

# DOES FIVE EQUAL THREE? READING THE TAKINGS CLAUSE IN LIGHT OF THE THIRD AMENDMENT'S PROTECTION OF HOUSES

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*The Supreme Court's 5-4 decision in Kelo v. City of New London broke new ground by holding that the seizure of owner-occupied homes as part of a plan to foster economic development was a taking for "public use" under the Takings Clause of the Fifth Amendment. Kelo's many critics have yet to clearly articulate a constitutionally grounded rationale for why homes should receive special protection from condemnation. This Note argues that the Third Amendment's solicitude for the home provides a constitutional basis for distinguishing between homes and the other forms of "private property" covered by the Takings Clause. The Amendment, which provides that "[n]o 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," shares both historical and textual links with the Clause. These connections suggest the judiciary should apply a form of heightened scrutiny similar to the "meaningful" review standard proposed by Justice Kennedy's concurring opinion in Kelo when determining whether the government's seizure of an owner-occupied home is for "public use."*

## INTRODUCTION

On November 22, 2000, Susette Kelo returned home to be greeted by a notice of condemnation "nailed" to her door.<sup>1</sup> Kelo's home did not violate the local housing code; nor was it in a blighted neighborhood.<sup>2</sup> Rather, it was condemned because she refused to sell the property to the city, which planned to convert the land into a privately owned office park as part of an economic redevelopment project.<sup>3</sup>

Kelo and her neighbors sought an injunction to prevent the city from taking their homes. Their case was eventually heard by the United States Supreme Court in *Kelo v. City of New London*.<sup>4</sup> The homeowners' attorneys argued that economic development does not constitute a "public use" under the Fifth Amendment's Takings Clause, which provides that "private property [shall not] be taken for public use, without just compensation."<sup>5</sup>

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1. Laura Mansnerus, Ties to a Neighborhood at Root of Court Fight, N.Y. Times, July 24, 2001, at B5.

2. *Kelo v. City of New London*, 545 U.S. 469, 475 (2005) ("There is no allegation that any of the[] properties [owned by Kelo and her neighbors] is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.").

3. See *id.* at 474-75 (describing city's economic redevelopment project).

4. 545 U.S. 469.

5. U.S. Const. amend. V.

When *Kelo* and her neighbors lost their case,<sup>6</sup> the public backlash was intense and widespread.<sup>7</sup> *Kelo* became a “swear word” in the mouths of “property rights advocates, the news media, and . . . legislators.”<sup>8</sup> It led to “probably . . . more new state legislation than any other Supreme Court decision in history,”<sup>9</sup> although these laws have not solved the fundamental problem.<sup>10</sup> A subsequent article summarized the national mood: “Everyone hates *Kelo*.”<sup>11</sup>

For centuries, the Anglo-American legal system has had a “reverence for the sanctity of the home [that] is rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society.”<sup>12</sup> Yet in the more than six years since *Kelo* was decided, its critics have not clearly articulated a textually grounded constitutional ra-

6. See *Kelo*, 545 U.S. at 484 (finding city’s seizure constitutionally valid); cf. Goldstein v. Pataki, 516 F.3d 50, 53 (2d Cir. 2008) (upholding lower court’s dismissal of claim that taking of private land, including homes, for Atlantic Yards Project in New York City violated public use requirement of Takings Clause).

7. See Daniel H. Cole, Why *Kelo* Is Not Good News for Local Planners and Developers, 22 Ga. St. U. L. Rev. 803, 822–24 (2006) (discussing results of public opinion polls on state and national level and observing decision was “deeply unpopular” with general public); Julia D. Mahoney, *Kelo’s* Legacy: Eminent Domain and the Future of Property Rights, 2005 Sup. Ct. Rev. 103, 104 (“*Kelo* sparked a conflagration of outrage that even months later showed no sign of abating.”).

8. Cole, *supra* note 7, at 819.

9. Ilya Somin, The Limits of Backlash: Assessing the Political Response to *Kelo*, 93 Minn. L. Rev. 2100, 2102 (2009) (noting forty-three states enacted legislation in response to *Kelo*).

10. See *infra* notes 53–54 and accompanying text (discussing scholars’ doubts about efficacy of laws).

11. Abraham Bell & Gideon Parchomovsky, The Uselessness of Public Use, 106 Colum. L. Rev. 1412, 1413 (2006).

12. Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 1013 (1982); see also 4 William Blackstone, Commentaries \*288 (“[E]very man’s house is looked upon by the law to be his castle . . .”); Jeannie Suk, At Home in the Law 3 (2009) (“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.”); Akhil Reed Amar, America’s Lived Constitution, 120 Yale L.J. 1734, 1772 (2011) [hereinafter Amar, Lived Constitution] (noting “‘houses’ were singled out above and beyond all buildings” in Fourth Amendment’s text “in part because a person’s house has always been a special place of privacy, and in part because houses in American fact and folklore have been a particularly broadly distributed type of property” (footnote omitted)); D. Benjamin Barros, Home as a Legal Concept, 46 Santa Clara L. Rev. 255, 255 (2006) (“[H]omes often are treated more favorably by the law than other types of property.”); John Fee, Eminent Domain and the Sanctity of Home, 81 Notre Dame L. Rev. 783, 786–87 (2006) (“Federal constitutional law . . . [and] important areas of statutory and common law . . . recognize the home as a special place worth preserving.”); cf. Stephanie M. Stern, Residential Protectionism and the Legal Mythology of Home, 107 Mich. L. Rev. 1093, 1094–96 (2009) (conceding “[r]esidential real estate has achieved an exalted status and privileged position in American property law” but “[d]rawing on the research literature in psychology, sociology, and demography . . . [to] argue[ ] that there is little evidence to support a categorical theory of ongoing control over one’s home as a prerequisite to psychological flourishing”).

tionale for why the Supreme Court should provide homes with special protection from condemnation.

This Note argues that the Third Amendment provides a constitutional basis for distinguishing between homes and the other types of “private property” covered by the Takings Clause. The Amendment provides that “[n]o 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>13</sup> Its text and history reflect both a unity of purpose with the Takings Clause and the emphasis the Framers placed on protecting the home.<sup>14</sup> Consequently, this Note contends that the judiciary should employ heightened scrutiny when determining whether the condemnation of an owner-occupied home is for “public use.”<sup>15</sup>

Part I summarizes the early history and modern doctrine of the Takings Clause. Part II explores the history, jurisprudence, and scholarship of the Third Amendment. It then examines the Amendment’s text and underlying principles, concluding that the Clause should be read in light of the Amendment. Finally, Part III proposes applying heightened scrutiny to condemnations that involve an owner-occupied home.

## I. THE PAST, PRESENT, AND UNCERTAIN FUTURE OF THE TAKINGS CLAUSE

Little evidence exists about the original meaning of the Takings Clause. The scant information that is available provides no insight into whether the Framers intended the home to receive special protection from condemnation. The Supreme Court thus reached its decision in *Kelo* on the basis of well-established precedent that accorded great deference to the government’s determination that a seizure was for “public use.”<sup>16</sup> Yet the Court’s future interpretation of the Clause is uncertain in light of its apparent uneasiness with its own ruling.<sup>17</sup>

Part I.A begins with an exploration of the early history of the Clause. Part I.B describes when a home can be taken for “public use” under modern Supreme Court jurisprudence. Part I.C discusses whether the Court will reinterpret the Clause to require heightened scrutiny in certain types of eminent domain proceedings, noting that a text-based constitutional rationale for specifically protecting the home has not yet been advanced.

13. U.S. Const. amend. III (emphasis added).

14. See *infra* Part II.

15. See *infra* Part III. This Note may also have some bearing on how the Just Compensation Clause should be read, but for reasons subsequently discussed, see *infra* notes 182–185 and accompanying text, it focuses on the Third Amendment’s relation to the Public Use Clause.

16. See Joseph L. Sax, *Kelo*: A Case Rightly Decided, 28 U. Haw. L. Rev. 365, 365 (2006) (“[T]he U.S. Supreme Court has decided twelve . . . public use cases, the first in 1893 . . . [and in] every one . . . the Court sustained the exercise of the eminent domain power . . .”).

17. See *infra* notes 55–57 and accompanying text (discussing majority opinion, Justice Kennedy’s concurrence, and Justice Thomas’s dissent).

A. *The Past: The Murky Origins of the Takings Clause*

The minimal information available regarding the origins of the Takings Clause does not reveal whether the Framers intended the provision to provide special protection to the home. Scholars have paid “relatively little attention to the original understanding” of the Clause in part precisely because of the “paucity of historical evidence of the framers’ intent.”<sup>18</sup> Indeed, Professor William Treanor laments that “[t]here are apparently no records of discussion about the meaning of the clause in either Congress or, after its proposal, in the states.”<sup>19</sup>

Despite the murky origins of the Takings Clause, certain facts are clear. First, prior to the creation of the Bill of Rights, only a few state governments were required to pay compensation when private property was seized for public use. Variants of the Clause appeared in only three governing documents created between the end of the Revolutionary War and the ratification of the Constitution: the state constitutions of Massachusetts and Vermont, and the Northwest Ordinance.<sup>20</sup> In other states, “compensation was the norm” but was not legally mandated.<sup>21</sup>

Second, the Takings Clause was probably, if only partially, a reaction to a rash of uncompensated military impressments of private goods during the Revolutionary War.<sup>22</sup> Such seizures were a regular occurrence in

18. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782, 811 (1995) [hereinafter Treanor, *Original Understanding*]; see also Joseph L. Sax, *Takings and the Police Power*, 74 *Yale L.J.* 36, 58 (1964) [hereinafter Sax, *Police Power*] (“[C]ontemporaneous commentary upon the meaning of the compensation clause is in very short supply.”).

19. Treanor, *Original Understanding*, supra note 18, at 791; see also Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 78 (1998) [hereinafter Amar, *Bill of Rights*] (“[U]nlike every other clause in the First Congress’s proposed Bill [of Rights], the just-compensation restriction was not put forth in any form by any of the state ratifying conventions.”).

20. Treanor, *Original Understanding*, supra note 18, at 790–91; cf. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 *Wash. L. Rev.* 553, 575 (1972) (“As far as exhaustive research shows, there was not a single English, nor . . . any reported American . . . [judicial] decision rendered prior to the formation of the Union in which it was held or said that compensation was required for a taking.”). Treanor identifies “[o]nly two fundamental documents of the colonial era [that] provided even limited recognition of a right to compensation”—the 1641 Massachusetts Body of Liberties and the 1669 Fundamental Constitutions of Carolina. Treanor, *Original Understanding*, supra note 18, at 785. The latter document was “never fully implemented.” *Id.*

21. Treanor, *Original Understanding*, supra note 18, at 787 (“[C]olonial governments often took private property without providing compensation.”). For example, every colony but Massachusetts “provided that undeveloped land could be taken for roads without compensation.” *Id.*

22. *Id.* at 835–36; see also Jed Rubenfeld, *Usings*, 102 *Yale L.J.* 1077, 1122 (1993) (arguing one category of conduct targeted by Takings Clause was “the appropriation of private property to supply the army during the Revolutionary War”); Sax, *Police Power*, supra note 18, at 58 (referencing uncompensated military impressments in support of thesis “that the clause was designed to prevent arbitrary government action, rather than to preserve the economic status quo”).

that era.<sup>23</sup> In *Respublica v. Sparhawk*, for example, the Supreme Court of Pennsylvania held the commonwealth was not required to compensate Sparhawk for 227 barrels of flour seized in 1777 by its Board of War.<sup>24</sup> In a similar vein, John Jay drafted a message to the New York Legislature in 1778 regarding “‘*the Practice of impress[ing] Horses, Te[a]ms, and Carriages by the military . . . without any Authority from the Law of the Land,*’” and expressing hope that “[t]he Time may come when Law and Justice will again pervade the State . . . [and allow] recover[y of] damages.’”<sup>25</sup>

The only “more or less contemporaneous statement of why the clause was passed”<sup>26</sup> supports the conclusion that the Takings Clause was enacted at least partially in response to military impressments. In 1803, legal scholar St. George Tucker observed that the Clause “was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressments, as was too frequently practised during the revolutionary war.”<sup>27</sup> Tucker’s interpretation appears to be “the best piece of evidence explaining why most people initially favored the clause”<sup>28</sup>—not only because it is essentially the only contemporary interpretation available but also because Tucker was a well-known “jurist, politician [and] legal educator.”<sup>29</sup>

Ultimately, it is unlikely that any single theory can entirely explain the enactment of the Takings Clause.<sup>30</sup> Yet the limited historical evidence supports three conclusions. First, the property right protected by the

23. See Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 *Wm. & Mary L. Rev.* 2053, 2072 (2004) (“Throughout the [Revolutionary] [W]ar years . . . Congress routinely resorted to impressments as a means of supporting the army in the field.”).

24. 1 *Dall.* 357, 363 (Pa. 1788). The court rationalized the taking by noting it occurred in wartime and “many things are lawful in that season, which would not be permitted in a time of peace.” *Id.* at 362.

25. Rubinfeld, *supra* note 22, at 1122 (quoting John Jay, *A Hint to the Legislature of the State of New York* (1778), reprinted in 5 *The Founders’ Constitution* 312, 312–13 (Philip B. Kurland & Ralph Lerner eds., 1987)).

26. Treanor, *Original Understanding*, *supra* note 18, at 835–36.

27. 1 *St. George Tucker, Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* app. at 305–06 (Lawbook Exch., Ltd. 1996) (1803). Rubinfeld and Sax also approvingly cite this quote. See Rubinfeld, *supra* note 22, at 1123–24; Sax, *Police Power*, *supra* note 18, at 58.

28. Treanor, *Original Understanding*, *supra* note 18, at 835.

29. *Id.* at 835–36. Notably, Tucker edited one of the best-known annotated versions of *Blackstone’s Commentaries*. See Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 *Iowa L. Rev.* 547, 562 n.57 (1997) (discussing Tucker’s edition).

