

# ARE HOUSES OF WORSHIP “HOUSE[S]” UNDER THE THIRD AMENDMENT?

ERIC RASSBACH\*

I. INTRODUCTION .....	611
II. HISTORY OF QUARTERING AND RELIGION .....	613
III. MEANING OF THE WORD “HOUSE” WHEN THE THIRD AMENDMENT WAS ADOPTED .....	620
IV. INTERPRETING THE THIRD AMENDMENT .....	622
V. IMPLICATIONS .....	623
VI. CONCLUSION .....	626

## I. INTRODUCTION

The Third Amendment serves as something of an ideological Rorschach test. In most areas of constitutional law—long notorious as an “inexact science”<sup>1</sup>—scholarly and judicial interpreters are still constrained by precedent and those scholars’ and judges’ interests in pushing those precedents in the direction of desired outcomes. For example, in treating a Fourth Amendment question, a scholar cannot ignore the idea of “reasonable expectation of privacy,” even if she were convinced that it is not something that rightfully makes up a part of Fourth Amendment jurisprudence.<sup>2</sup> Indeed, to maintain credibility within the terms of the debate, an untenured scholar might decide not to voice her disagreement with the “reasonable expectation of privacy” at all. Similarly, no judge or scholar dealing with the Establishment Clause today can ignore *Lemon v. Kurtzman*,<sup>3</sup> even if they think it terribly wrong-headed; *Lemon* sets part of the terms of the debate.<sup>4</sup> Put another way, a scholar or judge

---

\* Deputy General Counsel, The Becket Fund for Religious Liberty. The views expressed in this essay are mine alone and do not necessarily reflect the views of The Becket Fund or its clients. Many thanks to Mark Rienzi and the editors of the Tennessee Law Review for their comments.

1. Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States’ Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1766–67 (1995) (arguing that “constitutional interpretation is an inexact science” but “pop constitutionalism” is worse).

2. *Cf.* *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (first using the term “reasonable expectation of privacy”).

3. 403 U.S. 602 (1971) (finding state funding of church-related schools to be in violation of the Establishment Clause).

4. *See, e.g.*, *Card v. City of Everett*, 520 F.3d 1009, 1023–24 (9th Cir. 2008) (Fernandez, J., concurring) (footnotes omitted) (“I applaud Judge Wardlaw’s

interpreting most provisions of the Bill of Rights does not write on a blank slate.

But the Third Amendment *is* a blank slate, at least when it comes to precedent.<sup>5</sup> Because the Amendment sees so little use in the courts, and there is thus almost no precedent to interpret, the Third Amendment is more likely than the other amendments to disclose the interpreter's starting ideological assumptions, conscious or unconscious. One might, therefore, expect a libertarian who is generally concerned about government or military intrusion into individuals' private space to give the Third Amendment a broad interpretation—applying “Soldier” to many different kinds of government agents, interpreting “time of peace” to include all situations short of an officially-declared war, and the like.<sup>6</sup> By contrast, a scholar with a strong interest in protecting national security might read those words much more narrowly.<sup>7</sup>

If this is true, then no one will be surprised that when the Rorschach test is applied to me—a lawyer who advocates on behalf of religious organizations and people—I conclude that yes, houses of worship are “house[s]” under the Third Amendment. Churches, synagogues, and mosques will all have an interest in sharing Third Amendment rights against government officials (to the extent that those rights are actionable), rather than seeing them restricted to “houses” owned by individual citizens.

---

scholarly and heroic attempt to create a new world of useful principle out of the Supreme Court's dark materials. Alas, even my redoubtable colleague cannot accomplish that. The still stalking *Lemon* test and the other tests and factors, which have floated to the top of this chaotic ocean from time to time in order to answer specific questions, are so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable.”); Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506, 564–65 (2001); Eric Rassbach, *Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History*, CATO SUP. CT. REV. 71 (2014).

5. It is true, of course, that the slate is not utterly blank because the Second Circuit decided a Third Amendment claim, and because the Third Amendment itself has a history. See *infra* at 6–30. What I am pointing out is that there are no “terms of the debate” — no one is seeking to spin precedent because there is not enough yet to work with. It may be that, like the Second Amendment or the Establishment Clause, a debate that was once moribund could begin anew, but at present that debate is occurring without precedent.

6. See U.S. CONST. amend. III. The Third Amendment reads, “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.” *Id.*

7. Others contributing to *Tennessee Law Review's* symposium have addressed these topics.

Yet I would ask the reader to subtract any *argumentum ad hominem* lurking in the reader's subconscious and consider why such an interpretation is not only on balance correct, but compelling. The answer lies, I would suggest, in the history of quartering in houses of worship prior to adoption of the Third Amendment and in the history of the use of the word "house" at the time the Third Amendment was adopted. As I set forth below, there was a long history of quartering soldiers in houses of worship and specifically as a method of resolving religious disputes.<sup>8</sup> In addition, the meaning of the word "house" at the time the Bill of Rights was adopted presumptively included houses of worship.<sup>9</sup> With no contrary evidence showing that the Founders believed that the term "houses" did not comprehend all kinds of "houses," the best conclusion is that the owners of houses of worship should be able to make out claims under the Third Amendment on the same terms as the owners of residential "houses."

