

## NOTES

# ALIENAGE JURISDICTION AND THE PROBLEM OF STATELESS CORPORATIONS: WHAT IS A FOREIGN STATE FOR PURPOSES OF 28 U.S.C. § 1332(a)(2)?

### I. INTRODUCTION

The globe is divided into manifold nation-states, each possessing legal sovereignty.<sup>1</sup> The boundaries that delineate these states, however, are not immanent in nature,<sup>2</sup> nor do they exist as the consequences of pure, socially decontextualized reason.<sup>3</sup> Rather, national boundaries are products of history; they are the result of military, political, economic and social interaction.<sup>4</sup> Colonialism,<sup>5</sup> once widespread,<sup>6</sup> shaped many of the legal boundaries of our

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1. This acutely obvious point is nonetheless an historic anomaly. *See generally* BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983) (arguing that the modern nation-state is an imagined community unlike previous forms of political ordering); MALCOM ANDERSON, *FRONTIERS: TERRITORY AND STATE FORMATION IN THE MODERN WORLD* 10 (1997) (“A specific conception of the frontier originated in the violent process of state formation in western Europe in the early modern period. Since then frontiers have marked the limit of an authority to rule, the sharp line at which sovereignty ran out.”); ERNEST GELLNER, *NATIONS AND NATIONALISM* (1983); E.J. HOBBSAWM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* (1990); TERRY H. PICKETT, *INVENTING NATIONS: JUSTIFICATIONS OF AUTHORITY IN THE MODERN WORLD* (1996) (discussing various humanistic meta-narratives informing modern conceptions of political order); J.R.V. PRESCOTT, *POLITICAL FRONTIERS & BOUNDARIES* (1987) (providing a detailed historic exploration of boundary formation and dispute patterns).

2. National boundaries do not devolve from nature, but that is not to say the natural world does not influence the formation of such boundaries. *See* PAUL BUCKHOLTS, *POLITICAL GEOGRAPHY* (1966). Even then, human exertions to delineate what is “natural” are historically contingent. *See* MORAG BELL ET AL., *GEOGRAPHY & IMPERIALISM* (1995).

3. That reason could exist in a pure, socially decontextualized fashion is itself an untenable proposition, as critical theory has energetically polemicized over recent decades. *See generally* MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (Alan Sheridan trans., 1972); MICHAEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (Vintage 1973) (1970). Nonetheless, there is a difference between the reason one might use to divide a tabula rasa planet into administrative regions and the collision of colonialist reason and history that has given us the current national boundaries of, say, Africa.

4. *See generally* works cited *supra* note 1.

5. Definitional controversy attends most academic discourse, but modern colonialism can be defined as:

the establishment and maintenance for an extended time of rule by alien minorities who represented, among other things, machine-oriented civilization, powerful economies, Christian origins, rapid pace of life, and who asserted feelings of racial and cultural superiority over indigenous majorities who were separate from and subordinate to the ruling colonial race.

Georges Balandier, *La situation coloniale: Approach theorique*, *Cahiers Internationaux de Sociologie*,

world.<sup>7</sup> Today, multistate trade alliances, such as the North American Free Trade Agreement (“NAFTA”),<sup>8</sup> the World Trade Organization (“WTO”),<sup>9</sup> and the European Union (“EU”),<sup>10</sup> are reconfiguring the global legal map.<sup>11</sup> This Note explores how the globe’s dynamic mix of legal sovereignties interacts with the subject matter jurisdiction of the federal courts in the United States. Particularly, it examines alienage jurisdiction, the type of diversity jurisdiction<sup>12</sup> available in suits between U.S. citizens and citizens or subjects of foreign states.<sup>13</sup>

XI: 51 (1951) 75-76, quoted in “Introduction, THE JAPANESE COLONIAL EMPIRE, 1895-1945, at 4-5 (Ramon Myers & Mark Peattie eds., 1984).

6. See generally works cited *supra* note 1. For an important historical reaction, see V.I. LENIN, IMPERIALISM, THE HIGHEST STAGE OF CAPITALISM (1917). For a legal perspective on the colonialism of the United States, see Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225 (1996). See also LOUIS L. SNYDER, THE IMPERIALISM READER (1962).

7. See generally works cited *supra* note 1.

8. See North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3301-3473). The NAFTA became effective in 1994. See generally JAMES R. HOLBEIN & DONALD J. MUSCH, NORTH AMERICAN FREE TRADE AGREEMENT (1995); BARRY APPLETON, NAVIGATING NAFTA: A CONCISE USER’S GUIDE TO THE NORTH AMERICAN FREE TRADE AGREEMENT (1994); Symposium, 23 ST. MARY’S L.J. 611 (1992) (containing a collection of North American Free Trade Agreement articles).

9. See generally JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990); JOHN H. JACKSON, THE WORLD TRADING SYSTEM (1989); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969); Thomas J. Dillon, *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT’L L. 349 (1995); *World Trade Organization Home Page* (last modified June 12, 1998) <<http://www.wto.org>>.

10. See generally John P. Flaherty & Maureen E. Lally-Green, *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 923 (1996).

11. For a comparative gloss on these multinational intergrations, see PAUL TAYLOR, INTERNATIONAL ORGANIZATION IN THE MODERN WORLD: THE REGIONAL AND THE GLOBAL PROCESS (1993), which compares the European Union and the United Nations. See also John P. Fitzpatrick, *The Future of the North American Free Trade Agreement: A Comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North America and Western Europe*, 19 HOUS. J. INT’L L. 1 (1996). On a more ethereal level, a dialog exists regarding the extent to which the information age will alter national sovereignties. See, e.g., Timothy S. Wu, Note, *Cyberspace Sovereignty?—The Internet and the International System*, 10 HARV. J.L. & TECH. 647 (1997).

12. Alienage jurisdiction is not a ubiquitous term, even though alienage jurisdiction has been around for more than 200 years. Alienage jurisdiction is sometimes referred to as a component of diversity jurisdiction, and indeed the diversity statute, 28 U.S.C. § 1332, is the current codification for alienage jurisdiction. Whether alienage jurisdiction is a type of diversity jurisdiction or is its own phylum is a contested topic. Some courts have called it diversity jurisdiction based on diversity between a U.S. party and a citizen or subject of a foreign state. Other courts have labeled it alienage jurisdiction, and one court has even called it “alienage diversity jurisdiction.” Despite this tendency to collapse alienage jurisdiction into diversity jurisdiction, it is a separate concept, supported by rationales that are wholly distinct from those supporting diversity jurisdiction of the more common sort, i.e., parties from different states of the United States. See generally Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT’L L. 1 (1996).

13. The relevant portion of the judicial code is 28 U.S.C. § 1332:

The federal circuits currently disagree whether corporations organized under the laws of certain foreign entities can gain access to the federal courts under 28 U.S.C. § 1332.<sup>14</sup> Specifically, the circuits disagree whether federal subject matter jurisdiction exists in cases between a U.S. citizen and an alien corporation registered under the laws of a foreign entity that lacks clear recognition as a "foreign state." Corporations so situated can include those established under the laws of British colonies or former colonies.<sup>15</sup>

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(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

- (1) citizens of different States
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335 and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except where express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

- (1) a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and
- (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1332 (1994 & Supp. II 1996).

14. Specifically, 28 U.S.C. § 1332(a)(2) authorizes jurisdiction when the suit arises among "citizens of a State and citizens or subjects of a foreign state." *See Matimak Trading Co. v. Khalily*, 188 F.3d 76 (2d Cir. 1997) (holding that a Hong Kong corporation could not sue two New York corporations in federal court because Hong Kong was not a state). *But cf. Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (7th Cir. 1990) (holding that U.S. plaintiffs could sue a corporation created under the laws of the Cayman Islands, a British Dependent Territory).

15. These include Hong Kong, the Cayman Islands, Bermuda, St. Helena, the Falkland Islands, Gibraltar and the British Virgin Islands. Before the People's Republic of China resumed sovereignty over Hong Kong on July 1, 1997, Hong Kong had been a British Colony for 155 years. *See RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG* 1-41 (1997).

Corporations created under the laws of British Dependent Territories are products of legal entities that are not recognized "states." This raises questions because alienage jurisdiction is explicitly for suits between U.S. citizens and citizens or subjects of foreign states.<sup>16</sup>

The circuit split on this point presents an interesting legal question<sup>17</sup> and one of more than pedantic interest. As two international practitioners recently noted, "These [problematic] jurisdictions are the international equivalent of Delaware or Nevada for many clients."<sup>18</sup> Moreover, due to ever increasing international trade<sup>19</sup> and the escalating importance of regional trade

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16. The Constitution provides that "The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1. The constitutional grant of jurisdiction is extended to the courts in 28 U.S.C. § 1332(a)(2). See *supra* note 13.

17. This is just the sort of narrow, technical issue that has allowed legions of law students, professors and practitioners to churn out commentary esteemed only by other lawyers, if even by them.

For more information (and some humor and additional cynicism) on this point, there is an enjoyable thread of law review articles reflecting on various aspects of the law review endeavor. See Arthur Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009 (1990); Arthur D. Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131 (1987); J.M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 CHI.-KENT L. REV. 843 (1996); C. Steven Bradford, *As I Lay Writing: How To Write Law Review Articles for Fun and Profit: A Law-and-Economics, Critical, Hermeneutical, Policy Approach and Lots of Other Stuff that Thousands of Readers Will Find Really Interesting and Therefore You Ought to Publish in Your Prestigious, Top-Ten, Totally Excellent Law Review: [this space reserved]*, 44 J. LEGAL EDUC. 13 (1994); Herma Hill Kay, *In Defense of Footnotes*, 32 ARIZ. L. REV. 419 (1990); Patrick M. McFadden, *Fundamental Principles of American Law*, 85 CALIF. L. REV. 1749 (1997); Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739 (1985); Phil Nichols, Note, *A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton*, 1987 DUKE L.J. 1122. To understand the carnage a student editor can cause, see James Lindgren, *Fear of Writing*, 78 CALIF. L. REV. 1677, 1678 (1990) ("Discussing fine points of English usage with a battalion of law review editors armed with the *Texas Manual on Style* is a bit like trying to carry on rational discussions with followers of astrology. No amount of reasoned argument can shake their belief in rule by the stars.")

For an interesting discussion of the history of footnotes in general, see ANTHONY GRAFTON, *THE FOOTNOTE: A CURIOUS HISTORY* (1997).

18. William Wilson III & Jonathan K. Cooperman, *2d Circuit Bars Suits by "Offshore" Corporations/Decision Precludes Hong Kong, Caribbean Companies from Bringing Suits in Federal Court*, NAT'L L.J., Aug. 25, 1997, at B9. This article, published only two days after the *Matimak* decision was issued, paired *Matimak* and *Wilson* for contrast and is the inspiration for this Note. The article suggested these offshore incorporations are popular because they offer favorable tax regimes, administrative convenience and developed legal systems.

