NOTES

Into the Weeds of the Third Amendment: Constitutional Protections for At-Home Marijuana Use

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ABSTRACT

The text of the Constitution sets up a series of checks countering the overgrowth of the State's power. The Bill of Rights follows in a similar vein; the principles of these amendments outline citizen-counters to the potentially tyrannical reach of the government. While the Third Amendment has lacked many advocates to date, I believe it has modern applications. Using the original public meaning of the amendment, this Note argues that while the Third Amendment deals particularly with the quartering of soldiers, it also acts as a restraint on government by restricting the state's presence in one's home.

Specifically, I argue that the Third Amendment provides constitutional protection for individuals to grow and consume marijuana within their homes. This does not mean that the government may not regulate any marijuana use; rather, in these narrow circumstances—instances in which marijuana is grown and subsequently used within one's home—the state lacks an invitation to intervene in private life.

To substantiate this view, I examine historical sources. These illustrate the circumstances surrounding the adoption of the Third Amendment and its intended function. I then analyze two relatively recent Supreme Court decisions, Kyllo v. United States *and* Gonzales v. Raich. *These cases both dealt with marijuana grown in homes. However, as I will attempt to describe, the facts of the latter case would lead to a very different outcome in light of this newly proposed interpretation of the Third Amendment.*

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* B.A., Columbia University; J.D., Georgetown University Law Center. I'm so thankful for the many people who made this possible. To my friends—Sam Adler, Mike Nisper, Matthew Schaefer and Justin Winas—who helped turn our amusement with the Third Amendment into a paper. To my brother, Josh, who reminds me to love the law with every conversation. And to Begonia El Koury who managed to edit this all the way from Scotland. My thanks, most of all, to my parents, who encourage me to write every idea down—no matter how outlandish any one may seem. Lastly, all my gratitude to the *Journal of Law & Public Policy*'s wonderful staff. I'm so fortunate to be a part of this journal. All errors are begrudgingly my own.

I. INTRODUCTION

The Bill of Rights sets up checks on the federal government's power: it protects an individual's speech (First Amendment), an individual's right to possess a firearm (Second Amendment), an individual's personal possessions (Fourth Amendment), and, even on a macro level, the rights of individual states that make up our union (Tenth Amendment).[1] These amendments demonstrate that the Bill of Rights is not solely about protecting the rights of political minority groups, but is, like the Constitution itself, about outlining a structure of government based around preventing the excesses of government intervention.[2] In the words of Akhil Amar:

> [I]ndividual and minority rights did constitute a motif of the Bill of Rights—but not the sole, or even the dominant, motif. A close look at the Bill reveals structural ideas tightly interconnected with language of rights . . . [yet] the genius of the Bill was not to downplay organizational structure but to deploy it, not to impede popular majorities but to empower them.[3]

Or, as James Madison poignantly writes in *The Federalist* No. 51, "[it] is of great importance in a republic not only to guard the society against the oppression of its rules, but to guard one part of the society against the injustice of the other part."[4] Thus, the United States' government is structured both to ensure that

1. Patrick M. Garry, *Liberty through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. REV. 1745 (2009).

2. *Id*. at 1754–55.

3. AKHIL REED AMAR, *Introduction* to THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, at xii (1998).

4. THE FEDERALIST NO. 51 (James Madison).

internal factional divides cancel one another out and to create an external counterweight to government power in the body politic.

This note assumes that the principles embodied in the Bill of Rights and the Constitution establish protections for citizens against government power and may even provide citizens with the ammunition to "check" government itself. However, a specific, and oft-forgotten, amendment will serve as the main guide to underscore this point and even highlight where laws today violate its guarantees: The Third Amendment and its anti-quartering provisions. Maybe there is no explicit modern link to highlight the tug-and-pull of rights between the government and its citizens and this amendment; it does not help that the rather inconspicuous text of the amendment belies its importance: "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."[5]

On its face, the message of this amendment is ostensibly clear: Soldiers may not occupy private homes by force.[6] To this end, this anachronistic focus may be why there has never been a Supreme Court challenge to the extent of the Third Amendment's protections and why only one major case has dealt with this portion of the Bill of Rights.[7]

But this amendment deserves its day in the high court. The Third Amendment stands for something: the intervention of apparatuses of the state within citizens' homes without their consent. Some have argued that the National Security Agency's bulk collection of data is not only a violation of the Fourth Amendment, but also the Third on these grounds.[8] Similarly, the only significant case that addressed the Third Amendment held that because the National Guard is a collection of "soldiers," their quartering during national emergencies may similarly violate the protections found in this amendment.[9] I take a similar tack here with a different policy focus: the use of marijuana within one's home, in certain quantities and all the while never crossing state lines, is within the bounds of the Third Amendment's protections. This is not exactly because one is afforded the "privacy" to do so (perhaps they may, even still[10]) but rather because agents of the government, by and large, are forbidden within a home. Two cases, *Kyllo v. United States*[11] and *Gonzales v. Raich*,[12] both deal with marijuana in homes. They also reached very different outcomes as to the protections afforded to

5. U.S. CONST. amend. III.

6. *See* Gordon Wood, *Interpretation: The Third Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-iii/interps/123 [https://perma.cc/28C4-ZCD7].

