

OVER THERE, OVER THERE: THE EXTRATERRITORIAL  
APPLICATION OF DOMESTIC ESTABLISHMENT  
CLAUSE JURISPRUDENCE IN FORMER WARZONES

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I. INTRODUCTION

In 529, the Benedictine Order constructed a monastery atop an Italian hill called Monte Cassino.<sup>1</sup> Because of its tactical location on the hill, the monastery suffered from numerous destructions and restorations throughout history.<sup>2</sup> Monte Cassino is now famous because it represents the “pointless devastation of one of the most famous religious sites in the West.”<sup>3</sup>

Although Italy signed an armistice with the Allies in September 1943, it remained a warzone in 1944 because Germany immediately occupied the country and established fortifications to prevent the Allies from further advancing north.<sup>4</sup> The Allies believed the Germans had converted the monastery into one such fortification, and were using it as an artillery-observation post.<sup>5</sup> This belief quickly became a supposed fact after thousands of American soldiers died in their attempt to scale the hill.<sup>6</sup> In order to prevent any further infantry casualties, the commanders insisted that the United States bomb the monastery.<sup>7</sup>

In the early morning hours of February 15, 1944, planes dropped 257 tons of 500-lb bombs and 59 tons of 100-lb

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<sup>1</sup> David Colvin & Richard Hodges, *Tempting Providence: The Bombing of Monte Cassino*, HISTORY TODAY, Feb. 1994 at 14.

<sup>2</sup> *Id.* at 14–15. “In 577 the monastery suffered the first of its [three war-related] destructions when it was sacked by Lombards. In 717 it was restored . . . . Its riches, though, attracted the Saracens in 883 who once again sacked it . . . . It suffered again under Napoleon’s armies . . . .” *Id.*

<sup>3</sup> Elizabeth Michel, *Seeking Consensus in the Ruins: Montecassino and Italian Reconstruction*, 1.1 HIST. IN THE MAKING REV. 64, 65 (2012).

<sup>4</sup> *Id.* at 66.

<sup>5</sup> *The Bombing of Monte Cassino*, TIME, Feb. 28, 1944, at 20.

<sup>6</sup> Colvin & Hodges, *supra* note 1, at 15.

<sup>7</sup> Michel, *supra* note 3, at 67.

incendiaries.<sup>8</sup> Later that afternoon, the planes returned and dropped 283 bombs, each weighing 1000 lbs.<sup>9</sup> The monastery was completely destroyed and only one of the original walls remained standing.<sup>10</sup> Survivors and Nazi communiqués later stated that there were no German soldiers in the monastery<sup>11</sup>—only a few monks, the abbot, and 2,000 civilians.<sup>12</sup>

The Allies continued to affirm that the monastery had been destroyed in good faith and that the destruction was necessary for the war.<sup>13</sup> However, the United States Chargé D'affaires at the Vatican informed the Papal Secretary of State that the United States would offer to rebuild the monastery.<sup>14</sup> His offer was ultimately rebuffed,<sup>15</sup> and the Italian government took over the reconstruction efforts on its own.<sup>16</sup>

The bombing of the monastery and its aftermath raised important questions about the intersection of American military decisions with constitutional religious liberty questions. The Establishment Clause of the First Amendment specifically prevents Congress from making any “law respecting an establishment of religion.”<sup>17</sup> The United States is therefore prohibited from preferring one religion to another, or even preferring religion to non-religion. Had the Papal Secretary of State accepted the offer to rebuild the monastery, would the Establishment Clause nevertheless have prevented the United States from taking such action because it amounted to a government-sanctioned preference for the Roman Catholic Church?

This question and others like it continue to resonate even throughout today's wars, which are waged in towns and villages—not on isolated battlefields—containing civilians and their religious buildings, particularly Islamic houses of worship.<sup>18</sup> For

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<sup>8</sup> Colvin & Hodges, *supra* note 1, at 17.

<sup>9</sup> *Id.*

<sup>10</sup> *The Bombing of Monte Cassino, supra* note 5, at 21.

<sup>11</sup> *Id.*

<sup>12</sup> Michel, *supra* note 3, at 67.

<sup>13</sup> *The Bombing of Monte Cassino, supra* note 5, at 21.

<sup>14</sup> *Id.*

<sup>15</sup> The Papal Secretary of State supposedly replied, “Even if you rebuild it in gold and diamonds, it still isn't the monastery.” *Id.*

<sup>16</sup> Michel, *supra* note 3, at 71–75.

<sup>17</sup> U.S. CONST. amend. I.

<sup>18</sup> President Bush explained what separates recent United States conflicts in the War on Terror from past wars. He noted:

example, does the Establishment Clause even apply to governmental action taken outside the United States? If it does not apply extraterritorially but the United States exerts substantial control over the area, is it then within the domestic territory of the United States and subject to the Establishment Clause regardless? If the Establishment Clause does apply extraterritorially, should deference be given to national security concerns that seek to promote good will amongst those living in warzones?

Amazingly, given the more prominent position religion has held in recent United States conflicts, the Supreme Court has never answered any of these questions. The United States is increasingly involved in funding the reconstruction of churches, mosques, synagogues, and other faith-related buildings, even in countries it was never in conflict with.<sup>19</sup> The United States also appears to strategically choose the specific mosques and Islamic buildings it reconstructs, such that only those that advocate in favor of a more moderate Islam receive aid.<sup>20</sup>

In fact, the many potential legal gray areas that characterize these difficult questions are precisely why clear and

[W]e know that this war will not be won by force of arms alone. We must defeat the terrorists on the battlefield, and we must also defeat them in the battle of ideas . . . . We must defend and extend a vision of human dignity, and opportunity, and prosperity—a vision far stronger than the dark appeal of resentment and murder.

President George W. Bush, Remarks at the United Nations High-Level Plenary Meeting (Sept. 14, 2005), <http://www.un.int/usa/05gwb0914.htm>.

<sup>19</sup> The U.S. Cultural Heritage Center of the Bureau of Educational & Cultural Affairs in the State Department annually allocates funds for cultural preservation, regardless of whether the United States was involved in the destruction. For example, in 2009 the Bureau provided hundreds of thousands of dollars to rebuild faith-related buildings in countries such as Mexico, St. Vincent & the Grenadines, Lebanon, Georgia, Uzbekistan, and Macedonia. U.S. Dep't of State, The U.S. Ambassadors Fund for Cultural Preservation, Annual 2009-2010 Rep. 2-3 (2010), [https://eca.state.gov/files/bureau/afcp2009annual\\_report\\_0.pdf](https://eca.state.gov/files/bureau/afcp2009annual_report_0.pdf) [hereinafter *2009-2010 U.S. Ambassadors Report*].

<sup>20</sup> Since 2001, the United States has donated over \$1.5 million to the restoration and conservation of Sufi Islam shrines in Pakistan because it views Sufi Islam as a counter force to terrorism. Huma Imtiaz & Charlotte Buchen, *The Islam That Hard-Liners Hate*, N.Y. TIMES, (Jan. 6, 2011), [http://atwar.blogs.nytimes.com/2011/01/06/the-islam-that-hard-liners-hate/?\\_r=1](http://atwar.blogs.nytimes.com/2011/01/06/the-islam-that-hard-liners-hate/?_r=1).

definite answers must be provided. Without answers, the United States risks violating its own Constitution and the fundamental values on which it was founded, and thus endangers the credibility of the democracy it hopes to foster in war-torn countries.

This paper not only argues that the Establishment Clause must apply to governmental action abroad in order to ensure that Congress holds true to the fundamental principles of the Constitution, but also that domestic Establishment Clause jurisprudence is capable of reconciling the competing national security and religious liberty concerns when the United States repairs religious buildings abroad.

Few scholars have approached this issue,<sup>21</sup> particularly how the Establishment Clause affects the rebuilding of foreign religious buildings. The current scholarship that discusses the intersection of Establishment Clause and national security concerns abroad subjects them to a balancing test against one another.<sup>22</sup> However, a balancing test ultimately means that the Clause can be interpreted differently abroad than it is domestically.<sup>23</sup> Indeed, Professor John Mansfield explained, “because of the exigencies of the foreign situation and in part because of respect for the right of foreign nations to follow their own ways, a different judgment on the government’s conduct may

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<sup>21</sup> Jesse Merriam, *Establishment Clause-Trophobia: Building a Framework for Escaping The Confines of Domestic Church-State Jurisprudence*, 41 COLUM. HUM. RTS. L. REV. 699, 700–01 (2010) (“Surprisingly, very few scholars have addressed the issue . . . . This neglect by legal academics is so surprising because national security’s relationship to human rights is probably the hottest topic in law today . . . . Nevertheless, the specific issue of whether and how the Establishment Clause applies abroad has risen barely above a whisper in scholarly discourse.”).

<sup>22</sup> Jessica Powley Hayden, *Mullahs on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 GEO. L.J. 171, 203–04 (2006) (contending that if a foreign aid program abroad would domestically violate the Establishment Clause, “the court could employ a balancing analysis . . . to determine if the program should be upheld,” and that such a balancing test should uphold the program “if there is a compelling national security interest” that is “narrowly tailored to serve that compelling government interest.”); John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DE PAUL L. REV. 1, 34 (1986) (arguing that because funding religious institutions is not a fundamental rule of the Establishment Clause and thus is “not of such severity as to invalidate the core freedom protected by the first amendment,” balancing the funding against other interests such as “[t]he strength of the United States’ foreign policy interest in the stability of [the foreign territory]” is appropriate).

