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Quartering Species: The Living Constitution, the Third Amendment, and the Endangered Species Act

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QUARTERING SPECIES: THE "LIVING CONSTITUTION," THE THIRD AMENDMENT, AND THE ENDANGERED SPECIES ACT

BY

ANDREW P. MORRISS* AND RICHARD L. STROUP**

The authors argue that the fundamental flaw in the Endangered Species Act (ESA) is that it fails to force government decision makers to consider the opportunity cost of their actions, resulting in flawed decision making that imposes heavy costs on landowners without actually protecting endangered species. The authors develop this analysis through an examination of the ESA in light of the modern "living Constitution" theory of interpretation. They conclude that under this theory the ESA's "quartering of species" on private land violates the Third Amendment's ban on quartering soldiers.

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What part did [judges] act in preventing your houses (which by law are to every man a place of refuge and safety) from being made barracks for the soldiery? Did they execute the penal statute of our mother country against it, or did not some of them act a shameful neutrality while others united with power and in its very council abetted the illegal attempt?¹

[A]ny property holder who currently farms his land, utilizes it for extractive purposes, or contemplates making improvements in the future must worry about the ESA The ESA, in short, is every property owner's nightmare.²

I. INTRODUCTION

Many modern judges and scholars subscribe to a constitutional philosophy that treats the Constitution as a living document subject to "contemporary ratification" that must be interpreted in light of society's "current problems and current needs."³ Although we harbor some doubts about the wisdom of unmooring the Constitution from the Framers' intent and the specific words they chose for the Constitution's text, the widespread acceptance of this theory by constitutional scholars⁴ led us to examine the consequences of a "living Constitution" analysis for the neglected Third Amendment.⁵ Our conclusion is that, under a "living Constitution" theory,

¹ *A Letter to the People of Pennsylvania*, in PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776 257, 269 (Bernard Bailyn ed., 1965) (emphasis in original) [hereinafter BAILYN].

² Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 344-45 (1997).

³ William J. Brennan, Jr., Presentation to the American Bar Association (July 9, 1985), in AMERICAN CONSTITUTIONAL LAW 607, 610 (Mason & Stephenson eds., 8th ed. 1987).

⁴ See, e.g., Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 YALE L.J. 2011, 2012 (1999) ("[N]o analyst denies that [changes in constitutional provisions through judicial interpretation] have occurred; we have had, for good or ill, a 'living Constitution.'"); Bruce Ackerman, *A Generation of Betrayal?*, 65 FORD. L. REV. 1519, 1522 (1999) ("[T]he living constitution . . . is derived by analyzing the contemporary discourse in the spirit of a cultural anthropologist attempting a thick description of the powerful symbols used in courts . . ."); Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept of a "Living Constitution"*, 139 U. PA. L. REV. 1319, 1320 (1991) (Justice Brennan saw his role as "defender . . . of a 'living Constitution.'"); ARTHUR SELWYN MILLER, *SOCIAL CHANGES AND FUNDAMENTAL LAW: AMERICA'S EVOLVING CONSTITUTION* 349 (1979) ("The idea of the living Constitution thus is a justification for adaptation of the basic document to fit new social exigencies."). Some constitutional scholars propose even more radical approaches. See, e.g., Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 411 (1997) (rejecting the "living Constitution" approach as not able to eliminate the "dead-hand problem" or supply us with "the Framers' answers to our problems").

⁵ U.S. CONST. amend. III. The few commentators who consider the Third Amendment worthy of analysis concur on its neglected status. Professor Tom Bell notes in his comprehensive survey of the Third Amendment that "the Third Amendment languishes in comparative oblivion. The scant attention that it does receive usually fails to serve it well.

the Endangered Species Act⁶ (ESA) is unconstitutional because, through the ESA, the federal government “quarters” living creatures on privately held land, a position analogous to—and sometimes more serious than—the explicit textual ban on the peacetime quartering of soldiers imposed by the Third Amendment.

Although some readers may at first find the suggestion that the Third Amendment applies to the ESA humorous or silly,⁷ we think it is no sillier than many of the “living Constitution” interpretations offered in the past for other portions of the Constitution’s text.⁸ Indeed, as one commentator on an early draft of this Article pointed out to us, the colonists who quartered British soldiers not only were forced to provide them with shelter but were also forbidden to shoot, or “take” in ESA parlance, the soldiers they quartered.⁹ Even if no court ever adopts our analysis, considering the ESA in light of the Third Amendment offers a valuable insight into why many Americans find the ESA so burdensome and frightening. Understanding those burdens is the key to reforming the ESA so that it accomplishes what should be its primary objective: protecting endangered species in a sustainable way.¹⁰

In Part II, we briefly outline the “living Constitution” method of constitutional interpretation. In Part III, we describe the historical background of the Third Amendment and apply the “living Constitution” method to it. In Part IV, we describe the Endangered Species Act and the practical problems it creates for landowners. In Part V, we apply the

Lawyers twist it to fit absurd claims, the popular press subjects it to ridicule, and academics relegate it to footnotes.” Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 117 (1993). An earlier analysis noted that “[t]he 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.” Seymour W. Wurfel, *Quartering of Troops: The Unlitigated Third Amendment*, 21 TENN. L. REV. 723, 732 (1951). Another labeled it a “poor cousin” and noted that “[s]tudents of American constitutional history dismiss the amendment as an insignificant legal fossil.” B. Carmon Hardy, *A Free People’s Intolerable Grievance: The Quartering of Troops and the Third Amendment*, in *THE BILL OF RIGHTS: A LIVELY HERITAGE* 67 (Jon Kukla ed., 1987). William Fields and David Hardy wrote in 1991 that few parts of the Constitution “have been relegated to more obscurity” and that the amendment had gone “virtually unnoticed” for two hundred years. William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL. HIST. 393, 393–94 (1991). Peggy Noonan in a recent essay on the amendment called “[t]he poor Third . . . ignored, unloved, unnoticed.” Peggy Noonan, *Expect the Unexpected: Why the Third Amendment May Once Again Be Needed*, in *AMERICAN PERSPECTIVES* 1, 3, available at <http://www1.mightywords.com/asp/bookinfo/bookinfo.asp?theisbn=EB00000828> (last visited Sept. 9, 2000). A 1979 *New York Law Journal* article summed up the Third in its title: *What Ever Happened to the Third Amendment? Search Reveals Judges, Bar Treat It As a Constitutional Stepchild*. Frank B. Lewis, *What Ever Happened to the Third Amendment?*, N.Y. L.J., Feb. 26, 1979, at 1.

⁶ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (1994).

⁷ Some lacking a sense of humor will possibly find it offensive. Tough.

⁸ See discussion *infra* Part II.

⁹ Thanks to Andrew Rutten for pointing this out to us.

¹⁰ “Sustainable” here incorporates the notion that to last, a statutory approach must be seen as both morally correct and cost-effective in the sense that other, less costly approaches would not work better.

principles developed in Part III to the Endangered Species Act. Finally, we examine how endangered species protection can be made both consistent with the Third Amendment and more effective at actually protecting endangered species.

II. THE "LIVING CONSTITUTION" AND CONSTITUTIONAL INTERPRETATION

The phrase "living Constitution" apparently first appeared as the title to a 1927 book by Howard Lee McBain.¹¹ The term has since been used in a variety of ways, from a justification of a broad style of judicial interpretation¹² to a narrow notion of applying established principles to new situations.¹³ As we use the term here, "living Constitution" reflects the tradition inspired by the New Deal of a "dynamic, living Constitution, which changed as social and economic needs demanded."¹⁴

As articulated by one of its strongest advocates, former Justice William Brennan, the "living Constitution" method of interpretation rejects the notion that constitutional claims be upheld "only if they were within the specific contemplation of the Framers"¹⁵ and rejects the restriction of "claims of right to the values of 1789 specifically articulated in the Constitution."¹⁶ It also rejects the notion, which Justice Brennan termed "perhaps more sophisticated" than the "facile historicism" of originalism,¹⁷ that courts must defer to the will of the majority expressed through the

¹¹ Benedict, *supra* note 4, at 2012, n.3 (citing HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION: A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW* (1927)). See also G. Edward White, *The "Constitutional Revolution" as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 874-79 (1997) (tracing the emergence of the "living Constitution" term).

¹² This approach is usually identified with Justice William Brennan and the Warren Court in general. See Adams, *supra* note 4, at 1319 ("This view of the Constitution as a living and evolving document whose interpretations should not be cabined by too literal a quest for the Framers' intent is a position that Justice Brennan consistently defended and thoughtfully espoused in his opinions regarding the first amendment religion clauses. It constitutes one of the many contributions by this great jurist."). See also Stephen Reinhardt, *The Anatomy of An Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313, 314 (1999) ("The Warren Court—the Warren-Brennan era—will be remembered for that legacy [an era in which courts acted as protectors of the rights of the poor, disenfranchised, and underprivileged. The Court's decisions were guided by a broad, humanitarian vision of the role of the judiciary and of the Constitution as a living document.]). Other justices, including Byron White and Hugo Black, have also been tagged with the "living Constitution" label. See Bernard W. Bell, *Byron R. White, Kennedy Justice*, 51 STAN. L. REV. 1373, 1393 (1999) ("Justice White's approach was heavily precedent-based and incremental, but a 'living Constitution' approach nonetheless."); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 703 (1963) ("Like every other part of the Constitution, the Bill of Rights was framed to meet the problems known in the eighteenth century . . . Justice Black has been the leading advocate of giving the Bill of Rights safeguards a meaning appropriate to contemporary contexts.").

¹³ See William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976).

¹⁴ Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2136 (1999).

¹⁵ William J. Brennan, Jr., Presentation to the American Bar Association, *supra* note 3, at 609.

¹⁶ *Id.*

¹⁷ *Id.*

legislature. "It is the very purpose of a Constitution—and particularly of the Bill of Rights—to declare certain values transcendent, beyond the reach of temporary political majorities."¹⁸ Thus, a "living Constitution" interpretation requires

an approach to interpreting the text [that] must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances. The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours. Successive generations of Americans have continued to respect these fundamental choices and adopt them as their own guide to evaluating quite different historical practices.¹⁹

The "ultimate question" of interpretation, therefore, must not be what the words literally say but "what do the words of the text mean in our time."²⁰ From this we can derive three principles of interpretation to use in our examination of the Third Amendment and the ESA:

- (1) The Constitution's text informs interpretation but does not limit interpretation to the plain meaning of the text itself.
- (2) The Constitution's meaning must be interpreted in light of the social realities of the present, not of 1789 or any prior moment.
- (3) The Constitution must be interpreted to give effect to the principles expressed in the text in the context of contemporary social and political problems.

III. THE THIRD AMENDMENT

The text of the Third Amendment is straightforward: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."²¹ Unlike some of the other parts of the Constitution, this language appears to be straightforward and susceptible to a plain and obvious interpretation: the Founders did not want soldiers put into people's houses in peacetime without the homeowner's consent or during wartime without legal process.²²

¹⁸ *Id.* at 610.

¹⁹ *Id.*

²⁰ *Id.* See also Adams, *supra* note 4, at 1330–31 (Brennan's "stance is one in which sensitivity replaces dogmatic rules, and a view in which continuum resides; one which honors original intent and, yet, adapts it to contemporary issues; one which permits the judicial interpreter to breathe deeply and see broadly.").

²¹ U.S. CONST. amend. III.

²² See, e.g., Wurfel, *supra* note 5, at 729 ("Perhaps it is because it deals with a single limited subject in simple concise language that the Third Amendment has not provoked litigation."); William Sutton Fields, *The Third Amendment: Constitutional Protection from the Involuntary*

And most accounts of the adoption of the Third Amendment take a fairly literal approach to the Amendment, such as that in Edward S. Corwin's *The Constitution and What It Means Today: The Third (and Fourth) Amendments*

sprang from certain grievances which contributed to bring about the American Revolution. They recognize the principle of security of the dwelling which was embodied in the ancient maxim that a man's house is his castle. There has never been an instance of an attempted violation of the prohibition.²³

However, this focus on specific words is inconsistent with the "living Constitution" analysis. The First Amendment's Free Speech Clause is also superficially clear—"Congress shall make no law . . . abridging the freedom of speech"²⁴—yet scholars and the courts have determined that the Framers did not mean "Congress,"²⁵ "no law"²⁶ or "speech"²⁷ when they wrote that provision. The Constitution's prohibition on bills of attainder²⁸ is another provision which, if taken literally, could be characterized as a "constitutional antique of little significance to today's world."²⁹ However, Justice Hugo Black argued that a liberal reading of the clause prohibits statutes denying pay to named employees,³⁰ government blacklists,³¹ and denial of social security benefits to deported Communist aliens.³²

Thus, plain meaning is not a bar, in this view, to understanding the principles behind the Third Amendment. To determine those principles, we need to briefly examine the history of the Amendment. In doing so, we must remember that we are not to be limited to the "precise, at times anachronistic, contours" erected by the English Crown's "particular malefactions"³³ in quartering soldiers. Rather we should strive to unearth the

Quartering of Soldiers, 124 MIL. L. REV. 195, 195 (1989) ("The lack of controversy engendered by the right makes it unique and is indicative of the broad consensus as to both its purpose and meaning."); Noonan, *supra* note 5, at 4 (The Third Amendment is "easy enough to understand.")

²³ EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 341 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978).

²⁴ U.S. CONST. amend. I.

²⁵ See James L. Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, in *THE EVOLVING CONSTITUTION* 169, 184-85 (Norman Dorsen ed., 1987) (dismissing as a "technical quibble" the First Amendment's "peculiarly explicit wording" concerning "Congress" rather than the government generally).

²⁶ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . .").

²⁷ See, e.g., *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 505 (1969) (holding that wearing a black armband is "speech"); *King v. California Unemployment Ins. Appeals Bd.*, 101 Cal. Rptr. 660, 664 (Cal. Ct. App. 1972) (holding that wearing a beard is "speech").

²⁸ U.S. CONST. art. I, § 9, cl. 3.

²⁹ Reich, *supra* note 12, at 710.

³⁰ *United States v. Lovett*, 328 U.S. 303, 315 (1946).

³¹ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 144 (1951) (concurring opinion).