19. See Kristen Bole, *Port of Oakland Trade is Catching Asia's Economic Flu*, S.F. BUS. TIMES, Jan. 30, 1998, at 3 (discussing increase in imports from Asia and decrease in exports following devaluation of several Asian currencies); Michael R. Sesit, *Hong Kong's "Peg" to Dollar Is a Global-Markets Pillar*, WALL ST. J., Jan. 27, 1998, at C1 (noting many financial analysts view the Hong Kong dollar's link to the U.S. dollar as crucial to containing recent Asian financial problems, and quoting analyst Gary Dugan of J.P. Morgan Securities as saying, "We see removal of the Hong Kong peg [to the dollar] as the key risk to all global [stock] markets . . . . It would be the straw that breaks the camel's back, setting in train a new round of devaluations in Asia that would have a wider impact on global growth.").

alliances,<sup>20</sup> the question of how to handle “stateless corporations”<sup>21</sup> in federal jurisdiction will grow in importance.<sup>22</sup>

Part II of this Note provides a context for discussion of the stateless corporation issue by reviewing the history of alienage jurisdiction and considering two recent conflicting federal appellate decisions concerning alienage jurisdiction for stateless corporations. Part III assesses the strength of the judicial approach to the stateless corporation problem discussed in Part II and argues for a flexible reading of foreign state, so that alienage jurisdiction obtains in close calls. Under this proposal, suits between a U.S. citizen and a citizen or subject<sup>23</sup> of a foreign political territory with which the United States has substantial political and economic exchanges qualify for alienage jurisdiction, absent contrary intent by another branch of government. This result is particularly appropriate in cases where “derivative” or “composite” sovereignty is found.<sup>24</sup>

## II. BACKGROUND

### A. *The History of Alienage Jurisdiction*

Article III of the Constitution established alienage jurisdiction,<sup>25</sup> and since the early days of the Republic it has been statutorily conferred by Congress<sup>26</sup>

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20. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward A Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (noting the striking success of the European Union at transnational adjudication and advocating possible transplantation of that success).

21. “A stateless corporation is an oxymoron,” quipped the dissenting judge in *Matimak v. Khalily*, 118 F.3d 76, 89 (2d Cir. 1997) (Altamari, J., dissenting), responding to the majority’s finding that a Hong Kong corporation is stateless and therefore, like a stateless person, cannot avail itself of alienage jurisdiction. However, there are portents of stateless corporation emergence in the supranational arena. See generally David C. Donald, *Company Law in the European Community: Toward Supranational Incorporation*, 9 DICK. J. INT’L L. 1, 10-24 (1991) (discussing proposals for Pan-European Union company law). Corporations created under the European Union would also appear to be stateless under current law.

22. See generally U.S. Dept. of Commerce, *Office of Trade and Economic Analysis* (visited June 10, 1998) <[http://www.ita.doc.gov/cgi-bin/otea\\_ctr?task=otea](http://www.ita.doc.gov/cgi-bin/otea_ctr?task=otea)>; International Trade Administration, *Monthly Trade Update* (last modified Feb. 7, 1996) <<http://www.ita.doc.gov/industry/otea/usftu.html>>.

23. Corporeal or corporate citizens or subjects, as currently understood.

24. See *infra* text accompanying notes 144-46.

25. See U.S. CONST. art. III, § 2, cl. 1.

26. Alienage jurisdiction is currently conferred in 28 U.S.C. § 1332(a)(2). See *supra* note 13. Congress amended section 1332 in 1996, increasing the amount in controversy requirement to \$75,000. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, tit. II, § 205(a), 110 Stat. 3847, 3850. In 1988, Congress raised the amount to \$50,000 from \$10,000. See Federal Courts Study Act, Pub. L. No. 100-702, tit. II, § 201(a), 102 Stat. 4044, 4646 (1988). The amount in controversy requirement was set at \$10,000 in 1958. See Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415. Prior to that it was \$3,000. In addition to adjustments in the amount in controversy requirement,

and applied by federal courts in case law.<sup>27</sup> The Constitution provides that, “The judicial Power shall extend to all Cases, in Law and Equity, . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>28</sup> This constitutional provision is the foundation for diversity and alienage jurisdiction. Since 1789, Congress has conferred this jurisdiction on the federal courts. The original conferral is in the Judiciary Act of 1789. The modern incarnation is in 28 U.S.C. § 1332, commonly known as the “diversity statute.”

Although, as one commentator observed, there is a “habitual failure to consider alienage and diversity as independent bases of federal jurisdiction,”<sup>29</sup> they are not identical, even though the current diversity statute and all its previous iterations roll them together.<sup>30</sup> Diversity jurisdiction is for citizens of different States *within* the United States.<sup>31</sup> Alienage jurisdiction is for cases involving a citizen of the United States and a “citizen or subject of a foreign state.”<sup>32</sup>

Not only do diversity and alienage jurisdiction apply to different types of parties, they are also founded on different rationales. Diversity jurisdiction is designed to prevent local bias in the adjudication of suits among U.S. citizens, so that an out-of-State party is not forced to litigate in a hostile or unsympathetic environment.<sup>33</sup> Alienage jurisdiction seeks to avoid the same

other substantive changes include deeming permanent residents citizens of their domiciled state rather than aliens, *see* Federal Courts Study Act, § 203(a), and deeming an insurer’s state of citizenship as its state of incorporation, its principal place of business and the state of citizenship of the insured in certain types of actions. *See* Act of Aug. 14, 1964, Pub. L. No. 88-439, 98 Stat. 445.

27. The diversity statute, 28 U.S.C. § 1332, is fairly terse, running just over 400 words. However, annotations to the statute are numerous. *See* 28 U.S.C.A. § 1332 (1998) (running more than 600 pages). The principal case for this Note is the recent *Matimak v. Khalily*, 118 F.3d 76 (2d Cir. 1997), but for a much earlier treatment of alienage jurisdiction, *see Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800), which found that the pleadings were inadequate because they alleged that one party was an alien but failed to state the opposing parties were U.S. citizens. The Court stated, “a description of the parties is . . . indispensable to the exercise of jurisdiction” under Article III of the Constitution and the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (repealed 1911). *Mossman*, 4 U.S. (4 Dall.) at 14. The party seeking jurisdiction must still plead facts to establish jurisdiction. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-89 (1936).

28. U.S. CONST. art. III, § 2, cl. 1.

29. Johnson, *supra* note 12, at 21.

30. “In the judiciary’s formative period, only suits between citizens of different states within the United States were called ‘diversity’ suits. Controversies between United States citizens and alien citizens were called ‘alienage’ suits. Today, however, the term ‘diversity’ is commonly understood to encompass both diversity and alienage jurisdiction.” George M. Esahak, Comment, *Diversity Jurisdiction: The Dilemma of Dual Citizenship and Alien Corporations*, 77 NW. U. L. REV. 565, 565 n.2 (1982) (citing J. MOORE ET AL., *MOORE’S FEDERAL PRACTICE*, 90.71 [1] n.2 (2d ed. 1982)).

31. For the purposes of this Note, “States” of the United States are indicated by use of a capital “S,” as opposed to “states” with a lower case “s,” which are foreign entities.

32. 28 U.S.C. § 1332(a)(2) (1998).

33. *See, e.g., Smith v. Metropolitan Property and Liability Ins. Co.*, 629 F.2d 757 (2d Cir. 1980);

kind of partiality to denizens of a local jurisdiction, but seeks to do so for reasons not relevant to diversity jurisdiction. The Framers intended for alienage jurisdiction to promote a strong central government and healthy foreign relations.<sup>34</sup> Unjust adjudication of cases involving foreign citizens or subjects could impair foreign relations.<sup>35</sup> Therefore, the Framers believed cases involving aliens should be heard in federal court. Under the Constitution, States cannot make foreign policy<sup>36</sup> and should not affect foreign relations indirectly by adjudicating the rights of foreign subjects. The Framers feared that State involvement in foreign affairs could lead to war.<sup>37</sup> Also, a lack of fairness in State trials involving foreigners could dissuade foreigners from investing in the United States, which the young Nation wished to encourage.<sup>38</sup>

*Betar v. De Havilland Aircraft of Canada, Ltd.*, 603 F.2d 30 (7th Cir. 1979) (stating that the purpose of diversity jurisdiction is to prevent local prejudice); *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975); *Ziady v. Curley*, 396 F.2d 873 (4th Cir. 1968); *Burt v. Isthmus Development Co.*, 218 F.2d 353 (5th Cir. 1955); *Winningham v. North Am. Resources Corp.*, 809 F. Supp. 546 (S.D. Ohio 1992); *Lewis v. Time Inc.*, 83 F.R.D. 455 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983); *Wheeler v. Shoemaker*, 78 F.R.D. 218 (D.R.I. 1978); *French v. Clinchfield Coal Co.*, 407 F. Supp. 13 (D. Del. 1976); *Hall v. Fall*, 235 F. Supp. 631 (W.D.N.C. 1964); *Lutz v. McNair*, 233 F. Supp. 871 (E.D. Va. 1964), *aff'd*, 340 F.2d 709 (4th Cir. 1965); *Riley v. Gulf, Mobile & Ohio Ry.*, 173 F. Supp. 416 (S.D. Ill. 1959); *Browne v. Hartford Fire Ins. Co.*, 168 F. Supp. 796 (N.D. Ill. 1959); *Shulman v. Compagnie Generale Transatlantique*, 152 F. Supp. 833 (S.D.N.Y. 1957); *Detres v. Lions Bldg. Corp.*, 136 F. Supp. 699 (N.D. Ill. 1955), *rev'd on other grounds*, 234 F.2d 596 (7th Cir. 1956); *Harris v. Conn. Light & Power Co.*, 125 F. Supp. 395 (D. Conn. 1954), *aff'd*, 221 F.2d 958 (2d Cir. 1955); *Commercial Solvents Corp. v. Jasspon*, 92 F. Supp. 20 (S.D.N.Y. 1950).

34. See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 46-50 (1913) (stating that the Framers wanted strong federal power over foreign affairs and gave jurisdiction for actions involving foreigners to federal judiciary).

35. As one judge succinctly stated,

The primary reason for diversity jurisdiction is to provide a neutral forum. Another compelling reason for establish alienage jurisdiction is to avoid entanglements with foreign sovereigns. Providing a neutral federal forum avoids the appearance of injustice or grounds for resentment in the relations of the United States with other nations.

*Matimak Trading Co. v. Khalily*, 116 F.3d 76, 88 (2d Cir. 1997) (Altimari, J., dissenting).

36. Among the difficulties with the Articles of Confederation was that States did endeavor to create individual foreign policies or treaties.

37. See *Johnson*, *supra* note 12, at 11; see also *Van Der Schelling v. U.S. News & World Report*, 213 F. Supp. 756, 758-61 (E.D. Pa. 1963), cited in *Matimak Trading Co.*, 118 F.3d at 82-83.

38. State court bias ran to citizens of other States as well as foreigners. See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492-93 (1928) (quoting James Madison, "It may happen that a strong prejudice may arise in some states, against the citizens of others, who may have strong claims against them.") Madison worried that this bias was bad for trade and investment, "[T]his has prevented many wealthy gentlemen from trading or residing among us." James Madison, *reprinted in* 3 J. ELLIOT, *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 528 (1896). Because the world economy is much more integrated now than at the time the Constitution was drafted, "[t]he economic justifications for alienage jurisdiction in some ways are currently stronger than at the time of constitutional convention. The increasingly global economy has resulted in a vast growth of foreign trade by domestic businesses." See *Johnson*, *supra*

Alienage jurisdiction was essentially an uncontroversial part of the Constitution.<sup>39</sup> Neither the Constitutional Convention nor the State conventions of ratification debated the provision extensively.<sup>40</sup> Indeed, of the five plans put before the Constitutional Convention, four of them created alienage jurisdiction.<sup>41</sup> In *Federalist No. 80*, Alexander Hamilton argued that *all* cases involving foreign citizens should be handled by the federal courts.<sup>42</sup> Although at least one anti-Federalist wished to subject aliens to the prejudices of local tribunals, as adopted, the Constitution provides alienage jurisdiction.