<sup>23</sup> Hayden, *supra* note 22, at 203–04.

result than when the government acts at home.”<sup>24</sup> In this way, a balancing test makes it difficult for the government to predict if its actions overseas will violate the Establishment Clause. A balancing approach is also inappropriate because the Supreme Court itself has recognized that national security interests abroad, while important and normally due a certain degree of deference, cannot be used as an excuse “to switch the Constitution on or off at will.”<sup>25</sup> When the scholarship does discuss funding the repair of religious buildings overseas, it does not fully consider domestic Establishment Clause jurisprudence and thus assumes that such funding is still unconstitutional—in spite of national security interests.<sup>26</sup> This paper argues that when the Establishment Clause is applied abroad, it must be applied just as it would be domestically. As such, domestic Establishment Clause jurisprudence can decide the constitutionality of funding the repairs of foreign religious buildings.

Part I of this paper begins by describing the various American efforts abroad in the reconstruction of various religious structures. It highlights how interwoven religion has become with American foreign policy, and how their intersection implicates the constitutional limits on the United States. Part II explains the difficulties that arise from attempting to make a legal distinction between what constitutes “domestic” versus “foreign” territory. Part III then charts the progression of domestic Establishment Clause jurisprudence and details the relevant legal tests that determine when funding the renovation of a religious building violates the Establishment Clause. Part IV argues that it is necessary for the Establishment Clause to apply extraterritorially to preserve the Clause as an intended constraint on the government’s power. Finally, because there must be a uniform standard due to the ambiguity between “domestic” and “foreign” territory, Part V argues that domestic Establishment Clause jurisprudence must control—and in fact possesses the capability to reconcile religious liberty and national security concerns inherent in funding the repairs to religious buildings abroad.

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<sup>24</sup> Mansfield, *supra* note 22, at 25.

<sup>25</sup> *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

<sup>26</sup> Merriam, *supra* note 21, at 761 (explaining that when deciding “whether USAID’s repair of the mosques would violate [a proposed test] . . . there is little reason for thinking that the United States is incapable of satisfying its function in Iraq without funding the repair of the mosques,” and thus the Establishment Clause might not even apply.).

## II. AMERICAN RELIGIOUS AND RECONSTRUCTION EFFORTS ABROAD

Through its policies and programs, the United States readily acknowledges that the War on Terror involves an unavoidable intersection between national security and religion. Even activities outside the sphere of traditional combat—those more akin to social programs—take on a distinct ideological character through which the United States hopes to impart the importance of democracy. But policymakers recognize that this message can be spread more effectively if it is delivered in a way more familiar to the citizens of Middle Eastern countries: in the context of Islam.<sup>27</sup> As such, the United States seeks to utilize Middle Eastern countries' strong ties to Islam by showing that Islam and democracy foster the same values.<sup>28</sup>

Congress readily accepted this strategy, even before the War on Terror had officially begun. In 1998, it passed the International Religious Freedom Act,<sup>29</sup> which required Congress and the President “to use and implement appropriate tools in the United States foreign policy apparatus . . . to promote respect for religious freedom.”<sup>30</sup> The Act grants the President authority to engage in various punitive measures against any country that

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<sup>27</sup> At the outbreak of the War in Iraq, an editorial explained:

American policymakers must understand that Iraq's legal and ethical history did not start with the overthrow of Saddam [Hussein]. A dual commitment to Islamic law and democracy is possible, but only if Muslims understand Islamic law to reinforce the same commitments made by democracy to individual human rights and dignities.

Khaled Abou El Fadl, *Rebuilding the Law*, WALL STREET J., (Apr. 21, 2003), <http://www.wsj.com/articles/SB105088882597031500>.

<sup>28</sup> The United States Agency for International Development (“USAID”) notes the “cultural context . . . is markedly different from that in the United States, and they stated that such religious references are useful for connecting with the target audience.” OFFICE OF THE INSPECTOR GENERAL, AUDIT OF USAID'S FAITH-BASED AND COMMUNITY INITIATIVES, UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT 7 (2009), <https://oig.usaid.gov/sites/default/files/audit-reports/9-000-09-009-p.pdf> [hereinafter *USAID AUDIT*].

<sup>29</sup> 22 U.S.C. §§ 6401–6481 (1998).

<sup>30</sup> 22 U.S.C. § 6401(b)(5) (1998).

engages in religious persecution.<sup>31</sup> However, the President may choose to waive the punitive measures if “the important national interest of the United States requires the exercise of such waiver authority.”<sup>32</sup> Moreover, the Act created three entities to promote religious freedom through American foreign policy: the Office of International Religious Freedom,<sup>33</sup> the Commission on International Religious Freedom,<sup>34</sup> and the Special Advisor on International Religious Freedom.<sup>35</sup>

The Office of International Religious Freedom’s work reveals that the United States government has a continued history of promoting democratic ideals through religious-related activities. As it pertains to the scope of this paper, the Office is responsible for monitoring religious persecution and discrimination across the globe, as well as advancing the right of freedom to religion abroad.<sup>36</sup> Moreover, the Office has the power to allocate and recommend the allocation of funds for programs that promote religious freedom abroad.<sup>37</sup> It is also responsible for establishing relationships with religious nongovernmental organizations.<sup>38</sup> Each year, the Office researches and publishes a report that discusses the various violations of religious freedom and the American policies passed in response to those violations.<sup>39</sup>

In its International Religious Freedom Report for 2013, the Office detailed various programs either undertaken or funded by the United States that utilize religion as a means to promote democracy and various democratic ideals. For example, the United States Embassy in Albania created a civic education and religious tolerance program in which more than 7,000 students

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<sup>31</sup> These punitive actions include: a private or official public demarche; a public condemnation; the delay or cancelation of scientific or cultural exchanges; the denial of working, official, or state visits; the withdrawal, limitation, or suspension of development assistance; refusing to approve the issuance of guarantees, insurance, or extensions of credit; the withdrawal, limitation, or suspension of security assistance; opposing or voting against loans; and refusing to issue licenses. 22 U.S.C. § 6445 (1998).

<sup>32</sup> 22 U.S.C. § 6447(a)(3) (1998).

<sup>33</sup> 22 U.S.C. § 6411 (1998).

<sup>34</sup> 22 U.S.C. § 6431 (1998).

<sup>35</sup> The International Religious Freedom Act amended Section 101 of the National Security Act of 1947 to create this position. *See* The National Security Act of 1947, 50 U.S.C. § 402 (1947).

<sup>36</sup> 22 U.S.C. § 6411.

<sup>37</sup> 22 U.S.C. § 6415 (1998).

<sup>38</sup> 22 U.S.C. § 6414 (1998).

<sup>39</sup> 22 U.S.C. § 6412 (1998).

discussed the various “common civic values shared across religions.”<sup>40</sup> The program thus used religion to facilitate discussions on promoting general human rights, cultural preservation, and political views.

The 2013 Report also reveals that the United States engages religion for a second national security purpose: to combat radical Islam. It explained that in Pakistan, the United States specifically developed “curricula and training materials to promote religious tolerance,” but also to “combat violent extremism.”<sup>41</sup> The United States thus recognizes definite ties between fostering religious liberty and fighting against the extremist beliefs that characterize the enemy in the War on Terror. The executive summary of the 2013 Report even contains a message from President Barack Obama claiming, “[n]ations that do not uphold [freedom of religion] sow the bitter seeds of instability and violence and extremism.”<sup>42</sup>

This mindset can best be shown through the American response to the 2010 attacks on five Sufi Islam shrines in Pakistan.<sup>43</sup> While attacks on these shrines between 2005 and 2009 normally occurred at night when no worshipers were present, in 2010 terrorist suicide bombers detonated their bombs amidst thousands of worshipers in Pakistan’s largest cities.<sup>44</sup> These five bombings in less than a year resulted in 64 deaths.<sup>45</sup> The increased attacks and the higher casualty rates reveal that the terrorists hoped to disrupt the religious practices of this more moderate strand of Islam.<sup>46</sup> The effect of the American response was thus two fold. First, the United States sought to protect Sufis from threats and encouraged them to assert their rights to religious liberty,<sup>47</sup> as some Sufis continue to visit shrines and

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<sup>40</sup> U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., International Religious Freedom Report 12 (2013), <http://www.state.gov/j/drl/rls/irf/2013religiousfreedom/index.htm#wrapper> [hereinafter *2013 Report*].

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1.

<sup>43</sup> Imtiaz & Buchen, *supra* note 20.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* By contrast, the nine bombings over a four-year span from 2005 to 2009 resulted in 81 deaths. *Id.*

<sup>46</sup> The Sufi strand of Islam has “long been condemned as un-Islamic by fundamentalist groups because they worship saints and perform music and dance.” *Id.*

<sup>47</sup> Some fear that the continued violence against Sufis could result in few Sufis feeling safe enough to continue practicing their faith. At a Sufi festival in

attend festivals.<sup>48</sup> Second, the United States incidentally promoted the Sufis' more moderate version of Islam, and, therefore, hoped to counteract the terrorists' radical strain, by contributing over \$1.5 million to restoring Sufi shrines in Pakistan.<sup>49</sup>

The United States recognizes the potential problems that arise at this delicate intersection between its national security concerns, its humanitarian programs, and its constitutional limits. Congress appropriates funds to USAID, some of which USAID uses for religious activities. In fact, in 2009, USAID used more than \$325,000 to rebuild mosques in Fallujah, Iraq.<sup>50</sup> In an Inspector General report, USAID admitted that it was unsure as to whether or not using appropriated funds to rebuild mosques in war-torn areas violated the Establishment Clause.<sup>51</sup> In 2007, even the Department of Justice failed to offer any decisive legal clarification on the issue.<sup>52</sup> Similarly, the Bureau of Educational & Cultural Affairs justifies its funding of the restoration of religious buildings by claiming that the Establishment Clause permits such appropriations, so long as the religious building's primary significance is based on "architectural, artistic, historical, or other cultural (non-religious)" criteria.<sup>53</sup> But this explanation does not name "national security concerns," which are inherently involved in the decision to repair specific religious buildings, as a possible "primary significance."

