

# THE THIRD AMENDMENT IN 2020

By Michael L. Smith\*

## I. INTRODUCTION

Compared with other Amendments in the Bill of Rights, the Third Amendment does not get much attention.<sup>1</sup> Its prohibition on the quartering of soldiers in houses during peacetime, along with its prohibition on similar quartering during times of war absent legal prescription,<sup>2</sup> is rarely the subject of litigation or scholarship. Indeed, most people—and likely most attorneys—probably cannot tell you what the Third Amendment covers if put on the spot.

This Article—hopefully the first in an indefinite series—aims to fix this by giving the Third Amendment the respect that one of the Constitution’s original amendments deserves. This Article surveys and analyzes caselaw, scholarship, and popular media coverage of the Third Amendment published in 2020. This “year in the life” view of the Third Amendment illustrates how this largely forgotten amendment manages to make consistent appearances in modern law and literature. Indeed, 2020 turned out to be one of the most Third-Amendment-heavy years in recent memory.

Beyond the immediate objective of providing a snapshot of Third Amendment law, this Article has a few broader goals. First, it marks the beginning of a series of yearly articles describing the state of Third Amendment law, scholarship, and discussion. Some Amendments—certainly the Fourth, and perhaps the First, could warrant weekly (even daily) updates in light of the volume of

---

\* © 2022, All Rights Reserved. Associate, Glaser Weil Fink Howard Avchen & Shapiro LLP, J.D. 2014, UCLA School of Law, B.S. (Political Science), B.A. (Philosophy), University of Iowa. The views expressed in this Article are mine alone and do not reflect the views of my employer.

1. See Glenn Harlan Reynolds, *Foreword: The Third Amendment in the 21st Century*, 82 TENN. L. REV. 491, 491 (2015) (“For many years, the Third Amendment to the Constitution has been the Rodney Dangerfield of the Bill of Rights, getting no respect”). *But see Third Amendment Rights Group Celebrates Another Successful Year*, ONION (Oct. 5, 2007), <https://www.theonion.com/third-amendment-rights-group-celebrates-another-success-1819569379/>.

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

caselaw and associated discussion to which these amendments give rise. Others, such as the Second Amendment, could get by with monthly updates—although a recently decided Supreme Court case could throw this area of the law into even more upheaval.<sup>3</sup> Given the relative rarity of Third Amendment references in cases and scholarship, a yearly update will likely suffice.

Second, this series of articles, collectively, may serve as a barometer of how unusual life was during certain years. A brief article indicates a more normal year—at least normal in the sense that the quartering of soldiers did not weigh very much on the public’s mind. A longer article suggests that the year involved a fair share of challenges. Indeed, 2020’s Article may be one of the longer articles in the series.

Third, this Article serves to situate the current state of the Third Amendment in relation to other areas of the law. While the Third Amendment itself may not be the focus of much litigation or scholarship, it is still consistently referenced—albeit briefly—in cases and in academic legal writing. A systematic study of these references and mentions sheds light on developments in the literature and law and the various scenarios that courts and parties may believe warrant Third Amendment references. Cataloguing the Third Amendment’s use in courts and scholarship may reveal connections that may not be readily apparent.

Fourth, as with much of what I have written before, this Article aims to arm the reader with enough facts and trivia to dominate at their next party, wedding, cocktail gathering, or networking event. Most people, even most lawyers, do not know what the Third Amendment says.<sup>4</sup> Knowledge of not just what the Third Amendment is, but how it was applied and referenced on a

---

3. See generally *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (striking down a New York law requiring applicants for concealed carry permits to show “good cause,” rejecting the lower court consensus on evaluating Second Amendment claims, and recognizing a Second Amendment right to carry firearms); see also Scott Neuman & Nina Totenberg, *Supreme Court to Take Up 1st Major Gun Rights Case in More Than a Decade*, NPR (Apr. 26, 2021), <https://www.npr.org/2021/04/26/990846329/supreme-court-to-take-up-first-major-gun-rights-case-in-more-than-a-decade> (describing the Supreme Court’s grant of certiorari in *New York State Rifle & Pistol Association*, and noting that this would be the first major Second Amendment case heard by the Court since 2010).

4. A highly informal survey I have performed over several years in which I ambush my coworkers by asking them to quickly tell me what the Third Amendment says suggests that this is true.

yearly basis, gives one an immediate advantage in any conversational scenario.<sup>5</sup>

## II. SOME BACKGROUND ON THE THIRD AMENDMENT

Before getting to the Third Amendment's various appearances in 2020, a brief background on its history, litigation, and academic treatment will provide some context. This is far from an exhaustive treatment of the (admittedly limited) caselaw and literature on the Third Amendment. For the history of the Third Amendment, its drafting, state constitutional analogues, and Third Amendment litigation, Tom Bell's prior writing is a helpful resource.<sup>6</sup> And Scott Gerber provides a thorough review of academic treatment of the Third Amendment and its modern applications through 2015.<sup>7</sup>

### A. The Historic Origins of the Third Amendment

Tom Bell notes that the Third Amendment has a deep history in Anglo-Saxon law, observing that prohibitions against "forced billeting"<sup>8</sup> date back as far as 1131.<sup>9</sup> Over the centuries, "the quartering of troops grew to present a greater threat of homeowners," as soldiers repeatedly required that homeowners quarter them.<sup>10</sup>

In the American colonies, quartering had been a problem long before the Revolutionary War, with widespread quartering of British troops occurring during wars such as the French and Indian War.<sup>11</sup> Resistance against quartering gradually grew, and the practice of "quartering large bodies of armed troops among us"

---

5. Should you end up speaking with someone who has also read this Article, don't be alarmed. You can then bond over your shared interest in high quality legal scholarship. You can't lose!

6. See generally Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL OF RTS. J. 117, 118–19 (1993).

7. Scott D. Gerber, *An Unavoidably Brief Historiography of the Third Amendment*, 82 TENN. L. REV. 627 (2015).

8. The verb, "billet" means to "assign lodging to someone"—while the noun, "billet" is "an official order that a member of the military be provided with board and lodging." *Billet*, MERRIAM-WEBSTER (2022), <https://www.merriam-webster.com/dictionary/billet/>.

9. Bell, *supra* note 6, at 119.

10. *Id.* at 123; see also William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 396–400 (1991) (describing early efforts to regulate quartering).

11. Bell, *supra* note 6, at 125.

was one of the various grievances identified in the Declaration of Independence.<sup>12</sup>

James Madison proposed an initial draft of the Third Amendment for inclusion in a bill of rights, which stated that: “No soldiers shall in time of peace be quartered in any house without the consent of the owner; nor at any time, but in a manner warranted by law.”<sup>13</sup> This version—which did not specify that “war” was necessary to allow legally authorized quartering—was rejected and replaced with a recommended version based on several state constitutional prohibitions on quartering that existed at the time.<sup>14</sup> The proposed version stated: “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.”<sup>15</sup> This version was virtually identical to what was ultimately adopted, although the ultimate version of the Third Amendment includes a bit more capitalization: “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.”<sup>16</sup>

While the Third Amendment does not get much attention today, it was of great importance to the founders who drafted the Bill of Rights and the communities that ratified this first set of amendments to the Constitution.<sup>17</sup> The revolutionary generation was concerned with the maintenance of standing armies—having suffered at the hands of the British—and sought to impose protections that would prevent the abuses associated with these forces.<sup>18</sup> Despite the importance of the Third Amendment to the founders’ generation, the eventual development of a standing army

---

12. *Id.* at 127; *see also* THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

13. Bell, *supra* note 6, at 135; 1 ANNALS OF CONG. 434 (Gales & Seaton eds., 1789).

14. Bell, *supra* note 6, at 135.

15. 1 ANNALS OF CONG. 752 (Gales & Seaton eds., 1789).

16. U.S. CONST. amend. III.

17. William Sutton Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195, 195 (1989) (“Of the rights embodied in the United States Constitution, perhaps none was of greater importance to the revolutionary generation than the [T]hird [A]mendment’s prohibition against the involuntary quartering of soldiers in private homes.”); *see also* Gordon S. Wood, *The Third Amendment*, INTERACTIVE CONST. MADE BY NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-iii/interps/123> (last visited Aug. 29, 2022).

