

# ESTABLISHMENT CLAUSE-TROPHOBIA: BUILDING A FRAMEWORK FOR ESCAPING THE CONFINES OF DOMESTIC CHURCH-STATE JURISPRUDENCE

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Does the First Amendment's Establishment Clause, which provides that "Congress shall make no law respecting an establishment of religion,"<sup>1</sup> apply to United States conduct abroad? For years, this question has been lurking in the background of discussions of the Constitution's extraterritorial application. Indeed, while the U.S. Supreme Court has ruled that the Fifth and Sixth Amendments apply abroad in some circumstances,<sup>2</sup> and that the Fourth Amendment's warrant requirement generally does not apply abroad,<sup>3</sup> the Court has never considered the transnational applicability of the Establishment Clause. In fact, only one case has directly addressed whether the Establishment Clause applies abroad, *Lamont v. Woods*,<sup>4</sup> a Second Circuit U.S. Court of Appeals decision holding that the Establishment Clause always applies abroad but less strictly than it does domestically. The Department of Justice has refused to take on the subject; it still has not responded to a 2007 U.S. Agency for International Development ("USAID") request for the Department of Justice to offer guidance on whether USAID may fund international social-service

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1. U.S. Const. amend. I.
2. *Reid v. Covert*, 354 U.S. 1, 5-7 (1957).
3. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).
4. *Lamont v. Woods*, 948 F.2d 825, 841-42 (2d Cir. 1991). But note that sixteen years before *Lamont*, the Fifth Circuit dealt with a similar controversy involving whether the United States violated the Establishment Clause by providing aid to Israel. The Fifth Circuit avoided the Establishment Clause issue by holding that the case presented a nonjusticiable political question. *Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976).

programs that use religious messages.

Surprisingly, very few scholars have addressed the issue. The leading article on the Establishment Clause's application abroad was written by Harvard Law School Professor John H. Mansfield five years before the *Lamont* decision and fifteen years before the September 11, 2001 terrorist attacks.<sup>5</sup> Although some prominent church-state scholars have commented on the *Lamont* decision,<sup>6</sup> none has thoroughly analyzed it, leaving a law student Note as the most significant work to engage the *Lamont* reasoning.<sup>7</sup> This neglect by legal academics is so surprising because national security's relationship to human rights is probably the hottest topic in law today. Indeed, over the past several years the Supreme Court's most anticipated and controversial decisions have been those addressing the rights of the Guantanamo detainees.<sup>8</sup> Moreover, in the last few years, several of the country's most accomplished judges and legal scholars, such as Judge Richard A. Posner and Daniel Farber, have written major works on the difficulty of balancing national security and individual liberty.<sup>9</sup> Additionally, several scholars have recently explored more generally whether and to what extent the Constitution applies abroad.<sup>10</sup> Nevertheless, the specific issue of whether and how the Establishment Clause applies abroad has risen barely above a whisper in scholarly discourse.

The issue is now screaming for scholarly and judicial treatment, as evidenced by a July 17, 2009 audit by the USAID inspector general's office, questioning whether some of USAID's programs violate the Establishment Clause. The audit report identifies two USAID disbursements as particularly

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5. John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DePaul L.Rev. 1 (1986).

6. For example, in their work for the Pew Roundtable on Religion and Social Welfare Policy, Professors Chip Lupu and Bob Tuttle wrote an article analyzing the constitutionality of various USAID program, and in that article they questioned "whether the view of the *Lamont* Court would be adopted by the Supreme Court today." Pew Roundtable on Religion and Social Welfare Policy (2004), [http://www.religionandsocialpolicy.org/legal/legal\\_update\\_display.cfm?id=26](http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=26) (last visited Mar. 29, 2010).

7. Jessica P. Hayden, Note, *Mullahs on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 Geo. L.J. 171 (2006).

8. See, e.g., *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S. Ct. 2229 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

9. Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (2006); *Security v. Liberty: Conflicts Between Civil Liberties and National Security in American History* (Daniel Farber ed., 2008).

10. See, e.g., Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (2009); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. Cal. L. Rev. 259 (2009); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 Colum. L. Rev. 973 (2009).

suspect: (1) USAID's spending more than \$325,000 to repair four Iraqi mosques,<sup>11</sup> and (2) USAID's funding of an African HIV/AIDS program that encourages youths to memorize biblical passages.<sup>12</sup> To clarify the constitutionality of these and other USAID programs, the audit report issues seven recommendations, the first of which requests that USAID obtain legal guidance from President Obama's recently created White House Office of Faith-Based and Neighborhood Partnerships.<sup>13</sup> According to the report, USAID desperately needs clarification in this area of church-state law, as "[t]his uncertainty could broaden the Agency's exposure to legal challenges."<sup>14</sup> Although after *Hein v. Freedom From Religion Foundation*<sup>15</sup> there is some doubt about who would have standing to bring a lawsuit challenging these USAID expenditures,<sup>16</sup> the audit report certainly seems right in warning that USAID's promotion of religion could open up the agency to future constitutional litigation.

In response to the audit report, USAID claims that, though it will comply with the Audit Report's Recommendations 2 through 7, USAID is reluctant to comply with Recommendation 1, requesting that USAID seek guidance from Obama's faith-based office. According to USAID, Obama's faith-based office cannot clarify these issues because "[t]he Constitutionality of USAID programs overseas can only be determined on a case by case basis and thus there can be no 'one size fits all' legal resolution of this question."<sup>17</sup> USAID further argues that, even if the Establishment Clause did apply abroad just as it applies domestically, its programs would still be permissible because these programs do not fund "religious activities."<sup>18</sup> Therefore, USAID concludes, the programs comply with the various legal standards that the U.S. Supreme Court has interpreted the Establishment Clause to require domestically.<sup>19</sup>

Signaling an increased public interest in the issue, the *Washington Post* on July 23, 2009 published an article covering the audit report,<sup>20</sup> and one week

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11. Office of the Inspector General, *Audit of USAID's Faith-Based and Community Initiatives* 1, July 17, 2009, available at <http://www.usaid.gov/oig/public/fy09rpts/9-000-09-009-p.pdf> [hereinafter *Audit Report*].

12. *Id.* at 1.

13. *Id.* at 8.

14. *Id.* at 7.

15. *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007).

16. The *Hein* decision limited taxpayer standing in Establishment Clause suits so that now taxpayers have standing only if the expenditure in question was specifically mandated by Congress. *Id.* at 608–09.

17. *Audit Report*, *supra* note 11, at 23.

18. *Id.* at 24.

19. *Id.*

20. Colum Lynch, *Programs' Religious Ties Raise Concerns*, *Wash. Post*, July 23,

later the *Post* profiled a conflict between a former USAID employee (Clifford H. Brown) and USAID lawyers.<sup>21</sup> The second article explains how, while working for USAID in Kyrgyzstan, Brown came up with the idea of translating Islamic writings into the Uzbek and Kyrgyz languages. In trying to convince USAID authorities to implement the idea, Brown argued that highlighting some of the moderate messages in these writings would help curtail the spread of radical Islam in Central Asia.

USAID lawyers barred Brown from implementing the idea because, according to these lawyers, USAID's funding the project would violate the First Amendment's Establishment Clause. The article quotes Gary Winter, USAID's legal counsel, as saying that Brown's proposal was impermissible because the same Establishment Clause rules that apply domestically also apply abroad. Reciting the various Supreme Court decisions interpreting the Establishment Clause, Winter claims that USAID may not fund a program that has a religious purpose and that "the legal test goes beyond that to [prohibit the government's] endorsement of religion, indoctrination of religions, excessive entanglement with religion."<sup>22</sup> But Brown, who was a USAID lawyer for more than a decade, contends that his proposal is permissible because the First Amendment does not even apply to U.S. funding abroad at all.

Several months later, this issue again appeared in the news, with the release of *Engaging Religious Communities Abroad: A New Imperative for U.S. Foreign Policy*, a report sponsored by the Chicago Council on Global Affairs. The report is the product of a two-year study by a task force consisting "of thirty-two experts and stakeholders—former government officials, religious leaders, heads of international organizations, and scholars,"<sup>23</sup> including eminent church-state scholar Kent Greenawalt. The report concludes that "[i]f the United States does not develop effective policies for engaging religious communities, it will struggle to build the necessary bridges on the road to economic development and political stability in many troubled regions,"<sup>24</sup> and that "[l]egal uncertainty about the extent to which the Establishment Clause applies

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2009, at A8, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/22/AR2009072203663.html?nav=emailpage>.

21. Colum Lynch, *In Fighting Radical Islam, Tricky Course for U.S. Aid*, Wash. Post, July 30, 2009, at A12, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/29/AR2009072903515.html> [hereinafter Lynch, *In Fighting Radical Islam*].

22. *Id.*

23. The Chicago Council on Global Affairs, *Engaging Religious Communities Abroad: A New Imperative for U.S. Foreign Policy*, [http://www.thechicagocouncil.org/UserFiles/File/Task%20Force%20Reports/2010%20Religion%20Task%20Force\\_Full%20Report.pdf](http://www.thechicagocouncil.org/UserFiles/File/Task%20Force%20Reports/2010%20Religion%20Task%20Force_Full%20Report.pdf) [hereinafter *Task Force Report*].

24. *Id.* at 23.

to government action overseas has seriously undermined the effectiveness of U.S. foreign policy.”<sup>25</sup> To correct this problem, the report “calls upon the president of the United States, advised by executive branch offices and agencies who have studied the problem, to clarify that the Establishment Clause does not bar the United States from engaging religious communities abroad in the conduct of foreign policy, though it does impose constraints on the means that the United States may choose to pursue this engagement.”<sup>26</sup> Echoing the disagreement within the USAID, five members of the Task Force refused to endorse this position and instead argued in a dissent that unless there is any compelling evidence to the contrary, “no administration should impose constraints on American foreign policy that are imagined to derive from the Establishment Clause.”<sup>27</sup> The report has received significant news coverage, with much of the news commentary focusing on this issue of whether and how the Establishment Clause applies abroad.<sup>28</sup>

In 2007, a similar report came out of the Center for Strategic and International Studies (“CSIS”),<sup>29</sup> The CSIS report contained a section on how the First Amendment might constrain United States involvement, and based on interviews with top U.S. officials, the report concluded that legal concerns have led the government to “limit direct engagement with religious issues.”<sup>30</sup> Since publishing the report, CSIS has held several meetings that have brought together government officials and legal scholars with the goal of clarifying the

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25. *Id.* at 64.

26. *Id.* at 65.

27. *Id.* at 84.

28. For example, in a Huffington Post article on the report, Monica Duffy Toft (Director of the Initiative on Religion in International Affairs for Harvard’s Kennedy School of Government) noted the report’s disagreement on the transnational applicability of the Establishment Clause and concluded that this is “a question that cries out for further research and reflection.” Monica Duffy Toft, *Religion Matters In International Relations*, Huffington Post, Mar. 1 2010, [http://www.huffingtonpost.com/monica-duffy-toft/turning-religious-and-mul\\_b\\_48](http://www.huffingtonpost.com/monica-duffy-toft/turning-religious-and-mul_b_48)

1237.html. In a Washington Post article, J. Brent Walker (Executive Director of the Baptist Joint Committee for Religious Liberty) explained that he agreed with the report’s majority that the Establishment Clause does apply abroad. J. Brent Walker, *Establishment Clause applies to U.S. foreign policy*, The Wash. Post On Faith Blog, Feb. 24, 2010, [http://newsweek.washingtonpost.com/onfaith/panelists/j\\_brent\\_walker/2010/02/establishment\\_clause\\_applies\\_to\\_us\\_foreign\\_policy.html](http://newsweek.washingtonpost.com/onfaith/panelists/j_brent_walker/2010/02/establishment_clause_applies_to_us_foreign_policy.html).

29. CSIS is a think tank that “provides strategic insights and policy solutions to decision makers in government, international institutions, the private sector, and civil society.” Center for Strategic and International Studies, *About Us*, <http://csis.org/about-us> (last visited Mar. 29, 2010).

30. Center for Strategic and International Studies, *Mixed Blessings: U.S. Engagement with Religion in Conflict-Prone Settings* 44 (2007), available at [http://csis.org/files/media/csis/pubs/070820\\_religion.pdf](http://csis.org/files/media/csis/pubs/070820_religion.pdf).

First Amendment's application abroad. Unfortunately, although the meetings have involved John Mansfield,<sup>31</sup> who authored the leading article on the subject,<sup>32</sup> and Jessica Hayden, who wrote the leading article discussing the *Lamont* decision,<sup>33</sup> little legal certainty has followed from these meetings. Indeed, CSIS's Shannon Hayden puts it well when claiming that the issue is still "a sticky wicket"<sup>34</sup> that is "unclear and confusing."<sup>35</sup>

In sum, despite all this discussion of how the Establishment Clause might apply abroad, there is a dearth of legal scholarship on this issue, leaving this important policy question unguided by the necessary legal clarity. This Article seeks to provide that clarity by comprehensively analyzing whether and to what extent the Establishment Clause applies abroad.

Part I examines the practical significance of applying the Establishment Clause abroad. Part I.A discusses the relationship between religion and national security, and explores in particular how conflict-prone Islamic states threaten American security, either through terrorism or internal war. Part I.B then summarizes various United States policies that use Islam to democratize and demilitarize these conflict-prone Islamic states. Part II examines various proposed approaches to applying the Establishment Clause abroad, and points out some of the deficiencies in these approaches – most importantly their variation from the U.S. Supreme Court's cases on how other constitutional provisions apply abroad. After Part III.A discusses the over 100 years of jurisprudence on the Constitution's transnational applicability, Part III.B derives from this jurisprudence a formal framework for applying constitutional rights abroad. Finally, Part IV.A extends this framework to the Establishment Clause, and Part IV.B uses this analysis to speculate how courts might adjudicate current United States programs promoting religion abroad.

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31. Audio file: Center for Strategic and International Studies, Religion in Foreign Policy: John Mansfield on Recent Supreme Court Rulings, (July 25, 2008) (*available at* <http://csis.org/multimedia/audio-religion-foreign-policy-john-mansfield-recent-supreme-court-rulings>).

32. Mansfield, *supra* note 5.

33. Hayden, *supra* note 7.

34. Posting of Shannon Hayden to Center for Strategic and International Studies Blog, *U.S. Engagement with Religion Abroad, A Little Case Law*, <http://csis.org/blog/us-engagement-religion-abroad-little-case-law> (last visited Mar. 29, 2010).

35. Center for Strategic and International Studies Blog, *More Legal Gray Areas*, <http://csis.org/blog/more-legal-gray-areas> (last visited Mar. 29, 2010).

I. THE PRACTICAL SIGNIFICANCE OF THE ESTABLISHMENT CLAUSE'S  
TRANSNATIONAL APPLICABILITY

A. Religion and National Security

Americans have grown keenly aware of the relationship between religion and national security, largely due to 9/11's planning and many of its perpetrators being connected with highly religious nations like Saudi Arabia.<sup>36</sup> Besides posing terrorist threats, conflict-prone Islamic states also threaten American security due to their vulnerability to internal conflicts, which have recently increased in frequency. As Steven David recounts in his article "Internal War Causes and Cures," ninety-one of ninety-six conflicts that arose between 1989 and 1996 were internal conflicts.<sup>37</sup> In his recent book, *Catastrophic Consequences: Civil Wars and American Interests*, Professor David notes that, whereas only a little over half of all wars between 1816 and 2002 were civil wars, they made up 95% of all armed conflicts between 1995 and 2005.<sup>38</sup> David warns that internal wars present an enormous threat to American security—not only economically in that "[t]he American economy is dependent on the free access of imported oil at reasonable prices, and robust trade and investment,"<sup>39</sup> but also physically in that "America's physical security relies on countries maintaining tight controls over their nuclear arsenals."<sup>40</sup> David identifies four vulnerable countries in which serious internal conflict could damage American interests: Saudi Arabia, Pakistan, Mexico, and China.<sup>41</sup>

Of these four countries, Pakistan might pose the most immediate threat. In a June 2009 article in the *New York Review of Books*, Pakistani journalist Ahmed Rashid assesses the likelihood of a Pakistani civil war: "Pakistan is close to the brink, perhaps not to a meltdown of the government, but to a permanent state of anarchy, as the Islamist revolutionaries led by the

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36. 15 of the 19 hijackers came from Saudi Arabia—a link that has been traced to Saudi Arabia's Islamicist educational curriculum. David Johnston, *Two Years Later*, N.Y. Times, Sept. 9, 2003 <http://www.nytimes.com/2003/09/09/us/two-years-later-9-11-tactics-official-says-qaeda-recruited-saudi-hijackers.html>.

37. Steven R. David, *Internal War: Causes and Cures*, 49 *World Politics* 552, 553 (1997) (reviewing *The International Dimensions of Internal Conflict* (Michael Brown ed., Center for Science and International Affairs 1996) and *Stopping the Killing: How Civil Wars End* (Roy Licklider ed., 1993)).

38. Steven R. David, *Catastrophic Consequences: Civil War and American Interests* 7 (2008).

39. *Id.* at 148.

40. *Id.*

41. *Id.* at 18.