In 2002, President George W. Bush passed Executive Order 13279 in an attempt to offer a solution.<sup>54</sup> The Executive Order recognized that federal agencies needed guidance in formulating policies that had "implications for faith-based" organizations.<sup>55</sup> It required that the United States implement federal programs

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October 2013, "the number of devotees was notably smaller compared to the past. This shrine was targeted by two suicide bombers two years ago leaving ten people dead." Shadi Khan Saif, *Mystical Islam 'Under Threat' in Pakistan*, DW, (Nov. 20, 2013), <http://www.dw.de/mystical-islam-under-threat-in-pakistan/a-17237588>.

<sup>48</sup> Imtiaz & Buchen, *supra* note 20.

<sup>49</sup> *Id.*

<sup>50</sup> *USAID AUDIT*, *supra* note 28, at 5.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 7.

<sup>53</sup> U.S. Dep't of State, *The U.S. Ambassadors Fund for Cultural Preservation, Ambassadors Fund for Cultural Preservation: Request for Proposals* 4 (2015), <http://photos.state.gov/libraries/belize/113414/Small%20Photos/AFCP%202015%20-%20Call%20for%20Proposals%20and%20Guidelines.pdf>.

<sup>54</sup> Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

<sup>55</sup> *Id.* at 77,143.

abroad in accordance with the Establishment Clause.<sup>56</sup> To act within the limits of the Establishment Clause, the Executive Order mandated that organizations that engage in “inherently religious activities, such as worship, religious instruction, and proselytization,” must engage in those activities at an entirely separate time or location from “any programs or services supported with direct Federal financial assistance.”<sup>57</sup> Yet the Executive Order does little to explain the Establishment Clause limitations on restoring religious buildings, as worshiping in a restored religious building necessarily always involves inherently religious activities that cannot occur at an entirely separate time or location. So while helpful in some situations, its application to the repair of religious buildings is insufficient.

### III. FOREIGN VERSUS DOMESTIC SOIL: NOT A BLACK AND WHITE DISTINCTION

Most of the current scholarship on the extraterritorial application of the Establishment Clause focuses exclusively on the tensions between constitutional limits on religion and national security. It assumes that it is simple to determine whether any given territory is domestic or foreign as part of its analysis of whether the Establishment Clause prohibits a certain activity abroad.<sup>58</sup> Yet such a distinction is important when it comes to the extraterritorial application of constitutional rights, particularly if constitutional rights vary depending on location.

One of the earliest decisions concerning the Constitution’s extraterritorial applicability of was *In re Ross*.<sup>59</sup> The constitutional rights at issue were the lack of a grand jury indictment or a trial by jury, as Ross was instead tried by the consular general in Japan.<sup>60</sup> The Court found that the consular trial was lawful because the Constitution’s guarantees only apply “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>61</sup> The

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<sup>56</sup> *Id.* at 77,142.

<sup>57</sup> *Id.* at 77,142.

<sup>58</sup> See Merriam, *supra* note 21, at 699; Hayden, *supra* note 22, at 171; Mansfield, *supra* note 22, at 1.

<sup>59</sup> 140 U.S. 453 (1891).

<sup>60</sup> *Id.* at 461.

<sup>61</sup> *Id.* at 464 (emphasis added).

Constitution only applied if the claim arose within the United States.<sup>62</sup> The Court, therefore, refused to entertain even the possibility of an extraterritorial Constitution.

But the Court clarified this holding just a few years later in the *Insular Cases*,<sup>63</sup> and in turn opened the door to potential constitutional claims from abroad. In order to determine whether the Constitution applied to the territories the United States acquired after the Spanish-American War, the Court utilized the Territorial Incorporation Doctrine.<sup>64</sup> Under this doctrine, only “incorporated” territories were part of the United States and could enjoy the full protection of the Constitution.<sup>65</sup> Other territories were “unincorporated,” and could only receive fundamental constitutional protections.<sup>66</sup> Only Congress could grant a territory “the enjoyment of all the rights, advantages, and immunities of citizens of the United States,” and thus incorporate that territory

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<sup>62</sup> Merriam, *supra* note 21, at 730.

<sup>63</sup> The list of *Insular Cases* includes: *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Dorr v. United States*, 195 U.S. 138 (1904); *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); *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); and *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

<sup>64</sup> “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.” Merriam, *supra* note 21, at 731 n.178 (citing BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 5 (2006)).

<sup>65</sup> *Rasmussen*, 197 U.S. at 522 (finding that Congress intended to incorporate Alaska, and thus that the Sixth Amendment applied to Alaska, because Congress expressly declared that it would grant to Alaska “the enjoyment of all the rights, advantages, and immunities of citizens of the United States.”); *Downes*, 182 U.S. at 287–88 (“The right to recover is predicated on the assumption that Puerto 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.”).

<sup>66</sup> *Dorr*, 195 U.S. at 147 (“But this [lack of incorporation] does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed . . .”) (citing *Downes*, 182 U.S. at 244–88 (White, J., concurring)); Merriam, *supra* note 21 at 731 (citing BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 5 (2006)).

into the United States.<sup>67</sup> In this way, Congress alone possessed the power of picking and choosing where the Constitution applied.<sup>68</sup>

However, the Territorial Incorporation Doctrine left many people—including United States citizens—without constitutional protection if they happened to be abroad, including on American military bases. The Court needed to expand its interpretation of the Constitution's boundaries. In *Reid v. Covert*,<sup>69</sup> it explained that the Constitution always protects its citizens—even if these citizens are not physically within the territorial jurisdiction of the United States.<sup>70</sup> All citizens deserved full constitutional protection, deeming a distinction between foreign and domestic soil unnecessary. The *Reid* Court thus held that the Fifth and Sixth Amendments protected Covert, an American citizen, even though she was abroad.<sup>71</sup>

The Court found it absurd that only fundamental constitutional rights would protect citizens abroad. It 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 . . . .”<sup>72</sup> Citizens carry these rights with them wherever they go. Any firm distinction between a citizen's foreign and domestic constitutional rights “should be left as a relic from a different era.”<sup>73</sup> In this way, the Court reclaimed authority from Congress. Neither Congress nor the Executive could decide when and how the Constitution applied because the Constitution applies to all branches of the Government.<sup>74</sup>

It is important to note that the absolute protections in *Reid* do not apply to non-citizens. As such, the distinctions between foreign and domestic soil survive. The rights afforded to non-citizens remain muddled in the murky waters of the *Insular Cases*' Territorial Incorporation Doctrine, and fluctuate depending on the

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<sup>67</sup> *Rasmussen*, 197 U.S. at 522.

<sup>68</sup> *Dorr*, 195 U.S. at 147–48.

<sup>69</sup> 354 U.S. 1 (1957).

<sup>70</sup> *Id.* at 6–7.

<sup>71</sup> *Id.* at 5.

<sup>72</sup> *Id.* at 9.

<sup>73</sup> *Id.* at 12.

<sup>74</sup> “The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.” *Id.* at 17.

physical location where the claim arises and the fundamentality of the constitutional right at issue. In 1990, the Supreme Court cited to the *Insular Cases* when explaining that a non-citizen could not invoke Fourth Amendment protections for a claim that arose in a foreign nation, one that was not even an unincorporated territory under the control of the United States.<sup>75</sup> Both the individual asserting constitutional rights and the location where the violation occurred wholly lacked any connection to the United States.<sup>76</sup> In such a case, the Constitution cannot serve as a shield from governmental misconduct.

The requirement that either the non-citizen or foreign nation have some substantial connection to the United States in order to invoke constitutional protection, however, adds another layer of complexity to the Territorial Incorporation Doctrine analysis. It leaves open for interpretation the question of how much of a connection constitutes a substantial connection for purposes of invoking constitutional rights. The Court answered this question in *Boumediene v. Bush*.<sup>77</sup> There, the United States argued that detainees at Guantanamo Bay could not assert constitutional rights to habeas corpus because they were non-citizens held in a foreign country, and, thus, were outside the territorial jurisdiction of the United States.<sup>78</sup> While the Court recognized that the United States does not maintain formal sovereignty over Guantanamo Bay and that Guantanamo Bay is not formally part of the United States,<sup>79</sup> it did find that the United States exercises “complete jurisdiction and control” over the area.<sup>80</sup>

An objective analysis of the degree of control the United States asserted over the foreign territory revealed a substantial connection between the two. First, the United States maintained uninterrupted control of the area for over 100 years.<sup>81</sup> Second, severe separation of powers concerns would emerge if the United

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<sup>75</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268–69 (1990).

<sup>76</sup> *Id.* at 271 (“[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”); *id.* at 268 (“If [the Incorporation Doctrine] is true with respect to territories ultimately governed by Congress, respondent’s claim that the protections of the Fourth Amendment extend to aliens in foreign nations is even weaker.”).

<sup>77</sup> 553 U.S. 723 (2008).

<sup>78</sup> *Id.* at 739.

<sup>79</sup> *Id.* at 748, 753.

<sup>80</sup> *Id.* at 753.

<sup>81</sup> *Id.* at 764.