Congress first conferred diversity and alienage jurisdiction on the federal courts in the Judiciary Act of 1789.<sup>43</sup> Shortly thereafter, case law began to shape diversity and alienage jurisdiction. In *Strawbridge v. Curtiss*,<sup>44</sup> the Supreme Court limited diversity jurisdiction to only those cases with complete diversity between opposing sides. This meant no common citizenship could exist “across the v.”<sup>45</sup> In *Hodgson v. Bowerbank*,<sup>46</sup> the

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note 12, at 48.

Others argue this concern regarding aliens is unfounded in modern times. See James W. Moore & Donald T. Weckstein, *Corporations and Diversity Jurisdiction: A Supreme Court Fiction Revised*, 77 HARV. L. REV. 1426, 1449 (1964); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Court*, 109 HARV. L. REV. 1120 (1996) (finding empirical evidence that foreign litigants win a greater percentage of cases than U.S. citizens, but arguing this fact is explained by an aversion of foreign parties to seek redress through U.S. courts, resulting in the self-selection of only the most favorable cases for litigation).

In this context, interesting parallels to China exist. The development of China's legal system is often stimulated by a desire to attract foreign investment, and U.S. commentators often cite uncertainties about China's legal system as a risk of doing business there. Notably, a desire to attract foreign investment shaped the legal history of the United States as well. See generally RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS (1997).

39. See Johnson, *supra* note 12, at 10.

40. See *id.*

41. See *id.*

42. See THE FEDERALIST NO. 80, at 517 (Alexander Hamilton) (Edward Meade Earle ed., 1941).

43. See Judiciary Act of Sept. 24, 1789, ch. 20 § 11, 1 Stat. 73, 78. From the beginning, the judicial code has “intermingled” alienage and diversity jurisdiction. See Johnson, *supra* note 12, at 20.

44. 7 U.S. (3 Cranch) 267 (1806).

45. *Id.* at 267. A more recent affirmation of the complete diversity requirement is *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). Additional case law establishes that the requirement of complete diversity means aliens may not sue aliens in federal court, nor may a U.S. corporation suing a foreign corporation in alienage jurisdiction use supplemental jurisdiction to add the U.S. corporation's foreign subsidiary, because that would destroy complete diversity. See *Nike, Inc. v. Commercial Liberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 991 (9th Cir. 1994). However, courts have held that U.S. citizens who are diverse do not destroy that diversity if aliens are on both sides of the controversy. See *Dresser Indus., Inc. v. Underwriters at Lloyd's of London*, 106 F.3d 494, 497-98 (3d Cir. 1997); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 428 (7th Cir. 1993); see also Nancy M. Berkley, Note, *Federal Jurisdiction Over Suits Between Diverse United States Citizens with Aliens Joined to Both Sides of the Controversy Under 28 U.S.C. 1332(a)(3)*, 38 RUTGERS L. REV. 71, 75 (1985).

Supreme Court held that suits between aliens do not qualify for alienage jurisdiction because the Constitution only authorizes jurisdiction for suits between a U.S. citizen and an alien.<sup>47</sup> Thus, early precedent created important limitations on alienage and diversity jurisdiction.<sup>48</sup>

There is also a body of case law determining the meaning of "citizenship" for corporations and individuals when applying the jurisdictional statute.<sup>49</sup> However, much of the early case law has been supplanted by statute.<sup>50</sup>

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In yet another permutation of the situations not expressly covered in the law, what if a foreign party opposes a citizen and a "permanent resident"? In *Lloyds Bank v. Norkin*, 817 F. Supp. 414 (S.D.N.Y. 1993), the court found no jurisdiction. One commentator has suggested that the *Lloyds Bank* court ruled that "so fundamental a decision is *Strawbridge* . . . that if Congress had intended to overrule it in the 1988 amendment, it would have said so expressly somewhere along the line of the amendment's legislative history, and didn't." David D. Siegel, *Commentary On 1988 Revision*, 28 U.S.C.A. § 1332 (West 1993).

Other cases apply section 1332 to alien corporations. *See, e.g.*, *Atlanta Shipping Corp., Inc. v. Chemical Bank*, 631 F. Supp. 335 (S.D.N.Y.), *aff'd*, 818 F.2d 240 (2d Cir. 1986) (finding that a Liberian corporation with its principle place of business outside the United States was an alien for jurisdictional purposes); *R. W. Sawant & Co. v. Ben Kozloff, Inc.*, 507 F. Supp. 614 (N.D. Ill. 1981) (finding that an alien cannot have alienage jurisdiction in suit against another alien); *Windert Watch Co. v. Remex Elec. Ltd.*, 468 F. Supp. 1242 (S.D.N.Y. 1979) (deciding that a foreign corporation is a citizen of an entity under the laws of which it is incorporated for purposes of alienage jurisdiction); *Mazzella v. Pan Oceanica A/S Panama*, 232 F. Supp. 29 (S.D.N.Y. 1964) (finding that a foreign corporation's ownership by American interests immaterial for purposes of alienage jurisdiction).

46. 9 U.S. (5 Cranch) 303 (1809).

47. *See id.* at 303.

48. The interplay between Article III, congressional action and case law is discussed in Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 *Nw. U. L. Rev.* 1, 2 (1990), noting, "[T]he case law indicates that no precise demarcation of authority between Congress and the Court exists. Instead, the boundaries of federal jurisdiction—and the authority to define that jurisdiction—evolve through a dialogic process of congressional enactment and judicial response." For discussion of the dialogic approach specifically regarding diversity jurisdiction, see *id.* at 25-28, and see *id.* at 28-29 n.166 on the general indeterminacy of Article III and section 1332.

49. *See Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809) (stating that corporate citizenship is determined by citizenship of corporation's members); *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. 497 (1844) (stating that corporate citizenship is determined by place of incorporation). There is also a body of case law devoted to determining individual citizenship in diversity cases. In regard to alienage jurisdiction, Congress decided in 1988 that legal permanent residents of the United States are, for purposes of section 1332, citizens of their State of domicile. *See* *Judicial Improvements and Access to Justice Act*, Pub. L. No. 100-702, tit. II, § 203, 102 Stat. 4642 (1988) (codified at 28 U.S.C. § 1332(c) (1994)). This means a French citizen with permission to stay permanently in the United States, for example, through a "green card," may not claim alienage jurisdiction in a suit against an American citizen. Whether such a French citizen can claim alienage jurisdiction against, say, a Brazilian corporation is another question. If the lawful permanent resident is, for purposes of section 1332, a citizen of the United States, then alienage jurisdiction could be invoked. But doing so arguably creates problems under *Hodgson*. *See supra* notes 46-48 and accompanying text. However, in actions involving the green card holder and a U.S. citizen, the permanent resident is, under the final paragraph of section 1332(a), a citizen of the State in which she is domiciled. *See* 28 U.S.C. § 1332(a).

50. Regarding the effectiveness of the 1958 amendment which codified the current corporate citizenship requirements, one court concluded that the 1958 amendment "did not abolish the fiction of citizenship based on the State of incorporation. Rather, it wrote into the statute the decisional law on

Presently, domestic corporations are citizens of two places:<sup>51</sup> their place of incorporation and their principal place of business. Congress created this dual citizenship in 1958 when it amended section 1332 by adding subsection (c).<sup>52</sup> The amendment sought to lessen docket pressures by making complete diversity harder to obtain, thus limiting access to federal courts.<sup>53</sup> It also

the subject and then added another fiction of citizenship based on the principal place of business of a party.” *Moore-McCormack Lines, Inc. v. Ingalls Shipbuilding Corp.*, 194 F. Supp. 412, 413 (S.D.N.Y. 1961).

51. There is disagreement about whether foreign corporations should receive the dual citizenship mandated by section 1332(c)(1). For contrasting views, see Marc Miller, Comment, *Diversity Jurisdiction over Alien Corporations*, 50 U. CHI. L. REV. 1458 (1983) (arguing that section 1332(c)(1) should not be applied to alien corporations absent clear congressional direction); H. Geoffrey Moulton, Jr., Note, *Alien Corporations and Federal Diversity Jurisdiction*, 84 COLUM. L. REV. 177 (1984) (arguing that section 1332(c)(1) should be applied to alien corporations). See also Jim Whitlatch, Note, *Diversity Jurisdiction and Alien Corporations: The Application of Section 1332(c)*, 59 IND. L.J. 659; Moulton, *supra*, at 178-79.

Several cases discuss this point. See, e.g., *Danjaq, S.A. v. Pathe Communications Corp.*, 979 F.2d 772 (9th Cir. 1992) (applying subsection (c) dual citizenship to an alien corporation); *Pancan Int'l Management Consultants, Inc. v. STS Microscan, Inc.*, 848 F. Supp. 1321 (E.D. Mich. 1993) (finding two Canadian corporations ineligible for diversity jurisdiction); *Rauhi v. Harza Eng'g Co.*, 785 F. Supp. 1290 (N.D. Ill. 1992) (applying dual citizenship to a foreign corporation); *Carmania Corp., N.V. v. Hambrecht Terrell Int'l*, 758 F. Supp. 896 (S.D.N.Y. 1991) (applying dual citizenship to a foreign corporation); *Petroleum & Energy Intelligence Weekly, Inc. v. Liscom*, 762 F. Supp. 530 (S.D.N.Y. 1989) (applying dual citizenship to a foreign corporation); *Clifford Corp., N.V. v. Ingber*, 713 F. Supp. 575 (S.D.N.Y. 1989) (applying dual citizenship to a foreign corporation); *Schneider v. Bahama Cruise Line, Inc.*, 664 F. Supp. 80 (S.D.N.Y. 1987) (applying dual citizenship to a foreign corporation); *Richmond Const. Corp. v. Hilb*, 482 F. Supp. 1201 (M.D. Fla. 1980) (applying dual citizenship to a foreign corporation); *Southeast Guar. Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001 (N.D. Ill. 1973) (applying dual citizenship to a foreign corporation); *Tsakonites v. Transpacific Carriers Corp.*, 246 F. Supp. 634, (S.D.N.Y. 1965), *aff'd*, 368 F.2d 426 (2d Cir. 1966), *cert. denied*, 386 U.S. 1007 (1967) (refusing to apply dual citizenship to a foreign corporation); *Chemical Transp. Corp. v. Metropolitan Petroleum Corp.*, 246 F. Supp. 563 (S.D.N.Y. 1964) (refusing to apply dual citizenship to a foreign corporation).