## II. HISTORY OF QUARTERING AND RELIGION

Troops have for centuries conquered (and usually destroyed) houses of worship, often with terrible consequences.<sup>10</sup> Requisition of houses of worship to quarter soldiers seems to have come later. In the early modern period, the practice of quartering troops in private buildings of all sorts began to be widely practiced and was closely connected to the European religious wars resulting from the Reformation.<sup>11</sup> It was also during Europe's wars of religion that quartering—including quartering in houses of worship—became a method of social control.<sup>12</sup>

Quartering or billeting was a common method of sustaining troops in England and throughout continental Europe during the sixteenth, seventeenth, and eighteenth centuries.<sup>13</sup> Barracks were

---

8. See *infra* pp. 613–20.

9. See *infra* pp. 620–22.

10. See, e.g., Jeremiah 52:12–13 (recounting the destruction of the Temple of Solomon by the Babylonians).

11. See DAVID CRESSY, CHARLES I AND THE PEOPLE OF ENGLAND 137–42 (Oxford Univ. Press 2015) (discussing the quartering of British troops during the religious wars of the 17th century).

12. See GUILLAUME DE FÉLICE, HISTORY OF THE PROTESTANTS OF FRANCE 314–15 (Phillip E. Barnes trans., 2d ed. 1853) (describing the quartering of French troops as a means of harassing protestants).

13. CRESSY, *supra* note 11, at 137–42; PHILIP HAYTHORNTHWAITE, BRITISH CAVALRYMAN 1792–1815 9 (Osprey Publ'g 2012) (billeting was preferred form of housing until the Napoleonic Wars, when Parliament decided to switch to the

the exception rather than the rule.<sup>14</sup> In Stuart England, however, quartering became “a social liability,” tending to bring the military into disrepute.<sup>15</sup> Repeated outrages committed by soldiers and mariners billeted upon townspeople resulted in grave disorder during the reign of Charles I.<sup>16</sup>

These outrages found a response in the Petition of Right, which Parliament passed, and Charles I reluctantly assented to, in 1628.<sup>17</sup> The Petition of Right was and is a major milestone in the development of individual rights in the Anglo-American world.<sup>18</sup> It declared individual rights of Englishmen in a variety of areas, including prohibitions on: “taxation without consent of Parliament,” “arbitrary imprisonment,” “the imposition of martial law” and “quartering or billeting of soldiers.”<sup>19</sup> One of the specific government abuses it protected against was quartering and billeting, requesting “that your Majestie would be pleased to remove the said Souldiers and Mariners and that your people may not be soe burthened in tyme to come.”<sup>20</sup>

Despite the Petition of Right’s purported prohibition on quartering and billeting, the English Civil War (1642–1651) saw a great deal of quartering and billeting.<sup>21</sup> This practice of quartering extended—on a sometimes massive scale—to houses of worship. Parish churches were often requisitioned, especially by the Parliamentary side, as quarters for troops or their horses.<sup>22</sup> Although it does not appear to have been systematic, quartering in houses of worship seems at times to have tracked the religious predilections of the armed forces.<sup>23</sup>

---

barracks system).

14. CRESSY, *supra* note 11, at 137 (soldiers “[o]ften . . . were billeted with private families, whether the householder was willing or not.”).

15. *Id.* at 137–42.

16. *Id.*

17. *Id.* at 142.

18. See *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2499 (2011) (“The Petition of Right occupies a place in English constitutional history superseded in importance, perhaps, only by Magna Carta itself and the Declaration of Right of 1689.”).

19. *Id.*

20. Petition of Right, 1627, 3 Car. 1, c. 1 § 8 (Eng.).

21. See MARTYN BENNETT, *THE ENGLISH CIVIL WAR 1640–1649* 58 (Routledge 2014).

22. See PETER GAUNT, *THE ENGLISH CIVIL WAR: A MILITARY HISTORY* 118 (I.B. Tauris 2014); DIANE PURKISS, *THE ENGLISH CIVIL WAR: PAPISTS, GENTLEWOMEN, SOLDIERS, AND WITCHFINDERS IN THE BIRTH OF MODERN BRITAIN 186–87*, 360–61 (Basic Books 2006).

