

WHY SHOULD LAW AND POLICY MAKERS UNDERSTAND
EXTREMIST BELIEFS? THE ISLAMIC STATE (ISIS) AS A CASE STUDY:
PAST, PRESENT, AND FUTURE

by
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The overarching argument in this Article is that inadequate comprehension of extremist doctrines undermines efforts in law and policy. Selecting the Islamic State (ISIS) as a case study, this Article attempts to resolve three legal and policy dilemmas by exposing internal ISIS doctrine (i.e. by considering the perspectives of the movement itself). This focus on ISIS is justified, for despite the movement's recent territorial decline, it is precisely its doctrine and ideology that will persist and enable the rise of 2.0 and 3.0 movements modeled after the prototype. In considering ISIS, the aim here is to demonstrate the general need for law and policy to be better informed by subject matter expertise within Middle Eastern and Religious Studies.

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INTRODUCTION

The overarching argument of this Article is that inadequate comprehension of extremist doctrines, and particularly the conflation of various extremist movements that are merely superficially similar, hamstrings the descriptive and prescriptive measures of American and international law and policy. While extremism takes religious as well as secular forms, this Article focuses on the former, and selects the Islamic State (ISIS)—particularly during its heyday from 2014 to 2016—as a case study. This selection of ISIS is quite deliberate, for despite the movement’s later political and territorial decline, it is precisely its doctrine and ideology that will per-

sist and enable the rise of ISIS 2.0 and 3.0 movements modelled after the now declining prototype.¹ In addressing the case of ISIS, this Article does not attempt an exhaustive survey of legal and policy concerns related to the movement, nor does it attempt to comprehensively account for the movement's doctrines, both of which would be far beyond the scope of an article. Instead, this Article selects three ISIS-related problems in recent legal and policy discourse and attempts to resolve these problems by exposing ISIS's own internal doctrine related to these specific areas only. This exposition of ISIS doctrine is done both through analysis of primary sources—some of which have been translated herein by the present author—as well as through citations of secondary source material.² In so doing, the aim of the present author is to demonstrate, through the examples selected herein, the pressing need for legal and policy analysis to be better informed by subject matter expertise within the academic field of Middle Eastern and Religious Studies.

Part I (the "ISIS Present") considers ISIS in its capacity as a non-state actor that has been disrupting the Westphalian order of nation-states. Historically, numerous Islamist movements have, despite originating as non-state insurgencies, eventually modified their behaviors and have become incorporated within the apparatus of the nation-state (e.g., the Muslim Brotherhood, Hamas, etc.), or in some cases even attained nation-state status (e.g., Saudi Arabia, Islamic Republic of Iran, etc.).³ Can such cases serve as precedents for ISIS? Should ISIS be considered a nation-state for purposes of criminal liability? Alternatively, under what circumstances could ISIS be engaged within the apparatus of the nation-state for purposes of realpolitik, such as stabilizing a regional power vacuum? To address these matters, ISIS's current governance practices are first exposed across four domains: political, legal, economic, and social. Next, it is argued that the question of nation-statehood can be addressed through both "standard" and "doctrinal" methods. The standard method considers the legal and extra-legal requirements for the international community to admit a non-state movement into its ranks (e.g., the Montevideo Convention, UN General Assembly Resolution 2625, *Kadic v. Karadzic*). After reviewing these requirements, this Article then conducts a doctrinal analysis which reverses

¹ William McCants, *Don't Celebrate ISIS Setbacks Too Soon*, BROOKINGS INST. (Aug. 9, 2016), <https://www.brookings.edu/blog/markaz/2016/08/09/dont-celebrate-isis-setbacks-too-soon/>.

² When quoting from these sources, this Article replaces transliterated Arabic terms with bracketed English translations, for ease of read. For example, whereas ISIS's English language periodical states that "racism is a tool of Shaytān," this Article modifies the quotation as follows: "racism is a tool of [Satan]." Likewise, transliterations such as "al-malāhim" are modified herein as "[Armageddon]," "al-Shām" as "[Syria]," and so forth.

³ See generally HAMID ENAYAT, MODERN ISLAMIC POLITICAL THOUGHT (1982).

the subject and object of inquiry, asking: would ISIS accept membership in the international community? The answer is clearly no, for three doctrinal reasons that distinguish ISIS from most Islamist movements. First, ISIS considers all secular political theories to be heretical, regardless of their permutations (e.g., democracy, socialism, monarchy, etc.).⁴ Second, ISIS considers even “Islamic” nation-states (e.g., Saudi Arabia, Islamic Republic of Iran, Pakistan, etc.), as well as movements striving to erect Islamic nation-states (e.g., Muslim Brotherhood, Hamas, etc.) to be hypocritical.⁵ Third, and most importantly, ISIS considers the very concept of the nation-state, particularly its concomitant of national boundaries, to be fundamentally un-Islamic.⁶

Part II (the “ISIS Past”) addresses the constitutionality of the U.S. government’s interventions against ISIS, which have been contested due to the lack of Congressional authorization under the War Powers Act.⁷ Although the legality of the interventions turns on the “association” between ISIS and al-Qaeda,⁸ this Article argues that neither side of the debate has been able to determine association due to a common inability to discern which of the two movements’ disagreements have been fundamental, and which have been merely rhetorical, opportunistic, or otherwise tertiary. More particularly, the U.S. government’s position employs an “exogenous” standard, the hallmark of which is expediency, whereby the overall relationship of al-Qaeda and ISIS is glossed over except for certain facts that are cherry-picked to justify a predetermined policy position.⁹ Critics of this position, on the other hand, employ an “endogenous-liberal” standard which, in attempting to discern facts of the al-Qaeda/ISIS relationship, defers excessively to the rhetorical claims of the movements.¹⁰ From a policy perspective, the weaknesses of these two standards translate into executive unilateralism and legislative overload, respectively. Given these deficiencies, this Article undertakes an analysis which peels away the two superficial layers of the al-Qaeda/ISIS dispute in order to expose a core disagreement concerning religious doctrine. The irreconcilability of this core doctrinal dispute constitutes empirical evidence against “association,” thus suggesting the illegality of the U.S. interventions.

Part III (the “ISIS Future”) concerns the consequences for world order if ISIS

⁴ See *infra* Part I, Section B(2)(a).

⁵ See *infra* Part I, Section B(2)(b).

⁶ See *infra* Part I, Section B(2)(c).

⁷ See *infra* Part II, Section A(1).

⁸ See *infra* Part II, Section A(1).

⁹ See *infra* Part II, Section A(2)(a).

¹⁰ See *infra* Part II, Section A(2)(b).

were to achieve its ultimate aims. This question has remained obscure within legal and policy discourse for several reasons. First, inquiry into the ultimate objectives and threats of extremist movements are naturally less pressing than inquiry into their immediate objectives and threats. Second, until the recent completion of the present author's separate monograph,¹¹ ISIS's theory of the "final world order" and its differences from that of other Islamic movements remained unaccounted for within the field of Middle Eastern and Religious Studies.¹² Third, and as a consequence of the first two reasons, the ISIS Future is typically assumed to represent the same future objectives of other Islamist movements that exhibit similar traits and behaviors in their immediate and near-term objectives. This Article addresses these issues by exposing ISIS's theory of the final world order—across the political, legal, economic, and social domains—and then contrasting this theory of the future with that of the Sadrists. The Sadrists are chosen because they are superficially similar to ISIS in several respects. First, both are non-state Islamist insurgencies that have generally employed violent tactics against established authorities.¹³ Second, both operate in the same general geographic heartland: ISIS in both Iraq and Syria, and the Sadrists in Iraq.¹⁴ Third, unlike many Islamic movements, both ISIS and the Sadrists believe that the advent of the final world order is imminent rather than distant.¹⁵ Despite these and other similarities, this Article argues that the ISIS vision of the future is far more dystopian and existentially threatening than that of the Sadrists. This contrast should serve to caution law and policy makers against facile conflation of Islamist movements that are similar in their immediate and near-term behaviors, but which have radically different end goals.

I. THE ISIS PRESENT: NON-STATE ACTORS AND THE QUESTION OF WESTPHALIA

Politicians and journalists alike have expressed concerns that ISIS has come closer than any previous terrorist group to establishing a *de facto* nation-state¹⁶—a possibility that would disrupt the international community in unprecedented ways.

¹¹ Babak (Ali) Rod Khadem, *From the Islamic State to the Messiah's Global Government: Structures of the Final World Order According to Contemporary Sunni and Shi'ite Discourses* (Oct. 19, 2016) (unpublished Ph.D. dissertation, Harvard University) (on file with author) [hereinafter *Dissertation*].

¹² *Id.* at 4–8.

¹³ *Id.* at 42–50.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See infra* notes 17–21.

Britain's Prime Minister, Theresa May, for instance, has warned that, "[i]f ISIS succeeds in firmly consolidating their grip on the land they occupy in Syria and Iraq, we will see the world's first truly terrorist state established within a few hours flying time of our country."¹⁷ The Wall Street Journal, likewise, has remarked that "the terrorist organization calling itself the Islamic State is operating like a government, with a bureaucratic hierarchy."¹⁸ The state-like behavior of ISIS, furthermore, has prompted some to argue that the best way to stop ISIS is to actually grant the movement legal status as a nation-state, for doing so would open up a range of options within international law.¹⁹ Nation-states, after all, are held to higher standards of liability for wrongful acts, according to United Nations standards.²⁰ Likewise, both the International Criminal Court and the Geneva Conventions presuppose nation-states in their provisions concerning war crimes and armed conflicts.²¹ Furthermore, as noted by one recent observer,

[t]he advantages of the plan [to recognize ISIS as a nation-state] are pretty clear. Once war is declared, ISIS's enemy nations can attack anywhere in the country, pursuant to the laws of war. ISIS militants and the Islamist warriors who came to help would all be in one place. It plays to the strengths of established nation states with superior weaponry. The defined borders give the conflict shape, and a government to topple gives it a well-defined goal.²²

Such assertions beg the question: is it possible for ISIS to follow the precedent of the numerous Islamic movements that, despite originating as non-state insurgencies, eventually became incorporated within the apparatus of the nation-state (e.g., the Muslim Brotherhood, Hamas, etc.), or even attained nation-state status (e.g., Saudi Arabia, Islamic Republic of Iran, etc.)?

¹⁷ Corinne Lestch & Corky Siemaszko, *British Home Secretary Theresa May Warns ISIS Thugs Could "Acquire Nuclear Weapons," Attack West*, N.Y. DAILY NEWS (Oct. 1, 2014), <http://www.nydailynews.com/news/world/british-home-secretary-theresa-warns-isis-thugs-acquire-nuclear-weapons-attack-west-article-1.1957975#>.

¹⁸ *The Islamic State: How Its Leadership Is Organized*, WALL STREET J. (Sept. 8, 2014), <https://www.wsj.com/video/the-islamic-state-how-its-leadership-is-organized/4F4FA0B8-9C07-4D09-BF1D-5761162A0D87.html>.

¹⁹ See, e.g., Peter Weber, *Why the West Should Accept ISIS as a Sovereign Nation*, WEEK (Aug. 28, 2014), <http://theweek.com/articles/444156/why-west-should-accept-isis-sovereign-nation>.

²⁰ G.A. Res. 56/83, annex, *Responsibility of States for Internationally Wrongful Acts* (Dec. 12, 2001).

²¹ See generally Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 3. See also Geneva Convention Relative to the Protection of Civilian Persons in Times of War, art. 2, Aug. 12, 1949, 75 U.N.T.S. 135.

²² Weber, *supra* note 19.

Part I presents two reasons why this question has remained elusive. First, ISIS's current governance practices have remained insufficiently accounted for in legal and policy discourse. Second, and more importantly, legal and policy analyses are asking the wrong overarching question. The standard inquiry—i.e., whether the international community can accept ISIS—merely conveys one half of the answer, for it focuses only on ISIS practice, entirely neglecting the question of ISIS religious doctrine. Therefore, this inquiry must be complemented by a doctrinal inquiry, which reverses the subject and object of inquiry, asking not whether the international community can accept ISIS, but rather whether ISIS can ever accept membership in the international community. Section A addresses the first of these two deficiencies by exposing the basic governance practices of ISIS across various domains (as reflected in the ISIS structure during its heyday of 2014–2016). Section B then considers whether ISIS can potentially integrate within the nation-state system, both according to the standard inquiry and the doctrinal inquiry. These findings of Sections A and B, in the aggregate, lead to the following two conclusions, respectively: (i) with certain modifications to current practices, the international community can potentially accept ISIS, particularly given the historical precedent of having integrated other non-state, Islamist insurgencies (e.g., the Muslim Brotherhood, the Wahhabis, Hamas, etc.);²³ (ii) conversely, ISIS can never accept membership in the international community, for doing so would contradict the essential doctrinal tenets that define the core identity of the movement.

A. The ISIS System of Governance (2014–2016)

Although ISIS governance practices have been partially exposed within Middle Eastern and Islamic Studies, these findings have not yet been integrated within legal scholarship—a fact which is reflected in the dearth of literature on the movement's practices within law reviews and related domains of scholarship. Accordingly, this section delineates ISIS's basic governance practices across four broad domains: (1) political structure, (2) legal system, (3) economic structure, and (4) social structure.

1. Political Structure

ISIS's polity is structured as an autocracy, the highest authority of which is the Caliph, the most recent of which has been Abu Bakr al-Baghdadi.²⁴ Reporting directly to the Caliph are his two deputies for Iraq and Syria: Abu Ali al-Anbari and

²³ See *infra* Part I, Section B(1).

²⁴ WILLIAM MCCANTS, THE ISIS APOCALYPSE: THE HISTORY, STRATEGY, AND DOOMSDAY VISION OF THE ISLAMIC STATE 1, 45 (2015).

Abu Muslim al-Turkmani,²⁵ respectively, as well as the Shura Committee, which consists of high-level religious scholars and military experts.²⁶ Next in the chain of command are the governors of various “provinces” (twelve each for Iraq and Syria), who are in turn informed by multiple administrative committees: financial, leadership, military/jihad, legal, fighters’ assistance, security, intelligence, and media.²⁷ These political layers, in the aggregate, govern over not only contiguous regions of Iraq and Syria, but also non-contiguous “provinces” in Libya, Algeria, Egypt, Yemen, Saudi Arabia, the Afghanistan-Pakistan border, Northern Nigeria, and Russia.²⁸ These provincial claims are mostly the result of oaths of allegiance given to ISIS by pre-existing jihadist movements (e.g., Boko Haram in Nigeria).²⁹ Within Iraq and Syria alone, the population living under ISIS governance reached roughly seven million.³⁰

As for the functioning of its various administrative bodies, ISIS rejects, in principle, a *modus operandi* based upon Western or secular notions of administration and bureaucracy. ISIS expresses this general view by raising the rhetorical question,

It might be argued [against us]: “among the basic constituents of a government is the existence of well-known, modern institutions, governing apparatus, and government facilities—but the government that you [ISIS] are announcing does not comprise any of these things, and does not enjoy what we recognize as the facets of sovereignty which we perceive in contemporary governments.”³¹

ISIS then refutes this hypothetical objection, asserting:

²⁵ Ruth Sherlock, *Inside the Leadership of Islamic State: How the New ‘Caliphate’ is Run*, TELEGRAPH (July 9, 2014), <https://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10956280/Inside-the-leadership-of-Islamic-State-how-the-new-caliphate-is-run.html>.

²⁶ MCCANTS, *supra* note 24, at 78.

²⁷ See, e.g., Cameron Glenn, *Al Qaeda v ISIS: Leaders & Structure*, WILSON CTR. (Sept. 28, 2015), <https://www.wilsoncenter.org/article/al-qaeda-v-isis-leaders-structure>.

²⁸ See, e.g., Bardia Rahmani & Andrea Tanco, *ISIS’s Growing Caliphate: Profiles of Affiliates*, WILSON CTR. (Feb. 19, 2016), <https://www.wilsoncenter.org/article/isis-growing-caliphate-profiles-affiliates>.

²⁹ *Id.*

³⁰ See, e.g., Daveed Gartenstein-Ross, *How Many Fighters Does The Islamic State Really Have?*, WAR ON THE ROCKS (Feb. 9, 2015), <http://warontherocks.com/2015/02/how-many-fighters-does-the-islamic-state-really-have/>.

³¹ ‘UTHMĀN B. ‘ABD AL-RAḤMĀN AL-TAMĪMĪ, I’LĀM AL’ANĀM BI-MILĀD DAWLA AL-ISLĀM 66 (2006) (SHARI’AH COMMITTEE FOR THE ISLAMIC STATE IN IRAQ) [hereinafter I’LĀM]. This title is translatable as, “Informing Humanity of the Birth of the Islamic State.”

To this we reply that the principle that we return to in our decrees, and on the basis of which we plan our actions, is the Book [Qur'an] and the Traditions, and the credible views of the past scholars among the Companions [of the Prophet] and the generation that succeeded them. Within these sources, we see no description of Muslim government wherein its basic constituents include specific government apparati along contemporary lines—and there's no known evidence requiring the existence of apparati and instruments in the manner of contemporary states . . . that derive from the unbelieving West and its political heritage. This does not mean that we deny the function of these apparati and the effectiveness of those instruments which organize a government's actions and assist in accomplishing its duties—rather, our admonition involves conditioning the desired Islamic government on modern descriptions of governments, in terms of their structures and administration And from another perspective, the form in which we have announced the government is not unknown For the initial Prophetic Government was similar in this condition . . . when the Prophet entered Medina, and began to regulate the affairs of the people³²

In light of this ethos of minimalism and the rejection of modern methods of governance, the ISIS approach to administration emphasizes several features that ISIS presumes to have characterized as the “7th-Century Polity of Prophet Muhammad in Arabia.”³³ ISIS describes this structure “in a general sense as restoration of the religious and worldly condition of humanity, or it can be said: restoring the conditions of the [Islamic] congregation and its affairs, and foremost among its affairs is their religion. This is at a general level.”³⁴ While the word “restoration” within this general definition already indicates a regressive vision of political structure, this backward-looking ethos becomes more evident in light of the following elaboration of this definition offered by ISIS.³⁵ In this elaboration, ISIS explains that the Prophet's government comprises nine essential structures, all of which are replicated by ISIS within its current governance practice:

“1. Safeguarding the religion in its fixed principles and in the consensus of the first three generations of the [Islamic] community.”³⁶ This includes the “restoration” of true monotheism in the world—which is anathema to “all forms of innovation, such as Ba'athism, free-will ideology, and Communism”³⁷ It also means the

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 41–42.

³⁵ *See infra* notes 37–67.

³⁶ I'LĀM, *supra* note 31, at 41–42.

³⁷ *Id.*

“restoration” of the “Islamic Shari’ah to the station which God had designated for it, which is the station of dominion over actions, individuals, organizations, customs, and other structures”³⁸

“2. Implementing adjudication among disputants—or, in other words, settling disruptive quarrels and contentious disagreements (and this overlaps with the [third function] of establishing judges and mediators, described further below).”³⁹ In describing this function, ISIS likens its citizens to those of the Prophet’s polity wherein the disparate tribes of Aws and Khazraj in Medina reconciled their differences and “melded into a single line, and a single community.”⁴⁰

“3. Establishing judges and mediators.”⁴¹ In explaining this, ISIS first notes that “the term ‘judges’ is defined in accordance to the definition of [the medieval Muslim jurist] Ibn Rushd—i.e., informing [disputants] of the required Islamic legal principle that is applicable.”⁴² This is not limited to the “issuing of fatwas . . . for the mufti cannot force his fatwa on the inquirer”⁴³—whereas the judge, in contrast, has the authority to enforce compliance.⁴⁴ The judgment itself is a “collective duty,” so the ruler must select judges for that purpose.⁴⁵ The model for this is the Prophet himself, for “he adjudicated among his companions,”⁴⁶ and appointed Ali and Mu’adh as judges for Yemen.⁴⁷ Likewise, the first four political successors to the Prophet—known in Sunni terminology as the “Rightly Guided Caliphs,” undertook adjudication themselves at first—but also appointed judges.⁴⁸

“4. Freeing the captives, safeguarding the territory, and defending the sacred.”⁴⁹ More particularly, “freeing the captives” is explained in light of the Islamic tradition that gives instructions to “free the captives, feed the hungry, and treat the sick.”⁵⁰ Likewise, “safeguarding the territory” means “securing highways and spreading safety.”⁵¹

³⁸ *Id.*

³⁹ *Id.* at 42.

⁴⁰ *Id.*

⁴¹ *Id.* at 43–44.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 44.

⁵⁰ *Id.*

⁵¹ *Id.*

“5. Implementing the [Qur’anic] legal punishments.”⁵² This includes “punishing the corrupt in order to censure and deter great sins and abominations, for implementing the legal punishments is among the greatest causes of blessings . . . for punishments deter people from committing many forbidden things . . . this is why the Prophet said, ‘implementing a punishment in the earth is better than 70 days of rain.’”⁵³ Thus, “implementing the punishments is one of the most important solutions to . . . the land’s economic problems.”⁵⁴ However,

the veiled ones who soil their thinking with the poison of modern heathenism and afflict their hearts with the darts of Westernization consider implementation of the punishments to be savagery and backwardness and a cause for angering their international community, which would then implement sanctions and boycott on their land—but this is a test which distinguishes the believers from the doubters.⁵⁵

“6. Defense against enemies and reinforcement of breaches.”⁵⁶ This means “protecting the Islamic lands from the greed of enemies among the disbelievers and apostates, and this is the concept of ‘guarding the frontiers,’ which is one of the greatest forms of worship.”⁵⁷ More particularly, ISIS explains that this duty means “combating” a range of opponents, including not only deviants and apostates, but indeed even those who claim to be Muslim but who “refrain from some of the Shari’ah,” as the Prophet himself did during the Battle of Khandaq in the 7th century.⁵⁸

“7. Gathering of taxes, war-booty, charitable contributions, and other such resources within the Public Treasury.”⁵⁹ This means “gathering wealth in its various resources, the most important of which is zakāt, and this is because it is the third pillar of Islam after the two testimonies and prayer”—and ISIS further explains this by emphasizing that the Companions agreed that whoever withholds the taxes should be fought, just as the first Islamic Caliph, Abu Bakr, decided.⁶⁰

“8. Guardianship over the family of martyrs and the helpless, and supporting

⁵² *Id.* at 44–45.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 46–47.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

the army.”⁶¹ ISIS explains this, noting that within the polity, there are many who have “no provider and no protector,” and this is one means by which God tests the government, for government must assume the role of “guardianship over the many”—particularly the “many orphans and innocent ones.”⁶² As for the “military department,” ISIS explains that it must be “optimally configured in terms of the quantity of the army’s combatants and casualties, its movements, and so forth—and they are without doubt included among the [recipients of the government’s] assistance and guardianship.”⁶³

“9. Appointment of well-qualified experts.”⁶⁴ ISIS equates this function with the medieval jurist Mawardi’s concept of “employing reliable agents and deferring to advisors,” which depends upon competence and trustworthiness, as suggested in the Qur’an 28:26.⁶⁵ However, “the combination of competence and trustworthiness is rare among people . . . so the leader must select the best for every domain; thus, the domain of warfare lends itself to one who has strength and bravery, even if there be some deficiency in his actions and in his piety, while the judiciary domain requires the most knowledgeable and most pious, even if he is not a brave fighter and lacks insight regarding warfare”—and so forth with the other domains of government.⁶⁶

2. Legal Structure

ISIS’s legal structure is grounded in a negative premise: the rejection of every man-made legal system as “pagan-tyranny”⁶⁷—i.e., “a regime that does not rule by God’s law, but by temporary man-made laws of disbelief . . . so the ruler who rules by temporary man-made laws is to be considered among the [pagan-tyrants] that God ordered us to reject and avoid.”⁶⁸ This categorical rejection of man-made law has several implications. First and foremost, it is tantamount to a rejection of positive law in the modern sense of codification, whether in the form of legislation,

⁶¹ *Id.* at 47.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 47–48.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ This term translates the Arabic adjective, *tāghūṭī*. See, e.g., Fahd, T. & Stewart, F.H., “*Tāghūṭ*”, in *ENCYCLOPAEDIA OF ISLAM* (P. Bearman et al. eds., 2d ed. 2012).

⁶⁸ ISIS RESEARCH & FATWA COMMITTEE, *Clarifying the Ruling on the Education System in the Nusayri [Alawite] Government [of Syria]*, www.meforum.org [hereinafter Educational Fatwa]. This statement has been translated into English by Aymenn Jawad al-Tamīmī.

written constitutions, or other forms. This, in turn, prompts ISIS to reject the modern norm of rule-of-law: “the source on which the state proceeds is the law, and no one has the right to go outside it or infringe on it, because it is the foundational source on which the disbelieving regime arises and refers to and is issued from.”⁶⁹ Thus, according to ISIS, the rule-of-law norm presumes that “the law is the legislator and is to be worshipped, obeyed and followed—and one must be subject to it and be led by its rule and refer to it in every matter. And this is among the greatest of what nullifies [divine unity] and the [testimony of faith] that Muhammad is the Messenger of God.”⁷⁰ Additionally, the rejection of man-made law in general, and positive law in particular, means the invalidity of the secular doctrine of judicial independence, for “the judiciary existing in the states of disbelief and apostate organizations . . . [derives from] temporary, man-made laws and idolatrous legislative councils.”⁷¹ Stated positively, the sources of law within the legal system are, according to ISIS, restricted to the two scriptural sources in Islam, namely the Qur’an and the Prophetic traditions (the latter being often referred to as “Sunnah”).⁷² This, of course, contrasts not only with Western or secular jurisprudence, but also with one of the hallmarks of “classical” jurisprudence after the Prophet—namely, the existence of multiple legal schools and their monopoly over the law.⁷³ But what specific laws does ISIS promulgate? The restriction of all law to the Qur’an and Sunnah suggests a jurisprudence of minimalism (not unlike the minimalism characterizing ISIS’s theory of political structures, described above). Indeed, as noted recently by one scholar, “the Islamic state has avoided codifying all but the most widely known Islamic legal rules,” taking the position that “there is no need to write down the rules of the *shari’a* because they have already been expressed in the primary texts of revelation.”⁷⁴ Thus, any law explicitly stated within the scriptural sources will be reinstated within the final legal system—such as the fixed punishments stated within the Qur’an, which ISIS announced in Aleppo, in 2014, as follows:⁷⁵

⁶⁹ *Id.* at 17.

⁷⁰ *Id.*

⁷¹ *Id.* at 16.

⁷² See MCCANTS, *supra* note 24, at 161.

⁷³ Rejection of the authority of the classical legal schools is, of course, also tantamount to rejecting the Sunnī doctrine of the end of independent legal reasoning, or “*ijtihad*.” See, e.g., Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT’L J. MIDDLE E. STUD. 3, 3 (1984).

⁷⁴ Mara Revkin, *Legal Foundations of the Islamic State*, in 23 THE BROOKINGS PROJECT ON U.S. RELATIONS WITH THE ISLAMIC WORLD 12 (2016).

⁷⁵ The English translation of this table is produced by Revkin, *id.* at 17.

Crime	Punishment
Blasphemy of God	Death
Blasphemy of the Prophet	Death, even if the accused repents
Blasphemy of Islam	Death
Adultery	Stoning until death if the adulterer was married and 100 lashes and exile if he or she were unmarried
Sodomy (homosexuality)	Death for the person committing the act, as well as for the one receiving it
Theft	Cutting off the hand
Drinking alcohol	80 lashes
Spying for the unbelievers	Death
Apostasy	Death
Brigandage	<ol style="list-style-type: none"> 1. Murder and theft: Death and crucifixion 2. Murder only: Death 3. Armed robbery: Cutting off right hand and left leg 4. Terrorizing the people: Exile

On the other hand, the restriction of all law to that which is expressly stated in the Qur'an and Sunnah presents a practical dilemma of addressing the many mundane aspects of life which are not mentioned in the scriptural sources, particularly realities of the modern era which were non-existent in the Prophet's era. This is why ISIS employs medieval scholar Ibn Taymiyyah's doctrine of 'Shari'ah-governance'⁷⁶ in order to legally justify a considerable body of de facto positive legislation—or "law-like decisions."⁷⁷ Employment of this doctrine has enabled ISIS to issue "rules and regulations governing virtually every aspect of life in the caliphate—including commerce, healthcare, education, and military operations" as well as the enforcement apparatus—consisting of courts, police, and prisons—that is necessary to enforce them.⁷⁸ Furthermore, "[s]uch regulations include mandatory Islamic education through the ninth grade (girls and boys are educated in different schools) and prohibitions on the use of birth control."⁷⁹

While ISIS is careful to avoid the appearance of engaging in the "pagan" enterprise of positive law,⁸⁰ there are fewer theological risks at stake in announcing general

⁷⁶ See, e.g., Muhammed Khalid Masud, *The Doctrine of Siyasa in Islamic Law*, in 18 RECHT VAN DE ISLAM 1, 10–12, 21 (2001).

⁷⁷ Revkin, *supra* note 74, at 13.

⁷⁸ *Id.*

⁷⁹ *Id.* at 19.

⁸⁰ See *supra* note 67.

policies—such as promotion of Islamic education, for “the education system is considered among the most important pillars of the states, and it is part of the regime and a foundational pillar, a crucial joint, a strong-arm in it, and a face for it on the inside and outside.”⁸¹ But perhaps the most prominent examples of general policy statements are ISIS’s “Documents of the City,” which are publicized in the various cities or regions within its claimed territories.⁸² Despite explicitly rejecting modern, written constitutions as examples of positive law, these “Documents” nonetheless provide a rough equivalent thereof, and are generally modeled after the so-called Medina Charter of the Prophet’s own polity.⁸³ More specifically, these documents comprise both general policy announcements as well as various laws deriving directly from the Qur’anic principles.⁸⁴ Excerpts of the policy-related items include the following:⁸⁵

“Document of the City”	
Art. 1	“We [the Islamic State] bear responsibility for restoring the glories of the [C]aliphate and obtaining retribution for the oppression and injustice suffered by . . . our Muslim brothers.”
Art. 2	“We do not make accusations without evidence and proof . . . We show mercy to a Muslim, unless he has apostasized or given aid to criminals.”
Art. 3	“The people in the shadow of our rule are secure and safe . . . Islamic governance guarantees to the [deserving] their rights. The wronged will be given justice against a violator of his right”
Art. 4	“We order that the funds that were under the control of the apostate government (public funds) must be returned to the public treasury under the authority of the caliph of the Muslims who bears responsibility for spending these funds in the malasha [interests] of the Muslims.”
Art. 5	“Trafficking and dealing alcohol or drugs, or smoking, or other taboos, are prohibited.”
Art. 6	“Mosques are the houses of God We urge all Muslims to build them and pray”

⁸¹ Educational Fatwa, *supra* note 68, at 4.

⁸² Revkin, *supra* note 74, at 14.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 15.

Art. 7	“Beware of employment with the apostate government and the [idol-worshippers] He who repents of sin is not guilty of sin. To the apostates of the army and police and the rest of the unbelieving apparatus we say that the door of repentance is open to anyone who wants it, and we have designated specific places to receive those wishing to repent subject to conditions”
Art. 8	“Councils and associations and banners [bearing the names of other groups] are unacceptable.”
Art. 9	“God commands that you join the society [the Islamic State] and renounce factions and strife Division is one of the traps of the devil”
Art. 10	“Our opinion regarding . . . polytheistic and pagan shrines is that of the Prophet [who prohibited them].”
Art. 11	“To the virtuous and dignified women: Dress decently and in loose tunics and robes. . . . Do not leave the house except out of necessity”
Art. 12	“[God commands that we] establish Islamic governance and . . . release the people from the shackles of rotten positive laws”
Art. 13	“We listen to the council of the small and the great and the free and the slave, and there is no difference among us between red and black, and we judge ourselves before others.”

3. Economic Structure

The sources of ISIS’s current revenue have already been generally identified, and include oil sales, confiscation of bank proceeds (particularly in Iraq and Syria), the looting and sale of archeological relics in international black markets, human trafficking, appropriation of property, agriculture, ransom of hostages, direct contributions from donors, as well as taxation.⁸⁶ But aside from these sources of revenue, what is ISIS’s overall economic structure?

For ISIS, the general benchmark for the economy, as with other structures of government, is that of the Prophet’s polity.⁸⁷ At the most general level, ISIS touts an economy, the ethos of which is cooperation, generosity, and philanthropy.⁸⁸ In the Prophet’s polity, for instance,

⁸⁶ See, e.g., Ana Swanson, *How the Islamic State Makes Its Money*, WASH. POST (Nov. 18, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/18/how-isis-makes-its-money/>.

⁸⁷ I’LĀM, *supra* note 31.