While not relevant to section 1332 analysis for United States alienage or diversity jurisdiction, a similar issue of “where is the company” exists in the newer federal system of the European Union. See Terence L. Blackburn, *The Unification of Corporate Laws: The United States, The European Community and The Race To Laxity*, 3 GEO. MASON INDEP. L. REV. 1, 1 (1994) (“The choice of law system used by the majority of the member states of the European Community is based on the *siège réel*, or ‘real seat’ concept, which applies the law of the member state in which the real seat of the corporation is located, if the real seat is different from the state of incorporation.”).

52. For the text of 28 U.S.C. § 1332(c), see *supra* note 13.

53. Specifically with regard to subsection (c), cases express lessening docket pressure as a rationale for the dual citizenship amendment. See, e.g., *Egan v. American Airlines, Inc.*, 324 F.2d 565 (2d Cir. 1963); *Canton v. Angelina Cas. Co.*, 279 F.2d 553 (5th Cir. 1960); *Crum v. Veterans of Foreign Wars*, 502 F. Supp. 1377 (D. Del. 1980); *Salomon Englander Y CIA LTDA v. Israel Discount Bank, Ltd.*, 494 F. Supp. 914 (S.D.N.Y. 1980); *Van Horn v. Western Elec. Co.*, 424 F. Supp. 920 (E.D. Mich. 1977); *Bender v. Hilton Riviera Corp.*, 367 F. Supp. 380 (D.P.R. 1973); *Boysen v. Treadway Inn of Lake Harmony, Inc.*, 53 F.R.D. 96 (E.D. Pa. 1971); *National Spinning Co. v. City of Washington, N.C.*, 312 F. Supp. 958 (E.D.N.C. 1970); *Knee v. Chemical Leaman Tank Lines, Inc.*, 293 F. Supp. 1094 (E.D. Pa. 1968); *Carter v. Clear Fir Sales Co.*, 284 F. Supp. 386 (D. Or. 1967); *Huggins v. Winn-Dixie Greenville, Inc.*, 233 F. Supp. 667 (E.D.S.C. 1964); *Nayer v. Sears, Roebuck & Co.*, 200 F. Supp. 319 (D.N.H. 1961); *Eisenberg v. Commercial Union Assurance Co.*, 189 F. Supp.

aimed to stop nimble reincorporations from creating instant diversity.<sup>54</sup>

Though the Supreme Court and Congress have periodically tinkered with the diversity statute,<sup>55</sup> diversity jurisdiction and to a lesser extent, alienage jurisdiction, remain a common basis for invoking federal jurisdiction.<sup>56</sup>

### *B. The Current Problem—What Is a Foreign State for Purposes of Section 1332(a)(2)?*

Section 1332 confers jurisdiction on district courts when a civil suit involves an amount in controversy greater than \$75,000 and is between “citizens of a State and citizens or subjects of a foreign state.”<sup>57</sup> However, neither the Constitution nor any iteration of the jurisdictional statute, from the Judiciary Act of 1789 to the most recent 1996 amendment to section 1332, defines foreign state as it applies to alienage jurisdiction. The Supreme Court has not yet defined foreign state under section 1332,<sup>58</sup> and lower courts have reached inconsistent rulings. This section examines two recent, contrary

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500 (S.D.N.Y. 1960); *Taussig v. Wellington Fund, Inc.*, 187 F. Supp. 179 (D. Del. 1960), *aff'd*, 313 F.2d 472 (3d Cir. 1963); *Stroup v. Pittsburgh & Lake Erie R.R.*, 186 F. Supp. 154 (N.D. Ohio 1960); *Johnson v. Angelina Cas. Co.*, 177 F. Supp. 85 (E.D. Tex. 1959), *aff'd*, 279 F.2d 553 (5th Cir. 1960); *Diesing v. Vaughn Wood Prod., Inc.*, 175 F. Supp. 460 (W.D. Va. 1959); *Moesser v. Crucible Steel Co.*, 173 F. Supp. 953 (W.D. Pa. 1959); *Harker v. Kopp*, 172 F. Supp. 180 (N.D. Ill. 1959).

54. Instant diversity refers to the problem of companies reincorporating in another state in order to take advantage of diversity jurisdiction, as illustrated in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 523 (1928). For rationale on the 1958 amendment, see *Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1007 (N.D. Ill. 1973).

55. Congress made federal jurisdiction harder to obtain by raising the required amount in controversy from the original level of \$500 to the present level of \$75,000. Congress intended these adjustments to reduce swelling federal dockets. See *Kristufek v. Saxonburg Ceramics, Inc.*, 901 F. Supp. 1018 (W.D.N.C. 1994), *aff'd*, 60 F.3d 823 (4th Cir. 1995); *Young Spring & Wire Corp. v. American Guarantee & Liab. Ins. Co.*, 220 F. Supp. 896 (D.N.J. 1962); *Delaware River Joint Tool Bridge Comm'n v. Miller*, 147 F. Supp. 270 (E.D. Pa. 1956).

56. Parties brought 55,278 diversity cases in federal district courts during the twelve month period ending September 30, 1997. See *Index of Judicial Business* (last modified Mar. 10, 1998) <[www.uscourts.gov/judicial\\_business/c02sep.97.pdf](http://www.uscourts.gov/judicial_business/c02sep.97.pdf)>. Statistics are not kept on the percentage of these cases invoking alienage jurisdiction. There is considerable literature on the perpetual suggestion to do away with or otherwise seriously curtail diversity jurisdiction. See, e.g., ANTHONY PARTRIDGE, *THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION* 4 (1988); Victor Eugene Flango, *How Would the Abolition of Federal Diversity Jurisdiction Affect State Courts?*, 74 *JUDICATURE* 35 (1990); Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 *BROOK. L. REV.* 197 (1982); Russell G. Murphy, “Common Sense Legal Reform” and *Bell's Toll: Eliminating Punitive Damage Claims from Jurisdictional Amount Calculations in Federal Diversity Cases*, 84 *KY. L.J.* 71 (1995).

Of course, a court must by necessity have the initial jurisdiction to determine if it has jurisdiction. See *Whitlock v. Leatherman*, 460 F.2d 507, 514 (10th Cir. 1972); *Alabama v. United States*, 314 F. Supp. 1319, 1321 (S.D. Ala. 1970).

57. 28 U.S.C. § 1332(a)(2) (1994 & Supp. II 1996).

58. “The Supreme Court has never addressed the issue before us.” *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 79 (2d Cir. 1997).

decisions defining foreign state for purposes of obtaining subject matter jurisdiction under 28 U.S.C. § 1332.

1. *A Narrow Reading of Foreign State: Matimak Trading Co. v. Khalily*

In *Matimak Trading Co. v. Khalily*,<sup>59</sup> the United States Court of Appeals for the Second Circuit held that a corporation created under the laws of Hong Kong, prior to the date the People's Republic of China resumed sovereignty,<sup>60</sup> is not a citizen of a foreign state and therefore cannot access the federal courts through alienage jurisdiction.<sup>61</sup> *Matimak*, a creature of Hong Kong law with its principal place of business in Hong Kong,<sup>62</sup> sued two New York corporations for breach of contract.<sup>63</sup> *Matimak* claimed jurisdiction under 28 U.S.C. § 1332(a)(2), the portion of the diversity statute enabling alienage jurisdiction.<sup>64</sup>

The district court raised the question of subject matter jurisdiction on its own motion<sup>65</sup> and ultimately dismissed the claim for lack of jurisdiction.<sup>66</sup>

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59. 118 F.3d 76 (2d Cir. 1997).

60. China resumed sovereignty over Hong Kong on July 1, 1997. The *Matimak* court noted that China would regain control of Hong Kong, but did not announce how the transfer would affect its ruling had the transfer already occurred. Diversity is determined at the time the suit is brought. See *Louisville New Albany & Chicago Ry. v. Louisville Trust Co.*, 174 U.S. 552, 566 (1899); *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957). Regarding the general retrocession of Hong Kong, see Symposium, *Hong Kong's Reintegration into the People's Republic of China*, 30 VAND. J. TRANSNAT'L L. 635 (1997), including Ted Hagelin, *Reflections on the Economic Future of Hong Kong*, *id.* at 701, and Edwin L.-C. Lai, *The Economic Implications of the Reunification of Hong Kong with China*, *id.* at 735. For information regarding the legal treatment of Hong Kong by the People's Republic of China, see Xianwu Zeng, *International Legal Developments in Review: 1996 China Law*, 31 INT'L LAW. 509, 511-12 (1997); MUSHKAT, *supra* note 15.

61. See *Matimak*, 118 F.3d at 82.

62. For a cogent description of the lower court decision with a helpful review of the other Second Circuit decision on Hong Kong's status prior to *Matimak*, see Peter Lam, Comment, *The Recognition of Hong Kong as a Foreign State for Purposes of Diversity: Matimak Trading Co. v. Khalily*, 10 FLA. J. INT'L L. 341 (1995).

63. See *Matimak*, 118 F.3d at 78.

64. See *id.*

65. Exhortations of the duty to make such an inquiry about the jurisdictional basis of matters are abundant. See, e.g., *Kane v. Ford Motor Co.*, 450 F.2d 315 (3d Cir. 1971); *John Birch Soc'y v. Nat'l Broad. Co.*, 377 F.2d 194 (2d Cir. 1967); *Wymard v. McCloskey & Co.*, 342 F.2d 495 (3d Cir. 1965); *Lowry v. International Bhd. of Boilermakers, Iron Shipbuilders & Helpers*, 259 F.2d 568 (5th Cir. 1958); *Roby v. General Tire & Rubber Co.*, 500 F. Supp. 480 (D. Md. 1980); *Jeter v. Jim Walter Homes, Inc.*, 414 F. Supp. 791 (W.D. Okla. 1976); *Kansas City, Mo. ex rel. Gemco, Inc. v. American Concrete Forms, Inc.*, 318 F. Supp. 567 (W.D. Mo. 1970); *Cockerham v. Howell*, 265 F. Supp. 593 (E.D. La. 1967); *DiStefano v. Lehigh Valley R.R.*, 258 F. Supp. 721 (E.D. Pa. 1966); *Schroeder v. Nationwide Mut. Ins. Co.*, 242 F. Supp. 787 (S.D.N.Y. 1965).

66. See *Matimak*, 118 F.3d at 78. For the lower court decision, see 936 F. Supp. 151 (S.D.N.Y. 1996) (Kimba M. Wood, J.).

The district court determined that Hong Kong was not a foreign state for purposes of section 1332(a)(2) and, perforce, Matimak, as a Hong Kong corporation, could not be a citizen or subject of a foreign state.<sup>67</sup> Thus, the court held Matimak had no basis to avail itself of federal subject matter jurisdiction.<sup>68</sup> In an opinion that considered alienage jurisdiction at some length, the appellate court affirmed.<sup>69</sup>

On appeal, Matimak did not claim Hong Kong was a foreign state.<sup>70</sup> Rather, it argued Hong Kong had been de facto recognized by the United States, providing a basis for Hong Kong citizens to claim alienage jurisdiction in suits against U.S. citizens.<sup>71</sup> In seeking to invoke alienage jurisdiction through de facto recognition, the Second Circuit observed that Matimak was “[i]nvo[ki]ng the jurisprudence of this Court and others . . . .”<sup>72</sup>

The Second Circuit “established” the “doctrine of de facto recognition” in *Murarka v. Bachrack Bros.*<sup>73</sup> In *Murarka*, a partnership from India asserted alienage jurisdiction to sue a New York corporation in federal court. The Second Circuit determined alienage jurisdiction existed in *Murarka*, even

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67. See 936 F. Supp. at 152-53.