Taliban and their many allies take more territory, and state power shrinks.”<sup>42</sup> Furthermore, Rashid points out the distinct possibility that the Taliban could acquire nuclear weapons: “Pakistan has between sixty and one hundred nuclear weapons, and they are mostly housed in western Punjab where the Taliban have made some inroads.”<sup>43</sup>

The big question, then, is how Pakistan can prevent the Taliban from taking over its nuclear arsenal, a scenario that Secretary of State Hillary Clinton has characterized as “the worst, the unthinkable.”<sup>44</sup> President Zardari’s answer is to “deal[ ] with the 18,000 madrasas... that are brainwashing [Pakistani] youth.”<sup>45</sup> Although some foreign relations scholars contend that religion is never the primary cause of such problems,<sup>46</sup> it seems clear that the roots of the Pakistani conflict are religious as well as secular.

The idea that religion, and in particular Islam, can contribute to both internal and international conflicts was put most starkly by Samuel Huntington, who controversially wrote in his groundbreaking 1993 Foreign Affairs article that “Islam has bloody borders.”<sup>47</sup> As Huntington later disclosed in his 1998 book *The Clash of Civilizations and the Remaking of World Order*, “[n]o single statement in [his 1993] article attracted more critical comment.”<sup>48</sup> In *Clash of Civilizations*, Huntington offered six reasons<sup>49</sup> why Islamic states are more

42. Ahmed Rashid, *Pakistan on the Brink*, 56 N.Y. Rev. Books 10, 12 (June 11, 2009), available at <http://www.nybooks.com/articles/22730>.

43. *Id.* at 12.

44. *Id.*

45. *Id.*

46. Some scholars argue that only material factors cause internal conflicts. For example, in their article “Ethnicity, Insurgency and Civil War,” James D. Fearon and David Laitin argue that religious and ethnic diversity does not increase the likelihood of internal conflict; rather, factors such as poverty, political instability, rough terrain, and large population are the primary sources. James D. Fearon and David Laitin, *Ethnicity, Insurgency and Civil War*, 97 Am. Pol. Sci. Rev. 75, 75 (2003). Likewise, Michael L. Ross believes that material factors outweigh religious ones, as evidenced by the fact that countries rich in “lootable” natural resources are the most likely to engage in internal conflicts. Michael L. Ross, *How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases*, 58 Int’l Org. 35, 61 (2004). And Paul Collier has similarly demonstrated that the poorest countries are the most susceptible to internal war. Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* 17 (2007).

47. Samuel Huntington, *The Clash of Civilizations?*, 72 Foreign Aff. 22, 35 (1992–93), available at <http://www.foreignaffairs.com/articles/48950/samuel-p-huntington/the-clash-of-civilizations>.

48. Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* 258 (1996).

49. The six factors are: (1) the religion’s inherent militarism, (2) the proximity of Islamic states to non-Islamic cultures, (3) Islamic culture’s indigestibility of other cultures, (4) the sense of victimhood among Muslim people, (5) the lack of a powerful Islamic state to arbitrate regional conflicts, (6) and the region’s “demographic bulge” of young men. *Id.* at



likely to be involved in fault-line conflicts.<sup>50</sup> A few of Huntington's explanations focus solely on Islam's allegedly intrinsic traits, such as the claim that Islamic culture is "indigestible" to other cultures and that Islamic doctrine is inherently militaristic.<sup>51</sup>

Monica Duffy Toft has added some quantitative heft to Huntington's thesis.<sup>52</sup> Running a correlation based on the forty-two religious civil wars occurring between 1940 and 2000, Toft concludes that Islam has recently been more likely than other religions to transform a non-religious civil war into a religious one because Muslim elites stand to gain the most from framing the conflict in religious terms.<sup>53</sup> Toft offers three reasons why Islam bears such a high relationship to religiously based conflicts—including that the religion itself justifies violence, most vividly and dangerously in the doctrine of *jihad*.<sup>54</sup> This explanation is of course controversial, as it echoes Huntington's argument that Islam's borders are so bloody because of Islamic culture's "indigestibility of other cultures" and the "militarism" in Islamic doctrine.<sup>55</sup> Given Toft's claim that Islam's structure is partly responsible for so many internal conflicts being fought in the name of the faith, she proposes that "religious belief should be incorporated into bargaining theory rather than shunted aside as a category of irrational action."<sup>56</sup>

Likewise, Alexander Evans of the British Foreign and Commonwealth Office has argued in *Foreign Affairs* that "madrasahs offer an important arena for public diplomacy" because they provide "a chance to ensure that the Muslim leaders of tomorrow do not see the West as an enemy inherently hostile to all Muslim institutions."<sup>57</sup> Therefore, Evans prescribes that the United States

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262–65.

50. Fault-line conflicts are conflicts "arising between neighboring states from different civilizations, between groups from different civilizations within a state," or between groups attempting to create new states out of old ones. *Id.* at 207–08.

51. *Id.* at 263–64.

52. Monica Duffy Toft, *Getting Religion? The Puzzling Case of Islam and Civil War*, 31 *Int'l Sec.* 97 (2007), available at <http://www.wcfia.harvard.edu/node/2207>.

53. *Id.* at 103–04.

54. The other two reasons are: (1) *historical* (whereas centuries of Christian conflicts prompted European states to separate religion and government, Islamic states have not had this history and therefore have maintained a close relationship between religious and state authorities), and (2) *geographical* (many of Islam's holiest sites are near accessible petroleum reserves, linking Islam with competition for oil). *Id.* at 107, 129.

55. Huntington, *supra* note 48, at 263–64.

56. Toft, *supra* note 52, at 129.

57. Alexander Evans, *Understanding Madrasahs—How Threatening Are They?*, 85 *Foreign Aff.* 9, 9 (2006).

should not “undermin[e] the madrasah system” but rather “should engage it.”<sup>58</sup> For a long time, United States foreign policy rejected proposals to use religion to engage with other nations because American policymakers considered religion to be irrelevant to politics.<sup>59</sup> Recently, however, the United States has changed its approach and used religion as an engine for democratization and demilitarization in the Islamic world. Although the United States has not completely adopted Evans’s proposal that it directly “engage... the madrasah system,” the United States has given Pakistan \$100 million to use for general education reform,<sup>60</sup> and has begun to experiment with religious elements of foreign policy in other ways, discussed in the next section.

#### B. Current U.S. Policies that Use Islam to Democratize and Demilitarize Conflict-Prone Islamic States

Due to the threat that conflict-prone Islamic states pose to American security, the United States has recently used Islamic doctrine in these states as an engine of foreign policy. Indeed, in Iraq,<sup>61</sup> Pakistan,<sup>62</sup> Nigeria,<sup>63</sup> Afghanistan,<sup>64</sup> Bangladesh,<sup>65</sup> and Indonesia,<sup>66</sup> the United States is promoting

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58. *Id.*

59. See Barry Rubin, *Religion and International Affairs*, in Religion, The Missing Dimension of Statecraft 20, 20, 33 (Douglas Johnston and Cynthia Sampson eds., 1994) (arguing that the United States has wrongly ignored religion’s role in world politics).

60. Christopher M. Blanchard, *Islamic Religious Schools, Madrasas: Background*, CRS Report RS21654, at 6, (2005), available at <http://www.fas.org/sgp/crs/misc/RS21654.pdf>. This and other transnational funding of religious organizations and activities are discussed in Part I.B, *infra*.

61. To convince the Sunni population in Iraq to vote, the Pentagon has joined forces with Islamic scholars to design and disseminate Islamic messages explaining Islam’s compatibility with democracy. David S. Cloud & Jeff Gerth, *Muslim Scholars Were Paid to Aid U.S. Propaganda*, N.Y. Times, Jan. 2, 2006, at A1.

62. In September 2002, USAID committed \$100 million over five years for general education reform in Pakistan. Blanchard, *supra* note 60, at 6.

63. According to a USAID fact sheet, “USAID works with public primary schools in the northern region, which teach the core Koranic curriculum as well as math, English and social science. New programs this year will train 9,000 teachers, repair 750 classrooms and strengthen 1,500 parent-teacher associations and religious groups to identify and resolve the most pressing constraints to quality and equitable basic education in their communities.” USAID, *USAID Engagement with Muslim Communities in the Developing World*, July 27, 2007, <http://www.usaid.gov/press/factsheets/2007/fs070627.html> [hereinafter USAID].

64. The Central USAID Mission has an Islamic Outreach program designed “to integrate independent and credible Islamic leaders into USAID’s development activities” and “to create ‘cognitive dissonance’ by challenging negative perceptions of U.S. foreign policy.” USAID Center for Development Information and Evaluation, USAID Summer Seminar Session 10—Notes (2005), <http://www.usaid.gov/policy/cdie/notes10.html>. Part of this Islamic Outreach program is “Mullahs on a Bus,” which typically brings together regional religious leaders to spend a day on a bus visiting various U.S. funded projects, with the hope

Islamic doctrine and funding Islamic institutions. Despite the apparent efficacy of some of these programs,<sup>67</sup> many, if not all, would be unconstitutional if implemented domestically. Because reviewing the constitutional defects in each of these programs would yield an exhaustive but exhausting analysis, this paper examines in detail only what appears to be the most constitutionally problematic of these programs – USAID’s Islam and Civil Society Program in Indonesia (“ICS”).

ICS includes several policies that use Islam to democratize and demilitarize the Indonesian population. According to a USAID evaluation of the ICS program, two premises govern ICS policies.<sup>68</sup> One premise is that promoting democratic political reform in Indonesia requires that the United States work with “NGOs that are linked to Muslim organizations.”<sup>69</sup> The second premise is that promoting democratic political reform in Indonesia requires the United States to use Islamic doctrine as a political vehicle because “[r]eligious terminology is more effective than secular discourse in winning popular support

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that these religious leaders will in turn share with their followers the work that the U.S. does for Muslims. USAID, *Tours of Aid Sites to Counter Radicals*, Front Lines, Nov. 2004, at 7, available at [http://www.usaid.gov/press/frontlines/Nov04\\_FrontLines.pdf](http://www.usaid.gov/press/frontlines/Nov04_FrontLines.pdf).

65. According to the USAID Fact Sheet, “USAID works with imams and other opinion leaders to build support for development by taking them around Bangladesh to increase exposure to development issues, such as health, basic education, human trafficking, and local governance.” The program is designed to promote “tolerance, diversity and social harmony, and understanding in Bangladeshi society. Over the next four years, the program will reach at least 20,000 leaders of influence representing all religious faiths and a variety of secular fields—including local elected officials, community service club members, professionals, business leaders, journalists and women and youth leaders.” USAID, *supra* note 63.

66. As discussed *infra*, USAID’s Islam and Civil Society Program might be the most widespread and developed program that funds and promotes an American-friendly version of Islam.

67. As reported by USAID, the Islam and Civil Society Program in Indonesia has been more successful than many other U.S. efforts to promote democratization. See Robert W. Hefner and Krishna Kumar, USAID, *Summary Assessment of the Islam and Civil Society Program in Indonesia: Promoting Democracy and Pluralism in the Muslim World 7–8* (2006), available at [http://pdf.usaid.gov/pdf\\_docs/PDACG325.pdf](http://pdf.usaid.gov/pdf_docs/PDACG325.pdf). [hereinafter USAID, *Summary Assessment of Islam in Indonesia*]. Moreover, there is some evidence that America’s respectful and active engagement with Islamic doctrine might help demilitarize these populations. For example, a 2006 Gallup poll of the Islamic world asked how the United States can improve its reputation among Muslims, and the number one answer that respondents gave was that the United States should show greater respect for people of faith. John L. Esposito, Gallup, Inc., *Muslims and the West: A Culture War?*, Feb. 13, 2006, <http://www.gallup.com/poll/21454/Muslims-West-Culture-War.aspx>.

68. USAID, *Summary Assessment of Islam in Indonesia*, *supra* note 67, at 1.

69. *Id.* at 1.

for democratic values.”<sup>70</sup> Guided by the first ICS premise that the United States must work with Muslim NGOs, ICS supports various religious institutions, such as “a conservative Muslim student organization [that] has long had a theologically conservative reputation.”<sup>71</sup> Due to ethno-religious violence that Indonesia suffered from 1998 to 2002, this fundamentalist organization has come to value pluralism and democracy, leading it to develop seminars on these subjects in “university campuses known as strongholds of hardline Islamism.”<sup>72</sup> In addition to supporting such fundamentalist religious organizations, ICS supports civic education in religious universities, such as the public State Islamic University (UIN) and the private Muhammadiyah University (UMY). Specifically, ICS has funded the State Islamic University’s preparation of a course book entitled *Democracy, Human Rights, and Civil Society*. And to “replace the authoritarian indoctrination required under the Suharto regime,”<sup>73</sup> ICS has also funded a mandatory Muhammadiyah University full-term course that teaches “democracy, human rights, and gender equality *from an Islamic perspective*.”<sup>74</sup> This “civic education curriculum is now beginning to be taught in all 35 Muhammadiyah universities, which have a combined population of 30,000 students.”<sup>75</sup> USAID predicts that given “Muhammadiyah’s influence in the Muslim community as a whole, this development is likely to have a profound impact on future professionals and Muslim leaders graduating from these universities.”<sup>76</sup>

If the United States funded similar organizations domestically, the funding would certainly be struck down as unconstitutional. Imagine an analogous domestic program, such as a federal program that sought to mediate our current culture war by encouraging evangelical professionals and leaders to become more tolerant of homosexuality. Also imagine that to achieve this goal, the United States funded evangelical organizations to teach courses in the most conservative evangelical universities, such as Jerry Falwell’s Liberty University or Pat Robertson’s Regent University, and that these courses focused on how good Christians must tolerate homosexuality. Or imagine that the United States designed and disseminated a university textbook that focused on this theme. Such domestic efforts to use evangelical Christianity as a political vehicle would violate the Establishment Clause by singling out gay-friendly evangelical organizations for preferential funding and by engaging in the interpretation of

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70. *Id.* at 2.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 7 (emphasis added).

75. *Id.*

76. *Id.*

Christian doctrine.<sup>77</sup>

Several other ICS projects similarly seem to violate the Establishment Clause by singling out some American-friendly Muslim groups for preferential treatment and by promoting a particular interpretation of Islamic doctrine. Particularly problematic are those ICS programs that fund Muslim preachers and mosques. According to USAID, ICS seeks to work with Muslim preachers because in Indonesia “teachers and preachers from [religious] institutions have more credibility than leaders of government and political parties.”<sup>78</sup> Therefore, one ICS program works with approximately 1,500 Islamic boarding schools (*pesentrens*) with the goal of “address[ing] common problems, such as religious extremism and intra-religious tolerance.”<sup>79</sup> Another ICS program funds “workshops on democracy education for preachers (*khatib*) at Friday mosque services.”<sup>80</sup> According to USAID, “[d]uring 2002-03, it trained some 500 preachers on matters of pluralism tolerance and democracy.”<sup>81</sup> This program has also funded the distribution of “2,000 handbooks for sermons on democracy and pluralism,”<sup>82</sup> sermons that “reach about 50,000 congregants each week.”<sup>83</sup> Another ICS project instructs female Muslim preachers (*muballighat*) how to incorporate gender-equality lessons into their sermons.<sup>84</sup> According to USAID, this project has “been at the forefront of the campaign to highlight threats to women’s rights posed by efforts to implement harsh interpretations of Islamic (sharia) law.”<sup>85</sup>

Consider two more ICS programs that promote Islamic speech. One is the radio show *Religion and Tolerance*. As is evident from the show’s title, ICS created the show to promote the view that the true version of Islam is tolerant of other faiths and viewpoints. The show is immensely popular; according to the

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77. In fact, a 2005 federal district court ruling followed this reasoning in enjoining a public school’s sex education program that taught that “fundamentalists and evangelicals are more likely than other religions to have negative attitudes about gay people.” *Citizens For A Responsible Curriculum v. Montgomery County Public Schools*, 2005 WL 1075634, at 10 (D. Md. May 5, 2005). The court issued a temporary injunction against the program on the ground that it likely violated the Establishment Clause by “discriminat[ing] between religious sects in that it prefers those sects that are friendly to the homosexual lifestyle,” *id.*, and engaging in religious indoctrination by suggesting that some faiths are “theologically flawed.” *Id.* at 11.

78. USAID, *Summary Assessment of Islam in Indonesia*, *supra* note 67, at 3.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 4.

83. *Id.*

84. *Id.* at 5.

85. *Id.*

2005 congressional testimony of James Kunder,<sup>86</sup> *Religion and Tolerance* has become “one of the largest radio talk shows in Asia,”<sup>87</sup> and according to a 2003 *Time* magazine story on significant Asian radio programs, “[m]ore than 5 million Indonesians listen” to the show.<sup>88</sup> The *Time* article describes the show’s host, Ulil Abshar-Abdalla, as “one of the country’s best-known young Muslim intellectuals.”<sup>89</sup> As the *Time* article explains, Ulil uses his show “to dissect issues facing modern Islam today;”<sup>90</sup> for example, in one show Ulil discussed “how each individual experiences Islam differently.”<sup>91</sup> *Time* astutely notes that this is “a topic usually reserved for ulemas,”<sup>92</sup> who are elite Muslim scholars entrusted with interpreting shari’a law. Interestingly, though, the *Time* article does not mention that the United States funds Ulil’s discussion and interpretation of Islamic doctrine. Nor does *Time* mention that about six months before the article’s publication, a group of Muslim clerics issued a death *fatwa* against Ulil because he claimed that “there is no such thing as Islamic law and that the Prophet Muhammed was merely a historical figure.”<sup>93</sup> Clearly, if the United States were to fund a domestic radio show that adopted a particular view on Christian law or the divinity of Jesus, it would almost certainly be condemned as unconstitutional. Yet there has been little discussion of whether support of the *Radio and Tolerance* show is constitutional.

