NOTES

Constitutional Issues Raised by Diplomatic Relations Between the United States and the Holy See

In November 1983 the United States Congress initiated the establishment of de jure diplomatic relations[1] with the Holy See by repealing the 1867 ban on appropriations for an official American Embassy in Papal Rome[2] and by calling for the establishment of official diplomatic relations with the Holy See.[3] Accordingly, President Reagan elevated his personal representative to the Holy See, William A. Wilson, to the rank of ambassador in early 1984.[4] In June 1984 Congress approved appropriations for the first American ambassadorial mission to the Holy See.[5]

The establishment of de jure diplomatic relations between the United States and the Holy See raises constitutional questions concerning the Establishment Clause of the First Amendment.[6] Furthermore, Article III of the United States Constitution complicates the adjudication of the establishment clause issues by limiting the jurisdiction of the federal courts. Standing and the political question doctrine are two Article III hurdles that may bar a judicial determination of establishment clause questions.[7]

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1. For an explanation of the relationship between the Holy See, the Vatican and the Catholic Church, see *infra* notes 12-31 and accompanying text. For a definition of de jure relations, see *infra* note 37.

2. Act of Feb. 28, 1867, ch. 99, 14 Stat. 412, 413, *repealed by* Act of Nov. 22, 1983, Pub. L. No. 98-164, § 134, 97 Stat. 1017, 1029. *See also infra* note 45 and accompanying text.

3. *See* H.R.J. Res. 316, 98th Cong., 1st Sess. (1983); S. 1757, 98th Cong., 1st Sess. (1983). *See also infra* note 45 and accompanying text.

4. 20 WEEKLY COMP. PRES. DOC. 22 (Jan. 10, 1984). *See also infra* note 46 and accompanying text. The Senate confirmed the nomination on March 7, 1987. 130 CONG. REC. S2390, S2413 (Mar. 7, 1984). Mr. Wilson resigned on May 20, 1986, L.A. Times, May 21, 1986, § I, at 5, col. 1; N.Y. Times, May 21, 1986, at A1, col. 4, and President Reagan appointed Frank Shakespeare, former American ambassador to Portugal, to succeed him. N.Y. Times, Sept. 27, 1986, at 19, col. 6.

5. *Reprogramming Funds for United States Mission to the Vatican: Hearing Before a Subcomm. on Appropriations*, 98th Cong., 2d Sess. 13, 22-23 (1984).

6. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend I.

7. U.S. CONST. art. III, § 2. *See also infra* notes 54-60 and accompanying text.

The Establishment Clause represents an implicit call for government neutrality towards religion. The Holy See, however, is a sovereignty which serves a dual role as spiritual authority of the Catholic Church and secular ruler of the Vatican City. This unique combination of religious and political roles raises two related establishment clause questions: (1) whether, by establishing de jure diplomatic relations with the Holy See, the United States is recognizing a religion as well as a state; and (2) whether this recognition violates the Establishment Clause.

The concept of justiciability embodied in the article III terms "cases" and "controversies"[8] creates two distinct hurdles to judicial determination of the establishment clause questions raised by de jure diplomatic recognition of the Holy See. First, under the doctrine of standing, the court must determine whether a case presents establishment clause issues in an adversarial context and whether these issues are capable of resolution through the judicial process.[9] Second, under the political question doctrine, the court must determine whether adjudication of establishment clause issues intrudes into areas constitutionally allocated to other branches of the federal government.[10]

Americans United for Separation of Church and State v. Reagan[11] represents the first legal challenge to the constitutionality of establishing de jure diplomatic relations with the Holy See. The United States Court of Appeals for the Third Circuit summarily dismissed the case for lack of standing and the Supreme Court denied the petitioners a review or rehearing. Nonetheless, the constitutional issues arising from the actions of Congress and the President deserve careful scrutiny.

This Note discusses the two major constitutional issues surrounding the establishment of official diplomatic relations with the Holy See. Part I presents a brief discussion of general background issues: (a) the nature of the spiritual and secular sovereignty of the Holy See; (b) the history of the diplomatic relations between the United States and the Holy See; and (c) the constitutional mechanisms for granting de jure diplomatic recognition to a foreign state. Part II analyzes two distinct constitutional issues surrounding the establishment of diplomatic relations with the Holy See: (a) the article III justiciability issues of standing and the political question doctrine; and (b) the first amendment establishment clause issues. This analysis ultimately concludes that the present diplomatic relations between the United States and the Holy See are constitutional.

8. U.S. CONST. art. III, § 2.

9. *See infra* notes 61-93 and accompanying text.

10. *See infra* notes 94-114 and accompanying text.

11. 786 F.2d 194 (3d Cir.), *cert. denied sub nom.* American Baptist Churches v. Reagan, 107 S. Ct. 314, *reh'g denied*, 107 S. Ct. 660 (1986).

I. Background

A. The Nature of the Secular and Spiritual Sovereignty of the Holy See

The Holy See is a sovereign state with a worldwide spiritual mission.[12] Its dual nature arises from its position as the spiritual authority over the worldwide Roman Catholic Church[13] and as the secular sovereign over the Vatican City.[14] For centuries the Church has voiced the need for a secular domain to "assure the full autonomy of exercise of the spiritual authority of the Holy See . . . which knows no frontiers . . . ."[15] The minuscule autonomous territory of the Vatican City[16] gives a juridical personality to the entity of the Holy See which has been recognized by the United States Supreme Court in a number of cases.[17] The spiritual authority of the Holy See, by contrast, extends throughout the world to wherever members of the Church reside.[18]

As the head of the Holy See, the Pope serves a tripartite function as Prophet, Priest and King. As Prophet, he is the preeminent interpreter of Church doctrine. As Priest, he is the head of Catholic worship and spiritual life, presiding over the Sacred College of Cardinals and all the clergy of the Church. Finally, as King, the Pope serves as the monarch of the Vatican City.[19]

The spiritual and temporal influence of the Holy See fluctuated throughout the centuries.[20] At its inception during the Roman Empire,

12. R. GRAHAM, VATICAN DIPLOMACY—A STUDY OF CHURCH AND STATE ON THE INTERNATIONAL PLAIN 219 (1959); J. LECLER, THE TWO SOVEREIGNTIES: A STUDY OF THE RELATIONSHIP BETWEEN CHURCH AND STATE 69 (1952);Williams, *John Paul II's Concepts of Church, State and Society*, 24 J. CHURCH & STATE 463, 486 (1982); Note, *Diplomatic Relations Between the United States and the Holy See: Another Brick from the Wall*, 19 VAL. U.L. REV. 197, 199 (1984).

13. Encyclical letter, *Immortale Dei*, of Pope Leo XIII (Nov. 1, 1886), *partially reprinted in* R. GRAHAM, *supra* note 12, at 218-19. The Roman Catholic Church hereinafter will be referred to as the "Church".

14. Treaty of the Lateran, Feb. 11, 1929, Italy-Holy See, arts. II-IV, 1929 ACTA APOSTOLICA SEDIS 209, *reprinted in* J. HEARLEY, POPE OR MUSSOLINI 221-33 (1929) [hereinafter Treaty of the Lateran].

15. Address by Pope John Paul II to the Union of European Broadcasters (Apr. 3, 1981), *reprinted in* Williams, *supra* note 12, at 486.

16. The Vatican City consists of 108 acres of sovereign, neutral, independent territory. *See* Treaty of the Lateran, *supra* note 14.

17. *See, e.g.*, Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 5, 7 (1929) (Archbishop of the Phillipines held to be a juristic person subject to Phillipine court jurisdiction); Santos v. Roman Catholic Church, 212 U.S. 463, 465 (1909) (legal personality of the Holy See and its ability to possess property recognized by the Court); Municipality of Ponce v. Roman Catholic Church, 210 U.S. 296, 324 (1908) (juridical existence of the Catholic Church, the Holy See, and the Papacy recognized by the Court under international law).