68. See *Matimak*, 118 F.3d at 78. In *Matimak*, the district court essentially reasoned that: (1) the executive and legislative branches, which are responsible for foreign relations, have not formally recognized Hong Kong as a foreign state; (2) the judicial branch is not in charge of foreign relations; it does not, should not and cannot grant recognition to foreign states; and (3) therefore, Hong Kong’s citizens are not citizens or subjects of a foreign state and cannot sue under section 1332(a)(2). See 936 F. Supp. at 152-53.

69. The court recalled its previous observation that the question before it is a “shoal strewn area of the law.” *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 552 (2d Cir. 1988), quoted in *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 79 (2d Cir. 1997).

70. See *Matimak*, 118 F.3d at 80.

71. See *id.* Further, the dissent exhaustingly recounts that:

The United States and the international community recognize Hong Kong as an autonomous force. Congress recognizes Hong Kong as a separate foreign state for the purposes of per-country numerical limitations under Section 202 of the Immigration and Naturalization Act. Hong Kong is: recognized as an autonomous entity in the economic and trade arena; a contracting party to the General Agreement on Tariffs and Trade, and thereby accorded most favored nation status by the United States; considered a member country in the United States Information Agency educational exchange program; and a member of the Organization for Economic Cooperation and Development. Hong Kong is a founding member of the World Trade Organization and strongly supports an open multilateral trading system and is a member in its own right in several multilateral economic organizations including the Asia Pacific Economic Cooperation and the Asian Development Bank. With respect to the legislative arena and international conventions, Hong Kong has acceded to the Paris Convention on industrial property, the Berne copyright convention, and the Geneva and Paris Universal Copyright Conventions.

*Id.* at 90 (citations omitted). The dissent states, “The facts, actions and other factors discussed above, when considered in the aggregate, demonstrate an implicit willingness by Congress and explicit request by the Executive Branch to permit a Hong Kong corporation to litigate its claims in our federal courts.” *Id.* at 92.

72. *Id.* at 80.

73. 215 F.2d 547 (2d Cir. 1954).

though when *Murarka* initiated the suit India was not yet recognized as an independent foreign state.<sup>74</sup> In *Murarka*, the court reasoned, “Unless form rather than substance is to govern, we think that in every substantial sense by the time this complaint was filed India had become an independent international entity and was so recognized by the United States.”<sup>75</sup> But forty years after the *Murarka* decision, the Second Circuit in *Matimak* found the analogy between Hong Kong and India “inapt”<sup>76</sup> and refused to find that the United States had given Hong Kong de facto recognition.

The *Matimak* court distinguished *Murarka* in a number of ways.<sup>77</sup> Besides refusing to find de facto recognition of Hong Kong as a foreign state,<sup>78</sup> the court in *Matimak* also denied that Hong Kong’s status as a colony of the United Kingdom provided a basis for alienage jurisdiction. The court noted British sovereignty over Hong Kong would cease on July 1, 1997; however, at the time *Matimak* initiated the action, Hong Kong was a British Dependent Territory.<sup>79</sup> Because the United Kingdom is indisputably a foreign state recognized by the United States,<sup>80</sup> the court could have regarded Hong Kong as a foreign state for diversity purposes through its United

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74. See *Matimak*, 118 F.3d at 80.

75. *Murarka*, 215 F.2d at 552.

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

77. The *Matimak* court noted when the parties initiated the *Murarka* suit, India was on the cusp of becoming an independent foreign state, whereas Hong Kong was not becoming independent but rather being absorbed into China. See *id.* at 80. And, as then-Judge Harlan noted in *Murarka*, the exchange of ambassadors with India which had occurred before the suit was instituted or de jure recognition of India was conferred, “to all intents and purposes . . . constituted a full recognition of the Interim government of India . . .” *Murarka*, 215 F.2d at 552. The Second Circuit in *Matimak* characterized the *Murarka* analysis as arguably “nothing more than an acknowledgment of the United States’ imminent formal recognition of a sovereign state.” *Matimak*, 118 F.3d at 80.

78. Interestingly, an official in the State Department at first urged that Hong Kong receive de facto recognition as a foreign state. However, that position was withdrawn via footnote in a brief supplied by the Justice Department. See Letter from Jim Hergen, Assistant Legal Advisor for East Asian and Pacific Affairs, United States Department of State, to Marshall T. Potashner, Attorney for *Matimak*, 3 (June 21, 1996), quoted in *Matimak*, 118 F.3d at 81-82. Amusingly, by way of a footnote, the court lectured the Justice Department about the use of footnotes to convey important information, such as a change of opinion on Hong Kong’s de facto status as a foreign state. See *Matimak*, 118 F.3d 76, 82 n.2 (quoting *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993)). For information on footnotes in legal scholarship, see generally *supra* note 17.

79. The court stated:

We express no view as to Hong Kong’s current status, following Great Britain’s transfer of sovereignty on July 1, 1997. As noted above, diversity of citizenship is determined as of the commencement of an action. Accordingly, we need not determine the status of Hong Kong, its residents, or its corporations under Chinese rule for purposes of alienage jurisdiction.

*Matimak*, 118 F.3d at 80 n.1. Hong Kong has returned to China under the “one country, two systems” chant, and it is not in fact obvious that Hong Kong corporations are now creatures of Chinese law any more than they were once citizens of the United Kingdom.

80. *Id.* at 85.

Kingdom affiliation. However, the court did not countenance this argument.<sup>81</sup>

The Second Circuit in *Matimak* interpreted the de facto recognition doctrine of *Murarka* and "citizens or subjects" of the United Kingdom extremely narrowly. The court's desire to dutifully defer to the executive and legislative branches in matters of foreign policy was the rationale for this narrow reading of foreign state and citizens or subjects.<sup>82</sup> Quoting the Supreme Court, the *Matimak* court reiterated, "Who is the sovereign, de jure or de facto, of a territory, is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."<sup>83</sup>

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81. Under both the British Nationality Act of 1981 and the British Companies Act of 1948, the court found that Hong Kong citizens, corporate or otherwise, did not enjoy the privileges of British citizenship. *See id.* at 85-86. In so holding, the court disregarded the urgings of an amicus curie brief from the Justice Department which argued that such derivative statehood for the purposes of section 1332 was possible.

Also, the court noted, "When *Matimak* brought this suit in August 1995, Hong Kong was a 'British Dependent Territory,' British Nationality Act 1981, Sched. 6, and was ruled by a governor appointed by the United Kingdom. . . . [I]n matters of defense and foreign affairs [it] remained dependent on the United Kingdom." *Matimak*, 118 F.3d at 81.

Given the fact that Hong Kong was a colonial possession of the United Kingdom, it is interesting that the court did not consider Hong Kong persons or corporations to be *subjects* of Great Britain. The court determined that:

In § 1332(a)(2) the terms "citizen" and "subject" do not connote a different "degree of attachment or allegiance to a foreign state." 1 James Wm. Moore et al., *Moore's Federal Practice* ¶ 0.75 (3d ed. 1996); *United States v. Wong Kim Ark*, 169 U.S. 649, 663-664 (1898) [citations omitted] ("The term 'citizen' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government.") Rather, the terms are meant to encompass persons living under distinct forms of government: "A monarchy has subjects; a republic has citizens." Moore, *supra* ¶ 0.75.

*Matimak*, 118 F.3d at 85. This comparison between citizen and subject fails to consider that a political entity might transform its government without transforming all of its subjects into citizens. Subjects seems most appropriate in the colonial context of Hong Kong, where the United Kingdom never enfranchised the native population.

82. Although chanting the refrain of "deference," the majority in *Matimak*, as the dissent points out, did not cling to the wishes of the executive branch: "In this case, the Department of State and the Department of Justice unequivocally made their wishes known—they withdrew support of the de facto recognition of Hong Kong and urged this Court to recognize Hong Kong as a "citizen or subject" of the United Kingdom." *Matimak*, 118 F.3d at 91.

83. *Jones v. United States*, 137 U.S. 202, 212, cited in *Matimak*, 118 F.3d at 80. The *Matimak* court noted, "Neither the Constitution nor § 1332(a)(2) defines 'foreign state.' However, "[i]t has generally been held that a foreign state is one formally recognized by the executive branch of the United States government." *Matimak*, 118 F.3d at 79 (citing CHARLES ALAN WRIGHT ET AL., 13B FEDERAL PRACTICE & PROCEDURE § 3604 (1984)).

*Matimak* involved the degree to which the executive branch or the Legislature allow federal courts to have subject matter jurisdiction over foreign parties. At times the other branches wish to *force* the judiciary to hear cases involving particular kinds of foreign disputes. *See* John Yoo, *Federal Courts As Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV.

The court reasoned that “at least two compelling reasons” supported deference to the executive branch in defining foreign state, namely, that “such deference is consistent with (1) the purposes of alienage jurisdiction and (2) the well-established analysis for defining a foreign state in related jurisdictional statutes and constitutional provisions.”<sup>84</sup>

The *Matimak* court first argued that the Framers intended alienage jurisdiction to abet good foreign relations by “treat[ing] the legal controversies of aliens on a national level.”<sup>85</sup> The court then tautologically claimed that one cannot endanger foreign relations by failing to give national judicial attention to an entity not recognized as a state. “Where the Executive Branch determines that a foreign entity is not a ‘sovereign,’ there is no threat of entanglement with a sovereign stemming from the refusal of a federal court to treat that entity’s citizens in a national forum.”<sup>86</sup> The court acknowledged there could still be “foreign-relations repercussions” if an unrecognized foreign political entity perceived that State courts treated its citizens unjustly, but the court maintained:

It is clearly the bailiwick of the Executive Branch, however, to evaluate the autonomy and resources of a foreign entity in evaluating whether the entity constitutes a sovereign and independent state; it is for the Executive Branch, not the courts, to anticipate where potential ‘entanglements’ with such entities are appreciable enough to recognize sovereign status.<sup>87</sup>

Besides believing that deference to the executive branch would serve the underlying rationale of alienage jurisdiction—to avoid conflicts with foreign political entities—the court in *Matimak* also found that “deference to the Executive Branch for purposes of alienage jurisdiction is further warranted in light of the well-established jurisprudence surrounding the notion of foreign state in other jurisdictional statutes.”<sup>88</sup> The court referred to 28 U.S.C. §§ 1330(a), 1332(a)(2), 1332(a)(4) and 1441(d),<sup>89</sup> and defended its reading of section 1332(a)(2) as consistent with the meaning of state in other parts of the judicial code.<sup>90</sup>

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747 (1997).

84. *Matimak*, 118 F.3d at 82.

85. *Id.* at 82 (quoting *Iran Handicraft & Carpet Export Ctr. v. Marjan Int’l Corp.*, 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987)).

86. *Matimak*, 118 F.3d at 83.

87. *Id.*

88. *Matimak*, 118 F.3d at 83.