³² *Flemming v. Nestor*, 363 U.S. 603, 627 (1960) (dissenting opinion).

³³ See *supra* note 19 and accompanying text.

principles behind the Third Amendment's text as inspired by those malefactions.

A. *The Colonial Experience with Quartering*

Understanding the American experience with quartering³⁴ requires a brief survey of the contemporaneous practices in Britain,³⁵ for it was against British practice that Americans measured the burdens of quartering. Moreover, "[t]he American concern for protecting the rights of private homeowners against quartered troops was the product both of direct experience and their English political heritage."³⁶

English town and borough charters, even before the Magna Carta, attempted to restrict quartering abuses, and these charters "are the major legal antecedents of the Third Amendment."³⁷ Three principles run through these charters as follows: quartering was to be done in accordance with established legal procedures; local civilians, not military commanders, were to decide where quartering would take place; and most importantly, quartering had to be voluntary.³⁸

In reaction to a long history of abuses in England,³⁹ Parliament passed the Anti-quartering Act of 1679,⁴⁰ which forbade involuntary quartering, and the Mutiny Act of 1689,⁴¹ which forbade quartering soldiers in private homes. The Mutiny Act did allow quartering "in Inns Livery Stables Alehouses

³⁴ "Quartering" involved providing more than shelter. Those called upon to quarter troops were required to furnish extensive supplies as well. English public house owners, for example, had to choose between giving troops food and beer at statutorily mandated prices or providing the troops "with candles, vinegar, salt, five pints of small beer or cider, utensils, and firing." STANLEY McCRORY PARGELLIS, *LORD LOUDOUN IN NORTH AMERICA* 188 (1933). In theory, early British practice involved compensation for anything the troops took by giving receipts that could be used to gain reimbursement. "In practice, however, these receipts often proved to be worthless, and 'billeting' came to signify free room and board" by the end of the sixteenth century. Bell, *supra* note 5, at 123. See also Fields & Hardy, *supra* note 5, at 400 (describing the receipts given by the soldiers as "worthless").

³⁵ For a history of British quartering practices, see Bell, *supra* note 5, at 118–24. See also Fields, *supra* note 23, at 195–99; Fields & Hardy, *supra* note 5, at 395–413. "Protections against forced billeting appear to be a uniquely British invention, well-rooted in Anglo-Saxon law." Bell, *supra* note 5, at 118. See also JOSEPH PLESCIA, *THE BILL OF RIGHTS AND ROMAN LAW: A COMPARATIVE STUDY* 63–64 (1995) (noting that Roman law's original restriction of quartering to non-citizens was abolished in 212 A.D., making all but those specifically exempted subject to quartering).

³⁶ Hardy, *supra* note 5, at 80.

³⁷ *Id.* at 68.

³⁸ *Id.*

³⁹ Bell notes the mention of complaints about quartering in the 1628 Petition of Right by Parliament and as a factor in the English Civil War. Bell, *supra* note 5, at 123–24. See also Hardy, *supra* note 5, at 69–70 (describing how Charles I's military ambitions, and Parliament's unwillingness to provide revenue for the military, led to the billeting of soldiers in private homes). Hardy summarizes quartering practices in the Middle Ages as "often brutal, subjecting to peril a householder's beds and goods on the approach of any army, friend or foe." Hardy, *supra* note 5, at 68.

⁴⁰ 31 Car. II, c. 1, § 54 (Eng.).

⁴¹ 1 W. & M., c. 6 (Eng.).

Victuallinghouses" and the like,⁴² but it failed to allocate funds to build sufficient barracks space.

Over time, military *infrastructure* developed and solved the quartering problem.⁴³ "In England and Wales troops were stationed in permanent camps, and when they took to the road, along a route determined by a civil official, the secretary at war, they found shelter according to the rigid specifications of the Mutiny Act in inns and public houses with which the country abounded."⁴⁴ In Scotland, however, public houses were smaller and fewer in number, and troops were sometimes placed in private homes.⁴⁵ Colonial Americans thus understood the quartering of troops as something to be undertaken either by the military directly, through construction of permanent camps, or by innkeepers but not by the general public.

At first, American conditions did not produce quartering issues as "[t]he colonists built their defenses around an adapted militia system," and the militia were rarely out of their home counties.⁴⁶ However, along with the appearance of a British military presence, so quartering problems appeared too.⁴⁷ American conditions made the English solution unworkable: troops covered greater distances, troop movements were irregular in the French and Indian Wars, and American inns were fewer in number and smaller than their English counterparts. As a result, quartering in America was more likely to resemble the Scottish practice than the English one. Not surprisingly, Americans found this objectionable. Some colonies followed New York's lead and enacted specific bans on quartering.⁴⁸

"The problem of quartering troops . . . first became acute in 1754 and 1755 when accommodations had to be made for [Major General Edward] Braddock's army."⁴⁹ The Pennsylvania Assembly refused to authorize payment for either building barracks or compensating those who housed the troops, insisting on the "undoubted right" of British subjects . . . 'not to be burdened with the sojourning of soldiers against their will.'⁵⁰ Braddock

⁴² *Id.*

⁴³ See Fields & Hardy, *supra* note 5, at 415 ("The escalation in the size of armies and their camp followers during the late seventeenth and early eighteenth centuries had made haphazard quartering of soldiers obsolete."). Part of the original quartering problem was due to "logistics not keeping pace with the development of armies themselves." Hardy, *supra* note 5, at 70.

⁴⁴ PARGELLIS, *supra* note 34, at 188.

⁴⁵ *Id.*

⁴⁶ Hardy, *supra* note 5, at 73.

⁴⁷ Fields, *supra* note 22, at 199 ("[P]roblems resulting from the quartering of soldiers amongst the civilian population had occurred through the history of the colonies each time there had been a significant British military presence.").

⁴⁸ Hardy, *supra* note 5, at 73-76. In 1683, New York enacted a law stating that "Noe Freeman shall be compelled to receive any Marriners or Souldiers into his house and there suffer them to Sojourne, against their willes provided Alwayes it be not in time of Actuell Warr within this province." Charter of Libertyes and Priviledges, *reprinted in* 1 THE ROOTS OF THE BILL OF RIGHTS 166 (Bernard Schwartz ed., 1980).

⁴⁹ BAILYN, *supra* note 1, at 702. See also BURNHAM HOLMES, THE THIRD AMENDMENT 37 (1991) ("British troops were first quartered, or housed, in America during the French and Indian War" beginning in 1754.).

⁵⁰ BAILYN, *supra* note 1, at 702.

replied by warning that he would "take care to burthen those colonies the most, that show the least loyalty to his Majesty."⁵¹ When the colony's governor moved to requisition private homes in 1756, the Colonial Assembly "cut him off, disputing with him, through a committee, with 'heat, passion, and rudeness."⁵²

Instead, the Pennsylvania Assembly attempted to extend the Mutiny Act provisions on quartering to its territory.⁵³ In doing so, the Assembly included a preamble explaining that "it was an undoubted right of subjects not to have soldiers quartered on them against their will; no officer, civil or military should presume to transgress this right; any subject could refuse, legally, to quarter."⁵⁴

Interestingly, colonists did not resist all attempts to quarter troops. In some areas British authorities approached the problem quite differently than Major General Braddock had—offering incentives for those willing to quarter. Those authorities, like Massachusetts Governor and Commander in Chief William Shirley, "avoided raising the quartering issue by the simple expedient of scattering the Crown's money with a lavish hand,"⁵⁵ spending almost two thousand pounds in May 1756 alone.⁵⁶ What colonists resisted was the requirement that they subsidize the military by bearing the burden of quartering. As an influential pamphlet in the late 1760s noted, if British authorities could order a colony to provision its troops then they could "lay *any burthens* they please upon [the colony]."⁵⁷

British authorities used the stick as well as the carrot. Lord Loudoun, for example, required Albany, New York to provide shelter with beds, firing, and candles for thirteen hundred men in the winter of 1757, but later resumed payments for fuel, bringing to an end a "flurry of actual oppression, to show the inhabitants the length to which a commander in chief might go if he were a less merciful man."⁵⁸

⁵¹ Jeffrey L. Scheib, *Barracks for the Borough: A Constitutional Question for Lancaster*, 87 J. LANCASTER COUNTY HIST. SOC'Y 54 (1983).

⁵² BAILYN, *supra* note 1, at 703.

⁵³ PARGELLIS, *supra* note 34, at 191.

⁵⁴ *Id.* (citing V Statutes at Large of Pennsylvania 194).

⁵⁵ *Id.*

⁵⁶ *Id.* Similarly, in 1756 Lord Loudoun pacified colonists agitated over quartering by paying for his own quarters at the "princely rate of five pounds a week" and using Crown funds to help supply troops. Moreover, "[t]he inhabitants replaced their trade with the French with a more lucrative one with the army, and no further trouble arose until the autumn of 1757, when Loudoun's greatly enlarged army went into winter quarters." *Id.* at 196.

⁵⁷ JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA, TO THE INHABITANTS OF THE BRITISH COLONIES (1767–68), *quoted in* THEODORE DRAPER, A STRUGGLE FOR POWER: THE AMERICAN REVOLUTION 305 (1996).

⁵⁸ PARGELLIS, *supra* note 34, at 198. *See also* PARGELLIS, *supra* note 34, at 199 (Loudoun threatens to take quarters in New York City by force if they are not voluntarily provided), 201 (Loudoun threatens to march on Pennsylvania to secure quarters), 206 (Loudoun's strategy explained as "insisting upon less than he explained was his rightful due . . . and by holding always in the background the threat of force"). The British army understood the punitive power of quartering. After the Boston Massacre prompted the withdrawal of British forces in Boston to Castle Island in Boston Harbor, the troops sang, as they awaited reinforcements:

The quartering disputes, caused in part by the lack of formal legal authority for British commanders to quarter their troops in the 1750s, led to the first explicit Parliamentary authorization for quartering of soldiers in America, the Quartering Act of 1765.⁵⁹ This legislation was sought by General Thomas Gage, commander of the British Army in America.⁶⁰ Gage had experienced trouble with voluntarily quartering troops in America during the Seven Years War (1756–1763), and his troubles increased after the end of the war.⁶¹ In 1765, he reported that difficulties were “increas[ing] very fast.”⁶² As historian Merrill Jensen writes,

Americans denied that the Mutiny Act extended to America except for the clauses in it naming America. Americans tempted soldiers to desert, hid them, and bought their clothes and arms. Officers who captured deserters who had become indentured servants were seized, prosecuted, and fined. Officers had even been sent to jail for living in the quarters assigned to them. Others had been prosecuted for taking carriages while on the march. Gage said that such examples were rare but that the news was spreading and that it would soon be difficult to keep the soldiers in the service and to march and quarter them without “numberless prosecutions, or perhaps worse consequences.”⁶³

To solve the problem of limited quarters, Gage proposed that justices of the peace and other magistrates be “required” to quarter soldiers in private homes, whose owners would have to accept statutorily set rates of compensation.⁶⁴ King George III, however, rejected the idea of directly authorizing forcible quartering in private homes.⁶⁵ The 1765 Act, as it ultimately emerged, did not permit nonconsensual quartering in private homes, although it did allow quarters in inns, livery stables, and ale houses and if these proved inadequate, other private buildings.

Nonetheless, the “direct result” of Gage’s report was the Quartering Act of 1765, which “became a major source of conflict and, as amended in 1774,

Our fleet and our army, they soon will arrive,
Then to a bleak island, you shall not us drive.
In every house, you shall have three or four,
And if that will not please you, you shall have half a score.
Derry down, down, hey derry down.

Hardy, *supra* note 5, at 78–79 (quoting SONGS AND BALLADS OF THE AMERICAN REVOLUTION 51–52 (Frank Moore ed., Kennikat Press 1964) (1855)).

⁵⁹ 5 Geo. 3, ch. 33.

⁶⁰ MERRILL JENSEN, THE FOUNDING OF A NATION: A HISTORY OF THE AMERICAN REVOLUTION 1763–1776 66 (1968).

⁶¹ *Id.*

⁶² *Id.* at 67.

⁶³ *Id.* See also JOHN RICHARD ALDEN, GENERAL GAGE IN AMERICA 109 (1948) (describing resistance to the Mutiny Act after the end of the French and Indian War); DRAPER, *supra* note 57, at 202 (quoting Gage).

⁶⁴ JENSEN, *supra* note 60, at 67.

⁶⁵ *Id.* at 67–68. See also JOHN SHY, TOWARD LEXINGTON: THE ROLE OF THE BRITISH ARMY IN THE COMING OF THE AMERICAN REVOLUTION 185 (1965) (noting that Lord Grenville advised the King that the quartering of soldiers in private homes was “by far the most likely to create difficulties and uneasiness”).

was one of the Intolerable Acts that led to war.⁶⁶ Even the relatively moderate provisions contained in the 1765 Act, essentially requiring the colonies to contribute to the support of the British Army in America, provoked substantial opposition. New York, for example, engaged in a long-running dispute with British officials over the requirements of the Quartering Act.⁶⁷ By the end of 1767, New Jersey, South Carolina, Georgia, and Massachusetts had also taken steps to oppose it in various ways.⁶⁸

Americans did not accept that the new Quartering Act resolved the issue. Bostonians complained, for example, that "[t]he quartering of troops upon British Americans, in time of peace, is quite repugnant to the Bill of Rights, and a measure that always has been considered as an intolerable grievance, by a free people."⁶⁹

The need for the Quartering Act in 1765 was questionable. As historian John Shy notes, horses and wagons could be procured on a contract basis, barracks provided at government expense, and troop movements scheduled for seasons when units could camp overnight.⁷⁰ And, Shy notes, an ad hoc solution had already arisen to the quartering problem, a solution that rested on such voluntary arrangements.⁷¹ Nonetheless, Gage pushed for legislation to formally solve the quartering problem, rather than rely on market transactions. Gage's insistence on a statute transformed the quartering issue from an economic transaction into a political one: "[B]y trying to codify a delicate *modus vivendi*, Gage destroyed it. By assuming the inevitability of American resistance, he helped to make it inevitable."⁷²

The feature of the Quartering Act that the colonists found most objectionable was its requirement that they involuntarily provide housing (and food and other goods) for the troops. As John Dickinson, a prominent colonial politician, wrote in a widely circulated series of letters on British policy,

[I]f the *British* parliament has legal authority to issue an order that we shall furnish a single article for the troops here, and to compel obedience to *that* order, they have the same right to issue an order for us to supply those troops with arms, cloth[es], and every necessary; and to compel obedience to *that*

⁶⁶ SHY, *supra* note 65, at 164. The Quartering Act was passed at the same time as the Stamp Act. ALDEN, *supra* note 63, at 109. "As a result, the problems related to the quartering of soldiers became entwined with the volatile political issue of 'taxation without representation.'" Fields, *supra* note 22, at 200.

