

# ValpoScholar

## Valparaiso University Law Review

---

Volume 19  
Number 1 *Symposium: Rights, Work, and  
Collective Bargaining*

pp.197-219

---

*Symposium: Rights, Work, and Collective Bargaining*

### Diplomatic Relations Between the United States and the Holy See: Another Brick from the Wall

Mark Thomas Van Der Molen

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

---

#### Recommended Citation

Mark Thomas Van Der Molen, *Diplomatic Relations Between the United States and the Holy See: Another Brick from the Wall*, 19 Val. U. L. Rev. 197 (1984).

Available at: <https://scholar.valpo.edu/vulr/vol19/iss1/8>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



## DIPLOMATIC RELATIONS BETWEEN THE UNITED STATES THE HOLY SEE: ANOTHER BRICK FROM THE WALL

### INTRODUCTION

On January 10, 1984, President Reagan agreed to establish full diplomatic relations between the United States and the Holy See.<sup>1</sup> The Holy See is the government of the worldwide Catholic Church and of the secular State of Vatican City.<sup>2</sup> Diplomatic relations with the Holy See raise questions concerning a possible violation of the First Amendment's establishment clause. The establishment clause states that "Congress shall make no law respecting an establishment of religion. . . ."<sup>3</sup> The establishment clause requires government neutrality toward religion.<sup>4</sup> Because the Holy See is the government of the Catholic Church, it is necessary to analyze whether diplomatic relations with the Holy See are non-neutral toward religion and thus violate the establishment clause. Non-Catholic groups have already opposed diplomatic relations with the Holy See at the executive and legislative level, anticipating that an establishment clause challenge

---

1. The agreement to establish diplomatic relations was executed through a confidential exchange of notes between the United States and the Holy See. Telephone Interview with Mr. Smolik, Assistant to the President's Personal Representative to the Holy See, (Feb. 27, 1984). See also 20 WEEKLY COMP. PRES. DOC. 22 (Jan. 10, 1984) (President Reagan announced the nomination of William Wilson to be the first full rank ambassador to the Holy See). The Senate confirmed Wilson's nomination by a vote of 81 to 13. 130 CONG. REC. § 2390 (March 7, 1984). In November, 1983, The House and Senate repealed an 1867 law which prohibited the funding of an embassy in Rome. See 129 CONG. REC. § 16,367, H 10,429 (Nov. 18, 1983). Although both President Reagan's initiative and the legislative action could be challenged separately as violative of the establishment clause, this note's analysis is appropriate for both situations. The term "Vatican" can refer to the Holy See, the Vatican palace, or Vatican City. This note avoids using the confusing term "Vatican" and refers specifically to the Holy See or the secular state Vatican City.

2. J. NEUVECELLE, *THE VATICAN* 8 (1955).

3. U.S. CONST. Amend. I.

4. *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). (Supreme Court cases interpret the establishment clause as requiring government neutrality toward religion). See also Note, *Crowns and Crosses: The Problems of Politico-Religious Visits As They Relate to the Establishment Clause of the First Amendment*, 3 HARV. J. LAW & PUB. POL. 227 (1980).

is likely to be non-justiciable.<sup>5</sup> However, these opponents continue to argue that diplomatic relations with the Holy See violate the establishment clause.<sup>6</sup>

Before determining whether the United States' diplomatic relations with the Holy See violate the establishment clause, it is necessary to understand the nature of the Holy See. First and foremost, the Holy See exercises spiritual authority or sovereignty over the worldwide Catholic Church.<sup>7</sup> The spiritual sovereignty enables the Holy See to enter into diplomatic relations with secular governments.<sup>8</sup> Second, the Holy See exercises sovereignty over the secular state of Vatican City.<sup>9</sup> Thus, the Holy See has the dual role of exercising one sovereignty over both a world religion and a secular state.

The Reagan administration emphasizes the dual role of the Holy See in justifying diplomatic relations between the United States and the Holy See. The United States government asserts that diplomatic relations with the Holy See concern only the Holy See's role as the authority of the secular Vatican City and therefore that diplomatic relations cannot violate the establishment clause.<sup>10</sup> However, this note

---

5. Diplomatic relations raise political questions that courts are not likely to review. See *infra* note 139 and accompanying text. The National Association of Evangelicals, the General Council of Seventh Day Adventists, the Southern Baptist Convention, and Americans United for Separation of Church and State have all voiced opposition to diplomatic relations between the United States and the Holy See. CHICAGO TRIBUNE, Feb. 23, 1984, p. 14, sec. 1.

6. In September, 1984, a suit was filed in federal district court in Philadelphia challenging the constitutionality of United States—Holy See diplomatic relations. The plaintiffs include Americans United for Separation of Church and State, the Presbyterian Church, American Baptist Churches, the National Coalition of Nuns, the National Association of Evangelicals, the Progressive National Baptist Convention, the Unitarian—Universalist Association, the Church of the Brethren, the American Humanist Association, the National Association of Catholic Laity, Episcopal Bishop H. Coleman McGeehee of Detroit, and Rabbi Balfour Brickner of the Stephen Wise Free Synagogue in New York. The lawsuit alleges that diplomatic relations between the United States and the Holy See create excessive entanglement between church and state. CHICAGO TRIBUNE, Sept. 20, 1984, p. 3, col. 1. For a discussion of the possible judicial treatment of a lawsuit challenging United States—Holy See diplomatic relations, see *infra* text accompanying notes 139-146.

7. Catholic Church theory asserts that the Holy See's authority is equal to that of secular governments. See *infra* text accompanying note 12.

8. R. GRAHAM, VATICAN DIPLOMACY - A STUDY OF CHURCH AND STATE ON THE INTERNATIONAL PLAIN 220 (1959). See also *infra* text accompanying notes 32-39.

9. Lateran Treaty of 1929, Art. 2, reprinted in III PEASLEE, CONSTITUTIONS OF NATIONS 668 (2d ed., 1956). See *infra* text accompanying note 56.

10. By taking this position, the United States argues that diplomatic rela-

demonstrates that the United States' position misconstrues the Holy See's diplomatic role, as Holy See diplomacy is based on a spiritual authority or sovereignty.<sup>11</sup> This note concludes that given the unique nature of the Holy See, diplomatic relations between the United States and the Holy See violate the establishment clause.

#### NATURE OF THE HOLY SEE

The Holy See's sovereignty is based on the Catholic Church's conception of itself as a sovereign entity on par with the secular sovereign states.<sup>12</sup> The Catholic Church, however, realized that a spiritual sovereignty needed a secular foundation in a world of secular states. Thus, historically, the Church claimed its right to a secular domain to secure the spiritual sovereignty.<sup>13</sup>

#### *Theoretical Foundation of Holy See Sovereignty*

According to Catholic belief, the Church was established to carry out God's spiritual mission on earth.<sup>14</sup> The Church exercises absolute sovereignty in its spiritual mission, just as a secular state exercises absolute sovereignty in its secular mission.<sup>15</sup> Pope Leo XIII wrote that the Catholic Church possessed a juridical or legal character:<sup>16</sup>

[The Church] is a society perfect in nature and in its title since it possesses in itself and by itself, . . . all needful provision for its well being and. . . operation. [I]ts authority can[not]. . . be looked upon as inferior to the civil power or in any manner dependent upon it.<sup>17</sup>

Thus, the Catholic Church is organized on juridical principles<sup>18</sup> as

---

tions with the Holy See are relations with a *secular authority*. See *infra* text accompanying note 170. See also 25 HARV. INT'L. L. J. 441 (1984) (hereinafter cited as *Recent Developments Commentary*) (If such a challenge were to be found justiciable, the author concludes that the Holy See possesses a secular personality in international law which alone would defeat an establishment clause challenge to United States—Holy See diplomatic relations.

