

# They're People Too: Why U.S. Courts Should Give Foreign Agencies and Instrumentalities Due Process Rights Under the Foreign Sovereign Immunities Act (FSIA)

Lauren Bursey

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## Recommended Citation

Lauren Bursey, *They're People Too: Why U.S. Courts Should Give Foreign Agencies and Instrumentalities Due Process Rights Under the Foreign Sovereign Immunities Act (FSIA)*, 66 DePaul L. Rev. (2017)

Available at: <http://via.library.depaul.edu/law-review/vol66/iss1/9>

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**THEY'RE PEOPLE TOO:  
WHY U.S. COURTS SHOULD GIVE FOREIGN  
AGENCIES AND INSTRUMENTALITIES DUE PROCESS  
RIGHTS UNDER THE FOREIGN SOVEREIGN  
IMMUNITIES ACT (FSIA)**

INTRODUCTION

We live in a globalized world interconnected by technology and innovation.<sup>1</sup> International trade has become the standard, not the exception.<sup>2</sup> Further, transnational litigation has continued to grow, and foreign litigants have flocked to the United States.<sup>3</sup> There is little to no distinction between public and private corporations; more times than not, they conduct their business in the same manner.<sup>4</sup> Where there are two parties, one a private corporation and the other a state-

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1. See Dan A. Naranjo, *It's a Small World After All: Why It Is So Important for Texans to Understand the International Court of Justice*, 77 TEX. BUS. L.J. 322, 322 (2014).

2. See *id.* In *Helicopteros Nacionales de Colombia S. A. v. Hall*, a case concerning a Columbian company doing business in the United States, Justice Brennan in his dissent, noted The vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause . . . [I]t has become both necessary, and . . . desirable to allow the States more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdictions.

466 U.S. 408, 410, 422 (1984) (Brennan, J., dissenting); see Michael Joachim Bonnell, *Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87, 87–88 (2001) (discussing the implementation of international codes and statutes in the last two decades such as the United Nations Commission on International Trade Law and the United Nations Convention on Contracts for the International Sale of Goods).

3. Recent Case, *Civil Procedure – Personal Jurisdiction – D.C. Circuit Dismisses Suit Against National Port Authority of Liberia for Lack of Personal Jurisdiction – GSS Group Ltd. v. National Port Authority*, 680 F.3d 805 (D.C. Cir. 2012), 126 HARV. L. REV. 1691, 1691 (2013).

4. See Joel Slawotsky, *Corporate Liability in Alien Tort Litigation*, 1 VA. J. INT'L L. ONLINE 27, 41 (2011), <http://www.vjil.org/articles/corporate-liability-in-alien-tort-litigation> (“In today's world, both states and corporations have similar or even identical interests. This coalition of interest underscores the blurring of the distinction between states and corporations.”). For example, an issue that affects the global population is oil, which is extracted and processed through both state-owned and private corporations. See generally Melaku Geboye Desta, *The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements*, 37 J. WORLD TRADE 523, 523, 545 (2003). As another example, in the future, there will almost certainly be litigation over control of the world's fresh-water supply, which is also currently in the hands of both state-owned and private corporations. John Tagliabue, *As Multinationals Run the Taps, Anger Rises Over Water for Profit*, N.Y. TIMES (Aug. 26, 2002), <http://www.nytimes.com/2002/08/26/world/as-multinationals-run-the-taps-anger-rises-over-water-for-profit.html>.

owned corporation, behaving identically in international commerce, the current statutory framework allows for the state-owned corporation to be subject to different procedural rights in U.S. courts, solely because of their ownership identity.<sup>5</sup>

A domestic state's laws of incorporation define a corporation as a legal entity; rules of its creation, organization, and dissolution also stem from state law.<sup>6</sup> But for their ownership or foundational origins, state-owned corporations' ties to a foreign state would be completely unknown and irrelevant.<sup>7</sup> Determining which jurisdictions allow foreign parties to litigate disputes, and what rights these jurisdictions grant to these parties, is naturally of pressing concern as global commercial relationships cause the world to shrink. What kind of due process do these state-owned international corporations have, where should they litigate their disputes, and what kind of rights do they have?

The Foreign Sovereign Immunities Act (FSIA)<sup>8</sup> provides foreign sovereigns and their organs with immunity for their public actions.<sup>9</sup> However, if their conduct fits within one of the enumerated exceptions, the foreign sovereign can be hauled into U.S. courts.<sup>10</sup> In do-

5. 28 U.S.C. §§ 1603(b)(1)–(2) (2012); Frederick Watson Vaughan, *Foreign States Are Foreign States: Why Foreign State-Owned Corporations Are Not Persons Under the Due Process Clause*, 45 GA. L. REV. 913, 917 (2011).

6. *Corporations*, CORNELL UNIV. LAW SCH., <https://www.law.cornell.edu/wex/corporations> (last visited Aug. 11, 2016).

7. See Vaughan, *supra* note 5, at 917.

8. Act of Oct. 21, 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602–1611 (2012)).

9. 28 U.S.C. §§ 1604–1607 (2012). Congress left the term “organ” undefined. Michael A. Granne, *Defining “Organ of a Foreign State” Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. DAVIS L. REV. 1, 16–17 (2008). In *USX Corp. v. Adriatic Insurance Company*, the Third Circuit Court of Appeals determined that for an entity to be an “organ” of a foreign state under FSIA, it must “engage in a public activity on behalf of the foreign government.” 345 F.3d 190, 208 (3d Cir. 2003). The court also enumerated various factors to test for “organ” status, none of which is determinative, namely

(1) the circumstances surrounding the entity's creation; (2) the purpose of its activities; (3) the degree of supervision by the government; (4) the level of government financial support; (5) the entity's employment policies, particularly regarding whether the foreign state requires the hiring of public employees and pays their salaries; and (6) the entity's obligations and privileges under the foreign state's laws. To this list, we should add an additional factor: (7) the ownership structure of the entity [where majority ownership is not necessary].

*Id.* at 209. One commentator argues that the “ad hoc and subjective nature” of “organ or ownership status” analysis prevents consistent application of an “objective” test from being consistently applied. ERNESTO J. SANCHEZ, *THE FOREIGN SOVEREIGN IMMUNITIES ACT DESKBOOK* 85 (A.B.A., 2013).

10. 28 U.S.C. §§ 1605, 1607 (2012). The exceptions include; when a state waives immunity, engages in commercial activity, expropriates property contrary to international law, commits a non-commercial tort in the United States, agrees to submit a dispute to arbitration, makes a

mestic cases, the requirement of jurisdiction is a means of meeting the due process protections guaranteed in the Fifth and Fourteenth Amendments of the Constitution, whereby “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”<sup>11</sup> The two main means of meeting the requirements of subject matter<sup>12</sup> jurisdiction in domestic cases are diversity jurisdiction and federal question jurisdiction.<sup>13</sup> In *Price v. Socialist People’s Libyan Arab Jamahiriya*, the Circuit Court of Appeals for the District of Columbia determined that foreign states are not “persons” under the Due Process Clause because the clause aims to protect American citizens from acts of their own government.<sup>14</sup> The court reasoned that foreign

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counterclaim and voluntarily appears in litigation, or sponsors terrorism. *Id.* The commercial activities exception is the most important and heavily litigated of the exceptions. Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It Like One*, 5 CHI. J. INT’L L. 675, 676 (2005).

11. U.S. CONST. amends. V, XIV, § 1 (emphasis added). Both subject-matter jurisdiction and personal jurisdiction are requirements for the exercise of federal court jurisdiction over a litigant. HAZEL FOX QC & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* 424 (Oxford University Press, 3d ed., 2013) (“Neither FSIA nor the House Report made clear whether or not foreign States were entitled to the jurisdictional protection of the Due Process Clauses of the 5th and 14th Amendments of the US Constitution.”).

12. Subject matter jurisdiction is the power of a court to hear particular types of cases. *Subject Matter Jurisdiction*, CORNELL U. L. SCH., <https://www.law.cornell.edu/wex/matterjurisdiction> (last visited Sept. 23, 2016). A district court can accord priority to a personal jurisdiction or *forum non conveniens* inquiry if there are doubts about a court’s jurisdiction over the subject matter. *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 579 (1999).

13. Matt D. Basil et al., *Federal Subject Matter Jurisdiction Outline*, JENNER & BLOCK LLP PRACTICE SERIES 10, 18 (2011), [https://jenner.com/system/assets/assets/5507/original/Federal\\_20Subject\\_20Matter\\_20Jurisdiction\\_20Outline\\_Jenner\\_20\\_26\\_20Block\\_0611.pdf?1323113751](https://jenner.com/system/assets/assets/5507/original/Federal_20Subject_20Matter_20Jurisdiction_20Outline_Jenner_20_26_20Block_0611.pdf?1323113751). “The [United States] Constitution allows the judicial power of the United States to extend to cases involving ‘[c]ontroversies . . . between Citizens of different States.’” *Id.* at 19 (quoting U.S. CONST. art. III, § 2) (alteration in original). Both Congress and the United States Constitution vest federal district courts with subject matter jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2012); *see* U.S. CONST. art III, § 2. FSIA automatically accords personal jurisdiction when one of the enumerated exceptions applies, provided there has been adequate service of process and the requirement of subject matter jurisdiction is met. SANCHEZ, *supra* note 9, at 271; *see* 28 U.S.C. §§ 1330(b), 1608 (2012). “Personal jurisdiction is the power of a court over the parties in the case,” requiring the parties to have “certain minimum contacts with the forum in which the court sits.” *Personal Jurisdiction*, CORNELL U. L. SCH., [https://www.law.cornell.edu/wex/personal\\_jurisdiction](https://www.law.cornell.edu/wex/personal_jurisdiction) (last visited Sept. 23, 2016); *see* *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945) (holding that a party, including a corporation, may be subject to the jurisdiction of a state court if it has “minimum contacts” with that state). The Court in *International Shoe* held that the casual presence of a corporation or its agent in a state in a single or isolated incident is not enough to establish personal jurisdiction. *Id.* at 317. Rather, the Supreme Court of the United States considered systematic and continuous business operations to be sufficient contact with the state to meet this threshold. *Id.*

14. *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 95–96 (D.C. Cir. 2002); *see also* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261, 264 (1990).

states do not need these protections because they are juridical equals of the U.S. government.<sup>15</sup> In addition, because foreign states are not “persons” under the Fifth Amendment, courts have reasoned that a foreign sovereign waives personal jurisdiction under FSIA.<sup>16</sup> Personal jurisdiction is provided for in FSIA regardless.<sup>17</sup>

This Comment argues that foreign state agencies and instrumentalities should be afforded the Constitutional due process protections that are available to both foreign and domestic private corporations. Corporations were found to be “persons” with Constitutional rights in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>18</sup> in direct contrast to the holding in *Price* holding that only natural persons have the right to Constitutional protections.<sup>19</sup> Judicial precedent shows that courts have awarded due process protections on a limited basis and with a lack of uniformity to particular individuals or corporations.<sup>20</sup> Agencies and instrumentalities of foreign governments should receive constitutional protections because they are treated as separate legal entities with individual rights both by international and commercial law, as well as by FSIA.<sup>21</sup> For example, in the historic 1984 case of *Helicopteros Nacionales de Colombia S.A. v. Hall*, the Supreme Court accorded due process protections to a privately owned, foreign corporation.<sup>22</sup> While the Supreme Court has not made a decision on whether foreign state instrumentalities are entitled to due process protections, this Comment argues that given the jurisprudence, there is every reason why these instrumentalities should be afforded Constitutional protection.

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15. *Price*, 294 F.3d at 98. This analysis is accurate when considering the foreign policy implications of extending these protections to foreign states. *Id.* at 99. The court gives as an example the power of Congress to impose economic sanctions and freeze the assets of a foreign state when the United States is trying to put pressure on that state, actions which could be challenged as “deprivations of property without due process of law.” *Id.*

16. CHARLES ALAN WRIGHT ET AL., 14A FED. PRAC. & PROC. JURIS. § 3662.2 n.22 (4th ed. 2015) (quoting *I.T. Consultants, Inc. v. Republic of Pakistan*, 351 F.3d 1184, 1191 (D.C. Cir. 2003)). If a foreign sovereign waives personal jurisdiction, the plaintiff does not have to prove that the foreign sovereign had “minimum contacts” with the forum state, as required by *International Shoe*. See *Int’l Shoe*, 326 U.S. at 317.

17. 28 U.S.C. § 1330(b).

18. *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751 (2014).

19. *Id.* at 2768.

20. See, e.g., *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 389 F.3d 61 (2d Cir. 2004) (holding that a French railroad’s prior existence as a private entity did not bar retroactive application of FSIA); *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1117 (E.D. Cal. 2012) (holding that a municipality is a “person” that can be sued for civil rights violation).

21. 28 U.S.C. §§ 1603(b)(1)–(2); see *First Nat’l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983), *superseded by statute*, 28 U.S.C. § 1610(g) (2012) (crafting a ‘terrorism exception’ to the statute which allows attachment under certain circumstances).

22. *Helicopteros Nacionales de Columbia, S. A. v. Hall*, 466 U.S. 408, 418–19 (1984).

Based on the *Hobby Lobby* decision, corporations are “persons”;<sup>23</sup> foreign agencies and instrumentalities are sufficiently similar to corporations and should be afforded the same constitutional protections. Since foreign corporations have already been afforded Constitutional protection, the association with a foreign-state should not prevent the corporation from protections to which all other parties litigating in U.S. courts are entitled.

