PUTTING THE "ALIEN" BACK INTO ALIENAGE JURISDICTION: ALIENAGE JURISDICTION AND "STATELESS" PERSONS AND CORPORATIONS AFTER *TRAFFIC STREAM*

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INTRODUCTION

In 1994, the representatives for nine Palestinians killed by Israeli dispersion of CS gas (teargas) brought a wrongful death suit against the American manufacturer of the gas in a federal district court.[1] However, Judge William L. Standish dismissed the case for lack of subject-matter jurisdiction.[2] The problem was that the case was based on alienage diversity jurisdiction, but the Palestinian plaintiffs were neither citizens nor subjects of any recognized state.[3] This disturbing example is not an isolated jurisdictional fluke. Many companies have not been able to take advantage of U.S. federal courts because they are based out of foreign dependencies of other nations.[4] Alternatively, American plaintiffs have occasionally been frustrated in their attempts to hold stateless parties accountable.[5] The analysis of the law in this area is limited and unclear, and *Abu-Zeineh* was perfectly positioned to expose cracks in the system. Resolution of the ambiguities and contradictions in this area would streamline private international law practice, alleviate unfairness to often marginalized groups, and support the welfare and commerce of the United States.

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1. Abu-Zeineh v. Fed. Labs., Inc., 975 F. Supp. 774 (W.D. Pa. 1994).
2. *Id.* at 775.
3. *Id.* at 777.
4. *See, e.g.*, Matimak Trading Co. v. Khalily, 118 F.3d 76, 88 (2d Cir. 1997).
5. *See, e.g.*, JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88 (2002).

Subject-matter jurisdiction in the U.S. federal courts usually derives from either a federal question or diversity of citizenship.[6] For diversity of citizenship, governed by 28 U.S.C. § 1332, there is an explicit provision dealing with "citizens or subjects of a foreign state," differing from other provisions within § 1332 that deal with U.S. citizens, permanent resident aliens, and foreign nations.[7] However, some "stateless" individuals and corporations fall outside the realm of both of the diversity statute's foreign and domestic prongs:

> Statelessness may arise from one of four reasons: (1) voluntary renunciation of nationality, when such renunciation is admissible; (2) conflicts of nationality laws, that is a child born in a country which adopts the *jus sanguinis* rule,[8] of parents from a country which adopts the *jus soli* rule;[9] (3) territorial changes and inadequacy of treaties on territorial settlement; and (4) loss of nationality, that is, when the State in accordance with its own law, strips the individual of his or her nationality.[10]

There is no clear limit to which individuals might fall prey to the "statelessness" exception, though in the past it has usually affected marginalized ethnic groups and foreign dependencies.[11] At the least, the statelessness exception

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6. 28 U.S.C. §§ 1331–1332 (2000); *see also* U.S. CONST. art. III, § 2. *But see* 28 U.S.C. § 1367 (also permitting supplemental jurisdiction in certain cases).

7. *Compare* 28 U.S.C. § 1332(a)(2) (jurisdiction for "citizens or subjects of foreign states"), *with* 28 U.S.C. § 1332(a)(1) *and* (a)(4) (jurisdiction for U.S. citizens of different states and for foreign nations, respectively).

8. *Jus* (*ius*) *sanguinis* is the acquisition of nationality on the basis of the nationality of one's parents. CARMEN TIBURCIO, THE HUMAN RIGHTS OF ALIENS UNDER INTERNATIONAL AND COMPARATIVE LAW 8 (2001).

9. *Jus* (*ius*) *soli* is the acquisition of nationality on the basis of where one was born. *See* TIBURCIO, *supra* note 8, at 9.

10. *See id.* at 11.

11. Criminals, terrorists, slaves, refugees, native peoples, and those with dual citizenship could all be affected by the "statelessness" loophole. While it is unlikely that many terrorists want to use federal courts to bring civil suits based on state laws, the other categories pose interesting if somewhat tangential situations. *See, e.g.*, Romanella v. Hayward, 114 F.3d 15, 15 (2d Cir. 1997) (Indian tribes are neither citizens nor states and thus cannot invoke diversity). There may be more than one of these questionable categories in play at the same time. For example, in *Abu-Zeineh*, some of the plaintiffs claimed dual citizenship with Jordan, thus combining "stateless" person and dual citizenship issues. Abu-Zeineh v. Fed. Labs., Inc., 975 F. Supp. 774, 776–78 (W.D. Pa. 1994). These are fascinating areas, but this Note will refrain from exploring them in detail. The Author has found many applicable cases involving various entities. *See, e.g.*, JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure, Ltd., 536 U.S. 88 (2002) (allowing jurisdiction over citizens of the British Virgin Islands); Koehler v. Bank of Berm. (N.Y.) Ltd., 209 F.3d 130 (2d Cir. 2000) (denying jurisdiction over citizens of Bermuda); Matimak Trading Co. v. Khalily, 118 F.3d 76 (2d Cir. 1997) (finding no jurisdiction for Hong Kong citizens both before and after Hong Kong's return to China); Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239 (7th Cir. 1990) (allowing jurisdiction over citizens of the Cayman Islands); Inarco Int'l Bank N.V. v. Lazard Freres & Co., No. 97 Civ. 0378, 1998 U.S. Dist. LEXIS 11574 (S.D.N.Y. July 29, 1998) (failing to reach issue of jurisdiction for citizen of Aruba); *Abu-Zeineh*, 975 F. Supp at 774 (denying jurisdiction over Palestinians); Chang v. Nw. Mem'l Hosp., 506 F. Supp. 975 (N.D. Ill. 1980) (allowing jurisdiction over citizens of Taiwan);

potentially and directly affects 33.9 million people[12] from areas with a combined gross domestic product worth approximately $759.8 billion.[13]

Preventing "stateless" persons and corporations from using U.S. courts defeats the purposes of alienage jurisdiction. Furthermore, it creates unnecessary murkiness in this area of subject-matter jurisdiction, leading to wasted judicial resources and unfulfilled party expectations. A newer manifestation of the statelessness problem occurs when American parties try to sue a stateless person or corporation.[14] The stateless party is rewarded for maneuvering into this jurisdictional void and cannot be held accountable.[15] This Note explores the current limits of diversity jurisdiction and advocates broader inclusion of stateless parties in federal courts. Alienage jurisdiction should apply to all people not specifically addressed by other diversity provisions (that is, all non-U.S. citizens except permanent resident aliens living inside the United States). This application is both constitutional and practical. It eliminates an unnecessary iniquity against stateless persons and corporations. Furthermore, it aligns federal civil procedure with the legal and moral norms of equal protection under the law and the preservation of distinct, ethnic communities.

I. DEFINING THE LIMITS OF ALIENAGE JURISDICTION

The Constitution states that "[t]he judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."[16] While the Constitution marks the furthest reach of federal subject-matter jurisdiction, it is up to Congress to enable federal courts to use all or part of constitutionally permissible jurisdiction.[17] The current version of § 1332 grants federal courts jurisdiction over suits between:

(1) citizens of different States;

Blair Holdings Corp. v. Rubinstein, 133 F. Supp. 496 (S.D.N.Y. 1955) (denying jurisdiction over a refugee from the Soviet Union).

12. This figure includes Aruba, Bermuda, the British Virgin Islands, the Cayman Islands, the Gaza Strip, Gibraltar, Taiwan, the Turks and Caicos Islands, the West Bank, and China's two Special Administrative Regions, Hong Kong and Macau. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2005), http://www.odci.gov/cia/publications/factbook/index.html. Not included but certainly significant is the United Nations High Commissioner for Refugees' estimate that there are 17 million people "of concern" in the world today, though that figure would have to be reduced by refugees living in the areas already counted or in the United States under grants of asylum or withholding (treated as permanent resident aliens). United Nations High Commissioner for Refugees, *Basic Facts*, http://www.unhcr.ch/cgi-bin/texis/vtx/basics (last visited Oct. 18, 2005).

13. CENTRAL INTELLIGENCE AGENCY, *supra* note 12. Some areas also have disproportionately high economic impact on the United States. For instance, the British Virgin Islands has approximately 180 companies registered for *each* person living there, and the Cayman Islands boasts close to 600 banks, more than one for every 72 residents. *Id.*

14. *See, e.g.*, *Traffic Stream*, 536 U.S. at 90–91.

15. *See, e.g.*, *Koehler*, 209 F.3d at 139.

16. U.S. CONST. art. III, § 2.

17. *See id.* § 1; *cf. Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1868) (describing congressional regulation of federal court jurisdiction).

> (2) citizens of a State and citizens or subjects of a foreign state;
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> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
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> (4) a foreign state . . . as plaintiff and citizens of a State or of different States.[18]

Permanent resident aliens are treated as citizens of their state of residence.[19]

Judges interpreting the Constitution and § 1332 must either use their own definitions for included terms or turn to case law. While most people would consider the plain meaning of "citizen" and "subject" to be anyone governed by the laws of a particular nation, judges relying upon a law dictionary would find that a "subject" is one who *owes allegiance* to a sovereign.[20] Interestingly, the definition of "allegiance" seems to rule out the *Abu-Zeineh* plaintiffs entirely because any allegiance would have to be in "consideration for protection."[21] The constitutional language reflects the political reality of the late eighteenth century, when "subjects" were those whose allegiance was to a monarch, while "citizens" owed allegiance to a democracy.[22] Moreover, some commentators believe that the Founders used terms like "citizens" and "subjects" interchangeably.[23] Both supporters and detractors of the constitutional language frequently described federal jurisdiction as applicable to all "foreigners."[24] Modern political dialogue

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18. 28 U.S.C. § 1332(a) (2000). This is the current version of § 1332(a). It was revised in 1875 from a version that was more amenable to "stateless" persons. *See infra* note 29 and accompanying text.

19. 28 U.S.C. § 1332(a).

20. BLACK'S LAW DICTIONARY 1425 (6th ed. 1990). The full definition of "subject" is "[o]ne that owes allegiance to a sovereign and is governed by his laws . . . . Men in free governments are subjects as well as *citizens*; as citizens they enjoy rights and franchises; as subjects they are bound to obey the laws." *Id.* (emphasis in original).

