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House of Wisdom or a House of Cards? Why Teaching Islam in U.S. Foreign Detention Facilities Violates the Establishment Clause

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The opinions expressed herein are solely those of the author and do not reflect the views of his employer.

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I. INTRODUCTION

In an attempt to erase Islamic-fundamentalist sentiments held by detainees apprehended in the course of the "war on terror," the United States government has been teaching and preaching a more moderate version of the Qur'an and Islam to detainees in Iraq. One such detention program in Iraq has been dubbed the House of Wisdom.[1] But the wisdom of such a practice is highly suspect—both because it likely runs afoul of the Establishment Clause of the First Amendment and because it may be doing more harm than good to the American effort to defuse Islamic-extremism and anti-American sentiment. This Article examines the current practice of promoting the "true" meaning of Islam in detention centers for its legal legitimacy and uses the program as a lens to evaluate the extraterritorial reach of the Establishment Clause.

Part II briefly outlines the current program that was implemented by the Bush Administration in detention centers in Iraq and discusses whether it is adviseable. Part III describes the contours of the Establishment Clause as it is applied within the U.S. and describes how teaching Islam in detention centers violates the current Establishment Clause tests. Part IV demonstrates how the Establishment Clause serves as both a protection of individual liberties and a structural restraint on government action. Drawing on recent case law and scholarship, Part V argues that the Establishment Clause—as either a structural restraint or as a protection of individual liberty—extends

1. Walter Pincus, *U.S. Working to Reshape Iraqi Detainees: Moderate Muslims Enlisted to Steer Adults and Children Away from Insurgency*, THE WASHINGTON POST, Sept. 19, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/18/AR2007091802203.html (last visited March 13, 2008). The great irony here is that the original "House of Wisdom" was an enormous library and translation institute in Baghdad during the Abbassid empire. It was built in 750 AD and destroyed during the Mongol invasion of Baghdad in 1258. It was said that the Tigris River ran black with ink for six months after the library was ransacked and its contents dumped into the water. JOSEF W. MERI & JERE L. BACHARACH, MEDIEVAL ISLAMIC CIVILIZATION: AN ENCYCLOPEDIA 451 (Routledge 2003).

extraterritorially to these detention centers, meaning that these programs are unconstitutional. Finally, Part VI compares the Muslim reeducation program to a more government-deferential test (yet to be adopted by the Supreme Court) that considers the U.S. government's national security interests. The Article concludes that even under this test, however, the religious education program violates of the Establishment Clause of the Constitution.

II. THE MUSLIM "RELIGIOUS ENLIGHTENMENT" PROGRAM AND ITS SHORTCOMINGS

On September 18, 2007, the commander of U.S. detention facilities in Iraq at the time, Major General Douglas M. Stone, introduced the "religious enlightenment" program for Iraqi detainees to the public.[2] The program is part of the larger effort to win the "battlefield of the mind" and involves the U.S. military hiring "moderate" Muslim clerics to teach detainees a "truer," less anti-American version of Islam.[3] According to General Stone, the religious education programs are designed to "bend them back to our will" and tear down the message of "[l]et's kill the innocents" promulgated by Al-Qaeda and other extremist groups.[4] The effort began as detention centers in Iraq ballooned from 10,000 in 2006 to over 25,000 at the end of 2007, and U.S. military analysts came to believe that these centers were becoming "breeding grounds" for radical Islam.[5] The size of the detention population has decreased since 2007 and, according to the U.S.-Iraqi Strategic Framework Agreement, the U.S. is gradually handing over detention responsibilities to the Iraqi government, with the goal that the transition will be complete by 2011.[6] Nevertheless, the religious education program continues to raise relevant legal issues with implications for future American detention operations and, more broadly, all extraterritorial engagements with religion.

While the exact details of how the program has been run are unknown, the rough contours provide sufficient information to demonstrate that the programs violate the Establishment Clause. The U.S. military, either directly or through government contractors such as Operational Support & Services, a subcontractor of Russian and East

2. Pincus, *supra* note 1. *See* Department of Defense Bloggers Roundtable with Major General Douglas Stone, USMC, Commanding General, TF-134, MNF-I Detainee Operations via Conference Call From Baghdad, Iraq, September 18, 2007, FEDERAL NEWS SERVICE, *available at* http://www.defenselink.mil/dodcmsshare/BloggerAssets/2007-09/091807Stone_transcript.pdf.
3. Pincus, *supra* note 1.
4. *Id.*
5. *Id.*
6. Richard Tomkins, *U.S. Troops Empty Detention Centers In Iraq*, RADIO FREE EUROPE, July 14, 2009, available at http://www.rferl.org/content/US_Troops_Empty_Detention_Centers_In_Iraq/1776533.html (last visited Sept. 3, 2009).

European Partnerships, Inc., hires "moderate" clerics to teach religious education classes to detainees.[7] In total, around 160 moderate imams have been brought in to teach the detainees.[8] According to Major Matthew Morgan of Task Force 134, the military unit responsible for operating detention centers in Iraq, all of the detainees set to be released from the detention centers as of the summer of 2008 had gone through the religious education program, indicating that the classes are likely prerequisites to release.[9] This highlights the plainly coercive, if not mandatory, nature of the program. In addition to leading the religious discussion classes, the hired imams make recommendations to the board reviewing detainee releases on whether the detainee presents an ideological threat.[10] According to General Stone, who in 2008 handed over reigns of the Iraqi camp system to Admiral Garland Wright, the classes were the single best way to identify extremists within the camps.[11]

Aside from the hiring of moderate clerics, the U.S. military seems to be engaged directly in religious interpretation and translation. Under the direction of General Stone, the military developed a directory of radical refrains and corresponding moderate passages of text from the Qu'ran, in order to refute detainees when they use certain passages to support a radical interpretation of Islam.[12] General Stone's team also completed what they described as "the world's most moderate Hadith."[13] Hadith are accounts from the life of the Prophet Mohammed which record his actions and sayings.[14] In sum, the religious education programs involve the U.S. government hiring clerics based on their particular religious beliefs, coercing detainees to be taught by these clerics, and, in some instances, engaging in religious interpretation itself.

Although the success of the religious re-enlightenment program has been trumpeted by General Stone, his replacement Admiral

7. Andrew Woods, *Good Muslim, Good Citizen*, SLATE, Jan. 23, 2009, *available at* http://www.slate.com/id/2194671/ (last visited Sept. 3, 2009); Andrew Woods, *The Business End*, THE FINANCIAL TIMES, June 27, 2008, *available at* http://www.ft.com/cms/s/2/71c42ec0-40ca-11dd-bd48-0000779fd2ac.html?nclick_check=1 (last visited Sept. 3, 2009).

8. *Singapore Scheme Helps De-Radicalise Detainees in Iraq*, THE MALAYSIAN INSIDER, March 22, 2009, http://www.themalaysianinsider.com/index.php/world/20956-singapore-scheme-helps-de-radicalise-detainees-in-iraq (last visited Sept. 3, 2009).

9. Woods, *The Business End*, *supra* note 7.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. VINCENT J. CORNELL, VOICES OF ISLAM: VOICES OF TRADITION 106 (2007).

Wright, and the U.S. military, there is reason to doubt its efficacy.[15] Dr. Cheryl Benard has been leading several RAND Corporation studies on de-radicalization of violent extremists. According to Dr. Benard, the evidence suggests that "by and large, religious instruction is not an effective and sensible part of the U.S. program and policy arsenal."[16] Indeed, Dr. Benard continues,

> [O]ur survey of the detainee population in U.S. custody in Iraq as well as our studies of religious programs being conducted elsewhere that serve as models (Yemen prison program, Saudi Arabia, Indonesia) indicate that religious instruction of this sort is at best suited only for a small subset of the target population and even then is distinctly risky.[17]

These are fairly weighty indictments from an organization not known to be either a bastion of liberal thinking or a constant critic of Republican administrations' military policies. These criticisms are echoed by Professor Khaled Abou El Fadl of the University of California, Los Angeles, who notes that by engaging in this "battlefield of the mind," the religious education programs "will be just another powerful piece of evidence that this is an ideological war—that this is not about the threat of terrorism to the U.S., but about literally trying to create an Islam that is acceptable to certain power elites in the U.S. or the West."[18] Instead of religious education, which runs the risk of further radicalizing and alienating detainees who see through the effort and of granting access to individuals who may be falsely presenting themselves as "moderates" while pursuing other agendas, the RAND Corporation advocates

> a civics education program instead, complete with units intended to foster critical thinking and informed decision-making, in the hope of inoculating the detainees against extremist messages whether ideological or religious, and to support the peace-building, anti-sectarian, nation-building effort. While not a panacea, this may divert at least some of the discontented individuals to legal avenues of political change and constructive social engagement.[19]

Civics education, in addition to being more effective, would also avoid any potential violations of the Constitution. And even if the jury is still out on whether the religious re-education program has worked from a practical standpoint, the verdict with respect to its legal valid-

15. *See* Nic Robertson, *Behind the Scenes: Walking Amid 2,000 al Qaeda Suspects*, CNN, April 28, 2008, http://www.cnn.com/2008/WORLD/meast/04/28/btsc.iraq prison/index.html (last visited April 29, 2008); *10,000 Detainees Releases This Year, Re-internment Rate Less Than 1 Percent*, OPERATION IRAQI FREEDOM, OFFICIAL WEBSITE OF MULTI-NATIONAL FORCE-IRAQ, Aug. 4, 2008, *available at* http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=21624&Itemid=110 (last visited Sept. 3, 2009).

16. Email Correspondence with Cheryl Benard, Director, Initiative for Middle Eastern Youth, RAND Center for Middle East Public Policy, RAND Corporation (December, 2008).

17. *Id.*

18. Woods, *The Business End*, *supra* note 7.

19. Benard, *supra* note 16.

ity is in—teaching and promoting a certain interpretation of Islam to detainees violates the current Establishment Clause tests regulating government involvement with religion.

III. TEACHING ISLAM VIOLATES THE CURRENT ESTABLISHMENT CLAUSE TESTS

The First Amendment of the U.S. Constitution states explicitly that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of people to peaceably assemble, and to petition the Government for a redress of grievances."[20] The first clause of this amendment is known as the Establishment Clause. But despite its seemingly clear command that Congress *shall* make *no* law respecting the establishment of religion, the precise limits and edges of this prohibition have taken a long time and many court battles to iron out—and several wrinkles still remain.[21]

A. The Prohibition of Discrimination

When trying to determine whether the government is violating the Establishment Clause, the first question is whether the government is discriminating among or against certain religious groups. If so, then the government action is only permissible if it satisfies the strict scrutiny test—that is, if the government can demonstrate that the law or program is necessary to achieve a compelling government interest.[22]

The principle that the Establishment Clause prohibits discrimination among religions was made clear in the 1947 Supreme Court decision in *Everson v. Board of Education*.[23] *Everson* centered on whether a New Jersey statute which provided reimbursement for bus fares incurred by parents sending their children to private religious schools violated the First Amendment. In reaching its ultimate decision that the statute did not violate the Establishment or Free Exercise clauses, the *Everson* Court stated, "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions,

20. U.S. CONST. amend. I.

21. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 230 (2000) (Rehnquist, Ch. J., dissenting).

22. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1156 (2d ed. 2002). Despite the Court's prohbition on discrimination and citation to cases where strict scrutiny is employed, no decisions in recent years have employed strict scrutiny in the Establishment Clause context, even where a law was arguably discriminatory. That said, the strict scrutiny test has not been overturned.

23. 330 U.S. 1 (1947).

or prefer one religion over another."[24] This principle of non-discrimination between religions or denominations has been reaffirmed by a long line of Supreme Court precedent.[25] Relying on this precedent, the Supreme Court in *Larson v. Valente* stated that when "presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."[26] The questions then arise, what is government discrimination and when is strict scrutiny met?

1. When is the Government Discriminating Among Religions?

The contours of what constitutes discrimination among religions can be understood through an examination and comparison of the different laws that the courts have deemed to be discriminatory and non-discriminatory. In *Everson*, the New Jersey statute was ruled non-discriminatory because it provided reimbursement to parents who sent their children to any type of parochial or religious school but still provided free transportation for those who sent their children to public schools.[27] In *Zorach v. Clauson*, the Court upheld as non-discriminatory a New York City program which permitted public schools to release students to attend religious courses operated outside of the school building because it was applicable and available to people of all faiths (though ostensibly not available to secular individuals).[28] In *Larson*, the Court held that a Minnesota law was discriminatory because it exempted from the reporting requirements imposed on charities religious institutions that received more than 50 percent of their financial support from member donations.[29] In *Board of Education of Kiryas Joel Village School District v. Grumet*, the Court held as discriminatory a state law establishing a separate school district for a village inhabited only by Hasidic Jews.[30] The school district was created solely to help one religious group, the Hasids, so their children with special needs would not have to attend a public school with non-Hasidic children.

24. *Id.* at 15. *See* Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1305 (1996) (discussing the emphasis in *Larson* on equality among religions).
25. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion . . . ."); Abington School District v. Schempp, 374 U.S. 203, 305 (1963) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief."); Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects.").
26. 456 U.S. 228, 246 (1982).
27. 330 U.S. at 17.
28. 343 U.S. at 313–315.
29. *Larson*, 456 U.S. at 248–49.
30. 512 U.S. 687, 703–04 (1994).

Based on this Supreme Court jurisprudence, the determination of "discrimination" seems to hinge, at least in part, on whether the government is facially and clearly preferring one religion over another.[31] This is in contrast to situations where the government is, at least arguably, preferring all religions over those who do not adhere to a particular religious faith at all. The laws in *Larson* and *Kiryas* were both ruled discriminatory because they gave special treatment to certain religious groups in relation to other religious groups. However, in *Everson* and *Zorach*, the laws were upheld even though there was a colorable argument that the laws gave preference to religions and religious adherents above secular groups and non-religious individuals. When these precedents, particularly *Larson* and *Kiryas*, are compared to what the government has been doing in foreign detention centers, it seems rather plain that the government is discriminating among religions through its Muslim re-indoctrination program. Indeed, the government's stated purpose behind this program is to instill and imprint a more moderate version of Islam in the detainees' heads and quash any more "radical" or conservative Islamic beliefs—clearly giving preference to one sect or religion above another. As General Stone describes "the many religious leaders, all imams that we have working for us teach out of the moderate doctrine."[32] General Stone also tells how the program is not just teaching one version or doctrine of Islam, but how the detention center personnel are actively working to "take those arguments [of the more radical imams] and tear them apart."[33] Moreover, the detainees' release seems to hinge, at least in part, on their successful completion of and adherence to the religious curriculum.[34] Here, although the exact contours of the program remain somewhat unclear, the discrimination is based solely on ideology and belief—and as a result is even more problematic than the type of discrimination in *Larson* which was based on whether a church received more than half of its contributions from its members. The Supreme Court found even arbitrary, non-ideology based differentiations by the government problematic and discriminatory in *Larson*. Given the purposes of the Establishment Clause—to prevent the promotion of one religion over another and to protect freedom of belief—this belief-based discrimination is all the more repugnant to the Establishment Clause and clearly meets the definition of discrimination.

31. *But see* Lee v. Weisman, 505 U.S. 577 n.1 (1992) (noting that the clause is no less applicable to government acts which favor religions generally than to acts favoring one religion over another).

32. Department of Defense Bloggers Roundtable with Major General Douglas Stone, *supra* note 2.

33. *Id.*

34. Woods, *The Business End*, supra note 7.

2. Is Strict Scrutiny Nevertheless Met?

Even if a law discriminates among religions, it may be permissible if it meets strict scrutiny. Strict scrutiny means that the law must be narrowly tailored or closely fitted to achieving a compelling government interest.[35] In *Larson*, the Court recognized that Minnesota had a significant, secular interest in preventing fraudulent solicitations for charity and assumed, for the sake of argument, that this was a compelling interest.[36] The State of Minnesota offered three reasons why the statute in question was narrowly tailored: (1) church members will exercise greater supervision over the organization's solicitation activities when membership contributions exceed fifty percent; (2) membership control is an adequate safeguard against abusive solicitations of the public; and (3) the need for public disclosure rises in proportion with the percentage of nonmember contributions.[37] The Court, emphasizing that the burden was on the State to justify the discrimination and demonstrate that the law was narrowly tailored, found that there was no evidence to support any of the rationales offered and, most importantly, even if true, the rationales failed to address the only part of the statute being challenged—the fifty percent member contribution requirement that discriminated against religions which were not member funded (as it was intended to do).[38]

Applying the strict scrutiny standard of *Larson* to the government's re-education program of Islamic detainees reveals that while the government probably does have a compelling, secular purpose for the program, the means are hardly narrowly tailored. The government's stated purpose for teaching a more moderate version of Islam to detainees is to de-radicalize them and make them less hateful towards America. Certainly, the government's goal of trying to engender more positive feelings towards America is a compelling government interest, a secular one, and one that has the potential to safeguard America from future harm and enhance our national security. That said, there are a litany of other, more narrowly tailored means by which to engage in that effort rather than discriminating among religions and seemingly actively engaging in the promotion of a certain version of Islam and hiring clerics to teach this version to detainees. Examples of more narrowly tailored programs include civic education and critical thinking classes that would teach the detainees the values of democracy, representative government, and embolden them to think critically about what they are learning from fundamentalist clerics. According to the U.S. military, some of these civic education programs are currently going on—though they appear to occur

35. *Larson v. Valente*, 456 U.S. at 228, 246–47 (1982).
36. *Id.* at 248.
37. *Id.* at 248–49.
38. *Id.* at 248–51.

only as a detainee is transitioning out of the detention center.[39] Nevertheless, such programs are certainly capable of expansion and improvement. Secular civic education and critical thinking programs would be much more narrowly tailored, would not infringe on the Establishment Clause, and, as elucidated by Dr. Benard of the RAND Corporation, would be much more effective in achieving the government's objectives.

B. The *Lemon* Test

As the Supreme Court stated in *Hernandez v. Commissioner*, "[W]hen it is claimed that a denominational preference exists, the initial inquiry is whether the law facially discriminates among religions. If no such facial preference exists, we proceed to apply the customary three pronged Establishment Clause inquiry derived in *Lemon v. Kurtzman*."[40] So, in this instance, if for some reason a court was not convinced that the government's Muslim re-education program discriminates among religions, then the court would proceed by applying the three-part *Lemon* test.

In *Lemon*, a consolidated case involving Pennsylvania and Rhode Island statutes that provided state aid to non-public schools to offset costs associated with the teaching of secular curriculum, the Supreme Court held that to comply with the Establishment Clause the law in question must (1) have a "secular legislative purpose," (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) "must not foster an excessive government entanglement with religion."[41] If the law fails to satisfy any one of these three parts, then it violates the Establishment Clause.[42]

1. Is there a Secular Legislative Purpose?

The first requirement under the *Lemon* test is that the law must have a secular legislative purpose. Based on a survey of Supreme Court decisions dealing with the secular purpose requirement, it seems that if a law has no secular legislative purpose or if it has some secular purpose but its primary purpose is religious in nature, then the law fails to meet this prong of the *Lemon* test. However, if the law may have some religious purpose, but its primary purpose is secular, then it will likely pass this prong. This distinction was clearly articulated by the Supreme Court in *Wallace v. Jaffree* when it stated, "For even though a statute that is motivated in part by a religious purpose

39. Department of Defense Bloggers Roundtable with Major General Douglas Stone, *supra* note 2.
40. 490 U.S. 680, 695 (1989).
41. Lemon v. Kurtzman, 403 U.S. 602, 612–613 (1971).
42. Stone v. Graham, 449 U.S. 39, 40–41 (1980); *see* CHEMERINSKY, *supra* note 22, at 1159.

may satisfy the first criterion [of the *Lemon* test], . . . the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."[43] Examining the factual background of the cases where the Court found, or failed to find, a secular purpose will help flesh out this distinction.

In *Wallace v. Jaffree*, the Supreme Court held that an Alabama statute which authorized a moment of silence in public schools for meditation or voluntary prayer violated the Establishment Clause.[44] In reaching its decision, the Court said that the statute's sole express purpose was to return voluntary prayer into the schools and that there was no secular purpose whatsoever behind the statute.[45] To support its finding that the sole purpose was a religious one, the Court delved into the legislative history and extracted testimony from the statute's sponsor which indicated that the goal of the bill was a religious one.[46] Because the Court could find no secular purpose, the statute failed the first prong of the *Lemon* test. Likewise, in *Stone v. Graham*, the Court invalidated a Kentucky law which mandated that a copy of the Ten Commandments purchased with private money be displayed in every public school classroom.[47] The State argued that the statute's avowed purpose was secular in nature and that the Kentucky legislature required that a notation of this purpose be printed at the bottom of each copy of the Ten Commandments.[48] In small print, the notation read: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."[49] The Court found such an "avowed" secular purpose unpersuasive and ruled that merely having an avowed secular purpose would not "avoid conflict with the First Amendment."[50] The Court stated that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[51] In other words, the Court held that if a law's pre-eminent or primary purpose is religious and the supposed secular purpose for the statute appears to be little more than makeup intended to help the law pass constitutional muster, then the law will be deemed to have *no* secular purpose and will fail the first prong of the *Lemon* test. As characterized in a con-

43. 472 U.S. 38, 56 (1985).
44. *Id.* at 60–61.
45. *Id.* at 56.
46. *Id.* at 65 (Powell, J., concurring).
47. 449 U.S. 39, 39–41 (1980).
48. *Id.* at 41.
49. *Id.*
50. *Id.*
51. *Id.*

curring opinion by Justice O'Connor in *Lynch v. Donnelly*, "The purpose prong of the *Lemon* test asks whether government's *actual* purpose is to endorse or disapprove of religion."[52]

The Court cemented this more exacting interpretation of the first prong of the *Lemon* test in *Edwards v. Aguillard* and endorsed looking beyond the stated purpose of the statute to the legislative history and intent.[53] *Edwards* dealt with a Louisiana statute that required public schools teaching evolution to also teach creation science.[54] As an opening salvo into its examination of whether the Louisiana statute had a secular purpose, the majority stated, "While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."[55] The stated purpose of the act was to promote academic freedom. During trial, the State argued that "academic freedom," as used by the state legislature, meant "teaching all of the evidence" about the origins of humanity or, more broadly, meant fairness between different views.[56] In rejecting these as the real or sincere goals of the statute, the Court emphasized that the statute did not actually help achieve those goals and reasoned that if a statute is not actually geared toward achieving the stated purpose, then that stated purpose must not be genuine.[57] Rather than enhancing academic freedom or fairness, the law forced teachers and schools to teach creationism and provided resources for creating "creationism" teaching guides and resource services for that curriculum—the law did not provide those resources for evolution curriculum.[58] Nor was the Court blind to the historical context in which the evolution verses creationism debate emerged when it relied, in part, on that history in reaching its decision. The Court stated, "There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution."[59] Based on this history and the disconnect between the stated and actual purpose that was discovered after a close examination of the law and its legislative history, the Court determined that the primary purpose was religious and as a result violated the first prong of the *Lemon* test.[60]

52. 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (emphasis added); *see* CHEMERINSKY, *supra* note 22, at 1159.

