

RETHINKING THE SOVEREIGN STATUS OF
THE HOLY SEE: TOWARDS A GREATER
EQUALITY OF STATES AND GREATER
PROTECTION OF CITIZENS IN UNITED
STATES COURTS

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I. INTRODUCTION

Though the sensation of the childhood sex abuse scandals perpetrated in the Catholic Church has waxed and waned within

American media culture, the numbers are still quite staggering. A recent survey found that between 1950 and 2002, childhood sexual assault by priests and deacons affected more than ninety-five percent of dioceses, and approximately sixty percent of religious communities.¹ In total, about 2.7% of all priests during that time period have been accused of childhood sexual assault,² with the total number of alleged sexual abuses of youths at 10,667.³ Even in 2004, years after widespread revelations of priesthood sexual assault, of the 756 priests or deacons accused *that year* of sexual assault, half of them had been named in a prior similar accusation.⁴

The sheer number of sexual abuse allegations and the perceptible lack of an appropriate and effective response by Catholic leadership have, understandably, led to a plethora of litigation against the Catholic Church. As such, the Catholic Church has spent over \$840 million dollars in legal settlements and “other costs related to sex abuse.”⁵ Yet even this rather large sum has been limited by several factors. Firstly, plaintiffs seeking to collect damages directly from an abusive priest may find that the priest has undertaken a vow of poverty.⁶ Secondly, plaintiffs seeking to collect damages from an archdiocese may find that the institution has resorted to a declaration of bankruptcy that shield them from liability and prevents the collection of damages for sexual abuse.⁷

¹ JOHN JAY COLLEGE OF CRIMINAL JUSTICE, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY PRIESTS AND DEACONS 25 (2004), available at http://www.bishop-accountability.org/reports/2004_02_27_JohnJay/index.html#prev1. This information was based upon a survey which comprised “195 dioceses, representing 98% all diocesan priests in the United States, and 140 religious communities, representing approximately 60% of religious communities and 80% of all religious priests.” *Id.* at 5.

² *Id.* at 7.

³ *Id.* This number is, of course, based on survey allegations and has not been substantiated. Conversely, the number may also be deflated due to the fact that the survey: (1) may not represent all allegations of sexual assault or (2) does not contain information on sexual assault that has not been reported.

⁴ Alan Cooperman, *In 2004, 1000 alleged Abuse by Priests*, WASH. POST, Feb. 19, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A36324-2005Feb18.html>.

⁵ This number is taken from a February 2005 article and could be expected to have increased significantly over five years. *Id.*

⁶ A priest who has taken a vow of poverty will have little assets, thus making him, effectively, judgment-proof. Michael J. Sartor, *Respondeat Superior, Intentional Torts, and Clergy Sexual Misconduct: The Implication of Fearing v. Bucher*, 62 WASH. & LEE L. REV. 687, 724 (2005).

⁷ See William Brian Mason, *A New Call for Reform: Sex Abuse and the Foreign Sovereign Immunities Act*, 33 BROOK J. INT'L L. 655, 679 (2008) (citing *Iowa Catholic*

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Surprisingly, it has been with rare occurrence that the Holy See, the “government of the Catholic Church,”⁸ has been named as a defendant or co-defendant in priesthood sexual abuse lawsuits.⁹ Asserting jurisdiction over the Holy See has been difficult, largely because of the strict requirements of the Foreign Sovereign Immunities Act (FSIA).¹⁰ This is due to the fact that the Vatican City State and the Holy See have routinely been held as a foreign sovereign state in United States courts.¹¹

This Note evaluates the international and domestic personality of the Vatican City State and the Holy See. In doing

Diocese Files For Bankruptcy After Sex-Abuse Claims, FOX NEWS, Oct. 11, 2006, <http://www.foxnews.com/story/0,2933,219741,00.html>; Janet I. Tu, *Spokane Diocese Files For Bankruptcy*, SEATTLE TIMES, Dec. 7, 2004, http://seattletimes.nwsourc.com/html/localnews/2002111403_diocese07m.html) (showing that the Catholic Dioceses of Spokane, Washington, Tucson, Arizona, and Davenport, Iowa were able to escape liability for sex abuse judgments through declarations of bankruptcy). The Guardian reports that in October of 2009, the Catholic Diocese of Wilmington, Delaware became the eleventh diocese to declare bankruptcy since the sex abuse scandal, with a lawyer from the prosecution stating that the bankruptcy filing was a “desperate effort to hide the truth from the public and conceal the thousands of pages of scandalous documents[.]” *US Diocese Delays Sex Abuse Trial with Bankruptcy Move*, THE GUARDIAN, Oct. 19, 2009, <http://www.guardian.co.uk/world/2009/oct/19/catholic-sex-abuse-trial-bankruptcy>.

⁸ U.S. DEP’T OF STATE, *Background Note: Holy See* (Mar.10, 2010), <http://www.state.gov/r/pa/ei/bgn/3819.htm>.

⁹ One author was unable to find any cases prior to 1987 in which the Holy See was named as a co-defendant for its role in sexual abuse cases. Mason, *supra* note 7, at 673 n.147. Pope Benedict XVI had also been named, once, in a lawsuit dealing with priesthood sexual assault. Dina Aversano, *Can the Pope be a Defendant in American Courts? The Grant of Head of State Immunity and the Judiciary’s Role to Answer this Question*, 18 PACE INT’L L. REV. 495, 496 (2006). The particular suit against the Pope, which alleged the Pope conspired to conceal tortuous activity by Catholic clergy in the United States, was dismissed. *Judge Dismisses Pope from Sex Abuse Suit*, FOX NEWS, Dec. 23, 2005, <http://www.foxnews.com/story/0,2933,179586,00.html>.

¹⁰ Codified in 28 U.S.C. §§ 1330, 1332(a), 1391(f), and 1601-1611 (2006). The FSIA codified the restrictive theory of sovereign immunity that was first espoused by the Department of State in the Tate Letter. Jack B. Tate Letter, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP’T ST. BULL. 984 (1952). Under current legislation, sovereigns are immune from suits in U.S. courts unless their actions fall under one of the prescribed exceptions. 28 U.S.C. § 1605 (2008). These exceptions include the tortuous activity exception, the commercial activity exception, and the waiver exception, but have been expanded, such as in 1996, to make exceptions for acts of State-sponsored terrorism. 28 U.S.C. §§ 1605, 1605(a)(7) (repealed 2008). The added exception, requiring that the foreign state be designated by the U.S. as a “state sponsor of terrorism[.]” which was in many ways similar to the court’s inquiries pre-FSIA, allowed the Department of State to control which suits could be brought in the courts.

¹¹ *See Doe v. Holy See (State of Vatican City)*, 793 N.Y.S.2d 565, 565-67 (3d Dep’t 2005); *Dale v. Calagiovanni*, 337 F. Supp. 2d 825, 832 (S.D. Miss. 2004) (treating the Vatican as a foreign state for purposes of the FSIA); *English v. Thorne*, 676 F. Supp. 761, 764 (S.D. Miss. 1987).

so, it makes the argument that, while the Holy See has correctly been afforded sovereign protections, these protections should be the protections given to an instrumentality, and not those given to a sovereign state in American courts.¹² Further, this Note will make that argument that it is not only within the courts' purview to judicially determine the instrumentality status of the Holy See but that—according to any of the tests that courts currently use to distinguish between a sovereign state and a sovereign instrumentality—courts should find that the Holy See is correctly identified as an instrumentality.¹³

Part II of this Note provides a background of the current political status of the Holy See and, as such, is divided between the Holy See's international personality and its domestic personality within the United States. Part III.A provides an analysis of both the FSIA and its relation to the Holy See, arguing first and foremost that the courts' ability to make this determination should not be abrogated by the political question doctrine.¹⁴ Part III.B provides that the entities known as the "Holy See" and the "Vatican City State" are separable in International law. Part III.C analyzes both tests used to distinguish between states and instrumentalities as applied to the structure of the Holy See, and outlines the practical and theoretical effects of identifying the Holy See as an instrumentality. Finally, Part IV concludes that courts should not disregard their obligations to determine the exact scope of the Holy See's sovereign status, as it is necessary to ensure equal treatment for foreign states and instrumentalities under the laws of the U.S., grant appropriate judicial protections to U.S. citizens, and assure the predictability of jurisdiction that is

¹² For purposes of this Note, the words *state* and *instrumentality* will be used to refer to *separate* entities, each of which receives some form of sovereign protection under the FSIA. Though Section 1603 of the FSIA provides that "[a] 'foreign state,' except as used in Section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state," this Note will use the terms exclusive of one another. See 28 U.S.C. § 1603(a) (2005).

¹³ There is a circuit split among courts as to the correct test applicable to this question. Working Group of the American Bar Association, *Report: Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L LAW 489, 508-09 (2002) [hereinafter *Reforming the Sovereign Immunities Act*]. Two tests have been developed: (1) the legal characteristics test and (2) the core functions test. *Id.* These are analyzed in Part III.B of this Note.

¹⁴ The political question doctrine was first originated as dictum in the famous case of *Marbury v. Madison*, 5 U.S. 137 (1803), in which it was determined that some questions were "political" in nature and, therefore, not reviewable by courts. The doctrine was further fleshed out in *Baker v. Carr*, 369 U.S. 186 (1962).

guaranteed under the FSIA.

II. BACKGROUND

A. *The Holy See and the FSIA*

Though there have been prior attempts to hold the Holy See liable for sexual abuse by Catholic priests in U.S. state and federal courts, these attempts have been dismissed for various reasons including the statute of limitations, failure to prosecute, and—of course—sovereign immunity under the FSIA.¹⁵ The Supreme Court has interpreted the FSIA to be the only avenue available to prosecute foreign sovereigns. In dismissing one claim brought against a foreign state under the Alien Tort Statute, Chief Justice Rehnquist stated definitively that “the text and structure of the FSIA demonstrate Congress’ intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts[.]”¹⁶ The Department of State’s classification of the Holy See as a foreign sovereign, therefore, requires that suits be brought against the Holy See as either a state or instrumentality, and limits prosecution of the Holy See to those suits that satisfy one of the exceptions of the FSIA¹⁷ and its strict requirements of service.¹⁸

There have been at least two recent cases that have attempted to hail the Holy See into court under exceptions to the FSIA, yet both of these cases brought suit against the Holy See as a state and not as an instrumentality. In *O’Bryan v. Holy See*,¹⁹ which was heard in a Kentucky federal court, plaintiffs sought certification as a class, representing *all* victims of priesthood sexual assault in the

¹⁵ These cases not only highlight the various ways in which the Holy See has escaped prosecution within the U.S. justice system, but also how the statute of limitations can work as an effective bar for claims by victims who may have been too young, naive, or scared to bring their claims prior. See *Doe v. Holy See*, 793 N.Y.S.2d at 569-70 (dismissing the claim against the Holy See based both on the statute of limitations and “jurisdictional grounds”); *Doe v. O’Connell*, 146 S.W.3d 1, 2 (Mo. Ct. App. 2004) (dismissing the claims against the Holy See on a failure to prosecute and, more broadly, the claims against all defendants on the grounds that the statute of limitations had expired); *English*, 676 F. Supp. at 763-64 (holding that the FSIA denied jurisdiction over the Holy See).

