactly drove the Framers to include the Third Amendment?

The presence of a large, foreign military force, unanswerable to the local colonists was central to the concerns of the founding fathers in the lead-up to the Revolutionary War. The quartering of British soldiers in Colonial America took root as a widespread phenomenon during the French and Indian War.[111] The war had required a dramatic increase in the number of British soldiers stationed in the colonies.[112] In response to this influx, the British Parliament passed the first Quartering Act in 1765.[113] The Act provided that American colonists were required to bear the *financial* burden of housing, supplying, and feeding British soldiers.[114]

The residual British soldiers that remained in the colonies during peacetime, once the French and Indian War had subsided, caused tension between the soldiers and American colonists.[115] The tension became particularly pronounced after 1768, when the British began using their soldiers in the colonies for law enforcement.[116] This, in turn, led to rebellion among the colonists and manifested itself in, among other things, the Boston Tea Party.[117]

109. 2 Samuel Johnson, A Dictionary of the English Language (8th ed. 1799).

110. 1 John Ash, The New and Complete Dictionary of the English Language (1775).

111. J. Alan Rogers, *Colonial Opposition to the Quartering of Troops During the French and Indian War*, 34 Military Affairs 7, 7–8 (1970).

112. *Id.*

113. Quartering Act, 1765, 5 Geo. 3, c. 33 (Eng.).

114. *Id.*

115. B. Carmon Hardy, *A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment*, 33 Va. Cavalcade 126, 130 (1984).

116. *Id.* at 132.

117. Seymour W. Wurfel, *Quartering of Troops: The Unlitigated Third Amendment*, 21 Tenn. L. Rev. 723, 726 (1951).

In response to the colonial unrest, the British Parliament passed a new Quartering Act in 1774.[118] Known as one of the "Intolerable Acts," the Act further authorized quartering in private homes.[119] The First Continental Congress shortly thereafter passed a resolution condemning the legislation, declaring that, "the raising or keeping a standing army within these Colonies in time of peace, unless it be with the consent of the Provincial Legislatures, is illegal, pernicious, and dangerous; and that every statute for quartering and supplying troops within the said Colonies is illegal and void."[120]

Accordingly, the practice received special attention in the Declaration of Independence. The Declaration provides, in relevant part, "He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.[121] He has affected to render the Military independent of and superior to the Civil power . . . [f]or Quartering large bodies of armed troops among us . . . ."[122]

As this history suggests, the grievance that made its way into the Third Amendment was the most specific formulation of a much broader grievance. Nonetheless, it appears that there was no consideration over whether to broaden the Amendment's reach. For example, five of the eight states that requested specific articles for consideration in the new nation's Constitution specifically called for prohibitions on the quartering of soldiers.[123] Of the eight states that submitted proposed quartering amendments, there were two general versions.[124] One, exemplified by Maryland and New Hampshire, contained an absolute prohibition on quartering of soldiers in times of peace, but was silent on its application during wartime.[125] The other version, requested by states including Virginia, New York, and North Carolina, included language mirroring the Third Amendment.[126] That is, while forced quartering was categorically prohibited during peace, allowances by law would be permissible during times of war. Despite their differences, all of these proposals provided absolute protection to homeowners from forced lodging by military personnel.

118. *Id.* at 726; Quartering Act, 1774, 14 GEO. 3, c. 54 (Eng.).

119. William Sutton Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195, 201 (1989).

120. 1 JOURNALS OF THE CONTINENTAL CONGRESS 69 (1774).

121. THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

122. THE DECLARATION OF INDEPENDENCE paras. 13, 14 & 16 (U.S. 1776).

123. Hardy, *supra* note 115, at 134.

124. Bell, *supra* note 13, at 129–30.

125. *Id.*

126. *Id.* at 130.

In summary, the Amendment was a reaction to the large presence of British military troops across the American colonies. Thus, the Amendment, as it emerged, only prohibited a narrow category of abuse—forced occupation, by persons in the military, of a private person's house, during peacetime. As discussed, the Quartering Acts authorized forced lodging in areas other than the home. Further, the colonists frequently aired their quartering-related concerns alongside their fears of standing armies. So, while the Amendment's spirit targeted more general abuses by the British military, it was certainly limited in scope. First, despite some initial disagreement among state legislatures, the text explicitly prohibits quartering only during peace. Second, the prohibition only applies to the home. Third, the restrictive words in the Amendment seemingly preclude application to *any* type of government actor. While limited in scope, that is not the end of the discussion. Just as *Heller* distinguished between reasons for *codification* versus *rationale* behind the right itself, there is a distinction to be parsed here.

B. Reasons Behind the Right Itself

As discussed, the specific reason for codification was to protect homeowners from forced lodging of members of a military unit. The reasons behind the right, on the other hand, are multifaceted. John Hart Ely, as an example, counted no less than three underlying values behind the Third Amendment. According to Ely, the Amendment is a "separation of powers provision," a guarantee of "civilian control of the military," and a "desire to protect the privacy of the home from prying government eyes."[127] Similarly, Justice Joseph Story captured the various facets of the Third Amendment when he wrote that "[t]his provision speaks for itself. Its plain object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion."[128] Justice Warren Burger also summarized the Amendment's spirit by writing, "the military must be subject to civilian control, and that the government cannot intrude into private homes without good reason."[129]

Of these underlying reasons behind the Third Amendment, two deserve close attention—the imperative of civil domination over military affairs and the protection of the home from governmental intru-

127. ELY, *supra* note 85, at 95.

128. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 713, 747 (1833).

129. Warren E. Burger, *Introduction* to Burnham Holmes, The American Heritage History of the Bill of Rights: The Third Amendment 6 (1991).

sion. This framework renders the Third Amendment a natural fit between the Second and Fourth Amendments. The Third Amendment flows from the Second, as both represent military-related prohibitions.[130] This is crucial, as the Framers of the Constitution saw an unchecked military as a direct corollary to the infringement of individual rights. As Alexander Hamilton cautioned in *The Federalist Papers*, "[A strong military leads to the] frequent infringements on [the people's] rights . . . and by degrees the people are brought to consider the soldiery not only as their protectors but as their superiors."[131] Thus, the Second and Third Amendments, read in concert, provide a constitutional check against any usurpation of power by federal military units. Where the Second Amendment solidifies the role of state militias by protecting them against disarmament, the Third Amendment limits federal members of the military from a specific tactic that was once commonplace.