53. 482 U.S. 578, 586–87 (1987).

54. *Id.* at 580–82.

55. *Id.* at 586–87.

56. *Id.* at 586.

57. *Id.* at 588.

58. *Id.*

59. *Id.* at 590.

60. *Id.* at 594.

This same exacting methodology was followed more recently by the Court in *McCreary County, KY v. ACLU of KY*.[61] In this 2005 decision, the Court once again examined the legislative history when it evaluated the constitutionality of installing the Ten Commandments in two county courthouses.[62] The counties claimed that the displays were intended to provide civic education regarding one of our founding legal codes.[63] Before the suit which reached the Supreme Court was brought, the displays had been challenged twice before, and in response, the counties twice installed other documents and historical explanations—all of which, however, referenced only legal documents with Judeo-Christian religious rhetoric.[64] Based on this, the Supreme Court confirmed that the real and authentic purpose behind the installation was religious, and that the installation was aimed at advancing a particular religion.[65] Aside from affirming the importance of scrutinizing the genuine purpose behind the law, the Court in *McCreary* also emphasized the importance of neutrality in the Establishment Clause and the first prong of the *Lemon* test.[66] Quoting *Epperson v. Arkansas*[67] and *Everson v. Board of Education*,[68] the Court emphasized that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[69] The Court further stated that "[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."[70] Indeed, as characterized by the Supreme Court in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, "*Lemon*'s 'purpose' requirement aims at preventing [government] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious mat-

61. 545 U.S. 844 (2005).

62. *Id.* at 861–64; *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1203 (3d ed. 2006).

63. *Id.* at 851–55.

64. *Id.* at 853–55.

65. *Id.* at 884–85 (O'Connor, J., concurring).

66. *Id.* at 860.

67. 393 U.S. 97, 104 (1968).

68. 330 U.S. 1, 15–16 (1947).

69. *McCreary*, 545 U.S. at 860. *See* Shahin Rezai, Note, County of Allegheny v. ACLU: *Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U.L. REV. 503 n.34 (1990) (discussing how "[a]dvocates of neutrality between denominations as well as between religion and nonreligion maintain that the drafters of the first amendment fully realized the distinction between church and religion. Hence, if their aim was limited to the prohibition of governmental discrimination among religious beliefs, they would have constructed the Establishment Clause to indicate that notion").

70. *McCreary*, 545 U.S. at 860.

ters."[71] So, the Court in *McCreary* not only affirmed the importance of the first prong of the *Lemon* test, but also emphasized that one of the Establishment Clause's key objectives is to maintain government neutrality between religions and between religion and no religion.[72]

Despite the Court's willingness to scrutinize whether the avowed secular purpose is the actual purpose, and its requirement that the primary purpose be a secular one, the Court does not seem to require that the law be devoid of religious purpose or overtones. This is evident in the somewhat older case of *McGowan v. Maryland*.[73] In *McGowan*, petitioners challenged the constitutionality of Maryland laws which required businesses to be closed on Sundays—laws known as Sunday Blue Laws.[74] The Court once again recognized the importance of looking back to the legislative and social history surrounding the laws—and in this case went all the way back to the 13th century in discussing the originally-religious purpose for Sunday Blue Laws.[75] But while the Court noted the religious origins of these laws, it ultimately upheld them because the present purpose for the laws was a secular one—to provide a day of uniform rest for all citizens.[76] The Court held that "the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals."[77] So in contrast to *Edwards*, *Wallace*, and *Stone*, the *McGowan* Court chose to downplay the religious origins of the laws because it seemed that the primary contemporary purpose of each law was a secular one.

Where does the U.S. government's program of teaching a moderate version of Islam to detainees fit in this rubric? There is a strong argument to be made on behalf of the government that the program has a primary purpose which is secular. The goal—at least the stated goal—is to win the hearts and minds of detainees and deradicalize them towards the United States in order to enhance American national security. This is a secular purpose, and arguably a very compelling one. The program, being both new and an executive action, does not have the same kind of history—either social or legislative—to examine when deciding if the avowed purpose of helping in the war on terror, is the true purpose or just a sham. It seems very unlikely, especially given our nation's relationship to Christianity (as demonstrated by the litany of cases where state actors attempt to prop up

71. 483 U.S. 327, 335 (1987).
72. Contrast this with the initial inquiry regarding the existence of "discrimination" which, based on the case law, seems to be more focused on discrimination between religions.
73. 366 U.S. 420 (1961)
74. *Id.* at 422–23.
75. *Id.* at 431–32.
76. *Id.* at 445.
77. *Id.*

Christianity) and the Bush Administration's strong ties to the Christian community, that the program is intended to promote Islam. Thus, the program will not be unconstitutional in quite the same way as the government actions in the above cases.

This does not mean, however, that the purpose behind the deradicalization program would pass the first prong of the *Lemon* test. The emphasis of one version of Islam over another seems to clearly conflict with the Court's recently renewed emphasis on neutrality in *McCreary County, KY v. ACLU of KY*, where the Court discussed at great length the importance of neutrality when making a determination under the first prong of *Lemon*.[78] Here, the program is far from neutral and is specifically designed to promote one branch or sect of Islam over another, eroding any claim that the government may have a secular purpose.

The Court's treatment of the Establishment Clause in public schools and prison may be instructive. In *Edwards v. Aguillard*, the Court emphasized the importance of keeping the public school system free from the establishment of religion and indicated that the courts should be especially cautious when monitoring religion in the schools.[79]

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.[80]

Perhaps in a detention center context and a foreign affairs context, the Supreme Court would allow the government more leeway in the evaluation of whether a secular purpose existed or not. Certainly courts treat religion and the First Amendment differently in the domestic prison system. For example, the Court upheld as constitutional the Religious Land Use and Institutionalized Persons Act (RLUIPA), which allows restrictions on prisoner's First Amendment rights so long as the restriction serves a compelling government interest and is the least restrictive means of furthering that interest.[81]

In *Edwards*, one of the rationales for being doubly confident that public schools were not unduly promoting a particular religious view-

78. 545 U.S. 844 (2005).

79. 482 U.S. 578, 583–84 (1987).

80. *Id.*

81. *See* Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000).

point was the compulsory nature of the institution and that students were a captive audience. Those same considerations would seem to apply to the detention center context as well, as it involves an involuntary presence and a captive audience. That said, those considerations also apply in the domestic prison setting and the courts have not used the same level of vigilance in policing prisoner's first amendment rights as they have public school students—on the contrary, prisoners have been afforded less rights despite their captivity.[82] This is not to say that the Court has not afforded prisoners any religious rights. But relative to the rights of students and those outside of prison, Congress through RLUIPA[83] and the Supreme Court in cases such as *Cutter v. Wilkinson*,[84] have recognized some of the exigencies placed on the government in running a prison system and permit the government to restrict religious rights when a compelling interest is present. Those same exigencies relating to prison security and order—and others related to foreign policy and national security—would be at play in the foreign detention center context as well. However, a distinction can be drawn between the domestic prison cases which usually restrict a prisoner's ability to fully practice his or her religion and the religious education programs in the detention centers in Iraq, where a particular set of beliefs is being promoted at the exclusion of others.

Given these examples, though the government is engaging very overtly in the promulgation of a certain religion—hiring clerics, having them teach detainees a certain color of Islam, and actually itself engaging in religious interpretation—the government program may still pass the first prong of the *Lemon* test because the reason for doing this seems to be motivated by a secular, national security interest. And it is that national security interest and the fact that the program is taking place in a type of prison, as opposed to the schoolhouse, which would provide additional reason and justification for a court to find that the first prong of *Lemon* is satisfied. So, at least with respect to the first prong of the *Lemon* test, the government has a colorable claim that it passes constitutional muster—though it is far from clear. However, if the neutrality aspect of the first *Lemon* prong continues to hold force as it did in the 2005 *McCreary* decision, the government program is likely to be found in violation of the *Lemon* secular purpose prong because its purpose is to advance one religion over another, irrespective of what other secular purposes it may have. In any event, even if a court finds that there is a secular purpose, the government program must still pass the other two prongs of the *Lemon* test.

82. *See* Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1700–08 (2009).

83. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, Pub. L. No. 106-274, 42 USC. § 2000cc-1 et seq (2000).

84. 544 U.S. 709 (2005).

2. Does the Primary Effect Either Advance or Inhibit Religion?

In its second prong, the *Lemon* test mandates that the principal effect of the law must be one the neither advances nor inhibits religion.[85] This prong comes from a long line of jurisprudence predating *Lemon*. In *Board of Education v. Allen*, which the Court cites in *Lemon*, a New York law that required public school libraries to check out books free of charge to students enrolled in public *and* parochial schools was held to have a secular purpose that neither inhibited nor advanced religion.[86] In determining that there was a secular effect, the Court looked back to the stated purpose of the statute—to provide educational opportunities to all students—and said that plaintiffs could point to nothing in the effect that was inconsistent with that purpose.[87] It also emphasized that the benefit the statute provided went to parents and children—and not other parochial schools.[88] The Court conceded that perhaps the free book loans made it more likely that a parent would send their child to a religious school, but that was no more true than with the state-paid bus fares in *Everson* and did "not alone demonstrate an unconstitutional degree of support for a religious institution."[89]

However, since *Allen* and *Lemon*, the Court has expressed some willingness, albeit limited, to overturn cases based on their lack of secular effect. For example, in *Estate of Thornton v. Caldor, Inc.*, the Court ruled that a Connecticut statute which precluded employers from requiring employees to work on their Sabbath was an invalid advancement of religion.[90] The Court characterized the effect of the law as follows:

> [The statute] imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates. The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. The employer and others must adjust their affairs to the command of the State whenever the statute is invoked by an employee.[91]

As a result, the Court held that the statute had more than "an incidental or remote effect of advancing religion,"[92] but in fact had "a primary effect [of] impermissibly advanc[ing] a particular religious practice."[93]

85. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
86. 392 U.S. 236, 248–49 (1968).
87. *Id.* at 243.
88. *Id.* at 243–44.
89. *Id.* at 244.
90. 472 U.S. 703 (1985).
91. *Id.* at 709.
92. *Id.* at 710.
93. *Id.*

Hence, the focus of the Court seemed to be not only on the fact that it advanced religion by creating an unqualified right for a person with a particular religious belief—advancing religion—but also on how that right affected others—inhibiting their secular interests. Here, the law advanced one's religious right to observe a Sabbath at the expense of an employer's interest in running their business successfully and fellow employees' interest in not being unduly impacted by the absentee coworker and the additional workload the Sabbath observer's absence would create.