⁶⁷ JENSEN, *supra* note 60, at 213. New York's refusal to comply with the Quartering Act led the British government to suspend the colony's assembly until it complied. SHY, *supra* note 65, at 250. See also ALDEN, *supra* note 63, at 122–23 (describing conflict between Gage and the New York assembly), 153–54 (describing conflict between Parliament and New York assembly); DRAPER, *supra* note 57, at 291–93 (describing the crisis). The financial burdens of the Quartering Act were also cited in the Circular Letter of 11 February 1768, circulated by the Massachusetts House of Representatives. JENSEN, *supra* note 60, at 250.

⁶⁸ SHY, *supra* note 65, at 250.

⁶⁹ Hardy, *supra* note 5, at 78.

⁷⁰ SHY, *supra* note 65, at 180.

⁷¹ *Id.* at 250 ("[I]t is striking to see how far most colonies were willing to go in supporting the regular troops stationed or marching within their borders.")

⁷² SHY, *supra* note 65, at 181.

order also; in short, to lay any burthens they please upon us. What is this but taxing us at a certain sum, and leaving to us only the manner of raising it? How is this mode more tolerable than the Stamp Act?⁷³

Dickinson's letter cleverly linked quartering to another major American grievance: imposition of taxes by a body in which Americans had no representation. Thus, as Dickinson pointed out, quartering was objectionable for the same reasons as the Stamp Act. Quartering was also worse than a simple tax because it fell unevenly on the colonists. British military commanders decided where their troops would quarter, but the costs of quartering were borne unequally among the colonists. In modern economic terms, the military decision makers faced less than the full opportunity cost of their decisions.

The Quartering Act was amended again in June 1774 as part of what the colonists soon labeled the "Intolerable Acts," aimed at punishing Boston for the Boston Tea Party.⁷⁴ James Phinney Munroe notes that the new quartering act went "out of its way to irritate the inflamed citizens of Boston."⁷⁵ Under the 1774 amendments, soldiers could now be quartered wherever needed, including in private homes.⁷⁶ As the name suggests, Americans found the experience intolerable.⁷⁷ Peggy Noonan summarized the experience of Americans who were forced to quarter British soldiers:

These were strangers in the house. The colonists did not appreciate having agents of the very government they wished to throw off reading in the parlor and eating at their table. And the troops stationed in civilian houses were soldiers—sometimes coarse, often uneducated, occasionally unruly,

⁷³ DICKINSON, *supra* note 57, at 44–45.

⁷⁴ See JENSEN, *supra* note 60, at 457; DON COOK, *THE LONG FUSE: HOW ENGLAND LOST THE AMERICAN COLONIES, 1760–1785* 188 (1995) ("Little wonder that the Coercive Acts passed by the English Parliament became known as the Intolerable Acts when they were published in America.").

⁷⁵ James Phinney Munroe, *Last Chance for the Empire*, in 2 *COMMONWEALTH HISTORY OF MASSACHUSETTS* 514, 518 (Albert Bushnell Hart ed., 1966).

⁷⁶ JENSEN, *supra* note 60, at 457; ROBERT W. TUCKER & DAVID C. HENDRICKSON, *THE FALL OF THE FIRST BRITISH EMPIRE: ORIGINS OF THE WAR OF AMERICAN INDEPENDENCE* 316 (1982) (contrasting the Quartering Act with the previous state of affairs, when troops could only quarter in uninhabited houses and buildings). There is some controversy over whether or not the 1774 Act allowed quartering in private homes. See Don R. Gerlach, *A Note on the Quartering Act of 1774*, 39 *NEW ENGLAND QUARTERLY* 80 (1966) (arguing that Act's text did not authorize quartering in private homes); HOLMES, *supra* note 49, at 66 ("The Quartering Act of 1774 did not openly state that soldiers could be quartered in private homes. However, the colonists feared that this might be the meaning of 'other buildings.' The colonists remained uncertain about the interpretation of this law by the British Army, as well as by the government officials who were Tories . . ."). Regardless of whether the 1774 Act authorized quartering in private homes, it is clear that, at least in some instances, British authorities did so. See, e.g., Scheib, *supra* note 51, at 58 (describing quartering-related conflicts between British soldiers and Lancaster residents). The resolution of this dispute is well beyond the scope of this Article and rests on the actual practice of the British army as well as the text of the statute. We assume that the 1774 Act did produce quartering in homes, in part because this makes our task more difficult as we must analogize to homes rather than simply to property.

⁷⁷ See Bell, *supra* note 5, at 126.

sometimes alcoholic. There were complaints of violence and ill-treatment.⁷⁸

As a result, both the First Continental Congress's Declarations and Resolves of October 14, 1774⁷⁹ and the Declaration of Independence denounced the practice.⁸⁰

B. The Constitutional Response

Quartering soldiers was a subject that Americans felt strongly about. Six of the state conventions from the original thirteen colonies proposed texts on quartering soldiers to the Congress.⁸¹ Six states had their own constitutional or statutory provisions against quartering soldiers.⁸² The practice had also been the subject of grievances by Englishmen and Americans from 1627⁸³ through 1776.⁸⁴ The absence of a constitutional bar on quartering played a role in the Anti-Federalist campaign against ratification of the Constitution.⁸⁵ For example, the *Federal Farmer*, an Anti-Federalist pamphlet series, editorialized in 1787 and 1788 that the Constitution's lack of restrictions on quartering soldiers was a reason to oppose the Constitution.⁸⁶ Opposition to the quartering of soldiers in private homes was both widespread and noncontroversial in the Founding Era. If there was to be a Bill of Rights, inclusion of a federal constitutional ban on quartering was uncontroversial.

The text of the Third Amendment changed remarkably little during the drafting process from James Madison's original proposal to the House of Representatives on June 8, 1789.⁸⁷ The House debate on the text centered on proposals to make the prohibition more absolute by removing the wartime exception⁸⁸ and, when that failed, by requiring a civil magistrate to

⁷⁸ Noonan, *supra* note 5, at 5.

⁷⁹ 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 63, 69 (1904).

⁸⁰ THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776) (including "For Quartering large bodies of armed troops among us . . ." among a list of grievances against the King).

⁸¹ THE COMPLETE BILL OF RIGHTS § 5.1.2, at 215-16 (Neil H. Cogan ed., 1997), (Maryland (minority), New Hampshire, New York, North Carolina, Rhode Island, and Virginia). *See also* 4 LEGISLATIVE HISTORIES: AMENDMENTS TO THE CONSTITUTION THROUGH FOREIGN OFFICERS BILL [H.R. 116] 15-26 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter LEGISLATIVE HISTORIES] (giving text of state proposals).

⁸² THE COMPLETE BILL OF RIGHTS, *supra* note 81, § 5.1.3, at 216-17 (Delaware, Maryland, Massachusetts, New Hampshire, Pennsylvania, and New York.).

⁸³ 1627 3 Car. 1, c. 1 (Eng.) *quoted in* THE COMPLETE BILL OF RIGHTS, *supra* note 81, § 5.1.4.1, at 217.

⁸⁴ THE DECLARATION OF INDEPENDENCE, *supra* note 80 ("For Quartering large bodies of armed troops among us").

⁸⁵ Hardy, *supra* note 5, at 81.

⁸⁶ THE FEDERAL FARMER, No. 6, December 25, 1787 & No. 16, January 20, 1788 *quoted in* THE COMPLETE BILL OF RIGHTS, *supra* note 81, § 5.2.4.1-5.2.4.2, at 220-21.

⁸⁷ *See* THE COMPLETE BILL OF RIGHTS, *supra* note 81, § 5.1.1.1, at 207 (quoting Madison's original proposal "No soldier shall in time of peace be quartered in any house without the consent of the owner; nor at any time, but in a manner warranted by law"). Fields and Hardy note that the text "differed little" from the initial proposal. Fields & Hardy, *supra* note 5, at 425.

⁸⁸ THE COMPLETE BILL OF RIGHTS, *supra* note 81, § 5.1.1.5, at 208 (Motion by Sumpter in the House, Aug. 17, 1789, "to strike out all the words from the clause but 'No soldier shall be

determine whether the quartering could occur.⁸⁹

In the brief debate over these proposals, the proponents of stricter restrictions argued that where owners did not consent, "[t]heir property would lie at the mercy of men irritated by a refusal, and well disposed to destroy the peace of the family."⁹⁰ The amendment's opponents, however, argued that "it was absolutely necessary that marching troops should have quarters, whether in time of peace or war, and that it ought not to be put in the power of an individual to obstruct the public service; if quarters were not to be obtained in public barracks, they must be procured elsewhere."⁹¹ Similarly, in opposing the "civil magistrate" amendment, another delegate argued "that cases might arise where the public safety would be endangered by putting it in the power of one person to keep a division of troops standing in the inclemency of the weather for many hours . . ."⁹² By August 24, 1789, the House had settled on the language of the Third Amendment.⁹³

The most significant change from Madison's original proposal concerned the different standards for peacetime and war. Madison's proposal drew a distinction between "time of peace" and other times. The final amendment text changed that to a distinction between "time of peace" and "time of war."⁹⁴ Professor Tom W. Bell has creatively analyzed this change, noting that Madison's version and the final text differ in the rules governing conditions that were neither peace nor war.⁹⁵ Madison's proposal required legislative action for such circumstances, but the final text was ambiguous.

C. Principles of the Third Amendment

What are the principles behind the Third Amendment? As shown above, the Third Amendment was certainly motivated in part by the outrageous behavior of the Royal Government that quartered soldiers in colonial homes

quartered in any house without the consent of the owner"). See also LEGISLATIVE HISTORIES, *supra* note 81, at 29 n.15.

⁸⁹ THE COMPLETE BILL OF RIGHTS, *supra* note 81, § 5.1.1.6, at 208 (Motion by Gerry in the House, Aug. 17, 1789 "to insert between 'but' and 'in a manner' the words 'by a civil magistrate'"). See also LEGISLATIVE HISTORIES, *supra* note 81, at 29 n.14 (motion by Gerry to insert "by a civil magistrate" voted down 35-13).

⁹⁰ THE COMPLETE BILL OF RIGHTS, *supra* note 81, § 5.2.1.2.a, at 218 (Sumpter).

⁹¹ *Id.* (Sherman).

⁹² *Id.* § 5.2.1.2.a, at 219 (Hartley). Some have read this relatively narrowly—Laurence Tribe and Michael Dorf, for example, cite the Third and Fourth Amendments as evidence of "special solicitude for the home." LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 117 (1991). However, the Tribe-Dorf formulation does not fully capture the quartering problem as understood by colonial Americans. Many of the quartering disputes did not involve private homes but attempts by British authorities to require colonials to pay for the quartering of troops in taverns and public houses. Resistance to quartering thus extended beyond the home to coerced payments to house unwelcome soldiers elsewhere.

⁹³ THE COMPLETE BILL OF RIGHTS, *supra* note 81, § 5.1.1.7-5.1.1.8, at 209. There was a debate in the House and Senate over a number of amendments, including what was to become the Third. *Id.* at 210-14.

⁹⁴ See Bell, *supra* note 5, at 129-34.

⁹⁵ *Id.* at 135-36.

during peacetime. Americans resented sharing their homes with often rude and boorish strangers, a practice that carried with it financial losses and a loss of privacy and control of property. Drawing on this experience, Thomas Cooley summed up the need for the Third Amendment by saying:

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 a company of soldiers, who are to be fed and warmed at his expense, under the direction of an officer accustomed to the exercise of arbitrary power, and in whose presence the ordinary laws of courtesy, not less than the civil restraints which protect person and property, must give way to unbridled will; who is sent as an instrument of punishment, and with whom insult and outrage may appear quite in the line of duty.⁹⁶

More recently Akhil Amar similarly phrased the need for the Third Amendment as aimed at preventing the “more insidious forms of military occupation, featuring federal soldiers cowing civilians by psychological warfare, day by day and house by house.”⁹⁷

The pre-Intolerable Acts quartering disputes also undoubtedly played a significant role in shaping the constitutional response. Americans objected not only to sharing their homes with British soldiers, but also to the quartering of troops at their expense when the decision to quarter was at the sole discretion of the British military authorities. As shown above, this was by far the most common colonial experience with quartering.

Additionally, the experience with the Intolerable Acts suggests that, along with “penumbras, formed by emanations”⁹⁸ from the Fourth and Fifth Amendments, the Third Amendment expresses a principle of privacy and security in private property.⁹⁹ It must do more than this, however, because the pre-Intolerable Acts experience centered on resistance to paying for the military’s decisions to quarter troops. We therefore argue for a broader interpretation than simply construing the Third Amendment as restating the privacy concerns of the Fourth and Fifth Amendments. The Third Amendment is an expression of the principle that Americans cannot be compelled by the federal government to share the occupancy of their property with others. It thus embeds within the Constitution the American expectation of voluntarism in shouldering the burdens of quartering. This principle includes the specific malefactions that led to the actual text of the Amendment, and fits the three principles set out earlier.

First, the Constitution’s text informs the interpretations but does not limit interpretation to the plain meaning of the text itself. Our proposed principle is rooted in the behavior that motivated the Framers, but generalizes their concern.

Second, the Constitution’s meaning must be interpreted in light of the

⁹⁶ THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATING POWER OF THE STATES OF THE AMERICAN UNION 435 (7th ed. 1903).

⁹⁷ AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 69 (1998).

⁹⁸ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (describing “zones of privacy”).