⁸⁸ ABU AYYUB AL-MASRI, AL-DAWLA AL-NABAWĪYYA, *THE ISLAMIC STATE IN IRAQ* 9 (2008). This title is translated as, “The Prophetic Government.” [hereinafter DN].

despite [the difficult conditions], we hear absolutely nothing [in the traditions] suggesting that the Muslims, let alone the hypocrites, discredited the Prophet's government with words such as "he's unable to secure that which will nourish himself and his Companions, so how can he possibly deprive himself and yet establish a government which doesn't possess the vital ingredients of government, including the most basic of them, which are food and water?"⁸⁹

Likewise, ISIS emphasizes the economic ethos of generosity and philanthropy by citing an Islamic tradition regarding Abu Hurayra, who, despite his hunger, was instructed by the Prophet to share a portion of milk with the 'men of the platform,' for

these people . . . were the guests of Islam who had no families, nor money, nor anybody to depend upon, and whenever an object of charity was brought to the Prophet, he would send it to them and would not take anything from it, and whenever any present was given to him, he used to send some for them and then take some of it for himself.⁹⁰

More particularly, this benchmark of the Prophet's polity means a return to the transactional and economic norms thereof, particularly the prohibitions stipulated within the Qur'an and Sunnah.⁹¹ While ISIS has not yet expounded on some of these prohibitions, such as the prohibition on transactions involving excessive uncertainty ("gharār"),⁹² it has explicitly mentioned others, such as the prohibition on unjust enrichment ("riba").⁹³ Arguably, one way in which ISIS has attempted to prevent unjust enrichment has been through regulation of prices within the market, including "housing rents, medications sold at pharmacies, and childbirth operations performed in its hospitals. It has even issued a fatwa requiring that the price of counterfeit goods be lower than the price of the authentic product."⁹⁴ Likewise, the prohibition on unjust enrichment has prompted ISIS to return to the original Islamic standard of gold, silver, and copper currencies, rather than fiat money.⁹⁵ ISIS

⁸⁹ *Id.*

⁹⁰ *Id.* at 6.

⁹¹ I'LĀM, *supra* note 31.

⁹² For a general account of "excessive uncertainty" and "unjust enrichment" in Islamic jurisprudence, see NABIL A. SALEH, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW 49 (1986). *See also*, Priya Uberoi & Ali Rod Khadem, *Islamic Derivatives: Past, Present, and Future*, in ISLAMIC CAPITAL MARKETS: PRODUCTS AND STRATEGIES 147, 147 (2011).

⁹³ ISIS, *Islamic State Reports: The Currency of the Khilafah*, 5 DABIQ 10, 18 (2014).

⁹⁴ Revkin, *supra* note 74, at 21.

⁹⁵ ISIS, *supra* note 93, at 18.

noted this connection between currencies and unjust enrichment in its announcement that “[i]n an effort to disentangle the [Islamic community] from the corrupt, interest-based global financial system, the Islamic State recently announced the minting of new currency based on the intrinsic values of gold, silver, and copper.”⁹⁶ As to the form of the coinage, “[t]he images used are representative of the guidance that the Muslims have attained from the Book of Allah and the Sunnah of His Messenger.”⁹⁷ In a subsequent statement, ISIS acknowledges that the world at large might consider this gold-based currency to be regressive: “many central banks around the world rubbish the idea of a return to gold or a gold standard in the 21st Century, citing that it would be a huge step backwards.”⁹⁸ Nonetheless, ISIS rejects the modern banking system as:

a scam designed to feed itself and governments. Nothing tangible exists, just a huge amount of paper and lots of numbers on computers. With today’s system, the governments and banks hold all the gold while the public have worthless pieces of paper to play with, and when the economy collapses guess who’ll still have the gold⁹⁹

Aside from prohibitions such as *riba* and *gharār*, the basic Prophetic model for redistribution of wealth is also replicated in the economy. This means, in the first instance, that the government accumulates revenue through various Islamic levies (as mentioned in the duties listed under political structure, above), including: land tax *gharār*;¹⁰⁰ tax on assets (“*zakāt*”), which for ISIS is a 2.5 percent tax on total income and savings;¹⁰¹ violent seizure of non-Muslim property (“*ghanīma*”);¹⁰² non-

⁹⁶ *Id.*

⁹⁷ ISIS acknowledges, however, that the practice of minting Islamic coinage derives not from the Prophet’s polity, due to practical restrictions at that time, but rather from the later period, specifically the Umayyad Caliphate. ISIS explains: “The minting of a unique currency specific to the Muslims and based on precious metals has its precedence in the [Umayyad Caliphate] of [Caliph] ‘Abdul- Mālik Ibn Marwān. . . . The Muslims during the time of the Prophet . . . the Rightly-Guided [Caliphs], and the early [Umayyad Caliphs] made use of coinage circulated by the Persian and Roman empires.” *Id.*

⁹⁸ ISIS, *Meltdown*, 6 DABIQ 58, 62 (2015).

⁹⁹ *Id.*

¹⁰⁰ ISIS, *My Provision Was Placed for Me in the Shade of My Spear*, 4 DABIQ 10, 12 (2014).

¹⁰¹ ISIS, *And They Gave Zakah*, JIHADOLOGY (June 17, 2015), <https://jihadology.net/2015/06/17/al-furqan-media-presents-a-new-video-message-from-the-islamic-state-and-they-gave-zakah>.

¹⁰² Media Office of North Baghdād Province, ISIS, *Photographic Report: Aspect of the Spoils of the Islamic State in the Battle of Nazem with the Safavid Army Near the Nibai Region*, JUSTPASTE.IT (Apr. 30, 2015), http://justpaste.it/we_sh_bag01. See also Revkin, *supra* note 74, at 19.

violent acquisition of non-Muslim property (“fay”);¹⁰³ and import-export tariffs (“ushr”).¹⁰⁴ ISIS then redistributes these proceeds for various purposes. For example, ISIS claims that zakāt is spent for a variety of ends, including outreach and recruitment, providing for the needs of jihad, freeing Muslim prisoners and slaves, and assisting the poor.¹⁰⁵ Ghanīma and fay, likewise, are used for various purposes, including the provision of living quarters to fighters,¹⁰⁶ and the maintenance of orphans.¹⁰⁷

4. Social Structure

As with other aspects of its practices, ISIS benchmarks its social structure according to its perceived ideal of the Prophet’s polity.¹⁰⁸ This, according to ISIS, means that within its society, differences based on mere biology endure, comprising the primary form of diversity. On the one hand, certain biological differences—particularly those of gender—persist under traditionally conceived restrictions of inequality.¹⁰⁹ Indeed, the fundamental inequality between men and women is one of the two reasons that ISIS explicitly rejects the modern norm of human rights.¹¹⁰

¹⁰³ Cole Bunzel, *32 Islamic State Fatwas*, JIHADICA (Mar. 25, 2015), <http://www.jihadica.com/32-islamic-state-fatwas>. See also Revkin, *supra* note 74, at 19.

¹⁰⁴ Revkin, *supra* note 74, at 21.

¹⁰⁵ ISIS, *supra* note 101.

¹⁰⁶ Revkin, *supra* note 74, at 19.

¹⁰⁷ *Id.* at 20. See also Shari’ah Committee for Raqqa Province, ISIS (@baqiah1407), *Announcement on Contributing Ghanīma and Fay’ to Orphans*, TWITTER (May 2, 2014), web.archive.org/web/20160323013442/https://twitter.com/baqiah1407/status/462371102405431296.

¹⁰⁸ To begin with, ISIS suggests that the understanding and righteousness of the individual within the final society, though undoubtedly loftier than most of human history, will nonetheless fall short of the level of individuals who resided within the Prophet’s polity. This view is expressed in a footnote wherein ISIS states that:

[t]his contrast between the Islamic State today and the state of [Medina] in the time of the Prophet . . . and his Companions is not to suggest that the khalaf [later Muslims] are better than the Salaf [early Muslims] . . . [The medieval scholar] Ibnul-Qayyim . . . makes a similar contrast, saying, ‘Rather, the true Islam, which Allah’s Messenger . . . and his Companions were upon, is something far stranger today than it was when it first emerged’. . . Also similar to this is the [Islamic tradition] that states, ‘He from among them who does good deeds will receive the reward of fifty [of you] . . . Finally, the companions have virtues that will never be attained by any individual after them regardless of how hard he works or how much he strives.

ISIS, *The Islamic State Before [Armageddon]*, 3 DABIQ 5, 5 (2014).

¹⁰⁹ Educational Fatwa, *supra* note 68, at 17.

¹¹⁰ *Id.*

More specifically, ISIS decries “human rights” for “[c]ondemning the [Islamic] distinction between man and women in stipulated rights in law, like divorce, inheritance and blood money, holding that they are equal in humanity”—and therefore concludes that human rights advocates “have condemned what it [Islam] has designed in the rights and values between male and female.”¹¹¹

On the other hand, other forms of biological diversity—particularly race, ethnicity, and linguistic background—enjoy protections of equality.¹¹² ISIS, for instance, decries “racism,” particularly in its American forms, as “a tool of [Satan], which, like nationalism, is intended to divide and weaken the children of Adam and prevent them from uniting upon the truth.”¹¹³ In contrast, ISIS lauds its society as one wherein “the Arab and non-Arab, the white man and black man, the easterner and westerner are all brothers. It is a [Caliphate] that gathered the Caucasian, Indian, Chinese, [Syrian], Iraqi, Yemeni, Egyptian . . . [North African], American, French, German, and Australian. Allah brought their hearts together, and thus, they became brothers by His grace”¹¹⁴

While ‘biological diversity’ is tolerated, differences are unacceptable in matters of belief, doctrine, or practice.¹¹⁵ ISIS expresses its rejection of such diversity in various instances, such as its criticism of

[so-called] ‘Islamic’ preachers and writers . . . with humanistic undertones that seek to portray Islam as a religion of peace that teaches Muslims to coexist with all. Deluded by the open-ended concept of ‘tolerance’ . . . for the purpose of advancing an agenda that attempts to ‘Islamize’ more ‘liberal’ concepts that the [infidels] apply across the board for achieving evil, such as political pluralism, freedom of religion, and acceptance of sodomites.¹¹⁶

This rejection of the freedom-of-belief norm in fact constitutes ISIS’s second ground for rejecting the modern concept of human rights, for according to ISIS, another implication of “human rights” is “[d]ealing with people on the basis of humanity

¹¹¹ *Id.*

¹¹² *See infra* notes 117–18.

¹¹³ ISIS, [*The Doctrine of ‘Loyalty and Disavowal’ Versus American Racism*, 11 DABIQ 18, 20 (2015).

¹¹⁴ ISIS, [*Caliphate*] *Declared*, 1 DABIQ 6, 7 (2014). Similarly, ISIS quotes from Abu Mus’ab al-Zarqawi, who stated that “you would find the soldiers and the commanders to be of different colors, languages, and lands: . . . the Jordanian, the Tunisian, the Egyptian, the Somali, the Turk, the Albanian, the Chechen, the Indonesian, the Russian, the European, the American and so on.” ISIS, *supra* note 108, at 5–6.

¹¹⁵ *See infra* notes 120–25.

¹¹⁶ ISIS, *supra* note 113, at 19.

and human matter, far removed from the religious and doctrinal basis.”¹¹⁷ This presumption of human rights causes its advocates to feel “annoyed by what the religion of Islam has stipulated in dealing with people on the basis of religion and creed.”¹¹⁸ In short, when it comes to matters of doctrine, belief, and practice, the operating principle for ISIS is that of inequality—which ISIS expresses as the doctrine of ‘loyalty-and-disavowal.’¹¹⁹ In elucidating this doctrine, ISIS first establishes a basic dichotomy: “[t]he Muslim . . . does not accept the [Islamic community] remaining divided in the name of petty concepts, for he recognizes that the only acceptable line of division is that which separates between a Muslim and a [non-believer]”¹²⁰ Given this dichotomy between Muslim and non-Muslim, “the Muslim’s obligation [is] to reject [non-belief], separate himself from the [non-believers] . . . harbor enmity and hatred towards them, and wage war against them until they submit to the truth.”¹²¹

Although ideological and doctrinal differences may take varying forms, ISIS elaborates in particular on how to address the problem of religious diversity. For ISIS, Muslims (defined self-referentially, as followers of ISIS) are to enjoy the highest level of social status—and are thus the only people who enjoy full citizenship to the Caliphate (including the benefits of holding ISIS passports, which are reported to have been distributed to some).¹²² Second to Muslims are the so-called “People of the Book”—i.e. pre-Islamic, Abrahamic religious minorities, which for practical purposes, is reducible to Jews and Christians.¹²³ These religious minorities face the options of conversion to Islam, death, or maintaining their religions by entering into the protection contract, known as “dhimma,” and paying the associated religious poll-tax, known as “jizya.”¹²⁴ Should they opt for the latter, their social standing will,

¹¹⁷ Educational Fatwa, *supra* note 68, at 16.

¹¹⁸ *Id.*

¹¹⁹ This translates the Arabic phrase, “walā’ and barā.” See, e.g., MOHAMED BIN ALI, THE ROOTS OF RELIGIOUS EXTREMISM: UNDERSTANDING THE SALAFI DOCTRINE OF AL-WALA’ WAL BARA’ 1 (2015).

¹²⁰ ISIS, *supra* note 113, at 20.

¹²¹ *Id.* at 19.

¹²² See, e.g., *ISIS Allegedly Issues ‘Caliphate’ Passport*, AL ARABIYA NEWS (July 5, 2014), <http://english.alarabiya.net/en/news/middle-east/2014/07/05/isis-allegedly-issues-caliphate-passport.html>.

¹²³ See generally YOHANAN FRIEDMANN, TOLERANCE AND COERCION IN ISLAM: INTERFAITH RELATIONS IN THE MUSLIM TRADITION 71 (2003).

¹²⁴ According to Revkin, “Reports from Islamic State-controlled areas of Iraq indicate that the *jizyah* tax there is set at a rate of four gold dinars for the wealthy, two dinars for middle-income people, and one dinar for the poor.” Revkin, *supra* note 74, at 16.

of course, be inferior to that of Muslims.¹²⁵ To this end, the government is to guarantee Muslims a number of “legally enforceable rights,” such as “the right to an impartial judge,” the right for male Muslims to enjoy “equal treatment before the law of God,” the right to “a seven-day limit on pre-trial detention before an accused suspect is entitled to a court hearing,” as well as “the right of women to appeal to its courts for redress when their rights are violated.”¹²⁶ In contrast, the protected Jews and Christians are second-class citizens: they are entitled to “protection of the Islamic State and limited freedom of worship,” but must comply with various requirements, including “bans on the construction or repair of houses of worship, bearing of arms, or public consumption or trade of pork and wine, engaging in religious rituals outside of their churches; a duty to hand over spies or other individuals wanted by the judiciary of the Islamic State; and a duty to respect Islam and Muslims.”¹²⁷

The next two rungs in the descending social hierarchy, after the second-class Jews and Christians, are “original unbelievers,” which is largely reducible to non-Abrahamic faiths, followed by the lowest of all, the apostates, which comprise those groups that ISIS considers to have historically originated within Islam, but which later broke off therefrom.¹²⁸ According to ISIS, an example of the “original unbelievers” is the Yazidi community, while examples of the apostates include Twelver Shi’ites, Druze, Alawites, and Isma’ilis, along with many who claim to be Sunnis but who have allegedly apostatized due to embracing non-Islamic beliefs (e.g. Sufism, democracy, etc.) or who otherwise disagree with ISIS.¹²⁹ In one sense, these two social strata are similar, for neither is eligible for the protection contract (ISIS states, for example, that “[u]nlike the Jews and Christians, there was no room for [religious poll-tax] payment”¹³⁰ for the original unbelievers—and similarly states that apostates “cannot pay [religious poll-tax] to become a [protected religious minority]”).¹³¹ However, the reason that original unbelievers enjoy a higher status than apostates is that the former maintain a possibility of keeping their religion by becoming subjugated as slaves, while the latter face only the choice between conversion

¹²⁵ FRIEDMANN, *supra* note 123, at 14.

¹²⁶ *Id.* at 13.

¹²⁷ *Id.*

¹²⁸ ISIS, *The Revival of Slavery Before the Hour*, 4 DABIQ 14, 14–16 (2014). *See also* ISIS, *The [Shi’ites]: from Ibn Saba’ to the [Antichrist]*, 13 DABIQ 32, 33–43 (2016); ISIS, *The Allies of [al-Qaeda in Syria]*, 10 DABIQ 6, 8 (2015).

¹²⁹ *See* sources cited *supra* note 128.

¹³⁰ ISIS, *The Revival of Slavery Before the Hour*, *supra* note 128, at 15.

¹³¹ ISIS, *The [Shi’ites]: from Ibn Saba’ to the [Antichrist]*, *supra* note 128, at 43.

to Islam or death.¹³² It is for this reason that ISIS explains, regarding the Yazidi, that “their women could be enslaved unlike female apostates who the majority of the [jurists] say cannot be enslaved and can only be given an ultimatum to repent or face the sword.”¹³³

B. *Integration within the International Order of Nation-States*

The question of whether ISIS can become integrated within the international order of nation-states can be answered through one of two methods. First is the “standard” analysis of legal and policy discourse, which inquires as to the circumstances under which the international community might fully or partially admit a non-state actor within its ranks, according to particular legal and extra-legal criteria. The second method is the “doctrinal” analysis, which asks whether the movement itself, according to its own defining doctrine, would accept such integration within the international community. Both methods are considered below.

1. *The Standard Analysis*

If ISIS were to modify certain aspects of its practice, could the international community allow it to partially or even fully integrate within the Westphalian order, thus following the precedent of numerous other non-state Islamist movements in the past? From a historical perspective, the methods by which groups have attained nation-state status have been considerably broad in the modern era, including the post-WWII, global decolonization process and the associated norm of the right to self-determination, the dissolution of conglomerates such as the Soviet Union, the break-up of nation-states (e.g. Yugoslavia) into smaller states, the forceful annexation of territories (e.g. Russia’s activities in Crimea), or relatively non-hostile mergers (e.g. Yemen, Germany). Given the diversity of these historical trajectories, various sets of criteria have been proposed for legal recognition of nation-states.

a. *The Montevideo Requirements*

The most widely recognized legal standard for statehood is found in the Montevideo Convention on the Rights and Duties of States (“Montevideo”).¹³⁴ Article 1 of Montevideo dictates that “[t]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”¹³⁵

¹³² See sources cited *supra* note 128.

¹³³ ISIS, *The Revival of Slavery Before the Hour*, *supra* note 128, at 15.

¹³⁴ Convention on the Rights and Duties of States, *opened for signature* Dec. 26 1933, 165 LNTS 19 (entered into force Dec. 26, 1934).

¹³⁵ *Id.* at art. 1.

Each of these four requirements of statehood are further explained in the Third Restatement of the Foreign Relations Law of the U.S.,¹³⁶ which notes, respectively, that (a) a “significant number of permanent inhabitants” must be located in the defined territory; (b) the defined territory must have clear borders and must comprise specified land; (c) “government” implies the ability to carry out governmental functions; and (d) the capacity to enter state-relations means the ability to represent the population in international relations.¹³⁷

All four of these Montevideo requirements are clearly met by ISIS. As to the first requirement, Montevideo states no minimum threshold for population.¹³⁸ As noted in the previous section on current ISIS structures, there are indeed permanent populations residing in ISIS’s territories—not only the seven million or so who resided in its Iraqi and Syrian territories, but also others in the so-called ISIS provinces.¹³⁹ As also noted, some of these inhabitants received ISIS passports, the text of which allegedly includes the statement that “[t]he holder of the passport if harmed we will deploy armies for his service.”¹⁴⁰ Even the international community has tacitly acknowledged the fulfillment of this first requirement. For example, in October 2014, Philip Hammond, the U.K. Foreign Secretary, stated in connection with British citizens who had defected to ISIS that “there had been ‘discussion’ within the U.K. government about whether [such] British citizens . . . could be charged under the U.K.’s treason law, which dates back to 1361.”¹⁴¹ Such statements suggest, albeit tacitly, that those who reside in ISIS territory are citizens thereof.

As for the second requirement, although Montevideo is unclear as to the required scope of territory, ISIS’s holdings—even in its reduced size at the time of this writing—are clearly greater than that of numerous recognized nation-states (e.g. Luxembourg, Belgium, Qatar, etc.).¹⁴² Furthermore, while Montevideo leaves the concept of “effective control” undefined, there is little doubt that ISIS’s effective

¹³⁶ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 201 (AM. LAW. INST. 1987).

¹³⁷ *Id.*

¹³⁸ Convention on the Rights and Duties of States, *supra* note 134, at art. 1.

¹³⁹ See *supra* Part I, Section A(1).

¹⁴⁰ See, e.g., *ISIS Allegedly Issues ‘Caliphate’ Passport*, *supra* note 122.

¹⁴¹ Mark Hanrahan, *UK Citizens Who Join ISIS Could Be Charged with Treason: British Foreign Secretary*, INT’L BUS. TIMES (Oct. 17, 2014), <http://www.ibtimes.com/uk-citizens-who-join-isis-could-be-charged-treason-british-foreign-secretary-1706685>.

¹⁴² See, e.g., NATIONAL GEOGRAPHIC, ATLAS OF THE WORLD (10th ed. 2014); Rick Noack, *How the Islamic State Compares with Real States*, WASH. POST (Sept. 12, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/09/12/heres-how-the-islamic-state-compares-to-real-states/>.

control over its claimed territories exceeds that of internationally recognized nation-states, such as Andorra and Monaco, which lack the capacity for basic self-defense.¹⁴³

Likewise, although the geographic borders of the ISIS territories have been shifting, lack of fixed borders has not barred international recognition of Israel and indeed other nation-states with border disputes.¹⁴⁴ A more notable objection, perhaps, is that ISIS acquired its territories through coercion¹⁴⁵—a violation of Montevideo Article 11, which imposes an obligation

not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.¹⁴⁶

However, acquisition of territory through coercive force has been one of the most common means by which nation-states have historically established themselves—not only in the colonial era, but also in recent times, as evidenced by Russia's annexation of the Crimean Peninsula from Ukraine in 2014.¹⁴⁷ Furthermore, the fact that ISIS acquired its central territories in the context of the Iraqi and Syrian civil wars lends at least a modicum of further legitimacy to its method,¹⁴⁸ for the argument can be made that ISIS merely stepped into a power vacuum, rather than seizing land from capable sovereigns.

As for the third Montevideo requirement, the summary of ISIS governance practices provided in Section A above clearly establishes that ISIS is fulfilling the basic functions of governance. As noted, in its political structure, ISIS is organized as an autocracy with several layers of secondary and tertiary hierarchies and an administrative apparatus covering standard governance functions.¹⁴⁹ In its legal structure, despite ISIS's jurisprudential disdain for positive law, it nonetheless has a de

¹⁴³ See, e.g., Zbigniew Dumienki, *Microstates as Modern Protected States: Towards a New Definition of Micro-Statehood*, CENTRE FOR SMALL STATE STUDIES 22–27 (2014), <http://ams.hi.is/en/utgafa/publications-by-the-centre-for-small-state-studies/>.

¹⁴⁴ See, e.g., 1 BORDER DISPUTES: A GLOBAL ENCYCLOPEDIA, TERRITORIAL DISPUTES xxix (Emmanuel Brunet-Jailly ed., 2015).

¹⁴⁵ See, e.g., MCCANTS, *supra* note 24, at 152.

¹⁴⁶ Convention on the Rights and Duties of States, *supra* note 134, art. 11.

¹⁴⁷ See RUSSIA BEFORE AND AFTER CRIMEA: NATIONALISM AND IDENTITY 2010-17, 5 (Pål Kolstø & Helge Blakkisrud eds., 2018).

¹⁴⁸ See MCCANTS, *supra* note 24, at 80.

¹⁴⁹ See *supra* Part I, Section A(1).

facto constitution and de facto positive laws, many of which are pronounced as regulations.¹⁵⁰ In its economic structure, ISIS has considerable sources of revenue, a currency, a defined transactional system, and a system for levying taxes and redistributing the proceeds thereof.¹⁵¹ In its social structure, ISIS implements a hierarchical class or caste system comprising full-citizens, second-class citizens, and non-citizens.¹⁵²

As for the fourth Montevideo requirement, ISIS arguably already conducts foreign relations with other states. As a justification for this claim, one need only look to the official media and public relations departments of ISIS that regularly communicate ISIS propaganda, announcements, and ultimatums to various state and non-state actors throughout the world. These communications are made through a variety of channels, including written statements, twitter messages, videos, as well as publications such as ISIS's "Dabiq" magazine, which have already been extensively cited in this article. Of course, an objection can be made on the grounds that virtually all of ISIS's relations with other nation-states are hostile and threatening in nature. Montevideo, however, does not stipulate that state relations must be "friendly"—merely that they must exist.¹⁵³ A separate objection may be made that these forms of state relations are all informal in nature, for to date, ISIS has no embassies or formal diplomatic ties with other states, nor do other states have them in ISIS territory. However, even if it is argued that only official and diplomatic ties count as "state relations," Montevideo only requires the *capacity* to enter into such relations¹⁵⁴—rather than the realization or actualization of this capacity. From a financial and technological perspective, ISIS certainly has this capacity.

b. UN General Assembly Resolution 2625

A second international legal norm concerning recognition of nation-states is Resolution 2625 of the United Nations General Assembly (entitled, the "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations").¹⁵⁵ This Resolution enjoins upon nation-states "the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples."¹⁵⁶ So long as nation-states fulfill this duty, then sub-groups within the

¹⁵⁰ See *supra* Part I, Section A(2).

¹⁵¹ See *supra* Part I, Section A(3).

¹⁵² See *supra* Part I, Section A(4).

¹⁵³ Convention on the Rights and Duties of States, *supra* note 134, art. 1.

¹⁵⁴ *Id.*

¹⁵⁵ G.A. Res. 2625 (XXV) 121 (Oct. 24, 1970).

¹⁵⁶ *Id.* at 123–24.

states have no right of seceding from, or otherwise dismembering, the nation-state.¹⁵⁷ The implication, therefore, is that in cases where nation-states fail to fulfill this duty, then sub-groups may have legal grounds to exercise their right to self-determination through secession. This, indeed, was suggested by the advisory opinion of the International Court of Justice in 2010, in which it held that Kosovo's unilateral declaration of independence from Serbia was in accordance with the principles of international law.¹⁵⁸ A contrasting example is, for instance, that of the referendum by Quebec to unilaterally secede from Canada—an effort which the Canadian Supreme Court rejected on various grounds, including the fact that the Quebecois are not being deprived of their right to self-determination, for they are permitted to have their own representatives participate in government institutions to further their minority interests.¹⁵⁹

Ironically, Resolution 2625 provides a legal basis by which the international community can recognize ISIS as a nation-state. This is due to the fact that ISIS can justifiably claim that, as a Sunni group, its right to self-determination was being systematically deprived by both the Iraqi and Syrian governments, both of which were Shi'ite in religious orientation and were known to have systematically disenfranchised the Sunni population.¹⁶⁰ Of course, ISIS itself is now, through the persecution of groups already described earlier in this Article, systematically depriving its own population (particularly religious minorities) of the right to self-determination¹⁶¹—yet this hypocrisy does not in itself negate ISIS's own potential claim vis-à-vis the Iraqi and Syrian governments.

c. United States Case Law

A third legal standard—which provides the lowest threshold for recognition of ISIS as a nation-state—is that of *Kadic v. Karadžić*.¹⁶² In this case, the United States Court of Appeals for the Second Circuit addressed the matter of human rights

¹⁵⁷ See, e.g., Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 732 (1971).

¹⁵⁸ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 ¶ 123 (July 22).

¹⁵⁹ Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 286–87 (Can.).

¹⁶⁰ See, e.g., HUMAN RIGHTS WATCH, WORLD REPORT 2015: EVENTS OF 2014, 2 (2015); see also Nader Hashemi, *The ISIS Crises and the Broken Politics of the Arab World*, in ROUTLEDGE HANDBOOK ON HUMAN RIGHTS AND THE MIDDLE EAST AND NORTH AFRICA 87 (Anthony Tirado Chase ed., 2017).

¹⁶¹ See *supra* Part I, Section A(4).

¹⁶² *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

abuses committed by the self-proclaimed Bosnian–Serb Republic, under the leadership of Radovan Karadzic, against the Bosnian population.¹⁶³ After confirming subject matter jurisdiction through the Alien Tort Claim Act, the court suggested basic criteria according to which non-state actors can be recognized as nation-states for purposes of criminal liability¹⁶⁴—namely, that even if “statehood in all its formal aspects” does not exist, groups purporting to wield state power can be held accountable as states if they exceed “internationally recognized standards of civilized conduct.”¹⁶⁵ If applied to ISIS, this standard provides further legal grounds for considering ISIS a nation-state, albeit for purposes of criminal liability only. On these general grounds, some have suggested that, “since ISIS has met the legal requirements of statehood, the international community should permit international criminal law to hold ISIS accountable for their actions without worrying about the effects of political recognition of ISIS’ legitimacy.”¹⁶⁶

d. Extra Legal Norms of Legitimacy

Although ISIS fulfills all three sets of legal requirements for statehood outlined above, actual recognition of ISIS as a nation-state is obviously problematic on the basis of extra-legal norms of legitimacy. As noted in recent scholarship, “ISIS does not operate by peaceful means and does not protect the lives of the people it governs so it will never be able to claim status as a state under international law,”¹⁶⁷ and “[t]he biggest hurdle towards achieving statehood for ISIS . . . is that it is lacking legitimacy as a state.”¹⁶⁸ Indeed, the survey of current practices conducted in Section A above illustrates that ISIS is oppressive and regressive in all four domains of governance. Its political structure, for instance, is undemocratic. Its legal structure is brutal in its penalties and lacks transparency due to its dismissal of positive laws. Its economic structure is based on Qur’anic prohibitions and is therefore restrictive in the range of transactions that are permitted. And perhaps worst of all, its social structure is hierarchical and oppressive, not only towards women, but even more so towards religious minorities, who at best are relegated to second-class citizenship,

¹⁶³ *Id.* at 236–37.

¹⁶⁴ *Id.* at 242.

¹⁶⁵ *Id.* at 245.

¹⁶⁶ Zach Cobb, *It is Time to View ISIS as a Legal State for Purposes of Criminal Liability*, COLUM. J. TRANSNAT’L L. (2014), <http://jtl.columbia.edu/it-is-time-to-view-isis-as-a-legal-state-for-purposes-of-criminal-liability>.

¹⁶⁷ Chelsea Elizabeth Bellew, *Secession in International Law: Could ISIS Become a Legally Recognized State?*, 42 OHIO N.U. L. REV. 239, 266 (2015).

¹⁶⁸ Safia Aoude, *The State of Things to Some: The Statehood of ISIS Between Practice*, INT’L L. & RELIG. 15 (Nov. 24, 2016) (unpublished manuscript) (on file with the University of Copenhagen).

and at worst to slavery or death. A counter-argument can, however, be made, that as oppressive as these practices may be, the international community nonetheless already recognizes nation-states that commit equally unsavory practices. North Korea, for instance, is an autocratic government that permits human enslavement.¹⁶⁹ Saudi Arabia is a monarchy that implements virtually the same harsh punishments as ISIS—including public stoning and the severing of limbs.¹⁷⁰ Cameroon and the Central African Republic, among others, permit the practice of female genital mutilation.¹⁷¹ Iran considers certain religious minorities (e.g. Baha'is) to be apostates, and has sentenced significant numbers of them to death.¹⁷² And so forth.

On balance, ISIS's glaring lack of legitimacy relegates the question of integration within the international community to the domain of political expediency and realpolitik. In other words, although ISIS may fulfill the technical legal requirements, the international community's actual admission of ISIS within the Westphalian order can be reduced to a cost-benefit analysis, which in turn depends on the ever-changing geopolitical circumstances in the world and in the Middle East particularly. As noted recently:

at this stage, the [ISIS] [C]aliphate does not have international legitimacy and is not recognized by the States of the world A change in this situation could occur if Iraq or Syria officially dissolve, as was the case in the former Yugoslavia . . . [therefore] it is too early to declare that the [C]aliphate established by the Islamic State meets the requirements of a State under international law.¹⁷³

In principle, any of the following options can be opportunistically elected by the international community: (i) wholly vanquishing ISIS and thereby rendering the question of its nation-state status altogether moot; (ii) granting ISIS nation-state status only for purposes of criminal liability; (iii) allowing ISIS to participate within the nation-state processes of Iraq or Syria (e.g. through organizing as a political party, etc.) on the condition that ISIS curb its excesses; or (iv) granting nation-state

¹⁶⁹ See generally *World Report 2015: North Korea*, HUMAN RTS. WATCH (2015), <https://www.hrw.org/world-report/2015/country-chapters/north-korea>.

¹⁷⁰ See, e.g., Rory Donaghy & Mary Atkinson, *Crime and Punishment: Islamic State vs Saudi Arabia*, MIDDLE EAST EYE ONLINE (October 13, 2015), <http://www.middleeasteye.net/news/crime-and-punishment-islamic-state-vs-saudi-arabia-1588245666>.