23. *Id.*

The use of quartering to suppress a disfavored religious minority was on even more prominent display a few decades later in France. In the years prior to and immediately after the 1685 revocation of the Edict of Nantes—which had guaranteed some protections for the religious liberty of Protestants in France—French King Louis XIV instituted what came to be called the *dragonnades*.<sup>24</sup> The *dragonnades* were named after the dragoons (*dragons* in French) that the French government systematically quartered in the homes of Protestant Huguenots in order to coerce them into converting to Catholicism.<sup>25</sup> If the Huguenot homeowner converted to Catholicism by signing a form, the dragoons would be withdrawn.<sup>26</sup> The troops were encouraged to be rowdy and to engage in assaults and thefts against the homeowners to encourage conversion.<sup>27</sup>



[Contemporary cartoon of quartered dragoon portrayed as a “New Missionary” forcing a Huguenot to convert to Catholicism at gunpoint.]<sup>28</sup>

In 1681, the first *dragonnade* occurred in Poitou, and the *dragonnades* continued for some time after the revocation of the Edict of Nantes in 1685.<sup>29</sup> As a result, many Huguenots immigrated

24. DE FÉLICE, *supra* note 12, at 314–15.

25. *Id.*

26. *Id.* at 314.

27. *Id.* at 389–91.

28. MUSÉE VIRTUEL DU PROTESTANTISME, <http://www.museeprotestant.org/notice/les-dragonades-1681-1685/> (last visited Mar. 16, 2015).

29. See, e.g., DE FÉLICE, *supra* note 12, at 366–67 (describing the easing of

to Protestant countries such as Prussia, the Netherlands, and Great Britain.<sup>30</sup> In Britain, the *dragonnades* were so well known that they became a conspicuous theme of political polemic, particularly with respect to Jacobite controversies.<sup>31</sup> Indeed, the *dragonnades* were such a prominent part of public discourse that they became the origin of the English verb “to dragoon.”<sup>32</sup>

Many Huguenots subsequently immigrated to the American colonies, founding among other cities New Rochelle, New York, New Paltz, New York, and Jamestown, South Carolina.<sup>33</sup> Henry Laurens, Paul Revere, John Jay, and Francis Marion, among others prominent during the Founding era, were descended from Huguenots.<sup>34</sup> The Huguenot experience with *dragonnades* was thus well-known and likely informed the adoption of the Third Amendment.<sup>35</sup> And although the *dragonnades* specifically targeted family homeowners, given that the *dragonnades* represented a systematic attempt to suppress a disfavored religious minority, it seems unlikely that the Founders would have wanted to restrict the ban on peacetime quartering of troops to the houses of families only.

Quartering and billeting occurred in Great Britain at the same time as the *dragonnades*, also with the goal of a suppressing a disfavored religious group. In Scotland, the Covenanters—a disfavored minority religious group of Scottish Presbyterians—were

---

religious persecution and the “more moderate” system of the *dragonnades*, after the death of Louis XIV in 1715).

30. For example, the current German Minister of the Interior Thomas de Maizière is descended from Huguenot refugees in Prussia. Bettina Marx, *Thomas de Maiziere: a Look at “Merkel’s Best Man,”* DW (Dec. 16, 2013), [www.dw.de/thomas-de-maiziere-a-look-at-merkels-best-man/a-16874033](http://www.dw.de/thomas-de-maiziere-a-look-at-merkels-best-man/a-16874033).

31. See, e.g., SAMUEL CHANDLER, GREAT BRITAIN’S MEMORIAL AGAINST THE PRETENDER AND POPERY 24–28, 30–34 (1745) (narrating dragoons’ torture of Huguenots and calling for the English to suppress the Jacobites in order to avoid the same fate).

32. 4 THE OXFORD ENGLISH DICTIONARY 1014 (2d. ed. 1989). The word “refugee” also entered the English language as a word applied to the Huguenot *réfugiés* who had fled from French state persecution to Britain. 13 THE OXFORD ENGLISH DICTIONARY 493 (1989).

33. See *Huguenots in America*, in VIII ENCYCLOPEDIA AMERICANA (Frederick Converse Beach, ed. 1904).

34. See LUCIAN JOHN FOSDICK, THE FRENCH BLOOD IN AMERICA 19 (1906).

35. See Harry M. Bracken, *Pierre Jurieu: The Politics of Prophecy*, in 4 MILLENARIANISM AND MESSIANISM IN EARLY MODERN EUROPEAN CULTURE: CONTINENTAL MILLENARIANS: PROTESTANTS, CATHOLICS, HERETICS 93 n.19 (John C. Laursen & R.H. Popkin eds. 2001) (positing connection between Huguenot experiences of the *dragonnades* and introduction of the Third Amendment).