Part II of this Comment details the background of the Foreign Sovereign Immunities Act.<sup>24</sup> It also addresses how FSIA defines an agency and instrumentality, and how that definition differs from the judicial understanding of a foreign corporation.<sup>25</sup> Part III argues that foreign state-owned corporations are no different from private foreign corporations for the purposes of jurisdiction,<sup>26</sup> and then applies the holding of *Hobby Lobby* to foreign sovereign-owned agencies and instrumentalities.<sup>27</sup> Furthermore, Part III supplies a case study of foreign museums, and investigates the aspects of due process that already exist for foreign museums litigating in U.S. courts.<sup>28</sup> Finally, Part III argues that the Immunity from Judicial Seizure statute coincides with the due process right, which prevents a deprivation of property without due process of law resulting in certain foreign state instrumentalities already benefitting from some due process protections.<sup>29</sup> Part IV looks at the future implications of this argument, including (1) whether giving due process protections to agencies or instrumentalities will open the floodgates of litigation, and (2) the likely possibility of such a change.<sup>30</sup> Part V concludes that under FSIA, foreign sovereign agencies and instrumentalities should be given due process protections, and that the courts should look to the IFJS as a comparable statute which gives these due process protections to museums, a type of foreign sovereign agency.

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23. *Hobby Lobby*, 134 S. Ct. at 2768.

24. See *infra* notes 36–77 and accompanying text.

25. See *infra* notes 78–131 and accompanying text.

26. See *infra* notes 194–97 and accompanying text.

27. See *infra* notes 198–221 and accompanying text.

28. See *infra* notes 222–54 and accompanying text.

29. See *infra* notes 255–317 and accompanying text. Most foreign museums are state-owned and are entitled to apply for immunity from seizure of their artwork prior to a loan to a United States museum. See Seizure Under Judicial Process of Cultural Objects Imported for Temporary Exhibition or Display Statute (Immunity from Judicial Seizure (IFJS)), 22 U.S.C. § 2459 (2012).

30. See *infra* notes 318–34 and accompanying text.

## II. BACKGROUND

This Section first provides a history of FSIA and its definition of agencies and instrumentalities.<sup>31</sup> Section B provides a definition of foreign corporations and their treatment in the *Helicopteros* case.<sup>32</sup> Section C summarizes the history and background of the 2014 Supreme Court case *Burwell v. Hobby Lobby Stores, Inc.*<sup>33</sup> Section D examines the history of the Due Process Clause and the judicial interpretation of “personhood.”<sup>34</sup> Finally, Section E addresses the history and purpose of the Immunity from Judicial Seizure statute.<sup>35</sup>

### A. FSIA & Agencies and Instrumentalities

FSIA was enacted in 1976 to codify the “restrictive” theory of immunity, whereby foreign states are immune from litigation in U.S. courts only for their public acts, or *jure imperii*, while their private acts, or *jure gestionis*, are not immune.<sup>36</sup> Public acts are “of a governmental nature typically performed by a foreign state”<sup>37</sup> for public benefit, while acts that are governmental in nature are characterized as “political, diplomatic, or military in nature.”<sup>38</sup> Such acts include the expropriations of an alien’s property within the boundaries of the sovereign state.<sup>39</sup> Private acts are those that do not directly benefit the public, such as civil or commercial activities in which the sovereign acts as a private individual.<sup>40</sup> FSIA also serves to transfer responsibility for immunity determinations from the Executive Branch and the

31. See *infra* notes 36–77 and accompanying text.

32. See *infra* notes 78–131 and accompanying text.

33. See *infra* notes 132–57 and accompanying text.

34. See *infra* notes 158–74 and accompanying text.

35. See *infra* notes 175–93 and accompanying text.

36. SANCHEZ, *supra* note 9, at 28; see 28 U.S.C. § 1602 (2012) (“Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned.”). Prior to the restrictive theory of immunity, sovereign states followed absolute theory, whereby a foreign state had immunity at all times, unless the state consented to be sued. JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 3 (2d ed., 2003).

37. David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges*, FEDERAL JUDICIAL CENTER INTERNATIONAL LITIGATION GUIDE 1–2 (2013) (quoting *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026 (9th Cir. 2010)).

38. Judi L. Abbott, *The Noncommercial Torts Exception to the Foreign Sovereign Immunities Act*, 9 FORDHAM INT’L L.J. 134, 135 n.11 (1985).

39. George Kahale, III, *Characterizing Nationalizations For Purposes of the Foreign Sovereign Immunities Act and the Act of State Doctrine*, 6 FORDHAM INT’L L.J. 391, 409 (1983). An example of expropriation of property would include the seizure of an alien’s funds from a United States bank account.

40. Abbott, *supra* note 38, at 135 n.11. For example, a sovereign acts in its private capacity as an employer.

State Department to the Judicial Branch.<sup>41</sup> FSIA is primarily a jurisdictional statute; it does not address the sufficiency or substantive nature of a claim.<sup>42</sup> Rather, it “provides the sole basis for establishing jurisdiction over foreign sovereign defendant in U.S. courts.”<sup>43</sup> According to the Supreme Court in *Republic of Austria v. Altmann*, Congress sought to bring order to the legal inconsistency in immunity determinations by way of ratification of FSIA.<sup>44</sup>

Other purposes of FSIA include; depoliticizing immunity decisions by taking them out of the hands of the Executive and the State Department and vesting them in the federal courts<sup>45</sup> and providing “definite, appropriate rules on competence, jurisdiction, mode of trial, rules of decision, service of process, and venue.”<sup>46</sup> Bringing the treatment of foreign states in U.S. courts in line with the treatment of the United States and its corporations, both domestically and internationally,<sup>47</sup> providing “a balanced possibility for execution of a judgment against a foreign state,”<sup>48</sup> and assuring uniform treatment of foreign states in U.S. federal courts under the legal principle of comity are also purposes of FSIA.<sup>49</sup>

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41. SANCHEZ, *supra* note 9, at 28. Prior to the codification of FSIA, foreign nations would put diplomatic pressure on the Department of State to file suggestions of immunity “in cases in which immunity would not have been available under the restrictive theory.” *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004). When foreign nations failed to ask the Department of State for the right to immunity, the courts were forced to make immunity determinations. *Id.* at 690–91 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487–88 (1982)). As a result, the responsibility for determining sovereign immunity “[was] made in two different branches,” which, unsurprisingly, created unnecessary complications. *Verlinden*, 461 U.S. at 488.

42. *First Nat’l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983).

43. SANCHEZ, *supra* note 9, at 41.

44. *Altmann*, 541 U.S. at 677. The House of Representatives’ Report in 1976 stated that “uniformity in decision . . . is desirable . . . to reduc[e] the foreign policy implications of immunity determinations and assure the litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.” H.R. REP. NO. 94-1487, at 13 (1976).

45. 28 U.S.C. §§ 1602, 1604 (2012).

46. DELLAPENNA, *supra* note 36, at 33–34 (citing H.R. REP. NO. 94-1487, at 45 (1976); *see* 28 U.S.C. § 1608 (2012)).

47. DELLAPENNA, *supra* note 36, at 34 (citing H.R. REP. NO. 94-1487, at 12); *see* 28 U.S.C. § 1604.

48. DELLAPENNA, *supra* note 36, at 34 (citing H.R. REP. NO. 94-1487, at 12); *see* 28 U.S.C. § 1605.

49. DELLAPENNA, *supra* note 36, at 33–34; *see* 28 U.S.C. § 1602 (“[T]he determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.”).



According to FSIA, an “agency or instrumentality” means any entity “which is a separate legal person, corporate or otherwise.”<sup>50</sup> A legal person is “the subject of rights and duties” and has the “capacity” to be “a party” to legal relations.<sup>51</sup> Moreover, FSIA’s definition requires the entity to be “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.”<sup>52</sup> In 2003, the U.S. Supreme Court in *Dole Food Co. v. Patrickson*,<sup>53</sup> held that “only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement.”<sup>54</sup> “[W]here the foreign state is not a direct majority owner of the entity, the entity” must “demonstrate that it is an organ of the state.”<sup>55</sup> An organ of a state is generally understood by the term “arm of the state,” although Congress ultimately left the term undefined.<sup>56</sup> Finally, in accordance with FSIA, an agency or instrumentality 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.”<sup>57</sup>

Thus, FSIA’s definition intends to include corporations, associations, foundations, or any other entity which can sue or be sued, which can contract in its own name and hold property in its own name under the laws of the foreign state where it was created.<sup>58</sup> As non-exhaustive examples of entities that would be considered to be agencies or instrumentalities, the House Report cited a state trading corporation,

50. 28 U.S.C. § 1603(b)(1) (2012).

51. Bryant Smith, *Legal Personality*, 37 *YALE L.J.* 283, 283–84 (1928).

52. 28 U.S.C. § 1603(b).

53. 538 U.S. 468, 474 (2003), *superseded by statute*, 28 U.S.C. § 1610(g) (2012) (crafting a ‘terrorism exception’ to the statute which allows attachment under certain circumstances).

54. *Id.*

55. Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 *J. TRANSNAT’L L. & POL’Y* 1, 3 (2008).

56. Michael A. Granne, *Defining “Organ of a Foreign State” Under the Foreign Sovereign Immunities Act of 1976*, 42 *U.C. DAVIS L. REV.* 1, 2, 16–17 (2008). Michael Granne suggests that the court, in evaluating this threshold, should ask five questions:

First, has the foreign state ceded any of its core and traditional sovereign powers to the entity?; Second, there are sufficient financial ties between the foreign state and the entity such that any award would be paid out of the public treasury?; Third, how does the foreign state treat the entity under local law and is that treatment significantly different from its treatment of other similar entities?; Fourth, do U.S. courts give agency or instrumentality status to similar entities in the United States and other foreign states?; Finally, does the foreign state control how the entity conducts its business beyond what is customary in that state and, if not, can it exercise such extreme control?

*Id.* at 8–9.

57. 28 U.S.C. § 1603(b); Granne, *supra* note 9, at 16 (“Almost all litigation about whether an entity meets the threshold criteria of ‘foreign state’ revolves around § 1603(b)(2).”).

58. H.R. REP. NO. 94-1487, at 15.

a central bank, and a shipping line or airline.<sup>59</sup> An agency or instrumentality is meant to perform a public function in accordance with the restrictive theory of immunity as mentioned above.<sup>60</sup> Under FSIA, “an ‘agency or instrumentality’ of the foreign sovereign . . . engages in core functions that are predominantly commercial rather than governmental,” but still serves a public function.<sup>61</sup> A foreign-government-owned corporation or other agency or instrumentality derives a restrictive immunity from its relationship to a foreign state irrespective of the nature of the functions the corporation performs.<sup>62</sup>

In 2004, the Second Circuit Court of Appeals in *Filler v. Hanvit Bank*,<sup>63</sup> identified five factors that are relevant to determining whether an entity is an organ of a foreign state for purposes of FSIA:

- (1) whether the foreign state created the entity for a national purpose;
- (2) whether the foreign state actively supervises the entity;
- (3) whether the foreign state requires the hiring of public employees and pays their salaries;
- (4) whether the entity holds exclusive rights to some right in the [foreign] country; and
- (5) how the entity is treated under foreign state law.<sup>64</sup>

A foreign state organ can serve many purposes. Rather than requiring the foreign state itself to obtain resources for large scale international investments, a foreign state organ can serve as a vehicle through which the foreign state indirectly obtains the same resources.<sup>65</sup> Indeed, in *First National City Bank v. Banco para el Comercio Exterior de Cuba*,<sup>66</sup> the Supreme Court pointed out that agencies and instrumentalities enjoy more autonomy from close political control and self-determination than is generally enjoyed by traditionally understood political subdivisions which are more connected to the governing power.<sup>67</sup>

59. *Id.* at 15–16; Granne, *supra* note 9, at 15 n.75 (“Courts have interpreted ‘agency or instrumentality’ broadly.”).

60. SANCHEZ, *supra* note 9, at 72.

61. *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1163 (C.D. Cal. 2006) (citing *Garb v. Republic of Poland*, 440 F.3d 579, 591 (2d Cir. 2006)), *aff’d in part, rev’d in part*, 580 F. 3d 1048 (9th Cir. 2009), *on rehearing en Banc*, 616 F. 3d 1019 (9th Cir. 2010).

62. DELLAPENNA, *supra* note 36, at 65.

63. *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir. 2004).

64. *Id.* (alteration in original).

65. *First Nat’l City Bank v. Banco para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 624–25 (1983).

66. *Id.*

67. *Id.*

FSIA recognizes the reality that agencies and instrumentalities are entities separate from the government and, accordingly treat them different than states.<sup>68</sup> FSIA's service of process requirements, one of the mandatory requirements for personal jurisdiction, prescribes one set of rules for foreign states and their political subdivisions, and another for their agencies and instrumentalities.<sup>69</sup> For example, FSIA section 1608(a)(2) provides that one of the ways service may be provided to a foreign state or political subdivision is by delivery of the "summons and complaint in accordance with an applicable international convention on service of judicial documents."<sup>70</sup> For agencies and instrumentalities, however, FSIA adds that if no special arrangement exists delivery may be made "either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States."<sup>71</sup> Congress distinguished an agency or instrumentality as an organ that is not explicitly under the realm of control of the sovereign, such that service on an agency or instrumentality through diplomatic channels would be inappropriate.<sup>72</sup>

Another difference in the treatment of foreign states, agencies, or instrumentalities is that "it is easier to establish jurisdiction under the international takings exception over an agency or instrumentality than it is over a foreign sovereign itself."<sup>73</sup> In addition, FSIA prevents courts from awarding punitive damages against a state, but not against an agency or instrumentality.<sup>74</sup> Further, it is also "easier to attach or execute [a judgment] on the property of an agency or instrumentality than it is the property of a foreign sovereign."<sup>75</sup>

The judiciary has also formulated its understanding of agencies and instrumentalities. In *United States v. Noriega*,<sup>76</sup> the district court created a five-factor test describing what constitutes an "instrumental-

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68. SANCHEZ, *supra* note 9, at 71 (noting that agencies and instrumentalities are subject to different treatment regarding their potential liability for punitive damages, service of process, or appropriate enforcement and remedial measures).

69. *Id.* at 273.

70. 28 U.S.C. § 1608(a)(2) (2012).

71. *Id.* § 1608(b)(2).

72. *Id.*

73. Alex Haller, *The FSIA, Agency and Agents: Avoiding a Basic Pitfall*, FSIA LAW (Jan. 20, 2014), <http://fsialaw.com/2014/01/20/the-fsia-agency-and-agents-avoiding-a-basic-pitfall/>; see 28 U.S.C. § 1605(a)(3) (2012).

