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Mark Baker*

I. INTRODUCTION

The phenomenon of statelessness and its repercussions typically conjure images of refugees forced into a nomadic life by unfortunate circumstances, most often due to war.1 Consider, however, the more atypical situation of the stateless, and most unfortunate, Alfred Merhan:

It's a weekday morning in Charles de Gaulle Airport's Terminal One, and passengers are sipping coffee and passing time until they ride the glass-enclosed escalators to their planes and fly away. One man, however, has been waiting here patiently for a flight for the last 9 ½ years! Merhan Karimi Nasseri, nicknamed Alfred by the airport staff, sits on a red plastic bench and writes the day's entry in his loose-leaf diary. In August 1988, Mr. Nasseri landed at Charles de Gaulle Airport with no documents, the result of bureaucratic bungling and a string of bad luck. Since then, Europe's increasingly strict immigration and refugee laws and Mr. Nasseri's deteriorating mental state have kept him trapped in a sort of legal no man's land. Mr. Nasseri, 48, frail with thinning dark hair, sunken eyes and hollow cheeks, says he still has hope that he will one day leave the airport. But the airport workers who watch out for him say they think he is there for good.... [Mr. Nasseri] was born in Soleiman, a part of Iran then under British jurisdiction, to an Iranian father and

* Associate Professor of International Law; Graduate School of Business, University of Texas at Austin. The author gratefully acknowledges the invaluable assistance of Meredith Pierce, B.A., Louisiana State University, 1996; J.D. expected, University of Texas at Austin, 1999.

1 The United Nations Commissioner for Refugees provides a moving website that highlights the plight of refugees. The site contains maps, photographs, statistics and other relevant information, all of which prove disturbing. See United Nations High Commissioner for Refugees (visited Feb. 20, 1999) <http://www.unhcr.ch>.

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sue a postgraduate course. When he returned to Iran, he was imprisoned for protesting against the shah and expelled without a passport. In Europe, Mr. Nasseri bounced from capital to capital for nearly four years and applied for political asylum in several countries. In 1981, the United Nations High Commission for Refugees in Belgium granted his request, giving him refugee credentials that allowed him to seek citizenship in a European country. Mr. Nasseri decided on Britain, but he got only as far as Paris, where his briefcase containing the refugee certificate was stolen in a train station. Several months later, Mr. Nasseri boarded a plane for London anyway, showing French police a copy of the theft report. British immigration officers sent him back to France. French police arrested him, but because he had no official documents, there was no country to which he could be deported. He has been in the airport ever since....

Besides serving as a damning critique of bureaucracy at its extreme, this story reflects only one of the many alarming results of statelessness. Stateless persons may not participate in politics; states may deny them access to courts; stateless persons may be liable for taxes wherever they happen to be; they may, under international law, be subject to discrimination since they belong to no state capable of protecting them.

Statelessness clearly implicates issues concerning basic human rights. The United Nations has addressed some of these issues by taking steps to reduce statelessness and to minimize its results, most notably with the Convention on the Reduction of Statelessness and the Convention Relating to the Status of Stateless Persons. Although mitigating the effects of statelessness is noble and quite worthwhile, these efforts may fail to reach certain stateless persons, and, more specifically, certain stateless entities.

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2 Susannah Patton, *Man May Never Leave Airport Refuge*, DALLAS MORNING NEWS, March 11, 1998, at 12A (emphasis added). Mr. Nasseri's plight is amplified by the dearth of entertainment common to airports around the globe: Mr. Nasseri's routine has varied little over the last 9 ½ years. Every night after the stores close, he settles down to sleep on the padded plastic bench, wrapped in a navy blue nylon sleeping bag. He awakens about 5:30 a.m., when activity begins to stir in the terminal, and heads to the washroom to shave and brush his teeth with toiletries from complimentary airline kits. His meals, mostly from Burger King and surrounding cafes, come largely courtesy of airport staff members, who give him meal vouchers. "French fries are my favorite," he confides. "It's not a very health diet, but I get enough." Once a week he washes his only shirt, which dries in two hours. His jacket and corduroy pants are cleaned by the airport laundry, and he showers in staff facilities. The rest of his day is spent chatting with passing staff members, writing in his diary and reading his most recent volume from the Book-of-the-Month Club, which he is able to pay for with donations from journalists who have befriended him over the years. . . .


4 See id. at 936.

5 Besides the United Nations and various governments, private groups strive to solve the problems presented by statelessness. In 1978, one such group established a home for the stateless in Thailand (the Old People's Home). Currently, the home accepts no new residents because the Thai government has instituted measures to aid the stateless. See <http://www.cybernet.net/~rsmall/oldpeo.htm>.
Enter Matimak Trading Company ("Matimak"), a corporation formed under the laws of, and with its principal place of business in, Hong Kong. Recently, the U.S. Second Circuit Court of Appeals deemed Matimak to be "stateless" due to Hong Kong's status as a dependent territory and Great Britain's nationality law. The court dismissed the case for lack of subject matter jurisdiction since Matimak failed to meet one of the criteria set out in the Alienage Diversity statute, being a citizen of a foreign state.

Matimak Trading Co. v. Khalily deviates from the opinions reached by other circuits when confronted with the citizenship issue of corporations formed under the laws of British Dependent Territories. Wilson v. Humphreys (Cayman) Ltd. best illustrates this departure. In Wilson, the Seventh Circuit held that a Cayman Islands corporation, although incorporated under the laws of a British Dependent Territory, was a citizen of a "foreign state" under the Alien Diversity statute. It therefore could access United States federal courts.

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7 See id. The Alienage Diversity statute reads: "[t]he 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 citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. § 1332(a)(2) (1997).

8 Presently, the British Dependent Territories are Anguilla, Bermuda, British Antarctic Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Islands, Saint Helena, Saint Helena Dependencies, South Georgia and the South Sandwich Islands, and Turks and Caicos Islands. See Britain in the U.S.A.: Britain's Dependent Territories (visited Jan. 17, 1998) <http://britain.nyc.ny.us/bistext/fordom/dts/dts.htm>. In addition, other entities exist as dependent territories. France's dependent territories are Bassas da India, Clipperton Island, Europa Island, French Polynesia, French Southern and Antarctic Islands, Glorioso Islands, Juan de Nova Island, New Caledonia, Tromelin Island, and Wallis and Futuna. See Central Intelligence Agency, The World Factbook 1997 (visited Jan. 17, 1998) <http://www.odci.gov/cia/publications/pubs.html>. The Netherlands' dependent territories are Aruba and the Netherlands Antilles. See id. Furthermore, Australia, the United States and Portugal maintain dependencies, although Macau, Portugal's only dependency, is "scheduled to become a Special Administrative Region of China" on December 20, 1999. Id. Note that many of these locales are tax havens. Among those more commonly known are Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Netherlands Antilles, Turks and Caicos Islands, and U.S. Virgin Islands. See generally MILTON GRUNDY, OFFSHORE BUSINESS CENTERS: A WORLD SURVEY (1997). Thus, the Second Circuit's holding introduces into the world of tax structuring an element of unpredictability, leaving the question of whether the United States federal courts may exercise subject matter jurisdiction over corporations formed under laws of dependent territories unanswered.


10 The opinion is vague as to which "foreign state" the Cayman Islands corporation should be considered a citizen: the Cayman Islands or Great Britain. The opinion holds that "[t]he Cayman Islands is a British Dependent Territory. A citizen of a British Dependent Territory is a "citizen of the United Kingdom and Colonies."" Id. at 1242 (citing British Nationality Act 1981 § 51(3)(a)(ii)).
States federal courts. These irreconcilable decisions leave similarly situated corporations in a jurisdictional twilight zone where their ability to enter a federal courthouse is questionable. This inconsistent treatment of foreign corporations by the courts of appeals could have international ramifications.\textsuperscript{12} A remedy imposing certainty is crucial.

\textsuperscript{11} See id.

\textsuperscript{12} One example of foreign governments reacting to what they perceive as a threat to their interests can be found in the area of extraterritorial exercise of United States law, notably the extraterritorial application of American antitrust law, the Export Administration Act, and securities laws. See JAMES ATWOOD, KINGMAN BREWSTER, ANTI TRUST \& AMERICAN BUSINESS ABROAD 94 (1981). Recently, extraterritorial application has made news through the Helms-Burton Act which "exercises extraterritorial jurisdiction in an attempt to impose economic sanctions on [American] trading partners who do business with Cuba." John Yoo, \textit{Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act}, 20 HASTINGS INT'L \& COMP. L. REV. 747 (1997). There are several reasons for foreign resentment of the extraterritorial application of American laws. The first rationale for foreign resentment rests with the idea that, while other countries often concur with the ends underlying a particular American law, the foreign country prefers other, perhaps less formal, preventative means. See ATWOOD, supra at 83. For example, Canadian antitrust law is based on "[i]nformal negotiation and the threat of bad publicity [which] result[s] in the resolution of most disputes prior to formal action." \textit{Id.} at 84. On the other hand, foreign countries simply may not support the American law being applied beyond American borders. See \textit{id.} at 86. Finally, and perhaps most apparent, is the feeling that extraterritorial application of U.S. laws offends notions of state sovereignty. See \textit{id.} at 92.

Foreign governments have reacted in the past to perceived injustices inflicted upon their citizens when U.S. law is applied abroad. The most common reaction occurs via diplomatic channels in the form of messages or "filing briefs amici curiae." \textit{Id.} at 101. Foreign courts, supported by their governments, have refused to acknowledge American antitrust rulings and, more commonly, dismiss American discovery demands. See \textit{id.} at 102. Foreign legislatures reveal their resentment through legislation which blocks extraterritorial investigations or defeats American judgments. See \textit{id.} at 102-05. One example of this occurring is the Protection of Trading Interests Act 1980 passed by the British Parliament. The Act contains a "clawback provision" which allows "certain defendants who [had] paid a multiple damage judgment in an overseas country to recover the multiple portion of that judgment from the successful plaintiff." Joseph E. Neuhaus, \textit{Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law}, 81 COLUM. L. REV. 1097, 1098 (1981). The act was "aimed at the treble damages available under the United States antitrust laws . . ." and was "a response to a perceived increase in the aggressively extraterritorial enforcement of American antitrust and trade law." \textit{Id.} at 1098-99. Australia and Canada passed similar acts. See \textit{id.} at 1098.

A more recent example is the passage of "clawback" statutes enacted by most of America's trading partners to mitigate the effects of the Helms-Burton Act. The European Community adopted Council Regulation 2771/96. The Regulation "prohibits, in categorical terms, the recognition and enforcement of any judgment of a court as well as any decision of an administrative authority located outside of the European Community giving effect to the Helms-Burton Act or the D'Amato Act or to actions based thereon or resulting therefrom." Jurgen Huber, \textit{The Helms-Burton Blocking Statute of the European Union}, 20 FORDHAM INT'L L.J. 699, 704 (1997). The Regulation also contains a "clawback clause" whereby Helms-Burton defendants can recover expenses from Helms-Burton plaintiffs incurred during litigation. \textit{Id.} at 705. Canada enacted similar legislation. See Kim Campbell, \textit{Helms-Burton: The Canadian View}, 20 HASTINGS INT'L \& COMP. L. REV. 799, 803 (1997). "Mex-
This article investigates methods to alleviate this intercircuit conflict. Part II of this article examines the potential effects of statelessness on corporations such as Matimak and the role of alienage jurisdiction within the federal court system. Part III serves as an introduction to executive recognition of foreign states. Part IV contrasts and discusses the Matimak and Wilson opinions. Part V presents three possible solutions to the conflict and concludes that a congressional amendment to the Alienage Diversity statute would most likely resolve this conflict. An amendment would inject predictability into the process by which courts of appeals decide the status of foreign parties. This resolution would foster the separation of powers inherent in our legal system and allow the political branches the final word in matters involving international policy.