18. William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 393–94 (1991).

ultimately rendered the Third Amendment's protections "superfluous."<sup>19</sup>

### B. The Third Amendment in Court

Tom Bell notes that even though the Third Amendment was ratified, this did not prevent widespread quartering of troops during the War of 1812 and the Civil War.<sup>20</sup> More recently, in 1942, United States forces forcibly removed native residents from Alaska's Aleutian Islands to send them to unhealthy internment camps—quartering in residents' homes in the process.<sup>21</sup> Despite these practices, the Third Amendment did not make its mark in any notable court opinions until later.<sup>22</sup>

The Third Amendment received a brief mention in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, where he cited it as an example of how congressional authorization was required for executive actions, even in wartime.<sup>23</sup> The Supreme Court also referenced the Third Amendment in *Griswold v. Connecticut*,<sup>24</sup> citing it as one of several provisions of the Bill of Rights "whose penumbras identified a constitutional right to privacy."<sup>25</sup> The *Griswold* Court identified the Third Amendment's prohibition against quartering in times of peace without the consent of owners as one "facet" of a "zone of privacy" that was also supported by the First, Fourth, and Fifth Amendments.<sup>26</sup> Beyond this analysis, however, the Court did not address or further define the scope of the Third Amendment.<sup>27</sup>

The only Court of Appeals case squarely addressing the Third Amendment is *Engblom v. Carey*.<sup>28</sup> In *Engblom*, the Security and Law Enforcement Employees Council 82, AFL-CIO called a strike, in which most officers at a prison facility joined.<sup>29</sup> The appellants

---

19. *Id.* at 395.

20. Bell, *supra* note 6, at 136–39.

21. Tom W. Bell, "Property" *In the Constitution: The View from the Third Amendment*, 20 WM. & MARY BILL RTS. J. 1243, 1271 (2012).

22. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).

23. *Id.*

24. 381 U.S. 479 (1965).

25. Gerber, *supra* note 7, at 627–28.

26. *Griswold*, 381 U.S. at 484.

27. *Id.*

28. 677 F.2d 957 (2d Cir. 1982).

29. *Id.* at 960.

were two of several prison officers whose sole place of residence was a staff building located approximately “a quarter mile from the prison.”<sup>30</sup> Their living quarters in the staff building included bedrooms with a semi-private or private bath and shared kitchens.<sup>31</sup> The appellants were eligible to live in the staff building, but they were not required to reside there as a condition of their employment at the prison.<sup>32</sup>

When most of the prison’s officers went on strike, the superintendent barred striking employees from the grounds, and the national guard was called in.<sup>33</sup> The appellants were barred from the staff housing, and the prison leased their rooms to the national guard members, who remained there for several weeks.<sup>34</sup> When the appellants returned, they found that their rooms had been “ransacked” and that personal property was “missing or destroyed.”<sup>35</sup> The appellants filed suit under 42 U.S.C. § 1983, claiming, among other things, that their Third Amendment rights had been violated when members of the national guard were quartered in their residences.<sup>36</sup>

The Second Circuit Court of Appeals agreed with the district court that the national guard members were “Soldiers” within the meaning of the Third Amendment.<sup>37</sup> The court further agreed with the district court “that the Third Amendment [was] incorporated into the Fourteenth Amendment” and applied to the actions of the State of New York.<sup>38</sup> Beyond these agreements with the lower court’s decision, the Second Circuit did not provide much additional analysis on these points.<sup>39</sup>

The court rejected the argument that the appellants lacked a Third Amendment claim because they were not fee simple owners of their living quarters.<sup>40</sup> While the Third Amendment’s use of the terms “house” and “Owner” suggest that such an ownership

---

30. *Id.* at 958–59.

31. *Id.*

32. *Id.*

33. *Id.* at 960.

34. *Id.*

35. *Id.*

36. *Id.* at 958–59.

37. *Id.* at 961.

38. *Id.*

39. *See id.*; see also Samantha A. Lovin, *Everyone Forgets About the Third Amendment: Exploring the Implications on Third Amendment Case Law of Extending Its Prohibitions to Include Actions by State Police Officers*, 23 WM. & MARY BILL RTS. J. 529, 538–39 (2014).

40. *Engblom*, 677 F.2d at 962.

interest is necessary, the court focused on the Third Amendment's place in the broader right to privacy that the *Griswold* Court had previously identified.<sup>41</sup> The *Engblom* court concluded that a stricter treatment of the Third Amendment's scope compared with, for example, the Fourth Amendment's scope, would lead to unusual results:

A rigid reading of the word "Owner" in the Third Amendment would be wholly anomalous when viewed, for example, alongside established Fourth Amendment doctrine, since it would lead to an apartment tenant's being denied a privacy right against the forced quartering of troops, while that same tenant, or his guest, or even a hotel visitor, would have a legitimate privacy interest protected against unreasonable searches and seizures.<sup>42</sup>

Accordingly we hold that property-based privacy interests protected by the Third Amendment are not limited solely to those arising out of fee simple ownership but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others.<sup>43</sup>

Noting additional facts that supported the appellants' privacy interests in the quarters, including the fact that they did not have any other residences, that they furnished the rooms, and that they paid monthly rent, the court reversed the district court's summary dismissal of their Third Amendment claim.<sup>44</sup>

Since *Engblom*, no federal circuit court has squarely addressed a Third Amendment claim or further defined the scope or application of the Third Amendment.<sup>45</sup> While the *Engblom* court concluded that the Third Amendment was incorporated against the states, this conclusion has not been affirmed by the United States Supreme Court—meaning that, as of today, the Third Amendment is only incorporated against states in the Second

---

41. 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."); *Engblom*, 677 F.2d at 962.

42. *Engblom*, 677 F.2d at 962; *see, e.g.*, *Jones v. United States*, 362 U.S. 257 (1960) (friend's apartment); *United States v. Agapito*, 620 F.2d 324, 333–35 (2d Cir. 1980) (hotel room), *cert. denied*, 449 U.S. 834 (1980); *United States v. Bell*, 488 F. Supp. 371 (D.D.C. 1980) (apartment tenant).

43. *Engblom*, 677 F.2d at 962.

44. *Id.* at 963–64.

45. Lovin, *supra* note 39, at 536.

Circuit.<sup>46</sup> Because the *Engblom* court did not provide much analysis on the incorporation issue,<sup>47</sup> it may not present a significant barrier to a separate court of appeals reaching a contrary decision on whether the Third Amendment applies to states. Of course, if that were to occur, there would then be a circuit split over the incorporation of the Third Amendment, which could warrant intervention by the Supreme Court. The world will be in for a pretty exciting annual Third Amendment article if that ever comes to pass.

### C. Scholarship on the Third Amendment

In the absence of extensive litigation involving the Third Amendment, most existing scholarship addresses the Amendment's history and potential applications. Scott Gerber's historiography of the Third Amendment provides an exhaustive survey of Third Amendment scholarship up to 2015.<sup>48</sup> In the academic legal literature, he identifies eleven "historical studies" of the Third Amendment and thirteen "modern applications" of the Third Amendment.<sup>49</sup> The historical studies Gerber surveys address the history and development of the Third Amendment.<sup>50</sup> As for the modern applications, they include analysis of *Engblom v. Carey*, as well as other articles and notes that either stretch the Third Amendment in an effort to apply it to an existing law or set of facts,<sup>51</sup> or that cook up (sometimes elaborate) hypothetical scenarios and evaluate whether the Third Amendment applies.<sup>52</sup>

---

46. *Id.* at 542.

47. *Id.* at 539.

48. Gerber, *supra* note 7.

49. *Id.* at 629, 635.

50. *Id.* at 629.

51. See, e.g., Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The Living Constitution, The Third Amendment, and the Endangered Species Act*, 30 ENV'T L. 769, 769 (2000) (arguing that the Endangered Species Act requires that private landowners must "quarter" endangered species, and that this violates the Third Amendment's ban on quartering soldiers under a "living Constitution" theory of interpretation); Gerber, *supra* note 7, at 637 (citing Morriss & Stroup, *supra*, at 637 n.60, and describing the article as "one of the strangest articles I have ever read" yet noting—likely correctly—that some have characterized the article as "satire").