¹⁶ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989).

¹⁷ 28 U.S.C. § 1605 (2008).

¹⁸ It is important to note that classifying the Holy See as an instrumentality will not completely forego the demands of the FSIA, but service of process between a state and an instrumentality do differ in their requirements. 28 U.S.C. § 1608 (1976).

¹⁹ *O’Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009); *O’Bryan v. Holy See*, 549 F.3d 431 (6th Cir. 2008); *O’Bryan v. Holy See*, 471 F. Supp. 2d 784 (W.D. Ky. 2007).

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United States.²⁰ The Oregon-based case of *Doe v. Holy See*,²¹ less broad in its scope, is specific as being from individual plaintiffs against both the Portland Diocese and the Holy See for the alleged sexual abuse of a parishioner by a priest within the Archdiocese of Portland, Oregon during the late 1950's, when the sexual abuse is said to have occurred.²² In *Doe*, the plaintiff had originally asserted three causes of action against the Holy See: (1) negligence; (2) respondeat superior; and (3) fraud.²³ Responding to the claims, the Ninth Circuit held that the Holy See was not "immunize[d] . . . from liability on respondeat superior theory."²⁴ In *O'Bryan*, the Court of Appeals upheld a decision of the District Court²⁵ that indicated that the Holy See might be subject to jurisdiction under the tortious act exception,²⁶ stating:

[T]he portion of plaintiffs' claims that are based upon the conduct of bishops, archbishops and Holy See personnel while supervising allegedly abusive clergy satisfy all four requirements of the tortious act exception: this conduct served as a substantial cause of the alleged abuse; the conduct occurred in the United States; the conduct was within the scope of employment; and these individuals were, according to the pleadings, Holy See employees.²⁷

While these cases only represent the *prospect* of successful litigation against the Holy See, the fact that these cases proceeded at all represents a monumental shift in the treatment of the Holy See by U.S. courts. Indeed, the novelty of these cases have led to some interesting arguments by the plaintiffs in order to either create exceptions to the FSIA, or to avoid its application altogether. Though neither set of plaintiffs tried to bring suit against the Holy See as an instrumentality, two specific arguments

²⁰ *O'Bryan*, 471 F. Supp. 2d at 786. The fact that the plaintiffs in *O'Bryan* had sought to make the Holy See liable for *every* case of abuse in the United States makes it unique among all other suits, where typically plaintiffs have been either individuals or small groups. *Id.*

²¹ *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009); *Doe v. Holy See*, 434 F. Supp. 2d 925 (D. Or. 2006).

²² *Doe v. Holy See*, 557 F.3d at 1069.

²³ *Doe v. Holy See*, 434 F. Supp. 2d at 931.

²⁴ *Doe v. Holy See*, 557 F.3d at 1069.

²⁵ *See O'Bryan*, 556 F. Supp. 2d at 361.

²⁶ 28 U.S.C § 1605(a)(5) (2006).

²⁷ *O'Bryan*, 556 F.3d at 386. The claims that withstood the Holy See's motion to dismiss for lack of subject matter jurisdiction included negligent failure to report, negligent failure to warn, outrage and emotional distress, and violations of the customary law of human rights. *Id.* at 387-88.

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of the *O'Bryan* plaintiffs, who sought to avoid the application of the FSIA, stood out for both their legal innovation as well as their legal flaws.

The first argument, advanced in the original claim against the Holy See, was that the Holy See had a “dual personality”—one personality as a foreign sovereign and the other as the government of the Catholic Church.²⁸ The plaintiffs thus contended that the Holy See, by acting in its capacity as the government of the Church and not as a sovereign state, should not be able to utilize the FSIA to avoid liability.²⁹ The second argument, brought up on appeal and subsequently denied by the court, was that the recognition of the Holy See as a foreign sovereign violated the Establishment Clause of the Constitution,³⁰ echoing arguments that were made upon the initial sovereign recognition of the Holy See by the United States.³¹

Both arguments failed. Though this Note contends that the federal court in Kentucky made the correct decision to respect the sovereignty of the Holy See, this Note also argues that the validity of the plaintiffs' contention concerning a “dual personality” of the Holy See makes it more akin to an “instrumentality” than a sovereign state under the FSIA. The FSIA makes a distinction between a foreign state and an “agency and instrumentality” in Section 1603 which states:

For purposes of this chapter –

- (a) A “foreign state”, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
- (b) An “agency or instrumentality of a foreign state” means any entity –
 - (1) which is a separate legal person, corporate or otherwise, and
 - (2) which is an organ of a foreign state or political

²⁸ *Id.* at 373.

²⁹ *Id.* The court noted that the plaintiff's argument was “somewhat obscure[,]” holding several possible meanings, and that it would fail under any construction. *Id.* The constructions the court considered, however, did not take into account the Holy See's possible instrumentality status. *Id.*

³⁰ *Id.* at 375.

³¹ *See generally* *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194 (3d Cir. 1986) (challenging the recognition of the Holy See as a foreign sovereign).

- subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
- (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.³²

Though this distinction may not seem significant, it can affect the “degree of protection enjoyed by the foreign entity in several sections of the FSIA, including the service of process, venue, and execution provisions.”³³ The implications of being held an instrumentality may also affect the interpretations that courts afford to certain behaviors of the Holy See.³⁴ As the Holy See has been able to utilize its classification as a sovereign state to the disadvantage of plaintiffs seeking judgments against it,³⁵ it is incumbent upon future plaintiffs to bring claims against the Holy See as an instrumentality; such a designation allows for both a greater ease and flexibility of litigation, and more validly comports to the international and domestic character of the Holy See.

B. International Personality of the Holy See

Domestic sovereignty of the Holy See stems from, and is at least influenced by, its international personality. Much of this personality is derived in relation to the Vatican City State; the Holy See is the government of the Catholic Church, while the Vatican City State is the sovereign territory under the rule of the pope. The Vatican City State itself consists of an area of approximately 0.44 square kilometers³⁶ (0.17 square miles) and has a population of approximately 826 people and a citizenry of 546

³² 28 U.S.C. § 1603 (2005).

³³ *Reforming the Sovereign Immunities Act*, *supra* note 13, at 508. The report concluded that Section 1608 requires less stringent service of process standards, and that Section 1391(f) appeared to make the District of Columbia the proper venue for foreign states, but not for their instrumentalities. It also indicated that Section 1606 allowed for punitive damages to be awarded against an instrumentality, but not against a foreign state. *Id.* n.50.

³⁴ These are explained further in Part III.C. This Note will briefly argue that the actions of a state are more likely to be seen as public in nature and, therefore, *less commercial* than the same actions as performed by an instrumentality.

³⁵ See discussion *infra* Part III.C.

³⁶ CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK: HOLY SEE (VATICAN CITY), <https://www.cia.gov/library/publications/the-world-factbook/geos/vt.html> (last visited Feb. 23, 2011).

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people (467 of them being residents).³⁷ Both the limited geography and sparse population make the Vatican City State, effectively, the smallest country in the world.³⁸

The different and often intertwined functions of the Holy See and Vatican City State emphasize their unique international character and the difficulty in defining these entities both individually and conjunctively (and, perhaps for this reason, very few have even tried). Though there exists no universal definition of the Holy See's individual international personality, some have suggested that "the Holy See is an 'anomaly,' an 'atypical organism,' or is an entity sui generis,"³⁹ a breadth of definitions reflecting both the lack of consensus and uniformity in conceptions of its personality.

On the international plane, a fused view of the Holy See and Vatican City State has been popular. Josef Kunz, an early scholar of the Holy See, sought to distinguish the Vatican City as a "vassal state" of the Holy See.⁴⁰ The Holy See has been described as the "international personality" of the Vatican City State, yet the Vatican City State is the named party for such treaties which the Holy See cannot enter "for reasons of its existence solely as a legal personality and not a temporal body."⁴¹ As such, the Holy See and the Vatican City State have been allowed to occupy unique positions within global politics, as the Vatican City State places all of its foreign relations duties upon the religious authority of the Holy See.⁴² Moreover, the Vatican City State has neither foreign service of its own nor any foreign ministry distinct from that of the Holy See.⁴³ The fact that the Vatican City State has relied on such an arrangement has made it necessary for foreign governments desirous to have relationships with the Vatican City State to do so

³⁷ *Id.*

³⁸ *Id.*

³⁹ Robert Aroujo, *The International Personality and Sovereignty of the Holy See*, 50 CATH. U. L. REV. 291, 323-24 (2001) (citations omitted) [hereinafter *International Personality*].

⁴⁰ Josef Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L L. 283, 310 (1952).

⁴¹ The Holy See will state that its membership in these treaties is "in the name and on behalf of the Vatican City State." Stephen Young & Alison Shea, *Researching the Law of the Vatican City State*, <http://www.nyuglobal.org/globalex/vatican.htm> (last visited Feb. 23, 2011).

⁴² ROBERT A. GRAHAM, *VATICAN DIPLOMACY: A STUDY OF CHURCH AND STATE ON THE INTERNATIONAL PLANE* 345 (Princeton Univ. Press 1959).