subjected to quartering designed to suppress their belief system.<sup>36</sup> Referred to as “non-conformists,” these individuals refused to attend official state church services and instead attended open-air religious services known as conventicles. The non-conformists were specifically targeted for oppression of various sorts, including quartering.<sup>37</sup> Covenanter meeting-houses were destroyed by British troops, though it is unclear whether any were occupied.<sup>38</sup> Like the Huguenots, many Covenanters emigrated—both voluntarily and involuntarily—to the American colonies, where presumably their experiences had an effect on American understandings of quartering.<sup>39</sup>

Parallel conflicts arose in the North American colonies. Colonists were subjected to quartering and billeting whenever military action occurred in North America during the seventeenth and eighteenth centuries.<sup>40</sup> The rising costs of military action in the colonies over the course of the eighteenth century prompted Parliament to pass the Quartering Acts, which provided that the ban on billeting set forth in the annually-renewed Mutiny Acts did not apply to the colonies.<sup>41</sup> The Quartering Act of 1765 provided that troops could, at the option of local colonial authorities, be quartered without consent in “ale-houses,” “victualing-houses,” “houses of sellers of wine by retail,” and other “publick houses”; failing that, they could be quartered in “uninhabited houses, outhouses, barns, or other buildings.”<sup>42</sup> The Act clearly authorized unconsented quartering not

36. See PETER HUME BROWN, 2 HISTORY OF SCOTLAND 308–09 (Cambridge Univ. Press 1911).

37. ROBERT WODROW, III THE HISTORY OF THE SUFFERINGS OF THE CHURCH OF SCOTLAND 263–64, 385, 491 (Blackie & Son 1836).

38. See, e.g., Graham, John, of Cloverhousen, in 22 DICTIONARY OF NATIONAL BIOGRAPHY 377 (Leslie Stephen & Sidney Lee eds., Smith, Elder & Co. 1890).

39. See DAVID DOBSON, SCOTTISH EMIGRATION TO COLONIAL AMERICA, 1607–1785 55, 63–64, 74 (Univ. of Georgia Press 1994).

40. See Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 125–26 (1993) (describing the British practice of quartering during, *inter alia*, King Philip’s War, the French and Indian War, and Pontiac’s War).

41. See KEVIN P. PHILLIPS, THE COUSINS’ WARS: RELIGION, POLITICS, AND THE TRIUMPH OF ANGLO-AMERICA 86 (Basic Books 1999).

42. Quartering Act, 1765, 5 Geo. 3, c. 33 (Eng.), *reprinted in* DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY 1606–1913 131–32 (William Macdonald ed. Macmillan 1920). Among other things, the Act provided that colonial officials were required to

quarter and billet the residue of such officers and soldiers for whom there shall not be room in such barracks, in inns, livery stables, ale-houses,

only on family property, but also all privately-owned buildings in the colonies, including houses of worship.

Local colonial authorities in many cases resisted the 1765 Act by relying on their own laws that prohibited quartering without consent.<sup>43</sup> In response to this resistance, the Quartering Act of 1774 went a procedural step further, allowing the royally-appointed governor to side-step American colonial authorities in ordering quartering in “other buildings.”<sup>44</sup> The Quartering Act of 1774 raised the real prospect of any privately-owned building in the colonies (again, including houses of worship) being requisitioned for use as quarters for British troops. It was therefore known as one of the “Intolerable Acts” that were an immediate cause of the Revolution.<sup>45</sup>

The course of the Revolution itself brought home to the Founders the evils of quartering in houses of worship. During the Revolution, British troops frequently quartered in houses of worship, often with the goal of penalizing disfavored religious groups, particularly non-Anglicans. In Philadelphia, for example, British troops took possession of (the Presbyterian and anti-British) Pine Street Church and used it for a hospital and for stables.<sup>46</sup> They left the nearby Anglican church untouched, an indication that quartering was meant to penalize those who did not cooperate.<sup>47</sup> Similarly, in

---

victualing-houses, and the houses of sellers of wine by retail . . . ; and in case there shall not be sufficient room for the officers and soldiers in such barracks, inns, victualling and other publick ale-houses, that in such and no other case, and upon no other account, it shall and may be lawful for [officials to] . . . hire, and make fit for the reception of his Majesty's forces, such and so many uninhabited houses, outhouses, barns, or other buildings, as shall be necessary, to quarter therein the residue of such officers and soldiers for whom there should not be room in such barracks and publick houses as aforesaid.

*Id.*

43. See Bell, *supra* note 40, at 125–26. Beginning in the 1680's, following King Philip's War, which included the quartering of British soldiers in private homes, “[c]olonial legislatures responded to these grievances by enacting legal protections against quartering.” *Id.* at 125.