7. *See* Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209 (1991).

8. Glenn Harlan Reynolds, *Should 3rd Amendment Prevent Government Spying?*, USA TODAY (July 22, 2013, 11:24 AM), https://www.usatoday.com/story/opinion/2013/07/22/third-amendment-nsa-spying-column/2573225/ [https://perma.cc/Z3TZ-68UZ].

9. Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982).

10. *See* AMAR, *supra* note 3, at 62.

11. Kyllo v. United States, 533 U.S. 27 (2001).

12. Gonzales v. Raich, 545 U.S. 1 (2005).

citizens. As a result, *Kyllo* and *Raich* seem to be apt foils with respect to the conversation regarding at-home marijuana use. Particularly with *Raich*, the Third Amendment's protections buttress claims that a citizen should be able to grow and consume an "illicit" substance within the confines of his home—implicitly rejecting the presence of the state by not venturing outside these walls.

The Third Amendment also reinforces the Constitution's emphasis on protecting property rights as a pseudo-proxy for protecting against the overreach of the government. But, importantly, it is a unique kind of property—one's home (not a shop or a farm or even one's car)—that this amendment cares so deeply about.[13] Thus, this is not to say the federal government does not have the power to, say, regulate the sale of drugs between states (or for that matter that individual state governments cannot regulate the sale or production of drugs within its state broadly[14]), but rather to suggest that within the confines of a clearly demarcated space, the State is not welcome. This is because the Third Amendment acts as a check against government power explicitly and exclusively within the home, not just as a reinforcement of one's right to privacy.

Part II outlines the history of the Third Amendment, highlighting not only the events leading up to the passage of the amendment by the former colonies but also the basis of anti-quartering provisions in England centuries prior to the ratification of our Constitution. Part III explores the text of the amendment and examines two specific components—the understanding of "soldiers" and one's "home"—as they likely meant to the Framers and how they will be used to understand the two cases dealing with marijuana in Part III. Following this discussion, I will share the facts and relevant passages from the opinions of both *Kyllo* and *Raich* in Part IV. Finally, in Part V, I will link Parts II, III, and IV together to show how this interpretation, in light of the history and understanding of the amendment, modify our understanding of marijuana consumption (and even growth) in one's home: It is essentially protected not just by other provisions of the Constitution but, specifically, the Third Amendment.

II. HISTORY OF THE THIRD AMENDMENT

As with much of our early Republic, the story of the Third Amendment begins centuries earlier and across the Atlantic Ocean in England. Indeed, British anti-quartering provisions began in the Middle Ages, with one of the earliest being King Henry I's London Charter of 1130.[15] Later, and most prominently, the 1689 English Bill of Rights (which motivated many provisions of our own Bill of

13. John Gamble, *The Third Artefact: Beyond Fear of Standing Armies and Military Occupation, Does the Third Amendment Have Relevance in Modern American Law?*, 6 ALA. C.R. & C.L. L. REV. 205, 219 (2015) ("Americans generally read their emails and engage in other online activities from within the privacy of their homes").

14. *See Raich*, 545 U.S. at 2231 (Thomas, J., dissenting).

15. 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, 399 (1991).

Rights, such as the second amendment[16]), accused King James II of "quartering soldiers contrary to law."[17] Though the English Bill of Rights condemned quartering, it was ultimately the Mutiny Act which formally outlawed the "quartering of soldiers in private homes without the consent of the property owner."[18]

Accordingly, in the colonies, "few of the ancient English constitutional rights were as well known to the American colonists as the traditional disdain for standing armies."[19] Indeed, among the litany of "abuses and usurpations" outlined in the Declaration of Independence,[20] the colonists accused the king of violating their fundamental rights by "quartering troops" among the people.[21] Just prior to the Revolutionary War, in fact, two English laws permitted quartering in the colonies. One, the 1765 Quartering Act, stated that British soldiers may be housed in public facilities or "uninhabited structures, barns, and outhouses."[22] But its successor, the Quartering Act of 1774, caused the most uproar.[23] This law permitted quartering "without the concurrence of colonial councils or assemblies."[24] It may have also allowed quartering in private homes[25]—gone were the days of soldiers confined to the barn and in its place came conscripted co-living.