18. *See* Note, *supra* note 12, at 199-200.

19. *See* Williams, *supra* note 12, at 486; Note, *supra* note 12, at 200.

20. *See generally* CHURCH AND STATE THROUGH THE CENTURIES—A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES (S. Ehler and J. Morrall eds. 1954) [hereinafter

the Church possessed virtually no temporal power.[21] However, the Church's temporal and spiritual powers gradually increased[22] and culminated in the establishment of the Papal States and the Holy Roman Empire.[23] From the fifteenth to the eighteenth century the secular influence of the Holy See gradually diminished[24] until it reached its nadir in the late nineteenth century with the annexation of the Papal States by Italy.[25]

In return for the Holy See's renunciation of all territory previously encompassed in the Papal States, the Lateran Treaty of February 11, 1929 created the Vatican City.[26] The creation of the Vatican City provided the Holy See with an independent territorial base from which it is able to conduct the spiritual affairs of the Church, free from the influence of any secular power.[27] However, the Holy See still exercises a strong spiritual influence over many people and nations who share its spiritual, peace-seeking teachings. As a secular diplomatic entity, the Vatican City conveys the ideology of the Catholic Church to the world.[28]

EHLER & MORRALL]; N. EBERHARDT, A SUMMARY OF CATHOLIC HISTORY (1961); P. HUGHES, A POPULAR HISTORY OF THE CATHOLIC CHURCH (1951); D. MEADOWS, A SHORT HISTORY OF THE CATHOLIC CHURCH (1959); Bettwy, *United States-Vatican Recognition: Background and Issues*, 29 CATH. LAW. 225, 227-234 (1984).

21. *See* D. MEADOWS, *supra* note 20, at 3-33; Bettwy, *supra* note 20, at 228.

22. *See* D. MEADOWS, *supra* note 20, at 64-68; Bettwy, *supra* note 20, at 228-29.

23. The Papal States were located in central Italy. They were comprised of modern Romagna, Umbria, Rome and the Marches. Bettwy & Sheehan, *United States Recognition Policy: The State of Vatican City*, 11 CAL. WEST. INT'L L.J. 1, 2 n.7 (1981). *See also* D. MEADOWS, *supra* note 20, at 75-89; Bettwy, *supra* note 20, at 229.

24. In this period of absolutism and despotism, European secular rulers instituted a series of anti-clerical reforms which separated church and state and subjugated the Holy See's secular power to that of the state. *See* D. MEADOWS, *supra* note 20, at 90-120, 133-193; Bettwy, *supra* note 20, at 229-30.

25. After the annexation of the Papal States by the newly unified Italian states in 1870, the Holy See lost its secular autonomy and became dependent upon Italy. The "Roman Question" arose when Pope Pius IX immured himself as the "prisoner of the Vatican" due to the loss of the Holy See's territory. During this period, the Holy See's secular influence was at its lowest. However, the Holy See continued to practice international diplomacy, and its spiritual influence remained powerful, especially in the Catholic Church's efforts for world peace. *See* D. MEADOWS, *supra* note 20, at 201-04; Bettwy, *supra* note 20, at 231.

26. Treaty of the Lateran, *supra* note 14, art. II. *See also* D. MEADOWS, *supra* note 20, at 201-04; Bettwy, *supra* note 20, at 231.

27. *See* II N. EBERHARDT, *supra* note 20, at 691-92; Bettwy, *supra* note 20, at 231-32.

28. Bettwy, *supra* note 20, at 232, summarizes the international goals of the Holy See as follows:

> (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
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> (2) recognition that it is an equal voice in the international community capable of exercising spiritual [and moral] influence in the realm of international politics between and among nations.

See also EHLER & MORRALL, *supra* note 20, at 378-618; D. MEADOWS, *supra* note 20, at 216-31.

Despite the spiritual aspect of the Holy See, over one hundred secular governments in the international community recognize the Holy See as a sovereign entity.[29] However, the Holy See is unique in its spiritual sovereignty over the Church.[30] Territorial sovereignty provides the Holy See with a diplomatic point of origin for pursuing its spiritual mission.[31]

B. History of United States-Holy See Relations

United States-Holy See relations may be divided into four categories: consular, non-reciprocal, unofficial, and full diplomatic.[32] The scope and intensity of relations between the United States and the Holy See has varied considerably since 1797, when the United States first established consular relations[33] with the Papal States. The United States maintained an uninterrupted consular presence in the Papal States until their annexation by Italy in 1870.[34] During this period of consular relations, the United States briefly conducted non-reciprocal formal relations with the Papal States.[35]

In 1893, the Holy See sent its first apostolic delegate to Washington, D.C. This non-diplomatic relationship with the United States continued until 1984, when the apostolic mission was raised to ambassadorial status

29. Position Paper from the United States State Department, *U.S.-Vatican Diplomatic Relations: Talking Points* 1 (Jan. 1984). *See also* 130 CONG. REC. S2387 (Mar. 7, 1984) (statement of Sen. Lugar); Note, *supra* note 12, at 201; L.A. Times, June 15, 1987, at 6, col. 1.

30. *See supra* notes 13-19 and accompanying text; *see also* 130 CONG. REC. S2384-90 (Mar. 7, 1984).

31. Bettwy, *supra* note 20, at 234.

32. *Id.* at 240-44.

33. Consular relations consist of commercial non-diplomatic relations conducted by agents, designated as consuls, who are usually citizens of the host country. *See* L. PFEFFER, CHURCH, STATE AND FREEDOM 302-03 (2d ed. 1967); Bettwy, *supra* note 20, at 241; Note, *supra* note 12, at 205.

34. The United States had consular relations with the Papal States because no unified Italian nation existed at that time. *See supra* notes 22-25 and accompanying text. The Papal States maintained a consular presence in the United States from 1826 until the death of the papal consul general in 1895. *See* A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 273-80 (1950); Bettwy, *supra* note 20, at 241.

35. In 1847, President Polk requested that Congress authorize formal diplomatic relations with the Papal States by appropriating funds for a *chargè d'affaires* (a diplomatic representative of inferior rank to an ambassador). The Senate initially debated the constitutionality of appropriating the funds, but eventually agreed that some form of diplomatic relations with the Holy See would be advantageous to the United States, despite significant anti-Catholic sentiment. The Papal States never established reciprocal relations and the United States terminated its *chargé d'affaires* twenty years later due to disintegrating relations with Pope Pius IX. *See generally* Act of Feb. 28, 1867, ch. 99, 14 Stat. 412, 413, *repealed by* Act of Oct. 20, 1983, Pub. L. No. 98-164, § 134, 97 Stat. 1017, 1029; CONG. GLOBE, 30th Cong., 1st Sess. 477 (1848); R. GRAHAM, *supra* note 13, at 82-84; L. PFEFFER, *supra* note 33, at 303-04; A. STOKES & L. PFEFFER, *supra* note 34, at 273-74; Bettwy, *supra* note 20, at 245-46; Note, *supra* note 12, at 205-06.

by the arrival of the Holy See's *pro-nuncio*.[36] Congress accorded the Holy See de facto recognition forty-five years later.[37] In the following year, the United States reciprocated the Holy See's unofficial representation when President Franklin D. Roosevelt sent Myron C. Taylor as his "personal representative with the rank of ambassador" to Pope Pius XII.[38]

Mr. Taylor was sent as the President's personal representative to the Pope and not as an official diplomat to the Holy See.[39] Thus, President Roosevelt was able to retain the benefits of having diplomatic channels with the Holy See while circumventing an establishment clause analysis.[40]

Strong political pressure and public opposition have precluded the establishment of full diplomatic relations with the Holy See since 1847, when Congress first considered and rejected establishing full diplomatic relations, choosing instead to send a *chargè d'affaires*.[41] In 1951, President Truman attempted to name Mark C. Clark as an ambassador to the Holy See, but Congress refused to comply.[42] Despite pressure by his staff

36. An apostolic delegate is a non-diplomatic representative of the Holy See. A *pro-nuncio* is the Holy See's highest ranking diplomatic representative, equivalent to an American ambassador. *See* Americans United for Separation of Church and State v. Reagan, 607 F. Supp. 747, 750 (D.C. Pa. 1985); A. STOKES & L. PFEFFER, *supra* note 34, at 276; Bettwy, *supra* note 20, at 242.