That said, the Court has not invalidated all laws that create exemptions for religious organizations.[94] Of note is *Corp. of Presiding Bishop of the Church of Jesus Chris of Latter-Day Saints v. Amos*, in which the Court upheld the constitutionality of a provision in Title VII which exempted religious organizations from employment discrimination based on religion.[95] The Court emphasized that this was different than the situation in *Thornton* and that a "law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[96] The Court agreed that the plaintiff's choice of religion was infringed upon, but highlighted that it was not being infringed upon by the state, but rather by the Church,[97] as his discharge was not required by statute.[98] This contrasts with *Thornton*, where, according to the Court, the Connecticut statute required accommodation by the employer to the employee's religious demands.[99] The distinction is a fine one and, as Erwin Chemerinsky notes, perhaps "difficult to defend because both laws granted a preference for religion alone."[100] Nevertheless, this is the state of the current law.

Applying the secular effect test to the government re-indoctrination program in Iraq and other detention centers would seem to indicate that the program is invalid. Perhaps under *Allen*, there is an argument to be made that because there is a secular purpose—of deradicalizing detainees and advancing America's interests in its "war on terror"—then the effect of the statute is similarly secular insofar as it makes detainees hate America less and not engage in acts of violence toward American strategic interests. But the better and stronger argument would seem to be that under the *Thornton* and *Amos*-type

94. *See* CHEMERINSKY, *supra* note 22, at 1161.
95. 483 U.S. 327 (1987).
96. *Id.* at 337 (emphasis in original).
97. *Id.* at n.15.
98. *Id.*
99. *Id.*
100. CHEMERINSKY, *supra* note 22, at 1162.

analyses, the program is advancing a particular religious interest at the sake of the detainees' secular interests, their own religious interests, or both. So, as in *Thornton*, the government is not making an exception for a religion, but rather is sanctioning and requiring people to be impacted by a particular religion. The detainees are seemingly required, as a condition of release, to learn about a certain version of Islam. This impedes their ability to be free from religion altogether, or their ability to develop and practice their own religious beliefs. As a consequence, the program has no secular effect, and even if it does have some, the state program fails even under *Amos* because its effect has "advanced religion through its own activities and influence."[101]

Not discounting this more traditional approach to "secular effect" analysis, which is still good law and valid, the Court has recently focused on whether the law or program in question is a symbolic endorsement of religion.[102] A prime example of where the Court upheld a statute because it was not a symbolic endorsement of religion and, as a result, did not advance a religious purpose, was in *Board of Education of Westside Community Schools v. Mergens*.[103] In *Mergens*, the Court held a school policy which allowed extracurricular student groups, including religious groups, to use school facilities after school had dismissed did not advance a religious effect and was in no way a symbolic endorsement of those students' religious views.[104] The Court distinguished this scenario from ones where it invalidated the use of state funds to help pay for parochial school teachers that were teaching state required courses.[105] It reasoned that "the risk of creating 'a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school'" was not present when the school is merely allowing religious students to congregate in its facilities.[106] The Court also took pains to emphasize that high school students were capable of distinguishing between an equal access policy and state sponsorship of a religion,[107] and that because all school groups and religions could take advantage of the policy, the school could not be seen as endorsing a particular religion.[108]

Even under the symbolic endorsement test, the U.S. religious reindoctrination program fails the secular effect test. Unlike *Mergens*, under the program the individuals in question are ostensibly required,

101. *Amos*, 483 U.S. at 337.
102. *See* CHEMERINSKY, *supra* note 22, at 1161.
103. 496 U.S. 226 (1990).
104. *Id.*
105. *Id.* at 250.
106. *Id.* (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985)).
107. *Id.* at 250–51.
108. *Id.* at 252.

or at least coerced, to be involved with the religious program. Moreover, again unlike *Mergens*, the state-funded staff members are not prohibited from facilitating the religious program or endorsing it. Indeed, the state officials and the hired clerics are actively promoting the ideology and beliefs to the detainees. Of course, it seems ridiculous to postulate that the U.S. government would ever symbolically endorse Islam and, arguably, Muslim detainees would be well aware of the government's intentions behind the program. But within the detention center context, endorsement of Islam, or at least a type of it, is precisely what is happening. Indeed, the endorsement is much more than symbolic: it is actual and active, as the government's goal is to affect these detainees' beliefs in such a way that they adopt a particular set of religious beliefs.

So, either under the symbolic endorsement veneer of the secular effect test or under the more classic *Thornton* and *Amos* approach, the re-indoctrination program in U.S. foreign detention centers fails the second prong of the *Lemon* test because it advances a religious effect at the expense of a secular one.

3. *Does the Law Foster Excessive Government Entanglement with Religion?*

Finally, even if the law or government program in question passes the first two prongs of the *Lemon* test, it will still be struck down as unconstitutional if it causes excessive government entanglement with religion. Again, the *Lemon* case involved a review of Pennsylvania and Rhode Island statutes that authorized state funds to be paid to parochial schools in order to offset the cost of teachers, textbooks, or both, which were used for secular subjects.[109] In invalidating the Rhode Island and Pennsylvania laws and articulating the contours of the "no entanglement" prong, the Court focused on how the religious nature of the schools "led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education."[110] But it was this need for judicious monitoring in order to ensure that state funds were not being used for a religious purpose that led to the excessive government entanglement with religion. In other words, if the law requires "comprehensive, discriminating, and continuing state surveillance" to ensure that there is a clear separation of church and state and no establishment of religion, then there is entanglement.[111] Entanglement gives the appearance of establishment, and because the risk of the public perceiving establishment is too great, the law is un-

109. Lemon v. Kurtzman, 403 U.S. 602 (1971).
110. *Id.* at 616.
111. *Id.* at 619.

constitutional.[112] The Court said that the dangers to entanglement with respect to monitoring teacher behavior were particularly acute because:

> [A] dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.[113]

In short, when individuals are involved in an authoritative position over others and are asked to separate out their religious role from their secular role, such a task is immensely difficult if not impossible.

The Court echoed this reasoning in *Committee for Public Education and Religious Liberty v. Nyquist*.[114] In that case, the Court held that state education and tax laws which provided maintenance and repair grants, tuition reimbursement grants, and income tax breaks to parents sending their children private schools were invalid.[115] The Court overruled the grants and tax breaks based on the second prong of *Lemon*, because they unconstitutionally advanced a religious purpose.[116] As a result, the Court did not rule directly on the entanglement issue. However, in compelling dicta, the Court made sure to note (and affirm) the ruling in *Lemon*. It stated that

> [T]he importance of the competing societal interests [of preventing Establishment or religion] implicated here prompts us to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.[117]

And so, it is not just actual entanglement of the government that violates the third *Lemon* prong. Any government program that carries the "potential" for entanglement in the sense that it may cause political acrimony and strife about whether the government is aiding religion impermissibly violates the third prong of *Lemon*.

In 1985, the Court affirmed this line of reasoning in *Estate of Thornton v. Caldor, Inc.*[118] As noted above, *Thornton* dealt with a Connecticut statute prohibiting employers from forcing employees to work on their Sabbath.[119] In addition to overturning the statute because it impermissibly advanced a religious effect, the Court also overruled the part of the statute that required the State Mediation Board

112. *Id.*
113. *Id.* at 618–619.
114. 413 U.S. 756 (1973).
115. *Id.*
116. *Id.*
117. *Id.* at 794.
118. 472 U.S. 703 (1985).
119. *Id.*

to determine which religious activities could fairly be considered as observances of Sabbath on the grounds that the statute was "exactly the type of comprehensive, discriminating and continuing state surveillance . . . which creates excessive governmental entanglements between church and state."[120] Requiring the state to make judgments about which religious observance is genuine enough to be considered a Sabbath observance completely immerses the government into debates over the nature of different religious practices.

Recently, it appears the Court may be moving towards abandoning the entanglement prong of the *Lemon* test. In *Mitchell v. Helms*, a case with no majority opinion, the Court held that the government could give instructional tools and equipment to religious schools so long as they were not utilized for religious purposes.[121] Four of the justices—Rehnquist, Scalia, Thomas, and Kennedy—relying on the Court's previous ruling in *Agostini v. Felton*,[122] said that only the first two prongs of the *Lemon* test were relevant today.[123] But so far, no majority decision has advocated the complete abandonment of the entanglement prong. Even these four justices have limited their holding relating to the modification of the *Lemon* test to the context of providing state aid to parochial schools.[124] And in *Agostini*, where there was a five justice majority, it is far from clear that the decision, written by Justice O'Connor, was intended to throw out the entanglement prong.[125] Instead, the decision seems to suggest that the mere presence of a public school employee at a private school, teaching special education programs, was not enough to constitute a "symbolic link" or entanglement.[126] This is to say, the four justice plurality in *Mitchell* seems to be overstating the extent to which *Agostini* really undermined the entanglement prong. As such, the entanglement prong is still good law and needs to be evaluated, particularly outside of the parochial school context. As one scholar described the current status of the *Lemon* test, "Although the *Lemon* test has come under extensive criticism by legal scholars and Justices of the Supreme Court, it remains the lens through which domestic aid and programs regarding religion are examined."[127] Needless to say, even if the entanglement prong is not "good law" it does not arise to the level of "bigotry" as the plurality in *Mitchell* hyperbolically contends.[128]

120. *Id.* at 708 (quoting Caldor, Inc. v. Thornton, 464 A.2d 785, 349 (1983)).
121. 530 U.S. 793 (2000). *See* CHEMERINSKY, *supra* note 22, at 1162.
122. 521 U.S. 203 (1997).
123. *Mitchell*, 530 U.S. at 829.
124. *Id.* at 807.
125. *Agostini*, 521 U.S. at 222–24.
126. *Id.* at 224.
127. Jessica Powley Hayden, Note, *Mullahs on a Bus: The Establishment Clause and US Foreign Aid*, 95. GEO. L.J. 171, 181–82 (2006).
128. *Mitchell*, 530 U.S. at 829.