To this end, "in the years immediately prior to the creation of the Constitution, there was broad popular support in the colonies for legal restrictions on quartering."[26] And, in the following period prior to the Constitution's ratification, Anti-Federalists bemoaned the lack of an anti-quartering provision.[27] In one Anti-Federalist response to the proposed (and later ratified Constitution), pseudonymous author "Federal Farmer" wrote that "[there was no] provision in the constitution to prevent the quartering of soldiers" which, though it posed no "immediate danger," was "fit and proper to establish" because it was "essential to the permanency and duration of free government."[28] Two notable Framers concurred: Samuel Chase announced his opposition to the Constitution because it gave Congress the "right to quarter soldiers in our private homes"[29] and Patrick Henry noted that, in spite of the fact that among the colonists' "first complaints . . . was the quartering of troops," the Constitution nonetheless

16. *See* Gamble, *supra* note 13, at 206.
17. *See* Fields & Hardy, *supra* note 15, at 405.
18. *See* Gamble, *supra* note 13, at 208.
19. *Id.* at 209.
20. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
21. *See id.*
22. Thomas G. Sprankling, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses*, 112 COLUM. L. REV. 112, 125 (2012).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 127.
28. FEDERAL FARMER NO. 16 (1788), *reprinted in* PHILLIP KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 217 (1987).
29. Samuel Chase, Address at the Maryland Ratifying Convention (Apr. 1788), *in* NEIL COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 322 (1944).

implicitly allowed "troops in time of peace . . . [to be] billeted in any manner—to tyrannize, oppress, and crush us."[30]

It should be no surprise then that "every draft of the Bill of Rights included an anti-quartering provision," and the Annals of Congress indicate that the inclusion of such a provision was not "controversial."[31] This history—in both the colonies and abroad—thus gave birth to the present-day text and protections of the Third Amendment.

III. INTERPRETATION OF THE THIRD AMENDMENT AND A NEW APPROACH

Before delving into the past and my proposed interpretation of the Third Amendment, it is necessary to better clarify the original meaning of the text and, importantly, what it stood for. Let's begin with one of the main actors in the amendment: the "soldiers." Prior to Max Weber's conception of the state[32] and its relationship to violence, both John Locke and Thomas Hobbes offered definitions of the State. Locke and Hobbes dealt with the conundrum of what humans were like in the state of nature, a hypothetical world predating government.[33] Plainly, Hobbes sees the state of nature as a place of anarchy in which humans settle disputes with individual violence in the name of defending their rights.

By contrast, Locke sees the state of nature as something closer to the Garden of Eden in that Locke's conception is more pastoral or even idyllic.[34] In this world, individuals are entitled to their property which "nature has. . .set. . .[to] the extent of men's *labour* and the *conveniences of life*," for an individual cannot "consume more than a small part."[35] But, like Hobbes, Locke views power as vested in the individual, leaving every person to settle disputes on his or her own behalf.[36] In short, both Hobbes and Locke consider property rights as central to the state of nature and, further still, believe it is critical that one has the right to defend his or her property.[37]

In both philosophers' conceptions, though, these rights are assumed by the introduction and formal acceptance of government.[38] Simply, the disaggregated forms of individual rights to commit or conduct violence are taken in by the collective whole of the State, which defends and protects these rights on behalf of individuals.

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30. *See generally* Patrick Henry, Debate in Virginia Ratifying Convention (Jun. 16, 1788), *in* NEIL COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (1944).

31. Sprankling, *supra* note 22, at 128.

32. HANS H. GERTH & C. WRIGHT MILLS, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77–78 (1946) (statement of Max Weber) ("[A] state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.").

33. André Munro, *state of nature*, *in* ENCYCLOPEDIA BRITANNICA (2021), https://www.britannica.com/topic/state-of-nature-political-theory [https://perma.cc/SN94-G7MB].

34. *See* Munro, *supra* note 33.

35. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 22 (C.B. Macpherson ed., 1980) (1689).

36. *Id.*

37. *See* Munro, *supra* note 33.

38. *See id.*

It is critical to expose this lengthy philosophical background, as the use of a "soldier"—not just for the purposes of occupying a bed in one's home—is a representation of State authority. Prior to the American Revolution, there was a palpable frustration with the English army since it was "used to assist in law enforcement"[39] This is not surprising since

> policing in Colonial America had been very informal, based on a for-profit, privately funded system that employed people part-time. Towns also commonly relied on a 'night watch' in which volunteers signed up for a certain day and time, mostly to look out for fellow colonists engaging in prostitution or gambling.[40]

As a result, "the militia was the community under arms: all able-bodied free men under a certain age . . . were obligated to serve"; as a "combination of both military unit and police, they were often the only way for governments in early America to exert force."[41] Plainly, then, the colonies relied on soldiers (federal or local militia forces) who were responsible for "policing" disputes.