30. Madison’s writings, for example, indicate that he favored compensation because “he believed that the majoritarian decisionmaking process was least likely to protect the interests of landowners and slaveowners.” Treanor, *Original Understanding*, *supra* note 18, at 847; cf. Amar, *Bill of Rights*, *supra* note 19, at 78 (observing Madison garnered support for Takings Clause “[i]n part by clever bundling, tying the clause to a variety of other provisions that commanded more enthusiasm”). For a detailed discussion of Madison’s motivations, see William Michael Treanor, *Note, The Origins and Original Significance of*

Clause was not well-established in the states prior to the creation of the Bill of Rights. Second, public anger at past abuses of power by the military probably played an important role in the enactment of the Clause. This view is supported by the fact that colonial resentment of the military appears elsewhere in the Bill of Rights.<sup>31</sup> As Professor Akhil Amar notes, such “sentiments . . . resonate with the special fears of an overweening and unaccountable federal military [that are] audible in the Second and Third Amendments.”<sup>32</sup> Finally, the historical record indicates that protection of personal property was a primary purpose of the Clause. It does not, however, show whether the Framers intended real property, such as a home, to receive special protection from condemnation.<sup>33</sup>

### B. *The Present: Public Use and the Home in the Modern Era*

Perhaps because the courts received scant guidance from the Framers on how to interpret the Takings Clause, the provision’s jurisprudence is notoriously complex.<sup>34</sup> Yet the rule regarding whether the government can condemn private property, including a home, is relatively simple. Although an older interpretation of the Clause defined “public use” as a “‘literal requirement that condemned property be put into use for the general public,’”<sup>35</sup> the Supreme Court has long rejected this narrow approach. It now employs the “broader and more natural interpretation of public use,” requiring only that a taking serves “a public purpose.”<sup>36</sup> Under the public purpose test, “a taking is for public use if a

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the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 708–13 (1985) [hereinafter Treanor, Origins].

31. See *infra* Part II.A.1.c (noting Antifederalist concern over lack of antiquartering provision in Constitution).

32. Amar, Bill of Rights, *supra* note 19, at 80. Professor Matthew Harrington has also drawn a connection between the protections offered by the Third Amendment and the Takings Clause:

[B]y 1789, the traditional fear of large standing armies, along with the Revolutionary experience with impressment, gave rise to concerns about the power of the new national government to requisition supplies without payment. These fears no doubt led . . . [to the Third Amendment’s] prohibiti[on] [on] the quartering of troops . . . . The Compensation Clause added to these protections by preventing the government from taking property to support its troops without payment for goods or services received.

Harrington, *supra* note 23, at 2073.

33. See Harrington, *supra* note 23, at 2067 (“[T]he clause was less about concerns with land use . . . than it was about military impressments.”).

34. See, e.g., Treanor, Original Understanding, *supra* note 18, at 880–82 (“Modern Supreme Court takings jurisprudence is famous for its incoherence.”).

35. *Kelo v. City of New London*, 545 U.S. 469, 479 (2005) (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)); see also Stoebuck, *supra* note 20, at 589 (“In its purest, and mostly fabled [sic], form, the public-use doctrine would allow property interests to be taken only if the subject matter in which they exist, land or things, will be used by the public.”).

36. *Kelo*, 545 U.S. at 480 (internal quotation marks omitted).

rational basis test is met . . . [that is,] so long as the government acts out of a reasonable belief that the taking will benefit the public.”<sup>37</sup>

The line of cases leading to the *Kelo* decision begins with *Berman v. Parker*.<sup>38</sup> In *Berman*, the Court held that a government entity could seize a department store located in a blighted neighborhood for “public use” so long as the goal to be achieved—in that case, fostering economic development—fell within the scope of the entity’s police powers.<sup>39</sup> The Court reaffirmed the *Berman* approach in *Hawaii Housing Authority v. Midkiff*, where it upheld the constitutionality of a plan by the state of Hawaii to use its eminent domain power to break up the oligopoly of land ownership that existed in the state by forcing landlords to sell their lots to the tenants currently occupying them.<sup>40</sup>

The *Kelo* Court faced a fact pattern somewhat similar to those involved in *Berman* and *Midkiff*, with one key difference: The condemned properties were owner-occupied homes.<sup>41</sup> In *Kelo*, the impoverished Connecticut city of New London used its eminent domain power to condemn private homes for an economic development project that included restaurants, new homes, and an office park.<sup>42</sup> Nine petitioners, who owned a total of ten condemned houses in which they or a family member lived, sued the city, seeking an injunction against condemnation on the grounds that “economic development” did not constitute “public use” under the Takings Clause.<sup>43</sup>

The Court held the homes were taken for a constitutionally valid public use, based on *Berman* and *Midkiff*.<sup>44</sup> Justice Stevens’s majority opinion, however, exhibited less deference to the legislature than the Court

37. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 662 (3d ed. 2006).

38. 348 U.S. 26 (1954).

39. *Id.* at 30–33, 36 (observing “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive” and so long as purpose of seizure is “within the authority of [the legislature], the right to realize it through the exercise of eminent domain is clear”); see also Stoebuck, *supra* note 20, at 590 (summarizing rule as “what is a public purpose is up to the legislature and hardly ever up to the courts”). Significantly, *Berman* did not raise the same legal questions as *Kelo* because (1) the neighborhood in which the seizures occurred was blighted and (2) although houses were among the properties seized, the petitioner was a department store owner. See *Berman*, 348 U.S. at 30–31.

40. 467 U.S. at 232–34, 241. The majority opinion emphasized that the Court’s role in reviewing such legislation was “extremely narrow” and that it would not intervene in the legislature’s determination of public use “‘unless the use be palpably without reasonable foundation.’” *Id.* at 240–41 (citations omitted) (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

41. See Barros, *supra* note 12, at 296 & n.167 (emphasizing neither *Berman* nor *Midkiff* “concerned the involuntary taking of a person’s home”).

42. See *Kelo v. City of New London*, 545 U.S. 469, 473–74 (2005).

43. *Id.* at 475, 477.

44. *Id.* at 484–85.

had in either of the earlier cases,<sup>45</sup> possibly demonstrating discomfort with applying the deferential public use standard to owner-occupied homes.<sup>46</sup> Further, the Court emphasized that “nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”<sup>47</sup>

Justice Kennedy was the deciding vote in the 5-4 decision. Although he joined the majority opinion, he also wrote a concurring opinion that was less deferential to precedent. First, Justice Kennedy applied what one commentator labeled a “brawnier” level of rational basis review,<sup>48</sup> which New London’s project survived. Under “meaningful rational-basis review,” a “court confronted with a plausible accusation of impermissible favoritism to private parties . . . review[s] the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose.”<sup>49</sup>

Second, Justice Kennedy suggested that the Court’s ruling “does not foreclose the possibility that a more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings.”<sup>50</sup> Admittedly, Justice Kennedy’s proposed standard is not directly linked to condemnations involving owner-occupied homes. If adopted at some future date, it would presumably be applied only in the case of a government-sponsored transfer of land from one private party to another where “the risk of undetected impermissible favoritism of private parties is . . . acute.”<sup>51</sup>

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45. See Mahoney, *supra* note 7, at 116 (noting “the majority opinion does not assert that the Court must defer to legislative determinations that an exercise of the takings power will serve a public use” and that it “examines in detail both the content of the redevelopment plan and the circumstances of its creation”); John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. Times, Feb. 21, 2006, at A1 (describing majority opinion as “narrowly written” and noting it stated “that the ‘necessity and wisdom’ of the use of eminent domain were issues of legitimate debate”).

46. The majority opinion appeared to avoid using the word “home.” While Justice O’Connor’s dissent used the word home eight times, the majority opinion employed the word “house” instead and referred to the home only twice: “once in referring to the *new* homes that were to be built upon the taking of blighted property in [*Berman*] and once in referring to the homes *newly* purchased by ordinary people after the taking of oligopolists’ property in [*Midkiff*].” Suk, *supra* note 12, at 91.

47. *Kelo*, 545 U.S. at 489.

48. Mahoney, *supra* note 7, at 119.

49. *Kelo*, 545 U.S. at 491–92 (Kennedy, J., concurring).

50. *Id.* at 493.

51. *Id.*; see also Mahoney, *supra* note 7, at 120 (noting Justice Kennedy “does not so much set out an alternative to the highly deferential approach as imply one might be forthcoming”).

C. *The Future: The Uncertain Path of Takings Jurisprudence*

Forty-three states accepted the invitation of the majority opinion and passed protective laws in response to *Kelo*.<sup>52</sup> But commentators have expressed doubts regarding the efficacy of these newly enacted laws,<sup>53</sup> leaving open the possibility that “the Court may again be called upon to confront questions about the meaning of public use and the role of the judiciary in securing property rights.”<sup>54</sup>

Most members of the Court appear to support greater judicial scrutiny of eminent domain proceedings. Justice Thomas’s dissenting opinion in *Kelo*, for example, stated “[t]here is no justification . . . for affording almost insurmountable deference to legislative conclusions,”<sup>55</sup> but stopped short of suggesting an alternative approach.<sup>56</sup> Further, one scholar contends the majority opinion and Justice Kennedy’s concurrence, when “[t]aken together,” may “signal[] a willingness to enjoin condemnations in situations where there is . . . no plausible claim that the overall public interest is being served [and thus] lay the foundation for . . . a form of *genuine* rational basis review.”<sup>57</sup>

Even if the Court began applying heightened scrutiny in some eminent domain cases, however, it is far from certain that homes would receive any special protection. The language of the Takings Clause appears to treat all “private property” as equally subject to government seizure, so long as just compensation is paid. *Kelo* critics have not clearly articulated a textually grounded constitutional rationale that justifies specifically protecting homes from condemnation.<sup>58</sup>

52. See *supra* note 9 and accompanying text (noting Somin’s empirical study of state laws).

53. See Somin, *supra* note 9, at 2103–04 (challenging “validity of claims that the political backlash to *Kelo* has provided the same level of protection for property owners as would a judicial ban on economic development takings [because] . . . the majority of the newly enacted post-*Kelo* reform laws are likely to be ineffective”); see also Mahoney, *supra* note 7, at 133 (“[I]t is hard to imagine that political fixes will dissipate the controversy over eminent domain anytime soon.”).

54. Mahoney, *supra* note 7, at 133.

55. *Kelo*, 545 U.S. at 517 (Thomas, J., dissenting). Justice Thomas also stated that “[t]he most natural reading of the Clause” would permit a taking “only if the government owns, or the public has a legal right to use” the property. *Id.* at 508.

56. See Mahoney, *supra* note 7, at 124–25 (noting Justice Thomas did not “provide any detail regarding what sort of judicial oversight” he favored). While Eric Rutkow contends Justice Thomas’s vision of the Public Use Clause “would explicitly require overturning precedent,” see Eric Rutkow, Comment, *Kelo v. City of New London*, 30 Harv. Envtl. L. Rev. 261, 271 n.66 (2006), Mahoney argues that Justice Thomas might support a more moderate approach than his words suggest, see Mahoney, *supra* note 7, at 124 (highlighting that Justice Thomas (1) “draws back from arguing that all exercises of the eminent domain power that do not meet [his] criteria are unconstitutional” and (2) “sign[ed] onto Justice O’Connor’s dissent, with its conclusion that condemnations to alleviate . . . ‘blight’ are constitutional”).

57. Mahoney, *supra* note 7, at 131 (emphasis added).

58. Professor Amar has suggested in passing that courts might “use the Fourth Amendment to craft special rules when the government tries to ‘seize’ a ‘house.’” Amar,

Professors John Fee and D. Benjamin Barros, among others, have proposed protecting the home by increasing the amount of compensation paid to a homeowner for a taking.<sup>59</sup> The Just Compensation Clause usually requires the government to pay the owner the “fair market value” of her property, which is defined as “‘what a willing buyer would pay in cash to a willing seller’ at the time of the taking.”<sup>60</sup> The Court has held that “nontransferable values arising from the owner’s unique need for the property are not compensable.”<sup>61</sup> Thus, a homeowner does not currently receive additional compensation beyond market value simply because she has lived in the house since childhood or because it has been owned by her family for generations. The proposals by Fee and Barros, however, are based on the broad mandate of the Takings Clause that the government provide “just compensation” when it seizes private property, rather than on constitutional text that mandates special protection of the home.<sup>62</sup>

The Supreme Court will probably be confronted with another case involving condemnation of homes, which will require it to interpret the Takings Clause again. A majority of the Court appears willing to apply heightened scrutiny when determining the constitutional validity of a taking in some circumstances. But, in the more than six years since *Kelo* was decided, its critics have not advanced a textually grounded constitutional

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Lived Constitution, *supra* note 12, at 1777. However, he does not explore this idea further. Moreover, it is open to question whether such an approach would actually protect the home above other types of property, as the Court has interpreted the Fourth Amendment’s use of the word “houses” to encompass “[o]ffices, stores, and other commercial buildings” as well as private homes. See 1 Joshua Dressler & Alan C. Michaels, *Understanding Criminal Procedure*, Investigation § 5.03 (5th ed. 2010); cf. *infra* note 177 (contending Third Amendment’s use of word “house” is synonymous with phrase “private home”). Finally, Amar himself recognizes that in the wake of *Katz v. United States*, 389 U.S. 347 (1967), Fourth Amendment jurisprudence has moved “away from ‘property’ and toward ‘privacy.’” Amar, *Lived Constitution*, *supra* note 12, at 1771; cf. *infra* Part II.C.1.c (arguing Takings Clause and Third Amendment can be distinguished from Fourth Amendment on grounds that their primary purpose is to protect property); *infra* notes 67–68 (contending Third Amendment primarily protects property while Fourth Amendment primarily protects privacy).

59. Barros, *supra* note 12, at 295 (“[C]ourts and legislatures should change their approach to just compensation . . . to take into account the personal interest in the home.”); Fee, *supra* note 12, at 785 (concluding “the most effective correction” to current takings doctrine is to pass statutes requiring government “to pay more than market value for taking a person’s home”); see also Amar, *Lived Constitution*, *supra* note 12, at 1776–77 (citing Fee and suggesting that “[i]f the government ends up paying a special bonus whenever a house is taken from its owner, this result is less likely to be grossly unfair or inefficient”).

60. *United States v. 564.64 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)); see also John G. Sprankling, *Understanding Property Law* 666 (2d ed. 2007) (“The goal is to put the owner in as good a monetary position as if the property had not been taken, but rather voluntarily sold on the open market.”).

61. *564.64 Acres of Land*, 441 U.S. at 514.