States could side-step constitutional limits by contracting for complete control of a territory while surrendering formal sovereignty.<sup>82</sup> This tactic would give Congress and the President the power to decide how and when the Constitution applied—an authority that is not permitted by the Constitution.<sup>83</sup> Finally, the United States has never been answerable to any other sovereign for its acts at Guantanamo Bay—not even to Cuba itself.<sup>84</sup>

Thus, the Court found that because Guantanamo Bay was in essence a United States territory and because habeas corpus is a fundamental right, non-citizen detainees could assert habeas corpus rights.<sup>85</sup> But the *Boumediene* Court introduced a new facet to the Territorial Incorporation Doctrine, making it even more complicated and difficult to predict. The Court revealed that distinguishing foreign soil from domestic soil is not just a simple matter of looking at a map, nor is it a matter of congressional decree. Instead, the distinction focuses on whether the United States has, in practice, exercised control or exclusive jurisdiction over the area.<sup>86</sup> This added layer of complexity blurs the line between what constitutes foreign or domestic. Indeed, based on the *Boumediene* decision, it appears that any given territory could be both.

#### IV. DOMESTIC ESTABLISHMENT CLAUSE JURISPRUDENCE

Many of the questions raised by restoring religious buildings abroad have also been raised in the domestic sphere, and have received more definite solutions. Case law dealing with the renovation or construction of religious buildings domestically not only reveals that there is a methodology to examine such action under the Establishment Clause, but also that the Establishment Clause can allow for the repair of religious buildings. That analysis of domestic activity may be applied to the same activity overseas. In *Lemon v. Kurtzman*,<sup>87</sup> the Supreme Court created the

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<sup>82</sup> *Id.* at 765.

<sup>83</sup> “The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions . . . in the Constitution.’” *Boumediene*, 553 U.S. at 765.

<sup>84</sup> *Id.* at 770.

<sup>85</sup> *Id.* at 798.

<sup>86</sup> Merriam, *supra* note 21, at 742.

<sup>87</sup> 403 U.S. 602 (1971).

primary test for determining whether or not governmental action violates the Establishment Clause. The *Lemon* test thus provides guidance for a number of domestic Establishment Clause concerns. Section A of this Part lays the foundation for Establishment Clause jurisprudence by explaining interpretations of the *Lemon* test. Section B then describes how the courts have applied the *Lemon* test to the repair of religious buildings domestically.

#### A. *Interpreting the Lemon Test*

*Lemon* arose in response to statutory programs in both Pennsylvania and Rhode Island that provided financial support to religious schools. The Pennsylvania statute allowed the state to reimburse teacher salaries, textbooks, and instructional materials for secular subjects.<sup>88</sup> The Rhode Island statute allowed the state to supplement teachers' salaries by directly paying teachers 15% of their annual salaries, but only if the teacher taught exclusively secular subjects.<sup>89</sup> Taxpayers from both states challenged the constitutionality of the statutes.<sup>90</sup> Before laying down its new test, the Supreme Court explained that the Founders intended the Establishment Clause to protect against three evils: "sponsorship, financial support, and active involvement of the sovereign in religious activity."<sup>91</sup> To guard against these evils, the Court stated that governmental action is only constitutional under the Establishment Clause if (1) it has a secular purpose; (2) its "primary effect" neither advances nor inhibits religion; and (3) it does not foster an "excessive entanglement" with religion.<sup>92</sup>

While the Court found that the two regulatory schemes at issue both had a secular purpose<sup>93</sup> and neither advanced nor inhibited religion,<sup>94</sup> it determined that the statutes did involve an

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<sup>88</sup> *Id.* at 610.

<sup>89</sup> *Id.* at 607–08.

<sup>90</sup> *Id.* at 608–11.

<sup>91</sup> *Id.* at 612 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

<sup>92</sup> *Id.* at 612–13.

<sup>93</sup> The Court found that the statutes clearly stated that they were intended to "enhance the quality of the secular education in all schools covered by the compulsory attendance laws." *Lemon*, 403 U.S. at 613.

<sup>94</sup> While the statutory schemes came very close to intruding upon the Establishment Clause, the states designed restrictions to guarantee the separation between the schools' secular and religious functions, "to ensure that State financial aid supports" only secular functions. *Id.*

excessive entanglement between government and religion.<sup>95</sup> In order to determine the presence of excessive entanglement, courts must examine the character and purposes of the benefitting institution, the nature of the state's aid, and the resulting relationship this aid creates between the government and the religious authority.<sup>96</sup> Both statutes at issue involved excessive entanglement because the religious schools served the explicit purpose of passing on the faith, the states gave financial aid directly to the teachers or religious schools, and it would be too difficult to ascertain whether a teacher brought in religious doctrines while teaching a secular subject.<sup>97</sup> Such a judgment would require "comprehensive, discriminating, and continuing state surveillance," and would cause the states to indefinitely enmesh themselves in religious affairs.<sup>98</sup>

Although the *Lemon* test has undergone extensive criticism—even by members of the Supreme Court<sup>99</sup>—the Court has never formally renounced it or replaced it with an alternative test. Instead, it often elaborates on the test in the hopes of further defining the three prongs.

Generally, the Supreme Court assumes that a government program has a secular purpose unless evidence proves the contrary.<sup>100</sup> But the Court has expanded its understanding of the test's second factor—"primary effect" of advancing or inhibiting religion—so that it now includes the former third prong of "excessive entanglement,"<sup>101</sup> an analysis of whether the aid is neutrally accessible to nonreligious and religious institutions

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<sup>95</sup> *Id.* at 614.

<sup>96</sup> *Id.* at 615.

<sup>97</sup> *Id.* at 617–21.

<sup>98</sup> *Id.* at 619–20.

<sup>99</sup> *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Cause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

<sup>100</sup> *E.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 583–94 (1987) (explaining a law lacks a secular purpose when its express purpose was to promote the "particular religious doctrine" of creationism); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (holding there is no secular purpose when the actual purpose of the law was to promote prayer).

<sup>101</sup> *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (holding that the "excessive entanglement" factor will not be used again unless the "primary effects" factor appears to promote or inhibit religion).

alike,<sup>102</sup> and whether private citizens rather than the government ultimately choose to spend government funds at a religious institution.<sup>103</sup>

Most importantly, domestic Establishment Clause jurisprudence is primarily concerned with the neutrality of governmental aid, focusing on whether the government aid is open to all regardless of religion.<sup>104</sup> Under this principle, government aid violates the “primary effects” factor if the government defines the recipients of the aid by reference to religion.<sup>105</sup> There is no such violation if the government provides aid on the same terms to all who adequately further the government’s stated secular purpose, because any aid to a religious recipient has the effect of furthering the secular purpose—not the religion itself.<sup>106</sup> Any effect on religion is merely incidental.<sup>107</sup> The Court has even declared that the mere existence of more religious beneficiaries than secular beneficiaries is not a constitutional factor, especially if such a disparity occurs only because eligible religious institutions happen to outnumber eligible secular institutions in the area.<sup>108</sup> Instead, what matters most to the Court is whether or not the government aid program is neutral with respect to religion.

When determining whether government aid has the primary effect of advancing or inhibiting religion, the Supreme Court also examines whether the government provides the aid directly to the religious institution, or if the religious institution

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<sup>102</sup> *Id.* at 230–31.

<sup>103</sup> *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

<sup>104</sup> *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (“In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and a religious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”); *Agostini*, 521 U.S. at 234.

<sup>105</sup> *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

<sup>106</sup> *Mitchell*, 530 U.S. at 793–95.

<sup>107</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

<sup>108</sup> *Id.* at 656–57 (“It is true that 82% of Cleveland’s participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. To attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater.”) (citation omitted).

receives the aid as a result of independent private choice.<sup>109</sup> The connection between the government and religion is broken, and thus never implicates the Establishment Clause, if a private party is the direct beneficiary of the government aid and in turn chooses to invest it in a religious institution.<sup>110</sup> The private individual is the one who advances the religion, not the government. There is no Establishment Clause problem so long as the funding is first given to eligible private individuals, rather than directly to religious institutions, regardless of whether the private individuals apply for the aid.<sup>111</sup>

The second prong of the *Lemon* test also remains inviolate if the governmental aid does not provide religious content or convey a religious message. In this way, government benefits may be distributed directly to religious institutions—even without the presence of independent private choice—because the aid itself has no religious content.<sup>112</sup> The Supreme Court has ruled that the government funding of content-neutral items, such as computers, overhead projectors, and laboratory equipment, in religious schools does not violate the Establishment Clause.<sup>113</sup> Even if the schools ultimately use the content-neutral materials to indoctrinate, indoctrination is not attributable to the government if the aid “is not itself ‘unsuitable for use in the public schools because of religious content’ and eligibility for aid is determined” using neutral criteria.<sup>114</sup>

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<sup>109</sup> *Zelman*, 536 U.S. at 652–53; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10–11 (1993); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 486–88 (1986).

<sup>110</sup> *Zelman*, 536 U.S. at 652.

<sup>111</sup> *Agostini*, 521 U.S. at 228–29.

<sup>112</sup> *Mitchell*, 530 U.S. at 820–24; *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 656–59 (1980).

<sup>113</sup> *Mitchell*, 530 U.S. at 822–23 (“The issue is not divertibility of aid but rather whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school . . . . And just as a government interpreter does not herself inculcate a religious message—even when she is conveying one—so also a government computer or overhead projector does not itself inculcate a religious message, even when it is conveying one.”).

<sup>114</sup> *Id.* at 820 (citing *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245 (1968)).

*B. The Lemon Test as Applied to the Reconstruction of Religious Buildings*

Using the *Lemon* test, domestic Establishment Clause jurisprudence has proven capable of determining the specific issue at hand: if the United States government can use tax revenues to repair religious buildings. The Supreme Court has dealt with this specific question on two occasions, and both times ruled that the some aspect of the government aid was unconstitutional. However, these cases reveal that the Court does recognize situations in which governmental action may appear to benefit religion and still be constitutional. In this sense, these opinions and those of lower courts that apply them offer a way to analyze governmental action to determine if the government's actions are a forbidden establishment of religion. So long as the government remains neutral and uninvolved in actual religious practices, it can even go so far as to construct a religious building from scratch.