⁹⁹ *Id.* (stating that the Third Amendment is “another facet of . . . privacy”).

social realities of the present, not of 1789 or any prior moment. It seems safe to say that the Framers, concerned as they were by a standing army of relatively small size aimed at local disturbances, would be utterly mystified by our sprawling defense establishment and role as the world's policemen. With no serious military threats to the territory of the United States and with the existence of national relationships we suspect that many of the Framers would term "foreign entanglements," America is more likely to quarter soldiers in Bosnia and Japan than in American homes.¹⁰⁰ Indeed, military establishments have become so domestically popular that special measures are necessary to reduce their presence, rather than to protect civilians from soldiers.¹⁰¹ Because the federal government now pays fully (to the low bidder) for the quartering of its soldiers, military bases are widely lobbied for. The Founders would also likely be surprised to learn that the federal government had taken an interest in grizzly bears and red cockaded woodpeckers. Since soldiers are no longer being forcibly quartered on private property but bears and woodpeckers are, applying the Third Amendment to the latter better reflects current "social realities" than does an exclusive focus on soldiers.

Finally, the Constitution must be interpreted to give effect to the principles expressed in the text in the context of contemporary social and political problems. The scope of the federal government has grown considerably since the Founding. As a result, individual eighteenth century Americans' contacts with federal employees (or even representatives of the crown before the Revolution) were far more likely to be with military personnel than they are today. Given the broadened scope of non-military federal actions, the Third Amendment should be read to guide our understanding of these activities as well.

Another alternative is possible and needs to be considered. Some commentators have focused on the civilian-military relationship as the key to the principles behind the Third Amendment (and the Second Amendment as well).¹⁰² For these writers, the principle expressed by the Third Amendment is that the military must remain subordinate to civilian authority.¹⁰³

We offer four responses to this interpretation. First, it does not preclude the interpretation we have given. If the Constitution's text is strong

¹⁰⁰ See, e.g., Gabe Masaaki, *Okinawa Summit No Solution to U.S. Military Base Issues*, 47 JAPAN Q. 10 (2000) (describing Japanese opposition to U.S. military presence on Okinawa).

¹⁰¹ See, e.g., Jessica K. Reynolds, *Military Base Closure Oversight via Environmental Regulations: Replacing Judicial Review of Closure Decisions and Methods with Comprehensive Alternative Redevelopment Mechanisms*, 4 ALB. L. ENVTL. OUTLOOK 40 (1999) (tracing history of domestic military base closures).

¹⁰² See, e.g., AMAR, *supra* note 97, at 59-63 (discussing the Third Amendment as "centrally focus[ing] on the structural issue of protecting civilian values against the threat of an overbearing military"); Fields & Hardy, *supra* note 5, at 395 (quartering problem is "by its history and nature so intimately connected with the large political issue of the 'standing army,' that in the end, the successful resolution of that larger issue for practical purposes rendered [the Amendment] superfluous").

¹⁰³ AMAR, *supra* note 97, at 62-63.

enough to bear the strains that the "living Constitution" approach puts on it generally, it is certainly strong enough to express a principle about security of property ownership simultaneously with a principle about the relationship of military to civilian authority.¹⁰⁴ Second, to the extent it does conflict with our interpretation, we believe ours is more closely rooted in the existing (if sparse) Third Amendment jurisprudence, which expresses concern with privacy issues, not civilian-military relations.¹⁰⁵ Blackstone, for example, emphasized the individual rights nature of the common law right against quartering.¹⁰⁶ Third, even if our interpretation precluded a civilian supremacy interpretation, other provisions of the Constitution deal with the civilian-military conflict.¹⁰⁷ Concerns about those issues, concerns we share, are adequately addressed by those provisions. Fourth, subordination of military to civilian authority does not recognize the full extent of the problem quartering was intended to address. Colonists objected to the quartering of troops even after Parliament (the civilian authority) passed the Quartering Act of 1765. Their objection was thus not that there was not *some* civilian control of the British military (which existed in Parliament). Rather, their objection was that the colonists *themselves* were not able to control the imposition of the costs of the military's quartering decisions.

Indeed, the closest functional relationship of the Third Amendment's text may well be to the Takings Clause. Just as that constitutional provision limits the government's ability to take private property without compensation, so the Third Amendment layers an additional restriction upon the specific takings of land that fall within its purview.¹⁰⁸

IV. THE ENDANGERED SPECIES ACT

The Endangered Species Act is a sweeping piece of command-and-control legislation, dictating that certain favored species (those listed as endangered) will be granted extraordinary levels of protection from human impacts. The Supreme Court described it as "the most comprehensive

¹⁰⁴ See, e.g., AMAR, *supra* note 97, at 61-63 (discussing how the Third Amendment expresses federalism and privacy principles in addition to its civilian-military focus).

¹⁰⁵ See, e.g., *Griswold v. Connecticut* 381 U.S. 479, 484 (1965) (listing Third Amendment prohibition against quartering of soldiers as another facet of privacy); *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982) (using a privacy based rationale to interpret Third Amendment claim).

¹⁰⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *400 ("[T]he petition of right enacts that no soldier shall be quartered on the subject without his own consent . . ."). See also Fields & Hardy, *supra* note 5, at 411-12 ("In short, the common law recognized an individual right against the involuntary quartering of soldiers that was separate and apart from the related concept of whether a standing army was an especially appropriate way of defending a free republic.").

¹⁰⁷ U.S. CONST. art. I, § 8; art. II, § 2; amend. II.

¹⁰⁸ See Bell, *supra* note 5, at 146 (Bell notes the parallel, but argues that courts "must not treat peacetime quartering as merely another form of taking. Unless they levy punitive damages or other penalties against those responsible for this illegal and unconstitutional behavior, the Third Amendment's consent requirement will offer no more protection from quartering than the Fifth Amendment's taking clause.").

legislation for the preservation of species ever enacted by any nation."¹⁰⁹ The Congressional Research Service labeled the ESA "one of this country's most important and powerful environmental laws."¹¹⁰ It is an environmental symbol of the highest order—with one environmental historian comparing it to the Declaration of Independence.¹¹¹ Unlike other national environmental laws, which often temper their goals by requiring action only where practicable, the ESA "elevated protection of all species to one of the U.S. government's highest priorities"¹¹² without tempering it with concerns for feasibility or cost.¹¹³

One of the problems the ESA was intended to protect against, habitat destruction, is a serious one: "Habitat destruction and degradation are by far the leading threats to biodiversity, contributing to the endangerment of at least eighty-eight percent of the plants and animals on the endangered species list."¹¹⁴ Extensive action has been taken under the ESA—1,201 species are now listed as endangered or threatened, and millions of acres of public and private land are subject to restrictions on use because of the presence of listed species.¹¹⁵

The ESA's form, however, creates numerous problems. Chief among these is that public or private landowners on whose property an endangered species is found are subject to extensive restrictions on the use of their land. In light of this problem, it is no surprise that the success of the ESA in actually saving species is questionable at best. In May of 1998, the Secretary of the Interior announced at a press conference that twenty-five years since the ESA was passed, twenty-nine species, out of 1,138 listed, would be removed from the endangered and threatened species lists.¹¹⁶ But of those that had been delisted, five were removed due to their extinction, four were removed because their listing had been due to taxonomic error, ten more had been initially listed due to data error, and several others, arguably, had recovered for reasons other than the ESA.¹¹⁷

¹⁰⁹ *Tennessee Valley Auth. v. Hill (TVA v. Hill)*, 437 U.S. 153, 180 (1978).

¹¹⁰ M. Lynne Corn, *Endangered Species Act Issues*, CONG. RES. SERV., May 27, 1992, at 1.

¹¹¹ JOSEPH M. PETULLA, *AMERICAN ENVIRONMENTALISM* 51 (1980) ("The legal idea that a listed nonhuman resident of the United States is guaranteed, in a special sense, life and liberty has shocked countless human residents.").

¹¹² ROCKY BARKER, *SAVING ALL THE PARTS: RECONCILING THE ENDANGERED SPECIES ACT 20* (1993).

¹¹³ *Id.*

¹¹⁴ David S. Wilcove, *The Promise and the Disappointment of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 275, 277-78 (1998).

¹¹⁵ U.S. Fish and Wildlife Service, available at <http://www.endangered.fws.gov/boxscore.html> (last updated Nov. 30, 1999).

¹¹⁶ Press Release, Department of the Interior, Babbitt Announces New Policy, Plans to "Delist" Endangered Species (May 6, 1998), available at <http://www.nwi.org/SpecialStudies/BabbittReport/DIOrelease.htm> (last visited Oct. 17, 2000).

¹¹⁷ A report listing the species that had been delisted is the National Wilderness Institute's "Babbitt's Big Mistake," released in July, 1998, available at <http://www.nwi.org/SpecialStudies/BabbittReport/Overview.html> (last visited Oct. 17, 2000). See also Richard L. Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC POLICY SERIES PS-3 (1995), at <http://www.perc.org/ps3.htm> (last visited Oct. 17, 2000) (attributing the recovery of the bald eagle, brown pelican, peregrine falcon, and gray whale to factors other than the ESA);

How can such a powerful piece of legislation be performing so miserably? The ESA's flaws cannot be attributed to inadequate authority or even lack of funding. In 1993, more than \$500 million federal dollars were spent on endangered species protections, across many agencies, and the figure had been rapidly rising.¹¹⁸ States, too, are forced to bear substantial costs, running into the tens of millions of dollars per year in some cases.¹¹⁹ Many times as much is spent by private sources across the nation.¹²⁰ Considering expenditures alone is, moreover, a misleading measure of the ESA's ability to commandeer resources. The power of the ESA comes not from direct governmental expenditures on endangered species preservation, but from the ESA's ability to effectively seize private property without compensation. Rather than being caused by a lack of funding or authority, the ESA's failure can be attributed to the statute's failure to take into account the fundamental economic problem of scarcity, the resulting fact of opportunity cost. In this section, we discuss the lack of attention in the ESA to providing incentives to protect endangered species and habitat. Indeed, the ESA is a powerful incentive for landowners to manage their land so as to make it less attractive and useful to the listed species whose presence, due to the ESA, can impose serious penalties on the landowners who harbor them. In Part IV.A, we address how these flaws are related to the ESA's failings under our Third Amendment analysis.

A. The ESA Process

When the ESA was created in 1973, there was comparatively little debate. What debate there was centered on "issues relatively inconsequential to later developments."¹²¹ Saving endangered species like

R. J. TOBIN, *THE EXPENDABLE FUTURE: U.S. POLITICS AND THE PROTECTION OF BIOLOGICAL DIVERSITY* 257 (1990) ("[T]he [ESA] program can point to few successes at least when measured against its statutory goal"); UNITED STATES GENERAL ACCOUNTING OFFICE, *ENDANGERED SPECIES: MANAGEMENT IMPROVEMENTS COULD ENHANCE RECOVERY PROGRAM* 18 (1988) ("Measured against the logical, absolute standard, the small number of domestic species officially declared recovered would suggest that the program has been of limited success in recovering species."). Defenders of the ESA argue that the appropriate measure of the statute's effectiveness is not recovered species but those whose condition has improved or stabilized. W.R. Irvin, *The Endangered Species Act: Prospects for Reauthorization in TRANSACTIONS OF THE FIFTY-SEVENTH NORTH AMERICAN WILDLIFE AND NATURAL RESOURCES CONFERENCE* 642, 644 (R.E. McCabe ed., 1992).

¹¹⁸ Robert E. Gordon, Jr., et al., *Conservation Under the Endangered Species Act*, 23 ENV'T INT'L 359, 400 (1997).

¹¹⁹ See *id.* at 361-63 (discussing Florida).

¹²⁰ For example, negotiating an incidental take permit outside of an expedited program available only in central Texas requires negotiations that are "typically time consuming and costly," lasting "from three months to three years." Thompson, *supra* note 2, at 317. FWS approved creation of a "conservation bank" for red-cockaded woodpeckers by International Paper in Georgia. A "credit" for a pair of woodpeckers is estimated to be worth up to \$100,000, suggesting the high cost imposed on landowners by the presence of the birds. *Endangered Woodpeckers To Get Preserve*, AUGUSTA CHRON., Feb. 19, 1999, at C2, available at 1999 WL 13176746.

¹²¹ Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 474 (1999).

the bald eagle was an uncontroversial environmental goal with broad support. The ESA

was the comprehensive end product of seventy years of incremental federal wildlife law. It was spawned by an extremely symbolic issue that fed public sentiment and support and was buttressed by an amazingly strong and well-organized set of activist groups and a powerful set of congressional staff and members. It was defined as a technical problem that would not hurt any domestic interests and framed prohibitively because no one perceived any costs of doing so. The act was seen as a low-cost, no-lose legislative situation.¹²²

Like other major national environmental laws adopted in the late 1960s and early 1970s, the ESA was designed around a command-and-control model. Experts in the federal government would determine which species were threatened and endangered, design regulations to ensure that those species' habitat was protected, and enforce the regulations to ensure public and private landowners complied.

The ESA process today essentially calls for the biologists of the Fish and Wildlife Service (FWS) to control the use of land, public or private, that is home to one or more endangered species.¹²³ FWS biologists, not landowners, decide if land¹²⁴ can be used for logging, farming, or building. In important respects, government biologists become the land's managers.¹²⁵ This is due, in part, to the expansive interpretation the federal government has given to the ESA.¹²⁶

This is also the root of one of the most serious structural problems within the ESA. Unlike private land managers, government biologists face no opportunity costs to their decisions to place restrictions on the use of private land or the land of other government agencies.¹²⁷ Because they are

¹²² STEVEN L. YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 57 (1982).

¹²³ See Thompson, *supra* note 2, at 310 ("Section 9 [of the ESA] gives the federal government immense and broad authority over private land use decisions in many regions of the nation.")

¹²⁴ The National Marine Fisheries Service handles ocean-going fish.

¹²⁵ This point is explored at more length in Stroup, *supra* note 117.