¹⁷¹ See, e.g., ZIMRAN SAMUEL, *FEMALE GENITAL MUTILATION: LAW AND PRACTICE* 19 (2017).

¹⁷² See, e.g., NAZILA GHANEA-HERCOCK, *HUMAN RIGHTS, THE UN AND THE BAHÁ'IS IN IRAN* 288, 356 (George Ronald ed., 2002).

¹⁷³ Yuval Shany et al., *ISIS: Is the Islamic State Really a State?*, ISRAEL DEMOCRACY INST. (Sept. 14, 2014), <http://en.idi.org.il/articles/5219>.

status, or allowing a power-sharing arrangement, if the proximate political situation in the Middle East deteriorates to the point where ISIS is needed, as the least of all evils, in order to provide a modicum of stability. Until one of these options is selected, the best that ISIS can possibly hope for, according to the Standard analysis, is to be relegated to the purgatory of the Unrepresented Nations and Peoples Organization,¹⁷⁴ members of which include Somaliland, Iranian Kurdistan, Taiwan, and numerous other non-state entities whose ultimate fate remains indeterminate.¹⁷⁵ This indeterminate status would enable the international community to postpone final determination of ISIS's relationship to the Westphalian order to a more opportune time.

2. *Doctrinal Analysis: Can ISIS Accept Participation in the Nation-State System?*

The standard analysis just presented presupposes that ISIS aspires towards the establishment of a nation-state in the international community. This notion is raised implicitly and explicitly throughout current academic and popular discourse on ISIS. Chelsea Bellew, for instance, suggests that, “[i]t is clear that ISIS desires to unite all Sunnis in a specific territory in the Middle East Could ISIS become a state and govern the Sunni majority it seeks to unite?”¹⁷⁶ Safia Aoude, likewise, remarks that “few experts know yet how to deal with ISIS’ own ambition of establishing a 21st century Caliphate as an unique experience of modern statehood,” and suggests that if Syria continues to fragment, then ISIS may “have a chance to legitimate itself in the international community.”¹⁷⁷ Peter Weber, similarly, assumes that “it wouldn’t be hard to get ISIS to declare itself a sovereign state—it’s their stated goal, after all.”¹⁷⁸

Ostensibly, this assumption that ISIS aspires towards establishment of a nation-state appears quite reasonable, for it is consistent with the experience of numerous other Islamic movements. Saudi Arabia, Pakistan, and the Islamic Republic of Iran, after all, are each nation-states that emerged out of non-state Islamist movements.¹⁷⁹ Numerous other Islamic movements, though they have not yet erected

¹⁷⁴ See UNREPRESENTED NATIONS & PEOPLES ORGANIZATION, <http://www.unpo.org/members.php> (last visited Oct. 13, 2018 2:55 PM).

¹⁷⁵ *Id.*

¹⁷⁶ Bellew, *supra* note 167, at 240.

¹⁷⁷ Aoude, *supra* note 168, at 14–15.

¹⁷⁸ Weber, *supra* note 19.

¹⁷⁹ See generally MADAWI AL-RASHEED, A HISTORY OF SAUDI ARABIA 4, 8 (2d ed. 2010); MICHAEL AXWORTHY, REVOLUTIONARY IRAN: A HISTORY OF THE ISLAMIC REPUBLIC 143–44 (2013); ROGER LONG, A HISTORY OF PAKISTAN (Roger Long ed., 2015).

nation-states, nonetheless strive to do so, including Sunni movements such as Hamas and the Muslim Brotherhood, and Shi'ite movements such as the Sadrists and Hezbollah, to name just a few.¹⁸⁰ These movements, in their efforts to erect Islamic nation-states, have organized themselves as political parties, vying for popular support and representation in the elected institutions of their respective nation-states.¹⁸¹ All such movements—whether they have already achieved, or are striving to achieve nation-state status—thereby acknowledge the legitimacy of, and operate within, the international Westphalian order. This acknowledgement of the political legitimacy of the nation-state, it should be emphasized, extends even to extremist movements like the Taliban—for although the Taliban has not directly run in national elections, it has supported certain candidates in the electoral processes of, and has acknowledged the legitimacy of agreements between, nation-states.¹⁸²

When it comes to ISIS, however, all of these examples prove misleading, for ISIS, along with al-Qaeda and certain other movements, subscribes to a specific interpretation of Islam known as “Salafi-jihadism.” One of the cardinal principles of Salafi-jihadism is the rejection of the international order of nation-states.¹⁸³ This rejection is based on the following three doctrinal grounds:¹⁸⁴

a. Secular Nation-States are Essentially Heretical

To begin with, Salafi-jihadism brands all permutations of secular nation-

¹⁸⁰ See generally Ibrahim Al-Marashi, *Iraq*, in 1 GUIDE TO ISLAMIST MOVEMENTS 264, 266 (Barry Rubin ed., 2010); Israel Elad Altman, *Egypt*, in 1 GUIDE TO ISLAMIST MOVEMENTS 231 (Barry Rubin ed., 2010); ENAYAT, *supra* note 3, at 3; Hillel Frisch, *Palestinians*, in 1 GUIDE TO ISLAMIST MOVEMENTS 361, 367 (Barry Rubin ed., 2010); Robert G. Rabil, *Lebanon*, in 1 GUIDE TO ISLAMIST MOVEMENTS 328, 333 (Barry Rubin ed., 2010); CARRIE ROSEFSKY WICKHAM, THE MUSLIM BROTHERHOOD: EVOLUTION OF AN ISLAMIST MOVEMENT 1–4 (2013).

¹⁸¹ ENAYAT, *supra* note 3, at 69.

¹⁸² For example, the Taliban tacitly recognizes the legitimacy of the nation-states of Pakistan and Afghanistan by entering into “exploratory” discussions with them concerning a peace agreement. See, e.g., M Ilyas Khan, *Can a Historic Peace Deal be Secured with the Taliban?*, BBC (July 8, 2015), <https://www.bbc.com/news/world-asia-33449809>; see also ANTONIO GIUSTOZZI & SILAB MANGAL, VIOLENCE, THE TALIBAN, AND AFGHANISTAN’S 2014 ELECTIONS, UNITED STATES INSTITUTE OF PEACE 5–6 (2014), <https://www.usip.org/sites/default/files/PW103-Violence-the-Taliban-and-Afghanistan-s-2014-Elections.pdf>.

¹⁸³ See *infra* notes 187–93.

¹⁸⁴ See, e.g., Bernard Haykel, *On the Nature of Salafi Thought and Action*, in GLOBAL SALAFISM: ISLAM’S NEW RELIGIOUS MOVEMENT 48–54 (Roel Meijer ed., 2009). Note, however, that “[n]ot all manifestations of Salafism, therefore, demand violent solutions. There are also violent manifestations that do not rely on excessive application of takfir.” DONALD HOLBROOK, THE AL-QAEDA DOCTRINE: THE FRAMING AND EVOLUTION OF THE LEADERSHIP’S PUBLIC DISCOURSE 34 (2014).

states—whether socialist, democratic, or otherwise—as heretical.¹⁸⁵ ISIS, for instance, denounces socialism as “not only an economic school of thought or social movement, but also a comprehensive theory of man, existence and history, emanating from evil heretical Communism that condemns God’s existence, rejecting all heavenly religions and waging war on them, while considering religion an opiate for the masses.”¹⁸⁶ Democracy is even more problematic, for it comprises three features, “every one of which . . . is disbelief in its own right . . .”¹⁸⁷ The first feature is “rule of the people: the meaning being that legislation and law-making are referred to the people, not to God Almighty, so the people rules itself in what it chooses, and that by who so represents them in the legislative councils of disbelief.”¹⁸⁸ The second feature is:

[P]eaceful handover of power: this means annulling the legitimacy of jihad against the disbelieving ruler, and [accepting] that change will only be through peaceful elections, and that the people are to be subjected to whosoever has been elected and are to be led by him, even if he is among the most disbelieving of people, for the priority of power is referred to the choice of the majority of the people with no consideration to religion or law.¹⁸⁹

The third feature is:

separation of powers: and among the powers is legislative power, executive power, judicial power and the like. And the principle of meaning from the separation of powers is the separation of religion from the state and politics, and it is the call upon which the support bases of irreligious secularism have arisen, and the meaning from them is the preservation of religion in the mosques and places of worship and the like and the independence of internal and external politics from the regulations and instructions of the law.¹⁹⁰

This rejection by ISIS of secular nation-states is echoed by other Salafi-jihadi thinkers and movements. For instance, Abu Muhammad Maqdisi (“Maqdisi”), who has been described in recent scholarship as one of the most influential of all Salafi-

¹⁸⁵ See DAURIUS FIGUEIRA, SALAFI JIHADI DISCOURSE OF SUNNI ISLAM IN THE 21ST CENTURY: THE DISCOURSE OF ABU MUHAMMAD AL-MAQDISI AND ANWAR AL-AWLAKI 6–8 (2011); Haykel, *supra* note 184, at 48–54; SHIRAZ MAHER, SALAFI-JIHADISM: THE HISTORY OF AN IDEA 11 (2016); JOHN A. TURNER, RELIGIOUS IDEOLOGY AND THE ROOTS OF THE GLOBAL JIHAD: SALAFI JIHADISM AND INTERNATIONAL ORDER 8–9 (2014).

¹⁸⁶ Educational Fatwa, *supra* note 68.

¹⁸⁷ *Id.* at 12.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 14.

¹⁹⁰ *Id.* at 16.

jihadiist thinkers,¹⁹¹ explains that “Communism, Socialism, Secularism, and other such innovated methods, and principles, which men invented with their own minds, and then satisfied these ideas to be their own religions. One of these religions is democracy. It is a religion that is a contradictory to Allah’s religion.”¹⁹² Maqdisi further criticizes democracy as being “the judgment of the masses or the deity, according to the constitution but not according to Allah’s decree. This is included in their constitutional books, which they sanctify more than the Quran.”¹⁹³ He therefore concludes that “[w]e must destroy those who follow democracy, and we must take their followers as enemies— hate them and wage a great jihad against them.”¹⁹⁴ Likewise, Osama Bin Laden, the former leader of al-Qaeda, observed that “[w]henever permits himself or others to follow a positive or man-made law is transgressing God’s Law and therefore is an infidel and an apostate who no longer belongs to our religious community.”¹⁹⁵ Similarly, Ayman al-Zawahiri (“Zawahiri”), the current al-Qaeda leader, has stated that “we have to recognize that legitimacy isn’t in elections and democracy . . . [t]he legitimacy which you should defend and adhere to is the governance of the Shariah and its supremacy over all the constitutions and laws.”¹⁹⁶ Numerous other Salafi-jihadi ideologues have echoed these sentiments.¹⁹⁷

b. Islamic Nation-States are Essentially Hypocritical

Salafi-jihadism not only rejects secular nation-states, but also power-sharing relationships between Islamic and secular groups within nation-states—and, indeed, even the erection of fully Islamic nation-states.¹⁹⁸ All such efforts are viewed as hypocritical, not to mention futile and misguided from the start.¹⁹⁹ As such, Salafi-jihadis are fundamentally opposed to Islamic nation-states, such as Saudi Arabia, Pakistan, or the Islamic Republic of Iran, as well as to Islamic political parties that

¹⁹¹ See generally JOAS WAGEMAKERS, A QUIETIST JIHADI: THE IDEOLOGY AND INFLUENCE OF ABU MUHAMMAD AL-MAQDISI (2012).

¹⁹² ABU MUHAMMAD MAQDISI, DEMOCRACY: IT IS A RELIGION! (Abu Muhammad al-Maleki trans., 2010), <https://azelin.files.wordpress.com/2010/08/democracy-a-relegoin.pdf>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ HOLBROOK, *supra* note 184, at 116.

¹⁹⁶ Ayman al-Zawahiri, The Dried Dates Idol of Democracy, in FURSAN AL-BALAGH MEDIA TRANSLATION DEPARTMENT 7 (Aug. 2013), <https://azelin.files.wordpress.com/2013/08/dr-ayman-al-e1ba93awc481hirc4ab-22the-idol-of-the-democratic-date22-en.pdf>.

¹⁹⁷ See, e.g., Shaykh Anwar al-Awlaki, *The New Mardin Declaration: An Attempt at Justifying the New World Order*, 2 INSPIRE MAG. 33, 33 (2010).

¹⁹⁸ See Educational Fatwa, *supra* note 68, at 12.

¹⁹⁹ *Id.*

aspire towards nation-state status, such as the Muslim Brotherhood and Hamas.²⁰⁰ ISIS, for instance, remarks, that the method of the “bankrupt ‘Muslim’ Brotherhood” is to

take control of the government by fielding candidates to run in the [polytheistic] democratic elections . . . [whereby] the democratic ‘Islamists’ and their secularist allies put the rule of Allah to a vote, seeking to cut up and implement bits and pieces of ‘Shari’ah’ upon the filthy, conflicting, and hostile foundation of democracy, although Allah is free of being in need of anyone’s approval for His rule.²⁰¹

More generally, ISIS denigrates attempts to erect Islamic nation-states as:

a hodgepodge of deviance . . . combined with the various tenets and rites of democracy, liberalism, pacifism, and socialism borrowed from the pagans of the West and the East. Its ultimate goal was to serve the short-term individual and partisan interests of its leaders and members. It would claim to be working for the implementation of Shari’ah, the revival of [Caliphate], and the fulfillment of jihad, while waging war against Islam and the Muslims! The cancer would ultimately cooperate with the [pagan-tyrant rulers] and the crusaders in this regards [sic] in Afghanistan, Iraq, Algeria, the Philippines, Somalia, Yemen, Tunisia, Libya, Pakistan, Bangladesh, Indonesia, Malaysia, Egypt, and elsewhere. Its servitude to the crusaders reached the point of hosting Western intelligence agents in the ‘Islamic’ centers of the West to partake in the war against jihad!²⁰²

This same rejection of attempts to erect Islamic nation-states is echoed by numerous other Salafi-jihadi ideologues. Maqdisi, for instance, criticizes the Muslim Brotherhood’s attempts to erect an Islamic nation-state, noting that:

[Salafi-jihadism] does not think that patching up the system will work; plastic surgery with these regimes will not work . . . the path that this movement is taking is one of removing these regimes and uprooting them and establishing Allah’s rule. As for patching up and participating in the rule, this is not our policy. This reformatory patching-up policy is that of the bankrupt Muslim Brotherhood.²⁰³

²⁰⁰ *Id.*

²⁰¹ ISIS, *The Libyan Arena*, 8 DABIQ 25, 25–26 (2015); *See also* ISIS, *The Most Dangerous [Illicit Religious Innovations]*, 8 DABIQ, 2015, at 52–56 (describing the “hypocrisy” of not only “‘Islamic’ factions with a nationalist agenda,” but also “nationalist factions with an ‘Islamic’ agenda”).

²⁰² ISIS, *The Murtadd Brotherhood*, 14 DABIQ 28, 28 (2016).

²⁰³ Abu Muhammad Maqdisi, DEMOCRACY QUESTIONS ANSWERED BY SHAYKH ABU

As such, Maqdisi asserts that “voting in democratic elections”—even if it is meant to elect Islamist parties—is “illegitimate because its authority derives not from the Book and laws of the Prophet, but from worldly laws.”²⁰⁴ He further notes regarding such elections that “aside the fact that it is forbidden and is blasphemy and polytheism, it is also a dead end, meaning this is a game that people play with.”²⁰⁵

Likewise, Anwar al-Awlaki (“Awlaki”)—described by the *New York Times* as “the first American citizen to be hunted and killed without trial by his own government since the Civil War”²⁰⁶—has analyzed participation in the nation-state system as one of “[t]he proposed methods that Islamic groups [have] presented for re-establishing [the Caliphate].”²⁰⁷ Citing the Muslim Brotherhood as an example, he argues that this method is illegitimate, for “we do not [truly] believe in it, but we are using it as a vehicle to reach to power and after we reach to power we will implement Islam [as Caliphate].”²⁰⁸ The illegitimacy, in other words, derives from insincerity, for erection of Islamic nation-states:

[it] is a deception and a lie to use democracy and claim to be adherents to the democratic system but not believe in it. Now deception is acceptable against the enemy if the Muslims are in a state of war with them. The problem is that the particular groups that are involved in the democratic process do not believe that they are in a state of war with the disbelievers but believe that there is a covenant between the Muslims and the disbelievers. So if we are in a covenant with the disbelievers then it is not allowed to use deception against them and it is not allowed to lie to them.²⁰⁹

In addition, Awlaki explains that the democratic approach is hypocritical, for “Muslims do not try to infiltrate the system and work from within. It is just not our way. It is the way of the Jews and the [hypocrites] but not the way of the Muslims. We are honest and straightforward with friend and foe.”²¹⁰

Zawahiri, likewise, has admonished Muslims who engage in the nation-state

MUHAMMAD AL MAQDISI, <https://www.youtube.com/watch?v=cPDLBJ92rjE&feature=youtu.be&t=627>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. TIMES (Aug. 27, 2015), <http://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html>.

²⁰⁷ Anwar al-Awlaki, *A Question about the Method of Establishing [the Caliphate]*, ANWAR AL AWLAKI ON-LINE (Aug. 29, 2008), <http://cryptome.org/anwar-alawlaki/08-0829.htm>.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

project, noting that a claim to be a socialist Muslim or a 'democratic Muslim' is the same as stating that "I am a 'Jewish Muslim', or I am a 'Christian Muslim.'"²¹¹ These latter two claims are, of course, tantamount to apostasy in Islam, which occurs when a former Muslim leaves the faith, and which incurs the penalty of death.²¹² Zawahiri therefore concludes that whoever "claims to be a Muslim and cites a democratic or socialist thinker becomes an unbeliever and an apostate."²¹³ More particularly, Zawahiri has reprimanded Muslims who seek to elect Islamist parties within nation-states, noting that:

We have to recognize that legitimacy isn't in elections and democracy . . . the legitimacy which you should defend and adhere to is the governance of the Shari'ah and its supremacy over all the constitutions and laws. And legitimacy isn't the electing of Morsi as president of the republic as a head of for a nationalist secular state that believes in national identity, governance of the masses. . . and denies the governance of the Sharia and brotherhood of Islam. . . . We have engaged in all elections and referendums and won them whether they were constitutional or parliamentary or presidential; despite of all that they removed you from government and didn't accept you. You gave up the implementation of the Sharia and accepted citizenship, civil state, national association and governance of the people, and glorified the corrupt manmade judiciary, and recognized the sovereignty of the corrupt laws, and despite of all that they didn't accept you. You agreed to respect the international treaties and the agreements of surrender with Israel and security treaties with America, despite of all that they rejected you.²¹⁴

c. The Very Concept of Nation-State is Essentially Un-Islamic

The fact that Salafi-jihadism rejects both secular and Islamic nation-states derives from an even deeper doctrinal presumption—one that involves a particularly strict interpretation of the Sunni conception of the Caliphate.²¹⁵ Historically, the institution of the Caliphate—which was founded upon the death of Prophet Muhammad and lasted in various forms for over a millennium—was imperial in form,

²¹¹ Ayman Al-Zawahiri, *The Bitter Harvest: The [Muslim] Brotherhood in Sixty Years*, in THE AL QAEDA READER 119 (Raymond Ibrahim ed. & trans., 2007).

²¹² See generally FRIEDMANN, *supra* note 123, at 5.

²¹³ HOLBROOK, *supra* note 184, at 118.

²¹⁴ al-Zawahiri, *supra* note 196, at 7.

²¹⁵ It should be noted that Salafi-jihadis are not the only Islamic group to have this strict interpretation of the Caliphate. Others include, for instance, the Hizb al-Tahrir. See, e.g., TAQIUDIN AN-NABHANI, THE ISLAMIC STATE 235–39 (2001).

and therefore comprised various provinces, but not nation-states per se.²¹⁶ The decline of global Islamic power in the modern era, however, resulted in the dissolution of the Caliphate after WWI and the sub-division of its territories into nation-states through the Sykes-Picot agreement—an event that amounted to a “crisis” among modern Sunni thinkers and movements, who began to anxiously fret over the loss of Islamic world power generally, and their venerable institution of the Caliphate in particular.²¹⁷ In contemporary Islamic thought, while most Sunnis agree that re-establishment of the Caliphate is desirable, and likely even a religious duty, various opinions exist as to the specific roadmap that should be adopted towards reaching this goal. The majority advocate for a phased approach, beginning with the erection of Islamic nation-states within the parameters of the existing Westphalian order, as a prelude to eventually re-establishing the supra-national Caliphate and thereby resurrecting the glory days of global Islamic dominance.²¹⁸ Salafi-jihadists, on the other hand, adopt a stricter position: categorical rejection of the nation-state as an illegitimate means for achieving the desired goal of the Caliphate.²¹⁹

This rejection of the nation-state is not merely a tactical or strategic position, but rather, is a matter of religious doctrine. ISIS, for instance, explains that:

nationalism declares people equal regardless of their religion, it does not discriminate between them accordingly, it limits the religion to a nationalist border, and it prohibits its expansion beyond. For these reasons, nationalism was innovated by the West, as through it, they elevated their [second-class Christian and Jewish] brethren, empowered apostasy in the Muslims’ lands, divided and conquered the Muslim peoples, and defended the crusaders’ lands from offensive jihad.²²⁰

²¹⁶ See, e.g., HUGH KENNEDY, *THE PROPHET AND THE AGE OF THE CALIPHATES: THE ISLAMIC NEAR EAST FROM THE 6TH TO THE 11TH CENTURY* 50–57 (2d ed. 2014).

²¹⁷ See generally ADNAN KHAN, *100 YEARS OF THE MIDDLE EAST* 79 (2016); Robin Wright, *How the Curse of Sykes-Picot Still Haunts the Middle East*, *NEW YORKER* (Apr. 30, 2016), <https://www.newyorker.com/news/news-desk/how-the-curse-of-sykes-picot-still-haunts-the-middle-east>.

²¹⁸ See Carol Kersten, *Introduction*, in 3 *THE CALIPHATE AND ISLAMIC STATEHOOD: FORMATION, FRAGMENTATION, AND MODERN INTERPRETATIONS* 1–4 (Carol Kersten ed., 2015).

²¹⁹ See Educational Fatwa, *supra* note 68, at 12.

²²⁰ ISIS, *Foreword*, 8 *DABIQ* 3, 4 (2015); see also Educational Fatwa, *supra* note 68, at 9 (rejecting nationalism as “a call of heretical ignorance aiming to wage war on Islam, and get rid of its rulings and teachings. Nationalists consider the call to religion a call deficient in the realization of the nationalists’ ambitions, but also they consider it backward, and that it must be separated from the state as well.”); see also *id.* at 12 (rejecting patriotism, noting that “under the slogans of patriotism, the right of the ruler and regime is considered greater than the right of God and right of His Messenger . . . so whoever disbelieves in God or blasphemes the religion or

It is therefore due to a doctrinal rejection of nationalism that ISIS, pointing to the Iraqi-Syrian border, remarks in a propaganda video that:

[t]his is the so-called border of Sykes-Picot: we don't recognize it and we will never recognize it. This is not the first border we will break—we will break other borders also, but we start with this . . . we will break the barriers of Iraq, Jordan, Lebanon, all the countries, until we reach Jerusalem The Prophet says that 'whoever calls to a nationality is not from me' . . . there is no nationality, there is only one country, we are Muslims . . . we will have only one Caliph, Abu Bakr Baghdadi.²²¹

That same year, ISIS circulated a similar propaganda video, entitled “Destroying Passports,” in which a group of ISIS supporters, while shredding the passports of their pre-ISIS nationalities, explained that “[w]e disbelieve in you and your passports, and if you come here we will fight you.”²²²

Other Salafi-jihadi ideologues echo the same theological position concerning nationalism and national borders.²²³ Al-Qaeda's Arabian franchise, for instance, has rejected nation-states as a means for realizing the Caliphate, drawing on the analogy

blasphemes the Prophet . . . is not considered a criminal among them but rather his deeds come under the patriotic framework of freedom.”).

²²¹ ISIS, *The End of Sykes-Picot*, AL-HAYAT MEDIA CENTER (June 29, 2014), <https://jihadology.net/2014/06/29/al-%E1%B8%A5ayat-media-center-presents-a-new-video-message-from-the-islamic-state-of-iraq-and-al-sham-the-end-of-sykes-picot/>.

²²² Shiv Malik, *French Isis Fighters Filmed Burning Passports and Calling for Terror at Home*, GUARDIAN (Nov. 19, 2014), <https://www.theguardian.com/world/2014/nov/20/french-isis-fighters-filmed-burning-passports-calling-for-terror> (original propaganda video referenced no longer unavailable).

²²³ Ironically, ISIS alleges that al-Qaeda's rejection of ISIS's authority is tantamount to acceptance of these same false ideologies that al-Qaeda claims to disavow. For example, in May of 2013, when Zawahiri ordered ISIS to remain in Iraq, and for Nusra to remain in Syria, ISIS replied with accusations that Zawahiri's decision was full of “great evil,” in part because his restriction of ISIS and Nusra operations to Iraq and Syria was tantamount to maintaining the “sinister Sykes-Picot [nation-state] boundaries . . . which were imposed upon our people, tearing the body of our community, dispersing its people, and tricking them to believe that this geographic design is like an immutable revealed law—whereas Islam recognizes no designated boundaries,” and remarking that this action is “evil,” “corrupt,” and “destructive.” Pietervanostaeyen, *An Internal Jihadi Strife—Jabhat an-Nusra and the Islamic State in Iraq and as-Sham*, PIETERVANOSTAEYEN BLOG, <https://pietervanostaeyen.files.wordpress.com> (last visited Sept. 5, 2018). Later, ISIS stated even more vehemently that al-Qaeda, in rejecting the ISIS announcement of Caliphate, is pursuing the false idol of “nationalist Islam,” and then elaborates, noting that this idol conspires with another false idol, namely “nationalist secularism,” and that together, “[t]he two sides compete to display more and more apostasy so as to win the favor of the crusaders and their allies” ISIS, *The Allies of [al-Qaeda in Syria]*, 8 DABIQ 7, 9 (2015).

of the Berlin wall, which only served to separate the German people.²²⁴ Likewise, Abu Bakr Naji (“Naji”), the strategist who authored al-Qaeda’s handbook, *The Management of Savagery*,²²⁵ laments therein that:

[w]hen the [Ottoman] Caliphate fell . . . the situation stabilized soon after that on account of . . . the establishment of the Sykes-Picot treaty. Thereupon, the division of the Caliphate and the withdrawal of the colonial states was such that the Caliphate was divided into [large] states and small states, ruled by military governments or civil governments supported by military forces. . . . These regimes opposed the [Islamic belief-system] of the societies which they ruled and, with the passage of time and gradual decay, they squandered and plundered the resources of those states and spread iniquity among the people . . . ‘No goodness, no justice, and no world.’ Such is the state of affairs since the fall of the Caliphate.²²⁶

On this basis, he criticizes Muslims who

look to the modern civilization of Satan, and their sick minds imagine that the awaited nation of Islam is a nation represented in the United Nations, living with its neighbors and having mutual interests with them. The reality is that Islamic government is predicated on the curtailment of all of that.²²⁷

Likewise, Abu Mus’ab al-Suri (“Suri”), the author of *The Call for Global Islamic Resistance*²²⁸ (arguably the second-most influential Salafi-jihadist handbook ever written), describes therein “[t]he idea of belonging to the [global] aggregate of the [Islamic community] and its necessity for jihad”²²⁹ as follows:

This is at a level of religious belief, self-awareness, and geographic belonging, and at every level. So if we come to any Muslim now and ask him where he is from, he will mention his country: Egypt . . . Syria . . . from Tunisia . . . from Saudi Arabia . . . etc. . . . He will not mention his city first to say that he is from Damascus, Beirut, Cairo or Tashkent because he is resolved to accepting the borders of Sykes-Picot that the colonialists drew onto his mind . . . Also

²²⁴ Abu Sayf al-Awrasi, *AL-TARIQ ILA AL-KHILAFAT [THE PATH TO THE CALIPHATE] NUKHBAT AL-ILAM AL-JIHADI* (2014), <https://azelin.files.wordpress.com/2013/12/abc5ab-sayf-al-awrc481sc4ab-22the-path-to-the-caliphate22-ar.pdf>.

²²⁵ ABU BAKR NAJI, *THE MANAGEMENT OF SAVAGERY: THE MOST CRITICAL STAGE THROUGH WHICH THE UMMA WILL PASS 4* (William McCants trans., 2006).

²²⁶ *Id.*

²²⁷ *Id.* at 176.

²²⁸ ABU MUS’AB AL-SURI, *THE CALL FOR GLOBAL ISLAMIC RESISTANCE* (2004).

²²⁹ *Id.* at 10.

in covert, solo jihad, the work . . . [must be] global, where the horizons of this work are opened by ignoring borders and nations Thus, one must feel like one is belonging to the [global Islamic community] and its world, in the geographic, political, and military aspects, and every aspect. But the strange thing is that those who look at these straight lines, bent lines, and strangely distorted lines that draw the maps of our lands see that when the pens and rulers of the infidels in the colonialist ministries delineated them, they dug in the hearts and minds of most of the sons of [the Islamic community]. The strange thing is that this tragedy only happened tens of years ago, since the fall of the aggregate political essence of the [Islamic community] in 1924, when the final symbolic Caliph . . . fell. So we must open the minds of the youth and their hearts so they can feel a sense of belonging to the whole [global Islamic community]. And this is the basis of the religion and the creed, and it is also in the politics and the strategic military conception.²³⁰

C. Conclusions Regarding ISIS Governance Practice and Possibilities of Integration within the Westphalian Order

This Part I, on the “ISIS Present,” has addressed two interrelated questions. The first question, which represents a basic informational gap in legal and policy discourse, concerned the basic practices comprising ISIS’s de facto government. Section A addressed this inquiry by exposing the ISIS approach to governance across four broad domains. The first domain considered was political structure, wherein it was shown that ISIS is organized as an autocracy with several layers of secondary and tertiary hierarchies, an administrative apparatus covering standard albeit basic functions of government, and that ISIS covers territories and populations that are relatively sizable. The second domain was legal structure, wherein it was shown that despite ISIS’s jurisprudential disdain for “positive law,” it nonetheless has had a de facto constitution and de facto positive laws, many of which are pronounced as regulations. The third domain was economic structure, wherein ISIS was shown to have considerable sources of revenue, as well as an approach to transactions which is based on cooperation and philanthropy, commodity-based currencies, avoidance of Islamic prohibitions on usury and uncertainty, the levying of taxes and redistribution thereof. The fourth domain was social structure, where it was shown that ISIS implements a descending social hierarchy comprising male full-citizens, female full-citizens, second-class citizens, slaves, and finally apostates.

The second question considered was whether, and under what conditions, ISIS could become integrated within the international community of nation-states. This

²³⁰ *Id.*

question was addressed through two methods—the first of which is the “standard” legal and policy analysis, which asked whether legal grounds exist for the international community to admit ISIS within its ranks. To this end, it was found that ISIS governance practices fulfill the basic legal requirements of all three of the relevant standards (Montevideo, UN Resolution 2625, and *Kadic v. Karadžić*). Furthermore, although ISIS practices are highly oppressive and regressive, the international community already recognizes numerous nation-states that adopt equally unsavory methods. Nonetheless, from an extra-legal standpoint, ISIS clearly lacks legitimacy in the eyes of the international community, and the question of its integration within Westphalia therefore becomes relegated to the domain of political expediency and *realpolitik*. More specifically, the fate of ISIS within Westphalia rests upon a cost-benefit analysis, whereby any of the following options may be elected: (i) vanquishing ISIS and thereby rendering the question of nation-state status altogether moot; (ii) granting ISIS nation-state status only for purposes of criminal liability; (iii) integrating ISIS within the international order (through power-sharing in Syria or Iraq, etc.) if ISIS curbs its excesses; or (iv) integrating ISIS within the international order if the proximate political situation deteriorates to the point where ISIS is needed to provide a modicum of stability. In the meanwhile, the best that ISIS can hope for is to be considered as having the same legitimacy as the numerous other non-state groups that comprise the Unrepresented Nations and Peoples Organization.

Finally, the “doctrinal” analysis was presented, according to which it was shown that regardless of the international community’s posture towards involvement of ISIS within the international order, ISIS would never accept any involvement. This finding negates all of the options that might be considered within the standard analysis except for that of recognizing ISIS in order to increase the scope of its criminal liability. The refusal of nation-state status by ISIS is due to three doctrinal positions within Salafi-jihadism, which is the brand of Islam to which ISIS subscribes. First, ISIS considers all secular nation-states to be essentially heretical, regardless of their formal permutations (e.g. democracy, socialism, monarchy, etc.). Second, ISIS considers even Islamic nation-states (let alone Islamic political parties vying for power or power-sharing within the nation-state system) to be essentially misguided and hypocritical. This is why ISIS accuses the Muslim Brotherhood, Hamas, Saudi Arabia, and others as committing covert, if not overt, apostasy. Third, and most fundamentally, ISIS considers the very concept of nation-state—and particularly its concomitant of national boundaries—to be essentially un-Islamic. This derives from Salafi-jihadism’s strict interpretation of the Sunni doctrine of Caliphate, which is uncompromising and intransigent in the means that are to be adopted for actualizing the ultimate political goal.

