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A Jurisdictional Approach to Collapsing Corporate Distinctions

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A JURISDICTIONAL APPROACH TO COLLAPSING CORPORATE DISTINCTIONS

*Peter B. Oh**

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I.	INTRODUCTION	

The distinctions between corporations and unincorporated associations have blurred. The vast majority of states have enacted filing requirements for unincorporated associations that typically had applied only to corporations.¹ Although somewhat onerous, complying

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1. See REVISED UNIFORM PARTNERSHIP ACT § 105 & cmt. 2 (Robert W. Hillman et al. eds., 1999) (noting that “Section 105(a) provides for a single, central filing of all statements, as is the case with corporations, limited partnerships, and limited liability

with these requirements indirectly provides certain unincorporated associations with means to attain limited liability while avoiding double taxation.² Further, the Internal Revenue Service (IRS) has created so-called "check-the-box" regulations³ that permit eligible

companies") [hereinafter RUPA]. Although filings are not mandatory under RUPA, *id.* at cmt. 1, they are in many states. See LARRY E. RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES §§ 11.01, 12.02A, 13.01A (1996) (outlining filing requirements for limited partnerships, limited liability companies, and limited liability partnerships). Twenty-two states have adopted RUPA. RUPA, *supra*, app. B at 463. All fifty states have legislation governing the formation and operation of limited liability companies. See generally J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, LIMITED LIABILITY COMPANIES: A STATE BY STATE GUIDE TO LAW AND PRACTICE §§ 15.11-15.60 (1994) (summarizing state laws on limited liability companies) [hereinafter CALLISON & SULLIVAN, LIMITED LIABILITY COMPANIES]. Every state except Louisiana has adopted both the Uniform Limited Partnership Act (ULPA), which was approved in 1916 and wholly revised in 1976, and the Uniform Partnership Act (UPA), which was approved in 1976 and has been amended several times. RUPA, in 6A UNIFORM LAWS ANNOTATED 2 (Supp. 2001); see also 2 ALAN R. BROMBERG & LARRY E. RIBSTEIN, PARTNERSHIP § 11.02(c), at 11:23 (1996) ("While the 1916 ULPA was motivated largely by underutilization of its predecessors, the 1976 Act was motivated largely by the overutilization of its predecessor . . .") [hereinafter BROMBERG & RIBSTEIN, PARTNERSHIP]. Every state that has adopted the ULPA, except Vermont, also has adopted the Revised Uniform Limited Partnership Act (RULPA). RULPA, in 6A UNIFORM LAWS ANNOTATED, *supra*, at 1-2.

2. See, e.g., Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1, 6 (1995) ("LLC [limited liability company] statutes tend to resemble corporation and limited partnership statutes in terms of the filings and other formalities required to form the firm. . . . All of the LLC statutes provide that members, like corporate shareholders, are not liable as such for the debts of the LLC.") [hereinafter Ribstein, *Emergence of LLC*]. The connection between filing and limited liability, however, is not apparent. Many of the conventional reasons supporting filing, such as third-party notice, do not apply to unincorporated limited associations. This is because most LLC and LLP statutes require a public name identifying their status. See, e.g., Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375, 386 (1992). A possible explanation for the filing requirement concerns statutory domicile. One commentator has suggested that "it might be argued that the formality of a filing requirement is necessary in order to be completely clear about which state's rules will apply in the absence of any such filing." Jonathan R. Macey, *The Limited Liability Company: Lessons for Corporate Law*, 73 WASH. U. L.Q. 433, 440 (1995). Professor Macey rejects this argument because "[n]onfiling firms simply would bear the risk that the law being applied in a particular case might not be the law they would have selected had they filed" while potential investors could simply contract for a particular jurisdiction's laws to apply. *Id.* Although this might make sense for firms, a potential investor's leverage in this regard seems dubious.

3. The check-the-box regulations provide:

A business entity that is not classified as a corporation . . . can elect its classification for federal tax purposes as provided in this section. An eligible entity with at least two members can elect to be classified as either an association (and thus a corporation under § 301.7701-2(b)(2)) or a partnership, and an eligible entity with a single owner can elect to be classified as an association or to be disregarded as an entity separate from

organizing businesses⁴ to decide whether they will be regarded as a corporation or a partnership for federal tax purposes. Not surprisingly, these state and federal benefits have rendered unincorporated limited associations a viable, if not superior, alternative to corporations as a way to organize a business.⁵

its owner.

Treas. Reg. § 301.7701-3(a) (2002).

4. The check-the-box regulations concern publicly traded entities. See, e.g., David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627, 1629-30 (1999) ("The check-the-box regulations eliminated the four-factor test [of the Kintner Regulations] and moved the line between partnerships and corporations to public trading."). The American Law Institute has proposed uniform tax treatment for all private entities. See GEORGE K. YIN & DAVID J. SHAKOW, FEDERAL INCOME TAX PROJECT: TAXATION OF PRIVATE BUSINESS ENTERPRISES 49 (AMERICAN LAW INSTITUTE, Reporter's Study 1999) (Proposal 2-1) ("[A]ll private business firms shall be treated alike for income-tax purposes, regardless of their characteristics or form of organization . . .") [hereinafter ALI, TAXATION OF PRIVATE ENTERPRISES]. The study, however, is not unproblematic. See, e.g., Steven A. Bank, *Entity Theory as Myth in the Origins of the Corporate Income Tax*, 43 WM. & MARY L. REV. 447, 465 (2001) (criticizing the American Law Institute's resort to the traditional entity theory of corporate personality to explain the enactment of a separate corporate income tax).

5. See, e.g., Walter D. Schwidetzky, *Is It Time To Give the S Corporation a Proper Burial?*, 15 VA. TAX REV. 591, 592 (1996). According to Schwidetzky,

S Corporations were once the entity of choice for small businesses, and sometimes for larger ones as well. However, new partnership-type vehicles, specifically the limited liability company and the limited liability partnership, have now come into their own. These new entities are, on the whole, the preferred choice for the vast majority of private businesses.

Id. But see *infra*, note 79. According to Donald C. Alexander, the former Commissioner of the IRS, "[n]o rational, reasonably well-informed tax professional would deliberately choose subchapter S status over an LLC [limited liability company] when there is a choice, and 99 percent of the time there is a choice." Amy Hamilton, *S Corporations Most Popular Choice, IRS Finds*, TAX PRAC. July 17, 2000, at 1, 67; see also 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 1.01, at 1 (2000) (stating that "the LLC has become what many considered to be the preferred choice for many businesses") [hereinafter RIBSTEIN & KEATINGE, LIMITED LIABILITY COMPANIES]; Franklin A. Gevurtz, *Squeeze-Outs and Freeze-Outs in Limited Liability Companies*, 73 WASH. U. L.Q. 497, 497 (1995) (predicting that "before too long the LLC may largely render the partnership, limited partnership and closely held corporation obsolete"); Don W. Llewellyn & Anne O'Connell Umbrecht, *No Choice of Entity After Check-the-Box*, 52 TAX LAW. 1, 2 (1998) (crowning the LLC "as the entity of choice for the next millennium"). Partnerships with limited liability were particularly attractive when states had more stringent corporate charter requirements. Richard A. Mann & Barry S. Roberts, *Unincorporated Business Associations: An Overview of Their Advantages and Disadvantages*, 14 TULSA L.J. 1, 28 (1978) (stating that the "[l]imited partnership enjoyed wide use when corporate charters were not readily granted"). Such partnerships continue to be a prominent form of business organization. See *id.* ("[T]he past twenty-five years have witnessed a resurgence in the use of limited partnerships . . ."); Fallany D. Stover, *The LLC Versus LLP Conundrum: Advice for Businesses Contemplating the Choice*, 50 ALA. L. REV. 813, 841 (1999) ("Unsophisticated businesses that either cannot afford the

The problem is a continued path dependence⁶ on these now blurred distinctions. The amended state statutes and liberalized tax regulations have resulted in proposals for consolidated treatment that range, *inter alia*, from a universal statute for all business organizations⁷ to a unified limited liability entity.⁸ These proposals

transaction costs of completing an elaborate operating agreement or have not even considered entering into a written agreement will typically be better off choosing the LLP.”).

6. See, e.g., Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 603-04 (2001). Broadly defined, path dependence

means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it. . . . At the most basic level, therefore, path dependence implies that “what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time.”

Id. (quoting William H. Sewell, Jr., *Three Temporalities: Toward an Eventful Sociology*, in *THE HISTORIC TURN IN THE HUMAN SCIENCES* 262-63 (Terrence J. McDonald ed., 1996)). According to Richard Posner,

in a number of other respects, the law is in thrall to history, and not merely as a matter of judicial psychology. This point can be made perspicuous with the aid of the economists' concept of path dependence, which means that where you end up may depend on where you start out from, even if, were it not for having started where you did, a different end point would be better.

Richard A. Posner, *Path-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 583 (2000). See generally W. BRIAN ARTHUR, INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY (1994); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996). But see generally S. J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205 (1995) (challenging the analytical utility and validity of path dependence). For corporate applications of path dependence theory, see generally Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999) (using path dependence theory to explain varying methods of corporate governance); Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior, and Cognitive Biases*, 74 WASH. U. L.Q. 347 (1996) (using path dependence theory to suggest possible reasons for the standardization of corporate contracts).

7. See, e.g., Robert R. Keatinge, *Universal Business Organization Legislation: Will It Happen? Why and When*, 23 DEL. J. CORP. L. 29, 81-82 (1998) (discussing “hub and spokes” structure for a universal statute) [hereinafter Keatinge, *Universal Business Organization Legislation*]; Larry E. Ribstein, *Linking Statutory Forms*, 58 LAW & CONTEMP. PROBS. 187, 200-06 (1995) (delineating relative merits and deficiencies in enacting a universal statute); Symposium, *Check-the-Box and Beyond: The Future of Limited Liability Entities*, 52 BUS. LAW. 605, 610-11 (1997) (proposing one statute to govern all closely held entities) (statement of D. Gordon Smith); see also *infra* Part II.A.

8. See, e.g., Robert C. Art, *Conversion and Merger of Disparate Business Entities*, 76 WASH. L. REV. 349, 378 (2001) (endorsing statutory changes permitting business entities to convert or merge into all possible combinations); Dale A. Oesterle & Wayne M. Gazur, *What's in a Name?: An Argument for a Small Business “Limited Liability*

are largely a response to certain unincorporated limited associations, such as the limited liability company (LLC) and the limited liability partnership (LLP), that amalgamate characteristics once exclusively associated with corporations and partnerships.⁹ But this exclusivity no longer obtains.¹⁰ That these combined characteristics can co-exist in relative balance merely points to the disutility in using increasingly defunct definitions of a corporation or an unincorporated association.¹¹ Without resort to these definitions, there is no legal justification for collapsing their target corporate distinctions.

This article presents such a justification. By critically examining

Entity" Statute (With Three Subsets of Default Rules), 32 WAKE FOREST L. REV. 101, 131 (1997) (proposing a "limited liability entity" with three sets of default rules designed to account for different types of business organizations) [hereinafter Oesterle & Gazur, *What's in a Name?*]; Larry E. Ribstein, *The New Choice of Entity for Entrepreneurs*, 26 CAP. U. L. REV. 325, 344 (1997) (suggesting limited liability as a default rule); see also *infra* Part II.A.

9. See, e.g., *Int'l Flavors & Textures, LLC v. Gardner*, 966 F. Supp. 552, 553 (W.D. Mich. 1997) (characterizing the LLC as "designed to achieve the best of all worlds"); *Prefatory Note*, UNIFORM LIMITED LIABILITY COMPANY ACT, in 6A UNIFORM LAWS ANNOTATED 426 (1995) ("The allure of the limited liability company is its unique ability to bring together in a single business organization the best features of all other business forms All state limited liability company acts contain provisions for a [corporate-styled] liability shield and [pass-through] partnership tax status."). One commentator explains:

In general, the statutes [authorizing the creation of LLPs] share the theme that a limited liability partnership will limit, or eliminate, joint and several liability of partners for some, or all, of the partnership's debts or other obligations. For purposes other than joint and several liability, the statutes provide that a limited liability partnership remains a general partnership under the UPA [Uniform Partnership Act] or RUPA.

Author's Comments, RUPA, *supra* note 1, § 1001, at 348. See generally Symposium, *LLC, LLPs and the Evolving Corporate Form*, 66 U. COLO. L. REV. 855 (1995).

10. See *infra* notes 109-16 and accompanying text.

11. Similarly tautological are conventional critiques that focus on the incapacity of the tax classification system to account for the limited liability company. See, e.g., Susan Pace Hamill, *A Case for Eliminating the Partnership Classification Regulations*, 68 TAX NOTES 335, 352 (1995) ("Although elimination of the classification regulations undoubtedly will allow some limited partnerships and LLCs . . . to enjoy the many benefits offered by the partnership tax provisions, this adds no new legal inconsistencies or formalistic distinctions to those that already exist") [hereinafter Hamill, *Eliminating Partnership Classification*]; Susan Kalinka, *The Limited Liability Company and Subchapter S: Classification Issues Revised*, 60 U. CIN. L. REV. 1083, 1141 (1992) ("A comparison of the S corporation and the LLC with respect to . . . the [repealed Kintner] regulations reveals that the two entities are not sufficiently different to warrant the differences in taxation. . . . On the whole, the differences between the two entities do not indicate why one should be considered more 'corporate' than the other.") [hereinafter Kalinka, *LLC and Subchapter S*]. By definition, business organizations such as the limited liability company exhibit certain traditional characteristics of corporations and unincorporated associations. Predictably, problematic definitions engender problematic classifications.

the origins and rationales of certain jurisdictional principles,¹² this article reveals an inconsistency¹³ that can serve as an entry point for analyzing and potentially reconciling certain existing distinctions between corporations and unincorporated associations. Resolving this inconsistency can provide a sound legal basis for harmonizing corporate distinctions.¹⁴ Such a result is possible without having to revise our conventional definitions of different types of business organizations.¹⁵

Although indistinct in many practical respects, corporations and limited unincorporated associations continue to receive systematically disparate treatment in other respects. Specifically, different tests determine the citizenship of corporations and unincorporated associations for jurisdictional purposes. The test for corporations is codified in the alienage and diversity jurisdiction statute,¹⁶ which provides "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"¹⁷ In contrast, the test for unincorporated associations exists as a common law rule that "[alienage and] diversity jurisdiction in a suit by or against the

12. See *infra* Part III.B.

13. See *infra* Part III.C.

14. See *infra* Part IV.

15. In an extremely abstract sense, this method can be, and has been, used in a diverse range of contexts. For instance, John Rawls has applied the method in an attempt to harmonize a deeply-entrenched division between consequentialist and retributivist theories of criminal punishment:

The answer, then, to the confusion engendered by the two views of punishment is quite simple: one distinguishes two offices . . . and one distinguishes their different stations with respect to the system of rules which make up the law; and then one notes that the different sorts of considerations which would usually be offered as reasons for what is done under the cover of these offices can be paired off with the competing justifications. . . . One reconciles the two views by the time-honored device of making them apply to different situations.

JOHN RAWLS, *Two Concepts of Rules*, in JOHN RAWLS: COLLECTED PAPERS 20, 23-24 (Samuel Freeman ed., 1999).

16. 28 U.S.C. § 1332 (2000). For the distinction between alienage and diversity jurisdiction, see *infra* Part III.A.

17. *Id.* § 1332(c); see *infra* Part II.B.1. But see *Eisenberg v. Comm. Union Assurance Co.*, 189 F. Supp. 500, 502 (S.D.N.Y. 1960) (finding that "subdivision [(c) of section 1332] is not susceptible of the construction as if it read 'all corporations shall be deemed citizens of the States by which they have been incorporated and of the States where they have their principal places of business'"); Charles A. Szypszak, *Jural Entities, Real Parties in Controversy, and Representative Litigants: A Unified Approach to the Diversity Jurisdiction Requirements for Business Organizations*, 44 ME. L. REV. 1, 5 (1992) (explaining that "Congress has never explicitly sanctioned the Supreme Court's treatment of a corporation as a jural entity whose citizenship is the exclusive measure of diversity").