The Third Amendment can also be read in line with the Fourth Amendment in that both seek to safeguard the home from governmental actors.[132] Both the Third and Fourth Amendments reflect the longstanding common-law principle recognizing that "a man's home is his castle."[133] As Blackstone wrote, "[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity."[134] Read in this light, both Amendments are homeowner-protection provisions, standing guard against a range of potential governmental

130. *See* Amar, *supra* note 86, at 1174 ("Like the Second, the Third is centrally focused on the structural issue of protecting civilian values against the threat of an overbearing military."); *see also* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 185 (1962) (noting that the Second and Third Amendments were passed as assurances to the people who were "still troubled by the recollection of the conditions that prompted the charge of the Declaration of Independence that the King had 'effected to render the military independent and superior to the civil power'").

131. THE FEDERALIST NO. 8, at 36 (Alexander Hamilton) (P.F. Collier & Son rev. ed., 1901).

132. *See* AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 133 (1998) ("To be sure, there is an important link between the Third Amendment and the Fourth (which restricts searches and seizes)—both protect 'houses' from needless and dangerous intrusions by government officials.").

133. *See* EDWARDO COKE, THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 161 (London, E. & R. Brooke, 1797 ed.) (providing that, if nowhere else, a man is safe in his house).

134. 4 WILLIAM BLACKSTONE, COMMENTARIES *223.

abuses, including unreasonable searches and seizures and forced lodging for members of military units.[135]

In summary, the reason behind codification was to protect homeowners from forced lodging by "soldiers." The reason behind the right itself was the guarantee of civil control over the military and the protection of homeowners from governmental intrusion.

C. "Soldiers" and Law Enforcement

The crucial question here is, to whom did the Framers of the Bill of Rights understand "soldier" to refer? There are a few narrow categories of persons whom the Framers of the Constitution understood as embodying soldiers (defined as, "one who performs military service for pay; a warrior; a common man in a regiment").[136] First, the Framers understood the British military as soldiers. After all, it was quartering by the British that brought about the Third Amendment. While the British soldiery would have no place in the new government of the United States, it is useful to consider to whom the Framers were reacting.

The Framers inherited from the British—and as a result of the British—a grave fear of standing armies and concerns over military involvement in domestic law enforcement. Two British statutes in 1714 confirm the distinction between the domestic law enforcement and military law enforcement. The Riot Act provided for civilian officials and the *posse comitatus*[137] (civilian-volunteers) to disperse mobs and suppress civil disorders, and authorized those civilian personnel to use any degree of force necessary to accomplish the purpose.[138] Distinctly, another Act, passed within the same year, provided for *use of the militia* in the event of "insurrection," "rebellion," or "invasion."[139] This bifurcation, however, didn't stop the British from imposing military law enforcement on their subjects outside of England proper.

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135. *See* Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209, 214 (1991) (speculating that, "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").

136. ASH, *supra* note 110.

137. *See Posse Comitatus*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("[T]he power or force of the country."); *see also* Sean J. Kealy, *Reexamining the Posse Comitatus Act*, 21 YALE L. & POL'Y REV. 383, 389 (2003) ("[Posse comitatus] refers to the common law power of a county sheriff to summon a 'posse'—consisting of any able-bodied person over the age of fifteen years—to assist him in keeping the peace, pursuing and arresting felons, and suppressing riots.").

138. David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 16–17 (1971).

139. *Id.* at 17.

The British enraged the pre-revolutionary colonists by providing legal protection for their soldiers, who were "used with increase[d] regularity for the suppression of tumults and civil disturbances."[140] Specifically, during British occupation of Boston from 1768 until 1770, the British military began using their soldiers in the colonies for law enforcement.[141] Its intention was to use its soldiery to enforce British law in Boston and to seek civil obedience.[142] General Thomas Gage confirmed British intentions when he suggested the occupation "will strengthen the hands of government in the province of Massachusetts Bay, enforce a due obedience to the laws, and protect and support the civil magistrates and the officers of the Crown in the execution of their duty."[143]

Notably, the way the Framers of the Constitution responded to these events would sow the seeds for a century of federal and state governments utilizing soldiers in a domestic law enforcement capacity.[144] That is, instead of proscribing military involvement in domestic law enforcement outright, the Framers opted instead to vest residual power in state militias.

D. The New Domestic Soldiery

The Framers would soon embed two general categories of soldiers—the militia and the army—into the new Constitution.[145] The roles of both of these types of soldiers were explicitly written to respect a federalist balance. Thus, the Framers of the Constitution struck a compromise by which the states would maintain militias, but the Congress could call the militia forth, if necessary.[146] Here, the Framers

140. Engdahl, *supra* note 138, at 26.

141. *Id.*

142. John Phillip Reid, *In a Constitutional Void*, 22 WAYNE L. REV. 1, 4 (1975) ("The Earl of Hillsborough, secretary of state in charge of colonial affairs . . . [told General Gage that the troops] 'will strengthen the hands of government in the province of Massachusetts Bay, enforce a due obedience to the laws, and protect and support the civil magistrates and the officers of the Crown in the execution of their duty.'").

143. *Id.*

144. *See infra* Part IV.B.1.

