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## A Clarification of the Constitution's Application Abroad: Making the "Impracticable and Anomalous" Standard More Practicable and Less Anomalous

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**A CLARIFICATION OF THE CONSTITUTION’S  
APPLICATION ABROAD: MAKING THE  
“IMPRACTICABLE AND ANOMALOUS” STANDARD  
MORE PRACTICABLE AND LESS ANOMALOUS**

Jesse Merriam\*

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### INTRODUCTION

Two controversial and pressing issues in U.S. constitutional law are the extent to which courts should consult foreign constitutions and the extent to which courts should interpret the U.S. Constitution to apply to U.S. conduct abroad. Indeed, the first issue divided the U.S. Supreme Court in *Lawrence v. Texas*<sup>1</sup> and *Roper v. Simmons*,<sup>2</sup> prompting various senators to question Court nominees on this subject in the confirmation hearings<sup>3</sup> and generating various resolutions and bills forbidding courts to consult foreign law in interpreting the U.S. Constitution.<sup>4</sup> And the second issue has recently received significant scholarly,<sup>5</sup> media,<sup>6</sup> and

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<sup>1</sup> 539 U.S. 558 (2003).

<sup>2</sup> 543 U.S. 551 (2005).

<sup>3</sup> See, e.g., *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 348–50 (2009) [hereinafter *Confirmation Hearing of Hon. Sotomayor*].

<sup>4</sup> See, e.g., American Justice for American Citizens Act, H.R. 4118, 108th Cong. (2004); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004); Constitutional Preservation Resolution, H.R. Res. 446, 108th Cong. (2003).

<sup>5</sup> See, e.g., KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259 (2009).

<sup>6</sup> For example, there was significant media commentary on the transnational applicability of the Establishment Clause following the United States Agency for International Development (USAID) Inspector General’s Office July 17, 2009, audit questioning whether some of USAID’s programs violate the Establishment Clause. See, e.g., Colum Lynch, *In Fighting Radical Islam, Tricky Course for U.S. Aid*, WASH. POST, July 30, 2009, at A12; Colum Lynch, *Programs’ Religious Ties Raise Concerns*, WASH. POST, July 23, 2009, at A8. In particular, the audit report questions the constitutionality of USAID’s funding of the repair of Iraqi mosques and funding of an African sex education program infused with religious messages. Jesse Merriam, *Establishment Clause-Trophobia: Building a Framework for Escaping the Confines of Domestic Church-State Jurisprudence*, 41 COLUM. HUM. RTS. L. REV.

policy<sup>7</sup> attention, largely due to its significant implications for the War on Terror and its relevance to the Guantanamo Bay decisions.<sup>8</sup> This Article engages both of these issues by using comparative constitutionalism to inform the Constitution's transnational applicability.<sup>9</sup>

This Article thus extends a previous piece in which I explored the transnational applicability of the Establishment Clause,<sup>10</sup> and in so doing, derived from the Supreme Court's precedents the following framework for the transnational applicability of *all provisions*<sup>11</sup> of the Constitution: If a constitutional claim arises in a land over

701 (2010); *see also* OFFICE OF INSPECTOR GEN., AUDIT OF USAID'S FAITH-BASED AND COMMUNITY INITIATIVES (2009), available at <http://oig.usaid.gov/sites/default/files/audit-reports/9-000-09-009-p.pdf>.

<sup>7</sup> In 2010, the Chicago Council on Global Affairs released a report which covered various issues relating to U.S. foreign policy and religion, including how the Establishment Clause applies abroad. Task Force on Religion and the Making of U.S. Foreign Policy, The Chicago Council on Global Affairs, *Engaging Religious Communities Abroad: A New Imperative for U.S. Foreign Policy*, [http://www.thechicagocouncil.org/UserFiles/File/Task Force Reports /2010 Religion Task Force\\_Full Report.pdf](http://www.thechicagocouncil.org/UserFiles/File/Task%20Force%20Reports/2010%20Religion%20Task%20Force_Full%20Report.pdf). In 2007, the Center for Strategic and International Studies ("CSIS") published a similar report. Liora Danan, *Mixed Blessings: U.S. Government Engagement with Religion in Conflict-Prone Settings*, CENTER FOR STRATEGIC AND INT. STUD. (August 20, 2007), <http://csis.org/publication/mixed-blessings>. Since publishing the report, CSIS has held several meetings that have brought together government officials and legal scholars with the goal of clarifying the First Amendment's application abroad. *See, e.g., PCR Event: Religion and Foreign Policy Series: July 25*, CENTER FOR STRATEGIC AND INT. STUD., <http://CSIS.org/blog/pcr-event-religion-and-foreign-policy-series-july-25> (last visited Oct. 14, 2012).

<sup>8</sup> *See, e.g.,* *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004). Of these cases, only *Boumediene* squarely addressed the Constitution's transnational applicability, and this decision was unclear on what standard it employed to determine how the Suspension Clause applies to Guantanamo Bay, a land controlled by and under the exclusive jurisdiction of the United States, but leased and not legally owned by it. *Boumediene*, 128 S. Ct. 2229.

<sup>9</sup> *See infra* Part II.B.3.b.

<sup>10</sup> Merriam, *supra* note 6, at 699.

<sup>11</sup> I emphasize "all provisions" because some commentators, wrongly in my opinion, have urged for courts to apply a different framework for structural guarantees than for individual-rights guarantees, with structural guarantees applying almost wherever and whenever the United States acts, and individual rights applying in a much narrower set of circumstances. *See, e.g.,* Jessica Powley Hayden, Note, *Mullahs on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 GEO. L.J. 171 (2006); Jessica Powley Hayden, Note, *The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 GEO. L.J. 237, 248 (2007); Robert Knowles & Marc D. Falkoff, *Toward a Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 646-48 (2007). I believe that banking the analysis on this structural-individual rights distinction is flawed for several reasons—one being that there is often not a tight conceptual distinction between structural and individual rights, and another that there is little to no basis in Supreme Court doctrine for basing the extraterritorial applicability of a right on the basis of such a distinction. For further discussion of this issue, *see* Merriam, *supra* note 6, at 723-25.

which the United States exercises absolute control or exclusive jurisdiction, and if the court deems that the claim involves a “fundamental meaning”<sup>12</sup> of the Constitution, then the court should apply the same standard abroad as would apply if the claim had arisen domestically.<sup>13</sup> And if neither of these conditions is satisfied, then the court should not enforce the Constitution at all.<sup>14</sup> But the court should apply an intermediate standard if only one of these conditions is met; under this intermediate standard, the court should apply the Constitution abroad just as it would apply domestically unless doing so would be “impracticable and anomalous.”<sup>15</sup> Although this framework by no means *necessarily* follows from all of the Court’s decisions on the Constitution’s applicability abroad, I believe it is the *best* characterization of those decisions, as both a descriptive and normative matter.

A significant weakness in this framework, however, is the ambiguity of the “impracticable and anomalous” standard. Indeed, the syntactic structure of the “impracticable and anomalous” standard is still unclear, as the Court has not clarified whether it is a disjunctive or conjunctive standard, and there is also confusion about the standard’s semantic content, since the Court has provided little insight into what these words mean in this context.<sup>16</sup> With so many ambiguities, the doctrine itself is impracticable because judges cannot apply it objectively and predictably, and it is also anomalous in the Court’s constitutional jurisprudence, because although many judicial doctrines contain some ambiguity, it is difficult to think of one whose semantic content and syntactic structure are this amorphous.

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<sup>12</sup> By a “fundamental meaning,” I refer to how, as explained in detail in my previous article on the subject, the Court has treated the question of fundamentality in this context differently from how it has treated that question in incorporating rights to apply to the states through the Fourteenth Amendment. See Merriam, *supra* note 6, at 745–46. Whereas in incorporating rights the Court has generally inquired whether an *entire* constitutional provision should apply to the states, in the extraterritorial context, what I have called “excorporation,” as it is the inverse of incorporation, the Court has more narrowly inquired “whether a *particular meaning* of a constitutional provision should apply” abroad. *Id.* at 745. Compare *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that “the Fourteenth Amendment guarantees a right of jury trial *in all criminal cases* which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee” (emphasis added)), with *Reid v. Covert*, 354 U.S. 1, 74–78 (1957) (holding that the Sixth Amendment right to a jury trial in criminal prosecutions always applies *only in capital cases*, because only in these instances is the meaning of the right fundamental for purposes of applying it abroad) (Harlan, J., concurring). Incidentally, in my previous article, I miscited the *Reid* incorporation analogue as *Klopfert v. North Carolina*, 386 U.S. 213 (1967), which incorporated only the right to a speedy trial, not the right to a trial by an impartial jury. See Merriam, *supra* note 6, at 745. That right was not incorporated until the next year in *Duncan*. *Duncan*, 391 U.S. 145.

<sup>13</sup> Merriam, *supra* note 6, at 742.

<sup>14</sup> *Id.* at 742–43.

<sup>15</sup> *Id.* at 743.

<sup>16</sup> *Reid*, 354 U.S. at 74–75 (using the words “impractical” and “impracticable” interchangeably in applying the standard).

Although there has been little scholarly inquiry into how to apply the standard, the issue is heating up, as are the policy consequences and implications.<sup>17</sup> Professors Gerald Neuman and Christina Duffy Burnett, two leading lights on the Constitution's transnational applicability, have both recently written significant articles on how they believe courts should and do apply the standard,<sup>18</sup> though both agree that "a full elaboration and defense of [the standard] has yet to be written."<sup>19</sup> This Article undertakes this challenge to become the first "full elaboration and defense of" the standard, and in the process, to make it more practicable as a judicial doctrine and less anomalous in the Court's constitutional jurisprudence.

Although Neuman has criticized the standard for giving courts too much discretion and lacking a "textual anchor"<sup>20</sup> in the Constitution, he has recently expressed tentative support for the standard, what he characterizes as a functionalist approach and has dubbed a form of "balancing" or "global due process."<sup>21</sup> Examining the Court's use of the standard, Neuman has interpreted the "impracticable" prong to limit transnational application to situations where "compliance is literally impossible, or . . . imposes tolerable costs domestically but vastly greater costs in foreign territory."<sup>22</sup> And he has interpreted the "anomalous" prong to limit transnational application to situations that would create "incongruity with local customs."<sup>23</sup> Neuman acknowledges that there are scholars, including himself at one point, who have criticized the standard on the ground "that the 'global due process' methodology currently involves a troubling degree of indeterminacy."<sup>24</sup> But he now believes that this indeterminacy does not provide adequate justification for abandoning the standard altogether.<sup>25</sup>

Neuman has such faith in the standard because he thinks it is sufficiently clear but flexible, so that it is capable of being "narrowed over time by the exercise of judicial discretion."<sup>26</sup> To guide courts in this task, Neuman proposes that they consult

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<sup>17</sup> See, e.g., *supra* notes 5–8 and accompanying text (positing that this standard *is* important for the War on Terror).

<sup>18</sup> See Burnett, *supra* note 5; Neuman, *supra* note 5.

<sup>19</sup> Burnett, *supra* note 5, at 994 n.73 (discussing Professor Neuman's ideas).

<sup>20</sup> Gerald L. Neuman, *Extraterritorial Rights and the Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2076 (2005).

<sup>21</sup> See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 5–8 (1996) [hereinafter NEUMAN, STRANGERS] (categorizing the various approaches to applying the Constitution abroad: "universalism," "membership," "mutuality of legal obligation," and "balancing" or "global due process"). Neuman has expressed his tentative support for the balancing or global due process approach. See, e.g., Neuman, *supra* note 5; Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365 (2009) [hereinafter Neuman, *Global Due Process*].

<sup>22</sup> Neuman, *Global Due Process*, *supra* note 21, at 392.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 365.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

international human-rights law because “[o]ne form of anomalous consequence that weighs against the extraterritorial application of a constitutional right under the functional approach is the cultural inappropriateness of a distinctive U.S. right in foreign territories.”<sup>27</sup> According to Neuman, looking to international norms “could add more specificity to the methodology and could partly channel [judicial] discretion.”<sup>28</sup>

Burnett, however, does not see the “impracticable and anomalous” standard, even with Neuman’s modifications, as capable of sufficiently constraining judicial discretion. In Burnett’s view, this functionalist standard will amount to judicial decisions “driven entirely by consequentialist concerns”<sup>29</sup>—i.e., decisions consisting simply of judges consulting their policy preferences in determining whether to apply a particular constitutional provision to a particular set of circumstances. For Burnett, “because impracticability and anomalousness are such open-ended criteria, the courts in these cases have ended up wielding a nearly unbounded discretion in selecting the factors relevant to a determination of what constitutional guarantees apply when and where.”<sup>30</sup>

In addition, Burnett argues, the “impracticable and anomalous” standard calls for courts to ask the wrong question: whereas the standard calls for courts to consider certain practical factors in determining *whether* a constitutional provision applies in a particular instance, Burnett contends that courts can and should limit such consequentialist decisionmaking by considering these practical factors only in asking *how* a provision should apply abroad.<sup>31</sup> Because Burnett believes that this latter inquiry fits more comfortably with the Supreme Court’s constitutional jurisprudence, particularly its incorporation of most of the Bill of Rights through the Fourteenth Amendment, and moreover, because she believes that it will create more principled judicial decisionmaking, she urges courts to abandon the “impracticable and anomalous” standard.<sup>32</sup> Importantly, abandoning the standard does not present a difficult task for Burnett, since it seems that based on her interpretations of the relevant cases, particularly the *Insular Cases*, the standard is not binding precedent.<sup>33</sup>

Engaging with both Neuman’s prescriptions and Burnett’s criticisms, this Article explores whether the “impracticable and anomalous” standard is binding law and to what extent it can generate objective and predictable judicial decisionmaking. And in the nature of my previous work on the issue, I focus in particular here on how the standard relates to applying the Establishment Clause abroad.

In so doing, this Article respectfully disagrees with Neuman’s notion that courts should look to international human-rights standards to determine the fit between a

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<sup>27</sup> Neuman, *supra* note 5, at 277.

<sup>28</sup> Neuman, *Global Due Process*, *supra* note 21, at 365.

<sup>29</sup> Burnett, *supra* note 5, at 1002.

<sup>30</sup> *Id.* at 1004.

<sup>31</sup> *Id.* at 1042–43.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 994.

constitutional right and the cultural tradition in the land in which it would apply. My principal problem with Neuman's prescription is that it would seem to require the U.S. Constitution to apply with equal force wherever international human-rights standards are applicable, leading to rather strange results, such as the Establishment Clause applying with the same force to U.S. conduct in a nation like Pakistan, with a formally established religion,<sup>34</sup> as to such conduct in a country like France that requires a strict separation of religion and government.<sup>35</sup> Instead, to determine when there would be such rights-culture dissonance, courts should consult the *constitution of the country in question*, including not only the constitutional text itself but also the authoritative interpretations of that text. In this regard, this paper sets the foundation for a heretofore unexplored form of comparative constitutionalism, an approach that would seem to satisfy even those like Justice Scalia who hold that American judges must not interpret the U.S. Constitution according to foreign law.<sup>36</sup>

This Article also respectfully disagrees with Burnett's claim that the "impracticable and anomalous" standard is insufficiently clear to generate principled results. To the contrary, courts can apply, and to some extent have applied, the standard in a principled and consistent manner that not only honors the integrity of constitutional rights but also ensures sufficient executive and legislative discretion to pursue U.S. foreign policy interests.<sup>37</sup> The trick is to give enough precision to the standard's syntactic structure and semantic content so that courts are not simply making the type of policy judgments that Burnett condemns as improper for the judiciary to make in this context. With such precision, in fact, the standard is likely to work in a more principled way than is Burnett's approach. Indeed, she urges for courts to treat *all* constitutional provisions as applying abroad so that the only question would be *how* they apply in a particular instance.<sup>38</sup> But this requires courts to tailor particular constitutional applications to *particular facts*, thus inviting the very type of convenience-based jurisprudence that Burnett rejects. A clearer "impracticable and anomalous" standard would seem to satisfy Burnett's criticisms better than would her own fact-driven approach.

The Article proceeds as follows. Part I explores the lineage of the "impracticable and anomalous" standard to determine whether it is now part of the law under stare decisis. A close examination of the Court's use of the standard reveals that it is binding, even though in binding opinions it has appeared explicitly only in dictum, and when not in dictum, it has appeared explicitly only in non-binding concurring

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<sup>34</sup> See PAKISTAN CONST. art. 2.

<sup>35</sup> See 1958 CONST. 1 (Fr.) ("France shall be an indivisible, *secular*, democratic and social Republic." (emphasis added)).

<sup>36</sup> See *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

<sup>37</sup> See Merriam, *supra* note 6, at 763.

<sup>38</sup> Burnett, *supra* note 5, at 979–81.



opinions.<sup>39</sup> Even so, the standard is binding because it was implicitly applied in the *Insular Cases*, as Justice Harlan explained in his important concurrence in *Reid v. Covert*.<sup>40</sup> Moreover, the *Insular Cases* have become the foundational precedents in this area of the law, as Justice Kennedy recently affirmed in his majority opinion in *Boumediene v. Bush*<sup>41</sup> and before that, in his concurrence in *United States v. Verdugo-Urquidez*.<sup>42</sup>

Admittedly, though, the precedential status of the *Insular Cases* is an arguable point, turning on highly subtle and unresolved matters concerning the interpretation of precedent in general and the *Insular Cases* in particular. So for those who reject my interpretations and insist that Justice Harlan was wrong in proclaiming that the *Insular Cases* adopted this standard, the question is *not* whether the Court should overrule the standard and opt for a better one. Rather, the question for these commentators is whether the Court should now, for the first time, adopt the standard. This question turns largely on the standard's efficacy—that is, whether it furthers the project, referenced above,<sup>43</sup> of applying the Constitution abroad in a principled and consistent way so that it not only preserves the integrity of constitutional rights but also ensures sufficient executive and legislative discretion to pursue U.S. foreign policy interests.

To answer this question, Part II explores what the “impracticable and anomalous” standard means, and in so doing, divides into three sections. Part II.A explores how to interpret the “impracticable” prong; this discussion turns on the important point that “impracticable” is conceptually distinct from “impractical,” a point that, amazingly, has eluded many scholars and judges, including Justice Harlan, who first explicated the standard.<sup>44</sup> Part II.B examines the “anomalous” prong and the extent to which foreign constitutions can and should aid this analysis. Based on these discussions, Part II.C explains that the standard consists of two conceptually distinct prongs and is therefore different from unitary judicial standards, such as the “arbitrary and capricious” test. Because the “impracticable and anomalous” standard is binary,<sup>45</sup> it is crucial to determine whether the standard is conjunctive or disjunctive, another issue that has been largely overlooked.<sup>46</sup> This is a difficult question, and one on which

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<sup>39</sup> See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2255–56 (2008) (discussing in dicta concurring opinions in earlier cases in which the “impracticable and anomalous” standard was applied); *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring).

<sup>40</sup> *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring).

<sup>41</sup> *Boumediene*, 128 S. Ct. at 2254–58.

<sup>42</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring).

<sup>43</sup> See *supra* text accompanying note 37.

<sup>44</sup> Indeed, in Justice Harlan's concurring opinion in *Reid v. Covert*, the opinion that first explicated the standard, Harlan used “impracticable” and “impractical” interchangeably. See *infra* notes 232–37 and accompanying text.

<sup>45</sup> See Merriam, *supra* note 6, at 747–48.

<sup>46</sup> *Id.*

current law provides little direction, thus making it quite tempting to answer the question by turning to one's policy sensibilities—i.e., to urge for a disjunctive standard if one prefers making it harder for courts to apply the Constitution abroad, and a conjunctive standard for the opposite result. We can limit this policy-based judicial decisionmaking by turning to the purpose of the standard: to ensure that U.S. foreign policy is effective (practicable) and culturally sensitive (not anomalous).<sup>47</sup> Given that courts have generally treated these goals as tremendously and equally important,<sup>48</sup> it is most consistent with the purpose of the standard to treat it as disjunctive.

Finally, on the basis of these inquiries, the Article concludes by questioning whether Burnett is right that this is a functionalist standard that cannot generate consistent and principled judicial decisionmaking.<sup>49</sup> My assessment is that the standard, like the framework of which it is a part, consists of both formalist and functionalist elements, and if defined and applied with sufficient rigor, as proposed in this Article, it can guarantee the consistent and principled decisionmaking of formalism, as well as the flexible and commonsensical decisionmaking of functionalism.<sup>50</sup> Put more concretely, it will provide what ACLU attorney Cecillia Wang has argued the Court would serve by adopting the test: “national security and the rule of law.”<sup>51</sup>

#### I. THE PRECEDENTIAL LINEAGE OF THE “IMPRACTICABLE AND ANOMALOUS” STANDARD

The “impracticable and anomalous” standard first explicitly appeared in a Supreme Court opinion in Justice Harlan's concurring opinion in *Reid v. Covert*.<sup>52</sup> Harlan's opinion was the binding opinion, because the plurality opinion, written by Justice Black, was significantly broader, urging for all constitutional provisions to apply whenever and wherever the United States acted abroad.<sup>53</sup> Importantly, though, Harlan's discussion of the standard appeared only in dictum, as discussed at length below.<sup>54</sup>

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<sup>47</sup> *Id.* at 746–47.

<sup>48</sup> *Id.* at 747–48.

<sup>49</sup> See Burnett, *supra* note 5, at 974–78.

<sup>50</sup> See Merriam, *supra* note 6, at 764.

<sup>51</sup> Cecillia Wang, *Guest Blogger: Boumediene v. Bush: Avoiding a Pyrrhic Victory*, ACSBLOG, <http://www.acslaw.org/acsblog/node/11938> (Dec. 4, 2007, 6:50 PM) (“By adopting the ‘impracticable and anomalous’ test in *Boumediene*, the Court would serve both national security and the rule of law.”).

<sup>52</sup> *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring).

<sup>53</sup> *Id.* at 5–9 (majority opinion). Justice Frankfurter also wrote a concurring opinion in *Reid*, so his opinion is also arguably the binding opinion, as it is of similar breadth to Harlan's concurrence, with both opinions extending jury-trial rights only to cases involving capital charges. See *id.* at 44–45 (Frankfurter, J., concurring). But Harlan's concurrence, due to its explicit invocation of the “impracticable and anomalous” standard, has received much more attention from later scholars and Justices than has Frankfurter's opinion. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>54</sup> See *infra* Part I.A.