[unincorporated] entity depends on the citizenship of 'all the members,' 'the several persons composing such association,' [or] 'each of its members.'"¹⁸

An undesirable by-product of these asymmetrical tests becomes manifest when one considers the jurisdictional status of alien business organizations. A novel way to understand the alienage jurisdiction statute involves its applicability to two separate classes of aliens: "domestic aliens," which are citizens or subjects of a foreign state that permanently reside in the United States, and "foreign aliens," which are United States citizens legally domiciled in another country.¹⁹ Unlike their domestic counterparts, foreign aliens do not constitute "citizens" in a jurisdictional sense—they are deemed "stateless" and thus cannot sue or be sued in federal courts on the basis of alienage.²⁰ Accordingly, a foreign alien who is a member of an unincorporated association renders that association incapable of suing or being sued under the alienage jurisdiction statute.²¹

Statelessness bears material consequences for all unincorporated business associations. The incapacity to sue or be sued eviscerates the historical rationales supporting alienage jurisdiction.²² The

18. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990) (quoting *Chapman v. Barney*, 129 U.S. 677, 682 (1889); *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456 (1900); *United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 146 (1965)). See *infra* Part II.B.2.

19. See *infra* Part III.C.

20. See *id.*

21. See, e.g., *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 69 (2d Cir. 1990). The Second Circuit there concluded:

If in fact any of [the defendant New York law partnership]'s foreign-residing United States citizen partners are domiciled abroad, a diversity suit could not be brought against them individually; in that circumstance, since for diversity purposes a partnership is deemed to take on the citizenship of each of its partners, a suit against [the partnership] could not be premised on diversity.

Id. (citations omitted), *remanded on other grounds*, 771 F. Supp. 580 (S.D.N.Y. 1991).

22. See generally *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 93-96 (2002) (delineating certain Constitutional Convention rationales for alienage jurisdiction); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1 (1996) (reviewing the historical origins of, and modern justifications for, alienage jurisdiction). According to Professor Johnson,

[h]istory has demonstrated that the political processes in the country are susceptible to antiforeign sentiment . . . which necessitates a forum more politically insulated than that offered by most states. Though this danger is not present in every alienage case, state court adjudication of disputes involving foreign citizens continue to raise the possible adverse foreign policy and international trade consequences feared by the Framers of the Constitution.

standing possibility that local and state courts may harbor prejudice towards U.S. citizens residing abroad presents the prospect of forum shopping to unincorporated associations.²³ Further, ascertaining whether an unincorporated association is stateless imposes an additional or undesirable cost on potential litigants that can override negotiated contractual choice-of-venue provisions, which potentially compromises commercial relations.²⁴ These considerations may affect whether an unincorporated association elects to have foreign branches or become registered subjects of foreign laws.

This distinct problem of unincorporated business associations did not always exist. Courts initially applied the same common law citizenship test to both corporations and unincorporated associations.²⁵ Under this test, all business organizations assumed the citizenship of their respective constituent groups: stockholders for corporations and members for most unincorporated associations.²⁶ The uniform test was highly controversial,²⁷ perhaps ironically, because it was thought that corporations should be denied access to federal courts.²⁸

The citizenship test changed as corporations assumed a more prominent role in the economy.²⁹ Recognizing the "necessities and

Id. at 31.

23. See *infra* notes 260-64, 341-42, and accompanying text.

24. See *infra* notes 272-75, 343, and accompanying text.

25. See, e.g., *Chapman*, 129 U.S. at 682 (determining citizenship of a joint stock company using the test for corporations first established in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809)).

26. See, e.g., *Great S. Fire Proof Hotel*, 177 U.S. at 456 ("When the question relates to . . . jurisdiction . . . as resting on the diverse citizenship of the parties we must look in the case of a suit by or against a partnership association to the citizenship of the several persons composing such association."); *Deveaux*, 9 U.S. (5 Cranch) at 91 ("The court feels itself authorized . . . on a question of jurisdiction, to look to the character of the individuals who compose the corporation. . .").

27. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 136-45 (1927) (referencing virtually annual attempts from 1878 to 1910 to limit or deny corporations access to federal courts).

28. See, e.g., *Hawes v. Oakland*, 104 U.S. 450, 452 (1882) ("[T]he corporation created by the laws of the States bring a large part of their controversies with their neighbors and fellow citizens into the courts of the United States for adjudication, instead of resorting to the State courts, which are their national, their lawful, and their appropriate forum.").

29. See *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953) ("During the 19th Century . . . corporations were relatively few and small. . . . But the 20th Century has presented a different climate."). See generally GEORGE HERBERTON EVANS, *BUSINESS INCORPORATION IN THE UNITED STATES 1800-1943* (1948); TONY A. FREYER, *PRODUCERS VERSUS CAPITALISTS* (1994); JAMES WILLIARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* (1970); Gregory A. Mark, Comment, *The Personification of the Business Corporation in*

conveniences of trade and business" implicated by corporations, the Supreme Court fashioned a new citizenship test based on the state of incorporation.³⁰ This test recognized that corporations possessed many of the powers belonging to natural persons, and so they should be treated equally in a jurisdictional sense.³¹ Congress codified this test in 1948,³² and then expanded citizenship for corporations a decade later to include also their principal place of business.³³ The amendment was an explicit attempt to regulate the economic significance of corporations, as broadened bases for citizenship decreased the likelihood of diversity between litigants.³⁴ Consistent with this rationale, Congress paid no attention to whether the amended citizenship test should extend to unincorporated associations, which remained a relatively insignificant part of the economy.³⁵ As a result, the once-uniform common law test now applies only to unincorporated associations. The Court has noted that this separate hold-over test for unincorporated associations "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization."³⁶

The reality is that, increasingly, new businesses are electing to organize as unincorporated associations. For instance, the IRS's most

American Law, 54 U. CHI. L. REV. 1441 (1987).

30. *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 327-28 (1853).

31. *Id.*

32. Act of June 25, 1948, ch. 646, 62 Stat. 930 (codified as amended at 28 U.S.C. § 1332 (2000)).

33. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415. As early as 1939, the Supreme Court had held that foreign corporations, by qualifying to do business in a state and appointing therein an agent for receiving process, thereby consented to being sued in diversity suits in that state. See *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 174-75 (1939).

34. S. REP. NO. 85-1830, at 3101-02 (1958), reprinted in 1958 U.S.C.C.A.N. 3099, 3101-02. According to the Senate report,

[T]his fiction of stamping a corporation a citizen of the State of its incorporation has given rise to the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another state.

Id. (citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928) (permitting company that had reincorporated in another state for purposes of accessing federal court to sue on basis of diversity)).

35. See, e.g., *R.H. Bouligny, Inc. v. United Steelworkers of Am.*, AFL-CIO, 336 F.2d 160, 164 (4th Cir. 1964) ("By no stretch of the process of interpretation can [28 U.S.C.A. § 1391(c) (1958)] be read as applying to an unincorporated association."), *aff'd*, 382 U.S. 145 (1965). The 1965 *Bouligny* decision marked a sixty-one year span since the Court had last re-examined the jurisdictional status of unincorporated associations in *Thomas v. Board of Trustees Ohio State University*, 195 U.S. 207 (1904).

36. *Carden*, 494 U.S. at 196.

recent tax filing statistics reveal the number of new limited liability companies has quadrupled, dwarfing the rate of new S-class corporations over the same five-year span:³⁷

	1995	1996	1997	1998	1999
S Corps ³⁸	2,153,119	2,304,416	2,452,254	2,588,088	2,725,775
LLCs (Members) ³⁹	118,559 (1,580,900)	221,498 (1,654,256)	349,054 (1,758,627)	470,657 (1,855,348)	589,403 (1,936,919)
LLPs (Members) ⁴⁰	N/A ⁴¹ (N/A)	11,458 ⁴² (N/A)	N/A ⁴⁰ (N/A)	26,287 (141,884)	42,612 (206,142)
LPs (Members) ⁴³	295,304 (10,223,901)	311,563 (10,025,630)	328,210 (10,167,018)	342,726 (9,325,111)	354,295 (8,944,693)

37. One commentator has challenged the propriety of comparing the growth rate of LLCs to S Corporations:

The same pattern of concentration of real estate businesses and service businesses in all partnerships indicates that what Professor [Susan Pace] Hamill calls the "meteoric pace" in the growth of LLCs, which has been the motor driving the increase in the number of all partnerships since 1994, appears to have been more at the expense of other types of partnerships than C and especially S Corporations.

John W. Lee, *A Populist Political Perspective of the Business Tax Entities Universe: "Hey the Stars Might Lie But the Numbers Never Do,"* 78 TEX. L. REV. 885, 890 (2000) (quoting Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1454, 1460-61 (1998) [hereinafter Hamill, *Origins*]). Professor Lee bases his challenge on data indicating that, "while the number of LLCs is continuing to grow at a phenomenal rate, the number of general partnerships has recently declined, and net growth in the number of limited partnerships has been limited." *Id.*; see also Larry E. Ribstein & Bruce H. Kobayashi, *Choice of Form and Network Externalities*, 43 WM. & MARY L. REV. 79, 100 (2001) (contending that, "for tax reasons, LLCs are replacing general partnerships but not corporations"). As with many things, the truth perhaps lies in the middle. The LLC's ascendance likely has cut into the growth of both general partnerships and S Corporations.

38. INTERNAL REVENUE SERVICE, STATISTICS OF INCOME: SOI BULLETIN, Winter 2001-2002, at 198 [hereinafter IRS, SOI BULLETIN (Winter 2001-2002)]; INTERNAL REVENUE SERVICE, STATISTICS OF INCOME: SOI BULLETIN, Winter 2000-2001, at 198 [hereinafter IRS, SOI BULLETIN (Winter 2000-2001)].

39. IRS, SOI BULLETIN (Winter 2001-2002), *supra* note 38, at 196. IRS, SOI BULLETIN (Winter 2000-2001), *supra* note 38, at 196. See, e.g., 1 RIBSTEIN & KEATINGE, LIMITED LIABILITY COMPANIES, *supra* note 5, § 1.01, at 1 (observing that "LLCs appear to be the fastest growing form of unincorporated organization") (citation omitted). Exactly why LLCs are so popular is a subject of debate. Some commentators believe LLCs enjoy a superior federal tax status. See, e.g., Susan Pace Hamill, *The Limited Liability Company: A Catalyst for Exposing the Corporate Integration Question*, 95 MICH. L. REV. 393, 396 (1996) [hereinafter Hamill, *Corporate Integration*]. Professor Hamill also believes that "use of LLCs actually improves the fairness of the business tax system" by "level[ing] the playing field" between sophisticated small businesses able to circumvent double-taxation and their unsophisticated peers. *Id.* at 430. Other commentators believe LLCs provide a safer and simpler way to acquire

Additionally, these statistics for limited unincorporated associations are conservative. The IRS has indicated that the “[n]umber of limited partnerships and of limited liability companies and associated number of partners are understated because some businesses failed to answer the question about type of partnership on their tax returns as originally filed.”⁴⁴ Regardless of what the actual numbers are, limited unincorporated associations now clearly occupy a significant place in the business organization landscape.⁴⁵

limited liability than the alternative, which is to circumvent the S Corporation rules. See, e.g., Ribstein, *Emergence of LLC*, *supra* note 2, at 3. Professor Ribstein contends that “closely held business association statutes” reduce the transaction costs of doing business. See Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 73 WASH. U. L.Q. 369, 372-84 (1995).

40. IRS, SOI BULLETIN (Winter 2001-2002), *supra* note 38, at Schedule B; IRS, SOI BULLETIN (Winter 2000-2001), *supra* note 38, at Schedule B. “The key reason for the popularity of the LLP is that there is no need to change the partnership to a new entity with the corresponding need to change the existing partnership agreement.” PHILIP P. WHYNOTT, *THE LIMITED LIABILITY COMPANY* § 2:40, at 2-3 (3d ed. 2000). *But see*, e.g., Saul Levmore, *Partnerships, Limited Liability Companies, and Taxes: A Comment on the Survival of Organizational Forms*, 70 WASH. U. L.Q. 489, 491 (1992) (noting that individuals who shift from a partnership form to a limited company could still enjoy the benefits of limited liability, but “many of these firms’ contractual creditors will be caught by surprise”); *see also* BORIS I. BITTKER & JAMES S. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* ¶ 2.01[3], at 2-7 (7th ed. 2000) (“Decisions to embrace the corporate form of organization should be carefully considered, since a corporation is like a lobster pot: easy to enter, difficult to live in, and painful to get out of.”) (citations omitted).

41. The IRS began collecting information on the number of LLPs and their members when Form 1065 first appeared in 1998. E-mail from Judy Lim-Sharpe, Reference Librarian, Treasury Department Library, to Peter B. Oh, The Florida State University College of Law (Aug. 29, 2002, 12:50 E.S.T.) (containing information supplied by Timothy Wheeler, Treasury Department) (on file with author).

42. ALAN R. BROMBERG & LARRY E. RIBSTEIN, *BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT* § 1.01(e) (1998) (citing INTERNATIONAL ASSOC. OF CORPORATE ADMIN., 1997 ANNUAL REPORT).

43. INTERNAL REVENUE SERVICE, *STATISTICS OF INCOME: SOI BULLETIN*, Spring 2002, at 295 [hereinafter IRS, SOI BULLETIN (Spring 2002)]; INTERNAL REVENUE SERVICE, *STATISTICS OF INCOME: SOI BULLETIN*, Spring 2001, at 285 [hereinafter IRS, SOI BULLETIN (Spring 2001)].

44. IRS, SOI BULLETIN (Spring 2002), *supra* note 43, at 334 (Table 11 n.2). Starting in 1993, the IRS began using a survey question that identifies partnerships as limited liability companies. *Id.* “[T]he question identifying partnerships as limited liability companies was only introduced, starting with 1993. No attempt was made to identify these companies for the statistics for earlier years.” *Id.*

45. For an informal set of statistics concerning the number of cases involving LLCs and diversity of citizenship, see Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. SMALL & EMERGING BUS. L. 435, 437 nn.6-7 (2002) (“In 2002 to date, there have been almost fifty times the number of cases reported in 1995 in which LLCs are parties. . . . Of the growing number of cases involving LLCs that were filed in federal court, 465 expressly mention diversity.”).

This development has not escaped the Supreme Court's attention. Since 1958, when Congress amended the citizenship test for corporations, the Court twice has considered the merits of extending this test to unincorporated associations. Less than a decade after the 1958 amendments, Justice Fortas acknowledged that corporations and unincorporated associations were becoming "indistinguishable . . . in terms of the reality of function and structure."⁴⁶ But he concluded that "these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for extension of . . . diversity jurisdiction . . . ought to be made to the Congress and not to the courts."⁴⁷ The invitation received no legislative audience and, fifteen years later, the Court took occasion to revisit the alienage jurisdiction statute's distinction between corporations and unincorporated associations. Although admitting that perhaps "considerations of basic fairness and substance over form require"⁴⁸ a uniform citizenship test for all business organizations, a divided Court again balked: "Which [type of unincorporated associations] is entitled to be considered a 'citizen' for diversity purposes, and which of their members' citizenship is to be consulted, are questions more readily resolved by legislative prescription"⁴⁹

The time for such prescription has arrived. Part II of this article critically examines the landscape of legal distinctions between corporations and unincorporated associations. Beginning with the Revenue Act of 1894⁵⁰ and culminating with the Kintner Regulations,⁵¹ the IRS consistently has established regulations predicated on the now orthodox dichotomy between corporations and partnerships.⁵² On which side of the dichotomy a particular business

46. *Boulogny*, 382 U.S. at 149-50; see *infra* Parts II.A.1, II.A.2.

47. *Boulogny*, 382 U.S. at 150-51.

