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# UNITED STATES—VATICAN RECOGNITION: BACKGROUND AND ISSUES†

SAMUEL W. BETTWY\*

"A lawyer without history or literature is a mechanic . . .; [with] some knowledge of these . . . an architect."<sup>1</sup>

In world affairs, the Roman Catholic Church and all its alter egos are known generically as "the Vatican." Its leader is the "Pope," its diplomatic agent is called the "Holy See," and its independent territory is called "The State of Vatican City." The Vatican participates in international conferences as well as in bilateral and multilateral treaties with world nations. Nevertheless, the Church is not a state, nor does it claim to be one. On January 10, 1984, the United States became the 107th nation and the first superpower to establish reciprocal diplomatic relations with the Vatican.<sup>2</sup> Although other attempts had been made, never before

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\* Project Editor, American Society of International Law; Member, California and Arizona State Bars and the Bar of the District of Columbia; B.A. Economics, Pomona College; J.D., California Western School of Law; LL.M., Georgetown University Law Center. In 1981 the author wrote: "[T]he United States may soon find it to be in its best interest and in the best interest of the world to normalize relations with Vatican City." Bettwy & Sheehan, *United States Recognition Policy: The State of Vatican City*, 11 CAL. W. INT'L L.J. 1, 20 (1981). This Article is written in response to the mutual recognition which took place on January 10, 1984. It is also written as the author's graduate paper for the LL.M. degree in International and Comparative Law at the Georgetown University Law Center. Special acknowledgment is made of Mr. Robert Dalton, Assistant Legal Advisor for Treaty Affairs, Department of State, and of Mr. Michael K. Sheehan, devout Catholic, educator, and jurist; both of these scholars have provided the author with invaluable direction in the preparation of this Article. All translations from the French are made by the author unless otherwise indicated.

<sup>1</sup> W. SCOTT, GUY MANNERING ch. 37 (1906).

<sup>2</sup> See *U.S. and Vatican Restore Full Ties After 117 Years*, N.Y. Times, Jan. 11, 1984, at 4, col. 3. At his regular, daily briefing, John Hughes, a White House spokesperson, stated:

had such *de jure* recognition been accorded by these parties to one another.<sup>3</sup>

United States-Vatican recognition is certain to arouse renewed interest in the juridical personality of the Vatican according to international law and the dictates of the United States Constitution. Three traditional questions revived by the recognition are: 1) Does recognition of a religion or a religious state violate the establishment clause of the United States Constitution?;<sup>4</sup> 2) Is Vatican City a state under international law?;<sup>5</sup> and 3) What is the legal capacity of the Vatican in international affairs?<sup>6</sup> A scholar who focuses on the role of the Vatican only under United States

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The United States of America and the Holy See, in the desire to further promote the existing mutual friendly relations, have decided by common agreement to establish diplomatic relations between them at the level of embassy on the part of the United States of America, and nunciature on the part of the Holy See, as of today, January 10, 1984.

*Id.* A reciprocal statement was made by the Vatican on the same day at Vatican City. *Id.* It should be noted, however, that the title of this newspaper article is inaccurate; the United States and the Vatican had never before established full ties.

<sup>3</sup> See *infra* notes 71-74 & 79-104 and accompanying text.

<sup>4</sup> See Cullinan, *The White House and the Vatican: The Legal Aspects*, 38 A.B.A. J. 471, 472 (1952) (written in response to President Truman's nomination of General Mark Clark); Baum, Danzinger & Stern, *United States Diplomatic Relations with the Vatican in International and Constitutional Law* (Jan. 1984) (written in response to President Reagan's nomination of William A. Wilson), reprinted in *Nomination of William A. Wilson: Hearing Before the Senate Committee on Foreign Relations*, 98th Cong., 2d Sess. 14 (1984) [hereinafter cited as *Confirmation Hearing*]; Menefree, *Crowns and Crosses: The Problems of Politico-Religious Visits as They Relate to the Establishment Clause of the First Amendment*, 3 HARV. J.L. & PUB. POL'Y 227, 227-28 (1980).

<sup>5</sup> See JARRIGE, *LA CONDITION INTERNATIONALE DU SAINT-SIEGE AVANT ET APRES LES ACCORDS DU LATRAN* (1930); Bettwy & Sheehan, *United States Recognition Policy: The State of Vatican City*, 11 CAL. W. INT'L L.J. 1, 3-9 (1980); de la Briere, *La Condition Juridique de la Cité du Vatican*, 33 RECUEIL DES COURS 133 (1930); Ireland, *The State of the City of the Vatican*, 27 AM. J. INT'L L. 271 (Supp. 1933); Rousseau, *Etat de la Cité du Vatican*, 37 REV. GEN. DR. INT'L PUB. 145 (1930); Wigmore, *Should a Papal State Be Recognized Internationally By the United States?* 22 ILL. L. REV. 881, 881-82; Wright, *Status of the Vatican City*, 38 AM. J. INT'L L. 452, 452 (Supp. 1944).

<sup>6</sup> See H. CARDINALE, *THE HOLY SEE AND THE INTERNATIONAL ORDER* 99-128 (1976) (Father Cardinale was the Vatican's Apostolic Nuncio (ambassador) to Belgium, Luxembourg, and the European Economic Community); Cumbo, *The Holy See and International Law*, 2 INT'L L.Q. 603, 603 (1948); Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L L. 308, 309 (Supp. 1952); Study on the Status of Permanent Observer to the Organization of American States and on the Nature and Legal Status of the Holy See in International Law, OEA/Ser. G. Cp/CG—892/78, Feb. 27, 1978 [hereinafter cited as *OAS Study*]; see also R. BOMPARD, *LE PAPE ET LE DROIT DES GENS* (1888); Y. DE LA BRIERE, *L'ORGANIZATION INTERNATIONALE DU MONDE CONTEMPORAIN ET LA PAPAUTE SOUVERAINE* (1924); J. LATOUR, *LA PAPAUTE EN DROIT INTERNATIONAL* (1983); N. NUCCITELLI, *LE FONDEMENT JURIDIQUE DES RAPPORTS DIPLOMATIQUE ENTRE LE SAINT-SIEGE ET LES NATIONS UNIES* (1956).

domestic law or under international law, however, misses the overall role of the Vatican in world politics. This role is inextricably related to the historical development of the Vatican. Without a historical framework, the scholar becomes lured into an analytical shell game.

Therefore, the first section of this Article presents a historical outline of the Vatican with respect to its role in world politics. Given that understanding of the Vatican, the second section narrows the examination to the role of the Vatican under international law. The third section is narrower still, examining the role of the Vatican under United States law. The final section explores particular issues that arise from the United States' recognition of the Vatican.<sup>7</sup>

The issues related to international law and the foreign policy of the United States are: 1) Is the United States recognizing a church or a state?, 2) What does the United States have to gain by formally recognizing the Vatican?, and 3) How are the protection, privileges, and immunities of American and Vatican diplomats and their missions affected? The issues related to the domestic law and policy of the United States are: 1) Does the recognition violate the principle of separation of church and state?, 2) Will the tax status of the Vatican's mission in Washington, D.C. be affected?, and 3) How are other United States laws governing affairs with the Vatican affected?

## I. A WORLD VIEW: AN OUTLINE OF VATICAN HISTORY

That aspect of the Vatican that has the greatest bearing on our discussion of issues of international and domestic law is its seemingly dual character as both a spiritual (religious or ecclesiastical) and a temporal (secular or political) influence. If we imagine a spectrum of influence with spiritual at one end and temporal at the other, the Vatican has run the gamut at various times in its history. The outline below follows the metamorphosis from the founding of the Church to the present day.<sup>8</sup> While reading the outline and the sections that follow, consider what balance of spiritual and temporal influence is being sought by the Vatican today and what balance the international community and the United States will tolerate.

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<sup>7</sup> See *infra* notes 140-172 and accompanying text.

<sup>8</sup> The outline of history given in this section of the Article is derived in great part from the following sources: CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES (trans. & ed. S. Ehler & J. Morral 1954) [hereinafter cited as COLLECTION OF HISTORIC DOCUMENTS]; C. DAWSON, RELIGION AND THE MODERN STATE 102-154 (1935); P. HUGHES, A POPULAR HISTORY OF THE CATHOLIC CHURCH (1951).

A. *Roman Empire (First Three Centuries, A.D.)*

The first three centuries of the Church represent its least temporal-laden period. The Church was established by Jesus Christ who named the apostle, Peter, as the first head or Pope of that Church:

And I say also unto thee, That thou art Peter, and upon this rock I will build my church; and the gates of hell shall not prevail against it.<sup>9</sup>

On or near the year 42, Peter arrived in Rome where he founded the Roman Catholic Church. The first Christians were a small minority, attempting to survive and grow in the Mediterranean world of the Roman Empire. To the secular (or pagan) Roman state, religion and politics were one; the citizens of the Roman state were to practice the official religion. Because of this, the Christians suffered persecution for their obedience to the Church and its one God. When Roman society began to decay, however, its citizens willingly turned to the ideal of citizenship in the "Kingdom of God." In this way the universality of the Church successfully rivaled the universality of the Roman Empire.

B. *Roman Empire (Fourth and Fifth Centuries)*

During the Roman Empire, the Church accepted the Roman states invitation to participate in political matters. Emperor Constantine (reigning from 308 to 337) officially tolerated the existence of the Church in his Edict of Milan (313), and, by the end of the fourth century, the Roman Empire had officially adopted Christianity. Although the organization of the Church's hierarchy closely followed the organization of the Roman state, the Church managed, unlike the Eastern Church of the Byzantine Empire, to remain independent of the secular authority of the state. As a consequence of the Church's ability to maintain its independence, the Church did not fall with the Roman Empire; instead, it survived as a unified repository of law, culture, and learning for the invading barbarians.

C. *Dark Ages (475-1000)*

The Dark Ages represent an era of even greater politicization of the Church. Despite the threat imposed by the chaos of Western Europe and the barbarian invasions, the Church maintained its ecclesiastical independence. Paradoxically, independence required the Church's increased political involvement in the affairs of the Western world. During this period was the development of the "Gelasian" theory of Pope Gelasius I (494), which set up the ecclesiastical-secular dualism of authority for Europe.

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<sup>9</sup> Matthew 16:18 (King James).

This remained the position of the Church throughout the Dark Ages. During this period, the influence of the Church was spread chiefly by the monasteries of the Merovingian period (500-750); these monasteries, cloisters of contemplative worship, later became the abbeys—open centers of trade and culture, preserving the Carolingian Empire (750-980). The territorial independence of the Church was established in the Papal States in 754 with the acquisition of about 16,000 square miles of land in the mid-section of modern-day Italy. This acquisition facilitated the Church's policy of becoming a leading temporal influence.<sup>10</sup>

The end of the Dark Ages saw the invasion of the Northmen from the North and the Saracens from the South. This resulted in the worst chaos that Europe and the Church had experienced thus far. The Church became suppressed by the temporal power of the feudal lords and monarchs, who preserved the organization of the Church for the unity it provided while themselves making the appointments of bishops and Popes.<sup>11</sup>

#### *D. The Gregorian Reformation of the Middle Ages (Eleventh Century)*

The Church succeeded in regaining independence through the reforms of the Popes, culminating with the efforts of Pope Gregory VII. The reform was based upon a highly political and competitive theory of the Church that maintained that spiritual authority should be superior to temporal authority; the Church advocated its power to judge the temporal authorities and to punish them for violations of Church law. This reform, known as the "Contest of Investitures," resulted in the Concordat of Worms (1122), in which the Church and the Holy Roman Empire agreed upon a balanced dualism of independence for the two spheres of influence.<sup>12</sup>

#### *E. Feudal Middle Ages (The Twelfth through the Fifteenth Centuries)*

This final third of the Middle Ages saw the Church's successful exercise of full spiritual and temporal power throughout Europe. During this period of its history the Church was most politicized and steeped in temporal influence. No emperor was able successfully to defy the Church's supremacy over the temporal authority. The secular leaders sought the Pope's sanction in all major decisions, such as the acquisition of and entitlement to new territories. In addition, the Popes possessed the authority both to crown kings and to judge them and their princes. Consequently,

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<sup>10</sup> See COLLECTION OF HISTORIC DOCUMENTS, *supra* note 8, at 4-7; P. HUGHES, *supra* note 8, at 23-24.

<sup>11</sup> T. NEILL & R. SCHMANDT, HISTORY OF THE CATHOLIC CHURCH 162-65 (1965).

<sup>12</sup> See *id.* at 185-88.

the Church provided the unifying spiritual and temporal influence of the European communities.

*F. Protestantism (Sixteenth Century)*

After the Middle Ages, a profound transformation took place in the role of the Catholic Church in Europe. With the rise of Protestantism, the once unified Christian faith of the European states became divided. The competition between Catholics and Protestants and the colonization of Africa and America caused the spiritual influence of the Church to dwindle,<sup>18</sup> allowing the secular powers to reclaim independent influence over politics in their respective regions. Spiritual influence, both Catholic and Protestant, nevertheless remained significant in determining secular policies.

*G. Rationalism (Seventeenth and Eighteenth Centuries)*

Church influence diminished significantly during this period known as the age of despotism or absolutism, during which temporal powers regarded the influence of the Church as anachronistic. Secular rulers believed that religion had to give way to rational or "enlightened" thinking. Those rulers subjugated the Church's secular role through a wave of anti-clerical legislative reform. Rationalism is reflected in the decision of the "Founding Fathers" of the United States, who sought to maintain a separation of church and state affairs. Thus, this period was comparable to the situation that existed when the Concordat of Worms was concluded; the Church was once again confined to the realm of spiritual influence, while the state was confined to its realm of secular influence.