⁴³ *Id.*

only through foreign relations recognition of the religious entity. Thus, in 2007, the Holy See maintained diplomatic relations with 176 States.⁴⁴

United Nations' (U.N.) status for the Holy See is also anomalous. U.S. Secretary of State Cordell Hull had, upon initial Papal inquiry into the ability of the Holy See to become a member of the U.N., stated that "the Vatican would not be capable of fulfilling all of the responsibilities of membership."⁴⁵ Nonetheless, the Holy See had been awarded non-member State observer status after Pope Paul VI appointed its first U.N. envoy.⁴⁶ The status of non-Member State observer is advantageous as related to other organizations,⁴⁷ and it has been asserted that the Holy See "may participate in the work of the U.N. on the same level as if it were a member."⁴⁸

⁴⁴ Holy See Press Office, *Bilateral and Multilateral Relations of the Holy See*, http://www.vatican.va/news_services/press/documentazione/documents/corpo-diplomatico/corpo-diplomatico_stati_elenco_en.html (last visited Feb. 23, 2011). It is interesting to note that, of the seventeen states which did not maintain relations with the Holy See, nine can be considered Muslim countries: Afghanistan, Saudi Arabia, Brunei, Comoros, Malaysia, the Maldives, Mauritania, Oman, and Somalia. Sandro Magister, *Mission Impossible: Eject the Holy See from the United Nations* (Aug. 21, 2007), <http://chiesa.espresso.repubblica.it/articolo/162301?eng=y>. Four other countries that did not recognize the Holy See (China, North Korea, Laos, and Vietnam) were communist, joined by Bhutan, Botswana, Myanmar, and Tuvalu. *Id.*

⁴⁵ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 152-161 (Oxford Univ. Press 1979).

⁴⁶ Charles W. Bell, *Taking Aim at the Holy See: Group Wants UN to Limit its Credentials*, N.Y. DAILY NEWS, Sept. 4, 1999, available at <http://www.seechange.org/media/NY%20Daily%20News%209499.htm>. Catholics for Change, an organization composed primarily of members of the Roman Catholic faith and whose purpose is to change the status of the Holy See at the United Nations, claims that initial recognition came upon the Holy See as a result of "confusion regarding the interchangeable use of the terms Holy See and Vatican City." CATHOLICS FOR CHANGE, *THE CATHOLIC CHURCH AT THE UNITED NATIONS: CHURCH OR STATE?*, <http://www.seechange.org/PDF/See%20Change%20Briefing%20Paper.pdf> (outlining Catholics for Change's See Change Campaign) [hereinafter CHURCH OR STATE]. Prior to its acceptance of non-member state status, the Holy See was "active as an ad-hoc and at times formal observer to various UN bodies . . . usually at its own request." *Id.*

⁴⁷ R.G. SYBESMA-KNOL, *THE STATUS OF OBSERVER IN THE UNITED NATIONS* 63 (1981) (stating that Holy See's benefits to being an observer are "fundamentally different from those of other observers, who, being not a State, can never qualify for participation on an equal footing with the Member States").

⁴⁸ *Id.* Permanent observers, however, though given the right to speak in the General Assembly and permanent invitations to observe General Assembly sessions, are not allowed to vote on General Assembly resolutions. *Guidelines for Implementation of General Assembly Resolutions Granting Observer Status on a Regular Basis to Certain Regional Intergovernmental Organizations, the Palestine Liberation Organization and the National Liberation Movements in Africa*, 1975 U.N. Jurid. Y.B. 164, 167, U.N. Doc.

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The lack of expert consensus on a cohesive legal definition for the Holy See has created an international conundrum that is only furthered by the Holy See's self-characterization. The Holy See contends that the secular domain of the Vatican City State is meant to assure, but is not required for, its full autonomy and statehood in its exercise of foreign affairs.⁴⁹ Indeed, the constructive elements of statehood, derived from the Montevideo Convention, can be stated simply as: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states.⁵⁰ As recently as 1923, the Holy See did not fulfill the requirements of a defined territory⁵¹ and, therefore, could not have rightfully claimed statehood based upon these requirements.

Yet, while willing to accept (and even seek) U.N. recognition as a non-member *state* permanent observer, the Holy See concurrently maintains that its international personality was uninterrupted and derived from its religious and spiritual authority and not from the territory of the Vatican City State—a kind of *sui generis* sovereign status in international law.⁵² This *sui generis* sovereignty is, indeed, a greater argument for *continued* sovereignty, as the Holy See has survived fluctuating historical periods of both statelessness and statehood. Italy annexed the

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⁴⁹ Maria L. Hecker, *Constitutional Issues Raised by Diplomatic Relations between the United States and the Holy See*, 15 HASTINGS CONST. L.Q. 101, 103 (1987).

⁵⁰ Convention on Rights and Duties of States art. I, Dec. 26, 1933, 49 Stat. 4097. These requirements are echoed in the Restatement (Third) of the Foreign Relations Law of the United States. Restatement (Third) of Foreign Relations Law § 201 (1987).

⁵¹ The government of Italy signed the Lateran Treaty with the Holy See in 1929, thus granting the Pope sovereignty over a limited amount of territory that it had lost to Italy in 1870. *International Personality*, *supra* note 39, at 322. Prior to 1870, the Holy See acquired territories that “enabled the Holy See to resemble other temporal powers with few interruptions from the 8th century until 1870.” *Id.* at 296.

⁵² *Sui generis* is a Latin phrase that literally means “of its own kin” or unique. LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 339 (5th ed. 2009). The U.N. and other international organizations have made no decision on this issue as the acknowledgment of *sui generis* status to a religious authority might “give rise to similar claims by other religions, an issue that governments are not inclined to welcome.” *Id.* Hans Kelsen likewise stated:

[T]he State of the Vatican City, limited to a certain territory, must not be identified with the Church, which is tied to no limited territory. That means the territorial sphere of validity of the State of the Vatican City is limited, as every state territory is, whereas the territorial sphere of validity of the Roman Catholic Church is not limited.

Id. (citing HANS KELSON, *PRINCIPLE OF INTERNATIONAL LAW* 252 (2d rev. ed. 1966)).

Papal State in 1870, and most legal theorists believe that it thereby lost its claim to statehood⁵³ until the Lateran Treaty once again imbued the Pope with sovereign territory.⁵⁴ If such arguments are correct, this makes the Holy See a very different kind of international entity. Indeed, Pope John Paul II, while addressing the General Assembly of the U.N., stated that “the nature and aims of the spiritual mission of the Apostolic See and the Church make their participation in the tasks and activities of the United Nations Organization very different from that of the States, which are communities in the political and temporal sense.”⁵⁵

Thus, fitting the Holy See and Vatican City State into the international legal order has been much like fitting a square peg into a round hole, and while interim fit may have been achieved, the contours of that fit have been ill-defined, leaving lots of legal wiggle room. Some have even debated the recognition of statehood for both the Vatican City State and the Holy See entirely given their anomalous characters.⁵⁶ This Note does not take such an extreme position, but rather contends that the separate functions of the Holy See and Vatican City State allow the Vatican City State to maintain the requirements of a state with the Holy See acting as an instrumentality towards it.⁵⁷ It further maintains that, because of this, there are no justifications for using *sui generis* sovereignty as a consideration for the Holy See’s

⁵³ Yasmin Abdullah, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835, 1855 (1996) (citing C.G. Fenwick, *The New City of the Vatican*, 23 AM. J. INT’L L. 371 (1929)).

⁵⁴ The Lateran Treaty, Vatican-Ita., Feb. 11, 1929, O.V.T.S. 161, Europ. T.S. No. 590019, *reprinted in* 23 AM. J. INT’L L. 187 (1929), *available at* http://www.vaticanstate.va/EN/State_and_Government/Judicialgoverningbodies/Laws_and_decree.htm.

⁵⁵ Pope John Paul II, Address to the 34th General Assembly of the United Nations (Oct. 2, 1979).

⁵⁶ The See Change Campaign argues that not only does the Holy See not meet the criteria of statehood, but that, in being provided statehood, the Holy See “often goes against the overwhelming consensus of member states and seeks provisions in international documents that would limit the health and right of all people, but especially of women . . .” CHURCH OR STATE, *supra* note 46. A more detailed view of the reasons to deny statehood to the Holy See is provided in an academic paper of the same name. Abdullah, *supra* note 53, at 1870 (arguing that the Holy See “should not enjoy statehood status at UN conferences”). While the arguments advocating the complete denial of statehood to the Holy See are worthy of some consideration, such arguments are irrelevant to the point of this Note, as courts must first consider the domestic personality of the Holy See (described in the next part of this section) as overriding determinants of judicial recognition.

⁵⁷ See discussion *infra* Part III.A for the legal justifications on how the Holy See can still be separable from the Vatican City State while maintaining its foreign affairs.

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statehood either internationally or within U.S. courts. This position, rather than being undermined, is actually bolstered by the various arguments for *sui generis* sovereignty. One scholar sums up the Holy See's diplomatic missions during its period of non-territoriality as follows:

[B]etween 1870 and 1929, the diplomatic corps accredited to the Vatican was not only not dissolved, but also increased through the years, except for a period just before World War I. Thus, there were 18 permanent diplomatic missions at the Vatican in 1890. The number was dropped to 14 on the eve of World War I, but rose to 24 in 1921. At the time of the Lateran Treaty in 1929, there were 27 permanent diplomatic missions at the Vatican.⁵⁸

It has been argued that this period of continued diplomacy, in which the Holy See continued to engage in relations with territorial nations, should be considered as evidence to the Holy See's international parity with states.⁵⁹ Yet this view fails to account for the substantial number of nations that did not have diplomatic missions with the Holy See during this period.⁶⁰ Other arguments that have been made towards a *sui generis* status equal to that of states in international law are "the force of its spiritual power,"⁶¹ the Church's perceived position in maintaining world peace,⁶² and its various other roles in world affairs.⁶³

Yet many of the Holy See's non-religious functions, which authors claim grant it sovereignty, have been supplanted by the U.N. and various non-governmental organizations.⁶⁴ The same

⁵⁸ *International Personality*, *supra* note 39, at 302 n.50 (citing LUKE LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 176 (1966)).

⁵⁹ *Id.* at 344.

⁶⁰ *See generally International Personality*, *supra* note 39.

⁶¹ Editorial Comments, *The British Mission to the Vatican*, 9 AM. J. INT'L. L. 206, 208 (1915) (stating that "the spiritual power of the pope stands out in broad relief untrammelled and unspotted by temporal connections") [hereinafter *British Mission to the Vatican*]; Max Ascoli, *The Roman Church and Political Action*, 13 FOREIGN AFF. 441, 449 (1935) (stating that "[w]hen the [Holy See's] territorial power was crushed, her spiritual power was immensely increased all over the world").

⁶² *British Mission to the Vatican*, *supra* note 61, at 208.

⁶³ The extent of activities and an analysis of the importance that many scholars have placed on these activities are much too broad for this Note, though other papers have detailed analyses of the arguments for *sui generis* status. *See generally International Personality*, *supra* note 39.