62. Barros, *supra* note 12, at 298–300; Fee, *supra* note 12, at 790–94.

rationale for why the Supreme Court should provide homes with special protection from condemnation.

## II. LINKING THE TAKINGS CLAUSE AND THE THIRD AMENDMENT

The debate about the interpretation of the Takings Clause as it applies to homes has overlooked whether the Third Amendment can shed light upon how the Clause should be read.<sup>63</sup> The failure of the judiciary and academia to invoke the Amendment to help interpret the Clause, outside of cursory references in a handful of articles,<sup>64</sup> is at first glance unsurprising. The Amendment's prohibition of peacetime quartering is rarely invoked in litigation,<sup>65</sup> and our country has not engaged in large-scale domestic military deployment since the Civil War.<sup>66</sup>

Viewed in the context of the entire Bill of Rights, however, the Third Amendment's absence from the Takings Clause debate is striking. The Third Amendment is one of the few provisions that explicitly guarantee a property right.<sup>67</sup> Further, it safeguards a particular form of private prop-

63. Cf. Amar, *Bill of Rights*, *supra* note 19, at xi (“Instead of being studied holistically, the Bill [of Rights] has been broken up into discrete blocks of text, with each segment examined in isolation.”).

64. A 1996 article linking the military draft to the Takings Clause includes a brief footnote observing that the Third Amendment lends support to a “takings doctrine that . . . protect[s] one’s home and personal possessions more than other types of property.” William A. Fischel, *The Political Economy of Just Compensation: Lessons from the Military Draft for the Takings Issue*, 20 *Harv. J.L. & Pub. Pol’y* 23, 25 & n.8 (1996). The article does not explore this idea further. A handful of other articles juxtapose the Third Amendment and the Takings Clause but do not argue that the Amendment’s solicitude for the home should be read into the Clause. See *infra* note 119 and accompanying text (listing articles). Finally, several articles simply include the Amendment in a list of constitutional provisions that protect the home. See, e.g., Barros, *supra* note 12, at 255–56 (“Houses are expressly protected by the Third and Fourth Amendments . . .”); Fee, *supra* note 12, at 786 (observing “[f]ederal constitutional law recognizes the unique status of the home in several ways” and referencing First, Third, and Fourth Amendments); Timothy Zick, *Constitutional Displacement*, 86 *Wash. U. L. Rev.* 515, 539 & n.137 (2009) (linking First, Second, Third, Fourth, Fifth, and Fourteenth Amendments to home and noting “[o]nly one specific place—the home—was singled out for special constitutional treatment”).

65. Cf. James P. Rogers, Note, *Third Amendment Protections in Domestic Disasters*, 17 *Cornell J.L. & Pub. Pol’y* 747, 757 (2008) (“[P]otential litigants may be unaware when colorable Third Amendment claims arise because . . . they are not aware they have a constitutional protection at all.”).

66. See generally 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 (2004) (exploring whether any of three modern conflicts permit government to authorize forced quartering).

67. See William Sutton Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of Soldiers*, 124 *Mil. L. Rev.* 195, 210 (1989) (contending colonists probably viewed Third Amendment primarily as property right because “[i]n an age when expectations of privacy were limited, protection of property owners from the financial burden associated with the quartering of soldiers was undoubtedly an issue of greater concern”); Geoffrey M. Wyatt, *The Third Amendment in the Twenty-First Century: Military Recruiting on Private Campuses*, 40 *New Eng. L. Rev.* 113, 124–33 (2005) (arguing

erty—the home—from governmental intrusion.<sup>68</sup> Additionally, the Third Amendment appears to be derived from the same impetus that Treanor and others have identified as giving rise to the Takings Clause—the threat of military oppression. And, in contrast to the murky origins of the Takings Clause,<sup>69</sup> protection from nonconsensual quartering is a well-established individual right in the Anglo-American legal system.<sup>70</sup>

Part II addresses three questions. First, does Third Amendment law *preclude* reading the Takings Clause in light of the Amendment—i.e., does it provide an affirmative reason why the two provisions should not be read together? Part II.A surveys the history, jurisprudence, and scholarship concerning the Amendment, and concludes the answer is no.

Second, *could* the Takings Clause be read in light of the Third Amendment—i.e., is there an affirmative reason why the two seemingly unrelated provisions might be read together? Part II.B concludes the Framers could have intended the Takings Clause to incorporate the Third Amendment’s well-established protection of the home.

Third, *should* the Takings Clause be read in light of the Third Amendment? Using a standard interpretive methodology—intratextualism—Part II.C finds a textual link between the two provisions. Additionally, it concludes it would be in harmony with the foundational principle underlying the Amendment—solicitude for the home—to read special protection of the home into the Takings Clause. Part II.D summarizes the three preceding sections.

### A. Does Third Amendment Law Preclude a Link with the Takings Clause?

#### 1. A Longstanding Right: Antiquartering Provisions from London to Boston.

a. *Early Antiquartering Laws.* — British antiquartering laws originated in the Middle Ages, when city charters began including provisions designed to protect residents from the “brutal” quartering practices of both

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Amendment’s “primary function” is protecting property right); *infra* Part II.C.1.c (arguing Third Amendment and Takings Clause are only provisions in Bill of Rights with primary purpose of protecting private property).

68. The Fourth Amendment also protects the house, but it is primarily concerned with privacy—i.e., an individual’s right to be “secure” from “unreasonable searches and seizures.” U.S. Const. amend. IV; see also Amar, *Lived Constitution*, *supra* note 12, at 1771 (“Though the word ‘privacy’ does not appear on the surface of the text [of the Fourth Amendment], the concept is strongly implicit.”). At worst, an extended search of the home is a temporary invasion. In contrast, quartering constitutes a potentially indefinite governmental intrusion. Compare *Katz v. United States*, 389 U.S. 347, 351 (1967) (“[T]he Fourth Amendment protects people, not places.”), with *Wyatt*, *supra* note 67, at 132–33 (“It might fairly be said that the Third Amendment protects places, not people.”).

69. See *supra* Part I.A (describing early history of Takings Clause).

70. See *infra* Part II.A.1 (discussing origin and development of antiquartering provisions in British and American law).

friendly and enemy armies.<sup>71</sup> One of the earliest of these provisions appeared in King Henry I's London Charter of 1130,<sup>72</sup> which may have been later incorporated into the Magna Carta under one of its broad provisions that "reaffirm[ed] the 'ancient liberties and free customs' of England's cities."<sup>73</sup>

In seventeenth-century England, disputes related to quartering were "one of the issues propelling the nation toward civil war."<sup>74</sup> Although quartering complaints were often tied to a more general concern about standing armies, the 1628 Petition of Right identified "the problem of quartered troops as a grievance with a legal identity of its own."<sup>75</sup> Similarly, the 1689 English Bill of Rights, a conservative restatement of the rights of Englishmen violated by a past monarch, accused the former King James II of "quartering soldiers contrary to law."<sup>76</sup> The English Bill of Rights was followed by Parliament's passage of the Mutiny Act of 1689, which forbade quartering in private homes without permission from the owner but permitted "local civilian magistrates to quarter soldiers" in public facilities such as "alehouses, inns, [and] stables."<sup>77</sup> The law did not, however, extend to the colonies.<sup>78</sup>

Americans also have a long history of prohibiting involuntary quartering. Complaints by private homeowners about being forced to provide lodging for soldiers arose as early as 1675.<sup>79</sup> A number of colonies enacted legal protections to defend their residents from the threat of military encroachment. In 1683, for example, the New York Assembly passed a "Charter of Libertyes and Priviledges" providing, *inter alia*, that a "free-

71. B. Carmon Hardy, *A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment*, in *The Bill of Rights: A Lively Heritage* 67, 68 (Jon Kukla ed., 1987).

72. 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); Fields, *supra* note 67, at 196.

73. Fields & Hardy, *supra* note 72, at 399 (quoting Carl Stephenson & Frederick George Marcham, *Sources of English Constitutional History* 115, 117 (1937)).

74. Fields, *supra* note 67, at 197.

75. Hardy, *supra* note 71, at 70. The Petition declared that "great companies of soldiers and marines have been dispersed into . . . the realm, and the inhabitants against their wills have been compelled to receive them into their houses . . . against the laws and customs of this realm, and to the great grievance and vexation of the people." Seymour W. Wurfel, *Quartering of Troops: The Unlitigated Third Amendment*, 21 *Tenn. L. Rev.* 723, 723-24 (1951) (quoting Henry Campbell Black, *Handbook of American Constitutional Law* 616 (3d ed. 1910)).

76. Fields & Hardy, *supra* note 72, at 405 (quoting I Bernard Schwartz, *The Bill of Rights: A Documentary History* 42 (1971)). Fields identifies the document as the "third great Charter of English Liberty." Fields, *supra* note 67, at 199 (quoting Schwartz, *supra*, at 40).

77. Hardy, *supra* note 71, at 72.

78. *Id.* at 73.

79. Fields observes that "complaints were raised in Massachusetts and Connecticut over the quartering of soldiers in private homes as early as King Philip's War (1675-1676)." Fields, *supra* note 67, at 199.

man” could not be forced against his will to quarter a soldier in his house in peacetime.<sup>80</sup> The antiquartering provisions passed by the colonial legislatures, like the Mutiny Act, extended “only to private dwellings and continued to allow for the quartering of soldiers in public structures such as inns.”<sup>81</sup>

In the years immediately preceding the Revolutionary War, two British laws were enacted that explicitly permitted limited quartering in the colonies. The 1765 Quartering Act authorized the housing of British soldiers in public facilities (e.g., “alehouses, inns, [and] stables”), and, if necessary, “uninhabited structures, barns, and outhouses.”<sup>82</sup> Samuel Adams’s writings in the *Boston Gazette* suggest the depth of anger that the Act aroused among the colonists:

I again appeal to common sense, whether the act which provides for the quartering and billeting [of] the King’s troops, was not TRANSGRESS’D, when the barracks at the Castle WHICH ARE SUFFICIENT TO CONTAIN MORE than the whole number of soldiers now in this town, were ABSOLUTELY REFUS’D . . . . Should any one say that the law is not transgress[s]’d “to another[’]s harm,” the assertion I dare say would contradict the feelings of every sober householder in the town. No man can pretend to say that the peace and good order of the community is so secure with soldiers quartered in the body of a city as without them.<sup>83</sup>

Its successor, the Quartering Act of 1774, was one of the “intolerable acts” instituted by England shortly before the Revolutionary War.<sup>84</sup> The 1774 Act “empower[ed] governors” to order quartering “without the concurrence of colonial councils or assemblies.”<sup>85</sup> According to some authorities, it also permitted quartering in private homes,<sup>86</sup>

80. *Id.* at 200. The entire provision read: “Noe freeman shall be compelled to receive any Marriners or Souldiers into his house and there suffer them to Sojourn, against their willes provided Always it be not in time of Actuall Warr within this province.” *Id.*

81. Fields & Hardy, *supra* note 72, at 414; see also Hardy, *supra* note 71, at 74 (noting other colonies echoed New York Charter’s protections, but made “the traditional exceptions . . . [for] ‘innholders or other houses of entertainment’”).

82. Hardy, *supra* note 71, at 76.

83. Samuel Adams, *Bos. Gazette*, Oct. 17, 1768, reprinted in 5 *The Founders’ Constitution*, *supra* note 25, at 215, 215.

84. Don R. Gerlach, *A Note on the Quartering Act of 1774*, 39 *New Eng. Q.* 80, 80 (1966).

85. Hardy, *supra* note 71, at 79; see also Gerlach, *supra* note 84, at 86 (“Section two [of the Quartering Act of 1774] allowed a provincial governor (instead of the governor *and* council[]) . . . to take action.”).

86. There is significant academic disagreement over this point. Compare Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 *Wm. & Mary Bill Rts. J.* 117, 126 (1993) [hereinafter Bell, *Forgotten*] (arguing Quartering Act of 1774 was “even more offensive than its 1765 predecessor” since “it authorized the quartering of troops in private *homes* (as opposed to private *buildings*)”), and Fields & Hardy, *supra* note 72, at 416 (“The 1774 Act . . . was even more onerous than the 1765 Act in that it authorized the quartering of soldiers in the private homes of the colonists.”), with Gerlach, *supra* note 84, at 80

although the text of the Act did not explicitly grant the governors that power.<sup>87</sup>

Thus, at the outset of the struggle for American independence, the colonists were deprived of the right to be free from quartering—a right that was enjoyed by their English brethren. The colonists were therefore “able to identify their resistance to quartering of troops with a long-standing English libertarian demand that had apparently triumphed after the Glorious Revolution.”<sup>88</sup>

b. *Colonial Anger at Quartering.* — From the beginning of the Revolutionary War, the colonists repeatedly denounced quartering as an abuse of governmental power. This sentiment appears in the First Continental Congress’s Declaration and Resolves, which proclaimed “the act . . . for the better providing suitable quarters for officers and soldiers in his majesty’s service” (i.e., the Quartering Act of 1774) was an “infringement[ ] and violation[ ] of the rights of the colonists.”<sup>89</sup> Two years later, the Declaration of Independence accused King George III of “giving his Assent to . . . acts of pretended legislation” that permitted “quartering large bodies of armed troops among us.”<sup>90</sup>

The colonists’ anger was not directed solely toward the British. One of the revolutionary leaders in Massachusetts wrote to Elbridge Gerry in 1776 to request a “peremptory and absolute order and injunction on all the generals and officers of the American army, that quarters for the army or any part of them, shall in no case be impressed, but by the intervention of a civil magistrate, or direction of the legislature of the colony.”<sup>91</sup>

Freedom from forced peacetime quartering and arbitrary wartime quartering (i.e., quartering without the consent of the state legislature or a judge) subsequently appeared as a fundamental right in a number of the states’ governing documents. Between 1776 and 1787, four states—

(noting scholars have failed to “report adequately and accurately the content and intent of the [Quartering Act of 1774],” which “does not suggest any intention of forcing troops into private homes”), and Wurfel, *supra* note 75, at 726 (“The provisions of the [1774] Quartering Act . . . were essentially the same as those of the Quartering Act of 1765.”).