21. *Id.* at 74. Natural allegiance is a subdefinition that would make the whole issue moot. The definition deems such allegiance due to any person's native country. *See id.* Thus, the Palestinians would owe allegiance to whatever country they were born in (Israel or Jordan in this case) and be deemed subjects per se. *See id.*

22. *Id*. at 1425; *see also* 1 JAMES MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.75 (3d ed. 1996).

23. Van Der Schelling v. U.S. News & World Rep., Inc., 213 F. Supp. 756, 759 (E.D. Pa. 1963).

24. *See* Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican (1787) (letter of Oct. 10, 1787), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 40–42 (John P. Kaminski & Gaspere J. Saladino eds., 1983) [hereinafter DOCUMENTARY HISTORY]; Letter from Richard Henry Lee to Governor Edmund Randolph (Oct. 16, 1787), *in* PETERSBURG VA. GAZETTE, Dec. 6, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra*, at 369; Extract of a letter from a gentleman in New-York to his friend on the present Assembly, dated October 26, 1787, *in* VA. INDEP. CHRON., Nov. 14, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra*, at 104–05; Luther Martin, Speech to Maryland's State House of Delegates on Return from the Constitutional Convention (Nov. 29, 1787), *in* 14 DOCUMENTARY HISTORY, *supra*, at 290; Aristides, *Remarks on the Proposed Plan of a Federal Government* (Jan. 31–Mar. 27, 1788), *reprinted in* 15

with its nuanced levels of citizenship and subjugation exhibits far greater complexity than the delegates to the Constitutional Convention would have imagined.[25]

The first enactment of constitutional judiciary powers in the Judiciary Act of 1789 used the term "aliens" to combine "citizens" and "subjects" of foreign states.[26] The Senate, and especially the subcommittee that drafted the Judiciary Act, was composed of a large number of Constitutional Convention delegates who understood what the language of the Constitution was intended to mean.[27] The Judiciary Act finally passed after two months of "arduous" deliberations[28] despite the presence of bitter opponents within the Committee's membership;[29] therefore, it should not be assumed that Congress acted hastily in substituting "aliens" for "citizens and subjects" in the enacting language. Congress amended the language of the diversity statute in 1875 to its modern form, but there was no discussion about the change.[30] Most likely, this change was meant to provide uniformity between the diversity statute and the Constitution without altering the substantive meaning.[31]

Early court decisions defining "citizens" or "subjects" were less formalistic than modern cases.[32] Justice Story, in *The Pizzaro*, constructively deemed one party a "subject" of Spain even though he was not a native-born

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DOCUMENTARY HISTORY, *supra*, at 535; Letter from George Nicholas (Feb. 16, 1788), *in* 16 DOCUMENTARY HISTORY, *supra*, at 125; Letter from Richard Henry Lee to Samuel Adams (Apr. 28, 1788), *in* 17 DOCUMENTARY HISTORY, *supra*, at 232.

25. Strictly speaking, the first Congress technically *did* contemplate other classifications in the Alien Enemies Act of 1798, including "denizens" and "natives." Brief for Respondent at 3, JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88 (2002) (No. 01-651), 2002 WL 465130. However, these terms have two problems. First, they may not represent classifications of citizenship and instead signify a different type of subgroup, just as "refugees" and "criminals" may form subgroups of "citizens or subjects." Second, as explained *infra*, these may be thinly veiled proxies for racial or ethnic groups, which should not be adopted by the federal judiciary in light of the Fourteenth Amendment.

26. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (jurisdiction for all suits in which "an alien is a party").

27. Five of the ten Senators appointed to the Judiciary Committee at that time were present at the Constitutional Convention. *Van Der Schelling*, 213 F. Supp. at 763 n.3; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 57–58 (1923).

28. Warren, *supra* note 27, at 58.

29. Richard Henry Lee, one of the most vociferous Anti-Federalists, and Oliver Ellsworth, one of the delegates to the Constitutional Convention and the third Chief Justice of the Supreme Court, were political enemies. *Id.* at 57–58; *see also* Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449, 463 (1884).

30. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

31. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 166 (1874) (holding that subject, inhabitant, and citizen were interchangeably used terms that better described the kind of foreign state involved than the status of the individual). Note that this case was decided a year before the 1875 revision of the diversity statute.

32. This is somewhat surprising considering the relative formality of many early judicial interpretations of the Constitution.

citizen and had never been naturalized.[33] Story wrote that one is the subject of a particular nation when the law of nations deems that person to be domiciled in and protected by that sovereign nation.[34] Likewise, in *Carlisle v. United States*, Justice Field equated domicile in a country with owing allegiance to that country, thereby satisfying the definition of a "subject."[35]

Justice Story later extended his interpretation of "subject" to include those under de facto control of a sovereign.[36] Specifically, sovereigns could cede subjects to each other, and conquered peoples owed allegiance to the conqueror, unless they chose not to remain under the conqueror's protection.[37] Story also drifted freely between using "subject" and "citizen" depending on the character of the government referred to, implying that the difference between the two terms was negligible.[38]

Taken together, these more inclusive interpretations of "citizens or subjects" show a unified understanding during this nation's first century that *everyone* with a serious claim[39] would be allowed to use the federal courts. Once we expose the justifications for alienage jurisdiction, this preference for expansive interpretation is more lucid.

II. HISTORICAL AND MODERN JUSTIFICATIONS FOR ALIENAGE JURISDICTION

A. Traditional Reasons for Alienage Jurisdiction

Well before the United States came into existence, England employed laws that guaranteed large classes of aliens, regardless of their allegiances, access to English courts.[40] These laws, in force immediately prior to the American Revolution and familiar to many early American attorneys, probably influenced the understanding of terms used in the Constitution and during the constitutional debates.[41] Among the earliest English laws was the 1283 Statute of Merchants, which ensured that merchants' debts would be enforced.[42] It applied to "everyone," including "strangers."[43] The Statute of Merchants was later followed by the

33. The Pizzaro, 15 U.S. (2 Wheat.) 227, 246 (1817).

34. *Id.*

35. 83 U.S. (16 Wall.) 147, 154 (1873).

36. Inglis v. Trs. of the Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99, 156 (1830) (Story, J., dissenting).

37. *Id.* at 156–57.

38. *See generally id.* at 155–72.

39. "Serious" claims include any claim that, if not touching on a federal question, is in excess of the minimum jurisdictional amount and exhibits complete diversity of citizenship between any plaintiff and defendant involved.

40. *See infra* notes 42–44 and accompanying text.

41. Those attorneys may also have been enticed, out of apathy, to maintain British laws in American courts.

42. Statute of Merchants, 11 Edw. (1283) (Eng.), *reprinted in* 1 THE STATUTES OF THE REALM 53–54 (Dawsons of Pall Mall 1963) (1810).

43. In a notable exception, Jews were specifically excluded from the provisions of the law, but that was religious, not political, discrimination. *Id.* The protection of strangers shows that commerce, not politics or sovereignty, motivated this law.

Ordinance of the Staples, which offered the King's "special protection" to foreign merchants and required trials be judged by tribunals with a composition similar to the parties involved.[44]

The Founding Fathers recognized the importance of allowing foreigners access to American courts. Preventing foreigners from utilizing American courts would increase international conflicts, which could possibly escalate into wars, and hamper the United States' burgeoning share of international trade.[45] The Founders also knew that access to only state courts would not be sufficient to prevent these harms.[46] At the turn of the twenty-first century, concerns about international conflicts and trade remain as powerful as ever. Moreover, these historic concerns are joined by modern concerns for commercial stability and justice for all. The United States should carefully consider the potential harms caused by excluding stateless parties from access to federal courts and the courts' potential remedial devices.

During the great constitutional debates preceding ratification of the Constitution, Alexander Hamilton painstakingly detailed the necessity of a judicial branch in the constitutional scheme.[47] Part of that defense included a description of the types of cases that the envisioned federal judiciary should hear and what the Constitution should reserve to state courts.[48] Hamilton thought primarily about preventing conflicts with foreign states when he argued for alienage jurisdiction.[49] Several contemporaries affirmed Hamilton's thinking. North Carolina's Hugh Williamson warned that foreigners trusted the United States to uphold its treaties guaranteeing private debts, and if an individual state chose to abolish debts or debase the currency, the young nation might find itself at war.[50] Future President and so-called "Father" of the Constitution, James Madison, warned that a national tribunal was needed to prevent a particular state from "drag[ging] the whole community to war."[51] Future Supreme Court Chief Justice John Jay echoed that the nation would be safer if comparatively "more wise, systematical, and judicious" federal courts, rather than biased or provincial state courts, prudently dealt with foreigners.[52]

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44. Ordinance of the Staples, 27 Edw. 3, ch. 8, 20 (1353) (Eng.), *reprinted in* 1 THE STATUTES OF THE REALM, *supra* note 42, at 336, 340. If both parties were aliens, they would be judged by aliens; if both were "denizens," they would be judged by "denizens"; and if they were mixed alien and "denizen," they would be judged by a mixed tribunal. *Id.*

45. *See infra* notes 47–69 and accompanying text.

46. *See infra* notes 51–58 and accompanying text.

47. *See* THE FEDERALIST NOS. 78–83 (Alexander Hamilton).

48. *See* THE FEDERALIST NOS. 80–82 (Alexander Hamilton).

49. THE FEDERALIST NO. 80, at 443, 444–46 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

50. Hugh Williamson, *Speech at Edenton, N.C.* (Nov. 8, 1787), *in* N.Y. DAILY ADVERTISER, Feb. 25–27, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 24, at 203–04; *see also* Warren, *supra* note 27, at 82 n.78.

51. James Madison, *Debate at the Virginia Convention on the Constitution* (June 20, 1788), *in* 10 DOCUMENTARY HISTORY, *supra* note 24, at 1414–15.

52. *See* THE FEDERALIST NO. 3 (John Jay).