145. AMAR & HIRSCH, *supra* note 132, at 129.

146. *See* U.S. CONST. art. I, § 8, cl. 16 ("The Congress shall have the Power . . . [t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, *reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress*." (emphasis added)).

responded by seeking a constitutional framework that would emphasize the use of state militias, rather than a federal standing army.[147]

Notably, the enacted language would allow Congress to call forth the militia not only to "suppress [i]nsurrections and repel [i]nvasions," but also to "execute the Laws of the Union."[148] This controversial provision survived the passage of the Constitution to the dismay of many Antifederalists.[149] Nonetheless, the Federalists sought to assuage concerns by assuring that the provision would only be used as a last resort. Hamilton insisted that the provision would only be invoked "against those violent invasions of them which amount to insurrections and rebellions."[150]

In addition, many in the framing generation viewed, and argued for the position that, the militia—being all "able bodied men"[151]—was a trustworthy source of power. Madison suggested state militias, given their localized nature, would be structured as to avoid the potential for tyranny inherent in a federal standing army.[152]

E. The Limited Reach of Soldiers

Given these categories of soldiers, the Third Amendment, as originally understood, had a strikingly limited reach. First, federal soldiery at the time of ratification was virtually nonexistent, as President Washington had disbanded the Continental Army previously used to

147. *See* ARTICLES OF CONFEDERATION of 1777, art. VI ("[N]or shall any body of forces be kept up, by any state, in time of peace, except such number only as, in the judgement of the united states, in congress assembled, shall be deemed requisite . . . *but every state shall always keep up a well regulated and disciplined militia*, sufficiently armed and accounted." (emphasis added)); U.S. CONST. amend. II ("*A well regulated Militia, being necessary to the security of a free State*, the right of the people to keep and bear Arms, shall not be infringed." (emphasis added)).

148. U.S. CONST. art. 1, § 8, cl. 15.

149. *See* Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT. L. REV. 883, 890 (2006) (discussing the debate between Federalists and Antifederalists concerning the role of the militia).

150. THE FEDERALIST NO. 28 (Alexander Hamilton).

151. *Militia*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "militia" as "able-bodied men organized into companies, regiments, and brigades, with officers of all grades, and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations").

152. *See* THE FEDERALIST NO. 46 (James Madison) ("[T]he existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.").

fight the British.[153] Second, state militias, logically, only counted as federal governmental actors when called forth by Congress. Regardless of its limited reach, however, the Third Amendment can be thought of as written prospectively, as a preventive measure against potential abuse of a regular army.[154]

Either way, the Framers of the Constitution were aware of "soldiers" performing law enforcement roles and were certainly fearful of this becoming routine practice. However, the Constitution certainly did not preclude such application. One could say that this line of reasoning bolsters the argument that the Framers of the Constitution would have seen municipal police as "soldiers." I argue, however, that this link is too attenuated because the Framers didn't contemplate *any* state and local governments being bound by the Bill of Rights. It is important to bear in mind that the Bill of Rights, as originally penned, was understood to only bind the federal government.[155] That is, the Third Amendment, like all of the Bill of Rights Amendments, was a vertical separation-of-powers provision. While James Madison initially floated the idea of the Bill of Rights constraining both state and federal governmental actors, the idea failed to garner support.[156] I argue that certain historical developments *after* the Constitution's ratification make a better case for applying the Third Amendment's protections to state and local law enforcement. That is, incorporation analysis provides the necessary hook.

IV. THE THIRD AMENDMENT INCORPORATED

In this Part I first argue that the literal Third Amendment passes the *McDonald* test for incorporation. Then I show how alternative ways of framing the fundamental right at issue—that is, the reason behind the right itself—fare differently under the incorporation analysis. I advocate the position that, in order to survive incorporation analysis, the fundamental right behind the Third Amendment must be the American tradition of protecting the home from governmental

153. David E. Engdahl, *Foundations for Military Intervention in the United States*, 7 U. PUGET SOUND L. REV. 1, 26 (1983).

154. In 1792, shortly after the Bill of Rights was ratified, President Washington signed into law a measure creating a 5,000-person regular army. Horwitz, *supra* note 135, at 213.

155. *See* Barron v. City of Baltimore, 32 U.S. 243, 250 (1833) ("In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.").

156. Brent Tarter, *Virginians and the Bill of Rights*, *in* THE BILL OF RIGHTS: A LIVELY HERITAGE 15 (Jon Kukla ed. 1987).

intrusion. Framed properly, whether the Third Amendment restrains municipal police will hinge on an interpretation of the word "soldier," the subject of the provision.[157] Regardless of how the Framers of the Bill of Rights would have interpreted "soldier," the Framers of the *Fourteenth Amendment* certainly conceived of "soldiers" as encompassing those who perform domestic law enforcement functions. That is, from the time immediately after the Constitution's ratification, until 1878—a decade *after* the Fourteenth Amendment's ratification—federal and state governments progressively used the army, militia, and state militias for domestic, non-war-related, interventions. In many cases, militiamen were specifically used to supplement local police departments. One scholar has aptly termed this phenomenon the "police-ization" of the military.[158]

Distinctly, another trend of the 1800s gives credence to the idea that the Framers of the Fourteenth Amendment would consider today's police to be soldiers. The American police force of the 1800s looked nothing like the police force of today in terms of their roles, professionalism, and military characteristics. The phenomenon by which "police agencies and police officers take on more and more characteristics of an army" has been referred to as the "indirect militarization" of the police.[159] Because the indirect militarization of police is a recent trend, it underscores the extent to which municipal police, in the nineteenth century, were wholly different from those of today. Based on these trends, I conclude the Fourteenth Amendment's Framers would have conceived that the Third Amendment protection, as incorporated, has state and local police within its grasp.

A. Framing the Right at Issue

As discussed, the Third Amendment is loaded in terms of the fundamental rights it seeks to safeguard. The Third Amendment stands both for the proposition that the military must be subordinate to civil authority[160] and that citizens must be protected, in their homes, from

157. *But see* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1210 (2010) (arguing that a "bedrock question" of judicial review is "almost universally overlooked." That is "before judicial review focuses on verbs, let alone objects, it should begin at the beginning, with subjects . . . [e]very constitutional inquiry should begin with . . . the *who* question: *who has violated the Constitution?*") (italics in original).

158. *See* Charles J. Dunlap, *The Police-Ization of the Military*, 27 J. POL. & MIL. SOC. 217 (1999) (analyzing the growing use of the armed forces as police officers).

159. RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 35 (2013).

160. *See* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 186 (1962) ("[T]he axiom of subordination of the military to the civil . . . is so

governmental intrusion.[161] However, only the latter justification—protection of privacy in the home—neatly survives incorporation analysis. This is because a pattern of governmental activity, from Independence to Reconstruction, directly conflicts with the civil-military relations rationale.