48. *Carden*, 494 U.S. at 196 (quoting Brief for Respondent). Justice Scalia, writing for the *Carden* majority, proceeded to uphold the common law test for unincorporated associations. *Id.*; accord *MY COUSIN VINNY* (20th Century Fox 1992) ("Mr. Gambini, that was an intelligent, lucid argument. Overruled.").

49. *Carden*, 494 U.S. at 197.

50. Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 556 (exempting "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes"); cf. *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (1895) (striking down Revenue Act of 1894 as unconstitutional), *overruled by* *South Carolina v. Baker*, 485 U.S. 505, 522-23 n.13 (1988) (ruling that *Pollock* was superseded by the Sixteenth Amendment).

51. Former Treas. Reg. §§ 301.7701-1 to -11 (1960 amended 1996) [hereinafter *Former Treas. Reg.*].

52. See, e.g., Armando Gomez, *Rationalizing the Taxation of Business Entities*, 49 TAX LAW. 285, 286 (1996) ("Throughout the history of the federal income tax, Congress has chosen to treat corporations and partnerships differently for tax purposes."). Apparently, "Congress was not unaware that it had established disparate tax regimes

organization belonged was determined by the extent it possessed certain attributes.⁵³ Exhibiting a threshold number of these attributes warranted federal tax treatment as a corporation, notably the imposition of double taxation.⁵⁴ This bright-line formula unintentionally provided businesses with an organizational blueprint for avoiding double taxation.⁵⁵ Recognizing this problem, as well as the growing prevalence of hybrid forms such as the limited liability company,⁵⁶ the IRS implemented a more flexible taxation scheme in which business organizations could elect how they wished to be taxed with the aim of disengaging federal taxation of business organizations from the dichotomy between corporations and partnerships.⁵⁷ Accordingly, commentators have rushed to propose statutory schemes that attempt to provide uniform treatment to all business organizations.⁵⁸ These schemes, however, are premised on classifications designed to differentiate corporations from unincorporated associations.⁵⁹ Equally significant, these differences

for corporations and partnerships," *id.* at 288, until as late as "1919, when Treasury issued Regulation 45," *id.* at 289 (citing Regs. 45, art. 1503 (1919) (establishing transferability of interests and centralization of management as basis for tax classification)). See also J. William Callison, *Federalism, Regulatory Competition, and the Limited Liability Movement: The Coyote Howled and the Herd Stampeded*, 26 J. CORP. L. 951, 957-60 (2001) (recounting historical basis of IRS regulations).

53. Former Treas. Reg. §§ 301.7701 to -2. The attributes were continuity of life, centralized management, free transferability of interest, and limited liability. *Id.*; see *infra* Part II.A.1.

54. Former Treas. Reg. §§ 301.7701 to -2.

55. Tax shelters were devised where quasi-corporations assumed the optimal combination of attributes necessary to retain certain corporate benefits and yet be eligible for pass-through partnership tax treatment. See, e.g., Committee on Partnerships and Unincorporated Business Organizations, *Publicly Traded Limited Partnership: An Emerging Financial Alternative to the Public Corporation*, 39 BUS. LAW. 709, 723 (John W. Slater, Jr. ed., 1984) ("A publicly traded partnership generally has centralized management and probably has free transferability of interests. . . ."); Steven T. Limberg, *Master Limited Partnerships Offer Significant Benefits*, 65 J. TAX'N 84, 84 (1986) ("The MLP [master limited partnership], which operates as a partnership but has readily tradable units, has dramatically affected oil and gas tax planning. Because the MLP is an 'inside shelter,' it is becoming increasingly popular for other business offerings.").

56. See I.R.S. Notice 95-14, 1995-1 C.B. 297 ("[M]any states recently have revised their statutes to provide that partnerships and other unincorporated organizations may possess characteristics that have traditionally been associated with corporations, thereby narrowing considerably the traditional distinctions between corporations and partnerships.").

57. 26 C.F.R. § 301.7701 (2002).

58. See *infra* Part II.A.2.

59. See, e.g., RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES, *supra* note 1, § 10.05(A), at 253 ("[T]he Kintner [Regulations] remain of interest. . . . [They] help explain the current shape of business associations. . . ."). Professor Ribstein prefers to deemphasize tax considerations in favor of default rules, coherent and flexible

still endure in certain jurisdictional respects.⁶⁰ The residual distinctions between corporations and certain limited unincorporated associations evince a gap in how we should approach the task of collapsing corporate distinctions and fashioning corresponding statutory and common law schemes.

Part III of this article establishes the relevant jurisdictional framework for such collapsing by analyzing the historical bases of alienage jurisdiction. As a preliminary matter, alienage jurisdiction is distinct from, but often conflated with, its more problematic relative, diversity jurisdiction.⁶¹ Three discrete rationales supporting alienage jurisdiction can be gleaned from the Framers and modern commentary: protecting foreign relations from perceived provincialism by state courts,⁶² guarding against the threat—whether actual or apparent—of local prejudice towards foreigners,⁶³ and furthering international commercial interests.⁶⁴ These rationales establish the significant value of providing aliens access to federal

terminology, and efficiency considerations to fill gaps in contractual and statutory schemes. See, e.g., Larry E. Ribstein, *Limited Liability Unlimited*, 24 DEL. J. CORP. L. 407, 450 (1999) (advocating freedom to contract so as to avoid “fac[ing] the Scylla-and-Charybdis choice of either accepting a risk of vicarious liability or subjecting themselves to the inappropriate default rules of a business association statute that is designed for completely different settings”); *infra* Part II.A.1.

60. See *infra* Part II.B.2.

61. Johnson, *supra* note 22, at 4 (“Careful study, including ‘rattling through dusty attics of the history books . . . reveals that alienage jurisdiction differs in salient respects from ordinary diversity jurisdiction.”) (quoting *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 575 (1990) (Brennan, J., concurring in part and concurring in judgment)). For an informative debate about the relative merits of diversity jurisdiction, see Richard H. Field, *Proposals on Federal Diversity Jurisdiction*, 17 S.C. L. REV. 669, 673 (1965), which delineates and defends the American Law Institute’s proposals to modify diversity jurisdiction. But see John P. Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 S.C. L. REV. 677, 679-80 (1965) (“I am opposed to this proposal to gut the diversity jurisdiction. My objection is entirely in principle There is nothing wrong with this proposal except its substance.”). But see Richard H. Field, *Federal Diversity Jurisdiction—A Rebuttal*, 17 S.C. L. REV. 685, 685 (1965) (“[W]hen you have issues in a case wholly dependent upon state law . . . we feel that a case where the state judges have the last word as to what is the state law ought to be decided in the state court unless there is some good reason to have it elsewhere.”). Richard Field participated in drafting the American Law Institute’s proposals; Judge John P. Frank was one of the most vigorous supporters of diversity jurisdiction and chair of the national Committee to Maintain Diversity Jurisdiction. See, e.g., John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 405 (1979) (urging retention because “[d]iversity jurisdiction must be seen for what it is, a social service of the federal government”) [hereinafter Frank, *Case for Diversity*]; *infra* Part III.A.

62. See *infra* Part III.B.1.

63. See *infra* Part III.B.2.

64. See *infra* Part III.B.3.

courts.⁶⁵ Accordingly, Congress conferred federal courts with jurisdiction over all suits involving aliens, power of a breadth that arguably conflicted with the express terms of Article III.⁶⁶ The legislative “solution” to the conflict consisted of restricting alienage jurisdiction to suits where aliens were paired with U.S. citizens; this was accomplished by amalgamating alienage and diversity jurisdiction to co-habit the same statute.⁶⁷ Nevertheless, the primary criticisms advanced against diversity jurisdiction predominantly do not apply to alienage jurisdiction.⁶⁸ “Statelessness” is a problem endemic to alienage jurisdiction.⁶⁹ Only foreign aliens are susceptible to the phenomenon of “statelessness,” which is magnified when corporations and unincorporated associations become involved.⁷⁰

Part IV of this article proceeds to apply the jurisdictional framework to the business organization landscape. Statelessness is not merely an anomalous jurisdictional phenomenon, but also related to the citizenship test, unjustifiably maintained for unincorporated

65. See *infra* Part III.B.

66. See *infra* note 229-30 and accompanying text.

67. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1332 (2000)) (authorizing federal courts to hear controversies between “citizens of different States” and controversies “between citizens of a State and foreign states, citizens, or subjects”). Congress revised this statute in 1948. See Act of Jun. 25, 1948, ch. 646, § 1332 62 Stat. 869, 930 (codified as amended at 28 U.S.C. § 1332 (2000)).

68. See, e.g., Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 121 (“[Although] the case for abolishing diversity jurisdiction is clear . . . [t]he federal government is responsible, and is sometimes required by treaty, to provide aliens access to justice according to standards recognized in international law.”) [hereinafter Kramer, *Diversity Jurisdiction*].

69. The phenomenon of “statelessness” examined in this article is distinct from the problem concerning persons without a country. See *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 99 (2002) (noting that “some persons, like resident aliens, may live within a foreign state without being treated under American law as members of that particular polity”) (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 660 (1898)). Some persons are not citizens under their respective country’s law. See generally *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983) (involving an individual domiciled in New York whose Soviet citizenship had been revoked upon departure); *Blanco v. Pan-American Life Ins. Co.*, 221 F. Supp. 219, 228 (S.D. Fla. 1963) (involving Cuban refugees domiciled in Florida who had renounced Cuban citizenship), *modified on other grounds*, 362 F.2d 167 (5th Cir. 1966); *Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496, 498-99 (S.D.N.Y. 1955) (involving an individual domiciled in Portugal who had forfeited Soviet citizenship by illegally leaving country and then had Portuguese citizenship cancelled). The United Nations has denounced this phenomenon. See U.N. DEPT OF SOCIAL AFFAIRS, A STUDY OF STATELESSNESS 11, U.N. Doc. E/1112, U.N. Sales No. 1949.XIV.2 (1949) (“The 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.”).

70. See *infra* Part III.C.

associations. Both problems are based on incorrect and outdated reasoning, an instantiation of *stare decisis* gone awry.⁷¹ As Justice Holmes once remarked,

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in [a bygone time]. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁷²

The solution is to apply a citizenship test based on domicile to both foreign aliens and unincorporated associations. Implementing such a test would redress a number of dubious asymmetries. First, domestic and foreign aliens both would have access to federal court in compliance with the historical purposes of alienage jurisdiction.⁷³ Second, corporations and unincorporated associations would assume comparable citizenship status in agreement with their merging corporate personality.⁷⁴ Equally important, a citizenship test based on domicile would furnish a legal basis supporting additional uniform treatment of corporations and unincorporated associations. Accordingly, Congress should amend the alienage jurisdiction statute to give citizenship to foreign aliens based on their domicile and to unincorporated associations based on their principal place of business. Eliminating these sort of existing asymmetries is a critical predicate for business scholars and legislators who prospectively seek uniform statutes or universal entities.

II. CORPORATIONS: UNINCORPORATED ASSOCIATIONS

Although defunct, dichotomies between corporations and unincorporated associations remain an influential part of the business organization landscape. This Part examines two such dichotomies. First, IRS regulations once applied differential tax treatment to business organizations on the basis of whether they were a corporation or a partnership. Second, certain statutory and common law tests accord fictional citizenship status exclusively to

71. See *infra* Part IV.

72. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897); see also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *70 (1765-69) ("The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust."); JOSEPH RAZ, THE AUTHORITY OF LAW 201 (1979) (noting that two rules "pursuing different and inconsistent social goals . . . cannot coexist"); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1143 n.262 (1996) ("In some instances, inconsistencies that in one era made sense have grown frivolous with the passage of time and hence should be looked upon, more precisely, as anachronisms.").

73. See *infra* Part IV.A.1.

74. See *infra* Part IV.A.2.

corporations. Historically, tax regulations have framed our perspective on different types of business organizations.⁷⁵ The overhaul of the IRS regulations in favor of an elective scheme should have liberated current and prospective approaches to business organizations. While there is a movement towards unified treatment of all business organizations, the justifications for such a movement remain path dependent on the defunct dichotomies. Moreover, corporations and unincorporated associations continue to receive disparate treatment for citizenship purposes. This Part contends that such path dependency and jurisdictional disparity must be resolved before any corporate distinctions can be collapsed.

A. *Regulatory Distinctions*

1. Kintner Regulations⁷⁶

The Kintner Regulations established the modern analytical framework for distinguishing corporations from unincorporated associations. These Regulations established a classification system⁷⁷

75. See, e.g., Keatinge, *Universal Business Organization Legislation*, *supra* note 7, at 47 ("Of all the influences on the development of organic statutory regimes, the federal income tax system has had the greatest effect in the area of unincorporated business organizations."); see also Henry J. Lischer, Jr., *Elective Tax Classification for Qualifying Foreign and Domestic Business Entities Under the Final Check-the-Box Regulations*, 51 SMU L. REV. 99, 103 (1997) ("Because of the very abbreviated statutory language in section 7701 [of the Treasury Regulations] as to the tax status of unincorporated associations, the Treasury Regulations under section 7701 have played a particularly significant role in classifying business entities for federal income tax purposes."); J. Mark Meinhardt, Note, *Investor Beware: Protection of Minority Stakeholder Interests in Closely Held Limited-Liability Business Organizations: Delaware Law and its Adherents*, 40 WASHBURN L.J. 288, 297-98 (2001) (suggesting that the choice of business type is often propelled not by fiduciary protections for minority interests, but by tax consequences). *But see*, e.g., Cohen, *supra* note 45, at 439 n.15 ("Since the adoption of check-the-box, tax considerations are no longer a driving force in choosing an organizational form.").

76. Former Treas. Reg. §§ 301.7701-1 to -11. The impetus and namesake for these regulations derive from *United States v. Kintner*, 216 F.2d 418, 428 (9th Cir. 1954), where the Ninth Circuit adjudged a state law partnership, with an executive committee governance structure and continuity of existence akin to a corporation, to be an "association" for federal tax purposes.

77. See, e.g., WILLIAM S. MCKEE ET AL., 1 FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS ¶ 3.06[1], at 3-50 (2d ed. 1990) ("The 1960 Regulations, which track the *Morrissey* [v. Commissioner, 296 U.S. 344 (1935)] opinion more closely than the prior Regulations, describe six corporate characteristics that bear on the classification of an organization as an association . . ."); John J. Sexton & Donald F. Osteen, *Classification as a Partnership or as an Association Taxable as a Corporation*, 24 TUL. TAX INST. 95, 123-34 (1975) (comparing 1959 proposed regulations to 1960 final regulations under the rubric of both sets of regulations being a departure from "association" classification system).

whereby an organization constituted a corporation⁷⁸—and not a partnership⁷⁹—for federal tax purposes if three of the four following characteristics were present: continuity of life,⁸⁰ centralized management,⁸¹ free transferability of interest,⁸² and limited liability.⁸³

78. A "corporation" is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company and an insurance company." Former Treas. Reg. § 301.7701-1(c). The origin of the corporation can be traced to classical antiquity. Numa Pompilius introduced the corporation to Rome, and the Romans introduced the corporation to England by way of invasion. 2 SIR WILLIAM BLACKSTONE, COMMENTARIES 469 (St. George Tucker ed., 1969) (1803). In time, the British established a system of laws that recognized corporations for charitable, municipal, and private purposes. SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW 486 (2d ed. 1968).

79. A "partnership" includes, but is not limited to, "a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not a corporation or a trust or estate within the meaning of the Internal Revenue Code of 1954." Former Treas. Reg. § 301.7701-3(a). "As a profit-seeking arrangement, [partnership] has a traceable course from Babylonian sharecropping through classical Greece and Rome to the far-flung trading enterprises of the Renaissance." 1 BROMBERG & RIBSTEIN, PARTNERSHIP, *supra* note 1, § 1.02(a), at 1:19. The limited partnership originated in ancient Rome:

Commercial credit began when an individual or a family, by what Latin Christendom called *commenda*, commended or entrusted money to a merchant for a specific voyage or enterprise, and received a share of the profits. Such a silent or "sleeping" partnership was an ancient Roman device, probably relearned by the Christian West from the Byzantine East.