II. THE ISIS PAST: DOCTRINAL ORIGINS AND THE CONSTITUTIONALITY OF U.S. MILITARY ACTION

While few would deny the need for halting the ISIS atrocities, the Obama administration's military intervention against the movement, dubbed Operation Inherent Resolve (OIR), was harshly criticized on legal grounds, described by some as "legal stretch,"²³¹ and by others as a "clear violation"²³² of the law. Although the legality of the interventions has turned on the degree of "association" between ISIS and al-Qaeda,²³³ this Part II (the "ISIS Past") argues that both sides of the debate were unable to assess association due to employment of deficient analytic methods. More particularly, the Obama position employed what is referred to herein as an "exogenous" standard, the hallmark of which is expediency, whereby the overall relationship of al-Qaeda and ISIS is glossed over except for certain facts that are cherry-picked to justify a predetermined policy position. Critics of the Obama position, on the other hand, employed an "endogenous- liberal" standard that, while laudably attempting to heed the empirical facts of the al-Qaeda—ISIS relationship, has been incapable of distinguishing the fundamental from the tertiary, and therefore defers excessively to the mere rhetorical claims of the movements. From a policy perspective, the weaknesses of these two standards translate into executive unilateralism and legislative overload, respectively. Given these deficiencies, this Article introduces an "endogenous-conservative" standard that peels away the two superficial layers of the al-Qaeda—ISIS relationship (i.e. outer-layer of politics and middle-layer of tactics) in order to arrive at the doctrinal core, which involves a disagreement over apocalyptic imminence. This disagreement, it is argued, is indeed fundamental and irreconcilable, and thereby constitutes reliable evidence against "association" between the two movements. This empirical finding confirms that the current U.S. military intervention against ISIS has been illegal due to the absence of fresh Congressional authorization, as required by the War Powers Act.

²³¹ Deb Riechman & Nedra Prickler, *Obama to Send His New War Powers Request to Capitol Hill*, ASSOCIATED PRESS (Feb. 10, 2015), <http://www.newsmax.com/newsfront/obama-to-send-war/2015/02/10/id/623777/>; see also Kyle C. Walker, Note, *Operation Inherent Resolve and the Reemergence of the Debate Over the War Powers Resolution*, 43 HASTINGS CONST. L.Q. 423, 424–25 (2016).

²³² Spencer Ackerman, *White House Says Expired War Powers Timetable Irrelevant to Isis Campaign*, GUARDIAN (Oct. 16, 2014), <https://www.theguardian.com/us-news/2014/oct/15/white-house-war-powers-resolution-iraq> (quoting Mary O'Connell, Professor of International Law at the University of Notre Dame); see also Walker, *supra* note 231, at 436.

²³³ See *infra* Part II, Section A(1).

A. *Why is the OIR Debate Intractable? The Need for a New Analytic Standard*

1. *The Underlying Dispute: Are al-Qaeda and ISIS “Associated Forces”?*

Although the War Powers Resolution (WPR) requires the President to obtain Congressional authorization to continue military intervention beyond sixty days,²³⁴ Obama’s war against ISIS, dubbed OIR, continued absent such approval since the summer of 2014.²³⁵ The Obama administration justified this by arguing that OIR was merely a continuation of the pre-existing war against al-Qaeda and was therefore already covered by the Authorization to Use Military Force (AUMF) that Congress issued back in 2001 in connection with the 9/11 attacks.²³⁶ More particularly, the Obama administration argued that the 2001 AUMF authorized the President to use military force not only against al-Qaeda, which was the direct perpetrator of 9/11, but also against al-Qaeda’s “associated forces.”²³⁷ The meaning of “associated force,” according to the administration, is “(1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) . . . is a cobelligerent with al Qaeda in hostilities against the United States or its coalition partners.”²³⁸ Based upon this interpretation, the Obama administration claimed that ISIS was an “associated force” of al-Qaeda and was therefore covered by the 2001 AUMF, thus precluding the need for the President to obtain further Congressional approval under the WPR.

While some scholars have supported this position,²³⁹ the claim of “association”

²³⁴ 50 U.S.C. §§ 1541–48 (2012).

²³⁵ See generally U.S. GOVERNMENT, GUIDE TO OPERATION INHERENT RESOLVE: INFORMATION AND COMMENTARY ON AMERICA’S WAR AGAINST THE ISLAMIC STATE, ISIS, ISL, DAESH TERRORISTS IN IRAQ AND SYRIA, AL-BAGHDADI, LEVANT, AL-QAEDA IN SYRIA (2015).

²³⁶ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

²³⁷ For instance, in a May 16, 2016 hearing of the Senate Armed Services Committee related to the 2001 AUMF, the Department of Defense witnesses stated that according to the 2001 AUMF, “the President may use military force in order to prosecute the conflict against al Qaeda, the Taliban, and its associated forces.” *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force, before the S. Comm. on Armed Services*, 113th Cong. 6 (2013). Likewise, in a speech at Yale Law School in 2012, Jeh Johnsen (current Secretary of Homeland Security and then General Counsel to the Department of Defense) stated that, “in the conflict against al Qaeda and associated forces, the bedrock of the military’s domestic legal authority continues to be the Authorization for the Use of Military Force passed by Congress one week after 9/11 Ten years later, the AUMF remains on the books, and it is still a viable authorization today.” Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL’Y REV. 141, 145 (2012).

²³⁸ Johnson, *supra* note 237, at 146.

²³⁹ See, e.g., Harold Hongju Koh, *Obama’s ISIL Legal Rollout: Bungled, Clearly. But Illegal? Really?*, JUST SECURITY (Sept. 29, 2014), <https://www.justsecurity.org/15692/obamas-isil-legal-rollout-bungled-clearly-illegal-really/> (noting, “[d]id the Obama administration bungle its

between al-Qaeda and ISIS has been strongly contested on two grounds. First, a plain reading of the 2001 AUMF suggests that it applies only to al-Qaeda and the Taliban, but not to ISIS, for the statute states: “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or person”²⁴⁰ Whereas al-Qaeda clearly “planned, authorized, and committed” the 9/11 attack, and the Taliban indisputably “harbored” al-Qaeda in 2001, ISIS did not even exist at the time, and only came into being as an official organization in 2013.²⁴¹ For this reason, Bruce Ackerman, for instance, has remarked that “[m]ost lawyers and scholars, myself included, have criticized this effort [of the Obama administration] to use decade-old resolutions as the basis for a war against a terrorist group that didn’t even exist when Congress authorized the invasions of Afghanistan and Iraq.”²⁴² Secondly, critics have argued that al-Qaeda and ISIS cannot possibly be “associated forces” given the fact that the two movements expressly repudiated one another in 2014.²⁴³ Ackerman, for instance, remarked that, “[n]ot only was ISIS created long after 2001, but Al Qaeda publicly disavowed it earlier this year. It is Al Qaeda’s competitor, not its affiliate.”²⁴⁴ Likewise, Jack Goldsmith has stated that “The 2001 law authorized force against al Qaeda and its associates. The Islamic State once had associations with al Qaeda, but earlier this year al Qaeda expelled it and broke off ties.”²⁴⁵ Others, likewise, have remarked that “ISIL is not an ‘associated force’” because “Al Qaeda

legal rollout? Clearly. But does that mean the President’s actions are clearly illegal? No. As I suggest below, both the domestic and international legal grounds for the ISIL conflict are defensible.”); see also William S. Castle, *The Argument for a New and Flexible Authorization for the Use of Military Force*, 38 HARV. J.L. & PUB. POL’Y 509, 509 (2015) (noting that, “I agree with President Obama’s assertion that he has the constitutional authority to conduct military operations against IS.”); Jennifer Daskal et al., *Strikes in Syria: The International Law Framework*, JUST SECURITY (Sept. 24, 2014), <https://www.justsecurity.org/15479/strikes-syria-international-law-framework-daskal-deeks-goodman/> (arguing that OIR complies with international law).

²⁴⁰ 115 Stat. at 224.

²⁴¹ See *infra* Part II, Section B(1)(a).

²⁴² Bruce Ackerman, *Can the Supreme Court Force Congress to Own the War on ISIS?*, ATLANTIC (Aug. 25, 2015), <https://www.theatlantic.com/politics/archive/2015/08/supreme-court-and-isis/402155/>.

²⁴³ See *infra* Part II, Section B(1)(a).

²⁴⁴ Bruce Ackerman, *Obama’s Betrayal of the Constitution*, N.Y. TIMES (Sept. 11, 2014), <https://www.nytimes.com/2014/09/12/opinion/obamas-betrayal-of-the-constitution.html>.

²⁴⁵ Jack Goldsmith, *Obama’s Breathtaking Expansion of a President’s Power to Make War*, TIME MAG. (Sept. 11, 2014), <http://time.com/3326689/obama-isis-war-powers-bush/>.

and ISIL are fighting each other”²⁴⁶ and that, “[w]hile it is not questioned that ISIL was once an associated force of al Qaeda, the designation seemingly no longer applies since al Qaeda has purposefully distanced itself from ISIL.”²⁴⁷

Later, this dispute over “association” consummated in a lawsuit in the United States District Court for the District of Columbia, filed against the Obama administration by Captain Nathan Michael Smith, an intelligence officer in the U.S. Army who worked in the headquarters of the commander of OIR.²⁴⁸ As stated in his April 27, 2016, complaint, Smith “seeks a declaration that President Obama’s war against ISIS is illegal because Congress has not authorized it” as required by the WPA. More particularly, the complaint alleges that “[t]he 2001 Authorization for Use of Military Force . . . does not authorize the war against ISIS. It authorized the President to wage war against those responsible for the attacks of September 11, 2001—meaning Al Qaeda—and the governments which harbored it—meaning the Taliban. ISIS is in no way responsible for the September 11 attacks.”²⁴⁹ Because the war is illegal, “Captain Smith suffers legal injury because, to provide support for an illegal war, he must violate his oath to ‘preserve, protect, and defend the Constitution of the United States.’”²⁵⁰ After Smith’s lawsuit was dismissed by the federal district court in November 2016, it has since gone to appeal at the U.S. Court of Appeals for the D.C. Circuit.

²⁴⁶ Deborah Pearlstein, *Is It Legal? No.*, OPINIO JURIS (Sept. 11, 2014), <http://opiniojuris.org/2014/09/11/legal/>.

²⁴⁷ Alberto Gonzales, *Advising the President: The Growing Scope of Executive Power to Protect America*, 38 HARV. J.L. & PUB. POL’Y 451, 499 (2015). See also Aaron L. Jackson, *Hunting Down Terrorists “Wherever They Exist”: ISIL in Syria and the Legal Argument for United States Military Operations Within the Territory of a Non-Consenting Nation-State*, 74 A.F. L. REV. 133, 134–35, 138, 147 (2015) (noting that al-Qaeda disavowed ISIS because al-Qaeda “does not seek to establish a Caliphate,” whereas ISIS differs in “treatment of other sects of Islam” and tolerates greater “brutality”); Annalise Lekas, *#ISIS: The Largest Threat to World Peace Trending Now*, 30 EMORY INT’L L. REV. 313, 334 (2015) (suggesting that “ISIS is not affiliated with Al-Qaeda, as both the groups appear to have distinct and varying objectives”); Michael Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT’L L. 15, 21 (2016) (suggesting that “al-Qaeda leadership disowned ISIS” on account of “divergent aims [and] tactics”); Gregory Wagner, *Warheads on Foreheads: The Applicability of the 9/11 AUMF to the Threat of ISIL*, 46 U. MEM. L. REV. 235, 255 (2015) (noting that “the relationship between the organizations seems to have ended with al Qaeda shunning the actions of ISIL”); Walker, *supra* note 231, at 438.

²⁴⁸ Complaint, Smith v. Obama, 217 F. Supp. 3d 283 (D.D.C. 2016), No. 1:16-cv-00843, 2016 WL 2347065, at *1, *3.

²⁴⁹ *Id.* at *2.

²⁵⁰ *Id.* at *1.

2. *The Problem of Empirically-Weak Standards*

Which set of arguments regarding “association” is correct, that of the Obama administration, or that of its critics? This section argues that in its present formulation, this debate is intractable. More specifically, since neither the statute nor its legislative history provides a definition for “association,” the meaning of this term must be inferred empirically—that is, from the details and facts of the actual relationship between al-Qaeda and ISIS. Empirical analysis, however, presupposes a reliable method or standard for assessing the facts of the relationship and determining whether such facts indicate “association.” The standards that currently prevail within legal and policy discourse, however, are saddled with deficiencies in this regard.

This section addresses this methodological problem by first reviewing the deficiencies of the two prevailing standards (i.e., that of the Obama administration and that of its critics, respectively), and then suggesting a third standard as an alternative. The two prevailing standards, it will be argued, are problematic on two accounts. First, both are empirically weak, for they are equally dismissive of the actual facts of the relationship between al-Qaeda and ISIS, albeit for different reasons. Second, both standards are fraught with negative policy implications: the Obama administration’s standard encourages executive unilateralism, while the standard of its critics enables terrorist organizations to concoct ruses which can significantly burden the legislative branch.²⁵¹ The third standard, however, which is suggested further below as an alternative, is empirically more rigorous, for it demands a thorough comprehension of the underlying relationship between the two movements, and also avoids the negative policy implications of the first two standards.

a. *Deficiencies of the “Exogenous” Standard (The Obama Position)*

The Obama administration rests upon a standard that is grounded not in the facts of the al-Qaeda—ISIS relationship per se, but rather in external or “exogenous” concepts, deriving from the secular disciplines of law and political science, which are then imposed upon the two movements. As a result, empirical analysis becomes haphazard at best: potentially salient facts and details concerning the two movements are easily dismissed, while tertiary facts can be overly emphasized. It is precisely in light of this tendency that in arguing for the “association” between al-Qaeda and ISIS, the Obama administration entirely dismisses the public rift that transpired between the two movements in 2014.²⁵² Instead, the administration appeals to several other details that allegedly indicate continued association: (i) the two groups,

²⁵¹ See *infra* Part II, Section A(2)(a–b).

²⁵² See *infra* Part II, Section B(1)(a).

despite their public rift, continue to have important “ties,” as indicated by (anomalous and unnamed) al-Qaeda operatives who believe that ISIS “is the true inheritor of Osama Bin Laden’s legacy”; (ii) ISIS continues to employ the same “brutal tactics” that it employed under its previous name of al-Qaeda-in-Iraq; and (iii) the two movements share the same “ultimate aspiration,” which is the “formation of an Islamic caliphate.”²⁵³

More generally, the lack of empirical rigor of this exogenous standard, coupled with its overlaying of secular categories upon religious movements, yields conclusions that are inherently ambiguous, thereby facilitating political expediency and opportunism. The field of political science, for instance, lacks any single, unanimously accepted definition of terrorism or terrorist group. On the other hand, the generally accepted definition of “political movement” within political science is a group of people working together to achieve a political goal within a particular geographic scope.²⁵⁴ Absent solid empirical data regarding al-Qaeda and ISIS, application of this definition alone to their relationship yields no insight regarding potential “association,” for the concepts of “working together” and “political goal” are ambiguous. It can, on the one hand, be argued that al-Qaeda and ISIS are not part of the same “political movement,” because their public split negates the possibility that they are “working together.” On the other hand, it can be argued, as the Obama administration did, that despite their public break, the two movements continue to have ties and still consider one another de facto members of the same overall camp and must therefore be working together to achieve a political goal within a geographic scope. Either conclusion can thus be leveraged, depending on the political interests at hand.

Concepts from law and legal studies produce similarly ambiguous conclusions

²⁵³ *Press Briefing by Press Secretary Josh Earnest*, WHITE HOUSE OFF. PRESS SECRETARY (Sep. 11, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014>. See also Spencer Ackerman, *Obama’s Legal Rationale for Isis Strikes: Shoot First, Ask Congress Later*, GUARDIAN (Sept. 10, 2014), <https://www.theguardian.com/world/2014/sep/11/obama-isis-syria-air-strikes-legal-argument> (quoting an unnamed representative of the Obama administration, who stated that “[b]ased on ISIL’s longstanding relationship with al-Qa’ida (AQ) and Usama bin Laden; its long history of conducting, and continued desire to conduct, attacks against U.S. persons and interests, the extensive history of U.S. combat operations against Isil dating back to the time the group first affiliated with AQ in 2004; and Isil’s position—supported by some individual members and factions of AQ-aligned groups—that it is the true inheritor of Usama bin Laden’s legacy, the President may rely on the 2001 AUMF as statutory authority for the use of force against Isil, notwithstanding the recent public split between AQ’s senior leadership and Isil.”).

²⁵⁴ See, e.g., HYPERPOLITICS: AN INTERACTIVE DICTIONARY OF POLITICAL SCIENCE CONCEPTS 158 (Mauro Calise & Theodore J. Lowi eds., 2010).

when applied to Islamic movements and are therefore just as useful for purposes of political expediency. Within international law, for instance, there remains to date no definition of terrorism, such that “[t]errorism’ currently lacks the precision, objectivity and certainty demanded by [international] legal discourse If the law is to admit the term, advance definition is essential on grounds of fairness, and it is not sufficient to leave definition to the unilateral interpretations of States.”²⁵⁵ American law, on the other hand, abounds with definitions of terrorism, yet these definitions are inconsistent across numerous areas of legislation, and despite defining acts of terrorism, most of these definitions fail to define “terrorist movement.”²⁵⁶ One possible exception is U.S. Code Title 22 Chapter 38, Section 2656f(d), which defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”²⁵⁷ When slightly rearranged, this definition suggests that “terrorist movements” are “subnational groups or clandestine agents” that inflict “premeditated, politically motivated violence . . . against noncombatant targets . . . usually intended to influence an audience.” This implied definition, however, provides no conceptual mechanism by which to distinguish between multiple terrorist movements. Not only al-Qaeda and ISIS, but also Hezbollah, Hamas, and indeed a host of other Islamic and non-Islamic movements (e.g. the Irish Republican Army, the Revolutionary Armed Forces of Columbia, etc.), all constitute “subnational groups” that impose “premeditated, politically motivated violence.”²⁵⁸ This legal definition of terrorism therefore conflates all such movements to the same category, and any attempt to ‘disassociate’ these movements must resort to ad hoc argumentation and casuistry. The conclusions, in short, are ambiguous, and can therefore be employed elastically and expediently, as evidenced by the remarkable incoherence in the overall employment of

²⁵⁵ Ben Saul, *Defining ‘Terrorism’ to Protect Human Rights* (No. 08-125), SYDNEY L. SCH. LEGAL STUD. RES. PAPER 11 (2008). See also BRUCE HOFFMAN, *INSIDE TERRORISM* 33 (2d ed. 2006) (noting that, “[i]t is not only individual agencies within the same governmental apparatus that cannot agree on a single definition of terrorism. Experts and other long-established scholars in the field are equally incapable of reaching a consensus. In the first edition of his magisterial survey, ‘Political Terrorism: A Research Guide,’ Alex Schmid devoted more than a hundred pages to examining more than a hundred different definitions of terrorism in an effort to discover a broadly acceptable, reasonably comprehensive explication of the word. Four years and a second edition later, Schmid was no closer to the goal of his quest, conceding in the first sentence of the revised volume that the ‘search for an adequate definition is still on’”).

²⁵⁶ See, e.g., Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 251 (2004).

²⁵⁷ 22 U.S.C. § 2656f(d) (2012).

²⁵⁸ See, e.g., TIM PAT COOGAN, *THE IRA* (2002); FERNANDO LOPEZ TRUJILLO, *LAS FARC: TODA LA VERDAD SOBRE EL POLEMICO GRUPO GUERRILLERO* (2010).

the terrorist label:

The Taliban and Osama Bin Laden were once called freedom fighters (mujahideen) and backed by the CIA when they were resisting the Soviet occupation of Afghanistan. Now they are on top of the international terrorist lists. Today, the United Nations views Palestinians as freedom fighters, struggling against the unlawful occupation of their land by Israel, and engaged in a long-established legitimate resistance, yet Israel regards them as terrorists. Israel also brands the Hizbullah of Lebanon as a terrorist group, whereas most of the international community regards it as a legitimate resistance group, fighting Israel's occupation of Southern Lebanon. . . . The repercussion of the current preponderance of the political over the legal value of terrorism is costly, leaving the war against terrorism selective, incomplete and ineffective.²⁵⁹

In the specific case of OIR, the opportunism and expediency of exogenous standards are particularly striking and are perhaps best indicated by the Obama administration's own shifting stance towards the 2001 AUMF. Despite its argument that al-Qaeda and ISIS are "associated" under the 2001 AUMF, as recently as 2013 the administration argued that the statute should be repealed, for "not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States."²⁶⁰ Commenting on this inconsistency, Harold Koh, Obama's former Legal Advisor to the State Department, has remarked that the Obama administration's approach to the 2001 AUMF is an example of the political game of "Find the Statute,' or less colloquially, 'The Hunt for Allegedly Delegated Prior Executive Authority.'"²⁶¹ The administration, in other words, had already pre-determined its need to "associate" the two movements, and was then "making up its legal argument as it went along."²⁶² Likewise, John Bellinger has described the administration's approach as a case of "political justification, a political decision to rely on the 2001 AUMF, rather than a carefully laid out legal case. And it's politically very convenient because one, the president doesn't have to ask for and get an authorization right now, and two, the War Powers Act wouldn't be triggered."²⁶³ Others, similarly, have described

²⁵⁹ Sami Zeidan, *Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT'L L.J. 491, 492 (2004).

²⁶⁰ Barack Obama, *Remarks by the President at the National Defense University*, WHITE HOUSE PRESS OFF. (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

²⁶¹ Koh, *supra* note 239. See also Castle, *supra* note 239, at 523–31.

²⁶² Koh, *supra* note 239.

²⁶³ Molly O'Toole, *Obama's Dramatic Reversal on Bush's Laws of War*, DEFENSE-ONE (Sep. 15, 2013), <https://www.defenseone.com/politics/2014/09/obamas-dramatic-reversal-bushs-laws-war/94169/>.

the administration's position as an effort to "exaggerate a link between the organizations if that relationship would assist one's purposes," and to modify the interpretation of the 2001 AUMF "to fit the purposes of the administration."²⁶⁴

But what are the greatest dangers of an exogenous standard? While all three branches of government employ this standard in various instances (particularly in their treatment of the unfamiliar matters), the inherent expediency of the standard becomes acute when employed by the executive branch, for it greatly enables tendencies towards executive overreach and unilateralism. It is for this reason that, in the case of OIR, the Obama administration has been widely criticized for undermining the authority of the U.S. legislative branch (not to mention that of the UN Security Council).²⁶⁵ Bruce Ackerman, for instance, has described OIR as transforming the president "into a latter-day King George III,"²⁶⁶ while Garrett Epps describes OIR as "an ongoing violation of the Constitution, one of the most severe of the 21st century."²⁶⁷ Jack Goldsmith, similarly, has offered the more specific concern that "if this remarkably loose affiliation with al Qaeda brings a terrorist organization under the 2001 law, then Congress has authorized the President to use force endlessly against practically any ambitious jihadist terrorist group that fights against the United States."²⁶⁸ Noah Feldman, likewise, remarks that "future presidents may want to go to war even when only a small part of the population approves—and they'll be able to say that even the liberal Barack Obama started a full-scale war entirely on his own. This moves us one click further away from the ideal of a republic that goes to war only when the public approves."²⁶⁹

Congress, it should be noted, has not been an innocent victim, but rather has, through its tacit approval, been complicit in encouraging this executive unilateralism. One congressman, for instance, has admitted that

[a] lot of people [in Congress] would like to stay on the sideline and say [to

²⁶⁴ Wagner, *supra* note 247, at 249, 255.

²⁶⁵ For the relationship between OIR and the UN Security Council, see, e.g., Olivia Gonzalez, *The Pen and the Sword: Legal Justifications for the United States' Engagement Against the Islamic State of Iraq and Syria (ISIS)*, 39 FORDHAM INT'L L.J. 133, 156 (2015); Jackson, *supra* note 247, at 134–135; Wagner, *supra* note 247, at 237.

²⁶⁶ Ackerman, *supra* note 242.

²⁶⁷ Garrett Epps, *The War That Congress Won't Declare*, ATLANTIC (Aug. 22, 2015), <http://www.theatlantic.com/politics/archive/2015/08/aumf-isis/402017/>.

²⁶⁸ Goldsmith, *supra* note 245.

²⁶⁹ Noah Feldman, *Obama Doesn't Want Your Approval for War*, BLOOMBERG (Sept. 23, 2014), <https://www.bloomberg.com/view/articles/2014-09-23/obama-doesn-t-want-your-approval-for-war>.

the President], ‘Just bomb the place and tell us about it later,’”—and furthermore, that “[i]t’s an election year. A lot of Democrats don’t know how it would play in their party, and Republicans don’t want to change anything. We like the path we’re on now. We can denounce it if it goes bad, and praise it if it goes well and ask what took him so long.”²⁷⁰

For these reasons, Noah Feldman has noted that

[t]oday’s Congress actively wants to avoid endorsing the war on Islamic State, in large part because it fears that, if put plainly before the American people, the war would be unpopular. Yes, Democrats fear alienating their base at the midterms—but that’s just a cynical way of saying that congressional Democrats want to avoid confronting public opinion. At the same time, Congress wants the president to be able to go forward. This sets a dangerous precedent. This Congress may be winking at the president and telling him to proceed without authorization.²⁷¹

b. Deficiencies of the “Endogenous-Liberal” Standard

On the other hand, critics of the Obama position veer to the opposite extreme, arguing that the obvious differences between al-Qaeda and ISIS negate any possibility of “association” between the two of them.²⁷² This position, at bottom, rests on a standard that can be described as “endogenous,” for it seeks to ground itself in the facts of the relationship between al-Qaeda and ISIS, rather than in the externally imposed concepts and definitions used in the exogenous standard. It is, however, also a “liberal” standard, because it accepts the many claims of the two movements at face value, lacking the capacity to scrutinize and vet these claims in order to differentiate fact from mere rhetoric. As such, this “endogenous-liberal” standard ends up suffering from a lack of empirical rigor and thereby sharing the same descriptive and prescriptive deficiencies as the exogenous standard.

The first line of argument of the endogenous liberal standard, already noted in the previous section, is that because ISIS did not formally exist as an organization until 2013, which was of course years after the 9/11 attacks, then it cannot possibly be associated with al-Qaeda for purposes of the 2001 AUMF.²⁷³ The Obama administration, however, employing its exogenous standard, cherry-picked certain facts suggesting that ISIS in fact pre-existed its formal announcement in 2013. For

²⁷⁰ Jonathan Weisman et al., *As Obama Makes Case, Congress Is Divided on Campaign Against Militants*, N.Y. TIMES (Sept. 8, 2014), <https://www.nytimes.com/2014/09/09/us/as-obama-makes-case-congress-is-divided-on-campaign-against-militants.html>.

²⁷¹ Feldman, *supra* note 269.

²⁷² See generally Goldsmith, *supra* note 245.

²⁷³ See *supra* notes 241–243.

instance, the administration emphasized—correctly, in fact—that ISIS had a “long history” before that, during which it was named “al-Qaeda in Iraq” and thus had a “decade-long or more relationship” with al-Qaeda.²⁷⁴ The endogenous-liberal standard, however, fumbles in the face of this argument, because it accepts the appellations and claims of the movements at face value, lacking the conceptual nuance or subject-matter expertise needed to analyze the movements beyond this superficial level.

The second and somewhat stronger argument of the endogenous-liberal standard is to reject the Obama administration’s equation of al-Qaeda and ISIS on the basis of allegedly shared “ties,” “legacy,” and “ultimate aspirations”—for the public rift between the two movements in 2014 presumably negates any possibility of their association.²⁷⁵ Indeed, an astute observer employing the endogenous-liberal standard might even strengthen this argument by emphasizing that the parting of ways of al-Qaeda and ISIS in 2014 was not merely an organizational disassociation, but rather was expressed as a mutual vilification and, indeed, as a mutual excommunication.²⁷⁶ Such accusations are not merely descriptive, but also prescriptive, for excommunication in Islam is tantamount to the accusation of apostasy, which is considered as not only moral treason, but also the worst of all legal crimes, the commission of which, if un-remedied, causes the culprit to forfeit the rights of citizenship to the Islamic community and to incur the penalty of death.²⁷⁷ That the al-Qaeda—ISIS rift occurred *qua* excommunication ought to therefore constitute *prima facie* evidence that the two movements are not “associated forces.”

The problem with such arguments of the endogenous-liberal standard, however, lies in their policy implications, for if public rifts, let alone mutual vilification and excommunication, are accepted as *prima facie* evidence against “association,” then terrorist groups can easily thwart U.S. military intervention through dissimulation. For example, although congressional authority may be granted for aggressive action against a particular enemy, that enemy could opportunistically spin-off an offshoot, and the mother-group and offshoot could then feign a mutual excommunication while clandestinely maintaining solidarity. This ruse would effectively shield the offshoot from U.S. military intervention until some later point when fresh congressional authorization would be issued, thereby affording the offshoot precious time to advance operations with a free hand, while creating a significant legislative

²⁷⁴ See Josh Earnest, *supra* note 253.

²⁷⁵ See *supra* notes 254–266.

²⁷⁶ See *infra* Section B.

²⁷⁷ The penalty also includes forfeiture of property, annulment of marriage, and forfeiture of children, who must be delivered to other guardians. See FRIEDMANN, *supra* note 123, at 145.

and administrative burden for Congress. By the time new congressional authority is issued, further offshoots could be spun out, thus repeating the cycle.

While this policy concern applies to any Islamic or non-Islamic terrorist group, the problem is particularly acute in the specific case of the al-Qaeda—ISIS relationship, for the Salafi-jihadi school of Islam to which both movements subscribe is, among other claims to notoriety, infamous for its excessive and overzealous practice of excommunication.²⁷⁸ Compared to the mainstream Islamic norms (to be described under the third analytic standard, directly below), Salafi-jihadism broadens the definition of apostasy, lowers burdens of proof, suspends reprieve periods, and invests even commoners with authority to render verdicts of excommunication.²⁷⁹ These features, in the aggregate, increase rates of excommunication by permitting accusations to pass muster that would otherwise be considered trivial, capricious, or unsubstantiated. Al-Qaeda, for instance, considers merely “[s]upporting the infidels against Muslims is one of the ten things that nullify Islam”²⁸⁰; considers all Shi’ites to have committed “heresy” by way of having “distort[ed] . . . the Quran and the image of the Islamic Caliphate”²⁸¹; and considers even acts of omission, such as failure to “support and participate in holy war,” or “express[ing] discomfort with the levels of violence displayed by jihadists” as evidence of apostasy.²⁸² In all such cases,

²⁷⁸ See generally Bernard Haykel, *On the Nature of Salafi Thought and Action*, in GLOBAL SALAFISM: ISLAM’S NEW RELIGIOUS MOVEMENT (Roel Meijer ed., 2009). Note, however, that “[n]ot all manifestations of Salafism, therefore, demand violent solutions. There are also violent manifestations that do not rely on excessive application of *takfir*.” HOLBROOK, *supra* note 184, at 34.

²⁷⁹ On this latter point regarding investiture of commoners, see, e.g., al-Awlaki, *supra* note 197, at 34-39. Noting that,

when a Muslim does commit *kufr bawah* [open unbelief], the charge of *kufr* does need to be leveled against him. *Muslims* should level the charge of *kufr* against those whom Allah and His Messenger . . . considered as disbelievers, not more, not less. . . . It is important that we encourage Muslims to respect their scholars But when some of our scholars—no matter how knowledgeable they are—divert from the straight path, we the Muslims, need to advise them. . . . The early generations have formulated a framework for . . . jihad, extremism, rules of leveling charges of *kufr* against a Muslim, and al-walā’ wa al-barā’. Therefore, there is no need to re-interpret these core tenants

Id. (Emphasis added).

²⁸⁰ Osama Bin Laden, *Elegizing the Ummah’s Martyr and Emir of the Martyrs*, ABU MUSAB AL-ZARQAWI, AL-QAEDA AS-SAHAB MEDIA (transcript available in IntelCenter (2008-A) [92]); see also HOLBROOK, *supra* note 184, at 118.

²⁸¹ HOLBROOK, *supra* note 184, at 120 (quoting Zawahiri).