II. STATELESSNESS AND ALIENAGE JURISDICTION

A. Statelessness

Under international law, the stateless person or entity, as in Matimak's situation, lacks what can be termed the "right to have rights" that nationals enjoy. Admittedly this term seems overly encompassing but in actuality that is the case with statelessness. Under international principles of law, nationality grants an individual or entity protection by its state. Any harm done to a national is imputed to the state itself. Thus, the state is justified in taking action on behalf of an injured national. Without a state of nationality, the stateless individual or entity has no grounds to complain (nor anyone to hear those complaints) when it experiences discrimination. In other words, stateless individuals or entities have no "community willing and able to guarantee any rights whatsoever." The stateless individual in particular:

\textsuperscript{13} See McDougal et al., supra note 3, at 920.
\textsuperscript{14} See id.
\textsuperscript{15} See id. at 866-67.
\textsuperscript{16} Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.
\textsuperscript{17} See id. at 866.
\textsuperscript{18} See id. at 921.
\textsuperscript{19} Id. (quoting H. Arendt, The Origins of Totalitarianism 20 (1958)).
has no state to ‘protect’ him and lacks even the freedom of movement to find a state that is willing to protect him. His participation in the value processes of any territorial community is highly restricted. . . . The powerlessness of the stateless person is most apparent in the limitation upon his freedom of movement, both of egress and of return. . . . Other deprivations are visited upon the stateless individual. He is denied general participation, such as voting and office holding, in the internal power process of any body politic. He often cannot obtain documents certifying his personal status . . . . The stateless person may be discriminated against in every territorial community because of his alienage; he is not properly recognized as a person and is thus denied respect.\[19\]

While it appears that many of these restrictions would not affect entities such as corporations, potential discrimination is of primary concern. This concern intensifies if the entity is stateless since, under international law, the stateless entity is unprotected against discrimination.\[20\] Kevin Johnson documents examples of discrimination aimed at foreign corporate litigants in the United States.\[21\] He cites two particular state jury verdicts reversed by the Supreme Court arguably due to fears of discrimination against the foreign defendants.\[22\] Alienage jurisdiction, and thereby access to federal court, alleviates some of the threats of discrimination foreign litigants may face in state court. However, stateless entities cannot avail themselves of the Alienage Diversity statute. According to Matimak, corporations from dependent territories have no choice but to turn to state courts.\[23\] The next section discusses the origins of alienage jurisdiction and its purposes in relation to today’s foreign corporate litigants.

\[19\] Id. at 920-21. The United Nations has addressed statelessness and taken steps to reduce and statelessness and minimize its effects. See id. at 935-41. The Convention on the Reduction of Statelessness, the Convention relating to the Status of Stateless Persons, and the Convention relating to the Status of Refugees were adopted. See id. However, the language of these Conventions seems to preclude application to stateless entities such as corporations. See Convention relating to the Status of Stateless Persons, Sept. 20, 1954, 360 U.N.T.S. 117 (purpose of Convention is to include those persons not covered by the Convention relating to the Status of Refugees). Thus, even in contracting states, it would seem a plausible argument exists against applying the principles contained in these Conventions to stateless entities.

\[20\] See McDougal et al., supra note 3, at 921.


\[23\] This is assuming the foreign litigant could not invoke federal jurisdiction via other, more narrowly tailored, statutes available such as federal question jurisdiction. See Matimak, 118 F.3d at 88 (“Matimak is not a ‘citizen or subject of a foreign state,’ under 28 U.S.C. § 1332(a)(2), and there is no basis for jurisdiction over Matimak’s suit.”); infra note 33 and accompanying text.
B. Alienage Jurisdiction

1. Purposes of Alienage Jurisdiction

What purposes does alienage jurisdiction serve? As usual, history aids in searching for future answers. Johnson argues that concern about international relations is a constant theme of alienage jurisdiction. During colonial times and throughout the American Revolution, anti-British sentiment was prevalent. After the Revolutionary War, "[t]he states often failed to enforce debts owed by their citizens to British creditors. This problem grew as the U.S. economy experienced fluctuations and readjustments caused by, among other factors, the loss of British financial support." Though the national government took steps to prevent this from happening, the loosely based government of the Articles of Confederation permitted the states to remain recalcitrant. As a result, Federalists feared that the fledgling country could not "attract capital absent easier enforcement of commercial obligations owed to foreign citizens by U.S. citizens. A national court system was considered one solution." Thus, at the Constitutional Convention, a general agreement emerged that alienage diversity jurisdiction was necessary to further America's economic growth; for example "[f]our of the five plans presented at the Constitutional Convention provided for alienage jurisdiction." The resulting constitutional provision reads, "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." As for the Judiciary Act of 1789, Johnson argues that the First Congress passed an alienage diversity statute for much the same reasons as those of the framers: foreign relations and the desire to encourage a flow of capital to the United States.

Today, alienage jurisdiction serves a similar purpose by preventing potential discrimination against foreign litigants in state courts. Federal courts are commonly perceived as being more neutral than state courts. This proposition may be debatable however, according to Johnson:

Concern with foreign business frequently has been strongest at the state and local levels ... [E]xamples of antiforeign sentiment directed at foreign business abound. So-called Arab oil money in the 1970s and the Japanese ...
vasion’ of the economy in the 1980s triggered hysterical reaction from some commentators. Though more subtle, the debate over whether Congress should ratify the North American Free Trade Agreement resonated with a distinctively negative view of Mexican capital and labor.\textsuperscript{32}

If the aforementioned proposition is taken as true, alienage jurisdiction provides a neutral vehicle through which foreigners can adjudicate disputes. Interestingly, the policies underlying alienage jurisdiction persist despite two centuries of colossal change in the American and global economies.

2. Alienage Jurisdiction in the Federal Courts

Our federal courts are courts of limited jurisdiction.\textsuperscript{33} As previously enumerated, the Constitution expounds the outer limits of alienage jurisdiction for the federal courts: “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.”\textsuperscript{34} Congress further delineated such jurisdiction in 28 U.S.C. §1332(a)(2) which reads: “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 citizens of a State and citizens or subjects of a foreign state.”\textsuperscript{35}

The common thread that binds these jurisdictional decrees is the term “foreign state,” conspicuously left undefined both in the Constitution and the diversity statute.\textsuperscript{36} The Matimak court acknowledged that “[n]either 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.”\textsuperscript{37} Thus, for corpora-

\textsuperscript{32} Johnson, supra note 21, at 45.

\textsuperscript{33} See CHARLES ALAN WRIGHT, FEDERAL COURTS 27-28 (4th ed. 1994).

[Federal courts] are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress. Because of this unusual nature of the federal courts, and because it would be not simply wrong but indeed an unconstitutional invasion of the powers reserved to the states if those courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of such a court . . . [P]arties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress. The parties cannot waive lack of jurisdiction, whether by express consent, or by conduct, or even by estoppel.

\textit{Id.}

\textsuperscript{34} U.S. Const. art. III, § 2, cl. 1.


\textsuperscript{36} 28 U.S.C. §1603 which addresses foreign sovereign immunities defines the breadth of “foreign state” for purposes of that chapter. “A ‘foreign state’ . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).”


Because the Constitution empowers only the President to ‘receive Ambassadors and other public Ministers,’ the courts have deferred to the executive branch when determining
tions, those incorporated abroad are deemed citizens of a foreign state only if that foreign state is recognized. Therefore, those corporations not meeting this criterion are deemed stateless. The next section considers the theory behind recognition in international law. The section also considers the role given recognition by the federal courts.

III. RECOGNITION

A. Recognition Theory

Before turning to the Matimak and Wilson cases, the terminology of the recognition of states demands introduction. Recognition has been defined as the "acknowledgment of the existence of an entity or situation indi-

what entities shall be considered foreign states. The recognition of foreign states and of foreign governments, therefore, is wholly a prerogative of the executive branch."


38 See Nat. Steam-Ship Co. v. Tugman, 106 U.S. 118, 121 (1882) ("a corporation of a foreign state is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such state.") Congress passed 28 U.S.C. § 1332(c) which defines corporate citizenship: "For purposes of this section . . . a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . . " 28 U.S.C. § 1332(c) (1997).

The draftsmen of the 1958 amendment [28 U.S.C. § 1332(c)] did not consider how it would apply to corporations incorporated in a foreign country or to domestic corporations with their principal place of business abroad . . . More recent cases [ ] hold[ ] that a foreign corporation is considered a citizen of the state or foreign state in which it has its principal place of business. It has also been held that a domestic corporation is a citizen of the state of its incorporation, but that it is not to be regarded as a citizen of a foreign country even though it has its principal place of business in that country.

WRIGHT, supra note 33, at 168-69.

Another interesting twist to the foreign corporation equation is discussed in Cohn v. Rosenfeld wherein the court was faced with an "Anstalt" from Liechtenstein, as opposed to a corporation. The court held that "[s]ection 1332(a)(2) applies to foreign legal entities of all kinds, so long as the entity is considered a juridical person under the law that created it." Cohn v. Rosenfeld, 733 F.2d 625, 629 (9th Cir. 1983).

39 See Land Oberoesterreich v. Gude, 109 F.2d 635, 637 (2d Cir. 1940) ("The state must first achieve recognition by our government, but once recognized, the foreign sovereign, its subjects and citizens, including its corporations may be suitors in our courts."); World Communications Corp. v. Micronesian Telecomm. Corp., 456 F. Supp. 1122 (D. Haw. 1978) (a corporation formed under the laws of the Trust Territory of the Pacific Islands not a citizen of a foreign state).

40 See Matimak, 118 F.3d at 86 ("Matimak is not a 'citizen or subject' of a foreign state. It is thus stateless."). In the context of natural, stateless persons, see Shoemaker v. Malaza, 241 F.2d 129 (2d Cir. 1957) ("it seems clear that a stateless person . . . is not a citizen or subject of a foreign state within the meaning of 28 U.S.C.A. § 1332(a)(2)); Factor v.Pennington Press, Inc., 238 F. Supp. 630, 634 (N.D. Ill. 1964) ("The plaintiff was at the time of filing the complaint a stateless person, and a stateless person is not a citizen of a state of the United States or of any foreign state for purposes of satisfying the diversity of citizenship requirements."); Reyes v. Penoci, 202 F. Supp. 436 (D. P.R. 1962) ("A stateless person . . . is not a citizen or subject of a foreign state. . . . ").
cating that the full legal consequences of that existence will be respected.\textsuperscript{41} Recognition can be extended to states, governments and to governments' decrees.\textsuperscript{42} These different types of recognition are separate forms.\textsuperscript{43} Nonetheless, the nomenclature of governmental recognition seems applicable to that of recognition of states.\textsuperscript{44} For example, in analyzing state recognition the Matimak court looked to jurisprudence surrounding the meaning of "foreign state" as contained in § 1332(a)(4), the section granting federal courts jurisdiction over foreign sovereign immunities cases. The court concluded that "[a]ccording the same core meaning to 'foreign state' in both sections of the statute in which it occurs, we defer to the Executive Branch for purposes of § 1332(a)(2)."\textsuperscript{45} The court also supported its contentions with several cases dealing with recognition of foreign governments.\textsuperscript{46} Thus, much written about the recognition of governments can equally apply to the recognition of states, the seminal issue of this article.

\section{Manners of Recognition}

The study of state recognition focuses on the manner in which states are recognized and the types, or degrees, of recognition. The manner in

\begin{footnotesize}
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\item \textsuperscript{41} M.J. Peterson, Recognition of Governments 1 (1997).
\item \textsuperscript{42} See id. at 2; Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000, 1003 (D.C. Cir. 1951).
\item \textsuperscript{43} See Peterson, supra note 41, at 2. One of the main differences between governmental and state recognition in the context of alienage jurisdiction is that, to avail oneself of alienage jurisdiction, only one's state need be recognized. In sovereign foreign immunities cases, however, the state and government must be recognized before the state may access U.S. courts. See Iran Handicraft and Carpet Export Center, 655 F. Supp. at 1277 ("There exists a fundamental distinction between recognition of a state as an international juridical entity and recognition of a particular government."). The jurisdiction of foreign sovereign immunities cases is based on 28 U.S.C. § 1332(a)(4): "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 a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States." 28 U.S.C. § 1332(a)(4) (1997). Section 1603(a) defines "foreign state:" "A 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a) (1997).
\item \textsuperscript{44} See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 92 (4th ed. 1990). It should be noted, however, that the recognition or nonrecognition of a government is usually more political than recognition of states. See id. at 93.
\item \textsuperscript{45} Matimak, 118 F.3d at 84.
\item \textsuperscript{46} See id. (citing Pfizer Inc. v. India, 434 U.S. 308 (1978); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); National City Bank of N.Y. v. Republic of China, 348 U.S. 356 (1955); Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Jones v. United States, 137 U.S. 202 (1890); National Petrochemical Co. v. M/T Stolt Sheaf, 860 F.2d 551 (2d Cir. 1988); Land Oberoesterreich v. Gude, 109 F.2d 635 (2d Cir. 1940)).
\end{enumerate}
\end{footnotesize}
which states are recognized is further divided into express and tacit, or implied, recognition. Express recognition is fairly self-explanatory. In writing about the history of the recognition of governments, M.J. Peterson describes several methods of express recognition used in the nineteenth century. These include: a statement from the recognizing government to the other government expressing its recognition, a written correspondence between a recognizing government to the receiving government addressing the head of that government by his title and including typical diplomatic language, a diplomat’s verbal statement to the head of the receiving government, and “a treaty provision, or a joint declaration with other governments.”