⁶⁴ One scholar has even made a direct comparison between the Holy See and international organizations, claiming that the status of the Holy See acted as a precursor for the modern NGO. For a thorough deconstruction of the medieval papacy and its likening to modern International organizations, please see Robert John Araujo et al., *A*

entities that have either mirrored or abrogated these functions are neither considered states, nor would they be subject to FSIA protection in American courts *without* being an instrumentality of a state. By analogy, the same should hold true for the Holy See. The once unique functions that are claimed to imbue the Holy See with “statehood” have not, in other contexts, been recognized as having any legal authority towards that claim. Without a *sui generis* claim to statehood, there is little necessity for legally defining the Holy See as a state.

C. Domestic Personality of the Holy See

The U.S. Department of State defines the Holy See as the “universal government of the Catholic Church” operating from within the Vatican City State.⁶⁵ In this context, the Vatican City and, by association, the Holy See, have routinely been held as a foreign sovereign and a foreign state in U.S. courts.⁶⁶ However, the Department of State’s recognition of two separate definitions for the Vatican City State and the Holy See belies the fact that the Vatican City State and Holy See are separate entities.

Given these separate definitions, it would be hard to make the argument that both are separately imbued with statehood opposite any *sui generis* justifications. While the previous section of this Note argued that there is no longer an international justification

Forerunner for International Organizations: The Holy See and the Community of Christendom—with Special Emphasis on the Medieval Papacy, 20 J.L. & RELIGION 305 (2004-2005) [hereinafter *A Forerunner for International Organizations*]. It is this Note’s opinion, however, that the argument that the Holy See’s sovereignty stems from its religious authority fails to more strongly account for the Holy See’s *civil* authority. Even during the time of Justinian, “[t]here was a tendency of overlapping jurisdiction [of canon and Roman law]. Ecclesiastical courts frequently exercised jurisdiction in family law and succession matters, as well as in certain types of crimes.” JOHN H. MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION* 11 (3d ed. 2007). Framing it this way, such civil authority can easily be contextualized and, for purposes of modern analysis, downplayed with the advent of the “antireligious and anticlerical” revolution of secular natural law that was a driving force behind the Declaration of Independence and, as such, the formation of the United States itself. *Id.* at 16. Indeed, since this revolutionary period, “ecclesiastical courts lost what little remained of the temporal jurisdiction[,]” making for a strong argument that any sovereignty derived from them has been subsequently lost. *Id.* at 18.

⁶⁵ U.S. DEP’T OF STATE, *supra* note 8.

⁶⁶ *Dale v. Calagiovanni*, 337 F. Supp. 2d 825, 832 (S.D. Miss. 2004) (treating the Vatican as a foreign state for purposes of the FSIA); *English v. Thorne*, 676 F. Supp. 761, 764 (S.D. Miss. 1987); *Doe v. Holy See (State of Vatican City)*, 793 N.Y.S.2d 565, 570 (3d Dep’t 2005).

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for the Holy See's *sui generis* statehood,⁶⁷ American courts must make the final decision on whether *sui generis* statehood is accepted in U.S. jurisprudence. To date, there does not appear to be any evidence that U.S. courts have accepted this proposition. Courts have consistently deferred to the Department of State's recognition of sovereignty,⁶⁸ and as such, one of the strongest arguments against the recognition of the Holy See's *sui generis* statehood is the fact that the Department of State, itself, refused to extend sovereign recognition to the Holy See until 1984⁶⁹—approximately sixty-five years after the signing of the Lateran Treaty. This recognition also came approximately twenty-seven years after the U.N. itself granted the Holy See non-member state permanent observer status.⁷⁰

At the time of the recognition, the extent of protection that such recognition would give officials of the Catholic Church under the FSIA was summed up by one federal complaint that alleged “congressional actions consenting to the appointment of and funding for a diplomatic mission to the Vatican violate the first amendment”⁷¹ and that the “President’s actions in extending diplomatic recognition to the Vatican—sending an ambassador to and receiving an ambassador from the Vatican—exceed the President’s Article II powers and violated both the First Amendment and the liberty clause of the Fifth Amendment.”⁷² The court dismissed the suit, claiming both that the question of sovereign recognition was not justiciable and that “plaintiffs must rely upon actions by the President and Congress that cause injury to them in some manner different from and independent of the disadvantages that result from the unique status of the Vatican in the world community.”⁷³ Interestingly, though not adjudicated since then, this issue may remain open for plaintiffs who are able

⁶⁷ See discussion *supra* Part II.B.

⁶⁸ *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 283-84 (1st Cir. 2005) (stating that “[i]t may be argued that a foreign state, for purposes of the FSIA, is an entity that has been recognized as a sovereign by the United States government”).

⁶⁹ See, e.g., *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194, 197 (3d Cir. 1986) (noting 1984 as the beginning of U.S./Vatican City State relations).

⁷⁰ Prior to its acceptance of non-member state status, the Holy See was “active as an ad-hoc and at times formal observer to various UN bodies . . . usually at its own request.” *CHURCH OR STATE*, *supra* note 46, at 2 (outlining Catholics for Change’s See Change Campaign).

⁷¹ *Americans United For Separation of Church and State*, 786 F.2d at 196.

⁷² *Id.*

⁷³ *Id.* at 198.

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to assert damages on a more personal basis than the conglomeration of religious professionals who had brought up the *Americans United for Separation of Church and State* suit.⁷⁴

The court avoided ruling on this Constitutional issue because the plaintiffs lacked the appropriate standing, yet the issue is still alive and may be revived in future litigation. Part III.C of this Note explains how holding the Holy See as an instrumentality helps to avoid some of these Constitutional issues. So far, there have been no suits brought against the Holy See *as an instrumentality* in U.S. courts. Such a position would maintain the Department of State's sovereign recognition of the Holy See, while at the same time it would more truthfully appreciate the contours of its separateness from the Vatican City State.

III. ANALYSIS

A. *The Ability of U.S. Courts to Make Instrumentality Determinations Against the Holy See*1. *Separating the Vatican City State and the Holy See*

It is argued in this Note that treating the Holy See as distinct from the Vatican City State does not infringe on the Department of State's authority and, in any case, the Department of State has already implicitly classified the Holy See and the Vatican City State separately, representing the Vatican City State as a "sovereign, independent territory,"⁷⁵ and representing the Holy See as "a sovereign juridical entity under international law."⁷⁶ While certain authorities have been prone to defend the international character and personality of the Holy See, very often these defenses liken the Holy See to more of an international organization than to a sovereign state.⁷⁷ Still, the Holy See

⁷⁴ The court has not yet ruled on whether the injuries asserted in priesthood sexual assault cases would constitute a direct enough injury to make this claim, though the *O'Bryan* plaintiffs did try to bring up this claim on appeal. *O'Bryan v. Holy See*, 556 F.3d 361, 375 (2009). The claim was denied by the court because it was not pled in the original complaint. *Id.*

⁷⁵ U.S. DEP'T OF STATE, *supra* note 8.

⁷⁶ *Id.*

⁷⁷ *A Forerunner for International Organizations*, *supra* note 64, at 320 (claiming that the Holy See's "international personality materializes from its religious and spiritual authority and missions in the world rather than its claim over purely temporal matters or

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possesses foreign relations functions of the Vatican City State. Whether the fact that the Holy See conducts such a vital state function—the conduct of foreign affairs—automatically leads to the conclusion that it must be a state and not an instrumentality, is an important first question (as a negative answer would preclude any further FSIA analysis) and one that can be answered through a comparison with other international organizations. If it is found that the foreign relations of a state can be “outsourced” to either other states or international organizations, there would be no reason to hold that the Holy See must actually be a state itself.

While it is indeed rare, the ability of states to transfer obligation for their foreign relations to other entities has been accepted historically, often without issue. Liechtenstein, for instance, had in 1919 “concluded an agreement whereby Switzerland assumed representation of Liechtenstein’s diplomatic and consular interests.”⁷⁸ More recently, it has been noted that the establishment of the European Community “did not terminate the statehood of the member states or vest the Community with statehood,”⁷⁹ even though the Community “assumed international responsibility for certain matters . . . which were previously controlled by member states.”⁸⁰

Further examples stemming from both colonial era protectorates and weaker nations subject to some form of foreign military, economic or political control⁸¹ speak to the fact that a country’s vesting of foreign relations in other bodies neither destroys the original statehood of the nation nor grants statehood upon the body to which foreign relations control was given. In fact, even the framers of the FSIA may have been well aware of this fact, as Section 1603(b) explicitly allows both “organ[s] of a foreign state” or “political subdivision[s]” to be considered instrumentalities.⁸² It would seem that, though abnormal, it would a perfectly acceptable concept in both international and U.S. law

geographical areas”). In fact, as these authorities maintain that the sovereignty of the Holy See was uninterrupted by the Italian unification and the loss of the Papal State after 1870, this strongly suggests a character much more akin to that of international organizations and not sovereign states. See discussion *supra* Part II.C.

⁷⁸ U.S. DEP’T OF STATE, *Background Note: Liechtenstein* (March 29, 2010), <http://www.state.gov/r/pa/ei/bgn/9403.htm>. Likewise, the U.S. does not have an embassy in Liechtenstein and the U.S. Ambassador to Switzerland is accredited with the nation. *Id.*

⁷⁹ DAMROSCH ET AL., *supra* note 52, at 311.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 28 U.S.C. § 1603(b) (2005).

that the Holy See and the Vatican City State be seen as two distinct entities, one an instrumentality and the other a state.

2. *The Political Question Doctrine*

The political question doctrine does not preclude courts from determining the instrumentality status of the Holy See. The court in *O'Bryan* correctly decided that the determination of sovereign recognition should be left to the Executive Branch and, specifically, the Department of State.⁸³ The court also correctly quashed the plaintiffs' contention that courts may parse between sovereign and non-sovereign acts to avoid application of the FSIA to a state.⁸⁴ The intention of this Note is not to question the court's deferral to the Department of State for political questions, but to argue that the dual questions of sovereign recognition, a non-political question, should not be unnecessarily intertwined.

The Supreme Court itself has long decided that questions "in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."⁸⁵ This doctrine reflects the principle that, under the Constitution, "there are some questions that cannot be answered by the judicial branch"⁸⁶ and, as such, when a court realizes that it is incompetent to make a final resolution on a certain matter—and in order to maintain respect for coordinate branches of government—the court will determine the matter to be non-justiciable.⁸⁷ The Supreme Court has consistently held that questioning the Department of State's assessment of sovereign recognition is non-justiciable.⁸⁸

⁸³ *O'Bryan*, 556 F.3d at 372 (2009).