Given that the entanglement prong is still good law, especially outside of the context of aid to parochial schools, is the Muslim re-education program in U.S. detention centers unconstitutionally entangling the government with religion? In short, yes. Given that military personnel are involved in the education program, selecting clerics, and helping design religious lessons, there is a clear indication and direct involvement of the state in advancing the religion. What is more, even if the U.S. military were merely allowing or hiring moderate Muslim clerics to come in and teach the detainees, this would evidence entanglement because the government is paying these clerics, and even if not, allowing only select clerics access to the detainees certainly leads to the sort of symbolic endorsement of one religion. If all clerics and religions were allowed access to the detainees, perhaps the government would avoid entanglement because there would be equal access and the public and detainees could discern that the U.S. government was not endorsing a particular sect. But that is not even remotely the case. Indeed, as Dr. Benard points out, it is the religious education programs' association with the U.S. military that risks further alienating detainees.[129]

As the government re-education program also involves the U.S. government deciding which branch of Islam is true or at least worthy of teaching to the detainees and which ones are undesirable and "inauthentic," then the program is strikingly similar to the judgment calls that the State Mediation Board was required to make in *Estate of Thornton v. Caldor, Inc.*[130] The Court struck down the mediation board as an impermissible entanglement because it required the state to judge which religious observances were authentic and warranted protection under the Sabbath observance holiday.[131] Here too, the government is being asked to judge what interpretation of Islam is acceptable, authentic, and should be taught to the detainees. As a result, the detention program is fairly analogous to the situation in *Thornton* and should be struck down accordingly.

Further, given the emphasis of the Court in both *Nyquist* and *Lemon* on the appearance of entanglement and the risk that there may be political or social strife related to a program that may involve the government with one religion over another, courts should be cautious and only allow such programs when it is clear that no such strife or conflict would be fair or forthcoming.

Finally, even if the entanglement prong is no longer good law or a prong in its own right, the *Agostini* and *Mitchell* decisions do seem, at the very least, to include it as a factor within the first two prongs, and so this application and analysis is useful and still applicable in help-

129. Benard, *supra* note 16.
130. 472 U.S. 703 (1985).
131. *Id.* at 708.

ing to determine if there is a government purpose and if the program is advancing a secular purpose.

Summarizing the analysis of the Muslim re-indoctrination programs as applied to the *Lemon* test, it seems that the government has an arguable claim that it passes the first prong because it has a secular purpose even if it is not devoid of religious purpose. However, if the neutrality aspect of the first prong is emphasized, the program is likely to fail the secular purpose test because it is not neutral in which religions it chooses to support. The programs seem to fairly clearly fail the second prong of the *Lemon* test because they advance a religious effect and are a symbolic endorsement of a particular sect. As for the entanglement prong, it is clear that the program excessively entangles the government in religion—though the question remains as to whether this prong of the *Lemon* test will remain good law for long.

C. Cases Decided Without Reference to the *Lemon* Test

Though the *Lemon* test for the Establishment Clause is extremely important and has been relied on historically, several recent Supreme Court cases have declined to apply it—even though other recent cases have used the *Lemon* test[132]—as was evident in the 2005 *McCreary* case.[133] As a result of the *Lemon* test's precarious future, it is necessary to analyze these other cases and see what guidelines they provide for the Establishment Clause.[134] As will be made clear, cases applying alternative tests primarily focus on neutrality toward religion.

In *Van Orden v. Perry*, a case which dealt with whether the display of a Ten Commandments monument on the Texas state house grounds violated the Establishment Clause, the Court recognized that the *Lemon* test had been used in many cases, but not all.[135] In *Van Orden*, the Court decided it was unnecessary to apply *Lemon* in the situation where the Court was evaluating a passive monument, as opposed to a government program.[136] This may suggest that *Lemon* is still appropriate in the context of active government programs such as the Muslim re-education program in Iraq. However, given the chance that a court may find *Lemon* inapplicable, it is worth examining the standards, if any, the Court used in the *Van Orden* decision. The decision is relatively short and emphasizes the historical role that religion has played in American history, particularly the Ten Commandments.

132. *See Agostini*, 521 U.S. at 218, 232 (1997); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993); Sch. Dist. of City of Grand Rapids v. Ball, 473 U.S. 373, 382–83 (1985); CHEMERINSKY, *supra* note 22, at 1159.

133. McCreary County, K.Y. v. ACLU of K.Y., 545 U.S. 844 (2005).

134. In *Lee v. Weisman*, 505 U.S. 577 (1992), the Supreme Court specifically declined invitations to reconsider the *Lemon* test.

135. 545 U.S. 677, 685–86 (2005).

136. *Id.* at 686.

The decision took note of the several other Ten Commandments homages in government buildings, including the Supreme Court.[137] It seemed to emphasize that when the religious iconography was serving a historical purpose, it was permissible; but that when it was motivated by a clearly religious purpose—as was the Kentucky statute examined in *Stone v. Graham* which mandated the posting of the Ten Commandments in classrooms[138]—then it was impermissible.[139] Other than this emphasis on the distinction between the historical and secular purpose of the monuments—as opposed to a clearly religious purpose—the decision does not offer much in the way of guidelines for deciding Establishment Clause cases. The purpose of the Muslim re-education program has already been discussed and arguably there is a secular, national security based interest for the program. However, it also clearly advances religion and entangles the government. Thus, it seems likely that outside of the passive monument situation, the Court would be a bit more exacting in its evaluation of government's role with religion based both on its prior jurisprudence using the *Lemon* test (which again has not been abandoned) and its non-*Lemon* test cases.

In *Santa Fe Independent School District v. Doe*, decided in 2000, the Court held that student-led prayer over the public address system at the commencement of public high school football games violated the Establishment Clause.[140] The case mentions the secular purpose prong of *Lemon*, but somewhat in passing. The Court's decision focuses on whether the district's policy of providing for the election of a student to give the prayer and then allowing the student to do so constitutes an actual or perceived endorsement of religion. The Court emphasized that even perceived endorsement of religion constitutes a violation of the Establishment Clause and that even if no student ever speaks and no one is compelled to listen before the football games, the very policy and the act of electing a student to this post sends the signal of endorsement.[141] Though not emphasizing *Lemon*, *Santa Fe* does not diverge terribly from it, and Justice Steven's majority's emphasis on endorsement draws from the Court's secular effect jurisprudence under the second *Lemon* prong. As discussed above in relation to symbolic endorsement under *Lemon*, the government re-indoctrination program has the effect of endorsing certain sects of Islam over others, and both actively and symbolically endorses one religion over others and over no religion at all. Because of this, it would likely fail under the *Santa Fe* endorsement gloss.

137. *Id.* at 689–90.
138. 449 U.S. 39, 39–41 (1980).
139. *Van Orden*, 545 U.S. at 688–91.
140. 530 U.S. 290 (2000).
141. *Id.* at 306.

As mentioned above, four of the justices in *Mitchell v. Helms* advocated a modified version of *Lemon* with only the first two prongs of purpose and effect.[142] Analyzing the government instructional aid to parochial schools for whether it had a religious effect, the Thomas plurality opinion focused on whether there was government indoctrination. On this question, the *Mitchell* decision like *Santa Fe* primarily looked to neutrality. Justice Thomas wrote that:

> 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 areligious 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.[143]

But in addition to the issue of neutrality, the Court said that the "second primary criterion for determining the effect of governmental aid is closely related to the first. The second criterion requires a court to consider whether an aid program 'define[s] its recipients by reference to religion.'"[144] In this case, even under the more narrow *Mitchell* plurality decision, the detainee re-education program would violate the secular effect test. As discussed above, the program is far from neutral and only a certain type of Islam is singled out for government promotion and assistance within the detention centers, while more conservative elements of Islam are singled out for active elimination. Moreover, as the government is selecting only certain clerics to preach and teach, the government program "defines its recipients by reference to religion" and violates even Justice Thomas' characterization of the Establishment Clause.

Finally, in *Good News Club v. Milford Central School*, the Court does not even mention *Lemon* in deciding that a school would not violate the Establishment Clause were it to allow a religious group to use school facilities.[145] In doing so, the Court continued the trend of emphasizing neutrality towards religion.[146] The Court said that a "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[147] The Court then went on to consider the extent to which the community would feel pressure to participate in the religious club's activities.[148] Finally, the Court discussed the sig-

142. 530 U.S. 793, 807–08, (2000).
143. *Id.* at 809.
144. *Id.* at 813 (quoting Agostini v. Felton, 521 U.S. 203, 234 (1997)).
145. 533 U.S. 98 (2001).
146. *Id.* at 114; *see* CHEMERINSKY, *supra* note 22, at 1167.
147. *Good News Club*, 533 U.S. at 98–145 (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 839 (1995)).
148. *Id.* at 115.

nificance that the case dealt with public schools and captive children.[149] In applying these three criterions, the Court said that not allowing the club access would be partial, whereas allowing it access along with the other organizations was neutral and prevented a violation of the Free Exercise Clause.[150] In discussing coercion, because attending the after-school club required parental permission, the Court examined any coercive effects on the parent, not the student, and thus downplayed any significance and heightened scrutiny that normally attends Establishment Clause analysis of practice within a public school setting. So, once again, though this case does not explicitly fit into a rigid framework for evaluating Establishment Clause cases, it does provide another piece of the fabric by adding continued and enhanced validity to the focus on neutrality. *Milford* also emphasizes indoctrination and symbolic endorsement with its discussion of coercion. Applying the government re-indoctrination program to *Milford's* Establishment Clause regime once again would result in the Muslim re-education program being struck down. It is far from neutral and results in direct coercion and compulsion by requiring detainees, as a condition of release, to listen to moderate clerics hired by the U.S. government.

In sum, though the recent cases have not relied as explicitly on *Lemon* and are perhaps slightly loosening the Establishment Clause tests, they still provide for rigorous scrutiny into whether a government program has the purpose or effect of advancing a religion over others or none at all, with particular focus on whether the government is violating its obligation to be neutral. As has been articulated, the Muslim re-education program in foreign detention centers violates this neutrality and as a consequence the Establishment Clause.

Now that it has been established that the government's Muslim re-education program likely violates current Establishment Clause jurisprudence, the question is whether the Establishment Clause applies outside of the U.S. borders.

IV. THE ESTABLISHMENT CLAUSE IS BOTH A STRUCTURAL RESTRAINT AND A PROTECTION OF INDIVIDUAL LIBERTY

Whether the Establishment Clause is applicable outside of the United States may depend on whether the clause is considered a structural restraint on government or a protection of individual liberty. Many have viewed the Establishment Clause and other provisions of the Constitution in a rather narrow, less comprehensive light and emphasized that the Establishment Clause is either a structural

149. *Id.*
150. *Id.* at 119.

restraint or a protection of individual liberty. This Article contends that that the Establishment Clause, like several other provisions of the Constitution, is both—it restrains the government from impermissibly promoting certain religions and, as a consequence, protects individual liberty from the imposition or advancement of that religion. There are many historical, legal, and logical arguments that support this conception of the Establishment Clause. Viewing the Establishment Clause as a restraint and a protection provides the most cohesive and comprehensive interpretation of the clause, with the additional benefit that it provides the most protection to individuals and from the government. Emphasizing the dual role of the Establishment Clause as a protection and restraint also helps coalesce and make sense of precedents and history that only discuss one or the other. Whether the Clause is viewed as a structural restraint or protection of individual liberty is important because it may affect how and to what extent its protections apply extraterritorially. In either case, this Article contends the detention centers fall within the Establishment Clause's reach. But by demonstrating that the Establishment Clause is both a protection of liberty and restraint on government, it strengthens the rationale for the Establishment Clause's extraterritorial application and provides two legal justifications for its extension abroad.