²⁸² *Id.* at 118.

al-Qaeda affirms that it is permissible to “spill their blood and take their property.”²⁸³ ISIS, likewise, defines apostasy as whatsoever “attempt[s] to take hold of [the Muslims’] affairs and instill within them a religion other than Islam, in the name of Islam.”²⁸⁴ This includes the “absence of [Caliphate] . . . , Sufism, [scholastic theology] . . . , [juridical free-thinking] . . . , grave-worship, . . . modernism. . . , democracy, liberalism, pacifism, and socialism”²⁸⁵—and further includes “mocking the religion, worshiping the dead, ruling by manmade laws, and aiding the [non-believers] against the Muslims,” for “[t]he mere perpetrator of such deeds is [an apostate] without a doubt.”²⁸⁶ The ISIS list likewise includes the practice of Shi’ism, for according to ISIS, “the [Shi’ites] are [pagan] apostates who must [therefore] be killed wherever they are to be found, until no [Shi’ite] walks on the face of earth.”²⁸⁷ Beyond this, all people—even Sunni Muslims—who oppose the ISIS political project are, according to ISIS, de facto apostates.²⁸⁸

In short, accepting the al-Qaeda—ISIS rift as prima facie evidence against “association” is problematic not only on general policy grounds, but also because the Salafi-jihadi approach to vilifying and excommunicating other Islamic groups is in-

²⁸³ Osama Bin Laden, A MESSAGE TO OUR BROTHERS IN IRAQ, distributed by Al Jazeera (February 11, 2003), transcript available from FBIS (2004); IntelCenter (2008-A). See also HOLBROOK, *supra* note 184, at 118.

²⁸⁴ *The Murtadd Brotherhood*, *supra* note 202, at 28. See also Muhammad Haniff Hassan, *A Wolf in Sheep’s Clothing: An Analysis of Islamic State’s Takfir Doctrine*, EURASIA REV. (Aug. 12, 2015), <http://www.eurasiareview.com/12082015-a-wolf-in-sheeps-clothing-an-analysis-of-islamic-states-takfir-doctrine/> (arguing that despite ISIS rhetoric that it limits takfir according to well-defined rules, in practice it does not follow these rules).

²⁸⁵ *The Murtadd Brotherhood*, *supra* note 202, at 28.

²⁸⁶ *Id.* at 40 n.6.

²⁸⁷ ISIS, *The Rafidah: from Ibn Saba’ to the Dajjal*, 13 DABIQ 32, 45 (2016). Note further that Zarqawi justified the killing of Shi’ites by analogizing them to the Mongols, who threatened Islam nearly a millennium ago. Although outwardly the Shi’ites appeared to be Muslims, the medieval scholar Ibn Taymiyyah explained that

[they] are apostates and [therefore] it is obligatory to fight them, as they refrained from applying the *Shari’a* and the rule of the Koran, and instead applied the law of Yasa which was set down for them by Genghis Khan, who had assembled it for them from the laws of the Torah, the New Testament, the Koran, and the customs of the Mongols

Y. Yehoshua, *Dispute in Islamist Circles Over the Legitimacy of Attacking Muslims, Shi’ites, and Non-Combatant Non-Muslims in Jihad Operations in Iraq: Al-Maqdisi vs. His Disciple Al-Zarqawi*, MEMRI (Sept. 11, 2005), <https://www.memri.org/reports/dispute-islamist-circles-over-legitimacy-attacking-muslims-shiites-and-non-combatant-non>.

²⁸⁸ ISIS, *The Laws of Allah or the Laws of Men (Is Waging War Against the [Caliphate] Apostasy?)*, 10 DABIQ 50, 50 (2015).

herently exaggerated and hyperbolic (so much so that even other Islamist movements pejoratively brand the Salafi-jihadis as the ‘excommunicators’).²⁸⁹ As such, at least some portion of the apparent al-Qaeda–ISIS rift should be dismissed in order to account for the inflated accusatory rhetoric of Salafi-jihadism. The endogenous-liberal standard, however, lacks the conceptual nuance or analytic capacity needed to vet the various accusations exchanged in the al-Qaeda–ISIS dispute and to thereby differentiate true disagreement and schism from mere rhetoric.

3. *Remedying the Deficiencies: Towards an “Endogenous-Conservative” Standard*

Given the deficiencies of these prevailing analytic standards, the alternative standard suggested in this Article is that of the general or mainstream (i.e. non-Salafi-jihadi) Islamic norms governing doctrinal disagreements between various Islamic groups. This should be the standard of choice for several reasons. First of all, in the context of Islamic movements, doctrinal disagreements typically lie at the core of political rivalries yet are often left implicit and unstated by the movements, and therefore constitute a notable blind spot in external legal and policy analysis. Focus on this doctrinal dimension therefore forces legal and policy analysis to pierce beyond the superficial veneer of disputes. Secondly, employing the general Islamic norms pertaining to doctrinal disputes means that this standard is endogenous (for it derives from the Islamic intellectual tradition itself) and thereby avoids the methodological deficiencies of the exogenous standard. Thirdly, this standard is inherently skeptical and thus “conservative,” for rather than accepting mere claims of rift or disassociation at face value, it presumes association unless proven otherwise, and thereby avoids the deficiencies of the endogenous-liberal standard. Its inherent conservatism, furthermore, makes this analytic standard particularly useful for vetting, and thereby deflating, the exaggerated rhetoric of vilification which characterizes Salafi-jihadi groups, and thus provides a means for determining which, if any, of their alleged disagreements are indicative of a true cleavage.

What, then, is the intrinsic vetting mechanism of the endogenous-conservative standard?

a. *The Default Rule of Association*

Despite any claims or rhetoric of Islamic movements to the contrary, the endogenous-conservative standard presumes association, unless proven otherwise. This presumption derives from the fact that Islam, from a historical and comparative-religion perspective, tolerates a remarkably wide range of internal dissent regarding matters of doctrine—so much so that the line separating the orthodox from the

²⁸⁹ See, e.g., DEPARTMENT OF DEFENSE, DELEGITIMIZING AL-QAEDA: A JIHAD-REALIST APPROACH - SALAFIST, SHARIA, TAKFIR (2013).

heterodox is often opaque or fluid.²⁹⁰ This inherent tendency towards tolerance of disagreement derives from the fact that Islamic political and intellectual history never produced the equivalent of the Church—i.e. a singular institution, claiming to be the intermediary through which divine grace flows to humanity and in which vests the official authority over the singular definition of creed.²⁹¹ Absent such an institution, the authority to define and articulate doctrine remained decentralized within Islam, devolving instead to individual religious scholars (and the doctrinal “schools” which clustered around them) who, in principle, enjoyed considerable latitude in disagreeing with one another in their views.²⁹² Social cohesion throughout Islamic history has, as a result, derived not so much from unity of belief as it has from unity of basic practice. By this it is meant that since the inception of Islam, the norm in Muslim societies has been a coexistence of a wide array of parallel or even competing doctrinal understandings, but convergence in fundamental or primary practices, such as recitation of daily prayers, communal worship on Fridays, fasting during the month of Ramadan, modes of dress and parlance, and so forth.²⁹³ It is for this reason that Islam is often described as being a religion whose primary social concern is orthopraxy rather than orthodoxy.²⁹⁴

An even cursory survey of Islamic intellectual history confirms this default rule of association, despite doctrinal disagreement. In the domain of law, for instance, Sunnism and Shi’ism each recognize the legitimacy of multiple legal schools, each of which offers differing, and at times even conflicting, positive law on various matters.²⁹⁵ Likewise, Islamic societies have hosted multiple schools of theology, various ones of which enjoyed periods of ascendancy and popularity over time, before yielding to others.²⁹⁶ The same is true in the field of mysticism, which hosted numerous

²⁹⁰ See *infra* notes 297–300.

²⁹¹ See, e.g., Frederick M. Denny, *Islam*, in *ENCYCLOPEDIA OF RELIGION AND SOCIETY* 240–41 (William H. Swatos, Jr. ed., 1998) (noting that “Islam has since its origins emphasized legal orthopraxy far more than theological orthodoxy”).

²⁹² See generally MARSHALL HODGSON, 1 *THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION* (1977).

²⁹³ *Id.* at 78.

²⁹⁴ See, e.g., Denny, *supra* note 291, at 240.

²⁹⁵ See generally Arif A. Jamal, *Authority and Plurality in Muslim Legal Traditions: The Case of Ima'ili Law*, (Nat'l U. of Sing. L., Working Paper Series, Paper 008, 2018), https://law.nus.edu.sg/wps/pdfs/008_2018_Arif%20Jamal.pdf. At various points and places in Islamic history, certain schools have prevailed over others in popularity, and attained unto a majority status, but then yielded to other schools at later points, or in differing regions of the Islamic world. Yet throughout, an underlying feature of legal theory was that the multiplicity and even the areas of conflict between the various schools should be tolerated.

²⁹⁶ Sunnism, for example, has multiple theological schools, including Mu'tazilism,

doctrinal schools which competed for the membership of individual Muslims, yet nonetheless co-existed within their societies.²⁹⁷ Indeed, even the single greatest division within the overall fold of Islam—namely, the Sunni-Shi'ite sectarian divide—is one that, throughout most of Islamic history, has been characterized by a general attitude of tolerance and harmonious co-existence.²⁹⁸ In short, the norm throughout Muslim societies in each of these domains was that of toleration of doctrinal differences rather than the emergence of divisions or schisms (let alone excommunications) due to doctrinal disagreements.

b. Exceptions to the Default Rule of Association

There are, however, exceptions to the default presumption of 'association despite doctrinal disagreements.' Three of the most notable of these exceptions are the following:

i. The Political-Violence Exception

The first exception is when doctrinal disagreements, despite being of the tolerated, garden-variety type just described, are nonetheless leveraged as a pretext for

Ash'arism, Maturidism, and others. Shi'ism has had Akhbari and Usuli schools, as well as others. While the disputes between these rival theological schools have often been intense and even violent throughout Islamic history, they co-existed within Muslim societies, and individuals were, as a matter of principle, free to choose the theological school of their preference.

²⁹⁷ Sufi Orders and Their Shaykhs, ISLAM AND ISLAMIC STUDIES RESOURCES, <http://islam.uga.edu/sufismorders.html> (for example, Sunni Islam has given rise to multiple schools, or orders of Sufism—such as the Naqshbandis, the Qadiris, the Shadhilis, the Mevlevis, and so forth. Shi'ism, likewise, has given rise to the Ni'matullahis, the Ishraqis, the 'Irfanis, and others).

²⁹⁸ See generally The Sunni-Shia Divide, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/interactives/sunni-shia-divide#!/sunni-shia-divide>. At the heart of this sectarian divide are doctrinal differences stretching across multiple domains, including the definition of political and spiritual authority (i.e. the question of succession to Muḥammad after his passing in 632 AD), the definition of scripture (though both agree on the validity of the Qur'an, their definition of the second scriptural source—i.e. the "traditions"—differs), jurisprudence (for Sunnis, the actions of the first three generations of Muslims constitute legal precedent, while Shi'ites discard this, and view the actions of the twelve descendants of the Prophet as legal precedent), theology, as well as ritual practice. While this aggregate complex of differences is sizable indeed, it is nonetheless dwarfed by the similarities in doctrine and practice that are common to the two sects. That these similarities are more decisive than the differences are evidenced by the fact that, throughout most of Islamic history, Sunnis and Shi'ites, despite exchanging accusations of heterodoxy and waywardness, have nonetheless considered one another as belonging to the overall fold of Islam, and have therefore tended to refrain from branding one another as heretical or, in Islamic verbiage, as apostates.

systematic, politically-motivated violence, thereby transfiguring an otherwise mundane doctrinal difference into one that becomes irreconcilable. This typically occurs during times of extreme political instability wherein the Islamic power structures face real or perceived existential threats from *non-doctrinal* sources. Even so, the resulting “disassociation” between the persecutor and the persecuted typically proves to be temporary, reverting to the general norm of tolerance once the conditions of political instability normalize. For example, despite the historical norm of theological co-existence described above, the Abbasid Caliphs, as part of their power struggle against the rising political threat of the religious scholars, officially endorsed the theological school of Mu’tazilism, imprisoning and even killing doctrinal dissenters (such as those of the Ash’arite theological school) during the so-called “inquisition” of 833–848 CE.²⁹⁹ After this brief period of “disassociation” between Mu’tazilites and other theological schools, the norm of co-existence and tolerance reigned again among these competing theological schools.³⁰⁰ Likewise, despite the predominance of Sunni-Shi’ite co-existence throughout Islamic history, sectarian violence between the two sects temporarily surged during the political eclipse of the Abbasid Caliphate, during the reconfiguration of the political balance of power with the rise of the Buyid sultans, and at other times of great political insecurity.³⁰¹ Similarly, despite the tolerance of various schools of mysticism, Sufis were widely persecuted by both Shi’ites and Sunnis during the period of political instability of the late 18th century,

²⁹⁹ More specifically, the policy was initiated by Caliph al-Ma’mun, and then continued by his successors, Caliph al-Mu’tasim and al-Wathiq, whereby they persecuted scholars who denied the Mu’tazilite theological doctrine of the createdness of the Qur’an. See SHERMAN A. JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI* xxvii (1996).

³⁰⁰ See, e.g., RICHARD FRANK & DIMITRI GUTAS, *EARLY ISLAMIC THEOLOGY: THE MU’TAZILITES AND AL-ASH’ARI: TEXTS AND STUDIES ON THE DEVELOPMENT AND HISTORY OF KALAM* (Dmitri Gutas ed., 2007).

³⁰¹ JOEL L. KRAEMER, *HUMANISM IN THE RENAISSANCE OF ISLAM* 60–62 (2d rev. ed. 1992). While sectarian conflict still did not exist during the reign of the Abbasid Caliph al-Muqtadir (even in 925, after the burning of the mosque in Karkh where ‘Ali prayed, there was no sectarian violence), it began at the very end of the High Abbasid period, when in 935 we have the first record of the Caliph issuing a decree to prevent the Hanbalis from attacking the Shi’is. It accelerated greatly, however, in the Buyid period. In the 960s, the Buyid leader Mu’izz al-Dawla instated public cursing of the first Caliphs and celebration of the two Shi’ite festivals. The reign of his successor, Bakhtiyar, marked an even greater rift between the now mature sectarian Twelvers and the mainstream community. The Turkic military commander, Sabuktakin, diverted popular enthusiasm for jihad against the Byzantines into attacking the “heretic” Buyids and their Daylami supporters. Brutal fighting ensued, and Baghdad became divided into strictly Shi’ite (karkh) armed quarters, and Sunni quarters. *Id.*

after the fall of the Safavid Empire and amidst the increasing encroachment of European powers within the Islamic heartlands.³⁰²

ii. The Hostile-Doctrine Exception

The second exception concerns doctrinal topics which involve principles and tenets that are inherently hostile, antagonistic, or existentially threatening towards particular groups. In these areas, the general rule of ‘association despite doctrinal disagreement’ applies only insofar as the dispute remains merely speculative, or among neutral parties that are unexposed to the doctrinal hostility per se. No association is possible, however, between the proponents of these doctrines and the targets of their doctrinal hostility. For example, various Islamic legal schools remain “associated” despite their doctrinal disagreements concerning the nature of criminal law.³⁰³ However, efforts by a legal school, movement, or government to impose the criminal punishments upon an individual or group would of course undermine or preclude the possibility of association between the accuser and the accused. Likewise, while various schools of thought might remain associated despite disagreeing on the rules and principles of jihad, the actual waging of jihad by one group upon another obviously precludes any possibility of association between them. Further examples of the hostile-doctrine exception would include, for instance, the impossibility of “association” between the Nizari Isma’ilis of the 11th and 12th centuries and the objects of their so-called “assassination” theology,³⁰⁴ the impossibility of association between Wahhabis and the victims of their “disavowal” doctrine,³⁰⁵ and so forth.

iii. The Apostasy Exception

The third exception comprises the general Islamic rules of apostasy. Unlike the over- inclusive definition of apostasy of Salafi-jihadism, mainstream Islamic norms restrict apostasy to a limited set of violations, relegating all other sins and crimes, however egregious, to levels of lesser gravity and lesser penalty.³⁰⁶ One of these grounds for apostasy recognized by the general Islamic rules is religious doctrine—namely, when an individual or group, despite overtly professing faith in Islam and expressly accepting the Islamic scriptures, nonetheless espouses doctrines that are

³⁰² See, e.g., Robert Gleave, *Al-Bibbāhānī, Āqā Muḥammad ‘Alī*, ENCYCLOPEDIA OF ISLAM (3rd ed. 2008).

³⁰³ See, e.g., RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW 141–48 (2006).

³⁰⁴ See, e.g., Farhad Daftari, *Assassins*, in ENCYCLOPEDIA OF ISLAM (3rd ed. 2008).

³⁰⁵ See generally MOHAMED BIN ALI, THE ROOTS OF RELIGIOUS EXTREMISM: UNDERSTANDING THE SALAFI DOCTRINE OF AL-WALA’ WAL BARA’ (2015).

³⁰⁶ See generally FRIEDMANN, *supra* note 123, at 121–59.

understood to implicitly or indirectly reject Islam or its fundamental tenets.³⁰⁷ In addition, verdicts of apostasy can only be pronounced if several sets of high-threshold criteria are fulfilled. First, valid accusations of apostasy must be proven “beyond doubt”—an evidentiary standard that is often quite difficult to prove in practice, and which explains why some scholars describe apostasy or excommunication in Islam as merely a paper tiger.³⁰⁸ Second, even if a sufficient basis of evidence is presented, the suspect must typically be offered a period of reprieve in order to allow for the possibility of repentance.³⁰⁹ In practice, this allowance considerably reduces the actual accusation rates, for the suspect’s mere utterance of the Islamic testimony of faith is considered by many to constitute sufficient proof of repentance.³¹⁰ Third, if the suspect fails to repent, then only a competent Islamic official (typically a senior jurist or judge) is authorized to pronounce the verdict of heresy or apostasy, thereby barring overzealous laymen and commoners from leveling accusations.³¹¹ Given these high threshold requirements, if a verdict of apostasy is duly pronounced, it is likely to indicate that a truly egregious disagreement has in fact occurred among two or more groups, and can therefore be taken as *prima facie* evidence against association between the accuser and the accused.³¹²

B. Applying the Endogenous-Conservative Standard to the al-Qaeda—ISIS

³⁰⁷ *Id.* at 132.

³⁰⁸ *Id.* at 121–59; ABDULLAH SAEED & HASSAN SAEED, FREEDOM OF RELIGION, APOSTASY AND ISLAM 68 (2004).

³⁰⁹ SAEED & SAEED, *supra* note 308, at 54.

³¹⁰ *Id.* See also SADAKAT KADRI, HEAVEN ON EARTH: A JOURNEY THROUGH SHARI’A LAW FROM THE DESERTS OF ANCIENT ARABIA TO THE STREETS OF THE MODERN MUSLIM WORLD 239 (2012).

³¹¹ FRIEDMANN, *supra* note 123, at 121–59. See also al-Awlaki, *supra* note 197 (wherein numerous Muslim scholars agree that: “[t]he issue of Fatwas in Islam is a serious one. It is for this reason that scholars have drawn up stringent conditions/requirements for the Mufti (the authority issuing fatwas). Of these conditions is that he must be fully qualified in scholarly learning/knowledge. Of the conditions specific to the fatwa itself is having established the proper object of application (manat) according to place, time, and person, circumstance, and consequence/future outcome The notion of loyalty and enmity (alwalā’ wa al-barā’) must never be used to declare anyone out of the fold of Islam, unless an actual article of unbelief is held. In all other cases, it actually involves several types of judgment ranging according to the juridical fivefold scale: permissible, recommended, not recommended, non-permissible, and required. Therefore, it is not permissible to narrow the application of this notion and use it for declaring Muslim outside the fold of Islam.”).

³¹² *Id.*

Relationship

Because the endogenous-conservative standard assesses matters of religious doctrine, application of this standard to the al-Qaeda—ISIS relationship presupposes a basic understanding of their doctrinal relationship. Law and policy discourse, however, has thus far noted merely to the outward dynamics of political rivalry between the two movements, while overlooking deeper dimensions of their relationship, whether doctrinal or otherwise. This superficiality is unsurprising given the empirical weaknesses of the two prevailing analytic standards which have already been reviewed, and which in turn reflect the limited ability of American and Western legal and political science scholarship to access primary source material in Arabic. Indeed, these limitations have prompted some legal scholars to suggest—presumably out of sheer frustration—that comprehension of relationships among movements such as al-Qaeda and ISIS must be an impossible task, for “relationships between terrorists and their organizations are generally not well documented,” and “the link between these organizations is not clear, and will likely never be clear because by their very natures as terrorist organizations, they are secretive.”³¹³

This section therefore undertakes the double task of identifying the underlying doctrinal relationship between al-Qaeda and ISIS, and then vetting this doctrinal relationship, according to the endogenous-conservative standard, in order to determine whether the two movements are indeed associated. This will be done, more particularly, by exposing three successive layers of the al-Qaeda—ISIS relationship that have thus far eluded legal and policy discourse: an outer layer of political rivalry, a middle layer of tactical dispute, and an inner core of doctrinal clash.

*1. The Outer Layer of the al-Qaeda—ISIS Relationship: Politics**a. The Dispute*

At the most superficial level, the relationship between al-Qaeda and ISIS may be viewed as one of competition for market-share in global jihadism. This political rivalry escalated over the course of various stages—the first of which began with the ideological predecessors to ISIS, well before the formation of ISIS itself. Among these predecessors, a figure of particular importance was Suri, who was already introduced in Part I of this Article.³¹⁴ Although formerly a member of al-Qaeda and a colleague of Osama Bin Laden, Suri and Bin Laden increasingly became rivals within the jihadist landscape, leading the former to leave al-Qaeda in 1998 and to

³¹³ Wagner, *supra* note 247, at 248, 255.

³¹⁴ See generally BRYNJAR LIA, ARCHITECT OF GLOBAL JIHAD: THE LIFE OF AL-QAIDA STRATEGIST ABU MUS'AB AL-SURI 30 (2009).

realign himself with the Taliban.³¹⁵ After their falling out, Suri leveled various criticisms of al-Qaeda in general, including its 1998 attacks on the U.S. Embassies in East Africa and the 9/11 attacks in the United States.³¹⁶ He also personally criticized Bin Laden in 1999 for his excessive media appearances, stating that “[w]e are in a ship that you are burning on false and mistaken grounds,” accusing him of having “caught the disease of screens, flashes, fans and applause,” and reprimanding him for failing to fully fulfill his oath of allegiance to Taliban leader, Mullah Omar, insisting that “you should apologize for any inconvenience or pressure you have caused”³¹⁷

While Suri was an indirect predecessor to ISIS, the next phase in the al-Qaeda—ISIS rivalry began in October 2004, when al-Qaeda appointed the direct predecessor to ISIS, Abu Mus’ab al-Zarqawi (“Zarqawi”), to launch the al-Qaeda-in-Iraq franchise (“AQI”).³¹⁸ Despite his official subservience to al-Qaeda, Zarqawi consistently disregarded instructions from the al-Qaeda central command, thereby invoking the reprimand of his seniors.³¹⁹ For instance, in December 2005, al-Qaeda sent instructions to Zarqawi, emphasizing that “[y]ou need to keep in mind that you are leader in the field that is under a greater leadership that is more potent and more able to lead the Muslim nation,” and therefore insisting “[t]hat you abstain from making any decision on a comprehensive issue (one with a broad reach), and on substantial matters until you have turned to your leadership [Osama Bin Laden] and the Doctor [Ayman Zawahiri], and their brothers there, and consulted with them.”³²⁰ Political rivalry likewise escalated between Zarqawi and other jihadist leaders, such as his former teacher, Maqdisi (also introduced in Part I of this Article).³²¹ Defying Maqdisi’s counsel, Zarqawi claimed to receive instructions from religious “scholars who are far more knowledgeable than Maqdisi” in religious knowledge,

³¹⁵ *Id.* at 160, 229–30, 233–34.

³¹⁶ *Id.* at 280–81, 313.

³¹⁷ Alan Cullison, *Inside Al-Qaeda’s Hard Drive*, ATLANTIC (Sept. 2004), <https://www.theatlantic.com/magazine/archive/2004/09/inside-al-qaeda-s-hard-drive/303428/>; David Samuels, *The New Mastermind of Jihad*, WALL STREET J. (Apr. 2012).

³¹⁸ *See generally* JEAN-CHARLES BRISARD & DAMIEN MARTINEZ, ZARQAWI: THE NEW FACE OF AL-QAEDA (2005); JOBY WARRICK, BLACK FLAGS: THE RISE OF ISIS xv (2016).

³¹⁹ *See* BRISARD & MARTINEZ, *supra* note 318, at 144; WARRICK, *supra* note 318, at 22–23.

³²⁰ ‘Atiyah’s Letter to Zarqawi, COMBATING TERRORISM CTR. W. POINT (Dec. 10, 2005), <https://ctc.usma.edu/harmony-program/atiyahs-letter-to-zarqawi-original-language-2/> (from al-Qaeda liaison, ‘Atiyya ‘Abd al-Rahman, to Zarqawi, publicly released on September 18, 2006, by the Iraqi National Security Advisor and translated by Combating Terrorism Center).

³²¹ *See generally id.*

further emphasizing that even in the earlier days, “I disagreed with many of his positions,” and that he is in any case free to disregard Maqdisi’s instructions, for “[h]ave you come across a case in the [Qur’an], or [prophetic tradition], or the history of [the early Muslims], in which a person becomes a slave to his mentor? Have you come across any case such as the one above in which a person is not supposed to disagree with his mentor and is not suppose[d] to accept opinions from other scholars?”³²² Maqdisi, for his part, expressed his frustrations directly in an interview with Al-Jazeera, explaining that Zarqawi “took the name of my [web]site,” as the “name for [his] . . . organization and his community . . . [A]s long as the name . . . of my [web]site [is used] . . . for . . . [Zarqawi’s] organization, I have the right to reserve or mention reservations”³²³

In April 2006, two months prior to his death by U.S. airstrikes, Zarqawi further defied his al-Qaeda superiors by unilaterally announcing that AQI had established the “nucleus” for forming an Islamic State, which would be consummated within three months’ time.³²⁴ Though he did not live to execute this promise, his wish was executed by his direct successors, Abu Umar al-Baghdadi and Abu Ayyub al-Masri (“Masri”), who assumed the reigns of leadership of AQI after Zarqawi’s death.³²⁵ One of their first acts of leadership was thus to announce that AQI had assumed a new name: The Islamic State of Iraq (“ISI”).³²⁶ That this was in direct defiance of AQI’s political superiors was abundantly clear, for Zawahiri himself, then second-in-command of al-Qaeda, complained that, “the general command of al-Qaeda and its [leader] Osama Bin Laden . . . were not asked for permission, consulted, or even warned just prior to the announcement of the establishment of the Islamic State of Iraq.”³²⁷ Likewise, Adam Gadahn, al-Qaeda’s American spokesman, expressed his concern that, “[t]he decision to declare the [Islamic] State [of Iraq] was taken without consultation from al-Qaeda” and that it thereby “caused a split in the [jihadist] ranks and their supporters inside and outside Iraq.”³²⁸

³²² *Zarqawi Clarifies Issues Raised by Sheikh Maqdisi*, BRYN MAWR C. (July 21, 2005), <http://triceratops.brynmawr.edu/dspace/bitstream/handle/10066/4760/ZAR20050712.pdf?sequence=3>.

³²³ *Maqdisi Interview*, AL JAZEERA MEDIA NETWORK (2005), <http://www.aljazeera.net/NR/exeres/68E9B0F9-5F9F-447C-9B38-9F5DDB7D23C2.htm>.

³²⁴ Abu Mus’ab al-Zarqawi, APRIL 2006 STATEMENT “HADHA BALAGH LI-L-NAS” (KALIMAT MUDĪ’A). *See also* MCCANTS, *supra* note 24, at 14.

³²⁵ MCCANTS, *supra* note 24, at 29–31, 33.

³²⁶ *Id.*

³²⁷ *Id.* at 16–17.

³²⁸ *Letter from Adam Gadahn*, COMBATING TERRORISM CTR. W. POINT (Jan. 2011), <https://ctc.usma.edu/harmony-program/letter-from-adam-gadahn-original-language-2/>.

During the following years, ISI leadership passed from Abu Umar al-Baghdadi to Abu Bakr al-Baghdadi (“Baghdadi”) in May of 2010, while al-Qaeda leadership, after Bin Laden’s death in May of 2011, passed to Zawahiri.³²⁹ Although ISI continued to operate under the authority of al-Qaeda, political tension escalated in December 2011, when al-Qaeda, at the instruction of Zawahiri, appointed Abu Muhammad al-Jawlani to form its clandestine Syrian franchise, the al-Nusra Front (“Nusra”).³³⁰ Competition between ISI and Nusra quickly escalated; while ISI demanded Nusra’s obedience, Nusra insisted that it took orders directly from al-Qaeda.³³¹ Eventually, in April 2013, ISI publicly announced that the two groups had merged, and that the new entity was named The Islamic State of Iraq and Syria (“ISIS”).³³² In retaliation, Nusra broke its clandestine status and publicly announced, the following day, that it was independent of ISI, and that it reported directly to al-Qaeda.³³³ ISIS’s leader appealed to Zawahiri to intervene, noting that

[i]t has just now reached me that al-Jawlani has released an audio message announcing his direct oath of allegiance to you. This is what was planned for him to protect himself and those with him from the consequences of the mistakes and disasters he committed [I]t is up to our [leaders] . . . to announce a clear, unambiguous position in order to bury this conspiracy before it causes blood to flow³³⁴

Zawahiri responded to both parties with frustration: “[w]e have neither been asked for authorisation or advice, nor have we been notified of what had occurred between both sides. Regrettably, we heard the news from the media.”³³⁵ Though he rebuked Nusra for breaking its clandestine status and publicizing its link to al-Qaeda, he nonetheless ruled in its favor, confirming that ISIS has no authority over it.³³⁶

Al-Qaeda’s decision in favor of Nusra catalyzed the final political rift between

³²⁹ See generally MCCANTS, *supra* note 24; WARRICK, *supra* note 318, at xv.

³³⁰ WARRICK, *supra* note 318, at xvii.

³³¹ *Id.* at 276.

³³² *Id.* at 283.

³³³ *Id.* at 284.

³³⁴ MCCANTS, *supra* note 24, at 91.

³³⁵ *Translation of al-Qaeda Chief Ayman al-Zawahiri’s Letter to the Leaders of the Two Jihadi Groups*, <http://s3.documentcloud.org/documents/710588/translation-of-ayman-al-zawahiris-letter.pdf> (English Translation).

³³⁶ *Id.*

ISIS and al-Qaeda. ISIS's leader promptly rejected al-Qaeda's statement, first explaining his decision in a private letter on July 29, 2013,³³⁷ and then through a public announcement criticizing Zawahiri for erring in his decision.³³⁸ This announcement, in turn, prompted Zawahiri to publicly disown ISIS, announcing on February 2, 2014, that "ISIS is not a branch of [the al-Qaeda group]; we have no organizational relationship with it . . . [and are not] responsible for its actions and behaviors."³³⁹ ISIS then retorted that al-Qaeda in fact had no authority to expel it, because ISIS had already declared its independence from al-Qaeda back in 2006, when it had renamed AQI as ISI.³⁴⁰ This prompted Zawahiri, in turn, to cite correspondence with the former ISI leader, Masri, who had expressly confirmed ISI's continued loyalty to al-Qaeda, despite their name change at the time.³⁴¹

b. Association or Disassociation?

For starters, it should be noted that these basic facts of the al-Qaeda—ISIS political rivalry highlight glaring weaknesses in the exogenous standard. More particularly, the Obama administration has argued that the two movements, despite their public rift, remain associated due to their more than ten-year history.³⁴² This assertion gives the misleading impression that their history stretches back to the time of the 9/11 attacks, thus justifying "association" under the 2001 AUMF. The basic chronology of political rivalry established above, however, shows clearly that although the two movements do, indeed, have a history that exceeds a decade, this relationship nonetheless began in 2004—i.e. several years after 9/11. Rather than this disingenuous cherry-picking of facts, a stronger argument for the exogenous standard would be to concede that ISIS did not exist during the 9/11 period, but to emphasize that the two movements are nonetheless associated given implicit gestures towards reconciliation the two movements have made since their public split in 2014. Such gestures, for instance, might include: ISIS's tendency to suggest that al-

³³⁷ MCCANTS, *supra* note 24, at 92.

³³⁸ Abu Muhammad al-Adnani, ANNOUNCEMENT ON JUNE 19, 2013 ENTITLED "FA-DHARHUM WA-MA YAFARUN," (MU'ASSASAT AL-FURQAN) (available at <https://pietervanostaeyen.wordpress.com/2013/06/22/an-internal-jihadi-strife-jabhat-an-nusra-and-the-islamic-state-in-iraq-and-as-sham/>). See also MCCANTS, *supra* note 24, at 93.