74. Haller, *supra* note 73; see 28 U.S.C. § 1606 (2012).

75. Haller, *supra* note 73; see *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002).

76. Minutes in Chamber Order at 9, *United States v. Noriega*, No. 10-01031 (C.D. Cal. Apr. 20, 2011).

ity”: (1) the entity provides a service to its citizens; (2) the primary officers are appointed by government officials; (3) the entity is largely financed through government appropriations; (4) the entity is vested with controlling power; and (5) the entity is understood to be performing official functions.<sup>77</sup> Although the case concerned the Foreign Corrupt Practices Act of 1977,<sup>78</sup> this factor test should be applicable when the institutions being discussed are fundamentally of a similar nature. An examination of the history of the Due Process Clause and how the judiciary’s application of “personhood” to foreign states and their agencies and instrumentalities supports this argument.

### B. *Due Process Clause & “Personhood”*

The Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution state that, “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>79</sup> The purpose of the Due Process Clause is to recognize and protect the citizens’ individual liberty interest and property interest through procedural safeguards.<sup>80</sup> More specifically, the protected “liberty interest” is freedom from the government imposing burdens upon people “except in accordance with the valid laws of the land.”<sup>81</sup> The first Supreme Court decision construing the Due Process Clause explained that it serves as a limit on the branches of government, thereby ensuring the Constitutional requirement of separation of powers.<sup>82</sup> The Due Process Clause also serves as a restraint on all other legislative made law, as the Constitution is the “supreme Law of the Land.”<sup>83</sup> However, these public policy interests are the only ones encompassed by the Amendments’ protection of liberty and property. The Due Process Clause is meant to be more than a “mere technical service of process,” as positivists would have us interpret the clause.<sup>84</sup> In *Price*,

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77. Order Granting Motion to Dismiss at 9, *United States v. Noriega*, No. CR-10-01031-AHM (C.D. Cal. Apr. 20, 2011).

78. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

79. U.S. CONST. amends. V, XIV, § 1.

80. *Price*, 294 F.3d at 98; see also IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, *STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY* § 1:18 (2015).

81. 16B AM. JUR. 2D *Constitutional Law* § 950 (2009).

82. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 458 (1986) (citing *Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 277 (1855)).

83. Vaughan, *supra* note 5, at 921 n.36 (quoting U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land.”)).

84. Redish & Marshall, *supra* note 82, at 458; see *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972). Positivists, in opposition to natural law theorists, believe that laws are the written by human beings, and do not necessarily have any connection with morals.

the D.C. Circuit Court of Appeals advanced that the core concept of due process is to safeguard a party from arbitrary exercises of governmental power “unrestrained by the established principles of private right and distributive justice.”<sup>85</sup> A court must be able to assert personal jurisdiction over a defendant corporation to enforce a judgment without violating the principles of due process.<sup>86</sup>

In *Republic of Argentina v. Weltover, Inc.*,<sup>87</sup> the Supreme Court “assum[ed], without deciding, that a foreign state is a ‘person’ for purposes of the Due Process Clause.”<sup>88</sup> The Court proceeded to determine whether personal jurisdiction was satisfied.<sup>89</sup> Argentina satisfied the minimum contacts test—systematic and continuous business operations—necessary to satisfy the constitutional test for personal jurisdiction enumerated in *International Shoe*.<sup>90</sup> As a result, the Court found that FSIA properly asserted jurisdiction over the Republic of Argentina, who refinanced the debts they owed to foreign creditors and attempted to reschedule the bonds, all of which resulted in Weltover, Inc., suing the Republic of Argentina for breach of contract.<sup>91</sup> The Court, however, cited *South Carolina v. Katzenbach*,<sup>92</sup> which found that “States of the Union” are not “persons” for purposes of the Due Process Clause.<sup>93</sup> The *Katzenbach* case concerned a bill in equity for determining the validity of selected provisions of the Voting Rights Act of 1965.<sup>94</sup> The States sought a declaration that these provisions were constitutional, partly because they deny due process to the States.<sup>95</sup>

Embracing *Katzenbach*, the court in *Price* reasoned that no reasonable interpretation of the word “person” can be expanded to encom-

85. *Price*, 294 F.3d at 98 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)).

86. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The Court in *International Shoe* asserted personal jurisdiction requirements for compliance with due process protection, and allowed certain entities that are not *actual*, or “natural,” persons to qualify for due process purposes, among them being private corporations. *Id.* at 316–19.

87. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

88. *Id.* at 620.

89. *Id.* at 609.

90. *Id.* at 757; see *Int'l Shoe*, 326 U.S. at 316–19.

91. *Weltover*, 504 U.S. at 610.

92. *South Carolina v. Katzenbach*, 383 U.S. 301 (1996), *abrogated by* *Shelby County v. Holder*, 133 S. Ct. 2616 (2013).

93. *Id.* at 323. One Commentator argues, however, that the reasoning in *Katzenbach* should be disregarded in the present analysis because the case was challenging the substantive provisions of congressional acts and not the jurisdictional reach of courts, which is all FSIA concerns. DELLAPENNA, *supra* note 36, at 182–83.

94. *Katzenbach*, 383 U.S. at 307.

95. *Id.* at 323.

pass the States.<sup>96</sup> Therefore, unless there was a “compelling reason to treat foreign sovereigns more favorably” than the States, it does not logically follow to treat foreign states as “persons” under the Due Process Clause.<sup>97</sup> The court in *Price* went on to explain that it would be “highly incongruous” to allow foreign nations, who are aliens to the United States Constitution, to have greater rights under the Fifth Amendment than which are afforded to domestic states.<sup>98</sup> In that same vein, the court noted that “foreign nations are the juridical equals of the [U.S.] government” and are not subjugated to the power of the U.S. government, unlike private American citizens; therefore, the foreign nations do not need the same protection from the U.S. government that the Due Process Clause guarantees to its natural citizens.<sup>99</sup> In addition, the court reasoned that foreign nations have other means of seeking judicial remedy of their disputes, namely in the International Court of Justice.<sup>100</sup>

As a result, the ruling in *Price* affirmed that foreign governments are not “persons” and do not have access to Constitutional due process protections.<sup>101</sup> Following *Price*, every court to consider whether a foreign state qualifies as a “person” has answered in the negative.<sup>102</sup> Despite this extensive judicial review, the Supreme Court itself has not addressed the question of whether the Fifth Amendment applies to foreign states for the purpose of personal jurisdiction;<sup>103</sup> nevertheless, a general consensus exists among the courts that the clause is inapplicable where foreign sovereign are concerned.<sup>104</sup> In each case,

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96. *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002) (quoting *Katzenbach*, 383 U.S. at 323–24).

97. *Id.* at 96.

98. *Id.*

99. *Id.* at 98.

100. *Id.* The purpose of the International Court of Justice is “to settle, in accordance with international law, legal disputes . . . [between foreign States] and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.” *The Court*, INT’L COURT OF JUST., <http://www.icj-cij.org/court/index.php?p1=1> (last visited Jan. 24, 2016).

101. *Price*, 294 F.3d at 99–100. The court noted, however, that the holding does not extend to “other entities that fall within the FSIA’s definition of ‘foreign state’ – including corporations in which a foreign state owns a majority interest.” *Id.*

102. *SANCHEZ*, *supra* note 9, at 288; *see, e.g.*, *GSS Group Ltd. v. Nat’l Port Auth.*, 680 F.3d 805, 817 (D.C. Cir. 2012) (finding that a Liberian government-owned corporation was, as an independent judicial entity, a “person entitled to due process protection”); *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393 (2d Cir. 2009) (finding that foreign states are not “persons” for due process purposes, and noting that the Supreme Court has accorded due process protections to privately owned foreign corporations, but whether, and to what extent, the Court would do so for state-owned foreign corporations has yet to be decided).

103. *SANCHEZ*, *supra* note 9, at 289.

104. *Id.*

the court found there were sufficient minimum contacts with the United States to allow for personal jurisdiction to be established on the part of the U.S. courts.<sup>105</sup>

In *Price*, the court declined to express an opinion as to whether agencies and instrumentalities, separate from foreign sovereigns, could be considered persons under the Due Process Clause.<sup>106</sup> The case law history of the rights of agencies and instrumentalities comes mostly from the Second Circuit and the D.C. Circuit.<sup>107</sup> Common law jurisdictions generally presume that government instrumentalities established as juridical entities, distinct and independent from their sovereign, should generally be treated as separate entities.<sup>108</sup> In *Bancec*, however, the Supreme Court addressed whether a foreign state immunity is equivalent to a foreign state for liability purposes and found that the above common law principle can be disregarded where a corporate entity is so comprehensively controlled by its majority shareholder that a “principal and agent” relationship is created.<sup>109</sup> Where this is the case, one entity may be held liable for the actions of the other.<sup>110</sup> The Court also argued in favor of public policy and against the fraud and injustice that would result if the corporate form was blindly adhered to in attributing liability.<sup>111</sup>

*Bancec* involved a bank in Cuba established by the Cuban Government as an “official autonomous credit institution for foreign trade” which had “full juridical capacity . . . of its own.”<sup>112</sup> The Cuban bank sought payment from an American bank, whose assets in Cuba were seized shortly thereafter, for Cuban sugar delivered to the United States.<sup>113</sup> The Cuban bank, *Bancec*, was later nationalized at the time of suit to recover the seized assets.<sup>114</sup> *Bancec* claimed that according to FSIA, its separate judicial status shielded it from liability for the

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105. DELLAPENNA, *supra* note 36, at 182–83; see *GSS Group*, 680 F.3d at 810 (upholding the *TMR Energy* treatment of the Port Authority as a “separate ‘person’ entitled to due process protection. That protection includes the right to assert a minimum contacts defense.”); *Frontera Res. Azer. Corp.*, 582 F.3d at 398.

106. *Price*, 294 F.3d at 99–100.

107. SANCHEZ, *supra* note 9, at 290–91.

108. *Bancec*, 462 U.S. 611, 626–27 (1983), *superseded by statute*, 28 U.S.C. § 1610(g) (2012) (creating a “terrorism exception” to the statute, which allows attachment under certain circumstances).

109. *Id.* at 629.

110. *Id.* at 619.

111. *Id.* at 629 (quoting *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939)).

112. *Id.* at 613 (alteration in original) (quoting Law No. 793, Art. 1 (1960)).

113. *Id.*

114. *Bancec*, 462 U.S. at 614–15.

actions of the Cuban government.<sup>115</sup> Although FSIA does not consider substantive liability,<sup>116</sup> the holding in *Bancec* does have an effect upon the debate concerning personhood and due process of foreign state instrumentalities.

*TMR Energy Ltd. v. State Property Fund of Ukraine* involved the application of the minimum contacts requirement of the Due Process Clause to a Ukrainian oil fund.<sup>117</sup> The D.C. Circuit Court of Appeals sought to determine whether the state fund had a constitutional status separate from the State of Ukraine.<sup>118</sup> The court followed the reasoning in *Bancec* and *Foremost-McKesson v. Islamic Republic of Iran*,<sup>119</sup> another case decided by the D.C. Circuit Court of Appeals, which held that a foreign state is subject to suit if the sovereign wields sufficient control over the instrumentality to create a principal to agent relationship.<sup>120</sup> The court in *TMR Energy* determined the fund's status as a "person" for the purposes of the Due Process Clause depends on whether the State of Ukraine exerted "sufficient control" over the fund to qualify it as an agent of the state.<sup>121</sup> The court did not define the standard of "sufficient control," but it followed the rationalization in *Foremost-McKesson*, where an agency relationship has been created between the sovereign and the corporation.<sup>122</sup> If the threshold for "sufficient control" is attained, then "there is no reason to extend [to an agency] . . . a constitutional right that is denied to the sovereign itself."<sup>123</sup> The court found that the fund was "an agent of the State, barely distinguishable from an executive department of the government," and thus was not an independent juridical entity."<sup>124</sup> The fund, therefore, like the State of Ukraine, was "not a 'person' for the

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115. *Id.* at 620; see *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 300–01 (D.C. Cir. 2005). The *TMR* court dismissed their prior "core functions" test, whereby "an entity that is an 'integral part of a foreign state's political structure' is to be treated as the foreign state itself," whereas an entity with a "structure and core function" that is commercial is to be treated as an "agency or instrumentality of the state." *Id.* at 300 (quoting *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994)).

116. See SANCHEZ, *supra* note 9, at 290–91.

117. *TMR*, 411 F.3d at 298.

118. *Id.* at 301.

119. *Id.* at 301; *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990).

120. *Foremost-McKesson*, 905 F.2d at 446–47. This holding followed the reasoning in *Bancec*. See *Bancec*, 462 U.S. at 626–27.

121. *TMR*, 411 F.3d at 301 (quoting *Foremost-McKesson*, 905 F.2d at 446–47).

122. *Id.* at 301–02.

123. *Id.* at 301. This reasoning is similar to the court's reasoning in *Price* and *Katzenbach* concerning due process for foreign states. See *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002) (citing *Katzenbach*, 383 U.S. at 323–24).

124. *TMR*, 411 F.3d at 302.



purposes of the due process clause” and could not assert minimum contacts for U.S. jurisdiction.<sup>125</sup>

The only judicial opinion to directly address the due process rights of a foreign state’s agencies and instrumentalities is *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Department of Treasury*.<sup>126</sup> The District Court of D.C. recognized that Cubaexport, a corporation that exports food and other products from Cuba, was a “state-owned enterprise” and was governed in accordance with the instructions issued to it by the Cuban Ministry of Foreign Trade in line with the state’s foreign trade policy.<sup>127</sup> Despite this governance structure, the district court applied the “sufficient control” test from *TMR Energy* and determined that Cubaexport was not an agent of the state.<sup>128</sup> The court reached this conclusion by characterizing Cubaexport as a corporation that “engages in commercial operations, not governmental functions.”<sup>129</sup> The court continued, in an obvious reference to FSIA’s definition of an agency or instrumentality, that Cubaexport “enters into contracts in its own name, pays taxes to Cuba, and applied for registration of the HAVANA CLUB trademark [in the United States] in its own name.”<sup>130</sup> Though the court relied upon the previously mentioned case law in its analysis, it merely distinguished the facts of the prior cases, which it found were not synonymous with the facts of the case at issue.<sup>131</sup> A more in-depth due process analysis can be found in the recent case, *Burwell v. Hobby Lobby Stores, Inc.*

### C. *Burwell v. Hobby Lobby Stores, Inc.*

The threshold requirement of the Due Process Clause is that it must apply to “persons.”<sup>132</sup> The 2014 Supreme Court of the United States decision in *Burwell v. Hobby Lobby Stores, Inc.* formally extended due process protections to corporations, or “artificial entities.”<sup>133</sup> The issue in *Hobby Lobby* was whether the Religious Freedom Restora-

125. *Id.*

126. *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dept. of Treasury*, 606 F. Supp. 2d 59, 78–80 (D.C. Cir. 2009).