Another ICS program that promotes Islamic speech is its “Friday flyers” program, which funds the Institute for Islamic and Social Studies to “distribute[ ] at mosques 52,000 copies of a weekly flyer.”<sup>94</sup> This flyer “targets lower-middle-class and lower-class readers,”<sup>95</sup> and “cover[s] topics such as Islam and women’s rights, Islamic views of farmers’ rights, and democracy.”<sup>96</sup> In its *Grant Impact Monitoring Report*, USAID concedes that the express

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86. Kunder was at the time the USAID Acting Deputy Administrator. USAID, About USAID, *Biography of James Kunder*, Feb. 4, 2010, [http://www.usaid.gov/about\\_usaid/bios/bio\\_jkunder.html](http://www.usaid.gov/about_usaid/bios/bio_jkunder.html).

87. USAID, *Testimony of James Kunder, Assistant Administrator for Asia and the Near East, on Indonesia and Tsunami Construction*, <http://ocha-gwapps1.unog.ch/rw/rwb.nsf/db900sid/EGUA-6GAMYV?OpenDocument> (last visited Mar. 29, 2010).

88. Hannah Beach, *Making Waves*, *Time Magazine*, July 7, 2003, at 2, available at <http://www.time.com/time/magazine/article/0,9171,463131-1,00.html>.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Atika Shubert, *Fatwa on vocal Indonesian moderate*, CNN News, Jan. 22, 2003, <http://edition.cnn.com/2003/WORLD/asiapcf/southeast/01/22/indo.fatwa/>.

94. USAID, *Summary Assessment of Islam in Indonesia*, *supra* note 67, at 5.

95. *Id.*

96. *Id.*

purpose of this Friday flyer program is to promote an American-friendly version of Islam that opposes the “militant groups [that] have long taken the opportunity to reach this prime target audience by passing out leaflets to worshippers after Friday prayers.”<sup>97</sup> Significantly, to make their messages appeal to “the pious Muslim male population in Indonesia,”<sup>98</sup> the flyers use “Islamic language,”<sup>99</sup> consisting of Koranic verses and Islamic symbols.<sup>100</sup> Again, a hypothetical analogous domestic policy illustrates just how problematic this program would be under our constitutional tradition. For example, if the United States funded a Christian organization’s use of biblical verses to convince target populations to adopt more tolerant views on homosexuality, it clearly would violate the core Establishment Clause requirements that the government may not single out particular religious sects for preferential funding or engage in the interpretation of religious doctrine.

In sum, most if not the entire ICS program would be held unconstitutional if the same Establishment Clause rules that apply domestically were to apply abroad. But this of course does not mean that ICS is unconstitutional, for there is still no agreement on the most basic questions governing the Establishment Clause’s application abroad. Should the Establishment Clause apply abroad just as it applies domestically? Or should it not apply abroad at all, like some have suggested is the case for the Fourth Amendment? Or should it apply abroad but with a modified analysis, such as a standard that allows courts to weigh Establishment Clause values against government interests? Part II deals with these and related questions.

## II. PROPOSED APPROACHES TO APPLYING THE ESTABLISHMENT CLAUSE ABROAD

As noted in the introduction, very little has been written regarding the Establishment Clause’s applicability abroad. Indeed, the only scholar to tackle this issue seriously is Harvard Law’s John Mansfield;<sup>101</sup> the only court to address the issue is the Second Circuit in *Lamont v. Woods*;<sup>102</sup> and the most serious engagement with the *Lamont* decision was written by Jessica P. Hayden, while still a law student.<sup>103</sup> This Part reviews each of these approaches and

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97. See Hayden, *supra* note 7, at 180 n.44 (citing The Asia Foundation, *Grant Monitoring Report*, Islam and Civil Society Program, at 11 (Mar. 2005)).

98. *Id.*

99. *Id.*

100. *Id.* at 180, (citing The Asia Foundation, *Grant Monitoring Report*, Islam and Civil Society Program, at 11 (Mar. 2005)).

101. Mansfield, *supra* note 5.

102. *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991).

103. Hayden, *supra* note 7.

concludes that, although all three contribute to our understanding of how the Establishment Clause might apply abroad, these approaches ultimately fail, largely because they deviate sharply from the U.S. Supreme Court's many decisions applying other constitutional provisions abroad.

#### A. John H. Mansfield's Approach

Harvard Law's John H. Mansfield authored the first scholarly work to consider how to apply the Establishment Clause abroad.<sup>104</sup> In an incredibly prescient piece, written five years before a court had ever considered the issue and fifteen years before 9/11, Mansfield meditated on how the Establishment Clause should apply abroad—indeed, “meditate” properly describes Mansfield's approach, as the first paragraph of the article concedes that the work is “exploratory in nature, with more questions raised than answered.”<sup>105</sup>

Given the exploratory nature of the paper, Mansfield does not base his analysis on the Supreme Court decisions actually dealing with the Constitution's application abroad—in fact, Mansfield hardly mentions these decisions. Instead Mansfield generally bases his analysis on his belief that “when the United States acts abroad, the constitutionality of its actions should be judged differently than when it acts at home.”<sup>106</sup> Mansfield argues that the Constitution should apply differently abroad for two reasons: (1) the Constitution should accommodate “the exigencies of the foreign situation”;<sup>107</sup> and (2) the Constitution implicitly obligates the United States to demonstrate “respect for the rights of foreign nations to follow their own ways.”<sup>108</sup> Mansfield submits that these two reasons might be so important that “[p]erhaps the free exercise clause applies to the territories, but not the establishment clause.”<sup>109</sup> But Mansfield generally backs off this claim that the Establishment Clause should not apply abroad. Indeed, at another point in the paper he argues not only that the Establishment Clause must *apply* abroad, but also that it must *trump* other interests when a fundamental Establishment Clause value is at stake. He argues that within the Establishment Clause is “an irreducible core that will not accommodate”<sup>110</sup> other interests because this core element of the Establishment Clause “claims universal validity.”<sup>111</sup>

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104. Mansfield, *supra* note 5.

105. *Id.* at 1.

106. *Id.* at 25.

107. *Id.*

108. *Id.*

109. *Id.* at 24.

110. Mansfield, *supra* note 5, at 39.

111. *Id.*



Although Mansfield does not develop a strict framework for applying the Establishment Clause abroad, he does hint at a general approach, consisting of two distinct tracks. One track applies if a case involves a core Establishment Clause value; in such a case, courts should enforce the Establishment Clause requirement just as it applies domestically. A second track applies if a case does not involve a core Establishment Clause value; in such a case, courts should balance the Establishment Clause requirement against U.S. foreign policy interests and the relevant traditions of the nation in which the United States is acting. Although Mansfield does not expressly propose this standard consisting of two different tracks, he strongly implies such a standard in his two hypothetical scenarios involving a U.S. program funding Malaysian schools.

Mansfield imagines in his first hypothetical scenario that the United States seeks to promote science education in Malaysia, but to do so has to fund religious schools because only they are eligible for the funding. Mansfield acknowledges that this funding would violate the prevailing Supreme Court interpretation of the Establishment Clause—i.e., the rule that the government may not fund pervasively religious organizations.<sup>112</sup> Mansfield argues that although this rule would require a court to invalidate an analogous domestic policy, a court should analyze a foreign program differently by balancing the Establishment Clause rule against U.S. foreign policy interests and Malaysian cultural traditions.<sup>113</sup> Mansfield endorses balancing in such a case because he believes that the Establishment Clause rule against funding pervasively religious organizations is not a core rule; in his words, the rule “is not of such severity as to invalidate the core freedom protected by the first amendment.”<sup>114</sup> So, balancing the rule against these other interests, Mansfield concludes that the Establishment Clause should permit this funding of Malaysian schools because

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112. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding that a federal program violated the Establishment Clause by paying New York City public-school teachers to provide secular instruction to students in both public and private schools, including religious schools.). Notably, even though since Mansfield’s article the Supreme Court has overruled some of its separationist rulings, such as its *Aguilar* decision, Mansfield’s hypothetical Malaysian program would likely violate even the less-separationist standard currently governing programs that directly fund religious schools; under this less-separationist standard, the government may directly fund religious schools but only if there are adequate safeguards to ensure that the aid is not used for religious activities. See *Agostini v. Felton*, 521 U.S. 203, 222, 230 (1997) (overruling *Aguilar v. Felton* on the ground that the program at issue in that case was constitutional because it required public-school teachers to teach only secular content); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality) (holding that a federal program loaning secular instructional materials and equipment to public and private schools, including religious schools, did not violate the Establishment Clause because the government took reasonable steps to ensure the beneficiaries used the assistance only for secular purposes.).

113. Mansfield, *supra* note 5, at 34.

114. *Id.*

“[t]he strength of the United States’ foreign policy interest in the stability of Southeast Asia is great,”<sup>115</sup> and funding the Malaysian religious schools “accords with what the Malaysian government wants in government schools—a blending of the secular and the religious—and so is supported by the value... of respect for the ways of other nations.”<sup>116</sup>

Mansfield offers a second version of this hypothetical scenario to demonstrate his analysis of a case involving a *core* Establishment Clause requirement. Under this scenario, the United States would fund religious schools in Malaysia not to promote science education but rather to promote a moderate form of Islam as “a bulwark against... Iranian-style fundamentalism.”<sup>117</sup> Mansfield argues that this would violate even his weakened international Establishment Clause because “[f]or the United States directly to embrace the doctrines of a particular religion, albeit for political ends, might conflict with the values of the religion clauses to such an extent that cannot be outweighed by foreign policy considerations or the importance of respect for other cultures.”<sup>118</sup> In other words, Mansfield believes that the United States must never promote an American-friendly version of Islam—no matter the competing interests—because this would require the United States to involve itself in religious doctrine, thus violating a core Establishment Clause norm.

A few features of Mansfield’s framework are problematic. Perhaps his most problematic claim is that there is an implicit command in the Constitution to respect other cultures. Indeed, Mansfield makes a questionable textual argument that the Constitution might command the United States to respect foreign nations, because “[t]he Constitution recognizes the existence of foreign nations and, implicitly, their right to be different from the United States.”<sup>119</sup> And to bolster this questionable textual interpretation, Mansfield cites cases treating Native Americans differently from other groups.<sup>120</sup> But these cases were later undermined by Supreme Court decisions holding that the Constitution permits, and sometimes even requires, that the United States treat Native Americans just like other citizens.<sup>121</sup>

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 34–35.

119. Mansfield, *supra* note 5, at 25.

120. *Id.* at 10.

121. *See, e.g.*, *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause permitted Oregon to criminalize peyote use, even by Native Americans, because Oregon’s peyote ban was a “neutral law of general applicability”); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (holding that the federal government did not violate the Free Exercise Clause by constructing a road through a national forest that Native

Furthermore, even were one to accept that there is such a command, it is not clear that this command would limit the extraterritorial application of the Establishment Clause. In his first hypothetical scenario, Mansfield suggests that the United States would disrespect Malaysian culture by refusing to fund its religious schools. But it is not immediately apparent why this would disrespect Malaysian culture. Although applying the Establishment Clause rule abroad might induce Malaysia to create some secular schools so that it could receive funding from the United States for education, it would not *require* Malaysia to honor the American church-state model or even to alter its religious educational programs at all.

Another major problem in Mansfield's analysis is that it places more weight in respecting foreign traditions than in furthering American foreign policy interests. Mansfield argues that "[w]hen the United States has acted in a foreign country not out of respect for the ways of that country, but for its own purposes alone, perhaps it should not be able to invoke the value of such respect in justification of its departure from domestically applicable standards."<sup>122</sup> Similarly, in a 2008 article further developing his theory, Mansfield suggests that it would be improper to balance the Establishment Clause against American foreign policy interests because "[t]o import into the Establishment Clause a 'compelling state interest' exception arguably would run counter to the history that led to that Clause's adoption."<sup>123</sup> Mansfield does not, however, limit the weight that foreign traditions might hold in the analysis. Thus, Mansfield contends that whereas the Constitution forbids courts to balance American foreign policy interests against the Establishment Clause, it requires courts to balance foreign traditions against the Establishment Clause. Needless to say, this preference for foreign traditions over American interests is quite a counter-intuitive notion of how to balance constitutional norms against competing values.

#### B. The Second Circuit's Approach in *Lamont v. Woods*

Five years after its publication, Mansfield's article appeared prominently in *Lamont v. Woods*,<sup>124</sup> the only case to have directly addressed whether the Establishment Clause applies abroad. In *Lamont*, the U.S. Court of Appeals for the Second Circuit considered the constitutionality of a USAID program that funded Catholic and Jewish schools abroad. In considering this

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Americans used for religious ceremonies).

122. Mansfield, *supra* note 5, at 26.

123. John H. Mansfield, *Promotion of Liberal Islam by the United States, in Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues* 85, 86 (David K. Linnan ed., Praeger Security International 2008).

124. *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991).

issue, the court first determined which Establishment Clause standard it should apply. Noting that “Professor Mansfield has suggested a similar approach,”<sup>125</sup> the court announced that the Establishment Clause should apply less strictly than it applies domestically. Under this weaker standard, even if the government would violate the Establishment Clause by committing a particular act domestically, the government could still commit that act abroad if the government could offer a compelling reason for doing so.<sup>126</sup> Applying this standard to the facts of the case, the *Lamont* court held that the Establishment Clause permitted the government’s funding of international Catholic and Jewish schools if the government could “demonstrate some compelling reason why the usually unacceptable risk attendant on funding [a religious] institution should, in the particular case, be borne.”<sup>127</sup> The Second Circuit therefore remanded the case back to the district court to determine whether the government had such a compelling reason.

In reaching this conclusion, the *Lamont* court distinguished the then-recent U.S. Supreme Court decision in *United States v. Verdugo-Urquidez*,<sup>128</sup> that the Fourth Amendment’s warrant requirement generally does not apply abroad. Tracking the Supreme Court’s analysis in *Verdugo-Urquidez*, the Second Circuit broke its analysis into three categories: (1) operation and text, (2) history, and (3) policy considerations.

First, comparing the operation of the Establishment Clause to that of the Fourth Amendment, the *Lamont* court held that extraterritorial funding of religion generally has some domestic basis, whereas extraterritorial searches and seizures often occur wholly outside United States territory. For example, the court noted that the alleged Establishment Clause violation in this case was connected to U.S. citizens in at least three ways: the violation arose in the United States when the Department of State granted the money; the aid was given to Catholic and Jewish schools, which could empower Catholicism and Judaism in the United States; and the aid used American taxpayer dollars.<sup>129</sup> Moreover, comparing the text of the Establishment Clause and Fourth Amendment, the court found that whereas the Establishment Clause is a structural guarantee because it “imposes a restriction on Congress,”<sup>130</sup> the Fourth Amendment is an individual-rights guarantee because it “confers a right

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125. *Id.* at 842 n.20.

126. Note that this is very different from Mansfield’s approach, despite the *Lamont* court’s claim that it is similar. *See* text accompanying notes 111–18, 120–21, *supra*.

127. *Lamont*, 948 F.2d at 842.

128. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

129. *Lamont*, 948 F.2d at 828.

130. *Id.* at 835.

on the people.”<sup>131</sup>

Second, the court considered the history of the Establishment Clause and explained that while the Supreme Court might have been correct in *Verdugo-Urquidez* in finding that the Framers intended to limit the Fourth Amendment to domestic searches and seizures, the Framers did not intend to restrict how the Establishment Clause would apply to government funding of religious institutions abroad.<sup>132</sup> The Second Circuit cited several foundational First Amendment documents—in particular James Madison’s *Memorial and Remonstrance*—to support the view that the original purpose of the Establishment Clause was to limit how the government used tax dollars to fund religious institutions.<sup>133</sup> Given this purpose, the court could not find any reason to believe that the Framers sought to limit the Establishment Clause to domestic programs.<sup>134</sup>

Finally, considering the relevant policy factors, the Second Circuit declared that while the Court in *Verdugo-Urquidez* refused to apply the Fourth Amendment abroad partly out of concern for national-security interests, there were no such concerns present in extending the Establishment Clause abroad to constrain America’s international funding of religious education.<sup>135</sup> The Second Circuit declared that it could “identify ‘no direct relationship between educational programs and national security interests.’”<sup>136</sup>

Unfortunately, the *Lamont* court’s analysis is full of holes. Recall that in distinguishing the *Verdugo-Urquidez* decision, the *Lamont* court found that the Establishment Clause, unlike the Fourth Amendment, almost always operates domestically; one of the examples that the court offered for this claim was that USAID’s funding of religious schools abroad burdens individual American taxpayers just as would the government’s funding religious schools within the United States.<sup>137</sup> But immediately after providing this example, the court undermined this argument by saying that the Establishment Clause is different from the Fourth Amendment because the Establishment Clause text guarantees a particular governmental structure and not an individual right.<sup>138</sup> In other words, the court declared that when the government funds religious schools abroad, the Establishment Clause always operates domestically to guarantee American taxpayers an individual right. But the court also claimed

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131. *Id.*

132. *Id.* at 837.