Significantly, the *Federalist Papers* corroborate this fact too. The use of the military as an extension of State power was a central concern for the Framers of the Constitution. Indeed, in *Federalist* No. 8, Alexander Hamilton wrote that a government with an overly powerful military can lead to "frequent infringements" on people's rights.[42] Hamilton's observation is critical to understanding the basis for the Third Amendment: while the text seems to deal exclusively with "quartering" soldiers, the motivations behind its ratification and its underlying protections are more fundamentally about protecting individual rights within the home, free from agents of the government. Consequently, the use of "soldier" is consistent with what the Framers and their predecessors viewed as contrary to sound government: apparatuses of state power (i.e., the military) roaming the halls of an otherwise private dwelling. Here, they may infringe on the rights of citizens.

Moreover, this understanding carried on beyond the framing of the Constitution. Justice Joseph Story's *Commentaries on the Constitution of the United States* sheds light on the originally understood meaning of the amendment: Story writes that the Third Amendment "speaks for itself," as 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

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39. *See* Fields & Hardy, *supra* note 15, at 416.

40. Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017), https://time.com/4779112/police-history-origins/ [https://perma.cc/8E5W-6BZX].

41. Gregory Ablavsky, *Stanford's Greg Ablavsky on Law and the History of American Militias*, STAN. L. SCH. BLOG (Oct. 12, 2020), https://law.stanford.edu/2020/10/12/stanfords-greg-ablavsky-on-law-and-the-history-of-american-militias/ [https://perma.cc/8WDT-UXNK].

42. THE FEDERALIST NO. 8 (Alexander Hamilton).

intrusion."[43] Story's observation counters a stricter, narrower reading of the amendment which would otherwise simultaneously confine the amendment to another era's concerns (the niche focus of quartering soldiers during the reign of the English monarchs) and overlook the importance of the concerns about government intrusion, which the amendment seeks to counter.

Further trying to uncover the original meaning, consider Federal Farmer's critique of the original draft of the Constitution again: a lack of an anti-quartering provision was "essential to the permanency and duration of *free government*" (emphasis added).[44] The historical record says that quartering soldiers has represented the overreach of government dating back to King Henry I. It does not seem hyperbolic, then, to describe only the quartering of soldiers as the end of "free government." Or, examine the words of Patrick Henry, who declared that

> if Congress shall say that the general welfare requires it, they may keep armies continually on foot. There is no control on Congress in raising or stationing them. They may billet them on the people at pleasure. This unlimited authority is a most dangerous power: its principles are despotic. If it be unbounded, it must lead to despotism; for the power of a people in a free government is supposed to be paramount to the existing power.[45]

While quartering is referenced, it hardly, in and of itself, appears to be the overall concern for Henry: simply, billeting soldiers is a stand-in for despotism. In turn, "soldiers" are a proxy for the means by which the government would exercise its power.

Taken collectively, the Anti-Federalist critiques, the Federalist beliefs, and even others' views all highlight the fact that the "billeting" of soldiers undermines individual rights from within the home. In turn, the Third Amendment, which deals with these fears directly, speaks to the protections that the Framers sought to codify within the amendment—namely, the freedom of individuals from government actors within their homes. Importantly, these actors need not be members of the military, as "soldier" is a stand-in for the force of government, however it may appear.

In turn, the Third Amendment's text and underlying structure drive it away from the Fourth Amendment, with which it is typically joined in the name of enhanced privacy claims. For example, the landmark *Griswold v. Connecticut* decision cites the Third Amendment to amplify the privacy undertones of the

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43. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION § 1900 (1873).

44. *See* FEDERAL FARMER NO. 16, *supra* note 28.

45. JAMES MADISON, THE CONSTITUTIONAL CONVENTION, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 410 (Jonathan Elliot ed., 1987).

following amendment.[46] As Akhil Amar writes in *The Bill of Rights*, "lawyers, scholars, and judges are wont to link the Third Amendment to the Fourth" but "privacy is not the whole story—indeed perhaps not even the headline."[47] Alternatively, a more accurate understanding of the Third Amendment is not about hiding away from government in the private shadows of one's home but approaching government head-on. The amendment demands a kind of coequal positioning of the populace and its government, as soldiers may not be quartered "without the consent of the Owner."[48]

Think of how profound a relationship this text draws compared to its historical predecessors which lacked the same structure: this amendment provides, in plain words, for the individual owner to counter the wishes of government. Could the government, by its own desire and authority, dictate whether or not a soldier may occupy a room within an individual's home? No, says the Third Amendment, for the owner can counter the "despotic" whims of the State. This amendment, in short, empowers citizens by creating a check against the desires of their government.[49] This version of Third Amendment interpretation, which breaks from the frequent privacy understandings, is aptly understood through a kind of deductive reasoning. The Third Amendment protects against the encroachment of the military on private homes. And the military represents State power. So, the Third Amendment ultimately protects against the encroachment of State power on private homes by creating civilian and legislative checks on government.

As a result, though the Third Amendment considers and amplifies individual rights it also reflects the functional and structural relationship that exists between citizen and government.[50] Appropriately, given the backdrop with which this amendment was drafted and the events which served as intellectual fodder that preceded even that, it calls attention to the force of individual mechanisms which narrowly tailor government power.