³³⁹ *al-Qaeda Announcement*, BAYAN BI-SHA'NI 'ALAQAT JAMA'AT QA'IDAT AL-JIHAD BI-JAMA'AT AL-DAWLA AL-ISLAMIYYA FI AL-'IRAQ WA-L-SHAM (Feb. 3, 2014), <http://justpaste.it/ea9k>. See also MCCANTS, *supra* note 24, at 93.

³⁴⁰ Abu Muhammad al-Adnani Announcement, MA KANA HADHA MANHAJUNA WA-LAN YAKUN (Apr. 17, 2014), <http://justpaste.it/makan>. See also MCCANTS, *supra* note 24, at 93.

³⁴¹ MCCANTS, *supra* note 24, at 94.

³⁴² See *Josh Earnest*, *supra* note 253.

Qaeda is merely veering towards, rather than actually committing, full apostasy;³⁴³ al-Qaeda's general preference for silence rather than outright condemnation of ISIS; both movements' seemingly hopeful appeals that the other return to the fold; their lack of physical persecution of the other; and reports that the two have coordinated efforts in certain limited respects, such as at the Syria-Iraq border.³⁴⁴

The endogenous-liberal standard, on the other hand, takes the political rivalry of the two movements as *prima facie* evidence against association. Though not articulated to date, the strongest possible argument that this standard can make is one that not only recounts the facts of rivalry cited above, but also emphasizes the mutual vilification and excommunication of the two movements due to these political rivalries. For instance, in their political split, Nusra and al-Qaeda accused ISIS of "extremism" and of defecting from the Muslim community,³⁴⁵ and of deviating, lying, violating treaties, and breaking pledges.³⁴⁶ Likewise, al-Qaeda supporters, such as Maqdisi, accused ISIS of concocting a "heinous plot," fomenting a "conspiracy," committing "psychological, moral, and physical terror," and "fragmenting the ranks and destabilizing the structure" of jihadism, all of which prompted him to conclude that ISIS is "a deviant organization . . . [whose] orientation is extremism."³⁴⁷ ISIS responded in kind, branding al-Qaeda's leader, Zawahiri, as a pagan-tyrant,³⁴⁸ and

³⁴³ See, e.g., ISIS, *The Allies of al-Qaeda in Yemen*, 12 DABIQ 5, 7 (2015) (stating, "[m]ay Allah guide the soldiers in the ranks of al-Qa'idah out of the ranks of partisanship and into the ranks of the Jamā'ah before they follow the footsteps of the apostate Jawlānī front").

³⁴⁴ See, e.g., AFP, *Al-Qaeda Merges with Isis at Syria-Iraq Border Town*, TELEGRAPH (June 25, 2014), <http://www.telegraph.co.uk/news/worldnews/al-qaeda/10925602/Al-Qaeda-merges-with-Isis-at-Syria-Iraq-border-town.html>; Riyadh Mohammed, *The Merger of ISIS and al-Qaeda Could Cripple the Civilized World*, FISCAL TIMES (Oct. 10, 2014), <http://www.thefiscaltimes.com/2014/10/10/Merger-ISIS-and-al-Qaeda-Could-Cripple-Civilized-World?page=0>.

³⁴⁵ More specifically, this accusation of defection is made by likening ISIS to the first offshoot from Islam, the Kharijites. These accusations were made not only by al-Nusra, but by al-Qaeda headquarters itself. See Al-Nusra, *A Clarification Regarding the Alleged Announcement of an Emirate*, ESINISLAM (July 13, 2014), <https://www.esinislam.com/Mujahidun2014/Jabhatan-NusraEmirateClarification160714.htm>.

³⁴⁶ Kevin Jackson, *Al-Qaeda Revives Its Beef with the Islamic State*, JIHADICA (Oct. 15, 2014), <http://www.jihadica.com/al-qaeda-revives-its-beef-with-the-islamic-state/>.

³⁴⁷ See Abu Muhammad al-Maqdisi, *13 Ramadan 1435*, <http://justpaste.it/jppdf/g7x6>; Abu Muhammad al-Maqdisi, *A Call to the Umma and Mujahidin* (May 2014), <https://azelin.files.wordpress.com/2014/05/abc5ab-mue1b8a5ammad-al-maqdisc4ab-22the-case-of-the-islamic-state-of-iraq-and-al-shc481m-and-the-position-of-the-duty-toward-it22-en.pdf>. See also MCCANTS, *supra* note 24, at 128; Aaron Y. Zelin, *The Clairvoyant: Colonial Caliphate: The Ambitions of the "Islamic State"*, JIHADOLOGY (Nov. 16, 2014), <http://jihadology.net/2014/07/08/the-clairvoyant-colonial-Caliphate-the-ambitions-of-the-islamic-state>.

³⁴⁸ The Arabic term for "tyrant" is "taghut," which is pluralized as "tawaghit," which in

then emphasizing that pagan-tyrants “had always been open apostates in the camp of [unbelief], but due to the support they received from the palace ‘scholars’ and the deviant movements . . . many of the ignorant did not understand the blatant apostasy of these rulers.”³⁴⁹

The endogenous-conservative standard, however, considers this political rivalry between al-Qaeda—ISIS to be merely the superficial veneer of their relationship, and thus insufficient for resolving the question of association. Islamic history, after all, is replete with examples of groups and movements that have had bitter—even violent—political rivalries, some of which led to irreconcilable cleavages, and others of which have still accommodated collaboration, solidarity, and other forms of affiliation.³⁵⁰ Absent further evidence, it is unclear as to which of these two categories the al-Qaeda—ISIS rivalry falls into. In short, if analysis of the al-Qaeda—ISIS relationship focuses only on their political rivalry, the overarching question of association remains indeterminate. This, however, does not mean that analysis of their political rivalry is a useless exercise—quite the contrary, it is essential as a means for identifying the deeper and more fundamental dimensions of their dispute.

2. *The Middle-Layer of the al-Qaeda—ISIS Relationship: Tactics*

a. *The Dispute*

The above narrative of rivalry, though sound, is incomplete, for it depicts the al-Qaeda—ISIS dispute as merely political in nature, and thus misses an underlying tactical disagreement. To be sure, the common goal, shared not only by al-Qaeda and ISIS but indeed across the broader landscape of (Sunni) Islamic extremism, was and remains that of returning Islam to a state of dominance in the world through reestablishment of the Caliphate, and ultimately broadening the Caliphate’s jurisdiction until it achieves global dominion.³⁵¹ The tactical dispute between al-Qaeda and ISIS, however, concerns the manner in which this goal is to be achieved—namely, patience versus urgency.

Al-Qaeda, on the one hand, has consistently endorsed the tactics of patience and gradualism. These tactical orientations are traceable to the intellectual ideologies of the two movements. Al-Qaeda’s orientation, for instance, can be gleaned from Naji’s manifesto (mentioned in Part I), where he emphasizes that the Islamic world is merely at the first or second of the three stages that are prerequisite to the

general jihadist parlance signifies tyrannical political leaders who claim to be Muslim. See ISIS, *A Feeble Plea from the Khalaf to the Tawāghūt (from adh- Dhawāhīrī to the Tāghūt Morsi)*, 7 DABIQ 17, 18 (2015).

³⁴⁹ ISIS, *The Extinction of the Grayzone*, 7 DABIQ 54, 54 n.2 (2015).

³⁵⁰ See generally IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES (3d ed. 2014).

³⁵¹ See ENAYAT, *supra* note 3, at 70, 74–75.

re-establishment of the Caliphate, and that multiple failed attempts may be required in order to traverse the remaining stages.³⁵² As such, the proper attitude for traversing the totality of the stages is patience and gradualism. He therefore criticizes those who “put forward solutions which utilize force by means of a quick, sudden strike that ends everything in a short amount of time”³⁵³ Likewise, in a sub-section entitled “The Problem of Excessive Zeal,” Naji notes that:

[a]s for [the problem of] rushing, the prescription for it is understanding and sitting with the youth and clarifying the general policy for action and the importance of biding one’s time in some of the stages of the battle in order to drain the enemy, for example, and similar explanations. We will show them that this matter will only be mastered by one who is as ponderous as the mountains, who does not easily give in to the provocation of the enemy.³⁵⁴

On the other hand, ISIS’s approach to reestablishment of the Caliphate is one of urgency. This orientation is traceable to ISIS’s intellectual predecessors mentioned in the previous sub-section. Suri was a telling example of one who endorsed the tactics of urgency. Suri’s overarching criticism of al-Qaeda’s 9/11 attacks, for instance, was essentially due to his concern regarding time-sensitivity, for as he explained,

[t]he outcome, as I see it, was to put a catastrophic end to the jihadist current, an end to the period which started back in the beginning of the 1960s of the past century and has lasted up until September 11th. The jihadist current entered the tribulations of the current maelstrom which swallowed most of its cadres over the subsequent three years.³⁵⁵

In other words, the 9/11 attacks were, according to Suri, a debacle because they provoked the U.S. attacks on the Taliban, which in turn eliminated the safe-haven that had enabled al-Qaeda to pursue its operations. The jihadist movement, in short,

³⁵² These three stages are: “the stage of ‘the power of vexation and exhaustion,’ then the stage of ‘the administration of savagery,’ then the stage of . . . ‘establishing the [Islamic] state.’” More particularly, he emphasizes that the Islamic community may experience multiple failures in its attempt to progress through the stages, noting that, “the administration of savagery is the next stage that the [Islamic community] will pass through and it is considered the most critical stage. If we succeed in the administration of this savagery, that stage . . . will be a bridge to the Islamic state which has been awaited since the fall of the caliphate. If we fail . . . it does not mean end of the matter; rather, this failure will lead to an increase in savagery!!” ABU BAKR NAJI, *supra* note 224, at 15.

³⁵³ *Id.* at 73.

³⁵⁴ *Id.* at 71.

³⁵⁵ MCCANTS, *supra* note 24, at 87.

had lost decades of time in return for a brief moment of limelight in the international headlines—a luxury that could not be afforded given the urgency inherent in the goals at hand.

Compared to Suri, Zarqawi, the direct predecessor to ISIS, was even more emphatic in his urgency—a fact that is particularly discernable in his correspondences with al-Qaeda leadership at the time. Zawahiri, for instance, regularly rebuked Zarqawi for his excessive sense of urgency. In 2005, for instance, Zawahiri reminded Zarqawi that although the political goal is “establishment of a caliphate,” this must not be done hastily, but “requires several incremental goals,” the first step of which is to expel the Americans from Iraq, then establish an “Islamic authority or [emirate],” then to “develop” and “support” it, until it eventually achieves the “level of a caliphate”³⁵⁶ This imperative to slow down was repeated in al-Qaeda’s reprimand of Zarqawi in December 2005, which included the following instructions:

[D]o not be overzealous Do not be hasty in reforming and mending the Muslim nation. Do not rush victory over the enemy, for the war and our journey are truly long [T]he most important thing is that you be patient, forbearing, and persevere until the final moment, for indeed your enemy is also patient [S]o do not be hasty in this; I mean in giving out lessons to them, and in the issues that are laid upon the community and the way that they are delivered [Y]ou should be patient and not rush in forming an opinion [T]here is no harm in a certain amount of keeping quiet, overlooking things, forgiving, and reserving things . . . otherwise there would occur a greater harm than what we are striving to eliminate! [B]e patient and forbearing, even in weakness, and even with fewer operations; even if each day had half of the number of current daily operations, that is not a problem, or even less than that. So, do not be hasty Indeed, prolonging the war is in our interest³⁵⁷

As noted by McCants, it seemed at first that Zarqawi would heed this counsel, for he agreed that “[f]irst, we will expel the enemy . . . [t]hen we will establish the [government] of Islam . . . [then] embark on conquest of Muslim lands to reclaim them . . . and then set their sights on the infidels.”³⁵⁸ Despite giving this assurance, he abruptly announced, in April 2006, that the “nucleus” of the Islamic State had been formed, thus demonstrating his further commitment to the tactics of urgency and

³⁵⁶ Ayman al-Zawahiri, *Letter from a-Zawahiri to al-Zarqawi*, GLOBALSECURITY.ORG (July 9, 2005), http://www.globalsecurity.org/security/library/report/2005/zawahiri-zarqawi-letter_9jul2005.htm.

³⁵⁷ ‘Atiyah’s *Letter to Zarqawi*, *supra* note 320.

³⁵⁸ MCCANTS, *supra* note 24, at 14.

expediency.³⁵⁹ These tactics were directly bequeathed to his successors. In October 2006, when al-Masri rebranded AQI to ISI, al-Qaeda's reaction, unsurprisingly, was that the announcement of renaming AQI to ISI "was filled with obvious errors. There were things in it that a commander should never say."³⁶⁰ Furthermore, the leaders of the self-styled ISI as "self-absorbed and too hasty!"³⁶¹

Subsequently, this tactical clash between patience and urgency manifested as four technical disagreements between al-Qaeda and ISIS concerning the procedural prerequisites to the re-establishment of the Caliphate:

First is the disagreement over the necessity of coalition-building for establishing a strong, grassroots foundation for the Caliphate.³⁶² For al-Qaeda, patience and gradualism has meant that coalition building is not only possible, but necessary. This means making overtures to even those nominal Muslims who espouse questionable beliefs and practices—for persecution of apostates is "something that can be put off until the force of the [jihadist] movement in Iraq gets stronger."³⁶³ According to al-Qaeda, therefore, a prerequisite to establishing the Caliphate is the task of

[w]inning over the people, bringing them close, being cautious about alienating them, befriending them, helping them, accepting their foibles (which

³⁵⁹ *Id.* at 14–15.

³⁶⁰ *Id.* at 18–19.

³⁶¹ *Id.* at 19.

³⁶² This tension over coalition-building was already apparent during Zarqawi's leadership of AQI, who disregarded popular support and persecuted Shi'ites and Sunnis without hesitation. Al-Qaeda leaders therefore regularly rebuked him—such as Zawahiri's reminder to him that it is necessary to muster "popular support from the Muslim masses in Iraq, and the surrounding Muslim countries," because, "we are in a media battle in a race for the hearts and minds of our Umma." Therefore, Zarqawi must stop alienating the "majority of Muslims" who are averse to his persecution of the Shi'ites, and likewise must cease from advertising "scenes of slaughter," despite "the praise of some of the zealous young men." Maqdisi echoed these points, emphatically denouncing Zarqawi's rejection of coalition-building. In July of 2004, for instance, Maqdisi rebuked Zarqawi, emphasizing that "the hands of the Jihad fighters must remain clean so that they will not be stained by the blood of those who must not be harmed even if they are rebellious and shameless. You must also beware of entanglement by choosing means [of warfare] that are not illegal in the Shari'a . . ." See Nimrod Raphaeli, *'The Sheikh of the Slaughterers': Abu Mus'ab Al-Zarqawi and the Al-Qaeda Connection*, MEMRI (June 30, 2005), <https://www.memri.org/reports/-sheikh-slaughterers-abu-musab-al-zarqawi-and-al-qaeda-connection>. A year later, in an interview with Al-Jazeera, Maqdisi echoed these criticisms, along with censured Zarqawi's persecution of the Shi'ites.

³⁶³ BARAK MENDELSON, *THE AL-QAEDA FRANCHISE: THE EXPANSION OF AL-QAEDA AND ITS CONSEQUENCES* 122 (2016).

means [accepting] what they possess, including strength, weakness, propriety, impropriety, goodness, and ill . . .), with gentleness, gradual open-mindedness, while overlooking and being quiet about many of their mistakes and flaws, and while tolerating a great deal of harm from them for the sake of not having them turn away and turn into enemies on any level.³⁶⁴

But for ISIS, urgency in establishing the Caliphate means that there is no luxury of coalition-building, and instead a policy of expediency must be adopted—for “Allah has ordered us to target the [infidels], to kill them and to fight them, by any means that can achieve this goal, even if [those hurt] by these means include [not just] those infidels against whom war is being waged”³⁶⁵ In other words, rather than building the Caliphate on the foundation of popular support, it must instead be erected on the foundation of force, and the duty of excommunicating and persecuting apostates cannot be suspended or delayed.³⁶⁶

Second is the dispute concerning territorial control, with al-Qaeda arguing that the Caliphate can only be declared after control is won over a sufficient stretch of territory, otherwise claims to sovereignty are a mockery.³⁶⁷ ISIS, however, categorically rejected this argument, noting that “[t]here’s no doubt that the Caliphate requires some degree of power, force, and consolidation, yet this has already been attained in the Islamic State, as witnessed by both friend and foe . . . whereas full establishment throughout all the remaining Muslim lands is not a condition for the validity of the Caliphate” and that indeed all that is necessary is “partial establishment in some of the Muslim lands.”³⁶⁸ ISIS supported this claim on historical grounds: none of the Caliphates throughout Islamic history met this requirement—not even that of the Prophet himself, who began receiving pledges of allegiance as a political leader prior to having established any practical, territorial foundation for his rule, and only then began establishing the foundations, “little by little.”³⁶⁹ Subsequent to the Prophet, Abu Bakr became the first Islamic Caliph, despite having

³⁶⁴ ‘Atiyah’s *Letter to Zarqawi*, *supra* note 320.

³⁶⁵ Abu Mus’ab al-Zarqawi, *The Return of Ibn Al-‘Alqami’s Grandchildren* (May 2005), <http://www.memri.org/report/en/print1389.htm>.

³⁶⁶ See, e.g., MCCANTS, *supra* note 24, at 123 (noting, in short, ISIS’s view was that, “[y]ou don’t have to wait until the Muslim masses want the caliphate, and you don’t have to beg them to support your caliphal project. Ignore popular opinion and establish a caliphate by force of arms.”).

³⁶⁷ See, e.g., *id.* at 129–30.

³⁶⁸ See Turki bin Mubarak al-Bin’ali, *Al-Qiyafa fi ‘adam Ashrat al-Tamkin al-Kamil li-l-Khilafa*, PUBLICATION (Apr. 30, 2014).

³⁶⁹ *Id.* at 12.

even less territorial control than the Prophet, for “his Caliphate suffered the defection of the Muslim lands from his dominion, and the apostasy of the great majority.”³⁷⁰ ISIS continued this survey with later Caliphs, including ‘Ali, Hasan, Husayn, and indeed leaders of later movements, such as the Abbasids.³⁷¹ The overall conclusion is that “[Islamic] governments . . . begin in conditions of weakness and adolescence, but before long they strengthen, consolidate, and begin to gradually spread their influence.”³⁷²

Third, al-Qaeda argues that ISIS’s leader, Baghdadi, was not appointed Caliph via the consensus of the majority of religious scholars, as required by Islamic jurisprudence, but was instead appointed by a small group of quasi-scholars—a process that is invalid, for it is tantamount to a self-nomination and rejection of the counsel of the majority.³⁷³ In the words of al-Qaeda’s supporter, Abu Qatada, this “refusal of good counsel” is tantamount to espousing Judaism, as suggested in the Qur’anic verse 2:90—and likewise, those who disregard requirements of proper nomination of the Caliph “are unwittingly espousing Shi’ism, for the Shi’ites consider rulers and Imams to be mandated by God, rather than being chosen by human beings.”³⁷⁴ ISIS retorts, however, having few fealty-oaths from people is not an objection to being viewed as legitimate. As long as a small number pledge allegiance, that suffices.³⁷⁵

³⁷⁰ *Id.* at 7.

³⁷¹ *Id.* at 8–10 (he notes, for instance, that regarding ‘Ali: “not all the Muslims gave him the oath of allegiance, and not all of the Muslim lands entered his rule, but despite this, the Islamic community agreed on the validity of his Caliphate.” Similarly, regarding Hasan: “his influence and establishment wasn’t on all the Muslim lands, but merely his Caliphate was in the Hijaz, Yemen, Iraq, and some of the lands.” Likewise, regarding Husayn: “he was acknowledged with homage as the Caliph, despite not securing the Caliphate.”).

³⁷² *Id.* at 14. *See also* MCCANTS, *supra* note 24, at 123 (noting that, in short, ISIS’ view was that “[y]ou don’t have to overthrow Muslim countries to make a caliphate, and you don’t have to persuade them to declare one, argued the State. Conquer land and declare your own.”). McCants further explains that the difference in these attitudes towards urgency also explains the manner in which the two movements accepted affiliates. Al-Qaeda, for its part, “fretted endlessly about expanding the number of its affiliates. Because Bin Laden and Zawahiri worried so much about popular Muslim support, they were reluctant to sign on groups that might behave badly and tarnish the al-Qaeda brand.” *Id.* at 141. For example, Bin Laden delayed for months in responding to the application of the Somalian al-Shabaab organization in 2008, due to their lack of popularity owing to the harshness of their rule as well as other practices, such as damage to the economy and the environment. *Id.* at 64–66. In contrast, “[t]he Islamic State didn’t care about popular Muslim support, so it signed on affiliates at breakneck speed.” *Id.* at 141.

³⁷³ *See generally id.*

³⁷⁴ *See, e.g.,* Cole Bunzel, *Caliphate Now: Jihadis Debate the Islamic State*, JIHADICA (Nov. 25, 2013), <http://www.jihadica.com/Caliphate-now-jihadis-debate-the-islamic-state/>.

³⁷⁵ *See generally* Joas Wagemakers, *The Concept of Bay’a in the Islamic State’s Ideology*,

Fourth, al-Qaeda, equivocating on its claim that the announcement of a Caliph is premature, alleges that Baghdadi's Caliphate is void because in June 2001, Osama Bin Laden had already pledged a supreme oath of fealty to Mullah Omar, the leader of the Taliban, and Islamic jurisprudence forbids the existence of two Caliphs at any one time.³⁷⁶ Further underscoring this point, al-Qaeda reaffirmed its continuing allegiance to Mullah Omar in July of 2014, in its newsletter entitled al-Nafir, noting that "[Al-Nafir] begins its first issue by renewing its [oath of fealty] to [the Commander of the Believers, Mullah] . . . [Omar] and emphasizing that al-Qaeda with its branches all over, are his soldiers working under his victorious banner . . . for every area of Islam land to be free."³⁷⁷ ISIS and its supporters retorted, however, that Mullah Omar's Caliphate is invalid on several grounds, including: (i) the Taliban espouses a deviant religious doctrine rather than the correct doctrine of Salafi-jihadism;³⁷⁸ (ii) Mullah Omar is not of the Prophet's Qurashi lineage, which is a condition for the Caliph;³⁷⁹ and (iii) al-Qaeda itself has, at best, been lukewarm and inconsistent in upholding its own allegiance to Mullah Omar as the Caliph, so this claim has no credibility.³⁸⁰

b. Association or Disassociation?

As with its assessment of the outward layer of political relationship, the exogenous standard is haphazard and expedient in its assessment of the tactical relationship. The Obama administration, more particularly, justified the "association" of al-Qaeda and ISIS on the grounds that ISIS shares the "same tactics" as al-Qaeda-in-Iraq. This statement, however, is tautological and therefore misleading, for it suggests that ISIS and AQI are two different entities, whereas they are merely two appellations describing the same entity, as explained earlier.³⁸¹ Therefore, rather than inquiring as to whether ISIS and AQI share the same tactics, the Obama administration should have asked whether ISIS and/or AQI, on the one hand, share the

PERSPECTIVES ON TERRORISM (July 9, 2015), <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/448>).

³⁷⁶ See generally Cole Bunzel, *Al-Qaeda's Quasi-Caliph: The Recasting of Mullah Omar*, JIHADICA (July 23, 2014), <http://www.jihadica.com/al-qaeda%E2%80%99s-quasi-Caliph-the-recasting-of-mullah-%E2%80%98umar/>.

³⁷⁷ Al-Qaeda, *O Victorious Ummah, Carry Your Arms, Wage Jihad, and Rejoice*, AL-NAFIR 1 (2014), https://archive.org/details/al_nafir_1.

³⁷⁸ Their particular theological orientation is that of Maturidism. See generally Wilfred Madelung, *Maturidiyya*, in *ENCYCLOPEDIA OF ISLAM* (2nd ed. 2012).

³⁷⁹ See, e.g., ISIS, *The Qa'idah of Adh-Dhawabiri, al-Harari, and an-Nadhari, and the Absent Yemeni Wisdom*, 6 DABIQ 16, 24 (2015).

³⁸⁰ *Id.*

³⁸¹ See *supra* Part II, Section B(1).

same tactics as al-Qaeda Central, on the other. The answer to this question, as demonstrated in the above review of the al-Qaeda—ISIS tactical relationship, is that they clearly do not. A stronger argument, therefore, would be to claim association based not upon same tactics, but rather despite different tactics. After all, tactical disagreements can not only exist between various sister-movements, but also within various factions of the very same movement. Al-Qaeda, for instance, comprises numerous subsidiary or franchise groups, each of which has somewhat different strategic and tactical orientations.³⁸² Likewise, recent scholarship has suggested that ISIS itself is not monolithic when it comes to tactical matters, but rather comprises at least two distinct factions.³⁸³ Surely these internal tactical differences do not negate the reality of “association” between the various subsidiaries of the same movement.

In contrast, the endogenous-liberal standard, having already concluded against association at the outer, political layer, finds no need to probe the tactical layer. Were it to do so, however, its strongest argument would be similar to its argument at the political layer—namely, to point not merely to disagreement, but mutual vilification as a result of tactical differences. Regarding coalition-building, for instance, al-Qaeda scorned ISIS for “declaring the worshippers as disbeliever . . . and undermining the jihad and distorting the message of the [jihadists],”³⁸⁴ and instead called for a future Caliphate “based on justice and consultation, affinity and concord, not oppression, excommunication, murder of monotheists, and dividing the ranks of the [jihadists].”³⁸⁵ The implicit threat in these accusations is that ISIS itself is an apostate group, for as stated in the Islamic traditions, “[w]hen a man calls his brother an unbeliever, it returns at least to one of them. Either the accused is as claimed, or the charge will return against the accuser.”³⁸⁶ ISIS, for its part, responds with the counter-accusation that al-Qaeda’s concern with coalition-building has rendered it

³⁸² See, e.g., John Rollins, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Congressional Research Service, 2011).

³⁸³ This refers to the “Hazimi” versus the “Bin’ali” factions within ISIS, whose dispute concerns the methods and tactics of excommunications. See Tore Hamming, *The Extremist Wing of the Islamic State* (June 9, 2016), <http://www.jihadica.com/the-extremist-wing-of-the-islamic-state/>.

³⁸⁴ See MCCANTS, *supra* note 24, at 141. See also Jackson, *supra* note 346.

³⁸⁵ *al-Qaeda Announcement*, *supra* note 339.

³⁸⁶ See, e.g., Abu Amina Elias, *Dangers of Takfir, Declaring Muslims To Be Apostates*, FAITH IN ALLAH (Nov. 4, 2014), <https://abuaminaelias.com/dangers-of-takfir-declaring-muslims-to-be-apostates/> (citing the Sahih Bukhari, Tradition 5753).

overly permissive of apostates,³⁸⁷ which in turn puts al-Qaeda at the brink of apostasy, remarking “[i]s this not what the apostate [‘Awakening Movement’³⁸⁸ of Zawahiri] have fallen into in every land?”³⁸⁹ Likewise, in disputing the method of the Caliph’s appointment, al-Qaeda’s accusation that ISIS is espousing Judaism and Shi’ism is tantamount to an accusation of abandoning Islam in favor of another religion, which is precisely the definition of apostasy.³⁹⁰ Similarly, though not stated by al-Qaeda explicitly, its emphasis on Mullah Omar as counter-Caliph contains an implicit threat of violence to Baghdadi, for according to the well-known Islamic traditions, “[w]hen oath of allegiance has been taken for two Caliphs, kill the one for whom the oath was taken later.”³⁹¹

The endogenous-conservative standard, however, dismisses this tactical layer in the same manner that it dismissed the political layer, for despite being more substantive than the latter, it still fails to penetrate to the core of the al-Qaeda—ISIS disagreement, and therefore remains insufficient for resolving the question of association. Indeed, as with political rivalries, Islamic history also abounds with movements that experienced tactical differences, some of which movements remained affiliated, and others of which fully disassociated.³⁹² Absent further evidence, it is not possible to determine association between al-Qaeda and ISIS based upon their tactical relationship alone. Yet despite being inconclusive, comprehension of the tactical relationship is an essential step to identifying the fundamental grounds upon which association can be determined, namely, the doctrinal core of the al-Qaeda—ISIS relationship.

3. *The Inner Core of the al-Qaeda—ISIS Relationship: Religious Doctrine*

a. *The Dispute*

Why have ISIS and al-Qaeda disagreed regarding urgency versus patience in the reestablishment of a global Islamic Caliphate? These tactical differences have been far from haphazard but rather have stemmed from a deeper disagreement in core religious doctrine. To this end, it should be re-emphasized that al-Qaeda and

³⁸⁷ Particularly a “deviant, feeble stance towards the Rāfidah [Shi’ites].” *The Murtadd Brotherhood*, *supra* note 202, at 31 n.3.

³⁸⁸ The “Awakening Movement” is a branch of Saudi Salafism. *See generally* Yasir Qadhi, *On Salafi Islam*, MUSLIM MATTERS (April 22, 2014), <http://muslimmatters.org/2014/04/22/on-salafi-islam-dr-yasir-qadhi/>.

³⁸⁹ *The Murtadd Brotherhood*, *supra* note 202, at 43.

³⁹⁰ *See generally* FRIEDMANN, *supra* note 123.

³⁹¹ *See, e.g., Hadith – The Book on Government*, SUNNAH, <https://sunnah.com/muslim/33/96>.

³⁹² *See* LAPIDUS, *supra* note 350.

ISIS are indeed aligned in most domains of religious doctrine for both, as explained earlier, subscribe to Salafi-jihadism.³⁹³ This means that in many doctrinal domains—such as jurisprudence, theology, scriptural exegesis, and so forth—they are more or less indistinguishable.³⁹⁴ There is, however, one key area of religious doctrine in which they are not aligned: apocalypticism. In this regard, it should be noted that virtually all Islamic movements (including al-Qaeda and ISIS) agree that humanity will, in the future, enter into an apocalyptic era, during which the Islamic Caliphate will have global jurisdiction under the leadership of two messianic protagonists, namely the Islamic messiah known as the “Mahdi,” along with Jesus Christ upon his second coming.³⁹⁵ While these points are uncontested, the doctrinal disagreement between al-Qaeda and ISIS concerns the question of imminence: how soon will this apocalypse occur?

The position of al-Qaeda, along with the Islamic majority, is that the apocalyptic era will materialize in the unknown and likely distant future—a presumption which explains and justifies the movement’s tactical philosophy of patience and gradualism in achieving political goals. As noted by Jean-Pierre Filiu, “al-Qaeda, so far as one can judge from its internal correspondence, was . . . impervious to apocalyptic temptation.”³⁹⁶ McCants has likewise described al-Qaeda’s apocalyptic position as “languid,” noting that “[a]l-Qaeda’s leaders rarely referred to Islamic End-Times prophecies in their propaganda and never suggested the Mahdi was just around the corner.”³⁹⁷ These claims are indeed corroborated by al-Qaeda’s own statements, such as a 2006 article from the movement, titled, “God Has Withheld Information Regarding the Mahdi’s Personage from Our Religious Community Prior to His Appearance.”³⁹⁸

ISIS, on the other hand, endorses a minority doctrine which presumes that the apocalyptic era is imminent—and which therefore requires all apocalyptic prerequisites, including all present political objectives, to be pursued with urgency and expediency, for time is quickly running out before the apocalyptic advent.³⁹⁹ This doctrine is clearly traceable to ISIS’s intellectual predecessors. For instance, although

³⁹³ See *supra* Part I(B)(2).

³⁹⁴ See, e.g., MAHER, *supra* note 185, at 6, 9, 14–16.

³⁹⁵ See generally DAVID COOK, STUDIES IN MUSLIM APOCALYPTIC 36972 (2002). See also DAVID COOK, CONTEMPORARY MUSLIM APOCALYPTIC LITERATURE 1, 9, 143–45 (2005).

³⁹⁶ JEAN-PIERRE FILIU, APOCALYPSE IN ISLAM 186 (M.B. DeBevoise trans., 2011).

³⁹⁷ MCCANTS, *supra* note 24, at 282.

³⁹⁸ *Id.* at 28 n.98. Note that the “languid” apocalypticism of al-Qaeda leadership does not preclude rank-and-file followers of al-Qaeda from advocating for apocalyptic imminence. *Id.* at 146.