The British government, already financially strapped after fighting a series of colonial wars including the American Revolution, was under pressure from powerful lenders to protect their debts.[53] Although Great Britain was still licking its wounds, it remained an extremely dangerous enemy. The British navy was the world's most powerful, and millions of British subjects and soldiers, including thousands of loyalist refugees from the United States, lived in Canada.[54] Conflict was already apparent as the United States sparred with its former master over western outposts in U.S. territory still occupied by British soldiers.[55] Moreover, the British government was not above shaping its foreign policy around economic concerns.[56]

Other proponents for the Constitution emphasized the development of commercial credit abroad to invigorate the national economy. Future Supreme Court Justice James Wilson, urging ratification of the Constitution at the Pennsylvania Convention, reasoned that foreign lenders were eager to protect their investments and might avoid investing in Pennsylvania without the guarantee of an unbiased arbitrator.[57] To Wilson, one way to secure the newfound liberty of Americans was with monetary force.[58] The ideas of Adam Smith and Sir James Stewart were quickly gaining traction in economic thought at that time, and this led to the replacement of mercantilism with capitalism.[59] Capitalist financiers and business owners desire long-term stability for their investments. Two methods they have historically employed for this stability are threat of brute force, such as

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53. Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1439 (1989).

54. *See* NIALL FERGUSON, EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER 36–37, 101 (Basic Books 2003) (2002).

55. Holt, *supra* note 53, at 1444.

56. A prime example is Great Britain's dealings with India and the British East India Company. Not only did the company have a monopoly on trade in India, but the British Government allowed the company to hire British soldiers and other mercenaries to wage wars of conquest. Eventually, in 1773, a company officer named Warren Hastings was appointed the first Governor-General of British holdings in India. But the first Governor-General without direct ties to the British East India Company was not appointed for ten more years (General Cornwallis, coming off his defeat in the American Revolution), when the company ran into terrific debt and Parliament began an Enron-type, seven-year trial of Hastings. *See* FERGUSON, *supra* note 54, at 44–56.

57. James Wilson, Speech at the Pennsylvania Convention (Dec. 7, 1787), *in* 2 DOCUMENTARY HISTORY, *supra* note 24, at 518–20. Wilson also reiterated the prevention of wars justification. *Id.* at 520.

58. CHARLES PAGE SMITH, JAMES WILSON, FOUNDING FATHER, 1742–1798, at 153 (Greenwood Press 1973) (1956).

59. Charles G. Stalon, Conference Addendum, *Regulating in Pursuit of Efficient and Just Prices*, 8 ADMIN. L.J. AM. U. 913, 914 (1995); *see also* SMITH, *supra* note 58, at 145. Sir James Stewart, though less familiar today, was better known in the early United States than Adam Smith. His ideas combined morality and economics. *See id.*

invasion in repayment of debts owed,[60] and an open court system proven to give foreign businesses a fair and stable opportunity to protect capital.[61]

Other pro-creditor advocates abounded. Benjamin Franklin, John Adams, and John Jay had already written protection of foreign debt into the Treaty of Peace, which ended the Revolutionary War.[62] Philadelphia merchants Tench Coxe and Nalbro Frazier lauded the Constitution as the only way to instill foreign nations with the confidence necessary to increase trade.[63] North Carolina lawyer-planter Archibald Maclaine[64] vexed that foreign distrust drained the young nation of its specie and credit.[65]

The concerns of Hamilton, Wilson, and their counterparts did not go unnoticed. During the deliberations on the Judiciary Act of 1789,[66] Oliver Ellsworth argued for the necessity of providing foreigners—without distinguishing between foreign citizens, subjects, or otherwise—access to courts that were less biased than state courts.[67] Fears of disparate treatment of foreigners were well founded as many British lenders had trouble getting fair hearings from judges biased either in favor of local parties or against foreigners, especially the British.[68] Many states had passed various impeding statutes, and North Carolina went so far as to confiscate British debts.[69]

B. Modern Reasons for Alienage Jurisdiction

The historical justifications of alienage jurisdiction still apply in modern American law. Closing the courthouse doors on potentially stateless persons and corporations without any alternative resolution avenue encourages greater conflict. As for the commercial justification, both foreign and domestic businesses rely on

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60. This option is illegal under modern international law. *See* Convention Respecting the Limitation of Employment of Force for Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241.

61. *See infra* note 81 and accompanying text.

62. Holt, *supra* note 53, at 1439–40, 1440–49 (citing Definitive Treaty of Peace, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 8 Stat. 80).

63. *See* Letter from Tench Cox to James O'Neal (July 10, 1788), *in* 18 DOCUMENTARY HISTORY, *supra* note 24, at 255; Letter from Nalbro Frazier to Stephen Blackett (July 11, 1788), *in* 18 DOCUMENTARY HISTORY, *supra* note 24, at 255–56.

64. Writing under the pseudonym "Publicola."

65. Publicola, *An Address to the Freemen of North Carolina*, *in* ST. GAZETTE OF N.C., Mar. 20, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 24, at 439.

66. This law created the federal judiciary system beyond the Supreme Court. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 79 (1789).

67. *See* Warren, *supra* note 27, at 60–61 (quoting a letter from Ellsworth to Judge Richard Law). *But see id.* at 79 (noting that a literal interpretation of the adopted language would permit suits between foreigners with a U.S. citizen as party and thereby be unconstitutional).

68. *See* Holt, *supra* note 53, at 1438–39; 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA, IN 1787, at 299 (Jonathan Elliot ed., 1830) (commentary of Martin Van Buren).

69. *See* Holt, *supra* note 53, at 1438–39.

stability provided by access to federal courts.[70] The United States' commercial concerns have expanded worldwide and are not focused on any one country, as they were on England at the time the Constitution was ratified.[71] Statelessness affects refugees, some native peoples, and many persons and corporations located in areas not formally recognized as independent states.[72] Their effect on the American economy is immense.[73]

Federal court access serves to release pressure in sensitive areas. Far from becoming a less relevant justification for alienage jurisdiction, access diffuses conflict and increases commerce more now than in the past. While it is impossible to prove the negative and list all of the wars that never occurred, or prove that a business would have failed without access to courts, some specific cases are indicative of the larger pattern. In 1905, the United States sent its navy to the Dominican Republic to preempt European powers by seizing control of customs houses to pay off that nation's unpaid debts.[74] If foreigners could have relied on the Dominican Republic courts to assure repayment of debt, military intervention would have been unlikely.[75] Instead, the United States occupied the Dominican Republic for more than eight years and controlled its customs for thirty-six years.[76]

Tribal courts are an example of economic development hampered by limited court access. Many businesses point to the limited access to judicial remedies in tribal courts as a reason for not investing more in tribal enterprises despite significant incentives.[77] Tribal courts may deny non-Indian plaintiffs access if it is in the tribe's immediate advantage to do so.[78] Ensuring access to fair tribal courts could prevent conflicts arising from many simple business transactions and reassure potential businesses.[79]

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70. *See supra* notes 61–62 and accompanying text.

71. *See* U.S. Census Bureau, *Top Trading Partners—Total Trade, Exports, Imports: Year-to-Date January 2005*, *in* FOREIGN TRADE STATISTICS, http://www.census.gov/foreign-trade/statistics/highlights/top/top0501.html. Canada is the United States' top trading partner, yet it only accounts for 19.7% of the United States' total international trade. *Id*. The United Kingdom is sixth with only 3.4% of the United States' total international trade. *Id*.

72. *See supra* note 11.

73. Hong Kong, for instance, was the United States' twelfth largest trading partner at the time *Matimak* was decided. Matimak Trading Co. v. Khalily, 118 F.3d 76, 81 (2d Cir. 1997).

74. Major D.J. Lecce, *International Law Regarding Pro-Democratic Intervention: A Study of the Dominican Republic and Haiti*, 45 NAVAL L. REV. 247, 249–50 (1998).

75. *See id*. at 250.

76. *Id*.

77. Robert L. Gips, *Current Trends in Tribal Economic Development*, 37 NEW ENG. L. REV. 517, 519–20 (2003).

78. *See, e.g.*, Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682, 684 (10th Cir. 1980).

79. Gips, *supra* note 77, at 517–18; Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1155 (1995). The availability of tribal court access puts an interesting sovereignty twist in the mix because federal courts often feel obligated to make *some*

Multinational corporations and international exporters depend on economic stability to protect their commercial investments.[80] Whether it be predictability in taxation, procedural rights for employees abroad, environmental regulation of manufacturing facilities, or contractual disputes, businesses do not like ventures that risk increased transactional costs, or losing assets or employees, without a predictable system of laws and an adjudicating forum.[81] Both domestic businesses operating abroad and foreign businesses operating domestically may benefit from and favor federal court access.[82]

Beyond the two historical justifications are several newer concerns that support expanded access to federal courts. First is the desire for fundamental fairness. Local courts are at least perceived to be hostile to outsiders.[83] They are even more hostile to foreigners than to outsiders from other parts of the United States.[84] In contrast, federal courts rely on larger jury pools, have stable and uniform procedural safeguards, employ judges with life tenure, and have many other benefits.[85] The larger jury pools are more likely to bring together a more diverse jury and less likely to be tainted by local biases.[86] Life-tenured federal judges have less incentive to deviate from fair application of the law than elected state judges because judges seeking reelection may feel compelled to pander to the public at the expense of an unpopular foreign party.[87]

While most of the reasons for alienage jurisdiction focus on justice for the *alien* party, *United States citizens* may also benefit from expanded jurisdiction. Statelessness exception cases do not always involve foreign parties "preying" upon American corporations in the hope of a large award or settlement, as some critics may believe was the motivation in *Abu-Zeineh*. Many of the cases cited in this Note, unlike *Abu-Zeineh*, involve alien individuals or corporations trying to *avoid* being brought into federal court.[88] Companies usually do not incorporate in places

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remedy available to disaffected plaintiffs, thus eroding tribal sovereignty. *See id.* at 1130–32.

80. *See supra* notes 60–61 and accompanying text.

81. Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 1018–19 (2001).