127. *Id.* at 76.

128. *Id.* (quoting *TMR*, 411 F.3d at 301).

129. *Id.* at 76–77. This distinction harkens back to the original idea of restrictive immunity and the purpose of FSIA: foreign states are immune for their public actions, not their commercial, private ones. See 28 U.S.C. § 1602 (2012).

130. *Empresa Cubana*, 606 F. Supp. 2d at 77; see 28 U.S.C. § 1603(b) (2012).

131. *Empresa Cubana*, 606 F. Supp. 2d at 77–78.

132. U.S. CONST. amends. V, XIV.

133. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

tion Act of 1993<sup>134</sup> (RFRA) permitted the U.S. Department of Health and Human Services (HHS) to require that corporations, such as Hobby Lobby and Conestoga Wood Specialties, provide health insurance coverage for contraception that violated the genuinely-held religious beliefs of the companies' owners under the regulations established in the Patient Protection and Affordable Care Act (ACA).<sup>135</sup> The Supreme Court held that when applied to closely held corporations, the ACA regulations that imposed the contraceptive mandate violated the RFRA.<sup>136</sup>

Hobby Lobby Stores, an arts and crafts company founded and owned by the Evangelical Christian Green family, filed an action against the contraception rule in the ACA, which required that all U.S. Food and Drug Administration approved contraceptives be covered by employer-sponsored health insurance plans.<sup>137</sup> HHS specified the types of preventative care that should be covered in these employer-sponsored health insurance plans.<sup>138</sup> HHS, however, also exempted religious employers, non-profit organizations that object to this required service, employers providing grandfathered plans, and employers with fewer than fifty employees from this component of the ACA.<sup>139</sup> Hobby Lobby argued that they should not be forced to provide funding for emergency contraceptives because it violated their rights under the RFRA.<sup>140</sup> The RFRA, which Congress passed in 1993, requires strict scrutiny when a neutral law of general applicability substantially burdens a *person's* exercise of religion.<sup>141</sup> The Supreme Court was asked whether for-profit companies, such as Hobby Lobby, have a right to exercise religious freedom as a "person" under the RFRA.<sup>142</sup>

134. Pub. L. No. 103-141, 107 Stat. 1488, (codified as amended at 42 U.S.C. § 2000bb-4 (2012)).

135. *Id.* at 2754–55. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended at 42 U.S.C. § 300gg-11 (2012)). The ACA requires certain employers' group health plans to provide "preventive care and screenings" for women "without any cost sharing requirements." 42 U.S.C. § 300gg-13(a)(4) (2012).

136. *Hobby Lobby*, 134 S. Ct. at 2785.

137. *Hobby Lobby*, 134 S. Ct. at 2765, 2775; see also 42 U.S.C. § 300gg-13(a)(4) (2012).

138. *Hobby Lobby*, 134 S. Ct. at 2789.

139. *Id.* at 2763–64; see 26 U.S.C. § 4980H(c)(2) (2012); 42 U.S.C. § 18011(a)–(e) (2012); 45 C.F.R. § 147.131(b) (2014).

140. *Hobby Lobby*, 134 S. Ct. at 2766; see Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2012).

141. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a) (2012).

142. *Hobby Lobby*, 134 S. Ct. at 2769.

The Court analyzed the personhood of a corporation because the RFRA provisions employ the term “persons.”<sup>143</sup> Employing the perfunctory statutory interpretation method, the Court turned to the Dictionary Act of 1871.<sup>144</sup> The Dictionary Act instructs courts to apply definitions of certain common words (including “person”) to all federal statutes.<sup>145</sup> The Dictionary Act, however, has not been applied in a uniform manner by the courts since the time of its enactment.<sup>146</sup> Nevertheless, the Supreme Court applied the Dictionary Act in *Hobby Lobby*.<sup>147</sup> The Dictionary Act states that “the wor[d] ‘person’ . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>148</sup> On account of the lack of evidence in the Constitution indicating otherwise, the word “person” has a different meaning than that in the Dictionary Act, the Act is highly persuasive that the word “person” in the Constitution applies to corporations as well as individuals.<sup>149</sup>

The Court examined the justification for the familiar legal fiction that corporations are legal entities and “persons.”<sup>150</sup> The doctrine was first affirmed in 1888 in *Pembina Consolidated Silver Mining Co. v. Pennsylvania*,<sup>151</sup> in which the Court stated, “Under the designation of ‘person’ there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose and permitted to do business under a particular name and have a succession of members without dissolution.”<sup>152</sup> The doctrine of corporate personhood has evolved significantly from its first iteration over 125 years ago.<sup>153</sup> Indeed, the first legally recognized corporate

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143. *Id.* at 2767 (quoting 42 U.S.C. § 2000bb-1(a)-(b)). The RFRA prohibits the government from “substantially burden[ing] a *person’s* exercise of religion even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000bb-1(a) (emphasis added).

144. *Hobby Lobby*, 134 S. Ct. at 2768.

145. Emily J. Barnett, *Hobby Lobby and the Dictionary Act*, 124 *YALE L.J.F.* 11, 11–12 (2014) (citing 1 U.S.C. § 1 (2012)).

146. *Id.* at 12.

147. 1 U.S.C. §1 (2012).

148. *Hobby Lobby*, 134 S. Ct. at 2768 (alteration in original) (quoting 1 U.S.C. § 1).

149. *Hobby Lobby*, 134 S. Ct. at 2768; Barnett, *supra* note 145, at 12; *see* U.S. CONST. amend. V.

150. *Hobby Lobby*, 134 S. Ct. at 2768.

151. 125 U.S. 181 (1888).

152. *Id.* at 189.

153. *See* Rick Ungar, *Founding Fathers Spinning in Their Graves as SCOTUS Rules That Corporations Are People Too*, *FORBES* (June 30, 2014, 12:21 PM), <http://www.forbes.com/sites/rick-ungar/2014/06/30/founding-fathers-spinning-in-their-graves-as-scotus-rules-that-corporations-are-people-too/2/> (illustrating the historical evolution of the legal corporate personhood doctrine). Prior to *Hobby Lobby*, the case that provided the most sweeping expansion of corporate personhood was *Citizens United v. Federal Election Commission*, which granted corporations the right to freedom of speech guaranteed under the First Amendment of the Constitution. 558 U.S.

constitutional right flowed from the Due Process Clause of the Fourteenth Amendment.<sup>154</sup> The *Hobby Lobby* Court reasoned that the purpose of this fiction is to ensure protection for human beings.<sup>155</sup> A corporation is composed solely of a group of human beings organized to achieve a common end, typically profits, but not strictly so.<sup>156</sup> Protecting corporations from government expropriation of their privately held property without compensation protects all human beings who “have a stake in the corporation’s financial well-being.”<sup>157</sup> It is imperative, therefore, to discuss what is meant when discussing “foreign corporations,” and how they differ from “domestic corporations.”

#### D. Foreign Corporations

The Internal Revenue Code uses the term “foreign” to simply mean “a corporation or partnership which is not domestic.”<sup>158</sup> Delaware’s definition of a “foreign corporation” is “any corporation created by, or organized under, the laws of another state, government, or country.”<sup>159</sup> The etymology of the word “corporation” includes the Latin word *corpus*, meaning body.<sup>160</sup> With this origin in mind, the law in the

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at 310; Alex Park, *10 Supreme Court Rulings – Before Hobby Lobby – That Turned Corporations Into People*, MOTHER JONES (July 10 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/07/how-supreme-court-turned-corporations-people-200-year-saga>; see U.S. CONST. amend. I. During the 2008 presidential elections, the Political Action Committee “Citizens United” sought to broadcast television advertisements criticizing presidential candidate Hillary Rodham Clinton. *Citizens United*, 558 U.S. at 319–21. Since doing so would violate the 2002 Bipartisan Campaign Reform Act, which prohibited corporations and unions from paying for media that mentioned any candidate immediately preceding elections, the Supreme Court of the United States made the spending restriction unconstitutional, and thus gave non-persons free speech rights. *Id.* at 320–21, 347, 361, 372; see 2002 Bipartisan Campaign Act, 2 U.S.C. § 431 (2012); see Nick Bentley, *What is Citizens United?*, RECLAIM DEMOCRACY, <http://reclaimdemocracy.org/who-are-citizens-united/> (last visited Aug. 12, 2016).

154. Paul R. Hale, *It Is Hard to Make Everyone Happy: The Rights Gained and Lost by Companies and Employees in the Context of the Affordable Care Act Contraception Mandate*, 39 S. ILL. U. L.J. 323, 326 (2015).

155. *Hobby Lobby*, 134 S. Ct. at 2768.

156. *Id.*

157. *Id.*

158. 26 U.S.C. § 7701 (2012). This Comment uses the IRS definition of a foreign corporation, as well as the definition in the Delaware Code, for their simplicity.

159. 36 AM. JUR. 2D *Foreign Corporations* § 1 (2011). This is the same definition used in the Delaware Code, which states that “the words ‘foreign corporation’ mean a corporation under the laws of any jurisdiction other than this State.” DEL. CODE ANN. tit. 8, § 371(a) (2015). Delaware is known throughout the United States as the state in which it is best to register a corporation, because Delaware has the most favorable laws for businesses. See E. Norman Veasey, *Musings From the Center of the Corporate Universe*, 7 DEL. L. REV. 163, 165, 167–68 (2004). For the purposes of this Comment, the definition is somewhat adapted so that “this State” is assumed to refer to the United States as a whole, instead of just the State of Delaware.

160. Hale, *supra* note 154, at 323.

United States has recognized that a corporation can do almost all of the same things that a natural person can do.<sup>161</sup>

*Helicopteros Nacionales de Colombia, S. A. v. Hall* is a landmark case that gave a private foreign corporation the right to access Constitutional due process protections.<sup>162</sup> In its reasoning, the U.S. Supreme Court relied upon the legal concept of personal jurisdiction, also known as *in personam* jurisdiction.<sup>163</sup> *Helicopteros Nacionales* is the preeminent case concerning the requirements of the Due Process Clause of the Fourteenth Amendment as they relate to a foreign corporation.<sup>164</sup> In *Helicopteros*, the plaintiff brought a wrongful death action in a Texas state court against a Colombian corporation.<sup>165</sup> The matter was appealed up to the Supreme Court which determined that the Colombian corporation's contacts with Texas were insufficient to satisfy the requirements of the Due Process Clause necessary to allow the court to assert personal jurisdiction over the corporation.<sup>166</sup> The Court determined that, because the wrongful death claims did not arise out of and were not related to the contacts of the Colombian corporation with Texas, jurisdiction could be asserted under the Fourteenth Amendment only on the basis of general personal jurisdiction.<sup>167</sup> The Court required that the due process protections be satisfied before it would hear the case.<sup>168</sup>

When a defendant is not physically present within the territory of the forum, he must have certain minimum contacts with the forum to

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161. *Id.* For example, a corporation can bring lawsuits, buy and sell property, enter into contracts, pay taxes, commit crimes, and enjoy freedom of speech under the First Amendment. *Id.* at 323–24. Corporations are restricted, however, by their inability to vote. *Id.* at 324. Nonetheless, corporations have special power in their ability to lobby for legislation that will benefit them. Binyamin Applebaum, *What the Hobby Lobby Ruling Means for America*, N.Y. TIMES (July 22, 2014), <http://www.nytimes.com/2014/07/27/magazine/what-the-hobby-lobby-ruling-means-for-america.html>.

162. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 415–18 (1984). The Court recognized, “Even when the cause of action does not arise out of or relate to the foreign corporation’s activities in the forum State, due process is not offended by a State’s subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.” *Id.* at 414; see 1 BALDWIN’S OHIO PRAC. CIV. PRAC. § 4.3:13, Westlaw (database updated Dec. 2014).

163. *Helicopteros Nacionales*, 466 U.S. at 408.

164. *Id.*

165. *Id.* at 419, 412.

166. *Id.* at 418–19.

167. *Id.* at 416–19; see also BALDWIN’S *supra*, note 162. General jurisdiction “allows a defendant to be sued for any activities it has committed anywhere,” and is thus a hard standard for a plaintiff to prove. William Baud, *Opinion Recap: A Stricter View of General Jurisdiction*, SCOTUS BLOG (Jan. 15, 2014, 11:30 AM), <http://www.scotusblog.com/2014/01/opinion-recap-a-stricter-view-of-general-jurisdiction/>.