37. De facto recognition refers to a type of recognition which is offered for practical purposes, but which is not in total compliance with the law. BLACK'S LAW DICTIONARY 375 (5th ed. 1979). De jure recognition refers to legitimate diplomatic relations in total compliance with the law. *Id.* at 382. *See also* Bettwy, *supra* note 20, at 242. De facto recognition of the Holy See occurred when Congress passed a law, which remains in force today, confirming the validation of official records of the Vatican City. Act of June 25, 1938, ch. 682, 52 Stat. 1163 (codified at 22 U.S.C. § 4222 (1982)).

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

39. *See* 1 DEP'T ST. BULL. 711-12 (1939).

40. The idea of informally recognizing the Holy See was not original to President Roosevelt. Many sovereigns had used similar forms of recognition throughout history. R. GRAHAM, *supra* note 12, at 330. The Holy See accepted the President's personal representative, but did not grant Mr. Taylor the same status it accorded de jure diplomats from other countries, to discourage other countries from initiating such de facto relations with the Holy See. President Harry S. Truman retained Mr. Taylor as his personal representative to the Holy See, despite domestic opposition, until he terminated the mission in 1950. Lyndon B. Johnson resumed the practice in 1966 and all subsequent presidents have utilized this formula for communicating with the Holy See. *See* R. GRAHAM, *supra* note 12, at 326-34; L. PFEFFER, *supra* note 33, at 307-08; A. STOKES & L. PFEFFER, *supra* note 34, at 276-79; Bettwy, *supra* note 20, at 243; Note, *supra* note 12, at 207-09.

41. *See supra* note 35 and accompanying text.

42. In 1951, President Truman, in response to a perceived Communist threat, attempted to transform the American government's de facto recognition of the Holy See to de jure recognition by appointing an official ambassador to the Holy See. The President submitted General Mark C. Clark for appointment as the first full-ranking ambassador to the Holy See, pressur-

to establish full diplomatic relations, President Eisenhower disfavored the idea because of the public opposition following the nomination of Mark C. Clark.[43] President Richard M. Nixon also considered establishing full diplomatic relations, but instead sent a personal representative to avoid a battle with Congress and the public.[44]

On November 22, 1983, Congress repealed the 1867 ban on appropriations for an American delegation in papal Rome, indicating for the first time a Congressional willingness to establish full diplomatic relations with the Holy See.[45] President Reagan then elevated his personal representative to the rank of ambassador.[46] In response, the Holy See transformed its non-diplomatic apostolic delegation in Washington, D.C. to an embassy for a *pro-nuncio*. For the first time in history reciprocal de jure diplomatic relations existed between the Holy See and the United States.

C. The Constitutional Mechanisms for Granting De Jure Recognition to a Foreign State

The power to recognize foreign governments and to appoint and receive ambassadors rests with the President.[47] However, the President's

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ing the Senate to approve Clark's nomination before an imminent recess. The nomination was not confirmed before the Senate adjourned and religious groups mounted an extensive and effective campaign against the nomination. President Truman eventually succumbed to the anti-Catholic pressure and withdrew the appointment. *See* L. PFEFFER, *supra* note 33, at 308-09; A. STOKES & L. PFEFFER, *supra* note 34, at 278-79; Note, *supra* note 12, at 208-09. For a discussion of the interrelation between the fight against communism and diplomatic relations with the Holy See, see *infra* notes 144-146 and accompanying text.

43. *See U.S.-Vatican Diplomatic Link Favored*, Wash. Post, Feb. 24, 1954, at 7, col. 1; *Vatican Envoy Idea Attacked by Baptists*, Wash. Post, Mar. 12, 1954, at 48, col. 2.

44. *See U.S. Rules Out Vatican Envoy, But Plans Ties*, Wash. Post, July 4, 1969, at 1, col. 1.

45. Act of Nov. 22, 1983, Pub. L. No. 98-164, § 134, 97 Stat. 1017, 1029. A bill was introduced in each house of Congress. The Senate bill was postponed. The House bill was passed in lieu of it and signed into law by President Reagan on November 22, 1983. *See* S. 1342, 98th Cong., 1st Sess. (1983); H.R. 2915, 98th Cong., 1st Sess. (1983); 19 WEEKLY COMP. PRES. DOC. 1614 (1983). Both the House and the Senate called for establishment of diplomatic relations with the Holy See. *See* H.R.J. Res. 316, 98th Cong., 1st Sess. (1983); S. 1757, 98th Cong., 1st Sess. (1983).

46. After much discussion of the implications of such an action on the doctrine of separation of church and state, but little real resistance, the Senate confirmed the nomination on March 7, 1984. 20 WEEKLY COMP. PRES. DOC. 22 (1984). Congress approved appropriations for an ambassadorial mission on June 20, 1984. 130 CONG. REC. S2390, S2413 (Mar. 7, 1984) (Senate confirmation by 81 to 13 vote). *See also* 130 CONG. REC. S2384-90 (Mar. 7, 1984) (related debate); *Nomination of William A. Wilson: Hearing Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 14 (1984); *Reprogramming Funds for United States Mission to the Vatican: Hearing Before a Subcomm. on Appropriations*, 98th Cong., 2d Sess. 13, 22-23 (1984).

47. U.S. CONST. art. II, § 2, cl. 2, & § 3. As is evident from a review of United States-Holy See relations, Presidents historically have exercised the power to recognize foreign gov-

foreign affairs power is not absolute. The same article of the Constitution that grants the President the power to appoint ambassadors subjects that power to the advice and consent of the Senate.[48] Until recently the Senate refused to support the occasional presidential appointments of official ambassadors to the Holy See.[49]

Once the Senate approves the President's choice of ambassador the entire Congress determines what appropriation, if any, should be made for the establishment of a mission at the Holy See. The Taxing and Spending Clause[50] provides Congress with the power to appropriate funds, and the Necessary and Proper Clause[51] provides the means by which Congress can carry out such an appropriation.

The Establishment Clause of the First Amendment limits both the President's foreign affairs powers and the Legislature's confirmation and appointment powers by prohibiting governmental support of a religion.[52] Until recently Congress invoked the Establishment Clause to prohibit official diplomatic relations with the Holy See.[53]

II. Constitutional Issues Raised by the Establishment of De Jure Diplomatic Relations with the Holy See

A. Article III Issues: Standing and the Political Question Doctrine

Article III of the United States Constitution defines and limits the jurisdiction of the federal courts to hearing specific cases and controversies.[54] This definition of the judiciary's scope of power raises two procedural barriers to obtaining an establishment clause analysis from the Supreme Court. The concept of justiciability, embodied in the terms "cases" and "controversies," encompasses the two separate doctrines of standing and political questions:

> In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process [standing doctrine]. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government [political question doctrine].[55]

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ernments and receive ambassadors for a particular reason of foreign policy, international relations or political circumstances. *See supra* notes 32-46 and accompanying text.

48. U.S. CONST. art. II, § 2, cl. 2.
49. *See supra* notes 32-46 and accompanying text.
50. U.S. CONST. art. I, § 8, cl. 1.
51. U.S. CONST. art. I, § 8, cl. 18.
52. U.S. CONST. amend. I.
53. *See supra* notes 32-46 and accompanying text.
54. U.S. CONST. art. III, § 2.
55. Flast v. Cohen, 392 U.S. 83, 95 (1967).