*H. Liberalism (Eighteenth and Nineteenth Centuries)*

The secular principles of despotism were finally extended, largely due to the influence of thinkers such as Jean-Jacques Rousseau, to the concepts of "liberalism" and "nationalism." The modern nation-state derived its authority from the people, not from God; therefore, the influence of the Church in the politics of the state was strictly excluded. As long as these new states guaranteed the independence of the spiritual domain of the Church, the Church's spiritual influence was preserved. Thus, the Church became more active in treaty-making and lobbying constitutional conventions. In other words, the Church participated in its own form of

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<sup>18</sup> *Id.* Nevertheless, at that time the Church did not ignore the human problems created by the European conquests of the Indian populations. The Church stood then as it does now for the equality of all races and the need for humane and just treatment of those people conquered by the Europeans.

diplomacy, seeking independence from, but not domination over, temporal powers. In addition, the Church found it necessary to compete with capitalism and socialism, which were supplanting religion as the principles of daily secular life.<sup>14</sup>

The temporal influence of the Church was preserved through its dominion over the Papal States, which, in the mid-1800's, had a population of about three million. This final bastion of temporal character of the Church, however, finally was eliminated by the national unification of Italy, which took place between 1860 and 1870. During these years, the King of Italy attempted to persuade the Pope to surrender his territories for the unification. When the Pope refused, Italy took them by force. The final acquisition took place in 1870 when the Italians marched into Rome. The Pope refused to accept the King's unilateral term known as the Law of Guarantees.<sup>15</sup> Instead, he declared himself to be a political prisoner, confining himself to his palaces and giving rise to the so-called "Roman Question." Not since the late Dark Ages or the Church's very beginning had its temporal influence been so suppressed. The spiritual influence of the Church, however, remained powerful and not totally divorced from international politics. The Church continued to practice diplomacy in order to secure guarantees of religious freedom within national jurisdictions and, particularly during World War I, participated in efforts for world peace.<sup>16</sup>

### *I. Today's Isms (Twentieth Century)*

Today the influence of the Church continues to be challenged by nationalistic, social, and economic ideologies in two ways: (1) the suppression of religious expression or worship, and (2) the "dehumanization" or secularization of the daily lives of the citizenry.

The Roman Question had been resolved by the restoration of 108 acres of independent territory to the Vatican. But temporal influence was not necessarily restored. Vatican City, with a transient population of about 800 people, certainly does not embody the concept of a modern nationalistic state, reflecting the ideals of some secularism. Nonetheless, in practical terms, Vatican City does provide the Pope, as head of the

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<sup>14</sup> See C. DAWSON, *supra* note 8, at xx. Dawson wrote:

Religion gradually retreated into man's inner life, and left social and economic life to the State and to a civilization which grew steadily more secularized. A man's debt to religion was paid by an hour or two in church on Sundays, and the rest of the week was devoted to the real business of life—above all, the making of money.

*Id.*

<sup>15</sup> The original Italian text is found in *Gazzetta Ufficiale del Regno d'Italia*, May 15, 1871, reprinted in *COLLECTION OF HISTORIC DOCUMENTS*, *supra* note 8, at 285-91.

<sup>16</sup> See D. GRANDI & A. GALLI, *THE STORY OF THE CHURCH* 252-63 (1960).



Church, with an independent territorial base from which he can administer the Church free of any secular power. The Lateran Treaty, in which Vatican City was restored to the Vatican, states that the importance of Vatican City lies in the fact that it permits "the Holy See to make its voice better heard, to give greater value to its own suggestions, and to negotiate with those who control the fate of nations, in a spirit of mutual respect."<sup>17</sup>

As a spiritual influence, the Roman Catholic Church is supreme; as a temporal influence, it maintains a diplomatic corps under the title "the Holy See," which participates in discussions of world politics with other nations on a one-to-one basis and in the context of international organizations. As a diplomatic entity, the Church is recognized by many states as a viable political institution; its spiritual teachings are compatible and often supportive of the goals of many peace-seeking nations.<sup>18</sup> In short, the Church seems to be seeking: 1) religious freedom to act separately from and unhindered by affairs of nations so that it may continue its spiritual missionary work within them, and 2) recognition that it is an equal voice in the international community capable of exercising a spiritual influence in the realm of international politics between and among nations.

The Vatican exercises its international diplomacy through the title "the Holy See"<sup>19</sup> rather than "Vatican City," although both titles are used in other international contexts, such as international conferences.<sup>20</sup> Both titles have been used consistently since 1929. In fact, with respect to

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<sup>17</sup> Speech by Pope Paul VI, audience of Members of the Diplomatic Corps accredited by the Holy See (Jan. 12, 1970), reprinted in H. CARDINALE, *supra* note 6, at xx; see also *id.* at 115 ("[t]he Holy See is the Juridical personification of the Church in the same way that the state is of the nation") (footnote omitted).

<sup>18</sup> See *The President and the Pope*, 53 NEWSWEEK 64 (Jan. 23, 1984) (quoting a State Department official); *U.S. Catholic Spirit Agree, Says Delegate*, Wash. Post, May 25, 1959.

<sup>19</sup> H. CARDINALE, *supra* note 6, at 113.

<sup>20</sup> Vatican City is a member of the Universal Postal Union, the International Telecommunications Union, and the International Wheat Council. H. CARDINALE, *supra* note 6, at 265; 2 COUNTRIES OF THE WORLD 1175 (1983) [hereinafter cited as Background Notes]. The Holy See is a member of the United Nations Conference on Trade and Development (UNCTAD), the International Union for the Protection of Industrial Property (IUIPI), the Executive Committee of the High Commissioner's Programme at the Office of the United Nations High Commission for Refugees, the International Union for the Protection of Liberty and Artistic Works, the International Geographic Union, and the Council of Europe Resettlement Fund for National Refugees and Over-Population in Europe. *Id.* For a list of treaties to which Vatican City and the Holy See are parties, see Bettwy & Sheehan, *supra* note 5, at 21-31 (1981); P. ROHN, 4 WORLD TREATY INDEX 669-71 (2d ed. 1983). In 1958, the United Nations agreed with the Vatican to discontinue usage of the name "Vatican City" in all United Nations-sponsored international conferences to which papal authorities are invited. R. GRAHAM, S. J., VATICAN DIPLOMACY—A STUDY OF CHURCH AND STATE ON THE INTERNATIONAL PLANE 346 n.11 (1959).

treaty-making, both titles have been used in conventions dealing with topics ranging from the highly political to the highly technical,<sup>21</sup> in the same fields of international law,<sup>22</sup> by the same person on separate occasions in conference activities,<sup>23</sup> and to indicate membership in international organizations.<sup>24</sup> The titles have been used in the formation of the same international agreements—with Vatican City as the signatory and the Holy See as the ratifying authority.<sup>25</sup> The reverse situation has never occurred, and both titles have never been used at the same time in the same convention.

Since the Holy See and Vatican City are both headed by the Pope, it is hardly conceivable that the two operate independently of each other. Furthermore, there is no apparent basis for distinguishing the type of international activity in which each participates. Other than in the field of diplomatic relations, which is exclusively the practice of the Holy See, the decision of which title shall be used in international affairs appears to be arbitrary. Yet, even if it is arbitrary, such appearance would not be inconsistent with the policies of the Vatican. As stated by Pope Paul VI: The Church tries to avoid being "assimilated to institutes and organisms of a

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<sup>21</sup> Vatican City has been represented at conventions on arbitration, atomic energy, automotive traffic, bills of lading, cultural property, customs, diplomatic relations, grains, law, narcotic drugs, postal arrangements, refugees, satellites, settlement of disputes, telecommunications, tourism, and wheat. The Holy See has been represented at conventions on arbitration, atomic energy, copyrights, counterfeiting, cultural property, diplomatic relations, industrial property, intellectual property, judicial procedure, law, law of the sea, maritime matters, narcotic drugs, nuclear weapons, patents, phonograms, postal arrangements, prisoners of war, Red Cross, refugees, settlement of disputes, space, states' rights and duties, telecommunications, terrorism, and trade and commerce. See Bettwy & Sheehan, *supra* note 5, at 21-31; P. ROHN, *supra* note 20, at 669-71.

<sup>22</sup> Both Vatican City and the Holy See have participated in conventions, at different times, on arbitration, atomic energy, cultural property, diplomatic relations, law, narcotic drugs, postal arrangements, refugees, settlement of disputes, and telecommunications. P. ROHN, *supra* note 20, at 669-71.

<sup>23</sup> Ameleto G. Cicognani signed the Convention relating to the Status of Refugees (189 U.N.T.S. 137) for the Holy See on July 28, 1951 in Geneva, and he also signed the International Wheat Agreement (7 U.S.T. 3277, T.I.A.S. No. 3709, 270 U.N.T.S. 103) for Vatican City on May 16, 1956, in Washington, D.C. As a young monsignor, Ameleto Cicognani was present at the 1919 visit of Woodrow Wilson to the Vatican. *Osservatore Romano*, Jan. 5, 1919; see *infra* note 88. He later became Apostolic Delegate to the United States on March 17, 1933. 1950 ANNUARIO PONTIFICIO 42.

<sup>24</sup> See H. CARDINALE, *supra* note 6, at 256; *supra* note 20.

<sup>25</sup> See Constitution of the Universal Postal Union, *done* July 10, 1964, 16 U.S.T. 1291, T.I.A.S. No. 5881, 611 U.N.T.S. 7 (see ratification at 639 U.N.T.S. 368); Universal Postal Convention, *done* July 10, 1964, 611 U.N.T.S. 105 (see ratification at 639 U.N.T.S. 368); Agreement concerning insured letters and boxes, *done* July 10, 1964, 611 U.N.T.S. 387 (see ratification at 639 U.N.T.S. 369). For examples of other, related agreements, see Bettwy & Sheehan, *supra* note 5, at 27.

temporal order with which it cannot nor should be confused."<sup>26</sup>

In our modern political world, territorial independence is a fundamental element of international personality and equality among nations. If the Vatican were to lose Vatican City as it lost the Papal States in 1870, the international personality of the Vatican would be called into question.<sup>27</sup> By refusing to engage in diplomatic relations with any nation other than under the title "the Holy See," the Vatican is asserting, without compromise, its authority to promote the primary aim of papal diplomacy—the promotion of Church teachings. By participating in international dialogue as both the Holy See and Vatican City, the two titles being virtually interchangeable, the Vatican is reminding the international community that it is an equal member, because it enjoys territorial sovereignty, and that it is a unique member, because it is the supreme organ of the Roman Catholic Church. For the Vatican, territorial sovereignty is merely a temporal means to its spiritual end.<sup>28</sup>

## II. JURIDICAL PERSONALITY OF THE VATICAN UNDER INTERNATIONAL LAW

Who could have anticipated that scholars would labor so hard to find a category in which to place an institution which quite obviously to the Anglo-Saxon mind was a category by itself?<sup>29</sup>

The role of the Vatican must be examined in a historical context to understand its role in international law. Since international law is largely what has been established through the customs and treaty-making of nations between and among each other, it is inescapably related, at any point in time, to the prevailing practice and thinking of nations. For example, the "international" publicists of the Roman Empire expressed in uncertain terms that Christianity was illegal; thus, the Roman Catholic Church enjoyed no recognized juridical personality.<sup>30</sup> On the other hand, during the Vatican's virtual domination of international politics during the Middle Ages, the publicists of the time were ecclesiastical scholars, and the Church was proving their theories of the legality of not only the Church's international personality but its international supremacy.<sup>31</sup>

<sup>26</sup> Speech of Pope Paul VI, *supra* note 17, at xvii.

<sup>27</sup> See *infra* note 125 and accompanying text.

<sup>28</sup> H. CARDINALE, *supra* note 6, at 115. "The Vatican City . . . is a State set up to insure the absolute and visible liberty and independence of the Holy See, and to guarantee its undisputed sovereignty, even in the international field." *Id.*

<sup>29</sup> Fenwick, Book Review, 29 AM. J. INT'L L. 713, 713 (1935) (reviewing THE LEGAL POSITION OF THE HOLY SEE BEFORE AND AFTER THE LATERAN AGREEMENTS (1935)).

<sup>30</sup> See, e.g., COLLECTION OF HISTORIC DOCUMENTS, *supra* note 8, at 4 (Christian persecuted for failing to worship pagan gods).

<sup>31</sup> See, e.g., COLLECTION OF HISTORIC DOCUMENTS, *supra* note 8, at 11. For the publicists the church was the supreme international power, a power even greater than the royal power. *Id.*

With the rise of nationalism and the modern state, international personality depended fundamentally upon territorial independence. When the Church possessed such independence in the Papal States, its international juridical personality could not be disputed even under the new liberalism. During this period of the modern state, however, the Church lost its temporal independence to Italy in 1870. Although the spiritual personality of the Vatican on an international plane remained unequivocal, its juridical personality was seriously doubted. Thus, during the period after 1870, the international publicists enjoyed a field day of academic discourse, which was not ended by the establishment of Vatican City in 1929. Keeping in mind the historical and political context in which these recent scholars have written allows a broader understanding of their positions.

#### A. *The Juridical Personality of the Vatican Since 1870*

The period from 1870 to 1929 was marked by a total lack of territorial independence for the Vatican.<sup>32</sup> During this period, however, the Vatican continued to enter into a form of international agreement known as the concordat.<sup>33</sup> Most writers cite this activity as a major indication of the Vatican's international legal capacity.<sup>34</sup> The main purpose of the concordat is "to determine the status of the Catholic religion in [the] respective territories" of nations.<sup>35</sup> Although concordats are not to be classified as treaties, they do have an international nature, albeit *sui generis*.<sup>36</sup> In addition, the writers cite the fact that the Vatican continued to send and receive diplomatic missions as evidence of the Vatican's international le-

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In 494, Pope Gelasius I wrote:

There are . . . two powers by which this world is chiefly ruled: the sacred authority of the Popes and the royal power. Of these the priestly power is much more important, because it has to render account for kings of men themselves at the Divine tribunal.