11. See *infra* text accompanying notes 32-39.

12. See *infra* text accompanying note 17.

13. The Catholic Church realized the concept of a spiritual sovereignty was a nebulous concept in a world of power politics. See *infra* text accompanying note 39.

14. R. NEVILLE, *THE WORLD OF THE VATICAN* 38 (1962) (St. Peter established the Church in Rome, according to Catholic belief.)

15. R. GRAHAM, *supra* note 8, at 219.

16. See *infra* note 18.

17. Pope Leo XIII, *Immortale Dei* (1886) reprinted in R. GRAHAM, *supra* note 8, at 218.

18. The United States Supreme Court has recognized the juridical personality of the Catholic Church and papal sovereignty. *Gonzales v. Roman Catholic Archbishop*

secular states are, and has sovereign existence apart from the secular states in performing its spiritual mission.<sup>19</sup> But, unlike the secular states, the Church is a worldwide organization that has no national boundaries, as its spiritual jurisdiction extends to wherever its members reside.<sup>20</sup>

The Pope exercises the spiritual jurisdiction as head of the worldwide church.<sup>21</sup> In the exercise of the spiritual jurisdiction, the Pope embodies the tripartate functions of Prophet, Priest and King.<sup>22</sup> As Prophet, the Pope is the ultimate authority on church doctrine.<sup>23</sup> As Priest, the Pope has jurisdiction over all the Sees or Bishops' offices and convenes the Sacred College of Cardinals.<sup>24</sup> As King, the Pope exercises sovereignty over the State of Vatican City.<sup>25</sup> The Pope exercises the three functions by sitting at the Head of the Catholic Church government, known as the Holy See.<sup>26</sup>

The Holy See is the government and seat of the worldwide Catholic Church and embodies the spiritual sovereignty of the Church.<sup>27</sup> The Holy See has jurisdiction over all Catholics; this jurisdiction is not merely moral influence or persuasion, but is jurisdiction in the

of Manila, 280 U.S. 1 (1929) (Archbishop of Phillipines is juristic person subject to Phillipine court jurisdiction); Santos v. Roman Catholic Church, 212 U.S. 463 (1909) (legal personality of Catholic Church and its ability to hold property is recognized); Municipality of Ponce v. Roman Catholic Church, 210 U.S. 296 (1908) (corporate existence of Catholic Church and position of Holy See and papacy is recognized under international law). For further explanation of these cases see generally B. BROWN, *THE FIRST AMENDMENT AND CANON LAW*, 11 CATH. LAW. 33 (1965).

19. Early Catholic writers even used the words "sacred state" to describe the juridical nature of the Catholic Church. R. GRAHAM, *supra* note 8, at 221.

20. J. LECLER, *THE TWO SOVEREIGNTIES* 69 (1952).

21. R. NEVILLE, *supra* note 14, at 38.

22. The titles of the Pope include: Incumbent of the Holy See, Bishop of Rome, Vicar of Jesus Christ, Successor of the Prince of Apostles, Supreme Pontiff of the Universal Church, Patriarch of the West, Primate of Italy, Archbishop and Metropolitan of the Province of Rome, Sovereign of Vatican City, and Servant of the Servants of God. Williams, *John Paul II's Concepts of Church, State and Society*, 24 J. CHURCH & STATE 463, (1982).

23. In theory, the Pope does not add anything to Church doctrine, but rather defines truths that are in Scripture and tradition. When the Pope speaks infallibly, he is defining a truth *ex cathedra* (authoritatively). J. NEUVECELLE, *supra* note 2, at 28.

24. Williams, *supra* note 22, at 486. The Sacred College of Cardinals elects the Pope for life, and there is no provision for recall or forced abdication of a Pope. Although the Pope is supreme in the Church, he cannot choose his successor or bind his successor by his acts. R. NEVILLE, *supra* note 14, at 41.

25. Williams, *supra* note 22, at 486.

26. R. NEVILLE, *supra* note 14, at 38.

27. J. NEUVECELLE, *supra* note 2, at 8.

proper sense.<sup>28</sup> This jurisdictional authority means that the Holy See possesses executive, legislative, judicial<sup>29</sup> and disciplinary power over its citizens.<sup>30</sup> Therefore, the Church, through the government of the Holy See, possesses "all needful provision" and necessary power for the operation of a sovereign government.<sup>31</sup>

Papal diplomacy naturally arises from the belief that the Church is a sovereign entity with worldwide jurisdiction. The Holy See sends representatives throughout the world to advance Catholicism.<sup>32</sup> The Holy See is represented either by an apostolic delegate or a papal *nuncio*.<sup>33</sup> An apostolic delegate deals solely with ecclesiastical affairs in a foreign country.<sup>34</sup> A papal *nuncio* is a diplomat accredited to a foreign government in exchange for a diplomat accredited to the Holy See.<sup>35</sup> The sending and receiving of diplomats is called the right of active and passive legation, a right sovereign governments exercise when entering into formal diplomatic relations with other sovereign governments.<sup>36</sup> The Holy See, as a sovereign government, exercises the right of active and passive legation in the international community.<sup>37</sup>

Presently, over 100 secular governments in the international community recognize the Holy See as a sovereign government,<sup>38</sup> even though the Holy See's sovereignty is of a spiritual nature. However, spiritual sovereignty is a nebulous concept in a world composed of

28. R. GRAHAM, *supra* note 8, at 218. (jurisdiction in the proper sense means the capacity, power, or right to act).

29. J. NEUVECELLE, *supra* note 2, at 8, 9. (Catholic Church members are considered citizens of the "Sacred State," the Church).

30. The most extreme discipline is excommunication. Excommunication occurs only when the member attacks the very foundation of Catholic dogma, *e.g.*, Protestants whom are termed "heretics", in contrast to those who merely refuse obedience to the Pope, *e.g.*, Greek Orthodox who are termed "schismatics." J. NEUVECELLE, *supra* note 2 at 38.

31. *See supra* note 17 and accompanying text.

32. R. GRAHAM, *supra* note 8, at 123.

33. *Id.*

34. The United States hosts an apostolic delegation and grants this delegation tax-exempt status. 7 WHITEMAN, DIGEST OF INTERNATIONAL LAW 316 (1970).

35. R. GRAHAM, *supra* note 8, at 267.

36. *Id.* at 184.