87. The 1774 Act provided that a governor could order quartering in “uninhabited houses, out-houses, barns, or other buildings.” Quartering Act (June 2, 1774), reprinted in *Select Charters and Other Documents Illustrative of American History 1606–1775*, at 355, 356 (William MacDonald ed., 1906). Although the phrase “other buildings” could encompass private homes, the Quartering Act of 1765 included an identical list of places that the governor could commandeer for quartering purposes. Quartering Act (Apr. 1765), reprinted in *Select Charters and Other Documents Illustrative of American History 1606–1775*, *supra*, at 306, 307.

88. Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 *Val. U. L. Rev.* 209, 211 (1991).

89. Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), reprinted in *Select Charters and Other Documents*, *supra* note 87, at 356, 360–61.

90. The Declaration of Independence paras. 15–16 (U.S. 1776).

91. Letter from Joseph Hawley to Elbridge Gerry (Feb. 18, 1776), reprinted in *5 The Founders’ Constitution*, *supra* note 25, at 216, 216.

Delaware, Maryland, New Hampshire, and New York—included these negative freedoms in their lists of the fundamental rights enjoyed by residents.<sup>92</sup> Two additional states—Massachusetts and Pennsylvania—put antiquartering provisions in their state constitutions.<sup>93</sup>

Thus, in the years immediately prior to the creation of the Constitution, there was broad popular support in the colonies for legal restrictions on quartering. Consequently, it is not surprising that “[o]f the rights [ultimately] embodied in the United States Constitution, perhaps none was of greater importance to the revolutionary generation than the third amendment’s prohibition against the involuntary quartering of soldiers in private homes.”<sup>94</sup>

*c. Support for Inclusion of an Antiquartering Provision in the Constitution.*— Prior to the Constitution’s ratification, Antifederalists complained the document lacked an antiquartering clause. For example, an Antifederalist who wrote under the pseudonym “Federal Farmer”<sup>95</sup> noted there was no “provision in the constitution to prevent the quartering of soldiers.”<sup>96</sup> Its absence posed no “immediate danger . . . yet it is fit and proper to establish, beyond dispute, those rights which are . . . essential to the permanency and duration of free government.”<sup>97</sup>

Similar sentiments were echoed at the states’ ratifying conventions. During Maryland’s deliberations, Samuel Chase announced that he opposed the Constitution because, inter alia, it gave “Congress . . . [the] right to quarter soldiers in our *private* houses, not only in time of war, but also in time of *peace*.”<sup>98</sup> Several months later, at the Virginia Convention, Patrick Henry lamented that one of the colonists’ “first complaints, under the [British], was the quartering of troops upon us,” and yet the Constitution permitted “troops in time of peace . . . [to be] billeted in any manner—to tyrannize, oppress, and crush us.”<sup>99</sup>

92. The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 216–17 (Neil H. Cogan ed., 1997) [hereinafter *The Complete Bill of Rights*].

93. *Id.* Today, forty-three state constitutions mention quartering and thirty-three states have provisions “nearly identical” to the Third Amendment. Bell, *Forgotten*, *supra* note 86, at 144.

94. Fields, *supra* note 67, at 195.

95. Some scholars speculate that Federal Farmer may have been New Yorker Melancton Smith. See *The Anti-Federalist Papers and the Constitutional Convention Debates* 256–57 (Ralph Ketcham ed., 2003). Ketcham describes Federal Farmer’s letters as “perhaps the most eloquent and persuasive anti-federalist writings.” *Id.* at 256.

96. Federal Farmer No. 16 (Jan. 20, 1788), reprinted in 5 *The Founders’ Constitution*, *supra* note 25, at 217, 217 [hereinafter *Federal Farmer*, No. 16].

97. *Id.*; see also Federal Farmer No. 6 (Dec. 25, 1787), reprinted in *The Complete Bill of Rights*, *supra* note 92, at 220, 220–21 (listing as one of “[the] fundamental rights in the United States” that “no soldier be quartered on the citizens without their consent”).

98. Samuel Chase, Address at the Maryland Ratifying Convention (Apr. 1788), reprinted in *The Complete Bill of Rights*, *supra* note 92, at 220, 220.

99. Patrick Henry, Debate in Virginia Ratifying Convention (June 16, 1788), reprinted in 5 *The Founders’ Constitution*, *supra* note 25, at 217, 217.

After the Constitution was ratified, eight states proposed provisions to be included in the anticipated Bill of Rights.<sup>100</sup> Five states suggested an antiquartering amendment—the same level of support received by proposals that protected the freedom of the press and prohibited unreasonable searches and seizures.<sup>101</sup>

Every draft of the Bill of Rights included an antiquartering provision.<sup>102</sup> The congressional debate over its text spanned less than a page in the Annals of Congress, indicating its inclusion was not controversial.<sup>103</sup> The final version of the Third Amendment was nearly identical to the wording of the antiquartering provisions proposed by three of the states.<sup>104</sup>

Thus, in the years immediately preceding and during the ratification of the Constitution and the Bill of Rights, there was strong popular support for the inclusion of an antiquartering provision in America's governing document.

2. *Supreme Court Dicta and Engblom: The Limited Third Amendment Jurisprudence.* — Despite the Third Amendment's venerable history, the Supreme Court has never had occasion to hear an antiquartering claim.<sup>105</sup> The Third Amendment has, however, appeared sporadically in several prominent opinions as an example of underlying American values, such as the traditional separation between the civilian and military spheres and the right to privacy.<sup>106</sup> For example, Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* used the Third Amendment to illustrate constitutional restrictions on military power.<sup>107</sup>

100. Fields & Hardy, *supra* note 72, at 424.

101. *Id.* at 424, 430 n.173. For comparison, three states supported a provision guaranteeing freedom of speech and four proposed a prohibition on cruel and unusual punishment. 5 Bernard Schwartz, *The Roots of the Bill of Rights 1167* (1980). A sixth state, Rhode Island, supported an antiquartering provision, see *The Complete Bill of Rights*, *supra* note 92, at 216, but it did not ratify the Constitution until May of 1790, six months after the first state approved the Bill of Rights. Chemerinsky, *supra* note 37, at 12 (noting New Jersey approved Bill of Rights on November 20, 1789).

102. Fields, *supra* note 67, at 203; Hardy, *supra* note 71, at 81; Horwitz, *supra* note 88, at 211.

103. See 1 *Annals of Cong.* 752 (1789) (Joseph Gales ed., 1834).

104. Bell, *Forgotten*, *supra* note 86, at 130.

105. See, e.g., Schmidt, *supra* note 66, at 590 (noting Second Circuit decision *Engblom v. Carey* is “[t]he only case directly interpreting the Third Amendment”). Thus, the Third Amendment is one of four Bill of Rights provisions that have not been explicitly applied to the states via the Fourteenth Amendment. Chemerinsky, *supra* note 37, at 504–05; see also *infra* notes 211–214 and accompanying text (arguing Third Amendment has been implicitly incorporated).

106. See Wurfel, *supra* note 75, at 732 (“The few stage appearances of the Third Amendment before the Supreme Court have been in dramas of primary constitutional magnitude even if its habitual role has been as an extra with a non-speaking part.”).

107. 343 U.S. 579, 644 (1952) (Jackson, J., concurring) (“[I]n many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment [requires that] . . . even in war time, his seizure of needed military housing must be authorized by Congress.”); see also

Similarly, Justice Douglas's opinion in *Griswold v. Connecticut* cited the Third Amendment as one of the sources of the "penumbras" in the Bill of Rights that "create zones of privacy."<sup>108</sup>

A Third Amendment claim has been judicially validated in only a single instance—the 1982 Second Circuit decision of *Engblom v. Carey*.<sup>109</sup> In *Engblom*, two state prison guards brought suit against New York, claiming their Third Amendment rights were violated when the men were evicted from their state-provided housing during a strike by corrections officers, and their residences were subsequently used as living quarters by the National Guard without their permission for over two weeks.<sup>110</sup> The *Engblom* court noted that the case was "the first time a federal court [has been] asked to invalidate as violative of the Third Amendment the peacetime quartering of troops."<sup>111</sup> It not only refused to grant the state's motion for summary judgment, but it also held that the Third Amendment was incorporated—i.e., that it applied to the states.<sup>112</sup> Even the lone dissenting judge agreed with the majority that the Third Amendment was incorporated and declared that the Amendment was the embodiment of the "fundamental value . . . [of] the sanctity of the home from oppressive governmental intrusion."<sup>113</sup>

3. *Academic Interpretations of the Third Amendment.* — Much like its jurisprudence, the body of scholarly work exploring the Third Amendment is small. While other Bill of Rights provisions have been thoroughly analyzed, the Amendment's "declaration against the arbitrary quartering of troops has passed comparatively unnoticed both by history and the law."<sup>114</sup>

The articles and books that analyze the Third Amendment in any detail can be divided into four categories: (1) historical surveys, (2) theoretical discussions, (3) translation applications, and (4) novel applications. The first group is descriptive, generally emphasizing the English

Laird v. Tatum, 408 U.S. 1, 15 (1972) (citing Third Amendment as example of "traditional and strong resistance of Americans to any military intrusion into civilian affairs").

108. 381 U.S. 479, 484 (1965). The Amendment was subsequently cited as a "protect[ion]" of an "aspect of privacy from governmental intrusion" in *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967).

109. 677 F.2d 957 (2d Cir. 1982). See generally Ann Marie C. Petrey, Comment, The Third Amendment's Protection Against Unwanted Military Intrusion, 49 Brook. L. Rev. 857 (1983) (discussing details of *Engblom*).

110. *Engblom*, 677 F.2d at 958–59.

111. *Id.* at 959. Apart from the district court's decision below, there were "no reported opinions involving the literal application of the Third Amendment [although] [s]everal far-fetched, metaphorical applications have been urged and summarily rejected." *Id.* at 959 n.1.

112. *Id.* at 961, 964.

113. *Id.* at 966–67 (Kaufman, J., concurring in part and dissenting in part). Judge Kaufman would have ruled against the guards on the grounds that their residences did not constitute houses for Third Amendment purposes. *Id.* at 966.

114. Hardy, *supra* note 71, at 67.

origins of the prohibition on quartering.<sup>115</sup> The second group views the Amendment as a symbolic provision that reflects constitutional values but has little practical application.<sup>116</sup> The third group argues the Amendment's protection should be extended to modern domestic interactions between civilians and the military, such as the National Guard's response to Hurricane Katrina.<sup>117</sup> The last group applies the Amendment to areas of the law unrelated to housing soldiers, such as the Endangered Species Act and government wiretapping.<sup>118</sup> Only five articles address in detail the interaction between the Takings Clause and the Third Amendment, none of which suggest the Amendment's solicitude for the home should be read into the Clause.<sup>119</sup>

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115. See Bell, *Forgotten*, supra note 86; Fields & Hardy, supra note 72; Fields, supra note 67; Hardy, supra note 71; Wurfel, supra note 75; Petrey, supra note 109. The only two books that focus on the history of the Amendment are brief and are written for young adults. See generally Burnham Holmes, *The Third Amendment* (1991); Jason Porterfield, *The Third Amendment* (2011).

116. See Amar, *Bill of Rights*, supra note 19, at 59–63; Ronald Dworkin, *Freedom's Law: The Moral Reading of the United States Constitution* 8–9, 14 (1997); Tom W. Bell, "Property" in the Constitution: The View from the Third Amendment, 20 *Wm. & Mary Bill Rts. J.* (forthcoming 2012) (on file with the *Columbia Law Review*) [hereinafter Bell, *Property*]; Robert A. Gross, *Public and Private in the Third Amendment*, 26 *Val. U. L. Rev.* 215 (1991); Horwitz, supra note 88; Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 *Va. L. Rev.* 1135 (2005); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 *Stan. L. Rev.* 1005 (2011).

117. See Rogers, supra note 65 (discussing, inter alia, federal government's response to Hurricane Katrina); see also Schmidt, supra note 66; Wyatt, supra note 67.

118. See Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The "Living Constitution," The Third Amendment, and the Endangered Species Act*, 30 *Env'tl. L.* 769 (2000); Josh Dugan, Note, *When Is a Search Not a Search? When It's a Quarter: The Third Amendment, Originalism, and NSA Wiretapping*, 97 *Geo. L.J.* 555 (2009).

119. Bell explores whether a quartering could also constitute a taking, which would permit a private homeowner to receive just compensation for the harm caused by the presence of soldiers. See Bell, *Forgotten*, supra note 86, at 146–49. Additionally, Bell argues in a forthcoming article that the Third Amendment "teach[es] us" that the Takings Clause protects real and personal property equally. See Bell, *Property*, supra note 116 (manuscript at 25–31). Wyatt contrasts the Amendment's prohibition on peacetime quartering with the Clause's requirement of just compensation for a taking to support his argument that Congress cannot condition access to federal funds on a property owner's agreement to permit quartering during peacetime. See Wyatt, supra note 67, at 156–58. Kontorovich employs the Amendment's explicit property rule, which prohibits quartering in peacetime, as a foil for the Takings Clause's explicit liability rule, arguing that other constitutional entitlements that are not clearly property or liability rules should not be presumed to be one type or the other. See Kontorovich, supra note 116, at 1160–61, 1164–71; see also *infra* note 131 (critiquing Kontorovich's argument). Finally, Rosenkranz contends that the text of the Amendment is a "Rosetta stone" that compels the conclusion that "most of the provisions of the Bill of Rights" including the Takings Clause are "conditional check[s]" on "federal government action" that can be overcome by "interbranch coordination." Rosenkranz, supra note 116, at 1030, 1033, 1046 (emphasis omitted); see also *infra* notes 142–143, 215 and accompanying text (critiquing Rosenkranz's argument).

Thus, a survey of Third Amendment history, jurisprudence, and scholarship reveals a constitutional right with a long tradition in the Anglo-American legal system that has generally been overlooked by both the judiciary and academia. Because the modern Third Amendment is largely a blank slate, neither its history nor its prior interpretation preclude linking the Amendment to the Takings Clause. Indeed, a closer examination of the historical context in which both provisions were enacted suggests that such a reading is possible.