*Id.* at 11.

<sup>32</sup> *Contra Cumbo*, *supra* note 6, at 611. Some scholars have claimed that the territorial independence of the Vatican was not interrupted during the period from 1870 to 1929. See *id.*; see also Kunz, *supra* note 6, at 309 (Holy See always had been subject to international law).

<sup>33</sup> See BLACK'S LAW DICTIONARY 263 (5th ed. 1979). The concordat is also known as a bill of conscription in non-Catholic countries. A concordat is an agreement between a state and a Pope, usually related to ecclesiastical affairs of the Roman Catholic Church within the state. *Id.*

<sup>34</sup> See Cumbo, *supra* note 6, at 607. Concordats are "the most weighty arguments in favour of the personality of the [Holy] See." *Id.*; see also Kunz, *supra* note 6, at 310 (concordats have all characteristics of international treaties and recognition as treaties by many states).

<sup>35</sup> OAS Study, *supra* note 6, at 15.

<sup>36</sup> S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 8 (2d ed. 1916). "Concordats are agreements entered into by the Pope, not as a territorial sovereign, but as head of the Catholic Church, and are accordingly not to be claimed as international treaties." *Id.*

gal capacity.<sup>37</sup>

The Vatican's main purpose is to promote the teachings of the Roman Catholic Church; yet, it has been argued by some lay scholars that no church, including the Roman Catholic Church, can be a subject of international law.<sup>38</sup> Therefore, it is not the Vatican's connection with the Catholic religion alone that gives it international personality, assuming the Vatican has any. The publicist Cumbo stated in 1948: "The view commonly accepted [is] that the Holy See can only obtain an international 'status' when a territorial unity is recognized . . . ."<sup>39</sup> Supporting this statement is the fact that during the period from 1870 to 1929, the number of nations having diplomatic relations with the Vatican fell for a time to four.<sup>40</sup> The United States, for example, withdrew its ambassador in 1867 after it had become clear that the Papal States would be annexed by

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<sup>37</sup> See Ireland, *supra* note 5, at 272; Kunz, *supra* note 6, at 310. The Vatican had the power to send and receive diplomatic missions, a privilege assured in the Protocol of Vienna. Règlement on the Precedence of Diplomatic Agents, signed at Vienna, March 19, 1815, art. I, 64 C.T.S. 2 [hereinafter cited as Protocol of Vienna]. Article I states:

Les Employés Diplomatiques sont partagés en trois Classes. Celle des Ambassadeurs, Legats ou Nonces. Celle des Envoyés, Ministres, ou autres Accrédités auprès des Souverains. Celle des Chargés d'Affaires accrédités auprès des Ministres chargés des Affaires Etrangères.

*Id.* (emphasis added). The United States Department of State adopted the seven rules of the Congress of Vienna. See 4 J. MOORE, A DIGEST OF INTERNATIONAL LAW 430-31 (1906).

<sup>38</sup> See M. FALCO, THE LEGAL POSITION OF THE HOLY SEE BEFORE AND AFTER THE LATERN AGREEMENTS (A. Campbell trans. 1935). While some publicists have argued that a church cannot be a subject of international laws, other academics have expressed a contrary perception of the Church's juristic character:

The Church, like the States, possesses an international juridic personality and she does so of necessity because the same reasons which have attributed this quality to the States are found with as much, and sometimes more, certainly and clarity in the Catholic Church.

H. CARDINALE, *supra* note 6, at 82 (footnote omitted).

<sup>39</sup> Cumbo, *supra* note 6, at 605; see also L. OPPENHEIM, I INTERNATIONAL LAW 228 (4th ed. McNair 1928) (Holy See prohibited from concluding international treaties or voting at international congresses or conferences).

<sup>40</sup> Background Notes, *supra* note 20, at 1177. According to the Vatican yearbooks, *Annuario Pontificio*, the following numbers of nations maintained diplomatic relations with the Vatican from 1870 to the present:

1870:65  
1880:8  
1890:11  
1900:12  
1920:17  
1930:36  
1950:43  
1970:65  
1984:107

The middle division represents the Vatican's period of non-territoriality.

the Kingdom of Italy.<sup>41</sup> In addition, the Vatican was excluded, at the request of Italy, from participation in the Hague Peace Conference of 1899, the London Treaty of 1915, and the League of Nations.<sup>42</sup> In short, the Vatican had capacity to express its spiritual sovereignty with other nations in the form of concordats and diplomatic relations incidental to them, but it had no independent capacity to conduct itself as an equal with other sovereign states in international affairs.

Since 1929, the Vatican's participation in international affairs has extended far beyond the results of ecclesiastical concordats and related diplomacy. The Vatican has normalized diplomatic relations with over 100 nations;<sup>43</sup> participated in numerous international conferences, becoming a party to scores of conventions, treaties, agreements, and related protocols;<sup>44</sup> and it now shares formal recognition with the United States, a government noted for its constrained diplomatic policy toward the Vatican. With respect to the Vatican's participation in international organizations, both the United Nations and the Organization of American States have accepted it as a permanent observer,<sup>45</sup> and it is a full-fledged member of several other international organizations.<sup>46</sup>

Apparently the Vatican recognized that spiritual sovereignty was not enough to give it a universally recognized juridical personality; it sought and acquired territorial sovereignty in Vatican City. Article 26 of the Lateran Treaty, the constituent instrument of Vatican City, contains the following acknowledgment of the need for territorial sovereignty:

The Holy See thinks that with the agreements signed today, adequate assurance is made for what is necessary for providing it of due liberty and independence for the pastoral government of the diocese of Rome and of the Catholic Church in Italy and the world.<sup>47</sup>

Although some nations and scholars continued to recognize the Vatican as an international, juridical personality during its period of non-territo-

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<sup>41</sup> See *infra* note 85 and accompanying text.

<sup>42</sup> Kunz, *supra* note 6, at 312.

<sup>43</sup> See The 1983 Diplomatic List of the Vatican, reprinted in *Reprogramming Funds for United States Mission to the Vatican: Hearing Before a Subcomm. of the House Comm. on Appropriations*, 98th Cong., 2d Sess. 22-23 (1984) [hereinafter cited as *House Appropriations Hearing*]. For a list of those nations exchanging ambassadors with the Vatican, see 1980 ANNUARIO PONTIFICIO 1134-54, reprinted in Bettwy & Sheehan, *supra* note 5, at 10 n.56.

<sup>44</sup> See *supra* note 20.

<sup>45</sup> See OAS Study, *supra* note 6. For a general discussion of observer status, see Mower, *Observer Countries: Quasi Members of the United Nations*, 20 INT'L ORG. 266 (1966).

<sup>46</sup> See *supra* note 20; see also H. CARDINALE, *supra* note 6, at 256 (represented at United Nations Specialized Agencies and other international organizations).

<sup>47</sup> See Treaty of the Lateran, Feb. 11, 1929. 1929 ACTA APOSTOLICAE SEDIS 209, reprinted in H. CARDINALE, *supra* note 6, at 326 app.

rial existence, lack of universal recognition as an independent territory was a serious impediment to the Vatican's goal of securing worldwide religious freedom for the Church and its followers. Clearly, the experience and conduct of the Vatican is compelling evidence that today territorial independence is a fundamental element of recognition as a juridical, international personality.

### B. *The Juridical Personality of Vatican City*

The constituent instrument of Vatican City is the Lateran Treaty, in which Italy granted territory to the Vatican.<sup>48</sup> This treaty reveals the Vatican's own perception of itself and of Vatican City, and, because it is an international legal instrument, defines the international legal capacity of Vatican City. Articles 2, 3, 4, and 24 refer to the "sovereignty of the Holy See" over Vatican City, but nowhere in the treaty is there specific mention of the sovereignty of Vatican City itself. This fact has led more than one lay scholar to conclude that Vatican City is a state, but not a sovereign state; rather, they claim, it is a "vassal state" of the Vatican.<sup>49</sup>

Other legal writers have considered the legal capacity of Vatican City apart from the language of the Lateran Treaty. These writers have asserted that, as a practical matter, Vatican City lacks viable juridical personality, because it lacks the nationalistic spirit of a modern state,<sup>50</sup> it is a diminutive or exiguous state,<sup>51</sup> and it lacks a diplomatic corps. Church apologists have responded to these arguments, defending the status of Vatican City as a state under international law. To the conventional legal

<sup>48</sup> Treaty of the Lateran, art. 3, reprinted in H. CARDINALE, *supra* note 6, at 320.

<sup>49</sup> Bettwy & Sheehan, *supra* note 5, at 9; Cumbo, *supra* note 6, at 613; Kunz, *supra* note 6, at 313; see also Ireland, *supra* note 5, at 288 (Vatican City described as "nominally sovereign"). Le Fur characterizes the Vatican as "*extraétatique*." Le Fur, *Foreward* to JARRIGE, *supra* note 5, at xi. But see H. CARDINALE, *supra* note 6, at 116 (relationship between Vatican and Vatican City characterized as "juristic union").

<sup>50</sup> Rousseau, *supra* note 5, at 146. Rousseau has recognized Vatican City's lack of juridical personality because of its lack of nationalism:

The state is the juridical organ of the nation; it presupposes an army, and it possesses a character—at least relatively speaking—of unity. Historically, the state had the essential character of being national.

*Id.*

<sup>51</sup> See Bettwy & Sheehan, *supra* note 5, at 9. Secretary of State Cordell Hull, commenting on the question of the Vatican's membership in the United Nations, wrote:

As a diminutive state the Vatican would not be capable of fulfilling all the responsibilities of membership in an organization whose primary purpose is the maintenance of international peace and security. In a number of cases diminutive states were refused admission to the League [of Nations] on this ground. . . .

Telegram from Secretary of State Cordell Hull to M.C. Taylor (Sept. 27, 1944), reprinted in *FOREIGN RELATIONS OF THE UNITED STATES* 462 (1944).

mind, however, their explanations are abstruse.<sup>52</sup>

If customary law can be generalized from the tolerated conduct of Vatican City in international politics, it can be said that Vatican City enjoys at least *de facto* capacity. Although it has no diplomatic corps, Vatican City (or at least the Vatican using the title Vatican City) has participated in international conferences and signed numerous multilateral and bilateral treaties,<sup>53</sup> including a postal agreement with the United States.<sup>54</sup> It is also a member of the International Postal Union, the International Telecommunications Union, and the International Wheat Council.<sup>55</sup> In no instance has its participation in any of these capacities been challenged by another party.

If Vatican City has the capacity to conduct international affairs, is this capacity independent of the juridical capacity of the Holy See? That question remains academic, because no occasion has ever arisen in which the Holy See and Vatican City have both sought participation in the same international conference, and the issue is not likely to arise.<sup>56</sup> The Pope is the recognized head of each entity, and the Vatican would have nothing to gain by such a move.

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<sup>52</sup> See, e.g., H. CARDINALE, *supra* note 6. Cardinale argues for:

the existence of three distinct subjects of international law under the Pope's sovereignty: the Church, the Vatican State and the Holy See. The Church and the Vatican State, remaining distinct persons in international law, are united in virtue of a real union, in the person of the Pope. As Sovereign of both the Church and the State, the Pope uses the Holy See as a common supreme organ through which he exercises his sovereignty with regard to both these international bodies. The Holy See is indisputably recognised as the Pope's competent international agent for both the Church and the State by international law and practice.

*Id.* at 116-117; see also R. GRAHAM, *supra* note 20, at 346 n.11. Although Graham insists that the distinction between Vatican City and the Holy See is "clear in concept," he admits that ambiguities in terminology "bedevil discussions on the subject." R. GRAHAM, *supra* note 20, at 346 n.11.

<sup>53</sup> See Bettwy & Sheehan, *supra* note 5, at 12-31 (listing treaties signed by Vatican since 1929).

<sup>54</sup> Agreement for the Exchange of International Money Orders, Nov. 24-Dec. 22, 1955, United States-Vatican City, 7 U.S.T. 3205, T.I.A.S. No. 3700.

<sup>55</sup> See *supra* note 20.

<sup>56</sup> But see R. GRAHAM, *supra* note 20, at 202 n.13 (one is non-territorial institution, the other a state); A. SERENI, *THE ITALIAN CONCEPTION OF INTERNATIONAL LAW* 293 (1943) (if Catholic Church is international person, Catholic Church and Vatican City are distinct international persons); Cumbo, *supra* note 6, at 613 ("body" of Vatican distinct from that of See). The basis of Cumbo's conclusion is the Lateran Treaty, which he claims supplies "two separate recognitions, the second of which actually refers to the Vatican City." Cumbo, *supra* note 6, at 613. (emphasis added). Cumbo fails to note, however, that nowhere in the Lateran Treaty is the sovereignty of Vatican City itself recognized. The OAS Department of Legal Affairs concluded: ". . . [T]he legal personality of the Holy See is independent of the existence of a state that may be joined to it, as was the case with the Papal States, which existed until 1870, and Vatican City, since 1929." OAS Study, *supra* note 6, at 14.