52. See Christopher J. Schmidt, *Could a CIA or FBI Agent be Quartered in Your House During a War on Terrorism, Iraq or North Korea?*, 48 ST. LOUIS U. L.J. 587, 589 (2004) (raising a hypothetical situation of the CIA and FBI's offices and their agents' homes being destroyed in a terrorist attack and whether the officers' being quartered in private citizens' home would violate the Third Amendment); see also Gerber, *supra* note 7, at 637–38 (first citing Schmidt, *supra*, at 589; and then citing Geoffrey M. Wyatt, *The Third Amendment in*



Gerber also draws attention to work by Radley Balko, who has written at length on the increasing militarization of police forces in America and who highlights examples of how militarized police have intruded on people's lives, violating what Balko identifies as the "symbolic' Third Amendment."<sup>53</sup>

Gerber's article was one of several included in a 2015 symposium issue of the *Tennessee Law Review*—the first such symposium to focus on the Third Amendment.<sup>54</sup> The articles in that symposium delve into various facets of the Third Amendment, including a survey and initial analysis of its ambiguous terms,<sup>55</sup> police militarization and its potential Third Amendment implications,<sup>56</sup> and whether "houses of worship" are "houses" within the meaning of the Third Amendment,<sup>57</sup> among other issues. While I am not aware of much scholarship on the Third Amendment since the 2015 symposium, I have not made a systematic effort each year to monitor the state of academic writing on the Third Amendment. As of 2020, this, fortunately, is no longer the case.

### III. THE THIRD AMENDMENT IN 2020

The year 2020 turned out to be a livelier year than most for the Third Amendment. This might not be immediately apparent from the cases decided or the legal scholarship published during that time. Those two categories are addressed at the top of this Part in Parts III.A and B. Where things get a bit more unusual is the discussion of how the Third Amendment was treated in mainstream media outlets. President Donald Trump's efforts to call in national guard members to quash summer protests in Washington, D.C. gave rise to an active (if perhaps misguided)

---

*the Twenty-First Century: Military Recruiting on Private Campuses*, 40 *NEW ENG. L. REV.* 113, 113–14 (2005)).

53. Gerber, *supra* note 7, at 643 (quoting RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* 12–13 (Pub. Affs. eds., 1st ed. 2013)). For additional analysis of whether increasing militarization renders police "soldiers" under the Third Amendment, see Sandra Eismann-Harpen, Comment, *Rambo Cop: Is He a Soldier Under the Third Amendment?*, 41 *N. KY. L. REV.* 119, 126–31 (2014).

54. See Reynolds, *supra* note 1, at 491.

55. See Michael A. Cottone, *The Textualist Third Amendment*, 82 *TENN. L. REV.* 537, 545–54 (2015).

56. See Elizabeth Price Foley, *The "War" Against Crime: Ferguson, Police Militarization and the Third Amendment*, 82 *TENN. L. REV.* 583, 584–92 (2015).

57. See Eric Rassbach, *Are Houses of Worship "House[s]" Under the Third Amendment?*, 82 *TENN. L. REV.* 611, 612 (2015).

discussion of the Third Amendment when the mayor of Washington, D.C., asked for those members to leave hotels in the D.C. area.<sup>58</sup> Additionally, the rise of COVID-19 and associated safety measures gave rise to some novel takes on the Third Amendment's scope and whether it supported a general right to be free from infectious diseases.<sup>59</sup> All of this is addressed in Part III.C.

#### A. The Third Amendment in 2020 Caselaw

To start, a quick note on methodology. My search for Third Amendment caselaw in 2020 was performed using a Westlaw search for “third amendment” in all state and federal courts. These results were then limited to cases decided or published during 2020. I then examined each of the results to confirm which of the cases addressed the Third Amendment to the Constitution.

As expected, most of the results of this search ended up having nothing to do with constitutional law. Many cases addressed agreements that had been subjected to three or more amendments.<sup>60</sup> Many others involved pleadings that had been amended three times.<sup>61</sup> Still others involved trusts that had been amended at least three times.<sup>62</sup> While these cases may involve interesting legal issues, they are beyond the scope of this Article. Readers interested in trends and issues raised in cases involving multiple revised pleadings, agreements, trusts, and other documents must unfortunately look elsewhere for this information.

---

58. Grace Segers, *D.C. Mayor Bowser Asks Trump to Withdraw “Extraordinary” Military and Unidentified Law Enforcement*, CBS NEWS (June 5, 2020, 11:51 AM), <https://www.cbsnews.com/news/dc-mayor-bowser-asks-trump-withdraw-extraordinary-military-unidentified-law-enforcement/>.

59. Alexander Zhang, *The Forgotten Third Amendment Could Give Pandemic-Struck America a Way Forward*, THE ATLANTIC (Oct. 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/could-third-amendment-protect-against-infection/616791/>.

60. *See, e.g.*, *Four B Props., LLC v. Nature Conservancy*, 458 P.3d 832, 837 (Wyo. 2020) (addressing the “Third Amendment to the Purchase and Sale Agreement” between a developer and a nature conservancy); *In re COPsync, Inc.*, 619 B.R. 872, 876 (Bankr. E.D. La. 2020) (addressing the “third amendment” to a distribution agreement).

61. *See, e.g.*, *Steffen v. United States*, 147 Fed. Cl. 142, 143 (2020), *aff'd.*, 995 F.3d 1377 (Fed. Cir. 2021); *Smith v. Town of Lewiston*, No. 18-CV-1069V(F), 2020 WL 5237924, at \*9 (W.D.N.Y. July 30, 2020).

62. *See Gomez v. Smith*, 268 Cal. Rptr. 3d 812 (Cal. Ct. App. 2020).

### 1. *Passing References to the Third Amendment*

As for the cases that directly addressed the Third Amendment, several of these cases involved only brief references to the Third Amendment. One court included a reference by quoting one of the parties.<sup>63</sup> In the Northern District Court of Texas’s ruling on a motion to strike, motions for dismissal, motions for injunctive relief, and motions for costs against the plaintiff in *Olmstead v. Hoppe*,<sup>64</sup> the court noted that the plaintiff had filed at least three amended complaints with the knowledge that he lacked subject matter jurisdiction.<sup>65</sup> The court stated that the plaintiff was engaging in harassing behavior by filing various complaints, quoting an email in which the plaintiff stated that he would be filing a Fourth Amendment complaint the following day, “at which time your motion for 12(b)(6) dismissal of my Third Amended Complaint is dead in the water as the Third Amendment itself. . . .”<sup>66</sup> This reference to the Third Amendment by the plaintiff reflects a common view that the Third Amendment is of little use or relevance in modern constitutional litigation.

Three other courts made brief references to the Third Amendment in cases that involved different issues or constitutional provisions.<sup>67</sup> These references were all made with the purpose of identifying the Third Amendment as one of the few amendments that has not yet been incorporated against the states by the Supreme Court.<sup>68</sup> Beyond this cursory reference, none of these courts discussed the Third Amendment in any more detail.<sup>69</sup>

---

63. See *Olmstead v. Hoppe*, No. 5:19-CV-203-H-BR, 2020 WL 2487050, at \*9 (N.D. Tex. Mar. 9, 2020).

64. *Id.* at \*1.

65. *Id.* at \*9.

66. *Id.*

67. See *Conway v. Shoop*, No. 3:07-cv-345, 2020 WL 4464395, at \*3 (S.D. Ohio Aug. 4, 2020); *Nationwide Biweekly Admin., Inc. v. Super. Ct. of Alameda*, No. A150264, 2020 WL 3969328, at \*2 (Cal. Ct. App. July 14, 2020); *Ostipow v. Federspiel*, 824 F. App’x 336, 347 (6th Cir. 2020).