⁸⁴ The plaintiffs argued that "[either] they can rightfully bring suit against a parallel religious entity that also goes by the name 'Holy See' or that the conduct of the Holy See rendered it a private act *in this case*." *Id.* at 374.

⁸⁵ *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

⁸⁶ *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

⁸⁷ *Baker v. Carr*, 369 U.S. 186, 198 (1962).

⁸⁸ *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 299 (1918) (quoting *Jones v. United States*, 137 U.S. 202 (1890)) (stating "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—the political—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision"). In *Jones v. United States*, 137 U.S. 202, 212 (1890), the Court held:

Who is the sovereign, de jure or de facto, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has

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However, none of the cases handled by the Supreme Court nor any other federal cases have answered the more nuanced question of whether the courts may determine a sovereign recognized in name by the Department of State as an instrumentality. Such a judicial decision would not go against the Department of State's sovereign recognition, yet for the courts to do so would rightfully require a reanalysis of the political question doctrine. In deciding *Baker v. Carr*,⁸⁹ the Supreme Court created a balancing test that helps determine whether a particular case renders a non-justiciable political question.⁹⁰

The Court enunciated the test as to consider whether there is: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;"⁹¹ (2) "a lack of judicially discoverable and manageable standards for discovering it;"⁹² (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;"⁹³ (4) "the impossibility of the court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;"⁹⁴ (5) "an unusual need for unquestioning adherence to a political decision already made;"⁹⁵ or (6) "the potential of embarrassment from multifarious pronouncements by various departments on one question."⁹⁶

A decision on whether the determination of sovereign status *for the Holy See* is political in nature requires consideration of these prongs with the full understanding of judicial deferment of sovereign recognition. It is neither the case that all questions of sovereign recognition are political in nature, nor is it the case that deferral to official Department of State pronouncements has been universal. In fact, deferral has been limited in several ways and, though courts have been apt to follow the Department of State once it recognizes a foreign sovereign, courts have not consistently deferred to the Department of State in all questions of statehood.

This has been most apparent in cases where the court wishes

always been upheld by this court, and has been affirmed under a great variety of circumstances.

⁸⁹ *Baker*, 369 U.S. at 186.

⁹⁰ *Id.* at 217.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Baker*, 369 U.S. at 186.

⁹⁵ *Id.*

⁹⁶ *Id.*

to consider a foreign government as sovereign without formal United States recognition.⁹⁷ Courts have recognized “states” that have not been officially recognized by the Executive Branch. Part of the reasoning has been, ironically, of the same character that urged the enactment of the FSIA—the inherently *political* nature of state recognition that leaves the process open to *political* influence. The court in *Natural Petrochemical Co. of Iran v. M/T Stolt Sheaf* stated that “[t]he United States Department of State has sometimes refrained from announcing recognition of a new government because grants of recognition have been misinterpreted as pronouncements of approval.”⁹⁸ Conversely, and important for the case at hand, non-recognition of a state can be equally as prone to political influence; just as recognition can imply “pronouncements of approval,” non-recognition can imply pronouncements of disapproval.

The House Report of the FSIA was explicit in stating that, although the State Department was espousing the restrictive principle of immunity in the Tate Letter,⁹⁹ courts would have to be the final arbiters of foreign sovereign status because “the foreign state may attempt to bring diplomatic influences to bear upon the State Department’s determination.”¹⁰⁰ Rather than working against the Department of State, courts’ determinations over immunity are meant to “reduc[e] the foreign policy implications of immunity determinations and assur[e] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.”¹⁰¹ Allowing the State

⁹⁷ In settling a case of title to property, the New York Court of Appeals recognized the Soviet government as having valid rights in property despite the absence of formal U.S. recognition. *Saliminoff & Co. v. Standard Oil*, 262 N.Y. 220, 227 (N.Y. 1933) (stating that “[t]o refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country, is to give fictions an air of reality which they do not deserve”). Likewise, the Department of State, in urging the courts to grant Iran access to U.S. courts, argued that “the absence of formal recognition does not necessarily result in a foreign government being barred from access to United States courts.” *Nat’l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 554 (2d Cir. 1988). The court held that “the absence of formal recognition cannot serve as a touchstone for determining whether the executive branch has ‘recognized’ a foreign nation” *Id.*

⁹⁸ *Id.*

⁹⁹ The restrictive theory states that “the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts” and is defined in opposition to the absolute theory of sovereign immunity in which “a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign” Jack B. Tate Letter, *supra* note 10, at 984.

¹⁰⁰ H.R. REP. NO. 94-1487, at 6606 (1976).

¹⁰¹ *Id.*

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Department to maintain the “awkward position of a political institution trying to apply a legal standard”¹⁰² would inevitably poison the arbitration in a manner both unfair to litigants and violative of the purposes of the soon-to-be enacted FSIA.

As noted above, the U.S. government formally recognized the Holy See during the Reagan administration in 1984, approximately sixty-five years after the Lateran Treaty, and over twenty-seven years after the U.N. gave the Holy See non-member state observer status.¹⁰³ At the time of this recognition, the Holy See operated as the exclusive entity in charge of foreign relations for the Vatican City State.¹⁰⁴ Thus, the United States would have no means of establishing diplomatic ties with the Vatican City State except through the Holy See, and while it may be that the Department of State currently classifies the Holy See as a foreign sovereign, there is no evidence that such a determination has been anything but political in nature.¹⁰⁵

This Note argues that any political question analysis, as it applies to instrumentality determinations, would fall firmly in line with cases in which the court *did not* consider the Department of State’s official recognition of sovereignty by recognition of political embarrassment.¹⁰⁶ Further, even if the Department of State’s recognition of the Holy See were meant to forgo classification of the Holy See as an instrumentality, it is not entirely clear that this would be possible. Evidenced by the language of the FSIA,¹⁰⁷ this determination is meant for the courts and the courts alone. Indeed, even the *O’Bryan* court, while not recognizing the instrumentality question as relevant to the case at

¹⁰² *Id.* at 6607.

¹⁰³ *British Mission to the Vatican*, *supra* note 61.

¹⁰⁴ GRAHAM, *supra* note 42.

¹⁰⁵ Secret meetings between President Reagan and Pope John Paul II bolster the argument that this recognition was not only political in nature but may have been linked to a desire for both to work together against communism in Eastern Europe. Carl Bernstein, *The Holy Alliance: Ronald Reagan and John Paul II*, TIME, Feb. 24, 1992, available at <http://www.time.com/time/magazine/article/0,9171,974931,00.html#ixzz0fASMwtCK>. President Reagan and the Pope agreed to undertake a clandestine campaign to hasten the dissolution of the communist empire and Richard Allen, President Reagan’s first National Security Adviser during that period, characterized the meeting as “one of the great secret alliances of all time.” *Id.*

¹⁰⁶ Where, to sharpen the point, courts realized that sovereign recognition of a state are sometimes less nuanced than necessary due to implications and approval and disapproval. *Nat’l Petrochemical Co.*, 860 F.2d at 554.

¹⁰⁷ The FSIA grants the courts the ability to distinguish between foreign states and instrumentalities. 28 U.S.C. § 1603 (2005).

hand, had stated that “[c]ourts routinely determine whether incorporated entities satisfy the criteria necessary to be considered an agency or instrumentality of a recognized foreign state pursuant to 28 U.S.C. § 1603(b) without becoming entangled in a non-justiciable political question.”¹⁰⁸ To allow the Executive Branch to interfere with this determination would be to allow a return to such complete executive deferral as has not been seen since before the enactment of the FSIA.

B. Determinations of Instrumentality Status Under the FSIA

District courts are split as to how to determine whether a foreign entity is a foreign state or an “agency or instrumentality of a foreign state” under the FSIA.¹⁰⁹ Section 1603 defines foreign states, and agencies and instrumentalities of foreign states,¹¹⁰ and, indeed, the Working Group of the American Bar Association has found that the definitions of foreign states and instrumentalities are “unnecessarily confusing and have led to difficulties in interpreting the FSIA.”¹¹¹ This is especially apparent in the fact that two lines of cases have emerged to shed light upon this determination of foreign state or instrumentality status. One line holds that a determination of instrumentality status should be based upon whether the foreign entity shows legal characteristics, such as the ability to contract, to sue and be sued, to hold property in its own name, and that it is these factors that signify its independence from the foreign state.¹¹² Another line of cases

¹⁰⁸ *O’Bryan v. Holy See*, 556 F.3d 361, 374 (6th Cir. 2009).

¹⁰⁹ *Reforming the Sovereign Immunities Act*, *supra* note 13, at 508.

¹¹⁰ 28 U.S.C. § 1603 reads:

For purposes of this chapter –

- (a) A “foreign state”, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
- (b) An “agency or instrumentality of a foreign state” means any entity –
 - (1) which is a separate legal person, corporate or otherwise, and
 - (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
 - (3) which is neither a citizen of a state of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

¹¹¹ *Reforming the Sovereign Immunities Act*, *supra* note 13 at 507.

¹¹² *Transaero Inc. v. La Fuerza Area Boliviana*, 30 F.3d 148, 151-52 (D.C. Cir. 1994) (defining the “core functions test”).

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holds that the distinction should be made based on the entity's "core functions" and whether these core functions are primarily commercial rather than governmental.¹¹³

Though an approximately equal number of courts subscribe to either theory,¹¹⁴ the core functions test has been endorsed by both the Courts of Appeals¹¹⁵ and the U.S. State Department,¹¹⁶ while the legal characteristics test has been endorsed by the Working Group of the American Bar Association.¹¹⁷ The following analyses of both tests, taking into account both the current realities of the Holy See and the historical context of the FSIA, lead to the conclusion that the Holy See should be considered an instrumentality to its foreign sovereign, the Vatican City State. Such a determination would both maintain the Holy See's sovereign status while allowing for the subtle difference in service of process and execution as explained in Part III.C.

1. *The Core Functions Test*

The leading case defining and applying the core functions test is *Transaero Inc. v. La Fuerza Aerea Boliviana*.¹¹⁸ The case was argued when the Bolivian Air Force wished to dispute that it was properly served with notice, as it was served under the requirements of an instrumentality as opposed to a foreign state.¹¹⁹ In support of the Bolivian Air Force, the State Department

¹¹³ *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 681-82 (S.D.N.Y. 1996).

¹¹⁴ *Reforming the Sovereign Immunities Act*, *supra* note 13, at 509.