82. *Cf. id.*

83. *See* Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1342 (1984); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 407–12 (1992); John F. Molloy, *Miami Conference Summary of Presentations*, 20 ARIZ. J. INT'L & COMP. L. 47, 83 (2003) (address of Douglas Seitz).

84. Miller, *supra* note 83, at 408.

85. Marvell, *supra* note 83, at 1339–64; Molloy, *supra* note 83, at 83.

86. Marvell, *supra* note 83, at 1364; Molloy, *supra* note 83, at 83.

87. Marvell, *supra* note 83, at 1356.

88. *See, e.g.*, JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 91 (2002); S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 413 (3d Cir. 1999); Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1242 (7th Cir. 1989); Blair Holdings Corp. v. Rubinstein, 133 F. Supp. 496, 497–98 (S.D.N.Y. 1955).

like the British Virgin Islands because of the warm climate or complex business laws; they go there for safe-haven from adverse enforcement.[89] Federal court access may benefit individuals and other companies seeking to hold certain "rogue" companies accountable.[90] Proponents and opponents of expanded jurisdiction need not split solely along the foreign party–domestic party line; the divide might reflect opposing priorities of corporations and individuals.[91]

The United States should also remember its international treaty obligations and international norms. In 1789, the United States had few treaties with other nations,[92] and there was no such thing as a multilateral agreement. That is not the case today. Several international treaties now call for recognition of the legal rights of refugees and stateless persons. The United Nations' 1951 Convention Relating to the Status of Refugees guarantees refugees "free access to the courts of law" of all signatory states and treatment as nationals of the state of their habitual residence for the purpose of court access.[93] The Organization of American States' ("OAS") American Convention on Human Rights grants *all* people rights to a nationality (*not* citizenship) and court access.[94]

Beyond those obligations stemming from signed international treaties, the United States must also contend with international norms established by treaties it has *not* signed.[95] The OAS's American Declaration of the Rights and Duties of

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89. *See* Paul H. Asofsky & Andrew W. Needham, *U.S. Private Equity Funds: Common Tax Issues for Investors and Other Participants*, *in* TAX STRATEGIES FOR CORPORATE ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS AND RESTRUCTURINGS 2004, at 1338–39 (630 PLI Tax Law & Estate Planning, Course Handbook Series No. 2995, 2004); Keith R. Fisher, *In Rem Alternatives to Extradition for Money Laundering*, 25 LOY. L.A. INT'L & COMP. L. REV. 409, 410 n.7 (2003).

90. *See, e.g.*, *Traffic Stream*, 536 U.S. at 90–91.

91. Advocates for individual parties would generally support jurisdiction because they stand to gain much from a suit against a corporation while presenting slight potential return for plaintiff corporations. Corporations, for the same reasons, would generally oppose jurisdiction in suits against individuals. Corporate-corporate and individual-individual cases would not show this kind of split because they involve similar party types, and they would probably split along the foreign-domestic divide as determined by their status as plaintiffs or defendants.

92. One of the few treaties was the Treaty of Peace with Great Britain that guaranteed established debts between the two nations. *See supra* note 62.

93. Convention Relating to the Status of Refugees, art. XVI, July 28, 1951, 189 U.N.T.S. 150. The Convention excepts persons who have committed serious nonpolitical crimes from its provisions. *Id.* at art. I(F). While the United States did not sign the Convention directly, it did sign and ratify the 1967 Protocol Relating to the Status of Refugees and thereby acquiesced to that provision. Protocol Relating to the Status of Refugees, art. I, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

94. American Convention on Human Rights, arts. I, III, VIII(1), XX, XXIV, XXV, Nov. 22, 1969, O.A.S.T.S. No. 36. The United States, though a signatory, has not yet ratified this Convention. *Id.*

95. In addition to the moral authority international treaties carry, there is limited room for federal courts to apply international norms as substantive law. *Cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 729–31 (2004); *see also* The Paquete Habana, 175 U.S. 677, 700 (1900); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards,

Man declares that every person has the right to a juridical personality and "may resort to the courts to ensure respect for his legal rights,"[96] while the United Nations' Universal Declaration of Human Rights declares that "[e]veryone has the right to recognition everywhere as a person before the law."[97] The Convention on Stateless Persons advocates free access to courts for stateless persons, who would be treated as nationals of the country of their habitual residence in the courts of all other nations.[98]

Finally, there is an Equal Protection issue imbedded within the strict technical interpretation of "citizens or subjects" used by those courts denying jurisdiction. If it is assumed that the Founders *did* contemplate other classifications than citizens or subjects, continued use of those original distinctions may imply an impermissible racial distinction under the Fourteenth Amendment.[99] The Alien Enemies Act of 1798 included the terms "denizens" and "natives" along with "citizens" and "subjects."[100] These terms often parallel racial or ethnic divides. A "denizen" was traditionally a classification between alien and naturalized citizen, somewhat akin to the modern permanent resident alien.[101] However, the term has occasionally been used to circumvent civil rights for racial minorities.[102] In Kentucky, "free people of color" were deemed "*quasi*-citizens, or at least denizens."[103] "Native" is an obviously suspect term too.[104] Adopting a definition of

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J., concurring). *But see Tel-Oren*, 726 F.2d at 808–19 (Bork, J., concurring). *See generally* Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 815–821 (2005) (discussing modern federal court references to international law as authority for tort liability).

96. American Declaration of the Rights and Duties of Man, arts. XVII–XVIII, May 2, 1948, O.A.S. Res. XXX, *reprinted in* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 430.1 (2d ed. 1990).

97. Universal Declaration of Human Rights, art. VI, *adopted* Dec. 10, 1948, 3 U.N. GAOR (Resolutions, part 1) at 71, U.N. Doc. A/810 (1948).

98. Convention Relating to the Status of Stateless Persons, art. XVI, Sept. 28, 1954, 360 U.N.T.S. 117.

99. *Cf.* Tamra M. Boyd, *Keeping the Constitution's Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 STAN. L. REV. 319, 337–45 (2001) (describing alienage classification as a historic "vehicle for race discrimination").

100. *See supra* note 25.

101. BLACK'S LAW DICTIONARY 434 (6th ed. 1979); 1 WILLIAM BLACKSTONE, COMMENTARIES *362. It would be very odd if the Founders had intended to permit aliens and citizens, but not denizens, access to federal courts. All of the concerns that support federal diversity jurisdiction for aliens and citizens apply to denizens as well.

102. *See generally* Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 686–94, 715 n.335 (1995) (describing citizenship nomenclature games played with people of Asian, native, and African descent). Some southern judges resurrected the "denizen" category to deny free blacks full citizenship rights. *See* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 319–23 (1978). Ironically, some judges considered free blacks "subjects," which, for the purposes of this Note, would open up diversity jurisdiction to "denizens." *Id.* at 319.

103. Rankin v. Lydia, 9 Ky. (4 A.K. Marsh) 467, 476 (1820) (emphasis in original). Justice McLean was referring to this statement when, dissenting in *Dred Scott*, he sarcastically proclaimed, "These are the words of a learned and great judge, born and

"citizens or subjects" that bases distinctions used to deny access to federal courts on the terms "denizens" or "natives" probably violates the Fourteenth Amendment's equal protection of the law. Furthermore, those terms perpetuate colonialism despite the United Nations' mandate to increase self-determination.[105]

III. OPPOSITION TO EXPANDED JURISDICTION

Not everyone supports expanded federal court jurisdiction in this area. Those who believe that broader use of diversity jurisdiction to include stateless parties is not in accord with the Constitution may be reluctant to support a constitutional amendment solely to remedy this defect. Such a proposal is fraught with the difficulties and potential dangers present anytime there is a constitutional amendment.

Surprisingly limited opposition stems from the portion of the legal community generally antagonistic to all types of diversity-based jurisdiction. Citing an overburdened federal court system, increased costs, and other problems, they seek to eliminate diversity cases entirely from the federal docket.[106] This option at least presents stateless parties facially evenhanded treatment with other foreigners in federal courts. However, it ignores the prejudices and confusion lurking in state courts that sends many parties scrambling for the more stable and fair federal courts. Even if the need for diversity jurisdiction on these grounds is an unfounded assumption, the comfort gained from a seemingly neutral judiciary might bestow a measure of psychological security and coax jittery businesses into expanding their commerce in the United States.

Critics of expanded jurisdiction may disclaim the validity of any justification for alienage jurisdiction other than to prevent conflicts with foreign

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educated in a slave State." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 563 (1856) (McLean, J., dissenting).

104. While designation as Indian in the United States is considered a political distinction, "native" is an ambiguous term that could apply to indigenous peoples of other countries as well as those of the United States. *See* Morton v. Mancari, 417 U.S. 535, 554 (1974). Furthermore, even within the United States, there are many groups that consider themselves native but are not recognized as Indians by the federal government. These include Native Hawaiians, Native Alaskans, Aleutians, Inuits, and mainland tribes currently seeking or denied federal recognition. *Morton v. Mancari* itself lies on questionable ground when reviewed in light of *United States v. Sandoval*, which grants the federal government the power to determine, without any treaty or other legal instrument, whether a community of people is "distinctly Indian" and thus subject to federal trust authority. *Compare id., with* United States v. Sandoval, 231 U.S. 28, 46 (1913).

105. International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (signed by the United States but not ratified).

106. *See* Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 119–21 (1990) (disclaiming the validity of jurisdiction based on bias to out-of-staters as the basis for a large portion of the federal docket). *But see id.* at 121–23 (excepting suits involving aliens because they pose a relatively light burden on federal courts, though suits involving permanent resident aliens would be barred); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 966–68 (1979) (urging expanded alienage jurisdiction while eliminating domestic diversity jurisdiction).

states.[107] In particular, they oppose using diversity jurisdiction to overcome "perceived" biases toward out-of-state parties, viewing it as an unnecessary remedy for a nonexistent problem.[108] Initially, the analogous situation where U.S. citizens domiciled abroad are denied diversity jurisdiction supports the critics' position.[109] Expatriate U.S. citizens do not benefit from a "home court" advantage, yet must still use state courts for all of their nonfederal question cases.[110] However, there would then be no justification for diversity suits between U.S. citizens domiciled in different states because those suits have nothing to do with preventing conflicts with foreign states. Out-of-state biases are the sole justification for domestic diversity cases, and there is no reason to believe that such biases would diminish for alien parties. Fairness necessitates access to federal courts when one party will be at the mercy of the other party's local forum.