### C. Conclusion

Many lay scholars have considered the juridical personality of either the Holy See or Vatican City, but none have considered the characteristics of both as parts that, when combined, form a whole—the Vatican. Even ecclesiastical scholars have examined both entities, invariably concluding that each possesses a separate, independent personality.<sup>57</sup> Given actual international practice, it is probably accurate to conclude that the Vatican itself has an international juridical personality whether it acts as the Holy See or Vatican City, and that this personality has gained more universal recognition during the Vatican's enjoyment of territorial sovereignty than it has without such enjoyment. Without territory, the Vatican is a second-class international person, although it is still capable of protecting intranational interests through diplomacy. With territory, even if it is only a "token" state, the Vatican is allowed an equal voice in international political and legal discussions.

### III. JURIDICAL PERSONALITY OF THE VATICAN ACCORDING TO UNITED STATES LAW AND POLICY

The United States was founded by people, traditions, and principles that reflected the thinking of the times about policy toward religion in general and the Vatican in particular. Many of the colonists from Europe were seeking religious freedoms that were denied in their homelands. The drafters of the United States Constitution were particularly influenced by the writings of eighteenth century rationalism as interpreted by John Locke and thinkers like him. Thus, the separation of church and state as we know it today is the product of both anti-state and anti-religious thinking. United States-Vatican relations have taken place during those periods of history when secular and religious influences have remained at arms length and territorial independence has been a fundamental element of international juridical personality. Nonetheless, the United States has shown an interest toward the Vatican that surpasses the technical requirements of statehood. The United States and the Vatican share a reverence for the fundamental principles of peace and freedom. In each instance in which these principles have been defied, the United States has made gestures to strengthen ties with the Vatican.

#### A. Outline of History of United States-Vatican Relations

Relations between the United States and the Vatican have been continuous, though inconsistent, since 1797, when consular relations were es-

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<sup>57</sup> See *supra* note 56. Cardinale argues that the Pope and the Roman Catholic Church are separate, juridical persons in international law. H. CARDINALE, *supra* note 6, at 73-128.

tablished. United States-Vatican relations may be broken down into the following categories: consular, non-reciprocal diplomatic, unofficial, and full diplomatic. These categories are examined chronologically, with some overlap between consular and non-reciprocal diplomatic relations from 1848 to 1868.

1. *Consular (1797-1895)*. In 1797, John B. Sartori became the first United States consul to Rome.<sup>58</sup> The American consular presence in Rome continued without interruption until 1870, when the Papal States were annexed and the consulate was transferred to Italy.<sup>59</sup> There were also consuls, for varying periods of time between 1797 and 1870, at Ancona, Ravenna, Civitavecchia, Ceprano, Comacchio, Fiumicino, Ostia, and Porto d'Anzio. The primary purpose of the consulate offices was to encourage commerce between the United States and the Papal States; secondarily, the consulates were to report their observations of important political events to the State Department.

The Papal States sent consuls general to the United States between 1826 and 1895. In 1876, the *exaquatur* of Louis B. Binsse was challenged by the Italian government after the annexation of the Papal States to Italy. Secretary of State Hamilton Fish refused to seek withdrawal of the *exaquatur*, so the situation remained unresolved until Mr. Binsse's death in 1895.<sup>60</sup> Notwithstanding these occasional difficulties, the consular relations in both countries were described as being very friendly. In fact, in the Papal States, American consular representatives, unlike the representatives of any other state, "were received on the same footing at all festivals and formal affairs as full diplomatic functionaries of other nations."<sup>61</sup>

2. *Non-reciprocal diplomatic relations (1848-1868)*. Formal diplomatic relations began in 1848 when President Polk sent Jacob L. Martin as *chargé d'affaires*—which appointment was later raised to the rank of Minister—to the Papal States.<sup>62</sup> During this period from 1848 to 1868,

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<sup>58</sup> Stock, *American Consuls to the Papal States: 1797-1870*, 15 CATH. HIST. REV. 233, 233-34 (1929); see L. STOCK, CONSULAR RELATIONS BETWEEN THE UNITED STATES AND THE PAPAL STATES: INSTRUCTIONS AND DESPATCHES xxiii (1945).

<sup>59</sup> See Stock, *supra* note 58, at 250-51. The American consuls during the period were John B. Sartori (1791-1823), Felix Cicognani (1823-1837), George Greene (1837-1845), Nicholas Browne (1845-1849), William C. Sanders (1849-1856), Daniel Le Roy (1856-1858), Horatio de V. Glentworth (1858-1861), W. J. Stillman (1861-1865), Edwin C. Cushman (1865-1869), and David M. Armstrong (1869-1870). See L. STOCK, *supra* note 58, at xi-xxii.

<sup>60</sup> See L. STOCK, *supra* note 58, at xxxviii-ix.

<sup>61</sup> Stock, *supra* note 58, at 251.

<sup>62</sup> L. STOCK, UNITED STATES MINISTERS TO THE PAPAL STATES xxiii-xxiv (1933). A *chargé d'affaires* is a diplomatic representative two steps below the full rank of ambassador. See Protocol of Vienna, *supra* note 37, art. I. For the legislative history of the congressional appropriation, see CONG. GLOBE, 30th Cong., 1st Sess. 403-10 (1848).

the Vatican never reciprocated with a diplomatic representative of its own to the United States.<sup>63</sup> Hence, diplomatic relations between the United States and the Vatican were non-reciprocal. By 1867, however, annexation of the Papal States to the Kingdom of Italy was well under way. Congress, in an apparent response to the situation, withdrew appropriations "for the support of an American legation at Rome."<sup>64</sup> In 1871, after annexation was complete, President Grant formally recognized that the Papal States had ceased to exist.<sup>65</sup>

3. *Unofficial (1893-1984)*. The Vatican established non-diplomatic representation in the United States in 1893 when it sent its first apostolic delegate to Washington, D.C.<sup>66</sup> The delegation was continuous until its transformation in 1984 to an embassy for the Vatican's pro-nuncio to the United States. The United States did not "reciprocate" the Vatican's unofficial representation until 1939, and even after that United States representation was not continuous.

President Franklin D. Roosevelt began unofficial representation at the Vatican by sending Myron C. Taylor as his *personal* representative to the Pope.<sup>67</sup> After Taylor resigned in 1950, the practice of sending a permanent personal representative did not resume for nearly twenty years.<sup>68</sup> In the meantime, however, Presidents Eisenhower, Kennedy, and Johnson did make personal visits with the Pope, and Presidents Eisenhower and Johnson both sent personal representatives for certain special occasions at Vatican City.<sup>69</sup> In 1970, President Nixon resumed the practice

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<sup>63</sup> H. CARDINALE, *supra* note 6, at 200.

<sup>64</sup> Act of Feb. 28, 1867, ch. 99, 14 Stat. 412, 413 (1867); *see also* L. STOCK, *supra* note 62, at xxxix (Congress sympathetic to Italian desire for united Italy).

<sup>65</sup> *See* 9 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4098 (J.D. Richardson ed. 1897).

<sup>66</sup> 1895 ANNUARIO PONTIFICIO 670.

<sup>67</sup> *See* 1 DEP'T ST. BULL. 711-12 (1939). President Truman later reappointed Taylor to the same position. 14 DEP'T ST. BULL. 818 (1946).

<sup>68</sup> Ambassador Wilson testified before the Senate Foreign Relations Committee on February 2, 1984:

As you perhaps know, various Presidents from President Roosevelt until President Reagan have sent personal envoys. That has not been a continuous situation. There were three Presidents there that did not send a personal envoy, so it has been a discontinuous situation and one which does not tend to create a feeling of permanence between the two nations—that is, the United States and the Holy See.

Confirmation Hearing, *supra* note 4, at 6.

<sup>69</sup> *See* 2 WHITEMAN, DIGEST OF INTERNATIONAL LAW 543-44 (1963) (President Eisenhower's personal representative attended funeral of Pope Pius XII); 54 DEP'T ST. BULL. 230 (1966) (President Johnson sent representatives to Pope to explain his Vietnam policy). The first United States President to visit the Vatican was Woodrow Wilson who met with Pope Benedict XV on January 4, 1919. President Wilson was in Europe attending the Paris Peace Conference, at the conclusion of World War I. President Eisenhower was the second President to visit the Vatican. *See* 2 WHITEMAN, *supra*, at 544. For an account of other presiden-

started by President Roosevelt by appointing Henry Cabot Lodge as his personal representative to the Vatican. Ambassador Lodge continued his service under President Ford; President Carter sent David Walters and then Robert F. Wagner, and President Reagan sent William A. Wilson.<sup>70</sup>

4. *Full diplomatic relations.* Full diplomatic relations with the Papal States were considered but rejected by the Congress in 1847.<sup>71</sup> In 1951, President Truman attempted to name General Mark Clark as ambassador to Vatican City, but strong political pressure forced withdrawal of the nomination.<sup>72</sup> President Eisenhower was strongly urged by his staff to establish diplomatic relations, but continuing public opposition precluded his doing so.<sup>73</sup> President Nixon also considered the establishment of diplomatic relations with the Vatican, but he sent a personal representative instead to avoid a battle with Congress.<sup>74</sup>

Finally, on November 22, 1983, Congress quietly passed a bill that repealed the 1867 ban on appropriations for an American legation at

tial visits, see *JFK's Vatican Visit Gains Significance*, Wash. Post, July 2, 1963, at —, col. —; see also 58 DEP'T ST. BULL. 77-78 (1968) (President Johnson visited Pope Paul VI in 1968); 80 DEP'T ST. BULL. 17 (Aug. 1980) (President Carter met with Pope John Paul II in 1980); 82 DEP'T ST. BULL. 20-22 (July 1982) (President Reagan met with Pope John Paul II in 1982). At least four United States Presidents have met with popes either before or after their incumbency in the White House. President Grant met with Pope Leo XIII in March 1878, after his term as President, and President Taft met with Pope Leo XIII in June and July of 1902, see Baldwin, *The Mission of Gov. Taft to the Vatican*, 12 YALE L.J. 1, 3 (1902), prior to becoming President. President Hoover met with Pope Benedict XV in 1920, before becoming President, and both Presidents Truman and Hoover met with Pope Pius XII after their respective presidencies had ended. See Folliard, *Presidents at Vatican*, Wash. Post, Nov. 17, 1959, at —, col. —.

<sup>70</sup> 63 DEP'T ST. BULL. 15 (1970) (Henry Cabot Lodge); Nomination of William A. Wilson, 20 WEEKLY COMP. PRES. DOC. 22 (Jan. 16, 1984) (William A. Wilson).

<sup>71</sup> See CONG. GLOBE, 30th Cong., 1st Sess. — (1948).

<sup>72</sup> 25 DEP'T ST. BULL. 894 (1951); H. CARDINALE, *supra* note 6, at 201.

<sup>73</sup> In 1952, Eisenhower, then a Republican presidential candidate, stated that he had "never favored the appointment of an ambassador to the Vatican." *Ike Never for Envoy to Vatican, Aide Says*, Wash. Post, Oct. 21, 1952, at —, col. —. In 1953, Lutherans and Protestants reacted angrily to a rumor that Claire Booth Luce was secretly engaging in diplomatic relations with the Vatican for the President. *Church, State Split Upheld by Mrs. Luce*, Wash. Post, Feb. 18, 1953, at 6, col. 3; *Protestant Group Asks if Mrs. Luce is Vatican Envoy*, Wash. Post, Feb. 10, 1953, at 12, col. 3. In 1954, Undersecretary Walter Bedell Smith testified before the House Appropriations Committee that he "thought it would be a good idea to establish relations with the Holy See." This was met with immediate, fierce opposition by Church groups. *Vatican Envoy Idea Attacked by Baptists*, Wash. Post, March 12, 1954, at 48, col. 2; *U.S. Vatican Diplomatic Link Favored*, Wash. Post, Feb. 24, 1954, at 7, col. 1. The Baptist Joint Committee on Public Affairs adopted a resolution of its "unshaken conviction that any diplomatic relationship . . . is a violation of the historic American principle of the separation of Church and State." *Vatican Envoy Idea Attacked by Baptists*, Wash. Post, March 12, 1954 at 48, col. 2.

<sup>74</sup> See *U.S. Rules Out Vatican Envoy, But Plans Ties*, Wash. Post, July 4, 1969, at —, col. —.

Rome and provided for the establishment of United States diplomatic relations with the Vatican.<sup>76</sup> Shortly after that, on January 10, 1984, President Reagan took his cue from Congress and appointed his current personal representative, William A. Wilson, as ambassador to the Holy See.<sup>76</sup> The Senate confirmed the nomination on March 7, 1984.<sup>77</sup> Congress approved appropriations for an ambassadorial mission on June 28, 1984, marking the first time that the United States and the Vatican have established full diplomatic relations.

This historical review provides a backdrop for examining the United States perception of the status of the Vatican. That perception must be viewed through the eyes of the powers that have an influence on United States foreign policy.

### *B. United States Foreign Policy Toward the Vatican*

In order to examine the policy of the United States government toward the Vatican, one must determine who the policymaker is, what the policymaker has said the policy is to be, and how it is actually carried out. The government and political system of the United States is designed so that the power to shape foreign policy rests with more than one person or group. To varying degrees, policy is determined by the President and the executive branch, Congress, the courts, and public opinion.