B. *Can the Third Amendment and the Takings Clause Be Read Together?*

A historical comparison of the origins of the Third Amendment and the Takings Clause indicates the two provisions can be read together. Despite the Amendment's modern obscurity, it shares a common origin with the more prominent Takings Clause—both were enacted at least partially to protect Americans from military oppression.<sup>120</sup> Further, when the Bill of Rights was created, freedom from forced quartering was a well-established individual right that dated back to the Middle Ages,<sup>121</sup> long before the predecessors of the Takings Clause were enacted.<sup>122</sup> Thus, to the extent that the Third Amendment reflects what was a widely understood view of property rights when the Bill of Rights was created—that the home deserved special protection from government intrusion—it seems possible that the Framers intended that the lesser-known Takings Clause would provide greater protection to the home than to other types of property.

This theory is buttressed by the actions of individuals and state governments in the years preceding the passage of the Bill of Rights. As discussed in Part II.A, during the Revolutionary War era, the colonists complained of the abusive quartering practices of the British, initially in the First Continental Congress's Declaration and Resolves and later in the Declaration of Independence.<sup>123</sup> Subsequently, statesmen<sup>124</sup> and state governments<sup>125</sup> alike recognized the importance of including an anti-quartering provision in the Constitution. In contrast, despite the "popular groundswell for a bill of rights," scholars like Professor William Stoebuck have noted that "there is no evidence that eminent domain lim-

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120. For a discussion of the historical link between the Third Amendment and the Takings Clause mentioned by Amar and Harrington, see *supra* note 32 and accompanying text. This link has been recognized by at least one court. See *Johnson v. United States*, 208 F.R.D. 148, 151–52 (W.D. Tex. 2001) (labeling Third Amendment as "first cousin to the Fifth").

121. See *supra* Part II.A.1.a (discussing British anti-quartering laws).

122. See *supra* note 20 and accompanying text (discussing early state governing documents with analogous clauses).

123. See *supra* Part II.A.1.b.

124. See *supra* Part II.A.1.c (describing statements by Federal Farmer, Samuel Chase, and Patrick Henry).

125. See *supra* Part II.A.1.c (discussing state proposals to add anti-quartering provision to Constitution).

itations were given much attention.”<sup>126</sup> Stoebeck, who scoured the Declaration of Independence and “ten other important Revolutionary [War] documents,” failed to find any accusations that the British had “abused eminent domain.”<sup>127</sup> Not a single state proposed a version of the Takings Clause for inclusion in the Bill of Rights,<sup>128</sup> and Congress apparently failed to even discuss the Takings Clause during the debates leading up to its approval of the Bill of Rights.<sup>129</sup> Thus, in light of the relative obscurity of the Takings Clause at the time of the creation of the Bill of Rights, its protection of “private property” could be read to implicitly include the Third Amendment’s solicitude for the home.<sup>130</sup>

### C. *Should the Takings Clause Be Read in Light of the Third Amendment?*

Simply because the Takings Clause *could* be read in light of the Third Amendment does not necessarily mean that it *should* be. One scholar has argued that the difference in the level of protection to property provided by the two provisions suggests that they address fundamentally different problems.<sup>131</sup> Another question is whether there is sufficient reason to believe that the Framers intended the Amendment’s solicitude for the home to be applied to the Takings Clause, or whether the provision is simply a straightforward attempt to protect the public from unruly soldiers that defies deeper interpretation.<sup>132</sup>

126. Stoebeck, *supra* note 20, at 594.

127. *Id.* at 594 & n.145. Stoebeck adds the British “surely would have been accused of it if they had.” *Id.* at 594.

128. See *supra* note 19.

129. *Supra* note 19 and accompanying text.

130. This approach is analogous to the practice in statutory interpretation of reading statutes in light of the common law. See William N. Eskridge, Jr. et al., *Cases and Materials on Legislation, Statutes, and the Creation of Public Policy* 957 (4th ed. 2007) (“[W]hen the legislature deploys words with established common law meanings, courts will presume that those meanings are adopted by Congress. Especially for older, more generally phrased statutes . . . [which leave] issues entirely unaddressed . . . the interpreter might presume that the legislature intended to adopt the established common law rule.” (citations omitted)).

131. Kontorovich argues that linking the Third Amendment to the Takings Clause “ignores the fundamental difference between the [provisions’] . . . entitlements: The government *can* take property without consent if it subsequently pays for it, but it cannot forcibly ‘take’ the occupancy of a person’s house even if it provides compensation.” Kontorovich, *supra* note 116, at 1169 n.86. Thus “[t]he different remedial treatment of different types of takings suggests that . . . a different set of concerns motivated the two constitutional provisions.” *Id.* However, this critique overlooks the fact that the Third Amendment *would* permit the government to “‘take’ the occupancy of a person’s house” during wartime. See *infra* Part II.C.1.d (contending differences between Amendment and Clause are less significant than they initially appear).

132. See, e.g., Dworkin, *supra* note 116, at 8–9 (contending that when drafting Third Amendment, Framers “said what the words they used would normally be used to say: not that privacy must be protected, but that soldiers must not be quartered in houses in peacetime”).

Part II.C.1 addresses the first critique through the use of an intratextual analysis<sup>133</sup> of the two provisions. It argues that key structural similarities between the Amendment and the Clause indicate a textual link between the two provisions. Part II.C.2 responds to the second critique and contends that the available information regarding the early interpretation of the Amendment supports reading its protection of the home into the Takings Clause.

1. *Found Meaning: An Intratextual Analysis.* — Intratextualism, pioneered by Amar, asks the interpreter to “read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”<sup>134</sup> For example, one might read the Tenth Amendment in light of the Preamble because both provisions include the phrase “the people.”<sup>135</sup> Although the textual link between the Third Amendment and the Takings Clause is not quite as apparent as the connection in that example, the Amendment and the Clause do share three structural similarities.

a. *Not Absolute.* — Neither the Takings Clause nor the Third Amendment is, on its face, an absolute negative right. Instead, the provisions are closer to presumptive rights—limits on government action only until specified conditions are met. The Amendment allows nonconsensual quartering in wartime,<sup>136</sup> and the Clause permits eminent domain seizures as long as (1) the taking is for public use and (2) just compensation is paid.

In contrast, the protections provided by most of the other provisions in the Bill of Rights are expressed in absolute terms, without textual qualifications.<sup>137</sup> The First Amendment, for example, provides that “Congress shall make *no* law” abridging speech.<sup>138</sup> Similarly, the Second

133. See Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748–49 (1999) [hereinafter Amar, *Intratextualism*] (describing intratextualism).

134. *Id.* at 748. Of the three forms of intratextualism, the most relevant to this Note is “concordance” intratextualism, which involves “plac[ing] nonadjoining clauses alongside each other for analysis because they use the same (or very similar) words and phrases.” *Id.* at 793.

135. *Id.* at 793.

136. See Rosenkranz, *supra* note 116, at 1032 (noting Amendment “is a *conditional* restriction”).

137. Perhaps the closest parallel to the Third Amendment and the Takings Clause is the Fourth Amendment, which permits the government to intrude upon an individual’s “person[], house[], papers, and effects” under certain circumstances, such as after the government presents “probable cause” and a clear description of the place to be searched or the object or individual to be seized. U.S. Const. amend. IV. Yet even the Fourth Amendment places an absolute prohibition on “unreasonable searches and seizures.” *Id.*; see also Lawrence Rosenthal, *Those Who Can’t, Teach: What the Legal Career of John Yoo Tells Us About Who Should Be Teaching Law*, 80 Miss. L.J. 1563, 1595–96 (2011) (noting in passing that “the unqualified character of the Fourth Amendment[’s] guarantee against unreasonable searches and seizures] differs from its immediate predecessor, which forbids the quartering of troops in private houses but permits a different rule in time of war”).

138. U.S. Const. amend. I (emphasis added).

Amendment states that “the right . . . to keep and bear Arms . . . shall *not* be infringed.”<sup>139</sup>

This distinction matters because it approaches absurdity to suggest the Framers intended Americans to have complete freedom to say anything at any time or place, or to keep and bear any kind of firearm under any circumstances. Indeed, courts have placed limits on the rights protected by these amendments by balancing the societal benefit of preserving each right with other values, such as public safety.<sup>140</sup> In contrast, in the Third Amendment and the Takings Clause, the Framers explicitly removed part of that balancing decision from judicial control.

Admittedly, Professor Rosenkranz argues that “most of the provisions of the Bill of Rights are like the Third Amendment” in that they “are conditional restrictions on executive action . . . [and] not absolute restrictions . . . like the First Amendment . . . .”<sup>141</sup> However, Rosenkranz’s reading of the Bill of Rights is questionable, as it requires disregarding well-established Supreme Court precedent.<sup>142</sup> Further, he identifies only a handful of provisions that fit into the mold of the Third Amendment—the Fourth Amendment and the Fifth Amendment’s Takings and Due

139. U.S. Const. amend. II (emphasis added).

140. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (“*Heller* . . . recognized that the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’ . . . We repeat those assurances here.” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008))); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

141. Rosenkranz, *supra* note 116, at 1033 (emphasis omitted). It is far from clear that this characterization of the Third Amendment is correct. Rosenkranz contends that “[t]he Third Amendment . . . cannot be violated by making a law; the Third Amendment can only be violated by quartering a soldier.” *Id.* at 1030 (emphasis omitted). Yet his interpretation ignores the implications of the first clause of the Amendment, which forbids *peacetime* quartering “without the consent of the Owner” and does not make an exception for when such quartering is authorized by “law.” U.S. Const. amend. III. Under well-established principles of interpretation, the addition of the “law” exception to the wartime clause of the Third Amendment and the failure on the part of the drafters of the Bill of Rights to add a similar exception to the peacetime clause suggests that Congress could indeed violate the Amendment by passing legislation authorizing quartering during a time of peace. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“Affirmative words are often, in their operation, negative of other objects than those affirmed . . . .”); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“‘[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’” (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

142. See, e.g., Rosenkranz, *supra* note 116, at 1036 (noting Court’s holding in *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978), which found Act of Congress violated Fourth Amendment by authorizing unconstitutional search, is “quite wrong”); *id.* at 1042 (“[S]etting . . . substantive due process to one side, the object of the Due Process Clause is not Congress but the President.”).

Process Clauses.<sup>143</sup> Thus, even if Rosenkranz's interpretation of the Bill of Rights is correct (i.e., that several provisions of the Bill of Rights mimic the structure of the Third Amendment), the substance of his article suggests that relatively few amendments, on their face, create conditional rights akin to the right secured by the Third Amendment.

b. *Legislative Decision Required.* — Another structural similarity between the two provisions is that the Third Amendment and the Takings Clause both envision some form of legislative determination before the government can abridge the protected right. In the case of the Amendment, the country must be in a time of war,<sup>144</sup> and the quartering must be "prescribed by law."<sup>145</sup> Similarly, a legislative body must either decide that a particular taking is for public use or pass legislation delegating authority to the executive branch to condemn property.<sup>146</sup> In con-

143. See *id.* at 1028, 1033, 1041, 1044. In addition to the First Amendment, Rosenkranz excludes the provisions that "concern judicial procedure," which he later notes encompass "[m]any clauses of the Fifth, Sixth, Seventh and Eighth Amendments." *Id.* at 1046. He also labels the Ninth Amendment "an important exception" to the textual pattern he identifies due to its status as an "interpretive clause[.]" *Id.* at 1013 n.50 (internal quotation marks omitted). Rosenkranz omits discussion of the Second and Tenth Amendments. But see *id.* at 1050 & n.248 (conceding article examines relatively few clauses "[f]or reasons of space" and promising "[m]ore comprehensive analysis" in future book). Further, his inclusion of the Fifth Amendment's Due Process Clause is highly questionable because labeling it a conditional restraint that applies only to the executive branch requires discarding over a century of Supreme Court precedent. See *supra* note 142 and accompanying text (observing Rosenkranz's disregard of Court's substantive due process case law).

144. See Schmidt, *supra* note 66, at 667 (arguing "Congress must . . . authorize when the nation is formally in a wartime state for Third Amendment purposes").

145. U.S. Const. amend. III. Admittedly, the word "law" is used elsewhere in the Constitution in a manner that encompasses legislative, executive, and judicial decisions. E.g., U.S. Const. art. VI, cl. 2 ("the supreme Law of the Land"). However, during the congressional debates over the Amendment, the House rejected a proposal that mandated a judge authorize any nonconsensual wartime quartering. 1 *Annals of Cong.* 752 (1789) (Joseph Gales ed., 1834). The only representative who spoke on the record against the proposal argued the task "ought to be entrusted to the Legislature." *Id.*; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) (noting in dicta that wartime quartering "must be authorized by Congress"); William Rawle, *A View of the Constitution of the United States* 126–27 (2d ed. 1829), reprinted in 5 *The Founders' Constitution*, *supra* note 25, at 218, 218 ("[T]his must be construed [as] a law of the United States when the war is general, or of the state when . . . exercis[ing its] . . . right of self-defence . . ."); Rosenkranz, *supra* note 116, at 1032 ("The Third Amendment establishes a complex, two-pronged *legislative* check on executive quartering." (emphasis added)).

146. See *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 551–52 (1946) ("[I]t is the function of Congress to decide what type of taking is for a public use and . . . the [executive] agency authorized to do the taking may do so to the full extent of its statutory authority."). The possibility that a judicial decision could violate the Takings Clause has generated significant discussion in the legal community, but a "judicial taking" claim has yet to be upheld by the Supreme Court. Compare *Stop the Beach Renourishment Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601–02 (2010) (finding, in section of majority opinion joined by four of eight voting Justices, that "[i]f a legislature or a court declares that what was once an established right of private property no longer

trast, the other presumptive rights in the Bill of Rights generally require a case-by-case determination by a finder of fact before they can be abridged.<sup>147</sup>

c. *Property Right*. — Most importantly, the primary purpose of both the Takings Clause and the Third Amendment is to protect private property.<sup>148</sup> Beyond these two provisions, only the Fifth Amendment’s Due Process Clause and the Fourth Amendment expressly reference property.<sup>149</sup> The Due Process Clause provides that no person shall be “deprived of life, liberty, or *property*, without due process of law.”<sup>150</sup> The Fourth Amendment protects “[t]he right of the people to be secure in their . . . houses.”<sup>151</sup>

These other provisions are distinguishable from the Takings Clause and the Third Amendment. The Due Process Clause has a broader purpose than the Amendment or the Takings Clause. Additionally, the limited protection it provides to private property—the Due Process Clause triggers only rational basis review of the government’s action<sup>152</sup>—is

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exists, it has taken that property” and that “[o]ur precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary”), with Rosenkranz, *supra* note 116, at 1044 (“Just last term, it appeared that the Supreme Court would at last answer the fundamental question of whether a court can violate the Takings Clause . . . [but] the question remains open to this day.”), and John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 Vt. L. Rev. 475, 480, 487–93 (2010) (noting Justice Scalia’s proposed judicial takings doctrine “would upend a good deal of apparently settled law” and explaining why there are “substantial doubts about whether the Takings Clause should apply to the judiciary in the same fashion that it applies to the other branches”).