Finally, some detractors use a political question argument to challenge expanded jurisdiction over stateless parties. In short, the argument assumes that courts would begin determining what entities qualify as recognized nations, an area traditionally left to Congress or the State Department.[111] This assumption forgets, however, that courts have already overtly ignored the official recognition process in limited cases.[112] When the State Department's opinion on the sovereignty of a foreign state is unclear,[113] *any* decision on subject-matter jurisdiction becomes political. Critics also complain that judicial decisions about a party's nationality interfere with the ability of foreign nations to determine their own citizenship standards.[114] However, this concern conflicts with actual practice in previous cases.[115] Moreover, preventing de facto nationality recognition could humiliatingly require certain people, as a tactical necessity to satisfy the "citizens or subjects" requirement of § 1332(a)(2), to claim "allegiance" to a recognized state that they loathe. Palestinians, for example, may have to claim allegiance to Israel even though many Palestinians are fundamentally opposed to the Israeli state. Although this argument suggests an intriguing practitioner's nightmare, it (1) characterizes a previously per se excluded party's newfound tactical *choice* as a bad thing, and (2) forces the logical conclusion of the inclusionary argument to an unnecessary extreme. All of these examples represent fear of change more than reasoned analysis of possible alternatives. There is no need for a nation-specific

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107. Matimak Trading Co. v. Khalily, 118 F.3d 76, 82 (2d Cir. 1987) (noting the primary motivation for alienage jurisdiction is to prevent conflicts with foreign states).

108. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1672–73 (1992).

109. Sadat v. Mertes, 615 F.2d 1176, 1180 (7th Cir. 1980).

110. *Id.*

111. *Matimak*, 118 F.3d at 81; Walter C. Hutchens, Note, *Alienage Jurisdiction and the Problem of Stateless Corporations: What is a Foreign State for Purposes of 28 U.S.C. § 1332(a)(2)?*, 76 WASH. U. L.Q. 1067, 1089 (1998).

112. *See, e.g.*, Murarka v. Bachrack Bros., Inc., 215 F.2d 547, 550–52 (2d Cir. 1954) (holding that, prior to India's official recognition by the United States in 1954, there were seven years of de facto recognition by the State Department that could sustain a suit in diversity).

113. This has long been the case with Taiwan.

114. *See Matimak*, 118 F.3d at 85.

115. *See infra* at 120–22 and accompanying text.

determination. There need only be a presumption that one who is neither a U.S. citizen nor a permanent resident alien owes allegiance to some foreign state.

IV. PRE-*TRAFFIC STREAM* JURISPRUDENCE ON ALIENAGE JURISDICTION FOR STATELESS PERSONS AND CORPORATIONS

Seventeenth-century political philosophy pervaded Edward Coke's decision in *Calvin's Case*[116] when he said that all people were born subject to their monarch because of the allegiance due in consideration for protection at birth.[117] Allegiance was due multiple sovereigns if one was born abroad while still benefiting from the protection of the sovereign of one's homeland.[118] The two main doctrines of nationality, *jus soli* and *jus sanguinis*,[119] derive from these ideas first explained in *Calvin's Case* and reverberate throughout current debates on citizenship and sovereign independence.[120]

United States v. Wong Kim Ark set the current American standard and held that a foreign state may define its own citizenship standards as an inherent right of sovereignty.[121] This holding corresponds with international law and norms.[122] Following the mandate of *Wong Kim Ark*, most courts defer to a foreign state's own laws to determine whether a party is a citizen or subject of that state.[123] For example, the German laws of incorporation determine whether an entity is a German corporate citizen or an unrecognized association.[124] Combining domicile at birth or citizenship of parents with a foreign state's own laws of citizenship

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116. Calvin v. Smith, 7 Co. 1a, 77 Eng. Rep. 377 (K.B. 1608).

117. *See* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 13 (1985).

118. *See id.* at 14–15.

119. *See supra* notes 8–9.

120. *See* SCHUCK & SMITH, supra note 117, at 12; *supra* notes 8–9.

121. 169 U.S. 649, 668 (1898). This sovereign right probably also falls under the act of state doctrine that demands respect for the acts of an independent nation within its own borders. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964).

122. *See* Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, arts. I–II, Apr. 12, 1930, 179 L.N.T.S. 89; Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law, arts. II–III, May 24, 1984, 24 I.L.M. 465; Code of Private International Law (Bustamante Code), arts. IX, XII, XIV, XV, Feb. 20, 1928, 86 L.N.T.S. 362; Draft Conventions and Comments Prepared by the Research in International Law of the Harvard Law School: The Law of Nationality, art. 2, *reprinted in* 23 AM. J. INT'L L. (SPECIAL ISSUE) 13 (1929); *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 ("[Q]uestions of nationality are . . . in principle within this reserved domain [of domestic jurisdiction].").

123. *See, e.g.*, Matimak Trading Co. v. Khalily, 118 F.3d 76, 85 (2d Cir. 1997).

124. *Cf.* Nat'l S.S. Co. v. Tugman, 106 U.S. 118, 121 (1882) ("[A] corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such State."), *superseded by statute*, 28 U.S.C. § 1332 (2000) (deeming corporations to have dual citizenship, both in the place of incorporation and the principal place of business), *as recognized in* Casisse Nat'l de Credit Agricole v. Chameleon Fin. Co., No. 94 C 773, 1995 WL 76877 (N.D. Ill. Feb. 17, 1995). Note that *Tugman* still holds true for determining citizenship by place of incorporation, and the alienage diversity problem survives this amendment for all alien corporations without a principal place of business in a recognized nation.

helps U.S. courts gauge whether someone is stateless.[125] It has not traditionally been up to American judges to define their own procedures for determining foreign citizenship.[126]

But what happens in the grey areas? A corporation in a British overseas dependency[127] may be governed by and incorporated in the dependency itself and not in the United Kingdom. However, the United Kingdom still controls the foreign policy of the dependency.[128] Many British commerce laws specifically require equal treatment of United Kingdom corporations and British dependency corporations.[129] Finally, most of the British dependencies may have their laws changed at the will of Parliament.[130] Clearly, the dependencies do not act as independent sovereigns; they are under the thumb of the United Kingdom. However, a corporation formed under the laws of an overseas dependency is not clearly a citizen or subject (assuming the most restrictive definition of the latter term) of the United Kingdom.[131] What is the proper outcome?

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125. Courts must still determine if any other special circumstances exist, such as an individual's renunciation of citizenship or the foreign state's stripping that individual's citizenship. *See supra* notes 5–7 and accompanying text.

126. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 211 (1987) ("[A]n individual has the nationality *of a state that confers it*, but other states need not accept that nationality when it is not based on a genuine link between the state and the individual." (emphasis added)); *id.* § 213 ("[A] corporation has the nationality *of the state under the laws of which the corporation is organized*." (emphasis added)).

127. There are currently fourteen British Overseas Dependencies: Anguilla, British Antarctic Territory, Bermuda, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, St. Helena and Dependencies (Ascension Island and Tristan Da Cunha), Turk and Caicos Islands, Pitcairn Island, South Georgia and South Sandwich Islands, and two Sovereign Base Areas on Cyprus. Foreign and Commonwealth Office, *Overseas Territories*, http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1013618138295 (last visited Nov. 2, 2004). Their combined population (excluding British military personnel and related civilian contractors stationed at the British Indian Ocean Territory and the Sovereign Base Areas on Cyprus) is approximately 200,000. *Id.* The British Overseas Dependencies were commonly referred to as "Dependent Territories" until 1998 and as "Overseas Territories" afterwards, but this represents nothing more than a name change. JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure, 536 U.S. 88, 90 n.1 (2002).

128. Robin Cook, *Forward* to PARTNERSHIP FOR PROGRESS AND PROSPERITY: BRITAIN AND THE OVERSEAS TERRITORIES (1999), *available at* http://www.fco.gov.uk/Files/kfile/OT1.pdf.

129. *See* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner at 23–26, *Traffic Stream*, 536 U.S. 88 (2002) (No. 01-651), 2002 WL 257562.

130. *Id.* at 5–6, 14–18.

131. There are three citizenship classifications available to residents of British Overseas Dependencies: British citizenship, British Dependent Territories citizenship, and British Overseas citizenship. Cook, *supra* note 128. Furthermore, the British Overseas Territories Act of 2002 gives citizens of the Overseas Territories the option of obtaining British citizenship, either at the exclusion of their Overseas Territory citizenship or dually with it. British Overseas Territories Act, 2002, c. 2-3 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts2002/20020008.htm (last visited Oct. 25, 2005).

A. Decisions Excluding Stateless Persons and Corporations from Alienage Jurisdiction Applicability

Before *Traffic Stream*, the linchpin case for excluding stateless parties was *Matimak Trading Co. v. Khalily*.[132] The Second Circuit held that parties must claim citizenship or subjugation of a foreign state recognized as a free and independent sovereign by the United States.[133] The *Matimak* court held that while Hong Kong[134] was the twelfth largest trading partner of the United States, was considered an autonomous territory of the United Kingdom, helped found the World Trade Organization, and was a signatory to several international treaties and conventions, it was neither an independent sovereign nor subject to another independent sovereign.[135] Thus Matimak Trading Co., a citizen of Hong Kong, was summarily relegated to diversity wasteland.[136] The *Matimak* court believed the *only* justification for alienage jurisdiction was to "avoid entanglements with foreign states and sovereigns."[137] Therefore, the United States had no need to fear entanglements because stateless parties are, by definition, not connected to a foreign state.[138]

Besides not contemplating other justifications for alienage jurisdiction, this analysis exhibits limited reasoning because it assumes individuals cannot become "entangled" with the United States. If we learn nothing else from the terrorist attacks of September 11, 2001, it should be that individuals acting without state sponsorship can be just as dangerous as a foreign state. The *Abu-Zeineh* plaintiffs are ideal candidates for this type of transformation.[139] With no recourse

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132. 118 F.3d 76 (2d Cir. 1997). Curiously, despite frequent platitudes about leaving political determinations of sovereignty to the political branches and the federal government's urging that Hong Kong corporations be permitted to invoke alienage jurisdiction, the Second Circuit rejected this argument. *See* S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 417 (3d Cir. 1999).