With respect to recognition policy, the interplay of these four policymakers can be described as a chain reaction. The power to recognize foreign governments rests exclusively with the President who reacts to some political circumstances in arriving at the decision to recognize a certain foreign government. The people may react in anticipation that the power will be exercised by the President. This usually occurs when the President releases a "trial balloon" to test public reaction before committing

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<sup>76</sup> Act of October 20, 1983, Pub. L. No. 98-164, § 134, 97 Stat. 1017, 1029 (1983). Bills were introduced in each house of Congress. See S. 1342, 98th Cong., 1st Sess. (1983); H. 2915, 98th Cong., 1st Sess. (1983). The Senate bill, introduced by Senator Percy, was postponed; the House bill was passed in lieu of it. See S. REP. NO. 143, 98th Cong., 1st Sess. (1983); H. REP. NO. 130, 98th Cong., 1st Sess. (1983); H. REP. NO. 563, 98th Cong., 1st Sess. (1983) (conference report). The House bill was signed into law by President Reagan on November 22, 1983. 19 WEEKLY COMP. PRES. DOC. 1614 (1983). Prior to introduction of the bills, Representative Zablocki introduced a joint resolution on June 30, 1983 (H.R.J. Res. 316, 98th Cong., 1st Sess. (1983)), and Senator Lugar introduced a companion proposal on August 3, 1983 (S. 1757, 98th Cong., 1st Sess. (1983)), both of which called for establishment of diplomatic relations with the Vatican. See 129 CONG. REC. E3316 (daily ed. June 30, 1983) (remarks of Representative Zablocki).

<sup>76</sup> See 20 WEEKLY COMP. PRES. DOC., *supra* note 70, at 22.

<sup>77</sup> 130 CONG. REC. S2413 (daily ed. Mar. 7, 1984). For the related debate, see 130 CONG. REC. at S2384-90. For the subcommittee report, see Confirmation Hearing, *supra* note 4.

to the recognition of a government. After the President exercises the power of recognition, the United States Senate reacts by reviewing the President's choice of ambassador, and the entire Congress reacts by deciding what funds, if any, will be appropriated to the establishment of an ambassadorial mission to the newly recognized government. The Congress also responds to the reaction of the people. The President's recognition may withstand the political processes of Congress and the people, but it still remains vulnerable to judicial review. If the people react to the recognition by challenging its legality, it may undergo scrutiny by the courts. This last stage of the chain reaction has yet to be reached in the case of Vatican recognition.

Below, each policymaker is examined separately in the context of four critical periods of Vatican history: 1) the existence of the Papal States (until 1870), 2) the period of the "Roman Question" (1870-1929), 3) the existence of Vatican City before normalization of diplomatic relations with the United States (1929-1983), and 4) the period since the normalization of relations (1984 to the present).

1. *The President.* The President may wish to recognize the Vatican for a particular reason of foreign policy or international relations, but the President is also constrained by legal considerations and domestic politics. Legally, the establishment clause of the first amendment<sup>78</sup> prohibits governmental support of a religion; politically, many people are extremely defensive of the principle of separation of church and state. In a number of cases, Presidents have made overtures toward the Vatican. This Article examines the political motivations for those overtures and notes the statements made to divert or prevent adverse public reaction.

(a) *1797-1870.* Despite the fears expressed by John Adams in 1779, President George Washington established consular relations with the Papal States in 1797.<sup>79</sup> The President's purpose in establishing consular relations was two fold: politically, the relations gave the newly formed United States more indicia of independence, particularly among Europeans; commercially, the relations gave the United States greater access to the seaports of the Papal States.

In 1848, relations were upgraded, upon the proposal of President Polk, by the appointment of Ministers to the Vatican.<sup>80</sup> Polk was urged by his advisers to establish diplomatic relations despite significant anti-Catholic sentiments that existed throughout the country.<sup>81</sup> Secretary of State Buchanan stated at the time that diplomatic relations were being

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<sup>78</sup> U.S. CONST. amend. I.

<sup>79</sup> Stock, *supra* note 58, at 233-34; see *infra* note 111 and accompanying text.

<sup>80</sup> IV A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, at \_\_\_\_ (J.D. Richardson ed. 1897).

<sup>81</sup> I VATICAN POLICY IN A REVOLUTIONARY WORLD 460-64 (1963).

established with the Papal States and not with "the Pope as head of the Catholic Church." His specific instructions to Jacob Martin, the first Minister to the Papal States, were:

Most, if not all, the Governments which have diplomatic representation at Rome are connected with the Pope as the head of the Catholic Church. In this respect the Government of the United States occupies an entirely different position. It possesses no power whatever over the question of religion. . . . Your efforts therefore will be devoted exclusively to the cultivation of the most friendly civil relations with the Papal Government, and to the extension of the *commerce* between the two *countries*. . . . It might be proper, should you deem it advisable, to make these views known, on some suitable occasion, to the Papal Government, so that there may be no mistake or misunderstanding on this subject.<sup>82</sup>

During the Civil War, relations with the Vatican became more political and less commercial. The Confederate South sought recognition of its government, and the government in Washington threatened to break off relations with the Vatican if it responded positively to those overtures.<sup>83</sup> Vatican relations were important to both sides, particularly with over three million Catholics living in the divided nation.<sup>84</sup> When the extinction of the Papal States became inevitable, the President was forced to reconsider existing Vatican relations; without territory, the Vatican would lose its membership in the family of nations. Secretary of State Seward instructed his Minister, Rufus King:

Should the sovereignty at Rome undergo a revolutionary change, you will suspend the exercise of diplomatic functions within the territory in which a new government shall have been established. Should the present government remove and take up a residence in any other place, whether in or out of Italy, you will not be expected to follow it until the case, as it shall then exist, shall have received the attention of the President, and until his views thereupon shall have been made known.<sup>85</sup>

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<sup>82</sup> Memorandum from Secretary of State Buchanan to Jacob L. Martin (Apr. 5, 1848), reprinted in 1 J. MOORE, *DIGEST OF INTERNATIONAL LAW* 130 (1906) (emphasis added) [hereinafter cited as Buchanan Memorandum].

<sup>83</sup> L. STOCK, *supra* note 58, at xxxvi. In 1863, Jefferson Davis, President of the Confederate States during the Civil War, sought recognition from Pope Pius IX as head of the Papal States, but he received only an ambiguous reply. See Letter from Pope Pius IX to Jefferson Davis (Dec. 3, 1863), reprinted in 1 J. MOORE, *supra* note 82, at 211.

<sup>84</sup> See Alvarez, *The Papacy in the Diplomacy of the American Civil War*, 69 CATH. HIST. REV. 227, 228 (1983). For other articles on United States-Vatican relations during the Civil War, see L. STOCK, *CATHOLIC PARTICIPATION IN THE DIPLOMACY OF THE SOUTHERN CONFEDERACY* (1931); Stock, *The United States at the Court of Pius IX*, 3 CATH. HIST. REV. 103 (1923).

<sup>85</sup> Letter from Secretary of State Seward to Rufus King (Aug. 16, 1866), reprinted in 1 J. MOORE, *supra* note 82, at 131.

The President made those views known when the annexation of the Papal States to the Kingdom of Italy was complete. In 1871, President Grant formally terminated diplomatic relations with the Vatican.<sup>86</sup> Reciprocal consular relations also came to an end, and David Armstrong, the last consul to the Papal States, became the first consul to the newly unified Kingdom of Italy.<sup>87</sup>

(c) 1870-1929. During this period, when the Vatican enjoyed no territorial independence, relations with the United States government were virtually nonexistent. However, United States diplomats could not always avoid encountering papal diplomats in foreign countries that continued to recognize the Vatican. The Secretary of State instructed the American diplomatic corps to extend courtesies to those papal diplomats, but never to "address the Pope personally."<sup>88</sup> A notable exception to this policy was made by President Wilson on January 4, 1919, when he made a personal visit with Pope Benedict XV in Rome.<sup>89</sup> President Wilson was in Europe to attend the Paris Peace Conference following World War I, from which the Vatican had been excluded by the demands of Italy. Wilson's visit was perhaps the first official acknowledgment by the United States government of the spiritual domain of the Vatican.

Another unavoidable crossing of paths of the United States and the Vatican occurred in 1902, when William H. Taft was appointed, as Governor of the Philippine Islands, to negotiate with Pope Leo XIII "for the purchase of property from the owners thereof, and the settlement of land titles" in the Philippines.<sup>90</sup> To avoid the question of recognition, Taft was appointed not by President Theodore Roosevelt, but by his Secretary of War. The orders stated:

Your errand will not be in any sense or degree diplomatic in its nature, but it will be purely a business matter of negotiation by you as Governor of the Philippines. . . .<sup>91</sup>

(d) 1929-1983. Diplomatic and consular relations between the United States and the Vatican ceased to exist in 1870. Therefore, when certain United States Presidents after 1939 began to maintain contacts with the

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<sup>86</sup> See *supra* note 65 and accompanying text.

<sup>87</sup> See H. CARDINALE, *supra* note 6, at 284. The Vatican never withdrew the exequatur of its consul to New York, Leo Binsse, so the consul remained there until his death in 1895. The Italian government complained of the situation, but Secretary of State Hamilton Fish did nothing to change it. *Id.*

<sup>88</sup> Letter from Secretary of State Bayard to Mr. Dwyer (Jan. 31, 1887), reprinted in 1887 FOREIGN RELATIONS OF THE UNITED STATES 642.

<sup>89</sup> See Kissling, *President at Vatican*, Wash. Post, Nov. 13, 1959, at \_\_\_, col. \_\_; Folliard, *supra* note 69, at \_\_\_, col. \_\_.

<sup>90</sup> See Baldwin, *supra* note 69, at 3.

<sup>91</sup> *Id.*



Vatican, the State Department and the President's legal advisors were hard-pressed to explain how such contacts could exist without implicitly establishing diplomatic relations between the United States and the Vatican.

In 1939, during the political turmoil in Europe, President Roosevelt sent his personal representative, Myron C. Taylor, to the Pope.<sup>92</sup> In a letter to the Pope, President Roosevelt stated that the reason for his gesture was "in order that [their] parallel endeavors for peace and the alleviation of suffering may be assisted."<sup>93</sup> Near the time of the appointment, Secretary of State Welles stated that "while . . . this Government has not established formal diplomatic relations with the Government of the *Vatican City State*, it nevertheless is a sovereign state . . ."<sup>94</sup> It could be implied that the Executive's position at the time was that personal representatives were being sent to the Vatican in its temporal, rather than spiritual, capacity.

In 1951, during the Korean conflict and the Cold War between the United States and the Soviet Union, President Truman stated:

It is well known that the Vatican is vigorously engaged in the struggle against Communism. Direct diplomatic relations will assist in coordinating the effort to combat the Communist menace.<sup>95</sup>

In 1951, Truman nominated an ambassador to *Vatican City*, not to the Holy See or the Pope.<sup>96</sup> President Truman's move failed, however, due to adverse public opinion; consequently, the State Department offered this assurance: "The United States Government has not established diplomatic relations with the Government of *Vatican City* and has not recognized that Government."<sup>97</sup> The wording of this statement once again suggests a distinction between the spiritual and temporal capacities of the Vatican.

In 1959, President Eisenhower presented a new challenge for his lawyers when he paid a personal visit to Pope John XXIII.<sup>98</sup> If the President were to visit the Pope, the head of *Vatican City*, it could be argued that under international law, formal recognition had taken place. Since the

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<sup>92</sup> 1 DEP'T ST. BULL. 711 (1939).

<sup>93</sup> Letter from President Roosevelt to the Pope (Dec. 23, 1939), reprinted in 1 DEP'T ST. BULL. 711, 712 (1939).

<sup>94</sup> Letter from Undersecretary of State Sumner Welles to M. Hazen (May 26, 1939), reprinted in 2 WHITEMAN, *supra* note 69, at 538 (emphasis added).

<sup>95</sup> 25 DEP'T ST. BULL. 894 (1951).

<sup>96</sup> See *supra* text accompanying note 72.

<sup>97</sup> Letter from Assistant Secretary of State McFáall to Senator Smith (March 28, 1952), reprinted in 2 WHITEMAN, *supra* note 69, at 541 (emphasis added).

<sup>98</sup> See generally 2 WHITEMAN, *supra* note 69, at 544 (account of preparations for Eisenhower visit).

purpose of President Eisenhower's visit, however, was not to normalize diplomatic relations with the Vatican, and because such a purpose was to be avoided given the recent experience of the Truman administration, the executive was forced to change its characterization of the Vatican as a temporal domain to a spiritual domain.<sup>99</sup>

The Legal Advisor to the White House called the visit one between "the President . . . [and] the Pope in the Pope's capacity as *supreme pontiff of the Roman Catholic Church*, as a *spiritual leader*. . . ."<sup>100</sup> On its face, this new position would seem to raise more problems than it was designed to solve. Does not this position reverse the State Department's 1848 position that the United States government "possesses no power whatever over the question of religion?"<sup>101</sup> Perhaps the statement should be disregarded since it was made under political pressure to explain an anomalous situation and since it is not consistent with either prior or subsequent statements of the Executive. Nevertheless, it does indicate a continuing recognition that the Vatican consists of both spiritual and temporal domains.

In 1970, at the peak of the Vietnam conflict, President Nixon reestablished the practice of sending a personal representative to the Pope,<sup>102</sup> despite the adverse public reaction that resulted. The President explained his motivation for the move:

What is important is that the United States have with the Vatican close consultation on foreign policy matters in which the Vatican has a very great interest and very great influence.<sup>103</sup>

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<sup>99</sup> See *id.* at 545. It should be noted that this issue did not arise when President Wilson visited Pope Benedict XV in 1919 because the Pope was not then arguably a head of state. See H. CARDINALE, *supra* note 6, at 100.

<sup>100</sup> See WHITEMAN, *supra* note 69, at 544 (emphasis added). Mr. Hager made the potentially negative ramifications quite clear:

If the President, who under all circumstances is a head of state, were to visit the Pope in the latter's capacity as Head of the Vatican City State it would be extremely difficult for the United States to maintain thereafter that it did not recognize the Vatican City State. A state visit between the two heads of state would necessarily carry a substantial implication of recognition. Considerably less important actions have in the past been considered to require taking steps to avoid recognition. . . .