What's more, the Third Amendment creates a kind of arena for this citizen-government interaction: the home.[51] Such an epicenter is apt as "[f]or centuries

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46. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'").

47. *See* Amar, *supra* note 3.

48. *See* Wood, *supra* note 6.

49. *See* Amar, *supra* note 3.

50. Though this piece deviates from much of the existing literature in that it does not link the Third and Fourth Amendments together, this is not to say that no such link should exist.

51. *See* Sprankling, *supra* note 22, at 114.

the Anglo-American legal system has had a 'reverence for the sanctity of the home.'"[52] It should come as no surprise, then, that the "home has been central to the articulation of constitutional rights, including the right against unreasonable search and seizure, the right to due process, the right to privacy and (recently) the right to bear arms."[53] It follows that the struggle between the reach of government and a citizen's desire to counter this inclination must end (if not begin) at one's home.

Here, again, the Third Amendment's history comes to the fore (if not for the quartering of soldiers in citizens' homes perhaps our amendment would be critical of the occupation of barns and stables). However, the home is the ultimate battleground for this pseudo-conflict, as the deliberate purchase (or rental) of an abode is, in effect, the acquisition of a cudgel against government. Privacy is, of course, one of the ends by which one may yield this newfound authority, but it is not the only means. Indeed, a home functions as a clear demarcating line for what belongs to an individual, differentiating the public from the private sphere.[54] This is likely why the Third Amendment is often discussed in a privacy context. Such a linkage fails to examine the deliberate action that one takes—deciding to possess property in some fashion—versus more passively accepting that one ought to be afforded a patina of privacy.[55] Put another way, home ownership, broadly construed, is *active*—it is a declaration of one's affirmative stand against force.

Importantly, the extent to which an individual can confront the State within one's home is cabined with the practices that existed during the ratification of the Third Amendment. For instance, this piece focuses on marijuana because it is a drug that is harvested through farming, which the Framers commonly understood as a way individuals used their property. Importantly, "in the eighteenth century most Americans owned and lived off their land—agriculture was the principal industry."[56] To this end, the amendment directly protects a drug that is "farmable." Marijuana farming would be consistent with the Framers' understanding of where the government might erode rights through the "quartering" of soldiers. All told, the Third Amendment protects marijuana, a relatively new phenomenon, because its production mimes that regularly found on "estates" during the early days of the American republic.

However, this understanding of the Third Amendment does not come exclusively from the historical record. To the degree we have a judicial understanding of the Third Amendment, courts also seem ready to highlight the emphasis on ownership and homes. In *Engblom v. Carey*,[57] the only major Third Amendment case, the Second Circuit attempted to incorporate the Third Amendment against

52. *Id.* at 113.

53. JEANNIE SUK, AT HOME IN THE LAW 3 (2009).

54. Kyllo v. United States, 533 U.S. 27, 40 (2001).

55. *See* Amar, *supra* note 3.

56. Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 MARQUETTE L. REV. 1, 4 (2016).

57. *See* Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982).

the states. The court wrote that National Guardsmen did not need to be "federalized" to be seen as "soldiers."[58] First, the background to the case: during a corrections officers strike, New York Governor Hugh Carey called on the New York National Guard to maintain order in a prison. Yet, in order to provide a space for the guardsmen, the prison opted to allow the National Guard to take up rooms in the striking officers' residences.[59]

Critically, the Second Circuit ruled that, though the National Guardsmen were under state authorization, through the "incorporation doctrine," the Third Amendment classified the National Guard as "soldiers."[60] Moreover, the court wrote that ownership is not rigidly understood but, rather, should "extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others."[61] Doing so otherwise—i.e., deciding that ownership is strictly understood—would be "incongruous alongside Fourth Amendment case law."[62]

To this point, *Engblom*, the Framers, and Joseph Story help to expand the Third Amendment's meaning beyond a more narrow or rigid interpretation. Indeed, the Second Circuit opinion notes that the amendment features the "right to exclude others," including, presumably, governmental actors. In turn, the judiciary has provided a helpful clue as to how to approach this amendment: it is not wholly confined to a preceding generation's concerns; rather, the Third Amendment incorporates key common law doctrines that reject the government through its many agents at the threshold of one's home. *Engblom*'s central premise, then, appears to take a more expansive view of the Third Amendment's protections—a view which melds understandings of state power with the ability of individuals to exclude others from their homes. The court's view is also, importantly, consistent with the Framers' view: the use of "soldiers" is a stand-in for government. As a result, the Third Amendment takes on a broader significance, in that quartered soldiers are a proxy for the overreach of the government and a means by which the government may strip away the rights of individuals.