133. *Matimak*, 118 F.3d at 80.

134. The case was prior to Hong Kong's transfer of sovereignty from the United Kingdom to China.

135. *Matimak*, 118 F.3d at 81–82; *id.* at 90 (Altimari, J., dissenting); *see also* Bradford Williams, Note, *The Aftermath of* Matimak Trading Co. v. Khalily*: Is the American Legal System Ready for Global Interdependence?*, 23 N.C. J. INT'L L. & COM. REG. 201, 223–24 (1997).

136. *Matimak*, 118 F.3d at 86.

137. *Id.* at 87–88. Technically, the *Matimak* court briefly mentioned a second, historical justification of enforcing treaty obligations with Great Britain. *Id.* at 83. Because this justification is so closely related to avoiding entanglements with foreign states, as opposed to focusing on the intrinsic harms to the parties involved, this Author considers enforcing treaty obligations to be part of the umbrella justification of avoiding entanglements.

138. *Id.*

139. The Author of this Note does not wish to imply that all Palestinians, Arabs, or other peoples of the Middle East are prone toward terrorism. Such stereotyping is incorrect and unfair and is a dangerous habit to fall into. The Author uses Palestinians only because *Abu-Zeineh* sparked his interest in this topic and heads this Note, so continued use of Palestinians throughout the Note gives the reader a consistent and familiar group to follow.

to federal courts, Palestinians may develop a greater dissatisfaction with the United States. After being killed by the Israeli government, denied citizenship by recognized countries, and left without compensation for their losses, frustrated Palestinians probably view their denied use of diversity jurisdiction as yet another strike against their society. The result: an opportunity to provide access to justice spurned in return for increased hostility from Palestinians.

In another case excluding stateless parties, *Blair Holdings Corp. v. Rubinstein*, the court held that, in 1875, Congress intentionally departed from the previous law when it replaced the "alien" language in § 1332(a) with "citizen-subject" language.[140] This holding came despite nonexistent congressional discussion about the change.[141] In *Blair Holdings*, the court held that a refugee from the Soviet Union, who had not subsequently obtained citizenship in another country, could not be sued in diversity.[142] Despite admitting that the stateless person problem is a relatively recent phenomenon,[143] the *Blair Holdings* court supported its decision by refusing to interpret the Constitution in a manner "inconsonant with the intent of the framers."[144]

B. Decisions Favoring Alienage Jurisdiction Applicability to Stateless Persons and Corporations

Not all courts agree with the Second Circuit's decision in *Matimak*. For example, the Third Circuit held that pre-1997 Hong Kong corporations, though not citizens of the United Kingdom, qualified at least as subjects of the United Kingdom.[145] The court, in *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, found this conclusion consistent with the United Kingdom's own laws and the State Department's treatment of Hong Kong.[146] A key aspect of the inclusive holding in *Southern Cross* was that the State Department weighed in favor of finding Hong Kong citizens subject to the United Kingdom.[147] Thus, had the *Southern Cross* court followed *Matimak* and denied jurisdiction, its ruling would have been directly contradictory to the Executive Branch's political determination.

Likewise, in *Chang*, the Northern District of Illinois interpreted § 1332(a)(2) to require only "recognition," not "formal recognition," of Taiwan by the United States because the restrictive interpretation was not supported by legislative history or early judicial decisions.[148] Furthermore, the *Chang* court held that:

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140. 133 F. Supp 496, 500–01 (S.D.N.Y. 1955).
141. *Id.*
142. *Id*. at 502.
143. *Id.* at 501.
144. *Id.* at 502.
145. S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 418 (3d Cir. 1999).
146. *Id.*
147. *Id.* at 417–18.
148. Chang v. Nw. Mem'l Hosp., 506 F. Supp. 975, 977 n.2 (N.D. Ill. 1980).

> [C]ertain policy concerns support a mere "recognition" standard for alienage diversity jurisdiction. There must be flexibility in foreign affairs . . . , so that the United States and the citizens may maintain "commercial, cultural and other relations" with another nation and its citizens even in the absence of official diplomatic relations. Allowing only foreign nationals of countries "formally recognized" by the United States to sue in our federal courts would impair that flexibility.[149]

Another district judge, in *Tetra Finance (HK), Ltd. v. Shaheen*, reaffirmed the political realism argument in *Chang* and added that the U.S.-Hong Kong relationship was annually responsible for billions of dollars in trade and investment.[150] That decision also pointed out federal courts had often previously extended jurisdiction, with few complaints, over similar parties with citizenship from unrecognized foreign states.[151]

The Seventh Circuit, in *Wilson v. Humphreys (Cayman) Ltd.*, recognized alienage jurisdiction over plaintiffs attempting to sue a Cayman Islands corporation, because "the exercise of American judiciary authority over the citizens of a British Dependent Territory implicates this country's relationship with the United Kingdom."[152] This was precisely the same reason, the *Wilson* court held, for having alienage jurisdiction at all, and a contrary outcome would put form over substance.[153]

Some courts have not even required the threshold connection to a recognized foreign state. Instead, they justify diversity cases to prevent prejudice against a stateless party, to uphold de facto recognition by Congress or the Executive Branch, or for simple efficiency.[154] As seen in *Murarka*, courts may use de facto recognition by the State Department to fulfill the requirement of a "foreign state."[155] The same type of reasoning sustained diversity jurisdiction for a party with Taiwanese citizenship in *Millen Industries, Inc. v. Coordination Council for North American Affairs*.[156] The *Millen* court relied on an act that explicitly extended application of U.S. laws relating to foreign states to Taiwan.[157] The act allowed the court to avoid any political questions of statehood

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149. *Id.* at 977 (citation omitted).

150. 584 F. Supp. 847, 848 (S.D.N.Y. 1984).

151. *Id.*

152. 916 F.2d 1239, 1243 (7th Cir. 1990).

153. *Id.* (citing Murarka v. Bachrack Bros., Inc., 215 F.2d 547, 552 (2d Cir. 1954)).

154. *See, e.g.*, Sun Printing & Publ'g Ass'n v. Edwards, 194 U.S. 377, 383 (1904); Millen Indus., Inc. v. Coordination Council for N. Am. Affairs, 855 F.2d 879, 881–82 (D.C. Cir. 1988); *Murarka*, 215 F.2d at 550–52.

155. *Murarka*, 215 F.2d at 550–52; *accord* Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 554–55 (2d Cir. 1988) (de facto recognition of Iran allowed it to sue in U.S. federal courts).

156. 855 F.2d at 881–82.

157. The court looked to 22 U.S.C. § 3303, which said, "Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan." *Id.* at 882 (quoting 22 U.S.C. § 3303(b)(1) (1982)).

recognition.[158] That act and the *Millen* decision came in spite of the United States' official derecognition of Taiwan as an independent sovereign state.[159] Finally, in *Sun Printing & Publishing Ass'n v. Edwards*, the U.S. Supreme Court limited the nationality analysis of the appellant to either American or foreign citizenship and did not consider the possibility that he might not have a nationality at all.[160]

The application of alienage jurisdiction has been inconsistent over the years, even in cases from the same court or involving very similar parties. The rift began as a divergence between textualists and their opponents. Both sides, however, have since delved deeper into the underlying policy reasoning and the intent of the Framers. In 2001, the U.S. Supreme Court recognized the existent anarchy in this area of law and sought to provide further clarification.

V. JPMORGAN CHASE BANK V. TRAFFIC STREAM (BVI) INFRASTRUCTURE LTD.

In 1998, JPMorgan Chase Bank[161] ("Chase") contracted with Traffic Stream (BVI) Infrastructure ("Traffic Stream") to finance toll road construction in China, but Traffic Stream later defaulted on its obligations.[162] Chase brought suit in the Southern District of New York, and the court ruled that subject-matter jurisdiction existed under the alienage jurisdiction provision and found for Chase.[163] On appeal, the U.S. Court of Appeals for the Second Circuit reviewed sua sponte federal court diversity jurisdiction over Traffic Stream.[164] Basing its decision on precedent from *Matimak*, the court ruled that the requirements of § 1332(a)(2) were not satisfied.[165] The U.S. Supreme Court, wanting to reconcile the

158. *Id.*

159. *Id.* at 883.

160. 194 U.S. at 383. However, some commentators believe this was merely an oversight by the Court. *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3604 n.46 (2d ed. 2004).

161. At the time it was named Chase Manhattan Bank. JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 90 (2002).

162. *Id.* at 90–91.

163. *Id.* at 91. Recall that although diversity jurisdiction focuses on the individual parties and not on the claims involved, it refers only to subject-matter, not personal, jurisdiction. In the instant case, because the contract included an arm's-length, negotiated, forum-selection clause submitting each party to the laws of New York, there was no issue over personal jurisdiction. *Id.* at 90; *see also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991), *superseded in part by statute*, 46 U.S.C. app. § 183(c) (2000) (prohibiting forum-selection clauses related to personal injuries of passengers on sea vessels), *as recognized in* Yang v. M/V Minas Leo, 76 F.3d 391 (9th Cir. 1996); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972), *superseded by statute*, 28 U.S.C. § 1404(a) (2000) (permitting district courts to transfer cases, regardless of a forum-selection clause, to another district court if it is in the interest of justice), *as recognized in* Outokumpu Eng'g Enters. v. Kvaerner Enviropower, 685 A.2d 724 (Del. 1996).

164. Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure, Ltd., 251 F.3d 334, 336–37 (2d Cir. 2001).