It is possible for the President to visit the Pope in the Pope's capacity as supreme pontiff of the Roman Catholic Church, as a spiritual leader, without involving the question of the recognition of the Vatican City State in the international law sense. . . .

*Id.* at 544-45; see also Smith, *Diplomatic Relations with the Holy See—1815-1930*, 48 L.Q. REV. 374 (1932) ("[t]he story of British relations with the Holy See is a curious record of subterfuges and evasions").

<sup>101</sup> 4 J. MOORE, *supra* note 37, at 130.

<sup>102</sup> See 63 DEP'T ST. BULL. 15 (1970); *infra* note 131 and accompanying text.

<sup>103</sup> See *U.S. Rules Out Vatican Envoy, But Plans Ties*, *supra* note 74, at \_\_\_, col. \_\_\_\_.

Representatives to the Pope have been appointed by every subsequent President,<sup>104</sup> culminating in President Reagan's diplomatic recognition of the Vatican in 1984.

(d) *Since 1984.* In 1984, at a time when United States-Soviet relations were said to be the worst ever, President Reagan appointed an ambassador to the Holy See, not Vatican City as attempted by President Truman.<sup>105</sup> In addition to stating that the Vatican met the minimum requirements of statehood, Deputy Secretary of State Kenneth Dam pointed out that recognition was particularly motivated by the Vatican's worldwide sphere of political influence:

This is not a question of establishing relations with the Church or with the religion. The fact of the matter is that the Vatican is very active all over the world on many, many different kinds of issues. . . . There are immigration questions. There are narcotics questions, and questions on education, the humanitarian distribution of food and medicine.

These are the things that we want to talk to them about—not about religion, so I think that is the fundamental point.<sup>106</sup>

Since, according to Vatican policy, diplomatic relations could not be established with Vatican City, President Reagan had no choice but to use the title "Holy See" in announcing the recognition. So, how does the executive branch officially characterize the Holy See? Is it considered a temporal personality, consistent with United States former policy toward the Vatican? Or is it viewed as a spiritual personality as described by the Legal Advisor in 1959? Or is it both? The State Department's publication *Background Notes* reads:

The State of the Vatican City, seat of the Holy See and administrative and spiritual capital of the Roman Catholic Church, is recognized by many nations as an independent sovereign state under the temporal jurisdiction of the Pope. Diplomatic representatives are accredited formally to or from the Holy See itself.<sup>107</sup>

The statement seems to suggest that diplomatic representatives who are "formally" accredited to the Holy See are, in actuality, representatives to Vatican City. Consider as well statements made by State Department officials in congressional hearings and to the public on the subject of President Reagan's recognition. Immediately after the recognition, on January 10, 1984, executive statements were made and reported as follows:

Both Larry Speakes, the White House spokesman, and John Hughes, the State Department spokesman, said there was no violation of the separation

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<sup>104</sup> See *supra* note 70 and accompanying text.

<sup>105</sup> See *supra* note 72 and accompanying text; H. CARDINALE, *supra* note 6, at 201.

<sup>106</sup> See 1984 House Appropriations Hearing, *supra* note 43, at 17-18.

<sup>107</sup> Background Notes, *supra* note 20, at 1177.

of church and state because the United States was recognizing the Holy See, *rather than* the Roman Catholic Church itself.<sup>108</sup>

On February 9, 1984, one month after the recognition, Deputy Secretary of State Kenneth Dam testified before an appropriations subcommittee that was considering funding an ambassadorial mission to the Vatican that:<sup>109</sup>

[T]here is a distinction in diplomatic practice in international law between the Holy See and the Vatican. The Vatican, itself, has the physical territory.

The Vatican City has many of the same attributes that you would find in any country. . . .

The Holy See is the government of Vatican City, but it also has activity which is disproportionately large obviously to the size of Vatican City, in the sense of a nation or a country. . . .

I think that the reason that there has been some debate about whether it [the Holy See] is really a nation under international law is because of its size . . . that is the major problem that has troubled international legal scholars when they have approached this as a kind of academic issue. . . . When we accredit an Ambassador to the Court of St. James, you could say that that Ambassador is being accredited to a head of a religious order or religious group. But the reason we have an Ambassador in England is because England is an international entity with which other nations maintain relations, and *that is the sole reason why we are planning to have diplomatic relations with the Vatican.*<sup>110</sup>

2. *Congress.* Whereas presidents have consistently shown a desire to establish relations with the Vatican, the Congress, until recently, has been more reluctant.

(a) *1779-1870.* This first and oft-quoted statement was made by John Adams in 1779 before the Continental Congress:

Congress will probably never send a Minister to His Holiness who can do them no service, upon condition of receiving a Catholic legate or nuncio; or, in other words, an ecclesiastical tyrant which, it is to be hoped, the United States will be too wise ever to admit into their territories.<sup>111</sup>

Ironically, eighteen years later John Adams inherited Vatican consular relations established by President Washington.

When President Polk proposed the establishment of diplomatic rela-

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<sup>108</sup> *U.S. and Vatican Restore Full Ties After 117 Years*, *supra* note 2 (emphasis added). The Washington Post reported that the State Department indicated that the Holy See was recognized as having an "international personality *distinct from* the Roman Catholic Church" because the Vatican is a "sovereign city-state." *U.S., Vatican Set Formal Ties*, Wash. Post, Jan. 11, 1984, at 16, col. 1 (emphasis added).

<sup>109</sup> See 1984 *House Appropriations Hearing*, *supra* note 43, at 13.

<sup>110</sup> *Id.* at 31 (emphasis added).

<sup>111</sup> 7 *WORKS OF JOHN ADAMS* 109-10 (1853).

tions with the Vatican in 1848, the United States Congress bitterly debated the issue.<sup>112</sup> During those debates, Senator Calhoun, who voted for the appropriation of funds for a mission to the Vatican, stressed the importance of maintaining diplomatic relations with the temporal and not the spiritual personality of the Vatican:

I feel assured, that to give precedence here to the Pope's legate, upon spiritual grounds, *which is the case in Europe*, would produce a very undesirable and dangerous excitement. If the Pope should entertain any design of sending a legate to this government, I trust that the precaution of informing him with regard to the difficulty on the point will be observed . . . .<sup>113</sup>

Congress (and the President) therefore acknowledged the international legal capacity of the Vatican, but only as a temporal sovereign. Moreover, Vatican representatives were afforded the rank of *chargé d'affaires*, even though President Polk had proposed the higher rank of Minister.<sup>114</sup>

(b) 1870-1929. The extinction of the Papal States logically implied discontinuation of diplomatic relations because the United States relations were with the Papal States and not directly with either the Holy See or the Pope. Indeed, Congress withdrew its appropriations for a diplomatic mission three years before extinction of the States was final.<sup>115</sup> During the remainder of this period neither Congress nor the President raised the issue of restoring Vatican relations.

(c) 1929-1983. In 1938, nine years after Vatican City became an independent territory, Congress granted *de facto* recognition of its existence by passing a law concerning the validation of official records of Vatican City.<sup>116</sup> The law remains in force today. In 1951, President Truman attempted to transform that *de facto* recognition into *de jure* recognition by appointing an ambassador to Vatican City. Consistent with its refusal to grant full diplomatic status to a legate in 1848, Congress unofficially opposed the move;<sup>117</sup> the nomination was later withdrawn, before it could be considered in committee or on the floor. Nevertheless, in 1956, Congress reaffirmed its *de facto* recognition of Vatican City by authorizing

<sup>112</sup> See CONG. GLOBE, 30th Cong., 1st Sess, app. 403-511 (1848).

<sup>113</sup> *Id.* at 410 (emphasis added).

<sup>114</sup> *Id.* at 520-21; see *supra* note 62.

<sup>115</sup> 14 Stat. 413 (1867). But see H. CARDINALE, *supra* note 6, at 200:

The American Mission to Rome was brought to a close in 1867, when Congress refused to continue the appropriation for it on the ostensible reason of the mission's political insignificance. It was really moved to take the decision by the erroneous charge that the American Protestant Church had been ordered to remain outside the walls of Rome, obviously mistaking it for St. Paul's Basilica outside the walls!

*Id.*

<sup>116</sup> Act of June 25, 1938, ch. 682, 52 Stat. 1163 (codified at 22 U.S.C. § 4222 (1982)).

<sup>117</sup> See H. CARDINALE, *supra* note 6, at 113.

the issuance of a Treasury check drawn to the order of Vatican City to pay for accidental damage caused to Vatican buildings by American bombers during World War II.<sup>118</sup>

(d) *Since 1984.* When the ban on appropriations for an embassy was lifted in 1983, there was little opposition in Congress.<sup>119</sup> This support represented the first time that Congress indicated a willingness to establish full diplomatic relations with the Vatican and the first time that Congress had initiated the idea.

After President Reagan nominated William A. Wilson as ambassador to the Vatican,<sup>120</sup> Congress had its first chance to discuss the issue of establishing diplomatic relations with the Vatican in the Senate confirmation hearings.<sup>121</sup> There was no debate about the qualifications of Mr. Wilson, although that was, technically, the only issue open for discussion. All discussions focused upon the wisdom of establishing diplomatic relations with the Vatican.<sup>122</sup> Senator Hatfield stated:

I think when we stand here in the Senate and say that we are sending an ambassador, a political representative, to a church, and that is what the Holy See is; it is a church, we are making a grave error.<sup>123</sup>

In defense of the recognition, Senator Murkowski explained the non-religious motivation:

[W]e are not recognizing a particular religion, but instead are enhancing a diplomatic avenue for the advancement of peace and stability in the world.<sup>124</sup>

Senator East, on the other hand, emphasized the religious basis for the recognition:

I think it is clear that, barring the presence of the Vatican in that small piece of territory in Italy, we would not be recognizing it. So, in effect, what we are doing is to give political status at the highest level to what is fundamentally a spiritual entity.<sup>125</sup>

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<sup>118</sup> Act of July 3, 1956, ch. 514, 70 Stat. 495. For the legislative history, see H.R. REP. NO. 2251, S. REP. NO. 2292, 84th Cong., 2d Sess. (1956) (Comm. Rep. on H.R. 10766).

<sup>119</sup> See Confirmation Hearing, *supra* note 4, at 4-5 (remarks of Sen. Wilson). On October 5, 1983, opponents of the legislation held a press conference on Capitol Hill. See *Congress Moves Toward Establishing Diplomatic Ties With Vatican*, The Christian Sci. Mon., Nov. 7, 1983, at 9, col. 1.

<sup>120</sup> 20 WEEKLY COMP. PRES. DOCS. 22 (1984).

<sup>121</sup> See 130 CONG. REC. S2384-90 (daily ed. Mar. 7, 1984). Wilson was nominated on February 2. See Confirmation Hearing, *supra* note 4, at 14.

<sup>122</sup> See 130 CONG. REC. 2384-90 (daily ed. Mar. 7, 1984).

<sup>123</sup> *Id.* at S2385.

<sup>124</sup> *Id.* at S2387.

<sup>125</sup> *Id.* at S2386.

Despite the apparent wariness of certain Senators, Mr. Wilson's nomination was approved by a vote of 81 to 13.<sup>126</sup>

3. *Public Opinion.* The objections raised by private groups and individuals in the United States to the recognition of the Vatican have been based in almost every case upon religious grounds, so the sponsors of the opposition are usually non-Catholic church groups or anti-religion groups. Whether or not the opposition is based upon anti-Catholic bias, jealousy, or other deep-felt principles, the arguments are always presented in constitutional terms. Many believe that establishing relations with the Vatican, regardless of the title used by it, violates the basic principle that matters of church and state should remain separate.

(a) 1797-1870. Anti-Catholic sentiments were strong during this period, so it is not surprising that the actions of President Washington to establish consular relations and of President Polk to establish diplomatic relations were met with domestic opposition. However, because the Papal States comprised a territory of significant size and population, little doubt could be raised about the Vatican's juridical personality as a state.

(b) 1870-1929. During this period, no recognition of the Vatican was made or attempted by a President of the United States, so the issue was never raised before the public. When President Wilson, however, visited Pope Benedict XV in 1919, he was particularly sensitive to the adverse public opinion it could arouse among Americans. Mrs. Wilson, the President's wife, wrote:

Being a Protestant, and knowing the temper of many of our people at home regarding the Pope, the President decided he would call on his old friends . . . in charge of the American Episcopal Church in Rome.<sup>127</sup>

(c) 1929-1983. Interest in establishing relations with the Vatican had burgeoned under Franklin D. Roosevelt's administration; under President Truman, the fully blooming prospect of diplomatic relations incurred a severe wave of criticism by virtually all church groups. Their attack was so strong that the issue never reached the stage of formal debate in either Congress or the courts and the nomination was withdrawn in defeat.<sup>128</sup> President Eisenhower also manifested an interest in establishing relations with the Vatican by visiting the Pope in 1959, becoming the second

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<sup>126</sup> See *id.* S2390 (1984). The subcommittee vote was 14 to 1 in favor of Mr. Wilson. See *id.* at S2384.

<sup>127</sup> E. WILSON, MY MEMOIR 216-17 (1939). For evidence of anti-Catholic bias that appeared during the presidential campaign of Al Smith, see *Calls Romanism Crux of Campaign*, N.Y. Times, Oct. 8, 1928, at 1, col. 6.

<sup>128</sup> See H. CARDINALE, *supra* note 6, at 201. The twenty-fourth annual session of the Georgia Baptist Convention, November 13, 1945, considered "the appointment of Mr. Taylor, even as a war measure, a direct violation of the Constitution of the United States. . . ." See 91 CONG. REC. A5035 (1945).