168. *Helicopteros*, 466 U.S. at 413.

satisfy “traditional notions of fair play and substantial justice.”<sup>169</sup> This means litigation can only be fair, as due process alludes to, if service upon the defendant is “reasonably calculated to give him notice of the proceedings, and as provides an opportunity to be heard” in the case.<sup>170</sup> In *Helicopteros*, the Supreme Court treated an alien defendant headquartered in a foreign country the same way it would treat a defendant in a domestic state.<sup>171</sup> Unlike an individual, however, a corporation’s presence within a domestic jurisdiction can be ascertained only by “those activities of the corporation’s agent within the state” which courts can use to satisfy the demands of due process.<sup>172</sup> Since the Judiciary has not yet provided a consistent and comprehensive answer regarding the due process protections afforded to the agencies and instrumentalities of foreign states, it is worth considering another statute, the Immunity from Judicial Seizure<sup>173</sup> statute, which does afford the agencies and instrumentalities due process protections.<sup>174</sup>

### *E. Immunity from Seizure Statute*

The Immunity from Judicial Seizure statute was enacted in 1965, vesting in the United States’ Executive Branch the “authority to grant a work of art or other object of cultural significance that is on loan for temporary exhibition or display, when it is within the national interest of the United States, immunity from seizure by U.S. courts.”<sup>175</sup> “The United States was the first country to introduce immunity from seizure for cultural objects.”<sup>176</sup> One of the reasons the legislation arose was a proposed loan of objects from Russia to the University of Virginia during the 1960s, whereby the Soviet Government refused to process the loan unless the United States implemented statutory protections for the loaned Soviet art.<sup>177</sup> IFJS is administered by the De-

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169. *Id.* at 420 (Brennan, J., dissenting) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

170. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

171. DELLAPENNA, *supra* note 36, at 187.

172. *Int’l Shoe*, 326 U.S. at 316–17.

173. Immunity from seizure under judicial process of cultural objects imported for temporary exhibit or display, Pub. L. 89-259, 79 Stat. 985 (codified as amended at 22 U.S.C. § 2459 (2012)).

174. *Id.* § 245(a); see NOUT VAN WOUDEBERG, STATE IMMUNITY AND CULTURAL OBJECTS ON LOAN 152–53 (2012).

175. Sheppard Mullin, *Museum Loans – Part Two*, ART LAW BLOG (Apr. 23, 2013), <http://www.artlawgallery.com/2013/04/articles/art-museums-and-cultural-organizations/museum-loans-part-two/>.

176. WOUDEBERG, *supra* note 174, at 152.

177. *Id.* It has also been suggested that IFJS was passed as a reaction to the Second Hick-enlooper Amendment, 22 U.S.C. § 2370(e)(2), which reduced the efficacy of the judicial act of

partment of State under the Mutual Educational and Cultural Exchange Program.<sup>178</sup> This statute “fulfills an important role in fostering the exchange of art and cultural works between the United States and other nations.”<sup>179</sup> IFJS was passed to address situations in which, “[a]s a condition to the loan, [a foreign nation] insisted on a grant of immunity from seizure as protection against [its] former . . . citizens who had valid claims to the title of the works.”<sup>180</sup> Thus, a litigant with a claim to artwork may not seize the sovereign’s property while the property is within the United States.<sup>181</sup> IFJS also prevents prejudgment attachments for jurisdiction or for security on a potential judgment, prejudgment injunctions, and post-judgments attachments.<sup>182</sup>

IFJS requires that the covered objects have cultural significance, that an agreement exists between the lender and “one or more cultural or educational institutions within the United States,” and that the loan must be limited to temporary exhibition in the United States at a cultural exhibition “administered, operated, or sponsored, without profit, by any such cultural or educational institution.”<sup>183</sup> “Immunity from seizure maybe granted under two fundamental approaches: either protection is [deemed] automatic when recognized criteria are met, or advanced application is required,” after which the application is reviewed by the Department of State.<sup>184</sup> As a prerequisite, museums must apply for this protection, at which point the U.S. State Department may issue a notice that a certain object is of the cultural significance required under IFJS.<sup>185</sup> Therefore, the temporary display of the object within the United States is deemed to be in the national

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state doctrine in preventing the seizure of art works owned by foreign sovereigns. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 310 (D.C. Cir. 2005).

178. *Id.*

179. *Id.* Between 1995 and 2005, “the State Department . . . published immunity notices under § 2459 for more than 600 exhibits.” *Id.*

180. *Id.* (alteration in original) (quoting Rodney M. Zerbe, *Immunity from Seizure for Artworks on Loan to United States Museums*, 6 NW. J. INT’L L. & BUS. 1121, 1124 n.21 (1985)); see *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 236–37 (S.D.N.Y. 2009) (concerning the application of IFJS to a museum exhibiting a painting that may have been stolen from its original owners). *Portrait of Wally* is considered the preeminent IFJS case because the lending museum failed to apply for immunity from seizure under the federal legislative system, and as a result, the paintings were seized after their former owners sought a subpoena. WOUDEBERG, *supra* note 174, at 184–89.

181. *Malewicz*, 362 F. Supp. 2d at 311.

182. Mullin, *supra* note 175; see 22 U.S.C. § 2459 (2012).

183. 22 U.S.C. § 2459(a).

184. WOUDEBERG, *supra* note 174, at 7.

185. *Id.* at 153.

interest, and the object becomes exempt from seizure while it is in the country.<sup>186</sup>

The application must include: (1) a schedule of all the important items; (2) the loan agreements between the foreign owner or custodian and the U.S. cultural or educational institutions; (3) any related commercial agreements; (4) a “[l]ist of expected venues and dates of exhibition, especially the date of arrival into the U.S.; (5) a “[s]tatement indicating that the exhibition does not provide profit to the borrowing or participating institutions; (6) a “[p]rovenances statement concerning the works to be borrowed; (7) a “Cultural Significance Statement” concerning the imported objects; and (8) the educational and cultural nature of the U.S. participants.<sup>187</sup> The United States in its *amicus* brief for *Malewicz*, stated that at the time of enactment, the primary concern for sovereigns was “the exercise of *in rem* and *quasi in rem* jurisdiction over artwork to resolve claims as to its ownership, because *in personam* jurisdiction over foreign states was generally not at issue.”<sup>188</sup> Nevertheless, the District Court of D.C. has determined that IFJS protects an object from being seized, but not from suit.<sup>189</sup>

Outside of the United States, the majority of museums are considered state entities, that receive “most or all of their funding from public sources.”<sup>190</sup> The U.S. courts have been inconsistent in their IFJS classification of these state-funded museums;<sup>191</sup> in *Malewicz v. City of Amsterdam*, the District Court of D.C. determined that the Stedelijk Museum, in Amsterdam, was a political subdivision.<sup>192</sup> However, the Ninth Circuit a few years later in *Cassirer v. Kingdom of Spain*, treated the Thyssen-Bornemisza Museum in Madrid as an agency of the Kingdom of Spain.<sup>193</sup> Nevertheless, a majority of the cases litigated under IFJS classify foreign-state-funded museums as agencies

186. *Id.*

187. Stephen J. Knerly, Jr. & Kristen L. Gest, *International Loans State Immunity and Anti-seizure Laws*, A.L.I.-A.B.A. 1, 9–10 (2009). There is no official application form; rather, the applicant must instead write a letter to the State Department.

188. Brief for the United States as Amicus Curiae in Support of Appellant at 13, *Leonard Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (2007) [hereinafter “Brief for the U.S.”] *appeal dismissed* by 2008 WL 2223219 (D.C. Cir. May 14, 2008), No. 07-5247 (Jan. 28, 2008).

189. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 311–12 (D.C. Cir. 2005).

190. PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW – CASES AND MATERIALS* 221 (3d ed. 2012).

191. *See, e.g.*, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1021 (9th Cir. 2010) (determining that a Madrid museum was an agency of the Kingdom of Spain); *Malewicz v. City of Amsterdam (Malewicz II)*, 517 F. Supp. 2d 322, 328 (D.D.C. 2007) (hearing on appeal, the court determined that an Amsterdam museum was a political subdivision).

192. *Malewicz II*, 517 F. Supp. 2d at 328.

193. *Cassirer*, 616 F.3d at 1021.



and instrumentalities for the purposes of FSIA.<sup>194</sup> IFJS is a perfect parallel statute to FSIA for the purpose of examining due process protections afforded to foreign sovereign agencies and instrumentalities.

### III. ANALYSIS

Foreign state agencies and instrumentalities should be afforded the constitutional due process protections currently available to both foreign and domestic corporations. The first Section analyzes how, in *Hobby Lobby*, the Supreme Court of the United States defined corporate personhood in a domestic context.<sup>195</sup> The second Section applies the judicial precedent concerning foreign sovereign agencies and instrumentalities, explored in the background, to the *Hobby Lobby* analysis and characterization of corporations.<sup>196</sup> The final Section compares the framework through which agencies and instrumentalities of a foreign sovereign are afforded due process protections with the IFJS framework in order to explain why the FSIA should afford the same due process protections.<sup>197</sup>

#### A. *Hobby Lobby, Inc. & Corporate Personhood*

The FSIA definition of agencies and instrumentalities consists of corporations, and other bodies.<sup>198</sup> The question of whether foreign agencies and instrumentalities are entitled to due process protections rests primarily upon whether they are classified as “persons” according to the Constitution. The constitutional framework analysis that the *Hobby Lobby* court applied to a corporation can be employed when considering the constitutional rights of a foreign-sovereign-owned corporation or agency.<sup>199</sup> The issue in *Hobby Lobby* was whether the RFRA permitted HHS to require closely held corporations, pursuant to HHS’ rulemaking authority under the ACA, to provide employee health insurance coverage for contraception, for which the use of such contraceptives violated the corporate owners’ genu-

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194. See, e.g., *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785–86 (7th Cir. 2011) (explaining that the FSIA immunity against attachment is grounded in the common law principle that a foreign state’s property in the United States is presumed immune from attachment); *Cassirer*, 616 F.3d at 1022 (holding that FSIA does not require the foreign state against whom the action is filed to be the entity that took the property in question); *Altmann v. Rep. of Austria*, 142 F. Supp. 2d 1187, 1204 (2001) (holding that the museum’s change in structure does not remove the court’s subject matter jurisdiction because the events at the center of the suit occurred before the change in structure).

195. See *infra* notes 198–221 and accompanying text.

196. See *infra* notes 222–54 and accompanying text.

197. See *infra* notes 255–317 and accompanying text.

198. See *supra* note 34 and accompanying text.

199. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

inely held religious beliefs.<sup>200</sup> The Supreme Court held that when applied to closely held corporations, the ACA regulations that imposed the contraceptive mandate violated the RFRA.<sup>201</sup> The Court, with the support of the Dictionary Act, found that the RFRA applies “equally to for-profit corporations” as it does to natural persons.<sup>202</sup> Justice Alito, writing for the majority, reasoned that furthering the religious freedom of corporations “also furthers individual religious freedom.”<sup>203</sup> In this way, the Supreme Court equated for-profit corporations with “personhood” in a constitutional analysis of religious freedom, and thus strengthened the argument that corporations are “persons” and may thus be eligible for due process protection, at least as far as domestic corporations are concerned.

The Court used expropriation of property as an example of the individual human nature of corporations.<sup>204</sup> It was a direct attempt to draw a parallel between the Due Process Clause and the rights afforded to corporations if they are considered “persons.”<sup>205</sup> The *Hobby Lobby* decision certainly changed the discourse about the role of corporations in society by piercing through the maxim that corporations are persons solely because they are recognized as legal entities. Instead, the Supreme Court looked to the human factor inherent in a corporation as possible justification for such an adage.<sup>206</sup> Justice Alito noted, somewhat facetiously, that “[c]orporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”<sup>207</sup>

While *Hobby Lobby* involved a domestic corporation, the fundamental organization of corporations means that it should, nevertheless, be applicable to international corporations when they seek litigation in United States courts. In part, such an enlargement of

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200. *Id.* at 2754. The ACA requires certain employers’ group health plans to provide “preventive care and screenings” for women without any “cost sharing requirements.” *Id.* at 2762 (quoting 42 U.S.C. § 300gg–13 (a)(4) (2012)).

201. *Id.* at 2785; see 1 U.S.C. § 1 (2012) (defining “person” and “whoever” as including corporations, associations, firms, companies, partnerships, societies, and individuals).

202. *Hobby Lobby*, 134 S. Ct. at 2769.

203. *Id.* (quoting *Corps. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1986) (Brennan, J., concurring)).

204. *Id.* at 2768.

205. U.S. CONST. amends. V, XIV, § 1. The Constitution provides that “no person shall . . . be deprived of life, liberty, or property without due process of law.” *Id.*

206. Sandeep Gopalan & Akshaya Kamalnath, *Mandatory Corporate Social Responsibility as a Vehicle for Reducing Inequality: An Indian Solution for Piketty and the Millennials*, 10 Nw. J. L. & Soc. POL’Y 34, 41 (2015).

207. *Hobby Lobby*, 134 S. Ct. at 2768 (quoting *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health and Human Servs.*, 724 F.3d 277, 385 (3d Cir. 2013), *rev’d by Hobby Lobby*, 134 S. Ct. at 2768).

*Hobby Lobby's* scope is natural because judicial decisions in the United States hinge upon precedent, and all corporations should be treated equally by U.S. courts to ensure uniformity.<sup>208</sup> More importantly, the Court left the holding in *Hobby Lobby* open-ended and expansive, providing corporations with the potential to justify a right to privacy against regulatory scrutiny, or even claim the Second Amendment right to bear arms.<sup>209</sup> Justice Alito stated in the decision that “the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees.”<sup>210</sup> Just as these shareholders and officers are shielded from liability by the corporate legal organization of their business, so too do foreign-sovereign-owned agencies and instrumentalities enjoy “the shield of separate corporate status” from their sovereign as well as presumptive immunity from suit.<sup>211</sup> While international foreign-sovereign-owned corporations may look like a beast with another name, they are quite similar to domestic corporations, to the point where pivotal judicial decisions like *Hobby Lobby* will affect foreign corporations as much as domestic ones. Both domestic and international corporations must follow the laws of incorporation in their country of origin, function under similar rules, and are organized with the same structure.<sup>212</sup>

The *Hobby Lobby* decision was meant to apply narrowly and to be limited to only close, publicly held corporations.<sup>213</sup> This is because in coming to their conclusion on the right of closely held corporations to freedom of religion, the Court was forced to redefine, or at least establish, a more comprehensive definition of corporate personhood, namely that “[a] corporation is simply a form of organization used by

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208. *Precedent*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/precedent.html> (last visited Aug. 12, 2016).

209. Applebaum, *supra* note 161.

210. *Hobby Lobby*, 134 S. Ct. at 2755.