68. See *Conway*, 2020 WL 4464395, at \*3; *Nationwide*, 2020 WL 3969328, at \*2; *Ostipow*, 824 F. App’x at 347.

69. See *Conway*, 2020 WL 4464395, at \*3; *Nationwide*, 2020 WL 3969328, at \*2; *Ostipow*, 824 F. App’x at 347.

## 2. *Petitions for Writs of Habeas Corpus*

In 2020, two courts addressed writs for habeas corpus that raised Third Amendment claims.<sup>70</sup> In *Cavienss v. United States*, the petitioner sought a writ of habeas corpus to challenge his conviction and sentence following a guilty plea to multiple drug charges.<sup>71</sup> The petitioner argued that his sentence and conviction violated the Third Amendment, as well as the Fourth Amendment, Fifth Amendment, and Sixth Amendment.<sup>72</sup> The court did not describe the petitioner's Third Amendment claims in any detail and instead rejected all of the petitioner's claims together—finding that: (1) the petitioner had waived arguments related to the legality of a traffic stop; (2) the validity of the petitioner's guilty plea had already been addressed in prior proceedings; and (3) the petitioner's sentence was lawful, as it was below the sentencing guideline range for the petitioner's offenses.<sup>73</sup>

A similar situation arose in *McClendon v. Salas*.<sup>74</sup> There, the petitioner filed a petition for a writ of habeas corpus following his conviction for failing to register as a sex offender.<sup>75</sup> The petitioner alleged that he had been imprisoned for a crime for which he was never arrested or charged and that this constituted false imprisonment and cruel and unusual punishment.<sup>76</sup> In addition to claiming that his due process, Eighth Amendment, and Fourteenth Amendment rights were violated, the petitioner alleged that he had been falsely imprisoned under the Third Amendment.<sup>77</sup> The court's treatment of this claim was brief, with the court noting that “[t]he Third Amendment—which prohibits the government from quartering troops in a private home except under certain circumstances—does not prohibit ‘false imprisonment.’”<sup>78</sup>

---

70. *Cavienss v. United States*, No. 3:18-cv-1920 (VAB), 2020 WL 229317, at \*1, \*4 (D. Conn. Jan. 15, 2020); *McClendon v. Salas*, No. 2:20-cv-03239-AB-KES, 2020 WL 4354109, at \*1–2 (C.D. Cal. Apr. 15, 2020).

71. *Cavienss*, 2020 WL 229317, at \*1.

72. *Id.* at \*4.

73. *Id.* at \*4–5.

74. *McClendon*, 2020 WL 4354109, at \*1–2.

75. *Id.*

76. *Id.* at \*2.

77. *Id.*

78. *Id.* at \*4.

### 3. Section 1983 Claims Alleging Third Amendment Violations

Three 2020 cases involved claims asserted under 42 U.S.C. § 1983 for violations of the plaintiffs' Third Amendment rights.<sup>79</sup> In *Allen v. Hummer*, the plaintiff—a prisoner in the Idaho Department of Correction—brought a § 1983 action against several parties.<sup>80</sup> Right off the bat, the court concluded that the plaintiff had failed to allege sufficient facts to support a complaint, finding that the plaintiff's complaint did not include any factual allegations and instead listed various legal citations and alleged injuries.<sup>81</sup> The court went on to describe the rules of § 1983 claims and requirements for alleging violations of various rights in a § 1983 cause of action.<sup>82</sup> The court noted that the plaintiff had claimed that his Third Amendment rights had been violated and noted that this amendment did not appear to be implicated in the case.<sup>83</sup>

In *Anthony v. Warden*, the plaintiff—a prisoner—appealed the district court's summary denial of his § 1983 action against prison officials and a nurse arising from a six-month confinement in administrative segregation.<sup>84</sup> The bulk of the opinion noted that the plaintiff had raised Eighth and Fourteenth Amendment claims and ultimately affirmed the district court's grant of summary judgment to the defendants.<sup>85</sup> The court briefly noted that the plaintiff had raised a Third Amendment claim on appeal, but concluded that he had forfeited this claim because he had not raised it in district court.<sup>86</sup>

The last of the 2020 § 1983 cases that referenced the Third Amendment was *Li Huang v. Brasher*—a case in which a plaintiff filed a complaint in federal court following a state court's ruling depriving her of custody of her child.<sup>87</sup> The plaintiff's complaint had over forty counts and alleged “a litany of nearly every possible

---

79. *Allen v. Hummer*, No. 1:20-cv-00288-DCN, 2020 WL 4549271, at \*1, \*8 (D. Idaho Aug. 6, 2020); *Anthony v. Warden*, 823 F. App'x 703, 705–06 (11th Cir. 2020); *Li Huang v. Brasher*, No. 1:20-cv-2178-AT, 2020 WL 4777852, at \*4, \*7 (N.D. Ga. June 12, 2020).

80. *Allen*, 2020 WL 4549271, at \*1.

81. *Id.* at \*1.

82. *Id.* at \*1–8.

83. *Id.* at \*8.

84. *Anthony*, 823 F. App'x at 705–06.

85. *Id.* at 709–10.

86. *Id.* at 705 n.2.

87. No. 1:20-cv-2178-AT, 2020 WL 4777852, at \*1 (N.D. Ga. June 12, 2020).

constitutional violation imaginable,” all of which stemmed from the factual claim that the state superior court’s orders were incorrect.<sup>88</sup> Count Sixteen of the complaint was a § 1983 claim arising from “the foundation of the right of privacy under Third Amendment. . . .”<sup>89</sup> The court interpreted this cause of action as an allegation that the superior court’s order violated a “purported right of privacy under the Third Amendment’s guarantee against quartering troops.”<sup>90</sup> The court ultimately rejected this claim, along with all of the other causes of action, on the basis that the court lacked jurisdiction—as the plaintiff was essentially treating the district court as a court of appeal in an attempt to overturn the result of her state court case.<sup>91</sup>

While several 2020 opinions and rulings referenced the Third Amendment, only the five rulings discussed above addressed claims asserting Third Amendment violations.<sup>92</sup> All of these appeared to be assertions tacked on to unrelated allegations, which led to their summary dismissal. It looks like we will need to wait at least another year for the next *Engblom v. Carey*.

#### B. The Third Amendment in 2020 Legal Scholarship

While 2020 did not result in a great deal of Third Amendment scholarship, the year was not a total loss. As with my search for 2020 Third Amendment caselaw, my search for Third Amendment scholarship involved a Westlaw secondary source search for “Third Amendment,” which was narrowed down to law review and law journal articles. I do not include references to the Third Amendment in treatises or practice guides, as those results are typically older entries that are updated without any substantial changes each year.

Additionally, unlike the preceding Part on Third Amendment caselaw, this Part will not include an exhaustive list of publications citing the Third Amendment. For example, several articles referenced the Third Amendment in listing examples of amendments that have not yet been incorporated against the

---

88. *Id.* at \*6.

89. *Id.* at \*7 (quoting Count Sixteen of the complaint).

90. *Id.*

91. *Id.* at \*9–10.

92. *See supra* pts. III.A.1–2.

states.<sup>93</sup> I have decided that such a mention, without anything more, does not warrant inclusion in this Article.

Many articles published in 2020 that cite the Third Amendment do so in the course of a brief reference.<sup>94</sup> There is very little sustained discussion of the Third Amendment. A common example of this is the discussion of privacy rights. Because *Griswold v. Connecticut*—including its citation of the Third Amendment, among other amendments—is a foundational case in setting forth the notion of constitutional privacy rights, articles addressing those rights often include a citation to the Third Amendment in parallel with a citation to *Griswold*.<sup>95</sup> Other articles mention the Third Amendment without citing *Griswold*, although they rely on the Third Amendment to support a claim that the Constitution supports a right to privacy in essentially the same manner as the *Griswold* Court.<sup>96</sup>

A constitutional right to privacy is not the only context in which writers make passing references to the Third Amendment. José Felipé Anderson cites the Third Amendment as an example of one of the Bill of Rights’ multiple protections for criminals against government power and investigations.<sup>97</sup> And while Thomas Crocker’s article, *The Fourth Amendment at Home*, focuses on the importance of the home in the context of Fourth Amendment jurisprudence, he notes that the Third Amendment provides a similar protection against the government’s presence in the home.<sup>98</sup> Anthony Ghiotto cites the Third Amendment in support of arguing for a general constitutional right “to be free from military control,” noting that the Third Amendment (along with the Second

---

93. See, e.g., Fernando Montoya, Comment, *Intergenerational Control: Why Genetic Modification of Embryos via CRISPR-Cas9 Is Not a Fundamental Parental Right*, 69 AM. U. L. REV. 1015, 1029 n.82 (2020).

94. See, e.g., Christopher Bret Alexander, *The General Data Protection Regulation and California Consumer Privacy Act: The Economic Impact and Future of Data Privacy Regulations*, 32 LOY. CONSUMER L. REV. 199, 205 (2020); Anita L. Allen, *What is Privacy?*, 37 GPSOLO 9, 11 (2020); Russell L. Weaver, *Privacy: The Trans-Atlantic Divide*, 89 MISS. L.J. 593, 596 (2020); Patrick M. Garry, *The Erosion of Common Law Privacy and Defamation: Reconsidering the Law’s Balancing of Speech, Privacy, and Reputation*, 65 WAYNE L. REV. 279, 314 n.236 (2020); José Felipé Anderson, *Constitutional Dilemmas on the Corporate Regulatory and Fifth Amendment Arc*, 14 CHARLESTON L. REV. 375, 404 (2020).