44. Quartering Act, 1774, 14 Geo. 3, c. 54 (Eng.).

45. See Bell, *supra* note 40, at 125–26.

46. Thomas Brainerd, *A Brief History of Pine Street Church*, in *MANUAL OF THE THIRD PRESBYTERIAN CHURCH IN THE CITY OF PHILADELPHIA* 6 (William F. Geddes 1859) (“When the British army got possession of Philadelphia, they seized the Church and used it for a hospital. . . . The British Soldiers tore up the pews and used them for fuel, stripped the pulpit and windows, and finally used the building as a stable for the horses of dragoons.”).

47. *Id.*

Setauket, Long Island, British troops seized and garrisoned the Presbyterian Church, used the tombstones from the graveyard as part of their fortifications, and then used the church as a stable, but they elected not to desecrate the town's Anglican church.<sup>48</sup> In Boston, the British army used South Meeting House to stable horses and pulled down Old North Meeting House to use for firewood.<sup>49</sup> It was never rebuilt.<sup>50</sup> In Trenton, British Light Dragoons occupied the Hanover Street Quaker Meeting House.<sup>51</sup> There are many other examples, and all of this quartering in houses of worship would have been legal under the Quartering Acts (which had expired before these events transpired). In response to this plague of quartering during the Revolution, three states adopted constitutional provisions that banned billeting and quartering.<sup>52</sup> All used the word "house" to describe what was protected.<sup>53</sup>

Like other rights protected in the Bill of Rights, the right to be free from quartering was not included in the original Constitution. However, it was included in several of the States' proposals that set the parameters for the debate over the Bill of Rights.<sup>54</sup> Each of the anti-quartering proposals used the language "any house" or "private house."<sup>55</sup> As we know, the Third Amendment adopted as part of the Bill of Rights uses "any house."<sup>56</sup>

Despite adoption of the Third Amendment, quartering and billeting did not stop in the United States. As Professor Tom Bell has described, quartering in houses occurred frequently during the American Civil War.<sup>57</sup> Churches were no exception.<sup>58</sup> More recently, quartering in the Aleutian Islands during World War II resulted in the use (and in some cases destruction) of the Aleuts' churches and

---

48. BENJAMIN F. THOMPSON, HISTORY OF LONG ISLAND 277 (E. French 1839); THREE VILLAGE HISTORICAL SOCIETY, THE SETAUKETS, OLD FIELD, AND POQUOTT 42–43 (Arcadia 2005).

49. ALEX R. GOLDFELD, THE NORTH END: A BRIEF HISTORY OF BOSTON'S OLDEST NEIGHBORHOOD 78 (History Press 2009).

50. *Id.*

51. *See* LOUISE HEWITT, HISTORIC TRENTON 41–42 (Smith Press 1916).

52. *See* Bell, *supra* note 40, at 127–28 & n.96.

53. *Id.*

54. *Id.* at 129.

55. *Id.* at 129 n. 107, 130 nn. 108–11.

56. U.S. CONST. amend III.

57. *See* Bell, *supra* note 40, at 138–39.

58. *See* ALICE HAMILTON CROMIE, A TOUR GUIDE TO THE CIVIL WAR 360 (1975) (Old Stone Presbyterian Church in Lewisburg, WV used as a hospital and then to billet troops); 39 THE CHURCHMAN 290 (March 15, 1879) (troops used St. George's Episcopal Church in Pungoteague, VA as stables, leaving it a ruin).

the theft or destruction of many of their irreplaceable Russian Orthodox icons.<sup>59</sup>

### III. MEANING OF THE WORD “HOUSE” WHEN THE THIRD AMENDMENT WAS ADOPTED

The word “house” has been used since at least the year 1000 to refer to a place of worship.<sup>60</sup> This was true at the time of the Founding. During the colonial period and the Revolution, many different religious traditions used the term “house” to describe their houses of worship:

- (i) the New England Congregational “Meeting Houses,”<sup>61</sup>
- (ii) the Quaker “meetinghouse,”<sup>62</sup>
- (iii) Methodist “meeting houses,”<sup>63</sup>

---

59. See COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 356 (1982), available at <http://www.archives.gov/research/japanese-americans/justice-denied/aleuts-page-317.pdf> (“As devout followers of the Russian orthodox faith, the Aleuts treasured religious icons brought from czarist Russia and other family heirlooms that represented their greatest spiritual as well as material loss. They were priceless to the Aleuts.”); *id.* at 359 (“Through the insult of massive looting and vandalism of their homes and places of worship by American military forces, the Aleuts lost invaluable tangible ties to their past. Houses can eventually be rebuilt and refurnished, but stolen family mementos, heirlooms and religious icons brought from czarist Russia in the early 1800’s cannot be recovered.”). For an argument why the quartering in the Aleutian Islands during World War II violated the Third Amendment, see Tom W. Bell, “Property” in the Constitution: *The View from the Third Amendment*, 20 WM. & MARY BILL RTS. J. 1243 (2011).