¹²⁶ The definition of "taking" has proven especially troubling. Because the term includes activities that "harm" a protected species and because the U.S. Fish and Wildlife Service has defined "harm" to include harming habitat, "landclearing, timber harvest, conversion of rangeland to cropland, and other activities on private land can potentially 'take' endangered species and thus be prohibited by the ESA unless expressly authorized by a permit." Michael J. Bean, *The Endangered Species Act and Private Land: Four Lessons Learned from the Past Quarter Century*, 28 ENVTL. L. REP. 10,701, 10,702 (1998).

¹²⁷ Richard L. Stroup & Jane S. Shaw, *Technology and the Protection of Endangered Species*, paper at the "Technological Advancement and the Changing Context of Public Policy Justification" conference, sponsored by the Center for Science, Technology, and Society (Jan. 29, 2000) (on file with authors). Government officials understand this, even if they do not appreciate its importance. See *To Ensure That Landowners Receive Equal Treatment to That Provided to the Federal Government When Property Must Be Used: Hearing on H.R. 1142 Before the House Comm. On Resources*, 106th Cong. 40 (1999) (testimony of Jamie Rappaport Clark, Director, Fish and Wildlife Service) ("Taxpayer money spent on compensation for legally required agency actions is money not spent on protection and recovering the species needing the protections of the ESA"—a clear statement of the concept of opportunity cost, if not a clear

not required to compensate a private landowner for reducing the value of the landowner's property, they need not consider the value of the alternative uses of the land. Indeed, the Act forbids such considerations.¹²⁸

However, land is not free, even if government bureaucrats treat it as free. As a result, the ESA produces non-optimal decisions regarding land use. Part of the problem is that government land managers allocate too much land to habitat protection (because a zero price is too low) in those cases where they have determined that a species must be protected. Government land managers also have no reason to economize on the true cost of their efforts by seeking the land and habitat enhancement techniques that would minimize the cost to society of achieving their goals. Not surprisingly, their efforts are land intensive because land use is free to them.¹²⁹ They fail, however, to take even simple steps to increase the productivity of habitat, because while land is "free," technology is not free, even when the cost is small.¹³⁰ The result is that habitat protection is made more expensive for society than it needs to be—leading to too little habitat protection overall.

The ESA may exclude economic considerations from its formal decision-making process, but it cannot exclude the impact of these considerations on the government's activities. Raising the cost of habitat protection leads to less of it, because politicians and bureaucrats are more reluctant to incur the ire of those affected when the cost the government imposes on the citizenry rises. Failing to force decisionmakers to consider opportunity costs once a species is listed as endangered leads to overly intensive habitat protection. We observe, therefore, too much government action in individual instances where the government seizes more property rights than it needs to protect a given habitat, simultaneously with too little habitat protection over all, as the government avoids the political costs of the ESA by dragging its feet on actions such as listing species.¹³¹ One would

grasp of its importance.)

¹²⁸ See, e.g., *T.V.A. v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress was to halt and reverse the trend towards species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."). The 1978 Amendments to the ESA created "an administrative exemption process that effectively reversed the Court's determination that the ESA protects species at all costs." Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1051 (1997). While "solving" the problem when the cost is a multimillion dollar federal public works project stopped by the presence of endangered species, the amendments did not significantly alter conditions for private landowners confronted with the presence of a listed species. Obtaining an exemption from the "God Squad" remains effectively out of the reach of most private individuals because of the enormous political capital required to secure a decision.

¹²⁹ Stroup & Shaw, *supra* note 127. In the relatively few cases where the government has deigned to actually attempt to set out guidelines for what is required of landowners, it has produced minutely detailed guidelines that set out exacting requirements. See Bean, *supra* note 126, at 10,703 (describing red cockaded woodpecker guidelines).

¹³⁰ Because the ESA lacks any provision for requiring even simple acts such as placing nest boxes in trees and deters landowners from taking such acts on their own, the price necessary to induce such behavior is made higher by the statute. See Stroup & Shaw, *supra* note 127, at 4-6.

¹³¹ See Ivan J. Lieben, Comment, *Political Influences on USFWS Listing Decisions Under*

think the result could hardly be worse for either landowners or endangered species. Instead of buying as much protection as possible within the budget for endangered species, resources are uselessly squandered, destroying the value of individual landowners' properties.

It gets worse, however. Treating a scarce good as free creates perverse incentives for landowners. In particular, setting the price of land at zero makes the discovery of a species officially designated as an endangered species an economic liability.¹³² And animal species, unlike British soldiers, can often be kept away by simple land management techniques. The incentive for landowners is thus to remove endangered species where they exist and to render land uninviting to endangered species where they do not, leading to habitat destruction. The loss of habitat is therefore accelerated.

B. Examples

Discovering a listed species on one's land has important consequences for landowners. In essence, the endangered species becomes a tenant on the land whose needs as defined by the Fish and Wildlife Service trump the needs of the landowner and other tenants. Two examples illustrate both the extent of the impact and the consequences of that impact on the endangered species.

First, consider the case of Ben Cone. In 1982, Benjamin Cone, Jr. inherited 7,200 acres of land in Pender County, North Carolina.¹³³ He managed the land primarily for wildlife, planting chuffa and rye for wild turkey, for example, to help the wild turkey make a comeback in Pender County. He also frequently conducted controlled burns of the property to improve the habitat for quail and deer.

Red-cockaded woodpeckers have been listed as an endangered species since 1970.¹³⁴ They nest in the cavities of very old trees and are apparently attracted to places that have both old trees and a clear understory. By clearing the understory to protect quail and deer and by selectively cutting small amounts of timber, Cone provided a habitat that probably helped attract the woodpecker to his land.

In 1991, when Cone intended to sell some timber from his land, the presence of the birds was formally recorded. Cone hired a wildlife biologist to determine the number of birds, and the biologist estimated that there were twenty-nine birds in twelve colonies. According to the FWS guidelines then in effect for the red-cockaded woodpecker, a circle with a half-mile

the ESA: *Time to Rethink Priorities*, 27 ENVTL. L. 1323, 1327 (1997) (describing how FWS responds to political opposition to listing by slowing listing).

¹³² The price of land for governments may well be *negative* rather than zero—that is, governments may profit from regulatory takings. In central Texas, for example, the required "mitigation" necessary to receive an incidental take permit to allow construction of a single family home is \$1,500 per house paid to the city of Austin. Thompson, *supra* note 2, at 317.

¹³³ This example is drawn from Lee Ann Welch, *Property Rights Conflicts Under the Endangered Species Act: Protection of the Red-Cockaded Woodpecker*, in LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION 151, 173–79 (Bruce Yandle ed., 1995).

¹³⁴ *Id.* at 168.

radius had to be drawn around each colony, within which timber could not be harvested.¹³⁵ If Cone harvested the timber, he would be subject to a fine and imprisonment under the Endangered Species Act. Based on biologists' estimates of the presence of the birds and the Fish and Wildlife rules, 1560.8 acres of Cone's land came under the control of the Fish and Wildlife Service, which cost Cone about \$1.8 million by his consultants' calculations.

In response, Cone made several changes in the way he managed the wildlife and timber. In the past, he clearcut a 50-acre block every five to ten years. Such cuts simulated some effects of a small, intense fire, the kind that would start the cycle of succession every five to ten years. The whole of his property was thus attractive to a variety of wildlife on a sustained basis. But after the woodpeckers were found and Cone was required to stop logging on more than 1560 acres, he began to clearcut 300 to 500 acres per year on the rest of his land. He told an investigator, "I cannot afford to let those woodpeckers take over the rest of the property. I'm going to start massive clear-cutting. I'm going to a 40-year rotation, instead of a 75- to 80-year rotation."¹³⁶ Cone's new rotation was designed to do away with old trees in the areas he could still harvest, preventing the woodpecker from making nests in these aging trees. As a result, when eventually the acres set aside for the woodpecker rotted or burned, his land would be free of the woodpecker.¹³⁷

Ben Cone's experience teaches a lesson to all landowners who learn about his situation: they may be in for similar treatment unless they do something about it. Indeed, after Cone informed the owner of neighboring land about possible liabilities in connection with the red-cockaded woodpecker, he noticed that his neighbor clearcut the property. Overall, what has been the result of the ESA for the red-cockaded woodpecker? As Michael Bean of the Environmental Defense Fund said, "The red-cockaded woodpecker is closer to extinction today than it was a quarter century ago when the protection began."¹³⁸ Bean recommends that the rules be changed to help landowners avoid large reductions in the value of their land by the application of the ESA. But no change is currently in sight.

It is worth noting that private landowners are not the only ones who perceive problems in FWS's control of their land—so do other government agencies. Woodpecker advocate Jerome A. Jackson, for example, describes his encounter with a colonel at Fort Benning, Georgia, when Jackson came to relocate some woodpecker colonies on the Army's land: "Dr. Jackson, I ain't never seen a red-cockadoodled woodpecker and I never want to see one. You do what it takes to move them."¹³⁹ Jackson complains that

¹³⁵ *Id.* at 151, 174.

¹³⁶ Ike C. Sugg, *Ecosystem Babbitt-Babble*, WALL ST. J., Apr. 2, 1993, at A12.

¹³⁷ Cone also took steps to challenge the Fish and Wildlife Service in court, asking to be compensated for his losses, but FWS avoided that court challenge by negotiating a settlement. See also Bean, *supra* note 126, at 10,706 n.43. Eventually, Cone obtained an incidental take permit and found it unnecessary to follow through on his threat.

¹³⁸ Stroup, *supra* note 117, at 1.

¹³⁹ Jerome A. Jackson, *The Red-Cockaded Woodpecker Recovery Program*, in ENDANGERED SPECIES RECOVERY: FINDING THE LESSONS, IMPROVING THE PROCESS 157, 167 (Tim Clark et al. eds.,

government agencies resist outsiders getting involved, and they insist that "their own people" do the work on "their" lands."¹⁴⁰ Jackson also notes that two civilian Army employees were indicted for destroying woodpecker habitat and that the Forest Service threatened an employee with demotion and transfer for opposing clear cutting of woodpecker habitat.¹⁴¹ If even government agencies and employees see protected species as a threat to "their" land, something is seriously wrong with the ESA's approach.

Sometimes the hardships caused by the ESA strike closer to home, as they do in our second example. In 1986, John Shuler and his wife purchased a ranch located six miles west of Dupuyer, Montana.¹⁴² In August and September of 1989, grizzly bears attacked the Shulers' flock of sheep on four different occasions. Each attack was reported to the proper authorities. Attempts to capture and remove the bears were unsuccessful.

On September 9, 1989, at approximately 10:30 p.m., Mrs. Shuler noticed that the sheep, illuminated by three large security lights, were circling nervously in the bedding pen. Mrs. Shuler also heard what "sounded like something crunching bones" nearby and observed that the family dog would not leave the porch.¹⁴³ Shortly thereafter, Mr. Shuler glanced out of a window and saw something running along the fence line south of his house, heading toward the bedding pen and his sheep. Shuler grabbed a flashlight and a rifle and ran outside, barefoot and in his underwear, to the bedding pen "to keep [the sheep] from getting eaten up."¹⁴⁴

When he reached the bedding pen, Shuler testified "the sheep just exploded, and they all raced up to the north corner of the bedding pen." To prevent the sheep from hurting themselves by piling on one another, Shuler climbed over the fence to the bedding pen and walked toward the center of the flock. As he moved toward the center of the bedding pen, a heavy snowfall began, making it very difficult to see. Shuler testified that, at this point, "the sheep were boiling all around [him]," when three grizzly bears emerged from the darkness and sprinted past him, approximately thirty feet away, heading towards the north end of the bedding pen. Startled, Shuler dropped his flashlight and fired a shot at the bears.

Immediately thereafter, the sheep started to "flow into" Shuler from the north end of the bedding pen.¹⁴⁵ Suddenly, a fourth grizzly bear rose up on its hind legs amongst the sheep, approximately thirty feet away from Shuler. Shuler fired a shot at the bear's throat. The bear fell to the ground, let out a roar, and got back up. Shuler then lost sight of the bear in the snow and darkness.

Shuler rushed toward the sheep shelter in an effort to seek protection from the bear. As he waited next to the shelter, Shuler heard a gate in the

1994).

¹⁴⁰ *Id.* at 174.

¹⁴¹ *Id.* at 162-63.

¹⁴² This example is based on *Shuler v. Babbitt*, 49 F. Supp. 2d 1165 (D. Mont. 1998).

¹⁴³ 49 F. Supp.2d at 1166.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

shelter rattle, indicating either the sheep had hit the gate or the bear was leaving the bedding pen by climbing over the gate. Shuler waited by the shelter for a minute until he thought it was safe, and then he retrieved his flashlight. He walked to the spot where the grizzly bear had stood when he shot it. He found blood stains in the snow and followed the blood trail to the location where the bear had climbed over the gate in the wind break.

Shuler picked up the trail of the three other grizzly bears and followed it south to where it left the bedding pen. After ensuring that all four grizzly bears had left the bedding pen and that his sheep were relatively safe, Shuler returned to his home and he dressed. Shuler then drove out to look for the bear's carcass, but was he forced to discontinue his search due to the heavy snowfall and poor visibility.

Shuler resumed his search at first light the next morning to determine whether he had killed the bear or needed to warn his neighbors and the authorities that a wounded grizzly bear was in the area. He drove his truck into a pasture, let his dog out of the truck, and proceeded to a pasture just north of Sheep Creek. The dog disappeared into a low marshy area by the creek. Shuler stopped his truck and, armed with his rifle, he began walking towards where his dog was pointing. Shuler did not see anything, but as he turned to return to his truck, Shuler noticed a grizzly bear, approximately 150 feet away, sitting on its haunches.

Shuler testified that the bear then began "loping in [Shuler's] direction at an angle He was running in a little bit sideways and his right shoulder was throwing up. There was something wrong with the way he was tracking."¹⁴⁶ Shuler fired at the bear from a distance of approximately 125 feet, but missed. Shuler fired again, and the second shot caused the bear to roar and fall to the ground. The bear returned to its feet and came toward Shuler. From a distance of fifty feet, Shuler fired a third shot, which knocked the bear to the ground. Shuler then approached the bear and, realizing that it was dying, fired a final shot, which killed the bear. He then returned home and reported the incident to FWS.