95. See, e.g., Alexander, *supra* note 94; Allen, *supra* note 94.

96. See, e.g., Weaver, *supra* note 94; Garry, *supra* note 94.

97. See Anderson, *supra* note 94, at 404 (framing the Third Amendment as a protection against the quartering of troops “who might spy on citizens”).

98. Thomas P. Crocker, *The Fourth Amendment at Home*, 96 IND. L.J. 167, 176 n.49 (2020).

Amendment) demonstrates a prioritization of civil over military power.<sup>99</sup> Mark Nevitt references the Third Amendment in advancing a similar claim in the context of discussing the COVID-19 pandemic while noting that the pandemic involved an extensive military response in connection with aiding in healthcare services and enforcing various safeguards.<sup>100</sup>

There was some brief historic discussion of the Third Amendment in 2020. Heather Darsie, in describing Sir Edward Coke's *Petition of Right*,<sup>101</sup> argued that the principles set forth in the work gave rise to the Third Amendment and helped inspire the Fifth, Sixth, and Seventh Amendments.<sup>102</sup> Craig Hollander's recounting of how the federal government set up and debated over various means of compensating those who lost property in the War of 1812 only makes one indirect reference to the Third Amendment when describing a speech given in opposition to establishing a framework for compensating those who lost property.<sup>103</sup> But Hollander's article as a whole provides additional context for the Third Amendment by shedding light on the aftermath of a conflict that almost certainly involved numerous Third Amendment violations—even if these violations never made their way into the law reports.<sup>104</sup>

Meghan Boone makes a questionable reference to the Third Amendment in her article, *Reproductive Due Process*.<sup>105</sup> Boone's intriguing article frames the criminalization of abortion as state-compelled pregnancy, which necessitates a deprivation of liberty that requires procedural due process rights such as “notice, a hearing, compensation, and minimum conditions of care.”<sup>106</sup> Boone

---

99. See Anthony J. Ghiotto, *Defending Against the Military: The Posse Comitatus Act's Exclusionary Rule*, 11 HARV. NAT'L SEC. J. 359, 379 (2020).

100. Mark Nevitt, *Domestic Military Operations and the Coronavirus Pandemic*, 11 J. NAT'L SEC. L. & POL'Y 107, 114–15 (2020).

101. The Petition Exhibited to His Majestie by the Lordes Spirituall and Temporall and Commons in This Present Parliament Assembled Concerning Divers Rights and Liberties of the Subjects: With the Kinges Majesties Royall Aunswere Thereunto in Full Parliament 1628, 3 Car 1 c. 1 (Eng.).

102. Heather R. Darsie, *Our English Legal Forebearers and Their Contributions to the Practice of Law and American Jurisprudence: Sir Thomas More, Sir Edward Coke, and Sir William Blackstone*, 40 N. ILL. U. L. REV. 227, 235 (2020).

103. See Craig B. Hollander, “The Citizen Complains:” *Federal Compensation for Property Lost in the War of 1812*, 38 L. & HIST. REV. 659, 691 (2020) (recounting a speech by John Forsyth of Georgia arguing against a bill to provide payment for those who lost property on the Niagara frontier during the War of 1812).

104. See Bell, *supra* note 6, at 136–39.

105. Meghan Boone, *Reproductive Due Process*, 88 GEO. WASH. L. REV. 511, 516 (2020).

106. *Id.* at 518.



proposes that procedural due process serves as a means of requiring governments to pay for the consequences of laws that impose heightened restrictions on—or prohibit—abortion.<sup>107</sup> While the overall article seems interesting and of particular relevance in light of recent events,<sup>108</sup> my narrow focus in this Article is on Boone’s reference to the Third Amendment, which she cites as an example of the government’s “duty to provide at least minimally for individuals once they are in the military.”<sup>109</sup> She provides a brief explanation in an accompanying footnote, arguing that “[i]f the government is not housing soldiers in private homes, it stands to reason it has to put them somewhere.”<sup>110</sup> This is a stretch, as the Third Amendment limits what the government can do and does not provide independent authority or obligations for the government to provide housing or resources to military personnel.

David Landau, Hannah J. Wiseman, and Samuel R. Wiseman make a similar claim—stating that “the Third Amendment gives Congress the power to prescribe laws for the quartering of troops during wartime and with the owner’s consent during times of peace.”<sup>111</sup> This characterization is because the Third Amendment is a limit—not a grant—of government power.<sup>112</sup> Instead, the power to quarter troops derives from Article I, Section 8 of the Constitution, which gives Congress the power to “raise and support

---

107. *Id.* at 518–20.

108. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242–43 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and ruling that the Constitution does not protect the right to obtain an abortion); Carl Hulse & Lisa Lerer, *Supreme Court Case Throws Abortion into 2022 Election Picture*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2021/05/20/us/politics/abortion-2022-midterm-elections.html>; Edgar Sandoval & Dave Montgomery, *Near-Complete Ban on Abortion is Signed into Law in Texas*, N.Y. TIMES (May 19, 2021), <https://www.nytimes.com/2021/05/19/us/texas-abortion-law.html>.

109. Boone, *supra* note 105, at 516.

110. *Id.* at 516 n.28.

111. David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1237 (2020).

112. Landau et al. rely on Nicholas Quinn Rosenkranz’s *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1030 (2011)—citing Rosenkranz’s argument that the Third Amendment “expressly limits the President, requiring that Congress, not the President, shall determine how troops are to be quartered.” Landau et al., *supra* note 111, at 1237 n.291. Rosenkranz, though, does not characterize the Third Amendment as a grant of power to Congress—he only goes so far as to argue that it “cannot be a restriction on Congress, because it expressly contemplates that Congress may authorize quartering.” Rosenkranz, *supra*, at 1030. An amendment’s non-application to a particular branch of government is not the same as an express grant of power to that branch of government.

armies,” as well as to call forth the militia and to organize, arm, and discipline the militia.<sup>113</sup>

The Third Amendment comes up multiple times in articles on the Second Amendment. Robert Spitzer criticizes Justice Clarence Thomas’s characterization of the Second Amendment as a “disfavored right” and “constitutional orphan,”<sup>114</sup> arguing that such calls for identical treatment and attention warrant similar complaints about the Third Amendment’s lack of judicial attention.<sup>115</sup> Stephen Halbrook references the Third Amendment, along with the Fourth Amendment, as examples of instances where the scope of the amendment is explicitly restricted to the home.<sup>116</sup> The upshot, Halbrook argues, is that the Second Amendment’s lack of a similar limitation suggests that the right to keep and bear arms extends beyond the home.<sup>117</sup>

Halbrook’s brief reference to the Third Amendment is in the same vein as the most in-depth treatment of the Third Amendment to come out of 2020. That honor belongs to Gerald Dickinson, whose article, *Intratextual and Intradoctrinal Dimensions of the Constitutional Home*, urges a comparative approach to the text and doctrine of constitutional amendments in determining the scope and meaning of these amendments.<sup>118</sup> Dickinson appears to urge a contrary inference from the one Halbrook urges, suggesting that the Third Amendment, along with the Fourth Amendment, supports the limitation of the holding in *District of Columbia v. Heller*<sup>119</sup> to the right to bear arms in the home.<sup>120</sup> Dickinson’s argument is tenuous as a matter of Second Amendment doctrine after *Heller*, as *Heller* arguably involved the right to *keep* arms, rather than the right to *bear* arms.<sup>121</sup> While Dickinson characterizes *Heller* as finding a right to “bear” arms in the home, the very excerpt he quotes from the *Heller* opinion is a quote in

---

113. U.S. CONST. art. I, § 8.

114. *Silvester v. Becerra*, 138 S. Ct. 945, 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari).

115. Robert J. Spitzer, *Gun Accessories and the Second Amendment: Assault Weapons, Magazines, and Silencers*, 83 L. & CONTEMP. PROBS. 231, 254 (2020).

116. Stephen P. Halbrook, *The Right to Bear Arms: For Me, but Not for Thee?*, 43 HARV. J. L. & PUB. POL’Y 331, 331 (2020).

117. *Id.*

118. See Gerald S. Dickinson, *Intratextual and Intradoctrinal Dimensions of the Constitutional Home*, 15 DUKE J. CONST. L. & PUB. POL’Y 291 (2020).