133. *Id.*

134. *Id.*

135. *Id.* at 840.

136. *Id.*

137. *Id.* at 842 n.20.

138. *Id.* at 835.

that the Establishment Clause is different from the Fourth Amendment because its text does not create an individual right. So the court effectively said that the Establishment Clause text is at odds with how courts have interpreted it.

The Second Circuit's second ground for distinguishing *Verdugo-Urquidez* is also questionable. Recall that on this second ground, the court searched the history of the Establishment Clause and concluded on this basis that the Framers intended for the Establishment Clause to apply abroad. This part of the analysis is peculiar because the court consulted many of the documents—such as Madison's *Memorial and Remonstrance*—that scholars and the U.S. Supreme Court have cited in support of the finding that the Establishment Clause provides an individual right. Indeed, in *Everson v. Ewing Township Board of Education*,<sup>139</sup> the Supreme Court cited the *Memorial* heavily as a basis for finding that the Establishment Clause ensures an individual liberty that must be incorporated to apply to the states. The *Lamont* court's reliance on Madison's *Memorial* highlights the court's caprice on whether the Establishment Clause is an individual right or a structural guarantee.<sup>140</sup>

Finally, the Second Circuit's analysis of the third ground is stunningly myopic. Indeed, although one cannot fault the pre-9/11 Second Circuit for failing to appreciate the threat that *madrasas* currently pose to American national security, it was not difficult to imagine in 1991 that Islamic fundamentalism might spread in particular countries and eventually threaten American security, thereby necessitating America's funding of education that would counter the spread of such indoctrination. Therefore, it is incredible that the Second Circuit could “identify ‘no direct relationship between education programs and national security interests.’”<sup>141</sup>

As weak as the Second Circuit's justification is for distinguishing the *Verdugo-Urquidez* decision, the most questionable feature of the *Lamont* opinion is probably the proposed standard for applying the Establishment Clause abroad. Under the Second Circuit's standard, courts would balance Establishment Clause values against competing government interests. This sharply contrasts to the domestic version of the Establishment Clause. Indeed, only one Supreme Court case has directly authorized courts to balance Establishment Clause values against social interests,<sup>142</sup> and that one case is as

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139. *Everson v. Ewing Twp. Bd. of Ed.*, 330 U.S. 1, 509, 522 (1947).

140. This caprice is further highlighted by the Second Circuit's attack on originalism in the midst of its own inquiry into the original intent of the Framers. See *Lamont v. Woods*, 948 F.2d 825, 839 (2d Cir. 1991).

141. *Id.* at 840.

142. *Larson v. Valente*, 456 U.S. 228 (1982) (considering the argument that the prevention of fraudulent solicitations is a “compelling interest,” and that a statute that applies specifically to religious organizations is therefore constitutional).

an outlier, probably better understood as an Equal Protection Clause case.<sup>143</sup> Importantly, such a balancing approach is generally not applied to structural guarantees, such as the separation of powers, but rather to individual rights like the Free Speech Clause. The *Lamont* decision thus held that the Establishment Clause should always apply abroad because it is a structural guarantee yet that the clause should apply abroad just as individual rights apply domestically.

In sum, the Second Circuit's analysis in *Lamont* is full of logical and empirical defects. Its analysis of the operation, text, and history of the Establishment Clause is internally inconsistent; its proposed international Establishment Clause standard is at odds with its analysis of the text of the Establishment Clause; and its evaluation of foreign policy was short-sighted then and is demonstrably false now.

### C. Jessica Hayden's Approach

Despite the *Lamont* decision's defects, the Second Circuit's reasoning has been largely immune from criticism and has even gained broad support. One supporter of the court's decision is Jessica Hayden, who has latched on to the *Lamont* court's emphasis on the Establishment Clause being a structural guarantee rather than an individual right.<sup>144</sup> According to Hayden, the distinction between individual rights and structural restraints is fundamentally important in determining which constitutional provisions apply extraterritorially and which are more limited.<sup>145</sup> Hayden laments that the *Lamont* court did not go far enough in hinging the case on the structural-individual rights distinction, yet she nevertheless believes that "*Lamont* appears to have placed a heavy emphasis on this distinction"<sup>146</sup> and that for this reason the Second Circuit "seemed to be heading in the right direction."<sup>147</sup> In addition to following the *Lamont* court's

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143. See Susan Gellman and Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. Pa. J. Const. L. 665, 684 (arguing that the 14th Amendment provides a superior basis for challenging governmental religious expression, and that cases like *Larson* provide evidence of this superiority, though the case was decided based on the Establishment Clause).

144. Hayden, *supra* note 7.

145. Jessica P. Hayden, *The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 Geo. L.J. 237, 248 (2007). In this subsequent article, Hayden goes beyond the question of whether the Establishment Clause applies abroad. She proposes that, in considering whether to apply *any* constitutional provision abroad, courts should question whether that provision creates a structural guarantee (in which case it must apply abroad) or an individual right (in which case it need not apply abroad). *Id.* at 248 ("[T]he Court does apply different standards on the extraterritorial application of the Constitution when the provision at issue is a structural restraint, rather than an individual right. And this difference makes sense.").

146. Hayden, *supra* note 7, at 201.

147. *Id.*

structural-individual rights distinction, Hayden also follows the *Lamont* decision's proposal that the Establishment Clause should always apply abroad but less strictly than it applies domestically. But whereas the *Lamont* court merely announced that the international version of the Establishment Clause should permit some balancing of interests, Hayden goes further, importing a diluted version of the strict-scrutiny framework into her analysis of the Establishment Clause.

Specifically, Hayden creates an extraordinarily intricate two-track analysis for courts to apply in determining how the Establishment Clause applies abroad. Under Hayden's first track, courts "would follow the individual rights line of cases."<sup>148</sup> According to Hayden's interpretation of these cases, "constitutional individual rights would apply to U.S. citizens regardless of physical location and to aliens within the territory of the United States."<sup>149</sup> Under Hayden's second track, courts "would apply a structural restraint model and follow U.S. government action regardless of its location."<sup>150</sup> This second track further breaks down into several steps.

First, a court "would examine the program as if it were located in the United States, using the same analysis [that would be applied to a domestic program]."<sup>151</sup> Next, if under this analysis the program would be found unconstitutional, then "the court could employ a balancing analysis (much like that suggested in *Lamont*) to determine if the program should be upheld."<sup>152</sup> Third, as part of this balancing analysis, "the court should determine if there is a compelling national security interest."<sup>153</sup> Finally, if there is such a compelling national security interest, then the court should uphold the program if it is "narrowly tailored to serve that compelling government interest."<sup>154</sup> Hayden notes, however, "[t]his narrow tailoring requirement would not be as stringent as the one imposed in free speech and equal protection domestic contexts,"<sup>155</sup> but "it would serve as a check on executive abuses and to ensure that the stated program is no more expansive than it need be to fulfill national security demands."<sup>156</sup>

Hayden's proposed Establishment Clause doctrine, though elegant, is deficient in many ways. Perhaps her most significant mistake is to bank her

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148. *Id.* at 203.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 203–04.

154. *Id.* at 204.

155. *Id.* at 204 n.202.

156. *Id.*



entire analysis on the individual-structural rights distinction. This distinction has almost no basis in Supreme Court case law. Only in dicta in one opinion, *Downes v. Bidewell*,<sup>157</sup> did the Supreme Court ever suggest that the distinction is even relevant to whether a particular constitutional provision applies abroad, and more important, the Court has never applied a constitutional provision abroad due to its status as a “structural guarantee.”<sup>158</sup> Furthermore, even assuming that Hayden is right that structural guarantees must always apply abroad—which is a generous assumption—it still is far from clear whether this means that the Establishment Clause must apply abroad. Although Hayden is right that some scholars have argued that the original purpose of the Establishment Clause was to create a structural guarantee that would prevent the federal government from interfering with state church-state policies,<sup>159</sup> Hayden overestimates the likelihood of judges holding that this purpose should influence our contemporary understanding of the Establishment Clause. In fact, she cites only two U.S. Supreme Court Justices—Justices Potter Stewart and Clarence Thomas—who have ever expressly interpreted the Establishment Clause in light of its structural purpose.<sup>160</sup> Given that Justice Thomas is the only

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157. *Downes v. Bidewell*, 182 U.S. 244, 277 (1901) (“[W]hen the Constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed,’ and that ‘no title of nobility shall be granted by the United States,’ it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may apply to the First Amendment, that ‘Congress shall make no law respecting an establishment of religion . . . .’”).

158. In fact, one of the first and most important cases involving the Constitution’s application abroad, *In re Ross*, 140 U.S. 453 (1891), suggested that one of our most fundamental structural guarantees, the separation of powers, does not apply abroad. In the *In re Ross* decision, the Court upheld the constitutionality of a consular statute, and as the Supreme Court later explained in another important case, *Reid v. Covert*, 354 U.S. 1 (1957), this consular statute allowed “consuls [to] make the criminal laws, initiate charges, arrest alleged offenders, try them, and, after conviction, take away their liberty or their life.” *Reid*, 354 U.S. at 11. Even though “[s]uch a blending of executive, legislative, and judicial powers in one person, or even in one branch of the Government, is ordinarily regarded as the very acme of absolutism,” *id.*, the Court has never suggested that consular trials are unconstitutional due to the extraterritorial applicability of the separation of powers.

159. The most ardent supporter of this structural view is Carl Esbeck. *See, e.g.*, Carl Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1 (1998) (arguing that the Establishment Clause is best understood as a structural restraint on the government, removing matters relating to the establishment of religion from the area of civil governance, rather than as singularly aimed at securing individual rights).

160. Hayden, *supra* note 7, at 193–94. Justice Stewart adopted the view in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 309–10 (1963) (Stewart, J., dissenting) (“As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created National Government. The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.”), as did Justice Thomas in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (“The text and history of the Establishment Clause

current Supreme Court Justice to take the radical view that the Establishment Clause is solely a structural guarantee,<sup>161</sup> it is unlikely that the Court will adopt this view in the foreseeable future.

A more conceptual issue in Hayden's article is that she understates the implications of treating the Establishment Clause solely as a structural guarantee. She mentions in a footnote that "[s]everal critics of the individual rights model have advocated for the rolling back of Establishment Clause incorporation."<sup>162</sup> This puts it lightly. There is a very strong relationship—arguably a necessary one—between viewing the Establishment Clause as a structural guarantee and holding that the Establishment Clause does not apply to the states. Indeed, if the Court were to hold that the Establishment Clause is principally a structural guarantee, it would follow that the Court should never have incorporated the Clause to apply to the states through the Fourteenth Amendment's Due Process Clause, which incorporates only individual liberties. Given this relationship between structuralism and disincorporation, Justices Stewart and Thomas, the only two Justices who have expressly adopted the view that the Establishment Clause is a structural guarantee, both have expressed reservations about incorporating the Establishment Clause.<sup>163</sup> Disincorporation of the Establishment Clause is not only an unpopular position—supported by no member of the current Supreme Court other than Thomas, and perhaps not even by him any longer<sup>164</sup>—it would also lead to

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strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.”).

161. Notably, Justice Thomas has not displayed commitment to this structuralist view. In *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007), Justice Thomas joined Justice Scalia's concurrence claiming that Article III standing rules should apply to the Establishment Clause in the same way these rules apply to other rights. This reasoning seems to undermine Justice Thomas's claim that the Establishment Clause is different from other rights. *Hein*, 551 U.S. at 618 (Scalia, J., concurring).

162. Hayden, *supra* note 7, at 194 n.130.

163. Justice Stewart expressed his reservations about incorporation in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting), where he accepted it, but emphasized that it is “not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy.” Justice Thomas went much further in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring), where he urged for the Court to reconsider whether it was right in incorporating the Establishment Clause.

164. For example, Justice Thomas did not raise this incorporation point in *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (holding that the posting of the Ten Commandments in state court houses violated the Establishment Clause because the state's purpose was to promote Christianity), where he joined the dissenting opinion of *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that the posting of the Ten Commandments on a monument on the grounds of the Texas state capitol did not violate the Establishment Clause), where he joined the majority opinion.

absurd consequences under Hayden's proposed framework. Whereas the Establishment Clause would always limit how the United States promotes religion abroad, it would not limit at all how the individual *states* engage with religion. So if Hayden wants to avoid this absurd result, she must at least suggest how to reconcile structuralism with incorporation.

Finally, Hayden's proposed two-track framework is also problematic. Perhaps the framework's deepest flaw is that it bears little resemblance to how courts have interpreted the Constitution to apply abroad, and to how courts have interpreted the Establishment Clause to apply domestically. As explained in Part III *infra*, when applying other constitutional rights abroad, the Supreme Court has considered whether the given right is fundamental, and whether the claim arose in an area over which the United States exercises control or exclusive jurisdiction.<sup>165</sup> Hayden completely ignores these principles. In addition, Hayden's analysis is inconsistent with how the Court has interpreted the Establishment Clause. Only one Supreme Court case has explicitly authorized applying the "compelling interest" test to the Establishment Clause, and as explained above, that one case is an outlier, probably better understood as an Equal Protection Clause case.<sup>166</sup> And as John Mansfield has recently explained, "[t]o import into the Establishment Clause a 'compelling state interest' exception arguably would run counter to the history that led to that Clause's adoption."<sup>167</sup> Moreover, as discussed above in the analysis of the *Lamont* decision, applying the "compelling interest" test to the Establishment Clause does not conceptually mesh well with the claim that the Establishment Clause is a structural guarantee. Indeed, perhaps the strongest example of the Court treating the Establishment Clause as a structural guarantee is that the Court has not subjected the Clause to balancing tests. Oddly, though, Hayden, like the *Lamont* court, maintains that the Establishment Clause is a structural guarantee but then undermines that claim by applying a "compelling interest" test to it.

In sum, although Hayden provides a valuable contribution to the debate over how the Establishment Clause applies abroad, Hayden's proposed framework suffers from many of the flaws that plagued the *Lamont* court's analysis. Both the *Lamont* court and Hayden offer doctrines that seem designed to circumvent the Court's jurisprudence, in particular the *Verdugo-Urquidez* decision, and as a result, neither Hayden nor the *Lamont* court has presented a coherent or persuasive account of how to apply the Establishment Clause abroad. Mansfield's proposal likely remains the most workable, but as explained *supra*, his approach places undue weight on foreign traditions and,

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165. See *infra* Part III.

166. *Larson v. Valente*, 456 U.S. 228 (1982).

167. Mansfield, "Promotion of Liberal Islam by the United States," *supra* note 123, at 86.

moreover, pays inadequate attention to the Supreme Court's many decisions applying other constitutional provisions abroad. Part III next examines these Supreme Court decisions and explores how their underlying principles can guide courts in applying the Establishment Clause abroad.

### III. HOW THE SUPREME COURT HAS INTERPRETED OTHER CONSTITUTIONAL PROVISIONS TO APPLY ABROAD

The infamous *Dred Scott v. Sandford*<sup>168</sup> was the first Supreme Court case to consider how the Constitution applies abroad. *Dred Scott*, however, was centrally about slavery,<sup>169</sup> not the Constitution's applicability abroad. The U.S. Supreme Court did not directly consider the Constitution's transnational applicability until 1891, in *In re Ross*.<sup>170</sup> In the more than 100 years since *In re Ross*, the Court has modified and refined its approach to applying the Constitution abroad. But throughout this time, the Court has maintained that a particular provision's application abroad depends on (1) where the claim arises, and (2) the content of the right in question. In tracing the development of these two principles, the following discussion breaks into four different chronological phases. The first phase covers 1891 through 1922, beginning with *In re Ross* and going through the last of the *Insular Cases*. The second phase resumes thirty-five years later, with *Reid v. Covert*. The third phase covers the Court's most significant interpretation of *Reid*, in 1990 in *U.S. v. Verdugo-Urquidez*. Finally, the fourth phase covers *Boumediene v. Bush*,<sup>171</sup> the Court's most recent decision on the Constitution's transnational applicability.

#### A. Reviewing the Cases on the Constitution's Transnational Applicability

##### 1. *In re Ross* and the *Insular Cases*

*In re Ross* involved John Ross, an American sailor who was convicted by a U.S. consular general for committing a murder on an American ship while

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168. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

169. The Court held that it did not have jurisdiction to adjudicate Dred Scott's claim because African Americans were not citizens under Article III, Section 2, Clause 1 of the U.S. Constitution. In dictum, however, the Court declared that Dred Scott could not have become free by virtue of residing for a period in Minnesota, because the Fifth Amendment treated slaves as property and thus protected a slavemaster's right to bring a slave into a free territory without losing ownership over the slave. *Dred Scott*, 60 U.S. at 393-96.

170. *In re Ross*, 140 U.S. 453 (1891).

171. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

it was in Yokohama, Japan.<sup>172</sup> Ross was not indicted by a grand jury and did not receive a jury trial.<sup>173</sup> Instead, the consular general tried Ross.<sup>174</sup> After the consul general sentenced Ross to death, and President Rutherford B. Hayes commuted his sentence to life imprisonment, Ross filed a *habeas corpus* petition in which he argued that his conviction was improper because it violated his constitutional right to a grand jury and jury trial.<sup>175</sup> The U.S. Supreme Court disagreed, upholding the consular trial on the ground that the Constitution's indictment and jury-trial guarantees "apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad."<sup>176</sup> The Court thus established for the first time that the Constitution's transnational applicability depends on whether the claim arises within the United States.