147. For example, the Fourth Amendment requires that a judge find probable cause before a warrant may be issued. U.S. Const. amend. IV; see also Rosenkranz, *supra* note 116, at 1039–40 (arguing that Fourth Amendment is “a judicial check on executive action” (emphasis omitted)). Similarly, the Grand Jury Clause generally requires Grand Jury approval before an individual can be tried for a capital crime. U.S. Const. amend. V. Rosenkranz would include the Fifth Amendment’s Due Process Clause in this category, on the grounds that it is a “generally judicial” check on executive power. Rosenkranz, *supra* note 116, at 1043.

148. See *supra* note 67 (arguing Third Amendment primarily serves as property right).

149. The Second and Eighth Amendments could conceivably be included in this list. The Second Amendment does reference a type of property (“Arms”). U.S. Const. amend. II. Yet while the other four provisions limit government interference with specific property (e.g., the Due Process Clause protects the particular property the person is “be[ing] deprived of,” U.S. Const. amend. V), the Second Amendment simply protects a general right to possess firearms. Further, the Eighth Amendment, which provides that “[e]xcessive bail shall not be required, nor excessive fines imposed,” U.S. Const. amend. VIII, limits the *amount* of property the government can take. It does not, however, prohibit the government from taking property (i.e., the government can require an individual to pay a reasonable sum of money in either scenario); nor does it require that the government pay compensation for the taking.

150. U.S. Const. amend. V (emphasis added).

151. U.S. Const. amend. IV (emphasis added).

152. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (stating Due Process Clause limits government action when its objective is “arbitrary or irrational”).

weaker than the Takings Clause's compensation requirement or the Third Amendment's absolute prohibition on nonconsensual peacetime quartering. The Fourth Amendment does not truly create a property right—its protection of “houses” safeguards the owner's privacy right to be “secure” in his house, rather than protecting the house itself.<sup>153</sup>

d. *Addressing the Major Differences.* — Admittedly, an intratextual comparison of the Third Amendment and the Takings Clause reveals two important differences between the provisions. First, they address different types of government action—quartering soldiers versus condemnation of private property. Second, they provide different levels of protection to property. But these differences are not as significant as they might initially appear. Arguably, a “quartering is a form of taking” because it requires the government to temporarily seize a portion of the home for public use.<sup>154</sup> Further, while the Third Amendment is a property rule during peacetime, a legislative body could enact a law during wartime that temporarily converts the Amendment into a liability rule like the Takings Clause.

The three textual commonalities between the Clause and the Amendment distinguish these provisions from the rest of the Bill of Rights in a meaningful way. Protection of private property is the primary purpose of both provisions. Further, the Framers carefully detailed the manner and circumstances under which the rights guaranteed in the Clause and the Amendment could be abridged by a legislative decision. This similarity is particularly significant given the nature of the Bill of Rights—a document intended to protect individual rights from being infringed based on the whims of the majority. Thus, there is a significant textual link between the Third Amendment and the Takings Clause.

2. *Creating Meaning: Applying the Theory of Constitutional Construction.* — While an intratextual analysis suggests commonalities between the two provisions, it cannot conclusively determine whether the Framers intended the Third Amendment's protection of the home to be read into the Takings Clause.<sup>155</sup> In similar instances, where “[t]he judiciary may be able to delimit [the Constitution's] textual meaning, hedging in the pos-

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153. One commentator has noted this distinction: “Perhaps the best clue that the Third Amendment protects property rather than privacy is contained in its text, which directs that no soldiers are to be ‘quartered in any house,’ rather than, for example, ‘on any person.’” Wyatt, *supra* note 67, at 132 (footnote omitted). On the other hand, “[t]he Fourth Amendment . . . refers to the ‘right of the people to be secure in their . . . houses.’” *Id.*; see also *supra* note 68 (arguing Fourth Amendment primarily protects privacy).

154. See Bell, *Forgotten*, *supra* note 86, at 146–49 (“Absent intervening doctrines, . . . the Fifth Amendment should guarantee that those who suffer quartering receive just compensation for their losses.”).

155. Amar concedes that “intratextualism often merely provides an interpretive lead or clue, the full meaning of which will only become apparent when other interpretive tools are also brought to bear on the problem.” Amar, *Intratextualism*, *supra* note 133, at 771.

sibilities but . . . [where] major indeterminancies [still] remain,”<sup>156</sup> scholars have advocated developing policy in a manner that is consistent with the provision’s principles but not directly derived from them.<sup>157</sup> Thus, “[w]hen interpretation has provided all the guidance it can but more guidance is needed, constitutional interpretation must be supplemented by constitutional construction.”<sup>158</sup>

Sufficient evidence exists to conclude that construing the Clause to include a special protection for the home aligns with the principle that motivated the creation of the Amendment—solicitude for the home. This construction draws support from (a) the constitutional ratification debates, (b) the state proposals for an antiquartering provision in the Bill of Rights, and (c) subsequent descriptions of the Amendment in early constitutional law treatises.

a. *The Ratification Debates.* — Two prominent Antifederalists made statements during the debates suggesting that their support for an anti-quartering provision was premised in part on protection of the home. During the Maryland ratification debates, Samuel Chase stated he opposed the Constitution in part because it gave Congress power “to quarter soldiers in our *private* houses” even “in time of *peace*.”<sup>159</sup> Significantly, Chase did not express concerns about quartering that occurred in any other type of real property, such as a business or an inn.

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156. Keith Whittington, *Constitutional Interpretation* 7 (1999). Whittington gives the example of an instruction to “buy a dog.” *Id.* It is clear to the reader she should not buy an iguana or canary. Yet, without making an interpretive leap, she cannot determine with certainty the breed of dog she has been instructed to purchase. This leap, made perhaps based on her previous exchanges with the person giving her the instruction or other subsequent instructions (e.g., “buy dog food appropriate for a Great Dane”), is construction. Constitutional *construction* should be contrasted with constitutional *interpretation* (such as intratextualism), which attempts to discover meaning “already existent in the . . . text.” *Id.*

157. A classic example of constitutional construction is Professor Randy Barnett’s assertion that the judiciary should use a “Presumption of Liberty” when interpreting constitutional provisions. Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 5 (2005) [hereinafter Barnett, *Restoring*] (arguing that in place of “the presumption of constitutionality,” courts should employ presumption “that any restriction on the rightful exercise of liberty is unconstitutional unless and until the government convinces a hierarchy of judges that such restrictions are both necessary and proper”).

158. *Id.* at 121. Whittington argues that only the political branches should utilize constitutional construction, in part due to concerns that a court’s use of constitutional construction would be “a subtle grasp at judicial supremacy, for it draws all claims of constitutional meaning into the judiciary’s purview.” Whittington, *supra* note 156, at 7, 12. However, the Constitution was written “us[ing] general concepts and abstract principles in place of specific rules.” Barnett, *Restoring*, *supra* note 157, at 120. Consequently, judicial constitutional construction is necessary on occasions where “the abstract terms of the Constitution do not directly resolve a particular dispute.” *Id.* at 123; *cf. id.* at 129 (noting political question doctrine is “wholly [a] construction”).

159. Chase, *supra* note 98, at 220.

Similarly, when the Federal Farmer addressed the issue of quartering, he asked rhetorically whether the Constitution had “any provision . . . to prevent the quartering of soldiers on the inhabitants?”<sup>160</sup> The word “inhabitants” suggests habitation, and thus long-term residency in a home.<sup>161</sup> Had the Federal Farmer intended to refer to business owners or innkeepers when discussing the harm caused by quartering, he presumably would have used a more general word.<sup>162</sup>

b. *State Proposals for an Antiquartering Provision in the Bill of Rights.* — Five states proposed adding an antiquartering provision to the Bill of Rights.<sup>163</sup> Two states—Maryland and New Hampshire—suggested amendments that specifically protected “private houses,”<sup>164</sup> although this wording did not appear in the final draft of the Third Amendment. Importantly, the Maryland and New Hampshire proposals only addressed the military’s quartering power in times of peace—neither contained an equivalent to the Time of War Clause<sup>165</sup> of the modern Amendment. The other three proposals, which did include the Time of War Clause, watered down the antiquartering provision by stating that no soldier “ought” to (rather than “shall”) be quartered during peacetime without the consent of the owner.<sup>166</sup>

This distinction matters because the latter three proposals, which are very similar to the modern Third Amendment, all used the phrase “any house” rather than “private houses.” Because the final version of the Amendment appears to be modeled on the weaker version of the pro-

160. Federal Farmer, No. 16, *supra* note 96, at 217.

161. See Black’s Law Dictionary 853 (9th ed. 2009) (defining “inhabit” as “[t]o dwell in; to occupy permanently or habitually as a residence”).

162. Antifederalist statements made during the ratification debates, however, may not be authoritative pronouncements of the popular interpretation of the Bill of Rights. See Treanor, *Origins*, *supra* note 30, at 713 (noting that although Bill of Rights was generally seen as “victory” for Antifederalists, ratification was not “rapid and uneventful,” and “[c]ongressional reaction was mixed, opponents at the state level delayed ratification for two years, and three of the states failed to ratify it” (footnotes omitted)).

163. See *supra* note 101 and accompanying text. Those states included: Maryland, New Hampshire, New York, North Carolina, and Virginia. The Complete Bill of Rights, *supra* note 92, at 215–16.

164. The Complete Bill of Rights, *supra* note 92, at 215. The Maryland proposal provided: “That soldiers be not quartered in time of peace upon private houses, without the consent of the owners.” *Id.* New Hampshire’s proposal stated: “[N]or shall Soldiers in Time of Peace be quartered upon private Houses without the consent of Owners.” *Id.*

165. “No Soldier shall . . . be quartered in any house, without the consent of the Owner . . . in time of war, but in a manner to be prescribed by law.” U.S. Const. amend. III.

166. The Complete Bill of Rights, *supra* note 92, at 216. New York’s proposal states: “That in time of Peace, no Soldier ought be quartered in any House without the consent of the Owner, and in time of War only by the Civil Magistrate in such manner as the Laws may direct.” *Id.* North Carolina suggested: “That no soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the Laws direct.” *Id.* Virginia proposed: “That no Soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the laws direct.” *Id.*

posed antiquartering provisions, it seems unlikely that the property protected from quartering (“any house”) was meant to be more expansive than the property protected in the stronger version of the amendment (“private houses”).<sup>167</sup> Thus, the Third Amendment’s absolute prohibition on peacetime quartering probably protected the home above other types of property.

c. *Early Understandings of the Third Amendment.* — Three treaties written in the century following the adoption of the Bill of Rights provide additional support for the notion that the Third Amendment was intended to reflect a special solicitude for the home.<sup>168</sup> Justice Story’s *Commentaries on the Constitution of the United States*, written in 1833, observed that the “plain object [of the Third Amendment] is to secure the perfect enjoyment of that great right of the common law, that a man’s house shall be his own castle, privileged against all civil and military intrusion.”<sup>169</sup> Similarly, Thomas Cooley<sup>170</sup> noted in 1866 that the Amendment was a check on government tyranny because it prevented an overreaching executive from visiting disproportionate economic harm on a single disfavored individual<sup>171</sup>: “It is difficult to imagine a more terrible engine of oppression than the power in an executive to fill the house of an obnoxious person with . . . soldiers, who are to be fed and warmed at his ex-

167. Furthermore, although inclusion of the Time of War Clause could be viewed as strengthening the Third Amendment (because the rule prevents executive overreaching by requiring congressional approval before allowing nonconsensual quartering), its presence arguably weakens the provision. In the absence of clear guidance regarding wartime quartering, the judiciary might have looked to the Takings Clause to fill the constitutional gap and mandated the government pay just compensation to homeowners who were forced to quarter soldiers. Cf. Bell, *Forgotten*, *supra* note 86, at 130 (speculating that if New Hampshire or Maryland proposals had been adopted, interpreters determining extent of provision’s protection during war would have looked to “the other amendments in the Bill of Rights and to Articles I and II of the Constitution”).

168. Rawle and Tucker discuss the Third Amendment in their respective treatises (both of which predate the three discussed here), but their commentary does not shed light upon the *type* of property the Amendment protects. See 1 Tucker, *supra* note 27, app. at 300–01; Rawle, *supra* note 145, at 126–27.

169. 3 Joseph Story, *Commentaries on the Constitution of the United States* 747 (Bos., Hilliard, Gray & Co. 1833).

170. Justice Cooley served on the Michigan Supreme Court and also taught law at the University of Michigan. Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 *Nw. U. L. Rev.* 615, 654–55 (2009) [hereinafter Barnett, *Constitutional Assumptions*]. Cooley’s treatise’s discussion of the Second Amendment was cited as evidence that the provision “secure[d] an individual right unconnected with militia service” in the Supreme Court’s landmark decision that struck down a District of Columbia gun control statute on Second Amendment grounds. *District of Columbia v. Heller*, 554 U.S. 570, 616–17 (2008).