37. J. Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L LAW 308, 312 (1952).

38. Position Paper from United States' State Department, *U.S.—Vatican Diplomatic Relations: Talking Points 1* (Jan., 1984). [hereinafter cited as *Position Paper*]. *See also* 130 CONG. REC. § 2387 (March 7, 1984).

secular sovereignties. Realizing this fact, the Holy See historically claimed its right to a secular domain to secure the independence of its spiritual sovereignty.<sup>39</sup> Therefore, the Holy See for centuries possessed a secular domain; however, secular governments were not always willing to concede the legitimacy of a spiritually sovereign government possessing a secular domain.<sup>40</sup>

*The Dual Role: Sovereignty Over A World Religion and A Secular Domain*

Before 1870, the Holy See's secular domain extended over Italy and Southern France, a large territory known as the Papal States.<sup>41</sup> The secular governments of Europe, recognizing the influence of the Holy See, sent ambassadors to the Holy See and received papal *nuncios* in their own courts.<sup>42</sup> The papal *nuncios* received special honors over other secular ambassadors.<sup>43</sup> The special treatment of papal *nuncios* demonstrated that the secular governments felt that the Holy See's spiritual sovereignty took precedence over any authority derived from its secular domain.<sup>44</sup>

The secular domain supported the Holy See's spiritual sovereignty. Almost all Popes believed that the co-existence of a spiritual sovereignty and a secular domain was necessary for the maintenance of a spiritual sovereignty that extended worldwide jurisdiction.<sup>45</sup> In the Church's view, the spiritual mission of the Church needed to be supported by a secular domain in a world of secular sovereignties<sup>46</sup> that often showed hostility toward the Holy See.

39. See *infra* text accompanying notes 45,46.

40. See *infra* text accompanying notes 47-50.

41. See 30 Cong. Globe, 1st session at 471 (1848). See also R. GRAHAM, *supra* note 8, at 163.

42. Papal *nuncios* are entitled to full diplomatic privileges and immunities. 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 537 (1963). See also, G. STUART, AMERICAN DIPLOMATIC AND CONSULAR PRACTICE 133, 134 (1952).

43. See R. GRAHAM, *supra* note 8, at 163. (secular governments granted *nuncios* precedence over other ambassadors).

44. See J. LECLER, *supra* note 20, at 36.

45. See R. GRAHAM, *supra* note 8, at 180.

46. Pope John Paul II recently reiterated this historical belief that the Church needed a secular domain when he spoke about the relationship between the Holy See and the secular Vatican City: "[Vatican City is] a miniscule state, . . . minimal territorial expression. . . of which the principal purpose is to assure the full autonomy of exercise of a spiritual authority of the Holy See . . . which knows no frontiers . . ." Pope John Paul II's address to Union of European Broadcasters, (April 3, 1981), *reprinted in* Williams, *supra* note 22, at 486.

With the fall of medieval society and the rise of the nation-state, many European leaders believed that the Holy See should be relegated to exercising its spiritual sovereignty without a secular domain.<sup>47</sup> At various times in the 19th century, secular governments militarily invaded Holy See territory.<sup>48</sup> The secular governments slowly reduced the size of the Holy See's secular domain. For instance, Italian nationalists advocated the creation of a secular government which would control the Italian peninsula.<sup>49</sup> Finally, in 1870, these Italian nationalists' troops stormed the Vatican and ended the Holy See's control over a secular domain.<sup>50</sup>

However, the Holy See continued to insist that its spiritual sovereignty needed a secular domain. Catholic thinkers believed that the Holy See's independence in carrying out its spiritual mission was threatened by the loss of the secular domain.<sup>51</sup> Italy passed the Law of Guarantees to insure the independence of the Holy See in the international community.<sup>52</sup> Nevertheless, the Law of Guarantees proved inadequate to insure the Holy See's independence when an Italian court took jurisdiction of a case involving a private suit against the Holy See.<sup>53</sup> The Holy See believed that the Italian court's usurpation of jurisdiction was proof that a spiritual sovereignty devoid of

47. See J. LECLER, *supra* note 20, at 67.

48. Napoleon Bonaparte conquered much of the Papal States by 1809. T. JALLAND, *supra* note 48, at 498. (the Italian nationalists were reacting to the new concept of papal infallibility).

50. *Id.*, at 501.

51. Earlier in 1809, after Napoleon's conquest, one eminent Catholic thinker, Cardinal Bartholomeo Pacca, thought that God wanted a Europe dominated by one secular emperor. However, this was not the dominant line of thinking in Catholic circles. See R. GRAHAM, *supra* note 8, at 179.

52. The Law of Guarantees did not confer any new rights on the Holy See, but rather was a recognition of pre-existing rights. The Italians had a clear conception of the non-territorial sovereignty of the Holy See. SERINI, *THE ITALIAN CONCEPTION OF INTERNATIONAL LAW* 292 (1943).

53. An architect named Martinucci sued the Holy See for nonpayment of services. Although Martinucci lost the case, the jurisdiction question caused concern for the Holy See. Secretary of State Cardinal Jacobini protested the case:

It would be a great mistake to compare the political status of the Pope with that of a dispossessed prince. The Holy Father has remained a sovereign . . . by reason of his divine mission and in virtue of his Apostolic office which he exercises with supreme authority in the entire world, even after the loss of the temporal power. This status of real power is recognized by all the powers which have accredited to him . . . permanent embassies, endowed with diplomatic privileges . . . accorded only to reigning princes.

Secretary Jacobini's speech to foreign envoys at the Vatican (Sept. 11, 1882) reprinted in R. GRAHAM, *supra* note 8, at 214.



a secular domain could not be wholly independent in the international community.<sup>54</sup> Although the international community continued its diplomatic relations with the Holy See during his period,<sup>55</sup> the Holy See continued to pressure Italy for restoration of a secular domain.

In 1929, Italy and the Holy See signed the Lateran Treaty, which restored a nominal secular domain to the Holy See. Under the treaty, Italy recognized the spiritual sovereignty of the Holy See in the international community and recognized the Holy See's sole and absolute authority over the newly-created secular State of Vatican City.<sup>56</sup> The Lateran Treaty stated that the purpose of Vatican City was to insure the sovereign independence of the Holy See.<sup>57</sup> Therefore, the Lateran Treaty recognized the legitimacy of the Holy See's claim to a secular domain.

Although Vatican City is a secular state, its activity and authority are completely different from those existing in sovereign national states.<sup>58</sup> Vatican City functions only for the realization of the aims of the Catholic Church.<sup>59</sup> Its authority and constitution are derived from the Holy See, which means that Vatican City is subservient to the Holy See.<sup>60</sup> Vatican City can enter into certain treaties,<sup>61</sup> but it cannot establish diplomatic relations with foreign governments because Vatican City has no foreign ministry or foreign service.<sup>62</sup> Diplomatic

---

54. See R. GRAHAM, *supra* note 8, at 213.

55. See J. KUNZ, *supra* note 37, at 310.

56. LATERAN TREATY OF 1929, Art. 2 reprinted in III PEASLEE, CONSTITUTIONS OF NATIONS 668 (2d Ed. 1956). [hereinafter cited as LATERAN TREATY].

57. LATERAN TREATY, *supra* note 56, Art. 4.

58. SERINI, *supra* note 52, at 292.

59. *Id.*

60. Some commentators confuse the issue when they then equate Vatican City with the sovereign Holy See. See, e.g., Bettwy & Sheehan, *U.S. Recognition Policy: The State of Vatican City*, 11 CALIF. W. INT'L L. J. 1, 10 (1981) (the authors conclude that the United States recognizes the sovereign existence of Vatican City and therefore the United States should exchange embassies with Vatican City). The error of this conclusion is apparent when one recognizes that Vatican City has no foreign ministry; only the Holy See does. See *infra* text accompanying notes 62, 63.