Soon after the *In re Ross* case, the Supreme Court modified but upheld the decision in a series of important cases now collectively known as the *Insular Cases*.<sup>177</sup> The *Insular Cases* addressed whether and how the Constitution applied to the many territories the United States acquired as a result of the Spanish-American War. This was a controversial political issue, leading to many 5–4 Supreme Court decisions pointing in disparate directions depending

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172. *In re Ross*, 140 U.S. at 454.

173. *Id.* at 458.

174. *Id.* at 454.

175. *Id.*

176. *Id.* at 464.

177. The *Insular Cases* are a series of cases in which the United States Supreme Court fashioned a legal status for the new territories that the United States had acquired at the end of the nineteenth century. According to Efrén Rivera Ramos, a leading scholar on the cases, the Supreme Court created a "new legal and political category in American constitutional discourse: the theory of incorporation and the category of the 'unincorporated territory.'" According to the Court, 'unincorporated territories' belong to, but are not a part of, the United States." Efrén Rivera Ramos, *Deconstructing Colonialism, in Foreign in a Domestic Sense: Puerto Rico, The American Expansion, and the Constitution* (Christina Duffy Burnett & Burke Marshall, eds., 2001), at 105. The list of *Insular Cases* includes, at a minimum, the following 1901 cases: *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); and *Dooley v. United States*, 183 U.S. 151 (1901); *Crossman v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901) (the first *Dooley* case); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901). But some scholars add to this list some later cases, such as: *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Gonzales v. Williams*, 192 U.S. 1 (1904); *Rasmussen v. United States*, 197 U.S. 516 (1905). For example, Ramos counts as many as 23 *Insular Cases*. Efrén Rivera Ramos, *Deconstructing Colonialism, supra*, at 115–16. However, Bartholomew H. Sparrow might have the most expansive list, including 35 such cases. Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* 257 (2006).

on the particular composition of the majority. Despite this sharp disagreement within the Court, and though these many cases involved different constitutional provisions, the *Insular Cases* nonetheless reflect agreement on what scholars have confusingly dubbed the “Incorporation Doctrine.”<sup>178</sup> As Bartholomew Sparrow explains the doctrine in his leading book on the *Insular Cases*, the Incorporation Doctrine held that “[t]he United States’ island territories in the Caribbean Sea and the Pacific Ocean were ‘unincorporated’ territories that were to receive only unspecified ‘fundamental’ constitutional protections, whereas the ‘incorporated’ territories of continental North America were a part of the Union and enjoyed the full protections of the U.S. Constitution.”<sup>179</sup> Sparrow documents how the doctrine arose from the scholarship of some of the leading legal scholars of the period, such as Christopher Columbus Langdell, Thomas Cooley, and James Bradley Thayer.<sup>180</sup> But it took some time for the doctrine to prevail in the Supreme Court. Although the doctrine first appeared in a Supreme Court opinion in Justice White’s concurring opinion in *Downes v. Bidwell*,<sup>181</sup> which was one of the first *Insular Cases*, the doctrine did not command a majority until four years later, in *Rasmussen v. United States*.<sup>182</sup> Finally, seventeen years later, the doctrine “achieve[d] its complete triumph,”<sup>183</sup> as “Chief Justice Taft relied exclusively on the doctrine when drafting the Court’s unanimous decision”<sup>184</sup> in *Balzac v. Porto Rico*,<sup>185</sup> which Sparrow considers to

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178. This name for the doctrine is confusing because it does not refer to the incorporation of the Bill of the Rights through the 14th Amendment, but rather to the notion that a territory’s constitutional status depends on whether it has been “incorporated” into the United States. Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* 5 (2006).

179. *Id.*

180. *Id.* at 41.

181. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (White, J., concurring) (“The right to recover is predicated on the assumption that Porto Rico, by the ratification of the treaty with Spain, became incorporated into the United States, and therefore the act of Congress which imposed the duty in question is repugnant to article 1, § 8, clause 1, of the Constitution . . . . But as the case concerns no duty on goods going from the United States to Porto Rico, this proposition must depend also on the hypothesis that the provisions of the Constitution referred to apply to Porto Rico because that island has been incorporated into the United States.”).

182. *Rasmussen v. United States*, 197 U.S. 516 (1905) (finding Alaska to be “an incorporated territory,” therefore entitling the inhabitants of that territory to 6<sup>th</sup> Amendment protections).

183. Sparrow, *supra* note 177, at 5.

184. *Id.*

185. *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (“The *Insular Cases* revealed much diversity of opinion in this Court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the *Dorr Case* shows that the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court.”).

be “the last of the *Insular Cases*.”<sup>186</sup> For the next thirty-five years, the Incorporation Doctrine stood unchallenged. But in 1957, in *Reid v. Covert*,<sup>187</sup> a plurality of the Court sought to eradicate the doctrine so that the Constitution would always apply abroad, regardless of where the case arose and which constitutional provisions were at issue.

## 2. *Reid v. Covert*

*Reid* involved a soldier’s wife, Clarice Covert, who was not a member of the military but was charged by a court martial for killing her husband while on an airbase in England.<sup>188</sup> Covert claimed that, as an American citizen and a civilian, she had a right to a civilian trial under the Fifth and Sixth Amendments to the U.S. Constitution.<sup>189</sup> Although six Justices agreed and ruled in her favor, there was no majority opinion because Justices Frankfurter and Harlan each concurred separately in the judgment.

In the plurality opinion, Justice Black argued that because “the United States is entirely a creature of the Constitution,”<sup>190</sup> the entire U.S. Constitution always protects citizens, such as Covert, even in far-off lands that are completely free from American control.<sup>191</sup> To reach this conclusion, however, Justice Black had to disregard the *Insular Cases* and *In re Ross*, which he explained away as relics from a different era.<sup>192</sup> He showed particular disdain for the *Insular Cases*. Justice Black explained that, under the *Insular Cases*, only “those constitutional rights which are ‘fundamental’ protect Americans abroad.”<sup>193</sup> But he could “find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of ‘Thou shalt nots’ which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.”<sup>194</sup> In any event, he continued, even under the *Insular Cases* Ms. Covert would be entitled to a jury trial, because “in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights”<sup>195</sup> the right to a jury trial is a fundamental right.

Justices Frankfurter and Harlan each wrote much narrower concurring opinions extending the extraterritorial jury-trial right to apply only to capital

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186. Sparrow, *supra* note 177, at 5.  
187. *Reid v. Covert*, 354 U.S. 1, 6, 39–40 (1957).  
188. *Id.* at 3.  
189. *Id.* at 5.  
190. *Reid*, 354 U.S. at 5–6.  
191. *Id.* at 6.  
192. *Id.* at 12–13.  
193. *Id.* at 8–9.  
194. *Id.* at 9.  
195. *Reid v. Covert*, 354 U.S. 1, 9 (1957).

cases. Although Justice Frankfurter argued that the *Insular Cases* did not control Ms. Covert's claim because those cases involved territories rather than a military base, he explained that the analysis in the *Insular Cases* was "essentially the same as"<sup>196</sup> the standard he was to apply in his concurring opinion. Recall that the Incorporation Doctrine holds that, whereas the entire Constitution applies in incorporated territories, only fundamental constitutional rights apply in unincorporated territories. Frankfurter called this latter part of the Incorporation Doctrine "[t]he 'fundamental right' test,"<sup>197</sup> since this part of the Incorporation Doctrine turned on whether the right in question was deemed "fundamental." Justice Frankfurter explained that "[t]he 'fundamental right' test is the one which the Court has consistently enunciated in the long series of cases."<sup>198</sup> Under the Incorporation Doctrine, only fundamental rights would apply to Covert's claim because her claim arose on an airbase in England (which was clearly not an incorporated territory). Even though Frankfurter did not explicitly apply the Incorporation Doctrine to Ms. Covert's claim, he implicitly did so by considering the two factors central to that doctrine: (1) where the claim at issue arose, and (2) the content of the right in question. Indeed, Justice Frankfurter held that Ms. Covert was entitled to a jury trial because her claim arose on an airbase subject to United States control rather than on an "exotic 'Territory,'"<sup>199</sup> and moreover, "[i]t is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights."<sup>200</sup> Justice Frankfurter thus implicitly applied the Incorporation Doctrine and distinguished *In re Ross* as a case that did not involve a fundamental right because Ross, unlike Covert, was not facing the death penalty."

Justice Harlan's opinion, by contrast, had a more pragmatic tone. Justice Harlan interpreted *In re Ross* and the *Insular Cases* as not just distinguishing between fundamental and non-fundamental rights, but also as considering practical factors in determining when non-fundamental rights apply abroad. Justice Harlan interpreted the *In re Ross* and the *Insular Cases* to stand for the important proposition "that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."<sup>201</sup> These constitutional provisions, Justice Harlan continued, might not apply abroad when doing so would be "impracticable and anomalous."<sup>202</sup> For Justice Harlan, this "impracticable and anomalous" standard means that "the particular

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196. *Id.* at 51–53.

197. *Id.* at 53.

198. *Id.* at 53.

199. *Id.* at 45.

200. *Id.* at 45–46.

201. *Id.* at 74.

202. *Id.*



local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment.”<sup>203</sup> Justice Harlan explained that courts applying this standard would not require jury trials for “run-of-the-mill offenses”<sup>204</sup> committed abroad, because “such a requirement would be as impractical and anomalous as it would have been to require jury trial for Balzac in Porto Rico.”<sup>205</sup> Nevertheless, Harlan did not inquire whether applying the jury-trial right to Covert would be impractical and anomalous. This is because Harlan agreed with Frankfurter that the right to jury trial in capital cases is a fundamental right. As Harlan put it, “special considerations apply”<sup>206</sup> to capital offenses because “[i]n such cases, the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority.”<sup>207</sup> Thus, Justice Harlan concluded, “[s]o far as capital cases are concerned, I think they stand on quite a different footing than other offenses.”<sup>208</sup>

Justice Harlan’s pragmatic move away from focusing on a territory’s formal legal status and toward focusing on a right’s practical application has become known as a “functionalist” approach.<sup>209</sup> Harlan’s functionalist approach has proven quite influential in the Supreme Court through the decisions of Justice Kennedy – specifically his concurring opinion in *U.S. v. Verdugo-Urquidez* and his majority opinion in *Boumediene v. Bush*.

### 3. *U.S. v. Verdugo-Urquidez*

Justice Kennedy first adopted Harlan’s functionalist reasoning in his concurring opinion in *U.S. v. Verdugo-Urquidez*.<sup>210</sup> The disagreement between Justice Kennedy’s concurrence and Chief Justice Rehnquist’s majority opinion is relevant to the framework proposed in this Article, so it is important to review this case in detail. *Verdugo-Urquidez* arose after the Drug Enforcement Administration (“DEA”) searched the home in Mexico of Rene Martin Verdugo-Urquidez, an accused drug lord suspected of torturing and murdering a DEA agent. Although the DEA had received permission from the Mexican

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203. *Id.* at 75.

204. *Id.*

205. *Id.* at 75–76. Balzac was the claimant in the last of the *Insular Cases* (*Balzac v. Porto Rico*).

206. *Id.* at 76.

207. *Id.* at 77.

208. *Id.*

209. Harvard Law Professor Gerald L. Neuman is perhaps the scholar who has written the most important material on and in support of the functional approach, including *Whose Constitution?*, 100 Yale L.J. 909, 913 (1991) and *Strangers to the Constitution* 93 (1996).

210. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring).

government for both arresting Verdugo-Urquidez and searching his home, the DEA did not have a warrant. The search yielded records of marijuana shipments, which Verdugo-Urquidez claimed could not be introduced as evidence against him because the DEA had violated his Fourth Amendment rights by failing to obtain a warrant.

The Supreme Court upheld the search on the ground that the Fourth Amendment did not protect Mr. Verdugo-Urquidez, a Mexican national, while he was in Mexico. Writing for the Court, Chief Justice Rehnquist began his analysis by noting that the Fourth Amendment differs from the Fifth and Sixth Amendments in relevant ways. Whereas the Fifth Amendment privilege against self-incrimination “is a fundamental trial right”<sup>211</sup> and therefore applies as long as the trial occurs in an American court, the Fourth Amendment protects privacy and therefore its applicability depends not on the location of the trial but on where the search or seizure arises. The Court found the distinction important because the Fourth Amendment text extends protection only “to the people,”<sup>212</sup> a term that the Court found to refer to “the People of the United States” mentioned in the Constitution’s Preamble.

But Chief Justice Rehnquist did not rest the Court’s analysis entirely on this textual interpretation. Rather, applying the Incorporation Doctrine that the Court announced in the *Insular Cases* and that Justice Frankfurter applied in *Reid*, Chief Justice Rehnquist explained that “[o]nly ‘fundamental’ constitutional rights are guaranteed to inhabitants of [unincorporated] territories.”<sup>213</sup> Moreover, the Court continued, “[i]f that is true with respect to territories ultimately governed by Congress, [Mr. Verdugo-Urquidez’s] claim that the protections of the Fourth Amendment extend to aliens in foreign nations is even weaker.”<sup>214</sup> As a result, the Court concluded, “it is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its power.”<sup>215</sup> The Court thus rejected Justice Black’s plurality opinion in *Reid*, and instead adopted the narrower positions taken by Justices Frankfurter and Harlan in their concurring opinions.<sup>216</sup>

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211. *Id.* at 264.

212. *Id.* at 265.

213. *Id.* at 268.

214. *Id.*

215. *Id.* at 268–69.

216. Notably, Rehnquist’s rejection of Black’s plurality opinion is consistent with the Supreme Court’s approach to determining which opinions are binding when no opinion is supported by a majority of the Court. Under *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)), when there is no majority opinion, the binding law is the “position taken by those Members who concurred in the judgments on the narrowest grounds.” Under this standard,

Although Justice Kennedy joined Chief Justice Rehnquist's opinion, Justice Kennedy wrote an important concurrence applying Harlan's "impracticable and anomalous" standard. Kennedy concluded that because "[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous,"<sup>217</sup> the Fourth Amendment did not protect Mr. Verdugo-Urquidez from the DEA's search of his home. Justice Kennedy argued that different "conceptions of reasonableness and privacy... prevail abroad,"<sup>218</sup> as well as different judicial infrastructures that can make obtaining a warrant to search private property difficult or impossible.<sup>219</sup> To Justice Kennedy, these concerns rendered the warrant requirement "impractical and anomalous" in *Verdugo-Urquidez*.

There are several differences between Chief Justice Rehnquist's and Justice Kennedy's opinions, differences which have influenced how scholars and courts interpret the *Verdugo-Urquidez* decision. One difference is that even though Rehnquist's opinion did not recite Justice Harlan's "impracticable and anomalous" standard, Rehnquist's opinion was arguably more faithful to Harlan's concurrence than was Kennedy's concurrence. Recall that Harlan's *Reid* concurrence did not actually inquire whether extending a jury trial to Mrs. Covert would be "impracticable and anomalous." Harlan simply held that Covert was entitled to a jury trial because she was facing a capital charge, and thus, as Harlan put it, "special considerations appl[ied]."<sup>220</sup> Under Harlan's concurrence in *Reid*, Kennedy should have applied the "impracticable and anomalous" standard only if he concluded that the warrant requirement was not fundamental to the American constitutional scheme. But Kennedy skipped this step and instead inquired whether it would be "impracticable and anomalous" for the DEA to secure a warrant to search Mr. Verdugo-Urquidez's home. Rehnquist's majority opinion, by contrast, *did* discuss whether the warrant requirement was fundamental and in distinguishing the Fourth Amendment from the Fifth Amendment, he explained that the Fifth Amendment is different because it "is a fundamental trial right."<sup>221</sup>

Moreover, not only did Rehnquist more accurately apply the reasoning of the Harlan concurrence, Rehnquist was also more faithful to *In re Ross* and the *Insular Cases*. In his opinion, Rehnquist accurately summarized *In re Ross*

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either Frankfurter's or Harlan's concurrences would appear to be the binding opinion because these concurrences sought to narrow Black's plurality opinion by extending the jury-trial right abroad only in capital cases.

217. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

218. *Id.*

219. *Id.*

220. *Reid v. Covert*, 354 U.S. 1, 76 (1957) (Harlan, J., concurring).

221. *Verdugo-Urquidez*, 494 U.S. at 264.

and the *Insular Cases* as standing for the two principles expressed in the Incorporation Doctrine: (1) the application of a right depends on the location in which the claim arises, with incorporated territories receiving greater protection than unincorporated territories; and (2) whereas fundamental rights must always apply abroad to unincorporated territories, non-fundamental rights need not.<sup>222</sup> Rehnquist only deviated from these principles by inferring that, since incorporated territories receive more constitutional protection than unincorporated territories, foreign nations must receive even less protection than unincorporated territories under United States control.<sup>223</sup> Kennedy's concurrence, however, did not mention or follow these two principles. Indeed, his concurring opinion reads as though all constitutional rights (regardless of whether they are fundamental) apply abroad (regardless of location or relationship to the United States) so long as such application would not be "impracticable and anomalous."