Inherent in the Article III concept of standing is the requirement that the plaintiff "allege . . . a personal stake in the outcome of the controversy."[56] Thus, a plaintiff must demonstrate that he has suffered "some threatened or actual injury resulting from the putatively illegal action . . . "[57] before the court can consider the merits of the case.

In its review of *Americans United for Separation of Church and State v. Reagan*,[58] the Third Circuit dismissed the petitioners' complaint, holding that the case was not justiciable. Writing for the court, Judge Gibbons held that the petitioners lacked standing to sue. Moreover, even if petitioners had established standing, the political question doctrine would bar the court from hearing the case.[59] This holding denied the petitioners an adjudication based on the merits. The Supreme Court denied the plaintiffs' petition for certiorari review and rehearing.[60]

1. Standing

The plaintiffs in *Americans United* asserted standing to sue in three capacities: as taxpayers, as citizens and voters, and as victims of stigmatization.[61] The Third Circuit ruled that the plaintiffs lacked "a sufficient protectable interest" as either taxpayers or citizens and that the injuries alleged by the plaintiffs were not "direct and palpable" and therefore were insufficient to establish standing as victims of stigmatization.[62]

a. Taxpayer Standing

Suits by citizens predicated upon the ideological right of every citizen to challenge government violations of the Constitution are generally prohibited.[63] In 1923, the Supreme Court refused to recognize that a suit by a taxpayer fell under an exception to this general ban.[64] The Court

56. Baker v. Carr, 369 U.S. 186, 204 (1961).

57. Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). *See* Warth v. Seldin, 422 U.S. 490, 499 (1974); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151-54 (1970).

58. 786 F.2d 194 (3d Cir.), *cert. denied sub nom.* American Baptist Churches v. Reagan, 107 S. Ct. 314, *reh'g denied*, 107 S. Ct. 660 (1986).

59. *Id.* at 202.

60. American Baptist Churches v. Reagan, 107 S. Ct. 314, *reh'g denied*, 107 S. Ct. 660 (1986).

61. 786 F.2d at 198. The plaintiffs consisted of 20 religious organizations, twelve officials of those organizations, and seventy-one individual clergy of various denominations. *Id.* at 195.

62. *Id.* at 200, 201.

63. *See* Allen v. Wright, 468 U.S. 737 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 482-83 (1981); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216-17 (1974); Laird v. Tatum, 408 U.S. 1, 11-14 (1972); Baker v. Carr, 369 U.S. 186 (1962) (*per curiam*); Fairchild v. Hughes, 258 U.S. 126, 129-30 (1922). *See also infra* text accompanying note 65.

64. Frothingham v. Mellon, 262 U.S. 475 (1923); Massachusetts v. Mellon, 262 U.S. 447 (1923). These cases involved two challenges to the Maternity Act of 1921, ch. 135, 42 Stat. 224, one by the Commonwealth of Massachusetts and the other by an individual named Froth-

found that a federal taxpayer's interest in the moneys of the treasury, when compared with the combined interest of all other federal taxpayers, was too "minute and indeterminable" to constitute sufficient injury to confer standing.[65]

The Warren Court created a narrow exception to the traditional standing rules in the 1968 case of *Flast v. Cohen*.[66] In *Flast*, the Court granted standing to citizens challenging federal expenditures on the basis of their status as taxpayers. The majority in *Flast* announced a "logical nexus" test, which links the status of the taxpayer to the type of enactment challenged. Under the logical nexus test, the taxpayer must establish two interconnections: "First, the taxpayer must establish a logical link between [taxpayer] status and the type of legislative enactment attacked . . . . Secondly, the taxpayer must establish a nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged."[67] The Court explicitly restricted standing under the first requirement to challenges against exercises of congressional power under the Taxing and Spending Clause of article I, section 8 of the Constitution. Standing under the second requirement was restricted to actions that allegedly violate specific limitations on the taxing and spending power.[68]

In denying the plaintiffs standing as taxpayers in *Americans United*, the Third Circuit focused on the strict taxing and spending clause limitation set forth in *Flast*.[69] Without explanation, Circuit Judge Gibbons categorized "the general appropriations bill that authorize[d] support for foreign missions" [70] as an exercise of congressional power under the Necessary and Proper Clause[71] and not the Taxing and Spending Clause.[72]

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ingham. The individual plaintiff claimed that the Act's enactment would result in increased taxation, thereby violating the Fourteenth Amendment by depriving her of her property without due process of law. *Frothingham*, 262 U.S. at 477.

65. Frothingham v. Mellon, 262 U.S. at 487.

66. 392 U.S. 83 (1968). The plaintiffs in *Flast* challenged federal expenditures for instructors' salaries and educational materials in religious schools under the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (current version at 20 U.S.C. §§ 2711-2854), alleging that such expenditures violated the Establishment Clause of the First Amendment and caused the plaintiffs to suffer as taxpayers. 392 U.S. at 103.

67. 392 U.S. at 102.

68. *Id.* at 102-03. In regard to the test's first requirement, the Court unequivocally stated that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the Taxing and Spending Clause of Art. I, § 8, of the Constitution." *Id.* at 102. The Court further stated: "It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id.* at 102. *See also* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1981).

69. *Americans United*, 786 F.2d at 198-200.

70. *Id.* at 199.

71. U.S. CONST. art. I, § 8, cl. 18.

72. U.S. CONST. art. I, § 8, cl. 1.

The presidential appointment of an ambassador to the Holy See, the senatorial confirmation of the ambassador, and the congressional repeal of the 1867 prohibition against maintaining a mission at the Holy See are not spending enactments. Therefore, these acts cannot be challenged in a taxpayer suit. However, the congressional power to appropriate funds for an ambassadorial mission, like other congressional appropriations, is an exercise of the congressional power "to pay the Debts and provide for the common Defence and general Welfare of the United States."[73] The Necessary and Proper Clause is only the instrument by which Congress carries out its taxing and spending clause and other enumerated powers.[74]

The plaintiffs in *Americans United* did not specifically allege that the appropriation of funds for a mission to the Holy See was a violation of the Taxing and Spending Clause.[75] This oversight by the plaintiffs appears to be the only rational explanation for Circuit Judge Gibbons' necessary and proper clause categorization of Congress' actions, since the plaintiffs did in fact meet the first *Flast* requirement.

The second prong of the *Flast* logical nexus test requires that the plaintiffs establish a nexus between their status as taxpayers and the precise nature of the constitutional infringement alleged.[76] The *Americans United* plaintiffs challenged the constitutionality of a congressional exercise of the taxing and spending power which allegedly violated the Establishment Clause. The Supreme Court held in *Flast* that the Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power."[77] The plaintiff-taxpayers in *Americans United* thus satisfied the second nexus requirement of the *Flast* test as well as the first, and should not have been denied standing as taxpayers.[78]

b. Citizenship Standing

Justice Fortas, concurring in *Flast*, suggested that citizenship alone might be sufficient to confer standing for a challenged violation of the Establishment Clause.[79] "Perhaps the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be

73. U.S. CONST. art. I, § 8, cl. 1. Some commentators have anticipated that a suit challenging the establishment of official diplomatic relations with the Holy See would fall well within the taxing and spending clause confines set forth in Flast v. Cohen, 392 U.S. 83 (1968). *See* Bettwy, *supra* note 20, at 261; Bettwy & Sheehan, *supra* note 23, at 11-12.

74. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

75. 786 F.2d at 199.

76. 392 U.S. at 102. *See also supra* notes 67-68 and accompanying text.

77. *Flast*, 392 U.S. at 104. *See also* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 497 (1981) (Brennan, J., dissenting).

78. 392 U.S. at 102-03.