In May 1990, FWS served Shuler with a Notice of Violation, charging him with "taking" a grizzly bear¹⁴⁷ in violation of 16 U.S.C. § 1538(a)(1)(B)¹⁴⁸

¹⁴⁶ *Id.*

¹⁴⁷ Under the ESA, the term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Endangered Species Act of 1973, 16 U.S.C. § 1532(19) (1994). There is no little irony, of course, in the ESA's use of the term "taking" given the relatively small degree of protection afforded landowners like Shuler by the Takings Clause of the Constitution. *See generally* Thompson, *supra* note 2 (discussing appropriate compensation policy in the ESA context).

¹⁴⁸ The ESA states that "with respect to any endangered species of fish or wildlife . . . it is unlawful for any person subject to the jurisdiction of the United States to take any such species within the United States . . ." 16 U.S.C. § 1538(a)(1)(B) (1994). Equivalent authority exists for the Secretary of the Interior to restrict takings of "threatened" species under section 4(d) of the ESA. 16 U.S.C. § 1533(d) (1985). The Supreme Court upheld FWS's expansive definition of "take," which includes "significant habitat modification or degradation that actually kills or injures wildlife" by significantly impairing essential behavior patterns including breeding, feeding, or sheltering. *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687 (1994).

and proposing a civil penalty of \$7,000. In June 1990, Shuler filed a petition for relief from the assessment, asserting that he had acted in self-defense. Almost a year later, in April 1991, FWS rejected Shuler's argument and assessed a \$7,000 civil penalty. Shuler appealed and almost two years later, after a hearing, an Administrative Law Judge found that Shuler did not have a good faith belief that he was acting in self-defense:

In seeking out the bear, he [Shuler] unjustifiably, unreasonably, and intentionally placed himself in dangerous circumstances, circumstances upon which he may not now rely to establish a good faith belief that he was acting in self-defense.

Mr. Shuler's choice of twice placing himself in the zone of imminent danger and then shooting the bear cannot be condoned by labeling it self-defense. If such actions are condoned, the wildlife protection purposes of the ESA will be defeated. Any rancher wishing to protect his livestock from grizzlies or other listed species could initiate or provoke dangerous confrontations in order to justify killing the species.¹⁴⁹

The ALJ did reduce the civil penalty, in light of mitigating circumstances, to \$4,000. Shuler again appealed administratively, and more than three years later, the Ad Hoc Board of Appeals of the Department of the Interior held Shuler's actions, in leaving his house to protect his sheep and to search for the bear, were reasonably calculated to lead to a conflict.¹⁵⁰ Having determined that Shuler provoked the conflict, the Board found that Shuler did not act in self-defense in "taking" the bear. In addition, the Board held that Shuler's civil penalty was appropriately increased to \$5,000. Shuler sought judicial review of the Board's decision, and almost two years later, the U.S. District Court for the District of Montana reversed the Board's decision and granted Shuler's motion for summary judgment.¹⁵¹ After nearly nine years of costly legal battles, a court had finally ratified Shuler's right to be near his sheep, just outside his house.

C. Incentives

These examples are more than isolated incidents in which well-meaning landowners are caught up in a system aimed at those with bad intentions that are attempting to eradicate species. Indeed, we doubt that anyone is interested in eradicating species for the sake of eradicating them. The problem is not, for example, that an army of hunters is swarming across the land, seeking to shoot anything that moves—hunters, in fact, have been a part of some of the most successful voluntary, private efforts at species preservation.¹⁵² Rather than restraining those intent on evil, the goal of

¹⁴⁹ 49 F. Supp. 2d at 1168.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1168–69.

¹⁵² See, e.g., the work of Ducks Unlimited, described briefly in COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1983, at 153–54 (1983) (describing Ducks Unlimited's efforts at preserving and restoring habitat through private funding); the work of the Ruffed Grouse Society, at <http://www.ruffedgrousesociety.org> (last visited Oct. 17, 2000) (describing the Society's efforts at habitat conservation); and the work of Quail Unlimited, at

species protection should be to provide space for endangered species to coexist with other uses of the land. Logging operations like Ben Cone's and ranching operations like John Schuler's can be conducted to coexist with species as well as in ways that harm species. Landowners need incentives to choose the former; the ESA provides incentives to choose the latter.

Finding ways to make private landowners' use of their land compatible with endangered species protection is essential to preserving species because the great majority of endangered species exist on private land, and many exist only on private land. A 1994 GAO report, for example, found that 264 of 712 then-listed species had habitat only on private land.¹⁵³

Whether the ESA will actually save species—as opposed to simply making Americans feel good about having a law that purports to do so—will depend on whether it provides landowners with the proper incentives to manage their land in ways that are compatible with endangered species preservation. Unfortunately, as the above examples suggest, the current form of the ESA provides exactly the wrong incentives.

A landowner who discovers an endangered species on her land has the incentive to “shoot, shovel, and shut up.” Although killing endangered species is illegal, the chances that anyone will ever know about such incidents are slim. Some species, like the wolves reintroduced into the Yellowstone ecosystem, are carefully monitored,¹⁵⁴ but most are more like the red-cockaded woodpecker and can be killed with relative impunity.

Most property owners will not, of course, kill protected species, but they need not do so to defeat the ESA. Even before a species is seen on their land, the ESA gives private landowners an incentive to manage their land to preclude the species. Many do just that. For example, the “Developer's Guide to the Endangered Species Regulation” notes that

[u]nfortunately, the highest level of assurance that a property owner will not face an ESA issue is to maintain the property in a condition such that protected species cannot occupy the property. Agricultural farming, denuding of property, and managing of vegetation in ways that prevent the presence of such species are often employed in areas where ESA conflicts are known to

<http://www.qu.org/conservation/quailman.cfm> (last visited Oct. 17, 2000) (describing Quail Unlimited's efforts at habitat conservation). These hunter-based groups spend many millions of dollars each year to help preserve habitat for the game they hunt, preserving at the same time the habitat of all associated species. See also TERRY L. ANDERSON & DON R. LEAL, *ENVIRO-CAPITALISTS: DOING GOOD WHILE DOING WELL* (1997) (describing environmentally sensitive business's success); John A. Baden & Pete Geddes, *Environmental Entrepreneurs: Keys to Achieving Wilderness Conservation Goals?*, 76 DENV. U.L. REV. 519, 531–34 (1999) (describing success of entrepreneurial efforts to protect endangered species).

¹⁵³ GENERAL ACCOUNTING OFFICE, GAO/RCED-96-16, *ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 4–5* (1994). See also Bean, *supra* note 126, at 10,701–10,702 (“[W]hat private landowners do on and with their land will likely have a major influence on the success or failure of the ESA, and to date the results are not encouraging.”).

¹⁵⁴ Following their release in Yellowstone, for example, a pair of wolves traveled to the Red Lodge, Montana area. The skinned carcass of one of the wolves was found in the area, and Chad McKittrick was convicted of the taking. Jennifer Li, Ninth Circuit Environmental Review Chapter, *The Wolves May Have Won the Battle, but Not the War: How the West Was Won Under the Northern Rocky Mountain Wolf Recovery Plan*, 30 ENVTL. L. 677, 693 (2000).

occur. This is referred to as the "scorched earth" technique¹⁵⁵

Such management techniques are more than anecdotes. Economists Dean Lueck and Jeffrey Michael examined the way that the presence of the red-cockaded woodpecker affected timber harvest rates and age of harvest in North Carolina.¹⁵⁶ Because the birds strongly prefer old-growth Southern pine for nesting, landowners can keep the woodpeckers out by harvesting their timber before it is old enough to be attractive to the birds. Lueck and Michael used data on over 1,000 individual forest plots from the U.S. Forest Service's Forest Inventory and Analysis, a 1997-98 North Carolina State University survey of over 400 landowners, and sophisticated econometric techniques in order to find statistically significant evidence that "increases in the proximity of a plot to [woodpeckers] increases the probability that the plot will be harvested and decreases the age at which the forest is harvested."¹⁵⁷ When endangered species are present in North Carolina and elsewhere, it appears that the interference with land use and the financial penalties that result cause the preemptive destruction of habitat for species listed under the Endangered Species Act.

Similarly, the black-capped vireo and the golden-cheeked warbler were listed as endangered,¹⁵⁸ and in Texas, habitat destruction occurred prior to FWS orders to landowners to set their lands aside from development, leading to much reduction of the listed birds' favorite habitat.¹⁵⁹ An official of the Texas Parks and Wildlife Department wrote in 1993, "I am convinced that more habitat for the black-capped vireo, and especially the golden-cheeked warbler, has been lost in those areas of Texas since the listing of these birds than would have been lost without the Endangered Species Act at all."¹⁶⁰

It is not only property rights enthusiasts who recognize the failure of the ESA to create appropriate incentives. A senior ecologist at the Environmental Defense Fund blamed the ESA, which he termed "purely punitive in nature,"¹⁶¹ for its failure to protect species: "[I]t provides no rewards or incentives to encourage good behavior on the part of landowners. In particular, it does little to encourage landowners to restore or enhance the habitats of endangered species on their property."¹⁶²

¹⁵⁵ NATIONAL ASSOCIATION OF HOME BUILDERS, DEVELOPER'S GUIDE TO ENDANGERED SPECIES REGULATION 109 (1996).

¹⁵⁶ Dean Lueck and Jeffrey Michael, *Preemptive Habitat Destruction Under the Endangered Species Act* (Working Paper, Montana State University) (on file with authors).

¹⁵⁷ *Id.*

¹⁵⁸ 50 C.F.R. § 17.11 (1999). See also *Endangered and Threatened Wildlife and Plants: Emergency Rule to List the Golden-Cheeked Warbler as Endangered*, 55 Fed. Reg. 18,846 (May 4, 1990) (emergency listing to prevent golden-cheeked warbler habitat destruction).

¹⁵⁹ Bean, *supra* note 126, at 10,706.

¹⁶⁰ Larry McKinney, *Reauthorizing the Endangered Species Act—Incentives for Rural Landowners*, in BUILDING ECONOMIC INCENTIVES INTO THE ENDANGERED SPECIES ACT 71, 74 (1994).

¹⁶¹ David S. Wilcove, *Foreward, The Promise and the Disappointment of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 275, 277 (1998).

¹⁶² *Id.*

Landowners are not the only group for whom the ESA provides the wrong incentives. By giving regulators excessive power over landowners, it creates the wrong incentives for regulators as well. For example, a Maryland state wildlife biologist told one interviewer: "We don't have to prove anything. If the landowner disagrees with our recommendations then he can hire an expert!"¹⁶³ By eliminating the landowner's ability to reject the government's dictates, the ESA eliminates the incentive for government personnel to negotiate and persuade, and it creates an incentive for them to use their coercive power to dictate land use.

Mixing the absolutist command-and-control structure of the ESA with imprecise statutory language creates additional problems. A 1998 summary of the lessons learned from the first twenty-five years of the ESA by an Environmental Defense Fund attorney concluded that the case law adds

up to considerable confusion about the circumstances under which habitat modification constitutes a prohibited taking of endangered species. That confusion, in turn, means that landowners who want to know what they can do without running afoul of the law often face a very real practical problem: no one can give them a definitive answer.¹⁶⁴

Even where FWS has done a reasonable job of setting the rules out in advance, as it has with the red-cockaded woodpeckers, the guidelines that result are lengthy, detailed, and complex.¹⁶⁵ Thus, even those that want to comply with the law find themselves frustrated by their inability to know the law's requirements.

The command-and-control approach also allows government agencies to make mistakes nationally instead of merely locally. Earlier in the twentieth century, for example, governments worked to eradicate hawks—paying bounties to promote the killing of hawks—because hawks preyed on other birds.¹⁶⁶ Even the Audubon Society promoted the eradication of eagles, hawks, falcons, and other such birds, because raptors killed song birds.¹⁶⁷ One conservation-minded individual who disagreed with government policy toward raptors, Rosalie Edge, scraped together the funds to lease and ultimately buy hundreds of acres of prime raptor habitat on Hawk Mountain in Pennsylvania. She then barred hunting from the area. Through her efforts and the efforts of other individuals, Hawk Mountain Sanctuary became an internationally known conservation, education, and research organization.¹⁶⁸ When the government turned from eradicating to protecting raptors, there were raptors left, because Rosalie Edge and her

¹⁶³ James A. Adkins, *Ethical Treatment of Private Property Owners When Implementing Protection Measures for Rare and Endangered Species*, 26 N. KY. L. REV. 421, 421 (1999) (quoting interview with Glen Therres, Wildlife Biologist, Maryland Department of Natural Resources, in Wye Mills, Md. (1998)).

¹⁶⁴ Bean, *supra* note 126, at 10703.

¹⁶⁵ *See id.* at 10,703–10,704.

¹⁶⁶ *See* Andrew P. Morriss & Roger E. Meiners, *The New Feudalism in Property Law: The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. (forthcoming 2000).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

supporters had been able to use private property to "opt out" of the eradication campaign. Despite its conservation focus, the ESA may well make mistakes similar to those of the raptor-eradication programs.¹⁶⁹ Because of its comprehensive scope and command-and-control approach, however, no modern Rosalie Edge will be able to "opt out" of the mistaken mandates.

V. THE ESA AND THE "LIVING CONSTITUTION"

A "living Constitution" interpretation of the Third Amendment that bars the ESA requires several interpretative steps. A textual approach to the Amendment suggests that in order to run afoul of the Amendment, a government would have to 1) quarter 2) soldiers in 3) a house 4a) without the consent of the owner of the house 5a) during peacetime or 4b) during wartime unless 5b) done as prescribed by law. For the ESA to violate the Third Amendment, therefore, it must be true that i) the requirements of the ESA for private property owners are analogous to requiring the "quartering" of endangered species on the property owner's land, ii) the endangered species are analogous to soldiers, iii) that the property owner's land is analogous to the "house" mentioned by the Amendment, and iv) that the wartime provision (4b and 5b above) either does not apply or that the ESA does not meet the "prescribed by law" requirement for involuntary quartering in "time of war." In this Part, we examine each of these requirements in turn. In making our interpretation we must keep in mind Justice Brennan's admonishment that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."¹⁷⁰

A. Quartering

Is requiring a landowner to involuntarily host an endangered species on her land "quartering" within the meaning of our interpretation of the Third Amendment? We believe this is the most straightforward part of the analogy to the quartering of soldiers. Just as the Quartering Acts required landowners to allow British soldiers to make use of their property, so the Endangered Species Act requires landowners to allow non-human, but nonetheless potentially unwelcome, species to occupy their land.