60. See, e.g., 7 THE OXFORD ENGLISH DICTIONARY 436 (2d ed. 1989) (definition 2.b under the “house” entry: “A place of worship (considered as the abode of the deity); a temple; a church.”).

61. See, e.g., MARILYN J. CHIAT, AMERICA’S RELIGIOUS ARCHITECTURE: SACRED PLACES FOR EVERY COMMUNITY 47 (John Wiley & Sons 1997) (describing the oldest wooden church in the United States, in Hingham, Massachusetts, which has been referred to as a “Meeting House” since its construction in 1681); GOLDFELD, *supra* note 49, at 21–22 (describing Puritans’ rejection of “church” in favor of “meeting house”).

62. See MARGERY POST ABBOTT ET AL., HISTORICAL DICTIONARY OF THE FRIENDS (QUAKERS) 218–19 (Scarecrow Press 2d ed. 2012) (defining “meetinghouse”). This is still the typical term for the buildings used by Quaker meetings today.

63. See, e.g., D.A. WATTERS, FIRST AMERICAN ITINERANT OF METHODISM, WILLIAM WATTERS 277 (Curt & Jennings 1898) (explaining that the “Watters meeting-house” (now known as Thomas Run Church in Bel Air, Maryland) was one of the first Methodist meeting houses in the colonies); James E. Kirby, RUSSELL E.

(iv) Baptist “meeting-houses,”<sup>64</sup> and

(v) The Presbyterian “meeting-house,”<sup>65</sup>

The parish churches of the Church of England (which was strongest in the Virginia Colony<sup>66</sup>) appear to be the main exception to this rule. This difference in usage was presumably tied to the presence or absence of Protestant Dissenters (Protestants who did not subscribe to the beliefs of the state-run Church of England).<sup>67</sup> In most colonies Dissenters predominated, and thus “house” or “meeting house” predominated.<sup>68</sup> But even in those colonies like Virginia where the Church of England had an official role, there were many Dissenters who used the term “house” to refer to their house of worship.<sup>69</sup> Thus one of the most common uses of the word “house” in colonial America was to specifically denote houses of worship.

At the time of the Founding, the phrase “house of worship” was also in use.<sup>70</sup> Indeed, this term had already made its way into two

RICHEY, & KENNETH E. ROWE, *THE METHODISTS* 354–55 (Greenwood Press 1996) (discussing the Methodist log “meetinghouse” now known as the “Strawbridge Shrine” built around 1764).

64. See, e.g., COMMITTEE OF SEVERAL BAPTIST ASSOCIATIONS, PETITION TO VIRGINIA HOUSE OF DELEGATES (Nov. 11, 1784), available at <http://memory.loc.gov/nd/lpcoop/relpet/100/142/142001v.jpg> (referring to the Baptist “Dover Meeting-House”).

65. See, e.g., ROBERT DAVIDSON, *HISTORY OF THE PRESBYTERIAN CHURCH IN THE STATE OF KENTUCKY* 23–24, 35, 36 (1847) (listing different “Meeting-House[s]”); see also *Meeting House—Facilities*, OLD PRESBYTERIAN MEETING HOUSE (Aug. 11, 2011), <http://www.opmh.org/article299218.htm> (setting forth history of Old Presbyterian Meeting House in Alexandria, Virginia).

66. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2116–20 (2003).

67. See 9 THE OXFORD ENGLISH DICTIONARY 564 (2d. ed. 1971) (definition 2 under the “meeting-house” entry: “A place of worship: in the general sense, now only U.S. In England from the 17th c. always a nonconformist or dissenting place of worship, a conventicle”).

68. See McConnell, *supra* note 66, at 2110–11, 2121–30.

69. See CHARLES CAMPBELL, *INTRODUCTION TO THE HISTORY OF THE COLONY AND ANCIENT DOMINION OF VIRGINIA* 116 (1847) (referring to “a license of four [Presbyterian] places of worship, or meeting-houses in the language of the day”).

70. See, e.g., JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 39 (Dec. 3, 1789) (passing act “empowering the trustees of the Town of Lexington in the County of Fayette, to sell a part of the public lot in the said town for erecting thereon

state constitutions: North Carolina's seemed to equate "place of worship" and "house of worship,"<sup>71</sup> and Maryland treated "church[es]" and "meeting[s]" as subsets of the broader category "house of worship."<sup>72</sup>

#### IV. INTERPRETING THE THIRD AMENDMENT

The history—of events and of words—behind the Third Amendment demonstrates that the Third Amendment applies to houses of worship. In light of the evidence I have mustered above, there are several reasons to reach this conclusion:

First, the practice of quartering throughout European, and specifically British, history shows that quartering was often used to suppress specific religious minority groups like the Huguenots and the Covenanters—many of whom were ancestors of the Founders and whose tribulations were well known to those of the Founding era.<sup>73</sup> The Founders would not have thought to ban quartering in private family residences while simply tolerating it in Puritan meeting houses.