IV. PARALLEL CASES

Coincidentally (but by no means indicative of any link which I seek to break between the Third and Fourth Amendments), the first case we will examine is one that deals with the Fourth Amendment's privacy protections: *Kyllo v. United States*.[63] In 1992, federal officials with the Department of the Interior used thermal imaging devices outside of Danny Kyllo's home which could not "penetrate walls or windows" but could identify "only heat being emitted from the home."[64]

58. *Id.* at 960.
59. *Id.* at 960–961.
60. *Id.* at 961.
61. *Id.*
62. *See* Gamble, *supra* note 13, at 213.
63. *See* Kyllo v. United States, 533 U.S. 27, 29 (2001).
64. *Id.* at 30, 35.

Perhaps unsurprisingly, these devices picked up an unusual amount of heat in Kyllo's home relative to its neighbors, suggesting that, inside, there was a marijuana farm.[65] On this basis, federal agents obtained a search warrant where they found more than one hundred plants.[66]

The Supreme Court, in an opinion that crossed so-called ideological lines,[67] ruled that the use of thermal imaging devices constituted an unreasonable search in violation of the Fourth Amendment which made it unconstitutional.[68] Justice Antonin Scalia, writing for the majority, stated that the breach of constitutional protections stemmed from the fact that the agents used technology that was "not in general public use."[69] Moreover, Justice Scalia said that reversing

> [the] approach [that one cannot interpret the Fourth Amendment "mechanically"] would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.[70]

Most importantly of all, and why this case so crucially relates to the Third Amendment's protections, the majority opinion reiterated that the Fourth Amendment draws a "firm line at the entrance to the house."[71] By extension, the Constitution itself clearly differentiates between, say, the sidewalk running parallel to one's home and the threshold at one's front door. While neither the majority opinion nor the dissent questioned whether Kyllo's activities themselves violated the law (implicitly both conceded that they did[72]) but nonetheless, the government must rely both on search warrants and technology which would otherwise be available to the public.[73]

Just the same, *Gonzales v. Raich* deals with a similar substance: marijuana, specifically growing it at one's home.[74] A few years after Kyllo's arrest, in 1996, the state of California passed Proposition 215, which made the use of medical marijuana legal.[75] However, federal law prohibited the use of marijuana.[76] Angel

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65. *Id.* at 31.
66. *Id.*
67. *See* Linda Greenhouse, *The Supreme Court: Ruling on Surveillance Procedures; Justices Say Warrant Is Required in High-Tech Searches of Homes*, N.Y. TIMES (June 12, 2001), https://www.nytimes.com/2001/06/12/us/supreme-court-ruling-surveillance-procedures-justices-say-warrant-required-high.html [https://perma.cc/XS92-F4S3].
68. *See Kyllo*, 533 U.S. at 40.
69. *Id.*
70. *Id.* at 35–36.
71. *Id.* at 40.
72. *Id.* at 29–30; *id.* at 42–43 (Stevens, J., dissenting).
73. *Id.* at 40.
74. *See Raich*, 545 U.S. at 6–7 (2005).
75. *Id.* at 5–6.
76. *Id.* at 7.

Raich and Diane Monson both used homegrown marijuana to alleviate a variety of medical maladies.[77] In point of fact, Raich's physician declared under oath that Raich's life was at stake if she could not use medical marijuana.[78] Then, in 2002, federal Drug Enforcement agents destroyed six marijuana plants under the discretion of the Controlled Substance Act, which declares marijuana to be a Schedule 1 drug (meaning it has no known medical application[79]).[80] Raich and Monson subsequently sued claiming enforcing the Controlled Substance Act "would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity."[81]

Raich, Monson, and the Court relied on three precedents to determine whether, specifically, the Controlled Substance Act fell within the scope of the Commerce Clause: *Wickard v. Filburn*;[82] *United States v. Lopez*;[83] and *United States v. Morrison*.[84] The first of this triumvirate, *Wickard*, stated that if individual actions in the aggregate affect *inter*state commerce, Congress had the power to regulate *intra*state commerce.[85] By contrast, both *Lopez* and *Morrison* more narrowly reigned in the Commerce Clause as seemingly closer to Congress's enumerated powers.[86] *Lopez* and *Morrison* ostensibly derived their legislative weight from the Commerce Clause in spite of the fact that neither action Congress regulated in the respective contexts was explicitly economic.[87] *Lopez* in particular outlined three circumstances where Congress may regulate activities, not least of which being the power "to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[88]

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77. *Id.* at 6–7.

78. *Id.* at 7.

79. *Drug Scheduling*, U.S. DRUG ENF'T ADMIN., https://www.dea.gov/drug-information/drug-scheduling [https://perma.cc/57XZ-6TAL].

80. *See Raich*, 545 U.S. at 1.

81. *Id.* at 8.

82. Wickard v. Filburn, 317 U.S. 111 (1942).

83. United States v. Lopez, 514 U.S. 549 (1995).

84. United States v. Morrison, 529 U.S. 598 (2000).

85. *See Wickard*, 317 U.S. at 124–25 ("Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. . . . But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'").