79. 392 U.S. at 115-16 (Fortas, J., concurring).

acceptable as a basis for this challenge."[80] Justice Douglas advocated a similar view in his concurring opinion in *Flast*, suggesting that taxpayers could serve as "vigilant private attorneys general" protecting the people from various constitutional violations.[81]

Justice Harlan, in his dissent, distinguished the status of the plaintiffs, who sought to complain "not as taxpayers, but as 'private attorneys-general,' " from the traditional plaintiffs, who represent their own personal and proprietary interests.[82] The majority accepted Harlan's narrow definition, arguing that an all-encompassing definition of citizenship standing, while highly altruistic, would open the floodgates to the plaintiff who "seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System."[83]

The plaintiffs in *Americans United* asserted standing as citizens and voters;[84] nonetheless they lacked the personal and proprietary interests of the traditional taxpayer plaintiff required by the *Flast* majority. A general representation of the public's interest by itself does not support the plaintiffs' claim of citizenship standing.

c. Standing as Victims of Stigmatization

The Supreme Court has recognized that non-economic injuries, such as stigmatization, can be a basis for demanding legal redress. However, stigmatizing injuries provide standing only to those persons who are "personally denied equal treatment" by the challenged discriminatory conduct.[85] Moreover, standing is allowed only when stigmatization is likely to be relieved by a decision in the plaintiff's favor.[86]

Circuit Judge Gibbons summarized the alleged stigmatization of the plaintiffs in *Americans United* as: (1) the plaintiffs' deprivation of the benefits of diplomatic recognition enjoyed by the Holy See; and (2) the adverse light in which the plaintiffs are cast because they cannot enjoy

80. *Id.* at 115-16 (Fortas, J., concurring). *But see Valley Forge*, 454 U.S. at 488.

81. 392 U.S. at 107-14 (Douglas, J., concurring).

82. *Id.* at 119 (Harlan, J., dissenting). Justice Harlan characterized a "private attorne[y] general" as a plaintiff who represents the public's interest in an *acto popolaris*, act of the people. *Id.* at 119 n. 5. *See also* Reade v. Ewing, 205 F.2d 630, 632 (2d Cir. 1953); Associated Industries v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943); P. VAN DIJK, JUDICIAL REVIEW OF GOVERNMENT ACTION AND THE REQUIREMENT OF AN INTEREST TO SUE 212-23 (1980).

83. *Flast*, 392 U.S. at 106. While the majority accepted Justice Harlan's narrow definition, it rejected his strict adherence to Frothingham v. Mellon, 262 U.S. 447 (1923).

84. 786 F.2d at 198.

85. Heckler v. Mathews, 465 U.S. 728, 740 (1984). *See also* Allen v. Wright, 468 U.S. 737, 755 (1984).

86. *See Heckler*, 465 U.S. at 738; Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1981); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 41-42 (1976).

such benefits.[87] The Court of Appeals found an "absence of any causal connection between [the plaintiffs' allegations of stigmatization] and the challenged governmental action." Further, the "direct and palpable injuries" alleged by the plaintiffs were not legally sufficient to establish standing as victims of stigmatization.[88]

The Court acknowledged that the Holy See might enjoy certain diplomatic benefits invaluable to non-Catholic religious groups. However, it found that those benefits were only available to the Holy See because, unlike the plaintiffs, the Vatican exercises sovereignty over a small geographic area.[89] Thus, the court did not truly analyze whether the plaintiffs had suffered direct and palpable injuries or whether those injuries were causally connected to possible establishment clause violations by the federal government. Finally, Judge Gibbons did not consider whether the alleged stigmatization would be likely to be relieved by a decision in the plaintiffs' favor.

Judge Gibbons may have denied the plaintiffs standing because they were not "*personally* denied equal treatment"[90] by the establishment of de jure diplomatic relations with the Holy See.[91] Specific religious leaders or organizations who have actually suffered injuries due to the establishment of de jure relations between the United States and the Holy See would present a stronger argument for personal denial of equal treatment than the public interest group "Americans United for the Separation of Church and State." The petition for certiorari review of the Third Circuit's decision was brought under the name of *American Baptist Churches v. Reagan*.[92] The decision of the plaintiffs to change their name may reflect an effort to allege a more personalized injury.

In summary, the plaintiffs in *Americans United* were properly denied standing simply as citizens and as victims of stigmatization. However, they were improperly denied standing as taxpayers under the logical nexus test articulated by the Supreme Court in *Flast*.[93]

2. *The Political Question Doctrine*

Once standing is established, a federal court considers whether judicial review of the issues presented would be proper under the political

87. 786 F.2d at 200. The benefits of diplomatic recognition may be summarized as (1) access to the President through diplomatic channels; (2) the influence diplomatic relations would afford the American government over the affairs of the Holy See and vice versa; and (3) the advantage to the Church in the religious marketplace created by diplomatic relations with the United States. *Id.* at 197-98.

88. *Id.* at 200-01.

89. *Id.* at 201.

90. *Heckler*, 465 U.S. at 740 (emphasis added).

91. *See* 786 F.2d at 201.

92. 107 S. Ct. 314 (1986).

93. *See supra* notes 63-78 and accompanying text.

question doctrine. Under this doctrine, the federal judiciary defines its distinct role as the adjudicative branch of the government and ensures that it does not intrude on areas constitutionally committed to the political branches of the government.[94] The Court of Appeals in *Americans United* held that the political question doctrine would be an insurmountable barrier to an adjudication of the plaintiffs' establishment clause claims even if they were to establish standing.[95]

In the 1962 decision of *Baker v. Carr*,[96] Justice Brennan set forth a series of factors which would render an issue nonjusticiable under the political question doctrine. In general terms, a federal court cannot hear a matter: (1) that the Constitution has explicitly committed to another branch of government; (2) that lacks judicially manageable standards for resolution; or (3) that requires a single voiced statement of the government's view.[97]

Recognition of foreign governments has long been considered a power that the Constitution has committed to the President conditioned upon the advice and consent of the Senate. Thus, judicial determination of the propriety of such recognition is prohibited by the political question doctrine.[98] In addressing the Court's power to review the recognition of a foreign country in *Baker*, however, Justice Brennan stated in dicta that the doctrine does not preclude courts from examining "the resulting status [of diplomatic recognition] and decid[ing] independently whether a statute applies to that area."[99] Thus, alleged violations of statutes and, presumably, violations of the Bill of Rights resulting from diplomatic recognition are reviewable, although the recognition itself is not. Applying Justice Brennan's reasoning, judicial review of the issue of whether the United States is recognizing a spiritual as well as a secular entity is distinguishable from nonjusticiable review of the recognition of a foreign state where "the judiciary ordinarily follows the executive as to which nation has sovereignty over a disputed territory . . . ."[100]

There are judicially manageable standards for review of the establishment of de jure relations with the Holy See. The Court has reviewed the juridical status of the Holy See in a variety of circumstances.[101] For

94. *See* Flast v. Cohen, 392 U.S. 83, 95 (1968).

95. 786 F.2d at 201-02.

96. 369 U.S. 186 (1962).

97. *Id.* at 217.

98. *See* U.S. CONST. art. II, § 2, cl. 2, & § 3; *see also* Baker v. Carr, 369 U.S. at 212, 217 (dicta); Powell v. McCormack, 395 U.S. 486, 521 n.43 (1969).

99. *Baker*, 369 U.S. at 212.

100. *Id. See also* Bettwy, *supra* note 20, at 262.

101. *See supra* note 17; *see also* Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 457 U.S. 987 (1981) (distinguishing the religious from the diplomatic functions of the Pope); O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) (recognizing the Pope as the head of the theocratic, independent, secular state of the Holy See).

example, in *Gilfillan v. City of Philadelphia*[102] the Third Circuit used the three-pronged establishment clause test articulated in *Lemon v. Kurtzman*[103] to determine which of Philadelphia's expenditures during the Pope's visit to the city violated the Establishment Clause.[104] The District of Columbia Circuit also employed the *Lemon* test when it recognized the Pope as the head of the theocratic secular state of the Holy See in analyzing the papal visit to Washington, D.C. in 1978.[105] The *Lemon* test is routinely used by federal courts and, therefore, provides judicially manageable standards that should have been applied to the facts of *Americans United.*

Finally, the establishment of de jure diplomatic relations with the Holy See is not a matter that requires a single voiced statement of the government's view. Generally, a matter requires a single-voiced statement of the government's views if: (1) the matter is one of national security or policy;[106] or (2) a judicial decision reversing the matter would require the political equivalent of "unscrambling an egg."[107] The United States de jure recognition of the Holy See does not involve a matter of national defense.[108] Furthermore, the United States' checkered history with the Holy See shows that it has become adept at offering and revoking all forms of diplomatic recognition[109] and so would not have to "unscramble an egg" if the federal government's position were reversed.