Second, the Founders knew that quartering practices both in Britain and in the colonies had specifically resulted in quartering in houses of worship. Both the experiences of the English Civil War and the very recent experiences of the Revolution demonstrated that houses of worship were particularly likely to be subjected to

a house of worship."); Charles Chauncy, *A Sermon Delivered at the First Church in Boston, March 13th, 1785: On the Occasion of the Return of the Society to Their House of Worship, After Long Absence, To Make Way for the Repairs That Were Necessary* (Greenleaf & Freeman 1785).

71. N.C. CONST. art. XXXIV (1776) ("That there shall be no establishment of any one religious church or denomination in this State, in preference to any other; neither shall any person, on any presence whatsoever, be compelled to attend any place of worship contrary to his own faith or judgment, nor be obliged to pay, for the purchase of any glebe, or *the building of any house of worship*, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform; but all persons shall be at liberty to exercise their own mode of worship . . .") (emphasis added).

72. MD CONST. art. XXXIV (1776) ("That every gift, sale, or devise of lands, to any minister, public teacher, or preacher of the gospel, as such, . . . or any religious sect, order, or denomination, without the leave of the Legislature, shall be void; except always any sale, gift, lease or devise of any quantity of land, not exceeding two acres, for *a church, meeting, or other house of worship*, and for a burying-ground, which shall be improved, enjoyed or used only for such purpose – or such sale, gift, lease, or devise, shall be void.") (emphasis added).

73. See *supra* notes 10–39 and accompanying text.

quartering and should therefore benefit from any ban on quartering.<sup>74</sup>

Third, the language of the Quartering Acts, which were the specific ill that the Founders had in mind when adopting the Third Amendment, indicated that the term “house” extended far beyond a private family residence. In particular, the Quartering Acts covered “ale-houses,” “victualing-houses,” “houses of sellers of wine by retail,” “publick houses,” “uninhabited houses,” and “outhouses,” as well as “other buildings.”<sup>75</sup> The Founders would have intended to cover these types of “houses” under the Third Amendment as well. But it would lead to absurd results were “any house” in the Third Amendment to cover ale houses and outhouses but not houses of worship.<sup>76</sup>

Fourth, Congress chose to use the phrase “any house” in the Third Amendment. This phrase is very broad on its own terms, and it is certainly broader than the one proposed alternative of “private house.”<sup>77</sup> “[A]ny house” implies that the term should be construed broadly.

Fifth, for the Founders, the meaning of the word “house” included the idea of “house of worship” as a matter of course. For most Americans of that time, going to a religious assembly meant going to a “meeting house” rather than a “church.”<sup>78</sup>

Taken together, these reasons demonstrate conclusively that “any house” in the Third Amendment includes houses of worship.

## V. IMPLICATIONS

If a house of worship can claim to be “any house” for purposes of the Third Amendment, then what follows? The short answer is: whatever follows for other potential Third Amendment plaintiffs. I will leave it to other symposium contributors to answer questions about the exact scope of potential Third Amendment claims—for example, whether a claim might be brought against NSA electronic eavesdropping programs. But one particular area is worth mentioning briefly here: government surveillance and infiltration of houses of worship.

---

74. See *supra* notes 40–53 and accompanying text.

75. See Quartering Acts, 1765, 5 Geo. 3, c. 33 (Eng.).

76. Given the Quartering Acts’ inclusion of “other buildings” in their scope, it seems likely that the outer bound of properties covered by the Third Amendment is any privately-owned building. At the very least, it includes pubs, bars, restaurants, motels, and hotels in addition to residential houses and houses of worship.

77. See Bell, *supra* note 40, at 129.

78. See *supra* notes 60–72 and accompanying text.

It is of course commonplace for governments in totalitarian societies to surveil and infiltrate houses of worship. In all of the countries of the Soviet bloc, the secret police would commonly surveil and infiltrate churches, mosques, and other religious bodies.<sup>79</sup> Current dictatorships do the same.<sup>80</sup> This is because religious institutions are frequently viewed as alternative sources of power within society and thus a competitor to the State.<sup>81</sup>

Given the motive of these totalitarian societies in infiltrating houses of worship, perhaps it should give us pause that the United States government, as well as state and local governments (most notably the New York City Police Department) are engaged in widespread surveillance and infiltration of houses of worship.<sup>82</sup> Although radical mosques are the first image that comes to mind today, over the years the government has surveilled and infiltrated the Southern Christian Leadership Conference (including Dr. Martin Luther King Jr. in particular), Episcopal churches, church youth groups, and Presbyterian churches suspected of assisting illegal immigrants.<sup>83</sup> In retrospect, these incidents have been characterized as “a civil liberties disaster” in response to overblown security concerns.<sup>84</sup>