Some scholars have argued that Chief Justice Rehnquist's opinion is a plurality opinion, and that Justice Kennedy's concurrence more faithfully follows Supreme Court precedents. Most notably, Gerald L. Neuman has argued that Rehnquist's opinion is a plurality and not a majority opinion because although Kennedy joined that opinion, Kennedy's focus on the "impracticable and anomalous" standard suggests he did not agree with Rehnquist's basis for ruling against Mr. Verdugo-Urquidez, thus leaving Rehnquist's opinion with only four votes.<sup>224</sup> If Neuman is correct that Rehnquist's opinion is actually a plurality opinion, then Kennedy's concurring opinion is likely binding law under the Supreme Court's holding in *Marks v. United States*, which provides that, when there is no majority opinion, the binding law is "that position taken by those Members who concurred in the judgments on the narrowest grounds."<sup>225</sup> The narrowest opinion would appear to be Kennedy's concurrence, because whereas Rehnquist's opinion held that the Fourth Amendment's warrant requirement never protects non-citizens in land not under United States control, Kennedy's opinion suggested that the warrant requirement might protect non-citizens abroad so long as doing so would not be "impracticable and anomalous." Thus, it follows from Neuman's interpretation of *Verdugo-Urquidez* that Kennedy's, not Rehnquist's opinion, is binding precedent.

But Chief Justice Rehnquist's *Verdugo-Urquidez* opinion seems to be the binding precedent—not only because it is formally the opinion of the Court,

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222. *Id.*

223. *Id.*

224. See Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. Cal. L. Rev. 259, 259 (2009) (characterizing Chief Justice Rehnquist's decision in *Verdugo-Urquidez* as a plurality opinion).

225. *Marks v. United States*, 430 U.S. 188, 193 (1977).

which Justice Kennedy and three other justices joined—but also because in explaining why he concurred, Justice Kennedy explicitly declared: “Although some explanation of my views is appropriate given the difficulties of this case, I do not believe they depart in fundamental respects from the opinion of the Court, which I join.”<sup>226</sup> Even though some advocates have taken Neuman’s approach and interpreted Kennedy’s concurrence as the binding opinion,<sup>227</sup> most courts and scholars have acknowledged that Chief Justice Rehnquist’s opinion is the majority opinion and is thus binding precedent.

Therefore, given that Chief Justice Rehnquist’s opinion largely followed the two principles in the Incorporation Doctrine, the *Verdugo-Urquidez* decision did not substantially change the Constitution’s transnational applicability.<sup>228</sup> Nevertheless, though Justice Kennedy was unable to modify the Incorporation Doctrine in *Verdugo-Urquidez*, he was successful in doing so in *Boumediene v. Bush*,<sup>229</sup> the most recent of the Court’s decisions on the Constitution’s transnational applicability.

#### 4. *Boumediene v. Bush*

In *Boumediene*, the Court held that Section 7 of the Military Commissions Act violated the Constitution’s Suspension Clause,<sup>230</sup> because Section 7 eliminated the Court’s jurisdiction to hear *habeas corpus* petitions filed by people held in Guantanamo Bay, Cuba. Writing for the majority, Justice Kennedy focused on the practicality of giving Guantanamo detainees access to federal courts. Justice Kennedy explained that extending *habeas* rights to Guantanamo detainees would satisfy Justice Harlan’s “impracticable and anomalous” standard, because even though the United States does not own Guantanamo Bay but leases it from Cuba, extending *habeas* rights to detainees would not “cause friction with the host government.”<sup>231</sup> Indeed, Kennedy argued, it is difficult to imagine how such friction could arise from litigating

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226. *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring).

227. Indeed, many of the Guantanamo detainees have interpreted *Verdugo-Urquidez* in this way. See Petitioner’s Consolidated Reply to Respondent’s Return & Opposition to Cross Motion to Dismiss at 40 n.52, *Hamdan v. Rumsfeld*, (No. 1:04 - CV- 01519) (D.D.C. Sep. 30, 2004) (citing *Marks v. United States* 430 U.S. 185, 193 (1977) as the basis for interpreting Justice Kennedy’s concurrence in *Verdugo-Urquidez* as the binding opinion).

228. Note, however, that the decision might have had a more significant effect on the transnational applicability of particular constitutional provisions, such as the 4<sup>th</sup> Amendment, which mention the term “the people.” But the decision did not substantially change the doctrine concerning the Constitution’s general transnational applicability.

229. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

230. U.S. Const. art. 1, sec. 9 (“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”).

231. *Boumediene*, 128 S. Ct. at 2261.

these cases, since “[n]o Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there,”<sup>232</sup> and thus, “the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base.”<sup>233</sup> But Kennedy quickly noted that if the United States had not exercised absolute control or exclusive jurisdiction over Guantanamo, “arguments that issuing the writ would be ‘impracticable or anomalous’ would have more weight.”<sup>234</sup> Kennedy thus reasoned that Harlan’s standard is linked to the presence of the United States in the area, with greater presence corresponding to less emphasis on whether the Constitution’s application would be impracticable or anomalous.

Although Justice Kennedy based much of his *Boumediene* opinion on whether it would be practical to extend *habeas* rights to the Guantanamo detainees, he also wrote about the fundamental importance of *habeas corpus* to our constitutional scheme. He declared that “the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”<sup>235</sup> And while acknowledging the government’s national-security interest in denying the detainees access to courts, Kennedy wrote:

Security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.<sup>236</sup>

Justice Kennedy thus extended the *habeas* right not merely because it was practical to do so, but also because he found the right to be an “indispensable mechanism” to securing one of America’s most fundamental constitutional guarantees, the separation of powers, which he declared “chief among... freedom’s first principles.”<sup>237</sup>

Curiously, though, scholars have interpreted this fundamental rights discussion as being part of the functionalist approach. For example, Gerald Neuman writes that “inherent in the functional approach but not discussed at length in the *Boumediene* opinion is a non-textual, normative valuation of the importance of the particular right under consideration.”<sup>238</sup> Clearly, as demonstrated throughout this section, a normative valuation of rights is indeed

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232. *Id.*

233. *Id.* at 2261–62. *See* Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 6–23, 1903, T.S. No. 418 (granting United States “complete jurisdiction and control” over Guantanamo Bay).

234. *Boumediene*, 128 S. Ct. at 2262.

235. *Id.* at 2297.

236. *Id.* at 2277.

237. *Id.*

238. *Neuman*, *supra* note 224, at 273.

central to the Supreme Court's cases on the Constitution's application abroad, but it is quite odd for Neuman to shoehorn this feature into his functionalist approach. Functionalism, after all, focuses only on how rights *function* in practice, not on the *substance* of those rights—an inquiry that functionalists find too metaphysical for their pragmatic tastes.<sup>239</sup> In any event, whether or not Neuman calls Kennedy's approach in *Boumediene* functionalist, the important point is that he and other scholars agree that *Boumediene* "reaffirms the Insular Cases"<sup>240</sup> by following the two principles underlying this area of the law—that a constitutional right's applicability abroad depends on (1) where the claim arises, and (2) whether that right is deemed fundamental to our constitutional scheme.

But Justice Kennedy did not simply reaffirm the Incorporation Doctrine; he also modified it, or as Neuman puts it, *Boumediene* "hints at the[ ] further development"<sup>241</sup> of the Incorporation Doctrine. Recall that under the *Insular Cases* a critical issue was the formal legal status of a given territory; a territory was deemed incorporated only if some official governmental act rendered it a part of the United States. In *Boumediene*, however, Justice Kennedy retreated from this formalistic distinction and instead focused on whether in practice the United States has exercised control or exclusive jurisdiction over the area in question. This modification created a new framework for applying constitutional rights abroad. Part III.B develops this framework.

#### B. Developing the Supreme Court's Framework for Applying Constitutional Rights Abroad

After *Boumediene*, the first issue in determining whether a particular constitutional right applies abroad is whether the claim arises in a territory over which the United States exercises control or exclusive jurisdiction. If so, the next question is whether the court finds that the right at issue is fundamental to our constitutional scheme. And if the court also affirmatively answers this question, then the court will hold that the constitutional right in question applies abroad just as it applies domestically. *Reid* and *Boumediene* fall within this category, which is the strongest in the framework discussed in this Article.

At the opposite end of the spectrum are cases that do not trigger either of these points—that is, cases in which the right in question is *not* fundamental,

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239. See Brian H. Bix, *A Dictionary of Legal Theory* 75 (2004) (defining functionalism as describing the American legal realists "who emphasized a focus on the roles law plays in social life, as a contrast with what the realists saw as the more metaphysical view of legal formalism").

240. Neuman, *supra* note 224, at 282.

241. *Id.*

and the claim arises in an area over which the United States does *not* exercise control or exclusive jurisdiction. Here, the Constitution's application abroad is at its weakest. *Verdugo-Urquidez* falls in this category. The rule in this category of cases seems to be the holding in Chief Justice Rehnquist's *Verdugo-Urquidez* majority opinion—that the right does not apply abroad at all. So whereas a constitutional right will always apply abroad in the first category of cases (when the two trigger points are hit), a constitutional right will never apply in this second category (when neither trigger point is hit).

An intermediate standard applies if the case arises in an area over which the United States exercises control or exclusive jurisdiction, but when a fundamental right is not at issue. In this intermediate category, the question is whether applying the non-fundamental right would be “impracticable and anomalous.” According to the conventional interpretation of the *Insular Cases*, as summarized by Justice Harlan in his *Reid* concurrence, the *Insular Cases* implicitly applied this standard when the cases involved non-fundamental rights. In addition, Justice Harlan explicitly applied this standard in *Reid*. The Court found in *Reid* that the United States had exclusive jurisdiction over Covert's case because “an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents.”<sup>242</sup> But even though the Court had exclusive jurisdiction over the claim, Justice Harlan opined that had Ms. Covert's case not involved a capital charge, the right at issue would *not* have been fundamental. Therefore the jury-trial right would not have applied to her case if giving her a jury trial would have proven to be impracticable and anomalous.

A more complicated issue under the Court's case law is the standard that applies to the reverse scenario—that is, the scenario in which the right at issue *is* fundamental, but the United States does not exercise control or exclusive jurisdiction over the area. Although the Court does not seem to have dealt with any cases in this category, the same standard would logically apply here. Indeed, because the Court has consistently focused on the two trigger points and treated those points as though they had the same constitutional value, it follows that the same intermediate standard would apply whenever a case hits only one of the trigger points. This is further supported by *Verdugo-Urquidez*, in which the Court claimed that U.S. constitutional protections in Mexico are weaker than in unincorporated “territories ultimately governed by Congress.”<sup>243</sup> If the non-fundamental right at issue there (the warrant requirement) can weaken due to the area in which the right is claimed, then perhaps fundamental

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242. *Reid v. Covert*, 354 U.S. 1, 15 (1957).

243. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990).



rights can also weaken in the same way.<sup>244</sup>

Thus, we can represent the post-*Boumediene* framework with the following table:

	Claim Arising in a Land Under United States Control or Exclusive Jurisdiction	Claim Not Arising in a Land Under United States Control or Exclusive Jurisdiction
Claim Involving a Fundamental Right	Domestic Standard ( <i>Boumediene</i> ; <i>Reid</i> )	Unclear, But Perhaps the “Impracticable and Anomalous” Standard (no Supreme Court cases)
Claim Not Involving a Fundamental Right	“Impracticable and Anomalous” Standard (many of the <i>Insular Cases</i> )	Constitution Not Applicable ( <i>Verdugo-Urquidez</i> ; <i>In re Ross</i> )

The Supreme Court cases provide significant guidance on how to apply these different standards, though there remains significant uncertainty at the margins. First of all, in determining whether the United States controls or exercises exclusive jurisdiction over a piece of land, *Reid* demonstrates that the issue is *not* whether the United States has a pervasive influence over the entire country in which the land resides. As just mentioned, even though the United States did not have a strong presence in Great Britain at the time of Ms. Covert’s trial, the Court nonetheless found in *Reid* that the United States had exclusive jurisdiction over Covert’s case because of an executive agreement giving the United States’ military courts exclusive jurisdiction over offenses committed there by American servicepeople or their dependents.<sup>245</sup> Likewise, *Boumediene* demonstrates that even if a given territory is neither a part of nor owned by the United States, a court may still find that the United States controls that land.<sup>246</sup>

Secondly, although the task of determining what is a “fundamental right” is imprecise, calling for sensitive and prudent judicial judgment, it is a

244. But this is an arguable point and is not completely supported by the case law. In fact, the *Insular Cases* in some ways suggest otherwise, since they declared that fundamental rights apply to all territories, whether incorporated or unincorporated, and these cases never held that once a fundamental right applied to a territory, that the *scope* of the application would turn on whether the area was incorporated or unincorporated. In addition, lower courts have held that fundamental rights apply with full force even lands, such as Micronesia and West Berlin, not under United States control or exclusive jurisdiction. *See, e.g., Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977); *U.S. v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979).

245. *Reid v. Covert*, 354 U.S. 1, 15 (1957).

246. *Boumediene v. Bush*, 128 S. Ct. 2229, 2251–53 (2008) (“[I]t is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. This condition can occur when the territory is seized during war, as Guantanamo was during the Spanish-American War.”).

duty that many judges are equipped to perform, as this judicial function is deeply entrenched in our common-law constitutional tradition.<sup>247</sup> Indeed, there is evidence of this in the Court's "incorporation" of most of the Bill of Rights—an analogous enterprise in which the Court examined constitutional provisions to determine whether they were so fundamental to "a scheme of ordered liberty" to justify enforcing them against state and local governments.<sup>248</sup> Just as the Court examined whether a right is fundamental to determine whether it should apply *inward* to the states, the Court has done the same to determine whether the right should apply *outward* to U.S. action abroad. So we might call this the process of "excorporation," as it is the inverse of incorporation.

The interpretive task presented by excorporation differs from that posed by incorporation in one significant way: whereas with incorporation the Court has inquired whether the *entire* constitutional provision should apply, in the excorporation context the Court has inquired whether *a particular meaning* of a constitutional provision should apply. For example, in an incorporation case, *Klopper v. North Carolina*,<sup>249</sup> the Court found that because "[t]he history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution,"<sup>250</sup> the Sixth Amendment jury-trial guarantee must apply to all criminal prosecutions in all the states. But in *Reid*, in considering whether to "excorporate" the jury-trial right, the Court narrowed the inquiry so that the question was not whether the right to a jury trial was fundamental in all criminal prosecutions. Rather, the question for the *Reid* Court was whether the right to a jury trial was fundamental *in a capital case*. Likewise, in another incorporation case, *Mapp v. Ohio*,<sup>251</sup> the Court incorporated the entire Fourth Amendment, but in its excorporation counterpart, *Verdugo-Urquidez*, the Court considered more narrowly whether to apply a particular meaning of the Fourth Amendment, its warrant requirement. In excorporation, the Court's narrow focus on particular *meanings of rights* reflects the Court's greater sensitivity to applying rights outward to the world than when applying rights inward to the states.

But how should courts determine whether a particular meaning of a constitutional right is fundamental? Although the Court has not provided any clear guidance on this matter, it seems that a good guidepost is the Court's substantive due-process cases, which have inquired whether a particular

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247. See generally Milton R. Konvitz, *Fundamental Rights: History of a Constitutional Doctrine* (2000) (examining the common law bases for fundamental rights and judicial review thereof).

248. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (discussing which constitutional rights rise to the level of fundamental and why).

249. *Klopper v. North Carolina*, 386 U.S. 213 (1967).

250. *Id.* at 226.

251. *Mapp v. Ohio*, 367 U.S. 643 (1961).

practice is “objectively, deeply rooted in this Nation’s history and tradition” so as to be entitled to constitutional protection. Applying that approach to this context, a court would hold that a particular constitutional meaning or interpretation is fundamental if nearly every learned judge—regardless of time period, political affiliation, or judicial philosophy—would have no difficulty finding unconstitutional a domestic policy that violated that meaning or interpretation.

Finally, the Court has offered some guidance on what the words “impracticable and anomalous” mean in this context. Examining Justice Kennedy’s application of the standard in *Boumediene*, Neuman analyzes the role the word “anomalous” plays in the standard: “one form of ‘anomalous’ consequences that weighs against the extraterritorial application of a constitutional right under the functional approach is the cultural inappropriateness of a distinctive U.S. right in foreign territories.”<sup>252</sup> According to Neuman, *Boumediene* held that if applying a U.S. constitutional right in a particular foreign setting would not fit with the cultural tradition prevailing in that setting, then the application of that right would be anomalous in that setting. Neuman adds that “[r]eference to international human rights standards can aid the Court in recognizing norms that are widely shared.”<sup>253</sup> Further evidence of this meaning of “anomalous” is found in Justice Kennedy’s concurrence in *Verdugo-Urquidez*, where he declared that given “the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad,”<sup>254</sup> it would be anomalous to require DEA officials to secure a warrant in Mexico.

Whereas the “anomalous” part of the standard considers the *fit* between the constitutional right and the cultural traditions prevailing in the land in question, the “impracticable” part of the standard speaks to whether the United States is *capable* of achieving its foreign-policy mission while this right is enforced in American courts. Thus, impracticability seems to apply

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252. Neuman, *supra* note 224, at 277.