³⁹⁹ See *infra* notes 417–21.

the majority of Suri's 1600-page manifesto addresses jihadist tactics, the handbook reaches a climax in its final chapter, which argues for the imminence of the apocalypse. Suri opens this chapter stating that, "[w]e shall now recount selections from the most important Sunni books regarding the conditions of the people at the End of Time, which has overshadowed us" ⁴⁰⁰ The remaining eighty pages comprise a detailed review of Islamic scriptures concerning the apocalyptic era. ⁴⁰¹ This survey leads him to conclude, "I have no doubt about the fact that we have entered the era of apocalyptic tribulations, and of the many Signs of the apocalyptic era, as prophesized in the Islamic scriptures." ⁴⁰² This, in turn, means that during the little time that remains prior to the apocalypse, ordinary human choices are infused with particularly high and urgent stakes: "knowledge of these apocalyptic signs is of great importance in order to be close to the Prophet's guidance, for aspirations of salvation, and joining the band of 'estranged ones who keep to their religion'—the ones acquainted with the truth" ⁴⁰³ This point, regarding the urgency of human choices, is also repeated in the epilogue, where he repeats his conclusion concerning apocalyptic imminence, emphasizing that human beings should now seize the opportunity to join the small band of righteous, devoted ones who will comprise the winning-side during the coming apocalypse. ⁴⁰⁴

Zarqawi, ISIS's direct predecessor, also subscribed to this doctrine of apocalyptic imminence, and his leadership over AQI meant that "[t]he languid apocalypticism of Osama Bin Laden and Ayman al-Zawahiri now had to contend with the urgent apocalypticism of . . . Zarqawi, the founder of al-Qaeda in Iraq, and his immediate successors" ⁴⁰⁵ In contrast to Suri, who explicitly stated his belief in apocalyptic imminence, Zarqawi's belief is primarily inferable from his tactics of urgency and expediency—though he did make several statements to that end. For instance, upon being appointed as the head of AQI in 2004, Zarqawi not only referenced an Islamic tradition stating that during the apocalyptic era, the Caliphate will be reestablished "according to the prophetic model" ⁴⁰⁶—but also expressed his hope that ISIS itself would, during the course of his own leadership, be the group to accomplish this End Times feat. ⁴⁰⁷ His belief in apocalyptic imminence is also

⁴⁰⁰ AL-SURI, *supra* note 228, at 1518.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 1602.

⁴⁰⁵ MCCANTS, *supra* note 24, at 146.

⁴⁰⁶ *Id.* at 12.

⁴⁰⁷ *Id.* at 102–03.

detectable in the various reprimands that he received from his al-Qaeda superiors, such as the July 2005 letter addressed to him by Zawahiri. The letter emphasized that not only was it still premature to declare an Islamic government, but that even after its future establishment, the believers must “defend it, and for every generation to hand over the banner to the generation after it, until the Hour of Resurrection.”⁴⁰⁸ In this statement, Zawahiri stressed to Zarqawi that the apocalyptic era (i.e., the “Hour of Resurrection”) was at least multiple “generations” away, rather than being contemporaneous with Zarqawi’s own tenure as AQI’s leader.

ISIS itself not only inherited this doctrine of apocalyptic imminence from the likes of Suri and Zarqawi, but also considerably amplified it. Zarqawi’s successor, Masri, who renamed AQI to ISI, was even more extreme in his belief in apocalyptic imminence, believing that the apocalyptic era would materialize within one year, and therefore pursued a strategy of urgency which eclipsed even that of Zarqawi.⁴⁰⁹ To this end, “Masri rushed to establish the State because he believed the Mahdi, the Muslim savior, would come within the year. To his thinking, the Caliphate needed to be in place to help the Mahdi fight the final battles of the apocalypse.”⁴¹⁰ Furthermore, Masri:

[O]rdered his men to build pulpits for the Mahdi to ascend in the Prophet’s mosque in Medina, the Umayyad Mosque in Damascus, and the Aqsa Mosque in Jerusalem. He also ordered his commanders in the field to conquer the whole of Iraq to prepare for the Mahdi’s coming and was convinced they would succeed in three months When those close to Masri criticized him for making strategic decisions on an apocalyptic timetable, Masri retorted, ‘The Mahdi will come any day.’⁴¹¹

This doctrine was even too extreme for some of ISI’s own supporters, such as its chief judge, Abu Sulayman who, after being fired by Masri, complained to al-Qaeda regarding ISI’s apocalyptic excesses.⁴¹²

Under ISIS’s more recent leadership, suggestions of apocalyptic imminence have thoroughly permeated propaganda materials. ISIS’s most recent Caliph, Abu Bakr al-Baghdadi, has invited Muslims throughout the world to “[c]ome to your

⁴⁰⁸ This tradition states that, “[f]irst there will be Prophethood . . . then Caliphate, on the Prophetic model . . . then harsh kingship . . . then tyrannical kingship . . . then Caliphate again, on the Prophetic model” See, e.g., M. NĀSIR A-DĪN ALBĀNĪ, 1 AL-SĪLSILAH AL-ŠAHIHAH (2004).

⁴⁰⁹ MCCANTS, *supra* note 24, at 32–33.

⁴¹⁰ *Id.* at 32.

⁴¹¹ *Id.*

⁴¹² *Id.* at 39–40.

state to raise its edifice. Come . . . for the Great [apocalyptic] Battles are about to transpire,” and has emphasized that “[w]e will remain, by the permission of God, until the arrival of the [apocalyptic] Hour and the last of us fight the [Antichrist].”⁴¹³ Recent official publications of ISIS also emphasize the imminent nature of the apocalypse, such as its claim to be “the army that will pass on the banner to the slave of Allah the Mahdi;”⁴¹⁴ direct references to the most famous of all Mahdi traditions;⁴¹⁵ its claim that its “banner” will be directly handed to Jesus Christ;⁴¹⁶ and its claim that it has lit the “spark” that will lead to the End Times.⁴¹⁷ Furthermore, ISIS’s English-language magazine, *Dabiq* (mentioned in Part I), is named after the village in which the apocalypse, according to certain Islamic prophecies, is prophesied to begin.⁴¹⁸ In ISIS’s own words:

[a]s for the name of the magazine, *then* it is taken from the area named Dabiq in the northern countryside of [Aleppo] in [Syria]. This place was mentioned in an [Islamic tradition] describing some of the events of . . . what is sometimes referred to as Armageddon in English. One of the greatest battles between the Muslims and the crusaders will take place near Dabiq.⁴¹⁹

Launched in 2014, each of the fourteen volumes of *Dabiq* issued to date has included express predictions of apocalyptic imminence.⁴²⁰

b. Association or Disassociation?

Among the three layers of the al-Qaeda—ISIS relationship, this doctrinal core has remained the most inscrutable to both the exogenous and endogenous-liberal standards. This is due to the fact that this doctrinal dispute is also the dimension that is least articulated and most implicit in the polemics of the two movements themselves, particularly in English-language sources. Indeed, rather than directly attacking one another’s apocalyptic doctrine, the criticisms exchanged between the two movements at this level have tended to be more oblique, perhaps due to the inherent esotericism of apocalyptic doctrine. There is, however, no doubt that al-Qaeda leadership has held “disdain for apocalypticism . . . Bin Laden and Zawahiri grew up in elite Sunni families, who sniffed at messianic speculation as unbecoming,

⁴¹³ *Id.* at 100, 106.

⁴¹⁴ ISIS, *Reflections on the Final Crusade*, 4 DABIQ 32, 35 (2014).

⁴¹⁵ See, e.g., ISIS, *Remaining and Expanding*, 5 DABIQ 40 (2014).

⁴¹⁶ ISIS, *This is the Promise of Allah*, AL-HAYAT MEDIA CENTER 8 (2014).

⁴¹⁷ This claim is repeated on the cover pages of every issue of the ISIS magazine, *Dabiq*. See, e.g., ISIS, 4 DABIQ 2 (2014), <http://www.ieproject.org/projects/dabiq4.pdf>.

⁴¹⁸ *Id.*

⁴¹⁹ ISIS, *Introduction*, 1 DABIQ 4, 4 (2014).

⁴²⁰ See generally MCCANTS, *supra* note 24.

a foolish pastime of the masses.”⁴²¹ Indeed, Zawahiri has described apocalyptic thinking as “very dangerous” and as a force that “corrupts policy and leadership.”⁴²² Other senior supporters of al-Qaeda, such as Abu Qatada, have, likewise denounced ISIS’s apocalyptic bent, prompting Abu Qatada to dismiss ISIS supporters as “simpletons,” and suggesting that “[ISIS’s Caliph] Baghdadi is like the Mahdi of Juhayman al-’Utaybi.”⁴²³ This accusation is particularly telling, for the Mahdi of Juhayman al-’Utaybi (to be mentioned further below) is generally recognized within modern Islamic thought to represent the worst type of apocalyptic aberration from Islam. ISIS dismisses Abu Qatada, however, as a “deviant liar.”⁴²⁴

Despite being overlooked by the exogenous and endogenous-liberal standards, this doctrinal dimension is, ironically, the dimension of greatest salience to the endogenous-conservative standard. Furthermore, the fact that this doctrinal dimension tends not to appear within the explicit polemics of the two movements is of little concern to the endogenous-conservative standard, which in any event adopts a posture of a *priori* skepticism towards express accusations of doctrinal deviation, presuming association by default, unless proven otherwise. The question at hand, then, is whether the apocalyptic clash between al-Qaeda and ISIS falls under any of the three exceptions to the default rule of ‘association despite doctrinal disagreement’?

i. The Political-Violence Exception

The political-violence exception is inapplicable to the apocalyptic dispute between al-Qaeda and ISIS for two simple reasons. First, the nature of this doctrinal dispute is not of the mundane, garden-variety type, but rather the truly irreconcilable variety, for it involves principles and tenets embraced by ISIS which are inherently threatening to the very existence of al-Qaeda (i.e., ‘hostile-doctrine’). Second, even if this doctrinal dispute were of the garden-variety type, there has, to date, been no systematic, targeted violence between the two movements on these doctrinal grounds. While it is conceivable that violence might ensue at a later point, this seems rather unlikely, given the fact that al-Qaeda and even ISIS both generally refrain from inflicting systematic violence on other Sunni Islamist movements that are even more doctrinally divergent (e.g., Muslim Brotherhood, Taliban, etc.).⁴²⁵

⁴²¹ MCCANTS, *supra* note 24, at 28.

⁴²² *Id.* at 41.

⁴²³ *Id.* at 128; see Abu Qatada: *Khilafat Da’ish Batila wa-l-Baghdadi ka ‘Mahdi’ Juhayman al-’Utaybi*, AL-WEEAM (July 2014), www.alweeam.com.sa.

⁴²⁴ *The Murtadd Brotherhood*, *supra* note 202, at 43.

⁴²⁵ See generally ROEL MEIJER, GLOBAL SALAFISM: ISLAM’S NEW RELIGIOUS MOVEMENT (2014); MAHER, *supra* note 185.

ii. The Hostile-Doctrine Exception

Apocalyptic doctrine is one of the areas involving tenets inherently antagonistic and existentially threatening to particular groups. According to both Sunni and Shi'ite orthodoxy, Islam represents the penultimate chapter of humanity's existence in the world and is to be succeeded only by the apocalyptic era, which in turn will be followed by end of the world.⁴²⁶ The apocalyptic era, more particularly, will be a period of violent tumult not only for the world generally, but also for Islam specifically—for during this era, most of the norms of Islam will be overturned by the Mahdi and Jesus Christ, as a chastisement for the Muslim majority which will have strayed from the true path laid out by Prophet Muhammad.⁴²⁷ This dismantling of the Islamic status quo will take various forms, including not only the disgracing of Islamic political and religious leaders, but also of the great majority of rank-and-file Muslims, for in the apocalyptic era they will be exposed as hypocrites—as Muslims merely in name rather than in faith.⁴²⁸ This massive apocalyptic purging of Islam will, however, carry a major upshot: the true Muslims, namely that small minority of “estranged ones” mentioned above, will achieve a righteous victory at the vanguard of the Mahdi and Jesus Christ.⁴²⁹ This appellation of the “estranged” thus signifies not so much the relationship of Muslims to the religiously-diverse world at large, but rather the antagonism between the Muslim minority and the Muslim majority. Apocalyptic doctrine, in short, presupposes violent tumult and disruption to the very core structure of Islam itself. As such, disputes in this doctrinal domain are imbued with considerably higher existential stakes than garden-variety disputes in most other doctrinal areas.⁴³⁰

But in their specific apocalyptic agreement, might al-Qaeda and ISIS remain associated as neutral parties who merely disagree on speculative points—or does their dispute actually pit them against one another as inflictor and subject of the

⁴²⁶ ABBAS AMANAT, APOCALYPTIC ISLAM AND IRANIAN SHI'ISM 20 (2009); COOK, STUDIES IN MUSLIM APOCALYPTIC, *supra* note 395, at 369–372; COOK, CONTEMPORARY MUSLIM APOCALYPTIC LITERATURE, *supra* note 395, at 84.

⁴²⁷ FILIU, *supra* note 396, at 3–6.

⁴²⁸ *Id.* at 4.

⁴²⁹ *Id.*

⁴³⁰ Of course, not all apocalyptic disagreements are equally weighty and divisive. For example, disagreement over minutia of the apocalyptic drama (such as the identification of the prophesied heroes and villains) are merely speculative in nature, for they tend not to threaten the existing status quo of worldly Islamic authority, let alone the status quo of the world in general. As such, disagreement over these tertiary apocalyptic matters can be tolerated, and the general rule of doctrinal diversity and coexistence applies. Yet, disagreement over many other apocalyptic variables is far more problematic.

hostility itself? As it turns out, the specific disagreement at hand—namely, apocalyptic imminence, and particularly the doctrine of imminence endorsed by ISIS—does indeed posit a direct existential threat to al-Qaeda. More particularly, in advocating for apocalyptic imminence, ISIS fancies itself as the “estranged” minority that will rise as the apocalyptic victor, while relegating al-Qaeda to the so-called Muslim majority which, along with the world at large, is doomed to suffer both spiritual and physical defeat in the impending apocalypse. This view of ISIS is expressed unequivocally in numerous sources. Turki bin Mubarak al-Bin’ali, for instance, in arguing for apocalyptic imminence, explains that within the global Islamic community, only a “minority” is taking action for the return of the prophetic Caliphate, yet “most of this minority” is deviant in such action, employing “blasphemous or illicit” means.⁴³¹ Therefore, it is only the “minority-of-the-minority” which has been taking the proper course of action, and these are, of course, the supporters of ISIS, the true catalysts and leaven of the world, which will comprise the “foundations of the foundation” of the apocalyptic Caliphate.⁴³² Elsewhere, ISIS equates this same group with the apocalyptic “strangers” that are mentioned in the prophecies.⁴³³ Furthermore, ISIS clearly excludes al-Qaeda from this elite minority of strangers, noting instead that “al-Qaeda today has ceased to be the base of jihad . . . [A]l-Qaeda now runs after the bandwagon of the majority and calls them [the Islamic community], and softens in their stance at the expense of religion”⁴³⁴

As it turns out, disputes over apocalyptic imminence are not only characteristic of the hostility between ISIS and al-Qaeda, but, in fact, represent a broader historic pattern wherein the Islamic status quo (or beneficiaries thereof) tends to advocate for a distant apocalypse, while the disenfranchised, or those that otherwise wish to overturn the status quo, advocate for apocalyptic imminence, fancying themselves as the “estranged” protagonists thereof.⁴³⁵ This pattern began in the earliest period of Islam, when in 685 AD, a mere 52 years after Prophet Muhammad’s death, an

⁴³¹ al-Bin’ali, *supra* note 368, at 3–4.

⁴³² *Id.* at 3–4, 17.

⁴³³ That ISIS considers itself to be these apocalyptic “strangers” is apparent from the numerous instances of its self-appellation. For instance, ISIS names one of its Twitter outlets, “The Strangers’ Media Foundation,” and titles one of its propaganda videos, “Strangers—Islamic State in Iraq and Sham—Pictures from the Land of the Great Apocalyptic Battles.” MCCANTS, *supra* note 24, at 102.

⁴³⁴ al-Bin’ali, *supra* note 368, at 73.

⁴³⁵ The reason for these two tendencies is obvious, for deflection of the apocalypse to the distant future is tantamount to maintenance of the existing status quo, while advocating for an imminent apocalypse strengthens claims that the existing Islamic order is defective, corrupt, and in need of elimination.

individual known as Mukhtar formed a movement to overthrow the Umayyad dynasty in Syria and Iraq, the leadership of which he attributed to the apocalyptic figure of the Mahdi.⁴³⁶ Although his attempt failed, the following century witnessed the successful overthrow of the Ummayyads through the Abbasid revolution, which similarly propelled itself through appeals to its followers that the apocalyptic era was nigh, and that the Abbasid's own clandestine leader was the promised Mahdi.⁴³⁷ Two centuries later, in the tenth century, the Abbasids lost their Egyptian territory due to the uprising of the Fatimids, who likewise claimed apocalyptic imminence, and to be led by the Mahdi.⁴³⁸ Still later, the twelfth century witnessed the uprising of the Almohads in Spain and North Africa—another movement led by a self-proclaimed Mahdi at the dawn of the apocalypse.⁴³⁹ In the thirteenth and fourteenth centuries, in the midst of the power vacuum which followed the sweeping Mongol invasions, claims of apocalyptic imminence began to mushroom among numerous Sufi-oriented, nomadic groups, each of which, in their efforts to conquer political rivals, claimed to represent the promised Mahdi and to be ushering in the apocalyptic era.⁴⁴⁰ Likewise, the Safavid conquerors of the fifteenth century claimed leadership by the Mahdi, and to be inaugurating the apocalypse.⁴⁴¹

In the contemporary era, the doctrine of apocalyptic imminence has remained at the ideological core of disgruntled and disenfranchised minority groups and their anti-status-quo agendas. The year 1881, for instance, witnessed the armed uprising of Muhammed Ahmed, the self-proclaimed Mahdi of Sudan, who represented the economically disenfranchised against the Turko-Egyptian rulers, and succeeded in conquering Khartoum.⁴⁴² In addition to revolting against the political authorities, he also rebelled against the Islamic religious authorities in numerous ways, such as abolishing the four schools of Sunni jurisprudence, declaring the invalidity of all Qur'anic exegesis, altering the verbal profession of faith, and altering the five pillars of the religion.⁴⁴³ Unsurprisingly, the political as well as religious authorities both rejected his claims and became bitter enemies.⁴⁴⁴ Likewise, 1889 witnessed the rise

⁴³⁶ See FILIU, *supra* note 396, at 3–6.

⁴³⁷ LAPIDUS, *supra* note 350, at 71–72. See also HODGSON, *supra* note 292, at 284.

⁴³⁸ LAPIDUS, *supra* note 350, at 188.

⁴³⁹ *Id.* at 295.

⁴⁴⁰ *Id.* at 184.

⁴⁴¹ *Id.* at 379.

⁴⁴² See, e.g., MURRAY FRADIN, *JIHAD: THE MAHDI REBELLION IN THE SUDAN* *preface*, 43 (2003); FERGUS NICOLL, *THE MAHDI OF SUDAN AND THE DEATH OF GENERAL GORDON* 74–75 (2005).

⁴⁴³ FRADIN, *supra* note 442, at 43. NICOLL, *supra* note 442, at 154.

⁴⁴⁴ See, e.g., FRADIN, *supra* note 442, at 43–44; HAIM SHAKED, *THE LIFE OF THE SUDANESE*

of Mirza Ghulam Ahmad in India, another self-proclaimed Mahdi, whose platform, while less violent, nonetheless was one of reforming the Islamic status quo, which he viewed as hopelessly corrupt.⁴⁴⁵ To this day, his followers throughout the world (the Ahmadiyya) face persecution within the Muslim world at large.⁴⁴⁶ Similarly, the 1930s in the United States witnessed the birth of the Nation of Islam as an expression of ideological and paramilitary resistance to the institutionalized oppression of the African American community—the doctrinal basis of which included the claim that the movement’s founder, Wallace Fard, was the awaited Mahdi and the return of Christ, and that his successor, Elijah Muhammad, was his Messenger.⁴⁴⁷ More recently, in 1979, Saudi Arabia witnessed the armed uprising of Juhayman al-Utaybi and his Mahdi-appointee, Muhammad al-Qahtani.⁴⁴⁸ On November 20 (the first day of the 15th Islamic century) they seized the Grand Mosque in Mecca, Islam’s holiest site, in an attempt to overthrow the Saudi monarchy as well as the Wahhabi religious scholars, all of which they viewed as hopelessly corrupt.⁴⁴⁹ Supported by close to five hundred armed rebels, Utaybi sustained a siege for over two weeks, during which nearly four hundred rebels, pilgrims, and military were killed, and over a thousand others were injured. After the Saudi government’s victory, Utaybi himself was publicly executed on January 9, 1980.⁴⁵⁰

The modern Shi’ite world has witnessed as many if not more revolutionary movements claiming apocalyptic imminence—of which Iran alone is a sufficient

MAHDI 73–74 (1978).

⁴⁴⁵ See, e.g., HAZRAT MIRZA GHULAM AHMAD OF QADIAN, *THE PHILOSOPHY OF TEACHINGS OF ISLAM* (Sir Muhammad Zafrulla Khan trans., 1989); HOWARD ARNOLD WALTER, *THE AHMADIYYA MOVEMENT* *preface* (2016), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015024409735;view=1up;seq=2>.

⁴⁴⁶ Khalil Yousuf, *Five More Ahmadi Muslims Murdered During October. No Arrests Made*, PRESS DESK (Jan. 2013), <https://www.alislam.org/press-release/Pakistan-Persecution-News-Jan-2013.pdf>.

⁴⁴⁷ See, e.g., MARTHA LEE, *THE NATION OF ISLAM: AN AMERICAN MILLENARIAN MOVEMENT* 19–25 (1996); ELIJAH MUHAMMAD, *HISTORY OF THE NATION OF ISLAM* 2–4 (1993); STEVEN TSOUKALAS & CARL F. ELLIS, JR., *THE NATION OF ISLAM: UNDERSTANDING THE BLACK MUSLIMS* 1–3, 13, 17, 19–20, 31, 42 (2001).

⁴⁴⁸ See also THOMAS HEGGHAMMER & STEPHANE LACROIX, *THE MECCAN REBELLION: THE STORY OF JUHAYMAN AL-’UTAYBI REVISITED* 18 (2011); YAROSLAV TROFIMOV, *THE SIEGE OF MECCA* 69 (2007).

⁴⁴⁹ HEGGHAMMER & LACROIX, *supra* note 448, at 18.

⁴⁵⁰ For an elaboration of the Juhaymani theory of apocalyptic radicalism, one might refer to the fifth of his open letters prior to his uprising titled, “Tribulations, the Mahdi, the Descent of Jesus, and the Signs of the Hour.” See also HEGGHAMMER & LACROIX, *supra* note 448, at 18–19; TROFIMOV, *supra* note 448, at 224–25, 239.

case in point.⁴⁵¹ The 1840s, for instance, witnessed the rise of the Babi and Baha'i faiths in Iran, both of which claimed the advent of the apocalypse and the messianic figures, calling for a complete overhaul of Islam, and announcing the advent of a new and progressive religious dispensation.⁴⁵² To this day, these religious minorities, despite their peaceful platforms, remain persecuted throughout the majority of the Muslim world.⁴⁵³ More recently, Iran witnessed the rise of the Hujjatiyya Society in 1954, in order to promote a platform of vigilance for the impending advent of the Mahdi.⁴⁵⁴ Although Hujjatiyya zeal lent important impetus to the popular anti-Shah movement, Khomeini ordered its dissolution in 1983, for after the success of the 1979 Islamic revolution the task of the newly-formed Republic was to consolidate the basis power, rather than to prepare for an imminent apocalyptic overhaul.⁴⁵⁵ However, claims of apocalyptic imminence have continued to enhance anti-establishment sentiment in Iran, both in popular culture, clerical circles, and even within the official ranks. Mahmoud Ahmadinejad, for instance, an outspoken advocate of apocalyptic imminence, was elected to presidency on a populist platform of dissatisfaction with the regime.⁴⁵⁶ Although his claims of apocalyptic imminence are too many to recount herein,⁴⁵⁷ it is sufficient to note that the general response to him

⁴⁵¹ Contemporary Shi'ite apocalyptic groups outside of Iran would include, for instance, the Sadrists as well as the Soldiers of Heaven in Iraq, and numerous others.

⁴⁵² See, e.g., AMANAT, *supra* note 426, at 54.

⁴⁵³ See, e.g., ABBAS AMANAT, RESURRECTION AND RENEWAL: THE MAKING OF THE BABI MOVEMENT IN IRAN, 1844-1850, 405, 411, 415 (2005); Moojan Momen, *Baha'i Schools in Iran*, in THE BAHAI'S OF IRAN: SOCIO-HISTORICAL STUDIES 94, 232-33, 271 (Dominic Parvez Brookshaw & Seena B.Fazel eds., 2012); Moojan Momen, *Preface*, in 1 STUDIES IN BABI AND BAHAI HISTORY vii (Moojan Momen ed., 1982).

⁴⁵⁴ AMANAT, *supra* note 426, at 68, 222.

⁴⁵⁵ *Id.* at 68, 212.

⁴⁵⁶ *Id.* at 238, 240.

⁴⁵⁷ While Ahmadinejad's claims regarding apocalyptic imminence are too many to recount herein, several are particularly noteworthy. These include his exchange with Khamenei during his swearing-in ceremony in 2005, in which he indicated his expectation that his tenure as president would be short for he would soon be handing power to the Mahdi. See KASRA NAJI, AHMADINEJAD: THE SECRET HISTORY OF IRAN'S RADICAL LEADER 92 (2008). Likewise, at a meeting of foreign ministers during that same year, he stated that the Mahdi was likely to appear within two years. Hussein Bastani, *Ahmadinejad's Belief in the Shiite Messiah?*, ROOZ 2500 (Feb. 28, 2008), <http://www.roozonline.com/english/opinion/opinion-article/archive/2008/february/28/article/ahmadinejads-belief-in-the-shiite-messiah.html>. And, in 2006, while in the city of Kirmanshaw, he said, "Let me enlighten all Christians . . . that in the not-distant future the Prophet Jesus will rise again alongside the Mahdi to put an end to injustice in the world." Mehr News Agency, December 19, 2006. Later, in 2008, he reportedly told seminarians in the city of Mashhad that "the endgame has started (harikati akhir). We should quickly wrap up Iran's

by the government status quo was censure and criticism.⁴⁵⁸ As a direct response to his apocalyptic views, by the latter years of his presidency, his decisions as president were being overturned, his doctrines were being openly criticized,⁴⁵⁹ and his affiliates were accused of “corrupting the sacred texts.”⁴⁶⁰

This brief historical survey serves to contextualize the apocalyptic dispute between al-Qaeda and ISIS, underscoring the fact that, unlike garden-variety disputes in most doctrinal areas, disputes concerning apocalyptic imminence typically defy the general rule of tolerance. Such disputes, at the very least, are indicative of hostility and existential threat. In cases where the claimants of imminence are successful (either due to power vacuums or other failures by the status quo), then the underlying apocalyptic dispute transcends mere hostility and polemics, and finds expression in political, social, and ideological revolution, where the winner takes all.

iii. The Apostasy Exception

While the hostile doctrine exception that was just reviewed constitutes sufficient evidence in itself against association between al-Qaeda and ISIS, the third remaining exception, that of apostasy, should also be considered in order to complete the endogenous-conservative analysis. As noted earlier, duly-rendered verdicts of apostasy, due to their high threshold requirements, are indicative of the most egregious forms of disagreement possible among Islamic groups and can therefore be regarded as *prima facie* evidence against any possible association between the accuser and the accused. Does the apocalyptic disagreement between al-Qaeda and ISIS meet this exception?

domestic problems so that we can commence with the global responsibilities of the [Mahdi's] Revolution.” See AMANAT, *supra* note 426, at 244. Similarly, in 2008, his Chief of Staff announced that, “Ahmadinejad’s era is the period of [the Mahdi’s] Lesser Advent (zuhur-i-sughra).” *Id.* at 243.

⁴⁵⁸ AMANAT, *supra* note 426, at 246.

⁴⁵⁹ For example, Ali Larijani, the parliamentary speaker, accused Ahmadinejad of “extremism and delusion” in 2011 due to his apocalyptic views. Ryan Mauro, *Power Struggle in Iran*, FRONTPAGEMAG (May 18, 2011), <http://www.frontpagemag.com/fpm/93670/power-struggle-iran-ryan-mauro>.

⁴⁶⁰ See, e.g., *Specialized Mahdist Center* of the Official Qom Seminary, IRANIAN GOV’T CONF. (Apr. 3, 2011), <https://www.youtube.com/watch?v=uquH8GxNvB8> (the Iranian government’s conference on April 3, 2011, organized by the “Specialized Mahdist Center” of the Official Qom Seminary, in which criticisms were made of the Ahmadinejad-sponsored documentary of March 2011, titled “The [Mahdi’s] Advent is Very Near.” See also Jamsheed Choksy, *Why Is Iran Championing Messianism to the Arab Masses?*, E-INTERNATIONALRELATIONS (Apr. 19, 2011), www.e-ir.info/2011/04/19/why-is-iran-championing-messianism-to-the-arab-masses/#_cdn17.

In order to answer this question, it is useful to sub-divide the numerous advocates of apocalyptic imminence, summarized in the historical survey directly above, into two categories. The first group comprises those individuals, groups, and movements that advance the claim that the apocalypse is imminent, and that the existing Islamic order is therefore deficient and will soon be overturned by the messianic protagonists (i.e. the Mahdi and Jesus Christ). The apocalyptic doctrine of ISIS, in its present formulation, falls within this category, along with those of the Abbasids, the Hujjatiyya, and numerous others.⁴⁶¹ These claims of apocalyptic imminence, however hostile they may be towards the Islamic status quo, nonetheless fail to trigger the threshold requirements of apostasy. This is due to the fact that the concept of apocalypse per se is explicitly stated within Islamic scriptures, and the question of imminence, while certainly a controversial divisive topic, is left ambiguous within these scriptures.⁴⁶² As such, claims of apocalyptic imminence amount to neither an explicit nor implicit rejection of Islam, and therefore fail to trigger the apostasy rules.

A slippery slope, however, exists by which members of this first group can easily modify their claims, and thereby be counted among the second group—namely, those who allege that the world has in fact *already* entered the apocalyptic era. Typically, movements that adopt this position rally around leaders who directly claim (or are claimed by their followers) to be the awaited Mahdi or Jesus Christ in the flesh.⁴⁶³ In executing their apocalyptic duties, these messianic leaders can easily trigger the apostasy rules by making verbal or written pronouncements that expressly disavow Islam or abrogate certain portions of the Islamic scriptures.⁴⁶⁴ Even if these overt actions are not committed, apostasy rules can still be triggered if these groups advance doctrines that implicitly reject the fundamental tenets of Islam. For example, the messianic leaders of these movements typically produce a corpus of teachings, writings, and claims which, in the aggregate, can be cited as an implicit rejection of doctrines such as the finality of the Qur'anic revelation or the status of Muhammad as the last Prophet.⁴⁶⁵ Such verdicts of apostasy have, indeed, been rendered by the Islamic orthodoxy against numerous movements listed in the survey above, including the Fatimids, the Safavids, the Sudanese Mahdi, the Nation of Islam, Juhayman al-'Utaybi, the Ahmadiyya, the Baha'is, and numerous others.⁴⁶⁶ While ISIS's doctrine of apocalyptic imminence does not fall into this category, it

⁴⁶¹ FILIU, *supra* note 396, at 3-6.

⁴⁶² *See id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

is not unlikely that it may quickly morph to take this form, in which case the apostasy exception would provide further evidence against association between al-Qaeda and ISIS.

C. Conclusions Regarding the Legality of Operation Inherent Resolve

The legality of Operation Inherent Resolve turns on whether ISIS and al-Qaeda are “associated forces,” but in making this determination, the two standards that prevail in current legal and policy discourse are both unreliable. Both standards are fraught with negative—albeit opposing—policy implications: the exogenous standard is inherently expedient, and therefore enables unilateralism when employed by the executive branch, while the endogenous-liberal standard permits the movements to concoct ruses that can significantly burden the legislative branch. These negative policy implications derive, in turn, from the fact that both standards are empirically weak. The exogenous standard grounds itself in concepts that are external to the actual movements and is thereby able to conveniently overlook salient facts regarding the movements; it can cherry-pick superficial details that fit a predetermined and possibly shifting policy position. The endogenous-liberal standard, while laudably attempting to heed the reality of the movements themselves, lacks the conceptual nuance needed to vet and distinguish facts from rhetoric, and therefore has no choice but to accept the claims of the movements at face value. This is particularly problematic with Salafi-jihadi movements, which are infamous for their hyperbolic rhetoric.

Given these deficiencies, this Article has suggested an alternative standard for determining association—namely, the general (i.e., non-Salafi-jihadi) Islamic norms governing doctrinal disputes. Because this standard derives from the Islamic tradition, it is endogenous, thereby avoiding the deficiencies of the exogenous standard. Furthermore, it is inherently conservative, avoiding the excesses of the endogenous-liberal standard through two mechanisms. First, its focus on matters of doctrine forces analysis to penetrate beyond the outer political layer of the al-Qaeda–ISIS dispute, and indeed even beyond the middle layer of tactical disagreement, until the doctrinal core of the dispute is identified, which, in the case at hand, concerns the question of apocalyptic imminence. Secondly, in assessing doctrinal disagreements, the endogenous-conservative standard presumes association by default, unless one or more of the three exceptions to association is met. In the case of the al-Qaeda–ISIS dispute over apocalyptic imminence, it has been found that the “hostile doctrine” exception is indeed met, and that the “apostasy” exception is likely to be met in the future based upon historical patterns of other movements. These findings lead to the following overall conclusion: although the political and tactical layers of the

al-Qaeda–ISIS dispute are dismissible for being inconclusive, the inner core of apocalyptic disagreement constitutes evidence against “association” between the two movements. This conclusion confirms that the illegality of Operation Inherent Resolve is due to the failure of the President to obtain fresh congressional authority, as required by the War Powers Act.