61. An example of a treaty signed by Vatican City is the STATUTE OF THE INTERNATIONAL ATOMIC ENERGY AGENCY open for signature Oct. 26, 1956, 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3. The Holy See also signs treaties, e.g., CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (June 10, 1958). The Holy See can also participate in some specialized agencies of the United Nations, e.g., the International Telecommunications Union. Bettwy & Sheehan, *supra* note 60, at 10, n. 57.

62. Although Papal authorities stressed the importance of the restoration of the secular domain in 1929, its importance, in and of itself, is not that great. "What

relations are carried on only through the Holy See. The Holy See manages all foreign affairs, whether they be secular or spiritual in nature.<sup>63</sup>

The Lateran Treaty restored the Holy See's dual role of exercising spiritual sovereignty over a world religion and a secular domain. The Holy See's dual role illustrates the spiritual nature of the Holy See's sovereignty over the spiritual domain, the Catholic Church, and the secular domain, Vatican City. The Holy See's dual role historically has impeded the establishment of full diplomatic relations between the United States and the Holy See.

#### HISTORY OF UNITED STATES - HOLY SEE RELATIONS

The United States initially hesitated to establish any diplomatic relations with the Holy See. Instead of establishing diplomatic relations, the United States established consular relations with the Holy See in 1797.<sup>64</sup> Consular relations are merely commercial relations protected by commercial agents called consuls.<sup>65</sup> As early as 1779, John Adams predicted Congress would never establish diplomatic relations with the Holy See as Adams feared that exchanging formal ambassadors would put an "ecclesiastical tyrant" representing the Holy See in the United States.<sup>66</sup>

The United States overcame its initial hesitancy by establishing diplomatic relations with the Holy See in 1848.<sup>67</sup> The United States believed that the new Pope, Pius IX, was a great liberal reformer and that diplomatic relations with the Holy See would be advantageous for the United States.<sup>68</sup> Consequently, President Polk appointed, and the Senate confirmed, Jacob Martin as the *chargé d'affaires* to the Holy See.<sup>69</sup>

---

would be the most tangible demonstration before the whole world—the creation of a Vatican [City] foreign ministry, is conspicuous by its absence." R. GRAHAM, *supra* note 8, at 140.

63. R. GRAHAM, *supra* note 8, at 138.

64. L. PFEFFER, *CHURCH, STATE AND FREEDOM* 258 (1953).

65. See *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (1964) (a consul is supposedly clothed with authority to act for his government only in commercial matters). See also *Hamilton v. Erie R. Co.*, 219 N.Y. 343, 114 N.E.2d 399, error dismissed, 248 U.S. 369 (1916) (international law regards consuls as mercantile agents, clothed only with authority for commercial purposes).

66. L. PFEFFER, *supra* note 64, at 257. (the Pope's image as a liberal reformer created a bandwagon effect of enthusiasm in the United States).

67. *Id.* at 259.

68. *Id.*

69. *Id.*

The Senate established the rank of *chargé d' affaires* for the Holy See relations as the result of a compromise. The Senate debate initially focused on whether to send a full rank ambassador (minister) to the Holy See.<sup>70</sup> It was argued that the commercial interests of the United States were already adequately protected by the consular relations.<sup>71</sup> Furthermore, since commercial interests did not justify the dispatch of a diplomatic mission, the mission would be of a religious nature, sent to the Head of the Catholic Church.<sup>72</sup> Such a religious mission would put the Catholic Church on a different footing from other denominations, thus violating the establishment clause.<sup>73</sup> As a result of the Senate debate, a compromise was reached by authorizing a diplomatic mission with the lowest diplomatic rank of *chargé d' affaires*.<sup>74</sup>

Secretary of State, James Buchanan, instructed the *chargé* to limit his efforts to civil or secular matters.<sup>75</sup> Buchanan further instructed the *chargé* to avoid even the appearance of interfering with religious matters.<sup>76</sup> This cautious policy recognized the fine line between secular and religious affairs and the constitutional problems involved with crossing the line into religious affairs.<sup>77</sup> Between 1848 and 1868, six persons served as *chargé d' affaires* to the Holy See and carried out Buchanan's instructions.<sup>78</sup>

Congress refused to appropriate funds for the embassy to the

70. 30 Cong. Globe, 1st sess. at 477 (1848).

71. "There is no commerce to be protected—none at least that has not always been amply protected by the consuls of the United States in the Papal dominions." Remarks of Senator Badger, *Id.*

72. Is not this mission . . . merely a religious mission on the part of the United States to the first Bishop of Europe? Certainly it is, sir. Although His Holiness . . . the universal head of the Roman Catholic Church . . . annexes to that the character of a secular prince, it must always be recollected that the Papal States are but the *appendage* [sic] attached to the Episcopal See, for the purpose of giving support and dignity to his religious character and office . . . As a secular prince, simply and merely, he would be nobody. It is his Holiness that governs . . . It [the U.S. government] will be regarded as . . . depart[ing] in no small degree from the principles of universal toleration and that non-intervention in religious matters which the Constitution has prescribed. *Id.*

73. *Id.*

74. IV HACKWORTH, DIGEST OF INTERNATIONAL LAW par. 371 (1974). (a *chargé d' affaires* is in charge of a diplomatic mission to which a full ambassador or minister has yet to be appointed or from which a minister has been withdrawn).

75. Letter from Secretary Buchanan to Jacob Martin (1848) reprinted in L. PFEFFER, *supra* note 64, at 259. [hereinafter cited as *Buchanan Letter*]

76. *Buchanan Letter*, *supra* note 75.

77. *Id.*

78. See L. PFEFFER, *supra* note 64, at 259.

Holy See in 1868, thereby ending the *chargé* mission.<sup>79</sup> Pope Pius IX had lost popularity in the United States because he was no longer perceived as a liberal reformer.<sup>80</sup> Congress did not want to maintain a diplomatic mission to the Holy See headed by an unpopular Pope.<sup>81</sup> Two years later, the Holy See lost its secular domain when Italian nationalists invaded the Vatican palace<sup>82</sup> and the issue of diplomatic relations between the United States and the Holy See remained dormant until World War II.

In 1939, after the outbreak of World War II, President Roosevelt appointed Myron C. Taylor as "Personal Representative with the rank of ambassador" to His Holiness Pope Pius XII.<sup>83</sup> The "personal representative" was not a diplomat, as the United States sent Taylor to the Pope, not to the Holy See.<sup>84</sup> The State Department stressed that the appointment was an emergency war-time measure and not a re-establishment of diplomatic relations.<sup>85</sup>

The Holy See accepted the appointment of the Personal Representative, but did not accredit him as a diplomat.<sup>86</sup> The Holy See did not want to encourage imitation of the personal representative formula because it was an attempt to circumvent the true channel of diplomacy, the Holy See.<sup>87</sup> The United States used the personal representative to carry on relations that appeared diplomatic, yet avoided the constitutional questions of a true diplomatic mission to the religious authority, the Holy See.<sup>88</sup> Consequently, the Holy See expressed its desire to re-establish diplomatic relations with the United States.<sup>89</sup>

79. This withholding of funds demonstrated the important role Congress plays in diplomatic relations. *Id.*

80. It was erroneously rumored that Pope Pius IX recognized the Confederacy during the United States' Civil War. *Id.*

81. *Id.*

82. Italian nationalists invaded the Vatican palace and ended the Holy See's secular domain. *See also* text accompanying note 50.