A. The Establishment Clause is a Protection of Individual Liberty

As scholar Jessica Hayden points out, "Today, the generally accepted view of the Establishment Clause is that it protects individual liberties."[151] Indeed, Professor Michael McConnell highlights that it is precisely because of the limitation on government action in the realm of religion that the free pursuit of religion in America has been so historically vibrant. He notes that "established religion tended to produce discord, conflicted with liberal principles, and weakened religion. [Alexis de] Tocqueville, who described religion as 'the first' of America's 'political institutions,' reported that religion was stronger in America than in any other country, and attributed this strength to the separation between church and state."[152]

This view of the Establishment Clause as a protection of individual liberty is supported by a long line of Supreme Court jurisprudence. In *Everson v. Board of Education*, the Court explicitly recognized that the Establishment Clause operated as both a limitation on government power and as a protection of individual liberty.[153] The Court

151. Hayden, *supra* note 127, at 189.
152. Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1255 (2000).
153. 330 U.S. 1 (1947).

emphasized that the Establishment Clause should be given "broad interpretation" and emphasized the interrelation of protection of liberty and restraint on government, stating that "[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."[154] The Court continued by listing the different tasks that the Establishment Clause performs:

> 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.[155]

Hence, the Establishment Clause limits the government's ability to aid a religion or set one up. But it also protects individuals from punishment or from being forced to go to a particular church—it protects their liberty. Further highlighting that the clause is both a protection of liberty and a restraint, the Court said that "State power is no more to be used so as to handicap religions than it is to favor them."[156] In other words, the state cannot limit a person's or religion's ability to operate and exist, nor can it favor one or another. It is both a limitation on the government and a positive right for the individual.

The *Everson* decision's view of the Establishment Clause as a protection of individual liberty was followed in several subsequent decisions. In *School District of Abbington Township v. Schempp*, the Court quoted *Everson* with approval.[157] The decision affirmed that the "liberties" guaranteed by the Constitution included the First Amendment's prohibition that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[158] In *Lemon v. Kurtzman*, the Court, in finding that the payment of parochial school teachers led to impermissible entanglement, emphasized the impact that this violation of the Establishment Clause would have on impressionable young students and their liberty interest in being free from government inculcation of religion.[159] Moreover, in its closing salvo on the importance of avoiding government entanglement and establishment with religion, the Court said, "The Constitution decrees that religion must be a private matter for

154. *Id.* at 15.
155. *Id.* at 15–16.
156. *Id.* at 18.
157. 374 U.S. 203 (1963).
158. *Id.* at 216.
159. 403 U.S. 602 (1971).

the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn."[160] The Court draws a fairly clear link between entanglement/establishment and its relationship to individual choice or liberty. In *Engel v. Vitale*, the Court once again recognized the interplay between the Establishment Clause and the protection of individual liberty. The Court stated that "one of the greatest dangers to the freedom of the individual in his own way [lies] in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services."[161]

Again, in *Aguilar v. Felton*, the Court highlighted the link between the Establishment Clause and the protection of individual liberty:[162]

> The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[163]

Notice that the two concerns that the Court gave as motivating the Establishment Clause are that the adherents of the religion with whom the government is dealing will be intruded upon, and that the non-adherents also suffer because the government is supporting another religion. It is worth noting that in his dissent, Chief Justice Burger also seems to recognize the connection between the Establishment Clause and the protection of individual liberty. His very objection to the majority opinion is that he does not believe that they have shown how the program's entanglement with the government infringes on liberty.[164] If they had, Chief Justice Burger implies he would have decided differently.

Further evidence of how the Establishment Clause has been viewed as an individual rights provision is that it has been applied to the states under the Equal Protection Clause of the Fourteenth

160. *Id.* at 625.

161. 370 U.S. 421, 429 (1962).

162. 473 U.S. 402 (1985). *But see* Agostini v. Felton, 521 U.S. 203 (1997) (overturning *Aguilar*'s holding but not changing or substantially commenting on the issue of whether the Establishment Clause is a protection of individual liberty).

163. *Aguilar*, 473 U.S. at 409–10 (quoting Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948)).

164. *Id.* at 419–20 (Burger, C.J., dissenting).

Amendment—meaning that individual liberty is protected against state establishment of religion.[165]

And even in the Court's most recent cases, written by some of the more conservative justices, the Court has been very concerned about indoctrination. In *Good News Club v. Milford Central School*[166] and *Mitchell v. Helms*,[167] both decided in the last nine years, the Court said rather clearly that the Establishment Clause is designed to prevent the government from unduly influencing and imposing religion on individuals and that these individuals have the liberty to practice how they wish, express that practice, and be free of government intrusion or coercion.[168]

Several commentators have criticized an approach which treats the Establishment Clause as a protection of individual liberty. Jessica Hayden has blamed the Court's treatment of the clause as a protection of liberty for the confusion that has surrounded how the Establishment Clause should be applied.[169] She believes that it has created an "analytical dilemma" which serves as the main impetus for the recent movement away from the *Lemon* test.[170] Professor Carl Esbeck has also criticized the Court's "reluctance to openly acknowledge that it views the Establishment Clause as [a] structural [restraint]" for causing Establishment Clause doctrine to "appear muddled."[171] However, scholars like Hayden and Esbeck are probably less realistic than the decisions may warrant. Certainly there has been much divergence in Establishment Clause jurisprudence. But the confusion and criticism has less to do with a view of the Clause as a protection of individual rights and more to do with an ideological shift in the Court's composition. As the appointees have become more ideologically conservative, their decisions, such as *Agostini* and *Van Orden*, have tended to be more tolerant of government involvement with, and support of, Judeo-Christian religious activity. And one would expect this trend to continue under the Roberts Court.

Indeed, as even Hayden notes, the Rehnquist Court to a large extent embraced the individual rights conception of the Establishment Clause adhered to by the Warren and Burger Courts, but is nevertheless responsible for the recent changes in Establishment Clause tests

165. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); *see also,* Hayden, *supra* note 127, at 189–90.
166. 533 U.S. 98, 114 (2001).
167. 530 U.S. 793, 809 (2000).
168. *See supra*, section III.C.
169. Jessica Powley Hayden, Note, *The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 GEO. L.J. 237, 267–68 (2007); Hayden, *supra* note 127, at 190–92.
170. Hayden, *supra* note 127, at 191.
171. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 11 (1998).

and jurisprudence.[172] The reason for the shift in jurisprudence seems to have more correlation with the shift in ideology than it does in a shift in whether the Establishment Clause is viewed as a protection of liberty. Moreover, far from clarifying Establishment Clause jurisprudence, a shift to an approach that viewed the Establishment Clause only as a structural restraint would muddle the waters even more by throwing into question the rationale and underpinnings of the last 70 years of Establishment Clause jurisprudence. Rather, the way to provide clarity and consistency to this jurisprudence is to recognize its dual foundations and motivations—that is, recognize that it works as a protection of individual liberty and a restraint on government. By recognizing these dual objectives, which find support in history, logic, and case law, courts will be able to more accurately judge whether an Establishment Clause violation is occurring by evaluating whether the government is either infringing on liberty and/or acting outside of its permissible bounds. Given the correlation between the two, most violations will probably implicate both. This is to say, when the government is establishing a religion, it will most likely also be infringing on individual liberty. That said, *requiring* violations of both should not be and is not a requisite for finding a violation of the Establishment Clause. But rather, by recognizing the interplay between the two a more cohesive and comprehensive analytical framework will help guide courts' decision making in the future and be more true to the Court's jurisprudential history where it recognized the dual role of the Establishment Clause in seminal cases such as *Everson*.

B. The Establishment Clause is also a Structural Restraint on Government

In addition to operating as a protection of individual liberty, the Establishment Clause also operates and has been viewed by commentators and the courts as a structural restraint on Government. As discussed at the outset of the previous subsection, the Court recognized the dual role of the Establishment Clause as both a protection of individual liberty and a restraint on government action in cases such as *Everson*.[173] Many of the commentators who argue for structural restraint approach see it as competing with the individual liberty approach. This Article contends that far from having two competing aspects, the Establishment Clause makes the most logical and legal sense when viewed as both a restriction on government action *and* a protection of individuals from that action. Indeed, as Professor Akhil Reed Amar and Jessica Hayden emphasize, a holistic evaluation of the Bill of Rights "reveals structural ideas tightly interconnected with lan-

172. Hayden, *supra* note 127, at 190–91.
173. *See supra*, section IV.A.

guage of rights."[174] Read through this holistic and structural gloss, it becomes more evident that the Establishment Clause was intended to serve as a restraint and a protection of individual liberty.

In addition to *Everson*, several other cases recognize the importance of the Establishment Clause as a restraint on government. In *Lee v. Weisman*, the Court said, "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[175] The Court clearly indicated that one of the prime characteristics of the Establishment Clause is that it prevents the government from coercing individuals regarding religion. Most recently, in *Pleasant Grove City v. Summum*, the Supreme Court held that a city's decision regarding what kind of monuments would be placed in parks is government speech, as opposed to private speech, and is therefore not governed by the Free Speech Clause of the First Amendment.[176] In so deciding, the Court noted, "This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause."[177] This language by Justice Alito clearly indicates that the Establishment Clause is a restraint on government—indeed, it is the example chosen by the Court to illustrate that restraints exist. Moreover, Justice Potter Stewart, dissenting in *School District of Abington v. Schempp*, strongly argued that the Establishment Clause operated as a restraint on the newly created national government and that it was designed to prevent the creation of a national church and prevent interference with the states' existing religious orientations.[178] Justice Thomas carries Justice Stewart's federalist torch today, and in his concurrence in *Elk Grove Unified School District v. Newdow*, argued that it was a federalist provision and a restraint on national government action.[179]

Without question, Stewart did not and Thomas does not view the clause as operating as both a restraint on government and a protection of individual liberty. But the majority decision in *Schempp* does not deny that the Establishment Clause was a restraint on national government or that it may have had a federalist aspect to it. Rather the majority also recognized the individual rights aspect of the clause. Indeed, in *Schempp* the majority discussed restraining or limiting the government's ability to become proximate with religious activity.[180]

174. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991); Hayden, *supra* note 127, at 194.
175. 505 U.S. 577, 587 (1992).
176. 129 S. Ct. 1125 (2009).
177. *Id.* at 1131–32.
178. 374 U.S. 203, 309–10 (1963) (Stewart, J., dissenting). *See* Hayden, *supra* note 127, at 195.
179. 542 U.S. 1, 45 (2004) (Thomas, J., concurring).
180. 374 U.S. at 263.