119. 554 U.S. 570 (2008).

120. Dickinson, *supra* note 118, at 299.

121. 554 U.S. at 614–16.

which Justice Antonin Scalia described that the founding generation supported “every man *bearing* his arms about him and *keeping* them in his house, his castle, for his own defense.”<sup>122</sup>

Dickinson’s argument goes beyond the Second Amendment, though, and is an example of how a relatively obscure provision like the Third Amendment may be employed in the analysis of other constitutional provisions.<sup>123</sup> In the vein of other 2020 scholars, Dickinson cites the Third Amendment as supporting the unique sanctity of the home when read in the context of the Fourth Amendment.<sup>124</sup> Dickinson also evaluates whether the quartering of soldiers would give rise to a parallel “taking” under the Fifth Amendment, concluding that it may well qualify as a partial taking as a result of the lost value of the property while quartering is taking place.<sup>125</sup>

While Dickinson’s article was one of the few sustained treatments of the Third Amendment in 2020, this survey of the year’s scholarship demonstrates how the Third Amendment manages to consistently pop up in legal academic literature. The Third Amendment serves as a frequent supporting example—a reliable “see also” to points about the Second, Fourth, and Fifth Amendments. While the quartering of soldiers is not something that weighs on the minds of scholars and the general public, people do recognize the importance of the home and freedom from government intrusion—and it is worth noting that the Third Amendment embodies these principles as well.<sup>126</sup>

### C. The Third Amendment in Current Events and Popular Media

In an ideal year, there should be little for me to say in this subpart. Parties may raise the Third Amendment in the odd court case. We should not be surprised by legal scholars and writers searching for distractions and entertainment by writing about the Third Amendment.<sup>127</sup> But in an ordinary year, there probably will

---

122. See Dickinson, *supra* note 118, at 299 n.50 (quoting *Heller*, 554 U.S. at 615–16, 635) (emphasis added).

123. *Id.* at 293.

124. *Id.* at 314.

125. *Id.* at 317–18.

126. See U.S. CONST. amend. III.

127. See, e.g., Michael L. Smith, *The Third Amendment in 2020*, 52 STETSON L. REV. 55 (2022).

not be much coverage or discussion of the Third Amendment in the news or in mainstream media publications.

The year 2020 was far from ordinary. The COVID-19 pandemic upended plans, resulted in lockdowns and other restrictions, and prompted wild political debates over these safeguards and other basic safety measures.<sup>128</sup> As it turns out, the venerable Third Amendment was not left out of the pandemic discourse.

The main event for the Third Amendment was a spat between the mayor of Washington, D.C., and President Trump in June 2020.<sup>129</sup> Following the death of George Floyd at the hands of police officers in Minneapolis on May 25, 2020, protests swept across the country.<sup>130</sup> Thousands of protestors gathered in Washington, D.C., in early June to protest the killing of George Floyd, police brutality, and racial oppression.<sup>131</sup> After National Guard troops were deployed to Washington, D.C., a dispute arose over whether Utah National Guard troops could stay in a particular hotel.<sup>132</sup> This gave rise to a surge of news coverage and discussion of whether those troops' presence violated the Third Amendment.<sup>133</sup>

1. *The Washington, D.C., National Guard Hotel Dispute and the Third Amendment's Moment in the Spotlight*

On May 25, 2020, George Floyd was killed while being arrested by several police officers in Minneapolis.<sup>134</sup> After video footage circulated showing police officer Derek Chauvin holding Floyd to the ground by holding his knee on Floyd's neck, protests

---

128. *COVID-19 Anti-Lockdown Protests in the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/COVID-19\\_anti-lockdown\\_protests\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/COVID-19_anti-lockdown_protests_in_the_United_States) (last visited Aug. 25, 2022).

129. Thomas Burr, *Utah National Guard Troops Deployed to D.C. Moved to New Hotel Amid Political Skirmish*, SALT LAKE TRIB. (June 5, 2020, 4:57 PM), <https://www.sltrib.com/news/politics/2020/06/05/utah-national-guard/>.

130. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

131. Patricia Sullivan et al., *Thousands Gathered Across City to Protest Death of George Floyd*, WASH. POST (June 7, 2020, 12:26 AM), <https://www.washingtonpost.com/dc-md-va/2020/06/06/dc-protests-saturday-george-floyd/>.

132. Burr, *supra* note 129.

133. John Haltiwanger, *Trump and the Threat of the Military in US Cities Has Made the Third Amendment Suddenly Relevant. Here's What It Means.*, BUS. INSIDER (June 5, 2020, 10:32 AM), <https://www.businessinsider.com/third-amendment-new-relevant-thanks-to-trump-military-us-cities-2020-6>.

134. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

erupted across the nation.<sup>135</sup> Chauvin was eventually convicted of second-degree murder on April 20, 2021.<sup>136</sup>

The death of George Floyd prompted protests and demonstrations across the country.<sup>137</sup> In some cities, protesters and police clashed, buildings were set on fire, and businesses were looted.<sup>138</sup> Washington, D.C., was no exception, and repeated protests led to police responding with tear gas and Mayor Muriel Bowser activating the National Guard and imposing a curfew.<sup>139</sup>

National Guard soldiers, including approximately 200 soldiers from Utah, were deployed to Washington, D.C., on Monday, June 1, 2020.<sup>140</sup> These troops joined about 1,300 soldiers from Washington, D.C.'s National Guard, along with soldiers from New Jersey.<sup>141</sup> As the week went on, the number of National Guard troops in town quickly expanded—with thousands more present or en route by Thursday, June 4.<sup>142</sup> These soldiers were involved with repairing damage and supporting local authorities in responding to ongoing protests.<sup>143</sup>

Before long, Mayor Muriel Bowser announced that she wanted out-of-state troops to leave the city.<sup>144</sup> In a June 5 letter to President Trump, Mayor Bowser demanded the removal of “all extraordinary federal law enforcement” and military personnel

---

135. *How George Floyd Died, And What Happened Next*, N.Y. TIMES (May 19, 2021), <https://www.nytimes.com/article/george-floyd.html>.

136. *Id.*

137. Brakkton Booker et al., *Violence Erupts as Outrage Over George Floyd's Death Spills into a New Week*, NPR (June 1, 2020, 1:30 AM), <https://www.npr.org/2020/06/01/866472832/violence-escalates-as-protests-over-george-floyd-death-continue>.

138. *Id.*

139. Shawn McCreesh, *Protests Near White House Spiral Out of Control Again*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/05/31/us/politics/washington-dc-george-floyd-protests.html>.

140. Thomas Burr, *Hundreds of Utah National Guard Soldiers Deployed in Washington, D.C., to Quell Protests*, SALT LAKE TRIB. (June 2, 2020, 5:53 PM), <https://www.sltrib.com/news/politics/2020/06/02/hundreds-utah-national/>.

141. *Id.*

142. Veronica Stracqualursi & Nicky Robertson, *DC Mayor Says She Wants Out-of-State Troops “Out of Washington,”* CNN (June 4, 2020, 3:39 PM), <https://www.cnn.com/2020/06/04/politics/dc-mayor-federal-troops-floyd-protests/index.html> (stating that over 4,500 troops were present by June 4); David Lawder & Jonathan Landay, *DC Mayor Wants Trump's Out-of-State Troops Gone from U.S. Capitol*, REUTERS (June 4, 2020, 7:47 PM), <https://www.reuters.com/article/us-minneapolis-police-protests-washingto/d-c-mayor-wants-trumps-out-of-state-troops-gone-from-u-s-capital-idUSKBN23B3HS> (estimating that 3,300 national guardsmen were in DC or were en route from other states).

143. Thomas Burr, *What it's Like for Utah National Guard Troops Deployed in D.C.*, SALT LAKE TRIB. (June 4, 2020, 7:30 PM), <https://www.sltrib.com/news/politics/2020/06/04/what-its-like-utah/>.