United States President to do so. There was talk throughout his administration of promoting diplomatic relations, but church groups were quick to denounce any rumors to that effect.<sup>129</sup>

During the 1960 campaign, President Kennedy's catholicism aroused fears that, as President, he would be a minion of the Pope. Kennedy, therefore, was forced to deny any interest he might have had in establishing relations with the Pope.<sup>130</sup> In 1969, when President Nixon indicated an interest in establishing permanent diplomatic relations with the Vatican, the opposition of church groups was tremendous. In several newspapers, a full-page ad signed by forty religious leaders entitled "DON'T DO IT, MR. PRESIDENT!" appeared.<sup>131</sup>

(d) *Since 1984.* The most recent attempt to establish diplomatic relations with the Vatican by President Reagan has also met with public resistance, but much milder and less widespread, by comparison, to the resistance in 1951. There is some speculation that the opponents of the recognition are saving their strength for a constitutional battle in the courts, to settle the issue once and for all.<sup>132</sup> Once again the argument is framed in constitutional terms—not only would the recognition amount to a promotion of the Catholic religion, but the Catholic religion would receive an unfair advantage since no other religion qualifies for diplomatic recognition according to the minimum criterion of territorial independence.

Whether or not the constitutional arguments are sound, they demonstrate that many Americans see little, if any, distinction between the Pope, the Church, the Holy See, and the Vatican City. Apparently they are not persuaded by the abstract arguments of the State Department designed to avoid the constitutional issue. Since this issue has not discouraged Congress and the President from their latest attempt at recognition of the Vatican, the next obvious forum for debate is the courts. The question of recognition of the Vatican finally will have matured from a political issue to a legal issue.

4. *The courts.* To date, the courts have not had the opportunity to review the acts of Congress and the President with respect to the Vatican. While judicial review may be viewed as a form of "political decisionmaking," court *dicta* about the status of the Vatican probably has been less

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<sup>129</sup> See *supra* note 73.

<sup>130</sup> See 1960 CONG. Q. ALMANAC 809; *Anti-Catholic Views Found Widespread in Parts of South*, N.Y. Times, Sept. 4, 1960, at 1, col. 6.

<sup>131</sup> See *Mini-Uproar Over Vatican Envoy*, Wash. Post, March 8, 1969, at \_\_\_\_, col. \_\_\_\_; *Baptists Ask Ban on Envoy to Vatican*, Wash. Post, March 7, 1969, at \_\_\_\_, col. \_\_\_\_\_. For a transcript of the 1969 news conference that spurred the public's anger, see 60 DEF'T ST. BULL. 239 (1969).

<sup>132</sup> See *infra* note 154.



politically motivated than the statements made by congressmen and spokesmen of the executive branch.<sup>133</sup>

(a) 1870-1929. There is no reference before 1870 in the reported federal cases to the status of the Vatican. In the case of *Ponce v. Roman Catholic Church* in 1907,<sup>134</sup> the Supreme Court made this observation:

The Holy See still occupies a recognized position in international law, of which the courts must take judicial notice.<sup>135</sup>

In support of its statement, the Court quoted the legal historian John Bassett Moore who characterized the Vatican at the time as a recognized spiritual sovereign, despite its loss of temporal dominion.<sup>136</sup> The above statement of the Court is perhaps the sole official statement of the United States government that was made about the personality of the Vatican at any time from 1870 to 1929. It indicates a recognition by the judicial branch that the Vatican possessed at least a spiritual, if not temporal, capacity.

(b) 1929-1983. In 1980, the Third Circuit Court of Appeals decided *Gilfillan v. City of Philadelphia*.<sup>137</sup> In *Gilfillan*, taxpayers opposed expenditures made by the City of Philadelphia to construct a special platform and to provide for other assistance for a mass performed by the Pope in a public area known as Logan Circle. In making its decision to prohibit such expenditures, the court distinguished the *religious* from the *diplomatic* functions of the Vatican, finding that in the particular case at issue, the religious function was being exercised and not the diplomatic one.<sup>138</sup> The dissent, however, made an even stronger statement about the secular personality of the Vatican:

Pope John Paul II is no ordinary bishop; he is the head of a secular state, albeit a theocratic one. The Holy See is an independent papal state, located in Vatican City . . . .

Sovereignty in this independent papal state is exercised by the Pope upon his election as the head of the Catholic Church.<sup>139</sup>

In sum, the few statements made by the judiciary on the status of the Vatican do not, except in the dissenting opinion of *Gilfillan*, place emphasis on the requirement of territoriality as a basis for finding recogniza-

<sup>133</sup> The courts refrain from deciding "political" questions as well. See *infra* notes 159-161 and accompanying text.

<sup>134</sup> 210 U.S. 296 (1908).

<sup>135</sup> *Id.* at 318.

<sup>136</sup> *Id.* at 318-19 (quoting 4 J. MOORE, *supra* note 37, at 39).

<sup>137</sup> 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981).

<sup>138</sup> 637 F.2d at 930-31.

<sup>139</sup> *Id.* at 935; see also *O'Hair v. Andrus*, 613 F.2d 931, 937 (D.C. Cir. 1979) (Pope permitted to offer mass on National Mall in Washington, D.C.).

ble personality. In fact, courts have acknowledged the personality of the Vatican when it possessed no independent territory, and cited its *diplomatic* and not its territorial independence when determining whether it acted for a secular purpose.

#### IV. ISSUES RAISED BY UNITED STATES RECOGNITION OF THE VATICAN

Certain issues arise in the minds of American jurists and laity because both the United States' fundamental principle of separation of church and state and because the distinction between the secular and religious affairs of the Vatican remains ambiguous. Those issues generally are related to foreign and domestic affairs. Let us consider first the foreign affairs issues.

##### A. *Issues Related to United States Foreign Policy*

1. *Is the United States recognizing a church or a state?* How is the international juridical personality of the Vatican relevant to the legality of Vatican recognition under United States law? If the courts are concerned with whether the President's recognition promotes a secular purpose, then it could matter whether the Vatican is an independent state. Moreover, it could matter whether the Vatican's international influence, from which the United States desires to benefit, is considered secular or religious. "Diplomatic" influence can be either secular or religious. Likewise, peace and freedom may be both secular and religious objectives. Today, the Vatican does not dominate governmental functions of other nations as it did in the Middle Ages, nor has it managed to acquire any significant amount of territory or permanent population within that territory. Yet, it has risen to a prominent and important position in the international community. The reason for this rise in position could be attributed to several things: international law, universal and fundamental in its purpose, is easily identifiable with Catholicism which is based on the principle of universality; our secularized societies are turning to spiritual guidance to fill the voids left (or created) by political and economic ideologies; jealousies among nations naturally invite the company of a "neutral," yet politically powerful participant; and the serious attempts of the Vatican to achieve world peace and freedom are a natural complement to the goals of most, if not all, nations. The importance of the Vatican to other independent nations is basically political, whereas the importance of independent nations to the Vatican is basically religious; the Vatican's main purpose is to spread Christianity throughout the world. In short, whereas recognition may fulfill a secular foreign policy objective of the United States and other nations, it also fulfills a spiritual policy objective of the Vatican. Are the two objectives reconcilable?

Although the United States will probably not go so far as some na-

tions have by concluding a *concordat*<sup>140</sup> with the Vatican, it will, in effect, further the religious purposes of the Vatican. Otherwise, the Vatican would have no interest in establishing diplomatic relations with the United States. Perhaps it is accurate to characterize the exchange of embassies as a compromise—meaning, the United States is willing to further the religious purposes of the Vatican if the Vatican is willing to further the foreign policy objectives of the United States.

2. *What does the United States stand to gain by formally recognizing the Vatican?* Presidents since Franklin D. Roosevelt have sent personal representatives to the Pope; why alter this informal practice, thereby raising the constitutional question and risking injury and offense to other religious groups? As Galloway pointed out in his study on United States recognition policy, only "in the few instances in which the United States perceives major interests at issue [does it show] a tendency to revive the use of recognition to pursue policy goals."<sup>141</sup>

When Congress was considering appropriation for a *chargé d'affaires* to the Papal States in 1848, Senator Badger asked the question: "[W]hat on earth can induce us at this time to establish this mission . . . ?"<sup>142</sup>

The benefits of any relations with the Vatican were recognized by numerous Presidents, all of whom took active steps to establish or maintain existing relations. In general, the Vatican operates a sophisticated foreign service through which it plays an active role in international affairs. In this role it has access to a great deal of information that can be useful to the United States in policymaking and decisionmaking. In particular, the Vatican has more experience than the United States in dealing successfully with the Communist world,<sup>143</sup> where many of its followers live. The United States government also works on a daily basis with the Vatican on such issues as immigration policy, refugee resettlement, and food and medicine distribution. The Vatican as a mediator has proven to be a diplomatic avenue for the advancement of peace and stability in the

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<sup>140</sup> See *supra* notes 33-36 and accompanying text. For a general review of United States-Vatican relations up to 1951, see M. HASTINGS, UNITED STATES-VATICAN RELATIONS: POLICIES AND PROBLEMS (unpublished manuscript 1952) (copy available through library loan, University of California at Berkeley, call no. JX 1428/C36H3/\*\*).

<sup>141</sup> L.T. GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS—THE PRACTICE OF THE UNITED STATES 124-25 (1978). Reagan is accused of playing domestic politics by recognizing the Vatican. See *Reagan's Vatican Move Assessed for Its Political and Constitutional Implications*, Christian Sci. Mon., Jan. 12, 1984, at 1, col. 1. President Truman was accused of the same thing for his nomination of a Vatican representative. R. GRAHAM & R. HARTNETT, DIPLOMATIC RELATIONS WITH THE VATICAN 5 (C. Keenan ed. 1952).

<sup>142</sup> CONG. GLOBE, 30th Cong. 1st Sess. 477 (1848) (remarks of Sen. Badger).

<sup>143</sup> "The Vatican, it is said, knows more about what is going on in Eastern Europe and Latin America, including Cuba, than perhaps even the U.S. State Department." R. Warshop, Washington and the Vatican, Feb. 20, 1969, Editorial Research Reports.

world.<sup>144</sup>

By formalizing relations with the Vatican, Ambassador Wilson believes that the Vatican "will have more confidence in us and will exchange information with us more freely . . .,"<sup>145</sup> because the relationship will be made more *permanent*, less susceptible to the vagaries of world politics and to the ephemeral foreign and domestic policies of Presidential administrations. Additional advantages include the United States ambassador's right of access to the Pope as chief of state; the creation of Senate oversight and access to information on Vatican activities; the promotion of the United States ambassador to a rank no longer subordinate to those of 106 other nations that formally recognize the Vatican; and a statement to the world of the United States' commitment to world peace and freedom.<sup>146</sup>

Perhaps the most obvious current situation of general concern is the worrisome state of Soviet-American relations. Focal points of that concern include South America, Africa, the Middle East, and all of Europe. The possibility of nuclear war is on the lips of the general public, and Western Europe considers itself to be a possible future target of Soviet aggression. Because it is well known that the Vatican, a powerful foe against communism, has always offered a neutral place for any country to express its views, recognition of the Vatican is an understandable step to be taken by the United States.<sup>147</sup>

3. *How are the protection, privileges, and immunities of American and Vatican diplomats and their missions affected by recognition?*

(a) *United States diplomats accredited to the Vatican.* Of the 106 other nations that have established diplomatic relations with the Vatican, only forty-five have actually exchanged embassies, and none of those forty-five nations maintains an embassy within the boundaries of Vatican City. Rather, the embassies are located in the city of Rome, Italy. Since the Vatican will not accept an ambassador who is also accredited to the

<sup>144</sup> See, e.g., H. CARDINALE, *supra* note 6, at 89 n.26.

<sup>145</sup> Confirmation Hearing, *supra* note 4, at 11.

<sup>146</sup> *Id.* at 3, 9, 10, 13; *Full U.S. Ties with Vatican Expected Soon*, N.Y. Times, Dec. 31, 1983, at 3, col. 2 (remarks of Sen. Lugar); R. GRAHAM & R. HARTNETT, *supra* note 141, at 15; *What the U.S. Does and Doesn't Win by Diplomatic Recognition of the Vatican*, Christian Sci. Mon., Jan. 13, 1984, at 10, col. 3.

<sup>147</sup> See Confirmation Hearing, *supra* note 4, at 10; Bettwy & Sheehan, *supra* note 5, at 18-20. The Vatican is "this nation's most useful ally abroad in the ideological warfare against communism. . . ." Cullinan, *supra* note 4, at 471. "The Pope is Stalin's most dangerous opponent in the struggle for dominance in Europe. . . ." *The Pope Versus Stalin*, N.Y. Daily News, Dec. 4, 1944 (editorial). "It is well known that the Vatican is vigorously engaged in the struggle against communism. Direct diplomatic relations will assist in coordinating the effort to combat the Communist menace." 25 DEP'T ST. BULL. 894 (1951). "Catholicism is synonymous with nationalism in countries that wish to defy Soviet domination." Dunn, *The Vatican's Ostpolitik: Past and Present*, 36 J. INT'L AFF. 247 (1982).

Italian government, pursuant to its right under the Vienna Convention on Diplomatic Relations,<sup>148</sup> the United States must either offer an ambassador who already is accredited to a country other than Italy<sup>149</sup> or an independently accredited ambassador who heads a mission in some other territory arranged for by the Vatican according to its obligation under the Vienna Convention.<sup>150</sup> It has offered the latter.