WILL DURANT, THE STORY OF CIVILIZATION, Part IV, 627 (1950) (discussing the revival of commerce between the Eleventh and Fourteenth centuries). The limited partnership re-emerged in Seventeenth-century France (*Comandite*) and Italy (*Accomandita*) and first appeared in the United States during France's occupation of Florida and Louisiana. See SCOTT ROWLEY, ROWLEY ON PARTNERSHIP § 53 (1960); FRANCIS J. TROUBAT, THE LAW OF COMMANDATARY AND LIMITED PARTNERSHIP IN THE UNITED STATES 34 (1853); see also *Ames v. Downing*, 1 Bradf. 321 (N.Y. Sur. Ct. 1850) (establishing well-regulated and well-established status of limited partnerships by tracing them to the Middle Ages). The first statutes governing (limited) partnerships appeared in Pennsylvania, Michigan, New Jersey, and Ohio. See PA. LAWS 271 (1874) (later codified at 59 PA. STAT. ANN. § 341 *et seq.* (1964)) (repealed 1989); MICH. COMP. LAWS §§ 449.301, 449.351 (1877); N.J. STAT. §§ 42:3-1, 42:3-29 (1880); OHIO REV. CODE § 783.01 *et seq.* (1881).

80. Subsection (b) of the Kintner Regulations provides:

An organization has continuity of life if the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will not cause a dissolution of the organization. On the other hand, if the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will cause a dissolution of the organization, continuity of life does not exist.

Former Treas. Reg. § 301.7701-2(b) (1).

81. Subsection (c) of the Kintner Regulations provides:

An organization has centralized management if any person (or any group of persons which does not include all the members) has continuing exclusive authority to make the management decisions necessary to the conduct of the

business for which the organization was formed. . . . The effective operation of a business organization composed of many members generally depends upon the centralization in the hands of a few of exclusive authority to make management decisions for the organization, and therefore, centralized management is more likely to be found in such an organization than in a smaller organization.

Id. § 301.7701-2(c)(1).

82. Subsection (e) of the Kintner Regulations provides:

An organization has the corporate characteristic of free transferability of interests if each of its members or those members owning substantially all of the interests in the organization have the power, without the consent of other members, to substitute for themselves in the same organization a person who is not a member of the organization. In order for this power of substitution to exist in the corporate sense, the member must be able, without the consent of other members, to confer upon his substitute all the attributes of his interest in the organization.

Id. § 301.7701-2(e)(1).

83. Subsection (d) of the Kintner Regulations provides:

An organization has the corporate characteristic of limited liability if under local law there is no member who is personally liable for the debts of or claims against the organization. Personal liability means that a creditor of an organization may seek personal satisfaction from a member of the organization to the extent that the assets of such organization are insufficient to satisfy the creditor's claim.

Id. § 301.7701-2(d)(1). Although not an inherent feature of early corporations, *see, e.g.*, Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 576 (1986), limited liability is arguably the most significant vestige of the historical distinction between corporations and unincorporated associations. *See, e.g.*, Keatinge, *Universal Business Organization Legislation*, *supra* note 7, at 38-39 ("Vicarious liability was once the characteristic that distinguished corporations from partnerships. . . . This . . . has been modified by the advent of LLCs and LLPs, which allow some unincorporated associations to have the property of limited liability."); *see also* ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT § 1.03(b), at 19-20 (1998) ("Limited liability is available to . . . LLCs, corporations, and limited partnerships. Accordingly, the policy issue concerning limited is not whether the liability should be limited at all, but whether it should be limited specifically in the LLP form."); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 40 (1991) ("Limited liability is a distinguishing feature of corporate law—perhaps the distinguishing feature."). For a good survey of the historical policy justifications supporting limited liability, *see* Steven C. Bahls, *Application of Corporate Common Law Doctrines to Limited Liability Companies*, 55 MONT. L. REV. 43, 55-58 (1994).

Limited liability offers two distinct advantages. First, limited liability enables persons to assume risks beyond actual means. Second, limited liability promotes economic efficiency. Under this argument, limited liability reduces transaction costs and enhances the operation of securities markets. EASTERBROOK & FISCHEL, *supra*, at 40-59. As a result, the cost of capital is decreased while economic output and public welfare are increased. *See id.* This occurs because limited liability: (1) reduces the need to monitor agents, thereby reducing operational costs; (2) reduces the need to monitor shareholder ability to assume risks; (3) promotes the free transfer of shares since they are regulated by the market; (4) creates homogenous commodities that publicize all

The IRS weighed all four characteristics equally in a "resemblance" test.⁸⁴ Under this test, a business organization must have exhibited more "noncorporate characteristics" than "corporate characteristics" to receive the pass-through tax treatment⁸⁵ accorded to partnerships.⁸⁶ By such formulaic means, the Kintner Regulations introduced a bilateral tax structure for corporations and partnerships.⁸⁷

This structure, however, engendered practical problems. The IRS had designed the Kintner Regulations to complicate the ability of

relevant information; (5) allows efficient diversification of assets; and (6) prevents excessive risk-aversion by managers. *Id.* at 41-44. Easterbrook and Fischel, however, acknowledge limited liability may create a moral hazard risk because managers may act on knowledge that costs will be imposed on someone else. *See id.* at 50. This problem, however, may apply only to involuntary creditors because voluntary creditors may factor in this risk *ex ante* before providing credit terms. *See id.* at 50-53. Moreover, courts may fashion doctrines to protect victims from this moral hazard. *See id.* at 54-55, 60-62. But Barbara Banoff points out that

[n]ot all business people do want limited liability. Although accounting firms have apparently converted to LLPs *en masse*, not all law firms have done so. The reason for that is surely *not* that they do not know they could. Instead, staying a full-liability partnership may serve as a signal to the market for legal services that the partners stand behind the quality of their work. It is, in effect, a bonding mechanism in a lemons market.

Barbara Ann Banoff, *Company Governance under Florida's Limited Liability Company Act*, 30 FLA. ST. U. L. REV. 53, 56 n.14 (2002) (citing Charles R. O'Kelley, Jr., *Opting In and Out of Fiduciary Duties in Cooperative Ventures: Refining the So-Called Coasean Contract Theory*, 70 WASH. U. L.Q. 353 (1992)).

84. *See Morrissey v. Commissioner*, 296 U.S. 344, 357 (1935) (construing inclusion of "association" within the definition of a "corporation" as "impl[ying] resemblance; but it is resemblance and not identity"). The *Morrissey* Court actually evaluated six salient characteristics to determine whether a state law trust constituted a corporation for tax purposes: (1) the presence of associates; (2) the business's purpose; (3) centralized management; (4) continuity of existence; (5) free transferability of interests; and (6) limited liability. *Id.* at 359.

85. *See, e.g., BITTKER & EUSTICE, supra* note 40, ¶ 1.07[2] ("Under the prevailing conduit theory, the character of such items as ordinary income, capital gains and losses, charitable contributions, tax-exempt interest, and so forth passes through to the partners.").

86. Former Treas. Reg. § 301.7701-2(a)(1).

87. Commentators heavily criticized this bilateral structure as not being based on sound tax policy considerations. *See, e.g.,* Milton B. Hyman & Peter M. Hoffman, *Partnerships and "Associations": A Policy Critique of the Morrissey Regulations*, 3 J. REAL EST. TAX'N 377, 384 (1976) (contending Kintner Regulations reflected "nothing about the federal tax policies, if any, underlying the tax distinctions between 'associations' and 'partnerships'"); William A. Klein & Eric M. Zolt, *Business Form, Limited Liability, and Tax Regimes: Lurching Toward A Coherent Outcome?*, 66 U. COLO. L. REV. 1001, 1010 (1995) ("[A]ny tax test that seeks to distinguish between entities based on nontax characteristics, without regard for tax objectives, will be arbitrary."). As one commentator has stated, the Kintner Regulations represented "the antithesis of rational tax policy." Daniel S. Goldberg, *The Tax Treatment of Limited Liability Companies: Law in Search of Policy*, 50 BUS. LAW. 995, 1006 (1995).

unincorporated associations seeking to avoid the double taxation⁸⁸ assessed on corporations.⁸⁹ But the disincentives associated with double taxation impelled business organizations to avoid incorporation and instead structure themselves in a strategic, albeit sometimes inefficient, manner. To evade double taxation, some businesses organized themselves with centralized management and free transferability of interests, but no other "corporate characteristics."⁹⁰ In exploiting the rigid Kintner Regulations,⁹¹ such

88. See, e.g., BITTKER & EUSTICE, *supra* note 40, ¶ 1.07[7] ("Most distributions from a C corporation to its shareholders are taxed as ordinary income dividends and do not affect the stock's basis. If the corporation distributes appreciated property, it must recognize as income the difference between the property's fair market value and its adjusted basis.").

89. RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES, *supra* note 1, § 10.05, at 250 ("Since the IRS was in [*United States v. Kintner*] concerned with stopping what it believed were essentially partnerships from attaining certain tax advantages of incorporation . . . the Kintner regulations are weighted in favor of finding that a business organization is *not* a corporation."). Shareholders can avoid double taxation by electing to incorporate under Subchapter S of the Internal Revenue Code. See I.R.C. § 1361 *et seq.* (2002). S Corporations, however, are subject to significant organizational restrictions. S Corporations cannot, *inter alia*, have more than seventy-five shareholders, create more than one class of stock, or own a corporate subsidiary. *Id.* § 1361(b)(1)-(2). Additionally, S Corporations are subject to significant operational restrictions. S Corporation shareholders must allocate income, loss, deduction, and credit in direct proportion to their interests, *id.* § 1377; the corporation's debts are not included in the shareholders' calculation of their deductions, *id.* § 1366(d); and only shareholders who control the corporation and take stock can contribute property without a recognizable gain, *id.* § 351.

90. See, e.g., MCKEE ET AL., *supra* note 77, ¶¶ 2.01[1]-[5], at 2-1 to -5 (outlining various alternative type of business organizations such as the REIT and REMIC). According to one commentator,

[t]he 1960 regulations allowed creative tax planners to devise new ways to use the partnership form to achieve tax benefits. In the 1970s tax planners developed large syndicated tax shelters as limited partnerships that easily met the technical requirements for partnership status. . . . Around 1980, large, widely held limited partnerships, known as master limited partnerships, whose interests were traded on the stock exchange, emerged. . . . Because the master limited partnerships met the technical requirements—by lacking continuity of life and limited liability—owners of these limited partnership interests received all the benefits of publicly traded corporate stock combined with flow-through taxation under the partnership provisions.

Hamill, *Eliminating Partnership Classification*, *supra* note 11, at 340; see also Kalinka, *LLC and Subchapter S*, *supra* note 11, at 1142-56 (recounting historical attempts to evade the Kintner Regulations). Two decisions have upheld limited partnerships functioning as tax shelters despite having greater affinity to corporations. See *Zuckman v. United States*, 524 F.2d 729, 730 (Ct. Cl. 1975); *Larson v. Commissioner*, 66 T.C. 159 (1976). For more information on publicly traded limited partnerships, see generally Committee on Partnerships and Unincorporated Business Organizations, *supra* note 55; Limberg, *supra* note 55.

91. The Kintner Regulations were not intended to be applied mechanistically. See,

business organizations willingly absorbed the costs of dissolving upon a member's death and the risk of exposing members unnecessarily to unlimited liability.⁹² Moreover, the Kintner Regulations were complicated to apply and so business groups, particularly less sophisticated ones, were forced to expend a great deal of resources to determine their federal tax status.⁹³ Small groups of individuals would organize as an unincorporated association under state law, only to realize that such an association nevertheless constituted a corporation for federal tax purposes.⁹⁴ And the possible permutations of corporate characteristics rendered selecting an optimal form a more costly process.⁹⁵

Equally problematic were the theoretical inconsistencies the Kintner Regulations permitted within and between corporate distinctions. On one level, the Regulations undermined their bilateral

e.g., *Morrissey*, 296 U.S. at 358 (finding that earlier judicial interpretations of "association" "are not to be pressed so far as to make mere formal procedure a controlling test. The provision itself negatives such a construction.").

92. See *infra* note 90.

93. See, *e.g.*, Rod Garcia, *Single-Member LLCs: Basic Entities Raise Complex Problems*, 68 TAX NOTES 142, 142 (1996) (observing that "[t]oo many resources have been wasted both by the IRS and the private sector in resolving classification issues") (citing statements by Michael Thomson, Treasury's acting deputy tax legislative counsel). A variant of this problem concerns the political viability of statutes that disadvantage less sophisticated entrepreneurs. See, *e.g.*, RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES, *supra* note 1, § 10.05(3), at 252 (noting that "even if many non-corporate firms were willing to adopt two or more corporate characteristics [for the purposes of the Kintner Regulations], legislators would be reluctant to enact statutes that provide for these features out of concern for misleading less sophisticated firms and their lawyers as to tax classification").

94. See, *e.g.*, MCKEE ET AL., *supra* note 77, ¶ 3.06[1], at 3-50 to 51 (delineating attempts to evade Kintner Regulations that met with mixed success); Jeffrey A. Maine, *Linking Limited Liability and Entity Taxation: A Critique of the ALI Reporters' Study on the Taxation of Private Business Enterprises*, 62 U. PITT. L. REV. 223, 235 n.65 (2000) ("Under the Kintner classification test, clients and tax practitioners spent considerable amounts of time and resources in ensuring desirable tax classification, despite the fact that partnership classification was usually a foregone conclusion.") [hereinafter Maine, *ALI Critique*].

95. See, *e.g.*, ALI, TAXATION OF PRIVATE ENTERPRISES, *supra* note 4, at 46 ("The IRS must administer . . . the three different [operating-rule] systems. Further, the planning, compliance, and administration costs are ongoing in that businesses may have the opportunity to change their choice of rule structure as their business activities evolve or as other aspects of the law change."); Maine, *ALI Critique*, *supra* note 94, at 235 n.65 ("[T]he Service spent considerable amounts of time and resources interpreting each factor and issuing rulings to those seeking assurance as to classification."); Weisbach, *supra* note 4, at 1629 ("Although taxpayers could achieve the desired tax results, the costs—the changes in organizational structures needed to meet the rules and the fees to accountants and lawyers—were significant in the aggregate.").

treatment of corporations and partnerships.⁹⁶ This is because an unincorporated business organization with more than two corporate characteristics would qualify for double taxation.⁹⁷ In essence, actual partnerships could be corporations for federal tax purposes.⁹⁸ On another level, the Regulations revealed a false distinction between "entities" and "aggregates." Behind the differential treatment of corporations and partnerships was a much broader, long-standing opposition between "entities" and "aggregates."⁹⁹ As applied to the Kintner Regulations, an unincorporated business organization qualifying for pass-through taxation constituted a partnership for federal tax purposes and thus an "aggregate."¹⁰⁰ This characterization, however, conflicted with the established knowledge that partnerships can and do exhibit many defining features of

96. See *supra* notes 77-87 and accompanying text.

97. Former Treas. Reg. § 301.7701-2(a)(1); see Rev. Proc. 95-10, 1995-1 C.B. 501, 501-05 (specifying under what conditions the IRS will determine whether an association should receive partnership or limited liability tax treatment). *But see* Rev. Rul. 88-76, 1988-2 C.B. 360, 361 (establishing that an LLC will be treated as a partnership unless continuity of life and free transferability of interest are both exhibited).

98. See, e.g., Larry E. Ribstein, *Possible Futures for Unincorporated Firms*, 64 U. CIN. L. REV. 319, 347 (1996) ("In general, the tax rules appear to be 'egg-eater' rules because they focus on underlying features rather than the form of the entity. . . . [I]f the firm varies the defaults it might be characterized for tax purposes as a corporation even if it is a 'partnership,' or as a 'partnership' even if it is an LLC.").