This is particularly evident when the Court distinguished between its decisions in *Illinois ex rel. McCollum v Board of Education*[181] and *Zorach v. Clauson*.[182] Both cases involved a certain amount of government involvement with sectarian schools. But the *Schempp* Court reiterated that the program involved in *McCollum* was unconstitutional because it lent "to the support of sectarian instruction all the authority of the governmentally operated public school system" by placing the religious instructor in the public school classroom.[183] The language of the Court and the distinction the majority draws emphasizes that the problem with the *McCollum* program was that the state was exceeding its structural restraints by giving its authority and prestige to a certain religious agenda.[184]

In *Elk Grove*, the majority did not reach a decision on the merits but instead dismissed the case for lack of prudential standing.[185] But Justice O'Connor's concurrence on the merits recognized not only the individual protection aspect of the Establishment Clause, but also its structural elements. O'Connor reviewed the issue of whether the pledge of allegiance is a violation of the Establishment Clause through what she calls the endorsement test. Justice O'Connor argued that the endorsement test "captures the essential command of the Establishment Clause, namely, that the government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'"[186] She was concerned about an individual's liberty and place in the community. But that concern was routed through and safeguarded by focusing on the government's limitations—what the government "must not" do. This view of the Establishment Clause as a restraint is slightly different than Justice Thomas' more federalism-focused view of the Establishment Clause as a restraint. But though they may differ in their beliefs regarding how the Establishment Clause restrains government with respect to its extraterritorial effect, it is enough to show that there is solid judicial support for viewing the clause as a restraint.

Evidence that the Establishment Clause operates as a structural restraint can also be gleaned from some of the unique rules the Court has created for the Establishment Clause in comparison to its more straight-forward individual rights clause cousins. Normally, when seeking redress for a violation of an individual right, a plaintiff must

181. 333 U.S. 203 (1948).
182. 343 U.S. 306 (1952).
183. 374 U.S. at 263.
184. *Id.*
185. Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).
186. *Id.* at 34 (O'Conner, J., concurring).

show a personal harm in order to have standing.[187] Not so with Establishment Clause cases, which can be brought on a taxpayer basis—the idea being that all citizens and taxpayers are harmed when the government exceeds its restraints and uses the people's money for unauthorized activity such as funding parochial schools.[188] Additionally, when the courts hand down awards for violations of individual rights, the award is usually designed to redress harm to the particular plaintiff.[189] But in Establishment Clause cases the remedies are often class-wide and come in the form of injunctions on certain state actions. As Hayden explains, "Remedies such as injunctions are typical of cases in which the government has exceeded its power, not when it has harmed an individual right."[190] Examples are plentiful but include where the Court recommended that the district court enjoin the states from making grants to the parochial schools for teacher salaries,[191] where the Court enjoined school prayer at high school graduations,[192] where the Court enjoined prayer before high school football games,[193] and where the Court enjoined the states from having mandatory Bible reading before each school day.[194]

V. THE ESTABLISHMENT CLAUSE APPLIES EXTRATERRITORIALLY

Now that the historical, legal, and logical arguments for why the Establishment Clause should be viewed as both a structural restraint on government power and a protection of individual liberty, rather than one or another, have been articulated, it is necessary to demonstrate why under either theory, the Establishment Clause, in the context of detainee re-indoctrination programs, applies abroad. Even if one is not convinced that the Establishment Clause is both a structural restraint and a protection of individual liberty, the Establishment Clause still applies to and regulates the programs in question.

187. *See generally* Allen v. Wright, 468 U.S. 737 (1984) (outlining the standing requirement of "injury in fact").

188. *See* PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 381 (5th ed. 2004) (explaining the role of taxpayer or citizen standing).

189. Hayden, *supra* note 127, at 196.

190. *Id.*

191. Lemon v. Kurtzman, 403 U.S. 602, 661 (1971).

192. Lee v. Weisman, 505 U.S. 577, 599 (1992).

193. Santa Fe Independent School District v. Doe, 530 U.S. 290, 317 (2000).

194. School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 223 (1963).

A. As a Structural Restraint, the Establishment Clause Applies Abroad

If the Establishment Clause is viewed as a structural restraint on government, then it applies extraterritorially. Jessica Hayden describes the role of structural restraints succinctly: "Structural restraints limit how the government can act, regardless of place or time . . . the purpose of a structural clause is to manage government power."[195] However, although that general statement regarding structural restraints may be true, the specific question of whether the Establishment Clause as a structural restraint applies regardless of time or place has not been specifically answered by the Supreme Court.

There is some lower court judicial precedent supporting the idea that the Establishment Clause as structural restraint applies abroad. In *Lamont v. Woods*, the Second Circuit ruled that the Establishment Clause did apply to a USAID program that provided public funds for the construction, maintenance and operations of Jewish and Catholic schools in foreign countries.[196] In so doing, the Second Circuit used the steps outlined by the Supreme Court in *United States v. Verdugo-Urquidez*, a case which dealt with the extraterritorial application of the Fourth Amendment.[197] There, the Supreme Court emphasized that when determining whether constitutional provisions apply to extraterritorial government action, three factors should be considered.[198] These three factors were distilled by the *Lamont* decision and include: "(1) the operation and text of the constitutional provision; (2) history; and (3) the likely consequences if the provision is construed to restrict the government's extraterritorial activities [i.e. the practical consequences]."[199]

In *Lamont*, the Second Circuit noted that the Establishment Clause "imposes a restriction on Congress," and as a consequence is different from provisions which solely give rights to the people.[200] This distinction was important to the Second Circuit's ultimate conclusion that the Establishment Clause applies abroad because the *Vergudo* Court relied on the fact that the Fourth Amendment was a protection of individual liberty to limit its extraterritorial application to citizens and resident aliens.[201]

The Second Circuit also granted plaintiffs taxpayer standing, indicating that everyone has a stake in the outcome because it is an issue

195. Hayden, *supra* note 127, at 189.
196. 948 F.2d 825 (2d Cir. 1991). *See* Hayden, *supra* note 127, at 198–99.
197. 494 U.S. 259 (1990).
198. *Id.* at 274.
199. 948 F.2d at 834.
200. *Id.* at 835.
201. 494 U.S. at 266.

of structural restraint.[202] This fact played heavily into the court's decision. It stated that "where the expenditure of federal tax money is concerned, there can be no distinction between foreign religious institutions and domestic institutions."[203] Relying on history to buttress its operational arguments, the Second Circuit highlighted that while drafting the First Amendment, the Framer's were acutely concerned about the use of taxpayer money to advance a particular religion.[204]

The Second Circuit also looked to Supreme Court precedent suggesting that provisions of the Constitution acting as structural restraints have extraterritorial affect.[205] In *Downes v. Bidwell*, the Supreme Court ruled that the Uniform Duties Clause of the Constitution did not have application outside of the United States, but indicated that there was a "clear distinction between those prohibitions that go to the very root of the power of Congress to act at all, irrespective of time or place, and those that as are operative only 'throughout the United States' or among the several states."[206] The Supreme Court in *Downes* even intimated that the Establishment Clause was one of the provisions of the Constitution that knew no territorial bounds:

> When the Constitution declares "no bill of attainder or *ex post facto* law shall be passed," and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill of that description. Perhaps, the same remark may apply to the First Amendment, that "Congress shall make no law respecting an establishment of religion . . . ."[207]

This is powerful language from the Supreme Court and is probably the best indication from them that we have regarding the applicability of the Establishment Clause overseas. As a result of *Downes* and the operational and historical arguments outlined above, the Second Circuit determined that the Establishment Clause did apply extraterritorially and limited the government's ability to fund these religious schools.

The Supreme Court case of *Reid v. Covert* dealt with a situation where individual rights provisions of the Constitution (the Fifth and Sixth Amendments) were being applied extraterritorially.[208] But the plurality decision by Justice Black seemed to indicate an approach whereby every provision of the Constitution was applicable and germane to government action abroad.[209] As Hayden characterized the decision, Justice Black "focused not on who was being harmed, but on

202. *Lamont*, 948 F.2d at 837.
203. *Id.*
204. *Id.*
205. *Id.* at 835.
206. 182 U.S. 244, 277 (1901).
207. *Id.*
208. 354 U.S. 1 (1957).
209. *Id.* at 5–6.

the actor—the government."[210] Indeed, Black said that the United States government was a "creature of the Constitution" and that the government—even when acting abroad—can act only "in accordance with all the limitations imposed by the Constitution."[211] No doubt it would seem perverse if a national government would have more authority over its own citizens or anyone else outside of its country than it would inside of its country. And so it is fitting that as a restraint on government, the Establishment Clause limits government abroad just as it would at home.

B. As a Protection of Individual Liberty, the Establishment Clause Applies Abroad

If the Establishment Clause is viewed as only a protection of individual liberty, then its extraterritorial application is not as broad or as general as it would be if it is viewed as a structural restraint on government. As the Supreme Court ruled in *Vergudo*, constitutional protections for individual rights protect American citizens irrespective of their physical location and protect aliens so long as they are within the territory of the United States.[212] This analysis has been followed more recently in *Reid v. Covert*.[213] Again, *Reid* focused on whether the Fifth and Sixth Amendments should be extended to a U.S. citizen abroad. Specifically, the case centered around whether a civilian who had allegedly killed her husband on a U.S. air base in England was entitled to a jury trial as opposed to a court martial.[214] The Supreme Court determined that she was entitled to a civilian jury trial and that her constitutional protections extended beyond the borders of the United States.[215] At the outset of the plurality opinion, Justice Black stated that "we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."[216]

Of course, this does not mean that individual rights provisions of the Constitution would apply abroad if a *non-citizen* were involved. Certainly in the context of detention centers in Iraq, the detainees are non-citizens. However, recently the courts have shown a willingness to deem overseas detention centers controlled by the United States as within the territory of the U.S. for purposes of extending individual rights protections to alien detainees. In his concurrence in *Rasul v. Bush*, Justice Kennedy indicated that federal courts could exercise jurisdiction over the detainees in Guantanamo and, hence, that they

210. Hayden, *supra* note 127, at 186.
211. *Reid*, 354 U.S. at 5–6.
212. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).
213. 354 U.S. 1 (1957).
214. *Id.* at 3.
215. *Id.* at 18–19.
216. *Id.* at 5–6.

could file habeas petitions, because of the "unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it."[217]

In *In re Guantanamo Detainee Cases*, the D.C. District Court ruled that because Guantanamo Bay is controlled entirely by the U.S. Marines and the U.S. exercises exclusive jurisdiction over the base through a treaty with Cuba, the Constitution extended protections to the enemy combatants held there.[218] In *Boumediene v. United States*, decided in June of 2008, the Supreme Court affirmed this analysis and held that constitutional habeas corpus extended to non-citizens held at Guantanamo Bay.[219] The Court did so, in part, because while *de jure* sovereignty may lie with the Cuban government, *de facto* sovereignty of the base lies solely with the U.S. government. The Court concluded that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[220] As a result, the fact that the U.S. maintained effective control over Guantanamo was more important to the question of whether the Constitution applied there than the fact that the land was leased from Cuba. In other words, "[o]ur basic charter cannot be contracted away like this," so the Constitution's protections extended to the detainees at Guantanamo.[221]

Whether the *Guantanamo Detainee Cases* and *Boumediene* decisions should be characterized as applying the Constitution extraterritorially to non-citizens in detention centers or as merely an extension of what constitutes "within the United States" is somewhat of a semantic difference. The bottom line is the same regardless of the characterization: individual liberty protections seem to apply to detainees in U.S. controlled foreign detention facilities. Many would argue that there is a difference between Guantanamo Bay and detention centers in fields of combat. But the situation in Iraq is not a typical field of combat situation. Indeed, the United States is for all intensive purposes still an occupier and governed by the Hague Convention on Occupation—at least to some degree.[222] Both the Supreme Court and