89. *See id.*

90. *See Matimak*, 118 F.3d at 88. Regarding a reference to section 1603 in another part of section 1332, the *Lonon* court held section 1332(a)(2) does not incorporate by reference the definition of

The court acknowledged that other courts reached divergent conclusions.<sup>91</sup> It dismissed a number of contrary opinions from district courts, saying they were not sufficiently analyzed and “should be contrasted with the two Southern District of New York decisions that have addressed the issue in more detail.”<sup>92</sup> The *Matimak* court also acknowledged the Seventh Circuit’s divergent holding in *Wilson v. Humphreys (Cayman) Ltd.*,<sup>93</sup> which granted alienage jurisdiction in a suit involving another corporation from a British Dependent Territory. However, the *Matimak* court criticized the *Wilson* court because it “failed . . . even to consider whether the United States recognized the Cayman Islands as a foreign state . . . .”<sup>94</sup>

## 2. *A Flexible Reading of Foreign State: Wilson v. Humphreys (Cayman) Ltd.*

In contrast to the Second Circuit’s decision in *Matimak*, decisions in other circuits have permitted alienage jurisdiction for suits involving a U.S. citizen and parties from Hong Kong, the Cayman Islands, Bermuda and other political entities that are problematic under the *Matimak* analysis.<sup>95</sup> A leading

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foreign state in section 1603. See *Lonon v. Companhia De Navegacao Lloyd Brasileiro*, 85 F.R.D. 71 (E.D. Pa. 1979).

91. See *Matimak*, 118 F.3d at 84-85. Regarding Hong Kong, the court cited *Timco Engineering, Inc. v. Rex & Co.*, 603 F. Supp. 925 (E.D. Pa. 1985), *Refco, Inc. v. Troika Investment Ltd.*, 702 F. Supp. 684 (N.D. Ill. 1988), and *Creative Distributors, Ltd. v. Sari Niketan, Inc.*, No. 89-C3614, available in 1989 WL 105210, at \*2 (N.D. Ill. Sept. 1, 1989). The court also noted two contrary circuit opinions about other colonial corporations. See *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (7th Cir. 1990) (allowing alienage jurisdiction in a suit by a U.S. citizen against a Cayman Islands corporation); *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731, 735 (2d Cir. 1983) (allowing a Bermuda corporation to claim alienage jurisdiction in a suit against a New York corporation). The *Matimak* court found the *Netherlands* court unconcerned with the subject matter jurisdiction question and the *Wilson* decision inappropriate because “the court failed . . . to even consider whether the United States recognized the Cayman Islands as a foreign state.” *Matimak*, 118 F.3d at 85; see *infra* note 95 and accompanying text.

92. *Matimak*, 118 F.3d at 84.

93. 916 F.2d 1239 (7th Cir. 1990).

94. *Matimak*, 118 F.3d at 85. Actually, the *Wilson* court reached a different conclusion on similar facts not because of a failure to consider the sole issue the Second Circuit found dispositive, but rather because the Seventh Circuit considered it more important to uphold the policies behind alienage jurisdiction and took a less formalistic approach more grounded in realism. See *infra* Part III.

95. As both the *Matimak* and *Wilson* courts observed, there has not been a detailed level of analysis in most of the decisions that granted alienage jurisdiction in cases involving a foreign entity with a problematic technical status. “Several federal courts have determined, although generally without discussion, that subject matter jurisdiction existed in suits between citizens of the United States and Cayman Island corporations.” *Wilson*, 916 F.2d at 1242 (citing *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 399-400 (7th Cir. 1986)). See *Philan Ins. Ltd. v. Frank B. Hall & Co.*, 712 F. Supp. 339, 345 (S.D.N.Y. 1989); *Rolls Royce (Canada) Ltd. v. Cayman Airways, Ltd.*, 617 F. Supp. 17, 18 (S.D. Fla. 1985); see also *Netherlands Shipmortgage Corp. v. Madia*, 717 F.2d 731, 735 (2d Cir. 1983) (finding alienage jurisdiction for a suit involving Bermuda, which is a British Dependent

example of the contrary conclusion is *Wilson v. Humphreys (Cayman) Ltd.*<sup>96</sup> In *Wilson*, the United States Court of Appeals for the Seventh Circuit upheld the finding of alienage jurisdiction in a suit brought by U.S. plaintiffs against a Cayman Islands corporate defendant.<sup>97</sup>

The Wilsons, an American couple from Illinois,<sup>98</sup> took a vacation in the Cayman Islands.<sup>99</sup> While in their hotel room in the Caymans, Mrs. Wilson was the victim of an attempted robbery and rape.<sup>100</sup> She sustained serious injuries and required hospitalization.<sup>101</sup> She and her husband sued Humphreys, the hotel owner, Holiday Inns, Inc., who licensed Humphreys, and American Trans Air, Inc., the tour operator.<sup>102</sup> Humphreys was incorporated in the Cayman Islands; Holiday Inns was a Tennessee corporation;<sup>103</sup> and the tour operator was headquartered in Indiana.<sup>104</sup>

In *Wilson*, the Seventh Circuit held that alienage was appropriate to establish subject matter jurisdiction,<sup>105</sup> even though the suit involved a corporation registered under the laws of an unrecognized state.<sup>106</sup> This ruling

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Territory just as Hong Kong was and the Cayman Islands remain).

96. 916 F.2d 1239 (7th Cir. 1989).

97. *See id.*

98. *See id.* at 1241. The Wilsons departed from Indiana for the trip, which was booked through an Indiana tour agency. The Wilsons' son was evidently an Indiana resident who booked the trip to the Cayman Islands for his parents as a gift. The Wilsons lived in Illinois. Indeed, while inveighing against the application of personal, not subject matter jurisdiction, to the defendant, the court twice mentioned that the Wilsons, who were suing in Indiana, were from Illinois. *See id.* at 1249.

99. *See id.* at 1241.

100. *See id.*

101. Mrs. Wilson was hospitalized on the Cayman Islands for one week, then returned to the United States and was treated by a hospital in Indianapolis. *See id.* at 1241.

102. The Wilsons' claim against the tour organizer was dismissed on summary judgment. *See Wilson*, 916 F.2d at 1241 n.1 (citing *Wilson v. American Trans Air, Inc.*, 874 F.2d 386 (7th Cir. 1989)). The Court of Appeals for the Seventh Circuit upheld the district court's summary judgment decision for American Trans Air because the Wilsons failed to show that American had a duty to investigate and warn or that American breached this duty. *See American Trans Air*, 874 F.2d at 391. Although the Wilsons did not raise a jurisdictional question in their appeal of the summary judgment motion granted to American, the court noted that the parties both raised a choice of law issue in the district court. *See id.* at 388 n.1. The Wilsons urged application of Indiana while the tour company sought to apply the law of the Cayman Islands to part of the claim. *See id.* The court reviewed the grant of summary judgment to the tour company using the substantive law of Indiana. *See id.* Even under Indiana law, the court found that the Wilsons had no case against the tour company. *See id.* This choice of law question intersects importantly with alienage jurisdiction. Even if suits involving foreign corporations from "quasi-states" gain access to U.S. federal courts, any perceived benefits of such access can be mitigated by the choice of law question and the fact that federal courts also empanel juries for many actions. Neither foreign law nor jury trials may be desirable for creating an ideal forum for adjudicating some disputes, from the point of view of either party.

103. *See American Trans Air*, 874 F.2d at 388.

104. *See id.* at 387.

105. *See Wilson*, 916 F.2d at 1243 (upholding the district court's determination that subject matter jurisdiction existed under section 1332).

106. *See British Nationality Act 1981*, 31 Halsbury's Statutes 172 (1994) (distinguishing Cayman

directly contradicts the holding in *Matimak* as the *Wilson* court found alienage jurisdiction in a suit between a U.S. citizen and a corporate citizen of a British Dependent Territory while the *Matimak* court did not. The Seventh Circuit read foreign state more liberally than did the Second Circuit.

The Seventh Circuit determined that the “weight of authority” supported a finding of subject matter jurisdiction based on section 1332.<sup>107</sup> The court cited, among other cases, *Murarka v. Bachrack Bros.*<sup>108</sup> The Seventh Circuit noted that in *Murarka*, “Then-Judge Harlan determined that the district court did have jurisdiction, because the United States had granted de facto recognition of India by accepting an ambassador from that country.”<sup>109</sup> In *Wilson*, the Seventh Circuit noted that Humphreys, in opposing the finding of subject matter jurisdiction, “relies on one unpublished district court decision for support of its assertion that alienage jurisdiction does not apply.”<sup>110</sup> However, the weight of authority the *Wilson* court found persuasive against this “one unpublished district court decision” was not copious, despite the Harlan moniker attached to the *Murarka* decision.<sup>111</sup> Even though courts had granted alienage jurisdiction in suits involving British Dependent Territories more often than they had withheld it, their analysis in doing so, by the Seventh Circuit’s own admission, was sparse.<sup>112</sup>

The Seventh Circuit decision in *Wilson* was predicated on policy grounds more than it was influenced by the scattered persuasive authority available on the question.<sup>113</sup> The *Wilson* court stated, “Certainly, the exercise of American judicial authority over the citizens of a British Dependent Territory implicates this country’s relationship with the United Kingdom—precisely the *raison d’être* for applying alienage jurisdiction.”<sup>114</sup> In adopting this policy approach, the court specifically rejected the type of argument accepted in

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Islands and other British Dependent Territories from British Commonwealth Countries).

107. See *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1243 (7th Cir. 1989).

108. 215 F.2d 547 (2d Cir. 1954). *Murarka* was also discussed by the Second Circuit in *Matimak*. See *supra* note 74 and accompanying text. In *Murarka*, a person from India filed a suit claiming alienage jurisdiction. The suit was filed *before* India shed its status as a British colony. See *Murarka*, 215 F.2d at 552.

109. *Wilson*, 916 F.2d at 1243 n.5 (citing *Murarka v. Bachrack Bros.*, 215 F.2d 547, 552 (2d Cir. 1954) (Harlan, J.)).

110. *Wilson*, 916 F.2d at 1242. Humphreys’ lawyers, of course, did not have the benefit of the Second Circuit’s analysis in *Matimak*, which came out eight years after *Wilson*. In *Wilson*, Humphreys relied on *St. Germain v. West Bay Leasing, Ltd.*, CV-81-3945 (E.D.N.Y. 1982).

111. *Wilson*, 916 F.2d at 1242-43.

112. The court noted that several federal courts found alienage jurisdiction in similar circumstances, “although generally without discussion.” *Id.* at 1242.

113. “Our inquiry therefore must be whether *the policies* supporting alienage jurisdiction permit a United States District Court to assume jurisdiction over a citizen of the Cayman Islands.” *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1241 (7th Cir. 1989) (emphasis added).

114. *Wilson*, 916 F.2d at 1243.