211. Riblett, *supra* note 55, at 3. Due to this “dual protection,” Riblett proposed that the term “agencies and instrumentalities” should be removed from FSIA definition of a foreign state and should not be entitled to immunity, but still retain their legal separateness. *Id.* at 3–4.

212. Adam Dowdney, *Corporate Governance in the UK and U.S. Comparison*, METRO. CORP. COUNSEL (Dec. 1, 2015), <http://www.metrocorpcounsel.com/articles/6173/corporate-governance-uk-and-us-comparison>. There has been a “measure of convergence” in corporate governance internationally, because of the standards required by international investors and capital markets, in addition to initiatives by the World Bank and the Organization for Economic Co-operation and Development to provide a framework for corporate governance. *Id.*

213. CYNTHIA BROWN, CONG. RESEARCH SERV., R43654, FREE EXERCISE OF RELIGION BY CLOSELY HELD CORPORATIONS: IMPLICATIONS OF *BURWELL V. HOBBY LOBBY STORES, INC.* 3 (2015) (noting that the Court’s determination that RFRA extends to for-profit corporations is bound to have untoward effects); see *Hobby Lobby*, 134 S. Ct. at 2797 (Ginsburg, J., concurring).

human beings to achieve desired ends.”<sup>214</sup> Under the law of non-contradiction, one of the three classical laws of thought, the terms “corporation” or “corporate personhood” cannot have different meanings when applied to publicly held, for-profit corporations, closely held corporations, and not-for-profit corporations.<sup>215</sup>

In addition, the majority’s explanation of the Dictionary Act’s definition of “person” as indistinguishable between different types of corporations according to the company’s value, which also suggests that it may not differentiate between types of corporations according to other criteria (e.g., size or public trading status), supports the extension of the Court’s narrow holding.<sup>216</sup> Ultimately, then, *Hobby Lobby* has destroyed the legal fiction of “corporate personhood,” and instead relegated a corporation to a sum of its parts, or a legal construction that can be overcome.<sup>217</sup> The Supreme Court shattered the long-standing legal fiction of what defines a corporation.<sup>218</sup> If the legal understanding of a corporation, namely that the corporation is merely the sum of the people controlling it, then a foreign-sovereign-owned agency or instrumentality does not automatically point to being a servant to the state itself, but may instead be a corporation in its own right. This would mean that instead of the agency or instrumentality being associated with the foreign state, the ownership is so limited or so distinct from policy that it is a corporation first, and foreign state entity second. Ultimately, the classification will turn on the amount of control exerted by a foreign state over an agency or instrumentality, and whether this control, or lack of it, grants those foreign state-owned agencies or instrumentalities the right to due process protection. In sum, *Hobby Lobby* changed the conversation regarding personhood for non-natural persons, and held that corporations are part of the traditional legal understanding of “person.”<sup>219</sup> This conclusion supports the rationale for giving due process protections to corpora-

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214. *Hobby Lobby*, 134 S. Ct. at 2768–70.

215. Patrick Wiseman, *Ethical Jurisprudence*, 40 *LOY. L. REV.* 281, 297 (1994). The law of non-contradiction states that contradictory statements cannot both be true in the same sense at the same time (not both P and not-P). *Id.* Aristotle’s *Metaphysics* is traditionally seen as the source of this law. *Id.* at 298. As Aristotle stated, “the same attribute cannot at the same time belong and not belong to the same subject and *in the same respect.*” *Id.* (quoting *ARISTOTLE’S METAPHYSICS*, BOOK IV, Ch. 4, 1005b19-21 (Hippocrates G. Apostle trans., 1979)).

216. Brown, *supra* note 213, at 3.

217. See Ungar, *supra* note 153 (“A corporation now not only enjoys many of the same protections as a person under our law but is crafted to remove obligations a person would ordinarily have but for the shield of the corporate entity such as personal liability for a corporation’s bad behavior.”).

218. *Id.*

219. *Hobby Lobby*, 134 S. Ct. at 2768–69.

tions, including the agencies and instrumentalities of foreign sovereigns because historically courts have held that only natural persons have the right to due process.<sup>220</sup> The connection that sovereign-owned agencies and instrumentalities have to be sovereign is the final causal link between foreign-owned corporations and due process protections.

### B. *Sovereign Control Over an Agency or Instrumentality*

The distinction between natural and artificial persons is similar to the difference between a sovereign-owned agency or instrumentality and corporation; at least so far as it is defined by *Hobby Lobby*—they are both at their center abstract concepts with the rights of citizens. In the case of *Verlinden B.V. v. Central Bank of Nigeria*,<sup>221</sup> the Supreme Court noted that when one of the enumerated exceptions to immunity in FSIA is applied, “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.”<sup>222</sup> It is unclear, however, whether the term “private individual” in FSIA was meant to refer to a private individual that is an American citizen and their corresponding rights, or a foreign individual, who holds significantly fewer rights to access the U.S. judicial system.<sup>223</sup> Just over twenty years later, *Hobby Lobby* provided a new definition of a corporation and its rights, seemingly providing corporations with the same right to constitutional protections as “natural” persons.<sup>224</sup> Part of the debate about whether corporations have the right to due process protections draws on the distinction between “natural” and “artificial” personhood, of which the corporation is certainly the latter.<sup>225</sup> This academic distinction is blurred beyond recognition now that corporations are recognized as being merely the sum of their parts.<sup>226</sup>

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220. See, e.g., *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 85–6 (2002) (determining that Libya, as a foreign state, was not a “person” as defined by the Due Process Clause).

221. 461 U.S. 480 (1983).

222. *Id.* at 488–89 (1983) (quoting 28 U.S.C. § 1604 (2012)).

223. *United States v. Verdugo-Urguidez*, 494 U.S. 259, 271, 274–75 (1990) (finding that aliens receive Constitutional protections only when they have substantial connections with the United States); see RICHARD H. FALLON, *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW* 250 (2004) (explaining that non-citizens in the United States do not receive the same rights as American citizens).

224. *Hobby Lobby*, 134 S. Ct. at 2768.

225. “*Liberty*,” Justia, <http://law.justia.com/constitution/us/amendment-14/06-definitions.html> (last visited Oct. 13, 2016).

226. See Ungar, *supra* note 153.

In *TMR*, the D.C. Circuit court formulated the sovereign-control test, which determined whether the veil of an agency or instrumentality should be pierced,<sup>227</sup> and employed a case-by-case analysis of whether the State exerted *sufficient control* over the entity to make it an agent of the State, at which point there would be “no reason to extend . . . a constitutional right that is denied to the sovereign itself.”<sup>228</sup> This test can still stand as functional in light *Hobby Lobby* because the amount of control that a foreign state exerts is integral in determining whether the agency or instrumentality is a legal entity in its own right, without its connection to the state to give it legitimacy.<sup>229</sup> An observer can rightly assume that a corporation is merely another branch of government when its close connection with the sovereign has been functionally subsumed under the sovereign as merely another branch of the government. On the other hand, if the corporation has limited contacts with the state, and is controlled to a lesser extent, it can be assumed to be a corporation first, and a state entity second. In *Hobby Lobby*, protecting the corporate right to freedom of religion thus protects the religious liberty of the humans who own and control the corporations.<sup>230</sup> *Hobby Lobby*, as a closely held corporation, the owners of which control its board of directors and hold all of its voting shares,<sup>231</sup> can be juxtaposed with corporations like *TMR Energy*, which is so extensively controlled by the State of Ukraine that the D.C. Circuit Court of Appeals found that the corporation was “not a juridical entity distinct from the State itself.”<sup>232</sup> Not only would that circumstance line up with current jurisprudence, but the entity would then fall neatly within the category of foreign corporation, for which there is evidence of due process rights, although pri-

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227. *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 301–02 (D.C. Cir. 2005). The Circuit Court relied upon the agency analysis in *Bancec* and *Foremost-McKesson* to determine that the State of Ukraine had plenary control over the State Property Fund. *Id.* at 301. The court reasoned that SPF’s chairman is appointed by the President of Ukraine subject to the consent of the Supreme Rada, and SPF’s expenses are paid from the budget of the State of Ukraine. The court found that SPF is an agent of the State, “barely distinguishable from an executive department of the government.” *Id.*

228. *Id.* at 301. The test has been followed most recently in a similar situation in *GSS Group Ltd. v. Nat’l Port Authority*. 774 F. Supp. 2d 134, 138–39 (D.D.C. Cir. 2011) (noting that Fifth Amendment rights are only precluded from an agency or instrumentality when it is “legally indistinguishable” from the foreign sovereign). Once again, as in *TMR*, the D.C. Circuit Court is the only court to continually apply this rule; it is not yet recognized in the rest of the country. Foreign corporations, however, have only been given the right to due process protections to challenge the exercise of personal jurisdiction, which is generally granted automatically through FSIA. *GSS Group Ltd.*, 680 F.3d at 813.

229. *TMR*, 411 F.3d at 301.

230. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761–62, 2768 (2014).

231. *Id.* at 2774–75.

232. *TMR*, 411 F.3d at 305.

marily related to personal jurisdiction, being provided by U.S. courts.<sup>233</sup> In *TMR*, the court noted that the Chairman of the State Property Fund, the agency at issue, is appointed and discharged by the President of Ukraine, and that the members of its board must be approved by the Presidium of the Supreme Rada.<sup>234</sup>

The D.C. Circuit court held that an instrumentality should be treated as a state, (i.e., lacking the protections of the Due Process Clause), at least when it has acted as the agent of its parent state, or where fraud or injustice would result from treating the agency or instrumentality as separate from the state.<sup>235</sup> Dr. Strong, a law professor who has handled complex international commercial disputes as both an attorney and arbitrator<sup>236</sup> has described the D.C. Circuit's reasoning as "circular" and asserted that "it will always result in the agency or instrumentality not receiving any due process protections."<sup>237</sup> She further explains that an agency or instrumentality is not covered by FSIA unless there is a relationship of principal and agent created by the sovereign exerting the requisite amount of control;<sup>238</sup> however, following the reasoning of the D.C. Court, if such a relationship between the sovereign and instrumentality does exist, the entity "can be equated with the state and the U.S. court need not extend any due process rights to the agency or instrumentality under the U.S. Constitution."<sup>239</sup> This is certainly the problem with the current framework, but considering *Hobby Lobby's* characterization of corporations, the foreign state-owned agency or instrumentality can be regarded as any other foreign corporation with access to due process protections.<sup>240</sup> The Court characterized corporations as nothing more

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233. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) (holding that a foreign manufacturer did not have sufficient minimum contacts with a state as to establish jurisdiction); *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102 (1987) (holding that a Japanese manufacturer lacked sufficient minimum contacts with the state of California to establish jurisdiction over it); *Helicopteros*, 466 U.S. 408, 418 (1984) (holding that a Columbian manufacturer did not have sufficient contacts with Texas as to subject it to a Texas court's jurisdiction).

234. *TMR*, 411 F.3d at 302.

235. George K. Foster, *Collecting From Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 695 (2008).

236. S.I. Strong, Ph.D., *Faculty Profile*, MISSOURI SCH. OF LAW, <http://law.missouri.edu/about/people/strong/> (last visited Nov. 30, 2016).

237. Foster, *supra* note 235, at 696 n.145 (quoting S.I. Strong, *Enforcement of Arbitral Awards Against Foreign States or State Agencies*, 26 N.W. J. INT'L L. & BUS. 335, 345–46 (2006)).

238. *Id.* at 345–46.

239. Foster, *supra* note 235, at 696 n.145 (quoting Strong, *supra* note 237, at 346).

240. There may be an issue of the agency or instrumentality otherwise being immune from suit if they are no longer classified as a party with a connection to a foreign sovereign.

than the sum of their parts—merely people with individual rights.<sup>241</sup> The Supreme Court reasoned that the individuals should not lose their constitutional rights and protections just because they are organized into a corporation.<sup>242</sup>

Naturally, there is a counter-argument that the individual owners of the Hobby Lobby corporation are U.S. citizens, as opposed to people from outside of the United States who are organized into a corporation.<sup>243</sup> In *Wang Zong Xiao v. Reno*,<sup>244</sup> the District Court for the Northern District of California reasoned that the plaintiff did not “seek admission to the United States; he requested no ‘privilege,’ and his claim infringers no ‘sovereign prerogative,’” so there was no limitation upon the alien’s rights to bring constitutional due process claims.<sup>245</sup> In addition, the court in *Lynch v. Cannatella*<sup>246</sup> held that “whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the Due Process Clauses of the Fifth and Fourteenth Amendments to be free of gross physical abuse at the hands of state or federal officials.”<sup>247</sup> Indeed, “case law grant[s] aliens other rights, such as the constitutional protections afforded all individuals against serious crimes.”<sup>248</sup> The Supreme Court has not yet ruled on this issue, and all case law thus far addresses only one due process right, as opposed to making a holistic determination on the due process rights of alien citizens.

Contemporary corporations are arguably just as powerful as state entities, but neither has recourse to states-only groups like the International Court of Justice.<sup>249</sup> The court in *Price* reasoned that foreign sovereigns do not need due process protections because they do not require protection from the U.S. Government in the same way that private U.S. citizens do.<sup>250</sup> If sovereigns have disputes with each other, they can bring their complaints to the International Court of

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241. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

242. *Id.*

243. In 1990, the Supreme Court reasoned in *United States v. Verdugo-Urquidez* that an alien’s request to suppress evidence seized during a search of respondent’s residence in Mexico should be denied because respondent was a “resident of Mexico with no voluntary attachment to the United States, was in the country involuntarily, and the place searched was in Mexico.” 494 U.S. 259, 274–75 (1990). The Court held that protection against unreasonable searches and seizures did not extend to aliens outside the United States. *Id.*

244. 837 F. Supp. 1506 (N.D. Cal. 1993).

245. *Id.* at 1549.

246. 810 F.2d 1363 (5th Cir. 1987).

247. *Id.* at 1374.

248. *Xiao*, 837 F. Supp. at 1550.

249. *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 95 (D.C. Cir. 2002).

250. *Id.* at 99–100.