From the time of the ratification of the Constitution, the lines between military and civil authority began to blur for almost a century. That is, the federal government began a trend of using the federal army, and state militias, for domestic law enforcement. This suggests that the fundamental nature behind limiting military power, relative to that of civilian authority, ceased to be of concern during the nineteenth century. Some have attributed this trend—the growing acceptance of standing armies—as the central reason for the Third Amendment's failure to garner broader application in the courts.[162] Others have argued that this trend makes the Third Amendment a poor candidate for incorporation.[163]

In order to avoid this dilemma, it is crucial to frame the right independent of the civil-military relations rationale. Instead, it should be framed in terms of the primacy of the home and fundamental right to be free from governmental intrusion. This framing comports with the Amendment's intent, given that the language was a specific formulation of an otherwise general grievance. That is, while the Framers complained of ubiquitous British soldiers,[164] they would pen an amendment—the Third—to address only the most objectionable aspect of military power: the effect on the rights of homeowners. When framed in terms of privacy rights in the home, the blurring of the lines between civil and military law enforcement can be used as an advantage in

deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life.").

161. *See* STORY, *supra* note 128, at 747 (concluding that the Third Amendment stands for the proposition that "a man's house shall be his own castle, privileged against all civil and military intrusion").

162. *See* Horwitz, *supra* note 135, at 213 (concluding that, notwithstanding President Jefferson's reduction in the size of the regular army—from 5,000 to 3,300—"the legitimacy of a standing army came to be accepted," rendering it unable to "draw off the symbolic energy of those who might otherwise have turned to the Third Amendment to support their fears of the military or to insist that only a people's militia comported with Republican principles").

163. *See* AMAR, *supra* note 78, at 267 (arguing that two considerations of original intent make the Third Amendment a "poor candidate for unrefined, mechanical incorporation: 1860s Republicans did not share their small-r-forbears' disdain for central armies, and surely [the Reconstruction Congress] did not mean to impose every aspect of federal separation of powers onto states").

164. *See supra* Part III.A.

applying the Third Amendment's protections against state and local law enforcement.

B. The Third Amendment and Step Two

The right to be protected from forced quartering of members of a military unit, given the sanctity of the home, is "fundamental to our scheme of ordered liberty"[165] and "deeply rooted in this Nation's history and tradition."[166] This protection of the home against forced quartering of soldiers has origins dating back to the Middle Ages.[167] In the modern era, the first codification of such a right was expressed in 1628 in the British Parliament's Petition of Right.[168] The Parliament was responding to concerns that "soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses . . . against the laws and customs of this realm and to the great grievance and vexation of the people."[169]

Accordingly, protection from the forced quartering of troops also made its way into the English Bill of Rights of 1689.[170] Shortly thereafter, however, the British Parliament reaffirmed, but limited, this protection.[171] The Mutiny Act allowed local civilian magistrates to direct soldiers to be stationed in "alehouses, inns, stables, and the like."[172] Significantly, the Act specified that private homes were off-limits from quartering in absence of the owner's consent.[173] Also, the Act did not apply to British soldiers stationed in the American Colonies.[174] As discussed previously, this spiraled into quartering during and after the French and Indian War, and ultimately, the Intolerable Acts, which led to the American Revolution.[175]

Here I should note a potential stumbling block in the incorporation analysis. That is, the United States government forced quartering of federal soldiers in civilian homes during the War of 1812 and the Civil

165. McDonald v. City of Chicago, 561 U.S. 742, 764 (2010) (emphasis omitted).

166. *Id.* at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

167. Fields, *supra* note 119, at 196.

168. Hardy, *supra* note 115, at 128.

169. *Id.*

170. Fields, *supra* note 119, at 199.

171. Hardy, *supra* note 115, at 129.

172. *Id.*

173. *Id.*

174. *Id.*

175. *See supra* Part III.A.

War.[176] Because these occupations took place in the context of war, they were not absolutely proscribed by the Third Amendment.[177] In the case of the War of 1812, Congress passed an Act to provide for compensating homeowners for property damage related to quartering, but only did so after the war.[178] During the Civil War, Congress passed a law permitting the confiscation of Confederate property, but had no similar provision allowing for quartering in Union-friendly homes.[179] Congress contemplated creating a system for property-damage claims, but ultimately declined to compensate those whose homes were occupied.[180] Once the Civil War ended, the former Confederate states, except for Tennessee, were divided into five military districts.[181] For the most part, the federal soldiery was quartered in permanent or semi-permanent military camps, tents or rented buildings, and forts.[182] Some of the military districts implemented policies restricting quartering, perhaps in acknowledgement of the undesirability of forced quartering.[183]

Thus, it is unclear how these abuses affect the analysis, or whether this concern is offset by acknowledgement of those grievances by Congress and individual Military Districts. Because most of these abuses took place during war, it is unclear whether they meet the Third Amendment's "in a manner to be prescribed by law" test.[184] Even assuming, *arguendo*, that these war-time abuses constituted Third Amendment violations, that does not, in and of itself, compel the conclusion that the Reconstruction Congress dispensed with the values underlying the Third Amendment.[185]

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176. Bell, *supra* note 13, at 137–38.

177. *See* U.S. CONST. amend. III ("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.*" (emphasis added)).

178. Bell, *supra* note 13, at 137 n.162.

179. James P. Rogers, Note, *Third Amendment Protections in Domestic Disasters*, 17 CORNELL J. L. & PUB. POL'Y 747, 756 (2008).

180. Bell, *supra* note 13, at 138–39.

181. 1 HARRY WILLCOX PFANZ, SOLDIERING IN THE SOUTH DURING THE RECONSTRUCTION PERIOD 5 (1958).

182. *Id.* at 251.

183. For example, the Department of Georgia (Third Military District) required approval from its headquarters, and the Department of Mississippi (Fourth Military District) absolutely banned the practice in absence of the homeowner's consent. *See id.* at 33.