*Matimak*. In *Matimak*, the Second Circuit held that an unrecognized foreign entity could not be a foreign state under section 1332.<sup>115</sup> Humphreys made this argument to the district court and the Seventh Circuit, urging that the Cayman Islands is not a foreign state; therefore, Humphreys was not a citizen or a subject of a foreign state within the meaning of section 1332(a)(2).<sup>116</sup>

The Seventh Circuit stated that allowing Humphreys to prevail on such a theory “would allow ‘form rather than substance to govern.’”<sup>117</sup> The court also cited a case finding alienage jurisdiction available for suits involving a U.S. citizen and Hong Kong corporations, quoting from a district court decision since overturned by *Matimak*, that stated, “[I]t would seem hypertechnical to preclude Hong Kong corporations from asserting claims in our courts simply because Hong Kong has not been formally recognized by the United States as a foreign sovereign in its own right.”<sup>118</sup> Thus, the Seventh Circuit sought to follow what it regarded as the policy principles behind alienage jurisdiction and the realities of the situation rather than be distracted by “hypertechnical” points that privileged form over substance.

### III. ANALYSIS & PROPOSAL: THE DRAWBACKS OF BOTH THE HYPERTECHNICAL READING OF FOREIGN STATE IN *MATIMAK* AND THE MORE LIBERAL INTERPRETATION IN *WILSON*, AND A PROPOSAL FOR A MIDDLE PATH

As the Second Circuit noted in *Matimak*, “Neither the Constitution nor § 1332(a)(2) defines ‘foreign state.’”<sup>119</sup> So what should circuit and district courts do when confronted with this problem? How should they determine what constitutes a foreign state when faced with a jurisdictional claim under section 1332? This question is the core of the matter, because once a political entity is identified as a foreign state, its citizens or subjects are encompassed under the plain language of section 1332(a)(2).<sup>120</sup> *Matimak* and *Wilson* exhibit two alternative readings of foreign state, one of which is narrow, the

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115. See *supra* Part II.B.1.

116. See *Wilson*, 916 F.2d at 1242.

117. *Id.* at 1243 (quoting *Mararka v. Bachrack Bros.*, 215 F.2d 547, 552 (2d Cir. 1954) (Harlan, J.)).

118. *Wilson*, 916 F.2d at 1243 (quoting *Tetra Finance (HK) Ltd. v. Shaheen*, 584 F. Supp. 847 (S.D.N.Y. 1984)). This hypertechnical allegation about the alternative disposition (that Hong Kong is not a state and therefore alienage jurisdiction is inappropriate) was duly noted in the *Matimak* decision, though the Second Circuit finally decided it did not mind being hypertechnical within its perceived constitutional role by showing deference to the Executive Branch in matters of foreign relations. See *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 83 (2d Cir. 1997).

119. *Matimak*, 118 F.3d at 79.

120. See *supra* note 13.

other more flexible. This section analyzes the weaknesses of both the *Matimak* and the *Wilson* approaches and argues that a flexible approach closer to *Wilson* is preferable.

#### A. Problems with *Matimak*

The *Matimak* decision is formalistic.<sup>121</sup> The court determined that Hong Kong was not a foreign state and thus denied jurisdiction to a Hong Kong citizen's suit.<sup>122</sup> Whatever technical status Hong Kong had when the court decided the case or has since acquired, it is clearly a foreign political entity. It is equally clear that United States citizens, both corporate and individual, conduct a considerable amount of trade with Hong Kong.<sup>123</sup> Thus, Hong Kong is a foreign political entity with whom Americans have extensive contacts. However, an American could not sue citizens of Hong Kong in federal court, nor could Hong Kong's citizens sue U.S. citizens in federal court, without some basis for subject matter jurisdiction other than alienage jurisdiction.

The Second Circuit's ruling in *Matimak* excludes disputes involving the billions of dollars in annual trade between the United States and Hong Kong from federal courts based on alienage jurisdiction, but such suits from the Republic of the Marshall Islands (RMI) are allowed.<sup>124</sup> Even though Hong Kong corporations and individuals might now be eligible under *Matimak* for alienage jurisdiction in suits against U.S. parties,<sup>125</sup> the exclusion remains for

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121. A vast literature exists on the subject of formalism and realism. See Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1402 (1997) (noting the emergence of a "new formalism").

122. See *Matimak*, 118 F.3d at 82.

123. "Hong Kong is the United States' twelfth-largest trading partner, with direct United States financial investment of almost twelve billion dollars." *Id.* at 81. Regarding ongoing investment in Hong Kong and the SAR's role as a conduit for investment in the mainland, see Mark Thompson, *Chasing The Emerald City: As Hong Kong Reverts to Chinese Control, U.S. Lawyers Hope to Cash in on the Mainland's Need for Capital*, CAL. LAW., July 1997, at 48, and Richard Marsland et al., *Shattered Dreams*, FIN. TIMES Jan. 27, 1998, at 18, available in 1998 WL 3527813.

124. See *Matimak*, 118 F.3d at 81 (citing *Bank of Hawaii v. Balos*, 701 F. Supp. 744, 746-47 (D. Haw. 1988)).

125. *Might* is the operative word. Hong Kong's retrocession is governed by the Basic Law, which assures continuation of Hong Kong's systemic characteristics for 50 years. Thus, while Hong Kong is now again part of mainland China, its corporate law is not People's Republic of China ("P.R.C.") corporate law, and the degree of sovereignty the P.R.C. yields it, to a considerable degree, is attenuated in the same fashion that Great Britain's control over Hong Kong was too attenuated for the Second Circuit. For discussion of the P.R.C.'s Company Law, adopted in 1994, see Nicholas C. Howson, *China's Company Law: One Step Forward, Two Steps Back? A Modest Complaint*, 11 COLUM. J. ASIAN L. 127 (1997); Chuan Roger Peng, Note, *Limited Liability in China: A Partial Reading of China's Company Law of 1994*, 10 COLUM. J. ASIAN L. 263 (1996).

the Cayman Islands<sup>126</sup> and other places. These might sound like exotic locales whose exclusion from federal courts through alienage jurisdiction is not of great consequence; however, these “jurisdictions are the international equivalent of Delaware or Nevada for many clients.”<sup>127</sup>

Moreover, the executive branch decision to recognize a political entity as a foreign state is almost certainly driven by factors far beyond the scope of the diversity statute. If the executive or legislative branch, by formal recognition or derecognition of a foreign state, intends to enable or limit alienage jurisdiction, doing so is clearly within the constitutional prerogative of those branches. However, if the court defers to another branch when the executive or legislative branch has *not* made such a determination about jurisdiction, then the court’s deference produces consequences not intentionally sought by *any* branch of government. For political reasons, the other branches might not want to recognize a nation formally, even if they want to allow alienage jurisdiction for suits involving their corporations.

In *Matimak*, the court’s deference to the executive branch actually functioned as a deference to the *British* parliament. Because neither the United States Department of State nor Congress recognized Hong Kong as an independent sovereignty, the court looked to British law to determine if Hong Kong corporations or individuals were citizens of the United Kingdom. Thus, a strict reading of foreign state, while ostensibly showing fidelity to the constitutional scheme of separation of powers, actually can cause results undesired by any branch of government.<sup>128</sup>

### B. Problems with Wilson

While the narrow reading of foreign state in *Matimak* can—and did—

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126. Interesting in this regard is the recent announcement by Fruit of the Loom that it will form a parent company in the Cayman Islands to improve its financial position. See George Gunset, *Fruit of the Loom Takes New Tack*, CHI. TRIB., Feb. 12, 1998, § 2, at 1.

127. See Wilson & Cooperman, *supra* note 18, at B9.

128. The case of Taiwan is representative. The diplomatic recognition of the People’s Republic of China and derecognition of Taiwan was geared to political ends far beyond the scope of jurisdictional concerns. Even after Taiwan’s derecognition by the United States, citizens and subjects of Taiwan are still allowed access to federal courts through diversity jurisdiction presumably on the premise that Taiwan was *formerly* recognized. See *Chang v. Northwestern Mem’l Hosp.*, 506 F. Supp. 975 (N.D. Ill. 1980). The *Matimak* court noted the case of Taiwan, observing “once the United States recognizes an entity as a sovereign state . . . a subsequent withdrawal of recognition of that state’s government does not effect a change in the underlying recognition of the states as an international judicial entity. *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 84 n.3 (2d Cir. 1997) (citing *Iran Handicraft and Carpet Export Ctr. v. Marjan Int’l Corp.*, 655 F. Supp. 1275, 1277-78 (S.D.N.Y. 1987)). This logic is difficult to square with the court’s reasoning that the decision to provide foreign relations benefits of alienage jurisdiction are determined by the state department.

produce undesirable results, the more open reading of foreign state in *Wilson* also raises potential problems. The disadvantage of *Wilson's* flexible approach is that it could conceivably grant jurisdiction for suits involving citizens of entities that the other branches specifically intended to deny access to American federal courts. There are a number of cases holding, for example, that Palestine is not a foreign state for purposes of alienage jurisdiction.<sup>129</sup> The Palestinian situation, like the situation in Taiwan,<sup>130</sup> is extremely delicate, and courts should not intrude on the role of the other branches to recognize states, especially when doing so could upset global politics.

One could imagine, as the ultimate extension of the flexible reading of foreign state in *Wilson* or a liberal use of the de facto recognition test of *Murarka*<sup>131</sup> the following: allowing corporations registered under the "laws" of the Republic of Texas<sup>132</sup> to claim alienage jurisdiction in suits against U.S. citizens. While far-fetched, such a result is conceivable if the interpretation of foreign state is left to unfettered judicial whim. Thus, there is a tension between the undesirable result of *Matimak* and potential problems of liberally following *Wilson's* casual disregard for the recognition question.

### C. Proposal

Both the approach taken by the Second Circuit and the approach taken by the Seventh Circuit are problematic. The Second Circuit's opinion in *Matimak* reaches an undesirable result using persuasive logic.<sup>133</sup> In *Wilson*,

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129. See *Abu-Zeineh v. Federal Labs, Inc.*, 975 F. Supp. 774 (W.D. Va. 1994).

130. See *supra* note 128.

131. *Murarka v. Bachrack Bros., Inc.*, 215 F.2d 547 (2d Cir. 1954).

132. See Sam Howe Verhovek, *Separatists End Texas Standoff as 5 Surrender*, N.Y. TIMES, May 4, 1997, at A1. Such antigovernment movements would likely be enthusiastic users of a ruling that allowed them to file suits in federal court because corporations they charter would be considered foreign corporations. See Deb Reichmann, *Bogus Liens Gum up Gears of Justice Law: Common Law Courts Are Springing up Around U.S., Surpassing Nuisance Level of the Militia Movement, Flood of Filings Can Be Nightmare for Police and Jurists*, L.A. TIMES, Feb. 1, 1998, at A20.

133. This point is made by Bradford Williams in another recent Note. See Bradford Williams, Note, *The Aftermath of Matimak Trading Co. v. Khalily: Is the American System Ready for Global Interdependence?* 23 N.C. J. INT'L. L. & COM. REG. 201 (1997). Williams concludes the *Matimak* decision was supported by precedent and was faithful to the constitutional scheme of separation of powers, even though he acknowledges the decision "may have undermined the basis for enacting § 1332(a)(2) . . . [and was] contrary to international law, without regard to the consequences it might have on American foreign relations." *Id.* at 225. Williams simply notes that "if the executive and legislative branches disagree with the Second Circuit's decision, the onus should be on them to clarify which entities can invoke alienage jurisdiction." *Id.* This Note generally concurs with Williams' observations about the tension between a loose and narrow reading of foreign state; however, the proposal differs. This Note proposes that the judiciary adopt a flexible reading of foreign state unless the executive branch voiced some explicit contrary intention. This gives courts flexibility in a dynamic

the Seventh Circuit reaches a result that seems more appealing and pragmatic. However, the Second Circuit's more recent, hypertechnical ruling seems, at least ostensibly, more faithful to the dictates of statutory interpretation, the separation of powers doctrine and judicial restraint. It does not, however, reach a result salutary for international trade,<sup>134</sup> and it runs counter to the policies for which the Framers established alienage jurisdiction, despite the court's circular arguments to the contrary. What accommodation might be struck between these two approaches, so that alienage jurisdiction as created in the Constitution is available in appropriate cases but not to all comers? How could a court not willing to usurp the authority of the other branches reach a conclusion different than *Matimak*?