In *Committee for Public Education & Religious Liberty v. Nyquist*,<sup>115</sup> the Supreme Court struck down a statute that provided direct money grants to religious schools for the maintenance and repair of school facilities, primarily because the aid was not content-neutral and was not distributed on a neutral basis.<sup>116</sup> The program was only available to nonpublic and nonprofit schools, and the statute's definition of "maintenance and repair" included such activities as providing heat, light, water, and other utilities.<sup>117</sup> The statute violated the Establishment Clause because it had the primary effect of advancing religion.<sup>118</sup> Firstly, the only schools that qualified were religious schools, "virtually all of which [were] Roman Catholic."<sup>119</sup> Secondly, the "maintenance and repair" program lacked any restrictions on how the funds could be used, which meant that a religious school could even use the funding to regularly maintain the school chapel.<sup>120</sup> However, the Court noted that if the government had provided neutral aid to *all* schools, any incidental benefit to the religious schools would not have been

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<sup>115</sup> 413 U.S. 756 (1973).

<sup>116</sup> *Id.* at 762.

<sup>117</sup> New York justified its decision to include utilities in the definition by invoking a state police powers argument: that the state had the primary responsibility to ensure all students' health, safety, and welfare, regardless of whether they attend public or private religious schools. *Id.* at 763–64.

<sup>118</sup> *Id.* at 774.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

unconstitutional.<sup>121</sup> The Court's reasoning is helpful to the analysis regarding the repairs of religious buildings overseas because it reveals that neutrality is arguably the most important requirement to comply with the Establishment Clause. Government programs that fund a religion's physical facilities are thus not automatically unconstitutional under the Establishment Clause.

By contrast, the Supreme Court only found one part of the government aid program in *Tilton v. Richardson*<sup>122</sup> unconstitutional. The Court analyzed a federal grant program to construct entirely new buildings on religious and non-religious college campuses in order to meet the "sharply rising number of young people demanding higher education."<sup>123</sup> While the funds were conditional on the restriction that none of the buildings be used for religious instruction or worship, that restriction only lasted 20 years.<sup>124</sup> The 20-year shelf life on the restriction was the only unconstitutional aspect of the program because it allowed the colleges to eventually use the building for religious purposes.<sup>125</sup>

But this restriction was severable from the rest of the statute, and thus did not render the entire statute unconstitutional.<sup>126</sup> The Court explained that there was no excessive entanglement because college students are less susceptible to religious indoctrination and college classes tend to limit religious influence due to the nature of the subjects.<sup>127</sup> This fact reduced the risk that the government grant would be used to support religious activities, or that intense government surveillance would be necessary.<sup>128</sup> Moreover, the government aid was entirely neutral because the buildings were open to all students regardless of their religion.<sup>129</sup> Finally, the Court focused

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<sup>121</sup> The Court admitted that neutral government aid could, "indirectly and incidentally . . . promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 775 (1973).

<sup>122</sup> 403 U.S. 672 (1971).

<sup>123</sup> *Id.* at 674-75.

<sup>124</sup> *Id.* at 675.

<sup>125</sup> *Id.* at 684.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 686.

<sup>128</sup> *Tilton*, 403 U.S. at 687.

<sup>129</sup> *Id.*

on the fact that the government funding was a “one-time, single-purpose . . . grant.”<sup>130</sup> Because there was no continuing financial relationship, there would be no need for the government to monitor the religious institution’s expenditures for secular or religious distinctions.<sup>131</sup> These three factors, taken as a whole, substantially lessened the likelihood that the grant program violated the Establishment Clause.<sup>132</sup> The Court strongly believed that no one factor was controlling of the others, and instead focused on the extent of the government involvement in the workings of religion. Such an analysis is useful in reconciling Establishment Clause concerns with that of national security because it signals that the government is not entirely precluded from the religious sphere, and also provides the government with notice of how far it can extend itself before its actions become unconstitutional.

In *American Atheists, Inc. v. City of Detroit Downtown Development Authority*,<sup>133</sup> the Sixth Circuit Court of Appeals used the *Lemon* test to show that government funding to repair religious buildings does not run afoul of the Establishment Clause.<sup>134</sup> In 2003, Detroit created a development program that partially reimbursed the costs of refurbishing building exteriors, including those owned by religious organizations.<sup>135</sup> The Sixth Circuit articulated that the most difficult part of the *Lemon* test in this realm was its mandate that government programs be neutral—that their primary effect must neither advance nor inhibit religion.<sup>136</sup>

The court explained that “[b]y endorsing all qualifying applicants, the program has endorsed none of them . . . .”<sup>137</sup> The Detroit program was facially neutral, and as applied did not

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<sup>130</sup> *Id.* at 688.

<sup>131</sup> *Id.*

<sup>132</sup> “No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government . . . . The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.” *Id.*

<sup>133</sup> 567 F.3d 278 (6th Cir. 2009).

<sup>134</sup> *Id.* at 302.

<sup>135</sup> *Id.* at 281–82. Three churches received this funding to renovate a total of nine buildings: a Methodist church, a Baptist church, and an Episcopal church. *Id.* at 283.

<sup>136</sup> *Id.* at 289.

<sup>137</sup> *Id.* at 282.

advance either religion in general or any specific religion.<sup>138</sup> First, the revitalization program gave all buildings, religious and non-religious, the opportunity to apply for reimbursement so as to encourage the economy of the area.<sup>139</sup> It did not skew its determination of a recipient's eligibility for benefits because of the recipient's religious character, but rather used secular and objective criteria.<sup>140</sup> Second, because these religious institutions were considered alongside secular entities, there was no implication that the agency endorsed or approved of the churches' religious views.<sup>141</sup> In fact, the court argued that Detroit would have actually violated the Establishment Clause had it purposefully excluded religious institutions from participation because such action declared a firm disapproval of religion.<sup>142</sup>

Third, the program did not violate the "primary effect" prong because the benefit itself possessed no inherently religious content.<sup>143</sup> The funding was never used to purchase religious objects or symbols, just content-neutral things like brickwork, doors, entranceways, and building trims.<sup>144</sup> Even the restoration of church signs, which identified the church as a church, and the storm windows over the stain glass, which made the stain glass

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<sup>138</sup> *American Atheists*, 567 F.3d at 282. By contrast, the only schools in *Nyquist* eligible for the grants were nonpublic religious schools, and even then most of them were of the same denomination. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973).

<sup>139</sup> *American Atheists*, 567 F.3d at 290.

<sup>140</sup> *Id.* at 291.

<sup>141</sup> The Sixth Circuit drew a comparison to other benefits generally provided to both religious and secular entities, such as sewers, sidewalks, and fire-protection services. It noted that all these services "facilitate the operation of the religious institution, either by saving them money directly or by sparing them the expense of providing the services on their own, and in the process they make it more likely that newcomers will attend their religious services." *Id.* at 291-92. Because none of these benefits have ever been constitutionally problematic, the court reasoned that "[i]f a city may save the exterior of a church from a fire, it is hard to understand why it cannot help that same church with peeling paint or tuckpointing—at least when it provides the same benefit to all downtown buildings on the same terms." *Id.* at 292.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 292.

<sup>144</sup> The simple repairs made to the churches were thus even less extreme than the construction of entirely new buildings that was approved in *Tilton*. Accordingly, the "greater authority to pay for *all* of the costs of a new building for a religious entity would seem to include the lesser authority to reimburse half of the costs . . . for refurbishing the exterior of an old building or parking lot for a religious entity." *American Atheists*, 567 F.3d at 298.

easier to see, were content-neutral because they themselves were not religious artifacts.<sup>145</sup> Because the aid was entirely content-neutral, the court could ignore the lack of private choice.<sup>146</sup>

Fourth, the court noted that none of the religious institutions diverted its secular aid to further their religious missions.<sup>147</sup> Such a diversion was not even possible, as the repairs the churches sought reimbursement for did not have dual uses.<sup>148</sup> Finally, there was no excessive entanglement because Detroit did not monitor the restoration, and because Detroit did not make judgments about religious content.<sup>149</sup> Unlike the *Nyquist* program and more similar to the *Tilton* program, the reimbursements were a one-time grant limited to exterior, cosmetic repairs.<sup>150</sup>

#### V. DOES THE ESTABLISHMENT CLAUSE APPLY ABROAD?

The Establishment Clause is intended to prevent the United States Government from wielding unchecked power by intruding on the right to religious liberty.<sup>151</sup> Yet, the Supreme Court has never ruled on its applicability outside the United States. However, two methods make it undeniably clear that the Establishment Clause applies to official United States activity abroad. Under the first method, as explained in Section A, the Establishment Clause grants a structural right—as opposed to an individual right—that follows and limits the United States government no matter where it goes. But even if the structural right argument fails, Section B explains that the *Boumediene* interpretation of the Territorial Incorporation Doctrine provides an alternative method to apply the Establishment Clause abroad.

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<sup>145</sup> These materials did not become “religious artifacts any more than removing plywood covering the windows would have made the wood a religious symbol.” *Id.* at 293.

<sup>146</sup> *Id.* at 295.

<sup>147</sup> *Id.* at 293.

<sup>148</sup> “Unlike a teacher, a sign-language interpreter or even an overhead projector—all of which conceivably can be used to communicate secular *and* religious messages—a brick, gutter or bush (unless burning) cannot be coopted to convey a religious message.” *Id.* at 293.