83. Letter from President Roosevelt to Pope Pius XII (Dec. 23, 1939) *reprinted in* WARTIME CORRESPONDENCE BETWEEN PRESIDENT ROOSEVELT AND POPE PIUS XII 17 (1947).

84. *See* R. GRAHAM, *supra* note 8, at 328.

85. 2 M. WHITEMAN, *supra* note 42, at 538.

86. *See* R. GRAHAM, *supra* note 8, at 329.

87. The Holy See believed widespread imitation of the personal representative formula would ultimately destroy the Holy See's ability to carry on true diplomacy. *Id.*

88. The United States recognized that the Holy See was ultimately a religious authority, even though the Holy See also exercised that authority over a secular domain. *Id.*

89. *See supra* note 87.

The United States re-established diplomatic relations with the Holy See in 1941 by appointing Harold Tittman, Jr., as *chargé d'affaires*.<sup>90</sup> Initially, Tittman was Taylor's special assistant and had no diplomatic rank.<sup>91</sup> When the war conferences began and Taylor was absent from Rome, Italy refused to deal with Tittman, so the United States upgraded Tittman's rank to *chargé d'affaires*.<sup>92</sup> As Tittman now had diplomatic rank, the United States could continue to deal with the Holy See and other allied diplomats in Rome.<sup>93</sup>

After President Roosevelt's death, President Truman continued the Taylor mission despite growing domestic opposition.<sup>94</sup> Truman promised that the mission would cease when the war ended.<sup>95</sup> After World War II, Taylor resigned his post as personal representative, and the mission terminated in 1950.<sup>96</sup> Protestant groups expressed relief that the war-time relations with the Pope and the Holy See had ended and that the religious tension created by the mission was over.<sup>97</sup>

President Truman believed that diplomatic relations with the Holy See would assist in fighting the new threat of communism.<sup>98</sup> In 1951, Truman submitted the name of Mark W. Clark to the Senate for appointment as the first full ranked ambassador to the Holy See.<sup>99</sup> The Senate was unable to confirm the nomination before adjourning.<sup>100</sup>

90. 2 M. WHITEMAN, *supra* note 42, at 540. *See also supra* note 74 (defining *chargé d'affaires*).

91. 2 M. WHITEMAN, *supra* note 42, at 540.

92. *Id.*

93. *See* R. GRAHAM, *supra* note 8, at 330.

94. The Georgia Baptist Convention passed a resolution calling on President Truman to terminate the Taylor mission to the Holy See. The resolution stated that the Taylor mission violated that establishment clause. 91 CONG. REC. A5035 (1945). *But see* Resolution adopted by Catholic War Veterans which called for the dispatch of a full ambassador and establishment of full diplomatic relations with the Holy See. 92 CONG. REC. A4452 (1946).

95. *See* L. PFEFFER, *supra* note 64, at 262.

96. Myron C. Taylor to President Truman, letter of resignation, 22 DEPT OF STATE BULL. 181 (Jan. 30, 1950).

97. *See, e.g.,* Statement of the Federal Council of Churches (1950) *reprinted in* L. PFEFFER, *supra* note 64, at 262.

98. The threat of communism in the 1950's created a similar emergency atmosphere to the one that prompted President Roosevelt to send a personal representative to the Holy See. *See* L. PFEFFER, *supra* note 64, at 262.

99. Statement of President Truman, 25 DEPT. OF STATE BULL. 894 (1951). (a full ambassador is entitled to full diplomatic privileges and immunities and is granted fullest honors and powers by the host nation).

100. President Truman was accused of submitting Clark's nomination at a late time to insure a speedy confirmation, but the plan backfired as the Senate did not

and opposition forces had time to mount a campaign against the appointment of an ambassador to the Holy See.

Almost every Protestant organization in the United States opposed Clark's appointment as ambassador to the Holy See.<sup>101</sup> The National Council of Churches mobilized public opinion, resulting in a flood of letters to the White House running six to one against the appointment.<sup>102</sup> Congressmen promised their constituents that they would vote against conformation.<sup>103</sup> Under the mounting pressure, Truman withdrew the appointment.<sup>104</sup> The non-Catholic forces had been successful in defeating the establishment of diplomatic relations with the Holy See.

President Eisenhower and President Kennedy neither resumed diplomatic relations with the Holy See nor sent a personal representative to the Pope.<sup>105</sup> Eisenhower merely dispatched a temporary representative to attend the funeral of Pope Pius XII.<sup>106</sup> Kennedy, the United States' first Catholic President, did not attempt to establish diplomatic relations with the Holy See<sup>107</sup> because he believed that diplomatic relations would appear to be a personal reward for his own church and would create political divisiveness.<sup>108</sup> Kennedy also believed that the consular relations provided adequate communication between the United States and the Holy See.<sup>109</sup>

All the Presidents from Johnson to Reagan employed the personal representative formula in communicating with the Holy See.<sup>110</sup> This approach circumvented constitutional questions because there

---

take up the confirmation issue before adjournment. See L. PFEFFER, *supra* note 64, at 263.

101. Jewish groups were also opposed to the appointment, but did not voice their opposition as strongly as the Protestant groups. *Id.*

102. *Id.*

103. *Id.*

104. Truman withdrew the nomination after Clark first requested that his name be withdrawn. *Id.*

105. 2 M. WHITEMAN, *supra* note 42, at 543.

106. *Id.*

107. P. BLANSHARD, PAUL BLANSHARD ON VATICAN II 289 (1966).

108. *Id.*

109. "I do not think that there is any lack of information or communication back and forth." Statement of President Kennedy at Washington news conference (1962) reprinted in P. BLANSHARD, *supra* note 107, at 289.

110. President Johnson resumed the personal representative formula. 54 DEPT. OF STATE BULL. 230 (1966). Nixon's representative was Henry Cabot Lodge. 63 DEPT. OF STATE BULL. 15 (1970). Carter's representative was Robert F. Wagner. 80 DEPT. OF STATE BULL. 18 (Aug., 1980). Reagan's representative was William Wilson. 20 WEEKLY COMP. OF PRES. DOC. 22 (Jan. 10, 1984).

were no formal relations with the religious Holy See under the personal representative formula.<sup>111</sup> However, President Reagan's reestablishment of full diplomatic relations with the Holy See resurrects the question of whether these relations violate the establishment clause.

#### THE ESTABLISHMENT CLAUSE AND DIPLOMATIC RELATIONS WITH THE HOLY SEE

The American principle of separation of church and state is a revered principle. The Founding Fathers were acutely aware of the history of governments waging war and persecuting their citizens in the name of religion.<sup>112</sup> With this awareness, the framers of the United States Constitution saw fit to erect a "wall of separation" between church and state.<sup>113</sup>

The metaphorical wall of separation is subject to many interpretations. These interpretations range from a complete separation theory to a narrow construction theory.<sup>114</sup> The complete separation theory forbids any government aid or interference with religion whatsoever.<sup>115</sup> The narrow construction theory forbids the government only from establishing an official religion or state church.<sup>116</sup> Neither of these extreme interpretations is favored by the United States Supreme Court today. Rather, the Supreme Court adopts an accommodation approach,<sup>117</sup> which allows the government to aid or interfere with religion. However, any aid or interference with religion is scrutinized for possible breach of the metaphorical wall of separation of church and state under a court-developed three prong test.<sup>118</sup>

---

111. See *supra* text accompanying note 88.

112. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY* 220 (1970).