How, then, does the Vatican assure protection, privileges, and immunity to American diplomats and their mission which are accredited to it, yet residing in Rome? In Article 12 of the Lateran Treaty between the Vatican and Italy, Italy agreed:

Envoys of foreign governments to the Holy See will continue to enjoy on Italian territory all of the prerogatives and immunities which accrue to diplomatic agents according to international law, even though their States shall not have diplomatic relations with Italy. It is agreed that Italy pledges for ever in every case to let pass freely correspondence of all States, including belligerents, both to the Holy See and vice versa, as well as to permit free access of bishops of the whole world to the Apostolic See.

[D]iplomats and Holy See couriers sent in the name of the Supreme Pontiff enjoy in Italian territory, even in time of war, the same treatment due to diplomats and diplomatic couriers of other foreign governments according to the regulations of international law.<sup>151</sup>

By this agreement, then, Italy becomes a "receiving state" of the United States mission to the Vatican and would therefore be bound to provide protection, privileges, and immunities under the Vienna Convention.<sup>152</sup>

(b) *Vatican diplomats accredited to the United States.* Since the Vatican's embassy will be located within the United States—in Washington, D.C.—the United States government must directly provide protection, privileges, and immunities itself, pursuant to the Vienna Convention. The United States has ratified the Vienna Convention, but it has

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<sup>148</sup> See Article 5(1) of the Vienna Convention on Diplomatic Relations, *done* at Vienna, Apr. 18, 1961, 23 U.S.T. 3227, 3232, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention]. The Vienna Convention states:

The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, *unless there is express objection by any of the receiving States.*

*Id.* (emphasis added). The Convention was entered into for the United States on December 13, 1972. See 22 U.S.C. §§ 252 *et seq.* (1982).

<sup>149</sup> Vienna Convention, *supra* note 148, art. 6, at 3233.

<sup>150</sup> *Id.* art. 21.

<sup>151</sup> See Lateran Treaty, *supra* note 47, art. 12, *reprinted in* H. CARDINALE, *supra* note 6, at 322-23.

<sup>152</sup> See Vienna Convention, *supra* note 148, art. 22, at 3237-38.

reserved the following power:

The President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the mission, the members of the mission, their families, and the diplomatic couriers which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.<sup>153</sup>

Applying the principle of reciprocity, the extent of United States protection, privileges, and immunities for Vatican diplomats and their mission will depend, at least in theory, upon the extent to which the Italian government does the same for United States diplomats to the Vatican and their mission in Rome.

### B. *Issues related to Domestic Law and Policy*

1. *Does the recognition violate the principle of separation of church and state?* It appears that non-Catholic church groups have decided not to rally public opinion against Vatican recognition as they did during the presidential administrations of Truman, Eisenhower, and Nixon; instead, the issue will probably be brought before the courts<sup>154</sup> in an effort to settle the question once and for all. If court action is brought, however, the issue will not simply be one of the constitutionality of the recognition. A claimant must prove standing and the court must find the issue to be justiciable. It is possible, therefore, that the issue would never be reached.

(a) *Standing.* Who would have standing to sue? The most likely candidate would be a taxpayer, since the Supreme Court in *Frothingham v. Mellon*<sup>155</sup> stated that a taxpayer, although suffering a generalized grievance, has standing to attack federal spending in violation of the establishment clause of the United States Constitution. In *Flast v. Cohen*,<sup>156</sup> the Court stated that the establishment clause "specifically limit[s] the taxing and spending power conferred by Art. I, § 8 . . ."<sup>157</sup> meaning that a "taxpayer will have a clear stake as a taxpayer in assuring [that his or her constitutional rights] are not breached by Congress."<sup>158</sup> Since Congress has appropriated funds for the maintenance of an ambassadorial mission to the Vatican and for protection of the Vatican's mission in Washington, the issue is now ripe for litigation by a United States taxpayer.

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<sup>153</sup> 22 U.S.C. § 254(c) (1982).

<sup>154</sup> "The legislative battle isn't over," said a spokesman for AU [Americans United for Separation of Church and State]. "But even if it is passed and if the President nominates an ambassador, we would go to court." *Congress Moves Toward Establishing Diplomatic Ties with Vatican*, Christian Sci. Mon., Nov. 7, 1983, at 9, col. 3.

<sup>155</sup> 262 U.S. 447 (1923).

<sup>156</sup> 392 U.S. 83 (1968).

<sup>157</sup> *Id.* at 105.

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

(b) *Justiciability*. Once standing is established, a court would undoubtedly consider whether the issue presented is justiciable; that is, does the court have the power to review actions by the President and the Congress to recognize the Vatican? In *Baker v. Carr*,<sup>159</sup> the Supreme Court addressed in *dicta* the particular question of the courts' power to review the recognition of another country, stating that the courts do have the power to "examine the resulting *status* and decide independently whether a statute applies to that area."<sup>160</sup> The Court also stated:

[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called a "republic of whose existence we know nothing," and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory. . . .<sup>161</sup>

A court considering review of the recognition of the Vatican could distinguish it from non-justiciable types of recognition, since the real issue is the "status" of the Vatican and not an issue of who has sovereignty over Vatican City. If a court found that it had the power of review, it could proceed to the substantive issues, namely: What is the status of the Vatican?; and given the status of the Vatican, is the recognition constitutional?

(c) *Constitutionality*. The question of the constitutionality of the recognition has been vigorously analyzed by other authors.<sup>162</sup> To those studies should be added the *Gilfillan* case,<sup>163</sup> in which the Third Circuit gave an indication of how the issue would be phrased and decided. The case rested on the "narrow question of the constitutionality of the expenditure by the City of Philadelphia of more than \$200,000 to construct a special platform and to provide other extraordinary assistance for the papal ceremonies at Logan Circle. . . ."<sup>164</sup> The Court held that "challenged City expenditures [did] violate the establishment clause of the first amendment. . . ."<sup>165</sup> In so holding, the court examined whether the Pope's visit involved "any diplomatic role" and whether it involved any "religious purpose." The court found that "the type of aid provided by

<sup>159</sup> 369 U.S. 186 (1962).

<sup>160</sup> *Id.* at 212.

<sup>161</sup> *Id.*; see also *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("[i]t has been specifically decided that 'who is sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, . . . of that government' ") (quoting *Jones v. United States*, 137 U.S. 202, 212 (1890)).

<sup>162</sup> See *supra* note 4 (articles considering constitutionality).

<sup>163</sup> *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 451 U.S. 487 (1981).

<sup>164</sup> *Id.* at 927.

<sup>165</sup> *Id.* at 934.

the City was plainly of a type intended to advance religion, not diplomacy."<sup>166</sup> The court implied, therefore, that expenditures for the diplomatic activity of the Pope are constitutional and that the intention of the government in making the expenditure, not the intention of the Pope, determines whether the activity is religious or diplomatic.

If other courts follow this same line of reasoning to determine whether United States recognition of the Vatican is constitutional, the intent of the President and Congress would be determinative. Since both branches have left little doubt in their statements that the purpose of the recognition is diplomatic and not religious, as long as that purpose is consistently pursued, the courts should find no violation of the establishment clause.

2. *Will the tax status of the Vatican's mission in Washington, D.C. be affected by the recognition?* Before formal recognition, the Vatican occupied premises in Washington, D.C. The United States recognized the mission to be charged with ecclesiastical duties only. Therefore, the mission and its Vatican employees were entitled to the tax exempt status provided by the Internal Revenue Code. Section 501(a) of the Code provides an exemption from taxation of "religious and apostolic organizations. . . ."<sup>167</sup> The question arises whether the Vatican will continue to enjoy the same tax status in its new ambassadorial mission.

In terms of its status, the question becomes whether recognition has transformed the status of the Vatican's mission in Washington, D.C. from one of a "religious" or "apostolic" organization to one of a "diplomatic" mission. Article 23 of the Vienna Convention Diplomatic Relations reads:

The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.<sup>168</sup>

Article 34 reads: "A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal," with certain exceptions such as sales, service, estate, and commercial income taxes.<sup>169</sup>

Apparently the tax effect will remain virtually the same, whichever status applies. Since a court deciding whether United States-Vatican recognition is constitutional will look to the question of whether the executive and legislative branches further a diplomatic or a religious purpose, the Internal Revenue Service would be well advised to classify the tax exempt status of the Vatican's Washington mission as one of a diplomatic

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<sup>166</sup> *Id.* at 930 n.4.

<sup>167</sup> I.R.C. § 501(d) (1982); *see also* Treas. Reg. § 1.501(d)-1(a).

<sup>168</sup> *See* Vienna Convention, *supra* note 148, art. 23(1), at 3238.

<sup>169</sup> *Id.*, art. 34, at 3242-43.



mission pursuant to the Vienna Convention.

3. *How are United States laws related to Vatican City affected?* There are several federal statutes and regulations that refer either to the Vatican, Vatican City, or the Holy See.<sup>170</sup> In all cases except one, the legislation creates ambiguities in name only. One piece of the legislation, however, does create a significant ambiguity in the *status* of the Vatican. On June 25, 1938, Congress passed a law, stating:

*[U]ntil the United States shall have consular officer resident in the State of the Vatican City, a copy of any document of record or on file in a public office of said State of the Vatican City, certified by the lawful custodian of such document, may be authenticated, as provided in section 1741 of title 28, by a consular officer of the United States resident in the city of Rome, Kingdom of Italy, and such document or record shall, when so certified and authenticated, be admissible in evidence in any court of the United States.*<sup>171</sup>

Such a law is necessary for document validation only if the related country does not have diplomatic relations with the United States. Hence, failure to repeal this statute may imply that the United States does have diplomatic relations with the Holy See but not with Vatican City.

One could argue that this statute automatically ceases to be effective when the "United States shall have a consular officer resident in the State of the Vatican City," but the United States embassy will be located outside the boundaries of Vatican City, in Rome. It can also be said that the consular officer accredited to the Vatican *will* be "a consular officer of the United States resident in the city of Rome, Kingdom of Italy," so that all the statute does now is empower that consular officer to do what he or she can do anyway. However, an ambiguous situation could arise, theoretically, since the statute also empowers the consular officer accredited to Italy to authenticate Vatican documents. The harm in this could be two-

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<sup>170</sup> The following are regulations in which the term "Vatican City" appears: 49 Fed. Reg. 8693 (1984); 48 Fed. Reg. 22,251 (1983); 48 Fed. Reg. 10,056 (1983) (to be codified at 22 C.F.R. pt. 201); 47 Fed. Reg. 52,261 (1982); 46 Fed. Reg. 48,660 (1981) (to be codified at 36 C.F.R. pts. 701-03); 45 Fed. Reg. 80,215 (1980); 45 Fed. Reg. 54,031 (1980) (to be codified at 15 C.F.R. 373); 15 C.F.R. § 373 Supp. No. 3 (1983); 15 C.F.R. § 373 Supp. No. 2 (1983); 22 C.F.R. § 92.39 (1983); 22 C.F.R. § 201.11 (1983); 31 C.F.R. § 500.322 (1983); 31 C.F.R. § 515.322 (1983); 36 C.F.R. § 701.15 (1983).

The following regulations use the term "Holy See": 47 Fed. Reg. 31,384 (1984) (to be codified at 50 C.F.R. pt. 17); 8 C.F.R. § 242.2 (1983); 19 C.F.R. § 133.31 (1983); 50 C.F.R. § 1-96 app. A to ch. 1 (1982).

The term "the Vatican" appears in 47 Fed. Reg. 13,071 (1982).

The following are statutes in which "Vatican City" appears: 17 U.S.C. § 9 (1976); 18 U.S.C. § 3491 (1982); 22 U.S.C. § 4222 (1982); 28 U.S.C. § 1741 (1982).

<sup>171</sup> 22 U.S.C. § 4222 (1982) (emphasis added).

fold: 1) it allows infringement upon the sovereignty and independence of Vatican governmental acts, and 2) it could unintentionally suggest that the procedure for authenticating "Vatican City" documents is different from the procedure for authenticating "Holy See" documents, since official documents of the Holy See can be authorized only by a consular officer accredited to the Holy See, whereas official documents of Vatican City according to the statute, can be accredited by a consular officer accredited to Italy or by a consular officer accredited to the Holy See. In order to maintain a consistent statement of its policy, it would seem that the State Department would be well advised to seek repeal of 22 U.S.C. § 4222.

### CONCLUSION

United States-Vatican relations began soon after the establishment of the United States. At that time, the influence of the Vatican was well known to Americans particularly because of their European heritage; European history from 42 A.D. had been inextricably related to, if not dominated by, Vatican history. The United States was founded, however, upon the prevailing thinking—liberalism that itself evolved from rationalism. Such thinking demanded assurance that the principle of separation of church and state be preserved, as it was, in the very constituent instrument of the new nation. Despite the principle and the Constitution that preserved it, United States presidents consistently have expressed an interest in maintaining relations with the Vatican, recognizing that the importance of the Vatican's political influence outweighs or otherwise goes beyond the Vatican's religious personality.

In the realm of international law and politics, the juridical personality of the Vatican may be *sui generis*, but it has become well established; United States recognition of the Vatican therefore is undoubtedly international customary practice. In the realm of United States law and politics, it would appear that the question of Vatican recognition has finally graduated from being a political one to being a legal one. Soon a United States court will probably be asked to decide whether United States recognition of the Vatican violates the principle safeguarded by the establishment clause of the first amendment. However the courts react, it will necessarily be either an implied or express statement of whether recognition of the Vatican is subject to judicial review; whether there are first amendment constraints on United States foreign policy and diplomatic practice; and, most broadly, the relevance of international religious, political influence to the United States and its foreign policy goals.