Justice, instead of U.S. courts.<sup>251</sup> “The risk of dispute in international business relations does not change if the foreign party is privately owned or state-owned.”<sup>252</sup> Given the fact that states can resolve their disputes among each other through a dedicated tribunal, foreign state agencies and instrumentalities should be afforded Constitutional due process protections.<sup>253</sup> Foreign state-owned museums, however, already have their own mechanism available to them in the United States to allow them to receive at least some Constitutional due process protections. The Immunity From Judicial Seizure (IFJS) statute is an excellent framework that gives due process rights to foreign sovereign agencies and instrumentalities. By providing these protections, IFJS could not only strengthen the rights that museums have, but also those of all agencies and instrumentalities. For these reasons, IFJS should be a model for how all agencies and instrumentalities should be treated in U.S. litigation.

### C. *Museums as Foreign Agencies or Instrumentalities*

There is no doubt that a corporation may not be deprived its property without due process of law, as was recognized in 1931 in *Russian Volunteer Fleet v. U.S.*<sup>254</sup> There, the Supreme Court found that the Fifth Amendment gives to “each owner of property” his “individual right;” foreign corporations doing business are included within the Court’s understanding of the Fifth Amendment.<sup>255</sup> Moreover, the Court noted that “alien friends are embraced within the terms of the Fifth Amendment,” and therefore the constitutional provision that private property cannot be taken without just compensation applies to the Russian corporation suing in this case.<sup>256</sup> As a result, within the meaning of the Due Process Clauses, any act prohibiting the corporation’s ownership of property (or just compensation for the lack of ownership) violated the Due Process Clause as applied to a foreign corporation.<sup>257</sup> A foreign corporation is now entitled to due process protections as they relate to property.<sup>258</sup> The question remains whether this right is still valid when the foreign corporation is also sovereign-owned. State ownership of a foreign corporation or instru-

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251. *Id.* at 100.

252. Vaughan, *supra* note 5, at 917.

253. *See supra* note 229 and accompanying text.

254. 282 U.S. 481 (1931) (concerning the failure of the U.S. Government to pay just compensation for ships which were built by a Russian corporation).

255. *Id.* at 491.

256. *Id.* at 492.

257. *Id.*

258. *Id.*

mentality should not pose a barrier to the right to due process. Indeed, IFJS already provides for just that. IFJS provides immunity from litigation to artwork owned by a sovereign agency and freedom from a claim to seize the property when it is on display in the United States.<sup>259</sup>

The corporation in *Helicopteros* was found to have had insufficient contacts with the United States to sustain a suit in American courts in part because the Helicopteros Corporation had no property or holdings in the United States.<sup>260</sup> In *Daimler AG v. Bauman*,<sup>261</sup> a human rights case implicating the Daimler corporation, the Supreme Court found that general jurisdiction was not met because the case involved “foreign plaintiffs suing a foreign defendant based on foreign conduct,” so the corporation had no reasonable connection to the forum state.<sup>262</sup> Justice Ginsburg characterized Daimler’s business in the State of California as so limited as to “hardly render it at home there.”<sup>263</sup> Following that same logic, when foreign agencies and instrumentalities do have property in the United States, they should be granted the right to not have their property taken away without due process of law. In *Price*, the court noted that it is wholly impractical to give due process protections to sovereigns, in part because “the power of Congress and the President to freeze the assets of foreign nations, or to impose economic sanctions on them, could be challenged as deprivations of property without due process of law,”<sup>264</sup> as well as judicial interference with political questions and the President’s executive power over international affairs.<sup>265</sup>

When it comes to agencies and instrumentalities, the issue of foreign policy should be of small concern and no impediment to due process protection. It would be futile to note all the sovereign-owned agencies and instrumentalities not influenced by policy decisions—because that is an impossible task, but “control” is also not the test courts exclusively envisioned in determining agency or instrumentality status.<sup>266</sup> The U.S. courts have attempted to create many tests to determine both agency and instrumentality status and whether the cor-

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259. 22 U.S.C. § 2459 (2012).

260. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 411–12 (1984).

261. 134 S. Ct. 746 (2014).

262. *Id.* at 761–62, 764 (2014) (Sotomayor, J., concurring).

263. *Id.* at 760.

264. *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002).

265. U.S. CONST. art. 2, § 2; see Toni Johnson, *Congress and U.S. Foreign Policy*, COUNCIL ON FOREIGN RELATIONS (Jan. 24, 2013), <http://www.cfr.org/united-states/congress-us-foreign-policy/p29871> (explaining the role of Congress and the President in foreign relations).

266. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) (“Only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement” involving an entity “a

porate veil should be pierced in litigation against one of these corporations, all in an attempt to show legal separateness from the sovereign.<sup>267</sup> More simply, the “core function” test in the case of *Transaero Inc. v. La Fuerza Aerea Boliviana*,<sup>268</sup> which finds an entity to be an agency or instrumentality if the core function of the entity is commercial in nature, should be sufficient to rebut any foreign policy concerns.<sup>269</sup> The essential purpose of the core function test is to determine how closely a sovereign controls an agency or instrumentality. If the core function of the agency or instrumentality is commercial, then the chance that its actions will impact foreign policy is very low. In addition to showing that courts follow different standards, not one of these tests looks at the political factor at play, namely whether the internal governmental policy has any impact upon the functioning and decision making of the agency or instrumentality.<sup>270</sup> Foreign policy undoubtedly creeps into these agencies, but the commercial decisions of state-owned corporations are, for the most part, market-focused, as is the case with more traditional, non-state-owned counterparts.<sup>271</sup>

Most importantly, IFJS provides a framework to give foreign state-owned agencies and instrumentalities due process protections.<sup>272</sup> In the case of foreign state-owned museums and cultural institutions, which are examples of a sovereign agency or instrumentality, IFJS prevents cultural objects on loan in the United States from being seized or attached to a judgment.<sup>273</sup> IFJS, therefore, codifies a due process protection, the right to not have property expropriated without due process of law as guaranteed in the Fifth Amendment of the U.S. Constitution, and applies the clause exclusively to foreign state-owned agencies or instrumentalities.<sup>274</sup>

In *Altmann*, an American woman sued for the return of paintings that had belonged to her uncle and were stolen in Austria by the Nazis during World War II.<sup>275</sup> The paintings subsequently ended up in the

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majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.” (quoting 28 U.S.C. § 1603(b)(2)); see also, Riblett, *supra* note 55, at 16.

267. Riblett, *supra* note 55, at 12–13, 16. There is the “core functions” test, the “legal characteristics” test, the *Bancec* presumption of separateness, and *Dole Food*’s direct majority-ownership threshold. *Id.*

268. 30 F.3d 148 (D.C. Cir. 1994).

269. *Id.* at 151.

270. *Id.*; see *Dole Food Co.*, 538 U.S. at 474.

271. Riblett, *supra* note 55, at 23.

272. 22 U.S.C. § 2459 (2012).

273. *Id.*

274. *Id.*

275. *Republic of Austria v. Altmann*, 541 U.S. 677, 680–81 (2004).

Belvedere Gallery (also known as the Austrian Gallery).<sup>276</sup> It was undisputed that the Gallery is an agency or instrumentality of Austria and that the property at issue was “owned” or “operated” by the Gallery, as required by FSIA because the Gallery was an agency that had “assumed control” over the property and used it for the benefit of the foreign state.<sup>277</sup> Under the so-called *Bundesmuseen-Gesetz* (BM-G) law of 1988, the Gallery became an economically “autonomous,” not-for-profit, scientific institution of public liability. The Gallery’s assets, however, continue to belong to the Republic of Austria.<sup>278</sup> The law dealt with the “legal standing, implementation, organization, and upkeep of the Austrian Federal Museums (BM).”<sup>279</sup> The Gallery, along with eight other museum institutions, was “placed under the supervision of the Federal Minister of Education, Science, and Cultural Affairs,” and is now subject to “yearly auditing by the Board of Trustees . . . to ensure control for financial decisions,” as well as being required to submit development, financing, and budget plans for four years ahead.<sup>280</sup> In addition, the Ministry appointed two of the nine members of the Board of Trustees.<sup>281</sup>

The oversight from the Austrian government’s Board of Trustees is understandable given that over half of the Gallery’s 7.2 million euro budget comes from the Ministry.<sup>282</sup> Nonetheless, the Gallery maintains in-house financial, curatorial, and management autonomy.<sup>283</sup> Ultimately, this new law transitioned the Gallery and other cultural institutions from being primarily state-run to independently run.<sup>284</sup> Despite *TMR*, which focused on whether an agency relationship existed between the entity and the state, the court ultimately considered the Gallery’s level of autonomy from the republic of Austria sufficient

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276. *Id.*

277. Appellee’s Opposition Brief on Expedited Trial at 28–29, *Republic of Austria v. Altmann*, 317 F.3d 954 (9th Cir. 2002) (No. 01-56003), 2000 WL 33980184, at \*28–29 (quoting *Vencedora Oceanica Navigation, S.A. v. Compagnie Nationals Algerienne de Navigacion*, 730 F.2d 195, 204 (5th Cir. 1984) (en banc)).

278. HADWIG KRAEUTLER, *INTERCOM CONFERENCE LEADERSHIP IN MUSEUMS, MANAGING MUSEUM WORK IN AUSTRIA* 3 (2002).

279. *Id.*

280. *Id.*

281. *Id.* The Board of Trustees oversees all nine museums and consists of a member from the Federal Chancellery, the Minister of Economic Affairs, an external scientific research institution related to the museum, the Friend of the Museum organization, the museum-personnel union, and the central organization of the trade union Public Services. *Id.*

282. Kraeutler, *supra* note 278, at 4.

283. *Id.* at 4.

284. EMMA BENTZ & MARLIES RAFFLER, *NAT’L MUSEUMS IN AUSTRIA, CONFERENCE ON BUILDING NAT’L MUSEUMS IN EUROPE 1750–2010*, EU NAMUS REPORT NO. 1, 21, 34 (Peter Aronsson & Gabriella Elgenius eds. 2011).

to meet the requirements of agency status.<sup>285</sup> *TMR* based its determination of whether an entity was a “person” on how much control the sovereign exercised over the agency.<sup>286</sup> If the *TMR* test were to be applied to the Belvedere Gallery, the Gallery would likely be found to be a legal “person” because it is considered to be independent from the Republic of Austria.<sup>287</sup> The issue of independence of the agency from the sovereign, however, is of little issue in the IFJS.

IFJS states that immunity applies to any “temporary exhibition or display thereof,” in which a “work of art or object of cultural significance is imported into the United States from any foreign country,” involving cooperation between “the foreign *owner* or *custodian*” and “the United States or one or more cultural or educational institutions,” and has received permission from the State Department.<sup>288</sup> The owner of the work of art, or the lending institution is only required to be a foreign “owner” or “custodian,” which is a relatively low bar.<sup>289</sup> The owner could be a private collector, foreign corporation, or a state-owned museum, but the result is the same: owners are all assessed for immunity protection equally.<sup>290</sup> IFJS places private and public foreign parties on equal footing and allows for public parties, also known as agencies or instrumentalities, to have the same property protection as that afforded to private parties.<sup>291</sup> This is a perfect example of how the distinction between private corporations and foreign state-owned agencies and instrumentalities has been eroded and how both are treated the same, for the purposes of Fifth Amendment due process protection, from having their property seized by the U.S. government.<sup>292</sup>

While the Due Process Clause is intended to prevent the government from abusing its power or employing its authority as an instrument of oppression,<sup>293</sup> there is no reason why that protection should

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285. *Altmann v. Republic of Austria*, 317 F.3d 954, 968–69 (9th Cir. 2002).

286. *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 301 (D.C. Cir. 2005).

287. BENTZ & RAFFLER, *supra* note 284, at 34.

288. 22 U.S.C. § 2459(a) (2012) (emphasis added).

289. *Id.*

290. *Id.*

291. In *Malewicz*, the court only mentioned “the foreign owner of works of art” but failed to put any limiting characteristic on that owner regarding whether it must be a public or private entity. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 305 (D.D. Cir. 2005). Further, the owner requesting immunity is required to submit a pre-written statement with the application, which refers to the owner only as “the applicant.” Jennifer M. Shield, *Curator Congress: How Proposed Legislation Adds Protection to Cultural Object Loans from Foreign States*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 427, 441 (2013) (quoting Application Procedure & Checklist, U.S. DEP’T OF STATE, <http://www.state.gov/s/1/3196.htm> (last updated May 2016)).

292. U.S. CONST. art. V.

293. DELLAPENNA, *supra* note 36, at 183.

not be extended to foreign parties doing business in and subjecting themselves to the laws of the United States on a daily basis.<sup>294</sup> In addition to the reasons that the courts above have already elucidated for denying due process to foreign countries, it should be noted that foreign sovereigns in their public capacity have very little impact upon American society.<sup>295</sup> In contrast, the private acts of a foreign sovereign, for which United States law extends no immunity, have become more sophisticated, and the foreign-sovereign-state structures its commercial operations through legally separate entities.<sup>296</sup> These private commercial acts enjoy financial success in the United States, one of the largest economies in the world.<sup>297</sup> The benefits of “corporate separateness” have historically been applied to traditional companies and individuals seeking to protect themselves from liability, but state-owned agencies and instrumentalities are no different in their structure, pursuit of investment and commerce, and a growth in the world’s economy.<sup>298</sup>

In *GSS Group*, the district court determined that a corporation operating separately from its sovereign “is not the ‘juridical equal’ of the United States” and is entitled to due process protections.<sup>299</sup> Such a corporation has “no diplomatic presence or political authority with which to engage the United States and defends its rights.”<sup>300</sup> While the expropriation exception of FSIA is limited in its applicability only

294. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 4–5 (2006); see, e.g., Edward B. Adams, Jr., *Personal Jurisdiction Over Foreign Parties*, in INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 113, 114 (David J. Levy ed., 2003) (noting that the same standards apply for “personal jurisdiction over a non-resident or foreign defendant”). Karen Halverson, *Is a Foreign State a “Person”? Does it Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT’L L. & POL. 115, 135–36 (2001) (stating that under “the ‘minimum contacts’ test . . . it is well settled that foreign corporations are entitled to due process” but noting that the U.S. Supreme Court has not “explicitly address[ed] the threshold question of whether a foreign corporation is entitled to due process.”).