<sup>149</sup> *Id.* at 295.

<sup>150</sup> The *Nyquist* program “provided an array of ongoing basic services designed to sustain the schools’ operation . . . . Unlike the one-time surface-level improvements designed to spruce up downtown Detroit, the state program in *Nyquist* kept the lights on at each religious school.” *American Atheists*, 567 F.3d at 298.

<sup>151</sup> *See infra* notes 161, 163.

### A. *The Establishment Clause as a Structural Restraint*

Most cases that discuss the Constitution's extraterritorial application examine purely individual rights: the right to a grand jury indictment,<sup>152</sup> the right to a trial by jury,<sup>153</sup> and the right to be free from unreasonable searches and seizures.<sup>154</sup> Generally, individual rights are constitutional rights the government owes to each individual within its jurisdiction.<sup>155</sup> However, structural rights serve as a limit on the government's activities to ensure that it operates within the proper scope of the government's powers.<sup>156</sup> Structural rights cannot be waived because they strike at the heart of the Constitution's foundational purpose to manage the government's authority.<sup>157</sup> Structural rights restrain the government's usage of its power, regardless of whether the government acts domestically or abroad.<sup>158</sup>

Modern day jurisprudence views the Establishment Clause as an individual right.<sup>159</sup> While this may be correct, viewing the Establishment Clause from an entirely individual right perspective overlooks the Founders' intent for the Establishment Clause to "restrain the federal government from interfering with the variety of state-church arrangements then in place."<sup>160</sup> Indeed, in *Everson v. Board of Education*,<sup>161</sup> the Court recognized that the Establishment Clause simultaneously serves as both an individual and structural right.<sup>162</sup> When listing the tasks the Establishment Clause performs, the Court lumped together individual and structural rights:

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<sup>152</sup> See *In re Ross*, 140 U.S. 453, 453 (1891).

<sup>153</sup> See *id.*; see also *Reid v. Covert*, 354 U.S. 1, 1 (1957).

<sup>154</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990).

<sup>155</sup> Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 3 (1998).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Hayden, *supra* note 22, at 189.

<sup>159</sup> "The broad meaning given the [First] Amendment . . . has been accepted by this Court in its decisions concerning an individual's religious freedom . . . ." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

<sup>160</sup> Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481–82 (1991).

<sup>161</sup> 330 U.S. 1 (1947).

<sup>162</sup> Scott Thompson, *House of Wisdom or a House of Cards? Why Teaching Islam in U.S. Foreign Detention Facilities Violates the Establishment Clause*, 88 NEB. L. REV. 341, 368–69 (2009).

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. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.<sup>163</sup>

As an individual right, the Clause protects individuals’ religious liberties by ensuring their ability to practice or not practice whatever religion or non-religion they so choose.<sup>164</sup> But as a structural constraint, the Establishment Clause limits the government from using its authority to set up a church, aid a religion, prefer a religion to another, or participate in religious affairs.<sup>165</sup>

The Court has understood the Clause as a structural right on several occasions. In *Pleasant Grove City v. Summum*,<sup>166</sup> the Court declared that there are “restraints on government speech. For example, government speech must comport with the Establishment Clause.”<sup>167</sup> The Court specifically used the Establishment Clause as its primary example of a structural restraint on government power. The government cannot use the authority that flows from its speech to support or reject a doctrine of belief or non-belief; it is thus limited in the way it can use its

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<sup>163</sup> *Everson*, 330 U.S. at 15–16.

<sup>164</sup> Thompson, *supra* note 162, at 369.

<sup>165</sup> *Id.*

<sup>166</sup> 555 U.S. 460 (2009).

<sup>167</sup> *Id.* at 468.

power. Moreover, in *School District of Abington v. Schempp*,<sup>168</sup> the Court struck down the government's involvement in religious schools because it involved "lending to the support of sectarian instruction of all the authority of the governmentally operated public school system."<sup>169</sup> The government violated the structural limits of the Establishment Clause because it used its authority to promote a religion by placing a religious teacher in a public school classroom.<sup>170</sup>

The Court even procedurally treats the Establishment Clause as a structural right. Normally, to acquire standing for an individual right, the plaintiff must assert a "personal, concrete injury that is remediable by judicial process."<sup>171</sup> Rather, like other structural rights, the Court allows Establishment Clause plaintiffs to have standing even if they have not suffered a personal harm.<sup>172</sup> Indeed, many Establishment Clause plaintiffs are taxpayers—a status that the Court regularly rejects on standing grounds when asserted by plaintiffs seeking vindication for harms against their individual rights.<sup>173</sup> Moreover, the remedies for Establishment Clause violations are completely different from those for individual rights. Individual rights violations are generally remedied with a tailored response to the plaintiff's specific harm.<sup>174</sup> Establishment Clause violations, on the other hand, are usually remedied with broad injunctions, which are ordered when the government exceeds the bounds of its power.<sup>175</sup>

When viewing the Establishment Clause through this structural right lens, it is clear that the Clause applies to United States action abroad. The government cannot circumvent its constitutional limitations by acting outside the domestic sphere. Using this approach, the Second Circuit Court of Appeals in

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<sup>168</sup> 374 U.S. 203 (1963).

<sup>169</sup> *Id.* at 263.

<sup>170</sup> "[A] religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction." *Id.*

<sup>171</sup> Esbeck, *supra* note 155, at 33.

<sup>172</sup> *Id.* at 35 (discussing *Flast v. Cohen*, 392 U.S. 83 (1968)).

<sup>173</sup> *Id.*; see *Bowen v. Kendrick*, 487 U.S. 589, 618–20 (1988) ("[W]e have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, even when their claims raised questions about the administratively grants.").

<sup>174</sup> Esbeck, *supra* note 155, at 40.

<sup>175</sup> *Id.*

*Lamont v. Woods*<sup>176</sup> held that the Clause applied extraterritorially when foreign religious schools received federal grant money.<sup>177</sup> The taxpayer plaintiffs had standing because the Founders enacted the Establishment Clause to guard against “the taxing and spending power . . . be[ing] used in favor of one religion over another or to support religion in general.”<sup>178</sup> As a restraint on the government’s taxing and spending power, the court found that there could “be no distinction between foreign religious institutions and domestic religious institutions—particularly when the former are sponsored and supported by the latter.”<sup>179</sup>

This structural lens even clarified that the Clause’s extraterritorial application raises no political questions: the plaintiffs did “not seek to adjudicate the lawfulness or political wisdom of the government’s policy . . . Rather, [they took] issue only with [the government’s] method of administering that policy.”<sup>180</sup> The government cannot wield unchecked power by side stepping these restraints, even in the context of national security. Indeed, the court declared that the “power of the President and Congress to conduct foreign relations does not give them *carte blanche* to transgress well-established constitutional boundaries.”<sup>181</sup>

The court further compared its analysis to the extraterritorial application of the Fourth Amendment, an undisputed individual right.<sup>182</sup> It claimed that, unlike individual rights, the Establishment Clause operates in such a way that any violation of its tenets through financial aid to foreign religious institutions occurs entirely within the United States. This is because the government’s decision to grant the money is made in the United States.<sup>183</sup> The court also argued that the Establishment Clause is devoid of any limiting language, like the kind in the Fourth Amendment.<sup>184</sup> The Fourth Amendment specifically applies to “the people,” who are defined as individuals with a substantial connection to the United States;<sup>185</sup> the

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<sup>176</sup> 948 F.2d 825 (2d Cir. 1991).

<sup>177</sup> *Id.* at 843.

<sup>178</sup> *Id.* at 837 (quoting *Flast v. Cohen*, 392 U.S. 83, 88 (1968)).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 832.

<sup>181</sup> *Id.*

<sup>182</sup> *Lamont*, 948 F.2d at 834.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 835.

<sup>185</sup> *Id.*

Establishment Clause only imposes a restriction on Congress.<sup>186</sup> The *Lamont* court thus made a convincing argument that the “constitutional prohibition against establishments of religion targets the competency of Congress to enact legislation of that description—irrespective of time or place.”<sup>187</sup>

*B. The Establishment Clause and the Boumediene Method*

Even if the structural reading of the Establishment Clause remains unconvincing,<sup>188</sup> the Supreme Court’s analysis in *Boumediene* provides a more than adequate justification for applying the Establishment Clause extraterritorially. Under the approach in *Boumediene*, the Court will only apply the Constitution abroad to the benefit of non-citizens if two criteria are met. First, the claim must arise in a territory over which the United States exercises “complete jurisdiction and control.”<sup>189</sup> Second, the constitutional right at issue must be a fundamental right.<sup>190</sup> The Establishment Clause meets both of these factors.

In many of the countries where the United States funds the repairing of mosques and other religious buildings, the government exerts complete jurisdiction and control for two reasons. First, it answers to no other sovereign authority for its actions within the territory. Second, it has occupied these foreign territories for an extended period of time.

*Boumediene* recognized that the United States exerts complete jurisdiction and control over a foreign territory if no other sovereign authority also occupies the territory, and there is thus no entity to hold the United States accountable for its actions. *Boumediene* explained that when non-citizens in German prisons were denied habeas corpus rights after World War II, “the prison was under the jurisdiction of the combined Allied Forces. The

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Jesse Merriam criticizes the structural rights approach to the Establishment Clause used in *Lamont*, arguing that the court there confused its structural approach with many characteristics of individual rights. See Merriam, *supra* note 21, at 722. He also believes that viewing the Establishment Clause purely as a structural right raises concerns about its incorporation against the states. *Id.* at 727. His arguments are precisely why it is important to note that the Supreme Court has regarded the Establishment Clause as possessing aspects of *both* individual and structural rights.