*A. Why Justice Harlan's Invocation of the "Impracticable and Anomalous" Standard in Reid Was Dictum*

The *Reid* case, and its companion case, *Kinsella v. Krueger*,<sup>55</sup> involved the applicability of jury-trial rights to civilian dependents facing capital charges for murders committed abroad on military bases under the exclusive jurisdiction of the United States.<sup>56</sup> Harlan proclaimed that the civilian dependents were entitled to jury-trial rights because capital charges involve "special considerations."<sup>57</sup> But Harlan posited that had the civilian dependents not been facing capital charges, which would not involve such special considerations, then the Court would have to extend the jury-trial rights to them only if doing so would not be "impractical and anomalous."<sup>58</sup>

Some have read Harlan's reference to the standard as non-dictum on the ground that the "special considerations" to which Harlan referred were the practicability and non-anomalousness of applying jury-rights abroad in capital cases.<sup>59</sup> To be sure, there is some basis for this interpretation, since Harlan did mention that "[t]he number of [capital] cases would appear to be so negligible that the practical problems of affording the defendant a civilian trial would not present insuperable problems."<sup>60</sup> But this was the only reference Harlan made to the convenience of providing jury trials for capital as opposed to non-capital cases.<sup>61</sup>

By contrast, he expounded at length on the vital importance of the right to a jury trial in a capital case, a case where a person's life is literally at issue.<sup>62</sup> As Harlan put it, he could "not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case."<sup>63</sup> Moreover, to justify this distinction between capital and non-capital cases in the Court's case law, he cited *Powell v. Alabama*<sup>64</sup> and *Betts v.*

<sup>55</sup> 351 U.S. 470 (1956).

<sup>56</sup> The *Reid* case involved a civilian wife accused of murdering her husband, a member of the military, while he was stationed in England. *See Reid*, 354 U.S. at 3. *Kinsella* involved the same situation but the murder arose on a U.S. military base in Japan. *See Kinsella*, 351 U.S. at 471–74.

<sup>57</sup> *Reid*, 354 U.S. at 76 (Harlan, J., concurring).

<sup>58</sup> *Id.* at 75–76.

<sup>59</sup> *See, e.g.,* Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 82 (2001). ("Justice Harlan concluded that a right should be extended unless it can be established that such an extension is *impractical and anomalous*. He concluded that in capital cases, such as were at bar in *Reid*, it would not be impractical or anomalous for the government to provide jury trials.")

<sup>60</sup> *Reid*, 354 U.S. at 78 (Harlan, J., concurring).

<sup>61</sup> *See id.* at 74–78.

<sup>62</sup> *Id.* at 77–78.

<sup>63</sup> *Id.* at 77.

<sup>64</sup> 287 U.S. 45 (1932) (holding that in capital cases, the Due Process Clause of the Fourteenth Amendment requires states to give indigent defendants access to counsel).

*Brady*<sup>65</sup> for the proposition that the distinction between such types of cases “is by no means novel.”<sup>66</sup> “[N]or,” he concluded “is [the distinction] negligible, being literally that between life and death.”<sup>67</sup> In other words, Harlan held that jury-trial rights are *fundamental* in capital cases, and the fundamentality of these rights took them outside the scope of an inquiry concerning their convenience.<sup>68</sup> For Harlan, such a pragmatic analysis would apply in this scenario only if the rights at issue were non-fundamental,<sup>69</sup> and because this case *did* involve a fundamental right, the “impracticable and anomalous” standard did not apply, thus making Harlan’s invocation of the standard dictum.

That Harlan’s invocation of the standard was dictum, however, is not the end of the inquiry as to whether the standard is now binding law. This is because Harlan proclaimed that he derived this standard from binding precedent, the *Insular Cases*.<sup>70</sup> Indeed, Gerald Neuman characterizes Harlan’s opinion as having “reasoned *from* the *Insular Cases* and *not about* them.”<sup>71</sup> Likewise, Justice Kennedy has interpreted this standard to come from the lesson that Justice Harlan “read the *Insular Cases* to teach.”<sup>72</sup> Moreover, Justice Kennedy has cited Harlan’s use of the standard to support applying it two times himself, the first time in his concurring opinion in *United States v. Verdugo-Urquidez*,<sup>73</sup> and most recently in his majority opinion in *Boumediene v.*

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<sup>65</sup> 316 U.S. 455 (1942) (holding that the Due Process Clause of the Fourteenth Amendment did not incorporate the Sixth Amendment right to counsel to the states in non-capital cases), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>66</sup> *Reid*, 354 U.S. at 77 (Harlan, J., concurring).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 77–78.

<sup>69</sup> Harlan opined that in such non-capital cases, involving what he called “run-of-the-mill offenses,” it might be impracticable to extend jury-trial rights because of the cost and difficulty of administering these rights to this significantly larger number of cases. *Id.* at 75–76 & n.12. For an analysis of how Harlan suggested applying this standard to such “run-of-the-mill offenses,” see *infra* notes 232–37 and accompanying text. It should also be noted that in *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), where the Court rejected the distinction between capital and non-capital offenses so as to extend jury trials abroad to civilian dependants charged with non-capital offenses, Justice Harlan dissented on the ground that, for the purposes of applying the right to a jury trial abroad, that right is fundamental only in capital cases. *Id.* at 255–57 (Harlan, J., dissenting). Indeed, affirming his reasoning in *Reid*, Harlan explained that the *Kinsella* Court’s rejection of a distinction between capital and non-capital cases “passes over too lightly the awesome finality of a capital case, a factor which in other instances has been reflected both in the constitutional adjudications of this Court and in the special procedural safeguards which have been thrown around those charged with such crimes.” *Id.* at 255.

<sup>70</sup> *Id.*

<sup>71</sup> NEUMAN, STRANGERS, *supra* note 21, at 93 (second emphasis added).

<sup>72</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2255 (2008).

<sup>73</sup> 494 U.S. 259, 277–78 (1990) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

*Bush*.<sup>74</sup> Therefore, to determine the precedential status of the “impracticable and anomalous” standard, we must inquire into the merits of Harlan’s imputing the standard to the *Insular Cases*, as well as into whether Kennedy made the standard binding law by invoking it in his *Verdugo-Urquidez* and *Boumediene* opinions.

*B. Whether Justice Harlan Was Right in Reid in Imputing the “Impracticable and Anomalous” Standard to the Insular Cases*

Before examining the merits of Justice Harlan’s imputing the “impracticable and anomalous” standard to the *Insular Cases*, it will be helpful to summarize the two cases addressing this issue before the *Insular Cases*, as these decisions influenced the *Insular Cases* as well as how the Court later developed the “impracticable and anomalous” standard.

1. The State of the Law Before the *Insular Cases*

*Dred Scott v. Sandford*<sup>75</sup> was the first Supreme Court case to consider how the Constitution applies abroad. This case infamously arose after a slave, Dred Scott, claimed that he had become free by virtue of residing for a period in Minnesota (then part of the Wisconsin Territory).<sup>76</sup> The Court rejected Scott’s claim on the ground that the Court lacked jurisdiction over the matter because African Americans were not citizens under Article III, Section 2, Clause 1 of the U.S. Constitution.<sup>77</sup> In dictum, however, the Court addressed the merits of Scott’s claim, declaring that even if the Court had jurisdiction over the matter, it still would have to deny Scott’s claim for freedom because the Fifth Amendment treated slaves as property and thus protected a slave-master’s right to bring a slave into a free territory (whether or not that territory was part of the United States) without losing ownership over the slave.<sup>78</sup>

Although some scholars have pointed out the *Dred Scott* decision’s relevance to debates about the Constitution’s transnational applicability,<sup>79</sup> most commentators have treated it as a case principally about slavery, with little significance for the Constitution’s applicability abroad.<sup>80</sup> Indeed, the U.S. Supreme Court did not

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<sup>74</sup> *Boumediene*, 128 S. Ct. at 2255.

<sup>75</sup> 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>76</sup> *Id.* at 493 (Campbell, J., concurring).

<sup>77</sup> *Id.* at 423, 454 (majority opinion).

<sup>78</sup> *Id.* at 446–50.

<sup>79</sup> For example, Sanford Levinson has written about how the *Dred Scott* case addressed the “meta-issue” of “whether Congress possesses truly ‘plenary,’ that is, unconstrained power in regard to the territories of the United States.” Sanford Levinson, *Installing the Insular Cases into the Canon of Constitutional Law*, in *FOREIGN IN A DOMESTIC SENSE* 121, 129–30 (Christina Duffy Burnett & Burke Marshall eds., 2001).

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

directly consider the Constitution's transnational applicability until 1891, in *Ross v. McIntyre*.<sup>81</sup>

That case arose after a British subject, John Ross, was convicted by a U.S. consular general for committing a murder while serving on an American merchant vessel stationed in Yokohama, Japan.<sup>82</sup> After the consular general sentenced Ross to death, and President Rutherford B. Hayes commuted his sentence to life imprisonment, Ross filed a habeas corpus petition in which he argued that his conviction was invalid because it violated his constitutional rights to indictment by a grand jury and trial by jury.<sup>83</sup> The U.S. Supreme Court disagreed, upholding the consular trial on the grounds that the Constitution's indictment and jury-trial guarantees "apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad."<sup>84</sup> The Court thus departed from the *Dred Scott* reasoning and declared for the first time that the Constitution's applicability depends on whether the claim arises within the United States.

## 2. The *Insular Cases*

Soon after *Ross v. McIntyre*, the Supreme Court modified, but upheld, the decision in a series of important cases, now collectively known as the *Insular Cases*, addressing whether and how the Constitution applied to the territories the United States acquired as a result of the Spanish-American War.<sup>85</sup> The Constitution's

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<sup>81</sup> 140 U.S. 453 (1891).

<sup>82</sup> *Id.* at 454.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 464 (citing *Cook v. United States*, 138 U.S. 157, 181 (1891)).

<sup>85</sup> See Treaty of Peace, U.S.-Spain, arts. I-III, Dec. 10, 1898, S. Treaty Doc. No. 57-182 (acquiring land from Spain). Note that there is some disagreement over which cases count as one of the *Insular Cases*, with some scholars including only those cases dealing with the territories acquired as a result of the Spanish-American War, and other scholars more expansively including cases dealing with the Constitution's applicability to other newly acquired territories. At a minimum, the list of *Insular Cases* includes the following 1901 cases: *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Dooley v. United States (Dooley II)*, 183 U.S. 151 (1901); *Huus v. N.Y. & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States (Dooley I)*, 182 U.S. 222 (1901); *Crossman v. United States*, 182 U.S. 221 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901). But some scholars add to this list some later cases, as well as cases dealing with other territories. See, e.g., *Rasmussen v. United States*, 197 U.S. 516 (1905); *Dorr v. United States*, 195 U.S. 138 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Gonzales v. Williams*, 192 U.S. 1 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903). Professor Efrén Rivera Ramos counts as many as twenty-three *Insular Cases*. Efrén Rivera Ramos, *Deconstructing Colonialism: The "Unincorporated Territory" as a Category of Domination*, in *FOREIGN IN A DOMESTIC SENSE* 104, 115-16 n.4 (Christina Duffy Burnett & Burke Marshall eds., 2001). Bartholomew

application to these territories was a controversial political issue, leading to many 5–4 Supreme Court decisions pointing in disparate directions depending on the particular composition of the majority,<sup>86</sup> but the Court eventually settled on a doctrine for resolving this issue, what is now known as the “Incorporation Doctrine.”<sup>87</sup> The Incorporation Doctrine generally provides that the Constitution’s applicability turns on whether a territory has been formally incorporated into the United States through some official governmental action,<sup>88</sup> but as we will see below, there is significant room for disagreement on what this precisely means.<sup>89</sup> Before we explore the precise content of the doctrine, however, we must first establish the precedential status of the doctrine itself.

*a. The Precedential Status of the Incorporation Doctrine*

The Incorporation Doctrine arose from articles written by some of the leading legal scholars of the period,<sup>90</sup> such as Christopher Columbus Langdell,<sup>91</sup> Thomas Cooley,<sup>92</sup> and James Bradley Thayer.<sup>93</sup> But it took some time for the doctrine to prevail in the Supreme Court. Indeed, the doctrine first appeared in a Supreme Court opinion in Justice White’s concurring opinion in one of the first *Insular Cases*, *Downes v. Bidwell*,<sup>94</sup> but it did not command a majority until four years later, in *Rasmussen v. United States*.<sup>95</sup> Finally seventeen years later, in *Balzac v. Porto Rico*,<sup>96</sup> the Incorporation Doctrine “achieve[d] its complete triumph”<sup>97</sup> in Chief Justice Taft’s unanimous decision.

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H. Sparrow might have the most expansive list, including thirty-five such cases. BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 257 (2006).

<sup>86</sup> See *supra* note 85.

<sup>87</sup> See *infra* notes 90–99 and accompanying text.

<sup>88</sup> See *infra* notes 103–04 and accompanying text.

<sup>89</sup> See *infra* Part I.B.

<sup>90</sup> SPARROW, *supra* note 85, at 4–5, 40–41. It should also be noted that Langdell, Cooley, and Thayer have come to be known as some of the leading legal formalists of that period. As will be explained below, they left their mark on this area of the law, as it has retained many formalist elements. See *infra* Part II.

<sup>91</sup> C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899).

<sup>92</sup> SPARROW, *supra* note 85, at 41.

<sup>93</sup> James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 471–80 (1899).

<sup>94</sup> 182 U.S. 244, 287–88 (1901) (White, J., concurring) (“The right to recover is predicated on the assumption that Porto Rico, by the ratification of the treaty with Spain, became incorporated into the United States, and therefore the act of Congress which imposed the duty in question is repugnant to Article I, sec. 8, clause 1, of the Constitution . . . . But as the case concerns no duty on goods going from the United States to Porto Rico, this proposition must depend also on the hypothesis that the provisions of the Constitution referred to apply to Porto Rico because that island has been incorporated into the United States.”).

<sup>95</sup> SPARROW, *supra* note 85, at 5.

<sup>96</sup> 258 U.S. 298 (1922).

<sup>97</sup> SPARROW, *supra* note 85, at 5.

As Taft summed up the state of the law in *Balzac*:

The *Insular Cases* revealed much diversity of opinion in this court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the *Dorr Case* shows that the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court.<sup>98</sup>

Therefore, through these many cases, starting with *Downes* and ending with *Balzac*, the Incorporation Doctrine became the settled law of the land. And as we will see below, it is a doctrine that is still largely in place, affirmed in *Reid*, *Verdugo-Urquidez*, and most recently in the Court's decision in *Boumediene*.<sup>99</sup> Now that we have established that the Incorporation Doctrine is indeed settled law under stare decisis, we are ready to explore its content.

*b. The Precise Content of the Incorporation Doctrine*

Bartholomew Sparrow defines the Incorporation Doctrine in these terms: "The United States' island territories in the Caribbean Sea and the Pacific Ocean were 'unincorporated' territories that were to receive only unspecified 'fundamental' constitutional protections, whereas the 'incorporated' territories of continental North America were a part of the Union and enjoyed the full protections of the U.S. Constitution."<sup>100</sup> Professor Burnett agrees that "[a]ccording to conventional wisdom, the *Insular Cases* held that the Constitution applied in its entirety only to incorporated territories, whereas only 'fundamental' rights applied of their own force ('ex proprio vigore') to unincorporated territories."<sup>101</sup>

Burnett, however, disagrees with this conventional interpretation.<sup>102</sup> Indeed, according to Burnett, this conventional interpretation holds that courts should consider the status of a given territory to determine *whether* a particular constitutional provision applies in a particular instance.<sup>103</sup> But as mentioned in the Introduction, Burnett believes that a better interpretation of the Incorporation Doctrine, as both a descriptive and a normative matter, is that courts should consider a territory's status only to determine *how* a provision should apply to that territory.<sup>104</sup> That is, courts should treat all rights as applying abroad but then tailor those applications to the particular circumstances relevant to the territory in question.

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<sup>98</sup> *Balzac*, 258 U.S. at 305.

<sup>99</sup> See *infra* notes 210–11 and accompanying text.

<sup>100</sup> SPARROW, *supra* note 85, at 5.

<sup>101</sup> Burnett, *supra* note 5, at 983.

<sup>102</sup> *Id.* at 984.

<sup>103</sup> *Id.* at 981.

<sup>104</sup> *Id.*



Burnett believes that focusing on the *how* question only in determining its applicability fits more comfortably with the Supreme Court's constitutional jurisprudence, particularly its incorporation of most of the Bill of Rights through the Fourteenth Amendment.<sup>105</sup> As an example, she points out how even after the Supreme Court incorporated the Sixth Amendment right to a jury trial for criminal cases, in *Duncan v. Louisiana*,<sup>106</sup> the Court went on to determine *how* that right should be applied in state courts, as opposed to how it had been applied in federal courts.<sup>107</sup> Indeed, in a series of decisions, the Court found that whereas the right requires a twelve-member jury and unanimous verdicts in federal courts, it required neither in state courts.<sup>108</sup> Just as the practical distinctions between federal and state courts were relevant to determining *how* the right to a jury trial applied to the states, not to determining *whether* it applied to the states at all, Burnett argues that the Incorporation Doctrine, properly understood, calls for courts to consider the practical distinctions between incorporated and unincorporated territories in determining *how* a particular constitutional provision applies abroad, not in determining *whether* it applies to unincorporated territories at all.<sup>109</sup>

Due to this similarity between the Incorporation Doctrine and the incorporation of the Bill of Rights through the Fourteenth Amendment, Burnett writes that though this use of the same term for these different doctrines is a mere coincidence, it is nonetheless "a welcome coincidence."<sup>110</sup> Other scholars have not been as sanguine about this coincidence; for example, Professor Neuman has found that this use of the same term in the Court's jurisprudence is "unfortunate," due to its liability to cause confusion between these two different areas of the laws.<sup>111</sup> I share Burnett's welcoming of the coincidence but for slightly different reasons. I do not agree with her that the Incorporation Doctrine does or should rest on this whether/how distinction, and, for that matter, I believe she overstates the extent to which the Court's incorporation of the Bill of Rights to the states through the Fourteenth Amendment rested on that distinction. Indeed, although the Court has held some incorporated rights apply less strictly to the states, such as the jury-trial rights mentioned *supra*, the Court has held that the vast majority of incorporated rights apply to the states with exactly the same rigor as their federal analogues in the Bill of Rights apply to the federal government. Moreover, whenever the Court has applied a constitutional guarantee abroad, it has not stopped short of extending the full protection of that guarantee. In *Reid*, for example, the Court held that Mrs. Covert was entitled to the same

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<sup>105</sup> *Id.*

<sup>106</sup> 391 U.S. 145 (1968).

<sup>107</sup> Burnett, *supra* note 5, at 1005, 1028.

<sup>108</sup> See, e.g., *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972); *Williams v. Florida*, 399 U.S. 78, 86 (1970).

<sup>109</sup> Burnett, *supra* note 5, at 981.

<sup>110</sup> *Id.* at 982 n.22.

<sup>111</sup> NEUMAN, STRANGERS TO THE CONSTITUTION, *supra* note 21, at 83n.c.

type of jury trial required in federal court,<sup>112</sup> and in *Boumediene*, the Court held that the detainees were entitled to the same type of habeas corpus review extended to other people detained by the government.<sup>113</sup> Nevertheless, although I disagree with Burnett on these points, I agree that the analyses under the Incorporation Doctrine and the incorporation of the Bill of Rights are quite similar, though distinct in important ways, with “incorporation” of the Bill of Rights to the states turning on a broader examination of the fundamentality of a particular right than the “excorporation” of a right to the world.<sup>114</sup>

As I will explain below, my interpretation of the Incorporation Doctrine is a middle position between the conventional understanding of the doctrine and Burnett’s interpretation based on the whether/how distinction.<sup>115</sup> According to the conventional interpretation, such as the one provided by Sparrow above, nonfundamental protections never apply to unincorporated territories.<sup>116</sup> According to Burnett’s interpretation, however, nonfundamental protections always apply to these territories but not always as strictly they as would apply domestically.<sup>117</sup> I believe Justice Harlan was right that nonfundamental protections apply to unincorporated territories, just as they would apply domestically, but if and only if it would not be impracticable and anomalous for the protection to apply there.<sup>118</sup> Thus, just as the Incorporation Doctrine is settled law under *stare decisis*, so too is the “impracticable and anomalous” standard, as discussed below.

*c. The Relationship Between the Incorporation Doctrine and the “Impracticable and Anomalous” Standard*

The words “impracticable” and “anomalous” did not appear in any of the *Insular Cases*.<sup>119</sup> But although the *Insular Cases* never explicitly invoked this language, the Court rested the Incorporation Doctrine on the grounds that nonfundamental rights do not apply to unincorporated territories because in such territories, it would often be difficult to apply constitutional rights (i.e., impracticable) and moreover, when it would not be too difficult, it would often be destructive of the traditions prevailing in those lands (i.e., anomalous).<sup>120</sup> This leaves open the possibility that the *Insular Cases* implicitly applied the “impracticable and anomalous” standard.

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<sup>112</sup> *Reid v. Covert*, 354 U.S. 1 (1957).

<sup>113</sup> *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>114</sup> Merriam, *supra* note 6, at 745–46.

<sup>115</sup> *See infra* Part I.B.2.d.

<sup>116</sup> *See supra* note 100 and accompanying text.

<sup>117</sup> *See supra* notes 103–04 and accompanying text.

<sup>118</sup> *See infra* notes 145–47 and accompanying text.

<sup>119</sup> *See, e.g.*, Burnett, *supra* note 5, at 996 (noting that the “impracticable and anomalous” standard was first articulated in *Reid v. Covert*).

<sup>120</sup> *See supra* note 100 and accompanying text.

Consider, for example, the *Balzac* opinion.<sup>121</sup> That case arose after a newspaper editor, Jesús M. Balzac, was charged with publishing libelous speech against the colonial governor.<sup>122</sup> After Balzac argued that he had a right to a jury trial under the Sixth Amendment, and the Supreme Court of Puerto Rico ruled that he did not have this right, Balzac brought his case to the U.S. Supreme Court.<sup>123</sup> Writing for a unanimous Court, Chief Justice Taft explained that even though Congress had granted Puerto Ricans citizenship under the Jones Act of 1917, Congress had not incorporated Puerto Rico, and therefore, under the Incorporation Doctrine, only a fundamental constitutional provision could apply there.<sup>124</sup> As Taft put it, “[t]he guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in [unincorporated territories like] the Philippines and Porto Rico.”<sup>125</sup> Because the Court did not consider the Sixth Amendment right to a jury trial to be one of these “certain fundamental personal rights declared in the Constitution,”<sup>126</sup> it held that the right did not apply to Balzac’s case.<sup>127</sup>

Here, it is worth deliberating on what the Court meant by “full application”<sup>128</sup> in the passage quoted above. This language leaves open the possibility that some non-fundamental rights might apply, though not fully, in unincorporated territories. Indeed, as mentioned above, Professor Burnett argues in various pieces that commentators have largely exaggerated the extent to which the *Insular Cases* foreclosed applying nonfundamental constitutional provisions to unincorporated territories at all.<sup>129</sup> Drawing on the distinction between *whether* a guarantee applies and *how* a guarantee applies, she argues that the *Insular Cases* stand for the proposition that nonfundamental constitutional guarantees *do* apply abroad, even in unincorporated territories, but perhaps less strictly than they would apply domestically.<sup>130</sup> But this does not by itself prove my point that the cases invoked the “impracticable and anomalous” standard; in fact, Burnett marshals this distinction to support her argument that the *Insular Cases* did not adopt the standard but rather simply held that in some foreign territories the Constitution applies with less force than it applies domestically.<sup>131</sup>

In making this argument, however, Burnett overlooks the extent to which the Court’s reasoning for limiting the application of the Constitution in these territories was that applying the Constitution with full force in such territories would not only

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<sup>121</sup> *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

<sup>122</sup> *Id.* at 300.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 313.