99. According to the ALI,

[t]he origin of . . . separate entity taxation of corporations as opposed to the conduit taxation of partnerships, can be linked to some extent to a debate that raged during the last part of the 19th century and the early part of the 20th century At that time, the 'aggregate' versus 'entity' controversy . . . applied to both corporations and partnerships. Gradually, the entity theory prevailed for corporations but not for partnerships. . . . This theory of business-organization personality influenced the income-tax rules that developed for those organizations.

ALI, TAXATION OF PRIVATE ENTERPRISES, *supra* note 4, at 35-36 (citing Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 57-62 (1990)); see also *infra* notes 101-02 and accompanying text. Under the aggregate theory, the corporation comprises "a mere collection of men having collectively certain faculties." *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). In contrast, under the entity theory, the corporation does not "derive aid from the personal character of its members; nor does it incur any disability from the disabilities of the individuals who compose the society. . . . [The corporation] is substance: it is the knot of its combination; it is its essence; it is the thing itself." *Id.* at 75 (quoting the defendant in opposition).

100. See Robert R. Keatinge, *Corporations, Unincorporated Organizations, and Unincorporations: Check the Box and the Balkanization of Business Organizations*, 1 J. SMALL & EMERGING BUS. L. 201, 233-34 (1997) (referencing tension between aggregate and entity theories of characterization) [hereinafter Keatinge, *Balkanization of Business Organizations*].

"entities."¹⁰¹ Whether a particular business organization "fit" the "aggregate" or "entity" theory only begged the question of whether these theories were conceived adequately.¹⁰² And on a final level, the Regulations disrupted the relationship between the corporation-partnership and entity-aggregate dichotomies. An incorporated business organization—an "entity" in a principled sense—also could qualify for pass-through taxation and thus constitute a partnership for federal tax purposes.¹⁰³ So "entities" could assume the federal tax identity of a partnership. In this way, the Kintner Regulations severed the parallel agreement between tax categories and principled characterizations.

Contrary to conventional belief, these multi-level inconsistencies are responsible for ensuring the continued significance of the Kintner Regulations.¹⁰⁴ Many commentators still utilize the four Kintner

101. See, e.g., ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 1.03 (1988) (discussing aggregate-entity distinction and showing that partnerships, like corporations, are regarded as entities for many purposes). Moreover, the Revised Uniform Partnership Act has recognized that the distinction between aggregate and entity theories is of limited utility. Partnerships, for instance, may seem to have "aggregate" liability for partners, but actually have "entity" capacity to own and dispose of property. See RUPA, *supra* note 1, § 201(a) ("A partnership is an entity distinct from its partners."). Indeed, the Official Comment to section 201 states that "the explicit statement provided by subsection (a) is deemed appropriate as an expression of the increased emphasis on the entity theory as the dominant model." *Id.* at 69.

102. See RUPA, *supra* note 1, § 201(a) (contending that partnerships seem to have "aggregate" liability for members, but "entity" capacity to own and dispose of property). One prominent commentator has noted that

[a]n unincorporated business association is not necessarily best characterized as either an aggregate or an entity because it combines aggregate and entity features. . . . It follows that it makes no sense to say that, because a partnership is on balance an "aggregate," it should necessarily have *only* "aggregate" features, such as personal liability or direct taxation of partners.

RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES, *supra* note 1, § 1.02, at 4.

103. And conversely, an unincorporated business organization—and so an "aggregate" in a doctrinal sense—could be considered a corporation for federal tax purposes. Indeed, some commentators have argued that LLCs most closely resemble S Corporations. See, e.g., Kalinka, *LLC and Subchapter S*, *supra* note 11, at 1084 ("While an LLC has some partnership characteristics, it more closely resembles the type of corporation that currently qualifies for taxation under subchapter S of the Internal Revenue Code ('S corporation')."); see also Jill E. Darrow, *Limited Liability Companies and S Corporations: Deciding Which Is Optimal and Whether To Convert To LLC Status*, 48 TAX LAW. 1 (1994) (drawing comparisons between LLCs and S Corporations beyond their similar pass-through tax treatment). Indeed, the IRS has established that an LLC that elects tax treatment as a corporation can elect to become an S corporation. See, e.g., Priv. Ltr. Rul. 98-53-045 (Oct. 2, 1998); Priv. Ltr. Rul. 96-36-007 (May 30, 1996).

104. See, e.g., Keatinge, *Balkanization of Business Organizations*, *supra* note 100, at 217 ("While the modification of the tax rules has made these properties [in the Kintner

factors when attempting to assess the relative merits of classifications for corporations and unincorporated limited associations.¹⁰⁵ Ironically, such comparisons are difficult precisely because of the Kintner Regulations. The desire to circumvent classification as a corporation for federal tax purposes directly led to the emergence of numerous unincorporated limited associations.¹⁰⁶

Regulations] unimportant for purposes of federal tax classification, these properties continue to be default rules under most partnership and LLC statutes.”).

105. See, e.g., Fallany O. Stover & Susan Pace Hamill, *The LLC Versus LLP Conundrum: Advice for Businesses Contemplating the Choice*, 50 ALA. L. REV. 813, 817 (1999) (comparing LLCs versus LLPs based on, *inter alia*, their respective management structures and limited liability shields); see also Keatinge, *Universal Business Organization Legislation*, *supra* note 7, at 36 (proposing distinction based on relation of business association to “internal properties,” which concern owners, managers, and agents, and “external properties,” which concern third parties). Keatinge proceeds to list eleven defining characteristics of all business organizations: (1) entity status; (2) limited or vicarious liability management structure; (3) formation requirements; (4) dissolution effects; (5) “Requirement of Owners at Formation”; (6) “Fungibility of Ownership Interests”; (7) “Sharing Relationships”; (8) “Interim Distribution Decisions”; (9) “Liability for Distributions”; (10) apparent authority; and (11) “Transferability of ownership interests.” *Id.* at 37-44.

106. See Hamill, *Corporate Integration*, *supra* note 39, at 402 (“If the tax system provided for corporate integration, the LLC probably would not have been born and without the critical partnership classification, the LLC had no chance of expanding throughout the country.”). “[B]y bringing the inequities between the incorporated and unincorporated forms out of the closet, the rise of the LLC form should compel lawmakers to integrate small closely held businesses as quickly as possible.” *Id.* at 432. According to the Delaware Supreme Court, the LLC “is designed to achieve what is seemingly a simple concept—to permit persons or entities (members) to join together in an environment of private ordering to form and operate the enterprise . . . with tax benefits akin to a partnership and limited liability akin to the corporate form.” *Elf Atochem N.A., Inc. v. Jaffari*, 727 A.2d 286, 287 (Del. 1999). Some commentators, however, attribute the blurring of corporate distinctions to the emergence and ascendance of limited liability companies:

With the LLC “gold standard” of pass-through income taxation and limited liability for all, one might have predicted that other existing forms would either need to change or become unimportant. The former prediction was correct. . . . Rather than jump to a new entity . . . why not just add limited liability by statute to an old favorite? As a result, LLPs and LLLPs were born.

Oesterle & Gazur, *What’s in a Name?*, *supra* note 8, at 105.

The origins of the limited liability company trace back to the German business form known as the *Gesellschaft mit beschränkter Haftung* (GmbH). See Bahls, *supra* note 83 (citing WILLIAM D. BAGLEY & PHILIP P. WHYNOTT, *THE LIMITED LIABILITY COMPANY: THE BETTER ALTERNATIVE* 1.502-503 (1991); WOLFGANG G. FRIEDMANN & GEORGE KALMANOFF, *JOINT INTERNATIONAL BUSINESS VENTURES* 214, 216-17 (1961)); see also Hamill, *Origins*, *supra* note 37. In its early formulation, the LLC received the same federal tax treatment applied to corporations. See, e.g., Carol R. Goforth, *The Rise of the Limited Liability Company: Evidence of a Race between the States, But Heading Where?*, 45 SYRACUSE L. REV. 1193, 1200 (1995). Only two states, Florida and Wyoming, initially recognized LLCs. See FLA. STAT. ANN. § 608.401-608.514 (West

Forms such as the LLC and LLP quickly demonstrated the inadequacy of the Kintner Regulations' predicate corporate distinctions.¹⁰⁷ So the Kintner Regulations arguably facilitated their own demise.

2. Check-the-Box Regulations¹⁰⁸

The IRS finally acknowledged the problems plaguing the Kintner Regulations in 1995. Observing that "many states recently have revised their statutes to provide that partnerships and other unincorporated organizations may possess characteristics that have traditionally been associated with corporations, thereby narrowing considerably the traditional distinctions between corporations and partnerships,"¹⁰⁹ the IRS decided to evaluate the merits of a more efficient corporate taxation scheme. In 1996, Treasury, working in conjunction with the IRS, concluded: "The existing regulations for classifying business organizations as associations . . . or as partnerships . . . are based on the historical differences under local law between partnerships and corporations. Treasury and the IRS believe that those rules have become increasingly formalistic."¹¹⁰

1982) (enacted in 1982); WYO. STAT. ANN. § 17-15-101 (Michie 1977) (enacted in 1977). In 1988, the IRS issued a ruling classifying a Wyoming LLC as a partnership for federal tax purposes. Rev. Rul. 88-76, 1988-2 C.B. 360 (1988). Then, in 1992 and 1993, the IRS issued rulings recognizing LLCs as partnerships for federal tax purposes in Virginia, Rev. Rul. 93-5, 1993-1 C.B. 227 (1993); Colorado, Rev. Rul. 93-6, 1993-1 C.B. 229 (Dec. 24, 1992); Delaware, Rev. Rul. 93-38, 1993-1 C.B. 233 (1993); Nevada, Rev. Rul. 93-30, 1993-1 C.B. 231 (1993). As one person critically observed, through the IRS rulings, "the Federal Government . . . opened up a candy store." James W. Wetzler, 1992 TAX NOTES TODAY 243-10. By 1994, thirty-eight states had enacted statutes recognizing and governing limited liability companies. Hamill, *Corporate Integration*, *supra* note 39, at 442-43. The IRS has never provided an official reason for its decision to change the tax policy for LLCs. Some commentators have speculated the change resulted from intense lobbying by business interests. *See, e.g.*, William W. Bratton & Joseph A. McCahery, *An Inquiry into the Efficiency of the Limited Liability Company: Of Theory of the Firm and Regulatory Competition*, 54 WASH. & LEE L. REV. 629, 683 (1997) (concluding that "the efficiency case for the LLC runs into a problem because interest group influence figures prominently in all accounts of the proliferation of LLC statutes").

107. *See, e.g.*, Thomas E. Fritz, *Flowthrough Entities and the Self-Employment Tax: Is It Time for a Uniform Standard?*, 17 VA. TAX REV. 811, 876 (1998) ("As evidenced by the emergence and subsequent popularity of the hybrid LLC, as well as by the [IRS's] 1996 adoption of final 'check-the-box' regulations, the historic distinctions among various forms of flowthrough entities are blurring."); Carol R. Goforth, *Limiting the Liability of General Partners in LLPs: An Analysis of Statutory Alternatives*, 75 OR. L. REV. 1139, 1150 (1996) ("Like LLPs, LLCs also blur the distinction between corporations and partnerships . . .").

108. Treas. Reg. § 301.7701-1 to -3 (2002).

109. I.R.S. Notice 95-14, 1995-1 C.B. 297.

110. *Simplification of Entity Classification Rules*, 61 Fed. Reg. 66,584, 66,584 (proposed Dec. 18, 1996) (codified at 26 C.F.R. pts. 1, 301, 602); *see, e.g.*, Gomez, *supra*

Accordingly, the IRS repealed the Kintner Regulations and instituted what now are known as "check-the-box" regulations.¹¹¹

Under these new regulations, federal tax treatment primarily depends on whether an entity is subject to the rules governing public trading.¹¹² Nearly all publicly traded entities receive treatment as corporations for federal tax purposes.¹¹³ All separate entities, except trusts and certain other exempt entities, are treated as "business entities."¹¹⁴ Two classes of "business entities" always receive treatment as corporations for federal tax purposes: entities organized under state corporation laws, and specially-listed entities such as joint stock companies, insurance companies, federally insured banks, and state-owned entities.¹¹⁵ All remaining "business entities" can elect whether they want to be treated as a corporation or a

note 52, at 292 ("[T]he [Kintner] regulations drew bright lines, precluding classification as an association unless the organization had more corporate characteristics than non-corporate characteristics."); Symposium, *supra* note 7, at 609 ("The so-called 'check-the-box' regulations mark the toppling of the old, formalistic regime.") (quoting J. William Callison). Arguably, this rationale has been undermined by Treasury and the IRS through their reliance on state corporate law to determine how mergers are to be treated for tax purposes. See Steven A. Bank, *Taxing Divisive and Disregarded Mergers*, 34 GA. L. REV. 1523, 1583-84 (2000) ("By denying A reorganization status to the merger of a target corporation into a disregarded entity . . . Treasury is turning [its stated purpose for the check-the-box regulations] on its head.").

111. There are questions about whether Treasury had the authority to implement the check-the-box regulations. See Hamill, *Eliminating Partnership Classification*, *supra* note 11, at 337 n.15 ("Arguably, eliminating [the Kintner] regulations by interpretative regulation, whether by creating a taxpayer election system or requiring *per se* partnership treatment, exceeds the Service's authority under IRC section 7805 . . .") (emphasis added). But see Victor E. Fleischer, Note, "If It Looks Like a Duck": *Corporate Resemblance and Check-the-Box Elective Tax Classification*, 96 COLUM. L. REV. 518, 520 (1996) ("Check-the-Box, in tandem with the publicly traded partnership rules, satisfies administrative law standards as a reasonable implementation of the congressional mandate to impose the corporate tax on those entities that resemble corporations.").

112. See, e.g., Joint Committee on Taxation Staff Review of Selected Entity Classification and Partnership Tax Issues (JCS-6-97), Daily Tax Rep. (BNA) (Apr. 9, 1997); see also Richard A. Booth, *The Limited Liability Company and the Search for a Bright Line Between Corporations and Partnerships*, 32 WAKE FOREST L. REV. 79, 83 (1997) ("There are numerous indications that public trading is in fact the most important line of demarcation between partnerships and corporations for tax purposes.") (citing Donna D. Adler, *Master Limited Partnerships*, 40 U. FLA. L. REV. 755, 783-86 (1988)).

113. See 26 C.F.R. § 301.7701-2(a) (2002); see also *supra* note 4.

114. 26 C.F.R. § 301.7701-2(a) ("For purposes of this section and § 301.7701-3, a *business entity* is any entity recognized for federal tax purposes . . . that is not properly classified as a trust under § 301.7701-4 or otherwise subject to special treatment under the Internal Revenue Code.").

115. *Id.* § 3301.7701-2(b).

partnership for federal tax purposes.¹¹⁶ Despite the seeming simplicity of this elective scheme, the check-the-box regulations still face some of the problems that plagued the Kintner Regulations.¹¹⁷

Nonetheless, the check-the-box regulations are widely perceived to have collapsed the practical distinction between corporations and unincorporated associations for federal tax purposes,¹¹⁸ and have become a vehicle for unified treatment of all business organizations. Some commentators have argued for unification on the sole basis of limited liability.¹¹⁹ There also have been proposals for collapsing

116. *Id.* § 3301.7701-3(c).

117. According to the ALI,

[a]lthough in theory, similarly situated businesses have an equal opportunity to be treated in the same tax-advantageous manner under current law, the practical reality is probably to the contrary, due to disparities in the quality of advice the businesses receive. By permitting such disparate tax choices without any apparent underlying, conceptual foundation, current law has simply provided a tax benefit for the well-advised and a trap for the ill-advised.

ALI, TAXATION OF PRIVATE ENTERPRISES, *supra* note 4, at 45; *see also* Maine, *ALI Critique*, *supra* note 94, at 240 ("The current law . . . is inefficient in that the available choices create unnecessary costs and complexities. Businesses must understand and compare three complex regimes before choosing one that minimizes overall taxes."); *cf. supra* notes 88-103 and accompanying text.