<sup>189</sup> *Boumediene v. Bush*, 553 U.S. 723, 753 (2008).

<sup>190</sup> *Id.* at 798.

United States was therefore answerable to its Allies for all activities occurring there.”<sup>191</sup> Unlike the situation at Guantanamo Bay where Cuba has no presence within the prison, the Allies did not “intend to displace all German institutions even during the period of occupation.”<sup>192</sup> Without the presence of other sovereign countries in the foreign territory, the Court found that the United States had “absolute” control over the Guantanamo Bay prison.<sup>193</sup>

The situation in former warzones in Iraq and Afghanistan are no different from Guantanamo Bay, as there is an utter lack of another sovereign presence in those countries. When it invaded, the United States set out to overturn tyrannical governments that fostered hatred and fear—namely, the Saddam Hussein and the Taliban regimes. The United States succeeded in removing Saddam Hussein from power in Iraq in 2003,<sup>194</sup> and the Taliban in Afghanistan on December 9, 2001.<sup>195</sup> After expelling these regimes, the United States engaged in “nation-building” to create democratic central governments.<sup>196</sup> Yet, even in 2015, the governments of these countries are anything but stable: they are plagued by government corruption and remain weak.<sup>197</sup> Violence remains commonplace, as the governments are unable to deliver basic services or administer justice effectively.<sup>198</sup> These governments thus depend on the United States to assist with these functions.<sup>199</sup> As the practical overseer of these governments, the United States is far from being answerable to them.

Importantly, the United States has also maintained this control on Iraq and Afghanistan for an extended period of time. *Boumediene* explained the importance of the temporal length of

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<sup>191</sup> *Id.* at 768.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Jesse Singal, Christine Lim, & M.J. Stephey, *Seven Years in Iraq: An Iraq War Timeline*, TIME, [http://content.time.com/time/specials/packages/article/0,28804,1967340\\_1967342,00.html](http://content.time.com/time/specials/packages/article/0,28804,1967340_1967342,00.html) (last visited Feb. 15, 2015).

<sup>195</sup> KENNETH KATZMAN, CONG. RES. SERV., RL30588, AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY 8 (2015).

<sup>196</sup> *Id.* at 9.

<sup>197</sup> *Id.*

<sup>198</sup> KENNETH KATZMAN, CONG. RES. SERV., RL31339, IRAQ: POST-SADDAM GOVERNANCE AND SECURITY 9-11 (2009).

<sup>199</sup> “U.S. officials have been stressing the need to . . . improve provision of public services, and implied that reconciliation was an Iraqi process that the United States could assist Iraq with but could not or would not implement by itself.” *Id.* at 12.

the War on Terror, and its implications for American *de facto* sovereignty in a territory where it lacks *de jure* sovereignty.<sup>200</sup> The Court found that the United States exerted complete control over Guantanamo Bay because it was “no transient possession.”<sup>201</sup> The Court again contrasted it with the non-citizens in German prisons, explaining that “[t]he Allies had not planned a long-term occupation of Germany.”<sup>202</sup> On the other hand, the possession of Guantanamo Bay was “indefinite.”<sup>203</sup> Indeed, the United States had been using the facilities at Guantanamo Bay as a detention center for seven years by the time the Court ruled in *Boumediene*, with no evidence that it would ever be used differently.<sup>204</sup> The length of time the United States occupies a foreign territory is particularly relevant when coupled with whether it occupies it alone or with other sovereign entities. If the United States occupies the territory alone for an extended period of time, its authority in the foreign territory looks no different from that which it exerts domestically. As such, it becomes necessary for the Constitution’s limitations to bind the government and prevent its extended presence from appearing despotic rather than democratic.

The United States has occupied Iraq and Afghanistan for a similarly long period of time. After overturning their despotic regimes, the United States occupied Iraq from 2003 to 2011<sup>205</sup> and Afghanistan from 2001 to 2014.<sup>206</sup> Even now, the United States maintains a formidable military presence in both countries to continue fighting against terrorist groups such as Al Qaeda and

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<sup>200</sup> *Boumediene v. Bush*, 553 U.S. 723, 770–71 (2008) (“It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present [2008], is already among the longest wars in American history.”).

<sup>201</sup> *Id.* at 768.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 771 (“[The case involves] individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present [2008], is already among the longest wars in American history.”).

<sup>205</sup> See Adil E. Shamoo, *In Iraq, Occupation by Another Name*, BALT. SUN (Feb. 16, 2012), [http://articles.baltimoresun.com/2012-02-16/news/bs-ed-iraq-20120216\\_1\\_embassy-staff-iraqi-politicians-security-forces](http://articles.baltimoresun.com/2012-02-16/news/bs-ed-iraq-20120216_1_embassy-staff-iraqi-politicians-security-forces).

<sup>206</sup> See Spencer Ackerman, *New Afghanistan Pact Means America’s Longest War Will Last Until at Least 2024*, GUARDIAN (Sept. 30, 2014), <http://www.theguardian.com/world/2014/sep/30/us-troops-afghanistan-2024-obama-bilateral-security-agreement>.

ISIL.<sup>207</sup> If *Boumediene* considered the seven years Guantanamo Bay was used as a detention facility impressive, the thirteen-year occupation of Afghanistan is even more telling of United States control. What is more, the United States has international authority to remain in some of these areas to train security forces for another ten years, extending the time of occupation even longer.<sup>208</sup>

As to the second prong of the *Boumediene* analysis, the Establishment Clause is firmly esteemed as a fundamental right. The Supreme Court reserves incorporation of constitutional rights against the states for those rights that are “rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>209</sup> Just as a right can be fundamental to apply inward to the states, a right can also apply outward to governmental action abroad.<sup>210</sup> It becomes no less fundamental to the American conscience just because it is applied in foreign territory.

When it decided to incorporate the Establishment Clause against the states, the *Everson* Court examined how the Founders left Europe specifically to escape the turmoil created by government-sponsored churches.<sup>211</sup> The practice continued in the early days of the colonies, particularly in Virginia. There, “the established church had achieved a dominant influence in political affairs,” sparking the movement to prevent the government from aiding religion.<sup>212</sup>

In order to accomplish this, the Founders set out to strip the government of “all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any

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<sup>207</sup> See Mark Mazzetti & Eric Schmitt, *In a Shift, Obama Extends U.S. Role in Afghan Combat*, N.Y. TIMES (Nov. 21, 2014), [http://www.nytimes.com/2014/11/22/us/politics/in-secret-obama-extends-us-role-in-afghan-combat.html?\\_r=0](http://www.nytimes.com/2014/11/22/us/politics/in-secret-obama-extends-us-role-in-afghan-combat.html?_r=0).

<sup>208</sup> Ackerman, *supra* note 206.

<sup>209</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>210</sup> Merriam, *supra* note 21, at 745.

<sup>211</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947) (“The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.”).

<sup>212</sup> *Id.* at 11.

religious individual or group.”<sup>213</sup> James Madison argued that such a prohibition was necessary because established religion converted democratic governments into tyrannies. He explained that because religion was not “within the cognizance of [c]ivil [g]overnment,” established religion was not necessary for a civil government to flourish.<sup>214</sup> All established religion did was “erect a spiritual tyranny on the ruins of the [c]ivil authority,” while simultaneously encroaching upon the liberties of the people.<sup>215</sup> Establishment thus departed from the original reason why the United States was founded: to offer “an asylum to the persecuted and oppressed of every [n]ation and [r]eligion.”<sup>216</sup> The *Emerson* Court recognized that Madison’s views, as indicative of the Founders’ opinions, played a leading role in the drafting of the First Amendment.<sup>217</sup> Unable to ignore that this attitude against establishment was fundamental among the protections within the Bill of Rights, the Court formally applied it against the states.<sup>218</sup>

Having satisfied both *Boumediene* factors, the Establishment Clause can be applied to governmental action on foreign soil. As such, the government cannot cast off the limitations of the Establishment Clause when it takes action abroad without facing serious consequences.

#### VI. RESOLVING ESTABLISHMENT AND NATIONAL SECURITY CONCERNS USING DOMESTIC JURISPRUDENCE

The Constitution was “designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”<sup>219</sup> Just as habeas corpus protections were

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<sup>213</sup> *Id.*

<sup>214</sup> JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions43.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Everson*, 330 U.S. at 13.

<sup>218</sup> The Court did not explicitly apply the Establishment Clause to the states, but rather explained that it had already been doing so for years. The Court said, “[t]he meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth.” *Id.* at 14–15.

<sup>219</sup> *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

seen to be within the *Boumediene* framework, so too must the Establishment Clause. Beginning within this framework necessarily means that government action must comply with its Establishment Clause limitations—not the other way around. It is thus imperative that the Establishment Clause not bend to each and every whim the government may have, even in the national security context.

Indeed, contorting the Establishment Clause to allow government action defeats the entire purpose for creating the Clause in the first place. The Clause’s role as a structural restraint specifically means that it is resistant to such manipulation, or else it would do nothing to limit government authority.<sup>220</sup> Balancing Establishment Clause concerns against national security interests is inappropriate because it ignores this fundamental aspect of the Clause’s purpose.<sup>221</sup>

Scholars and the *Lamont* Court subjected the Establishment Clause to such a balancing act and thus failed to take into account the well-rounded Establishment Clause jurisprudence, which includes a list of factors that make certain government-religion interactions acceptable. They incorrectly subject the Clause to a form of strict scrutiny, requiring a compelling governmental interest.<sup>222</sup> Such an approach blatantly ignores not only the structural restraint implicit in the Clause, but also the fact that neither those rights applied extraterritorially nor the Establishment Clause are weighed in this manner. The domestic application of the constitutional rights at issue in *Reid* and *Boumediene* remained fully intact even when applied abroad.<sup>223</sup> The Supreme Court refused to apply a different, more

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<sup>220</sup> Esbeck, *supra* note 155, at 3.