253. *Id.* But note that Professor Neuman’s proposed approach of looking to international human-rights standards would seem to require the U.S. Constitution to apply with equal force wherever international human-rights standards are applicable; for example, his approach would seem to require courts to apply the Establishment Clause with the same force to United States conduct in an Islamic nation like Indonesia as to such conduct in a secular country like France. Perhaps a better analytical guide than international human-rights law is the constitution of the country in question. Indeed, whereas it might not be anomalous to apply American-style disestablishmentarianism in a country like India whose constitution explicitly calls for some degree of religion-state separation, it certainly might be anomalous to apply it in a country like Pakistan whose constitution explicitly establishes a particular religion. I leave it for another article to develop this approach to applying the ‘anomalous’ prong of the ‘impracticable and anomalous’ standard.

254. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990).

particularly forcefully to positive rights, such as the right to a jury trial, since these rights often require the United States to create government infrastructure, which might be practically difficult to accomplish in far-off lands where the United States has a minimal presence. But it seems much less likely that a negative right, like the freedom of speech, would be impracticable for the United States to observe abroad, since the United States can usually avoid violating a negative right by simply refraining from taking a particular action, and in most cases such restraint is unlikely to pose serious obstacles to the achievement of the relevant foreign-policy mission.

Although the Court and scholars have provided some insight into what the words “impracticable” and “anomalous” mean in this context, there is little agreement on how to apply the two words together as a legal standard. The word “and” clearly suggests the standard is conjunctive. If the standard were indeed conjunctive, then for a particular constitutional right not to apply in a particular situation, the application of the right would have to be *both* impracticable *and* anomalous. But the Court has never confirmed that the standard is conjunctive and lower courts have not taken up the issue. In fact, the most authoritative application of the standard is probably Kennedy’s opinion in *Boumediene*, in which Kennedy at times suggested that the standard is in fact *disjunctive*. Kennedy wrote, “if the [Guantanamo] detention facility were located in an active theater of war, arguments that issuing the writ would be ‘impracticable *or* anomalous’ would have more weight.”<sup>255</sup> Some scholars have also suggested that the standard *should* be disjunctive.<sup>256</sup>

Importantly, though, the Court has made relatively clear that the “impracticable and anomalous” standard does not consider the weight of the United States’ *interests* in the issue. Despite opportunities to interpret the “impracticable and anomalous” standard as requiring strict scrutiny, the Court has resisted the temptation to do so.<sup>257</sup> And there are good reasons for this. Since many constitutional doctrines require courts to apply strict scrutiny, adding another layer of strict scrutiny to a right’s extraterritorial application would be absolutely incoherent. Consider, for example, the free-speech rule that content-based restrictions on speech are subject to strict scrutiny. Under this rule, for a court to uphold a domestic content-based speech restriction, the court must find that the restriction is necessary to serve some compelling government interest. Now imagine that the government extended a content-based speech

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255. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (emphasis added).

256. See Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. Haw. L. Rev. 337, 341–42 (1981).

257. Indeed, although the Court has noted the existence of grave national-security issues, such as in *Verdugo-Urquidez* and *Boumediene*, the Court has never held that a constitutional provision’s transnational applicability is subject to strict scrutiny.

restriction abroad. If the free-speech rule's transnational application required a second layer of strict scrutiny, a transnational content-based speech restriction would be constitutional only if a court could satisfy strict scrutiny two times. But "double strict scrutiny" is nonsensical, for the concept of necessity cannot be multiplied (there is no such thing as more or less necessary) and under the Court's jurisprudence, "compelling" is likewise a unitary standard (there is no such thing under the case law as a compelling government interest that is more or less compelling than another compelling government interest).

Thus, strict scrutiny does not find a backdoor route into a right through the "impracticable and anomalous" standard. This is very significant for the Establishment Clause's application abroad, the next subject of this Article.

#### IV. APPLYING THIS FRAMEWORK TO THE ESTABLISHMENT CLAUSE

Based on the above analysis, the Establishment Clause's application abroad falls into four categories. The strongest category applies when the United States exercises control or exclusive jurisdiction over the area in which the claim arises and if the claim involves a meaning of the Establishment Clause that is fundamental to our constitutional scheme.<sup>258</sup> In such a case, the Establishment Clause would bind United States conduct abroad in the same way the Establishment Clause binds domestic conduct—in other words, the act would be found unconstitutional. The weakest category applies to the reverse scenario, when the claim arises in an area over which the United States does not exercise control or exclusive jurisdiction and when the claim does not involve a fundamental meaning of the Establishment Clause. Here, the Establishment Clause would not limit U.S. conduct abroad at all. By contrast, the intermediate "impracticable and anomalous" standard applies when a non-fundamental meaning of the Establishment Clause arises in an area over which the United States exercises control or exclusive jurisdiction. In such a case, the applicability of the Establishment Clause would turn largely on the United States' capabilities and the right's compatibility with foreign traditions pervading in the land in question. Finally, the same standard might apply to the reverse scenario—when a fundamental meaning of the Establishment Clause is at issue, but the claim arises in an area over which the United States does *not* exercise control or exclusive jurisdiction. As explained above, the Court has never directly confronted this type of claim, so although systemic symmetry supports applying the "impracticable and anomalous" standard to such a claim involving one of the two trigger points, and the *Verdugo-Urquidez* majority

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258. See *infra* text accompanying notes 260–75 for a discussion of which Establishment Clause values might be fundamental.

reasoning also suggests this,<sup>259</sup> it is still unclear how to treat this scenario.

But it is clear that the Supreme Court's framework does not permit courts to consider American interests and thus does not permit courts to import the "compelling interest" test into Establishment Clause doctrine. For this and other reasons, the framework proposed in this Article is substantially different from prior proposed applications of the Establishment Clause abroad. Part IV.A analyzes some of these key differences, and Part IV.B concludes this Article by applying the framework proposed herein to some of the foreign policies discussed above in Part I.B.

#### A. How This Framework Is Different From Other Proposed Applications of the Establishment Clause

The framework proposed in this Article substantially differs from the three most significant proposed approaches to applying the Establishment Clause abroad—*i.e.*, Mansfield's, the *Lamont* court's, and Hayden's approaches.<sup>260</sup> Indeed, only Mansfield's framework also distinguishes between fundamental and non-fundamental meanings of the Establishment Clause.<sup>261</sup> Mansfield does not, however, consider the other part of the Incorporation Doctrine—the part that requires courts to consider *where* the claim arises. Because Mansfield does not find the location relevant, his standard would seem to treat a country under United States control (*e.g.*, Iraq) just like a country not under United States control (*e.g.*, Pakistan); indeed, it appears that under his standard a non-fundamental meaning of the Establishment Clause would not to apply in either setting. As explained above, the Supreme Court's cases require courts to apply non-fundamental meanings of the Establishment Clause to a country under United States control or exclusive jurisdiction unless it would be "impracticable and anomalous" to do so. But Mansfield does not adopt the "impracticable and anomalous" standard in either form or substance. Indeed, instead of considering the *practicability* of the United States extending the Establishment Clause abroad to a particular controversy, Mansfield proposes considering the weight of the United States' interests, which is not even a factor

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259. *Verdugo-Urquidez*, 494 U.S. at 278 (holding that protection against unreasonable searches and seizures extends only to people who have otherwise developed sufficient connection with the United States to be considered part of its community, and not to respondent Mexican citizen whose residence was in Mexico).

260. See *infra* text accompanying note 261 for an analysis of Mansfield's approach, text accompanying notes 262–65 for an analysis of the *Lamont* court's approach, and text accompanying notes 262–65 for an analysis of Hayden's approach.

261. Specifically, Mansfield proposes that although courts should always enforce fundamental Establishment Clause values abroad, courts should apply non-fundamental Establishment Clause values abroad only when they are not trumped by competing constitutional commands to respect foreign cultures. See *supra* Part II.A.

in the Court's analysis of how other constitutional rights apply abroad. And although Mansfield correctly emphasizes the role that foreign cultures must play in the analysis, he does not make this a question of the particular fit between the right's application and the relevant culture—the focus of the “anomalous” part of the “impracticable and anomalous” standard. Rather, Mansfield's analysis focuses more broadly on a loosely defined imperative to honor foreign traditions.

Jessica Hayden's and the *Lamont* court's analyses depart even further from the framework proposed in this Article. Unlike Mansfield, neither Hayden nor the *Lamont* court makes the important distinction between fundamental and non-fundamental Establishment Clause values. Nor do they consider whether the United States controls or exercises exclusive jurisdiction over the area in which the claim arises. Instead, Hayden offers a very intricate analysis that distinguishes between individual and structural rights, and between citizens and non-citizens. She would apply individual rights “to U.S. citizens regardless of physical location” but only “to aliens within the territory of the United States.”<sup>262</sup> By contrast, she would apply a structural guarantee (which according to Hayden the Establishment Clause is) to “follow U.S. government action regardless of its location.”<sup>263</sup> As explained above, these distinctions have very little basis in either the U.S. Supreme Court's extraterritorial case law or its church-state jurisprudence. Moreover, instead of using the “impracticable and anomalous” standard, both the *Lamont* court and Hayden balance the Establishment Clause against the United States' interests. This balancing test would probably look a lot like the familiar “compelling interest” test from the strict-scrutiny standard, which the Court has not applied to the Establishment Clause.<sup>264</sup>

Of course, a practical problem for litigants proposing a transnational Establishment Clause standard that varies from how the Court has applied other constitutional provisions abroad is that courts are unlikely to adopt such a novel approach, since it varies from binding Supreme Court decisions and is therefore susceptible to being overruled. A more conceptual and perhaps more important issue is that constructing a separate framework for the Establishment Clause is likely to lead to politically driven doctrines, with conservatives designing frameworks that grant broad discretion to promote religion abroad and liberals extending their vision of separationism to United States' foreign policy. The best way to avoid this political clash is to use the same framework for the Establishment Clause that the Court has applied to other constitutional provisions. Another conceptual problem with constructing a separate framework

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262. Hayden, *supra* note 7, at 203.

263. *Id.*

264. *See supra* Part II.C.

for the Establishment Clause is that judicial treatment of the Establishment Clause abroad can influence the domestic version of the Establishment Clause. So if courts were to extend the Establishment Clause abroad on the basis that it is a structural guarantee, this would increase the likelihood of courts treating the domestic version of the Establishment Clause as a structural guarantee. This would seem to require that the Court disincorporate the Establishment Clause and perhaps even change the rules concerning taxpayer standing in Establishment Clause suits.

Given these problems in constructing a separate framework for the Establishment Clause, it is best to treat the Establishment Clause's application abroad just as the Court has treated the transnational applicability of other constitutional provisions. Although this might lead to some undesirable results, for both conservatives and liberals, this bipartisan undesirability is arguably the hallmark of a sound constitutional doctrine. Part IV.B examines the practical effects of the framework proposed in this Article.

#### B. Applying the Establishment Clause to Actual Foreign Policies

As described above, the strongest Establishment Clause standard would apply when a fundamental meaning of the Establishment Clause is invoked in an area over which the United States exercises exclusive jurisdiction or control. Although it is outside the scope of this Article to determine conclusively and exhaustively which Establishment Clause values are indeed fundamental, a tentative exploration of two possible candidates will help in applying the framework proposed herein to actual foreign policies.

The first candidate for a fundamental meaning of the Establishment Clause is the principle that the government may never directly fund religious organizations in a way that facially or substantively favors one faith over others. There is no doubt that the issue of sect-preferentialism is at the core of the Establishment Clause. This has been evident since its drafting history, as one of the proposed drafts of the Establishment Clause provided that "no particular religious sect or society ought to be favored or established, by law, in preference to others."<sup>265</sup> In addition, James Madison's *Memorial and Remonstrance Against Religious Assessments*<sup>266</sup> (which Madison wrote only four years before drafting the Establishment Clause and six years before its ratification) argued that the Virginia legislature should not pass a law that

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265. John Witte, Religion and the American Constitutional Experiment: Essential Rights and Liberties 64 (2000).

266. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in *Selected Writings of James Madison* 21–27 (Ralph Ketcham ed., Hackett Publishing Co. 2006) (1785).



would use tax dollars to fund only Christian ministers, because such sect-preferential funding would “violate[ ] the equality which ought to be the basis of every law.”<sup>267</sup> Moreover, although the *Memorial* has produced much debate over the extent to which the government may fund religious institutions, both liberals and conservatives agree that the *Memorial* means, *at the very least*, if the government is going to fund religious institutions, the government must use sect-neutral criteria in allocating those funds.<sup>268</sup>

Even more significantly, this non-preferentialism principle has appeared in various periods among the most well-respected constitutional commentators,<sup>269</sup> and the Court has cited the principle in various contexts.<sup>270</sup> Indeed, even over the last twenty-five years, as the Supreme Court has become more conservative and moved away from requiring strict church-state separation, the Court still has not strayed from the principle that the government may never preferentially fund one religious sect over others. In fact, during this time, leading legal conservatives have pushed for an approach known as “non-preferentialism,” which holds that the government may promote religion in general because the core meaning of the Establishment Clause requires only that the government not prefer one faith over others.<sup>271</sup> Although this conservative

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267. *Id.* at 23.

268. Conservatives interpret the *Memorial* “as a prohibition on governmental preferences for some religious faiths over others.” *Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring). By contrast, liberals interpret the *Memorial* more broadly as also being a prohibition on government preferring religion over non-religion. *Id.* at 847 n.1 (Souter, J., dissenting). But the common ground in these two views is that the government may not prefer some religious sects over others.

269. *See, e.g.*, Joseph Story, *Commentaries on the Constitution* 632 (5th ed. 1891) (arguing that “the real object of the [Establishment Clause] was . . . to exclude all rivalry among Christian sects”); Thomas McIntyre Cooley & Andrew Cunningham McLaughlin, *The General Principles of Constitutional Law in the United States of America* 224 (1898) (“By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special advantages which are denied to others.”).

270. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (declaring that “the government must be neutral when it comes to competition between sects”); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

271. Current Justices with the most conservative views on church-state issues, Justices Scalia and Thomas, have both argued for non-preferentialism in government funding cases. *See, e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) (arguing that although the non-preferentialism principle should allow the government to display the Ten Commandments in a courthouse, it “is indeed a valid principle where public aid or assistance to religion is concerned”); *Rosenberger v. Rector & Visitors of the Univ. of*

approach has been thoroughly discredited on the ground that the Establishment Clause prohibits much *more* than non-preferentialism,<sup>272</sup> the conservative position is quite significant because it highlights a consensus on the principle that the Establishment Clause, *at the very least*, prohibits laws that fund religious organizations or individuals preferentially on the basis of sect. Indeed, it seems that the government's preferentially funding one religion over all others faiths would be condemned by almost all American constitutionalists—whether in the 18th or 21st Century, whether liberal or conservative. When agreement on a constitutional issue transcends time and political affiliation in this way, that consensus creates a core or fundamental constitutional principle. The non-preferentialism principle is thus a fundamental meaning of the Establishment Clause.

Another fundamental meaning of the Establishment Clause is the principle that government may never engage in religious indoctrination. Although this non-indoctrination principle is less settled than the non-preferentialism principle described above, constitutional history and Supreme

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Va., 515 U.S. 819, 855 (1995) (Thomas, J., concurring) (declaring that he could “find much to commend” in the view that the Establishment Clause was simply “a prohibition on governmental preferences for some religious faiths over others”). Before Justice Scalia and Thomas, Chief Justice Rehnquist argued for non-preferentialism not only in funding cases, but also in government speech cases. *See, e.g.,* Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) (arguing that the historical evidence suggests that Madison's intent in adopting the Establishment Clause was “to prevent [government] discrimination among sects”). The scholar to state the non-preferentialism position most forcefully is Robert L. Cord. *See, e.g.,* Robert L. Cord, *Church-State Separation: Restoring the “No Preference” Doctrine of the First Amendment*, 9 Harv. J.L. & Pub. Pol'y 129 (1986) (explaining the Supreme Court's justification of its interpretation of the First Amendment injunction); Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 11–12 (1982) (arguing that several facts support a reading of the Establishment Clause as a clause intended to prevent a “single . . . national religious establishment” rather than a pluralistic one; Cord contends that among these supporting documents are the resolutions of the State Constitutional Ratifying Conventions from Maryland, Virginia, New York, North Carolina, and Rhode Island, James Madison's response to these in which he supported this interpretation, the interpretation Madison later offered to Roger Sherman in a House debate in 1789, as well as the final wording of the religious clauses of the First Amendment). Attorney General Meese also advanced this position in his famous—or infamous—address to the American Bar Association, “The Supreme Court of the United States: Bulwark of a Limited Constitution,” Washington D.C., July 9, 1985; in that speech, Meese claimed that the original purpose of the Establishment Clause was that it would “not allow Congress to designate a particular faith or sect as politically above the rest.”

272. *See, e.g.,* Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 877 (1986) (arguing that “[t]he prominence and longevity of the non-preferential aid theory is remarkable in light of the weak evidence supporting it and the quite strong evidence against it”); Martha C. Nussbaum, Liberty of Conscience: In Defense of America's Tradition of Religious Equality 90–97, 109–14 (2008).