171. Cf. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–24 (1978) (“[T]he ‘Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be born by the public as a whole’ . . . .” (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))).

pense . . . .”<sup>172</sup> Twenty years later, Christopher Tiedeman<sup>173</sup> echoed Cooley, noting that “no more efficient means of oppression . . . can be devised than the power . . . to throw upon an objectional person the burden of housing and supporting a company of soldiers. . . . [Thus, the Third Amendment] protects the house of the citizen against all such intrusions in time of peace . . . .”<sup>174</sup>

Notably, both Tiedeman and Cooley placed their discussions of the Third Amendment under headings that refer to the home. Cooley, for example, titled his section on the Third Amendment “Quartering Soldiers in Private Houses.”<sup>175</sup> Similarly, Tiedeman labeled his discussion of the provision “Quartering soldiers in private dwellings.”<sup>176</sup>

Thus, the limited historical evidence suggests the foundational principle of the Third Amendment was solicitude for the home. During the ratification debates, several prominent Antifederalists indicated that their primary concern in limiting quartering was protecting the home and its inhabitants from governmental intrusion. The Framers’ decision to model the Third Amendment on the language of the weaker state proposals, which provided that no soldier “ought” to be quartered in time of peace, suggests that the Amendment’s superficially broad protection of “any house” is no more expansive than the stronger state proposals’ protection of “private houses.” The early treatises confirm this interpretation. Story, Cooley, and Tiedeman all recognized that the Amendment protected individuals from oppression within their homes.<sup>177</sup>

172. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 308 (Bos, Little, Brown & Co. 1868).

173. See Barnett, *Constitutional Assumptions*, supra note 170, at 655 (describing Professor Tiedeman as “the leading nineteenth-century theorist of the police power” after Cooley).

174. 1 Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States* 467 (St. Louis, The F.H. Thomas Law Book Co. 1886).

175. Cooley, supra note 172, at 308.

176. Tiedeman, supra note 174, at 466.

177. This Note deliberately uses the terms “house” and “home” synonymously. Several commentators have suggested the phrase “any house” (used instead of “private house” or “house”) creates a property right that extends beyond homeownership (or even analogous property rights, such as condominium or apartment ownership). See, e.g., Wyatt, supra note 67, at 142–47 (arguing Amendment protects “privately owned university buildings”); Dugan, supra note 118, 581–82 (contending Amendment protects “all areas in which an individual has a right to exclude” (emphasis added)). However, this reading is almost certainly flawed. The phrase “any house” should be read narrowly to include only dwellings for three principal reasons. First, a broader reading cuts against the *Engblom* holding, which seemed to confine the Third Amendment’s reach to “various modern forms of dwelling.” *Engblom v. Carey*, 677 F.2d 957, 962 n.11 (2d Cir. 1982). Second, the Amendment was a conservative provision—its drafters chose a narrower version of the right than was proposed by several of the state conventions, see supra Part II.C.2.b, and Congress rejected the only two proposals made during its floor debates to expand the Amendment’s protection, 1 *Annals of Cong.* 752 (1789) (Joseph Gales ed., 1834). Given that many colonies’ restrictions on quartering that predated the Bill of Rights “extended protection only to private dwellings and continued to allow for the quartering of soldiers in

#### D. *Confirming the Link*

The history, text, and primary purpose of the Third Amendment suggest that its solicitude for the home should be read into the Takings Clause. The Amendment's limited history, jurisprudence, and scholarship do not preclude such a reading—the modern Third Amendment is virtually a blank slate.

Further, a historical comparison of the provisions suggests the Takings Clause could be read in light of the Third Amendment. First, both provisions share a similar purpose—protecting private property from governmental interference. Second, while the origins of the Takings Clause can be traced back with reasonable certainty only to the mid-seventeenth century, the property right guaranteed by the Third Amendment has been a part of the Anglo-American legal system since the 1100s. Third, both individual Americans and the states demanded an anti-quartering provision in the Bill of Rights. Conversely, no state proposed the inclusion of a right similar to the Takings Clause, and Congress failed to formally debate the final version of the Clause. Thus, the Framers had a well-established expectation that homes would be protected from certain types of governmental intrusions and may have intended for the Takings Clause to provide greater protection to homes than to other types of property.

Finally, the text of the two provisions and the foundational principle underlying the Third Amendment—protection of the home—suggest the Takings Clause should be read in light of the Amendment. First, the provisions share several structural similarities that distinguish the Takings Clause and the Third Amendment from the rest of the Bill of Rights. The primary purpose of both provisions is to protect property rights. Further, both specify conditions under which the right they protect can be abridged by a legislative decision—an incongruous feature to include in a document designed to prevent specific individual rights from being infringed by majority vote.

Second, reading the Takings Clause to provide special protection to owner-occupied homes is in harmony with the Third Amendment's solici-

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public structures such as inns," Fields & Hardy, *supra* note 72, at 414, it seems doubtful that the Framers intended to expand *this* element of the right while otherwise reducing the protection provided by the provision. Third, the word "house" was commonly used to mean "home" during the era in which the Bill of Rights was drafted. For example, a portion of *Blackstone's Commentaries* published in 1768 listed a well-known legal adage as "every man's *house* is looked up on by the law to be his castle," 4 William Blackstone, *Commentaries* \*288 (emphasis added), and John Adams records a contemporary arguing at trial in 1761 that "[a] Man, who is quiet, is as secure in his *House*, as a Prince in his Castle," Barros, *supra* note 12, at 264 & n.32 (emphasis added) (quoting 2 *Legal Papers of John Adams* 125–26 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)). Professor Jeannie Suk reports surveying "English and American legal sources . . . [and finding] that in the adage that began as 'A man's house is his castle,' 'home' has come nearly to supplant 'house' . . . with 'home' occurring roughly twice as frequently as 'house' since the start of the twentieth century." Suk, *supra* note 12, at 136 n.9.

tude for the home. Both the Antifederalists and early constitutional law treatises viewed the Amendment primarily as a protection for the home. Admittedly, the Amendment's drafters adopted a narrow version of the right. Yet the final version of the Amendment still provides the home with absolute protection from nonconsensual quartering in peacetime. In light of the textual interrelationship between the Amendment and the Clause, it would be inconsistent to give the home special protection in one context (quartering), but not in the other (eminent domain).

Having tentatively established that the Takings Clause should be read in light of the Third Amendment, it is significant that the Clause broadly safeguards private property in *general* while the Amendment protects a *specific* type of property—the home. Under the familiar rule that the specific controls the general,<sup>178</sup> the Amendment's protection of the home should be reflected in determining the constitutional validity of an eminent domain proceeding.

Thus, there are at least two strong reasons why the Takings Clause should be read in light of the Third Amendment's solicitude for the home. First, a historical analysis of the provisions reveals the colonists had a well-established expectation that their homes would be protected from one form of governmental intrusion (quartering) and thus could have intended the Takings Clause to provide similar protection for homes. Second, in light of the significant textual relationship between the two provisions and the fact that the fundamental value underlying the Third Amendment is solicitude for the home, the Amendment's specific protection of the home should be reflected in the Takings Clause's general protection of private property.

### III. READING THE TAKINGS CLAUSE IN LIGHT OF THE THIRD AMENDMENT

If the Takings Clause should be read in light of the Third Amendment, how might this task be accomplished? Part III explores three potential approaches to modifying takings jurisprudence to better reflect the Amendment's solicitude for the home. Part III.A considers the possibility of imposing an absolute ban on seizures of homes. Part III.B addresses the possibility of a just compensation solution. In Part III.C, this Note ultimately recommends a middle ground: heightened judicial scrutiny of seizures involving homes.

#### A. *Alternative 1: Absolute Ban*

Why not impose an absolute ban on taking an owner-occupied home? On one level, this approach is analogous to the Third Amendment's prohibition of nonconsensual peacetime quartering. However, while theoretically possible, an absolute ban is not justified by the text of the Third Amendment. The Amendment does not bar the govern-

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178. Cf. Eskridge et al., *supra* note 130, at app. B 36 (“A precisely drawn, detailed statute preempts or governs a more general statute or remedies.”).

ment from quartering troops in homes when the nation is at war and Congress has enacted authorizing legislation. Further, an absolute ban is fundamentally at odds with the purpose and text of the Takings Clause, which permits private property to be taken so long as it is for “public use.” Even libertarian critics such as Richard Epstein recognize that the Takings Clause permits the government to seize property as long as it is used in a manner that clearly benefits the public.<sup>179</sup> Thus, an absolute ban is not an appropriate approach.

### B. *Alternative 2: A Just Compensation Clause Remedy*

The Third Amendment’s solicitude for the home buttresses a point already made by many scholars: Just Compensation Clause doctrine insufficiently compensates homeowners for what Judge Richard Posner has labeled the “personal value” of their homes.<sup>180</sup> As discussed in Part I.C, the fair market value rule weighs particularly heavily on homeowners, who “more often than others . . . value their own property in significant ways that the market does not recognize.”<sup>181</sup>

This Note does not rule out the possibility that a Just Compensation Clause remedy could appropriately reflect the special status of the home.<sup>182</sup> It focuses on the Public Use Clause, however, because the Third Amendment is primarily a property rule, rather than a liability rule.<sup>183</sup>

179. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 166–69 (1985) (“[T]reat[ing] the eminent domain clause as a complete bar against government takings . . . is manifestly inconsistent with its effort to set a screen through which some takings safely pass while others fail.”); cf. *Kelo v. City of New London*, 545 U.S. 469, 492 (2005) (Kennedy, J., concurring) (noting “broad *per se* rule . . . of invalidity” for economic development takings “would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the Public Use Clause”).

180. See *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (holding that taking without compensating owners for “relocation costs, sentimental attachments, or the special suitability of the property for their particular . . . needs” constitutes form of “limited confiscation”); see also Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 Mich. St. L. Rev. 957, 958–59 (identifying “uncompensated increment . . . made up of three distinct components: (1) the increment by which the property owner’s subjective value exceeds fair market value; (2) the chance of . . . obtaining an amount larger than one’s own true subjective valuation . . . and (3) the autonomy of choosing for oneself when to sell” (footnotes omitted)); *supra* note 59 and accompanying text (discussing proposals by Fee and Barros for special compensation rules for homes).

181. Fee, *supra* note 12, at 790–91 (“An appraiser would . . . see a house for its fungible characteristics: its size, quality of building materials, [and] proximity to important locations . . . . By contrast, the value of a home to [its owner] . . . might include a home’s connection to memories . . . and its ability to satisfy the unique aesthetic desires of the owner.” (footnotes omitted)).

182. Cf. Whittington, *supra* note 156, at xii (“Once we agree on the practice of constitutional interpretation, then we can argue about the correct product of that practice.”).

183. See Kontorovich, *supra* note 116, at 1169 (labeling Third Amendment “the only explicit property rule in the Constitution”).

Although the Amendment permits nonconsensual quartering during wartime, a congressionally authorized state of war<sup>184</sup> is a relatively infrequent occurrence. Thus, the Amendment chiefly provides an absolute right to prevent government intrusion and does not easily lend itself to a monetary quantification of a home's value. Indeed, if the prohibition on peacetime quartering could be circumvented by monetary compensation, that part of the Amendment would almost certainly be subsumed by the Takings Clause and thus rendered superfluous.<sup>185</sup>

### C. *Alternative 3: Heightened Judicial Scrutiny Over Seizures of Homes*

A better approach would require judges to apply heightened scrutiny when assessing the validity of eminent domain seizures involving owner-occupied homes.<sup>186</sup> This rule would not prohibit the use of eminent domain to seize homes, but it would require the government to have something greater than a "reasonable belief" that the taking serves a public purpose.<sup>187</sup> Specifically, the Supreme Court could adopt a variation of the "meaningful rational-basis review" suggested by Justice Kennedy in his *Kelo* concurrence.<sup>188</sup>

184. See *supra* note 144 (highlighting assertion by Schmidt that Congress must officially determine country is at war before nonconsensual quartering is permitted under Third Amendment).

185. Cf. Radin, *supra* note 12, at 1005–06 (observing that "if the personhood perspective is expressed in law, . . . one might expect to find that a special class of property like a family home is protected against the government by a 'property rule' and not just a 'liability rule'"). But see Fee, *supra* note 12, at 785 (arguing for just compensation solution to problem of government seizure of homes). Hypothetically, a victim of nonconsensual peacetime quartering might receive punitive damages that exceed the fair market value of the harm caused by the government's intrusion. Arguably, this payment still falls under the "just compensation" formulation of the Takings Clause because the Supreme Court has not established what amount of money (if any) constitutes adequate compensation in the specific context of quartering.

186. What constitutes a home will necessarily be a case-by-case determination. An owner-occupied house, as in *Kelo*, should clearly be considered a home. Apartment buildings pose a more difficult question because both the tenant and the landlord have ownership interests in the property. For the purposes of the public use determination, an apartment should probably be considered a home because a governmental taking would deprive the tenant of her private residence. This rule aligns with the *Engblom* court's refusal to grant summary judgment against the Third Amendment claims of the prison officers whose state-provided living quarters were occupied by members of the National Guard. *Engblom v. Carey*, 677 F.2d 957, 964 (2d Cir. 1982). If the Third Amendment's special protection for the home applies to the Just Compensation Clause, an apartment should not receive special protection because the landlord, rather than the tenant, would receive the compensation, and his relationship with the apartment is akin to the relationship between an owner and a business. But see *supra* text accompanying notes 183–185 (arguing interrelationship between Third Amendment and Takings Clause better supports Public Use Clause remedy).

187. See *supra* Part I.B (describing Court's current standard of review for public use determination).

188. See *supra* note 49 and accompanying text (noting Justice Kennedy's use of standard).

1. *Proposed Standard: Modified Meaningful Rational Basis Review.* — Under modified meaningful rational basis review, the court would review the record in a Takings Clause case involving an owner-occupied home to determine whether the public purpose ascribed to the taking by the government will *actually* be realized, while acting under the “presumption that the government’s actions were reasonable.”<sup>189</sup> In this special context, the court’s public use inquiry would shift from a subjective one-step test—could the legislature reasonably have believed the taking was for a public purpose—to a more objective two-step test: (a) is the taking for a valid public purpose and (b) is there a strong likelihood that the taking *would* contribute to the achievement of the public purpose.<sup>190</sup>

The first prong of the proposed standard, which reflects the Court’s current test, will easily be met in most cases,<sup>191</sup> as will the second prong in cases that involve traditional public goods, such as highways. For condemnations that involve a more nebulous concept of public purpose, such as the economic development rationale in *Kelo*, the second requirement will pose a more significant hurdle. Under modified meaningful review, *Kelo* and her neighbors would be granted the injunction against New London if they could show it was more likely than not that the promised public benefits of the taking—“creat[ing] in excess of 1,000 jobs, . . . increas[ing] tax and other revenues, and . . . revitaliz[ing the] . . . city”<sup>192</sup>—would not actually accrue to the city’s residents.