<sup>125</sup> *Id.* at 312–13.

<sup>126</sup> *Id.* at 312.

<sup>127</sup> *Id.* at 304–05, 313.

<sup>128</sup> *Id.* at 313.

<sup>129</sup> *See, e.g.,* Burnett, *supra* note 5, at 983–84.

<sup>130</sup> *Id.* at 992–93.

<sup>131</sup> *Id.* at 979.

be difficult for the United States to achieve but also destructive of foreign traditions. The *Balzac* reasoning is again instructive on this point. Chief Justice Taft explained that the jury-trial right could not apply in Puerto Rico because it would not be *possible* to apply it there:

The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire.<sup>132</sup>

Furthermore, even if it were possible to apply the jury-trial right in Puerto Rico, perhaps by training people how to think and act as jurors, this would be *destructive of the cultural tradition* that had prevailed in that land:

Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.<sup>133</sup>

This language might strike us today as paternalistic, imperialistic, and even racist—and for good reason: it is. Underlying this reasoning is the presupposition that these cultures were inferior to American culture and therefore unfit for American constitutional values. But this troubling presupposition need not entirely imbue or taint our understanding of the reasoning in these cases.

That is *not* to say that the *Insular Cases* and their progeny are not tainted at all by their racist and colonialist origins; to the contrary, Burnett correctly points out that these “cases [were] decided at a time of imperial exuberance in the United States and [have been] long tainted by association with the proposition that the Constitution does not ‘follow the flag’ outside the United States.”<sup>134</sup> And this taint rightfully exists because, as Professor Rivera Ramos observes, “[t]he doctrine of the *Insular Cases* became a constituent part of the American colonial project.”<sup>135</sup>

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<sup>132</sup> *Balzac*, 258 U.S. at 310.

<sup>133</sup> *Id.*

<sup>134</sup> Burnett, *supra* note 5, at 979.

<sup>135</sup> EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 141 (2001). For further discussion of the racist and colonialist dimensions of the *Insular Cases*, see Levinson, *supra*

But it *is* to say that the legacy of the *Insular Cases* and their progeny is changing, with legal scholars increasingly realizing that in many ways the decisions struck a principled compromise among competing constitutional prerogatives, and that this compromise ultimately led the way to progressive decisions such as *Boumediene*, holding that the Constitution applies abroad to citizens and non-citizens alike.<sup>136</sup> As Burnett puts it, “after *Boumediene*, the *Insular Cases* look rather like sheep in lion’s clothing.”<sup>137</sup>

This sheep-like quality is evident from the *Balzac* excerpts above, and many similar ones appearing in the other *Insular Cases*, indicating that the Court based its proposition that nonfundamental constitutional guarantees do not apply in unincorporated territories on the ground that it would be impracticable and anomalous to apply these rights in these lands. And there are non-paternalistic, non-imperialistic, and non-racist reasons for not applying nonfundamental guarantees abroad when it would be impracticable or anomalous to do so. Put differently, the “impracticable” prong need not rest on the claim that certain foreigners are unfit for democratic governance, and the “anomalous” prong need not rest on the claim that certain cultures have historically had inferior forms of government. In fact, there is nothing problematic—only something laudable—about wanting the Constitution to apply in a way that is both practicable and culturally sensitive.

This might be a good time to sum up what we have established thus far: (1) that the Incorporation Doctrine is binding law under *stare decisis*,<sup>138</sup> (2) that the Incorporation Doctrine rests on the proposition that the impracticability and anomalousness of applying nonfundamental rights to unincorporated territories is relevant to their applicability in those territories,<sup>139</sup> and (3) that although this proposition was originally based on racist and colonialist presuppositions, there are non-racist and non-colonialist reasons for supporting it now, and therefore this proposition of law is not tainted.<sup>140</sup>

But what we have not yet established is whether the “impracticable and anomalous” factors formed the Court’s *justification* for the Incorporation Doctrine or

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note 79, at 123 (noting that “one might well view the *Insular Cases* as central documents in the history of American racism”). See also Gerald Neuman, *Constitutionalism and Individual Rights in the Territories*, in *FOREIGN IN A DOMESTIC SENSE* 182, 184 (Christina Duffy Burnett & Burke Marshall, eds., 2001) (explaining that the *Insular Cases* “adopted a new distinction between ‘incorporated territories’ and ‘unincorporated territories’ for the explicit purpose of facilitating colonial expansion”); Ramos, *supra* note 85, at 113.

<sup>136</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

<sup>137</sup> Burnett, *supra* note 5, at 984. But note that some legal scholars have taken issue with Burnett’s interpretation of the *Insular Cases* as being sheep-like—rather than lion-like. See, e.g., EDIBERTO ROMÁN, *CITIZENSHIP AND ITS EXCLUSIONS* 178 n.18 (2010) (accusing Burnett’s interpretation of the *Insular Cases* of being “a revisionist view of the doctrine established by the cases”).

<sup>138</sup> See *supra* Part I.B.2.a.

<sup>139</sup> See *supra* notes 119–20 and accompanying text.

<sup>140</sup> See *supra* notes 132–37 and accompanying text.

whether these were *limiting factors* that are now actually a part of the doctrine. This distinction is extremely important for how we interpret the Incorporation Doctrine, but its importance, as we will see, turns on controversial matters concerning the nature of precedent.<sup>141</sup>

If the Court cited these factors to justify the Incorporation Doctrine, then the conventional interpretation of the doctrine seems correct in holding that the Court held that nonfundamental rights *never* apply in unincorporated territories. Under this interpretation of the doctrine, the “impracticable and anomalous” reasons merely justify the rule that nonfundamental rights do not apply in unincorporated territories. And these reasons for the rule do not matter because the Court established a canonical rule to apply to all facts within the scope of the rule (i.e., whenever a nonfundamental right is at issue in an unincorporated territory), regardless of whether the background justifications (i.e., the “impracticable and anomalous” reasons) for the rule obtain in that particular case.<sup>142</sup> But if the Court cited these factors to *limit* the scope of the rule that nonfundamental rights do not apply in unincorporated territories, then it appears that the Incorporation Doctrine means that nonfundamental rights do not apply in unincorporated territories, but *only when* the background conditions obtain. In other words, nonfundamental rights do not apply in unincorporated territories *only if* it would be impracticable and anomalous to do so. Under this interpretation, the “impracticable and anomalous” factors are part of the rule itself. The following subsection will explain why the latter interpretation is superior.

*d. Whether the “Impracticable and Anomalous” Factors Justified or Limited the Incorporation Doctrine*

One reason for supporting the interpretation that the “impracticable and anomalous” factors *limited* rather than *justified* the Incorporation Doctrine is that to read these factors as justifications requires that there be some relationship between a

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<sup>141</sup> This distinction between justifying reasons and limiting factors is relevant only if a court adopts what is called in the stare decisis literature “the rules approach” to precedent, whereby a precedent decision consists of whatever rule was articulated by the deciding court. The distinction is not relevant if a court adopts “the results approach,” whereby a precedent decision consists of the facts that triggered the ultimate result reached by the deciding court. For further explanation of these approaches, see LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 137–56 (2001) (exploring rules, natural, and result models of precedent and concluding that the rules model is best in serving the goals of stare decisis); Larry Alexander, *Precedent*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 495–500 (Dennis Patterson ed., 2010). I believe the rules approach to be the most defensible approach of how stare decisis does and should work in practice, but this is a contestable and controversial claim, as will be discuss *infra*.

<sup>142</sup> Again, this is based on a court adopting the rules approach to precedent and thereby holding that justifications for a rule come into play only if the deciding court did not announce the decision clearly as a rule. See *supra* text accompanying note 141.

nonfundamental right applying and the impracticability or anomalousness of it applying, and it is hard to conceive of such a relationship existing. That is, it requires us to say that fundamental rights are more likely than nonfundamental rights to apply in a given territory because fundamental rights are less likely to apply in an impracticable or anomalous way. But there is little to no basis for finding that there is such a relationship, either as a matter of fact or constitutional theory.

To take the *Balzac* case as an example, it seems just as impracticable and anomalous to apply in Puerto Rico the fundamental guarantees provided in the Due Process Clause as it would be to apply the nonfundamental guarantees provided in the Sixth Amendment's right to a jury trial. Indeed, when the *Balzac* case was decided, the freedom to contract was still considered a fundamental right under the Due Process Clause.<sup>143</sup> Applying this freedom to contract in Puerto Rico would certainly be impracticable and anomalous, as it would require the United States to create and enforce a libertarian economic market in the island (perhaps an impracticable task to accomplish), as well as to impose this market on the people (an anomalous economic system in a land that traditionally did not have a free market system).<sup>144</sup>

Given that it is just as impracticable and anomalous to apply fundamental rights in a particular territory as it would be to apply nonfundamental rights in that same territory, it does not make sense to say that nonfundamental rights do not apply abroad *because* it would be impracticable and anomalous to do so. Indeed, this is akin to saying that *because* stopping at red lights and following speed limits are equally inconvenient when a driver is in a rush, drivers *do* need to stop at red lights but *do not* need to follow speed limits. This "because" does not link up the reason with the conclusion. A "because" that would link up the reason and the conclusion, however, would be the following proposition: *because* stopping at red lights is more important to securing safety than is following speed limits, drivers *do* need to stop at red lights even when it would be inconvenient to do so, but in such a circumstance they *do not* need to follow speed limits. In this case, the convenience factors would *not justify* the exception to the speed limit, since these factors apply equally to both stopping at red lights and following speed limits. What would justify the exception would be the *fundamentality* of the relevant requirements, with the fundamental law (the red-light requirement) overriding the convenience factors, and the nonfundamental law (the speeding law) not being sufficiently important so as to override those factors. In effect, then, the convenience factors would *limit* the scope of the speed limit rule—i.e., the speed limit would apply *except* when it would be inconvenient for drivers to follow this requirement.

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<sup>143</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905). This interpretation of the Due Process Clause was not repudiated until *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>144</sup> For a general overview of how the United States sought to transform Puerto Rico's economic system, see CÉSAR J. AYALA & RAFAEL BERNABE, *PUERTO RICO IN THE AMERICAN CENTURY* (2007).

Using this example, we can see that while it does not make sense to say that nonfundamental rights do not apply abroad *because* it would be impracticable and anomalous to do so, it does make sense to say that, because nonfundamental rights are not sufficiently important to the American constitutional scheme so as to warrant applying them when doing so would be impracticable and anomalous, such rights do not apply in such circumstances. By contrast, fundamental rights, due to their importance to the American constitutional scheme, apply even when it would be impracticable and anomalous to do so. In other words, the “impracticable and anomalous” factors *limit* the scope of the Incorporation Doctrine rather than *justify* it.

Besides the logical incongruity of reading the impracticability and anomalousness factors as justifications, another objection to such a reading is that it would turn the “impracticable and anomalous” analysis entirely on Congress’s activity (or inactivity) with regard to incorporating a territory. This is because, under the conventional interpretation, a congressional action to incorporate a territory would be interpreted to mean that applying the Constitution there would never be impracticable and anomalous, whereas Congress’s failure to incorporate a territory would be interpreted to mean that applying nonfundamental guarantees there would always be impracticable and anomalous. This would be quite a strange paradigm, because the “impracticable and anomalous” factors function as highly narrow, subtle, and mutable fact-sensitive inquiries, making them more appropriate for specific judicial adjudication than general congressional determinations. That is, in inquiring into when it is impracticable to apply a particular constitutional provision in a given situation, the judiciary seems to be the best branch to determine the resources necessary for implementing the provision in that land and to determine whether at that time U.S. capabilities in that territory are up to the task. And in inquiring into when it is anomalous to apply a particular constitutional provision in a given situation, the judiciary also seems to be the best branch to determine the fit between a constitutional provision and the cultural tradition prevailing in that land. If the *Insular Cases* treated these inquiries as foreclosed by congressional inactivity—that is, by the lack of an affirmative congressional act incorporating a given territory—then the reasoning would lead to absurd conclusions.

For example, this would require treating it as *always* impracticable and anomalous to apply the Constitution in an unincorporated land long under U.S. control, such as Puerto Rico, even as over time it has become quite practicable and fitting to apply the Constitution there due to the increasing presence of U.S. resources and the infiltration of American culture and values. Given the extent to which the “impracticability and anomalousness” inquiries depend on the particular circumstances at that time, it does not make sense to interpret the *Insular Cases* as holding that nonfundamental rights never apply *because* it would be impracticable and anomalous to do so. Rather, the better interpretation is that nonfundamental rights do not apply *when* it would be impracticable and anomalous to do so.



For this reason, Justice Harlan seems to have been right in *Reid* when he proclaimed that *Balzac* “is *not* good authority for the proposition that jury trials need never be provided for American citizens tried by the United States abroad.”<sup>145</sup> Instead, Harlan explained, “the [*Balzac*] case *is* good authority for the proposition that there is no rigid rule that jury trial must *always* be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous.”<sup>146</sup> Here, Harlan was saying that it is *not* the case that non-fundamental rights do not apply abroad *because* doing so would be impracticable and anomalous. Rather, it *is* the case, as I argued above, that nonfundamental rights do not apply abroad *when* doing so would be impracticable and anomalous.<sup>147</sup>

As stated above, however, my interpretation of the *Insular Cases* is arguable, turning on subtle and open-ended matters concerning the best way to treat precedent in general and these precedents in particular. Indeed, there is a reasonable argument that Justice Harlan incorrectly interpreted the *Insular Cases* because, according to the results approach to precedent, the *Insular Cases* stand for the proposition that nonfundamental rights never apply in unincorporated territories,<sup>148</sup> thus rendering the “impracticable” and “anomalous” considerations outside the scope of the holdings. Although I think this interpretation is vastly inferior to the one I provided above, it is not an unreasonable argument and indeed, some eminent scholars have suggested that this is precisely what the *Insular Cases* held.<sup>149</sup> That is, after all, why it is the conventional interpretation, and it is this conventional interpretation that has made the *Insular Cases* so controversial for seeming to foreclose the transnational applicability of nonfundamental constitutional guarantees.

For those commentators who do not see the *Insular Cases* as adopting the “impracticable and anomalous” standard, it will be helpful to examine how Justice Kennedy has affirmed Justice Harlan’s interpretation of the Incorporation Doctrine.<sup>150</sup> As will be explained below, Justice Kennedy has not made these affirmations in binding statements of law, a point that has significant implications for how we conceptualize the framework for applying the Constitution abroad, but nevertheless, Kennedy’s non-binding invocations of the “impracticable and anomalous” standard contribute to settling it as the critical test governing the Constitution’s transnational applicability.<sup>151</sup>

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<sup>145</sup> *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring) (emphasis added).

<sup>146</sup> *Id.* at 75.

<sup>147</sup> *See id.* at 74–75.

<sup>148</sup> *See SPARROW*, *supra* note 85, at 5. Indeed, the result in each of the *Insular Cases* was that the nonfundamental right at issue did not apply to the unincorporated territory, so a reasonable interpretation under the results approach to precedent is that these cases stand for the proposition that nonfundamental rights never apply to unincorporated territories. Likewise, under the rules approach one can reasonably interpret the cases as announcing the canonical rule that nonfundamental rights never apply to unincorporated territories.

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

<sup>150</sup> *See Boumediene v. Bush*, 128 S. Ct. 2229, 2255–56, 2261–62 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring).

<sup>151</sup> *See Verdugo-Urquidez*, 494 U.S. at 277–78.

*C. The Contexts in Which Justice Kennedy Invoked the “Impracticable and Anomalous” Standard in His Verdugo-Urquidez and Boumediene Opinions*

Justice Kennedy has invoked the “impracticable and anomalous” standard twice, the first time in his concurring opinion in *United States v. Verdugo-Urquidez*,<sup>152</sup> and most recently in his majority opinion in *Boumediene v. Bush*.<sup>153</sup> Because some commentators and advocates have interpreted *Verdugo-Urquidez* as a plurality opinion,<sup>154</sup> thus making Kennedy’s concurrence binding as the narrowest opinion of the Court, it is important to examine this interpretation closely. Under this interpretation Justice Kennedy may have made the “impracticable and anomalous” standard binding law even if in *Reid* Justice Harlan incorrectly imputed the doctrine to the *Insular Cases*. Likewise, because Kennedy’s opinion in *Boumediene* is quite complicated<sup>155</sup> (to put it nicely—muddled and inconsistent to put it less charitably), determining whether he actually *applied* the “impracticable and anomalous” standard in citing it will require a close reading of his reasoning in that opinion.

1. *United States v. Verdugo-Urquidez*

*Verdugo-Urquidez* arose after the Drug Enforcement Administration (DEA) conducted a search in Mexico of the home of Rene Martin Verdugo-Urquidez, a drug lord suspected of torturing and murdering a DEA agent.<sup>156</sup> Although the DEA had received permission from the Mexican government for both arresting Mr. Verdugo-Urquidez and searching his home, the DEA did not have a warrant.<sup>157</sup> The search yielded records of marijuana shipments, which Mr. Verdugo-Urquidez claimed had to be excluded from his trial because the DEA had violated his Fourth Amendment rights by failing to obtain a warrant.<sup>158</sup> The Supreme Court upheld the search on the ground that the Warrant Clause did not protect Mr. Verdugo-Urquidez, a Mexican national, while he was in Mexico.<sup>159</sup>

Writing for the Court, Chief Justice Rehnquist began his analysis by noting that whereas the Fifth Amendment privilege against self-incrimination “is a fundamental trial right”<sup>160</sup> and therefore applies for any trial conducted within the United States, the Fourth Amendment’s Warrant Clause protects property, and therefore its

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<sup>152</sup> *Id.*

<sup>153</sup> *Boumediene*, 128 S. Ct. at 2255–56, 2261–62.

<sup>154</sup> See Neuman, *supra* note 20, at 2075 n.12.

<sup>155</sup> See Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2109 (2009) (describing *Boumediene* as “lengthy and complex”).

<sup>156</sup> *Verdugo-Urquidez*, 494 U.S. at 262.

<sup>157</sup> *Id.* at 262–63.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 274–75.

<sup>160</sup> *Id.* at 264.

applicability depends not on the location of the trial, but on where the search or seizure arises.<sup>161</sup> The Court found the distinction important because the Warrant Clause text is limited to “the people,”<sup>162</sup> a term that the Court found to refer to “the People of the United States” mentioned in the Constitution’s Preamble.<sup>163</sup> Rehnquist used this as a basis for opining that whereas rights that arise within the United States apply equally to citizens and non-citizens, searches conducted abroad apply differently to citizens and non-citizens under the Warrant Clause.<sup>164</sup>

But Chief Justice Rehnquist did not rest the Court’s analysis entirely or even principally on this distinction between citizens and non-citizens. Rather, turning away from the Fourth Amendment text and toward the Court’s doctrine, Rehnquist found that under the *Insular Cases* “[o]nly ‘fundamental’ constitutional rights are guaranteed to inhabitants of [unincorporated] territories.”<sup>165</sup> As a result, he concluded, “it is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its power.”<sup>166</sup> Because the Court found that the Warrant Clause creates a nonfundamental right, the Court concluded that the *Insular Cases* foreclosed the applicability of the Warrant Clause to the search of Mr. Verdugo-Urquidez’s home in Mexico.<sup>167</sup> The Court thus rejected Justice Black’s plurality opinion in *Reid*, and instead adopted the narrower position, taken by Justices Frankfurter and Harlan in their concurring opinions, that nonfundamental constitutional guarantees do not always apply to U.S. conduct abroad.<sup>168</sup>

Although Chief Justice Rehnquist did not bank the Court’s analysis on the citizen-alien distinction, but rather on the well-settled Incorporation Doctrine,<sup>169</sup> it is important to note that Chief Justice Rehnquist’s reasoning in *Verdugo-Urquidez* was broader than the *Insular Cases*, as well as broader than Justice Harlan’s interpretation of their central holdings. This is because Rehnquist did not suggest that the impracticability and anomalousness of applying the Warrant Clause to the search were relevant factors. Instead, Rehnquist held that the Warrant Clause did not apply at all to searches outside of the United States.<sup>170</sup> If one interprets the *Insular Cases* as holding

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<sup>161</sup> *See id.* at 264–66.

<sup>162</sup> *Id.* at 265.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 265–66.

<sup>165</sup> *Id.* at 268.

<sup>166</sup> *Id.* at 268–69.

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

<sup>168</sup> Notably, Rehnquist’s rejection of Black’s plurality opinion is consistent with the Supreme Court’s approach to determining which opinions are binding when no opinion is supported by a majority of the Court. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (holding when there is no majority opinion, the binding law is the “position taken by those Members who concurred in the judgments on the narrowest grounds” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))).

<sup>169</sup> *See Verdugo-Urquidez*, 494 U.S. at 268.

<sup>170</sup> *Id.* at 261, 267.

that nonfundamental rights do not apply in an incorporated territory only if such an application would be impracticable and anomalous (which, as I suggested above, is the best interpretation of the cases), then Rehnquist's reasoning seems incompatible with the *Insular Cases*, because *Verdugo-Urquidez* held that the Warrant Clause never applies outside of the United States,<sup>171</sup> regardless of whether it would be impracticable or anomalous for it to apply in that particular case.<sup>172</sup>

We can reconcile this incompatibility on the ground that the *Insular Cases* dealt only with two types of territories (incorporated and unincorporated lands).<sup>173</sup> By contrast, the *Verdugo-Urquidez* case involved a third type of territory—an entirely independent nation, Mexico, not under U.S. control.<sup>174</sup> By considering this distinction, we can find a consistency in both form and substance between, on the one hand, the holding in the *Insular Cases* that nonfundamental rights are subject to the “impracticable and anomalous” standard in unincorporated territories,<sup>175</sup> and on the other hand, Rehnquist's decision in *Verdugo-Urquidez* that nonfundamental rights do not apply at all in independent nations not under U.S. control.<sup>176</sup> Indeed, as a formal matter, the cases are consistent because the *Insular Cases* did not deal with territories under the sovereignty and control of other nations.<sup>177</sup> And as a substantive matter, the cases are consistent because *Verdugo-Urquidez* holds that nonfundamental rights do not apply at all to U.S. conduct in independent nations,<sup>178</sup> thus affirming the notion expressed in the *Insular Cases* that the amount of control the United States exercises over a land is a significant factor in determining the Constitution's applicability to U.S. conduct in that territory.<sup>179</sup>

This interpretation of the *Insular Cases* is also consistent with Justice Kennedy's *Verdugo-Urquidez* concurrence, which, though joining Rehnquist's opinion, explicitly invoked Harlan's use in *Reid* of the “impracticable and anomalous” standard.<sup>180</sup> Kennedy concluded that because “[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous,”<sup>181</sup> the Warrant Clause did not protect Mr. Verdugo-Urquidez from the DEA's search of his home.<sup>182</sup> Justice Kennedy's basis for finding that it would be *impracticable* to apply the Warrant Clause to the DEA's search was that this would require the United States “to cooperate with foreign officials,” and this

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<sup>171</sup> See *id.* at 273–74.