Later, in the twentieth century, these recognitions extended to include statements to the media. These actions can be analogized to the context of recognizing states: Certainly written and public expressions of recognition qualify as express recognition. Any other action towards a receiving state would be less conclusive and would therefore fall under the heading of tacit recognition.

Peterson defines tacit recognition of governments as occurring “when a government performs an act regarding, or establishes a contact with, a new regime that is inconsistent with nonrecognition.” Likewise, tacit recognition of states could consist of a government acting toward another state in a manner inconsistent with nonrecognition. The question arises as to what types of actions should be considered inconsistent with nonrecognition. Brownlie cites Lauterpacht as concluding that “in the case of recognition of states, only the conclusion of a bilateral treaty which regulates comprehensively the relations between the two states, the formal initiation of diplomatic relations, and, probably, the issue of consular exequaturs, justify the implication [of tacit recognition].”

Whether these specific actions are absolutely required to allow the implication of tacit recognition is not essential to this analysis; it is important to note that such action would be inconsistent with a policy of nonrecognition.

2. Degrees of Recognition

The degrees of recognition consist of de jure and de facto recognition. The significance of this dichotomy is a bit unclear. Peterson outlines the different interpretations of this dichotomy in the context of recognition of governments. However, these interpretations can apply equally to the recognition of states. Between the World Wars, several interpretations of the distinction between de jure and de facto recognition existed. One interpretation defined de jure recognition as “irrevocable” and de facto recogni-

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47 Peterson, supra note 41, at 86-87.
48 See id. at 87.
49 Id. at 87.
50 Brownlie, supra note 44, at 96.
51 See Peterson, supra note 41, at 94.
tion as "revocable."\textsuperscript{52} Another interpretation understood the distinction between de facto and de jure recognition to merely indicate whether full or limited diplomatic relations existed between the recognition and the receiving state.\textsuperscript{53} During the Cold War, these different interpretations were compressed to become merely a distinction between "provisional and final recognition."\textsuperscript{54} However, even then, the exact meaning of the terms remains unclear.

3. Implications of Recognition

The Restatement (Third) of The Foreign Relations of the United States notes two possible implications of recognition.\textsuperscript{55} The first is termed the "declaratory" theory of recognition.\textsuperscript{56} Under this theory, if an entity meets the requisites contained in § 201 of the Restatement,\textsuperscript{57} then recognition of that entity by pre-existing states merely confirms that entity's status as a state; it does not confer the status of "statehood" on that entity, but functions solely as an acknowledgment.\textsuperscript{58} The Restatement adopts this "declaratory" theory of recognition.\textsuperscript{59}

Under the "constitutive" theory of recognition, an entity must first gain recognition from other pre-existing states before it can attain the status of a state.\textsuperscript{60} Although this theory seems the antithesis of the "declaratory" theory of recognition, in practice the two theories are not so different. The Reporter's notes in the Restatement recognizes this phenomenon:

[Section 202] tends towards the declaratory view, but the practical differences between the two theories have grown smaller. Even for the declaratory theory, whether an entity satisfies the requirements for statehood is, as a practical matter, determined by other states . . . . On the other hand, the constitutive theory lost most of its significance when it was accepted that states had the ob-

\textsuperscript{52} Id.
\textsuperscript{53} See id.
\textsuperscript{54} Id. at 96.
\textsuperscript{56} See id.
\textsuperscript{57} These requisites are stated in the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987):

Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.\textsuperscript{58} See id. § 202 cmt. a & b.
\textsuperscript{59} See id. § 202 reporter's notes cmt. 1.

(1) A state is not required to accord formal recognition to any other state but is required to treat as a state an entity meeting the requirements of § 201, except as provided in Subsection (2). (2) A state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed forces in violations of the United Nations Charter.\textsuperscript{59} Id. § 202. See also id. § 202 cmt. b ("Statehood not dependent on recognition").
\textsuperscript{60} See id. § 202 reporter's notes, cmt. 1.
ligation... to treat as a state any entity having the characteristics set out in § 201.61

B. Recognition And Federal Courts

1. Types of Recognition

Explicit recognition of a state entails a formal statement from the White House that the United States recognizes a certain entity as a state.62 For example, the White House issued a statement in 1994 recognizing Macedonia as an independent, sovereign nation.63 Similar action was taken for

61 Id. See also id. § 201.
62 See infra p. 152 and note 125.
63 See U.S. Recognizes Macedonia Over Greek Objections, WASH. POST, Feb. 10, 1994, at A23. Michael Ross Fowler and Julie Marie Bunck have written a thorough account of the criteria considered when deeming states “sovereign states.” MICHAEL ROSS FOWLER, JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE (1995). A common theme of sovereign statehood is that the state maintains territory, people, and a government. See id. at 31. However, as they note, many entities, including dependent territories, possess these requisites yet are not considered “sovereign.” See id. at 31-36. They therefore turn to the dichotomy of de jure and de facto sovereignty. See id. at 36. The former theory would consider a state a “sovereign state” only if the state is legally or constitutionally separate from other states. See id. at 51.

The roots of the latter theory derive from the sixteenth century writings of Jean Bodin, which note “sovereignty has internal and external dimensions.” Id. at 36 n.15. Thus, this theory would find a state to be sovereign only if the state possessed territory, people, and a government plus two criteria: de facto internal supremacy and de facto external independence. See generally id. at 36-50. The requirement of de facto internal supremacy deals with a state being entirely self-governed rather than being governed from abroad; the state possesses authority over all territory and people which comprise the state. See id. at 37. Questions arise regarding the application of such a requirement however. The authors posit such questions as “[h]ow supreme must an entity be to qualify as a sovereign?” and “[h]ow what degree must domestic supremacy be eroded before the international community considers revoking the sovereign status of a state?” Id. at 45. For example, in some states, groups of “powerful guerrillas, terrorists, and narcotics traffickers” threaten the state’s internal supremacy. Id. at 41.

The second criterion of the de facto model is de facto external independence. The authors state that “external political independence is a matter of degree, not of bright lines” due to the interdependence of the global community and economy. Id. at 49. Thus the following questions arise: “To qualify as sovereign, just how independent must a territorial entity be in conducting its foreign relations? Is a state still fully sovereign when authority over vital matters is vested elsewhere, such as in a neighboring great power or perhaps in an international tribunal or organization?” Id. at 50.

An interesting interplay exists between the de facto and de jure models. The authors illustrate this interplay with the case which faced the Permanent Court of International Justice: Lighthouses in Crete and Samos (Greece v. Fr.), 1937 P.C.I.J. (ser. A/B) No. 71. See id. at 55. The case presented a conflict between France and Greece involving a contract a French company had signed in 1913 between the Ottoman Sultan to build and maintain lighthouses “along the coasts of the Ottoman Empire.” Id. The first judgment in 1934 held that the contract was enforceable by France against Greece. See id. at 56. In 1937, the parties returned to the court when Greece argued that the contract could not apply to those lighthouses in
Bosnia-Hercegovina, Croatia, Slovenia, Russia, Ukraine, Kazakhstan, Byelorussia, Armenia, and Kirghizia. In such circumstances, cases involving citizens or subjects present no ambiguity to federal courts. The executive branch has recognized these countries and, therefore, citizens or subjects from these states unequivocally meet the criteria of 28 U.S.C. § 1332(a)(2).

Crete and Samos since they were no longer a part of the Ottoman Empire when the contract was signed. See id. The majority, considering the constitutions of Crete and Samos, used the de jure model of state sovereignty to decide that Crete and Samos were legally and constitutionally a part of the Ottoman Empire when the contract was signed. See id. The dissent however used a de facto model to determine that Crete and Samos were not a part of the Ottoman Empire when the contract was signed:

If it can be said that a theoretical sovereignty remained in the Sultan after 1899, it was a sovereignty shorn of the last vestige of power. He could neither terminate nor modify the autonomy with which Crete had been endowed against his will and with the sanction of the four European States. A juristic conception must not be stretched to the breaking point, and a ghost of a hollow sovereignty cannot be permitted to obscure the realities of the situation.

Id. at 57 (quoting Lighthouses in Crete and Samos, (Greece v. Fr.), 1937 P.C.I.J. (ser. A/B) No. 71, at 127 (Hudson, J. dissenting)).

Although the interplay between the two models is certainly critical when deciding whether a state is truly "sovereign," the authors assert that the final decision rests with the international community. See id. at 58. Recognition of states is indisputably a political act and often states recognize entities within states in hopes that they will become sovereign. See id. at 59. Other times, states refuse to recognize those states which possess the attributes of sovereignty for political reasons, for example, the government of the state in question supports practices repugnant to international mores. See id. The authors conclude that "acceptance may be derived from a strong showing of de facto or de jure independence, or ideally both, but it is ultimately the international community that determines whether a particular political entity qualifies as a sovereign state." Id. at 62.

The notion of the "sovereign state" has played an important role in public international law. However, Ambassador Emilio J. Cardenas, Argentina's Permanent Representative to the United Nations, argues that this notion is giving way to a more global community and economy:

Governments must increasingly operate within a "global" environment, a phenomenon which places significant restrictions on their real powers and potential actions. The "nation-state" is not anymore at the centre of things. This is predominantly because its autonomy and functions are being constantly eroded by global trends. The shape of the world is being rapidly changed by the joint effect of trade, capital flows, information and communication. But also by a dramatic revolution arising from the international community itself. Like the Berlin wall, walls are tumbling down everywhere. The familiar "nation-state" model seems therefore unavoidably undone. We are forced to talk about the "obsolescence of territory" because the "nation-state" frequently appears to be the wrong structure to cope with the world's new problems.


However, cases arise where the executive branch’s stance regarding a certain foreign state or its government is not explicit. As a result, federal courts have acknowledged that ""[r]ecognition is not necessarily express; it may be implied, as when a state enters into negotiations with the new state, sends its diplomatic agents, receives such agents officially, gives exequaturs to its consuls, forms with it conventional relations." This sort of analysis results in findings of implied, or tacit, recognition by the federal courts that the United States considered the entity in question an independent sovereign nation.

The Second Circuit, addressing a 28 U.S.C. § 1332(a)(4) claim of jurisdiction, employed this analysis in deciding *National Petrochemical Co. v. M/T Stolt Sheaf*. In that case, a corporation wholly owned by the Iranian government brought suit in federal court at a time when the executive branch had severed relations with the Iranian government. In determining whether it could exercise diversity jurisdiction over the corporation, the Second Circuit held that due to the need for flexibility in foreign relations the executive branch need not be bound by formal recognition alone. The opinion then turned to several acts taken by the executive branch with respect to Iran which would indicate that some type of recognition had occurred. The court considered various interactions between the two countries and concluded:

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65 For a discussion of explicit (express) and implied (tacit) recognition, see supra pp. 139-40 and notes 47-51. Similarly, in *Betancourt v. Mutual Reserve Fund Life Ass’n*, the court found that a citizen of Cuba was a citizen of a foreign state although, at the time the complaint was filed, Cuba was occupied by the United States. The court reached this conclusion based on a simple statement by "the political branch of this government... that the people of the Island of Cuba 'are free and independent.'" *Betancourt v. Mutual Reserve Fund Life Ass’n*, 101 F. 305, 306 (C.C.D.N.Y. 1900). Although this pronouncement falls short of explicit recognition of Cuba as a sovereign state, the court found recognition to be implied by this statement.


67 For a general discussion of implied (tacit) recognition, see supra notes 50-51 and accompanying text. See also infra pp. 144-46 and notes 68-78 (discussing implied recognition in American case law).


69 See *National Petrochemical Co.*, 860 F.2d at 552.

70 See id. at 554-55. The court also noted that the Department of State had retreated from relying exclusively on formal recognition and therefore, federal courts should consider objective factors to decide whether tacit recognition had been granted by the executive branch. See id. at 554.

71 See id. at 555.

72 The court stated:

Iran and the United States entered into the Algerian Accords to resolve the embassy personnel hostage crisis; an ongoing Iran-United States Claims Tribunal at the Hague continues to adjudicate disputes between the countries; and the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran remains in full force and effect.