The dissent in *Matimak* noted there were at least three ways the court could have found that *Matimak* was a citizen or subject of a foreign state, as required for alienage jurisdiction under section 1332(a)(2). Judge Altimari noted:

There are adequate constitutional, statutory and prudential grounds to open our federal courts to *Matimak* by: (1) recognizing Hong Kong as a "foreign state" for the limited purpose of alienage diversity jurisdiction; (2) recognizing Hong Kong as a political subdivision of a foreign state; or (3) recognizing Hong Kong's people and entities as "citizens or subjects" of the United Kingdom today and after July 1, 1997, of the People's Republic of China.<sup>135</sup>

Each of these alternative grounds for finding alienage jurisdiction in *Matimak* would have been better attuned to the complex issues involved than the hypertechnical holding of the majority.<sup>136</sup> The executive branch, not the court, manages foreign relations, but granting jurisdiction under section 1332 is something less than opening an embassy and exchanging ambassadors.<sup>137</sup>

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global economy and prevents *Matimak*-style, counterintuitive denials of jurisdiction with major trading partners, while it does not usurp executive function when the executive will is expressed.

134. In *Matimak*, the court had before it a letter from the State Department's legal advisor for East Asian and Pacific affairs, averring that Hong Kong is the twelfth-largest trading partner of the United States and that U.S. citizens invest nearly 12 billion dollars in Hong Kong. See *Matimak Trading Co. v. Khalily*, 118 F.3d at 76, 81 (2d Cir. 1997). Although many international trade disputes are contractually bound to arbitration, when an arbitral award is given and a party seeks enforcement in federal court, the jurisdiction issue can still arise. See *Riccio v. Gray*, 852 F. Supp. 5 (S.D.N.Y. 1993) (finding no subject matter jurisdiction for an action involving an arbitration award when neither federal question or diversity jurisdiction existed).

135. *Matimak*, 118 F.3d at 92 (Altimari, J., dissenting).

136. See generally Hartwing Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification*, 59 MO. L. REV. 569 (1994) (suggesting some prevalence of discrimination against foreign companies in U.S. courts).

137. While foreign relations is not the prerogative of the judicial branch, to some commentators it

The courts should not wade into the murky waters of who is or is not a legitimate sovereign. On the other hand, one doubts that the State Department or the President recognizes foreign entities with an eye to providing their citizens (corporeal or corporate) with alienage jurisdiction in federal courts. Indeed, many things may stimulate the recognition or derecognition of foreign entities, and in some cases, such recognition reflects political realities beyond whether the state is substantial enough to merit recognition. For example, the United States did not have diplomatic relations with the People's Republic of China until 1978, and today the United States does not recognize the Republic of China (Taiwan) as a state, even though Taiwan is one of the United States' leading trading partners. The "one China" policy is a diplomatic sleight of hand to gloss over a geopolitical point of tension.<sup>138</sup> Currently, Taiwan is recognized as a foreign state for purposes of section 1332 because it *once was* recognized as a foreign state, even though Taiwan's diplomatic recognition was removed in 1978. Such a pragmatic result does not comport with the hypertechnical reading of *Matimak*. So, while the judiciary should not conduct foreign policy, the vicissitudes of foreign policy should not be allowed to warp the judicial process. The list of formally recognized foreign states simply does not necessarily reflect intentional policy determinations about alienage jurisdiction eligibility. Thus, formalistic reliance on such a list does not achieve deference to the executive branch in foreign affairs, ostensibly the purpose of such reliance. Moreover, as cases involving Taiwan,<sup>139</sup> Iran,<sup>140</sup> Cuba,<sup>141</sup> Palestine<sup>142</sup> and India<sup>143</sup> have shown, sovereignty and recognition

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does not necessarily follow that the executive branch should determine which entities are foreign states for alienage jurisdiction. In *Federalist No. 80*, Alexander Hamilton argued *all* claims involving aliens should be before national tribunals. See *supra* note 42 and accompanying text. Indeed, the article the *Matimak* court cited for its background that alienage jurisdiction is aimed at promoting good foreign relations did not suggest such good relations were necessary only with recognized states, or that the executive branch could determine which foreign entities needed the neutral forum of the federal courts. *Matimak*, 118 F.3d at 83 (citing Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Non-Citizens*, 21 YALE J. INT'L L. 1 (1996)).

138. See Joint Communique, Feb. 28, 1972, U.S.-P.R.C., 11 INT'L LEGAL MATERIALS 443, 445 (1972); Joint Communique on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, Dec. 15, 1978, U.S.-P.R.C., 18 INT'L LEGAL MATERIALS 274 (1979).

139. See *Chang v. Northwestern Mem'l Hosp.*, 506 F. Supp. 975, 978 (N.D. Ill. 1980).

140. See *Iran Handicraft & Carpet Export Ctr. v. Marian Int'l Corp.*, 655 F. Supp. 1275 (S.D.N.Y. 1987).

141. See *Calderone v. Naviera Vacuba S/A*, 325 F.2d 76 (2d Cir. 1963); *Betancourt v. Mutual Reserve Fund Life Ass'n.*, 101 F. 305, 306 (C.C.S.D.N.Y. 1900).

142. See *Abu-Zeineh v. Fed. Labs, Inc.*, 975 F. Supp. 774 (W.D. Pa. 1994); *Klausner v. Levy*, 83 F. Supp. 599, 600 (E.D. Va. 1949).

are not immutable. Governments come and go; political realities change. Therefore, the *Wilson* "rule of reason" is the more sophisticated approach. It should be used absent some express, contrary indication from the State Department or Congress that alienage jurisdiction should be denied to a particular foreign entity. Informal communication similar to the type in *Matimak* could be used as an ersatz certification of the question.

The difficulty of stateless corporations is particularly interesting in light of the global trend toward multinational trade alliances.<sup>144</sup> In particular, the European Union (EU) is considering creating various Pan-European business entities under EU law.<sup>145</sup> How would such an entity fit into section 1332? The European Union is not a state; its members do not plan to yield all their sovereignty to the EU. Even more than Hong Kong or the Cayman Islands, the corporations created under the laws of the EU are likely to include important trading partners of the United States. While such corporations will not be creatures of the municipal laws of recognized states, surely they should not be denied alienage jurisdiction on such a formalistic basis.

Given on the one hand the "colony problem" represented by *Matimak* and *Wilson*, and on the other hand the emerging problem of pan-regional business forms represented by EU proposals, courts should recognize "derivative sovereignty" and "composite sovereignty" for purposes of alienage jurisdiction under section 1332(a)(2). This proposal maintains judicial deference to the executive and legislative branches in terms of foreign policy, as deemed vital in *Matimak*, but also allows a flexibility in reading foreign state under the statute.

The people and corporations that inhabit the colonial territories at issue in *Matimak* and *Wilson* are neither citizens of independent sovereigns nor full citizens of the colonial power. Yet they are hardly stateless in the typical sense.<sup>146</sup> They represent a species of political entity which derives from a

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143. See *Murarka v. Bachrack Bros.*, 215 F.2d 547 (2d Cir. 1954)

144. Although corporations are creatures of state law in the United States, in many other nations business forms are a product of national law, and some have suggested a nationally uniform system of business organization law would be an improvement in the United States. See John H. Matheson & Brent A. Olson, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1 (1996).

145. See David C. Donald, *Company Law in the European Community: Toward Supranational Incorporation*, 9 DICK. J. INT'L L. 1, 10-24 (1991) (discussing proposals for Pan-European Union company law).

146. 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. 195 (1996).

Many cases address the stateless person issue. See, e.g., *Shoemaker v. Malaxa*, 241 F.2d 129 (2d Cir. 1957) (finding a foreign litigant whose home nation had revoked his citizenship ineligible for alienage jurisdiction); *Ligi v. Regnery Gateway, Inc.*, 689 F. Supp. 159, (E.D.N.Y. 1988) (finding that a litigant who availed himself of alienage jurisdiction could not then disclaim it by attempting to divest

recognized state. In the future, it is possible if not likely that corporations, and perhaps even natural persons, will exist with the legal status that attaches to a composite of yielded sovereignties of recognized states, such as the contemplated Pan-European business form. Such composite sovereignty, when created by recognized states, should also qualify for alienage jurisdiction under section 1332(a)(2). These concepts of derived sovereignty or composite sovereignty in conjunction with a rule of reason plus interlocutory appeal<sup>147</sup> to the executive branch in uncertain cases will allow the courts to apply the diversity statute in alienage jurisdiction cases without the formalism of *Matimak* or the potential open-ended problems of *Wilson*.<sup>148</sup>

#### IV. CONCLUSION

Federal circuits have reached divergent conclusions about what constitutes a foreign state for purposes of 28 U.S.C. § 1332(a)(2). A recent Second Circuit opinion reads foreign state narrowly to deny alienage jurisdiction to a corporation from Hong Kong, which was then a British Dependent Territory. In contrast, the Seventh Circuit determined alienage jurisdiction exists when a corporation from the Caymans Islands—also a British Dependent Territory—is sued by a U.S. party. A flexible reading of foreign state is preferable in an age of increasing global trade, particularly because recognition of foreign states by the nonjudicial branches of government is not likely to turn on, or even contemplate, the ramifications on section 1332. Courts should look for derivative or composite sovereignty, apply a rule of reason and allow diversity jurisdiction when the foreign state is a political entity with which the U.S. has substantial economic and political ties, unless the coordinate branches have expressly declared otherwise.

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himself of foreign citizenship to become stateless); *Reyes v. Penoci*, 202 F. Supp. 436 (D.P.R. 1962) (finding that a stateless person is also ineligible for jurisdiction in Puerto Rico under specific jurisdictional statutes); *Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496 (S.D.N.Y. 1955) (finding stateless persons ineligible for alienage jurisdiction).

147. See 28 U.S.C. § 1292(b) (1994), which provides for interlocutory appeal of orders of district courts. Here, of course, I mean an informal conferral between the courts and coordinate branches.

148. For strict textualists, this approach may seem to contravene the constitutional scheme by giving judges foreign relations power, but as argued above, the ostensible adherence to strict deference to the executive or legislative branches in identifying foreign state under section 1332(a)(2) can actually produce consequences unintended by those branches, and these proposals can be pursued by the judiciary even as Congress retains the power to expressly determine how foreign state should be interpreted. This dialogic process is typical of the way diversity jurisdiction has actually developed. See *supra* note 48. "To be sure, federal courts undoubtedly engage in interstitial 'lawmaking,' as part of the process of interpreting positive law." Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1248 (1996).