118. Arguably, a chasm exists between the perceived and actual effect of the check-the-box regulations on corporate entity characterizations. Eligible businesses may choose treatment as a corporation or as a partnership for federal tax purposes. In this way, the check-the-box regulations still perpetuate the orthodox corporation-partnership dichotomy. *See supra* notes 52 and 87. This is not to say that the dichotomy is sound. *See supra* note 86. In any event, perceptions need not be grounded in fact to have material consequences; whether the oversight by commentators is deliberate or unintentional, they nevertheless have pushed for unified treatment of business organizations on the basis of the check-the-box regulations. I thank an insightful conversation with Alice G. Abreu for this point.

119. *See, e.g.,* Oesterle & Gazur, *What's in a Name?*, *supra* note 8, at 141-48 (proposing uniform statutory treatment on basis of limited liability). Other commentators disagree:

[A]n extension of the corporate tax using substantive limited liability would be unwise for at least two reasons. First, it would severely disrupt the current business climate and would call into question the status of many partnerships. Second, the provisions surrounding the structure of the corporate tax contain many opportunities to mitigate its effect, which arguably sends a policy signal against any further expansion of the corporate tax beyond the corporate form.

Hamill, *Corporate Integration*, *supra* note 39, at 434. In addition, Jeffrey Maine argues that

[f]orcing all non-public entities to use one uniform limited liability business form is undesirable from a policy perspective, as such form would necessarily mandate extreme flexibility. . . . Conversely, maintaining distinctions among business forms and permitting businesses to choose among a proliferation of different forms, each serving a different purpose and each with its own

regulation of corporations and unincorporated associations into one universal statute,¹²⁰ where properties common to all business forms

coherent set of default rules, best serves diverse business interests. A proliferation of statutes offering different operational structures and established, predictable rules on fiduciary duties and piercing is far better, in theory, than one generic, flexible business form that would create a pandemonium free-for-all.

Jeffrey A. Maine, *Evaluating Subchapter S in a "Check-the-Box" World*, 51 TAX LAW. 717, 754 (1998) [hereinafter Maine, *Evaluating Subchapter S*]; see also David M. Deaton, Comment, *Check-the-Box: An Opportunity for States to Take Another Look at Business Formation*, 52 S.M.U. L. REV. 1741, 1744 n.20 (1999) (citing arguments by Mark J. Lowenstein, Osterle, and Gazur stating that the check-the-box regulations obviate the need for limited liability forms beyond corporations, general partnerships, and LLCs).

The American Law Institute has recommended uniform federal tax treatment for all private business entities, but rejected distinguishing firms on the basis of whether limited liability exists. See ALI, TAXATION OF PRIVATE BUSINESS ENTERPRISES, *supra* note 4, at 2-1. According to the American Law Institute, the income tax is not a tax on "benefits conferred" and, in any event, the amount of an entity-level tax could not properly reflect the value of the limited liability benefit. *Id.* at 54. Second, linking entity taxation and limited liability "would simply discourage firms from utilizing an efficient method of doing business" because limited liability creates efficiency gains by reducing agency costs and promoting diversification and more liquid investments. *Id.* at 55. Third, Congress and the Treasury have consistently refused to adopt such a rule. Fourth, it would be difficult to implement such a rule given the proliferation of possible entity forms and financing arrangements. *Id.* at 55-56; cf. generally Maine, *ALI Critique*, *supra* note 94, at 223.

120. See, e.g., Thomas F. Blackwell, *The Revolution Is Here: The Promise of a Unified Business Entity Code*, 24 J. CORP. L. 333, 334 (1999) ("The time has come for serious (re)consideration of a single unified code that would govern all variations of businesses entities . . .") (citing Henry J. Haynsworth, *The Need for a Unified Small Business Legal Structure*, 33 BUS. LAW. 849 (1978); Robert A. Kessler, *With Limited Liability for All: Why Not a Partnership Corporation?*, 36 FORDHAM L. REV. 235 (1967-68); John H. Matheson & Brent A. Olson, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1 (1996)) [hereinafter Blackwell, *Revolution*]; Keatinge, *Universal Business Organization Legislation*, *supra* note 7, at 68-69. "Changes in the tax law and the revision of most organic statutes have afforded those who work with these statutes the freedom to make the changes in them which facilitate the use of forms used by business owners. In doing so, many of the statutory distinctions among forms have disappeared, leaving some statutory forms almost indistinguishable from others . . ." Keatinge states that "[d]ue to the growth in alternative and often indistinguishable forms, the need for an increase in universality of the organic statutes governing the forms is suggested.").

Keatinge outlines two proposals for a universal statute: (1) the Universal Contractual Organization ("UNICORN"), whereby a single new business form may comprise most available business forms; and (2) the "hub-and-spokes" system, where general rules govern attributes shared by all business forms. *Id.* at 81. But see Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium*, 66 TENN. L. REV. 137, 235-45 (1998) (criticizing Keatinge's notion of an "unincorporation"). As early as 1995, Keatinge, along with George Coleman, in connection with the American Bar Association's Business Law Section Committee on Taxation and Partnerships and

would be subject to a superstructure of rules while sub-provisions would address properties particular to each business form.¹²¹

To a significant extent, both types of proposals flow from an unease directly attributable to the limited liability company. Whether the check-the-box regulations effected a liberalization of tax standards that popularized the limited liability company, or vice versa,¹²² numerous states have since amended their statutes

Unincorporated Business Organizations, had presented a draft argument for and proposed outline form of a UNICORN Act. See The Azle Society, *UNiversal [Contractual] ORgaNization Act*, at <http://www.stcl.edu/inet-llc/commlllo.html> (Aug. 7, 1995). See generally Thomas Geu & Robert Keatinge, *The Proposed Model Inter-Entity Transactions Act: A Proposal to Rationalize Changes in Forms of Business Organizations*, 37 REAL. PROP. PROB. & TRUST J. 385 (2002).

121. These universal statutes, which feature a hub-and-spoke structure, cater to two competing interests: "The first is a desire to simplify the statute and minimize duplication of provisions. The second is a concern that practitioners and other researchers be able to find all relevant provisions of the law." Thomas F. Blackwell, *Finally Adding Method To Madness: Applying Principles of Object-Oriented Analysis and Design To Legislative Drafting*, 3 N.Y.U. J. LEGIS. & PUB. POL'Y 227, 255 (1999-2000). How a universal statute would operate faces rule-based concerns that bear jurisprudential implications:

In evaluating each characteristic a statute may provide, drafters of a universal statute must consider whether that characteristic should be a mandatory or default rule. In an environment of highly flexible organic statutes, most rules should only apply as a default. There are only three reasons that a property should be mandatory: (1) public policy requires that it be mandatory, (2) it should be mandatory as a result of the fact that third parties will be relying on it, or (3) it should be mandatory as a structural rule.

Keatinge, *Universal Business Organization Legislation*, *supra* note 7, at 82. In many respects these considerations parallel H.L.A. Hart's "description" of how secondary rules function to supplement primary rules. See H.L.A. HART, *THE CONCEPT OF LAW* 89-91 (1961). Hart delineates three deficiencies in primary rules: (1) their uncertainty (i.e., lack of an authoritative basis); (2) their static character (i.e., need for adaptive compliance); and (3) their inefficiency (i.e., problems of enforcement). *Id.* To remedy these deficiencies, Hart suggests "supplementing the primary rules of obligation with secondary rules" *Id.* at 91. For a description of these secondary rules, see *id.* at 91-94. But see RONALD DWORKIN, *LAW'S EMPIRE* 34-35, 43-46, 70-72 (1986) (advancing a not unproblematic account of concepts and conceptions from which he formulates a critique of Hart's notion of secondary rules, also known as "the semantic sting").

122. See, e.g., *supra* notes 106-07 and accompanying text; see also CALLISON & SULLIVAN, *supra* note 1, § 1.5, at 4 (contending shift in federal tax status resulted in limited liability companies being recognized by numerous states); Maine, *Evaluating Subchapter S*, *supra* note 119, at 718 ("In the wake of check-the-box classification, the LLC has become even more attractive. Many states amended their LLC statutes in 1997, eliminating the statutory restrictions intended to cope with the old classification system and giving the LLC the flexibility to look like a corporation."); Dale A. Oesterle, *Subcurrents in LLC Statutes: Limiting the Discretion of State Courts to Restructure the Internal Affairs of Small Business*, 66 U. COLO. L. REV. 881, 881 (1995) ("The ongoing revolution in small business structure is driven by the belief that limited liability should be available to businesses without a tax penalty."). Keatinge states that:

governing various business organizations.¹²³ These amendments modify a variety of provisions originally designed to comply with the Kintner Regulations and converge in their preoccupation with regulating the limited liability company.¹²⁴ Not surprisingly, the reason behind the convergence is that the limited liability company, as formulated, is a hybrid of characteristics historically associated with both corporations and partnerships—the same set of characteristics that comprise the Kintner Regulations.¹²⁵ The implicit belief is that, by addressing limited liability companies, amended statutes can address all types of business organizations.¹²⁶ And this is

[B]ecause the tax code favors unincorporated business organizations that may be treated as partnerships and many business organizers prefer an organization that has many of the characteristics of a corporation (such as certificated interests, officers, and other corporate characteristics), the result is that many organizers are forming LLCs that contractually adopt characteristics that are corporate in nature.

Keatinge, *Universal Business Organization Legislation*, *supra* note 7, at 34.

123. See, e.g., Blackwell, *Revolution*, *supra* note 120, at 338. ("As might be expected with the recent expansion of the number of types of entities, and continuing of the authorizing statutes for various types of business entities, . . . there has been a development of a certain amount of overlap between the various statutes. This has been particularly true in areas such as statutory merger provisions . . .").

124. One commentator has observed that

[m]any of the provisions of the newer statutes have been driven by the desire to attain specific tax results while protecting business owners from vicarious liability for the obligations of their businesses. For example, current LLC statutes provide . . . that the dissociation of a member results in the dissolution of the LLC. . . . In formulating new business organization statutes and revising existing statutes, drafters have borrowed provisions from statutes governing one form of organization and have engrafted them into statutes governing others. Thus, many LLC statutes contain provisions borrowed from both traditional corporations and partnerships.

Keatinge, *Universal Business Organization Legislation*, *supra* note 7, at 48-49; see also Maine, *ALI Critique*, *supra* note 94, at 239 n.80 ("After the introduction of check-the-box entity classification regulations, state-law provisions in business statutes intended to cope with the Kintner classification regulations became unnecessary. . . . For example, some states eliminated the requirement that an LLC's Articles of Organization set forth a period of duration.") (citing Gary W. Derrick, *Oklahoma Limited Liability Companies and Limited Liability Partnerships*, 22 OKLA. CITY U. L. REV. 643 (1997)); Susan Kalinka, *The Louisiana Limited Liability Company Law after "Check-the-Box"*, 57 LA. L. REV. 715 (1997)); Oesterle & Gazur, *What's in a Name?*, *supra* note 8, at 104 ("[T]hose amending the various statutory forms are driving all forms toward each other. The drafters are attempting to allow businesses to register under whatever title they need for external regulatory advantage and, at the same time, contract specifically for the internal form of organization they prefer.").

125. Former Treas. Reg. § 301.7701 *et seq.*; see also *supra* notes 76-79.

126. But see, e.g., Keatinge, *Universal Business Organization Legislation*, *supra* note 7, at 81 ("In a hub and spoke regime, all of the alternative approaches to each property would be identified and separately described in the statute. This would require the identification of each property that must be addressed in all business

the same belief implicit in a universal statute or in treatment purely based on limited liability.¹²⁷

But the limited liability company's hybridity is an empty premise that alone cannot justify merging regulation of corporations and limited unincorporated associations. By definition, the limited liability company exhibits characteristics that bridge the historical dichotomy between corporations and partnerships¹²⁸—a dichotomy undermined by the operation and circumvention of the Kintner Regulations.¹²⁹ As a hybrid is only as good as its constituent elements, the limited liability company cannot amalgamate different organizational attributes viably from a defunct categorical distinction. More poignantly, the move to collapse statutory treatment of business organizations cannot be rationalized on the ground that the limited liability company, as well as other similar entities, combines elements of corporations and partnerships that are no longer exclusive.¹³⁰

The remaining rationales for such a move are no better. These rationales concern, respectively, a universal statute and a statute based on limited liability. First, some commentators contend that states already have begun implementing forms of universal statutes.¹³¹ This contention more closely resembles fatalism than any

organizations."). *But see, e.g.,* Richard A. Booth, *Form and Function in Business Organizations* (2003), available at SSRN Electronic Paper Collection, <http://www.ssrn.com/abstract=378740> (criticizing entity rationalization on the basis that "[i]t seems clear that there are fundamental differences between forms" and that "choice of form may affect the culture of a firm, and indeed that choosing the wrong form or mixing and matching elements may be harmful."). According to Professor Booth, "[o]ne of the distinct risks of entity rationalization . . . is that businesspeople will overplan and choose terms that do not work well together. . . . Mixing and matching rules from different organizations may be dangerous." *Id.*

127. *But see, e.g.,* *Mudge Rose Guthrie Alexander & Ferdon v. Pickett*, 11 F. Supp. 2d 449, 451-52 (S.D.N.Y. 1998) (rejecting New York LLP's argument that its statutorily-afforded limited liability justified treatment as a corporation for diversity jurisdiction purposes). The *Mudge* court reasoned that "the standard of liability by which the actions of members of an LLP are to be measured has little bearing on the proper characterization of the organization for [jurisdictional] purposes." *Id.* at 451-52.

128. *See* Gomez, *supra* note 52.

129. *See supra* Part II.A.1.

130. *See supra* note 117.

131. According to one proponent of universal statutes,

[r]egardless of whether statutory rules *should* move in the direction of universality, it seems clear that statutes *will* tend to move in that direction. While law professors and uniform law commissioners may consider these matters, statutory drafting in this area is being done almost entirely by practitioners Thus, the question is not whether these changes should occur, but whether the changes described in this article are likely to occur.

Keatinge, *Universal Business Organization Legislation*, *supra* note 7, at 68. This arguably explains the growing preponderance of model acts. *See, e.g.,* UPA, *supra* note

sort of justification. Merely citing the current state of affairs provides no assurance that this is a substantively sound path to take. Indeed, this argument merely comports with the possibility that these statutes uncritically perpetuate defunct corporate classifications and definitions. Second, other commentators believe a statute based on limited liability would yield the best policy results, as limited liability historically has been the most prominent aspect of business organization.¹³² But these commentators acknowledge, as they must, that limited liability has been of partial relevance ever since the Court decided *Morrissey v. Commissioner*.¹³³ In any event, this historical argument does not justify using limited liability now, much less ignoring all other aspects of business organization.¹³⁴ None of these objections is to say that these proposals are unsound—or even undesirable. But the proposals clearly lack a concrete legal basis for changing the existing framework for business organizations.

B. Statutory and Common Law Gaps

1. Corporate Citizenship

A statutory test determines the citizenship of corporations for federal jurisdictional purposes.¹³⁵ The historical basis for this test resides in the well-known trilogy of Supreme Court decisions: *Bank of the United States v. Deveaux*,¹³⁶ *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*,¹³⁷ and *Marshall v. Baltimore & Ohio Railroad*

1; RUPA, *supra* note 1. Cf. Oesterle & Gazur, *What's in a Name?*, *supra* note 8, at 108 ("Our obsession with 'uniform' state statutes may restrict and retard an otherwise valuable and natural process of statutory evolution, the state against state game of legal leapfrog."); see also Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws, and Limited Liability Companies*, 66 U. COLO. L. REV. 947, 949-53 (1995) (contending that market processes would yield a better set of statutes than a concerted effort to create one statute by experts).