*Id.*
Considering these factors in the aggregate, and not in isolation, as integral components of the United States overall relationship to Iran, the above recited connections strongly suggest that the Executive Branch has evinced an implicit willingness to permit the government of Iran to avail itself of a federal forum.\(^7\)

Thus, the Second Circuit found that the executive branch, through its actions, continued to recognize Iran and its government although formal, diplomatic ties had been severed.\(^7\)

Occasionally, courts also find implicit recognition of states by applying a test of statehood articulated by the Supreme Court in *United States v. Curtiss-Wright Export Corp.*\(^7\) The inquiry consists of examining the record for several uncontroversial aspects of statehood: "the power to declare and wage war; to conclude peace; to maintain diplomatic ties with other sovereigns; to acquire territory by discovery and occupation; and to make international agreements and treaties."\(^7\) These articulated principles closely correspond with conventional principles of public international law.\(^7\) The Montevideo Convention announced factors of statehood to be

\(^7\) *Id.* The case was ultimately decided by an explicit request by the executive branch to allow the corporation access to federal court. "Rather, here the Executive Branch . . . expressly entered this case as Amicus requesting that Iran be given access to our courts." *Id.* For an analysis of such deference by a federal court to the executive branch, see infra pp. 162-64 and text accompanying notes 179-84.

\(^7\) See *id.* Some commentators disagree with the *National Petrochemical* decision: *National Petrochemical* was incorrectly decided because it calls for the courts to conduct an analysis of the executive's attitude toward a particular government. Further, many authors agree and have criticized the Second Circuit opinion. One in particular attacked the soundness of the judicial branch in assuming such an onerous burden of interpreting executive actions. This type of judicial activism presents potential difficulties. The most obvious is the possibility of the judiciary reaching a different conclusion than the executive intends. Another problem exists with the assumptions the court chooses to make. The rationale used in *National Petrochemical* is based upon the questionable premise that the State Department avoids the issuance of formal recognition declarations. Recent events, however, reveal that the State Department continues to place importance upon the issuance of these declarations. Thus, it appears that a major premise of the *National Petrochemical* court, relied upon to rationalize their decision, may be false.


\(^7\) See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Morgan Guar. Trust Co. v. Republic of Palau, 924 F.2d 1237 (2d Cir.1991) (holding that Palau was not a foreign state).

\(^7\) Morgan Guar. Trust Co., 924 F.2d at 1243 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-19 (1936)).

\(^7\) For example, the powers enumerated in *Curtiss-Wright* (to wage war, conclude peace and enter into treaties) are indicative of autonomous government and the ability to engage in international diplomacy, two aspects of the Montevideo Convention. However, these aspects alone provide only guidance: Each examination is *sui generis.* See BROWNLIE, supra note 44, at 72. See also discussion infra note 78.
"a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."\(^7\)

Hong Kong and other dependent territories could never meet the test of statehood enumerated by the Supreme Court in *Curtiss-Wright* and the Montevideo Convention. Nor could a court find that the executive branch had established relations with these territories that were inconsistent with nonrecognition. The essence of being a dependent territory is that there exists a sovereign to which the dependent territory must answer. In the case of the British Dependent Territories, Great Britain is responsible for their

\(^7\) The Montevideo Convention, Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19. Note that the requirements of the Restatement correspond with those of the Montevideo Convention. See Restatement (Third) Foreign Relations Law of the United States, supra note 55, § 201. The requirement of a population simply dictates that a state must encompass not only physical territory, but an "organized community" as well. Brownlie, supra note 44, at 73. A state must also have a defined territory, but that territory need not always be absolute. See id. "[W]hat matters is the effective establishment of a political community. In 1913 Albania was recognized by a number of states despite a lack of settled frontiers; Israel was admitted to the United Nations despite disputes over her borders." Id. This "political community" must be stable and must uphold a "legal order"; an existing government is indicative of a stable political community. See id. However, government alone is not determinative of the statehood question since, as in the case of dependent territories, independence and sovereignty may not exist. See id. The final aspect of statehood articulated by the Montevideo Convention is the "capacity to enter into relations with other States," or, as Brownlie phrases it, independence: in other words, "foreign control overbearing the decision-making of the entity concerned on a wide range of matters of high policy and doing so systematically and on a permanent basis." Id. at 74. In the case of dependent territories, see infra note 80 and accompanying text. Brownlie enumerates additional aspects of statehood not included in the Montevideo Convention: "A degree of permanence," "[w]illingness to observe international law," "[a] certain degree of civilization," "[s]overeignty," and "[f]unction as a state." Brownlie, supra note 44, at 77-79. A degree of permanence seems simply to be a criterion of stability. See id. at 77. However, permanence in and of itself is not an absolute requirement since at times, states have expired after only a short lifespan. See id. The logic that a state must be willing to observe international law is, according to Brownlie, a bit circular. See id. at 78. Only states may observe international law so to make observance of international law a prerequisite to statehood would seemingly ask the egg to lay the chicken. See id. Nonetheless, earlier writings considered this a requirement. See id. The notion that a state must have a degree of civilization suggests a time when Western European values and traditions were considered the benchmark of civilized culture. See id. This aspect of statehood has since been extracted from literature delineating aspects of statehood. See id. Sovereignty, Brownlie stresses, is the ability of a state to "exercise[ its own legal capacities in such a way as to create rights, powers, privileges, and immunities in respect of other states." Id. The mere fact that the ability exists is an incident of statehood; should a state choose not to do act on this ability, its status as a state should not be affected. See id. Finally, to function as a state functions as a catch-all for those entities which may look like a state and possess all other aspects of statehood but which simply are not states. See id. at 79. Brownlie gives as an example the Free Territory of Treiste which was formed in 1947 by "[t]he peace treaty with Italy . . . [a]nd was placed under the protection of the Security Council." Id. The Free Territory of Treiste thus had a "specialized political function . . . ." and a relationship with an organization which precluded it from statehood. See id.
“defence, internal security, and foreign relation.” Thus according to the standards set forth in National Petrochemical Co., the Montevideo Convention and Curtiss-Wright, dependent territories can never be “states.”

Furthermore, the executive branch has yet to explicitly or tacitly recognize a dependent territory; nor should such action be anticipated. Doing so would undoubtedly upset those sovereigns possessed of these territories. Such action would also violate principles of international and American common law set forth in National Petrochemical Co., Curtiss-Wright and the Montevideo Convention.

2. Degrees of Recognition

The aspects of recognition comprising the dichotomy of de facto and de jure recognition also demand discussion. This dichotomy reflects degrees of recognition, as opposed to express and tacit recognition, which address whether the executive branch has extended recognition at all. De jure recognition is final recognition. The court in Abu-Zeineh v. Federal Laboratories, Inc. termed de jure recognition “formal recognition.”

De facto recognition can be analogized to a provisional recognition. American case law addressing de facto recognition of foreign states, however, remains enigmatic. The touchstone case is Murarka v. Bachrack

79 Britain in the U.S.A.: Britain’s Dependent Territories, supra note 8.
80 There has been no exchange of diplomats between the United States and dependent territories. See The World Factbook 1997, supra note 8.
81 See supra pp. 140-41 and notes 51-54.
82 See id.
83 See Abu-Zeineh v. Federal Lab., Inc., 975 F. Supp. 774, 776 (W.D. Pa. 1994). Courts sometimes seem to equate de jure recognition with explicit recognition and de facto recognition with implicit or tacit recognition. See id. It is important to distinguish these terms however. Explicit and tacit recognition address whether the executive branch has recognized an entity; de jure and de facto recognition deal with whether the recognition bestowed upon an entity is final or merely provisional. The court in Abu-Zeineh stated that “the foreign state must be recognized by the Executive Branch of the United States government. . . . The recognition may be de jure or de facto.” Id. From the language, it appears that the court is explaining one of two possible scenarios. First, it could be saying that a state must be recognized and that recognition may be final (de jure) or provisional (de facto). On the other hand, if the court is equating de jure recognition with explicit recognition and de facto recognition with tacit recognition, then the court could be saying that a state must be recognized either explicitly or tacitly. However, from the clear meaning of the language used, the former scenario seems more plausible. A state must be recognized. Once a state is recognized, the explicit/implicit dichotomy becomes moot. The state is simply recognized. However, that recognition may be final (de jure) or provisional (de facto). This is what the court seems to state when it says that the recognition may be either de jure or de facto. However, the opinion becomes more confusing when the court considers de facto recognition: “[de facto] recognition can be accorded a foreign state based upon an objective examination of the relations between the recognized entity and the recognizing state.” Id. For purposes of this article, implicit/explicit recognition and de jure/de facto recognition will be separate events, the former establishing recognition and the latter serving as a degree of recognition.
Murarka dealt with a breach of contract action brought by an Indian corporation against a New York corporation. The case was filed on July 14, 1947 and later amended on January 14, 1953. On July 18, 1947, Great Britain passed the Indian Independence Act and on August 15, 1947, India became a "self-governing member of the British Commonwealth of Nations." On that date, the United States formally recognized India as a foreign state. The court held that the date of the filing of the amended complaint should control:

"[I]n view of the fact that the dismissal of the original complaint was "without prejudice," rather than "with leave to amend," we would in any event be disposed to treat the amendment as in effect the filing of a supplemental complaint on January 14, 1953, at which time India was unquestionably an independent foreign power fully recognized by the United States." The importance of the case is its dicta, wherein the court stated that even had the original date of filing controlled, the court could have found de facto recognition of India. The exchange of ambassadors between the United States and India in February and April 1947 sufficed to show de facto recognition of India by the executive branch. "To all intents and purposes, these acts constituted a full recognition of the Interim Government of India at a time when India’s ties with Great Britain were in the process of withering away . . . ." Thus, it appears that the imminence of Indian recognition would have allowed the court to find that a type of "provisional" recognition had already occurred thereby permitting Indian citizens to successfully invoke alienage jurisdiction. Therefore, one might propose that in American common law, the definition of de facto recognition of states seems to indicate a "provisional" type of recognition to be applied when formal recognition is "imminent."

A further example of de facto recognition is presented in Bank of Hawaii v. Balos in which the court had to decide whether residents of the Marshall Islands were citizens of a foreign state under 28 U.S.C. § 1332(a)(2). The defendants argued that the court lacked subject matter over the plaintiff. The plaintiff was a resident of the Marshall Islands which, at the time of the suit, remained subject to a Trusteeship Agreement governing U.S.

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84 See Murarka v. Bachrack Bros., Inc., 215 F.2d 547 (2d Cir. 1954).
85 See id. at 549-50.
86 See id. at 550.
87 Id. at 551.
88 See id. at 552.
89 Id.
90 See id. at 552.
91 See id.
92 Id.
94 See id. at 744-45.
territories in the Pacific. The defendant supported its argument with *World Communications Corp. v. Micronesian Telecomm. Corp.* which involved an alienage diversity action wherein "the defendant was a citizen of the Trust Territories of the Pacific Islands." The *World Communications* court held that alienage diversity did not exist.

The *Bank of Hawaii* court, however, held that the Marshall Islands was a "foreign state" for purposes of the alienage diversity statute. It supported its decision with the *Murarka* case and then-recent developments between the United States and the Marshall Islands, namely that the Compact of Free Association Act of 1985 had been approved by both the Marshall Islands and the United States. The court concluded:

In the present case, highly significant changes have occurred with respect to the relationship between the United States and the RMI [Marshall Islands]. Both the Congress and the President have indicated that the RMI is henceforth to be treated as an independent sovereign. The fact that the Trust Agreement — in form — may technically yet be in effect does not alter the substantive change in the status of the RMI.

The court stressed the "substance over form" test of *Murarka*, in essence holding that although the Marshall Islands could not technically be a sovereign state under the circumstances, recognition by the United States was imminent.

Applying this standard to dependent territories again reveals that those territories have not received de facto recognition from the executive branch. Although some dependent territories have become independent states, independence for the remaining independent territories is not imminent. Under the "imminent" standard of *Murarka*, a dependent territory cannot be considered a "foreign state" as the term applies to de facto recognition.