¹¹⁵ *Transaero*, 30 F.3d at 152. In this case the State Department proposed the core functions test out of concern that the legislative history (as characterized in the legal characteristics test) would point towards the defining of a large number of government entities as being considered legally separate from the Foreign State. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Reforming the Sovereign Immunities Act*, *supra* note 13, at 509. The Working Group, in conjunction with its recommendation to consolidate the term "agency or instrumentality" into the single word "instrumentality," while admitting that the lists provided in the legislative history can be misleading and cause arguably incorrect categorizations, find that the legal characteristics test is standard under international law and supported by a greater, and more predictable, amount of case law making for an easier application. *Id.* at 508, 514. Nonetheless, the group did find strong arguments for both tests. *Id.*

¹¹⁸ *Transaero*, 30 F.3d at 148.

¹¹⁹ *Id.* at 150 (The district court considered the Bolivian Air Force's contention that because it is a "foreign state" within the meaning of Section 1608 of the Act, *Transaero* had served it improperly. However, the court held that because the Bolivian Air Force was an instrumentality, *Transaero's* method of service gave the New York court jurisdiction).

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proposed a test that would look at the “core function” of the foreign entity.¹²⁰

While the State Department’s test can be interpreted as effectively increasing the scope of which entities may be considered foreign sovereigns beyond what the legislative history of the FSIA would have concluded,¹²¹ the D.C. circuit, nonetheless, favored the Department of State’s assessment, holding that if an entity’s “core function” was inherently commercial, it should be considered an instrumentality.¹²² This determination both downplayed the traditional determinants of the ability to sue, contract, and hold property,¹²³ while increasing the importance of the economic function in relation to governmental function. The court saw its decision as simplifying the instrumentality inquiry based on “obvious functions, rather than the uncertain powers of foreign defendants.”¹²⁴ Yet, in deciding that the distinction between public and private acts could be mirrored with the commercial nature of those acts, it has been argued that the courts may have resorted to an oversimplification of Congress’ intent.¹²⁵ The core functions test, when applied to the Holy See, should be a simple test given the fact that religious acts in the United States have traditionally been considered private acts.¹²⁶ The *Transaero* court’s decision to use commercial nature

¹²⁰ *Id.* at 151.

¹²¹ The original act’s legislative history states that a “corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name, or hold property in its own name” may be considered a separate legal person. H.R. REP. NO. 94-1487, at 15-16 (1978), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614 (1978). It further includes that under the title of “[a]gency or instrumentality of a foreign state,” any “department or ministry which acts and is suable in its own name.” *Id.* Thus, the act would have seemed to include many government agencies usually considered part of a sovereign state so long as they were given the ability to act and sue in their own name. Such was noted by the dissent in *Transaero*, which claimed that the court’s majority opinion was “insufficiently deferential to the legislature[.]” *Transaero*, 30 F.3d at 154-55.

¹²² *Transaero*, 30 F.3d at 151-52.

¹²³ The factors are maintained in the alternate legal characteristics test. *Hyatt Corp.*, 945 F. Supp. at 684.

¹²⁴ *Transaero*, 30 F.3d at 152.

¹²⁵ The dissent in the case asserts a fear that “in formulating their interpretation my colleagues have placed efficiency concerns . . . above the apparent meaning of the statute.” *Id.* at 154.

¹²⁶ The First Amendment of the Constitution, itself, denies government the ability to regulate religion. U.S. CONST. amend. I. Further evidence of the private nature of religious activity has been found by the Supreme Court. In *Cantwell v. Connecticut*, the Supreme Court stated:

[T]o condition the solicitation of aid for the perpetuation of religious views or

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to simplify the decision between public and private functions leads logically to the assumption that private functions would, almost universally, fall under the classification of commercial functions.¹²⁷

Yet, case law against the Holy See disputes this assumption. Courts have found—in the context of evaluating exceptions to immunity under the FSIA—that the religious activities of the Holy See, while having some commercial aspects, are not by their nature commercial.¹²⁸ These views are not easily reconciled. The courts' view, however, coming from the uncontested perspective of the Holy See as a sovereign state and not a sovereign instrumentality, conflates the governmental and religious purposes of the Holy See, while denying the original purpose behind the FSIA. An incorrect interpretation of sovereign recognition, informing a misplaced belief that religious acts are public acts,¹²⁹ has been the perfect catalyst to a distortion in the courts' analysis of religious activities.

Without these biases, there are several factors that weigh strongly towards the consideration of religious activity as a private, commercial act. First and foremost is the pervasive, extraterritorial nature of religious activity. The religious acts of the Holy See, and the Catholic Church in general, are not restricted to or even promulgated specifically for citizens of the Vatican City State, either directly or indirectly. Religious functions are, likewise, not easily classified under “foreign relations.” By the very character of the acts, the Holy See is interacting with foreign citizens at a level of extreme similarity to that of commercial activity. For example, the American Religious

systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Cantwell v. Connecticut, 310 U.S. 296, 307 (1940).

¹²⁷ This assumption is supported in case law. Courts have noted that “[t]he ‘commercial activity’ exception of the FSIA withdraws immunity in cases involving *essentially private* commercial activities of foreign sovereigns that have an impact within the United States.” *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994) (emphasis added). Likewise, even the *O’Bryan* court, which denied the commercial nature of the Holy See’s religious acts, stated that “Congress constructed the FSIA to immunize foreign sovereigns *acting in a public capacity*, while ensuring that *essentially private activities* would be actionable under the FSIA exceptions.” *O’Bryan v. Holy See*, 556 F.3d 361, 374 (6th Cir. 2009) (emphasis added).

¹²⁸ *O’Bryan v. Holy See*, 471 F.Supp.2d 784, 788 (W.D. Ky. 2007). See *Doe v. Holy See*, 434 F. Supp.2d 925, 942 (D. Or. 2006) (holding that the “true essence of the complaint” lied in tort and not in commercial activity).

¹²⁹ This is not to say that religious acts are not “public acts” in that they do not have some public purpose, but that they are certainly not of the type of state-based public acts as understood to be the impetus behind the FSIA.

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Identification Survey had found that in 2001, there were approximately 50,873,000 adults over the age of eighteen residing within the United States who could be considered “Catholic.”¹³⁰

The idea that such a status, affecting so many U.S. citizens, could be considered immune from jurisdiction disregards many of the justifications provided for in the enactment of the FSIA.¹³¹ While it may seem cynical on its face to consider religious activities to be commercial, the framers of the FSIA were apt to point out that transactions in connection with aid programs (which are also directed towards the “public good”) would not cause an otherwise commercial transaction to lose its commercial character.¹³² Activities such as public relations or marketing, performed by a foreign entity, may likewise be considered commercial transactions, and courts have *purposefully* been given “a great deal of latitude” in determining what is a commercial transaction.¹³³

Accordingly, the fact that many commercial transactions are blanketed within religious activities would not negate their commercial nature any more than nationalist intent would negate the commercial nature of a marketing campaign. Indeed, Peter’s Pence, the “financial support offered by the faithful to the Holy Father,” enjoys a website only one click away from the Vatican’s main English web page for the Holy See.¹³⁴ Peter’s Pence Collection has raised nearly \$190 million¹³⁵ and “sums paid as [Peters Pence] have become one of the principal sources of income of the Holy See.”¹³⁶ Such staggering figures are difficult, if not

¹³⁰ This represents approximately 24.5% of the population, making Catholicism the most popular religion in the United States. BARRY A. KOSMIN ET AL., *AMERICAN RELIGIOUS IDENTIFICATION SURVEY 12* (The Graduate Center of the City Univ. of N.Y. 2001), http://www.gc.cuny.edu/faculty/research_briefs/aris.pdf. The next largest religion, Baptist, had by comparison a membership of only 33,830,000 adults over the age of 18. *Id.*

¹³¹ *Reforming the Sovereign Immunities Act*, *supra* note 13.

¹³² H.R. REP. NO. 94-1487, at 16 (1978), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 (1978) (stating that “a transaction to obtain goods or services would not lose its otherwise commercial character because it was entered into in connection with an AID program”).

¹³³ *Id.*

¹³⁴ Peter’s Pence, http://www.vatican.va/roman_curia/secretariat_state/obolo_spietro/documents/index_en.htm (last visited Feb. 23, 2011). Peter’s Pence contributions are counted as separate from donations to the diocese and go directly to the Holy See. *Id.* The Peter’s Pence website offers Catholics the ability to contribute to the Holy See through online and telephonic donations in addition to providing them with bank transfer instructions. *Id.*

¹³⁵ *Peter’s Pence Collection*, THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/ppc/about.shtml> (last visited Feb. 23, 2011). It is not stated whether this sum refers to international donations or to donations from the United States.

¹³⁶ *Peterspence*, CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/11774a>.

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nearly impossible, to discount as being non-commercial.

Those who wish to downplay this argument may point out that the extraterritorial nature of the Holy See's religious mission existed prior to the enactment of the FSIA, and that the FSIA's silence on the issue represents complicity to its public nature. This argument would ignore the fact that the Department of State had not yet formally recognized the Holy See. Such recognition would only come in 1984,¹³⁷ several years after the enactment of the FSIA. The FSIA was formed not merely because American citizens were in increasing contact with foreign sovereigns—such contact was undoubtedly previously present—but because these contacts were making litigation with foreign sovereigns increasingly commonplace.¹³⁸

There is another argument against such an interpretation stemming from case law. The *Transaero* court eventually found that the functions of the Bolivian Air Force were “so closely bound up with the structure of [the Bolivian] State that [it] must . . . be considered as the ‘foreign state itself,’”¹³⁹ and some may argue that the structure of the Holy See and the Vatican City State are equally bound. This logic, however, is not so easily applied to the Holy See. In fact, to apply it to the Holy See would actually amount to a reversal of the original logic of the *Transaero* decision. The Bolivian Air Force acted in furtherance of the functions of the Bolivian State and in this way was considered too intertwined with a governmental (public) function to be separable from the sovereign state. It is the Vatican City State, on the other hand, that generally acts in furtherance of the goals of the Holy See which, as previously argued, are not public goals. The commercial acts of the Holy See cannot be diluted by any state-derived public purpose and, as such, the Holy See must be considered an instrumentality under the core functions test.

2. *The Legal Characteristics Test*

In the Southern District of New York case of *Hyatt Corp. v.*

htm (last visited Feb. 23, 2011).

¹³⁷ *British Mission to the Vatican*, *supra* note 61.