217. 542 U.S. 466, 487 (2004).
218. 355 F. Supp. 2d 443, 464 (D.D.C. 2005).
219. 128 S. Ct. 2229 (2008).
220. *Id.* at 2258.
221. *Id.* at 2259.
222. "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends . . . where such authority has been established and can be exercised." Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, *adopted* Oct. 18, 1907, *available at* http://www.unhcr.org/refworld/docid/4374cae64.html. The United States authority and control in Iraq, even now that a government has been established, still seems to meet this definition.

the D.C. District Court based their decisions to extend habeas rights to the detainees, in part, on the permanent nature of Guantanamo Bay and its longevity as a U.S. naval base. Using that criterion, the detention centers in Baghdad seem very similar. Granted, the U.S. military is slowly handing over control of the detention centers to the Iraqi government and releasing detainees. But as made evident by the military's pronouncements, these are no temporary combat prisons; in fact, the U.S. recently invested $250 million into the construction of three new detention centers.[223] There is no question that the U.S. presence in Iraq has been and will continue to be long and far reaching. As one-time Presidential hopeful Senator John McCain opined, the United States could be there as long as 100 years.[224] Moreover, Guantanamo is really little more than a navy base. In Iraq, the U.S. government has several bases, not to mention being heavily involved in the reconstruction and provisional governance of the country. This is to say, although the U.S. may not be sovereign in Iraq, it does exercise tremendous control there. While Iraq as a whole could probably not be considered a U.S. territory, certainly the U.S. installations that are fairly permanent would seem to be. Surely the detention centers, which have been in operation for a full six years since the end of combat operations, are reasonably permanent in nature, and thus could be considered to be U.S. controlled territory. As such, the detainees there have a right to the same constitutional protections as the detainees in Guantanamo. The similarity between the two situations is enhanced when one considers that the detainees in both places receive the same classification—as enemy combatants—and are not being treated as criminals or prisoners of war.[225] Indeed, in the D.C. District Court decision *In re Guantanamo Detainees*, another one of the factors that led the court to protect the detainees was that they were classified as enemy combatants and had never been charged with a crime—just like many of the detainees in Iraq. Moreover, it would make little sense to give an Iraqi who was transported to Guantanamo different rights than an Iraqi held by the U.S. in Iraq. The Supreme Court has recently warned the U.S. government not to attempt to restrict individual rights and access to the courts by moving prisoners from one location to another within the United States.[226] The same rational would apply to the situation of moving detainees to Guantanamo or Iraq in order to limit or expand their rights.

223. *See* Robertson, *supra* note 15.

224. *McCain Defends "100 Years in Iraq" Statement*, CNN, Feb. 15, 2008, http://www.cnn.com/2008/POLITICS/02/14/mccain.king/ (last visited April 30, 2008).

225. Mark Kukis, *Are Iraq's Detainees Treated Fairly?*, TIME, Nov. 12, 2007, http://www.time.com/time/world/article/0,8599,1682972,00.html

226. Padilla v. Hanft, 547 U.S. 1062 (2006).

Moreover, as the *In re Guantanamo Detainees* decision makes clear, especially when providing detainees rights represents no significant hardship to the government, then there is reason to apply the Constitution to the detainees even if they are in a location of ambiguous denomination.[227] The Court in *Boumediene* also emphasized practical considerations as a factor in deciding on whether a right extends extraterritorially.[228] Here, providing detainees with the right to be free from religious indoctrination would not provide significant hardship on the U.S. government. There are other, arguably more effective, means by which to achieve their objective.

The proposition that detainees in U.S. detention centers abroad have access to the Constitution was similarly affirmed in *Hamdan v. Rumsfeld*.[229] Though not as explicit or far-reaching as *Boumediene*, the *Hamdan* Court implicitly recognized the right of detainees to access the Constitution by granting the petitioner's writ of habeas corpus.[230] That the detainees could access rights contained under American domestic law was also evident by the Court's determination that the President's use of military commissions to try Guantanamo detainees was a violation of the Uniform Code of Military Justice and that the Executive Branch lacked the Constitutional authority to set up military commissions to try captives taken in the "war on terror," as this authority lay with Congress.[231] As the petitioners in *Boumediene v. Bush* contended, "[i]mplicit in [the *Hamdan* decision] was the principle that a Guantanamo detainee can invoke constitutional restraints—in that case separation of powers—to contest government action."[232] And though *Hamdan* buttresses detainees' claims to protection based on the Constitution as a restraint, implicit in any case dealing with separation of powers and access to process is the protection of individual rights and an individual's ability to, in the case of due process, have his or her cause heard, and in the case of separation of powers, prevent tyranny of one branch over another and over the people. The *Boumediene* decision supports this analysis and elucidates how structural restraints and protections of liberty go hand in hand, declaring "that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power."[233]

Additional legal support for the extraterritorial application of the Establishment Clause based on its protection of individual liberties

227. 355 F. Supp. 2d 443, 463 (D.D.C. 2005).
228. *See generally* Boumediene v. Bush, 128 S. Ct. 2229 (2008).
229. 548 U.S. 557 (2006).
230. *Id.* at 567.
231. *Id.*
232. Petition for Writ of Certiorari at 23–25, Boumediene v. Bush, 127 S. Ct. 3078 (2007).
233. 128 S. Ct. at 2246.

comes from *Lamont v. Woods*.[234] As discussed above, to a large extent the Second Circuit focused on the Establishment Clause's structural restraints as a justification for its overseas application.[235] But the decision also indicated that the clause's protection of liberty was an additional justification for its extraterritorial application.[236] The Second Circuit quoted the Supreme Court's decision in *Flast v. Cohen* where the Supreme Court recounted that:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. . . . The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers [in this manner].[237]

The emphasis of the Supreme Court here, the Second Circuit in *Lamont*, and the Framer's in drafting the Establishment Clause was on how the government's establishment of a religion may affect individual religious liberty. Professor Jesse Choper echoes this reading of the Framer's motivation for the Establishment Clause. He instructs, "The practice perceived by the Framers as perhaps the most serious infringement of religious liberty sought to be corrected by the Establishment Clause was forcing the people to support religion by the use of compulsory taxes for purely sectarian purposes."[238]

The Second Circuit in *Lamont* also justified its application of the Establishment Clause to the UNAIDS program because of the taxpayer's interest in not having their money used to advance religions that would benefit within the United States from the support that they received outside of the U.S.[239] And though its debatable whether Islam's spread in the U.S. would be benefited by the U.S. detention center program which preaches a moderate version of Islam, Americans ostensibly have the same interest in not seeing the global Muslim religion expanded by the state as they do in not having the Catholic and Jewish faiths expanded by the state.

As a result, detainees in foreign detention centers are entitled to some constitutional liberty protections and insofar as the detention centers in Iraq resemble Guantanamo Bay, the Establishment Clause as a protection of liberty should extend to them. But if it is determined that the Establishment Clause is not interpreted as a protection of liberty or that even if it is, it should not extend to detainees in Iraq, the Establishment Clause is a structural restraint on govern-

234. 948 F.2d 825 (1991).
235. *See supra*, section IV.A.
236. *Lamont*, 948 F.2d at 837.
237. 397 U.S. 83, 103–04 (1968).
238. Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 677 (1980).
239. 948 F.2d at 837.

ment and restrains the U.S. government regardless of where it is acting. And so, in either case, the Establishment Clause would cover and apply to the detention centers in Iraq. As a consequence, the Muslim re-indoctrination program should be ruled unconstitutional because, as demonstrated in Part III, it violates the Establishment Clause.

VI. EVEN WITH A FOREIGN POLICY MODIFICATION TO THE DOMESTIC ESTABLISHMENT CLAUSE TEST, MUSLIM RE-INDOCTRINATION VIOLATES THE EXTRATERRITORIALLY-APPLIED ESTABLISHMENT CLAUSE

Once it is determined that the Establishment Clause applies to the detention centers and detainees and that the program would violate the domestic Establishment Clause jurisprudence, one possible issue that must be considered is whether a Court would or should modify the test for a situation implicating national security.

In *Lamont v. Woods*, the Second Circuit implied one such modification and considered the potential foreign political ramifications of ruling the aid program unconstitutional.[240] However, the court discussed at length the ability and, indeed, the responsibility of courts to judiciously monitor the political branches for compliance with the Constitution and to not relinquish that duty at the first sign of foreign political fervor.[241] The court stated:

> While it is true that the conduct of foreign relations is constitutionally committed to the political branches, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." The power of the President and Congress to conduct foreign relations does not give them *carte blanche* to transgress well-established constitutional boundaries, and the Judiciary "cannot shirk [its constitutional] responsibilities merely because [a] decision may have significant political overtones."[242]

The importance of judicial commitment to upholding the Constitution in the face of potential political or international fallout was also articulated by Justice Black in *Reid v. Covert*. He stated, "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine our basis of our government."[243] And so, if a balancing test is employed that, once a violation of the Establishment Clause is demonstrated, the government can be excused if it demonstrates something less than strict scrutiny, the courts must not and

240. *Id.* at 840.
241. *Id.* at 831–32.
242. *Id.* (citations omitted).
243. Reid v. Covert, 354 U.S. 1, 14 (1957).

cannot rollover at the first sign of consequences for the political branches.

Indeed, as the court suggests in *Lamont*, courts should also be careful to distinguish questions of policy from questions of implementation.[244] So, if the government policy is aimed towards de-radicalizing detainees, that is a policy which is outside of the Court's purview. But the courts can apply constitutional standards and limits to the implementation of that policy. No doubt, the examination into whether the law or program is narrowly tailored will involve just that type of scrutiny.

With respect to the Muslim re-indoctrination program, it is likely that the government can formulate some sort of government interest in de-radicalizing the detainee population. But courts should be exacting when evaluating whether a policy is narrowly tailored and whether its implementation is constitutional. In this case, the law is not narrowly tailored to the objective. Indeed, as the RAND Corporation suggests and as some of the military's other education efforts evince,[245] there are other, arguably much more effective, ways of achieving that compelling government interest or balancing test that do not violate the Establishment Clause. Thus, even if a compelling interest or balancing test "out" is formulated for extraterritorial Establishment Clause cases, the Muslim re-education programs currently being operated in Iraq would still fall short of constitutional muster.

VII. CONCLUSION

The Muslim re-indoctrination programs used in detention centers in Iraq violate the current domestic tests regulating government establishment of religion. The Establishment Clause applies extraterritorially to these detention centers and the detainees in them because it operates as both a structural restraint and a protection of liberty. Structural restraints are in effect regardless of where the U.S. government acts. Protections of individual liberty protect non-citizens when they are in the states or in areas which are sufficiently controlled by the U.S. to be deemed U.S. territory. Even if an altered version of the Establishment Clause test is adopted that allows for government violation of the clause in the case of a compelling interest, here, the programs would fail that test because they are not narrowly tailored. As a result, these programs should be declared unconstitutional, revamped, and the House of Wisdom should be shown for what it really is—a House of Cards.

244. 948 F.2d at 833.

245. *See supra*, Part II.