<sup>172</sup> See *id.* (noting the difficulty of case-by-case determinations).

<sup>173</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2254 (2008) (citing the *Insular Cases*).

<sup>174</sup> *Verdugo-Urquidez*, 494 U.S. at 275.

<sup>175</sup> *Reid v. Covert*, 354 U.S. 1, 13 (1957).

<sup>176</sup> See *Verdugo-Urquidez*, 494 U.S. at 261.

<sup>177</sup> See *Reid*, 354 U.S. at 13.

<sup>178</sup> *Id.* at 261.

<sup>179</sup> See *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922) (discussing the *Insular Cases*).

<sup>180</sup> *Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring).

<sup>181</sup> *Id.* at 278.

<sup>182</sup> *Id.*

would be difficult to do, particularly as a result of “[t]he absence of local judges or magistrates available to issue warrants.”<sup>183</sup> And Kennedy’s basis for finding that it would be *anomalous* to apply the Warrant Clause in this case was that there are “differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad.”<sup>184</sup>

Some scholars and advocates have argued that Chief Justice Rehnquist’s opinion is a plurality, and not a majority, opinion because Kennedy’s explicit invocation of the “impracticable and anomalous” standard suggests he did not agree with Rehnquist’s reasoning that the Warrant Clause did not apply at all to the DEA’s search.<sup>185</sup> If this interpretation were correct, that would make Kennedy’s concurring opinion binding law under the Supreme Court’s holding in *Marks v. United States*, which provides that when there is no majority opinion, the binding law is “that position taken by those Members who concurred in the judgments on the narrowest grounds.”<sup>186</sup> The narrowest opinion is Kennedy’s concurrence, because whereas Rehnquist’s opinion held that the Warrant Clause never protects non-citizens in land not under U.S. control,<sup>187</sup> Kennedy’s concurring opinion suggested that the Warrant Clause protects non-citizens abroad so long as doing so would not be “impracticable and anomalous.”<sup>188</sup> Thus, it follows from this interpretation of *Verdugo-Urquidez* that Kennedy’s, and not Rehnquist’s, opinion is binding precedent.

As I have explained elsewhere, however, I believe that this is not a faithful interpretation of the *Verdugo-Urquidez* decision,<sup>189</sup> as it severely undermines the Court’s operability as a formal institution of law.<sup>190</sup> Indeed, to establish that Justice Kennedy joined Chief Justice Rehnquist’s opinion, thus making it a majority opinion, it should be sufficient to point to the fact that Kennedy formally submitted his vote in favor of Rehnquist’s opinion.<sup>191</sup> Moreover, interpreting Kennedy as not joining Rehnquist’s opinion requires that we ignore Kennedy’s own declaration that he was joining it. In Kennedy’s own words, “[a]lthough some explanation of my views is appropriate

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

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

<sup>185</sup> See Neuman, *supra* note 5, at 290 (characterizing Chief Justice Rehnquist’s decision in *Verdugo-Urquidez* as a plurality opinion); Neuman, *supra* note 20, at 2076 (“As the narrowest explanation of the holding in *Verdugo*, [Justice Kennedy’s] ‘global due process’ approach enjoys precedential support.”). Indeed, many of the Guantanamo detainees have interpreted *Verdugo-Urquidez* in this way. See Petitioner’s Consolidated Reply to Respondent’s Return & Opposition to Cross Motion to Dismiss at 40–41 & n.52, *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004) (No. 1:04-CV-01519) (citing *Marks v. United States*, 430 U.S. 185, 193 (1977), as the basis for interpreting Justice Kennedy’s concurrence in *Verdugo-Urquidez* as the binding opinion).

<sup>186</sup> *Marks*, 430 U.S. at 193.

<sup>187</sup> *Verdugo-Urquidez*, 494 U.S. at 266.

<sup>188</sup> See *id.* at 277–78 (Kennedy, J., concurring).

<sup>189</sup> See Merriam, *supra* note 6, at 739.

<sup>190</sup> See *id.* at 737–39.

<sup>191</sup> See *Verdugo-Urquidez*, 494 U.S. at 261; Merriam, *supra* note 6, at 739.

given the difficulties of this case, I do not believe they depart in fundamental respects from the opinion of the Court, which I join.”<sup>192</sup> It takes more than a healthy dose of legal realism to have the audacity to find that Kennedy’s formal vote and own words do not prove that he joined the Rehnquist opinion.

Although some advocates and scholars have displayed such audacity,<sup>193</sup> most courts and scholars have refused to go this far. Rather, they have acknowledged that Chief Justice Rehnquist’s opinion is the majority opinion and is thus binding precedent.<sup>194</sup> To be sure, as a policy matter I am sympathetic with those who dislike Rehnquist’s opinion and would therefore prefer reading Kennedy’s concurring opinion as controlling. But this is just that—a policy preference. The legal issue has been resolved: Rehnquist’s opinion is the majority opinion and thus must be addressed under *stare decisis* in the same way as any other opinion rendered by the majority of the Court. This is the only way to read the opinion with integrity.

Given that Chief Justice Rehnquist’s opinion is the binding opinion and that it modified the *Insular Cases* only by clarifying that they did not deal with lands entirely under the control of independent nations,<sup>195</sup> the *Verdugo-Urquidez* Court largely preserved the status of the “impracticable and anomalous” standard—i.e., as applying to cases involving nonfundamental rights arising from U.S. actions in unincorporated lands under U.S. control.<sup>196</sup> Importantly, however, although Justice Kennedy’s concurring opinion is not binding and therefore did not change the framework established by the *Insular Cases*, his explicit invocation of the “impracticable and

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<sup>192</sup> *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring).

<sup>193</sup> See *supra* note 185 and accompanying text.

<sup>194</sup> See, e.g., *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 624 (5th Cir. 2006) (declaring that the “face value” reading of *Verdugo-Urquidez* is that Chief Justice Rehnquist’s opinion is the majority opinion because “Justice Kennedy joined the opinion of the Court”); *Cuban Am. Bar Ass’n v. Christopher*, 43 F. 3d 1412, 1428 (11th Cir. 1995) (holding that the proposition that foreign petitioners “have no First Amendment or Fifth Amendment rights which they can assert is supported by the Supreme Court’s decision[ ] [in *Verdugo-Urquidez*] declining to apply extraterritorially . . . the Fourth Amendment”); *United States v. Tehrani*, 826 F. Supp. 789, 793 n.1 (D. Vt. 1993) (citing Chief Justice Rehnquist’s *Verdugo-Urquidez*, opinion for the proposition that “the Supreme Court firmly rejected the argument that all aliens enjoy certain constitutional rights”); Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719, 734 (2012) (describing Chief Justice Rehnquist as “[w]riting for a five-Justice majority” in *Verdugo-Urquidez*).

<sup>195</sup> See *Verdugo-Urquidez*, 494 U.S. at 268, 274.

<sup>196</sup> See *id.* Note, however, that the *Verdugo-Urquidez* decision might have had a more significant effect on the transnational applicability of those constitutional provisions that specifically mention the term “the people.” These provisions arguably contain some alien-citizen distinction after the *Verdugo-Urquidez* decision. But as explained above, this distinction was not central to the decision, and moreover, the decision did not substantially change the doctrine concerning the Constitution’s general transnational applicability. See *supra* notes 162–65 and accompanying text.

anomalous” standard did contribute to the notion that it is settled law.<sup>197</sup> As we will see in the following subsection, Justice Kennedy contributed further to the settling of the standard in *Boumediene v. Bush*, the most recent of the Court’s decisions on the Constitution’s transnational applicability.<sup>198</sup>

## 2. *Boumediene v. Bush*

In *Boumediene*, Justice Kennedy, writing for the Court, held that Section 7 of the Military Commissions Act violated the Constitution’s Suspension Clause,<sup>199</sup> because Section 7 eliminated the Court’s jurisdiction to hear habeas corpus petitions filed by detainees in Guantanamo Bay, Cuba.<sup>200</sup> In contrast to his concurring opinion in *Verdugo-Urquidez*, Kennedy’s *Boumediene* opinion largely followed the framework established in the *Insular Cases* by inquiring into whether the right at issue—the right to a habeas review—is fundamental to our constitutional scheme.<sup>201</sup> Kennedy found that it is indeed a fundamental right because “the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”<sup>202</sup> And while acknowledging the government’s national security interest in denying the detainees access to courts, Kennedy found that this could not trump the habeas right because there was also a security interest in giving the detainees such access; in Kennedy’s words, “[s]ecurity subsists, too, in fidelity to freedom’s first principles.”<sup>203</sup>

Moreover, Kennedy continued, not only is habeas a fundamental right because it promotes national security, but it is also fundamental because “[c]hief among [freedom’s first principles] are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.”<sup>204</sup> And “[i]t is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.”<sup>205</sup> Therefore, because habeas is fundamental to the individual rights of the detainees, to our general security as free people, and to our system of government, Kennedy concluded that the detainees had a constitutional right to “the fundamental procedural protections of habeas corpus.”<sup>206</sup>

We see here how in contrast to his concurring opinion in *Verdugo-Urquidez*, where Kennedy did not consider whether the Warrant Clause was fundamental before

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<sup>197</sup> See *Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring).

<sup>198</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008).

<sup>199</sup> U.S. CONST. art. 1, §9, cl.2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

<sup>200</sup> *Boumediene*, 128 S. Ct. at 2274 (2008).

<sup>201</sup> *Id.* at 2244–48.

<sup>202</sup> *Id.* at 2259.

<sup>203</sup> *Id.* at 2277.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

deciding to apply the “impracticable and anomalous” standard,<sup>207</sup> in *Boumediene* Kennedy was more faithful to the *Insular Cases* by considering whether the habeas right is fundamental to determine which standard governs its applicability abroad.<sup>208</sup> Kennedy’s opinion thus “reaffirm[ed] the *Insular Cases*,”<sup>209</sup> as Gerald Neuman aptly characterizes Kennedy’s reasoning.

But Justice Kennedy also departed from the *Insular Cases* framework in important ways. Most significantly, he moved the framework from turning on the legal designation of the territory in question—that is, whether or not it has been incorporated through some official governmental act—to turning on whether the United States controls or exercises exclusive jurisdiction over that land.<sup>210</sup> Under the *Boumediene* reasoning, if the United States controls an unincorporated land, a court should treat that territory just like the *Insular Cases* treated an incorporated land.<sup>211</sup> We see this in Guantanamo Bay, which, though only leased by the United States, was completely under U.S. control.<sup>212</sup> As Kennedy put it, “[n]o Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there,”<sup>213</sup> and thus, “the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base.”<sup>214</sup> This move from the Incorporation Doctrine’s focus on formal governmental designations to a focus on functional governmental actions is part of Kennedy’s rejection of a strictly formalist approach to the Constitution’s transnational applicability.

Kennedy further modified the *Insular Cases* framework by suggesting that even *fundamental* rights might not apply as forcefully in lands not under U.S. control as they apply in lands under U.S. control.<sup>215</sup> Indeed, Kennedy argued, if it were *not* the case that “the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base . . . arguments that issuing the writ would be ‘impracticable or anomalous’ would have more weight.”<sup>216</sup> Some commentators

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<sup>207</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275–78 (1990) (Kennedy, J., concurring).

<sup>208</sup> *See supra* notes 201–05 and accompanying text.

<sup>209</sup> Neuman, *supra* note 5, at 282.

<sup>210</sup> *See Boumediene*, 128 S. Ct. at 2258–59, 2262.

<sup>211</sup> *See supra* Part I.B.2.b (explaining the manner in which the *Insular Cases* treated an incorporated land).

<sup>212</sup> *See* Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 23, 1903, T.S. No. 418 (granting the United States “complete jurisdiction and control” over Guantanamo Bay); *see also* Treaty Between the United States of America and Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1682 (continuing the 1903 lease “[u]ntil the two contracting parties agree to the modification or abrogation of [its] stipulations”).

<sup>213</sup> *Boumediene*, 128 S. Ct. at 2261.

<sup>214</sup> *Id.*

<sup>215</sup> *See id.* at 2261–62.

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



have interpreted this language, wrongly in my opinion, to signal that Kennedy was applying the “impracticable and anomalous” standard in *Boumediene*. For example, Christina Duffy Burnett interprets *Boumediene* as holding that “application of [the] writ in Guantanamo would not be ‘impracticable or anomalous’ under present circumstances, although it might be so under different circumstances.”<sup>217</sup>

But that is not exactly what Kennedy said. Rather, he explained that, under different circumstances, he would give these “arguments . . . more weight.”<sup>218</sup> By saying that in such a hypothetical situation he would give the *arguments more weight*, he was *not* saying that under such circumstances *a set of particular facts would be more likely to exist*. Instead, it appears that he was saying that he would apply a *different constitutional standard* to assess whatever facts were before the Court. That is, it seems that Kennedy was suggesting here that the key distinction is of a doctrinal rather than factual significance.

So if the United States did not control the base, then the Court would have to *apply a different doctrine*—i.e., the “impracticable and anomalous” standard—to determine whether the detainees would be entitled to habeas in that given situation. But Kennedy was not saying that it would be true, as a factual matter, that it would be more impracticable and anomalous to apply habeas to that case. Rather, what Kennedy seemed to be saying was that a different judicial doctrine would apply to such a case. The “impracticable and anomalous” standard *would* apply to a case involving a fundamental right arising from U.S. action in a land *not* under U.S. control.

This is, of course, dictum because the *Boumediene* case *did* involve land under U.S. control.<sup>219</sup> But it is important dictum, in that it suggests a modification of the *Insular Cases*. Recall that the Incorporation Doctrine held that fundamental rights *always* apply to U.S. conduct abroad, whether in an incorporated or unincorporated territory.<sup>220</sup> *Boumediene* affirmed this as true for a territory under U.S. control (as was the case in *Boumediene*),<sup>221</sup> but indicated that a fundamental right would apply in a territory not under U.S. control if and only if applying the fundamental right there would not be impracticable and anomalous.<sup>222</sup>

Notably, Kennedy’s reasoning here is consistent with Rehnquist’s reasoning in *Verdugo-Urquidez* that nonfundamental rights apply less forcefully in independent nations, like Mexico, than in unincorporated territories.<sup>223</sup> Indeed, both cases clearly stand for the proposition that there are two factors determining when a constitutional provision applies in a given situation: (1) whether the United States controls the

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<sup>217</sup> Burnett, *supra* note 5, at 976 n.6.

<sup>218</sup> See *Boumediene*, 128 S. Ct. at 2262.

<sup>219</sup> See *id.* at 2248.

<sup>220</sup> See *supra* note 101 and accompanying text.

<sup>221</sup> See *Boumediene*, 128 S. Ct. at 2262.

<sup>222</sup> See *id.*

<sup>223</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990).

territory where the claim arose, and (2) whether the claim involves a fundamental meaning of the U.S. Constitution.<sup>224</sup>

After *Boumediene*, then, the framework for applying the Constitution is as follows: If a constitutional claim arises in a land over which the United States exercises absolute control or exclusive jurisdiction, and if the court deems that the claim involves a “fundamental meaning” of the Constitution, then the court should apply the Constitution as it would if the claim had arisen domestically.<sup>225</sup> And if neither of these conditions are satisfied, then the court should not enforce the Constitution at all.<sup>226</sup> But if only one of these conditions is met, the court should apply the same standard as would apply domestically unless it would be “impracticable and anomalous” to do so.<sup>227</sup> This standard most clearly applies when a nonfundamental right arises in a land under U.S. control, as was the scenario in the *Insular Cases*. But the “impracticable and anomalous” standard less clearly applies when a fundamental right arises in a land not under U.S. control, as this case has never directly come before the Court. Nevertheless, Kennedy’s dictum in *Boumediene*, and the central principles underlying this area of the law, strongly suggest the applicability of the “impracticable and anomalous” standard to such a case.<sup>228</sup>

As explained in the Introduction, a significant weakness in this framework is the ambiguity in how to apply the “impracticable and anomalous” standard,<sup>229</sup> and because of this ambiguity, many scholars who reject my interpretation of the standard as binding precedent believe that it simply should not be adopted in the first place by the Supreme Court.<sup>230</sup> And even if we accept, as I believe we should, that Justice Harlan correctly interpreted the *Insular Cases* to hold that nonfundamental rights do not apply in unincorporated territories when it would be impracticable and anomalous to do so, we still need to defend this standard as worthy of not being

<sup>224</sup> See *supra* notes 219–22 and accompanying text.

<sup>225</sup> This was the case in *Reid and Boumediene*. See generally *Boumediene*, 128 S. Ct. 2229; *Reid v. Covert*, 354 U.S. 1 (1957).

<sup>226</sup> This was the case in *Verdugo-Urquidez*. See generally *Verdugo-Urquidez*, 494 U.S. 259. Lower courts have generally followed this reasoning. See, e.g., *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 123–28 (2d Cir. 2008); *United States v. Stokes*, 710 F. Supp. 2d 689 (N.D. Ill. 2009).

<sup>227</sup> For a similar reading of these precedents, as they stood before *Boumediene*, see Hall, *supra* note 59, at 106 (“The first step in the test is to determine if the territory is incorporated. If so, then the Constitution applies fully. If a territory is unincorporated, then the right to be applied must be examined through a Fourteenth Amendment incorporation lens. If the right is not deemed fundamental using Fourteenth Amendment analysis, then it is inapplicable in the territory. If it is fundamental, then the impractical and anomalous test determines whether the right is extended to the inhabitants of a territory.”).

<sup>228</sup> See *supra* Part I.C.2.

<sup>229</sup> See *supra* Introduction.

<sup>230</sup> See *supra* Introduction (discussing Burnett’s rejection of the “impracticable and anomalous” standard because she believes that it grants judges too much discretion).

overruled.<sup>231</sup> So for both those commentators who reject it as binding precedent and those who accept it, we must establish that the “impracticable and anomalous” standard is a defensible doctrine in this area of the law, a task that requires determining precisely what the standard means. Part II undertakes this inquiry.

## II. WHAT DOES THE “IMPRACTICABLE AND ANOMALOUS” STANDARD MEAN?

Part II will explore what the “impracticable and anomalous” standard means, and in so doing, will divide into three sections. Part II.A will explore how to interpret the “impracticable” prong; this discussion will turn on the important point that “impracticable” is conceptually distinct from “impractical,” a point that, amazingly, has eluded many scholars and judges, including Justice Harlan, who first explicated the standard.<sup>232</sup> Part II.B will examine the “anomalous” prong and the extent to which foreign law can and should aid this analysis. Based on these discussions, Part II.C will conclude that the standard consists of two conceptually distinct prongs and is therefore a binary standard. Part II.C will thus explore the critical question whether it is a disjunctive or conjunctive test.

### A. What Does “Impracticable” Mean?

#### 1. How the U.S. Supreme Court Has Applied the “Impracticable” Prong

Confusion about the meaning of “impracticable” was apparent from the first explicit invocation of the “impracticable and anomalous” standard—i.e., Justice

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<sup>231</sup> Note though, that a standard created over 100 years ago, and affirmed in every Supreme Court case in that area of the law through 2008, is unlikely, as a descriptive matter, to be overruled. Indeed, many social science studies have found a strong correlation between time and following precedent: the longer the precedent has been around, the more likely it is that the Court will follow it. In their groundbreaking research on *stare decisis*, for example, Spaeth and Brenner analyzed 154 of the Supreme Court’s overruled precedents and found that “precedent[ ] become[s] sacrosanct . . . in the nineteenth century and earlier,” as only “6.4 percent of the overturned cases (10 cases) were over 90 years old.” SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS* 29 (1995). Moreover, “the most frequently overruled decisions were 0 to 10 years old (26.6 percent), followed by those decided 11 to 20 years previously (23.4 percent).” *Id.* While recognizing “that far more decisions of the Court were handed down in the twentieth century than in the nineteenth century,” Spaeth and Brenner concluded that older precedents are more likely to be followed. *Id.* Similarly, Thomas G. Hansford and James F. Spriggs II found that “precedent age initially exerts a positive effect on the likelihood of a precedent being overruled,” maxing out between its seventh and fourteenth year, and then decreasing substantially. THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 84 (2006). Therefore, they conclude, “[o]ld precedents (50 + years old) are very unlikely to be overruled.” *Id.*

<sup>232</sup> See, e.g., *Reid v. Covert*, 354 U.S. 1, 74–76 (1956) (Harlan, J., concurring) (alternating between “impracticable and anomalous” and “impractical and anomalous”).

Harlan's concurring opinion in *Reid v. Covert*.<sup>233</sup> Indeed, in that opinion, Harlan used "impracticable" and "impractical" interchangeably.<sup>234</sup> He used the term "impracticable" only once, when he announced:

that the basic teaching of *Ross* and the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether *impracticable* and anomalous.<sup>235</sup>

But in the very next sentence, he changed the term to "impractical" in explaining that the *Balzac* case "is good authority for the proposition that there is no rigid rule that jury trial must *always* be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be *impractical* and anomalous."<sup>236</sup> And when applying the standard later in the opinion, Harlan again used the term "impractical," stating that "[t]he Government . . . has made an impressive showing that at least for the run-of-the-mill offenses committed by dependents overseas, such a requirement would be as *impractical* and as anomalous as it would have been to require [a] jury trial for *Balzac* in Porto Rico."<sup>237</sup>

Harlan's confusion of these terms is astounding, as they have quite different meanings.<sup>238</sup> Indeed, writing in 1926, H.W. Fowler explained in his famous *A*

<sup>233</sup> *See id.*

<sup>234</sup> *See id.*

<sup>235</sup> *Id.* at 74 (emphasis added).

<sup>236</sup> *Id.* at 74–75 (latter emphasis added).

<sup>237</sup> *Id.* at 75–76 (emphasis added).

<sup>238</sup> H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 453 (1926). Perhaps even more astounding is how many scholars have overlooked this distinction. *See, e.g.*, Hall, *supra* note 59, at 82 (questioning what Harlan meant by "*practical and anomalous*," and in seeking an answer for this question, explaining that "Justice Harlan enumerated several *practical* problems with requiring a jury trial for all civilians accused of crimes abroad") (emphasis added); *see also* Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, 358 (1981) [hereinafter Laughlin, *Application of the Constitution*]; Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 368–73 (2005) [hereinafter Laughlin, *Cultural Preservation*]. But at least one astute commentator has pointed out the difference between "impracticability" and "impracticality." *See* Burnett, *supra* note 5, at 1006, n.119 (noting that "Harlan used the two terms interchangeably, though arguably they do not mean quite the same thing (with 'impracticable' implying a more stringent standard, closer to impossibility, and 'impractical' implying a lower one, thereby making room for considerations closer to convenience)"). Burnett, however, does not go far enough: it is not just "arguabl[e] [that] they do not mean quite the same thing"—they simply do not mean the same thing.