184. U.S. CONT. amend. III.

185. For example, President Lincoln's suspension of habeas corpus via the Habeas Corpus Suspension Act of 1863, 12 Stat. 755, didn't preclude the Supreme Court from affirming its fundamental nature. *See* Slaughter-House Cases, 83

Nevertheless, these wrinkles are balanced out by the Fourteenth Amendment's legislative history. Leading proponents of the Fourteenth Amendment explicitly argued that the Amendment's effect would be to incorporate the first eight amendments against the states.[186] The Third Amendment received explicit attention during these debates. For example, on May 23, 1866, Senator Jacob M. Howard said on the Senate floor that the Fourteenth Amendment applies to states, "the right to be exempt from the quartering of soldiers in a house without the consent of the owner."[187] Representative John Bingham, a principal Framer of the Fourteenth Amendment, recognized the Amendment would protect the "inviolability of [individuals'] homes in time of peace, in that no soldier should be quartered in any house without the consent of the owner."[188]

Further, at the time of the Fourteenth Amendment's ratification, twenty-seven states—two-thirds of the states at the time—had explicit prohibitions on the quartering of troops in their respective Constitutions.[189] All of these provisions generally mirrored[190] the language of the Third Amendment. Even the Confederate Constitution, although no longer valid after the Civil War, contained an explicit anti-quartering provision.[191]

Thus, the protection of homeowners against forced quartering is deeply rooted in American history and was recognized as such by the Fourteenth Amendment's Framers. It should not, however, be thought of, or framed, as strictly a military provision. *Heller* and *McDonald* made clear that an amendment codified as a military-related provision doesn't preclude it from being read in a different light. In that case, the Court effectively dispensed with the prefatory clause ("A well regulated

U.S. 36, 114 (1873) (finding that habeas corpus is a fundamental right and is among the "privileges and immunities [that] attach as well to citizenship of the United States as to citizenship of the States").

186. It should be noted, however, that these arguments proceeded under the assumption that the privileges or immunities clause was the vehicle for incorporation.

187. CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 118 (1997).

188. *Id.*

189. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 56 (2008).

190. *Id.*; *see, e.g.*, OH. CONST. art. I, § 13 (1851) ("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 a manner prescribed by law.").

191. CONST. OF THE CONFEDERATE STATES OF AMERICA art. I, § 9, cl. 14 (1861).

militia . . . ") in favor of a non-military-related interpretation.[192] Here, the right against forced quartering, at its core, is about protecting the home from governmental intrusion, regardless of the military-related connotations of the words "soldier" and "quarter."

1. Soldiers and Domestic Law Enforcement

As mentioned, the Constitution's Framers were conscious of the potential for the use of soldiers in domestic law enforcement. Regardless of the Framers' immediate intentions, from America's independence until the Reconstruction era, both federal and state governments used militias for domestic law enforcement. This is not to suggest that the military—whether the standing army or the militia—was routinely used in "direct law enforcement," as in arrest or search authority, although that did happen as well.[193] But these "soldiers" *were* mobilized to enforce domestic laws in situations, the gravity of which fell short of war, invasion, insurrection, or other legitimate challenges to governing authority and rule of law.

This began with the Militia Act of 1792, which required all free, white men between eighteen and forty-five to be enlisted in a state militia.[194] A new amendment also allowed the *executive*, rather than Congress, to mobilize the militia if requested by state governors or legislatures.[195] The legislation was understood as allowing the executive to mobilize these forces not as soldiers, but as "civilians" or *posse comitatus*, at least so far as the law was concerned.[196]

The Act was first utilized in 1794 to suppress the Whiskey Rebellion, a series of riots and protests against the federal government's imposition of a tax on whiskey.[197] In addition to suppressing the rebellion, Alexander Hamilton instructed the militia to assist in civil law enforcement functions.[198] These instructions included supporting "civil officers in the means of executing the laws," which may require taking

192. *See supra* note 104 and accompanying text.

193. Charles J. Dunlap, Jr., *The Police-Ization of the Military*, 27 J. POL. & MIL. SOC. 217, 226 (1999).

194. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271.

195. Act of May 2, 1792, ch. 28, §§ 2–3, 1 Stat. 264; Robert Reinders, *Militia and Public Order in Nineteenth-Century America*, *in* 5 CRIME AND JUSTICE IN AMERICAN HISTORY PART II 608, 611 (Eric H. Monkkonen ed., 1992).

196. Engdahl, *supra* note 138, at 26.

197. Cornell, *supra* note 149, at 894–95.

198. *See* ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 54 (1988) (listing Alexander Hamilton's military instructions and objectives).

prisoners and delivering them to civil magistrates and even "seizing the stills of delinquent distillers."[199]

This trend would continue, unabated, for the next seventy years.[200] One military historian estimated that federal officials deployed the army "at least seventy-two times to help quell major disorders and other challenges to civil authority."[201] Federal troops were also used for objectively non-combat related law enforcement. For example, the army was mobilized to assist locals in enforcing a law barring certain private contracts between Native Americans and U.S. citizens (1796) and to evict squatters from public land (1807).[202] A subsequent 1807 amendment *further* expanded executive authority over use of these soldiers, allowing their use for broader categories of law enforcement.[203]

In the lead up to the Civil War, federal officials also mobilized the army to capture and return runaway slaves, pursuant to the Fugitive Slave Act of 1850.[204] Presidents Fillmore and Pierce both permitted federal officials to summon state militias to enforce the Act.[205] One infamous and contentious case was that of Anthony Burns, a runaway slave who sought refuge in Boston.[206] Burns was apprehended by an "enormous cortège of Boston police, state militia, and United States troops," and was delivered back to "the custody of his master aboard a ship bound for Virginia."[207]

Both administrations had justified the use of state militias in enforcing the Act by suggesting they were merely summoning the *posse comitatus*—mere citizen-volunteers—rather than soldiers.[208] Known as the Cushing Doctrine,[209] this dubious justification would serve as a

199. *Id.* at 54–55.

200. Engdahl, *supra* note 138, at 49–55.

201. Clayton D. Laurie, *Filling the Breach: Military Aid to the Civil Power in the Trans-Mississippi West*, 25 W. Hist. Q. 149, 150 (1994).

202. *Id.* at 152.