132. See, e.g., Maine, *ALI Critique*, *supra* note 94, at 227-31 (contending that the development of limited liability explains the development of entity taxation); see also *supra* note 83. These policy claims are by no means certain. See *id*

133. 296 U.S. 344 (1935); see Maine, *ALI Critique*, *supra* note 94, at 232 ("In the mid-1930s, courts began to formulate tax classification standards that weakened the role of limited liability in distinguishing between those entities that should be subject to an entity-level tax and those that should not. . . . In cases and regulations following *Morrissey*, the relevance of limited liability in determining tax status diminished.").

134. See, e.g., Klein & Zolt, *supra* note 87, at 1008 ("Although the tax issue and the limited liability issue historically have been intertwined, we find no good reason why that should be.").

135. 28 U.S.C. § 1332(c)(1) (2000) ("[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.").

136. 9 U.S. (5 Cranch) 61 (1809).

137. 43 U.S. (2 How.) 497 (1844).

Co.¹³⁸ This trilogy established a presumption of corporate citizenship that, according to the Supreme Court, was a "compromise destined to endure for over a century."¹³⁹

The debate over whether to grant citizenship to corporations initially revolved around the propriety of characterizing them as either an entity or an aggregate.¹⁴⁰ In *Deveaux*, Chief Justice Marshall established the analytical parameters for this issue with his now familiar observation: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in [federal] courts . . . unless the rights of the members . . . can be exercised in their corporate name."¹⁴¹ According to Marshall, the legal fiction of corporations having "corporeal qualities," in connection with the "general purposes and objects of a law"¹⁴² implied that corporations be represented in court by their members¹⁴³ and assume

138. 57 U.S. (16 How.) 314 (1853).

139. *United Steelworkers of Am., AFL-CIO v. R. H. Bouligny, Inc.*, 382 U.S. 145, 148 (1965). See generally Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95 (1995) (delineating three constitutional theories of the corporation: (1) the "corporate person," (2) the "contract," and (3) the "unconstitutional conditions") [hereinafter Ribstein, *Constitutional Conception*].

140. See *supra* notes 101-02 and accompanying text.

141. *Deveaux*, 9 U.S. (5 Cranch) at 86. The issue before the Court was whether the Georgia branch of the Bank of the United States, whose president and officers were all citizens of Pennsylvania, could commence a trespass action against certain Georgia citizens on the basis of diversity jurisdiction. *Id.* at 63.

142. *Id.* at 89; see also *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."). As one author has noted,

[u]ntil the last few years of the nineteenth century jurists took for granted that when they called a corporation a person, they were indulging in a standard convention, a kind of legal shorthand, that meant nothing more than treating a group of corporators . . . as a unit instead of individually. For most of the century, personification depended upon two interrelated but analytically distinguishable propositions: that the corporation was an artificial entity and that the corporation existed only through the grant of incorporation from the sovereign. . . . That the two were almost always used together in legal arguments . . . reinforced the view that the corporation was but a legal fiction.

Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1447-48 (1987)."

143. *Deveaux*, 9 U.S. (5 Cranch) at 91 ("[T]he term citizen ought to be understood, as it is used in the [C]onstitution That is, to describe the real persons who come into court . . ."). The Court held that only the citizenship of the Bank's officers mattered for the purposes of alienage and diversity jurisdiction. See *id.* at 92. A divided majority succinctly summarized the anomaly created by utilizing an entity theory for jurisdictional purposes: "An alien cannot sue a domestic corporation, unless in the state courts. Although you permit an obscure alien to sue a citizen in the federal courts, yet you deny that privilege to a corporation consisting of a great number of

their citizenship.

Thirty-five years later, the Court in *Letson*¹⁴⁴ repudiated *Deveaux* as illegitimately reasoned and unjustifiably perpetuated by stare decisis.¹⁴⁵ Absent an express constitutional prohibition,¹⁴⁶ the Court believed the citizenship of a corporation was related more sensibly to where it can expect to be sued, i.e., the charter state, and not where its members are domiciled.¹⁴⁷ The belief stemmed from the capacity of

aliens." *Id.* at 69. To resolve this anomaly, the Court resorted to a test based on "not what names appear upon the record, but between whom is the controversy; who are the real litigants." *Id.* at 68. By assuming the citizenship of their constituent shareholders, corporations enjoyed only limited access to federal courts on the basis of alienage or diversity jurisdiction. See, e.g., *Commercial & R.R. Bank of Vicksburg v. Slocumb, Richards & Co.*, 39 U.S. (14 Pet.) 60 (1840) (denying diversity of citizenship between Louisiana plaintiffs and a Mississippi corporation with Louisiana members, based on *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *Breithaupt v. Bank of Georgia*, 26 U.S. (1 Pet.) 238 (1828); *Sullivan v. Fulton Steam Boat Co.*, 19 U.S. (6 Wheat.) 450 (1821)).

144. 43 U.S. (2 How.) 497 (1844). The plaintiff, a New York citizen, commenced a breach of contract action against a South Carolina corporation, of which certain members were New York citizens. *Id.* at 497-98.

145. See *id.* at 556 ("We cannot follow further, and upon our maturest deliberation we do not think that the cases relied upon for a doctrine contrary to that which this court will here announce, are sustained by a sound and comprehensive course of professional reasoning."). The Court noted that: "[W]henever a case has occurred on the circuit, involving the application of the case of the Bank and Deveaux, it was yielded to, because the decision had been made, and not because it was thought to be right." *Id.* Interestingly, the Court also acknowledged its concern over widespread dissatisfaction with the rule in *Deveaux*, and "[b]y no one was the correctness of [the rule] more questioned than by the late chief justice [sic] [Marshall] who gave [the rule]." *Id.* at 555. Indeed, the Court felt compelled to state:

We remark too, that the cases of *Strawbridge* and *Curtiss* and the Bank [of the United States] and *Deveaux* have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly and with dissatisfaction.

Id.; see also Charles Warren, *Corporations and Diversity of Citizenship*, 19 VA. L. REV. 661, 667 (1933) (noting federal judges' disapproval of *Deveaux*) [hereinafter Warren, *Corporations*].

146. *Letson*, 43 U.S. (2 How.) at 552 ("[J]urisdiction is not necessarily excluded . . . unless the word citizen is used in the Constitution and the laws of the United States in a sense which necessarily excludes a corporation."). The Court has embraced this principle of *expressio unius* with Article III on a selective basis. See *infra* note 230; see also *Hyde v. United States*, 225 U.S. 347, 390 (1912) (Holmes, J., dissenting) ("The Constitution is not to be satisfied with a fiction.").

147. *Letson*, 43 U.S. (2 How.) at 553. The Court added:

[T]he question occurs, if the corporation be only suable where its locality is . . . and a suit is brought against it by a citizen of another state, . . . it is not a suit between citizens of the state where the suit is brought and a citizen of another state. The fact that the corporators do live in different states does not aid the solution of the question.

Id.

corporations to contract, sue or be sued, and otherwise act as natural persons do.¹⁴⁸ These state-conferred privileges led the Court to conclude that a corporation is "entitled, for the purpose of suing and being sued, to be deemed a citizen of that state."¹⁴⁹

Recognizing difficulties with characterizing corporations as entities or aggregates, the Court abandoned this paradigm for a new rationale in *Marshall*.¹⁵⁰ The decisions in *Deveaux* and *Letson* had created an unresolved tension between the corporation as an artificial entity and as a quasi-person with natural legal powers.¹⁵¹

148. *Id.* at 558; see also Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 207 (1979) (arguing that corporations can have the same "moral privileges, rights, and duties" accorded to persons). Individuals who wished to establish corporations had to apply to state legislatures for charters granting permission to incorporate. See, e.g., Ribstein, *Constitutional Conception*, *supra* note 139, at 98 ("As general incorporation became widely accepted, legal commentators and courts came to view individual contracting parties, rather than the state, as the creators of the corporate entity."). Professor Ribstein, however, identifies two residual vestiges of the "corporate person" theory: (1) limited tort liability and (2) the "internal affairs" doctrine. See *id.* at 99. See generally Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 138-63 (1985) (examining development of corporate privileges and identifying external factors that facilitated adoption of general incorporation laws). The advent of incorporation has brought a recognition that individual contracting parties, and not the state, create a corporation:

The states enacted "general corporation laws" to assure equal access to the corporate form. . . . Although many still saw a reified corporate entity, widespread use of the corporate form directed attention away from juridical constructs and towards the social reality of the business and the creativity of the individuals conducting it.

William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1485-86 (1989). According to one commentator, [t]he older idea that states were responsible for the creation of corporate power no longer seemed appropriate [in the early 20th century]. . . . With this change in theory came a new willingness to treat corporate activity as fundamentally private in nature, differing in no important ways from ordinary individual commercial activities

David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 213. For a debate on whether the corporation is a creature of contract or state action, see Symposium, *Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989) (containing relevant articles by Frank H. Easterbrook, Melvin Aron Eisenberg, Daniel R. Fischel, Lewis A. Kornhauser, and Fred S. McChesney).

149. *Letson*, 43 U.S. (2 How.) at 555. But see Dudley O. McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853, 873 (1943) (deriding *Letson's* holding thusly: "A deemster may adjudge a mouse to be a cat and in a story for children that make-believe would be amusing.") (citing *Letson*, 43 U.S. (2 How.) at 555).

150. 57 U.S. (16 How.) at 314. The case concerned a breach of contract action between a Virginia citizen and a Maryland corporation. *Id.* at 325.

151. Compare *id.* at 327 with *id.* at 327-28 (discussing inherent conflict between corporate status as a legal fiction and its ability to act as a "person" in other ways).

Rather than trying to reconcile this duality, the Court took a pragmatic approach: "The necessities and conveniences of trade and business require that [corporate members] . . . should . . . have the faculty of contracting, suing, and being sued in a . . . collective name. But these important faculties . . . cannot be wielded to deprive others of acknowledged rights."¹⁵² Accordingly, stockholders were held to have assumed the citizenship of the corporation's charter state.¹⁵³ In essence, the Court believed that the prominence of corporations within the nation's economy justified treating them as citizens for jurisdictional purposes.¹⁵⁴

This extension of federal jurisdiction to corporations for alienage or diversity purposes was not uncontroversial. From 1878 to 1910, Congress almost annually entertained bills limiting or prohibiting corporations access to federal courts.¹⁵⁵ Among the most ardent supporters of such bills were corporations, which wished to retain the perceived advantage of litigating in their respective charter state's courts.¹⁵⁶ As corporations became a ubiquitous element of the business landscape,¹⁵⁷ their public standing changed.¹⁵⁸ Particularly infuriating was the abuse by corporations in their strategic selection of where to incorporate.¹⁵⁹

152. *Id.* at 327.

153. *Id.* at 327-28 ("The presumption arising from the habitat of a corporation in the place of its creation . . . [is] conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it. . . ."); *see also* *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839) ("a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created"). In *Doctor v. Harrington*, 196 U.S. 579 (1905), the Supreme Court refused to extend this presumption to prevent stockholder derivative suits based on diversity jurisdiction.

154. *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 327-28 (1853).

155. FRANKFURTER & LANDIS, *supra* note 27, at 136-45 (citing, for instance, persistent legislative efforts by Representative Culberson of Texas); *see also* McGovney, *supra* note 149, at 854.

156. *See, e.g.*, Warren, *Corporations*, *supra* note 145, at 670 ("[T]he doctrine that a corporation could be treated as a citizen and hence as suable in Federal Courts was established against the opposition and protest of the corporation."). According to Warren, the doctrine was for the "benefit [of] the citizen suing the corporation by enabling [her] to keep out of the Courts of the State which chartered the corporation." *Id.*

157. According to one commentator, during the late nineteenth century, "[c]orporations became the dominant units of business and commerce. . . . In 1900 corporations produced approximately 60 percent of the total value of American manufactured goods and employed well over half of the nation's work force." EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958*, at 16 (1992).

158. *See generally* Steven A. Bank, *Corporate Managers, Agency Costs and the Rise of Double Taxation*, 44 WM & MARY L. REV. 167 (2002) (delineating increasingly prevalent suspicions of corporations and their retention of earnings).

159. *See, e.g.*, *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab &*

After codifying the citizenship test for corporations established in *Marshall*,¹⁶⁰ Congress proceeded to address their abusive practices.¹⁶¹ Citing the need to avoid "the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring it litigation into the Federal courts simply

Transfer Co., 276 U.S. 518 (permitting diversity suit by company that had reincorporated in another state specifically for purposes of accessing federal court). The Senate Report for the 1958 amendments specifically cited *Black & White Taxicab*. See *supra* note 34 and *infra* note 162.

160. The Act of 1948 incorporated the citizenship test into Title 28, Section 1332 of the United States Code. Act of June 25, 1948, ch. 646, 62 Stat. 930 (codified as amended at 28 U.S.C. § 1332 (1988)). In 1956, Congress amended the Act of 1948 merely to clarify that Puerto Rico's status as a "State" under section 1332 was not altered by a reference to the "Commonwealth of Puerto Rico" in the Puerto Rican Constitution of 1952. Act of July 26, 1956, Pub. L. No. 84-808, ch. 740, 70 Stat. 658 (codified as amended at 28 U.S.C. § 1332 (2000)).

161. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415. The 1958 amendments incorporated recommendations adopted in 1951 by the Judicial Conference of the United States. See COMMITTEE ON JURISDICTION AND VENUE, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 2 U.S.C.C.A.N. 3114 (1958). They also increased the amount-in-controversy requirement to \$10,000. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415; see also H.R. REP. NO. 82-1987 (1st Sess. 1951) (proposing to deem corporations a citizen of every state in which they do business); H.R. REP. NO. 88-834 (2d Sess. 1963) (proposing to deem corporations a citizen of the state of their incorporation and any state in which they are qualified to do business). Section 1332's constitutionality has been upheld:

It seems clear . . . that the pre-1958 decisions were not interpretations of the constitutional term, "citizens," but were rather holdings to the effect that a corporation would be treated as a citizen for the limited purpose of diversity jurisdiction. If it be conceded, as it must, that Congress has the power to define, confer, limit and take away the jurisdiction of the lower Federal Courts, *a fortiori* it has the power to change a judge-made rule defining the status of corporations for jurisdictional purposes.

Eldridge v. Richfield Oil Corp., 247 F. Supp. 407, 410 (S.D. Cal. 1965), *aff'd*, 364 F.2d 909 (9th Cir. 1966). However, commentary suggests the Framers never intended diversity jurisdiction to extend to corporations:

The Constitution makes no reference to a corporation as a jurisdictional party although the word was known to its framers in substantially its present-day meaning. . . . The acts of Congress now in force conferring original diversity jurisdiction upon the federal district courts . . . used for that purpose the very words of the Constitution and forestalled any charge that it was conferring any jurisdiction beyond that explicitly provided by the Constitution.

George Cochran Doub, *Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A. J. 243, 279 (1958). But see Frederick Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 206 (1946) ("If corporations are not to be allowed to sue and be sued in federal courts as being themselves citizens of the state or country by virtue of whose laws they exist, the purposes . . . for which federal courts were given jurisdiction in cases of diverse citizenship will largely be defeated.").

because it has obtained a corporate charter from another State,¹⁶² Congress expanded the citizenship test for corporations in 1958.¹⁶³ Whereas citizenship for corporations once was determined by the state of incorporation,¹⁶⁴ the citizenship test was expanded to include also the principal place of business.¹⁶⁵ This test applies regardless of

162. S. REP. NO. 85-1830, at 3101-02 (1958), *reprinted* in 1958 U.S.C.C.A.N. 3099,3101-02; *see also* Carter v. Clear Fir Sales Co., 284 F. Supp. 386, 387 (D. Or. 1967) ("The obvious purpose of the amendment to 28 U.S.C. § 1332(c) in 1958 was to narrow the situations in which a corporation could invoke federal jurisdiction."); Riley v. Gulf, Mobile & Ohio R.R. Co., 173 F. Supp. 416, 419 (S.D. Ill. 1959) ("It was the intention of Congress in its enactment . . . to remedy the evil whereby local corporations were permitted the free access of the Federal Courts simply because they were doing local business with a foreign charter."). *But see* Orie L. Phillips & A. Sherman Christenson, *Should Corporations Be Regarded as Citizens within the Diversity Jurisdiction Provisions?*, 48 A.B.A. J. 435, 436 (1962) ("We think . . . there is logical justification for the concept that a corporation has a separate and recognizable citizenship apart from that of its stockholders. And it is easier to justify the recognition of its localized citizenship than to suppose that it exists nowhere or everywhere.").