*Dictionary of Modern English Usage* that “practical” and “practicable” are distinct words, but, due to their overlapping meanings in some contexts, are often confused: “[e]ach word has senses in which there is no fear that the other will be substituted for it; but in other senses they come very near each other, & confusion is both natural & common.”<sup>239</sup> According to Fowler, “*practicable* means capable of being effected or accomplished,” whereas “*practical* [means being] adapted to actual conditions.”<sup>240</sup>

To illustrate this distinction, Fowler offered three sentences that confuse these words, and one of these sentences is particularly apt for our purposes: “But to plunge into the military question without settling the Government question would not be good sense or *practicable* policy; & no wise man would expect to get serviceable recruits for the Army from Ireland in this way.”<sup>241</sup> As Fowler explains, the author of this sentence should have said “practical” because “[t]he policy was certainly practicable, for it was carried out,”<sup>242</sup> and the author likely intended to say only that this policy “was not suited to the conditions.”<sup>243</sup> Even in this example, however, we can see the overlap between the words, for what is impracticable (i.e., difficult) to accomplish is usually impractical (i.e., unwise or imprudent) to pursue. Given the confusion and overlapping meanings between these words, Fowler prescribed that, to add clarity, we should say “impracticable” and “unpractical” instead of “impracticable” and “impractical.”<sup>244</sup> As Fowler put it, “[t]he constant confusion between *practicable* & *practical* is a special reason for making use of im- & un- to add to the difference in the negatives.”<sup>245</sup> Harlan might have avoided a lot of confusion had he simply followed *A Dictionary of Modern English Usage*, which, incidentally, was published thirty-one years before the *Reid* decision and was widely used at that time.<sup>246</sup>

But which meaning did Harlan *intend*—the impracticability (i.e., difficulty) or impracticality (i.e., imprudence) of providing jury trials abroad? Unfortunately, it seems that Harlan was operating in that murky area, alluded to by Fowler, in which the senses of the words largely overlap, leading many writers to confuse the words. Indeed, to support his claim that “[t]he Government . . . has made an impressive showing that at least for the run-of-the-mill offenses committed by dependents overseas, such a requirement would be as impractical and as anomalous as it would have been to require [a] jury trial for Balzac in Porto Rico,”<sup>247</sup> Harlan provided three reasons

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<sup>239</sup> Fowler, *supra* note 238, at 453.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 260.

<sup>246</sup> Jeff Aronson, *Modern English Abusage*, 520 BRIT. MED. J. 357 (Feb. 5, 2000), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1127144/> (noting the popularity of Henry Watson Fowler’s *A Dictionary of Modern English Usage* after its initial publication in 1926).

<sup>247</sup> *Reid v. Covert*, 354 U.S. 1, 75–76 (1957) (Harlan, J., concurring).

in an accompanying footnote.<sup>248</sup> Two of these reasons relate to the impracticability (difficulty) of extending a jury-trial right abroad for non-capital offenses, and the third relates to both the impracticability and the impracticality (imprudence) of doing so.<sup>249</sup>

Harlan's first reason for not extending a general right to a jury trial abroad is that if, to implement this right, the United States were "to try all offenses committed by civilian dependents abroad in the United States,"<sup>250</sup> the United States would have to provide transportation for the defendants as well as the witnesses, which "would be a ridiculous burden on the Government, quite aside from the problems of persuading foreign witnesses to make the trip and of preserving evidence."<sup>251</sup> Moreover, Harlan added, it is "doubtful in the extreme whether foreign governments would permit crimes punishable under local law to be tried thousands of miles away in the United States."<sup>252</sup> Here, Harlan clearly meant that providing jury trials in the United States would be difficult; he therefore should have said that it would be *impracticable*.

Harlan's second reason is that, even if the United States were to implement the right by providing a trial in the foreign nation where the offense arose, it would still be unbearably difficult to do so because "[i]f juries are required, the problem of jury recruitment would be difficult"<sup>253</sup> and "[f]urthermore, it is indeed doubtful whether some foreign governments would accede to the creation of extraterritorial United States civil courts within their territories."<sup>254</sup> Again, Harlan was referring to the difficulty of extending the right and thus should have said it would be *impracticable*.

But in his third reason, it seems that Harlan was referring to both the difficulty and the imprudence of extending the right, thus muddling whether he meant that it would be impracticable or impractical to apply the right abroad. In this third reason, Harlan considered whether, if the United States could not implement the jury-trial right by conducting a trial either in the United States or in the foreign nation where the offense arose, the United States might be able to implement the right by having a foreign court try the case with a foreign jury.<sup>255</sup> Harlan dismissed this possibility, however, on three grounds.<sup>256</sup> One, "the protections granted to criminal defendants compare unfavorably with our own minimum standards."<sup>257</sup> Moreover, Harlan continued, an act illegal in the United States might not be illegal under the law of the nation in which the act arises, and this offense "thus would go completely unpunished."<sup>258</sup>

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<sup>248</sup> *Id.* at 76 n.12.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *See id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

Finally, he concluded, “[a]dd to this the undesirability of foreign police carrying out investigations in our military installations abroad, and it seems to me clear that this alternative does not commend itself.”<sup>259</sup> Here, Harlan was referring partly to the *impracticability* of having foreign nations conduct the trials: foreign courts might not be able to try the offenses without our procedural protections and substantive laws. But he was also referring to the *impracticality* of having foreign nations conduct the trials: it would be “unfavorabl[e]”<sup>260</sup> to have a trial without our procedural protections, and moreover, it would be “undesirabl[e]”<sup>261</sup> to have foreign police conduct the investigation. So even if the trial would be practicable, in the sense that it could be done without too much difficulty, it would not “commend itself,”<sup>262</sup> as Harlan put it. This language reveals how Harlan was thinking about this issue partly from the perspective of a U.S. policymaker, considering whether to approve this approach in terms of its favorability and desirability; in this passage, but only in this passage, Harlan was right in using the word “impractical.”

As is clear from this analysis of the language in Harlan’s opinion, it is impossible to determine whether he intended the standard to be “impracticable and anomalous” or “impractical and anomalous.” Indeed, he used the word “impractical” twice but “impracticable” only once,<sup>263</sup> perhaps leading one to believe that he more likely meant “impractical.” But his reasoning focused much more on impracticability, perhaps providing stronger evidence, then, that he meant “impracticable.” Then again, his final reason did mention the impracticality of applying the right.<sup>264</sup> Given these inconsistencies, we simply cannot discern his intended meaning by closely reading the text or following his reasoning. For this reason, it should not come as a surprise that lower courts have split on whether it is the “impracticable and anomalous” or “impractical and anomalous” standard.<sup>265</sup>

Recall, however, that Harlan invoked this standard as dictum, because the *Reid* case involved a fundamental right in a land under the exclusive jurisdiction of the United States,<sup>266</sup> so under Harlan’s reasoning, the right was going to apply regardless of whether the government satisfied the standard. This language provides only guidance, not binding law, on what the standard means, because as argued above, the bindingness of the standard derives from the *Insular Cases*.<sup>267</sup> And importantly, the *Insular Cases*, though not explicitly using the “impracticable and anomalous”

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 74–76.

<sup>264</sup> *See id.* at 76 n.12.

<sup>265</sup> *See infra* Part II.A.2.

<sup>266</sup> *See Reid*, 354 U.S. 1.

<sup>267</sup> *See supra* Part I.

language, relied much more on the impracticability than impracticality of applying the Constitution abroad.<sup>268</sup>

In the *Balzac* opinion, for example, Chief Justice Taft explained that the jury-trial right did not apply in Puerto Rico because it would be too *difficult* to apply it there:

[t]he jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire.<sup>269</sup>

Indeed, the *Insular Cases* rarely described the *impracticality* of applying a particular Constitution abroad.<sup>270</sup> But they frequently explored the *impracticability* of doing so, due to the material or cultural infrastructure that the United States would have to create to accomplish this task.<sup>271</sup> Since Harlan was deriving the standard from these opinions, and since these opinions focused on impracticability much more than on impracticality, there is a much stronger basis in this context for interpreting Harlan's use of the standard as referring more to impracticability than impracticality.

This is indeed how Kennedy has interpreted Harlan's concurrence. Kennedy has consistently used "impracticable" instead of "impractical." In *Verdugo-Urquidez*, he used the word "impracticable" twice and "impractical" zero times in announcing the standard,<sup>272</sup> and in *Boumediene*, he used the word "impracticable" three times and "impractical" zero times in invoking the standard.<sup>273</sup> Moreover, not only has Kennedy used only the word "impracticable," Kennedy's reasoning in applying the standard has focused much more on impracticability than on impracticality. For example, in *Verdugo-Urquidez*, Justice Kennedy's basis for finding that it would be impracticable to apply the Warrant Clause in Mexico was that there is an "absence of local judges or magistrates available to issue warrants,"<sup>274</sup> and the United States would "need to cooperate with foreign officials."<sup>275</sup> These factors were relevant for Kennedy because they would make it exceedingly difficult for the Warrant Clause

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<sup>268</sup> See *supra* Part I.B.2.c.

<sup>269</sup> *Balzac v. People of Porto Rico*, 258 U.S. 298, 310 (1921).

<sup>270</sup> See *supra* Part I.B.2.c.

<sup>271</sup> See *id.*

<sup>272</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

<sup>273</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2255, 2262 (2008).

<sup>274</sup> *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

<sup>275</sup> *Id.*



to apply in Mexico.<sup>276</sup> Notably, based on Kennedy's correct use of "impracticable" to refer to the difficulty rather than the prudence of applying a particular constitutional provision in a particular territory, we might infer that, as compared to Harlan's apparent unfamiliarity with Fowler's writings on the impracticable-impractical distinction,<sup>277</sup> Kennedy is more acquainted with how the master legal linguist of our time, Brian Garner, views the word "impracticable."<sup>278</sup> Astonishingly, however, lower courts still occasionally get this wrong, even after Kennedy clarified in *Boumediene* that the standard is based on impracticability rather than impracticality.<sup>279</sup>

## 2. How Lower Courts Have Applied the "Impracticable" Prong

Lower courts have regularly alternated between using the terms "impracticable" and "impractical" in applying the standard. For example, in *Al Maqaleh v. Gates*,<sup>280</sup> a case on how *Boumediene* applies to the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan, the U.S. District Court for the District of Columbia represented the *Boumediene* decision as finding "that habeas review would not raise substantial *practical* obstacles in the way of the military mission."<sup>281</sup> This, of course, is a misrepresentation of *Boumediene* because, as mentioned above, the *Boumediene* decision did not actually *apply* the "impracticable and anomalous" standard. It held that Guantanamo Bay detainees, due to their being under the absolute control of the United States, were entitled to fundamental constitutional protections, such as the habeas right, regardless of whether it would be impracticable and anomalous for the United States to extend this right to the detainees.<sup>282</sup>

More important for our purposes here, however, to the extent that the *Boumediene* Court *did* apply the standard, the Court's language hinged on whether applying habeas in that instance would be *impracticable*, not on whether doing so would be *practical*,<sup>283</sup> as the district court in *Al Maqaleh* incorrectly claimed.<sup>284</sup> The district

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<sup>276</sup> *Id.*

<sup>277</sup> *See Reid v. Covert*, 354 U.S. 1, 74–76 (1957) (Harlan, J., concurring).

<sup>278</sup> Indeed, in his *A Dictionary of Modern Legal Usage*, Garner draws from Fowler's writings to distinguish "practical" from "practicable" by explaining that "practical" means to be "capable of being put to good use," whereas "practicable" means to be "capable of being accomplished; feasible; possible." BRIAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 678 (1995). In accord with Garner's definition, Kennedy clearly means the standard to refer to the *impracticability* of applying the Constitution abroad: the question is whether the United States is *capable* of enforcing the right.

<sup>279</sup> *Boumediene*, 128 S. Ct. 2229, 2255–56, 2262 (2008) (citing *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring) (finding that whether a constitutional provision has constitutional reach depends upon whether judicial enforcement would be "impracticable and anomalous"))).

<sup>280</sup> 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

<sup>281</sup> *Id.* at 227–28 (emphasis added).

<sup>282</sup> *Boumediene*, 128 S. Ct. at 2262.

<sup>283</sup> *See id.* at 2259–62.

<sup>284</sup> *See Al Maqaleh*, 604 F. Supp. 2d at 230 (citing *Boumediene*, 128 S. Ct. at 2262).

court was, therefore, wrong in basing its decision to grant habeas to some of the petitioners on the ground that “[h]abeas review is not impractical when detainees are held at secure military facilities.”<sup>285</sup> To the extent that the court was right in applying the “impracticable and anomalous” standard, it should have considered the impracticability (i.e., difficulty) of providing habeas review to the detainees held in secure military facilities, not the impracticality (i.e., imprudence) of doing so.

Likewise, the D.C. Circuit, in reversing this decision and denying habeas to the detainees, wrongly applied the standard, even misquoting Kennedy’s invocation of the standard in *Boumediene* by converting his language from “impracticable” to “impractical.”<sup>286</sup> Indeed, according to the D.C. Circuit, Kennedy proclaimed that had the United States not exercised control over Guantanamo, then “arguments that issuing the writ would be ‘*impractical* or anomalous’ would have more weight.”<sup>287</sup> But as explained *supra*, Kennedy instead wrote that in such a situation “arguments that issuing the writ would be ‘*impracticable* or anomalous’ would have more weight.”<sup>288</sup> In fact, as explained *supra*, Kennedy has never used the word “impractical” in applying the standard. To the contrary, Kennedy has consistently used “impracticable” in both his *Verdugo-Urquidez* and *Boumediene* opinions.<sup>289</sup> The D.C. Circuit’s misquote provides striking evidence of the profound terminological confusion that has pervaded this area of the law since Harlan’s conflation of the terms in *Reid*.

Furthering the confusion, the two most prominent pre-*Boumediene* lower court cases applying the “impracticable and anomalous” standard also misapplied the impracticability analysis. The first of these cases was *King v. Morton*,<sup>290</sup> a case that arose in the unincorporated territory of the American Samoa.<sup>291</sup> The case involved what Harlan would have called a run-of-the-mill criminal case—a prosecution of a U.S. citizen and resident of American Samoa for willfully failing to pay his income taxes, in violation of Samoan law.<sup>292</sup> After a Samoan court rejected his demand for a jury trial, he brought his case in the U.S. District Court for the District of Columbia,<sup>293</sup> which dismissed his claim for lack of jurisdiction.<sup>294</sup> He then appealed to the D.C. Court of Appeals, which reversed the district court and remanded the case back to that court so that it could apply the proper standard in determining whether to extend a jury trial.<sup>295</sup>

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<sup>285</sup> *See id.* at 228.

<sup>286</sup> *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010) (citing *Boumediene*, 128 S. Ct. at 2261–62).

<sup>287</sup> *Id.* (quoting *Boumediene*, 128 S. Ct. at 2261–62) (emphasis added).

<sup>288</sup> *Boumediene*, 128 S. Ct. at 2262 (emphasis added).

<sup>289</sup> *See id.* at 2255, 2262; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275–79 (Kennedy, J., concurring).

<sup>290</sup> 520 F.2d 1140 (D.C. Cir. 1975).

<sup>291</sup> *Id.* at 1142.

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

<sup>293</sup> *Id.* at 1143.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 1148.

This standard turned on the D.C. Circuit's interpretation of Harlan's *Reid* concurrence.<sup>296</sup> Indeed, the D.C. Circuit found that the critical inquiry was whether it would be "impractical and anomalous" to provide a jury trial in this instance.<sup>297</sup> But despite using the word "impractical" in announcing the standard, the D.C. Circuit focused on the *impracticability* of applying a jury trial in the American Samoa. The critical question for the court was "whether a jury in Samoa could fairly determine the facts of a case in accordance with the instructions of the court without being unduly influenced by customs and traditions of which the criminal law takes no notice; and whether the implementation of a jury system would be *practicable*."<sup>298</sup> In this sentence, not only did the court correctly *cite* the word "practicable," but it also correctly *applied* this word by referring to its analysis later in the opinion discussing whether it would be *possible* to implement the right, given U.S. resources in the area and the customs of Samoan jurors.<sup>299</sup> In the very next sentence, however, the court incorrectly summarized its analysis by quoting Harlan's use of the word "impractical."<sup>300</sup> In the court's words, "[i]n short, the question is whether in American Samoa 'circumstances are such that trial by jury would be *impractical* and anomalous.'"<sup>301</sup> Again, Harlan's confusion looms like a specter over judicial attempts to clarify the standard.

Similarly, in *Waboll v. Villacrusis*,<sup>302</sup> the next major lower court case invoking the standard, the Ninth Circuit cited Harlan's "impractical and anomalous" language to determine whether a provision in the Northern Mariana Islands (NMI) Constitution violated the Equal Protection Clause by "restrict[ing] the acquisition of long-term interests to persons of Northern Mariana Islands descent."<sup>303</sup> The court proclaimed that the question was whether this right to acquire property free from governmental race-based classifications "is one which would be impractical or anomalous in NMI."<sup>304</sup> The court found that it would not be "impractical" because:

[t]he land alienation restrictions are properly viewed as an attempt, albeit a paternalistic one, to prevent the inhabitants from

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<sup>296</sup> *Id.* at 1155–56 (citing *Reid v. Covert*, 354 U.S. 1, 74–75, 77 (1957) (Harlan, J., concurring)).

<sup>297</sup> *Id.* at 1147 (citing *Reid*, 354 U.S. at 75, 77 (Harlan, J., concurring)).

<sup>298</sup> *Id.* (emphasis added).

<sup>299</sup> In the next paragraph, the D.C. Circuit considered the American Samoa's claim that it would be impracticable for the U.S. government to set up jury trials in the American Samoa because the Samoan chiefs would exercise too much influence over jurors and moreover, it would be difficult for the system to work, given the kinship among the people. *Id.* at 1147–48. The court rejected this argument, but as Laughlin notes, this was not because the argument was not conceptually sound, but rather "because the American Samoa government failed to prove the factual premises upon which it was based." Laughlin, *Cultural Preservation*, *supra* note 238, at 353.

<sup>300</sup> *King*, 520 F.2d at 1147 (quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring)).

<sup>301</sup> *Id.* (emphasis added).

<sup>302</sup> 958 F.2d 1450 (9th Cir. 1992).

<sup>303</sup> *Id.* at 1452.

<sup>304</sup> *Id.* at 1461.

selling their cultural anchor for short-term economic gain, thereby protecting local culture and values and preventing exploitation of the inexperienced islanders at the hands of resourceful and comparatively wealthy outside investors.<sup>305</sup>

Therefore, the court concluded, “free alienation is *impractical* in this situation not because it would not work, but because it would work too well.”<sup>306</sup>

Although the Ninth Circuit wrongly relied on Harlan’s “impractical” language, because, as explained *supra*, the best reading of Harlan’s opinion is that it referred to the *impracticability* of applying the Constitution abroad,<sup>307</sup> at least the Ninth Circuit applied the term consistently with its meaning. Indeed, the court properly distinguished between whether applying a right will work (its practicability) and whether, as a policy matter, we want it to work that way (its practicality). The court wrongly invoked the latter concept, but at least it consistently and correctly applied the term “impractical” to the facts by considering the prudence of applying the Equal Protection Clause in NMI.

Not all courts, however, have misstated or misapplied the standard. For example, before the *Boumediene* decision, the District Court for the District of Columbia, in *In re Guantanamo Detainee Cases*,<sup>308</sup> found that the critical question in determining whether the detainees are entitled to some type of adjudicatory proceedings is whether it would be “impracticable and anomalous” for the United States to extend such proceedings in Guantanamo.<sup>309</sup> The court properly derived this standard from the *Insular Cases*, Harlan’s *Reid* concurrence, and Kennedy’s *Verdugo-Urquidez* concurrence. The court found that it would not be impracticable to apply the Due Process Clause to detainees held at Guantanamo Bay, because “[r]ecognizing the existence of that right at the Naval Base would not cause the United States government any more hardship than would recognizing the existence of constitutional rights of the detainees had they been held within the continental United States.”<sup>310</sup> This focus on governmental hardship is the proper model for analyzing the “impracticable” prong, as discussed below.

### 3. How Courts Should Now Apply the “Impracticable” Prong

The D.C. District Court’s decision in *In re Guantanamo Detainee Cases* is the model for how courts should now apply the “impracticable” prong, and moreover,

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<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 1462 n.21 (emphasis added) (citing Laughlin, *Application of the Constitution*, *supra* note 238, at 386).

<sup>307</sup> *See id.* at 1461 (citing *Reid*, 354 U.S. at 75 (Harlan, J., concurring)); *supra* note 298 and accompanying text.

<sup>308</sup> 355 F. Supp. 2d 443 (D.D.C. 2005), *vacated by* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev’d*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>309</sup> *Id.* at 463.

<sup>310</sup> *Id.*

how courts should have applied the Supreme Court's pre-*Boumediene* precedents on the Constitution's transnational applicability. Indeed, the district court properly began its analysis by considering whether the right at issue was fundamental.<sup>311</sup> The court then properly applied the "impracticable and anomalous" standard,<sup>312</sup> because before *Boumediene*, the question was not whether the United States functionally exercised control, but rather whether the territory was formally incorporated into the United States through some official governmental action.<sup>313</sup> Since Guantanamo Bay had not been so incorporated and that is the action that the pre-*Boumediene* cases required for full constitutional applicability of fundamental rights,<sup>314</sup> the district court properly found that the "impracticable and anomalous" standard applied to this case.<sup>315</sup> Finally, using the word "impracticable," the court correctly applied it to refer to the hardship of applying the right in Guantanamo Bay (the practicability) rather than the policy wisdom of doing so (the practicality).<sup>316</sup>

Importantly, the district court did *not* question whether it would be possible *in theory* to apply the Constitution in that instance.<sup>317</sup> Rather, the court considered the hardships *in practice* of applying the Constitution in Guantanamo Bay.<sup>318</sup> The court properly focused on practice rather than theory because the Constitution must not be interpreted to require the government to do what it, as a matter of fact, cannot do, even if such governmental action would be theoretically possible in some conceivable situations; this is, of course, a basic idea underlying any legal scheme.<sup>319</sup> Moreover, since it is at least *theoretically possible* to apply almost any constitutional provision abroad, interpreting "impracticable" in this broad way would not reflect the Court's invocation of the standard to express that nonfundamental rights do not always apply abroad. Indeed, such a broad interpretation would effectively adopt Justice Black's position in his *Reid* plurality opinion that the government must obey the Constitution whenever and wherever it acts abroad<sup>320</sup>—an approach that the Court has clearly and repeatedly rejected.<sup>321</sup>

The question, rather, is whether it would be possible, *given the relevant foreign-policy mission and the means readily available to the United States in pursuing that mission*, to apply the Constitution in that instance. To illustrate this, let us apply the "impracticability" prong to the recent controversy over the transnational applicability

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<sup>311</sup> *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 454–64.