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95 See id. at 745-46.
96 Id. at 745 (citing World Communications Corp. v. Micronesian Telecomm. Corp., 456 F. Supp. 1122 (D. Haw. 1978)).
97 See id.
98 See id. at 747.
99 See id. at 746-47.
100 Id. at 746. The Compact provided that the Marshall Islands entered into a "free association" with the United States. See id.
101 Id. at 747.
102 See id.
103 For example, the Bahamas gained its independent status on July 10, 1973. See The World Factbook 1997, supra note 8.
104 When distinguishing the situation presented in *Murarka* from that of *Matimak*, the Second Circuit emphasized that the impending independence of India was vital to the court finding de facto recognition. This distinction would prove critical to the *Matimak* opinion. When the case was filed, Hong Kong was a dependent territory and independence was not "imminent." The court thereby held that Hong Kong had not received de facto recognition. See Matimak Trading Co. v. Khalily, 118 F.3d 76, 80 (2d Cir. 1997), cert. denied, 118 S. Ct. 883 (1998).
As discussed above, a dependent territory cannot be considered a "foreign state" as the term applies in international and American common law. Therefore, a dependent territory cannot be considered a "foreign state" under the Alienage Diversity statute as interpreted by the federal courts. This leads us to the unfortunate conclusion that federal courts cannot exercise jurisdiction over litigants who are citizens of dependent territories; they are not, nor could ever hope to be, citizens of a recognized foreign state. This conclusion however is unsatisfactory considering the role that many corporate "citizens" of dependent territories play in the United States and global economy. The realization of this conclusion will be helpful when considering the Matimak and Wilson cases. The next section introduces these cases and analyzes their respective rationales.

IV. MATIMAK TRADING CO. v. KHALILY AND WILSON v. HUMPHREYS (CAYMAN) LIMITED

A. Matimak Trading Co. v. Khalily

1. Matimak In The District Court

Matimak Trading Company sued Albert Khalily d/b/a Unitex Mills, Inc. (Khalily) and D.A.Y. Kids Sportswear Inc. (D.A.Y.) for breach of contract in the Southern District of New York. A default judgment was entered against defendant D.A.Y. The court sua sponte directed the parties “to make brief submissions concerning the issue of subject matter jurisdiction.” The issue of subject matter jurisdiction arose because Matimak is a

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105 As discussed supra note 10, the Wilson opinion is vague as to which “foreign state” the Cayman Islands corporation should be considered a citizen: the Cayman Islands or Great Britain. If the opinion asserts that the Cayman Islands corporation should be considered a citizen of Great Britain, then the holding is supportable since Great Britain is a “foreign state” under American and international law. If, on the other hand, the opinion asserts that the Cayman Islands corporation should be considered a citizen of the Cayman Islands, the holding is unsupportable since the Cayman Islands cannot satisfy the criteria of a “foreign state” as demanded by American and international law.

106 See supra notes 8, 12 and accompanying text; infra note 157. In addition, the decision in Matimak makes undesirable actors parties to suits more frequently. Already as a result of Matimak, dependent territories’ corporations have tried to fraudulently assign their claims to parties able to access the federal courts. See generally Shamis v. Ambassador Factors Corp., No. 95 Civ. 9818, 1997 WL 473577 (S.D.N.Y. 1997) (dismissed due to a fraudulent assignment of claims by a Hong Kong corporation).

107 See Matimak, 118 F.3d at 78.

108 See Matimak Trading Co. Ltd. v. Khalily, 936 F. Supp. 151, 152 (S.D.N.Y. 1996), aff’d 118 F.3d 76 (2d Cir. 1997), cert. denied 118 S. Ct. 883 (1998). There was no mention of Khalily in the district court’s opinion. Whether a default judgment was entered against Khalily as well is unknown, however Judge Wood dismissed the entire case without prejudice to state court. See id. at 152.

109 Id.
Hong Kong corporation incorporated under Hong Kong law with its principal place of business in Wanchai, Hong Kong. Unless Matimak could prove that it was a citizen of a "foreign state" as defined in the alienage diversity statute, the district court could not exercise jurisdiction over the case. Matimak argued that it should be considered a "de facto foreign state" for purposes of the alienage diversity statute 28 § 1332(a)(2). It presented a letter from the State Department's Assistant Legal Adviser Jim Hergen that supported recognition of Hong Kong as a de facto foreign state for purposes of alienage jurisdiction. Matimak also cited Murarka v. Bachrack Bros., in which the Second Circuit held that India was a de facto foreign state because when the complaint was filed, India was "substantially" a foreign state. The district court found the case to be inapposite since, to date, the United States has not taken any of the steps it took with India to recognize Hong Kong as a foreign state.

Matimak further buttressed its argument with several cases, two of which the district court named: Netherlands Shipmortgage Corp. v. Madias and Wilson v. Humphreys (Cayman) Ltd. In the former case, the Second Circuit found that diversity jurisdiction existed over a Bermudian corporation. The district court in Matimak was not convinced: "there is no evi-
dence in the record that subject matter jurisdiction in that case was ever raised at the district or appellate level." In Wilson, the Seventh Circuit held that a Cayman Islands corporation satisfied the requirements of the alienage diversity statute. The district court in Matimak countered, "the reasoning behind that decision . . . is based primarily on policy arguments that are unavailing given the fact that the judicial branch has no power to recognize foreign states."

The district court, remaining unpersuaded, dismissed the case without prejudice.

2. Matimak in the Second Circuit

The Second Circuit affirmed the district court’s holding and went a step further: It not only found that alienage diversity jurisdiction did not exist over Matimak, but further, that Matimak was stateless for purposes of the alienage diversity statute. The court came to this conclusion after considering "(1) whether Hong Kong is a 'foreign state,' such that Matimak is a 'citizen or subject' of a 'foreign state'; (2) whether Matimak is a 'citizen or subject' of the United Kingdom, by virtue of Hong Kong's relationship with the United Kingdom when it brought suit; and (3) whether any and all noncitizens may ipso facto invoke alienage jurisdiction against a United States citizen." The court answered each negatively.

To answer the first inquiry, the Second Circuit began with the general rule to which federal courts adhere: a "foreign state" is usually defined as one recognized by the executive branch. Courts defer to executive recognition when deciding whether a nation is a "foreign state." The United States has never explicitly recognized Hong Kong as a foreign state. Therefore, the court turned to the issue of whether Hong Kong had received

New York and has its principal place of business in New York. Accordingly, the statutory and constitutional requirements of diversity jurisdiction are satisfied." Id. at 735.


120 Id.


122 See Matimak, 118 F.3d at 79.

123 Id. at 88.

124 Id. at 79 (citing C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3604 (1984)).

125 McDougal et al, supra note 3; see, e.g., Land Oberoesterreich v. Gude, 109 F.2d 635, 637 (2d Cir. 1940). See also Matimak, 118 F.3d at 79-80 (citing C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3604 (1984)).

126 Matimak, 118 F.3d at 80.
"de facto recognition" by the executive branch. Since the status of de facto recognition depends on whether "the Executive Branch regards the entity as an 'independent sovereign nation,'" the court determined that there could never be de facto recognition of Hong Kong. At the time of the suit, Hong Kong was a dependent territory of Great Britain and therefore, Hong Kong could not be considered an "independent sovereign nation." As a result, Matimak could not "invoke alienage jurisdiction as a 'citizen or subject' of Hong Kong since Hong Kong is not a 'foreign state' as contemplated by 28 U.S.C. § 1332."

As for the second inquiry, the court held that Matimak could not invoke alienage jurisdiction as a "citizen or subject" of the United Kingdom. Since foreign states alone dictate who their citizens are, the court began by delving into the British Nationality Act of 1981, the cornerstone of British nationality law. The court noted that "the Act applies only to natural persons, not corporations" and does not automatically confer United Kingdom citizenship on citizens of British Dependent Territories. Thus,

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127 See generally Murarka v. Bachrack Bros., 215 F.2d 547, 550-53 (2d Cir. 1954) (finding alienage jurisdiction over an Indian corporation thirty days before the United States recognized India). For a further discussion of Murarka see supra pp. 147-48 and notes 84-92.

128 Matimak, 118 F.3d at 80.

129 Matimak, 118 F.3d at 82.

130 The court supported this conclusion with the British Nationality Act 1981, the British Companies Act 1948, the United States-Hong Kong Policy Act of 1992, and an amicus brief from the Justice Department which stated that the United States did not "urge[] the treatment of Hong Kong as a de facto foreign state." Id. The British Nationality Act, according to the court, "applies only to natural persons, not corporations." Id at 85-86 (citing the British Nationality Act 1981 § 4(1)(2)). The British Companies Act 1948 states that "the privileges of British nationality are not conferred on corporations under the laws of Hong Kong." Id. (quoting Windert Watch Co. v. Remex Elecs. Ltd., 468 F.Supp. 1242, 1246 (S.D.N.Y. 1979) (citing the British Companies Act 1948 § 406)). The United States-Hong Kong Policy Act recognized Congress' desire to maintain relations with Hong Kong once China regained sovereignty. It states that Hong Kong will retain "a high degree of autonomy on all matters other than defense and foreign affairs." 28 U.S.C. § 5701 (1997). In addition, prior to the transition of control from Great Britain to China the United States would "continue to treat Hong Kong as a territory which is fully autonomous from the United Kingdom" with regard to "economic and trade matters." 28 U.S.C. § 5713 (1997).

131 Matimak, 118 F.3d at 82.

132 Id. at 85 (citing United States v. Wong Kim Ark, 169 U.S. 649, 668 (1898) ("Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.").

133 Id.

134 Id.

135 The Justice Department, as amicus curiae, argued that Hong Kong corporations are "citizens or subjects" of the United Kingdom by virtue of being "governed by the Hong Kong Companies Ordinance, modeled on the British Companies Act 1948." Id. at 86. Because Matimak ultimately must answer to the British Crown, it should be treated as a "citizen or subject" of the United Kingdom. The court rejected this argument stating that "[t]he fact that the Hong Kong Companies Ordinance may be 'ultimately traceable to the British
the court concluded that Matimak was stateless because it was neither a citizen of a recognized foreign state nor a citizen of the United Kingdom. Because it was stateless, Matimak could not invoke alienage jurisdiction. The court then turned to whether noncitizens of the United States may "ipso facto" take advantage of U.S. federal courts under alienage jurisdiction. The answer was no. Alienage jurisdiction performs two functions. First, it provides a neutral forum for foreigners; secondly, it avoids adverse international encounters between the United States and a foreign country. According to the court, allowing "stateless" persons access to federal courts under alienage jurisdiction does not serve [the rationale for alienage jurisdiction]: there is no danger of foreign entanglements, as there is no sovereign with whom the United State [sic] could be [sic] become entangled. . . . If a foreign state has determined that a person is not entitled to citizenship it should certainly be unconcerned with that person's treatment in a court in the United States. . . . Thus, the court ends its endeavor that, as the dissent points out, effectively denies the benefits of alienage jurisdiction to corporations formed under the laws of British Dependent Territories. The status of corporations incorporated under the laws of other dependent territories remains unclear.

Crown is too attenuated a connection. Matimak was incorporated under Hong Kong law, the Companies Ordinance 1984 of Hong Kong, and is entitled to the protections of Hong Kong law only." Id. See id. at 88.

Id. at 79. See id. at 86.

Id. at 82-83. Kevin Johnson states that, when discussing the policies underlying alienage jurisdiction, "courts state rather blandly, in ahistoric fashion, the basic reasons for alienage jurisdiction — to protect foreign citizens and to avoid foreign entanglements." See Johnson, supra note 21, at 31. He proposes that the main policy of alienage jurisdiction is to minimize the risk of bias that foreign litigants may encounter in the United States, namely, in state courts. See id. at 33. In particular, he argues that foreign corporations are particularly susceptible to these biases. See id.

Matimak, 118 F.3d at 87.

Id. at 88 (Altimari, C.J., dissenting). The dissent's argument was grounded in the notion of "substance" over 'form:'" Clearly Matimak exists and, in the dissent's view, it seemed unnecessarily technical to argue that Matimak should be stateless simply because it is not a British corporation. Id. at 91. "Is it thus so easy to disavow a person or a corporate entity?" Id. at 89. The dissent noted that the Department of Justice explicitly requested that the court exercise jurisdiction over Matimak and that 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 of 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. . . . Hong Kong has acceded to the Paris Convention on industrial property, the
B. Wilson v. Humphreys (Cayman) Limited

1. Wilson in the Seventh Circuit

The plaintiffs in Wilson were a husband and wife who vacationed in the Cayman Islands at Humphreys' hotel. There, Mrs. Wilson was "assaulted by an intruder entering her second floor hotel room through a balcony door while she was asleep. The intruder attempted to rob and rape Mrs. Wilson, and she suffered bodily injuries during the attack." The Wilsons sued the hotel for damages incurred by Mrs. Wilson. Humphreys moved to dismiss the complaint due to, inter alia, lack of subject matter jurisdiction. The hotel argued that, because it was a Cayman Islands corporation, alienage diversity jurisdiction was not satisfied. The Seventh Circuit, however, held that a corporation incorporated under the laws of the Cayman Islands was a citizen of a foreign state. It cited the British Nationality Act 1981: "A citizen of a British Dependent Territory is a 'citizen of the United Kingdom and Colonies.'" Then, it considered other cases decided by federal courts that, although "generally without discussion," found subject matter jurisdiction to exist when Cayman Islands corporations were parties. It concluded by stating, "We see no reason to depart from

Berne copyright convention, and the Geneva and Paris Universal Copyright Conventions.