295. The extent of scholarship regarding a foreign sovereigns’ public acts influencing the United States is limited to the enforcement of foreign arbitral judgment and the potential for recognizing moral rights from civil law countries. See Jeremy Maltby, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 2009 (1994); Richard S. Markovits, *Learning From the Foreigners: A Response to Justice Scalia’s and Professor Levinson’s Professional Moral Parochialism*, 39 TEX. INT’L L.J. 367, 379 (2004); Mark D. Rosen, *Should “Un-American” Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 785–86 (2004).

296. Riblett, *supra* note 55, at 18.

297. *Id.*

298. *Id.*

299. *GSS Group Ltd v. Nat’l Port Auth.*, 774 F. Supp. 2d 134, 140–41 (D.C. Cir. 2011) (quoting *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002)).

300. *Id.* at 140.

to foreign states, or more typically agencies and instrumentalities, IFJS applies to all foreign entities.<sup>301</sup> When analyzed concurrently, both the agencies and instrumentalities of foreign sovereigns and all other foreign parties, save for the states themselves, are given the same due process protection from seizure of their assets.<sup>302</sup>

“The guarantee of due process for all citizens requires the government to respect all rights, guarantees, and protections afforded by the U.S. Constitution and resultant statutes prior to the deprivation of life, liberty, or property.”<sup>303</sup> “Due process guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding.”<sup>304</sup> The goal of procedural due process, with which both FSIA and IFJS are concerned, is to ensure fundamental fairness by guaranteeing a party the right to be heard, proper notification of an imminent trial and standardized procedures throughout the trial, and ensure that the attendant court has the proper jurisdiction to render a judgment.<sup>305</sup> By all accounts, these purposes and provisions of the Due Process Clause match the spirit and function of IFJS.<sup>306</sup> Due process “is not an end in itself”; rather, “[i]ts constitutional purpose is to protect a substantive interest to which an individual has a legitimate claim of entitlement.”<sup>307</sup> Foreign museums have a substantive interest in their art and archaeological objects.<sup>308</sup>

IFJS protects foreign-owned art and archaeological objects from “seizure or other judicial process”<sup>309</sup> for the “purpose or having the effect of depriving such [U.S. cultural] institution . . . of custody or control of such object.”<sup>310</sup> In other words, a litigant may not ask the federal government to seize sovereign’s (or agency or instrumental-

301. Shield, *supra* note 291, at 433; see 28 U.S.C. § 1605(a)(3) (2012). The “expropriation exception” requires that the defendant owns the property in question, and is engaged in commercial activity in the United States, and that the property has been expropriated in violation of international law. *Id.* at 433–44.

302. 28 U.S.C. § 1605(a)(3).

303. *Fifth Amendment*, CORNELL U. L. SCH., [https://www.law.cornell.edu/wex/fifth\\_amendment](https://www.law.cornell.edu/wex/fifth_amendment) (last visited Aug. 13, 2016).

304. *Id.*

305. *Id.*; see *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 420 (1984) (Brennan, J., dissenting).

306. See Brief for the United States, *supra* note 188.

307. *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983); *Hill v. Jackson*, 64 F.3d 163, 171 (4th Cir. 1995).

308. Sue Choi, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT’L L. & BUS. 167, 180 (2005).

309. Woudenbergh, *supra* note 174, at 154 (quoting *Immunity from Judicial Seizure Applications – Cultural Objects*, U.S. DEP’T. OF STATE, <http://www.state.gov/s/l/c3432.htm> (last visited Nov. 28 2015)).

310. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 311 (D.C. Cir. 2005) (alteration in original) (quoting 22 U.S.C. § 2459 (2012)).

ity's) property physically located in the United States, nor may he also "serve the receiving [U.S.] museum with judicial process" resulting in the interference with the physical custody or control of the artworks.<sup>311</sup> In *Malewicz*, the court held that "Immunity from seizure is not immunity from suit for a declaration of rights or for damages arising from an alleged conversion if the other terms of FSIA jurisdiction exist."<sup>312</sup> The court noted that the Malewicz heirs were not seeking seizure of the artworks, but rather were seeking to establish their rights in the art through the judicial process provided by FSIA.<sup>313</sup> According to the principles of FSIA, IFJS prevented foreign property from being taken without due process of law, with the process of law occurring when Malewicz sued the Stedelijk Museum, an agency or instrumentality controlled by the City of Amsterdam. As a result, IFJS provided Fifth Amendment Constitutional due process protections to a foreign state-owned agency or instrumentality.

This Section demonstrates how the 2014 Supreme Court case of *Burwell v. Hobby Lobby Stores, Inc.*, has changed the analysis regarding corporations and personhood for the purposes of Constitutional protections.<sup>314</sup> The Court's reasoning can be applied to foreign corporations, including sovereign-owned agencies and instrumentalities in order to guarantee due process protections for these alien bodies.<sup>315</sup> Finally, the IFJS statute prevents foreign property, expressed as art and cultural objects, to be taken from foreign sovereign agencies and

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311. *Id.*

312. *Id.* at 312 (when the presence of property in the United States fulfilled one of the requirements for FSIA jurisdiction; that the contested property be "present" in the United States at the time of suit).

313. *Id.* (citing *Magness v. Russian Fed'n*, 84 F. Supp. 2d 1357, 1358–59 (S.D. Ala. 2000)). FSIA allows suits against foreign states over "*rights in property* taken in violation of international law." *Id.* at 313 (emphasis added) (quoting 28 U.S.C. § 1605(a)(3) (2012)). *Malewicz* is significant because it raises the problem of a "conflict between FSIA and IFJS and the status of loans of art works to United States institutions" when there is a claim that the works are stolen property. GERSTENBLITH, *supra* note 190, at 753. To solve this apparent problem, the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act "was introduced to amend FSIA so that the presence of art works and cultural objects in the United States with immunity from seizure would not be regarded as commercial activity" for the purposes of FSIA. *Id.* Such a bill would reverse the holding in *Malewicz* and make it impossible for a plaintiff to be awarded "a monetary award from a foreign sovereign for the theft of a cultural object." *Id.* This bill was first introduced in 2012, and it passed in the House of Representatives several times, but could not pass in the Senate in 2014, and is now effectively dead. *H.R. 4292 (113th): Foreign Cultural Exchange Jurisdictional Immunity Clarification Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr4292> (last visited Jan. 31, 2016).

314. *Malewicz*, 362 F. Supp. 2d at 301.

315. *Supra* notes 132–57 and accompanying text.



instrumentalities such as state museums, without Constitutional due process.<sup>316</sup>

#### IV. IMPACT

Foreign sovereign agencies and instrumentalities should be granted due process protections under the FSIA, as they are under IFJS. This Part examines the impact of this procedure, including the amendment of the FSIA and the policy-based consequences. “The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’”<sup>317</sup> Currently, there are many judicial tests between the Circuit Courts of Appeal to determine whether an entity is an agency or instrumentality, whether it is controlled by the state, and ultimately whether the entity should have the right to constitutional due process protections.<sup>318</sup> The existence of multiple tests means that every court applies its own standard, and there is no consistency in the law. This inconsistency is unacceptable in a legal system that relies upon an extensive use of precedent.<sup>319</sup> There needs to be an easily applied rule regarding due process for agencies and instrumentalities. In *Heller v. Doe*,<sup>320</sup> the Supreme Court commented that the purpose of “legal process,” according to the Constitution, is to “minimize the risk of erroneous decisions.”<sup>321</sup> The Court advocated for the courts to remain “flexible” in applying the due process doctrine because it is so fact specific and must apply to a “broad spectrum of concerns.”<sup>322</sup>

In rejecting absolute rules regarding due process, the Supreme Court advocated for a test balancing three considerations:

First the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government’s interest, including the function involved and the fiscal and administra-

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316. See 28 U.S.C. § 1605(a)(3) (2012).

317. *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976) (alteration in original) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)).

318. *Supra* notes 78–174 and accompanying text.

319. See Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 465–66 (2010).

320. 509 U.S. 312 (1993).

321. *Id.* at 332 (1993) (quoting *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 13 (1979)).

322. *Id.*

tive burdens that the additional or substitute procedural requirements would entail.<sup>323</sup>

These factors must be taken into account in determining the impact that giving due process rights to foreign-sovereign owned agencies and instrumentalities will have upon the parties and the U.S. judicial system.<sup>324</sup> An amendment to FSIA is necessary—one which not only explicitly permits due process protections for agencies and instrumentalities, but also denies subject matter jurisdiction where there is no connection to the United States.<sup>325</sup> The problem would not be solved, but another one would be created, if the subsidiaries of sovereign agencies and instrumentalities met the requirements of subject matter jurisdiction under FSIA despite the claim arising from business transacted outside of the United States.<sup>326</sup>

One way forward that has been consistently called for is an amendment to FSIA, requiring a personal jurisdiction analysis for state-owned corporations that behave on the international stage as independent juridical entities, essentially treating agencies and instrumentalities in the same manner as private, foreign corporations.<sup>327</sup> The most significant problem with this “solution,” however, is that once again the judiciary would be faced with a rule that requires ambiguous line-drawing to determine the threshold independence must surpass so as to accommodate the Due Process Clause.<sup>328</sup> Despite this procedural challenge, an amendment to FSIA is necessary to recognize, in the judicial system, the effects of globalization and the increased presence of state-owned agencies and instrumentalities in global commerce. The Second Circuit, at least, has focused less on the FSIA and more on the U.S. Constitution itself.<sup>329</sup>

From a policy perspective, if an agency or instrumentality is indistinguishable from a private corporation it should be treated like a corporation, and it should receive the requisite due process protections. This approach ensures that courts apply terms and definitions uniformly and aids courts in breaking down organizations into their component parts when forced to engage in line-drawing. Practically,

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323. *Today's Fresh Start, Inc. v. L.A. Cty. Office of Educ.*, 303 P.3d 1140, 1150 (2013) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)).

324. *Id.* at 1150.

325. Andrew Lowenstein, *The Foreign Sovereign Immunities Act & Corporate Subsidiaries of Agencies or Instrumentalities of Foreign States*, 19 *BERKELEY J. INT'L L.* 350, 374 (2001).

326. *Id.* at 375.

327. Vaughan, *supra* note 5, at 948–49.

328. *See TMR Energy Ltd. V. State Prop. Fund of Ukr.*, 411 F.3d 296, 301–02 (D.C. Cir. 2005) (discussing and applying the “sufficient control test”).

329. Strong, *supra* note 237, at 354.

giving the agencies and instrumentalities due process protections should not necessarily involve much change in procedure. Already codified in FSIA are different procedural provisions regarding service of process upon a foreign state versus an agency or instrumentality.<sup>330</sup> The provisions are a recognition that delivering notice solely through diplomatic means is insufficient and impractical for agencies and instrumentalities, especially those with sufficient commercial activity in the United States to justify maintaining offices in the country. While courts are always concerned about possibly opening the floodgates of litigation, a highly relevant consideration where jurisdiction is concerned, the opposite is likely to happen here. Indeed, if instrumentalities are “persons,” they can challenge a court’s exercise of personal jurisdiction, which is presumed to exist under FSIA, because sovereigns are not “persons.”<sup>331</sup> The courts and plaintiffs would have to prove that personal jurisdiction exists by satisfying the minimum contacts test of *International Shoe*.

Professor Strong notes, the United States is “exceedingly anxious” to grant itself jurisdiction over foreign sovereigns even though it is doubtful that the United States would allow itself, or its agencies or instrumentalities to be subject to the jurisdiction of the foreign courts under similar circumstances.<sup>332</sup> In the end, the effect of this change to FSIA’s application to international law is of little consequence because U.S. courts focus most, if not all, of their analysis upon the framework of domestic law.<sup>333</sup>

## V. CONCLUSION

The Foreign Sovereign Immunities Act is an expansive statute that has left many courts struggling to apply the provisions in a consistent manner. Unlike foreign states, foreign-sovereign-owned agencies and instrumentalities should have the right to Constitutional due process protections when they are subject to litigation in United States courts.

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330. See *supra* notes 36–77 and accompanying text.

331. Gosia Spangenberg, *The Exercise of Personal Jurisdiction Over Some Foreign State Instrumentalities Must Be Consistent with Due Process*, 81 WASH. L. REV. 447, 448, 455 (2006).

332. Strong, *supra* note 237, at 354. “In 2005, the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations (VCCR) Concerning the Compulsory Settlement of Disputes,” which “provides for jurisdiction in the International Court of Justice.” John Quigley, *The United States’ Withdrawal From International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences*, 19 DUKE J. COMP. & INT’L L. 263, 263 (2009). This “withdrawal raised questions in the international community about the United States’ intent to comply with its obligations under the VCCR.” *Id.* Many view the United States’ action as a “significant reversal of U.S. policy regarding U.S. participation in international dispute resolution mechanisms.” *Id.* at 263–64.

333. Strong, *supra* note 237, at 354.

Despite a lack of consensus among the judiciary, the Immunity from Judicial Seizure statute is a comparable statute that acts as precedent to giving agencies and instrumentalities due process protections in court. Therefore, it is not a stretch of judicial doctrine to grant due process under FSIA because it is already available under IFJS. Moreover, private foreign corporations are granted due process rights. The right to Due Process already exists under IFJS, and sovereign-owned corporations are not substantially different than private corporations, so there is no reason why agencies and instrumentalities should be granted the right to due process in one context but denied that same right in another.

*Lauren Burse*\*

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\* J.D. Candidate, DePaul University College of Law, 2017; B.A. Hons., University of Toronto, 2014. I would like to express my gratitude to the Volume 65 and 66 Editorial Board and staff for their dedication and hard work. I would especially like to thank my Editor, Jennifer James, for her tireless support and brilliant advice. Another thank you goes to my attorney mentor Kevin Ray for his thoughtful insights. Thank you to my parents for always believing in me and never letting me give up. To my brother, thank you for your humor and the constant photos of Griogair that put a smile on my face. All mistakes are my own.