113. Thomas Jefferson used the phrase "wall of separation" in a letter to the Committee of the Danbury Baptist Ass'n of Connecticut (Jan. 1, 1802) reprinted in S. PADOVER, *THE COMPLETE JEFFERSON* 518-19 (1943). The United States Supreme Court has recognized Jefferson as the author of the phrase. See *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

114. See Abraham, *The Status of the First Amendment Religion Clauses: Some Reflections on Lines and Limits*, 22 J. CHURCH & STATE 215, 224 (1980).

115. See Abraham, *supra* note 114, at 224.

116. See L. PFEFFER, *supra* note 64, at 136.

117. See Abraham, *supra* note 114, at 227. (author states that the accommodation approach attempts to settle conflict between the free exercise clause and the establishment clause).

118. See *infra* note 119 and accompanying text.

*The Three Prong Test*

In establishment clause cases, government aid or interference with religion is subjected to a three prong neutrality test.<sup>119</sup> In *Lemon v. Kurtzman*,<sup>120</sup> the Supreme Court held that governmental action violates the establishment clause if it has no valid secular purpose, if its primary effect advances or inhibits religion, or if it creates excessive entanglement between church and state.<sup>121</sup> If the government action fails any one of these three prongs, the action violates the establishment clause.<sup>122</sup>

Government aid or interference with religion must have a valid secular purpose. As long as the government has one valid secular purpose, the first prong is not violated.<sup>123</sup> A government action that has a valid secular purpose, but also has an incidental religious purpose satisfies the secular purpose requirement.<sup>124</sup> Government actions usually satisfy the secular purpose requirement,<sup>125</sup> thus courts inquire into the effect of the government action on religion.

A government action will violate the establishment clause if it has the primary effect of advancing or inhibiting religion. This second prong focuses on whether the governmental aid or interference in practice is a secular action.<sup>126</sup> Even a government action which has a valid secular purpose could in practice have the primary effect of advancing or inhibiting religion.<sup>127</sup> However, the meaning of primary effect

119. Early cases used only a two prong test. *See, e.g.*, *Board of Education v. Allen*, 392 U.S. 236 (1968) (Supreme Court used secular purpose and primary effect test); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (Supreme Court used two prong secular purpose and primary effect test). The third prong, excessive entanglement, first appeared in *Walz v. Tax Commission*, 297 U.S. 664 (1970).

120. 403 U.S. 602 (1971).

121. *Id.* at 612-20.

122. *Committee for Public Education v. Regan*, 446 U.S. 646 (1980).

123. *McGowan v. Maryland*, 336 U.S. 420 (1961) (Sunday closing law had a valid secular purpose of providing all citizens a day of rest).

124. *Id.* (Sunday closing law had incidental religious purpose and effect, but the law is still valid).

125. Only a few cases have found no valid secular purpose for a government action. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97 (1968) (statute forbidding public school teachers from teaching the theory of evolution had no valid secular purpose); *Stone v. Graham*, 449 U.S. 39 (1980) (statute requiring the posting of the Ten Commandments in classroom had no valid secular purpose).

126. *See, e.g.*, *Walz v. Tax Commission*, 397 U.S. at 664 (the Court determined that law granting tax-exempt status to churches would not primarily advance religion).

127. *Larkin v. Grendel's Den, Inc.*, 193 S.Ct. 505 (1982) (law granting church veto power over liquor license applications had valid secular purpose of insulating churches from undesirable neighbors. However, it had primary effect of advancing



is vague and often difficult to apply.<sup>128</sup> As a result, the courts have developed a third prong for establishment clause cases.

In addition to the purpose and effect prongs, the courts inquire into the degree of contact or entanglement between church and state.<sup>129</sup> A government action that creates excessive entanglement between church and state violates the establishment clause.<sup>130</sup> An examination of four factors reveals whether excessive entanglement exists. First, if the nature or purpose of the institution is pervasively religious, government aid or interference with that institution is likely to create excessive entanglement.<sup>131</sup> Second, if the nature of the aid or interference requires administrative entanglement between church and state, it is likely that excessive entanglement exists.<sup>132</sup> Third, the courts look to the nature of the resulting relationship between the government and the religious institution.<sup>133</sup> If the resulting relationship requires official and continuing administrative surveillance, the entanglement is likely to be excessive.<sup>134</sup> Fourth, if the aid or interference creates potential political divisiveness along religious lines, this divisiveness is a warning signal that excessive entanglement exists.<sup>135</sup> None of these four factors alone will invalidate a government action as creating excessive entanglement.<sup>136</sup> The four factors taken together provide the analysis for whether the government is excessively entangled with religion and therefore violates the establishment clause.<sup>137</sup>

religion because the church could favor the granting of liquor licenses for members of its congregation).

128. See Note, *Government Noninvolvement With Religious Institutions*, 59 TEX. L. REV. 921, 967 (1981) (author proposes "impermissible involvement" test).

129. See *supra* note 119. See generally, Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195 (1980). See also Note, *The Forbidden Fruit of Church - State Contacts: The Role of Entanglement Theory in its Ripening*, 16 SUFF. L. REV. 725 (1982).

130. *Lemon*, 403 U.S. at 615.

131. *Id.*

132. *Walz*, 397 U.S. at 674.

133. *Lemon*, 403 U.S. at 615.

134. *Walz*, 397 U.S. at 675 (denying tax-exempt status to churches would require official and continuing administrative surveillance, e.g., tax valuation of church property, tax liens, and tax foreclosures).

135. *Mueller v. Allen*, 103 S.Ct. 3062 (1982) (direct subsidy to religious institution created potential political divisiveness along religious lines). See also *Donnelly v. Lynch*, 104 S.Ct. 1355 (1984) (the political divisiveness created by the lawsuit itself is not controlling; there must be a history of political divisiveness as a result of the government action).

136. *Mueller v. Allen*, 103 S.Ct. at 3071.

137. *Id.*

An establishment clause challenge to diplomatic relations between the United States and the Holy See must employ the three prong analysis.<sup>138</sup> This type of case, however, presents a sensitive companion issue. The Supreme Court ultimately may determine that such a challenge is a political question which is beyond its power to review.<sup>139</sup> The possible non-justiciability of this challenge leads some commentators to conclude that if such a challenge is in fact non-justiciable, diplomatic relations with the Holy See must therefore be constitutional.<sup>140</sup> This conclusion is erroneous. A government action is not automatically constitutional solely because the government action will not be reviewed by a court.<sup>141</sup>

---

138. The Supreme Court does not limit its establishment clause analysis to the three prong test. *Larson v. Valente*, 456 U.S. 228 (1982) (the Court applied strict scrutiny analysis). Strict scrutiny is appropriate when the government patently prefers one religion over another. *Marsh v. Chambers*, 103 S.Ct. 1330 (1983). Strict scrutiny was applied in only one establishment clause case; *Larson*, 456 U.S. 228. This Note assumes that the three prong analysis, rather than strict scrutiny, is the appropriate test for analyzing whether diplomatic relations between the United States and the Holy See violate the establishment clause. Although it appears that these relations prefer the Catholic Church over other religions, this Note argues that since the Catholic Church is on such a different footing than other churches, no patent preference is involved. See *infra* text accompanying note 155.