86. *See Lopez*, 514 U.S. at 567–68 ("To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.").

87. *See id.*

88. *See id.* at 559.

As it relates to *Raich,* ultimately, the Court reasoned that enforcement of the Controlled Substance Act was constitutional.[89] Justice John Paul Stevens, writing for the majority, said:

> Even respondents acknowledge the existence of an illicit market in marijuana; indeed, Raich has personally participated in that market, and Monson expresses a willingness to do so in the future. . . . The diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.[90]

Simply put, the Court determined that the ostensibly limited production of marijuana at home posed a risk to influencing broader marijuana markets and, as a result, posed enough of a federal interest to involve more than an individual state.[91] Even *Kyllo*'s hero Justice Scalia wrote in a concurring opinion that

> unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could . . . undercut" its regulation of interstate commerce. . . . This is not a power that threatens to obliterate the line between "what is truly national and what is truly local."[92]

In a rather pointed dissent, Justice Clarence Thomas denounced the Court's opinion.[93] Of note, Justice Thomas wrote:

> Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.[94]

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89. *See* Gonzales v. Raich, 545 U.S. 1, 1 (2005).
90. *Id.* at 18 n.28, 19.
91. *See id.* at 19.
92. *Id.* at 38 (Scalia, J., concurring).
93. *See id.* at 57–58 (Thomas, J., dissenting).
94. *Id.*

Here, Justice Thomas disagreed with the principal undergirding premise of the majority which, implicitly, said that any marijuana growth somewhere may influence marijuana consumption or purchase anywhere.

V. *KYLLO* AND *RAICH* RECONSIDERED

These cases share two thematic similarities: one of course, is the subject matter (marijuana use and growth); the second is the nature of home rights. Though both *Kyllo* and *Raich* examine these home rights. But, *Raich* shows that our jurisprudence, to date, does not offer absolute protection. After all, the government was able to enter the homes of Raich and Monson.[95] In other words, while the *Kyllo* opinion calls attention to the great necessity for the court to defend home rights,[96] *Raich* shows that the government may have a reason, apropos only of the desire to curb a particular activity in spite of state laws, to cross the hearth in order to compel citizens to follow the laws governing public spaces in the private comfort of one's home.

Here is the key difference between these two cases, though: Kyllo's actions called for the government to intervene. Simply, Congress may permissibly regulate a market such as one that Danny Kyllo participated in because it included other parties outside of Kyllo's home. But, by contrast, Raich and Monson were deprived the chance only to create a commune of sorts within their respective homes—a deprivation which the Steven's majority opinion reasoned was a constitutionally permissible use of state power.[97] Except, Raich and Kyllo are very different figures: Kyllo was operating a farm built to expand beyond the walls of his home into a hostile world rife with acceptable, constitutionally consistent laws.[98] Raich and Monson were privately using marijuana within their homes and never intended to trade, sell, or enter the marketplace with their product.[99]

By doing so, Kyllo implicitly left his front door unlocked—that is, he invited the government into his home by conducting illegal activities presumably in public fora. However, Raich and Monson used marijuana for their personal use only—neither privately grew marijuana for the purpose of later selling it in public markets. Put another way, the only facet of these cases that links Kyllo, Raich, and Monson together is their drug of choice: Raich and Monson operated in a cyclical market in which they were the primary producers, suppliers, and consumers of their product. At bottom, while *Raich* may very well be a case involving federalism or general governmental compassion towards citizens,[100] this case is also principally a question of whether government agents may permissibly enter a home based on wholly private activities. To this end, the *Raich* court appears to misdiagnose the degree to which the case deals with actions Congress may permissibly

95. *Id*. at 7.
96. *See* Sprankling, *supra* note 22.
97. *See Raich*, 545 U.S. at 15.
98. *See* Kyllo v. United States, 533 U.S. 27, 30 (2001).
99. *See Raich*, 545 U.S. at 20.
100. *See Raich*, 545 U.S. at 42 (Thomas, J., dissenting).

regulate within the home. In the end, the Court sided with a view that is incongruent with the protections offered by the Bill of Rights—namely, the Third Amendment.

VI. THE NEW THIRD AMENDMENT IN PRACTICE

This is, ultimately, where this piece returns to the new interpretation of the Third Amendment. In refusing to venture outside their homes, Raich and Monson rejected the presence of the state. Put another way, *Raich* is a case about activities at home, free from the eye of government. As the amendment makes clear, one is protected from the force or agents (like federal drug enforcement agents) of the government within the walls of their home. This is because the text consciously denies entry to the home to agents of the state. Given that Raich and Monson's marijuana use was confined exclusively to their home, this new interpretation of the Third Amendment dictates that the coercive power the government as exercised through its agents—soldiers or drug enforcement personnel alike—must bow to the long-standing individual sanctity of one's home.