165. *Id.*

divide between the Second Circuit and other circuits on the applicability of alienage jurisdiction to corporations of British dependencies, granted certiorari.[166]

In a unanimous opinion, the Supreme Court made two key findings. First, U.S. law, not foreign law, ultimately decides who may use federal courts.[167] Second, corporations of the British Virgin Islands are subjects of the United Kingdom.[168] Additionally, the Court suggested that disparities of opinion on nationality issues between courts and the governments of the United States or foreign states, though not present in *Traffic Stream*, could raise issues of deference to those governments.[169]

The trumping of U.S. law over foreign law contrasts with the longstanding rule from *Wong Kim Ark* that a sovereign nation has an "inherent right" to determine its own citizenry.[170] While the *Traffic Stream* Court paid lip service to that legal maxim, it said that the jurisdictional issue depended solely on the United States' interpretation of the phrase "citizens or subjects" from the Constitution and § 1332(a)(2).[171] The Court ended its analysis of this issue by stating:

> [T]he text of § 1332(a)(2) has no room for the suggestion that members of a polity, under the authority of a sovereign, fail to qualify as "subjects" merely because they enjoy fewer rights than other members do. For good or ill, many societies afford greater rights to some of its members than others without any suggestion that the less favored ones have ceased to be "citizens or subjects."[172]

This mysterious language can embody a wealth of meanings. Focusing on the "greater rights" language, it could be a deferral to explicit disavowals of citizenship by foreign states. As long as a party enjoys *some* rights, it is a subject. If that is the case, an all-or-nothing standard exists, and courts would be saved from comparing the constitutional language to differing levels of citizenship in

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166. *Traffic Stream*, 536 U.S. at 91.

167. *Id.* at 98–99.

168. *Id*. at 99. More precisely, the Court held that Traffic Stream had conceded that British Virgin Islands citizens were at least "nationals" of the United Kingdom, and "nationals" was implied to mean the same as "subjects" for the purposes of diversity. *Id.*

169. *Id.* at 100.

170. United States v. Wong Kim Ark, 169 U.S. 649, 668 (1898); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 211, 213 (1987). This is actually an extraordinary statement that is nearly unprecedented in legal history. It is surprising that this statement has been so easily overlooked, especially in a case revolving around semantic battles. In the English case of *Stoeck v. Public Trustee*, the Chancery Court summed the impudence of such philosophy when it said, "[T]here is not and cannot be such an individual as a German national according to English law." 2 Ch. 67 (Eng. 1921), *cited in* OSCAR SVARLIEN, AN INTRODUCTION TO THE LAW OF NATIONS 423 (1955). *But see* Koehler v. Bank of Berm. (N.Y.) Ltd., 229 F.3d 187, 190 (2d Cir. 2000) (Sottomayor, J., dissenting from denial of *en banc* rehearing) (arguing that the various meanings of different foreign states' nationality laws requires interpretation using U.S. legal standards so that foreign laws do not deny constitutional privileges or discriminate against certain classes of people).

171. *Traffic Stream*, 536 U.S. at 98–99.

172. *Id.* at 99.

various countries. Voting citizens, disenfranchised subjects, native peoples, criminals, and other marginalized minority groups would all be considered "citizens or subjects," while only those individuals completely cut off from the protections of their respective governments would fail to qualify. Corporate bodies, subject to the legal fiction that they cannot exist without the blessing of a nation,[173] would *always* qualify.[174]

Alternatively, this language could be read more expansively by focusing on the phrase "authority of a sovereign." Is "authority" mere *legal* authority, or does it include de facto authority? If the former, then the discourse does not move forward, and courts still have to find if such power is legally exerted. If the latter "authority" prevails, most potential parties would at least be subjects of either the United States or a recognized foreign state.[175] The Palestinian plaintiffs in *Abu-Zeineh* would be subjects of Israel, as demonstrated by the facts of that case.[176]

The less controversial holding of *Traffic Stream* is that corporations of the British Virgin Islands are subjects of the United Kingdom.[177] The problem is figuring out whether this holding: (1) is limited to this case because Traffic Stream

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173. Nat'l S.S. Co. v. Tugman, 106 U.S 118, 121 (1882), *superseded by statute*, 28 U.S.C. § 1332 (2000), *as recognized in* Casisse Nat'l de Credit Agricole v. Chameleon Fin. Co., No. 94 C 773, 1995 WL 76877 (N.D. Ill. Feb. 17, 1995); *see also supra* note 124 (discussing the continuing viability of *Tugman*'s reasoning).

174. This, unfortunately, may cause problems of its own. The United States adheres to a policy where a corporation is a U.S. national if it is majority-owned by U.S. citizens, while other states regard place of incorporation as the sole basis of corporate nationality. INT'L CHAMBER OF COMMERCE, THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS 38 (Dieter Lange & Gary Born eds., 1987) (contrasting the corporate nationality rules of the United States and the United Kingdom).

175. This assumes that the United States or a recognized foreign state maintains de facto control over the entire globe. Colonial dependencies, for instance, would be under the authority of their colonizers. Unfortunately, this does not completely eliminate the problem. For example, Taiwan is free of de facto Chinese control, but it is not really controlled by any other country. *See* Y. Frank Chiang, *State, Sovereignty, and Taiwan*, 23 FORDHAM INT'L L.J. 959, 980–81 (2000). Legal authority is disputed. *Id.* at 980–82. Since the United States guarantees Taiwan's autonomy, does that mean Taiwanese citizens are "subjects" of the United States? *Id.* at 977. Clearly that result is not what is intended.

176. The Israeli military, in "occupied territories of the West Bank and the Gaza Strip or in the area around Jerusalem," killed the Palestinians with CS gas. Abu-Zeineh v. Fed. Labs., Inc., 975 F. Supp. 774, 775 (W.D. Pa. 1994). This raises interesting questions about subjection during wartime. During the recent conflict in Iraq, could Iraqis, at any time before the re-formed Iraqi government regained control from the U.S. military, be considered "subjects" of the United States and thereby be ineligible for alienage jurisdiction? If so, must the courts defer from taking jurisdiction because the waging and regulating of war is left solely to the political branches?

177. *Traffic Stream*, 536 U.S. at 99. The most controversial part of this holding is that the Court gave absolutely no support for deeming "nationals" included within the meaning of "citizens and subjects" and merely stated that there was "no serious question that 'nationals' were meant to be amenable to the jurisdiction of the federal courts." *Id.* It is odd that the Court so easily dismissed the wording differences in a case rooted in the conflict between strict and expansive construction of statutory language.

conceded it was at least a "national" of the United Kingdom,[178] (2) applies to all "stateless" corporations, or (3) applies only to corporations of British Overseas Dependencies because British laws treat them relatively uniformly. It seems likely that because the Court had extensive information at its disposal, including an amicus brief from the government of the United Kingdom, its holding extends to all British Overseas Dependencies.[179] However extensively lower courts apply *Traffic Stream*'s holding on this point, it probably does not extend past the individuals and corporations of recognized foreign state dependencies. Palestinians, refugees, Taiwanese citizens, and other stateless persons do not fit nicely into any of those three categories.

The *Traffic Stream* Court did not, however, give a firm explanation for its departure from or, alternatively, reconciliation with *Wong Kim Ark*. The decision cites *Wong Kim Ark* twice: once to say it is good law but inapplicable, and once to acknowledge that there are situations where a person is not a citizen or subject of the nation of domicile.[180] The first reference to *Wong Kim Ark* reaffirms the "inherent right" of sovereign nations to define their own citizenry,[181] but then it immediately deflates the practical force of that "inherent right" by holding that sovereign nations' citizenship laws have no direct bearing on determining whether a party is a "citizen" or "subject" under § 1332(a)(2).[182] The Court's paternalistic treatment of foreign citizenship laws does not support the alienage justification of preventing conflicts with foreign states. Instead, it only serves to heighten tensions with foreign states whose nationality laws deviate from U.S. law. It relegates *Wong Kim Ark* to a strictly academic concept that is unimportant to any aspect of American law.

The second reference to *Wong Kim Ark* is an unexplained, passing comment that not all who are domiciled in a nation are "citizens or subjects" of that nation under U.S. law.[183] This assertion may reflect practicalities such as the subjection of ambassadors and enemies temporarily in occupation, which most people would agree do not serve to establish citizen or subject status. The Court deflected explaining its comment because Traffic Stream admitted to being a "national" of the United Kingdom, leading the Court to label it a "subject" of that

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178. *Id.*

179. *See* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner, *Traffic Stream*, 536 U.S. 88 (2000) (No 01-651), 2002 WL 257562.

180. *Traffic Stream* at 98–99.

181. *See supra* notes 121–26 and accompanying text (discussing both U.S. and international law).

182. *Traffic Stream*, 536 U.S. at 98–99. Such laws, however, may be indirectly taken into account under the applicable U.S. laws. For instance, in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, a jurisdictional investigation was not foreclosed even though the Republic of Cyprus asserted in its jurisdictional statement that the Church of Cyprus was its citizen and subject. 917 F.2d 278, 284 (7th Cir. 1990). However, because Cyprus had several property laws recognizing the Church of Cyprus as a "distinct juridical entity," the court concluded the Church of Cyprus was a "citizen or subject" of Cyprus. *Id.* at 285.

183. *Traffic Stream*, 536 U.S. at 99. *But see* The Pizzaro, 15 U.S. (2 Wheat.) 227, 246 (1817).

country.[184] Does this mean that all parties who "concede" to being "nationals" of a recognized foreign state qualify for alienage jurisdiction? Surely not; otherwise nondiverse American parties could allege foreign nationality to revive diversity against an opposing party.[185] Such a system would also be fundamentally unfair to American parties as a class because only those stateless parties who want to be in court (normally those bringing a suit) would allege "nationality" of a foreign state, while stateless parties being sued would not allege nationality and thereby defeat diversity jurisdiction.