¹³⁸ The house report was specific to note that American citizens were “increasingly” coming into contact with foreign entities. H.R. REP. NO. 94-1487, at 16 (1978), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (1978). Litigation with the Holy See was not only unforeseen at the time of the enactment of the statute, but, due to its non-sovereign status, would have proceeded with any assumption of immunity for the Holy See.

¹³⁹ *Transaero Inc. v. La Fuerza Area Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994).

Stanton,¹⁴⁰ the court explicitly declined to follow the core functions test as it determined that the legislative history gave examples of both commercial and non-commercial entities in describing what could be viewed as agencies or instrumentalities.¹⁴¹ In this way, the court was more philosophically aligned with the dissent of the *Transaero* decision, and created a test that did away with the “speculation that an agency or an instrumentality must be a commercial, as opposed to a public, enterprise.”¹⁴² The court decided that the plain meaning of “separate legal person,” as indicated in the FSIA, was that an entity could operate independently of the state.¹⁴³

The factors most influential in whether an instrumentality is a separate legal person are whether the entity, “under the law of the foreign state where it was created, can sue and be sued in its own name, own property, contract in its own name, *or* hold property in its own name.”¹⁴⁴ When the test was applied to the Finland’s Government Guarantee Fund, the court found that the entity should legally be considered an instrumentality despite its “governmental functions.”¹⁴⁵

To apply this test to the Holy See, one must therefore ask if the Holy See can “sue and be sued in its own name.” This may seem difficult given the tethered nature of the Holy See and the Vatican City State. However, the Holy See, though it sometimes uses the sovereignty of Vatican City State to enter into treaties and contracts it might not otherwise be able to become party, does not have the ability to provide the reciprocal offer to the Vatican City State.¹⁴⁶ It is able to contract in its own name with dioceses around the world and has signed various treaties as a separate party from the Vatican City State.¹⁴⁷ The fact that the Holy See had done so

¹⁴⁰ *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 681-84 (S.D.N.Y. 1996).

¹⁴¹ *Id.*

¹⁴² *Transaero*, 30 F.3d at 155.

¹⁴³ *Hyatt Corp.*, 945 F. Supp. at 684.

¹⁴⁴ *Id.* (emphasis added).

¹⁴⁵ *Id.* at 685.

¹⁴⁶ *Young & Shea*, *supra* note 41.

¹⁴⁷ Some of the most blatant examples of the Holy See contracting in its own name are the various concordats between the Holy See and state actors, spanning from before the “statehood” of the Vatican City State, which often had the sole aim of modeling foreign national law on Canon law. *See* Concordat Watch, <http://www.concordatwatch.org> (last visited Feb. 23, 2011). Agreements between the Holy See and the State of Israel, which are both recent in existence and not burdened by relations existing prior to the grant of the Vatican City State to the Holy See, also make no mention of the Vatican City State and contract exclusively on religious and ecclesiastical issues. *See* Fundamental

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consistently during its tenure without its own sovereign territory is a testament to its ability to contract in its own name.

The next factor is whether the Holy See is able to own property in its own name. Again, given the unique way that the Holy See and the Catholic Church have positioned themselves, it may seem to be a difficult determination, but the Holy See does, in fact, own property in its own name. Throughout the history of the United States, dioceses have held property in three primary ways: (1) parish corporation; (2) corporation sole; and (3) in fee simple (all subject to canon law).¹⁴⁸ In 1911, a letter was sent to U.S. bishops that informed them that the parish corporation was the most acceptable means of holding property, compatible with canon law, and instructed them to abandon fee simple ownership.¹⁴⁹

The intersection of canon law and corporate law begs the question of what “ownership” implies under the FSIA. While the pope may not have direct ownership of the property (this is instilled in the diocese and its bishop), the diocese is required to: (1) seek papal permission before it can create a diocese and appoint the required bishop¹⁵⁰ and (2) seek permission from the Holy See before it can alienate any property held in its name.¹⁵¹ Also, because the pope “has universal jurisdiction over the entire Church, he has eminent domain over church property that belongs to subordinate bodies.”¹⁵² This means that while the pope “cannot claim ownership of local churches, he has the jurisdiction or power to sell them.”¹⁵³ In essence, this gives the Holy See and the pope effective control over all church “property,” while allowing the property to be held in the names of others.

This effective control over the property should not only be enough to satisfy the ownership requirements of the legal characteristics test—which, like the FSIA, should be more interested with the effects of the *contact* upon the general

Agreement between the Holy See and the State of Israel, Dec. 30, 1993, *available at* <http://www.jewishvirtuallibrary.org/jsource/anti-semitism/holysee.html>.

¹⁴⁸ Spirited Lay Action Movement, http://www.spiritedlayaction.org/assests/articles/news_and_events/2007/ownership_of_church_property.html (last visited Sept. 17, 2010). The Holy See, however, has maintained control of the property even in so far as to how the property is held. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ The Bishop is authorized to create subsequent parishes. *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Spirited Lay Action Movement, http://www.spiritedlayaction.org/assests/articles/news_and_events/2007/ownership_of_church_property.html.

population—but should simultaneously diminish any argument that the property is governed by the Vatican City State. Though the Holy See may seek to limit its perceived control over each diocese, its effective control—both in ownership and in contract—remains apparent once its governance structure is revealed: a governance structure derived from both canon law and the necessary approval of the Holy See. Dioceses are incorporated solely for a religious purpose and, as effectively subservient to the rules of the Catholic Church and canon law, they must be considered as under the governance of the Holy See, not the Vatican City State.

While it is evident that, by maintaining the separateness of the Holy See and the Vatican City State, the Holy See fulfills at least two of the three prongs of the legal characteristics test, the third prong—the ability to sue and be sued in its own name—is mired by the same conflicting norms of dependence and interdependence that Catholic authorities have, perhaps purposefully, created. Devised before U.S. recognition of the Vatican City State, the legislative history of the FSIA would not have taken into account a relationship of the kind or character as seen between the Holy See and the Vatican City State. While an entity with the breadth of independent characteristics that the Holy See has displayed need not necessarily satisfy all prongs of the test,¹⁵⁴ it is important to note that the final prong is at least partially dependent upon a changing position within American courts and the subsequent position that the Vatican City State would take.

As future plaintiffs, already knowledgeable of the separateness of the two entities,¹⁵⁵ begin to sue the Holy See as detached from the Vatican City State, the Holy See's ability to sue and be sued in its own name will be confirmed. Regardless, given the totality of available evidence, it appears that the Holy See would be deemed an instrumentality under the legal characteristics test, just as it was deemed under the core functions test. As Part III.C will describe, the instrumentality status will give future plaintiffs a more equal playing field with the Holy See, while still respecting its unique sovereignty.

¹⁵⁴ The test is not whether an entity displays all of these characteristics, but whether it displays one of these characteristics. *Hyatt Corp.*, 945 F. Supp. at 684 (using the word “or” in its list of factors in order to show they need not all be satisfied).

¹⁵⁵ As mentioned in Part II, The *O'Bryan* plaintiffs argued a “dual personality” for the Holy See without arguing for instrumentality status. *O'Bryan v. Holy See*, 556 F.3d 361, 371 (6th Cir. 2009).

2011] *RETHINKING THE STATUS OF THE HOLY SEE* 517*C. Results of Holding the Holy See as an Instrumentality**1. Service of Process*

As shown throughout the Part III.B, the Holy See is an instrumentality of the Vatican City State under both the core functions and legal characteristics test. The Holy See should therefore legally be considered an instrumentality. This has important ramifications in U.S. courts. Under the FSIA, “subject matter jurisdiction plus service of process equals personal jurisdiction”¹⁵⁶ and, as such, jurisdiction cannot be granted without the correct service of process.

One of the most practical effects of defining the Holy See as an instrumentality deals with how courts handle the question of service of process. The controversy of the *Transaero* case dealt with the difference of service between states and instrumentalities,¹⁵⁷ with Section 1608(a) requiring stricter services upon states than what Section 1608(b) requires upon instrumentalities.¹⁵⁸ In addition, “authorities generally hold that section 1608(b) may be satisfied by technically faulty service that gives adequate notice to the foreign state,”¹⁵⁹ creating a more lenient standard for a detailed, lengthy and (especially when dealing with the requirements as related to the Holy See) difficult process.

In at least one prior case, courts had maintained the dismissal of a complaint against the Holy See while noting insufficiency of process.¹⁶⁰ More recently, the court in *O’Bryan* found that the plaintiffs failed to comply with 28 U.S.C. 1608(a)(3)¹⁶¹ because,

¹⁵⁶ *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981).

¹⁵⁷ *Transaero Inc. v. La Fuerza Area Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994).

¹⁵⁸ 28 U.S.C. § 1608(a)-(b) (2010).

¹⁵⁹ *Transaero*, 30 F.3d at 153-54.

¹⁶⁰ *English v. Thorne*, 676 F. Supp. 761, 762 (S.D. Miss. 1987). Here, the plaintiff requested leave to correct the improper service of process; however, the court dismissed the complaint in its entirety for lack of subject-matter jurisdiction, thus avoiding the request entirely. *Id.*

¹⁶¹ *O’Bryan v. Holy See*, 471 F. Supp. 2d 784, 831 (W.D. Ky. 2007). The relevant section, 28 U.S.C. Section 1608(a)(3), requires service in the following manner:

[B]y sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

among other things, the plaintiffs had addressed the summons and complaint to the Head of the Secretariat of State rather than the Foreign Minister.¹⁶² This was despite the fact that the plaintiffs had stated that the Holy See complied with the “admittedly difficult” section.¹⁶³

The court eventually granted the *O'Bryan* plaintiffs an additional sixty days to perfect service, noting their “good faith attempts” to do so.¹⁶⁴ Had the court not done so, the lawsuit may have been dismissed. The plaintiffs’ “good faith” is clearly shown from their attempts to serve process on the Holy See:

On August 24, 2004, the Clerk of this Court sent a copy of the summons, complaint, and notice of suit, and a Latin translation of each via DHL Worldwide Express with delivery notification In five attempts, DHL was unable to deliver the documents. Plaintiffs next attempted service under 28 U.S.C. § 1608(a)(4). On November 3, 2004, the Clerk of this Court sent two copies of the summons and complaint and notice of suit, and a Latin translation of each via DHL Worldwide Express with delivery notification, addressed to the Director of Special Consular Services, U.S. Department of State, Washington D.C. The State Department transmitted a letter to the Clerk of this Court that included a certified copy of the diplomatic note it included with Plaintiffs’ materials. The note indicated that Plaintiffs’ documents were transmitted to Defendant on December 13, 2004. Plaintiffs’ third attempt at service was pursuant to the Kentucky long-arm statute, KRS § 454.210, under which the Kentucky Secretary of State sends, via certified mail with return receipt requested and bearing the return address of the Secretary of State, a copy of the summons and complaint to the defendant at the address listed in the complaint. The Secretary of State’s return of service indicates that service was effected on June 18, 2004.¹⁶⁵

The difficulties presented by such exhaustive, and sometimes futile, attempts to serve process are not difficult to appreciate. Nor are the difficulties presented by the need to translate official documents into Latin, the official language of the Holy See, as is

¹⁶² *O'Bryan*, 471 F. Supp. 2d at 832.