<sup>312</sup> *Id.* at 463.

<sup>313</sup> *Id.* at 462–64.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 463.

<sup>316</sup> *Id.* at 463–64.

<sup>317</sup> *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443.

<sup>318</sup> *Id.* (finding that it would not be impracticable and anomalous to recognize that the detainees at Guantanamo Bay have due process rights).

<sup>319</sup> *See* LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969).

<sup>320</sup> *Reid v. Covert*, 354 U.S. 1, 5–7 (1957).

<sup>321</sup> *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269–71, 274–75 (1990).

of the Establishment Clause. As I mentioned in the Introduction to this Article,<sup>322</sup> and as I have discussed at length in a previous work, there has been considerable debate over this issue largely as a result of the USAID Inspector General's Office July 17, 2009, audit questioning whether some of USAID's programs violate the Establishment Clause.<sup>323</sup> In particular, the audit report questions the constitutionality of USAID's funding of the repair of Iraqi mosques and funding of an African HIV/AIDS program infused with religious messages.<sup>324</sup>

Assuming that the "impracticable and anomalous" standard applied in these instances,<sup>325</sup> the question, as far as the "impracticable" prong is concerned, would be whether the United States, given its presence in Iraq and these specific countries in Africa, is capable of accomplishing the relevant foreign-policy mission.

So the first task is to identify that mission. In funding mosques in Iraq, the relevant policy mission seems to be to stabilize the area. Indeed, the audit report explains that "some of the expected benefits from rehabilitating the Al Shuhada Mosque were stimulating the economy, enhancing a sense of pride in the community, reducing opposition to international relief organizations operating in Fallujah, and reducing incentives among young men to participate in violence or insurgent groups."<sup>326</sup>

The next inquiry is whether, given the U.S. presence in these lands, the United States is capable of accomplishing that mission while enforcing the Establishment Clause constraints on funding religion. The answer for the funding in Iraq seems to be "yes." To stimulate the economy and enhance a sense of pride in the community, so as to stabilize the region, the United States could fund the repair of many types of buildings besides inherently religious ones; for example, the United States is capable of achieving this task in Iraq by funding community centers and secular schools.<sup>327</sup> So it seems entirely practicable to apply the Establishment Clause to this funding of mosques in Iraq. Note, however, that although it seems *practicable*, it might not be *practical* to do so, since it is possible that by having a court impose the Establishment Clause on this funding so as to cease the funding of these mosques, it would stir up hostility against American secularism, thus furthering the notion among Islamic

<sup>322</sup> See *supra* note 6 and accompanying text.

<sup>323</sup> Merriam, *supra* note 6, at 701.

<sup>324</sup> *Id.* See also OFFICE OF INSPECTOR GEN., *supra* note 6.

<sup>325</sup> Under the framework developed in this Article, both programs would likely be subject to the "impracticable and anomalous" standard, because the funding of mosques in Iraq would involve a nonfundamental meaning of the Establishment Clause (the prohibition on funding of religious buildings) in a land that was at the time under U.S. control, and the funding of the African HIV/AIDS program would involve a fundamental meaning of the Establishment Clause (the prohibitions on religious preferentialism and indoctrinations) in lands that were not under U.S. control. For a further discussion of how the framework would apply to these programs, see Merriam, *supra* note 6, at 753–55.

<sup>326</sup> OFFICE OF INSPECTOR GEN., *supra* note 6, at 5.

<sup>327</sup> *Id.* (noting that the USAID's community stabilization program promoted employment and skills training).

radicals that the United States is a nation of heathens.<sup>328</sup> Of course, it would be impractical (i.e., imprudent) to enforce the Constitution in a way that encourages this impression of the United States in the Middle East. So if practicality were the factor, then it would fail this prong, whereas it would satisfy the practicability prong so that the Establishment Clause would apply to the program.<sup>329</sup> This further illustrates the importance of distinguishing between impracticability and impracticality in applying the “impracticable and anomalous” standard.

The African HIV/AIDS program, however, might fail the impracticability prong so that the Establishment Clause would not apply, though this is far from certain based on the available facts. In analyzing this case, the first question, just as in the Iraq example, is to identify the relevant foreign-policy mission. Here, the mission seems to be, as the audit report explains, “to improv[e] the self-awareness and self-worth of young people so that students of the program might become less vulnerable to sexual exploitation and thus less at risk for HIV.”<sup>330</sup>

The next question is whether, given the U.S. presence in these regions of Africa, the United States is capable of accomplishing this mission while also enforcing the Establishment Clause prohibition on mixing religious doctrine with such lessons on sex education.<sup>331</sup> USAID officials have argued that because “the cultural context in which the curriculums would be used is markedly different from that in the United States . . . such religious references are useful for connecting with the target audience,”<sup>332</sup> and therefore, “the use of religious references can improve the effectiveness of an activity’s nonreligious purpose, such as preventing the spread of HIV.”<sup>333</sup>

In conducting this part of the analysis, it is important to note that USAID’s claims are quite tentative—it alleges that the use of religion in this context is “useful” and “can improve the effectiveness” of the mission.<sup>334</sup> This seems to suggest that it is *impractical* to apply the Establishment Clause to the program. But, it does not establish that it is *impracticable* to do so. Indeed, this is a much higher standard that will require a fact-specific inquiry into the particular U.S. resources available in the land in question and whether the people in that land actually seem capable of acquiring a sex education on these particular subjects without the use of such overtly Christian references. Since the audit report does not provide any facts on these issues,<sup>335</sup>

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<sup>328</sup> See Merriam, *supra* note 6, at 705–15 (discussing the potentially explosive relationship between religion and national security).

<sup>329</sup> That is, the Establishment Clause would apply to this program, so long as it also would not be *anomalous* for it to apply in this context. We will apply the anomalous prong to the program *infra*.

<sup>330</sup> OFFICE OF INSPECTOR GEN., *supra* note 6, at 6.

<sup>331</sup> See *id.* at 1.

<sup>332</sup> *Id.* at 7.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> See *id.* at 3–4, 7–9. USAID limited the audit to answering two questions: (1) “[w]ere USAID-awarded funds used for religious activities?”; and (2) “[d]id USAID implement

it is unclear whether applying the Establishment Clause to this program would be impracticable.

Our analyses of the Iraqi and African cases demonstrate how *practicality* will ultimately turn on a judgment about the *desirability* of the underlying policy, whereas *practicability* will turn on a significantly more circumscribed and technical judgment about the *possibility* of applying a particular constitutional provision abroad. This more circumscribed and technical judgment is a much more legally defensible task for a judge to perform. And as argued at length above, this approach is much more consistent with the “impracticable and anomalous” standard as it was implied in the *Insular Cases*, derived by Justice Harlan in *Reid*, and affirmed by Justice Kennedy in *Verdugo-Urquidez* and *Boumediene*. Now that we have established the meaning of “impracticable” in the standard, we can turn to our second task in discerning the standard, the meaning of “anomalous” in this context.

### B. What Does “Anomalous” Mean?

Our inquiry into the meaning of “anomalous” in this context must begin, as did our investigation into “impracticable,” with the first explicit invocation of the standard: Justice Harlan’s concurrence in *Reid*.

#### 1. How the U.S. Supreme Court Has Applied the “Anomalous” Prong

Unfortunately, just as he failed to distinguish between “impracticable” and “impractical,” Harlan also failed to distinguish “anomalous” from either of these terms. Indeed, as mentioned above, he applied his “impracticable and anomalous” standard only in a footnote and all three reasons he provided turned not on the anomalousness but on the impracticability (and impracticality) of extending jury trials to “run-of-the-mill offenses” committed abroad.<sup>336</sup> Harlan seemed to view the “anomalous” prong as simply part of the “impracticable” prong.

Harlan’s conflation of these prongs is quite peculiar, given that the word “anomalous” is quite distinct from both the words “impracticable” and “impractical.” As explained at length above, “impracticable” refers to the difficulty of accomplishing something and “impractical” refers to the wisdom of pursuing something. By contrast, “anomalous” means something entirely different: it means to be “inconsistent with or deviating from what is usual, normal, or expected.”<sup>337</sup>

But what does it mean for the Constitution to apply in a way that is “inconsistent with or deviating from what is usual, normal, or expected”? It seems to refer to

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policies and procedures for awards to faith-based and community organizations in accordance with the principles contained in Executive Order 13279?” *Id.*

<sup>336</sup> *Reid v. Covert*, 354 U.S. 1, 74–76 & n.12 (1957) (Harlan, J., concurring). *See also supra* text accompanying notes 248–64.

<sup>337</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 47 (10th ed. 1993).



whether, given the particular circumstances surrounding the application of a constitutional right in a particular territory, a person in that territory could reasonably expect its application there—i.e., whether it would be “usual, norm, or expected” for the right to apply there under the prevailing cultural and legal tradition. This part of the standard, therefore, seems to have more to do with the cultural tradition prevailing in the land in which the right would apply, than with the difficulty imposed on the United States in being subject to the right in that land.<sup>338</sup> Whereas the “impracticable” prong considers what applying the right would mean *for the United States*, the “anomalous” prong considers what applying the right would mean *for the people residing in the nation or territory in which that right would apply*. The two terms are thus quite distinct and deal with very different concerns.

This meaning of “anomalous” is consistent with the *Insular Cases*. For example, as mentioned above, the Court held unanimously in *Balzac* that even if it were practicable to apply the jury-trial right in Puerto Rico, perhaps by training people how to think and act as jurors, the Court still should not extend the right there because doing so would be destructive of the cultural tradition that had prevailed in that land. As the Court put it:

Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.<sup>339</sup>

So although Harlan did not explicitly apply the “anomalous” part of the standard in his *Reid* concurrence, it seems that he was right in deriving it from the *Insular Cases*, as those decisions paid significant attention to the impact that applying a right abroad would have on the indigenous culture. And as mentioned earlier, although the *Insular Cases* certainly applied this standard in a way that displayed racist overtones, there are of course non-racist bases for not applying the Constitution abroad in a way that would undermine and weaken other cultural traditions. Indeed, there is nothing racist about requiring courts to be culturally sensitive in how they apply the Constitution abroad. The racist overtones underlying the *Insular Cases*, therefore, do not contaminate the “anomalous” prong.<sup>340</sup>

Furthermore, Justice Kennedy, in his concurrence in *Verdugo-Urquidez* and majority opinion in *Boumediene*, has settled that the “anomalous” prong is a distinct part of the standard, and in so doing, he has clarified its meaning. In *Verdugo-Urquidez*,

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<sup>338</sup> Neuman, *supra* note 5, at 277 (noting the “cultural inappropriateness” of constitutional rights in foreign territories as an anomalous consideration).

<sup>339</sup> *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922).

<sup>340</sup> See *supra* text accompanying note 140.

in applying the “impracticable and anomalous” standard, Kennedy explained that the Warrant Clause did not apply to the search in question, due to, among other reasons, “the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad.”<sup>341</sup> On first glance, this language might seem to refer to the *content* of the right in question rather than to the application of the “anomalous” prong, because the focus on different “conceptions of reasonableness and privacy” can be interpreted to refer to the expectations of privacy central to the Court’s Fourth Amendment doctrine.<sup>342</sup> But these factors determine only whether a *search* has been performed, thereby triggering the Warrant Clause’s requirements. And whether there had been a search was not at issue in this case: the DEA officials had clearly searched Mr. Verdugo-Urquidez’s home.<sup>343</sup> Moreover, the Court’s standard for determining what constitutes a search does not turn on the idiosyncrasies of a culture, but rather on whether a person’s subjective expectation of privacy is consistent with that of an objectively reasonable person.<sup>344</sup> Kennedy’s reference, then, to “the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad,”<sup>345</sup> seems to refer not to the content of the Fourth Amendment but to the fact that it would be anomalous to require DEA officials to secure a warrant in Mexico, a land in which there is no cultural or legal tradition of limiting government searches in this way.

Kennedy’s majority opinion in *Boumediene* also suggested that the “anomalous” factor refers to the fit between applying a particular constitutional right in a particular region and the culture prevailing in that land. As indicated above, although many commentators have interpreted the *Boumediene* opinion to apply the “impracticable and anomalous” standard,<sup>346</sup> even though the case involved a fundamental right and a land under U.S. control, I think a better interpretation is that the Court did not apply the standard, given the presence of these two factors.<sup>347</sup> Supporting this interpretation is that the Court did not actually consider whether it would be impracticable or anomalous to apply habeas abroad; rather, the Court based its decision principally on the grounds that habeas is a fundamental right and the United States controls Guantanamo.<sup>348</sup>

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<sup>341</sup> United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 262–63 (majority opinion).

<sup>344</sup> See, e.g., Smith v. Maryland, 442 U.S. 735 (1979).

<sup>345</sup> See *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

<sup>346</sup> See Marc. D. Falkoff & Robert Knowles, *Bagram, Boumediene, and Limited Government*, 59 DEPAUL L. REV. 851, 871 (2010) (declaring that “*Boumediene* marked the triumph of a particular approach: the ‘impracticable and anomalous’ test”); Geltzer, *supra* note 194, at 765–73 (explaining that commentators have offered five different interpretations of *Boumediene* and the separation-of-powers and “impracticable and anomalous” tests are the two perspectives “most likely to be vindicated in future case law”).

<sup>347</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2256, 2261–62 (2008).

<sup>348</sup> *Id.* at 2239, 2244.

Nevertheless, although the Court did not apply the “impracticable and anomalous” standard in a rigorous way, the Court did mention that “[t]here is no indication . . . that adjudicating a habeas corpus petition would cause friction with the host government.”<sup>349</sup> This observation might be read as providing support for the important claim that the United States functionally exercised *control* over Guantanamo, and this language can also be interpreted as providing evidence of the *practicability* of applying the right there. But it also can be interpreted as evidence of it not being *anomalous* to apply the right in Guantanamo because there is no conflicting authority governing that territory, thus further suggesting that the “anomalous” prong refers to the fit between a constitutional right and the tradition prevailing in the land in which the claim arose.

To be sure, this was an oblique reference, at best, to the anomalousness of applying the habeas right to Guantanamo, and for this reason I believe that the best interpretation of *Boumediene* is that the Court did not apply the standard. But to the extent that the Court did apply the standard, the reference does provide some indication of how the Court views the standard as turning on the fit between the constitutional right and the cultural tradition of the land in question. As we will see below, lower courts have been clearer about what the “anomalous” prong means.

## 2. How Lower Courts Have Applied the “Anomalous” Prong

Whereas lower courts have inconsistently applied the “impracticable” prong, they have been largely *consistent* in how they have applied the “anomalous” prong.<sup>350</sup> For example, in applying the standard in the *King* case, the D.C. Circuit declared that “it must be determined whether the Samoan mores and matai culture with its strict societal distinctions will accommodate a jury system in which a defendant is tried before his peers.”<sup>351</sup> By this, the court was referring to American Samoa’s argument that jury trials would undermine its tradition of deferring to the judgment of the Samoan chiefs, and moreover, the tradition’s rejection of an adversarial adjudicatory process.<sup>352</sup> The D.C. Circuit thus interpreted the anomalous prong to turn on the fit between the constitutional right and the tradition prevailing in the land in which the claim arose.

Likewise, the Ninth Circuit in the *Wabol*<sup>353</sup> case found that in determining whether it would be impracticable and anomalous to apply the Equal Protection Clause to the NMI’s ethnic restrictions on the alienation of property, the court had to consider “the vital role native ownership of land plays in the preservation of NMI social and

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<sup>349</sup> *Id.* at 2261.

<sup>350</sup> *See, e.g., King v. Morton*, 520 F.2d 1140, 1148 (D.C. Cir. 1975).

<sup>351</sup> *Id.* at 1147.

<sup>352</sup> *Id.* at 1148.

<sup>353</sup> *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990).

cultural stability.”<sup>354</sup> Moreover, the court continued, “land is principally important in the Commonwealth not for its economic value but for its stabilizing effect on the natives’ social system.”<sup>355</sup> The court thus concluded that “[i]t would truly be *anomalous* to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property.”<sup>356</sup> Just like the D.C. Circuit in *King*, the Ninth Circuit in *Wabot* focused its analysis of the “anomalous” prong on the relationship between the right in question and the cultural tradition where the claim arose.

Similarly, in *In re Guantanamo Detainee Cases*, the District Court for the District of Columbia also focused on the fit between applying a constitutional right in a land and the cultural tradition prevailing in that territory.<sup>357</sup> As explained above, this case is in many ways a model for how courts should analyze the Constitution’s transnational applicability under the Supreme Court’s framework.<sup>358</sup> Indeed, the district court correctly applied the “impracticable” prong, and it did the same with the “anomalous” prong, concluding that it would not be anomalous to extend habeas to Guantanamo because “there are few or no significant remnants of native Cuban culture or tradition remaining that can interfere with the implementation of an American system of justice.”<sup>359</sup>

As this discussion illustrates, there is a consistent line stemming from the *Insular Cases* and extending for the most part unbroken and unaltered through *Boumediene*, holding that it would be anomalous to apply a constitutional provision in a land if and only if there would be an inconsistency between that application and the cultural tradition prevailing in that land. But although there is generally a consensus on the meaning of “anomalous” in this context, there is not a consensus on *how* to implement this meaning. That is, how should courts go about determining when there is such an inconsistency? What are our data points for determining whether there is an inconsistency?

Thus far, courts generally have made this determination on the basis of general observations of the culture of the people dominating the land in question,<sup>360</sup> but this approach has serious drawbacks. As evidenced in the *Insular Cases*, racism and paternalism might underlie a judge’s free-wheeling judgment about whether a group is “fit” for a particular constitutional guarantee.<sup>361</sup> And even if this is not as much

<sup>354</sup> *Id.* at 1461.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 1462 (emphasis added).

<sup>357</sup> *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 463 (D.D.C. 2005).

<sup>358</sup> *See id.* at 454–64.

<sup>359</sup> *Id.* at 463. But note that this claim concerning the lack of “remnants of native Cuban culture” also relates to the practicability of extending habeas rights there. See *infra* text accompanying notes 428–30.

<sup>360</sup> *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 463.

<sup>361</sup> Burnett, *supra* note 5, at 992, 1039 n.222.

of a concern in the 21st century, we still should be reluctant to turn a constitutional analysis on the cultural practices of a group of people, a task much better suited for an anthropologist than a judge. We, therefore, need some distinctly legal methodology to circumscribe the scope of the “anomalous” prong analysis.

As mentioned in the Introduction, Gerald Neuman has offered an interesting method of resolving this issue, but although Neuman’s method avoids the problem of making judges anthropologists, it introduces perhaps even more significant defects into the standard.

### 3. How Courts Should Now Apply the “Anomalous” Prong

#### *a. Gerald Neuman’s Proposal: Its Strengths and Weaknesses*

Instead of turning to culture, Neuman proposes turning to international human-rights law.<sup>362</sup> According to Neuman, “One form of anomalous consequence that weighs against the extraterritorial application of a constitutional right under the functional approach is the cultural inappropriateness of a distinctive U.S. right in foreign territories.”<sup>363</sup> And consulting “international human rights standards can aid the Court in recognizing norms that are widely shared, so that insisting on their inclusion in the terms of cooperation is less likely to cause friction with foreign governments, and foreign populations have more of an expectation that they will be observed.”<sup>364</sup>

There are three significant weaknesses in Neuman’s approach. One problem is that it consults international law to determine the meaning of the U.S. Constitution, an approach that many constitutional scholars and judges condemn as illegitimate.<sup>365</sup> This issue, of course, stirred up controversy after Justice Kennedy cited a foreign case in justifying his decision in *Lawrence v. Texas* to invalidate sodomy bans as violating the Due Process Clause.<sup>366</sup> Following the *Lawrence* decision, several Representatives introduced resolutions on November 18 and 21, 2003, forbidding the Supreme Court to “consider” or “look for guidance” to any foreign laws or opinions, even in decisions not involving the U.S. Constitution.<sup>367</sup> The following year, this

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<sup>362</sup> See Note, *The Extraterritorial Constitution and the Interpretive Relevance of International Law*, 121 HARV. L. REV. 1908 (2008), for similar but distinct proposals to consult international law in applying the standard; see also J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 540 (2007).

<sup>363</sup> Neuman, *supra* note 5, at 277.

<sup>364</sup> *Id.*

<sup>365</sup> See, e.g., Steven G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court’s Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004).

<sup>366</sup> 539 U.S. 558, 576–77 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981)).

<sup>367</sup> See H.R. Res. 468, 108th Cong. (2003); Constitutional Preservation Resolution, H.R. Res. 446, 108th Cong. (2003).

prohibition was narrowed in bills and resolutions forbidding judges to consult foreign law only in decisions interpreting the U.S. Constitution.<sup>368</sup>

In 2005, however, in *Roper v. Simmons*,<sup>369</sup> Justice Kennedy again consulted foreign law in his opinion for the Court,<sup>370</sup> drawing the ire of Justice Scalia, who inveighed against the opinion on the ground that “[t]o invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.”<sup>371</sup> Justice Scalia’s rejoinder inspired further Senate and House resolutions enjoining the use of foreign law in interpreting the U.S. Constitution.<sup>372</sup> Now it has become a standard in the Confirmation Hearings for Senators to question nominees about their views on the issue.<sup>373</sup>

Seeking to sidestep this debate, Neuman claims that his approach does not involve using foreign law to interpret the U.S. Constitution, because taking international human-rights norms “into account in the application of the functional approach would not involve the importation of foreign values into the constitutional system as constraints on our government.”<sup>374</sup> Rather, Neuman holds that in applying his framework, “the Court would be enforcing U.S. constitutional values in circumstances where the international background helped make extraterritorial compliance more feasible.”<sup>375</sup> Thus, Neuman contends that his proposal is about efficaciously applying the Constitution abroad, not importing foreign law into our system.

But contrary to Neuman’s assurances, his approach *does* seem to involve importing foreign values into the American constitutional system, since Neuman is essentially arguing for courts to find that the U.S. Constitution applies abroad in lockstep with international human-rights norms. Neuman contests that this is just a matter of compliance, not importation,<sup>376</sup> but it is not clear how compliance would be made more feasible by the mere fact that there is an international norm out there that the United States is allegedly violating. Indeed, it might very well be that if the United States is violating that norm, it is doing so in a country that also repudiates it, thus making the violation quite feasible to accomplish.