<sup>221</sup> “To import into the Establishment Clause a ‘compelling state interest’ exception arguably would run counter to the history that led to that Clause’s adoption.” 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).

<sup>222</sup> See *Lamont v. Woods*, 948 F.2d 825, 842 (2d Cir. 1991) (“Therefore, in our view, once it has been determined that a particular ASHA grantee is pervasively sectarian, the government should be permitted to demonstrate some compelling reason why the usually unacceptable risk attendant on funding such an institution should, in the particular case, be borne.”); see also Hayden, *supra* note 22, at 203–04.

<sup>223</sup> *Boumediene*, 553 U.S. at 798 (“We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the

deferential standard when those same rights were implicated on foreign soil, in spite of severe national security interests.<sup>224</sup>

Separation of powers concerns also make it critical that the Establishment Clause be applied uniformly in both domestic and foreign contexts. If the Establishment Clause were subjected to a more deferential balancing test, it would provide the government with a back door through which it can avoid the Constitution and act without oversight.<sup>225</sup> The Supreme Court firmly declares that “[o]ur basic charter cannot be contracted away like this.”<sup>226</sup> A balancing test allows the government to pick and choose when the Constitution applies, and thus grants an authority that gives the government too great an opportunity to abuse its powers. Given that *Boumediene* even further blurs the line between what is domestic and what is foreign, a uniform application of the Establishment Clause would force the government to act in accordance with the Constitution from the beginning rather than taking remedial measures after the fact.

Instead of undermining the Establishment Clause, scholars and courts should have more confidence in its long-standing jurisprudence as it applies to repairing religious buildings abroad. As it is currently interpreted, Establishment Clause jurisprudence offers more than enough guidance to the courts to decide whether the repairing of religious building abroad violates its basic tenets.<sup>227</sup> In conjunction with the structural restraint and *Boumediene* analysis, courts are also equipped with the ability to decide such issues as they apply to activity in foreign territory.

Take, for instance, USAID’s funding of the rehabilitation of four mosques damaged after American military attacks on Fallujah, Iraq. The government appropriated these funds due to

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framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.”). *Reid v. Covert*, 354 U.S. 1, 18 (1957) (“[W]e conclude that the Constitution in its entirety applied to the trials.”).

<sup>224</sup> While recognizing the need to defer to the Executive for a “sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict,” the *Boumediene* Court found that protecting liberty and structural restraints like separation of powers are equally if not more important because “[s]ecurity subsists . . . in fidelity to freedom’s first principles.” *Boumediene*, 553 U.S. at 796–97.

<sup>225</sup> *See id.* at 765.

<sup>226</sup> *Id.*

<sup>227</sup> “[T]he instant challenge simply requires the court to apply well-established Establishment Clause standards, a task traditionally vested in the federal courts.” *Lamont*, 948 F.2d at 833.

the anticipated benefits: stimulating the local economy, enhancing pride in the community, reducing opposition to international relief organizations, and reducing the incentives for Iraqis to join insurgent groups.<sup>228</sup> While the support amounted to \$325,338, the repairs were entirely mundane. They included masonry, electrical and plumbing repairs, providing furniture, and beautifying the surrounding gardens.<sup>229</sup> The four contracts were specifically limited to these kinds of repairs, as USAID provides faith-based organizations with funding so long as it is not used to support inherently religious activities such as worship, prayer, or proselytizing.<sup>230</sup>

The USAID contracts do not fall prey to the *Nyquist* or *Tilton* pitfalls, and are thus more similar to *American Atheists*, because they remain neutral and devoid of any government involvement in the actual religion. First, the national security and foreign policy concerns present in the decision to allocate funds to repair the mosques in Fallujah—namely, reducing both the opposition to international relief organizations and the incentives to join insurgent groups—stand as perfectly legitimate secular purposes under the Establishment Clause. In this way, national security concerns, as a secular interest, satisfy the first prong of the *Lemon* test. When paired with the other stated governmental purposes of stimulating the local economy and enhancing pride in the community, the USAID program is even more akin to the Detroit program in *American Atheists*. The overall object of the program, like that in Detroit, was to revitalize an area that had recently been devastated.

Importantly, USAID programs, as a general policy, are open to all regardless of religion. This neutrality satisfies the “primary effects” prong of the *Lemon* test. USAID’s policy specifically states that “[r]ecipients of the development program and assistance may not be selected by reference to religion.”<sup>231</sup> By considering religious and non-religious applicants on the same level playing field, the program does not advance nor inhibit either view. So long as the funding of mosque repairs are valid attempts

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<sup>228</sup> *USAID AUDIT*, *supra* note 28, at 5.

<sup>229</sup> *Id.*

<sup>230</sup> Faith-Based Organizations FAQ, USAID.GOV (Feb. 19, 2015), <http://www.usaid.gov/work-usaid/partnership-opportunities/faith-based-community-organizations/faith-based-organizations#Q6> [hereinafter *USAID FAQ*].

<sup>231</sup> *Id.*

to further the government's stated secular purposes of stimulating the local economy, enhancing pride in the community, reducing opposition to international relief organizations, and reducing the incentives for Iraqis to join insurgent groups, Establishment Clause jurisprudence recognizes that the aid to the mosques furthers the secular purposes and not religion itself.<sup>232</sup> Because the program remains neutral in both purpose and application, any indirect benefit to one particular religion or religious view, such as the subliminal promotion of moderate Islam or an Islam that comports with democracy, is not unconstitutional.<sup>233</sup>

In keeping with *American Atheists* and *Tilton*, the repairs were entirely content-neutral. The government funding in the instant contracts was a one-time grant that did not assist with the continued maintenance of the religious buildings—the funding was limited to entirely superficial repairs. Like the Detroit program in *American Atheists*, the USAID funding did not provide for any religious objects or symbols, just ordinary repairs like masonry and plumbing. Indeed, USAID policy specifically prohibits using “Federal funds to purchase religious materials—such as the Bible, Torah, Koran, or other religious or scriptural materials.”<sup>234</sup> None of the repairs contained the possibility of facilitating a religious message, unlike the stain glass windows in *American Atheists*.

While it would appear that funding all content-neutral materials is not that different from funding religion itself, the Supreme Court has recognized that there is a difference. The Inspector General itself did not consider the Supreme Court's language to determine that difference, and instead was more concerned that the funding to repair the mosques was itself the funding of a religious activity.<sup>235</sup> But the Supreme Court, as stated in *Tilton*, does not believe that the funding of repairs for religious buildings is itself dispositive of promoting religious activity; instead it considers *all* factors taken as a whole, including the secular purpose of the program, the program's neutrality towards religious and non-religious groups alike, and the kind of aid given.<sup>236</sup> Indeed, cutting religious organizations off from receiving funding for entirely secular materials effectively

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<sup>232</sup> See *Mitchell v. Helms*, 530 U.S. 793, 793–95 (2000).

<sup>233</sup> *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 775 (1973).

<sup>234</sup> *USAID FAQ*, *supra* note 230.

<sup>235</sup> *USAID AUDIT*, *supra* note 28, at 5–6.

<sup>236</sup> See *Tilton v. Richardson*, 403 U.S. 672, 688 (1971).

precludes religious organizations from receiving any sort of governmental aid. This also violates the Establishment Clause because it bars religious organizations from participating and declares a firm disapproval of religion.<sup>237</sup> The Inspector General thus focused its investigation on the wrong inquiry because it only looked at a small part. Instead, it should have investigated whether funding the mosques furthered the specifically stated secular purposes, and that it was not redirected to fund unconstitutional religious activity. Such an action forces the program across the plane of neutrality and into religious matters, making it an unconstitutional establishment of religion.

The Establishment Clause, therefore, does not stand in the way of national security and foreign policy concerns that involve religion. It operates to allow a certain amount of governmental action in the religious sphere, so long as the government action remains neutral in both intent and practice. The Clause is thus able to reconcile the fact that national security unavoidably intersects with religion. Indeed, the Clause actually supports national security objectives in this realm because adhering to the Clause's limitations validates governmental actions and makes objectors' arguments seem less credible. It can therefore be used as a tool to promote foreign policy objectives in a peaceful and constructive way.

## VII. CONCLUSION

The intersection between national security and religion in modern warfare and the new strategies the United States attempts to use to accomplish policy objectives have created constitutional issues. By funding the renovation of religious buildings overseas, the government primarily hopes to promote stability and indirectly advance a democracy-friendly version of Islam. Such activity triggers obvious Establishment Clause concerns, yet there is no current Supreme Court decision that examines the extraterritorial application of the Establishment Clause. Even more concerning to such an analysis, the distinction between domestic and foreign soil is not clear: a substantial connection to foreign soil can transform it into domestic soil.

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<sup>237</sup> *American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.* 567 F.3d 278, 292 (6th Cir. 2009).

These issues make it even more important that there be some way to examine the government's activity abroad in the Establishment clause context. Leaving the government with unfettered discretion to act as it pleases abroad gives it authority over the Constitution, rather than the other way around. Presumably, it does this to avoid objections to its display of power. However, the Establishment Clause as applied domestically provides more than enough credibility to support the funding of repairs for religious buildings abroad. So long as the governmental action remains neutral in both purpose and practice, the Clause does allow for some intermingling of secular and sectarian interests. The Establishment Clause can thus enhance national security and foreign policy objectives, rather than fight against them.