Id. at 90 (citing the Immigration and Naturalization Act H.R.Rep. No. 101-723(I) § 202 at 196 (1990); 22 U.S.C. § 5701 (1997); 22 U.S.C. § 5712(3) (1997); H.R.Rep. No. 128(I), 104th Cong. § 2403 (1995); DEPARTMENT OF STATE, 1995 and 1996 COUNTRY REPORTS ON ECONOMIC POLICY AND TRADE PRACTICES (HONG KONG)). The dissent concludes that "Hong Kong is a unique and critical component in the scheme of international policies and global economic expansion. Access to our federal courts is justified without exceeding the boundaries of judicial authority." Id. at 92.


143 The Cayman Islands is a British Dependent Territory. See Britain in the U.S.A.: Britain's Dependent Territories, supra note 8.


145 Wilson, 916 F.2d at 1242 (citing the British Nationality Act 1981 § 51(3)(a)(ii)).

146 Id. Hong Kong corporations, and indeed other corporations formed under the laws of dependent territories, have historically enjoyed the perceived neutrality of federal courts. See generally Nowak v. Tak How Investments, Ltd. 94 F.3d 708 (1st Cir. 1996) (exercising alienage diversity jurisdiction over a Hong Kong company); Neely v. Club Med Management Services, Inc., 63 F.3d 166, 180 n. 9 (3d Cir. 1994) (jurisdiction based on maritime jurisdiction but in dicta explaining that alienage diversity jurisdiction could have been exercised over a Cayman Islands corporation); Lehman v. Humphrey Cayman, Ltd., 713 F.2d 339 (8th Cir. 1983) (exercising jurisdiction over a Cayman Islands corporation).

the weight of authority. 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.\footnote{Wilson, 916 F.2d at 1243.}

This statement cannot be denied. The strange assertion by the Matimak court that “no danger of foreign entanglements [exists], as there is no sovereign with whom the United States could be [sic] become entangled”\footnote{Matimak Trading Co. v. Khalily, 118 F.3d 76, 87 (2d Cir. 1997), cert. denied, 118 S. Ct. 883 (1998).} is bewildering. In the case of British Dependent Territories, there is a foreign sovereign with whom the United States may become entangled: Great Britain. Refusing to allow these corporations access to federal court could easily be construed by the British as adverse to their interests. In the past, Great Britain has reacted when it perceived that the United States denied its citizens judicial protections.\footnote{Neuhaus, supra note 12, at 1098.}

Repercussions of this decision might involve making access to British courts difficult for U.S. corporations or, more specifically, making access more difficult for U.S. corporations incorporated under the laws of United States’ dependencies.\footnote{The United States' dependencies are American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Northern Mariana Islands, Palmyra Atoll, Puerto Rico, Virgin Islands, and Wake Island. See The World Factbook 1997 supra note 8.}

Another consideration is that many British Dependent Territories (along with dependent territories of other nations\footnote{See generally GRUNDY, supra note 8.}) are tax havens.\footnote{See id.} Corporations frequently incorporate under the laws of dependent territories to enjoy their beneficial tax schemes.\footnote{See id.} The notion that these multinational corporations are “stateless” in the eyes of United States federal courts is unappealing since statelessness implicates more than lack of access to federal courts.

A broad holding that corporations incorporated under the laws of a dependent territory are stateless could affect the substantive legal rights of these corporations in the United States. Under international law, there is no obligation, save a moral one, to treat the stateless entity in a nondiscriminatory manner.\footnote{See McDougal et al., supra note 3 at 921 ("statelessness means 'the loss of a community willing and able to guarantee any rights whatsoever.'") (quoting H. ARENDT, THE ORIGINS OF TOTALITARIANISM at 257 (1958)).} Discrimination against foreign business has been and remains an underlying reason for alienage jurisdiction. An authoritative decision by a federal court of appeals holding that these corporations are stateless, and therefore not entitled to legal protections, could encourage...
discriminatory legislation aimed at corporations from dependent territories. This possibility could discourage incorporation in these dependent territories, causing devastating effects on their economies. In addition, corporations already incorporated in these territories could see their substantive legal rights in the United States disappear thus discouraging those companies already so situated from doing business in the United States. The need for a resolution of this conflict is necessary to allow these corporations a modicum of predictability, especially when this predictability is intermingled with the economic stability of the dependent territories.

V. POSSIBLE SOLUTIONS TO THE MATIMAK DILEMMA

Each of the following suggestions rests the solution to the Matimak problem with one of our three branches of government. The first solution rests with the judiciary, the second with the executive branch, the third with Congress. The first option would require the judiciary to interpret foreign nations' nationality laws to determine whether citizens of those nations' dependent territories are citizens of the foreign nation or as citizens of the dependent territory. Should the former be decided, then the federal court could exercise alienage jurisdiction over the litigant. Otherwise, federal courts could not exercise alienage jurisdiction over the litigant since dependent territories cannot be considered "recognized" foreign states; dependent territories by definition are not independent sovereign nations. As described above, an executive recognition of a dependent territory would not comport with United States common law as articulated by the Supreme Court in Curtiss-Wright and international law as described by the Montevideo Convention.

The second resolution rests with the executive branch. This option would require that federal courts defer to executive requests regarding over which foreign litigants they may exercise jurisdiction. For example, in the Matimak case, the State Department issued an amicus brief requesting that

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156 These corporations make up much of dependent territories' economies. For example, Anguilla is home to more than 5,000 registered companies. See Grundy, supra note 8, at 7. As for Bermuda, "approximately 8,500 international businesses are registered in Bermuda. These employ approximately 2,000 people and contribute to approximately 26% of the Island's gross domestic product. Taking into account all secondary effects, international business provides approximately 50% of Bermuda's economic activity." Investment in Bermuda (visited January 17, 1998) <http://www.kpmg.bm/investme.htm>. The Cayman Islands is a major offshore financial center. See The World Factbook 1997, supra note 8. Incorporations fees are a significant source of revenue in the British Virgin Islands. See id.

157 This would be an unfortunate result since the U.S. is a significant trading partner with many of these territories. In 1995 Hong Kong exports to the United States reached $37.9 billion. United States exports to Hong Kong reached $14.9 billion. See Central Intelligence Agency, Handbook of International Economic Statistics No. PrEx 3.10/7-5 158 T.120 (1996). In 1993, Netherlands Antilles exports reached $1.3 billion, 39% of which went to the United States. See The World Factbook 1997, supra note 8.

158 See supra Part C.1.
the court exercise jurisdiction over the Hong Kong corporation.\textsuperscript{159} Although the Second Circuit declined this request, under this option, courts would instead allow the executive branch, the branch best equipped to deal with international issues, to decide which noncitizens of the United States should be entitled to enter U.S. federal courts. In this manner, the judiciary could refrain from making decisions regarding international affairs that could contradict executive policy.

The final option would require that Congress amend the current diversity statute to define (a) what a foreign state is and (b) over which entities from foreign states federal courts may exercise jurisdiction. This option would first require that the outer limits of federal court alienage jurisdiction set by the Constitution be deciphered. If the Constitution allows the courts alienage jurisdiction over any noncitizen of the United States, then the current alienage diversity statute compresses this jurisdiction to include jurisdiction over only those citizens of recognized foreign states. It would be constitutional for Congress to amend the diversity statute to allow alienage jurisdiction over any noncitizen of the United States. However, should the Constitution sanction suits involving only citizens of recognized foreign states, then the diversity statute as it stands stretches the federal courts' diversity jurisdiction as far as it can constitutionally reach. Therefore, one might surmise that only a constitutional amendment would allow Congress to change the diversity statute to allow the federal courts alienage jurisdiction over any noncitizen.\textsuperscript{160}

With each of these options come positive and negative aspects. The third solution, an amendment to the diversity statute, appears the most promising. This section first considers the other alternatives and explains why they are less satisfactory than the third.

A. The First Solution

The first option embraces the paths taken by the courts in both Matimak and Wilson. Both courts turned to Great Britain's nationality law to decide whether the dependent territory corporate litigant was a citizen of a recognized foreign state. Unfortunately, learning the intricacies of a foreign nation's nationality laws can lead to divergent opinions, as the Matimak and

\textsuperscript{159} The Second Circuit did not yield to this request because Hong Kong is not a recognized foreign state, nor could it ever be recognized as one. Thus, to exercise jurisdiction over the Hong Kong corporation would extend the court's jurisdictional boundaries past those set by Congress in the diversity statute 28 U.S.C. § 1332(a)(2). See Matimak Trading Co. v. Khalily, 118 F.3d 76, 86 (2d Cir. 1997), cert. denied, 118 S. Ct. 883 (1998).

\textsuperscript{160} Even if this is the situation, it could be argued that Congress could invoke its powers derived from the "necessary and proper" clause of the Constitution and thereby amend the alienage diversity statute. Such action would be justified since it would allow the federal courts to operate more efficiently by avoiding questions of other countries' nationality laws. See Wright, supra note 33, at 31 (discussing the American Law Institute's proposal that Congress "set[ ] a time limit for raising jurisdictional questions").
Wilson cases demonstrate. In Matimak, the court found that "the British Nationality Act clearly distinguishes between citizens of the United Kingdom and citizens of 'British Dependent Territories'"161 while the Wilson court found that "[a] citizen of a British Dependent Territory is a 'citizen of the United Kingdom and Colonies'."162 Both courts cited the British Nationality Act 1981.163

This curious result is most likely due to two reasons. First, the courts reviewed Britain's complicated nationality law, which requires not just an in depth study of the law as it presently stands, but also a study of the history and evolution of Britain's nationality laws.164 This article does not seek to be a primer on the British Nationality Act 1981, but perhaps one assumption about the Act may be made. Despite the intricacies of British nationality law,165 it seems unlikely that any sovereign possessed of dependent territories would favor the idea of United States federal courts considering the citizens of that dependent territory stateless.166

The results of Matimak and Wilson suggest that federal courts will arrive at discordant opinions when faced with other countries' nationality laws. While this result may not always be objectionable,167 it seems that in

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161 Matimak, 118 F.3d at 86 (citing British Nationality Act 1981 § 4(1)(2)).
163 The section of the British Nationality Act 1981 cited by the court in Matimak states:
(1) This section applies to any person who is a British Dependent Territories citizen, a British Overseas citizen, a British subject under this Act or a British protected person.
(2) A person to whom this section applies shall be entitled, on an application for his registration as a British citizen, to be registered as such a citizen if the following requirements are satisfied in the case of that person, namely — (a) subject to subsection (3), that he was in the United Kingdom at the beginning of the period of five years ending with the date of the application and that the number of days on which he was absent from the United Kingdom in that period does not exceed 450; and (b) that the number of days on which he was absent from the United Kingdom in the period of twelve months so ending does not exceed 90; and (c) that he was not at any time in the period of twelve months so ending subject under the immigration laws to any restriction on the period for which he might remain in the United Kingdom; and (d) that he was not at any time in the period of five years so ending in the United Kingdom in breach of the immigration laws.
British Nationality Act 1981 § 4(1)(2). The section of the British Nationality Act 1981 cited by the court in Wilson states, "(3) In any enactment or instrument whatever passed or made before commencement . . . (a) 'citizen of the United Kingdom and Colonies' . . . (ii) in relation to any time after commencement, means a person who under this Act is a British citizen, a British Dependent Territories citizen or a British Overseas citizen." British Nationality Act 1981 § 51(3)(a)(ii).
165 For example, the Second Circuit noted that British Dependent Territories' citizens "must first undergo a citizenship application procedure and fulfill certain application procedure and fulfill certain residency requirements in the United Kingdom proper before earning British citizenship." Matimak, 118 F.3d at 86 (citing British Nationality Act 1981 § 4(1)(2)).
166 See discussion of statelessness, supra Part II.A, notes 13-23 and accompanying text.
167 Judges and commentators agree that the increasing case load burdening the courts of appeals invites intercircuit conflict. See generally J. Clifford Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 CAL. L.
the realm of alienage jurisdiction, a sense of uniformity would be beneficial to potential litigants, foreign nations, dependent territories, and the United States. Potential litigants would be able to save time and money if they knew, before commencement of a suit, whether standing in a federal court would be attainable. With respect to foreign nations and the United States, uniform treatment of similarly situated corporations encourages the impression of just treatment in U.S. federal courts. Should that impression be damaged by decisions such as Matimak, foreign governments may choose to react: As before stated, Great Britain has been known to “claw back” via legislation when it perceives that its citizens are not receiving fair treatment in U.S. courts.168