Consider, for example, if the United States were to seek to prove its respect for Islam by banning or severely restricting the practice of all non-Islamic faiths in

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<sup>368</sup> The Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004) was introduced by two Republican congressmen on February 11, 2004. The American Justice for American Citizens Act, H.R. 4118, 108th Cong. (2004) was introduced on April 1, 2004, by Rep. Ron Paul (R-TX).

<sup>369</sup> 543 U.S. 551 (2005).

<sup>370</sup> *Id.* at 576.

<sup>371</sup> *Id.* at 627 (Scalia, J., dissenting).

<sup>372</sup> See S. Res. 92, 109th Cong. (2005); H.R. Res. 97, 109th Cong. (2005).

<sup>373</sup> See, e.g., *Sotomayor Confirmation Hearing*, *supra* note 3, at 348–50.

<sup>374</sup> Neuman, *supra* note 5, at 277.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

Iraq. Such action would of course violate international human-rights law, because although there is no international disestablishment norm, there is such a free-exercise norm, as expressed in Article 18 of both the Universal Declaration of Human Rights<sup>377</sup> and the International Covenant on Civil and Political Rights.<sup>378</sup> Nevertheless, despite the existence of this international free-exercise norm, it would be quite feasible to restrict the practice of non-Islamic faiths in Iraq, because even though various provisions of the recently enacted Iraqi Constitution guarantee the free exercise of religion,<sup>379</sup> it still might be the case that the prevailing cultural tradition of the land would make it easy for the government to effectuate such a ban. Indeed, a majority-Muslim nation still accustomed to the ways of Saddam Hussein's oppressive regime would seem unlikely to rebel against restrictions on the practice of non-Islamic faiths.

To illustrate further how Neuman's approach seems to involve the importation of international norms into the American constitutional order, let us consider another hypothetical example, one involving a trial in Iraq when the United States still controlled the nation's legal proceedings. A judge following Neuman's approach would be at greater liberty to find that it is unconstitutional for the United States to seek the death penalty abroad than if such an action were taken domestically, because in light of the growing consensus in the international community against the

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<sup>377</sup> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948).

<sup>378</sup> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

International Covenant on Civil and Political Rights, art. 18, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>379</sup> Articles 14, 41, 43, Section 2, Doustour Jomhouriat al-Iraq [the Constitution of the Republic of Iraq] of 2005.

death penalty, there is a plausible argument that the death penalty violates international human-rights norms, at least for anything but the most serious crimes.<sup>380</sup> Indeed, the International Covenant on Civil and Political Rights forbids the death penalty, except “for the most serious crimes,”<sup>381</sup> and moreover, it absolutely forbids the death penalty even for the most serious crimes if they were committed by certain classes of persons, such as minors and pregnant women.<sup>382</sup> So an American judge who opposed the death penalty could easily harness Neuman’s approach to forbid the United States to use capital punishment in certain types of cases abroad, such as cases that are not sufficiently serious under international law to warrant the death penalty, even if that punishment might not clearly be impermissible domestically under the Supreme Court’s Eighth Amendment jurisprudence. As a result, we would have stricter constitutional standards applying abroad than to U.S. domestic conduct, a dissonance that likely would lead to the stricter standards migrating into the Court’s domestic jurisprudence. Whatever the policy merits of such an approach, it clearly involves using international law to interpret the meaning of the U.S. Constitution. This approach is thus quite problematic for those scholars and judges who find it inappropriate to interpret the content of the U.S. Constitution according to international norms.

A second problem in his approach is that it seems to permit too many actions that are repugnant not only to our Constitution but also to many constitutions throughout the world. A recent case, *Al-Aulaqi v. Obama*,<sup>383</sup> illustrates how this is so.

The *Al-Aulaqi* case involves a challenge to the legality of the Obama Administration’s efforts to kill Anwar Al-Aulaqi, a senior talent recruiter for al-Qaeda.<sup>384</sup> In 2010, Al-Aulaqi’s father brought the suit against the President, the Secretary of

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<sup>380</sup> It should be noted that, in signing the I.C.C.P.R., the United States specified that it reserved the right to use the death penalty on any person—including minors but not pregnant women—validly convicted within its jurisdiction. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992). Nevertheless, despite this reservation, some commentators have argued that the death penalty in the United States might violate international law because there is an emerging international norm against all forms of the death penalty. For elaboration of this argument, see WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 2002; Michael Posner & Peter J. Spiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights Conformity Act*, 42 DEPAUL L. REV. 1209 (1993); John Quigley, *Criminal Law and Human Rights Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59 (1993); William A. Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM. & MARY BILL RIGHTS J. 417 (2004); Avinash Samarth, *The U.S. Death Penalty: An International Human Rights Wrong*, ACLU BLOG OF RTS. (Apr. 21, 2012, 9:51 AM), <http://www.aclu.org/blog/capital-punishment-human-rights/us-death-penalty-international-human-rights-wrong>.

<sup>381</sup> International Covenant on Civil and Political Rights, *supra* note 378, at art. 6.

<sup>382</sup> *Id.* at art. 2.

<sup>383</sup> 727 F. Supp. 2d 1 (D.D.C. 2010).

<sup>384</sup> *Id.* at 8.



Defense, and the Director of the CIA on the grounds that they violated the U.S. Constitution, as well as international human-rights law, by not seeking a court order before proceeding with their attempts to kill Al-Aulaqi.<sup>385</sup> The U.S. District Court for the District of Columbia dismissed the case for lack of jurisdiction on the ground that Al-Aulaqi's father did not have standing to bring the claim.<sup>386</sup> In so ruling, however, the court mentioned that "there is no basis for the assertion that the threat of a future state-sponsored extrajudicial killing—as opposed to the commission of a past state-sponsored extrajudicial killing—constitutes a tort in violation of the 'law of nations.'"<sup>387</sup> Following the ruling, the United States finally succeeded in killing Al-Aulaqi with targeted Hellfire missiles on September 30, 2011.<sup>388</sup>

This case demonstrates how difficult it is to establish that very serious constitutional violations—such as the threat of an imminent deprivation of life without due process—rise to the level of an international human-rights norm. Under Neuman's approach, then, a court would likely find that applying this right in Yemen, or in any other country, would be anomalous simply because it is not an international human right. This would permit the U.S. government to commit violations of the U.S. Constitution that, though not violating international human-rights law, are nevertheless quite serious. Indeed, as the *Al-Aulaqi* case demonstrates, government threats of an imminent deprivation of life without due process do not rise to a violation of international human-rights law, even though such governmental machinations strike at the core of fundamental guarantees of legal process.

A third serious problem in Neuman's approach is that it undermines the entire purpose of the "anomalous" prong—i.e., to respect the legal and cultural tradition prevailing in the *particular* land where the claim has arisen. Consider, for example, USAID's funding of mosques, discussed above.<sup>389</sup> Very few nations provide for the robust separation of religion and government guaranteed by the First Amendment's Establishment Clause,<sup>390</sup> and for this reason, there is clearly not an international human-rights norm against the government's funding of religion. Nevertheless, the idea of the United States funding religion abroad is quite troubling not only for many American taxpayers, but also for many people in the countries where that funding might take place.<sup>391</sup> Neuman's standard would ignore this because it would focus only on those rights that have developed such global approval that they have become international norms. Indeed, Neuman's proposed approach of looking to international human-rights standards would seem to require the U.S. Constitution to apply

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<sup>385</sup> *Id.* at 8–12.

<sup>386</sup> *Id.* at 35.

<sup>387</sup> *Id.* at 37.

<sup>388</sup> Mark Mazzetti, Eric Schmitt & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1, A8.

<sup>389</sup> OFFICE OF INSPECTOR GEN., *supra* note 6; *see* text accompanying *supra* notes 6, 327–35.

<sup>390</sup> U.S. CONST. amend. 1.

<sup>391</sup> *See* OFFICE OF INSPECTOR GEN., *supra* note 6, at 4.

with equal force wherever international human-rights norms are applicable. As a result, this approach would treat the funding of mosques in Iraq, a country that has an established religion, the same way as the funding of mosques in France, a country that requires a strict separation of religion and government.<sup>392</sup> In both cases, Neuman would seem to find it anomalous to impose American-style disestablishmentarianism on USAID's funding of religion, because disestablishment is not an international human-rights norm. This completely undermines the "anomalous" prong's focus on the particular tradition of the land in question.

As will be explained below, I believe that a better analytical guide than international human-rights law is the constitution of the country in question.<sup>393</sup> Such an approach would promote all of the strengths of Neuman's proposal by ensuring that judges apply the "anomalous" prong by consulting legal rather than anthropological materials, but it would do so without raising any of the three problems identified above in Neuman's approach. Although my proposal also has defects, in particular the interpretive problems that it raises,<sup>394</sup> I believe that these weaknesses pale in comparison to the ones enumerated above.

*b. My Proposal: Its Strengths and Weaknesses*

I propose that courts consult the constitution of the land where the claim arose to determine whether it would be anomalous to apply the particular U.S. constitutional provision there. We can see hints of such an approach in the D.C. Circuit's decision in the *King* case, where the court found that determining whether it would be "impractical<sup>395</sup> and anomalous" to apply a jury trial in American Samoa must "rest on a solid understanding of the present legal and cultural development of American Samoa."<sup>396</sup> In her recent article, Burnett scrutinizes the D.C. Circuit's reasoning and questions how "a federal court [could] acquire 'a solid understanding of the present legal and cultural development of American Samoa.'"<sup>397</sup> Burnett notes how, "on remand the district court . . . took up the appointed task with earnest diligence, [by] examining and explaining the details of Samoan culture."<sup>398</sup> Burnett concludes that this unlimited judicial "foray into Samoan culture" illustrates how the "impracticable and anomalous" standard is one of paramount "malleability."<sup>399</sup>

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<sup>392</sup> Compare Article 2, Section 1, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, with 1958 CONST. 1 (Fr.).

<sup>393</sup> See *infra* Part II.B.3.b.

<sup>394</sup> See *infra* Part II.B.3.b.

<sup>395</sup> Note again the D.C. Circuit's confusion of "impractical" and "impracticable," a confusion stemming from Harlan's conflation of the terms. *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (citing *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring)).

<sup>396</sup> *Id.*

<sup>397</sup> Burnett, *supra* note 5, at 1006 (quoting *King*, 520 F.2d at 1147).

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at 1007.

As mentioned above, I share Burnett's skepticism of having judges base their legal judgments on anthropological observations, but I disagree with Burnett that such observations are required to implement the "impracticable and anomalous" test. I also disagree that the D.C. Circuit's opinion called for the district court to make these observations on remand. The D.C. Circuit ordered the district court simply to consider the "present legal and cultural development of American Samoa."<sup>400</sup> To obey this order, the district court should have focused much more on Samoan law than culture, and a consideration of the American Samoa Constitution could have been helpful in performing this essentially legal task. Indeed, interpreting a constitution, even if a foreign one, is something that we can reasonably expect a federal court to do with competence. By limiting courts to interpreting the nation's constitution, rather than having them speculate about its cultural mores, we can be assured that in applying the "anomalous" prong, judges will not be engaging in a free-wheeling foray into another culture's traditions.

This approach of considering only the foreign nation's constitution is further supported by the Ninth Circuit's decision in the *Wabot* case, where the court consulted the NMI Constitution to determine whether it would be anomalous to apply the Equal Protection Clause to the territory's ethnic restrictions on the alienation of property.<sup>401</sup> The court found that it would indeed be anomalous because "Article XII, section 1 [of the NMI Constitution] provides that '[t]he acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent,'"<sup>402</sup> and this provision establishes "the vital role native ownership of land plays in the preservation of NMI social and cultural stability."<sup>403</sup> Therefore, the court concluded, "[i]t would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property."<sup>404</sup> The Ninth Circuit thus suggested that the "anomalous" part of the standard turns on whether an inconsistency would arise between, on the one hand, applying a particular provision of the U.S. Constitution in a territory and, on the other hand, protecting some value expressed in the constitution governing that territory. In the *Wabot* case, it was clear that such an inconsistency would arise between the Equal Protection Clause's prohibition of governmental racial classifications and the NMI Constitution's protection of land on the basis of a racial or ethnic classification.<sup>405</sup> In effect, the Equal Protection Clause prohibited an act that the NMI Constitution required, thus creating a sharp legal inconsistency and distinctly anomalous application of the Constitution abroad.

My proposal of consulting a foreign nation's constitution addresses the three significant problems in Neuman's approach, enumerated above. One, whereas Neuman's

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<sup>400</sup> *King*, 520 F.2d at 1147.

<sup>401</sup> *Wabot v. Villacrusis*, 958 F.2d 1450, 1454-62 (1990).

<sup>402</sup> *Id.* at 1452.

<sup>403</sup> *Id.* at 1461.

<sup>404</sup> *Id.* at 1462.

<sup>405</sup> *Id.* at 1451, 1455.

proposal to look to international human-rights norms permits, and perhaps even encourages, judges to apply the U.S. Constitution in a way that comports with those norms, thus violating conservative admonitions against having the U.S. Constitution track international law,<sup>406</sup> this issue would not seem to be raised by my proposed approach of looking to a foreign nation's constitution for the purpose of determining whether the application of the U.S. Constitution would be anomalous in that land. Indeed, there are very different foci at issue in these approaches. Recall that under Neuman's approach, the focus is international human-rights law, not the constitutional law prevailing in the land in question.<sup>407</sup> For this reason, the result of his approach would not actually be a determination about whether it would be anomalous to apply the U.S. Constitution in that specific land.<sup>408</sup> Rather, the likely result of such an approach would be for judges to smuggle international norms into our constitutional jurisprudence in the name of the "impracticable and anomalous" standard. In effect, Neuman's approach would likely lead judges to use international norms *to determine the meaning of our Constitution*, not to determine the extent to which applying a particular meaning of our Constitution conflicts with the legal tradition prevailing in the land in which the claim arose. Only this latter determination is called for by the Supreme Court's framework.<sup>409</sup>

In my proposed approach, however, a court would simply be consulting the foreign constitution to determine whether the legal tradition governing that land would fit in that instance with applying the U.S. Constitution there. This approach would accept the meaning of the U.S. Constitution, as interpreted by the U.S. Supreme Court, but look to a foreign nation's constitution only for the purpose of determining the fit between that nation's constitution and what our Supreme Court has interpreted our Constitution to mean. Because this would not involve using foreign law at all in interpreting the content of our Constitution, it would seem that even conservatives like Justice Scalia would be on board with this method of applying the "anomalous" prong.

To illustrate this distinction between my proposed approach and Neuman's formula, consider, again, our hypothetical case involving a constitutional challenge to the U.S. government's seeking of the death penalty in Iraq. Under Neuman's approach to the "anomalous" prong, the question would be whether international human-rights law permits the death penalty, a question that a judge who opposes the death penalty could reasonably answer in the negative. But under my approach, the question would be simply whether on this issue there is an inconsistency between the U.S. Constitution and the Iraqi Constitution. Indeed, under my approach, a court would begin its analysis by considering whether the Eighth Amendment, as interpreted by the Supreme Court, permits this particular use of the death penalty. If our

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<sup>406</sup> See *supra* Part II.B.3.a.

<sup>407</sup> See generally Neuman, *Global Due Process*, *supra* note 21.

<sup>408</sup> Neuman, *Global Due Process*, *supra* note 21 at 375, 391–93.

<sup>409</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

Eighth Amendment would permit this use of the death penalty, the analysis under the “anomalous” prong would be over. There would be no way for foreign law to turn a U.S. constitutional permission norm into a prohibition norm. But if our Eighth Amendment would not permit it—say, because the defendant was a minor—then the question would be whether it would be permissible under the Iraqi Constitution. If the Iraqi Constitution would permit it, then the “anomalous” prong would forbid the application of the Eighth Amendment to this case. But if the Iraqi Constitution did not permit it, then it would not be anomalous to apply the Eighth Amendment to that case and then the only remaining question would be whether it would be impracticable for it to apply. As this hypothetical case illustrates, there is a significant difference between Neuman’s approach and the one presented in this Article, with Neuman’s approach calling for American judges to use international law to guide their interpretations of the U.S. Constitution, and my framework forbidding that mode of analysis.<sup>410</sup>

Another important difference between these approaches is that whereas my proposal to look to a foreign nation’s constitution would not find it anomalous to apply a U.S. constitutional guarantee in a land where a similar constitutional value prevails, Neuman’s focus on international human-rights law would be too permissive. Neuman’s approach would find that it would be anomalous to enforce any American constitutional guarantee that is not supported by international human-rights law, even if it would not be anomalous in that land due to its constitution providing for the same guarantee as the U.S. Constitution.<sup>411</sup>

Note how this is the inverse problem of the one described above. The first problem with Neuman’s approach is that it is too *restrictive*, in that it binds the U.S. Constitution to the constraints of international law, but the second problem is that it is too *permissive*, in that it frees the U.S. Constitution of constraints that are fundamental not only to our system and but also to the land in which the claim arose. For example, if the United States were to promote Hinduism in India, that would violate both our Establishment Clause and the Indian Constitution’s prohibition against sect preferentialism. But this would not violate international human-rights law, for there is no international disestablishmentarian norm.<sup>412</sup> So under Neuman’s approach, this promotion of Hinduism would be permissible, even though it would violate both the U.S. Constitution and the Indian Constitution. Under my approach, however, so long as it would be practicable to apply our Establishment Clause prohibition of sect preferentialism to this case, this promotion of Hinduism would be impermissible, because it would not be anomalous to apply this norm in India, given that India has a similar prohibition of sect preferentialism in its constitutional order.

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<sup>410</sup> See Neuman, *supra* note 5, at 277.

<sup>411</sup> See *id.*

<sup>412</sup> But see Claudia E. Haupt, *Transnational Neoestablishment*, 80 GEO. WASH. L. REV. 991, 993 (2012) (arguing “that there is a discernable emerging trend toward a transnational principle of nonestablishment under the regime of the European Convention on Human Rights and—to a more limited extent—the law of the EU”).

Finally, the third problem we identified in Neuman's approach is that, by focusing on international human-rights law instead of the legal tradition prevailing in the particular land in which the claim arose, his approach contravenes the entire purpose of the "anomalous" prong: to respect the legal and cultural tradition prevailing in the particular land where the claim has arisen. My proposal of looking to the constitution governing that particular land satisfies this purpose. And it does this without making judges act like anthropologists. Indeed, it limits judges to an inquiry for which they are extremely well-suited—the legal determination of the meaning of a country's constitution.

But just like Neuman's approach, my proposed approach has its weaknesses. One problem in my approach is that many nations consist of heterogeneous cultures, and some of these cultures are politically autonomous within their nations,<sup>413</sup> thus raising the question of which constitutional norms will govern the analysis in these autonomous regions. In Iraq, for example, Kurdistan is an autonomous entity within the Federal Iraqi Republic.<sup>414</sup> In such regions, it seems that the proper inquiry is what constitution governs that land; it is that governing constitution that will guide the question of whether it would be anomalous to apply a particular American constitutional value there. So, in Kurdistan, the question would turn on the Iraqi Constitution, not the Kurdish laws, because the Iraqi Constitution governs that territory.

A more troubling problem in my proposed approach is of an interpretive nature: how are American courts to interpret a foreign constitution? By consulting the text of the foreign constitution? Or the nation's authoritative interpretations of that text? And what if the nation is like Israel or Great Britain and does not have a unified written constitution? These are thorny questions, to be sure. But it is important to remember that my proposed approach does not present nearly as narrow an inquiry as the one presented by a conflicts of law case, in which a court determines for that particular controversy whether those facts, if presented in another jurisdiction, would be lawful.<sup>415</sup> Here, by contrast, a court would simply consult the law of another jurisdiction to determine more generally whether that law evinces a certain constitutional value.

For example, in the question of USAID's funding of mosques in Iraq, the issue would not be whether the Iraqi Constitution specifically prohibits the government's funding of religious buildings. Rather, the question would be much more general—whether the Iraqi Constitution creates a general separation between government and

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<sup>413</sup> See Harvey W. Armstrong & Robert Reed, *Micro-States, Autonomous Regions and the European Union*, 1 EUR. URB. & REG'L STUD. 71, 71–78 (1994).

<sup>414</sup> *About the Kurdistan Regional Government*, KURDISTAN REGIONAL GOVERNMENT, [http://www.krg.org/uploads/documents/Fact\\_Sheet\\_About\\_Kurdistan\\_Regional\\_Government\\_KRG\\_2010\\_05\\_15\\_h13m42s9.pdf](http://www.krg.org/uploads/documents/Fact_Sheet_About_Kurdistan_Regional_Government_KRG_2010_05_15_h13m42s9.pdf) (last visited Oct. 14, 2012).

<sup>415</sup> This is, of course, a highly simplified reduction of the inquiry a court undertakes when it encounters a conflict of laws. For a thorough but accessible summary of this rich and complicated area of the law, see WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, *UNDERSTANDING CONFLICT OF LAWS* (2002). See also *Conflict of Laws*, LEGAL INFORMATION INSTITUTE, [http://www.law.cornell.edu/wex/Conflict\\_of\\_laws](http://www.law.cornell.edu/wex/Conflict_of_laws) (last visited Oct. 14, 2012).

religion. This general question is very easy to answer: the Iraqi Constitution does not create such a separation because Article II provides that “Islam is the official religion of the State and is a foundation source of legislation,”<sup>416</sup> and that “[n]o law may be enacted that contradicts the established provisions of Islam.”<sup>417</sup> And many countries would present similarly easy questions on how their constitutions treat the relationship between religion and government. For example, the current Indian<sup>418</sup> and Russian<sup>419</sup> Constitutions expressly require a separation of religion and government, but the Pakistani<sup>420</sup> and Saudi Arabian<sup>421</sup> Constitutions expressly reject separation by establishing Islam as the official religion. Therefore, if the USAID mosque-funding controversy arose in India or Russia, it would be clear that applying American-style disestablishmentarianism in these nations would not be anomalous, whereas it clearly would be in Pakistan and Saudi Arabia.

But difficult questions can arise even under this general approach. One type of problem might arise if a country’s constitution does not even address that issue—say, if the hypothetical cases discussed above arose in a land governed by a constitution that simply ignored the church-state question. A similar problem might arise if the country did not have a unified written constitution at all. In such cases, it would seem best to turn to the authoritative interpretations of that country’s constitution to see if those interpretations evince a constitutional value on the issue in question. Great Britain and Israel illustrate how easy it is to apply this framework in at least some cases. Neither country has a written constitution,<sup>422</sup> but both nations have deep constitutional traditions, and their case law makes clear that in many contexts the state has broad authority over the funding of religion.<sup>423</sup>

A more challenging type of problem might arise if the text of a country’s constitution conflicted with the authoritative interpretations of that text. For example, Article 20 of the Japanese Constitution requires a separation of religion and government.<sup>424</sup> But the Grand Bench of the Japanese Supreme Court has found this separation to be relatively weak, and on this ground has permitted the government to

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<sup>416</sup> Article 2, Section 1, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

<sup>417</sup> *Id.*

<sup>418</sup> INDIA CONST. preamble, art. 2.