203. Engdahl, *supra* note 138, at 48–49.

204. Fugitive Slave Act of 1850, 9 Stat. 462–63 (repealed 1864); Peter M. Sanchez, *The "Drug War": The U.S. Military and National Security*, 34 A.F. L. Rev. 109, 118 (1991); *see also* Dominic J. Campisi, *The Civil Disturbance Regulations*, 50 Ind. L.J. 757, 768 (1975) ("That law had stated that it was the duty of federal marshals to arrest and return all fugitives brought to their attention, and reasserted the marshal's power to summon the posse.").

205. Laurie, *supra* note 201, at 153–54.

206. Thomas J. Brown, *The Fugitive Slave Act in Emerson's Boston*, 25 L. & Soc. Inquiry 669, 671–74 (2000).

207. *Id.*

208. Laurie, *supra* note 201, at 153–54.

209. Caleb Cushing was Attorney General in the Pierce Administration. Cushing famously justified the use of state militias in enforcing the Fugitive Slave

precedent that allowed the federal government, over the next several years, to avoid the tough questions posed by the trend of military enforcement of domestic law.

In 1861, Congress again granted the executive further authority to utilize the militia and armed forces and made doing so even easier.[210] According to one scholar, the Civil War and Reconstruction period "marked the apex of military law enforcement."[211]

Following the Civil War, southern former-Confederate states were occupied militarily and split into five military districts.[212] Non-war-related law enforcement was among the occupying army's roles as the soldiers assisted with "controlling the illegal production of liquor, suppressing labor disputes, and enforcing Reconstruction policies."[213]

Only after passage of the Fourteenth Amendment did the Reconstruction Congress seek to reign in the use of the military for domestic law enforcement purposes. In 1878, Congress passed the Posse Comitatus Act, which prohibited the federal government from using troops in a domestic law enforcement capacity, save for a few narrow exceptions.[214] The Act was passed in direct response to "[s]outhern anger over this use of federal soldiers to uphold the laws of carpetbagger governments."[215]

The states, for their part, also utilized their militias for domestic, non-combat law enforcement. The militias were seen as an "extension of the police" and were called forth by state legislatures and governors to calm civil riots.[216] One historian compiled a brief, non-exhaustive list of examples of state governments calling forth their militias in their domestic law enforcement capacities:

> [I]n New Orleans in the 1850s militia patrolled the streets after police were unable to prevent a wave of arson; they quelled an

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Act by positing, "[t]he fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the *posse comitatus*." Engdahl, *supra* note 138, at 50–51.

210. Engdahl, *supra* note 138, at 26.

211. Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 Wash. U. J. L. & Pol'y 99, 111 (2003).

212. Pfanz, *supra* note 181, at 5.

213. Sanchez, *supra* note 204, at 118.

214. Act of June 18, 1878, ch. 263, § 15, 20 Stat. 152 (codified as amended at 18 U.S.C. § 1385 (2015)).

215. Roger Blake Hohnsbeen, Note, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 Geo. Wash. L. Rev. 404, 406 (1986).

216. Reinders, *supra* note 195, at 616–17.

> anti-Spanish riot, were involved in mob actions during elections in 1854 and 1858, and they were called out over a bogus Negro insurrection . . . Militia were used in anti-bank riots in Baltimore (1835), in a Portland, Maine, riot (1855), caused by a dealer overcharging on alcoholic "medicines," and in Philadelphia (1844) to separate rival fire companies. In Vicksburg the militia were used to destroy gambling dens . . . in Chicago to demolish houses of prostitution, while in Memphis two volunteer companies were called out to enforce collections of wharf fees.[217]

It appears some state militias, too, viewed their own role as including domestic law enforcement. In 1854, a contemporary military historian and former militiaman wrote, "the militia are, after all, however unpalatable the truth may be, neither more or less than an Auxiliary Police Force, and for the last forty odd years that is the only duty they have ever been called upon to perform."[218] In 1864, the *United States Service Magazine* opined about the New York State militia, observing, "Although [New York is] possessed of an excellent police, there are times of popular excitement when our metropolis must rely upon the presence of an armed force for the preservation of public peace. The organized militia are particularly adapted to this duty."[219]

2. The Police of the Nineteenth Century vs. Police of Today

If the militia and army were used so frequently in domestic law enforcement, where were the police? First of all, from the nation's founding until 1868, police forces looked much different than they do today. The first modern-style police force—the London Metropolitan Police—took root in Great Britain in 1829 and would serve as the model for American cities like New York, Boston, and Chicago.[220] As the first "modern-style" police were established in the United States in New York in 1845, officers were required to live in the wards in which they worked.[221] Today, a vast majority of police officers don't live in the communities they serve.[222]

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217. *Id.*

218. J. Watts De Peyster, 2 THE ECLAIREUR: A MILITARY JOURNAL 21 (Augustus T. Cowman ed., 1854–1855).

219. Reinders, *supra* note 195, at 616.

220. Roger Lane, *Urban Police and Crime in Nineteenth-Century America*, *in* 5 CRIME AND JUSTICE IN AMERICAN HISTORY PART II 438, 443 (Eric H. Monkkonen ed., 1992).

221. BALKO, *supra* note 159, at 30.

222. Nate Silver, *Most Police Don't Live in the Cities They Serve*, FIVETHIRTYEIGHT (Aug. 20, 2014, 4:14 PM), http://www.fivethirtyeight.com/datalab/most-police-dont-live-in-the-cities-they-serve/ [https://perma.cc/2SUJ-9UMK].