III. THE ISIS FUTURE: ULTIMATE AIMS AND THE PROBLEM OF UTOPIA VS. DYSTOPIA

While Part I of this Article exposed ISIS’s *current* governance practices across various domains, Part III asks what are the movement’s *ultimate* aims in these same areas, and what are the consequences for world order if ISIS were to achieve these aims? These questions have remained obscure within legal and policy discourse for several reasons. First, inquiries into the ultimate objectives and threats of extremist movements are naturally less pressing than inquiries into their immediate objectives and threats. Second, prior to the present author’s recently completed monograph,⁴⁶⁷ ISIS’s theory of the “final world order,” and its differences from that of other Islamic movements, remained unaccounted for within the field of Middle Eastern and Islamic Studies.⁴⁶⁸ Third, and as a consequence of the first two reasons, the ISIS Future is typically assumed to be the same as the future objectives of other Islamist movements that exhibit similar traits and behaviors in their immediate and near-term objectives.

Part III remedies this problem by exposing ISIS’s theory of the final world order (the ISIS Future) that will be established in the impending apocalyptic era by the Islamic messiah, known as the “Mahdi,” along with Jesus Christ (as well as by ISIS itself, as the “estranged” champions of these messianic figures).⁴⁶⁹ This topic, it should be noted, has been treated comprehensively in the present author’s separate monograph, where it has been shown that ISIS, compared to the broad spectrum of both Sunni and Shi’ite movements, posits an especially regressive vision of the future.⁴⁷⁰ For purposes of this Article, however, the ISIS theory of final world order will be compared, in summary form, to that of only one other contemporary Islamist movement: the Sadrists.⁴⁷¹ The Sadrists are chosen because they are superficially

⁴⁶⁷ Khadem, Dissertation, *supra* note 11.

⁴⁶⁸ *Id.* at 4–8.

⁴⁶⁹ See *supra*, Part II, Section B(3).

⁴⁷⁰ Khadem, Dissertation, *supra* note 11, at 54–55.

⁴⁷¹ The Sadrists are best known for their current “firebrand” leader, Muqtada al-Sadr. See generally PATRICK COCKBURN, MUQTADA: MUQTADA AL-SADR, THE SHIA REVIVAL, AND THE STRUGGLE FOR IRAQ 199–204 (2008).

similar to ISIS in several respects. First, both are non-state, Islamist insurgencies that have generally employed violent tactics against established authorities.⁴⁷² Second, both operate in the same general geographic heartland: ISIS in both Iraq and Syria, and the Sadrists in Iraq.⁴⁷³ Third, unlike many Islamic movements, both ISIS and the Sadrists believe that the apocalyptic era is imminent rather than distant.⁴⁷⁴ Despite these and other similarities, it is shown below that the ISIS vision of the future is far more dystopian and existentially threatening than that of the Sadrists. This difference should serve to caution law and policy makers against facile conflation of Islamic movements that are similar in their immediate and near-term behaviors but which have radically different end goals.

A. *Axiomatic Foundations of the Final World Order*

In comparing ISIS and the Sadrists, the primary matter at stake is the degree to which their theories are progressive or regressive. For both movements, this question of progress versus regress turns on assumptions that are made concerning two underlying variables: modality and temporality. The variable of modality, on the one hand, concerns whether the mode or form of the final world order will be retrospective, reverting to the archaic Islamic past, or forward-looking, surpassing previous Islamic history and reaching novel and unprecedented heights.⁴⁷⁵ The variable of temporality, on the other hand, concerns how long the final world order will last: merely a few short years, several generations, or something much longer?

1. *Modality*

ISIS, on the one hand, presumes that all of the primary structures of the final world order will revert to the modality of the 7th century polity of Prophet Mu-

⁴⁷² *Id.*; see also Ranj Alaaldin, *Could Muqtada al-Sadr be the Best Hope for Iraq and the Region*, BROOKINGS INST. (Aug. 21, 2017), <http://www.brookings.edu/blog/2017/08/21/could-muqtada-al-sadr-be-the-best-hope-for-iraq-and-the-region>.

⁴⁷³ COCKBURN, *supra* note 471, at 201–04.

⁴⁷⁴ *Id.* at 102–03; see also Khadem, Dissertation, *supra* note 11, at 42–50.

⁴⁷⁵ To this end, some Islamic traditions suggest the former concept, such as the Sunni tradition stating that “[f]irst there will be Prophethood . . . then Caliphate, on the Prophetic model. . . then harsh kingship . . . then tyrannical kingship . . . then Caliphate again, on the Prophetic model. . .” See e.g., M. Nāṣir a-Dīn Albānī, 1 *al-Silsilah al-ṣaḥīḥah* (2004) at Vol. 1, no. 5. Other Islamic traditions, on the other hand, suggest the latter concept, such as the Shi’ite tradition which states that “Our government will be the final government; all other rulers will already have ruled before us; thus, when they witness our method of governance, they will be unable to claim: ‘if only we had been given the opportunity to rule, we, too, would have ruled in this manner!’” See, e.g., M. Bāqir Majlisī, *Biḥār al-anwār* (2007) at vol. 52, p. 244.

hammad, while certain secondary and tertiary features of the final order will be upgraded, thereby differing from the Prophet's archaic polity, as suggested explicitly in the Islamic traditions.⁴⁷⁶ That the primary structures will revert to that of the past is evident in various statements of ISIS, such as the following by the first ISIS leader, Masri, wherein he dispels misconceptions that the movement's ultimate goal is to resurrect the extravagant and relatively progressive politics of later Islamic history:

Some of us incorrectly believe that the concept of government that ought to be established . . . is that of [the ninth century Abbasid Caliph] Harun al-Rashid, who exhorted the clouds in the sky, scooped up gold as if it were water, and commanded armies so extensive that they stretched continuously from Baghdad to his enemies.⁴⁷⁷

Rather, Masri clarified, "we must orient ourselves towards the [7th century] Medinan polity of the Prophet in order to remain attentive . . . to rearing up the Prophetic government."⁴⁷⁸

The Sadrists, on the other hand, presume that the final world order will be unprecedented and will therefore eclipse that of the Prophet's polity, for it will be

utopian, loftier than the current reality on all levels, whether relative to the [Prophet's] era . . . or to the era prior to the Mahdi's advent generally, and . . . [it will be] new to the minds and unknown by most of the people—nay by all of those who live in the era prior to the Mahdi's advent.⁴⁷⁹

This modality of progress will encompass all the domains of the final world order—and is described varyingly by the Sadrists as "the new divine plan for humanity,"⁴⁸⁰ a "new tradition . . . containing new laws, new concepts, and a new profound level of understanding, which the Mahdi will announce and through which all of humanity will advance,"⁴⁸¹ as well a "new political authority . . . that is unprecedented, absent even in the Prophet's era . . . the Mahdi's government will be . . . unlike any other human government in world history."⁴⁸²

⁴⁷⁶ Khadem, Dissertation, *supra* note 11, at 206–07. The one exception is in the domain of law and legal structure, in which there will be virtually no upgrade, as explained further below.

⁴⁷⁷ DN, *supra* note 88, at 2; *see also* MCCANTS, *supra* note 24, at 134.

⁴⁷⁸ DN, *supra* note 88, at 2. Note that a corollary to this modal assumption is the conception of the Mahdi and Christ as having lesser authority than the Prophet Muhammad. Khadem, Dissertation, *supra* note 11, at 31.

⁴⁷⁹ III MUHAMMAD SĀDIQ, SĀDIQ AL-SADR, SADR, MAWSŪ'AT AL-IMĀM AL-MAHDĪ, TĀRĪKH MĀ BA'D AL-UHŪR 105 (Beirut, Dar al-ta'aruf al-ma bū'āt 1978) [hereinafter SADR].

⁴⁸⁰ *Id.* at 454–55.

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 450–51.

2. *Temporality*

ISIS presumes that once the final world order is established, it will last for less than a single decade, after which humanity and the world will face the universal destruction of Judgment Day.⁴⁸³ More particularly, the Mahdi, who will inaugurate the final world order, is understood to be the last of the twelve just Caliphs prophesied to rule prior to the end of the world.⁴⁸⁴ To this end, ISIS connects the canonical Sunni tradition regarding the final government⁴⁸⁵ to a separate tradition regarding these twelve Caliphs—noting that among these twelve, “some will appear in the beginning of Islam, whereas others will appear at the end of Islam.”⁴⁸⁶ Indeed:

the promised, Prophetic Caliphate . . . will comprise twelve just Caliphs . . . but they will not come in succession, but rather some will come in the early period [sadr] of Islam—and it said that these will be five, six, or seven—then the remainder will come, paving the way for the Mahdi.⁴⁸⁷

Therefore, the final world order, which will by definition be inaugurated by the Mahdi, will also only survive through the reign of the Mahdi, who is the last of all twelve Caliphs destined to rule before the final end.

The Sadrists, on the other hand, though agreeing with ISIS that the Mahdi will inaugurate the final world order and will live for only a handful of years,⁴⁸⁸ nonetheless presume that the final world order itself will outlive the Mahdi.⁴⁸⁹ Indeed, to the Sadrists, the advent of the Mahdi generally, and inauguration of the final world order specifically, mark the advent of an entirely new era in the history of humanity—one that will last for not only a “millennium,” but indeed for many thousands of years.⁴⁹⁰ This temporal assumption is necessary for two reasons. The first concerns the purpose for which God created humanity, which is “to bring about perfect worship.”⁴⁹¹ Perfect worship has multiple levels of which the inauguration of the final world order is

⁴⁸³ ISIS, *The Islamic State Before al-Malhamah. Part 4: Hijrah to Sham is From the Millah of Ibrahim*, 3 DABIQ 5, 10 (2014), <http://www.ieproject.org/projects/dabiq3.pdf> (noting that, “This pleasant breeze takes the souls of the believers everywhere on the earth: [the] Hijāz, Iraq, Yemen, [Syria], and so on. It will be sent forth a number of years after the demise of the [Antichrist] and the passing away of the [Messiah, Jesus] . . .”).

⁴⁸⁴ Khadem, Dissertation, *supra* note 11, at 4.

⁴⁸⁵ *Id.* at 32.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ SADR, *supra* note 479, at 613–26 (see chapter titled, “The End of the Mahdi’s Life”).

⁴⁸⁹ Khadem, Dissertation, *supra* note 11, at 48.

⁴⁹⁰ *Id.* at 47.

⁴⁹¹ *Id.* at 48.

merely [the] beginning . . . while the remainder of [these meanings] are [also] attainable by humanity, but are traversable [only] through a longer period of time . . . In short, the establishment of the world government does not mean realization of the ultimate aim of creating humanity . . . there must rather be much more [time] for humanity in order to reach this ultimate goal.⁴⁹²

The second reason concerns proportionality, for

[t]he time-period [leading to] the Promised Day [of the final world order] comprises the entirety of humanity's history, from its inception until the [future] establishment of [the final world order], which will amount to not less than several thousands of years, if not more . . . and this time period will have encompassed millions of incidences of human suffering, pain, and sacrifices . . . So is it reasonable for the preparatory stage to continue thousands of years, but then for the fruit to last merely 9 years or less, as traditional thought on this matter claims??? [sic] This is most unlikely from the perspective of reason! It would, in all obviousness, be tantamount to employing the long-protracted generations of humanity for the purpose of bringing about the happiness of only one generation, or of only half a generation! This is repugnant to the rational mind, and thus impossible.⁴⁹³

B. *Basic Structures of the Final World Order*

1. *Political Structure*

Consistent with its modal and temporal assumptions, ISIS presumes that the political structure of the final order will, in its primary dimensions, replicate that of the Prophet's polity.⁴⁹⁴ To a large extent, this reduces to the same political structure that ISIS currently has. As outlined in Part I of this Article, this current structure is characterized by a rejection of secular political forms (e.g., democracy, socialism, etc.), and a minimalist approach to administration comprising nine basic functions: judicial and arbitral apparatus, moral police, a retributive body for implementing punishments, a military, a public treasury (responsible for gathering taxes, war-booty, charity, and other resources), an institution responsible for safeguarding the needy and the hapless, as well as further, non-specified specialty areas run by appointed experts.⁴⁹⁵ Certain secondary features of the final political structure, however, will be upgraded vis-à-vis ISIS's current structure, let alone that of the Prophet's polity. First, its jurisdiction will be global rather than confined to ISIS's

⁴⁹² *Id.*

⁴⁹³ *Id.* at 49.

⁴⁹⁴ *Id.* at 51.

⁴⁹⁵ *Id.* at 54–58.

current territories (and within this jurisdiction, Westphalian nation-state borders will of course be non-existent, as explained in Part I).⁴⁹⁶ Second, the final polity will be distinguished by global peace and security, which marks a stark contrast to the violence characterizing ISIS's current interactions with the world, and an even greater contrast to the "constant insecurity" that characterized the Prophet's seventh century polity.⁴⁹⁷ Third, while the head of state of the seventh century polity (i.e., the Prophet), as well as that of ISIS's current polity (i.e., Abu Bakr Baghdadi) both had, or will have, political successors, in the final polity the head of state (i.e., the Mahdi) will have no successor, for the end of his rule is consonant with Judgment Day and the end of the world, as noted above.⁴⁹⁸ Fourth, the Mahdi (as well as ISIS's current caliph) will merely be an executor of the law, whereas the Prophet combined the executive, legislative, and judicial functions.⁴⁹⁹

At first, the Sadrist conception of final political form appears similar to that of ISIS, for it rejects all Western and secular notions, including conventional democracy, nationalism, socialism, multi-party systems, as well as the institutions of the

⁴⁹⁶ *Id.* at 59.

⁴⁹⁷ *Id.* at 61; see also AL-MASRI, *supra* note 88, at 4 (ISIS elaborates on this by contrasting the Prophet's polity to that of the final polity. As to the former, "the life of the honorable Companions in the Prophetic government was a life of constant fear, apprehension, expectation of ambush, and vigilance—particularly at the stage of its initial establishment."); see also ISIS, *Islam is the Religion of the Sword Not Pacifism*, 7 DABIQ 20, 23–24 (2015), <https://clarionproject.org/docs/islamic-state-dabiq-magazine-issue-7-from-hypocrisy-to-apostasy.pdf>. (In contrast, the final polity, specifically after the second coming of Jesus Christ, will be distinguished by universal peace and tranquility: "It is clear then that salām (peace) is not the basis of the word Islam, although it shares the same consonant root (s-l-m) and is one of the outcomes of the religion's sword, as the sword will continue to be drawn, raised, and swung until 'Īsā . . . kills the Dajjāl (the Antichrist) and abolishes the jizyah. Thereafter, kufr and its tyranny will be destroyed; Islam and its justice will prevail on the entire Earth." Further elaborating on this peace of the final world order, ISIS quotes from various traditions, including one which states that "There will be no rivalries, no envy, no hatred, to the point that a man will pass by a lion yet it won't harm him, and step on a snake yet it won't harm him." *Id.* at 24. Likewise, ISIS cites another tradition which states that "the venom of every venomous creature will be removed, to the point that a newborn boy will place his hand in the mouth of a snake and it will not harm him. A newborn girl will make a lion flee and it will not harm her. The wolf will be amongst sheep like their guard dog. The Earth will be filled with peace just as a jar is filled with water. The word will be one—no one will be worshipped but Allah. And war will lay down its burdens," and yet a

third tradition which states that "[t]hereafter, swords will rest from war only to be used as sickles." *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ Khadem, Dissertation, *supra* note 11, at 62.

United Nations and the underlying *modus operandi* of modern nation-states.⁵⁰⁰ But, consistent with its modal assumption, the Sadrist movement departs from the ISIS account by also rejecting all political forms known even to Islamic history, including that of the Prophet's polity.⁵⁰¹ Instead, the political form of the final world order will have the following features: (i) organization as a federation of 120-200 regions, each of which will be directly ruled by a High Ruler and a High Judge;⁵⁰² (ii) a central leadership which holds not only executive but also legislative and judicial powers, and which will first be exercised by the Mahdi, and thereafter by his many successors;⁵⁰³ and (iii) government administration by way of modern bureaucratic methods and institutions.⁵⁰⁴ While these features comprise the foundation of the final political structure, the superstructure will change throughout the succession of three phases within the final order's long temporal arc. The first two stages (roughly 20 years and 720 years, respectively) will be eras of autocracy, while the third stage (lasting much longer than the first two) will resemble a democracy.⁵⁰⁵ The succession of these stages will also witness changes in administrative features, such as the gradual dissolution of the army, police, and prisons.⁵⁰⁶

2. *Legal Structure*

According to ISIS, legal structure, among the four domains of the final order, is the one that will receive the least upgrade vis-à-vis ISIS's current practices, let alone that of the Prophet's polity.⁵⁰⁷ This is because the Sunni traditions, while explicitly describing the upgraded features of the other three domains within the final order, are virtually silent when it comes to legal structure.⁵⁰⁸ This legal conservatism of the traditions is further reflected in ISIS's conception of the Mahdi and Christ as merely being executors of existing Islamic law, rather than as new legislators.⁵⁰⁹ It is also reflected in ISIS's primary criticism of the Shi'ite concept of the Mahdi in that he will change the traditional structure of Islamic law.⁵¹⁰ As such, ISIS's theory of the final legal system is essentially the same as its seventh century approach to the

⁵⁰⁰ *Id.* at 109.

⁵⁰¹ *Id.*

⁵⁰² *Id.* at 110.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at 112.

⁵⁰⁸ *Id.* at 249.

⁵⁰⁹ *Id.* at 113.

⁵¹⁰ *Id.* at 117.

law. As noted in Part I of this Article, the essential feature thereof is a rejection of modern conceptions of positive law in its various forms, as well as the associated concepts of rule-of-law, judicial independence, and so forth.⁵¹¹ Instead, its sources of law will be the Qur'an and Sunnah, while the Caliph (i.e., the Mahdi) and the judges he appoints will be mere executors and enforcers of the law.⁵¹² As for specific laws and policies, the rejection of positive law grounds a jurisprudence of minimalism. On the one hand, there is no objection to enumerating or publishing explicit legal provisions within the Qur'an, such as the fixed punishments, *qua* legislation. On the other hand, there are practicalities of modern life not mentioned in the scriptural sources, and not experienced within the Prophet's polity, giving rise to numerous rules and regulations (or *de facto* laws) covering all of the standard and mundane domains of legislation that a government must concern itself with, and even a *de facto* constitution, resembling the Prophet's own Medina Charter.⁵¹³ Finally, it should be noted that the restriction of the final Caliph (i.e., the Mahdi) as well as ISIS's current Caliph to being mere executors of the law is a stark contrast to the Prophet, who combined the executive, legislative, and judicial functions.⁵¹⁴

The Sadrist theory of the final legal system begins with a broad historical critique of Islamic as well as non-Islamic legal systems prior to the final world order, and, in doing so, notes not only their general weakness, but also their various strengths.⁵¹⁵ The final legal system, in contrast, will preserve these strengths and build upon them with a new jurisprudence that will replace conventional Islamic jurisprudence; it will create a new form of judicial procedure, a new method for addressing conflicts of laws, and a re-defined role for jurists.⁵¹⁶ In addition, the final legal system will promote new public policies and explicit positive laws across numerous domains, ranging from social relations to education, crimes, transactions, public health, and religious practice.⁵¹⁷ The Sadrists' own summary of the six most essential features of the final legal system is as follows: (i) implementation of the true laws that were already announced before the final order; (ii) incorporation of new understandings resulting from the advancement of Islamic thought; (iii) exposing laws and concepts that had been lost over the ages; (iv) implementing laws and concepts that are fundamentally new and unprecedented; (v) establishment of detailed

⁵¹¹ *Id.* at 112.

⁵¹² *Id.* at 112–13.

⁵¹³ *Id.* at 115.

⁵¹⁴ *Id.* at 107.

⁵¹⁵ *Id.* at 133.

⁵¹⁶ *Id.* at 138.

⁵¹⁷ *Id.* at 122.

regulatory structures implemented by the Mahdi; and (vi) general rules specifically applicable to the rulers.⁵¹⁸

3. *Economic Structure*

As with the other domains of the final order, the final economy, according to ISIS, will in its primary structure revert to that of the Prophet's 7th century polity.⁵¹⁹ Many of these economic features already characterize ISIS's current economic model, as outlined in Part I of this Article.⁵²⁰ These include a self-perceived ethos of cooperation and philanthropy as well as basic transactional norms, including: the use of gold and silver currencies,⁵²¹ prohibitions on unjust enrichment ("riba"), prohibitions on transactions involving excessive uncertainty ("gharār"), prohibitions on certain discrete goods and services (e.g., alcohol, pork, gambling, etc.), and the government's collection and redistribution of wealth through various levies (e.g., zakāt, kharāj, ghanīma, khums, fay', etc.).⁵²² Certain secondary features of the final economy, however, will be upgraded in the final world order. First, the final economy will be one of unbounded prosperity—a stark contrast to the dire poverty of the Prophet's polity, as well as the limited prosperity of the current ISIS polity.⁵²³ This unbounded prosperity, according to ISIS, will derive in part from resources and technologies that were simply inaccessible or undiscovered in the Prophet's polity (e.g., oil, medical sciences, etc.).⁵²⁴ But the primary source of this unbounded prosperity will be miraculous divine bounties, particularly in the agricultural sector, as indicated in traditions quoted by ISIS: "Then, it will be said to the earth, let your fruits grow and yield your blessings," and "[t]he sky will be permitted to pour its rain and the land to yield its plants, so even if you were to plant a seed on a stone, it would spring."⁵²⁵ This implies that human planning and innovation will play a minimal role within the final economy.

The Sadrists envision a final economy in which universal prosperity will not be achieved immediately, but rather will be realized over the long temporal arc of the final world order, such that poverty will exist in various regions at the outset, but will eventually be eliminated.⁵²⁶ The initial sources of this prosperity will derive from

⁵¹⁸ *Id.* at 152.

⁵¹⁹ *Id.* at 158.

⁵²⁰ *See supra* Part I.

⁵²¹ Khadem, Dissertation, *supra* note 11, at 159–60.

⁵²² *Id.*

⁵²³ *Id.* at 161–62.

⁵²⁴ *Id.* at 162.

⁵²⁵ *Id.*

⁵²⁶ *Id.* at 184–85, 209.

agriculture and mining—but, unlike ISIS, the Sadrists attribute the flourishing of these sectors to practical rather than miraculous causes (i.e., through ordinary human planning and labor).⁵²⁷ Surplus from agriculture and mining will be invested within science, technology, and other industries, particularly those involving communications, transportation, and information technology.⁵²⁸ More importantly, all of this prosperity and advancement will occur within the overarching framework of a new economic system.⁵²⁹ To this end, the Sadrists echo ISIS in rejecting secular systems such as capitalism and socialism—but given their modal assumptions, they also explicitly reject the possibility of returning to the Prophet’s economic system, which is viewed by the Sadrists as merely a “transitional” economic model “for training humanity towards the era that would succeed it.”⁵³⁰ The four primary features of the final economy will be: (i) government dominion over all sectors;⁵³¹ (ii) government guarantee of universal social welfare by providing universal employment and financial assistance;⁵³² (iii) limited private ownership;⁵³³ and (iv) morality in transactions.⁵³⁴ While each of these elements may sound commonplace, the Sadrists interpret them in novel ways. For example, the theory of limited private ownership is temporal in nature, whereby the final order will eventually reach a condition in which private ownership (and its derivative concepts, such as theft, sales, guarantees, etc.) will cease to have meaning. Likewise, morality in transactions means the introduction of unprecedented norms, such as a new law of trusts and a redefinition of unjust enrichment whereby even trade profit will become illicit.⁵³⁵

4. *Social Structure*

As with other aspects of the final world order, ISIS benchmarks the final society according to the Prophet’s polity. Most of these features are already replicated in ISIS’s current social structure. As noted in Part I, this is tantamount to a descending social hierarchy along the following lines: (i) male Muslims, who constitute full citizens, regardless of ethnic or linguistic differences; (ii) female Muslims, who constitute full citizens, regardless of ethnic or linguistic differences; (iii) religious minorities from the recognized Abrahamic line of religions, who, through paying the

⁵²⁷ *Id.* at 210.

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ *Id.*

⁵³¹ *Id.*

⁵³² *Id.*

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ *Id.*

religious poll-tax, have standing as second-class citizens; (iv) religious minorities from the non-Abrahamic line (e.g., Yazidis, according to ISIS) who can only maintain their religious identity if subjugated as slaves; (v) apostates (i.e., the many who ISIS perceives to have abandoned Islam) who must either convert back to Islam before being caught or face death. While this hierarchy characterizes the primary structure of the final society, it may be modified in certain secondary or tertiary ways.⁵³⁶ ISIS suggests, for instance, that in the final order, Jesus Christ will abolish the religious poll-tax, which, according to ISIS, means that the third social caste (i.e., second-class citizens, comprising non-Muslims who belong to Abrahamic religions) will cease to exist.⁵³⁷ ISIS is unclear, however, as to whether the fourth caste—i.e., slaves—will endure in the final society.⁵³⁸ This seems likely, however, given ISIS's suggestions that slavery is one of the "signs" of the final world order, as noted in the ISIS article, "*The Revival of Slavery Before the [Apocalyptic] Hour*."⁵³⁹ In short, while ISIS's current social structure comprises five castes (thereby replicating the ISIS conception of the Prophet's society), its theory of the final society is one that comprises only Muslim men and Muslim women, and possibly (non-Muslim) slaves.

The hallmark of the Sadrists' theory of the final social order is that individuals and the collective will attain the quality of "infallibility."⁵⁴⁰ During his personal tenure, the Mahdi will eliminate a number of social and structural injustices that marred humanity's pre-Mahdi history, thereby rendering even the initial society of the final world order far more advanced than the society just prior to the Mahdi's advent.⁵⁴¹ Nonetheless, much more time must pass after the Mahdi advent until individuals and the collective reach the stage of infallibility. The process will span three long temporal phases of the final world order: (i) fallibility in the majority of society; (ii) infallibility in the majority of society; and finally (iii) infallibility in the entirety of society.⁵⁴² These three stages will be traversed due to a government-implemented curriculum of "testing," the highest level of which produces unity of thought.⁵⁴³

Social diversity will undergo natural changes over these three temporal phases.

⁵³⁶ *Id.* at 216.

⁵³⁷ *Id.* at 212.

⁵³⁸ *Id.* at 218.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* at 236.

⁵⁴¹ *Id.* at 237.

⁵⁴² *Id.* at 238.

⁵⁴³ *Id.* at 254.

On the one hand, differences based upon mere biological differences will flourish throughout (a point which even ISIS agrees on). More specifically, ethnic and linguistic diversity will endure, under the safeguards of full equality, while gender differences will be partially leveled; women will attain unprecedented heights, and will attain achievements in all fields of endeavor, but will nonetheless face certain restrictions.⁵⁴⁴ On the other hand, differences based on belief and creed—namely, religious differences—will eventually disappear, for unity of thought presupposes the objectivity of truth, and therefore oneness of creed.⁵⁴⁵ Thus, although the initial society of the final order will include protected religious minorities paying the religious-poll tax (i.e., People of the Book), all such minorities will eventually convert—mostly willingly—to Islam.⁵⁴⁶ Thus, while ISIS and the Sadrists both envision a final society that is religiously homogenous, the process of reaching this end is violent with the former, but mostly voluntary and non-violent with the latter.

C. *Conclusion Regarding the “ISIS Future”*

Given their many superficial similarities, it is not surprising if law and policy makers tend to conflate ISIS with movements such as the Sadrists. Both, after all, are non-state, Islamist insurgencies that have employed violent tactics against established authorities. Likewise, both have operated in the same general geographic heartland of Iraq (though ISIS’s base also stretched to Syria). Furthermore, both believe that the apocalyptic era—and with it, the final world order—is an imminent rather than distant reality. Despite such similarities, this exposition of the “ISIS Future” has demonstrated that the two movements have striven to actualize radically different visions of the future. At the level of underlying axioms, ISIS presumes that the final world order will regress to the archaic modality of the Prophet Muhammad’s seventh-century polity, and that it will last for only seven to nine years, after which point humanity, and the world with it, will perish upon Judgment Day. The Sadrists, in contrast, presume that the final world order will be progressive and unprecedented in nature, eclipsing that of the Prophet’s polity, and that it will last for multiple millennia, spanning a temporal arc that will be considerably greater than the entirety of human history prior to the apocalyptic advent.

These differing axioms, in turn, account for clear differences between ISIS and the Sadrists in their proposed structures of the final world order. In the domain of final political structure, ISIS envisions an authoritarian autocracy, while the Sadrists envision a gradual transition from autocracy to a democracy, throughout the course

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

of which peace and security will increase, resulting in the gradual dissolution of the army, police, and prisons. As for the final legal structure, ISIS presumes that the seventh century legal system established by the Prophet will endure, in unmodified form, within the final polity. The Sadrists, in contrast, anticipate a novel legal system that will preserve the strengths of not only traditional Islamic law, but also non-Islamic legal systems, and will supplement both of these with a new jurisprudence, a new judicial procedure, a new method for addressing conflicts of laws, a re-defined role for jurists, and new positive laws and public policies. In the economic domain, ISIS presumes that the archaic transactional norms of the Prophet's seventh century polity will endure within the final economy. The Sadrists, in contrast, view the Prophet's economy as having been merely "transitional," and imagine a final economy based upon new transactional norms, and which will gradually transition from a quasi-capitalist system to a quasi-socialist system. Lastly, in the social domain, ISIS imagines a final society in which traditional Islamic strictures faced by women will continue unchanged, and which will be violently purged of all non-Muslims, except for those who are subjugated as slaves. The Sadrists, in contrast, envision a final society in which women will advance considerably, albeit remaining inferior to men, and which will initially include protected religious minorities, though most or all of them will eventually convert—willingly and non-violently—to Islam. In the aggregate, these comparisons demonstrate that the Sadrist vision of the future, while by no means one that the international community should encourage or endorse, is nonetheless far less existentially threatening than the ISIS dystopia.

CONCLUSION

The overarching aim of this Article has been to demonstrate that inadequate comprehension of extremist doctrine, and particularly the conflation of various extremist movements that are merely superficially similar—undermines the descriptive and prescriptive measures of American as well as international law and policy. This argument has been made by selecting the Islamic State (ISIS) as a case study, particularly in the form that the movement took during its 2014-2016 heyday, and then considering three specific, ISIS- related dilemmas that have frustrated current legal and policy discourse.

Part I (the "ISIS Present") addressed the question of whether and under what circumstances ISIS could be integrated within the Westphalian order of nation states (following the precedent of prior Islamist insurgencies), arguing that this question can only be answered after a basic accounting of ISIS's current governance practices, as well as a recognition of ISIS's own religious doctrine concerning the international order. After exposing these practices and doctrines, it was argued that although legal

and extra-legal grounds might exist for ISIS to be integrated in some form within the international community, ISIS on the other hand would never aspire to or accept such involvement. As a consequence, while ISIS might be considered a nation-state in order to increase the movement's criminal liability, any attempt to involve ISIS in the nation-state system—whether as a stratagem for pacification, engagement, or *realpolitik*—would be pointless, despite the fact that such efforts have proven effective with other non-state, extremist actors.

Part II (the “ISIS Past”) focused on the controversy over the legality of U.S. interventions against ISIS, arguing that only through an understanding of ISIS's core religious doctrine, and its differences from that of al-Qaeda, can the question of legality of U.S. interventions be determined. After exposing this doctrine, it was argued that the two movements are indeed fundamentally distinct, and that U.S. intervention have therefore been illegal due to the absence of Congressional authority as required under the War Powers Act. Part III (the “ISIS Future”) addressed the implications for world order if ISIS were to achieve its ultimate aims, arguing that this question remains unanswerable unless ISIS's theory of the “final world order” is exposed and contrasted with the theories of superficially similar movements. After exposing this theory and comparing it with that of the Sadrists, it was argued that although ISIS may exhibit similar behavior to other insurgencies in the contemporary Islamist landscape, the ISIS vision of the future is far more existentially threatening. In the aggregate, these doctrinal examples from the ISIS past, present, and future demonstrate the pressing need for legal and policy analysis to incisively distinguish between various extremist movements, and to be better informed by subject matter expertise within the academic discipline of Middle Eastern and Islamic Studies.