144. Stracqualursi & Robertson, *supra* note 142.

and stated that the deployment of federal personnel was “inflaming demonstrators,” who were engaged in peaceful protests.<sup>145</sup>

The 200 Utah National Guard troops were caught up in this dispute and soon found that their housing was in flux.<sup>146</sup> On the evening of June 4, Utah Senator Mike Lee accused Mayor Bowser of “evicting” Utah’s National Guard soldiers from the hotel where they had been staying.<sup>147</sup> Mayor Bowser stated that D.C.’s contract with the hotel where the Utah troops were staying only permitted the housing of National Guard soldiers who were “supporting the coronavirus outbreak response” and that this did not extend to soldiers responding to protestors who the District had not requested.<sup>148</sup> Mayor Bowser assured Senator Lee that the soldiers would be permitted to stay in D.C. hotels, but that D.C. would not pay their hotel bills.<sup>149</sup> President Trump soon chimed in to defuse the situation in his trademark fashion, calling Mayor Bowser “incompetent,” accusing her of having a budget that was “totally out of control,” and claiming that the National Guard had saved her “from great embarrassment.”<sup>150</sup> The Utah National Guard troops were eventually moved to a different hotel.<sup>151</sup>

It does not appear that Mayor Bowser ever invoked the Third Amendment during this dispute over the housing of Utah’s National Guard troops.<sup>152</sup> But commentators began discussing the possibility that the National Guard soldiers’ presence at the hotel constituted a Third Amendment violation—and some of these remarks got quite a bit of attention on Twitter.<sup>153</sup> Despite the efforts of several legal commentators who insisted that Third

---

145. Amanda Macias, *DC Mayor Tells Trump to Remove Federal Law Enforcement and Military from the City as George Floyd Protests Continue*, CNBC (June 5, 2020, 2:34 PM), <https://www.cnbc.com/2020/06/05/george-floyd-protests-dc-mayor-tells-trump-to-remove-federal-officers-military-from-city.html>.

146. Burr, *supra* note 129.

147. *Id.*; see also Mike Lee (@SenMikeLee), TWITTER (June 4, 2020, 12:09 AM), <https://twitter.com/SenMikeLee/status/1268756694252863488>.

148. Burr, *supra* note 129.

149. *Id.*

150. *Id.* (quoting Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2020)).

151. Burr, *supra* note 129.

152. *Id.*

153. See, e.g., @carterforva, TWITTER (June 5, 2020, 1:15 AM), <https://twitter.com/carterforva/status/1268773466079211520> (Mr. Carter quote-tweeted Senator Lee’s complaint over the National Guard being “evicted” from DC hotels with the comment, “Holy shit it’s finally happening. I get to say it. THIRD AMENDMENT RIGHTS, ASSHOLE!” As of May 19, 2021, the tweet has over 15,000 retweets and over 74,000 “likes.”).

Amendment claims were not the answer,<sup>154</sup> several news outlets stated that Mayor Bowser appeared to be invoking the Third Amendment.<sup>155</sup> Other outlets and commentators, while steering clear of the misstatement that the mayor had invoked the Third Amendment, began discussing the Third Amendment and whether it applied to the situation.<sup>156</sup> At least one commentator went so far as to claim that there was a “Third Amendment Crisis.”<sup>157</sup>

There were several problems with the notion that the Third Amendment applied to the D.C. hotel dispute. First, it was not apparent that anyone had invoked the Third Amendment.<sup>158</sup> Mayor Bowser never appeared to have mentioned it.<sup>159</sup> And even if she had, it is not clear if this would have made any difference as it was ultimately up to the hotels to decide whether they wanted to raise a Third Amendment violation, since they were the ones housing the soldiers.<sup>160</sup> There was never any suggestion that any D.C. hotels raised a Third Amendment objection to housing National Guard soldiers.<sup>161</sup> Indeed, the hotels likely would have welcomed the business that these soldiers would have brought, as the hotel business was still suffering greatly as a result of the COVID-19 pandemic.<sup>162</sup>

Second, there was the question of whether hotels were “houses” within the meaning of the Third Amendment. Several commentators asserted that the Third Amendment did not apply

---

154. See Steve Vladeck (@steve\_vladeck), TWITTER (June 5, 2020, 10:10 AM), [https://twitter.com/steve\\_vladeck/status/1268908065316880385](https://twitter.com/steve_vladeck/status/1268908065316880385) (“Stop trying to make the Third Amendment happen. It’s. Not. Going. To. Happen.”). Don’t tell me what to do, Steve.

155. See Mary Richards, *Sen. Lee Says Utah National Guard Kicked Out of DC Hotel*, KSL NEWS RADIO (June 5, 2020, 10:19 AM), <https://kslnnewsradio.com/1926641/utah-national-guard-kicked-out-of-dc-hotel/> (reporting that Mayor Bowser “seemed to be invoking the 3rd Amendment”); *What Is the Third Amendment and Can It Be Applied Now?*, AS (June 6, 2020, 11:03 AM), [https://en.as.com/en/2020/06/06/other\\_sports/1591455316\\_049832.html](https://en.as.com/en/2020/06/06/other_sports/1591455316_049832.html) (reporting that Mayor Bowser “had invoked” the Third Amendment).

156. See Haltiwanger, *supra* note 133; Jessica Mason, *For the First Time in Centuries, the Third Amendment Matters*, THE MARY SUE (June 5, 2020, 12:07 PM), <https://www.themarysue.com/what-is-the-third-amendment/>.

157. See Elly Belle, *America Is Facing a Third Amendment Crisis*, REFINERY29 (June 5, 2020, 12:44 PM), <https://www.refinery29.com/en-us/2020/06/9855812/trump-military-third-amendment-blm-twitter>.

158. See *Washington DC Mayor Muriel Bowser Press Conference Transcript June 4*, REV (June 4, 2020), <https://www.rev.com/blog/transcripts/washington-dc-mayor-muriel-bowser-press-conference-transcript-june-4>.

159. *Id.*

160. See Haltiwanger, *supra* note 133.

161. Burr, *supra* note 129.

162. Haltiwanger, *supra* note 133 (describing hotels as “desperate for cash”).

to the situation because hotels were not covered by the Third Amendment.<sup>163</sup> While these commentators had a point, the issue may be more of an open question than it first appears. After all, the court in *Engblom v. Carey* warned against applying the Third Amendment in a more restrictive manner than the Fourth Amendment—applying the Third Amendment’s protection of “house[s]” to an apartment-like dwelling and referencing the Fourth Amendment’s protection of privacy interests in a wide variety of areas, including hotel rooms.<sup>164</sup> If courts were to apply the expansive reasoning used in *Engblom* to the D.C. hotel dispute, they may well end up finding that the Third Amendment applies. Of course, such a broad application is not a given. *Engblom* is only one decision, and there is the readily available counterargument that it is not unusual for the Third Amendment to have a less extensive scope than the Fourth Amendment. After all, they are two different amendments, and if someone’s Fourth Amendment rights are violated, they may assert a Fourth Amendment claim.

As other legal commentators and I predicted,<sup>165</sup> the D.C. hotel dispute did not lead to Third Amendment litigation. It did, however, draw an unusual amount of attention to the largely forgotten Third Amendment and may have prompted several columns providing general explanations of the Third Amendment and its history.<sup>166</sup> While the June 2020 Third Amendment discussion certainly had its share of inaccuracy, unsupported claims, and bad arguments, it gave people a chance to educate

---

163. See Rick Aaron, *Given the Boot: Utah National Guard Soldiers Forced to Relocate During Washington D.C. Deployment*, ABC4.COM (June 5, 2020, 5:27 PM), <https://www.abc4.com/news/local-news/given-the-boot-utah-national-guard-soldiers-forced-to-relocate-during-washington-d-c-deployment/> (quoting law professor Paul Cassell, who stated that the Third Amendment did not apply because they were “quartered in hotels not houses, that are covered by the Third Amendment;” Cassell also noted that it was his understanding that the hotels consented to the soldiers’ presence).

164. See *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982).

165. See Michael L. Smith, *Does Quartering Troops in Hotels Implicate the Third Amendment?*, MICHAEL SMITH’S L. BLOG (June 5, 2020, 1:45 PM), <https://smithblawg.blogspot.com/2020/06/does-quartering-troops-in-hotels.html>; see also Brian L. Frye, *My House, My Rules: A Brief History of the Third Amendment*, MEDIUM (June 6, 2020), <https://medium.com/i-taught-the-law/my-house-my-rules-a-brief-history-of-the-third-amendment-3f57569b758> (predicting that the Third Amendment would “probably continue to slumber in benign neglect”).

166. See Becky Little, *Why We Have the Third Amendment—And Why It Rarely Comes Up in Court*, HIST. (June 5, 2020), <https://www.history.com/news/third-amendment-constitution-james-madison>; Philip Morgan, *The Constitution’s Ignored Stepchild: The Third Amendment*, LEGAL EXAM’R (Aug. 7, 2020), <https://www.legalexaminer.com/home-family/the-constitutions-ignored-stepchild-the-third-amendment/>.



themselves on a part of the Constitution that they likely never knew existed.