Second, as America's professional police force emerged, one of the prominent points of controversy was whether police should be required to wear uniforms. Members of the public objected that the uniforms were too militaristic in nature.[223] In 1854, the *New-York Daily Times* covered a public meeting between police and the citizenry in which a local attorney claimed the uniforms represented the "commencement of the establishment in this City of a standing army."[224] This was problematic because Americans "from their infancy [were] taught to rely upon the spontaneous action of the citizen soldiery—the volunteers—when and where they were needed."[225] Nonetheless, the police departments of Philadelphia and Chicago slowly continued the trend by requiring uniforms in 1860 and 1861, respectively.[226] However, as of 1860, only six cities in the United States had uniformed police departments.[227]

Third, police originally had a significantly more limited scope. Early police work, during the 1800s, was characterized less as enforcers of criminal law, and more as social workers[228] or a "kind of catchall or residual welfare agency."[229] Accordingly, New York's first professional police force was originally unarmed.[230] It wasn't until 1887 that the New York Police Department first mandated that its officers carry firearms.[231]

Today, police officers are not only armed, but are supplied many of their armaments from the Pentagon, as authorized by a 1994 law.[232]

223. BRYAN VILA & CYNTHIA MORRIS, THE ROLE OF POLICE IN AMERICAN SOCIETY 38 (1999).

224. *The Police Uniform*: *Indignation Meeting of Policemen in the Park*, N.Y. DAILY TIMES, June 30, 1854, at 4, PROQUEST HISTORICAL NEWSPAPERS, The New York Times.

225. *Id.*

226. JAMES F. RICHARDSON, URBAN POLICE IN THE UNITED STATES 28 (1974).

227. Reinders, *supra* note 195, at 615.

228. *See* Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685, 695 (2001) (explaining that the civil duties of police sheriffs initially dominated any criminal law enforcement responsibilities).

229. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 151 (1993).

230. BALKO, *supra* note 159, at 30.

231. CHRIS MCNAB, DEADLY FORCE: FIREARMS AND AMERICAN LAW ENFORCEMENT 71 (2009).

232. Radley Balko, *A Decade After 9/11, Police Departments Are Increasingly Militarized*, HUFFINGTON POST (Sept. 12, 2011, 8:12 AM), https://www.huffingtonpost.com/2011/09/12/police-militarization-9-11-september-11_n_955508.html [https://perma.cc/PB3L-FUVG].

The War on Terror has only exacerbated this trend. According to a study by the ACLU, the value in military equipment used by municipal police departments from 2001 to 2013 increased from one million to over four hundred million dollars.[233] Since 2006 alone, state and municipal law enforcement have acquired "at least 435 armored vehicles, 533 military aircraft and 93,763 machine guns."[234]

This has coincided with the contemporary phenomenon of widespread reliance on police paramilitary units, like SWAT for example, which represents a significant phase of militarization.[235] These police paramilitary units are modeled after special operations groups like the Navy Seals, and approximately half of the country's units receive specialized training from current and former operatives of the Navy Seals and Army Rangers.[236] "[O]nce reserved as the last option to defuse a dangerous situation," these units are now routinely called forth, by state and local governments, to "enforce laws against consensual crimes."[237] Thus, it appears today's police paramilitary units bear a strong resemblance to the nineteenth century militia. A recent *New York Times* exposé captures the similarities:

> Police SWAT teams are now deployed tens of thousands of times each year, increasingly for routine jobs. Masked, heavily armed police officers in Louisiana raided a nightclub in 2006 as part of a liquor inspection. In Florida in 2010, officers in SWAT gear and with guns drawn carried out raids on barbershops that mostly led only to charges of "barbering without a license."[238]

233. J. F., *How America's Police Became So Heavily Armed*, THE ECONOMIST (May 18, 2015), https://www.economist.com/blogs/economist-explains/2015/05/economist-explains-22 [https://perma.cc/L9H7-26XX].

234. Jon Swaine & Amanda Holpuch, *Ferguson Police, A Stark Illustration of Newly Militarised Law Enforcement*, THE GUARDIAN (Aug. 14, 2014), https://www.theguardian.com/world/2014/aug/14/ferguson-police-military-restraints-violence-weaponry-missouri [https://perma.cc/USK3-85A3].

235. *See* Peter B. Kraska, *Militarizing Criminal Justice*, 27 J. POL. & MIL. SOC. 205, 211 (1999) (describing the evolution of SWAT and Special Response Teams from a "periphery part" of police departments to full-scale military special operations groups).

236. *Id.*

237. Radley Balko, *How Did America's Police Become a Military Force on the Streets?*, A.B.A. J. BLOG (July 1, 2013, 10:10 AM), https://www.abajournal.com/magazine/article/how_did_americas_police_become_a_military_force_on_the_streets [https://perma.cc/VN49-AFJH]. Balko lists examples of such raids, including that of "neighborhood poker games, doctors' offices, bars and restaurants, and head shops." *Id.*

238. Matt Apuzzo, *War Gear Flows to Police Departments*, N.Y. TIMES (June 8, 2014), https://www.nytimes.com/2014/06/09/us/war-gear-flows-to-police-

3. Soldiers, State Actors, and Quartering

These two considerations—the nineteenth century "police-ization" of the military and the vastly different roles of police officers throughout American history—suggest that the Third Amendment, as applied to the states, ought to bind state actors beyond the National Guard. Perhaps the Third Amendment should govern *all* state and local actors the way the First Amendment does, notwithstanding explicit constitutional language that, based on the text alone, only binds Congress.[239]

At the very least, the Third Amendment ought to cover police paramilitary organizations like SWAT. The similarities between SWAT and state militias of the nineteenth century are striking, at least in terms of *function*. The only principled distinction between the two is federalism. That is, the familiar argument that the Third Amendment is among those Bill of Rights provisions whose core is federal restraint.[240] Nonetheless, *McDonald,* and the line of incorporation cases preceding it, evinces a deliberate pattern by the Supreme Court of incorporating all of the Bill of Rights Amendments against the states.[241] After all, it seems an *implicit* basis behind the very idea of incorporation is, if the right at issue were important enough to be included in the Bill of Rights, it is presumptively fundamental. So, unless the Court reverses course and finds the Third Amendment to be a mere federalism provision, this argument must fail.

While most of the discussion thus far has focused on the word "soldier," the Third Amendment contains another word that is perhaps even more limiting—quarter. While the fact pattern in *Mitchell v. City of Henderson* seemingly lends itself to straightforward application of the "quartering" question, the court never reached that inquiry after

departments.html [https://perma.cc/C2UA-PGKM]; *see supra* text accompanying note 217.

239. *See* U.S. CONST. amend. I ("*Congress* shall make no law . . . ." (emphasis added)).