Indeed, the traditional rights of landowners are stronger with respect to

¹⁶⁹ For example, Steven Minta and Peter Kareiva note that the ESA was passed at a time when "ecology was enamored of niche overlap theory and Lotka-Volterra models and filled with a vision of some soon-to-be-realized grand theory encoded in the form of rigorous mathematical statements. No longer is there much faith that ecology has a general theory." Steven C. Minta & Peter M. Kareiva, *A Conservation Science Perspective*, in *ENDANGERED SPECIES RECOVERY: FINDING THE LESSONS, IMPROVING THE PROCESS* 275, 276 (Tim W. Clark et al. eds., 1994). As a result of these changes in scientific theory and knowledge, "[i]t is now accepted that species-based conservation alone is incomplete and ineffectual . . ." *Id.* at 277. Yet the ESA continues to embody the species-centric approach.

¹⁷⁰ Brennan, *supra* note 3, at 610.

non-human trespassers than they are with respect to human trespassers. A colonist who encountered unwelcome British soldiers on his land would have, in the absence of the Quartering Acts, been able to bring a trespass action against the soldiers and seek their removal in court, but he could not lawfully kill the soldiers. A modern landowner who encountered an unwelcome member of a non-human species on her land, in the absence of the ESA or other legal restrictions such as hunting regulations, would be able to kill the animal. Moreover, while the British government recognized the principle of its responsibility for problems caused by its soldiers,¹⁷¹ neither the federal nor the state governments today recognize their liability for damage caused by "their" wildlife to private property.¹⁷² Finally, colonists who were forced to involuntarily quarter soldiers were often, in theory at least, entitled to some compensation unlike those quartering endangered species. Therefore, the "living Constitution" should recognize the requirements of the Endangered Species Act as "quartering" within the meaning of the Third Amendment.

B. Soldiers and Species

Are red-cockaded woodpeckers sufficiently similar to redcoats that the principles of the Third Amendment apply to woodpeckers as well? We believe so. Americans objected to the involuntary quartering of soldiers on their property, because the soldiers' presence imposed costs on the property owners. Not only did the property owner lose the use of the part of his property that the soldiers physically occupied, but he also suffered loss of privacy in other areas of his home, externalities from the behavior of the soldiers and of their visitors on the premises, losses from the increased wear and tear attributable to the soldiers' presence, and losses from the necessity of dealing with the British military about the numerous small problems that arose while the soldiers were quartered.

These losses are analogous to those that the ESA imposes on property owners. For example, the host to a red-cockaded woodpecker may not use the portion of the property that the woodpecker physically occupies. The landowner may also not use the buffer zone around the area physically occupied by woodpeckers—an area which can be quite extensive and take up far more room than even the most boisterous redcoat. Landowners are required to deal with government regulators concerning the use of the landowners' land, much as the American colonists had to deal with the British Army. At least a colonist saddled with a British soldier could ask the soldiers not to damage his home. A landowner whose land is "quartering" red-cockaded woodpeckers is forbidden to disturb the woodpeckers, even as the birds damage the landowner's property.¹⁷³

¹⁷¹ See, e.g., PARGELLIS, *supra* note 34, at 195 (describing punishment of a soldier for stealing from a civilian).

¹⁷² See, e.g., *Sickman v. United States*, 184 F.2d 616, 618 (7th Cir. 1950) (United States lacks ownership, control, or possession of wild geese, and is therefore not liable for their trespasses).

¹⁷³ We assume that the problem of interspecies communication is minimal in this context—that is, running at a red cockaded woodpecker while shouting "shoo! shoo!" is likely

The analogy holds true even with respect to the pre-Intolerable Acts practice. Colonists upon whom (or in whose communities) British soldiers were quartered bore uncompensated losses as a result of the soldiers' presence. Thus, for reasons unrelated to their own conduct, these colonists experienced significant losses of their property rights. Similarly, those finding themselves host to red-cockaded woodpeckers experience an arbitrarily allocated loss of their property rights.

However, more than takings of property rights are involved here. Landowners may well find themselves in the same position as the Shulers—and if there is a “more terrible engine of oppression than . . . a company of soldiers,”¹⁷⁴ it would be an angry grizzly bear. Species should therefore be considered the “living Constitutional” equivalent of soldiers.

C. Houses and Land

The most problematic aspect of the analogy between the ESA's requirements and the quartering of soldiers concerns the location of the unwelcome guests.¹⁷⁵ At least under the Quartering Act as amended in 1774, soldiers were quartered in Americans' homes, making their presence much more objectionable than if they were simply camping on the back forty.¹⁷⁶ On the other hand, endangered species are quartered out-of-doors.¹⁷⁷ Is this sufficient to distinguish their presence?

We believe not. The Constitution was written against a backdrop of common law, including common law understandings about property.¹⁷⁸ The Founders understood the difference between sole and shared ownership of property—the difference between a fee simple absolute and a tenancy in common—even if the drafters of the ESA did not. The quartering of soldiers on private property reduced the property owner's interest in his property from the ‘sole dominion’ characteristic of fee simple ownership to a form of shared control. Soldiers' presence inside the walls of the home was surely more objectionable than their presence in the field outside, but soldiers in the field were nonetheless objectionable.¹⁷⁹ Therefore, arguing that the ESA

to convey the message that the birds are unwelcome. (Different strategies may be required for species such as grizzly bears.) Given the extent of restrictions on “disturbing” red cockaded woodpeckers, this might be difficult under the current regulatory regime.

¹⁷⁴ COOLEY, *supra* note 96, at 435.

¹⁷⁵ See Wurfel, *supra* note 5, at 733 (“An attempt to quarter troops in private buildings in the United States would probably bring on controversy as to the meaning of the word ‘house’ as used in the Amendment.”).

¹⁷⁶ As noted earlier, Gerlach, *supra* note 76, argues that the Act did not authorize quartering in homes. We have opted to argue the more difficult case, that the practice of quartering included private homes, because this is consistent with the Amendment's text.

¹⁷⁷ Although we know of no recorded instance of this, it is possible that an endangered species might take up residence within the walls of a home. Insects, for example, might infest a house. We hope environmental regulators would refrain from protecting an insect under such circumstances, but we are not optimistic about how such a conflict might be resolved.

¹⁷⁸ Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1111–12 (1985) (“Federalists first argued that the law of the United States, including the Constitution, must inevitably be formed against the backdrop of the common law of England.”).

¹⁷⁹ See COOLEY, *supra* note 96, at 435; Wurfel, *supra* note 5, at 731.

does not require us to take grizzly bears and woodpeckers inside our homes is not enough to save the statute from entanglements with the Third Amendment.

Moreover, in many instances, the ESA can have at least as severe an effect on property rights as a soldier in the home. Property owners have been forbidden to build new homes or protect existing homes on property where endangered species are located.¹⁸⁰ The grizzly bears on the Schulers' land were not in their house, but nonetheless the bears threatened the Schulers' safety. Indeed, grizzly bears are extremely dangerous—probably more so than even inebriated British soldiers.

A landowner that is forced to share her property with endangered species might experience similar privacy violations as a landowner that is forced to share her property with soldiers. Most people would object to soldiers peering through their windows and doors or observing them engaged in private activities. Is it any different if the "Peeping Tom" turns out to be a woodpecker or a bear? There is obviously a difference of degree, but anyone who has experienced the feeling of being observed by an unknown other while hiking can testify that it is *only* a difference of degree. Indeed, it is not impossible that some people will object more to inter-species "Peeping Toms" than they would to humans—particularly with regard to species such as grizzly bears.

One objection to this analysis might be that other amendments distinguish between houses and other portions of property. For example, the Fourth Amendment draws a distinction between the interior of a home and the zone outside the "curtilage" of the house.¹⁸¹ We do not believe this distinction applies here because we are talking about a different kind of privacy interest than that protected by the Fourth Amendment. The Framers did not design the prohibitions of the Third Amendment merely to keep a person from seeing what another is doing (where walls make sense), but rather they intended the prohibitions to protect against forced sharing of property (where walls are irrelevant).

Here we can draw some support from the lone serious circuit court opinion dealing with the Third Amendment. In *Engblom v. Carey*,¹⁸² the

¹⁸⁰ See Stroup, *supra* note 117, at 5–6 (describing how FWS, to protect the Stephens's kangaroo rat, forbade homeowners in Riverside County, California from shielding their homes with fire breaks). See also National Endangered Species Act Reform Coalition, *How Has The ESA Impacted People*, at <http://www.nesarc.org/esamain.htm> (last visited Feb. 25, 2000) (describing how construction on a subdivision in Fontana, California has been halted to protect the Delhi Sands Flower Loving Fly and how a landowner was prevented from building a house on her property near Austin, Texas by FWS's requirement of an "incidental take permit," because the land had been deemed "biologically necessary for the continued existence of the golden cheeked warbler, black-capped vireo, and/or the cave invertebrates [cave bugs]" until her congressional testimony on the problem prompted FWS to reconsider).

¹⁸¹ See, e.g., *United States v. Dunn*, 480 U.S. 294, 301 (1987) (setting out four factor test that resolves what is within home's curtilage: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by").

¹⁸² 677 F.2d 957 (2d Cir. 1982).

Second Circuit was faced with a claim by prison guards who had had their leased apartments on prison grounds occupied by National Guard troops during a strike. The court found the leaseholds protected, holding that "property-based privacy interests protected by the Third Amendment . . . extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others."¹⁸³ By tying the Third Amendment's coverage to the property-based right to exclude, rather than to the character of the property as a home, *Engblom* supports a broad reading of the Amendment's scope of protection despite its reliance on a dictionary-based reading of the term "home."¹⁸⁴ Moreover, endangered species do not come alone—FWS agents who monitor the species will also be present on the property at least some of the time.¹⁸⁵ The presence of endangered species on land should thus be the "living Constitutional" equivalent of soldiers in the home.

D. Peacetime and Wartime

The text and history of the Third Amendment show a clear intent to distinguish between the level of restrictions applicable to quartering during peacetime and wartime.¹⁸⁶ In peacetime, the property owners' consent is required before soldiers can be quartered. In wartime, legal process is all that is required. The rejection of two strengthening amendments to the text by the House reinforces this conclusion.¹⁸⁷ During wartime, a lessened restriction applies. How does this affect the power to quarter species instead of soldiers?

The first question to be resolved is what precisely distinguishes peacetime and wartime. Professor Tom W. Bell persuasively argues that the Third Amendment's language leaves a gap for times of neither peace nor war, which he labels "unrest," when the executive retains power over quartering.¹⁸⁸ Bell's conclusion is reinforced by his survey of quartering behavior during the War of 1812 and the Civil War.¹⁸⁹ Therefore, we will consider the following three alternatives under which the ESA might be justified: conditions analogous to peacetime, to unrest, and to wartime.

The baseline is the peacetime standard when the owner's consent is required. Unless the threatened extinction of species invokes a condition

¹⁸³ *Id.* at 962.

¹⁸⁴ *Id.* at 962 n.11.

¹⁸⁵ A federal district court rejected a challenge to a 1947 rent control statute based on the allegation that the statute "is and always was the incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people in violation of Amendment III of the United States Constitution." *United States v. Valenzuela*, 95 F. Supp. 363, 366 (S.D. Cal. 1951). The court's consideration of the Third Amendment claim, made without the benefit of subsequent developments in the "living Constitution" theory, should not be a bar to renewed consideration of such claims in the ESA context.

¹⁸⁶ Indeed, in this regard it was less restrictive than the contemporaneous British practice. Wurfel, *supra* note 5, at 729.

¹⁸⁷ THE COMPLETE BILL OF RIGHTS, *supra* note 81, at 218-19.

¹⁸⁸ Bell, *supra* note 5, at 135-36.

¹⁸⁹ *Id.* at 136-40.

analogous to wartime and congressional passage of the ESA is all the legal process necessary to satisfy the wartime standard, the ESA must be judged under the stricter peacetime consent requirement. Since the ESA clearly fails that standard, the peacetime and wartime distinction is crucial.

What about unrest? Bell notes that allowing the executive branch the power to act during times of civil unrest could be justified as required by the need for quick and decisive action.¹⁹⁰ For example, unrest in the Whisky Rebellion of 1791–1794 was solved by the quick application of military force.¹⁹¹ If an unrest category under the Third Amendment exists by implication, it would seem to be a category that covers emergency situations. Serious unrest that required longer term responses would also require congressional action, which would bring the wartime category into play. Therefore, long term restrictions on land use could not be justified under the unrest category.

Are we in a “war” to save endangered species? The “war” metaphor is applied to everything from illegal drugs to poverty. Environmental pressure groups on all sides sometimes use rhetoric that suggests a wartime approach to environmental issues.¹⁹² However, more than mere words are needed to invoke the lessened wartime standard. Merely using war-like rhetoric cannot be the test of the existence of a genuine emergency.

The debate over the proposed amendments to the Third Amendment’s text suggests a solution. In opposing the requirement that a civil magistrate approve wartime quartering orders, a delegate to the convention noted “that cases might arise where the public safety would be endangered by putting it in the power of one person to keep a division of troops standing in the inclemency of the weather for many hours”¹⁹³ This language and reasoning confirms what a common sense¹⁹⁴ reading of the Third Amendment’s text suggests: the wartime exemption from the consent requirement was intended to prevent holdouts from jeopardizing public safety.

¹⁹⁰ *Id.* at 133.

¹⁹¹ *Id.* at 132.

¹⁹² See, e.g., Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 2 (1993–1994) (quoting National Audubon Society which said that a Congressional debate over the ESA will be “the environmental battle of the decade”); Frederic J. Frommer, *Four State Dams on List of ‘Wasteful’ Projects*, SEATTLE TIMES, Mar. 4, 2000, at A13 (quoting Mark Van Putten, president of the National Wildlife Federation who said, “It is time for the Army to stop waging war against our environment.”); Michael Lipske, *How Rachel Carson Helped Save the Brown Pelican*, NAT’L WILDLIFE, Dec.–Jan. 2000, at 44, 49 (“Carson crafted her indictment of the chemical companies and government agencies that, in the name of pest control, were waging war on the environment.”).