## 2. *COVID-19 Restrictions and the Third Amendment*

In October 2020, Alexander Zhang published an article in *The Atlantic* suggesting that the Third Amendment could support a “right to be protected from infection.”<sup>167</sup> Zhang’s theory is based on the history of the Third Amendment and a survey of negative colonial attitudes against the quartering of British soldiers in private residences.<sup>168</sup> Zhang points to several sources that he claims demonstrate that colonists were worried about being infected by quartered soldiers.<sup>169</sup> From these sources, Zhang suggests that the Third Amendment could be interpreted as a right against being forced to house people who might carry diseases.<sup>170</sup> He also proposes an even broader approach to the Third Amendment if the term “house” is “understood expansively” (read, removed from the amendment), to support a “general right to be free from being forced to come into close contact with diseases.”<sup>171</sup> The upshot of such a right is unclear—as the Third Amendment restriction on government action is now replaced with a broader restriction against being placed in a scenario where one may come in contact with a disease.

While Zhang’s argument is creative, its disconnect from the text of the Third Amendment makes it unlikely that a court would recognize such a broad reading. Beyond this, there are several other issues with Zhang’s argument.

First, it is not apparent that concern over disease motivated the adoption or was even considered during the debate over and ratification of the Third Amendment.<sup>172</sup> Zhang references an instance where “discontent” with soldiers grew after Albany residents learned that the soldiers had smallpox.<sup>173</sup> But the source Zhang cites goes on to describe the conflict between Albany’s

---

167. Alexander Zhang, *The Forgotten Third Amendment Could Give Pandemic-Struck America a Way Forward*, *THE ATLANTIC* (Oct. 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/could-third-amendment-protect-against-infection/616791/>.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* (citing DOUGLAS EDWARD LEACH, *ROOTS OF CONFLICT: BRITISH ARMED FORCES AND COLONIAL AMERICANS, 1677–1763*, at 91 (1986)).

inhabitants and the soldiers and primarily attributes it to the “loutish” behavior demonstrated by those soldiers in reaction to Albany’s hostile attitude towards them.<sup>174</sup> Another source Zhang cites references a concern about increasing rates of smallpox among British troops which, along with worsening weather, prompted a British commander to contemplate seeking a warrant to have his troops quarter in private residences in Philadelphia.<sup>175</sup> The next source Zhang cites notes that this threat of quartering and the prospect of soldiers marching into town to secure these quarters prompted Benjamin Franklin and other commissioners to agree to provide additional housing and hospital space to the soldiers.<sup>176</sup> If soldiers’ infectious status motivated the provision of additional housing (rather than the prospect of troops marching into town and taking over private residences by force), this is not apparent from the sources Zhang cites. While Zhang acknowledges that disease was not mentioned in the broadly framed debates over the Third Amendment, he contends that the founders “had been entangled in this history of disease and likely understood its relevance.”<sup>177</sup> Such speculation over the motivations of the founders is an insufficient basis for deriving a broad right against infection from the relatively specific text of the Third Amendment. Zhang’s assertion that “disease prevention was actually built into the Constitution” therefore strays well beyond the text.<sup>178</sup>

Second, the logic of deriving a broad right from concerns that the founders may have had can justify all manner of rights and restrictions against the government. For instance, one reason why colonists were likely opposed to quartering soldiers was the concern that those soldiers would eat much of the food in private residences.<sup>179</sup> From this, a general right against providing provisions to the government could be formulated—a right that could have been used to overturn rationing schemes in place during World Wars I and II and that could be used today to oppose

---

174. LEACH, *supra* note 173.

175. See 7 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA, FROM THE ORGANIZATION TO THE TERMINATION OF THE PROPRIETARY GOVERNMENT 358–59 (1851).

176. See ALAN ROGERS, EMPIRE AND LIBERTY: AMERICAN RESISTANCE TO BRITISH AUTHORITY, 1755–63, at 81 (1974).

177. Zhang, *supra* note 167.

178. *Id.* I recognize, though, that Zhang’s argument was presented in the course of an Atlantic article, not a law review article, and there may be additional sources or bases for his interpretation that may not have made it into such a restrictive medium.

179. See *What Is the Purpose of the Third Amendment?*, FINDLAW (May 19, 2021), <https://constitution.findlaw.com/amendment3.html>.

governmental restrictions on food standards. If this seems like a leap, it is! But this argument employs the same logic used to transform the Third Amendment's prohibition on the quartering of soldiers in houses into a generalized right to be free from disease.

Finally, a general right to be free from disease is out of place in the Bill of Rights, which restricts the government from taking certain actions. Zhang's broad reading of the Third Amendment transforms the amendment from a restriction on the government's ability to house soldiers in private residences and transforms it into a right against any third party or set of circumstances that may result in infection. Because such a broad right contrasts with the governmental restrictions in the surrounding amendments, this interpretation is questionable.<sup>180</sup>

This all may seem to be a fairly exhaustive response to a specific take on the Third Amendment. But it is consistent with my default, critical approach to Third Amendment scholarship that stretches the text of the Amendment too far.<sup>181</sup> My hope for this Article to mark the start of an ongoing series of yearly updates on Third Amendment law, scholarship, and news is genuine. But when discussion of the Third Amendment goes astray and stretches the text of the amendment beyond any reasonable interpretation, such treatment ought to be called out. If the Third Amendment is to gain back its missing respect,<sup>182</sup> discussion and scholarship regarding the Third Amendment should be serious. Where scenarios are hypothetical, they should be labeled as such. When the conclusion is that the Third Amendment does not apply, that conclusion should be embraced. It is folly to suppose that knowledge is not gained by work that concludes that the Third Amendment is, indeed, inapplicable to a particular present-day

---

180. See Gerald S. Dickinson, *Intratextual and Intradoctrinal Dimensions of the Constitutional Home*, 15 DUKE J. CONST. L. & PUB. POL'Y 291, 302 (2020) (urging that the Bill of Rights amendments, including the Third Amendment, be read in the context of the text and doctrine of other amendments in the Bill of Rights).

181. See Michael L. Smith, *The Third Amendment and Cybersecurity: Quirky but Mistaken*, MICHAEL SMITH'S L. BLOG (Sept. 22, 2013, 10:19 PM), <https://smithblawg.blogspot.com/2013/09/the-third-amendment-and-cybersecurity.html> (critiquing Alan Butler's article, *When Cyberweapons End up on Private Networks: Third Amendment Implications for Cybersecurity Policy*, 62 AM. U. L. REV. 1203 (2013)—an article that suggested that the Third Amendment be interpreted to frame computer viruses as "soldiers," computers as "houses," and the presence of a virus in a computer network as "quartering").

182. See Reynolds, *supra* note 1, at 491 ("For many years, the Third Amendment to the Constitution has been the Rodney Dangerfield of the Bill of Rights, getting no respect.")

situation. While such a conclusion may not end up changing courts' decisions, it adds to the body of work on this neglected amendment and makes us all a little bit smarter.

#### IV. *CONCLUSION: AN ACTIVE YEAR*

The chaotic, unpleasant nature of 2020 is reflected in the state of the year's Third Amendment law, scholarship, and popular discourse. While cases and scholarship referenced the Third Amendment at normal levels, popular discussion of the amendment reached notable heights in the wake of the pandemic and military responses to widespread protests. For now, the discussion seems to have died down, as the protests faded and as National Guard members returned to their home states. One wonders whether the coming years will bring an influx of student notes on the scope of the Third Amendment in light of the Washington, D.C., hotel dispute. We will have to wait for the next article in this series to see.

This Article's snapshot of the Third Amendment in 2020 serves as a window into a moment of Third Amendment law. Some aspects will likely remain consistent in future articles—with the Third Amendment being invoked in various writ proceedings and referenced by courts and scholars as one of several amendments cited in support of a right to privacy and other broader concepts. Authors will continue to reference the Third Amendment, often in passing and occasionally in creative hypothetical scenarios. One can only hope that real-world events remain tame and do not prompt further widespread public attention toward the Third Amendment. In the meantime, this Article, and others like it, will monitor the state of the Third Amendment—with the ultimate aim of shedding a little more light each year on this forgotten part of our Constitution and history.