Court case law still suggest that it is an excellent candidate for consideration as a fundamental meaning of the Establishment Clause. Indeed, like the non-preferentialism principle, the non-indoctrination principle is traceable to James Madison's *Memorial*. One of Madison's arguments against funding Christian teachers was that such funding would require the government either to interpret religious doctrine or to use religious doctrine for political purposes—both of which Madison found improper because they would “impl[y] either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy.”<sup>273</sup> Either implication would be improper, Madison continued, because “[t]he first [implication] is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.”<sup>274</sup>

In addition, like the non-preferentialism principle, the Supreme Court's case law reflects broad consensus on the non-indoctrination principle. The Court first announced the non-indoctrination principle in its first church-state case, *Watson v. Jones*,<sup>275</sup> in which the Court held that as a matter of federal common law, “[t]he law knows no heresy, and is committed to the support of no dogma.”<sup>276</sup> Later Supreme Court decisions confirmed that this is indeed a constitutional requirement,<sup>277</sup> and these cases stand for the principle that the Constitution removes from the judicial ken the authority to interpret religious doctrine.<sup>278</sup> This non-indoctrination principle also exists outside the regulatory context; indeed, the Court has applied the principle in a similar form to funding

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273. James Madison, “Memorial and Remonstrance Against Religious Assessments,” *supra* note 266, at 22.

274. *Id.*

275. *Watson v. Jones*, 80 U.S. 679 (1871) (holding that when a church-property dispute arises within a hierarchical church, federal courts must resolve the dispute by deferring to the hierarchical body's decision on the matter).

276. *Id.* at 728.

277. See, e.g., *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (reversing a Georgia court ruling on the ground that the First Amendment prohibits civil courts from awarding church property on the basis of the court's interpretation of church doctrine); *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696 (1976) (reversing an Illinois court ruling to reinstate a defrocked diocesan bishop, because the Illinois court impermissibly interpreted the religious organization's internal laws to determine whether the removal of the bishop was permissible); *Jones v. Wolf*, 443 U.S. 595 (1979) (upholding a Georgia law as a permissible way of resolving internal church disputes because the law rested on neutral legal principles and therefore did not require courts to interpret religious doctrine).

278. Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 262 (2006) (“The basic stance is one of noninvolvement: government may not resolve internal [church] problems by criteria that have a religious character.”).

cases<sup>279</sup> and speech cases.<sup>280</sup> In fact, this non-indoctrination principle is so entrenched in the American constitutional tradition that it even permeates cases outside of church-state law.<sup>281</sup>

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279. Although the Court has sharply divided on the constitutionality of public funding of religious organizations, leading to a very complicated and sometimes inconsistent jurisprudence on the subject, liberals and conservatives have at least been able to agree that such funding is unconstitutional if it renders the government responsible for religious indoctrination. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 680 (2002) (Thomas, J., concurring) (explaining that an Ohio school voucher program in which much of the funding went to religious schools was constitutional because “[t]he program does not force any individual to submit to religious indoctrination or education,” but rather “simply gives parents a greater choice as to where and in what manner to educate their children”); *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (upholding the lending of secular educational materials to religious schools, because “it neither results in religious indoctrination by the government nor defines its recipients by reference to religion”); *Agostini v. Felton*, 521 U.S. 203, 222, 230 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), a prior decision that had invalidated a federal program that sent public-school teachers into religious schools, but still asserting that “[a]s we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion” and that the critical question in funding cases is therefore “whether any use of [governmental] aid to indoctrinate religion could be attributed to the State”); *Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819, 847 (1995) (O’Connor, J., concurring) (explaining that the Court’s “cases have permitted some government funding of secular functions performed by sectarian organizations,” but these decisions “provide no precedent for the use of public funds to finance religious activities”).

280. In the Court’s many cases addressing the constitutionality of government-sponsored religious messages, the Court has generally applied the “endorsement test,” which turns on whether the message at issue uses religion to make some onlookers feel like political outsiders in the community. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (explaining that a government display of crèche was constitutional because its surrounding context did not send the message that it endorsed religion, and “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (applying the “endorsement test” to invalidate the display of a crèche in a county courthouse because it endorsed a Christian message, but applying the same test to uphold the display of a Christmas tree and menorah as acceptable recognitions of cultural diversity); *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding the display of the Ten Commandments on the Texas State Capitol grounds because the context of the display conveyed a secular purpose); *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (invalidating the display of the Ten Commandments and accompanying historical documents in a courthouse because the context of the display conveyed a religious purpose). Although these cases have come out differently and have not applied the “endorsement test” in an entirely consistent way, Christopher Eisgruber and Lawrence Sager have helpfully harmonized the cases as turning on whether the government-sponsored religious message embraces a religious doctrine as true (in which case it is unconstitutional), or merely frames a religious matter not for indoctrination purposes (in which case it is constitutional). Christopher Eisgruber & Lawrence Sager, *Religious Freedom and the Constitution*, 18, *President and Fellows of Harvard College* (2007)

Therefore, if the United States were to adopt a foreign policy in an area over which it exercised control or had exclusive jurisdiction, and if that policy either singled out a particular religious sect for preferential funding or rendered the United States responsible for religious indoctrination,<sup>282</sup> then that policy would be subject to the domestic version of the Establishment Clause. Several existent policies might fall within this category. For example, a current Pentagon program in Iraq funds the creation and dissemination of messages that explain Islam's compatibility with democracy.<sup>283</sup> This program hits at least one of the "trigger points," because courts would likely find under the *Boumediene* standard that the United States currently controls much of Iraq. Although it is less clear whether the second trigger point is hit, since we do not know exactly how the program operates, there is evidence that it does indeed violate a fundamental meaning of the Establishment Clause.

The program might violate the non-preferentialism principle by retaining only "Sunni religious scholars to offer advice and write reports for military commanders on the content of propaganda campaigns."<sup>284</sup> There is, to be sure, much debate among church-state scholars over the precise content of the non-preferentialism principle—in particular over whether the principle requires only facial neutrality among sects or also substantive neutrality.<sup>285</sup> Nevertheless, many scholars and judges agree that, at the very least, non-preferentialism requires that if the government seeks to fund religious individuals and organizations, it must select the beneficiaries by using criteria unrelated to their sect affiliations.<sup>286</sup> So while the Pentagon may consider which Islamic scholars and teachers can best achieve its objective of convincing Iraqis—particularly Sunnis—of the value of democracy, the Pentagon must not

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(arguing that "equal liberty" is the appropriate standard for Establishment Clause cases).

281. See, e.g., *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . . or force citizens to confess by word or act their faith therein.").

282. This is not to say that non-preferentialism and non-indoctrinationism are the *only* fundamental meanings of the Establishment Clause; there very well might be others.

283. David S. Cloud & Jeff Gerth, *Muslim Scholars Were Paid to Aid U.S. Propaganda*, N.Y. Times, Jan. 2, 2006, at A1, available at <http://www.nytimes.com/2006/01/02/politics/02propaganda.html>.

284. *Id.*

285. See Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990) (defining three types of neutrality and discussing the different implications of each type).

286. Indeed, in their work harmonizing the discrepant approaches to the Establishment Clause, Christopher Eisgruber & Lawrence Sager adeptly characterize the non-preferentialism principle as demanding that the government "must be equally welcoming of religions that are equally able to provide the services the government seeks." Eisgruber and Sager, *supra* note 280, at 203.

automatically exclude non-Sunnis from this program. It is unclear, however, whether the Pentagon program does this, since little is known about how the program operates.<sup>287</sup> Additionally, the Pentagon program might violate the non-indoctrination principle, because it might disseminate messages that directly invoke Islamic doctrine. But again, since we do not know the details of the program, we cannot conclude for sure whether it does render the United States responsible for religious indoctrination.

In contrast to this Pentagon program, which might hit both trigger points and therefore be subject to the domestic version of the Establishment Clause, a foreign policy would not be subject to the Establishment Clause at all if it did *not* involve a fundamental meaning of the Establishment Clause and the claim arose in an area *not* under United States exclusive jurisdiction or control. A likely example of such a program is the \$100 million that the United States has given Pakistan to use for general education reform. Because much of this money is destined to fund religious activities in religious schools, and because the Supreme Court has invalidated public funding of religion schools if there is any possibility of its resulting in the funding of religious activities,<sup>288</sup> a domestic version of this policy would probably violate the domestic version of the Establishment Clause.<sup>289</sup> But many judges and scholars would probably not deem this rule against funding religious activities to be a fundamental meaning of the Establishment Clause, since many conservatives believe that the

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287. As the New York Times reports, “[i]t is unclear how much of this money, if any, went to the religious scholars, whose identities could not be learned.” Cloud & Gerth, *supra* note 284.

288. See, e.g., Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (holding that two programs in Grand Rapids, Michigan violated the Establishment Clause by providing aid to private-schools teachers, including those in religious schools, for teaching secular classes in their schools, and by assigning public-school teachers to teach secular classes in private schools, including religious schools, during the school day); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (holding that three New York financial aid programs violated the Establishment Clause because they aided private elementary and secondary schools, including religious schools, by funding the repair of their school buildings and reimbursing low-income parents for tuition costs); Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that Pennsylvania and Rhode Island programs violated the Establishment Clause by giving private schools, including religious schools, supplemental funding for secular instructional materials as well as for teachers who taught secular subjects).

289. Because Pakistan’s political and educational systems are so different from our own, it is difficult to imagine a domestic version of this aid to Pakistan. The closest analogue would be a United States program that distributed aid to many types of schools – both private and public, religious and secular – for the purpose of making education more uniform to allay radicalism in some parts of the nation and to prepare students for participation in the national economy. If this hypothetical domestic program permitted religious schools to use the aid to teach religious subjects, as the Pakistan program does, then such aid would likely violate the Establishment Clause because it would fund religious schools without ensuring that the schools did not use the funding for religious activities.

government may fund religious activities so long as the funding program is sufficiently broad that it does not target religion.<sup>290</sup> Therefore, although the Supreme Court might invalidate a domestic version of the general education reform in Pakistan, the Court would surely be divided, highlighting that the policy does not involve a fundamental meaning of the Establishment Clause. So this funding of general education reform in Pakistan is likely not subject to the Establishment Clause at all.

The intermediate “impracticable and anomalous” standard would apply when a non-fundamental right is implicated in an area over which the U.S. exercises exclusive jurisdiction or control. An example might be USAID’s funding of the repair of the Iraqi mosques. Although the Establishment Clause might prohibit the government from funding the repair of religious buildings in the United States, particularly the insides of those buildings, this is not a settled rule because there is very little law on the subject.<sup>291</sup> So it would seem that USAID’s repair of the mosques involves a non-fundamental Establishment Clause rule and thus is subject to the “impracticable and anomalous” standard.

As for whether USAID’s repair of the mosques would violate this standard, it is difficult to say with much certainty, since that standard is still quite underdeveloped. But as explained above, the “impracticable” part of the standard seems to refer to government capabilities.<sup>292</sup> And there is little reason for thinking that the United States is incapable of satisfying its function in Iraq without funding the repair of mosques. The “anomalous” part of the standard, however, poses a more difficult issue, because this part of the standard seems to refer to cultural fit, and it might be unfitting in Iraq for people to be denied usable mosques due to a concern about mosque-state relations. Nevertheless, even if it would be “anomalous” to apply the Establishment Clause to this repair of mosques, the Establishment Clause might still apply, given that the “impracticable and anomalous” standard might be conjunctive and therefore permit the repair of mosques only if it would be both “impracticable” *and*

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290. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 795 (2000) (plurality) (“If aid to schools, even ‘direct aid,’ is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any ‘support of religion.’” (citing *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 489 (1986))).

291. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 795 (2000) (plurality) (Thomas, J.) (“If aid to schools, even ‘direct aid,’ is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any ‘support of religion.’” (citing *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 489 (1986))).

292. See *supra* notes 252–56 and accompanying text.

“anomalous” not to do so.

This intermediate standard might also apply in the opposite scenario—when a fundamental meaning of the Establishment Clause is implicated in a land over which the United States does not exercise exclusive jurisdiction or control.<sup>293</sup> For example, the United States does not have such a presence in Indonesia, but the above-mentioned ICS programs likely violate our most fundamental Establishment Clause values, such as the non-preferentialism and non-indoctrinationism principles. Indeed, the funding of religious organizations to disseminate American-friendly teachings from an Islamic perspective likely violates both principles. So the question is whether it would be impracticable and/or anomalous for the United States not to fund such religious organizations and activities in Indonesia. Again, it would not appear to be impracticable, since the United States likely does not need to promote these religious organizations and messages in order for the United States to further its foreign-policy mission of promoting tolerance in Indonesia. But it might be anomalous to impose such restrictions in a country like Indonesia where there is significant state-sponsorship of one religion.<sup>294</sup> Therefore, just like the constitutionality of USAID’s repair of mosques, the constitutionality of the Indonesia programs might turn on whether the “impracticable and anomalous” standard is conjunctive or disjunctive.

The African abstinence program, described in the introduction, also might fall in this category of cases involving a fundamental meaning of the Establishment Clause in a land over which the United States does not exercise control or exclusive jurisdiction. The USAID audit report alleges that the African abstinence program violated the non-preferentialism principle, because “USAID’s funding of the curriculums could be viewed by some as demonstrating USAID-funded preference for Christianity over other religions.”<sup>295</sup> Moreover, the program might violate the non-indoctrination principles because the beneficiary’s of this funding have used the funding to disseminate “religiously infused materials and religious references.”<sup>296</sup> But just like the programs discussed above, this African abstinence program might survive the “impracticable and anomalous” standard. Unlike the ICS program, however, the African program might turn on the “impracticable” component. In

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293. But this scenario is still unclear under the Court’s case law. See *supra* notes 242–44 and accompanying text.

294. See Pew Forum on Religion and Public Life, *Global Restrictions on Religion* (Dec. 2009), <http://pewforum.org/docs/?DocID=491> (documenting Indonesia’s support of Islam).

295. *Audit Report*, *supra* note 11, at 6. Note, however, that USAID rebuts the audit report’s claim; USAID argues that it did not violate the non-preferentialism principle because it worked with “[f]aith-based groups representing different faiths.” *Id.* at 25.

296. *Id.* at 25.



the ICS program described above, the United States uses Muslim organizations for the purpose of promoting tolerance, so the question about practicability would be whether the United States is capable of promoting tolerance without also promoting Islam. But in the African abstinence program, the United States is seeking to promote abstinence, so the practicability issue would be whether the United States is capable of funding the teaching of abstinence while also enforcing a prohibition on mixing religious doctrine with such teachings. Because the United States is likely not capable of strictly enforcing this prohibition in Africa, this program would be constitutional if the “impracticable and anomalous” standard were disjunctive, and if it were conjunctive, then of course the issue would be whether it would be anomalous to enforce the restriction, an inquiry that would require a fact-specific examination of the traditions prevailing in the country in question.

As illustrated in this discussion, developed arguments under the “impracticable and anomalous” standard cannot be made in the abstract. Rather, since arguments under this standard are extremely context-dependent—turning on interactions among the Establishment Clause value in question, the cultural tradition pervading the land in which the claim arises, and the United States’ capabilities in that land—these answers will definitively arise only from litigation.

## V. CONCLUSION

The framework presented herein is likely to disappoint ideologues on both sides of the debate. National-security advocates might complain that the framework unduly limits executive-branch power. According to these thinkers and policymakers, the Constitution must place national security above all other interests and therefore must grant the executive branch broad discretion to use religion as a policy tool in conflict-prone Islamic states. On the other side, ardent church-state separationists and constitutional absolutists might worry that the framework gives the United States too much authority to breach constitutional guarantees. In particular, they might claim that by allowing the United States to ignore non-fundamental Establishment Clause values in areas that the United States does not control but still has a significant presence, such as Pakistan and Indonesia, the already-eroding “wall of separation” might crumble even further, perhaps even to a point in which one could say the wall no longer exists.

Both sides have a point. To ensure national security, the executive branch might need discretion beyond that which is provided by domestic church-state jurisprudence. But to have meaning, constitutional guarantees must not be reducible to mere policy expedients. Specifically, for the Establishment Clause to have meaning in the international context, the Establishment Clause

must constrain the government when the Clause's core values are at stake and when the United States has acted abroad in such a way that renders it responsible for honoring those values. The framework in this Article strikes a balance that gives the executive branch flexibility to ensure national security and simultaneously limits government authority so that the Constitution's meaning remains robust.

More broadly, this area of the law must harmonize the two competing goals of flexibility and clarity. Indeed, think tanks like CSIS and the Chicago Council on Global Affairs are urging legal scholars and courts to give policymakers this flexibility and clarity, and the current controversy over the USAID audit illustrates the deleterious consequences of not having either. As is true with many other areas of constitutional law, the issue of the Establishment Clause's transnational applicability consists of both formalist and functionalist elements. We can reduce the issue to broad legal principles but these principles have meaning only in the context of the particular circumstances in which those principles apply. Only adjudication of concrete legal controversies will clarify what is a "fundamental" meaning of the Establishment Clause, or when it is "impracticable and anomalous" to apply the Establishment Clause abroad, or when the United States actually "exercises control or exclusive jurisdiction" over a piece of land.

As a result, the certainty sought by legal formalism is neither possible nor desirable until courts have worked out the meaning of these terms in real cases with well-developed records. But the complete flexibility sought by legal functionalism will provide little to no clarity, because, as Justice Scalia pointed out in his *Boumediene* dissent, functionalism, due to its hyper-sensitivity to context, "does not (and never will) provide clear guidance for the future."<sup>297</sup> Seeking to find a compromise between rigid formalism and flexible functionalism, the framework contained herein should help the United States escape the confines of domestic church-state jurisprudence and at the same time preserve the nation's most fundamental constitutional values.

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297. *Boumediene v. Bush*, 128 S. Ct. 2229, 2302 (2008) (Scalia, J., dissenting).