<sup>419</sup> KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 14 (Russ.).

<sup>420</sup> PAKISTAN CONST. art. 2.

<sup>421</sup> Basic Law of Government (1992), Art 1.

<sup>422</sup> *Overview of the UK System of Government*, DIRECTGOV, [http://www.direct.gov.uk/en/Governmentcitizensandrights/UKgovernment/Centralgovernmentandthemonarchy/DG\\_073438](http://www.direct.gov.uk/en/Governmentcitizensandrights/UKgovernment/Centralgovernmentandthemonarchy/DG_073438) (last visited Oct. 14, 2012); *THE STATE: The Law of the Land*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Nov. 28, 2010), <http://www.mfa.gov.il/MFA/Facts+About+Israel/State/THE+STATE-+The+Law+of+the+Land.htm>.

<sup>423</sup> See, e.g., Shimon Shetreet, *Freedom of Religion in Israel*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Aug. 20, 2001), available at [http://www.mfa.gov.il/MFA/MFArchive/2000\\_2009/2001/8/Freedom+of+Religion+in+Israel.htm](http://www.mfa.gov.il/MFA/MFArchive/2000_2009/2001/8/Freedom+of+Religion+in+Israel.htm).

<sup>424</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 20 (Japan).

fund Shinto ceremonies.<sup>425</sup> Overall though, the Japanese Supreme Court has honored this government-religion separation, as evidenced in its 1997 ruling forbidding the use of public funding for a religious memorial service.<sup>426</sup> So a general overview of the Japanese constitutional order, based on both its written constitution and the authoritative interpretations of that text, suggests that it would not be anomalous to apply American-style disestablishmentarianism in that land.

These interpretive issues, therefore, should not present insuperable problems for courts. In most cases, a court will not even encounter any of these interpretive problems because the foreign constitution will unambiguously express a general constitutional value and the authoritative interpretations of that text will be consistent with that value. And in the cases where there are such problems—either because of the lack of a written constitution, textual silence or ambiguity on the subject in question, or authoritative interpretations that contravene the text—American courts still seem well equipped to resolve the issue by gleaning from the general thrust of that nation's constitutional tradition.

Now that we have covered how courts should interpret the “impracticable” and “anomalous” prongs, we have only one more question to address: how do these prongs fit together? That is, do they create a conjunctive or disjunctive test? That is the subject of the next and final subsection of the Article.

*C. Is the “Impracticable and Anomalous” Standard a Conjunctive or Disjunctive Test?*

As is evident from the above discussion, the terms “impracticable” and “anomalous” have substantially different meanings in this context. Whereas the “impracticable” prong focuses on whether, given the U.S. presence in a land, the United States is *capable* of enforcing a particular constitutional provision in that land, the “anomalous” prong focuses on whether an *inconsistency* would arise between that provision and some value expressed in the constitution governing that territory. As Daniel E. Hall puts it in his article on the subject:

Both definitional and legal analyses lead to the inescapable conclusion that the terms impractical and anomalous represent two different tests, and the omission of either from the analysis may result in a decision that is illegitimate to the people of a territory or contrary to the foreign affairs interests of the United States.<sup>427</sup>

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<sup>425</sup> Saikō Saibansho [Sup. Ct.] July 13, 1977, 1971 (Gyo-Tsu) No. 69, 31 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 533 (Japan).

<sup>426</sup> Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, 1992 (Gyo-Tsu) No. 156, 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHU] 1673 (Japan).

<sup>427</sup> See Hall, *supra* note 59, at 106.



Surprisingly, though, this distinction between these terms is often overlooked. As mentioned above, Justice Harlan in his *Reid* concurrence seemed to treat the “anomalous” prong as simply part of the “impracticable/impractical” prong. Lower courts have similarly been slipshod in not clearly distinguishing the two parts of the test.

Perhaps one reason for the conflation of the two parts of the test is that there is some conceptual overlap: if it would be anomalous to apply an American constitutional norm in a territory due to a conflict with a constitutional norm governing that land, then that state of affairs also often would make it impracticable to apply the U.S. constitutional norm there. For example, if a foreign nation does not provide for a right to a jury trial, then that not only might make it anomalous to apply the Sixth Amendment’s right to a jury trial in that land, but it also might make it impracticable to do so, because providing a jury trial in such a nation would require the United States to create an entirely new cultural and governmental infrastructure (e.g., the United States might have to develop a jury selection process and train jurors).<sup>428</sup>

Likewise, just as there is some conceptual overlap between the “impracticable” and “anomalous” prongs but still sufficient conceptual distance to justify making them two separate parts of the analysis, these two prongs also overlap with the inquiry into whether the United States controls a given territory. As mentioned above, if the United States controls an area, the “impracticable and anomalous” standard applies if and only if the case does not involve a fundamental right; and if the United States does not control an area, the standard applies if and only if the case does involve a fundamental right.<sup>429</sup> But these are not conceptually independent inquiries, for the “control” question will influence the analysis under the “impracticable and anomalous” standard. Indeed, if the United States controls an area, it is often more practicable to apply an American constitutional guarantee there and less anomalous to do so. For example, because the United States absolutely controls Guantanamo Bay, so that there is no other governmental presence there, it is more practicable to apply habeas corpus in that land (given the U.S. resources there) and less anomalous to do so (given that there is no conflicting constitutional authority governing the territory).<sup>430</sup>

Nevertheless, the inquiries are sufficiently distinct that they can be kept as separate modes of analysis. In most cases, the “control” inquiry may *influence*, but will not *determine*, the application of the standard. We see evidence of this in the Iraqi case. Before the recent withdrawal from Iraq, the United States still controlled several parts of the nation, but this control did not mean that it was always practicable to apply a particular American constitutional norm there; nor did it mean that

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<sup>428</sup> Indeed, this was the basis for the Court’s decision in *Balzac*: creating a jury system in Puerto Rico would be too difficult to do, given the land’s cultural and governmental infrastructure. See *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922); *supra* notes 132–33 and accompanying text. This is also what the American Samoa government argued in the *King* case in resisting the application of jury trials there. See *King v. Morton*, 520 F.2d 1140, 1147 (1975); *supra* note 299 and accompanying text.

<sup>429</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2261–62 (2008).

<sup>430</sup> See *id.*

it would not have been anomalous to apply such a norm in Iraq, especially given the creation in 2005 of the Iraqi Constitution, which in many ways is inconsistent with the U.S. Constitution.<sup>431</sup> This illustrates how the “impracticable and anomalous” standard is not only a binary standard but also a mode of analysis that courts must treat as distinct from the question of whether the United States controls an area.

Therefore, given that the “impracticable and anomalous” standard is a conceptually independent and binary legal test, we must address whether it is disjunctive or conjunctive. If it is disjunctive, then it would be easier for the U.S. government to evade a constitutional norm abroad, because it would mean that whenever it was *either* impracticable *or* anomalous to apply that norm, the United States would be free to ignore the norm and proceed with its policy mission. But if the standard were conjunctive, of course, it would be much more difficult for the United States to evade a constitutional norm, because doing so would require satisfying both factors. Courts almost always state the standard as “impracticable *and* anomalous,” suggesting that the test is conjunctive. But this might be a mere linguistic convention in reciting the standard, with no logical significance. Indeed, the Supreme Court has never expressly affirmed that it is a conjunctive standard, and no lower court has directly taken up this subject. Because there is so little law on this issue—just the use of “and” in the standard’s formulation—it is very tempting to answer the question by turning to one’s policy sensibilities (i.e., to urge for a disjunctive standard if one prefers making it harder for courts to apply the Constitution abroad, and a conjunctive standard for the opposite result).

But we can resist this temptation by reminding ourselves of the twin goals of the standard: to ensure that U.S. foreign policy is both effective (practicable) and culturally sensitive (not anomalous).<sup>432</sup> These two goals seem to be of similar importance, both being worthy of not applying the Constitution in that instance. Indeed, the precedents on the Constitution’s transnational applicability have emphasized the importance of each feature of the standard, indicating that each prong is sufficiently powerful to nullify constitutional applicability.<sup>433</sup> Moreover, as mentioned above, a central feature of law is not to require anything that is impossible to accomplish, thus strongly suggesting that the Constitution should not apply in a land when it would be impracticable to do so.<sup>434</sup> Likewise, a fundamental feature of our constitutional scheme is that the judiciary must respect how the political branches conduct foreign affairs,<sup>435</sup> which requires that courts not apply the Constitution in a way that

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<sup>431</sup> See, e.g., *supra* text accompanying notes 416–17 (discussing the Iraqi Constitution’s establishment of religion).

<sup>432</sup> See Merriam, *supra* note 6, at 746–47.

<sup>433</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78 (1990) (citing *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

<sup>434</sup> FULLER, *supra* note 319, at 39.

<sup>435</sup> For examples of powers in foreign affairs delegated to the legislative and executive branches, see U.S. CONST. art. 1, § 8, cl. 3, 5; art. 1, § 9, cl. 8; art. 1, § 10, cl. 3; art. 2, § 2.

would compel the U.S. government to act in a foreign nation inconsistently with that nation's constitutional norms.<sup>436</sup> Reasoning from both within and without this area of law, therefore, leads to the conclusion that it is a disjunctive standard, despite the fact that courts use the word “and” in combining the terms.

Moreover, even though courts describe it as the “impracticable and anomalous” standard, there is some indication that they have nonetheless treated it as disjunctive. For example, Justice Harlan, in applying the standard in *Reid*, focused only on the impracticability/impracticality of extending the jury trial right abroad.<sup>437</sup> So to the extent that he found this “impracticability/impracticality” prong conceptually distinct from the “anomalous” prong, Harlan suggested that he thought the impracticability/impracticality of applying the Sixth Amendment to “run-of-the-mill offenses” was sufficient to render it inapplicable in those instances.<sup>438</sup> This would make it a disjunctive standard. Likewise, in his *Boumediene* opinion, Kennedy also suggested that it is a disjunctive standard by declaring that “if the [Guantanamo] detention facility were located in an active theater of war, arguments that issuing the writ would be ‘impracticable or anomalous’ would have more weight.”<sup>439</sup> Of course, we cannot place too much emphasis on Kennedy’s use of “or” here, not only because he did not actually apply the standard in the *Boumediene* opinion<sup>440</sup> but also because he has used “and” in every other instance in which he has recited the standard.<sup>441</sup> Nevertheless, his use of “or” here does suggest something about how he believes the standard applies.

Some scholars have also argued that, as a normative matter, the standard *should* be disjunctive. Most notably, Professor Stanley K. Laughlin, Jr. has urged courts to adopt this interpretation. He first advanced this argument in a 1981 article explaining that, to preserve American Samoan culture, the standard must be disjunctive.<sup>442</sup>

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<sup>436</sup> LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 373–75 (3d ed. 2000) (discussing the Court’s designation of exercise of foreign affairs powers as a non-justiciable political question due to the “political nature of the question” and the “absence of judicially manageable standards”); *see also* *Goldwater v. Carter*, 444 U.S. 996 (1979).

<sup>437</sup> *Reid v. Covert*, 354 U.S. at 74–75 (1957) (Harlan, J., concurring).

<sup>438</sup> *Id.* at 75–76.

<sup>439</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2261–62 (2008) (emphasis added).

<sup>440</sup> *Id.*

<sup>441</sup> *See supra* Part I.C.

<sup>442</sup> *See* Laughlin, *Application of the Constitution*, *supra* note 238, at 341–42. Note, however, that Laughlin, wrongly in my opinion, has used the term “impractical” instead of “impracticable.” *See* Laughlin, *Cultural Preservation*, *supra* note 238, at 332. His use of “impractical” is mitigated, though, by his claim that the term must mean much more than that applying the Constitution in a land would be unwise or imprudent:

Clearly, the test must be formulated in such a way that constitutional protections may not be defeated by mere inconvenience or expediency. Properly construed, the impractical branch of the proposed test must be premised on the idea that the underlying value of a constitutional right warrants a substantial degree of inconvenience.

*Id.* at 353. Therefore, Laughlin, while using the word “impractical,” clearly intends this part of the test to express a meaning much more compatible with the term “impracticable.”

Laughlin based his interpretation largely on the ground that the U.S. Constitution is not a genocide pact, “whether we define genocide as physically destroying a people or killing their culture.”<sup>443</sup> Laughlin’s language was approvingly cited in the Ninth Circuit’s *Wabot* opinion, with the court explaining that because the U.S. Constitution does not warrant such cultural genocide, the Equal Protection Clause could not be interpreted to forbid racial classifications in the NMI, given that it would be anomalous to apply such a restriction in a land in which the constitution guaranteed ethnic-based restrictions on land alienation.<sup>444</sup>

Twenty-four years after publishing that article, Laughlin published another article on the subject.<sup>445</sup> In that article, Laughlin expresses support for the *Wabot* opinion, not only because of its approving citation of his work, but “mainly because [he] firmly believe[s] that it articulates a good and useful rule,”<sup>446</sup> that is, “a rule that allows the residents of U.S. territories to enjoy the core constitutional rights of U.S. citizens while at the same time avoiding a mechanical application of constitutional interpretations from the mainland that might damage or destroy their indigenous cultures.”<sup>447</sup> Looking to the *Wabot* decision, as well as to Harlan’s *Reid* concurrence and the district court and D.C. Circuit opinions in *King*, Laughlin “conclude[s] that these are separate tests and that *either one* could justify a departure from mainland constitutional norms.”<sup>448</sup> Therefore, “a fundamental right will apply in a territory only if it can be shown to be both practical and not anomalous.”<sup>449</sup> In other words, a fundamental right will *not* apply if doing so would be *either* impracticable *or* anomalous.

In sum, based on the two values underlying the standard (i.e., legal efficacy and cultural sensitivity), based on how courts have applied the standard, and based on how commentators have construed it, the best interpretation is that it is a disjunctive standard. We can thus summarize this area of the law with the following framework: if a constitutional claim arises in a land over which the U.S. exercises absolute control or exclusive jurisdiction, and if the court deems that the claim involves a fundamental meaning of the Constitution, then the court should apply the Constitution abroad as it would apply if the claim had arisen domestically. And if neither of these conditions is satisfied, then the court should not enforce the Constitution at all. But if only one of these conditions is met, the court should apply the Constitution as it would apply domestically unless it would be *either* impracticable *or* anomalous to do so.

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<sup>443</sup> Laughlin, *Application of the Constitution*, *supra* note 238, at 388.

<sup>444</sup> *Wabot v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1992) (citing Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 357, 386–88 (1980)).

<sup>445</sup> See Laughlin, *Cultural Preservation*, *supra* note 238.

<sup>446</sup> *Id.* at 332.

<sup>447</sup> *Id.*

<sup>448</sup> *Id.* at 353 (emphasis added).

<sup>449</sup> Hall, *supra* note 59, at 106.

## CONCLUSION

As mentioned in the Introduction, Professor Burnett does not support the “impracticable or<sup>450</sup> anomalous” standard, because she does not see it as capable of sufficiently constraining judicial discretion.<sup>451</sup> She therefore concludes that it is a “functionalist” standard that will amount to nothing more than judges consulting their policy preferences to determine whether to apply a particular constitutional provision to a particular set of circumstances.<sup>452</sup> She thus urges courts to focus on *how*, rather than *whether*, the Constitution should apply in a particular instance. But her proposed approach requires courts to tailor particular applications to particular facts, thereby inviting the very type of convenience-based jurisprudence that she rejects.<sup>453</sup>

A clearer “impracticable or anomalous” standard, such as the one articulated in this Article, seems to satisfy Burnett’s criticisms better than her own approach does. In particular, the type of principled decisionmaking that Burnett seeks in applying the standard can be secured by taking the following four steps: (1) by conceptually separating the “fundamentality” and “control” analyses from the “anomalous or impracticable” inquiry, (2) by defining the “impracticable” prong as turning on the capabilities of the United States to enforce a particular constitutional provision in a particular area, (3) by defining the “anomalous” prong as turning on whether there is an inconsistency between, on the one hand, the U.S. constitutional provision at issue, and on the other hand, some constitutional value governing the land where the claim arose, and (4) by treating the standard as disjunctive, thus providing that under this standard the U.S. Constitution will not apply when it would be *either* impracticable *or* anomalous to do so.

These four issues all address matters vitally important to the Constitution’s extraterritoriality. One, by separating the “fundamentality” and “control” analyses from the “anomalous or impracticable” inquiry, we can ensure that courts will account for what is truly fundamental to our constitutional scheme, thus guarding against the temptation to dilute domestic constitutional jurisprudence through transnational application. This will also ensure that courts hold the United States accountable when it controls an area, an issue of central importance to broader notions of liberal governance. Two, by precisely defining “impracticable” as referring to physical difficulty rather than simple imprudence, courts can promote the efficacy of U.S. foreign affairs while still permitting the political branches to evaluate the wisdom of various foreign policies, free from judicial intrusion. Three, by defining “anomalous” to refer to an inconsistency between the U.S. Constitution and the constitutional tradition governing the land in which the claim arose, courts can make our foreign affairs more culturally sensitive. Finally, by treating the “impracticable and anomalous” standard as

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<sup>450</sup> I use “or” here and throughout the Conclusion to emphasize my support for it being a disjunctive standard.

<sup>451</sup> See *supra* text accompanying note 29.

<sup>452</sup> See *supra* text accompanying notes 29–30.

<sup>453</sup> See *supra* text accompanying note 31.

a disjunctive test, courts can ensure that policy efficacy and cultural sensitivity are each treated as sufficiently weighty values to override constitutional applicability.

But importantly, in promoting these four important values—i.e., domestic constitutional integrity, governmental accountability, policy efficacy, and cultural sensitivity—this framework does not permit judges to weigh U.S. *interests*. To the contrary of some representations of the framework,<sup>454</sup> such interest-based considerations do not enter the analysis at any juncture. Burnett's concerns about judges applying the standard based on U.S. interests therefore do not come into play under my proposed framework.

With these clarifications of the framework, we can see its formal elements, elements that thus far have largely been obscured by conflation of terms and manipulations of fuzzy doctrinal boundaries. That is not to say that the framework is entirely formalist; indeed, it is also imbued with functionalism. In particular, the *Boumediene* decision moved the framework away from the simple formalism of the Incorporation Doctrine, which had turned on whether Congress had officially incorporated a territory.<sup>455</sup> *Boumediene* made this a much more practical question of whether the United States has actually exercised control over the area where the claim arose,<sup>456</sup> an inquiry that makes the United States constitutionally accountable for its actual actions rather than for only formal congressional declarations. Moreover, the functional elements of the “impracticable or anomalous” standard, as I have interpreted the doctrine, are apparent from its warrant for some judicial discretion. Determining impracticability will not call for a theoretical inquiry into the general capabilities of the United States to enforce a constitutional provision abroad, but rather a more fact-based analysis into whether, given its presence in the area, the United States is capable of accomplishing a particular mission there. And determining whether it would be anomalous to apply a constitutional provision in a land will turn not simply on whether there is a direct textual conflict between the U.S. constitutional provision and the relevant foreign constitution, but rather on whether there is a conflict of constitutional values, based on a comprehensive examination of the foreign constitution and the authoritative interpretations of that text. This healthy bit of judicial discretion will be necessary to ensure that there is some flexibility in this area of the law, but this flexibility will be tightly circumscribed so that the objectivity and predictability of the framework will not be lost.

From this analysis, we can learn an important lesson about the law more generally. The debate over this issue thus far has been obscured by some oversimplifications of what it means for the law to be formalist and functionalist, and some

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<sup>454</sup> See, e.g., A. Hays Butler, *The Supreme Court's Decision in Boumediene v. Bush: The Military Commissions Act of 2006 and Habeas Corpus Jurisdiction*, 6 RUTGERS J.L. & PUB. POL'Y 149, 173 (2008) (defending the “impracticable and anomalous test” on the ground that, despite being “imprecise and vague,” the test “balances . . . national security concerns . . . with human rights concerns by giving the Court flexibility to take into account military considerations in determining whether to apply the Constitution in extraterritorial situations”). The framework does not authorize courts to weigh military interests or considerations.

<sup>455</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2254–55 (2008).

<sup>456</sup> *Id.* at 2262.

oversimplifications of how this area of the law fits with that distinction. This framework, like much of constitutional law, consists of both formalist and functionalist components. But we often talk of the law as though it fits with only one of these theories. For example, in his *Boumediene* opinion, Justice Kennedy writes that a formalistic reading of this area of the law “overlooks what [the Court] see[s] as a common thread uniting the *Insular Cases*, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”<sup>457</sup> Professor Neuman finds that in this statement Kennedy “is clearly correct that a functional approach informed the adoption of the *Insular Cases* doctrine, the concurring opinions in *Reid v. Covert*, and Kennedy’s own opinion in *Verdugo-Urquidez*.”<sup>458</sup> Neuman sees the approach as functionalist due to its balancing of various interests, but in making this characterization, Neuman seems to overlook the thoroughly formalist nature of much of the analysis, in that it calls for judges to make a substantive determination of what constitutes a fundamental right and that the framework consists of a closed system of necessary and sufficient conditions. And even in countering Neuman’s support of functionalism in this area of the law, Burnett uses the same discourse, resisting the standard on the ground that its functionalism grants judges too much discretion, thereby leading to policy-driven outcomes.<sup>459</sup>

These two leading lights on the Constitution’s transnational applicability have thus framed this issue along the lines of the grand debate in legal theory over formalism and functionalism. Yet, before we get further entangled in this age-old battle between formalism and functionalism, we should pause to consider its applicability to the “impracticable or anomalous” standard, given that the standard, like the framework of which it is a part, consists of both formalist and functionalist elements. If defined and applied with sufficient rigor, as proposed in this Article, the standard promises to provide the best that these two approaches have to offer: the consistent and principled decisionmaking of formalism, and the flexible and commonsensical decisionmaking of functionalism. As a result, the “impracticable or anomalous” standard will be both more practicable as a judicial doctrine and less anomalous in the Court’s constitutional jurisprudence.

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<sup>457</sup> *Id.* at 2258. Note that Kennedy cites *Johnson v. Eisentrager*, 339 U.S. 763 (1950), here, but *Eisentrager* did not invoke the “impracticable and anomalous” standard, though it did take practical factors into account in holding that the Court lacked jurisdiction to determine the constitutionality of holding German war criminals in a prison administered by the United States in Germany. Because *Eisentrager* did not expressly invoke the standard, nor did it implicitly rest its reasoning on the impracticability and anomalousness of applying the Constitution abroad, as did the *Insular Cases*, I have omitted *Eisentrager* from the preceding discussion.

<sup>458</sup> Neuman, *supra* note 5, at 271. Note, however, that in a footnote Neuman disagrees with Kennedy slightly here by claiming that the *Insular Cases* doctrine “was both formalist and functionalist: formalist regarding denial of extraterritorial rights, and functionalist regarding selective application of rights in unincorporated territories.” *Id.* at n.70.

<sup>459</sup> See *supra* text accompanying note 29.