¹⁶³ *Id.* at 831.

¹⁶⁴ *Id.* Indeed, the Holy See made three attempts to dismiss the suit due to insufficient service of process. *Federal Court in Oregon Rules that Sex Abuse Suit Against Vatican May Proceed*, PR NEWSWIRE, June 8, 2005, <http://www.prnewswire.co.uk/cgi/news/release?id=172844>.

¹⁶⁵ *O'Bryan*, 556 F.3d at 371.

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required by Section 1608(a).¹⁶⁶ The Holy See, however, challenged the adequacy of the Latin translations of the summons, complaint, and notice of suit.¹⁶⁷

While strict service of process is especially important in recognizing the sovereignty of states, the Holy See's continued attacks on jurisdiction show that such strict formalism can be abused, hindering the pursuit of proper justice in U.S. courts. Recognizing the Holy See as an instrumentality would not only lower the requirements for service of process, which are still very high for an instrumentality, but would also allow some courts to reward plaintiffs who try to serve process upon the Holy See "absen[t] any accommodation from the Holy See"¹⁶⁸ when those attempts *actually do provide notice* to the Holy See. Thus, in jurisdictions that hold "the pivotal factor is whether the defendant receives actual notice and was not prejudiced by the lack of compliance with the FSIA,"¹⁶⁹ the Holy See will not be able to avoid jurisdiction when exhaustive and proportionate attempts have been made to give it proper notice of suit.

2. *The Ability to Execute Judgments*

Within the FSIA, jurisdiction to adjudicate is distinct from jurisdiction to enforce. In fact, Section 1606 allows for punitive damages against an instrumentality, but does not allow punitive damages against a foreign state.¹⁷⁰ Likewise, Section 1610 grants foreign states a higher level of immunity from execution than it grants to instrumentalities engaged in commercial activity within the United States.¹⁷¹

¹⁶⁶ The statute requires a copy of the summons, complaint, and a notice of the suit to be sent "together with a translation of each into the official language of the foreign state." 28 U.S.C. § 1608(a).

¹⁶⁷ The court, however, found no deficiency in the translation. *See* O'Bryan, 556 F.3d at 372.

¹⁶⁸ O'Bryan, 471 F. Supp. 2d at 831.

¹⁶⁹ *Straub v. AP Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994).

¹⁷⁰ The relevant language of 28 U.S.C. Section 1606 reads:

[A] foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

¹⁷¹ Section 1610(a) requires, first and foremost, that state property being sought in execution must be "used for a commercial activity in the United States." 28 U.S.C. §

Assuming that courts will be more likely to view the Holy See as an instrumentality engaging in commercial activity, successful plaintiffs' ability to seek greater damages will assist them in cases where they have found that either an individual priest or the diocese was effectively judgment-proof.¹⁷² Such attachments will not only aid successful plaintiffs in realizing judgments, but will also act as a deterrent to Holy See officials who may themselves wish to engage in tortuous activity¹⁷³ in the belief that such activity may be shielded from damages.

3. *Greater Synthesis with the Establishment Clause*

By viewing the Holy See as an instrumentality, courts will be able to avoid the Establishment Clause issues which are encountered through viewing the Holy See as a state. The Constitution's Establishment Clause provides that "Congress shall make no law respecting the establishment of religion."¹⁷⁴ That granting sovereign recognition to the Holy See may represent a violation of the Establishment Clause is not a novel concept.¹⁷⁵ Indeed, the plaintiffs in *O'Bryan* attempted to advance an Establishment Clause claim, but failed because it was only raised on appeal.¹⁷⁶ Likewise, while courts have viewed the question of sovereign recognition of the Holy See as political in nature,¹⁷⁷ they have done so only in the context of one Third Circuit case in which the court also found the plaintiffs lacked standing.¹⁷⁸

1610(a) (2008). Section 1610(b) only requires that an instrumentality is "engaged in commercial activity in the United States" and does not necessitate that the property is used towards a commercial purpose. 28 U.S.C. § 1610(b) (2008).

¹⁷² Priests may undergo a vow of poverty; dioceses have in the past declared bankruptcy in the wake of judgments. See generally Sartor, *supra* note 6; Mason, *supra* note 7.

¹⁷³ In *O'Bryan*, the plaintiffs' case against the Holy See partially relied on the alleged "1962 policy" involving "an official legislative text issued by the Congregation of the Holy Office and specifically approved by Pope John XXIII [imposing] the highest level of secrecy on clergy sexual abuse matters." *O'Bryan*, 556 F.3d at 370. This document has been read to require U.S. bishops to refuse to report the sexual abuse of children by priests to U.S. criminal or civil authorities. *From the Supreme and Holy Congregation of the Holy Office for All Patriarchs, Archbishops, Bishops and other Diocesan Ordinaries "Even of the Oriental Rite,"* THE VATICAN PRESS, 1962, <http://www.bishop-accountability.org/resources/resource-files/churchdocs/CrimenEnglish.pdf>.

¹⁷⁴ U.S. CONST. amend. I.

¹⁷⁵ See discussion *supra* Part II.

¹⁷⁶ *O'Bryan*, 556 F.3d at 375.

¹⁷⁷ See generally *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194 (3d Cir. 1986).

¹⁷⁸ *Id.* at 201.

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The proposition that state recognition of the Holy See might unduly favor the Catholic Church over other religious entities is supported by a straightforward argument, after taking into account the immunities conferred by the FSIA.¹⁷⁹ Relations between the U.N. and the Holy See, unburdened by the requirements of the Establishment Clause, shed light on the unique respect that state recognition gives to the Holy See as a church. Dag Hammarskjöld, the Secretary General of the U.N. between 1953 and 1961, stated, “[W]hen I request an audience from the Vatican, I do not go to see the King of the Vatican City, but the head of the Catholic Church.”¹⁸⁰

Likewise, when the Holy See maintained that the pope’s representatives to the U.N. are from the Holy See and not the Vatican City State, it stated, “The presence of papal representatives under the title of the State of Vatican City would have unduly stressed the temporal aspects of the Pope’s sovereignty.”¹⁸¹ These statements show that the Holy See both sought and was given preferential concessions based on its status as a church so that it could participate in the U.N. Though courts have not ruled on this specific issue, the Establishment Clause may, in fact, bar such concessions.

Representatives of the Catholic Church have stressed the Holy See’s religious role, rather than its character as a state. Archbishop Dominique Mamberti, in response to calls for revocation of the Holy See’s state status in the U.N., has stated that “in carrying out its international role, the Holy See is always at the service of the comprehensive salvation of man, according to Christ’s commandment,” and that “the Holy See’s international juridical personality is independent of the criterion of territorial sovereignty.”¹⁸²

While recognition of the Holy See as an instrumentality may not eliminate all Establishment Clause questions indefinitely, it at least places the Holy See on a more equal footing with other religions, “a majority of whose shares or other ownership interest

¹⁷⁹ The full argument is discussed in detail in *Americans United for the Separation of Church and State*. *Id.* at 194.

¹⁸⁰ EDWARD GRATSCHEK, *THE HOLY SEE AND THE UNITED NATIONS 1945-1995* 10 (Vantage Press 1997).

¹⁸¹ This is taken from an exchange of letters between the Secretary General of the United Nations and the Holy See. HYGINUS E. CARDINALE, *THE HOLY SEE AND THE INTERNATIONAL ORDER* 256 (1976).

¹⁸² Magister, *supra* note 44.

[are] owned by a foreign state or political subdivision thereof.”¹⁸³ Although the Holy See would not necessarily receive equal treatment compared with all other religions in the US—the Holy See would still receive immunities from the FSIA that domestic religions would never be able to receive—it would assist it in disputing criticisms that its sovereign recognition was meant to favor the Catholic Church over other religions.¹⁸⁴ Therefore, when judges must decide upon the sovereign status of the Holy See, they should be aware of these criticisms and use them as a means to support and validate the Holy See’s status as an instrumentality.

IV. CONCLUSION

The Holy See’s legal status as a state, rather than as an instrumentality of the Vatican City State, has been unchallenged in American litigation, despite the fact that the character of the Holy See places it within the definition of an instrumentality under either the core functions test, or the legal characteristics test. Likewise, the argument for *sui generis* recognition of the Holy See’s statehood is outdated internationally, and has never been accepted in U.S. jurisprudence. While courts generally defer to the Department of State regarding sovereign recognition, the Department itself implicitly recognized that the Holy See and the Vatican City State are separate sovereign entities through its dual definitions. Regardless, courts should not defer to the Department of State when determining whether a specific entity is a state or instrumentality. Such determinations are prescribed to the courts through the FSIA and are, therefore, non-political in nature.

The realization that the Holy See is an instrumentality of the Vatican City State will allow for a legal synthesis of the Holy See’s religious mission, the FSIA, and the Establishment Clause. Holding the Holy See as an instrumentality will also assist future plaintiffs, enabling them to take advantage of the FSIA’s more plaintiff-friendly provisions for both service of process and judgment enforcement upon instrumentalities. The Holy See has thus far been able to use the stricter provisions that the FSIA provides for states in order to both frustrate lawsuits and deny

¹⁸³ 28 U.S.C. § 1603(b)(2) (2005).

¹⁸⁴ The legal synthesis of the Establishment Clause and FSIA as it relates to the Holy See’s status as either a state or an instrumentality could itself be the subject of a lengthy paper. This Note does not attempt to elucidate all of the nuances of this conflict, but rather only asserts that holding the Holy See as an instrumentality will lessen the conflict.

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settlements. As the FSIA is meant to protect citizens from political behavior of this type, recognizing that the Holy See is an instrumentality will grant citizens the appropriate protections and ensure them the predictability that the FSIA is meant to codify in suits against foreign sovereigns.

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