¹⁹³ THE COMPLETE BILL OF RIGHTS, *supra* note 81, § 5.2.1.2.a, at 219.

¹⁹⁴ Common sense!?! No, we are not switching theories of interpretation in mid-stream. The “living Constitution” approach may be nonsensical as a whole, but the individual pieces of it must still pass the test of elementary logic to succeed. The Third Amendment could not, therefore, be read to require that individuals be allowed to use illegal drugs in the privacy of their own homes, no matter how much privacy language was used to justify such a claim. At least, we think not.

Applied to the ESA, this suggests that there is a limited exemption from the consent requirement for emergency situations. While, as bumperstickers remind us, "extinction is forever," the threatened extinction of a species alone does not qualify as an emergency under either the wartime or unrest categories. An extinct species may later turn out to have held the cure for cancer or some other wonder drug, or it may be an important national symbol like the bald eagle. Nonetheless, the extinction of any particular species but our own is not comparable to a threat to public safety. Even if we forego a cure for a particular disease because of the extinction of some species, humanity in general, and Americans in particular, will continue to exist.¹⁹⁶

The limited exemption from the consent requirement suggests that in circumstances where a species is threatened with extinction in the short term, the federal government has the power to temporarily insist on mitigating measures and other land use controls that effectively quarter the endangered species on private land while making arrangements to 1) remove the species to public land, 2) purchase the right to maintain the species on the private land (by purchasing the land outright or through some other means), or 3) condemn the land through the power of eminent domain. We do not believe that the Third Amendment would support a precise time limit, we do note that we are discussing a matter of weeks or months, not years, before the restriction can no longer apply involuntarily.

E. Incorporation

A final question is whether the Third Amendment's principles apply only to the federal government or whether they are "incorporated" by the Fourteenth Amendment and thus also apply to state governments.¹⁹⁶ The one circuit court to consider the question held that the Third Amendment was incorporated.¹⁹⁷ Under the total incorporation theory advanced by Justice Hugo Black,¹⁹⁸ all of the first eight amendments are incorporated. However, under the prevailing selective incorporation theory created by Justice Brennan, each right guaranteed by the Bill of Rights requires an independent analysis of whether the right in question is "fundamental" enough to warrant incorporation. The Third Amendment is one of four rights in Amendments

¹⁹⁶ See David Ehrenfield, *Why Put a Value on Biodiversity?* in BIODIVERSITY 212, 215 (E.O. Wilson ed., 1988) ("We do not know how many species [of plants] are needed to keep the planet green and healthy, but it seems very unlikely to be anywhere near the more than a quarter of a million we have now And if we turn to the invertebrates, the source of nearly all biological diversity, what biologist is willing to find a value—conventional or ecological—for all 600,000 plus species of beetles?"). *But see* JOHN BRUNNER, *THE SHEEP LOOK UP* 456 (1972) (British-authored novel suggests extinction of Americans is necessary to solve world environmental problems).

¹⁹⁶ Incorporation may be unnecessary, as independent state law grounds may exist to object to state ESAs. Thirty-three states have state constitutional provisions nearly identical to the Third Amendment, and ten more have differently worded provisions. Bell, *supra* note 5, at 144.

¹⁹⁷ *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982).

¹⁹⁸ See JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* §10.2 315 (3d ed., 1986). However, the Supreme Court continually rejected the incorporation theory.

I–VIII that thus far remains “outside the selective fold.”¹⁹⁹ It may be that the most “plausible explanation for failure to incorporate [the Third Amendment] is that a proper case never materialized: the right rarely arises in modern litigation.”²⁰⁰

Without debating the legitimacy of incorporation itself, something well beyond the scope of this Article and an issue that is now largely settled, we argue that the principles identified above as underlying the Third Amendment are well within any reasonable definition of fundamental.²⁰¹ Protecting property from unreasonable intrusions by the government is something on which we imagine we are as close to a core American value as we can get. If the Third Amendment bears the weight that our “living Constitution” interpretation places upon it, incorporation is a relatively easy step.

VI. FIXING THE ESA

The problems with the ESA, as noted above, stem from its lack of attention to incentives, its command approach, and its failure to consider the problem of scarcity. These flaws relate to the ESA’s unconstitutionality. Other than their uniforms, surprisingly few differences exist between FWS biologists today and the British colonial military authorities acting under the Intolerable Acts. Just as FWS biologists today ignore the problem of scarcity, so did the British colonial military authorities ignore the scarcity problems created by their quartering of soldiers. Likewise, just as FWS biologists today seek to command landowners to welcome endangered species on their land, rather than finding incentives to induce them to do so (and to find low-cost habitat providers and techniques to minimize land restrictions), so too British colonial military authorities sought to solve the lack of barracks space by commanding colonists to accept soldiers into their homes. Alarming for the prospects of endangered species, environmental pressure groups today seem to be modeling their behavior on Lord Loudoun’s after the Seven Years War—instead of turning to incentives to save species, they insist on an ESA that will make resistance to the statute inevitable. Red-cockaded woodpeckers may thus soon be as rare as red coats in America.

Considering the problem in light of the Third Amendment also offers an important political insight concerning the strength of constitutional provisions. As noted earlier, the quartering issue was connected to the political questions surrounding a standing army. The Federalists, who

¹⁹⁹ AMAR, *supra* note 97, at 220. The other rights “outside the fold” are the right to keep and bear arms and the rights to grand and civil juries. *Id.* See also William J. Brennan, *The Bill of Rights and the States in THE EVOLVING CONSTITUTION* 254, 263 (Norman Dorsen ed., 1983) (enumerating the rights remaining unincorporated by 1969).

²⁰⁰ AMAR, *supra* note 97, at 220.

²⁰¹ Although his interpretation of the Third Amendment differs somewhat from ours, Amar makes a similar argument concerning its incorporation protecting privacy under his own theory of incorporation. See *id.* at 267 (“[T]he Third Amendment, on this reconstructed account, now bridges together a home-centric Second Amendment and a Fourth Amendment that was from the beginning protective of the private domain . . .”).

opposed the Bill of Rights, saw the solution to both in elected civilian supremacy over the army.

If the standing armies issue was solved, as proposed, by placing control of the military establishment in the hands of a government which in turn was controlled by the people; then the problem of involuntary quartering would itself be solved, since no popularly controlled government would engage in such an onerous practice.²⁰²

One of the lessons of the ESA is that the Anti-Federalists, who this argument failed to convince, were correct: popular control of government is no guarantee against arbitrary imposition of tremendous costs on individual property owners.

We need not fear that applying Third Amendment principles to the ESA will lead to mass extinctions. The original Third Amendment quartering problem has been so successfully "solved" today that the United States now has too many domestic military establishments, not too few. Reform of the ESA, to make it compatible with the Third Amendment, will lead to far greater recovery of species than the few that the ESA has "saved" thus far.

This is not mere speculation. In 1982, amendments to the ESA created a new exception to the ESA's "nearly absolute prohibition against taking" to allow creation of negotiated "Habitat Conservation Plans."²⁰³ Rather than harming endangered species, these amendments actually strengthened the protection of species by giving FWS what even environmental advocates concede was "its first practical means of influencing what private landowners did on their land."²⁰⁴ Complete replacement of the ESA with a scheme of positive incentives would further strengthen species protection. In addition, it is important not to forget that the government always has the option of protecting species by purchasing or condemning the land necessary to protect habitat outright. Although potentially expensive, requiring an expenditure of resources would force the government to face the opportunity costs of its actions.

We therefore suggest that the following principles be applied to endangered species protection:

First, do no harm. Government programs that provide incentives to destroy habitat should be eliminated. Such programs include subsidies for the draining of wetlands, for agricultural production (encouraging production on marginal lands and the overuse of pesticides), and for the highly subsidized building of dams that have harmed fish habitat, as well as allowing wild horses and burros to greatly degrade federal land in the Southwest.²⁰⁵

Provide positive incentives for habitat. If discovering an endangered species on one's land led to economic rewards, landowners would invest

²⁰² Fields & Hardy, *supra* note 5, at 423-24.

²⁰³ Pub. L. No. 97-304, 96 Stat. 1411 (codified as amended at 16 U.S.C. § 1539(a) (1994)).

²⁰⁴ Bean, *supra* note 126, at 10,708.

²⁰⁵ Richard L. Stroup & Jane S. Shaw, *Environmental Harms from Federal Government Policy*, in *TAKING THE ENVIRONMENT SERIOUSLY* 51-52 (Roger E. Meiners & Bruce Yandle eds., 1995).

considerably more toward making their properties attractive habitat. Purchasing the rights necessary to protect habitat or rewarding landowners for habitat conservation would increase the available habitat.²⁰⁶ Getting rid of the ESA as it now exists would remove the incentives to destroy the habitat.

Empower private actors. Private actors have made tremendous progress toward saving habitat and species.²⁰⁷ Creating incentives for them to expand their activities will lead to additional progress.

Require government actors to face opportunity costs. Land use decisions carry costs. For those decisions to be made correctly, the decision makers must understand the opportunity costs of their choices. Requiring full compensation for landowners would accomplish this.

The simplest way to implement these principles would be to repeal the ESA entirely and to begin with a fresh approach built around incentives and recognition of opportunity cost and scarcity principles. Resources currently being used under the ESA would be used instead to purchase property rights necessary to provide habitat or to reward landowners who enhance endangered species habitat. We believe such a program would result in vastly increased amounts of habitat, because it would replace the current set of incentives to destroy habitat with positive incentives to preserve and enhance habitat.²⁰⁸

Forcing government and nonprofit organization land managers to face the opportunity costs of their actions would also yield significant benefits. If the amount of resources to be applied to protecting endangered species is limited, and it surely is, choices must be made. The current system politicizes the choices of which species and habitat to protect. Although the ESA may be written in absolutist form, its implementation is by human beings—men and women who must fear the consequences for their careers if they cross a powerful bureaucrat, congressperson, or interest group. Submerging political choices in scientific babble and delay merely conceals the role of politics. Placing the ESA “on a budget” would force those choices into the open and it would provide common measures of effectiveness (for example, acres of habitat per dollar spent, costs of species saved) with which to evaluate results.

Note that we are *not* suggesting that the traditional fixes advocated by some environmental pressure groups would fix the ESA. These groups advocate mitigating development by requiring developers to set aside some portion of their land for conservation purposes or using special tax

²⁰⁶ Properly understood, incentives do not include programs that depend on an initial destruction of property value, followed by a “carrot” of partial restoration of value, as is the case with the habitat conservation plans and “no surprises” policies.

²⁰⁷ *Supra* note 168 and accompanying text.

²⁰⁸ Note that it would not be necessary for the government or nonprofit groups to purchase land outright in all, or even most, cases. Thus, it raises the concern that “far more [land would be needed] than anyone realistically expects will be acquired any time in the foreseeable future.” Bean, *supra* note 126, at 10,707. Only the specific property rights necessary to preserve habitat, not the full fee simple bundle, would be needed in most cases, as in the “adopt-a-pothole” program described in Stroup, *supra* note 117, at 9.

assessments on development to fund land acquisition.²⁰⁹ Such measures do not solve the ESA's problems that we identified above any more than requiring colonists to set aside portions of their land for soldiers would have solved the colonial quartering problem. Such measures do make the ESA's command-and-control approach less expensive, but they rely on coercion as the "incentive," and they fail to force government to face opportunity costs.

VII. CONCLUSION

To our knowledge, we are the first to suggest that the ESA violates the Third Amendment—at least the first to do so in print.²¹⁰ We have to admit that our tongues have been pressed firmly in our cheeks during at least some of the time we spent writing this Article. We do not think Justice Brennan's approach to the Constitution is the right one. Nonetheless, we recognize that Justice Brennan was an influential justice and his approach to constitutional interpretation is now widely accepted.

We also do not expect that any court will soon adopt this view of the Third Amendment.²¹¹ Indeed, we expect that those who take a sufficiently elastic approach to the Constitution's text to adopt our interpretation have political preferences that would preclude consideration of the value of property rights in the way we have proposed. Of course, that dependence on political beliefs is one of the problems with the "living Constitution" approach.

Nonetheless, the principles and conditions that motivated the drafting and adoption of the Third Amendment do apply to the problems of the Endangered Species Act. Even if quartering a species on private land is not *constitutionally* the same as quartering a soldier in a private house, it does not look that much different to the unwilling host. The difference between a red coat and listed wolf, bear or even a red-cockaded woodpecker is only a matter of degree when the landowner cannot make normal use of the land as a result of the presence of the listed animal. A terrible irony of the ESA, as we have pointed out, is that absent the ESA's land-use controls, many species would be quite welcome to most landowners.

As Peggy Noonan concluded in her essay on the Third Amendment, "[o]nly the dead have seen the end of war,' and only the dead have seen the end of the constant tension that inevitably exists between citizens and their

²⁰⁹ See Bean, *supra* note 126, at 10,709.

²¹⁰ One of us briefly suggested so in Stroup, *supra* note 117, which is the inspiration for this article, although without the "living Constitution" analysis. Indeed, we are among the first to suggest that the Third Amendment has any relevance to modern society and to attempt to rescue it from the constitutional storeroom where it languishes along with the "titles of nobility" clause. U.S. CONST. art. I, § 9.

²¹¹ Although her theory is not based on a living constitutional approach, Peggy Noonan recently characterized the Third Amendment as "a sleeper now" but argued "it may come awake." Noonan, *supra* note 5, at 4. If a court did adopt our proposed interpretation, then Noonan's prediction that "[s]ome day we may be grateful that [the Third Amendment] is there" may come true outside the apocalyptic scenario she hypothesizes. *Id.* at 9.

governments over issues of governmental abuse of power."²¹² Until the ESA and all environmental laws respect private property rights and thus provide proper incentives for private individuals and agents of the government, these laws will continue to fail to actually protect endangered species and the environment. The principles that we offer here are one small step in that direction.

²¹² Noonan, *supra* note 5, at 9.