Traffic Stream leaves many other questions unanswered for stateless persons and corporations.[186] Does the Court's reasoning apply to areas other than British Overseas Dependencies? If the United Kingdom's treatment of its dependencies lies at the heart of the Court's undisclosed reasoning, then it only clarifies the status of citizens of those dependencies. If it is based on the United Kingdom's efforts to have its dependency citizens treated the same as regular citizens, then (1) *Wong Kim Ark* continues unharmed, (2) jurisdiction depends on a recognized state's affirmative acknowledgement of control over the party at issue, and (3) alienage jurisdiction continues to fulfill its role in smoothing out relations with foreign states. However, stateless parties without the support of a recognized nation[187] would still be left without a federal remedy.

What happens in cases where either the United States or a foreign government disagrees with a court's assessment of nationality?[188] The court, by not deferring to these bodies, interferes with a political question. Denying jurisdiction implicitly answers the question (in the negative) just as effectively as granting jurisdiction. If the Supreme Court had held Traffic Stream was *not* a subject of the United Kingdom, its ruling would have been contrary to the desired result of the governments of both the United States and the United Kingdom.[189]

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184. *Traffic Stream*, 536 U.S. at 99.

185. That situation would bypass the bars to both same-state suits and suits involving U.S. citizens domiciled abroad.

186. One writer surprisingly believes that *Traffic Stream* solved all of the semantics problems involving stateless corporations. *See* Michael Cornell Dypski, *The Stateless Corporation Finds a Home: Alienage Jurisdiction and Dependent Overseas Territories*—J.P. Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Limited, 4 SAN DIEGO INT'L L.J. 319, 338 (2003). It is odd to believe that substituting the term "national" for "citizens or subjects" would eliminate semantics wars. Furthermore, Dypski does not address how *Traffic Steam* will be applied to parties from non-British dependencies and makes no mention of stateless *persons*. *Id.*

187. Lack of support could be due to several factors, such as no nation willingly claims a party, a nation that would otherwise claim the party fails to do so, or a party does not notify proper authorities of a pending suit.

188. "Because our opinion accords with the positions taken by the Governments of the United Kingdom, the BVI, and the United States, the case presents no issue of deference that may be due to the various interested governments." *Traffic Stream*, 536 U.S. at 100.

189. *See* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner at 7, *Traffic Stream*, 536 U.S. 88 (2000) (No 01-651), 2002 WL 257562; Brief for the United States as Amicus Curiae

These are merely the questions raised in dealing with distinct political bodies. The hurdles placed between other stateless persons and access to federal courts remain in place. Does *Traffic Stream* hold any answers for refugees, Palestinians, Taiwanese, and other similar parties without amicable relations with a recognized state? Probably not. The simple assumptions used in the decision that assume a connection to some recognized state could only have been intended for a case believed to hinge solely on semantics. Justice Souter is unlikely to have produced such a flippant decision if the issue involved did not have a seemingly obvious answer.[190]

Lower court applications of the *Traffic Stream* ruling will hopefully clarify some of these issues. Few decisions cite this case. In *Universal Reinsurance Co. v. St. Paul Fire & Marine Insurance Co.*, the Second Circuit accepted jurisdiction in a case involving a Bermuda-based company "[b]ecause Bermuda is, like the BVI, an Overseas or Dependent Territory of the United Kingdom."[191] In *United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co.*, the same reasoning applied to a Cayman Islands corporation.[192] Moving beyond the scope of British Overseas Dependencies, one district court judge held that *Traffic Stream*'s reasoning made corporations organized under the laws of the Hong Kong Special Administrative Region citizens of China for the purposes of diversity jurisdiction.[193] No other cases, though, refer to *Traffic Stream* on the issue of stateless party alienage jurisdiction.

VI. REFORMING ALIENAGE JURISDICTION TO MAKE DIVERSITY JURISDICTION AVAILABLE TO ALL

This Note proposes a broader understanding of the phrase "citizens or subjects." The phrase should be interpreted to reflect the historical understanding and plain meaning of the words. Historically, the Framers only contemplated two classes of people: citizens and subjects.[194] There were no "stateless" persons or corporations. As for the plain meaning, while most people might not agree that everyone is guaranteed citizenship of a recognized nation, they would agree that everyone is at least a subject—that is, subject to the laws—of a recognized nation. Corporations are conceptually even easier to impute nationality to because they are only entities in a legal, not physical, sense and depend wholly on a nation's laws for their existence.

Supporting Petitioner at 2, *Traffic Stream*, 536 U.S. 88 (2000) (No. 01-651), 2002 WL 316661.

190. The support of all governmental entities involved likely smoothed over any lingering doubts any of the justices may have had.

191. 312 F.3d 82, 86 (2d Cir. 2002); *see also* Lear Corp. v. Johnson Elec. Holding Ltd., 353 F.3d 580, 582 (7th Cir. 2003); Jordan (Berm.) Inv. Co. v. Hunter Greens Invs., 2003 U.S. Dist. LEXIS 5182, at *3 (S.D.N.Y. 2003); Koehler v. Bank of Berm., Ltd., 2002 U.S. Dist. LEXIS 13966, at *14–15 (S.D.N.Y. 2002).

192. 219 F. Supp. 2d 403, 473 (S.D.N.Y. 2002).

193. Zurich Am. Ins. Co. v. Dah Sing Bank, Ltd., 2004 U.S. Dist. LEXIS 10786, at *3 (S.D.N.Y. 2004).

194. *See supra* Part I.

To assist this broader interpretation of the constitutional language, Congress should amend § 1332(a)(2) to explicitly accommodate stateless persons and corporations. The amendment could be as minor as an additional comment assisting the interpretation of the constitutionally mirroring language or as major as a complete rewriting of the statute. Either way, Congress must strive for maximum clarity to rectify the disparate interpretations by different courts and alleviate the need for the Supreme Court's interpretation of the subject. This step will also further the goals of alienage jurisdiction, increase overall fairness in the U.S. judicial system, and extend to currently disallowed persons and corporations the rights that should exist under international law.

The result would not leave a political question for the courts. It also would not force stateless persons and corporations to claim allegiance to a nation they do not want to be associated with, or, on the other side, force foreign nations to claim these groups as their citizens (in violation of their sovereign right to define their own citizenry). A court would merely ask two questions. First, is the person or corporation a U.S. citizen? If yes, alienage jurisdiction does not apply, and there would be no further need to ask "political" questions or delve deeper into the issue. If no, is the person or corporation a permanent resident alien living in the United States? If yes on the second question, alienage jurisdiction again does not apply. If no, alienage jurisdiction does apply. This mechanism relies on the assumption of no "statelessness," that is, that everyone is a citizen or subject of *some* country.[195] There is no need to determine which particular nation the person

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195. This test parallels solutions suggested by others. Christine Biancheria, writing in response to *Abu-Zeineh*, recommended applying alienage jurisdiction to any alien with "a genuine linkage to a state" by imputing nationality. *See* Christine Biancheria, *Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of* Abu-Zeineh v. Federal Laboratories, Inc., 11 AM. U. J. INT'L L. & POL'Y 195, 244 (1996). The problem with Biancheria's solution is that it does not recognize that some persons and corporations do not want to be associated with the imputed state or, sometimes, any state at all. The *Abu-Zeineh* plaintiffs probably would not tolerate their attorney imputing Israeli nationality to them, and Traffic Stream would not want to be connected to any recognized state at all (to avoid federal jurisdiction). In the *Matimak* dissent, Judge Altimari described traditional American jurisprudence that permitted any alien to sue in U.S. courts. 118 F.3d at 89 (Altimari, J., dissenting). However, Judge Altimari accepted the bar on stateless *persons* while distinguishing stateless *corporations* as oxymorons, and he too was focused on the linkage of a corporation to a sovereign state. *Id.*; *cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213, cmt. a (1987) (defining corporations as organizations formed and given legal entity status under the laws of a state). Walter Hutchens largely adopts Judge Altimari's method, but he adds the possible future recognition of "composite sovereignty" derived from sovereignty yielded by recognized states to international entities. Hutchens, *supra* note 111, at 1089–93. While *Abu-Zeineh* focuses attention on the potential injustice to the party whose nationality is at question, *Traffic Stream* focuses attention on the injustice to the other party. Thus, a model purely based on a party's linkage fails to account for a defendant that has deliberately insulated itself from jurisdiction by nationality. This Author's solution accounts for injustices present when either a federal court denies jurisdiction over a party or that party purposefully avoids such jurisdiction. It most closely resembles the *Matimak* majority's interpretation of Biancheria's proposed solution. 118 F.3d at 86. The *Matimak* court's dismissal of the system was based entirely on its belief that it was an unconstitutional exercise of jurisdiction. *Id.* at 86–87. For an explanation why the

or corporation is a citizen or subject of because the Constitution requires only that they be citizens or subjects of *foreign* states.[196] That issue is settled by determining they are not American. Thus, this test both closes the loophole for stateless persons and corporations and is constitutional.

CONCLUSION

Overcautious courts seeking to avoid political entanglements or honor formalist restraints have created a jurisdictional loophole through which many of the most disadvantaged parties fall. Additionally, some corporations escape liability for their actions by hiding in the crevices of these interpretations. The result, meant to eliminate narrow political questions, defeats broader policies underlying constitutional and statutory federal court jurisdiction. Ironically, some of those policies have the same purposes as those justifying the avoidance of political questions. Judges get so locked into avoiding a political question that they may even ignore the determinations made by political branches in the cases before them.[197]

Reinterpreting alienage jurisdiction so that otherwise stateless persons and corporations may use federal courts restores sanity to the jurisdiction determination and has the side benefit of simplifying litigation. The traditional justifications of alienage jurisdiction, preventing wars and increasing commerce, married with newer justifications, such as providing equal protection of laws and conforming to international moral and legal norms, fully support this kind of reinterpretation. The result would conform with what the Founders intended and what most people today expect—access to fair tribunals for resolution of legal problems. Hopefully, if a case like *Abu-Zeineh* ever happens again, the plaintiffs will be respectfully granted the same access to a fair tribunal most other people have, not indifferently tossed out of court.

Matimak court was incorrect about the constitutionality of this solution, *see supra* Part IV.B.

196. U.S. CONST. art. III, § 2.

197. *See supra* note 132.