139. The political question doctrine has two principles or rationales: separation of powers and prudential concerns. *Baker v. Carr*, 369 U.S. 186 (1962). The Court will not hear a matter that the Constitution has committed to another branch of government, a matter that lacks judicially manageable standards, or matters that require a single voiced statement of the government's view (separation of powers concerns). *Baker*, 369 U.S. at 211. The area of foreign affairs is constitutionally committed to the executive branch. *U.S. v. Curtiss Wright Export Corp.*, 299 U.S. 304 (1936). Recognition of foreign governments strongly defies judicial treatment. *Baker*, 369 U.S. at 212. The limit of judicial review would be to examine the resulting status of the relations and decide independently whether a statute applies to that area. *Vermilya-Brown Co. v. Connel*, 335 U.S. 377, 380 (1948). *DeLima v. Bidwell*, 182 U.S. 1, 180-200 (1900). See also *Recent Developments Commentary*, *supra* note 10 (author argues that the federal courts likely would deem an establishment clause challenge to diplomatic relations between the United States and the Holy See non-justiciable). Strong support for the argument that an establishment clause challenge to United States - Holy See diplomatic relations would be non-justiciable can be found in two other cases. *Goldwater v. Carter*, 444 U.S. 996 (1979) *vacating* 617 F.2d 697 (D.C. Cir.), *remanding to district court with order to dismiss* (a challenge to President Carter's termination of defense treaty with Taiwan found to be non-justiciable); *Dickson v. Ford*, 521 F.2d 234 (5th Cir. 1975) (an establishment clause challenge to United States' aid to Israel found to be non-justiciable). Nevertheless, a persuasive argument can be made that given the *unique* religious nature of the Holy See in international law, an establishment clause challenge to United States - Holy See should be found justiciable.

140. See, e.g., Bettwy & Sheehan, *supra* note 60, at 12 (arguments about constitutionality are destined to go no "further than the covers of legal periodicals").

141. Constitutional challenges may occur at the executive and legislative branch.

Non-justiciability must not be equated with constitutionality. Although the Supreme Court is the final interpreter of the Constitution,<sup>142</sup> the executive and legislative branches must also observe constitutional limits on their power.<sup>143</sup> The executive and legislative branches determine constitutionality by applying the Supreme Court's interpretation of the Constitution.<sup>144</sup> Thus in determining whether diplomatic relations with the Holy See violate the establishment clause, the executive and legislative branches must apply the three prong analysis.<sup>145</sup>

It is critical that the executive and legislative branches adhere to the Supreme Court's three prong test when the government action is non-justiciable. A government action that is not subject to judicial review presents a greater danger that the action may infringe upon constitutional rights without an adequate remedy.<sup>146</sup> Therefore, the executive and legislative branches must determine whether diplomatic relations with the Holy See violate the three prong test.<sup>147</sup> Furthermore, a newly elected executive and legislative branch must make the same determination of constitutionality. Thus, it is appropriate to analyze whether diplomatic relations between the United States and the Holy See violate the establishment clause under the three prong test, even though the Reagan administration and Congress have already determined that such relations do not violate the establishment clause.

### *Application of the Three Prong Test*

The government action of establishing diplomatic relations with the Holy See must have a valid secular purpose, the primary effect of the action must neither advance nor inhibit religion and the action

---

See Howe, *Diplomacy, Religion, and the Constitution*, NATION 29 (Jan. 12, 1952). See also L. PFEFFER, *supra* note 64, at 270.

142. *Marbury v. Madison*, 5 U.S. 137 (1803).

143. *Marbury*, 5 U.S. at 180. See also Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1951). But see J. HAND, *THE BILL OF RIGHTS* (1958).

144. See *infra* note 145.

145. "The Supreme Court has articulated a three part test for first amendment questions . . . and this activity [diplomatic relations with the Holy See] is still constitutionally permitted, after a very thorough recognition of first amendment cases that come before the Supreme Court." Remarks of Senator Lugar, 130 CONG. REC. S2387 (March 7, 1984). See also Remarks of Senator Hatfield, 130 CONG. REC. S2386 (March 7, 1984) (Hatfield argued that diplomatic relations with the Holy See would violate the establishment clause).

146. Howe, *supra* note 141, at 29.

147. See *supra* note 145.

must not create excessive entanglement between church and state.<sup>148</sup> Recall the unique dual role of the Holy See: exercising *spiritual* sovereignty over both a world religion and a secular state.<sup>149</sup> The unique nature of the Holy See is crucial in determining whether diplomatic relations with the Holy See violate the three prong test.

The establishment of diplomatic relations with the Holy See has a valid secular purpose. The asserted purpose for establishing these relations is to further United States foreign policy goals which include opposing communism and promoting peace.<sup>150</sup> The United States' foreign policy goals are advanced by these relations because the Holy See is a source of worldwide information and influence through the Catholic Church.<sup>151</sup> Although the Holy See's information and influence are the products of its worldwide religious authority,<sup>152</sup> this religious source does not transform the United States' purpose into a religious purpose. The United States' purpose clearly focuses on the secular self-interest of the United States in promoting its foreign policy goals.<sup>153</sup>

The primary effect of establishing diplomatic relations with the Holy See neither advances nor inhibits religion. Diplomatic relations with the Holy See do not put the Catholic Church on a different footing than other denominations and thereby advance one religion over others.<sup>154</sup> Rather, the Catholic Church, through the Holy See, is by its very nature on a different footing than other denominations because no other religious organization can enter into diplomatic relations with secular governments.<sup>155</sup> The United States' establishment of diplomatic relations with the Holy See does not advance or inhibit that status.<sup>156</sup> Furthermore, diplomatic relations do not aid the Holy See financially.<sup>157</sup> United States expenditures go toward the maintenance of the United

148. See *supra* text accompanying notes 119-137.

149. See *supra* text accompanying notes 41-63.

150. 130 CONG. REC. S2385 (March 7, 1984) See also *Position Paper*, *supra* note 38, at 2.

151. 130 CONG. REC. S2385 (March 7, 1984). See also *supra* text accompanying notes 19-21.

152. See *supra* note 19.

153. 130 CONG. REC. S2384 (March 7, 1984).

154. In contrast see *supra* note 72.

155. See *supra* text accompanying note 63. See also R. GRAHAM, *supra* note 8, at 272.

156. 130 CONG. REC. S2385 (March 7, 1984). It could be argued that diplomatic relations with the Holy See lend more prestige to the Holy See and thus advance religion. But this is not the primary effect of diplomatic relations with the Holy See.

157. See Cullinan, *The White House and the Vatican: The Legal Aspects*, 38 A.B.A.J. 471, 473 (1952).

States' embassy and its staff; they do not flow into the Holy See treasury.<sup>158</sup> Diplomatic relations with the Holy See have the primary effect of serving the United States' secular purpose of furthering its foreign policy goals, and thus neither advance nor inhibit religion.