The second reason for the discordant opinions lies with a separate issue that arises when federal courts determine citizenship of corporate litigants based on other countries’ nationality laws. Corporate citizenship in U.S. federal courts is based on the corporation’s place of incorporation and principal place of business.169 However, when courts consider other countries’ laws, anomalies may result. In some countries, a corporation may not be considered a citizen at all. For example, the Matimak court noted that the British Nationality Act does not apply to corporations and instead found that “the privileges of British nationality are not conferred on corporations formed under the laws of Hong Kong.”170 The court then continued to hold that, even if the British Nationality Act did apply to corporations, citizens of the British Dependent Territories are not citizens of Great Britain.171

On the other hand, the Seventh Circuit in Wilson found that, since corporations are citizens of the state where they were incorporated, a Cayman Islands corporation is a citizen of the “United Kingdom and its Colonies” because the British Nationality Act confers such citizenship to British De-

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168 See Neuhaus, supra note 12, at 1098.
170 Matimak, 118 F.3d at 85-86 (citing Windert Watch, 468 F. Supp. at 1246 (citing British Companies Act 1948 § 406)).
171 Matimak, 118 F.3d at 86.
The question thus remains: When should American law determining corporate citizenship yield to foreign countries' laws regarding the same? The Second Circuit articulated the rule that "a foreign state is entitled to define who are its citizens or subjects." However, to what extent should foreign law affect the jurisdiction of United States federal courts?

These questions are not easily answered nor does this article purport to answer them. This article does suggest that this route, presently taken by federal courts, does not lead to uniform treatment of similarly situated corporations. In addition, the process presently taken by federal courts requires federal courts to master the nationality laws of any country possessing a dependent territory, thus confronting federal courts with a battery of elaborate and often times convoluted law.

B. The Second Solution

The second option would require federal courts to defer to executive requests regarding which foreign litigants may enter the federal courts when recognition is an issue. Federal courts have employed this option most often in cases of foreign sovereign immunities. In *Transportes Aereos de Angola v. Ronair, Inc.*, a district court in Delaware found that it had jurisdiction over an airline that was an instrumentality of the Angolan government, a government not recognized by the United States. The court allowed the action to continue "[b]ecause the executive branch, through the Departments of Commerce and State, ha[d] clearly indicated that this suit

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173 Judge Altimari, in his *Matimak* dissent, addressed this issue: "[I]t is time to reevaluate whether our courts should look to foreign laws to determine who are foreign citizens for purposes of United States' alienage diversity jurisdiction. We would not allow foreign law to grant privileges in the United States, why should we allow foreign law to deny privileges afforded under the Constitution? It is undisputed that the privileges of British nationality are not conferred upon corporations formed under the laws of Hong Kong." *Matimak*, 118 F.3d at 89 (Atimari, J., dissenting).
174 *Matimak*, 118 F.3d at 85 (citing United States v. Wong Kim Ark, 169 U.S. 649, 668 (1898)).
176 See *Transportes Aereos de Angola v. Ronair, Inc.*, 544 F. Supp. 858, 863-64 (D. Del. 1982). It should be noted that in this case, the section of the diversity statute in question was 28 U.S.C. § 1332(a)(4) as opposed to 28 U.S.C. § 1332(a)(2). For the distinction, see supra note 43. As is the case with the section of the jurisdictional statute involving aliens, the courts have uniformly held that to benefit from 28 U.S.C. § 1332(a)(2), a foreign state must be a recognized foreign state. See Iran Handicraft and Carpet Export Center v. Marjan International Corporation, 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987).
should be allowed to go forward. . . .” Absent this statement from the executive branch, the court would not have had jurisdiction over the case. 178

This solution to our problem is appealing since it would give the political branches the final word in matters involving international policy. 179 Courts strive to avoid doing this. However, it is possible that when deciding whether the executive branch has recognized a state courts may inadvertently upset executive policy. By deferring to the executive branch’s pronouncements, courts will assuredly avoid this result. Thus, in the Matimak case, the Second Circuit should have yielded to the amicus brief issued by the Justice Department and assumed jurisdiction over Matimak.

Two difficulties would arise if courts followed this solution. The first one presented is similar to the one described above. It concerns the need for uniform treatment of similarly situated litigants. Allowing the executive branch to intervene in litigation at will would expose the judicial system to political fluctuations that commonly occur. Litigants would be uncertain as to their standing in court from day-to-day since the executive branch, at any time, could decide that it is in the United States’ best interest to refuse to allow a certain group of citizens to enter federal court. This uncertainty could trigger reactions from other countries that are contrary to the interests of the United States. 180

One response to this concern is that the executive branch is solely responsible for foreign relations. Therefore, any executive action is presumably mindful of any potential international consequences stemming from such action. Thus, the executive branch’s request to provide (or not to provide) a federal forum for certain citizens does not threaten executive policy since the executive branch would be making the decision. However, political decisions are commonly made in tempestuous times and such decisions are occasionally regretted. 181 The judiciary, on the other hand, is consid-

177 Transportes Aereos de Angola, 544 F. Supp. at 864.
178 See id. In Matimak the state department issued an amicus brief in which it requested that the court allow Matimak to remain in federal court. However, the Second Circuit declined to do so. See Matimak, 118 F.3d at 86.
179 "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.” Jones v. United States, 137 U.S. 202, 212 (1890). “The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative — ‘the political’ — departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.” Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).
180 See generally supra note 12 and accompanying text.
181 A modern example is the infamous “three strike” legislation enacted against repeat offenders. Judging from the proliferation of articles debating these laws, the wisdom of this legislation is certainly controversial. See Ilene M. Shinbein, “Three Strikes and You’re Out”: A Good Political Slogan to Reduce Crime, But a Failure in its Application, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175 (1996); Meredith McClain, “Three Strikes and You’re Out”: The Solution to the Repeat Offender Problem?, 20 SETON HALL LEGIS. J. 97
Subjecting the judiciary to the passions of politics could undermine both national and international perceptions of our separation of powers. The most problematic area of this solution rests with the notion of a "foreign state" as it applies to 28 U.S.C. § 1332(a)(2). The term "foreign state" as applied by the courts to the diversity statute embraces only those foreign states recognized by the executive branch. The executive branch will never recognize Hong Kong and other dependent territories as foreign states since they are subservient to other sovereign foreign states. Dependent territories can never meet the criteria set by the definition of a "state" in both international law and as articulated by the Supreme Court in


Any person who shall distribute or port or cause or procure to be distributed or posted any advertisement of any form or nature whatsoever of spirituous or intoxicating liquors, which advertisement contains any reference whatever to any deceased ex-president of the United States of America, either by the use of his name, his picture, quotations from his writings or utterances, scenes purporting to be from his life or otherwise, shall be guilty of a misdemeanant.

Id. at 19 (quoting MICH. COMP. LAWS § 750.42 (1979)).


Along the same line, federal courts alone possess the power to determine whether they have jurisdiction. Should courts begin blindly to follow the executive branch's decrees, they would be surrendering some of this power to the executive branch, an action which may be untrue to the concept of separation of powers. See generally United States v. United Mine Workers of America, 330 U.S. 258, 292 (1947) ("If this Court did not have jurisdiction to hear the appeal in the Shipp case, its order would have had to be vacated. But it was ruled that only the Court itself could determine that question of law. Until it was found that the Court had no jurisdiction, . . . it had authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition. . . ."

(1906)).

See supra pp. 146-147 and notes 79-80.
Curtiss-Wright. Such a pronouncement by the executive branch would violate both U.S. and international law. Therefore, although the executive branch may want citizens of dependent territories to enter federal court via alienage jurisdiction, courts that grant such requests would be extending their jurisdiction beyond the confines set out by Congress in 28 U.S.C. § 1332(a)(2).

C. The Third Solution

The final option most effectively addresses the issues discussed above: Congress should amend the diversity statute to more effectively define (a) what the definition of a foreign state includes and (b) which entities from foreign states should be allowed access to federal courts. However, before Congress can take such action the parameters set by the Constitution regarding alienage jurisdiction must be gleaned. The Constitution sets the outer parameters of the federal courts' jurisdiction and Congress is free to work within these parameters to adjust federal court jurisdiction to its liking. If, in the case of alienage jurisdiction, the Constitution anticipates that a "citizen of a foreign state" is a citizen of a recognized foreign state, then any action by Congress expanding federal court jurisdiction beyond this boundary would be unconstitutional. If, however, the Constitution sanctions any non-U.S. citizen to sue as a citizen or subject of a foreign state, then Congress could conceivably change the well-entrenched notion that alienage jurisdiction requires that a party be a citizen or subject of a recognized foreign state. The question is how to decide whether the Constitution requires "minimal alienage" (litigants who are simply noncitizens of the United States) or "complete alienage" (litigants who are citizens of recognized foreign states).

Whether executive recognition of a state is a constitutional prerequisite for aliens to be citizens of foreign states within the sphere of alienage jurisdiction is debatable; the Supreme Court has not addressed the issue. Commentators have argued that at the time of the Constitution a "foreign

185 See United States v. Curtiss-Wright, 299 U.S. 304, 319-20 (1936); The Montevideo Convention, supra note 78.
186 The Supreme Court denied certiorari for both Matimak and Wilson. See Wilson v. Humphreys (Cayman) Limited, 499 U.S. 947 (1991); Matimak Trading Co. v. Khalily, 118 S. Ct. 883 (1998). An analogy may be drawn to diversity jurisdiction. Since Strawbridge v. Curtiss, the question remained whether or not the Constitution dictated absolute diversity among parties in diversity cases or whether this was a statutory mandate only. In State Farm Fire & Cas. Co. v. Tashire, the Court held that the Constitution required only minimal diversity in diversity cases and that Congress, by statute, had narrowed the federal courts' jurisdiction by requiring complete diversity. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967). See infra note 197 for another analogy drawn between diversity and alienage jurisdiction involving whether the Constitution requires that parties to litigation be citizens of a "State" or a "foreign State" in diversity cases or alienage cases, respectively.
state” was any state other than the United States, recognized or not.\textsuperscript{187} If this is taken as true, one could argue that all persons\textsuperscript{188} who are not citizens of the United States are considered citizens of foreign states by the Constitution.\textsuperscript{189}

\textsuperscript{187}Christine Biancheria argues that the Constitution sanctions suits founded on alienage jurisdiction between a citizen of the United States and a party not a citizen of the United States, whether that party be a citizen of a recognized state or not. See Christine Biancheria, \textit{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. & POL’Y 195, 215 (1996). She supports her stance with the argument that, at the framing of the Constitution, the notion of statelessness as we know it today did not exist. See \textit{id.} at 211.

A legislature, when drafting laws, clearly cannot anticipate all future circumstances, thus necessitating a more dynamic method of statutory interpretation. At the time of the writing of the Constitution and the enactment of the Judiciary Act of 1789 (and its revision in 1875), the phenomena of statelessness was virtually unknown. In fact the problems of statelessness did not emerge as a significant issue until after World War I.” \textit{Id.} at 201-10. She cites \textit{Blair Holdings Corp. v. Rubenstein} in which the court considered statelessness: “problems associated with that status are of recent vintage.” \textit{Blair Holdings Corp. v. Rubenstein}, 113 F. Supp. 496, 501 (S.D.N.Y. 1955). \textit{See also Kletter v. Dulles}, 111 F. Supp. 593, 598 (D. D.C. 1953) (“When Congress speaks of a ‘foreign State,’ it means a country which is not the United States, or its possession or colony — an alien country — other than our own, bearing in mind that the average American, when he speaks of a ‘foreigner,’ means an alien, non-American.”). This argument is disputable since the phenomenon of statelessness has been around for quite some time: Aristotle dubbed a stateless man “a bird that flies alone.” C. SECKLER-HUDSON, \textit{STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES} 244 (1934). Perhaps the argument should not be that statelessness was unknown to the framers, but that the effects and repercussions of statelessness in our modern world could not have been anticipated by the framers.