In effect, the government "quartered soldiers" in Raich and Monson's case. Neither's actions "invited" the government to intervene. Though the federal government sought to regulate marijuana in the public sphere, in entering the private homes of Raich and Monson, it ran headstrong into the protections that the Federalists, Anti-Federalists, and even earlier philosophers hoped to guarantee. Considering that the marijuana grown here was produced on their property for their own consumption, Raich and Monson did not "consent" to the government entering their homes. Quite the opposite: the private marijuana growing here was so limited in scope and reach that the government was from the beginning an unwelcome guest.

So, while governments may ban or legalize marijuana recreationally, grant licenses to distributors, or even simply decriminalize this drug, these potential laws apply to public areas—not the homes of individuals where the Constitution's Third Amendment essentially protects citizens' rights to govern themselves. What the Third Amendment adds to the quiver of citizens' defenses from the government, then, is a formal rejection of the State's agents within the home. In a way, the government's intervention in *Raich* is reminiscent of John Cleese's paraphrasing of H.L. Mencken: the government seemed consumed by the "haunting fear that someone, somewhere, may be having a good time."[101]

VII. DOES THE THIRD AMENDMENT ALLOW FOR MARIJUANA REGULATION?

This said, though, I would not—and do not here—argue that there is no justifiable reason for the government to regulate the sale of any marijuana under any circumstances. Instead, what the Third Amendment protects in this context is a

101. *See* H.L. Mencken & George Jean Nathan, *Clinical Notes*, 4 AM. MERCURY 59 (1925).

narrow, closed-circuit system in which individuals produce marijuana within their home to be used within their home.

Nevertheless, the Third Amendment is not a panacea. What the Third Amendment protects, instead, is marijuana consumption that is consistent with the farm-like practices of the founding era. As previously mentioned, the degree to which one may exercise his or her property rights to fall within the scope of the Third Amendment must be for personal consumption. Because production is necessarily limited by the types of production practices, the Third Amendment stands as a bulwark for only a small subset of all possible forms of marijuana growth. Ironically, Justice Scalia's *Kyllo* opinion summarizes the extent that the Third Amendment protects marijuana use. By way of paraphrasing, the Third Amendment's protections for drug use are a matter of "general individual consumption"—that is, the Third Amendment only protects the use of, in this case, marijuana to a certain degree. As with speech,[102] gun ownership,[103] or even the government's use of technology to conduct a search, there are constitutionally permissible limits. The same is true here: should one choose to grow marijuana within one's home, it must remain exclusively in one's home for one's individual, private use and produced in quantities that reflect this kind of use.

VIII. CONCLUSION

The Third Amendment—not unlike its peers among the other provisions of the Bill of Rights—acts to restrain government. It does so, principally, by offering citizens a refuge in their own homes, free from government intrusion in their domestic lives. For this reason, the Third Amendment is often paired with the Fourth to offer another form of privacy. But the Third Amendment is more than this; instead, this amendment consciously carves out a space where the government is unwelcome. This does not mean actions committed within the home do not "welcome" government in. On the contrary, one's home is free of state agents—until one decides to directly or indirectly venture into public spaces where the government is free to regulate as it sees fit.

These concurrent standards, which the Third Amendment outlines, come from the basic history that brought out this protection: extending back to the mid-seventeenth century in England, and corroborated by near contemporaries of the

102. *See generally* Brandenburg *v.* Ohio, 395 U.S. 444, 447 (1969) ("These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

103. *See generally* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.").

Constitution's framers like Joseph Story, the Third Amendment dictates that one's home is to be largely free from apparatuses of the government. Otherwise, failing to rid the government from citizens' homes is one of the heads on the path towards despotism.

The debate surrounding marijuana is a prime example of a contemporary challenge to enhancing these protections in line with the Third Amendment's guarantees. The government may regulate marijuana in various ways (notably it may other outlaw or actively endorse marijuana use) but only in particular contexts, and generally not within the home. Unless, of course, this drug should venture into the public, where it may conflict with a number of state or federal statutes.

Conveniently, a series of cases serve as guides. In particular, *Kyllo v. United States* and *Gonzales v. Raich* both offer some understanding as to how the government may marijuana within the home. But this latter case also highlights where courts have acquiesced to the whims of the other branches of government. The judicial practice of taking a laissez-faire approach to constitutional questions extends back to *Wickard*, which bloated the power of the Commerce Clause.

Thus, the purpose of this piece is two-fold. One, I hope to offer a new interpretation of the Third Amendment that is thematically in line with the views of the Framers and modern contemporaries as to the amendment's meaning. Second, I hope to reconsider where past cases have strayed from the intent of the Framers, especially with respect to marijuana. In turn, courts must reign in interpretations of this clause so as to place the Bill of Rights in greater harmony with the structural protections of the Constitution.