The Supreme Court's denial of review and rehearing in *Americans United*[110] offers future plaintiffs little, if any, guidance for resolving the justiciability and establishment clause issues surrounding the establishment of de jure relations with the Holy See. However, nonjusticiability does not imply constitutionality. Although the Supreme Court is the final interpreter of the Constitution,[111] each branch of the federal government is bound by the limits imposed by the Constitution.[112] Thus, the executive and legislative branches must consider the constitutionality of their actions by applying the case law requirements of the Establishment

102. 637 F.2d 924, 929 (3d Cir. 1980).

103. 403 U.S. 602 (1971). *See also infra* notes 121-137 and accompanying text.

104. *Gilfillan*, 637 F.2d at 929 (citing Gilfillan v. City of Philadelphia, 480 F. Supp. 1161 (E.D. Pa. 1979)).

105. O'Hair v. Andrus, 613 F.2d 931, 937 (D.C. Cir. 1979).

106. Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975) (establishment clause challenge to United States military aid to Israel held to be nonjusticiable); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (challenge to President Franklin D. Roosevelt's prohibition of arms sales to Bolivia held to be nonjusticiable).

107. Goldwater v. Carter, 444 U.S. 996, *vacating* 617 F.2d 697 (D.C. Cir. 1979), (challenge to President Carter's termination of defense treaty with Taiwan found to be nonjusticiable).

108. *See supra* notes 32-46 and accompanying text.

109. *Id.*

110. American Baptist Churches v. Reagan, 106 S. Ct. 314, *reh'g denied*, 106 S. Ct. 660 (1986).

111. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

112. *Id.* at 180. *See also* L. PFEFFER, *supra* note 33, at 317.

Clause.[113] Adherence to the Supreme Court's interpretation of the Constitution becomes especially critical when the government action involved is likely to be nonjusticiable. When a court is unlikely to review a government action, there is a greater danger of infringement upon constitutional rights without adequate remedy.[114]

B. The Establishment Clause

The doctrine of separation of church and state is a highly controversial and revered principle of American government.[115] The Framers of the Constitution drafted the First Amendment partly in an effort to prevent the creation of a national church and to protect the newly formed government from the evils of religious war and persecution.[116] With the proclamation that "Congress shall make no law respecting the establishment of religion . . . ,"[117] a "wall of separation"[118] was erected between church and state.

The meaning of the metaphorical wall of separation created by the Establishment Clause has been subject to varied interpretations throughout history. Some commentators advocate a complete separation theory which would forbid any and all interference with religion by the government.[119] At the other end of the spectrum, some commentators favor a narrow construction of the First Amendment which would forbid only the establishment of an official national religion.[120]

1. Challenging Government Actions Under the Establishment Clause

a. The *Lemon v. Kurtzman* "Neutrality" Test

In an effort to accommodate both extremes of the spectrum, the

113. 130 CONG. REC. S2387 (Mar. 7, 1984) (remarks of Sen. Lugar). *See also* 130 CONG. REC. S2386 (Mar. 7, 1984) (remarks of Sen. Hatfield).

114. Howe, *Diplomacy, Religion and the Constitution*, NATION 29 (Jan. 12, 1952).

115. John Locke's enlightenment theory that religion exists outside the jurisdiction of the civil government, J. LOCKE, A LETTER CONCERNING TOLERATION 17-20 (1955), was so widely accepted in Colonial America as to be deemed a "self-evident" truth by the Drafters of the Declaration of Independence. The Declaration of Independence para. 1 (U.S. 1776). Locke's theory, when combined with the multiplicity of religious sects and the movement away from religious worship at that time, had a profound influence on the American solution to the Church-State problem. L. PFEFFER, *supra* note 33, at 101-03. While an express guarantee of religious freedom was not included in the original draft of the Constitution, it was important enough to the several states to become a condition to its ratification. L. PFEFFER, *supra* note 33, at 125.

116. *See* Everson v. Board of Education, 330 U.S. 1, 15-16 (1947); A. STOKES & L. PFEFFER, *supra* note 34, at 91, 93-94.

117. U.S. CONST. amend. I.

118. Letter from Thomas Jefferson to the Committee of the Danbury Baptist Association of Connecticut, *reprinted in* S. PADOVER, THE COMPLETE JEFFERSON 518-19 (1943).

119. *See generally* L. PFEFFER, *supra* note 33, 149-54.

120. *Id.*

Supreme Court in *Lemon v. Kurtzman*[121] developed a neutrality test[122] to determine whether the Establishment Clause has been violated. The test consists of three prongs: first, whether the law in question has a valid secular purpose;[123] second, whether its primary effect advances or inhibits religion;[124] and third, whether it creates excessive entanglement between church and state.[125] A government action violates the Establishment Clause if it fails any one of the three prongs.[126]

Any government aid to or interference with religion must have a valid secular purpose to pass the first prong of the *Lemon*[127] test. As long as the government action has at least one secular purpose, it does not violate the first prong, even if the action has an incidental religious purpose.[128] Very few decisions have found a valid secular purpose to be lacking in government action.[129]

The second prong focuses on the primary effect of a government action by inquiring whether the action advances or inhibits religion.[130] This prong was designed to discern those government actions which meet the lax primary secular purpose test of the first prong, but which have the

121. 403 U.S. 602, *reh'g denied*, 404 U.S. 876 (1971).

122. *Lemon*, 403 U.S. at 612-20 (challenge to public salary support for parochial school teachers). The Supreme Court drew from a series of earlier decisions to develop the three prongs necessary to determine whether a government action violates the Establishment Clause. *See infra* notes 123-125.

123. 403 U.S. at 612. In Everson v. Board of Education, 330 U.S. 1, 16-18 (1947), the Court articulated the first of the three tests when it looked to the "purpose and primary effect" of publicly funded busing to parochial schools. The Court later used this functional purpose and primary effect test to analyze a challenge to Sunday Closing ("Blue") Laws in McGowan v. Maryland, 366 U.S. 420, 422 (1961).

124. 403 U.S. at 612. The second prong was first used by the Court in School District of Abington Township v. Schempp, 374 U.S. 203, 222 (1968), where an ordinance requiring Bible study in public schools was found to be unconstitutional because its primary effect was to advance religion. The Court later held that a government activity, *e.g.* military draft, may be constitutional even if it affects particular religious beliefs, if its primary impact on religion is generally neutral. Gillette v. United States, 401 U.S. 437, 450 (1971).

125. 403 U.S. at 613. The third prong, excessive entanglement, first appeared in Walz v. Tax Comm'n, 397 U.S. 664 (1970), where the Court questioned the effect a state property tax exemption for religious, educational and charitable institutions would have on the involvement of the government in religious matters.

126. Committee for Pub. Educ. & Religious Liberty v. Reagan, 444 U.S. 646 (1980).

127. 403 U.S. at 612-20.

128. McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday Closing ("Blue") Laws had a valid secular purpose of allowing citizens a day of rest and only an incidental religious effect).

129. *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980) (Kentucky statute requiring the posting in public school classrooms of privately purchased copies of the Ten Commandments had no valid secular purpose); Epperson v. Arkansas, 393 U.S. 97 (1968) (Arkansas statute prohibiting public school teachers from teaching the theory of evolution had no valid secular purpose).

130. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (1970) (state property tax exemption for religious, educational, and charitable institutions does not primarily advance or inhibit religion).

practical primary effect of advancing or inhibiting religion.[131]

Finally, under the third prong of the *Lemon* test the court must inquire into the degree of contact between a particular religion and the state. The Court has used several factors to determine whether excessive entanglement exists between church and state.[132] An inference of excessive entanglement will arise if: (1) the institution with which the government interacts is by its nature pervasively religious;[133] (2) the nature of the government action requires administrative entanglement between church and state;[134] (3) the nature of the resulting relationship between the government and the institution requires continuing official surveillance;[135] and (4) the government action creates potential political divisiveness along religious lines.[136] These four factors must be considered together in deciding whether a government action creates excessive entanglement; any single factor alone is insufficient for invalidation.[137]

b. The Historical Tradition Test

In recent cases, the Supreme Court has not consistently applied the *Lemon* three-prong test. Although the Court in many cases has followed the *Lemon* test,[138] an analysis of its recent decisions reveals significant deviations. For example, in *Marsh v. Chambers*[139] Chief Justice Burger relied on a historical tradition test rather than on the three prongs of *Lemon* to determine whether the Establishment Clause had been violated. In *Marsh*, the Court gave great weight to the traditional nature of the Nebraska legislature's practice of opening each day with a prayer by a chaplain, approving the practice without discussing the *Lemon* test.[140] In his dissent, Justice Brennan severely criticized the majority for ignoring the "formal 'tests' that have traditionally structured [the Court's] in-

131. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 1161 (1982) (law which granted churches veto power over liquor license applications had the secular purpose of insulating churches from undesirable neighbors, but churches could favor members of their congregation, thereby advancing religion).

132. *See* Mueller v. Allen, 463 U.S. 388, 404 (1983); *Lemon*, 403 U.S. at 615.

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

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

135. *See, e.g.*, *Lemon*, 403 U.S. at 615; *Walz*, 397 U.S. at 675.

136. *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983) (political divisiveness created along religious lines by direct subsidy to a religious institution). *But see* Lynch v. Donnelly, 465 U.S. 668 (1984) (political divisiveness created by lawsuit itself is not sufficient; a history of political divisiveness as a result of government action must exist).

137. Mueller v. Allen, 463 U.S. at 403.

138. *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983) (challenge to Minnesota income tax deduction primarily benefiting those with children in parochial schools); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973) (challenge to tax credits for parents of parochial school children); Hurt v. McNair, 413 U.S. 734, 741 (1973) (challenge to issue of revenue bonds to assist Baptist college).

139. 463 U.S. 783 (1983).

140. *Id.* at 790.

quiry under the Establishment Clause . . . ."[141]

One year later, the Supreme Court superficially returned to the *Lemon* test in *Lynch v. Donnelly*.[142] However, Chief Justice Burger, citing *Marsh* and "emphasizing [the Court's] unwillingness to be confined to any single test or criterion,"[143] clearly indicated that the law today involves both a *Lemon* analysis and an historical tradition test.

2. *De Jure Diplomatic Relations with the Holy See and the Establishment Clause*

a. Application of the Three Prong *Lemon* Test

The challenged government action in *Americans United* easily would have passed the first prong of the *Lemon* test. Numerous secular purposes exist for the establishment of diplomatic relations with the Holy See.

One of the Reagan Administration's paramount purposes is to tap the influence and experience of the Holy See in opposing Communism.[144] President Truman recognized the Holy See's influence on communist activities in the early 1950's. Citing the need to counter the threat of Communism as his primary secular purpose, President Truman unsuccessfully sought to transform the government's then de facto recognition of the Holy See into de jure recognition.[145] Similarly, the Reagan Administration views the Holy See, currently led by an anti-Communist Polish Pontiff, as a powerful ally for combating the perceived threat of worldwide Communist influence.[146] This is a clearly secular foreign policy objective and is therefore valid under the *Lemon* test.

Obtaining intelligence information is also a valid secular purpose. The Holy See's active and sophisticated foreign service exercises considerable influence throughout the world and has access to intelligence information of great political value to the United States.[147] The strategic location of the Vatican in the heart of Europe and the Church's intimate contact with most of the peoples of the world, especially those behind the Iron Curtain and in the Third World, make the Holy See an ideal "listening post."[148]

Finally, the Holy See has continuously served as a diplomatic cham-

141. *Id.* at 796 (Brennan, J., dissenting).

142. 465 U.S. 668 (1984).

143. *Id.* at 679.

144. *See* L. PFEFFER, *supra* note 33, at 310-12; Bettwy & Sheehan, *supra* note 23, at 17-18; Bettwy, *supra* note 20, at 258; Note, *supra* note 12, at 215. *But see* L. PFEFFER, *supra* note 33, at 312-14 (arguments refuting the Holy See's ability to counter Communism and provide valuable intelligence information).

145. *See supra* note 42 and accompanying text.

146. *See supra* note 144 and accompanying text.

147. *See* sources cited *supra* note 144.

148. *See* L. PFEFFER, *supra* note 33, at 311. *But see* L. PFEFFER, *supra* note 33, at 313-14.

pion of peace, human rights and political freedom.[149] The Holy See has explicitly stated that it "wishes to remain and will remain extraneous to all from the temporal competitions between States and to international Congresses held for such objects, unless the parties make concordant appeal to its peaceful mission . . . ."[150] President Roosevelt recognized the Holy See's dedication to peace, human rights and freedom during the 1930's and during the Second World War. He found this dedication sufficient to justify reestablishing reciprocal de facto relations with the Holy See in 1937.[151]

Thus, the United States has at least three secular purposes which meet the first requirement of the *Lemon* test. Furthermore, the blatantly spiritual goals of the Holy See in establishing de jure relations with the United States[152] are irrelevant to the analysis under the first prong of *Lemon*. The first prong of the *Lemon* test refers only to the government's purpose; it does not apply to the purposes of the religious entity.

Similarly, the primary effect which establishing diplomatic relations with the Holy See would have on the advancement or inhibition of religion would not necessarily render these relations unconstitutional. The plaintiffs in *Americans United* contended that diplomatic relations with the Holy See would place the Church on a different footing with the federal government than other denominations and thereby unconstitutionally advance the status of the Church in the United States.[153] However, distinguishing historical realities from a legally-defined relationship is difficult. The Church is an international organization formed around spiritual principles. Its leader is recognized both as a political sovereign and as a moral authority. Because of these facts, the Church does stand on a different footing from other denominations that do not have the secular autonomy created by the Vatican.

Within the United States, the status of the Holy See is determined by its unique international position and not by the United States' de jure recognition of the Holy See. The United States gives de jure recognition to other countries that have leaders who function in the dual role of secular and religious sovereign.[154] Theoretically, if other religious denomina-

149. *See supra* note 144.

150. Treaty of the Lateran, *supra* note 14, art. 24.

151. *See* sources cited *supra* notes 37-42.

152. The dual nature of the Holy See allows the tiny Vatican City to serve as a stepping stone for the world wide spiritual organization of the Catholic Church. Thus, by establishing official diplomatic relations with the United States, the Holy See is attempting to fulfill its spiritual policy objective of carrying its faith throughout the world. *See supra* notes 13-19 and accompanying text.

153. 786 F.2d at 197-98, 200-201. *See also supra* note 87 and accompanying text.