There are those, however, who believe government is doing too little to surveil and infiltrate houses of worship, and that national security interests require more. Perhaps the strongest proponent of church infiltration is Amos Guiora. Professor Guiora has argued in many venues that government should be carefully watching houses of worship and sending agents to attend services on a regular basis in order to ensure that no incitement to violence is occurring.<sup>85</sup> He argues that national security may require that “intelligence and security agencies attend religious services with pen and paper in

---

79. See, e.g., WENDY R. TYNDALE, *PROTESTANTS IN COMMUNIST EAST GERMANY: IN THE STORM OF THE WORLD* 20 (Ashgate 2010) (noting that the Ministry for State Security (i.e. the “*Stasi*”) set East German churches as one of the six priority institutions for infiltration).

80. See, e.g., U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, *REPORT ON INTERNATIONAL RELIGIOUS FREEDOM – CUBA* (2009) (stating that the Cuban government systematically surveils and infiltrates religious groups).

81. See, e.g., TYNDALE, *supra* note 79, at 20 (describing the influence of the Protestant church in East Germany as “hinder[ing] the victory of socialism”).

82. For an overview of the infiltration cases, see Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201 (2004).

83. *Id.* at 1211–13, 1217–22.

84. *Id.* at 1212–13.

85. See, e.g., Amos N. Guiora, *Responses to the Ten Questions*, 37 WM. MITCHELL L. REV. 5034, 5034–41 (2011)

hand” in order to determine whether they are inciting their congregants to violence.<sup>86</sup> Professor Guiora admits that surveillance and infiltration will inevitably chill religious speech, worship, and exercise, but he believes that freedom of speech within houses of worship should nevertheless give way to national security interests.<sup>87</sup>

I believe Professor Guiora’s position goes too far. Government infiltration of houses of worship—at least to the extent that the infiltration is undertaken by the military—ought to raise Third Amendment questions and possibly causes of action. Like other rights secured by the Bill of Rights, Third Amendment rights may be defeasible, especially if a true national security interest can be shown. But giving government *carte blanche* to infiltrate churches fails to strike the right balance; indeed, it does not strike any balance at all.<sup>88</sup>

Finally, although it is beyond the scope of this essay, it is worth noting that the inclusion of “house of worship” within the meaning of “house” in the Third Amendment also has implications for Fourth Amendment jurisprudence concerning houses of worship, specifically with respect to searches and seizures undertaken at houses of worship.<sup>89</sup>

---

86. Amos N. Guiora, *Houses of Worship – The Limits of Free Speech*, CENTER FOR GLOBAL JUSTICE BLOG, <http://law.utah.edu/houses-of-worship-the-limits-of-free-speech/> (Aug. 5, 2013) (“There can be no more immunity granted to priests, rabbis, and imams. When congregants believe these leaders speak directly to God, and for Him, their power to influence the actions of their members can become dangerous. This danger cannot go unchecked.”).

87. See Guiora, *supra* note 85, at 5036–38. Indeed, Prof. Guiora has even argued that religious speech should have *less* protection than secular speech. AMOS N. GUIORA, *FREEDOM FROM RELIGION* 31 (Oxford Univ. Press, 2009).

88. See also Lininger, *supra* note 82, at 1242 (the FBI’s indiscriminate mosque surveillance constitutes “overbroad targeting in a highly sensitive religious setting.”).

89. The Fourth Amendment refers to “persons, houses, papers, and effects.” U.S. CONST. amend. IV. The Third Amendment’s protection of houses would seem to be especially relevant to the house of worship infiltration cases. Several First Amendment challenges to mosque surveillance (in particular by the New York City Police Department) are currently being litigated in the federal courts. See, e.g., *Hassan v. City of N.Y.*, No. 2:12-3401, 2014 WL 654604, at \*1 (D.N.J. Feb. 20, 2014) (argued before the 3d Cir. on Jan. 13, 2015); *Raza v. City of N.Y.*, 998 F. Supp. 2d 70, 73 (E.D.N.Y., 2013). However, I am not aware of any case that includes Fourth Amendment or Third Amendment claims.

## VI. CONCLUSION

It remains to be seen whether the Third Amendment will follow the path of the Second Amendment and become a rediscovered source of rights, or whether this Amendment will remain a forgotten byway of Bill of Rights jurisprudence. However, the history of the Third Amendment leads to the conclusion that if some plaintiffs are allowed to raise Third Amendment claims, houses of worship must also be able to raise Third Amendment claims.