240. *See* McDonald v. City of Chicago, 561 U.S. 742, 866–67 (2010) (Stevens, J., dissenting) ("Although the enactment of the Fourteenth Amendment profoundly altered our legal order, it 'did not unstitch the basic federalist pattern woven into our constitutional fabric.' . . . Nor, for that matter, did it expressly alter the Bill of Rights. The Constitution still envisions a system of divided sovereignty, still 'establishes a federal republic where local differences are to be cherished as elements of liberty' in the vast run of cases, still allocates a general 'police power . . . to the States and the States alone.'") (internal quotations omitted).

241. *Id.* at 764 ("The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause."); *see id.* at 764 n.12 (citing numerous Bill of Rights incorporation cases).

finding that police are not "soldiers" under the Third Amendment.[242] Normally, when police occupy a private citizen's home without the person's consent, it takes place when the home, or someone or something within the home, is the target of investigation. Under those circumstances, the Fourth Amendment analysis is triggered. In *Mitchell*, however, the police used the family's home to aid in their investigation of the Mitchell family's *neighbor*. That the nine-hour intrusion appears to be more akin to an occupation, rather than a search or seizure, suggests that there is potential overlap between the Third and Fourth Amendments, at least under that fact pattern.[243]

The Fourth Amendment, too, has its limits in this domain. That is, there are cases in which the Fourth Amendment fails to protect individuals in their homes notwithstanding police officials doing things that could reasonably fall within a definition of quartering. In *Segura v. United States*,[244] law enforcement officers remained in a suspect's apartment for nineteen hours without a warrant and after the defendant had been removed off-site.[245] The officer remained in the suspect's place from 11pm until 6pm the next day when a magistrate issued a search warrant.[246] Referring to the event as an "occupation," the court found that the seizure of the apartment was reasonable under the Fourth Amendment.[247] Were the Third Amendment to apply to the police, the *Segura* court would have had to grapple with the Amendment's absolute prohibition on quartering during peacetime, rather than the "reasonableness" requirement in the Fourth Amendment.

Or consider a case in which a valid search warrant was authorized. In *Lykken v. Brady*,[248] police obtained a search warrant to search the plaintiff's property related to a stale murder investigation from decades earlier.[249] The search lasted four days, during which the plaintiff was not allowed to re-enter the interior of her farm to feed her livestock, care for her newborn kittens, or even to turn off the stove.[250] The search

242. Mitchell v. City of Henderson, No. 2:13-cv-01154, 2015 WL 427835, at *18 (D. Nev. Feb. 2, 2015).

243. To be sure, the Mitchell family's section 1983 Fourth Amendment claim is pending. This category of civil claims allows litigants to recover damages from the city, or individual governmental actors, for constitutional violations. 42 U.S.C. § 1983 (2006).

244. 468 U.S. 796 (1984).

245. *Id.* at 801.

246. *Id.*

247. *Id.* at 813.

248. 622 F.3d. 925 (8th Cir. 2010).

249. *Id.* at 928.

250. *Id.* at 930.

turned up no evidence, and the district court conceded the methods were unreasonable.[251] Nonetheless, the Eighth Circuit concluded that the search complied with the Fourth Amendment's reasonableness requirement, because "brief detention was not [an] unreasonable intrusion on Fourth Amendment rights."[252]

While it is unclear how these cases could have been resolved on Third Amendment grounds, they do illustrate the limitations of the Fourth Amendment in the context of alleged police occupations.

Thus, future Third Amendment litigants, like the Mitchell family, ought to persist in seeking a judicial determination that "soldier," as used in the Third Amendment, binds state and local law enforcement. Once a court makes this finding, the task will be to determine where the Third and Fourth Amendments overlap and whether that alters the available remedies. To be sure, the Fourth Amendment, by its text, is significantly more far-reaching than that of the Third.[253] Nonetheless, the existence of occurences, like those detailed in *Mitchell*, *Segura*, and *Lykken*, suggests potential overlap, even if only in unusual cases.

Further, a judicial determination that the Third Amendment binds state and local law enforcement must be aimed at eventually bypassing the governmental defense of qualified immunity. As discussed, the *Engblom* court allowed a facially meritorious Third Amendment claim to proceed to trial, only to later be dismissed because the law was not "clearly established."[254] This is why it is so critical for litigants to persist in their efforts to allege Third Amendment violations in the concededly rare circumstance of police occupations of civilian homes. That is to say, future victims of such occupations should seek to get a fresh Third Amendment interpretation clearly established.

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251. *Id.*

252. *Id.* at 926.

253. For example, the Fourth Amendment does not specify a governmental actor against whom the right applies. We only know that the right "shall not be violated" by government actors. Thus, the right has been interpreted to not only apply against police, but to apply to other state actors like public school officials. New Jersey v. T.L.O., 469 U.S. 325, 359 (1985). The Third Amendment, on the other hand, can only be violated by "soldiers." Further, the Fourth Amendment protects against unreasonable "searches and seizures." The elasticity of those terms has evolved over time to include not only physical searches, but even to include analysis of urine samples. Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 617 (1989) (finding that the "collection and testing of urine intrudes upon expectations of privacy" and constitutes "searches" under the Fourth Amendment). Also, the right applies to "persons, houses, papers, and effects." The Third, on the other hand, only protects persons in their "houses."

254. Engblom v. Carey, 572 F. Supp. 44, 46 (S.D.N.Y. July 15, 1983).

CONCLUSION

In this Note, I examine a unique way of bypassing the limitations inherent in the word "soldier," as used in the Third Amendment. I advocate for using the incorporation doctrine, which, by its nature, can yield novel—and perhaps even manipulated—interpretations of protections in the Bill of Rights. Given incorporation doctrine's emphasis on American history in the lead-up to the passage of the Fourteenth Amendment, I argue that it is likely that the Framers of the Fourteenth Amendment would have understood today's municipal police, and particularly police paramilitary units, as falling within the definition of "soldier." This is because, during the course of the nineteenth century, the federal government, as well as state governments, understood soldiers as fulfilling domestic law enforcement duties, just as police do today. Just as the Second Amendment is now an individual right unconnected to service in the militia, the Third Amendment could be interpreted as conferring an individual right against all forms of governmental intrusion in the home, independent of military-related contexts.

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