154. For example, Queen Elizabeth II is both ruler of the United Kingdom and titular head of the Anglican Church. Boston Globe, Sept. 13, 1979, at 12, col. 1-2. In recent years, many former political leaders have also held religious positions. For example, President William Tolbert of Liberia was a Baptist minister. NEWSWEEK, Apr. 21, 1980, at 63. Former Prime

tions developed secular autonomy similar to that of the Holy See, the United States would recognize them as well, assuming that sufficient foreign policy objectives existed for according recognition. De jure recognition of the Holy See has not significantly altered the international diplomatic status the Holy See held when the United States recognized it in only a de facto manner.[155]

The spiritual objectives of the Holy See in establishing official diplomatic ties with the United States do not affect a constitutional analysis of the primary effect of the relations.[156] While establishment of official diplomatic relations clearly has the effect of furthering the spiritual goals of the Holy See, its primary effect is to promote the secular foreign policy goals of the United States and the Holy See.[157] Since the United States deals with the Holy See only in its secular role as head of the Vatican, such government action neither advances nor inhibits religion.[158]

The final "excessive entanglement" prong of the *Lemon* test presents the most difficult obstacle to de jure recognition of the Holy See. Initially, the unique dual nature of the Holy See suggests significant entanglement between the United States and the Catholic Church. Therefore, a constitutional analysis of the actual entanglement involves a weighing and balancing of the four factors announced by the Court in *Lemon*.

While the United States established relations with the secular entity of the Vatican City and not with the Church,[159] the overall nature of the Holy See is unquestionably pervasively religious. Assessment of this particular factor clearly favors a finding of entanglement. Thus, it is particularly important to analyze the three remaining factors in order to decide whether excessive entanglement exists.

Regarding the second and third factors of the excessive entanglement analysis, some commentators argue that the diplomatic relationship requires official continuing surveillance and thus by its very nature creates excessive entanglement.[160] Proponents of this argument misunderstand the modern realities surrounding the diplomatic relationship.

Minister of Zimbabwe, Abel Muzorewa, is also a bishop. TIME, Mar. 3, 1980, at 39. Finally, de jure relations existed between the United States and Iran until the 1979 hostage fiasco in the American Embassy in Tehran. At that time, the Ayatollah Khomeini served as both the ruler of Iran and as a Shi'ite Imam. TIME, Jan. 7, 1980, at 13.

155. *See supra* notes 32-46 and accompanying text.

156. *See supra* notes 13-19, 152 and accompanying text.

157. Other foreign governments have not been blind to the foreign policy benefits that can be achieved by establishing diplomatic relations with the Holy See. The Polish government is presently exploring the possibility of establishing diplomatic relations with the Holy See in an attempt to achieve greater legitimacy abroad and within its predominantly Catholic population. L.A. Times, June 15, 1987, at 6, col. 2.

158. 130 CONG. REC. S2385 (Mar. 7, 1984).

159. 130 CONG. REC. S2387 (Mar. 7, 1984).

160. *See* Note, *supra* note 12, at 216 (citing G. STUART, AMERICAN DIPLOMATIC AND CONSULAR PRACTICE 59, 123 (1952)) (administrative entanglement results from the exchange

Under the theory of personal representation, a diplomatic agent is the personification of his sovereign state, whose independence must be respected.[161] Diplomatic premises have the status of foreign territory,[162] and the diplomatic agent is permitted freedom of movement and communication, as well as immunity from local jurisdiction, in order to carry out effective diplomatic relations.[163] The 1961 Vienna Convention on Diplomatic Immunities reaffirms these diplomatic privileges. Article 41 of the Treaty expressly states that diplomatic missions "have a duty not to interfere in the internal affairs of the [receiving] State. . . ."[164]

The principles of independence and sovereignty underlying the diplomatic relationship serve to reduce entanglement of administrative agencies and to avoid creation of such entanglement. The strict codes and rules of such relations preclude continuing official surveillance. Thus, unregulated de facto relations would result in greater entanglement than highly structured, official de jure relations. The entanglement that results from de facto recognition is evidenced by the confusing United States-Holy See relations prior to 1984.[165]

Finally, under the fourth excessive entanglement factor, the existence of a suit challenging the government's actions suggests a risk of political divisiveness developing along religious lines.[166] However, political divisiveness created by a lawsuit itself does not constitute entanglement; rather, a history of political divisiveness as a result of government action must exist.[167]

A history of political divisiveness due to government relations with the Holy See does exist.[168] The non-Catholic American population has long perceived the Holy See as a powerful threat to the secular autonomy of the federal government. This political discord and religious prejudice has been powerful enough in the past consistently to block de jure relations.[169]

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of embassies, diplomatic staffs, documents, communications and security forces). *See also supra* notes 134-135 and accompanying text.

161. C. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES 1 (1967).

162. *Id.* at 5.

163. *Id.* at 17.

164. Vienna Convention on Diplomatic Relations of 1961, art. 41, para. 1, 500 U.N.T.S. 95.

165. *See supra* notes 32-44 and accompanying text. De facto recognition of the Holy See could present a stronger establishment clause argument, based upon the *Lemon* test, than de jure recognition. When the President sends a personal representative to the Holy See, there is no way to verify that such a representative is fulfilling a purely secular role. In addition, a complaint based on this relationship could never surmount the Article III hurdles of standing and the political question doctrine.

166. *See supra* note 136.

167. Lynch v. Donnelly, 465 U.S. 668 (1984). *See supra* note 136.

168. *See supra* notes 32-46, 136 and accompanying text.

169. *See supra* notes 32-46 and accompanying text.

However, anti-Catholic sentiment appears to have subsided in recent decades. Productive relations with the Holy See throughout the last half-century, the presidency of Catholic John F. Kennedy, and the Holy See's peacekeeping role in international affairs have helped calm the fears of the non-Catholic populace. The senatorial consent to the presidential appointment and the congressional allocation of funds indicate that minimal political disharmony was provoked by the federal government action. Political divisiveness is a result of the alignment of the public on a specific issue. If the issue is resolved by de jure recognition, no future alignment will occur. Furthermore, if the political divisiveness directly results from anti-Catholic sentiment, such prejudice should not be a factor in determining the outcome of an establishment clause analysis.

An analysis of the above four factors in light of the excessive entanglement test suggests a close decision. No one factor is determinative;[170] the four factors collectively describe a highly complex relationship between the American government and a unique political-religious entity. However, based upon the foregoing analysis, the establishment of official diplomatic relations with the Holy See should withstand the *Lemon* three-pronged neutrality test.

b. Application of the Historical Tradition Test

The historical tradition test articulated by Chief Justice Burger in *Marsh v. Chambers*[171] provides little constitutional guidance. The Chief Justice stated: "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress . . . ."[172] This reasoning offers little more than a circular analysis.

The history of the United States-Holy See relations reveals decades of de facto indirect attempts, through consular, non-reciprocal, and unofficial relations, to accomplish what the Reagan administration has directly accomplished through official de jure reciprocal diplomatic relations with the Holy See.[173] Indirect relations were developed historically for various political reasons, including anti-Catholic bigotry. That these relations may have been due in part to attempts at circumventing the Establishment Clause does not indicate present constitutional validity or invalidity. The Establishment Clause is better served by the three-pronged test of *Lemon v. Kurtzman*.

170. Mueller v. Allen, 463 U.S. 388 (1983). *See supra* note 137 and accompanying text.

171. 463 U.S. 783, 790 (1983).

172. *Id.*

173. *See supra* notes 32-44 and accompanying text.

Conclusion

The unique status of the Holy See as both a spiritual and secular sovereignty creates difficult questions concerning the constitutionality of establishment of de jure diplomatic relations between the United States and the Holy See. The requirements of standing and the political question doctrine make adjudication of the establishment clause issues problematical. The unique political-religious nature of the Holy See further complicates the application of establishment clause jurisprudence.

To achieve de jure diplomatic relations with the Holy See, the United States must comply with all requirements of the law,[174] including the Establishment Clause of the Constitution. *Americans United* represents an attempt by dissenting citizens to ascertain whether de jure relations currently exist between the United States and the Holy See. Unfortunately, the Supreme Court declined to answer this urgent and unique question on behalf of the Constitution and the federal government. While the existing diplomatic relations between the United States and the Holy See meet all the requirements of the *Lemon* test,[175] the Supreme Court's silence casts a shadow over their de jure status.

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174. *See supra* note 37 and accompanying text.

175. *See supra* notes 121-137 & 144-173 and accompanying text.

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