Biancheria further argues that,

\begin{quote}
[perhaps the strongest evidence that the framers contemplated inclusion of all aliens in the grant of jurisdiction lies in the original phrasing of the Judiciary Act of 1789, codifying alienage jurisdiction as provided for in the Constitution. Initially, the Act permitted suit in federal court in any civil action involving more than $500, exclusive of costs, ‘where an alien is a party’ without any apparent qualification.

\textit{Id.} at 211-12. Biancheria quotes Chief Justice Joseph Story, who wrote of the alienage jurisdiction clause in the Constitution, “The inquiry may here be made, who are to be deemed aliens entitled to sue in the courts of the United States? The general answer is, any person who is not a citizen of the United States.” \textit{Id.} at 211 (quoting \textit{JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES,} 51, 499 (5th ed. 1891)).
\end{quote}

\textsuperscript{188}Corporate citizenship as it presently exists did not enter the legal arena until years after the Constitution’s ratification. Only natural persons were believed to have the capacity to be “citizens.” The earliest consideration of this problem was in \textit{Bank of United States v. Deveaux} in which the Court held that a corporation could not be a citizen. The Court then determined the diversity issue based on the “character of the individuals who compose” the corporation. \textit{See Bank of United States v. Deveaux}, 5 Cranch 61, 86, 91-92, 3 L. Ed. 38 (1809), \textit{overruled by} Louisville, C. & C.R. Co. v. Letson, 2 How. 497, 558, 11 L. Ed. 353 (1844). For simplicity’s sake, this article assumes that at the time of the Constitution, the \textit{Deveaux} standard would have been acceptable to the framers. Therefore, foreign corporations would be considered citizens of foreign states since all of the individuals composing the corporation would presumably be citizens of that foreign state.

\textsuperscript{189}See Biancheria, \textit{supra} note 187, at 211-12.
The Matimak court addressed this argument and found it lacking. The Second Circuit held that the Constitution permits federal courts to exercise diversity jurisdiction only over those persons or entities that are citizens of a recognized foreign state.\textsuperscript{190} It supported its stance with the history of statelessness and determined that, when the Constitution was adopted, the notion of statelessness did not exist.\textsuperscript{191} Thus, every person or entity originating beyond the borders of the United States satisfied the requirements of alienage jurisdiction, namely being a citizen or subject of a foreign state. Any noncitizen of the United States could enter federal court; they were certainly citizens of a foreign state since being stateless was impossible. According to the Second Circuit, however, “[t]he basic assumption of the framers — if indeed it was ever valid — no longer holds true: not every ‘foreigner’ is a citizen or subject of some foreign state. . . . [T]he term [foreigners] in 1787 did not include stateless persons — a category of people unknown to the drafters of the Constitution.”\textsuperscript{192} Thus, from the perspective of the Second Circuit, the definition of a citizen of a foreign state is a static one, one originating at the time of the framers. The introduction of statelessness to this equation does not affect what a citizen of a foreign state is: Citizens of foreign states must satisfy the same criteria as they would in 1787. To be a “citizen of a foreign state,” a litigant must not be stateless; to avoid being stateless, a litigant must be a citizen of a recognized foreign state. Such strict construction would pose difficult problems in any area involving twentieth century litigation. For example, whether Congress could confer the status of “citizen” on corporations would be questionable since, at the founding of our Constitution, corporations could not be “citizens.”\textsuperscript{193}

An analogous situation was presented when Congress passed a jurisdictional statute defining the term “State” as it applies to diversity jurisdiction. In 28 U.S.C. § 1332(d), Congress defines the word “State” to include “the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.”\textsuperscript{194} By doing so, Congress extended the diversity jurisdiction of the federal courts to include citizens of those areas.\textsuperscript{195} Applying the Second Circuit’s analysis would make this congressional action unconstitutional: At the Constitution’s founding a “State” could include neither the District of Columbia nor the commonwealths since those entities simply did not

\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} See supra note 188.
\textsuperscript{195} “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 citizens of different States.” 28 U.S.C. § 1332(a)(1) (1997).
exist as they do today. The term "State" could not include, for instance, the Commonwealth of Puerto Rico since the relationship between Puerto Rico and the United States had not yet developed. According to the reasoning of the Matimak opinion, by defining "State" as including Puerto Rico, Congress unconstitutionally stretched the bounds of federal jurisdiction as set by the Constitution. However, somehow Congress was able to pass the statute, and, more importantly, pass it constitutionally. The Su-


From the sea came the people — the first ones in canoes from Venezuela or Central America. From then on, sporadic waves of people came from the sea. The discoverers as well as the colonizers came originally from Spain; later, the immigrants from Europe and South America. Also from the sea came the attackers: first the Caribe Indians, then the British, French, Dutch, and the corsairs, or pirates. And in 1898 came the Americans. Next to hurricanes, epochs in our oral history among coastal people were established on the basis of the arrival of ships that brought the Spanish situado from Mexico to keep the colony alive, or a new governor, or bishop.

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David Brinkley explains the interesting conception of Washington, D.C.:

Two states, Maryland and Virginia, offered both land and money. They would provide between them one hundred square miles of land, on both sides of the Potomac River, and would give $192,000 for new government buildings. An attractive offer, but still not good enough to end the rivalries among the states until Alexander Hamilton, the first secretary of the treasury under the new Constitution, saw a chance to make a deal. He wanted the new federal government to assume responsibility for the debts the individual state governments had run up during the Revolution. He saw that those to whom the debts were owed were mostly wealthy and influential men; if the new central government owed them money, they would be more likely to work for its survival and stability. The Southern states opposed this idea, because most of those who were owed money were Northerners. And the money to pay the debt would have to be raised by increasing the government's only real source of revenue, the tariff on imports, which the Southerners also opposed because they, more than the North, were a rural, agrarian people dependent on imported manufactured goods. Hamilton got his way only by agreeing to support a new capital city in the South, on the Potomac River. On July 15, 1790, Congress voted to remain in Philadelphia for ten years and then move to a new "Federal City" to be constructed somewhere along the Potomac. And so Washington, D.C., was born as it was to live — with a political deal.


Chief Justice Marshall held that federal courts could not exercise diversity jurisdiction over citizens of the District of Columbia or citizens of U.S. territories in Hepburn & Dundas v. Ellzey and Corporation of New Orleans v. Winter respectively. See Hepburn & Dundas v. Ellzey, 2 L. Ed. 332 (1804); Corporation of New Orleans v. Winter, 4 L. Ed. 44 (1816). Professor Wright takes the view that the Hepburn opinion "seem[s] to suggest[ ] that only the [diversity] statute, rather than the Constitution, precluded diversity jurisdiction in suits between a citizen of the District of Columbia and a citizen of a state." Wright, supra note 33, at 155. If this is accepted, an analogy between alienage and diversity jurisdiction again may be drawn. If the Constitution does not require that parties in a diversity case be strictly citizens of a "State," then why should it require parties in an alienage case be strictly citizens of a "foreign State?" Also see note 186, supra, for a different analogy drawn between diversity and alienage jurisdiction: whether executive recognition is constitutionally required before an alien can be considered a citizen of a "foreign state" for alienage jurisdiction purposes.
preme Court upheld 28 U.S.C. § 1332(d) with respect to citizens of District of Columbia in *National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Co.* Overruling *Hepburn & Dundas v. Ellzey*, which held that diversity jurisdiction did not exist between a District citizen and a citizen of a state, the Court held that Congress could empower the federal courts to hear diversity cases of this kind. Treaty of Paris, Dec. 10, 1898, 30 Stat. 1754, 1755. See generally *Hepburn and Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805). However, the Court was badly split and it seems that the only issue on which five of the Justices could agree was on this point:

The Act before us, as we see it, is not a resort by Congress to these means to reach forbidden ends. Rather, Congress is reaching permissible ends by a choice of means which certain laudable ends are not expressly forbidden by the Constitution. No good reason is advanced for the Court to deny them by implication. In no matter should we pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power. To put federally administered justice within the reach of District citizens, in claims against citizens of another state, is an object which Congress has a right to accomplish. Its own carefully considered view that it has the power and that it is necessary and proper to do so is entitled to great respect. Our own ideas as to the wisdom or desirability of such a statute or the constitutional provision authorizing it are totally irrelevant. Such a law of Congress should be stricken down only on a clear showing that it transgresses constitutional limitations. We think no such showing has been made. The Act is valid.


199 After determining that Puerto Rico was a “territory” of the United States, the Third Circuit held that “Article IV, Section 3, provides the requisite constitutional authority for the 1956 [diversity] amendment. . . .” Americana of Puerto Rico, Inc. v. Kaplus 368 F.2d 431, 436 (3d Cir. 1966). Article IV, Section 3 of the Constitution states: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .” U.S. Const. art. IV, § 3.

200 Even if the Constitution requires “complete alienage,” it could plausibly be argued that Congress can constitutionally amend the alienage diversity statute by exercising powers granted it under the “necessary and proper” clause. See supra note 160 and accompanying text.
ing corporations incorporated abroad but with their principal place of business in the United States (or vice versa).\textsuperscript{201}

Granting alienage jurisdiction over corporations from dependent territories will ensure that the outside world perceives the United States and its courts as fair and neutral. This stability will enhance foreign relations with sovereigns of these dependent territories. No more opinions would declare corporations in dependant territories stateless, a status offensive to international law.\textsuperscript{202} In addition, these corporations would have the opportunity to avoid discrimination that may exist at local levels. It seems uncontroversial that a guaranteed neutral forum would encourage these corporations to do business in the United States, thus continuing America’s economic growth while furthering economic development in dependent territories. Most importantly, however, such an amendment would show other sovereign nations that the United States is dedicated to a fair and just legal system for citizens and foreigners alike.

VI. CONCLUSION

Even though our stateless but Iranian born friend remains stranded in Charles de Gaulle Airport, he retains some options.

In 1995, Belgium offered Mr. Nasseri the opportunity to settle there, if he agreed to live under the supervision of a social worker. With his heart set on Britain, Mr. Nasseri refused the offer. Belgium’s offer still stands, airport officials say. In addition, Mr. Nasseri could benefit from an immigration measure under consideration by the French Senate. It would allow him to claim residency papers in France because he has spent more than five years on national territory.\textsuperscript{203}

Matimak’s story is not so encouraging: The Supreme Court denied certiorari on January 26, 1998 relegating Matimak to state court as a stateless corporation.\textsuperscript{204} Whether Matimak should be considered stateless only in the context of the alienage diversity statute remains unclear. However, a declaration by a federal court of appeals that a corporation, or individual for that matter, is stateless should pique the interests of the international community. Statelessness is a status devoid of international rights; a status “deplored in the international community of democracies.”\textsuperscript{205}

\textsuperscript{201} See supra note 38 and accompanying text.

\textsuperscript{202} “Nearly fifty years ago, the United Nations (U.N.) issued a study denouncing statelessness, finding that ‘[t]he fact that the stateless person has no nationality places him in an abnormal and inferior position which reduces his social value and destroys his own self-confidence.’” Biancheria, supra note 187, at 200 (quoting United Nations Dep’t of Social Affairs, \textit{A Study of Statelessness} at 139, U.N. Doc. E/112, U.N. Sales No. 1949.XIV.2 (1949)).

\textsuperscript{203} Patton, supra note 2.


Federal courts have construed the alienage diversity statute as requiring that to be a citizen of a foreign state, the litigant must be a citizen of a recognized foreign state. Dependent territories are not, nor could ever be, recognized foreign states under the standards of American common law and international law. Congress should address this problem with an amendment to the alienage diversity statute so that federal courts can indisputably, certainly, and legally exercise jurisdiction over corporations from dependent territories. An amendment would also grant federal courts the independence to decide cases without addressing foreign relations issues or interpreting nationality laws of other nations.

Furthermore, such an amendment would send an undeniable message to other countries that the United States supports a neutral legal system for foreign corporations. Such a message would encourage continued economic growth in both the United States and dependent territories. In addition, it would prevent federal courts from holding that corporations from dependent territories are stateless as the Matimak court did. Such holdings are surely offensive to sovereigns of dependent territories. Therefore, most importantly, the amendment would aid foreign relations not just with dependent territories but with their sovereigns.