Nevertheless, diplomatic relations between the United States and the Holy See create excessive entanglement between church and state. Diplomatic relations necessarily involve administrative entanglement between two governments. The administrative entanglements results from the exchange of embassies, diplomatic staffs, documents, communications, and security forces.<sup>159</sup> Consequently, in establishing diplomatic relations with the Holy See, the United States is administratively entangled with a pervasively religious organization.<sup>160</sup> Administrative entanglement with a pervasively religious organization is one indication of excessive entanglement.<sup>161</sup>

To rebut the excessive entanglement argument, the United States cites its diplomatic relations with England and Israel as precedent for establishing diplomatic relations with the Holy See.<sup>162</sup> The Queen of England is the titular head of the Anglican Church as well as the titular head of the secular government.<sup>163</sup> Israel is arguably the embodiment of the religious Zionist ideal.<sup>164</sup> The United States asserts that these countries are analogous to the Holy See and therefore our diplomatic relations with these countries provide precedent for diplomatic relations with the Holy See.<sup>165</sup>

The analogies of England and Israel are fallacious analogies to justify diplomatic relations with Holy See. The United States' ambassador to England is accredited to its secular government, not the government of the Anglican Church.<sup>166</sup> Furthermore, if the Anglican Church were disestablished, England's secular government

---

158. See Cullinan, *supra* note 157 at 473. The reported expenditure to upgrade the embassy will be \$351,000. CHRISTIAN SCIENCE MONITOR, March 7, 1984, p. 1.

159. G. STUART, *supra* note 42, at 59, 123.

160. The Holy See is a religious authority that exercises sovereignty over a world religion and a secular domain. See *supra* text accompanying notes 41-63.

161. See *supra* text accompanying note 131.

162. 130 CONG. REC. S2385 (March 7, 1984). See also *Position Paper*, *supra* note 38, at 1.

163. See Cullinan, *supra* note 157, at 531.

164. See [1950] STATE OF ISRAEL GOVERNMENT Y.B. 43 (Jewish Council stated that the Jewish people have the historic right to establish the State of Israel in Palestine).

165. See *supra* note 162.

166. IV HACKWORTH, *supra* note 159, at 640.

would continue to exist, along with the United States' diplomatic relations with that government.<sup>167</sup> Conversely, if the Catholic Church were disestablished, there would be no Holy See, and thus no government with which to establish diplomatic relations.<sup>168</sup> The analogy to Israel is equally fallacious. Israel's secular and religious structures are separate from each other, and the United States' diplomatic relations with Israel are only with the secular government.<sup>169</sup> Therefore, the analogies to England and Israel do not negate the indication of excessive entanglement created by United States - Holy See diplomatic relations.

The United States advances another argument to negate the indication that excessive entanglement exists as a result of diplomatic relations with the Holy See. The United States asserts that it deals only with the Holy See in its role as authority over a secular domain.<sup>170</sup> If this assertion were true, no question of entangling with a pervasively religious organization would arise. Nonetheless, the argument is flawed because it denies the true nature of the Holy See. The Holy See is a spiritual sovereignty that carries on diplomacy regardless of whether the Holy See also governs a secular domain.<sup>171</sup> The Pope, as Head of the Holy See, not the secular domain called Vatican City, carries on relations with foreign governments.<sup>172</sup> The Holy See remains a religious authority, even though its religious authority is exercised over a secular domain. Therefore, the United States deals with the Holy See as a religious authority, not as a secular authority.

The United States' policy of separating religious and secular affairs is a more viable attempted rebuttal. Adhering to this policy, the United States would instruct the Holy See ambassador to concern himself only with secular affairs and not to interfere with the religious affairs of the Catholic Church.<sup>173</sup> However, the distinction between secular and religious affairs is not always clear. The danger exists that the president could use the diplomatic channel to the Holy See to influence Catholic Church policy in the United States and

---

167. See L. PFEFFER, *supra* note 64, at 266.

168. See *supra* text accompanying note 27.

169. See S. Linowitz, *Analysis of a Tinderbox: The Legal Basis for the State of Israel*, 43 A.B.A.J. 522 (1957).

170. 130 CONG. REC. S2387 (March 7, 1984).

171. See *supra* text accompanying note 55.

172. See *supra* text accompanying note 32-38.

173. 130 CONG. REC. S2386 (March 7, 1984).

abroad.<sup>174</sup> The President could also instruct the ambassador to the Holy See to quash Catholic Church criticism of United States' policies by exerting pressure on the Holy See.<sup>175</sup> Given the unclear distinction between secular and religious affairs, the United States' policy of separating religious and secular affairs is not a compelling rebuttal to the indication that excessive entanglement exists.

In addition to administrative entanglement with a pervasively religious institution, political divisiveness is another signal that excessive entanglement exists. Historically, diplomatic relations between the United States and the Holy See divided Catholics and Protestants.<sup>176</sup> The potential for political division along religious lines is evidenced today by many predominately Protestant groups who have voiced strong opposition to reestablishing diplomatic relations with the Holy See.<sup>177</sup> This political divisiveness further indicates that excessive entanglement exists between church and state as a result of the diplomatic relations.<sup>178</sup>

The administrative entanglement with the pervasively religious Holy See and the political divisiveness together show that diplomatic relations with the Holy See excessively entangle church and state.<sup>179</sup> Therefore, diplomatic relations between the United States and the Holy See violate the establishment clause. If the federal courts deem the issue non-justiciable as a political question, then the remedy lies in the political process.<sup>180</sup> Opponents to diplomatic relations with the Holy See must influence the executive and legislative branches with these constitutional arguments. If the present political leaders ignore these appeals, opponents must vote for leaders who are persuaded by the force of logic that diplomatic relations with the Holy See contravene the First Amendment's establishment clause.

174. See R. GRAHAM, *supra* note 64, at 347-8. (President Roosevelt asked Pope Pius to refrain from speaking out on the controversial Lend-Lease Act).

175. Senator Alan Cranston, in voting against confirmation of the Holy See ambassador, expressed the fear that President Reagan could use the diplomatic channel to quash American bishops' criticism of Reagan's nuclear policy. 130 CONG. REC. S2390 (March 7, 1984).

176. See *supra* note 94 and accompanying text.

177. See *supra* text accompanying notes 5, 6.

178. See *supra* text accompanying note 161.

179. Another possible indication that excessive entanglement exists is the nature of the resulting relationship between church and state. It could be argued that diplomatic relations result in a continuing administrative surveillance of the religious institution, the Holy See. See *supra* text accompanying note 134.

180. See *supra* text accompanying note 147.

CONCLUSION

Resolution of the issue of whether diplomatic relations with the Holy See violate the establishment clause requires an understanding of the nature of the Holy See. The Holy See is a religious government that exercises authority over a world religion and a secular domain. Through its religious authority, the Holy See carries on diplomatic relations with foreign governments.

The establishment clause requires a separation of church and state. The Supreme Court uses a three prong test to analyze whether a government action violates the establishment clause. If a government action fails the secular purpose, primary effect, or excessive entanglement prong, the government action violates the establishment clause.

United States—Holy See diplomatic relations violate the excessive entanglement prong. Diplomatic relations with the Holy See result in administrative entanglement with a religious organization and create political divisiveness along religious lines. The remedy for this violation likely rests in the political process. The future will show whether this remedy is adequate.

MARK THOMAS VAN DER MOLEN