Adoption of this standard would not be a radical departure from the Court’s takings jurisprudence. While most takings cases are scrutinized

189. Cf. *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (describing meaningful rational basis review).

190. Admittedly, this standard is similar to the “reasonable certainty” test proposed by the petitioners in *Kelo*, which was not adopted by the Court. See *Kelo*, 545 U.S. at 487–88 (rejecting test). Modified meaningful review can be distinguished from the test rejected in *Kelo* for two reasons. First, the proposed standard is rooted in the Third Amendment’s special protection of the home rather than in the text of the Takings Clause. Cf. *id.* (noting reasonable certainty test constitutes “[a] great[] departure from our [Takings Clause] precedent”). Second, the proposed standard is limited to a narrow category of takings—condemnations of homes. Thus, it does not raise the same level of institutional capacity concerns posed by the reasonable certainty test, which would have applied to *all* eminent domain proceedings. See *id.* at 488 (“[T]his formula ‘would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.’” (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005))). Similarly, the proposed standard would delay only a limited subset of condemnations—those that involve homes. The threat of such a delay could be a net positive, as it would incentivize governments to seize types of private property other than homes. See *infra* note 205 (listing increased difficulty of seizing homes as benefit of proposed standard).

191. But see *Kelo*, 545 U.S. at 477 (“[T]he sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”).

192. *Id.* at 472 (quoting *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004)).

under a weak form of rational basis review,<sup>193</sup> cases that involve exactions<sup>194</sup> already receive heightened scrutiny.<sup>195</sup> Further, the standard is consistent with the desire of a majority of the Court for heightened judicial review in at least some types of takings cases.<sup>196</sup> Although the *Kelo* Justices were most obviously concerned about the economic development rationale that New London used to justify its seizures, part of the Court's discomfort appeared to spring from the fact that *homes* were taken.<sup>197</sup>

2. *Advantages of the Proposed Standard.* — The proposed modified meaningful review standard has at least three benefits. First, it affords the home protection from governmental seizure. Both Supreme Court Justices<sup>198</sup> and commentators<sup>199</sup> recognize that the home is given a special legal status in a number of contexts. Yet in eminent domain proceedings, a home receives the same level of protection as a parking structure or a vacant lot. The proposed standard thus properly recognizes the home's unique significance in our nation's legal culture.<sup>200</sup>

Second, this standard gives new meaning to an often overlooked provision of the Bill of Rights.<sup>201</sup> Reading the Takings Clause in light of the Third Amendment is in line with the Amendment's history, text, and pur-

193. See *supra* notes 36–37 and accompanying text (describing current standard of review).

194. An exaction “is a requirement that the developer provide specified land, improvements, payments, or other benefits to the public to help offset the impacts of the project.” Sprankling, *supra* note 60, at 694.

195. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (requiring “essential nexus” between legitimate state interest and exaction); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (adding requirement of “rough proportionality” between nature and extent of exaction and development permitted in exchange); see also *Lingle*, 544 U.S. at 531–32, 547–48 (striking down rule that law is regulatory taking if it does not “substantially advance legitimate state interests” but leaving *Dolan* and *Nollan* in place (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980))).

196. See *supra* notes 55–57 and accompanying text (discussing both explicit and implicit support by individual Justices for heightened scrutiny).

197. See, e.g., *Kelo*, 545 U.S. at 495 (O'Connor, J., dissenting) (“To save their homes, petitioners sued New London . . .”); *id.* at 518 (Thomas, J., dissenting) (“Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not.”); see also *supra* note 46 (noting majority's avoidance of word “home”).

198. See *Kelo*, 545 U.S. at 518 (Thomas, J., dissenting) (“The Court has elsewhere recognized ‘the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic’ when the issue is only whether the government may search a home.” (quoting *Payton v. New York*, 445 U.S. 573, 601 (1980))).

199. See, e.g., *Barros*, *supra* note 12, at 276 (observing “[i]n a number of areas of law, the right to possess a home is given more protection than the right to possess other types of property” and listing examples of “[h]omestead exemptions, rights of redemption in foreclosure, just-cause eviction statutes, and residential rent control”).

200. See *Suk*, *supra* note 12, at 133 (“The home lies at the center of the legal edifice that helps to construct human experience.”); *Fee*, *supra* note 12, at 793 (“There has always been something uniquely personal about one's own home, making it different and in a sense of higher value than other forms of real property . . .”).

201. Cf. *Dugan*, *supra* note 118, at 560 (describing Third Amendment as “one-tenth of what many people believe to be the most important political document ever written”).

pose. It allows the nation to “squeeze more meaning from the document that inscribes our highest and most popular law.”<sup>202</sup>

Finally, the proposed standard enhances the legitimacy of eminent domain by protecting the most controversial type of property seized by the government. Outspoken opponents of *Kelo* have used the fact that homes were taken as a rallying point for their cause.<sup>203</sup> For example, in the aftermath of *Kelo*, the nonprofit law firm that represented Kelo and her neighbors launched a \$3 million campaign called “Hands Off My Home,” that encouraged the passage of state laws that limit takings.<sup>204</sup> Modified meaningful review would lower the volume in the political debate over eminent domain by decreasing the likelihood that homes will be taken.<sup>205</sup>

3. *Critiques of Modified Meaningful Review.* — There are at least three potential criticisms of this Note’s proposal for heightened judicial scrutiny when the government condemns an owner-occupied home, although all three can be rebutted.

a. *Lack of Textual Support.* — A critic might argue that homes are not explicitly given special protection in the Takings Clause and thus that modified meaningful review lacks constitutional grounding. At first glance, the failure of the Takings Clause to mention houses seems anomalous, especially because both the Third and Fourth Amendments do use the word “house.” There are, however, at least two reasons why the Takings Clause should still be read to provide special protection for the home.

First, inclusion of the word “house” in the Takings Clause would have created an interpretation problem. The Clause uses the generic term “private property.” Including a specific term alongside the general term (e.g., “nor shall any private property, especially houses, be taken for public use without just compensation”) would suggest that the phrase “private property” should be read as partially limited by the word “houses.”<sup>206</sup> Inserting an explicit reference to “houses” might lead the

202. Amar, *Intratextualism*, *supra* note 133, at 826–27 (describing primary benefit of intratextualism).

203. See *supra* notes 7–11 and accompanying text (discussing reactions to *Kelo*).

204. Motoko Rich, *The Buyouts Versus the Holdouts*, *N.Y. Times*, June 30, 2005, at F1; Editorial, *They Paved Paradise*, *Wall St. J.*, June 30, 2005, at A12. The campaign also sought to protect small businesses, Rich, *supra*, but it is telling that the name of the effort referenced the home.

205. If local governments know seizures of *homes* will receive heightened scrutiny, they will be incentivized to take property that will receive the current (and weaker) “reasonable belief” standard. Such a shift would not defuse the takings debate entirely, but owners of businesses and other types of real property would be more likely to be adequately compensated via the fair market value rule than are homeowners. As Fee notes: “[T]he concept of market value more closely reflects how business and investment owners typically value their property.” Fee, *supra* note 12, at 792.

206. Cf. Eskridge et al., *supra* note 130, at 852 (describing “[n]oscitur a sociis” canon as “when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the

reader to assume that the Takings Clause applied only to real property or only to physical structures, with houses receiving special protection. This phrasing would have limited the scope of a provision that was apparently partially a reaction to military impressments of *personal* property, such as carriages and barrels of flour.<sup>207</sup>

Second, the Court has often read constitutional provisions to include specific rights not expressly stated in the document. For example, the First Amendment does not facially guarantee “freedom of association,” but the Court has held that the right is constitutionally protected.<sup>208</sup> Further, the Court has established that there is a constitutional right to privacy, although its limits are admittedly ill-defined.<sup>209</sup> Thus, finding a special solicitude for the home in the Takings Clause is not necessarily a departure from the Court’s prior interpretation of the Constitution.

b. *The Third Amendment Has Not Been Incorporated.* — The Supreme Court has not formally held that the Third Amendment applies to the actions of state and local governments. However, the Takings Clause has been incorporated,<sup>210</sup> and it, rather than the Third Amendment, would act as the constraint in eminent domain proceedings that involve homes. The Third Amendment informs the reading of the Takings Clause that makes this constraint possible, but it is not the governing provision.

Further, accepting *arguendo* that incorporation of the Third Amendment is necessary before the Court can apply the proposed standard, the limited Third Amendment case law suggests either the provision has been implicitly incorporated or will be if the opportunity arises. In *Griswold*, the Court listed the Third Amendment as one of the provisions in the Bill of Rights that created the “zones of privacy” that rendered a *state* law banning the use of contraception unconstitutional.<sup>211</sup> The other specific rights identified<sup>212</sup> in the decision had all been applied against the states by that time.<sup>213</sup> The Third Amendment’s inclusion on the list, coupled with the *Engblom* court’s express incorporation

special word” (citations omitted) (internal quotation marks omitted)). Although the canon may not have been formally developed when the Bill of Rights was created, its logic is intuitive.

207. See *supra* notes 24–25 and accompanying text (discussing *Sparhawk* and statement by John Jay).

208. See *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”).

209. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras . . . [that] create zones of privacy.”).

210. *Chi., Burlington, & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 241 (1897).

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

212. The list included: the First Amendment right to freedom of association, the Fourth Amendment right to freedom from unreasonable searches and seizures, and the Fifth Amendment right against self-incrimination. *Id.*

213. *Chemerinsky*, *supra* note 37, at 503–04; see also *supra* note 208 and accompanying text (discussing *NAACP v. Alabama*).

of the provision,<sup>214</sup> suggests the Amendment has been implicitly incorporated.

Even if the Third Amendment has not been incorporated, it represents a fundamental right and would be incorporated if the proposed standard of review was challenged. A right will be incorporated if it is “fundamental to *our* scheme of ordered liberty or . . . [if the] right is ‘deeply rooted in this Nation’s history and tradition.’”<sup>215</sup> The long history of antiquartering provisions in English and American law<sup>216</sup> indicates that the Third Amendment is, at the very least, “deeply rooted” in American history and tradition.<sup>217</sup>

*c. Not Third Amendment Specific.* — Even if the Third Amendment does support requiring heightened scrutiny for condemnations of owner-occupied homes, why does it justify the specific test proposed by this Note? This Note does not contend that modified meaningful review is the only possible way to faithfully read the Clause in light of the Amendment. The proposed standard, however, is a plausible way to accomplish this task, because it meets the three criteria discussed below.

First, the modified meaningful review standard is triggered only by condemnation proceedings that include homes. Thus, at its outset, the proposed standard reflects the Amendment’s solicitude for the home.

Second, the test makes it more difficult, but not impossible, for the government to condemn a home. This feature of the proposed standard parallels the presumptive, rather than absolute, nature of the right secured by the Third Amendment. As discussed in Part III.A, the Amendment does not prohibit quartering in all circumstances.

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

215. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (citations omitted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Rosenkranz argues that the Third Amendment has not been and will not be incorporated because its “object . . . is not reflected in the subject of the Fourteenth.” Rosenkranz, *supra* note 116, at 1062. That is, he finds it “odd to describe th[e] structural division of federal military authority as a ‘privilege or immunity’ . . . [and] to read the Fourteenth Amendment as a restriction on state quartering of soldiers . . . when, as a general matter, states will have no peacetime troops to quarter.” *Id.* Yet Rosenkranz’s first objection ignores the Court’s test for incorporation, and instead cites a standard employed by only a single Justice in the Supreme Court’s most recent incorporation decision. See *McDonald*, 130 S. Ct. at 3059 (Thomas, J., concurring in part and concurring in judgment) (“[T]he right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.”). Further, Rosenkranz’s second objection ignores the existence of *Engblom* (where the state of New York attempted to quarter the National Guard) even though his article references that very case thirty-three pages earlier. See Rosenkranz, *supra* note 116, at 1029 n.151.

216. See *supra* Part II.A.1 (tracing development of antiquartering laws from Middle Ages through Revolutionary War).

217. See also Chemerinsky, *supra* note 37, at 505 (arguing Third Amendment has not been incorporated “almost certainly . . . [because a] case presenting the incorporation question never has reached the Supreme Court. If ever such a case would arise, the Supreme Court surely would find this provision applies to the states.”).

Finally, modified meaningful review, like the text of the Third Amendment and the Takings Clause, preserves a significant role for the political branches of government.<sup>218</sup> Under the proposed standard, a legislative body, or an executive agency operating on the basis of delegated power, can defeat a challenge to a taking by demonstrating it is more likely than not that the condemnation *will* serve its intended public purpose. Although this rule does require a judicial determination of the validity of the government's claim, it gives less discretion to the judiciary than, for example, a multifactor balancing test.

In addition to meeting these three criteria, modified meaningful review has three benefits. First, it affords the home protection from governmental seizure. Second, it gives the Third Amendment new meaning. Third, it enhances the legitimacy of all eminent domain actions.

#### CONCLUSION

The home has a special, almost exalted, status in most areas of the law. Under *Kelo*, however, a home is no safer from condemnation than any other type of private property.

The often overlooked Third Amendment can provide a text-based constitutional justification for granting the home special protection in eminent domain proceedings. The Amendment and the Takings Clause share significant historical and textual links. These commonalities suggest that the courts should apply heightened scrutiny when determining the constitutional validity of seizures that involve owner-occupied homes.

Six years have passed since the Supreme Court's *Kelo* decision. The homes owned by *Kelo* and her neighbors were removed or demolished years ago, but the promised benefits of New London's redevelopment plan never materialized. The land upon which the homes once stood is still vacant—"a barren wasteland of weeds, litter, and rubble."<sup>219</sup> Adoption of modified meaningful review will not restore what *Kelo* and her neighbors lost, but it will help to protect other homeowners from suffering a similar fate.

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218. See *supra* Part II.C.1.b (noting both provisions require legislative determination before government can abridge protected right).

219. Jeff Benedict, *Little Pink House* 377 (2009); see also Kathleen Edgecomb, *The First Step for a New Neighborhood*, *New London Times*, Nov. 18, 2010, at 1 (describing plan to build eighty townhouses in New London, which is "the first new construction on land cleared 10 years ago to spur economic development" but noting houses will be built on land city acquired from *federal government* in 2000 rather than on property owned by *Kelo* litigants).