163. According to one commentator, populists and progressives in Congress implemented this expansion to assert more control over corporations:

To the extent that they remained suspicious of the power and politics of large corporations, in fact, they were quite content to keep those corporations in the federal courts where they and the national judiciary, perceived in the late 1950s to be relatively liberal, could more effectively police them. . . .

....

. . . In 1958 Congress was not concerned with protecting corporations against the dangers of local prejudice but with keeping in the hands of the national courts what it regarded as in every realistic sense the basic affairs of the nation.

PURCELL, *supra* note 157, at 240-41. An unexpected consequence of the expanded citizenship test was that corporations thereby acquired a property distinct from a natural citizen, which was a duality at issue in *Deveaux* and *Letson*.

164. *See, e.g.,* Ohio & Miss. R.R. Co. v. Wheeler, 66 U.S. (1 Black) 286, 291 (1861) ("If, as the declaration avers, this corporation was created at all by the laws of Indiana, it is, for the purposes of jurisdiction, a citizen of Indiana . . . and it therefore cannot sue a citizen of Indiana in the Federal courts of that State."). The Court subsequently extended this principle to foreign corporations:

the legal presumption is . . . that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body. . . .

....

. . . Consequently, a corporation of a foreign State is, for purposes of [federal] jurisdiction . . . to be deemed, constructively, a citizen or subject of such State.

S.S. Co. v. Tugman, 106 U.S. (16 Otto) 118, 120-21 (1882) (internal quotations omitted).

165. 28 U.S.C. § 1332(c)(1) ("[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 . . ."). Unresolved questions linger about the citizenship test for corporations, which has remained unchanged since its enactment in 1958. Specifically,

the 1958 amendments are silent on the test for alien corporations. Arguably, section 1332 could be construed as referring only to corporations having a principal place of business in the United States. *See, e.g.,* *Willems v. Barclays Bank D.C.O.*, 263 F. Supp. 774, 775 (S.D.N.Y. 1966) (indicating section 1332 not applicable to Delaware corporation whose principal place of business was in British Guiana). But this does not seem to be the prevailing view. *See, e.g.,* *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989) (ruling that a domestically incorporated corporation did not lose United States citizenship by virtue of its principal place of business being outside the United States); *Steinbock-Sinclair v. Amoco Int'l Oil Co.*, 401 F. Supp. 19, 24-26 (N.D. Ill. 1975) (permitting Delaware corporation with principal places of business in London, Bermuda, and Cairo to sue under section 1332). Prior to the 1958 amendments, courts deemed alien corporations to be citizens of the foreign state in which they were incorporated. *See, e.g.,* *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 112 (1898) ("[A]n alien or a foreign corporation . . . may be sued by a citizen of a State of the Union in any district in which valid service can be made upon the defendant."); *Tugman*, 106 U.S.(16 Otto) at 121 ("[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."). *But see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1986) ("For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.").

By expanding the potential bases of corporate citizenship, most courts have understood Congress as having permitted alien corporations with a domestic principal place of business to avail themselves of federal court. *See, e.g.,* *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148, 1149 (5th Cir. 1985) (permitting suit by Liberian corporation with New Jersey principal place of business); *Vareka Invs., N.V. v. Am. Inv. Props.*, 724 F.2d 907, 908-10 (11th Cir. 1984) (permitting suit by passive investment vehicle incorporated in Netherlands Antilles with Ecuador as its principal place of business); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790 (2d Cir. 1980) (permitting suit by Swiss corporation with New York principal place of business). *But see* *Eisenberg v. Commercial Union Assurance Co.*, 189 F. Supp. 500, 502 (S.D.N.Y. 1960) ("[S]ubdivision [c of section 1332] is not susceptible of the construction as if it read 'all corporations shall be deemed citizens of the States by which they have been incorporated and of the States where they have their principal places of business.'"); Marc Miller, Comment, *Diversity Jurisdiction over Alien Corporations*, 50 U. CHI. L. REV. 1458, 1470 (1983) (endorsing the *Eisenberg* court's approach). However, some courts do not uniformly treat alien corporations as having dual citizenship, but instead regard such corporations only as a citizen either of the state of incorporation or principal place of business. *See, e.g.,* *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994) ("The distinction between our treatment of individuals and corporations finds its source in the statute establishing diversity jurisdiction. While the statute creates a system of dual citizenship for corporations . . . it contains no indication that we should consider the dual citizenship of an individual for purposes of diversity jurisdiction.") (citation omitted); *Trans World Hosp. Supplies, Ltd. v. Hosp. Corp. of Am.*, 542 F. Supp. 869, 878 (M.D. Tenn. 1982) ("Despite its incorporation in a foreign country, if an alien corporation maintains its principal place of business in a state of the United States, no compelling reason exists that it should not be deemed a citizen of that state."); *Bergen Shipping Co. v. Japan Marine Serv., Ltd.*, 386 F. Supp. 430 (S.D.N.Y. 1974) (same) (citing S. REP. NO. 85-1830, at 3101-02 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3114). *But see, e.g.,* *Int'l Shipping Co., S.A. Hydra v. Offshore, Inc.*, 875 F.2d 388, 392 (2d Cir. 1989) ("[W]e [have] concluded beyond cavil that, in this circuit, a corporation organized under the laws of a foreign nation remains an *alien* corporation under § 1332, even if its principal place of business is in one of the

whether a domestic or alien¹⁶⁶ corporation is involved.¹⁶⁷ Ironically, section 1332(c) has had the effect of increasing the volume of corporate litigation in federal courts.¹⁶⁸

2. Unincorporated Membership

Until *Letson*, the citizenship test for corporations paralleled that for unincorporated associations. In *Chapman v. Barney*,¹⁶⁹ the Court applied the test first established in *Deveaux* to determine that a joint

States.") (citing *Venezolana*, 629 F.2d at 790); *Rouhi v. Harza Eng'g Co.*, 785 F. Supp. 1290, 1294 (N.D. Ill. 1992) ("Like a domestic corporation, an alien corporation may add an additional place of citizenship for diversity purposes if its principal place of business is within one of the states of the United States," but it does not lose its foreign citizenship.") (quoting *Panalpina Welttransport GmbH v. Geosource, Inc.*, 764 F.2d 352, 354 (5th Cir. 1985)).

166. For instance, in *Jerguson v. Blue Dot Investment*, 659 F.2d 31, 32 (5th Cir. 1981), a group of Florida citizens commenced a suit under section 1332(c) against a Panama corporation whose principal place of business was in Florida. In affirming the district court's dismissal of the suit for lack of diversity, the Fifth Circuit interpreted the alienage jurisdiction statute as guarding against local bias. *Id.* at 35. The absence of any statutory provision precluding diversity between a citizen and a corporation with a principal place of business of the same state led the court to conclude that "Congress decided there was no need for federal court protection of a corporation with its principal place of business in the same state in which its legal adversary is a citizen, even though it is incorporated elsewhere." *Id.* Accordingly, the court held that "a foreign corporation is a citizen for diversity jurisdiction purposes of a state where it has its principal place of business." *Id.* See also, e.g., *Simon Holdings PLC Group of Cos. U.K. v. Klentz*, 878 F. Supp. 210, 212 (M.D. Fla. 1995) (citing *Vareka Invs.*, 724 F.2d at 909-10); *Rouhi*, 785 F. Supp. at 1293-95; *Carmania Corp., N.V. v. Hambrecht Terrell Int'l*, 758 F. Supp. 896, 898 (S.D.N.Y. 1991) (citing *Jerguson*, 659 F.2d at 33-35); *Cont'l Motion Pictures v. Allstate Film Co.*, 590 F. Supp. 67, 71 (C.D. Cal. 1984) (adopting alternative rationale set forth in *Eisenberg*, 189 F. Supp. at 502).

167. See, e.g., *Nike*, 20 F.3d at 990 ("We draw no distinction between corporations in a state of the United States and those incorporated in a foreign country when determining . . . citizenship for purposes of diversity jurisdiction. In each instance, the corporation is deemed a citizen of its place of incorporation and . . . its principal place of business.") (citing *Danjaq, S.A. v. Pathe Comm. Corp.*, 979 F.2d 772, 774 (9th Cir. 1992); 28 U.S.C. § 1332(c)(1)); *Southeast Guar. Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1006-07 (N.D. Ill. 1973) ("While several other courts have adopted . . . the dictum of *Eisenberg*, we do not agree with that analysis. We hold . . . that section 1332(c) applies to foreign corporations whose principal place of business is located in the United States.").

168. See Felix Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. PA. L. REV. 1097, 1100 (1931) (observing corporations were parties to 80% of all diversity cases drawn from sample of ten Federal Register volumes) [hereinafter Frankfurter, *Note on Diversity*]. During 2001, 49,681 cases were filed on the basis of diverse citizenship, which is approximately 24.9% of all private cases and 19.1% of all civil cases filed during that time. See ADMINISTRATIVE OFFICE OF THE U. S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 28, Table C-2 (Dec. 31, 2001). Of these diversity suits, approximately 62.6% involved personal injury or product liability claims. See *id.*; see also *infra* note 344.

169. 129 U.S. 677 (1889).

stock company assumes the citizenship of every one of its members.¹⁷⁰ Explicitly building on *Chapman*, the Court in *Great South Fire Proof Hotel Co. v. Jones*¹⁷¹ stated that "[we] do[] not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a State within the meaning of the Constitution."¹⁷² Rather, the Court held: "When the question relates to . . . jurisdiction . . . as resting on the diverse citizenship of the parties we must look in the case of a suit by or against a partnership association to the citizenship of the several persons composing such association."¹⁷³

Unlike corporations, the citizenship test for unincorporated associations remains uncoded. The Court considered and preserved this disparate status in *United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc.*¹⁷⁴ Presented with a defamation suit brought by a corporation against an unincorporated labor union, the Court acknowledged significant "dissatisfaction" with *Chapman's* "artificial and unreal" distinction between the "personality" and "citizenship" of corporations and that of labor unions and other unincorporated associations.¹⁷⁵ Specifically, courts and commentators had argued

170. *Id.* at 682 ("The [joint-stock] company may have been organized under the laws of the State of New York, and may be doing business in that State, and yet all the members of it may not be citizens of that state.").

171. 177 U.S. 449 (1900).

172. *Id.* at 454. The Court found *Chapman* "decisive" in this regard and proceeded to state:

That a limited partnership association . . . may be described as a "quasi corporation," having some of the characteristics of a corporation, or as a "new artificial person," is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations.

Id. at 457.

173. *Id.* at 456. On two occasions, the Supreme Court has deviated from this membership citizenship test. In *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 482 (1933), the Court concluded that a Puerto Rican business association known as a *sociedad en comandita* exhibited characteristics most closely approximating a corporation. Among these characteristics were public filing of certain articles; continuity of life; the ability to sue, be sued, and transact business; and unlimited liability. *Id.* at 481. In *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 462 (1980), the Court concluded a routine business trust was neither a corporation or an unincorporated business association. The Court ignored the trust's strong resemblance to a partnership (i.e., centralized management, continuity of enterprise, and unlimited duration). "[T]his case involves neither an [unincorporated] association nor a corporation. [The relevant entity] is an express trust, and the question is whether its trustees are real parties to this controversy . . ." *Id.* Utilizing a specific case controlling the jurisdictional status of trusts, the Court found the trustees to be real parties to the controversy. *Id.* at 465-66.

174. 382 U.S. 145 (1965).

175. *Id.* at 149 (citing, *inter alia*, *Mason v. Am. Express Co.*, 334 F.2d 392 (2d Cir.

that corporations and unincorporated associations were "indistinguishable... in terms of the reality of function and structure."¹⁷⁶ Although possessing "considerable merit," these arguments nevertheless struck the Court as misdirected: "We are of the view that these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts."¹⁷⁷ In particular, the Court observed Congress's self-perceived need to codify the simple and reliable rule in *Marshall* for corporations.¹⁷⁸ By extension, any similar common law rule for unincorporated associations would require Congressional approval as well.

Congress, however, has not extended the presumption of corporate citizenship to unincorporated associations. The reason for this neglect is not apparent, something that evidently did not trouble the *Bouligny* Court.¹⁷⁹ Indeed, whether Congress intended to exclude unincorporated associations from the citizenship test codified for corporations in 1958 is not even clear.¹⁸⁰

Meanwhile, the Court continues to find the case for harmonizing

1964); *Am. Fed. of Musicians v. Stein*, 213 F.2d 679 (6th Cir. 1954); *Van Sant v. Am. Express Co.*, 169 F.2d 355 (3d Cir. 1947); Recent Cases, *Federal Courts—Jurisdiction—Unincorporated Association Is a Citizen for Purposes of Diversity of Citizenship Jurisdiction*, 78 HARV. L. REV. 1661 (1965); Recent Decisions, *Unincorporated Joint Stock Association May Be Deemed a Citizen of the State of Its Organization for Purposes of Diversity of Citizenship Jurisdiction*. *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964), 53 GEO. L.J. 513 (1965); Recent Developments, *Federal Courts—Jurisdiction: Diversity Jurisdiction and Unincorporated Associations*, 65 COLUM. L. REV. 162 (1965)). The Court proceeded to categorize the *sociedad en comandita* in *Russell* as a *sui generis* case involving "an exotic creation of the civil law." *Bouligny*, 382 U.S. at 151; see also *id.* at 152 n.10.

176. *Bouligny*, 382 U.S. at 149-50.

177. *Id.* at 150-51.

178. *Id.* at 152.

179. See *supra* note 177 and accompanying text.

180. See Comment, *Citizenship of Unincorporated Associations for Diversity Purposes*, 50 VA. L. REV. 1135, 1136 n.16, 1143 (1964) ("The [1958] amendment[s] w[ere] intended merely to prevent essentially local corporations from invoking diversity jurisdiction by virtue of foreign incorporation. The problems of unincorporated associations were not considered."); see also John Kaplan, *Suits Against Unincorporated Associations under the Federal Rules of Civil Procedure*, 53 MICH. L. REV. 945, 959 (1955) ("In fact there has been no legislation on the subject and no court has actually analyzed the reasons for or against including the unincorporated association within the diversity jurisdiction [statute]."); Comment, *Diversity Jurisdiction for Unincorporated Associations*, 75 YALE L.J. 138, 147 n.50 (1965) ("There is no indication that Congress even considered the status of unincorporated associations in [the 1958 amendments], and the failure of Congress to enact a rule governing the citizenship of associations in 1958 is not equivalent to congressional action denying them citizenship for jurisdictional purposes.").

the citizenship tests for corporations and unincorporated associations compelling. In *Carden v. Arkoma Associates*,¹⁸¹ a limited partnership organized under Arizona law commenced a diversity suit against Louisiana citizens over a contract. The citizens moved to dismiss the case on the basis that one of the limited partners was a Louisiana citizen.¹⁸² After the Fifth Circuit declined to hear the certified question, the district court denied the citizens' motion.¹⁸³ On appeal, the Fifth Circuit affirmed the district court's decision and judgment in favor of the limited partnership.¹⁸⁴

Justice Scalia, writing for a minimum majority, framed the precise question as "whether [a limited partnership] may be considered a 'citizen' of the State under whose laws it was created."¹⁸⁵ Briskly analyzing *Chapman*, *Great Southern*, and *Bouligny*, the Court observed that limited partnerships do not enjoy the citizenship status accorded to corporations.¹⁸⁶ The Court then entertained whether to consider only the limited partnership's general partners on the basis that they are the real parties-in-interest. The Court dismissed evidence that only the general partners had "exclusive and complete management and control of the operations of the partnerships."¹⁸⁷

The Court then addressed Justice O'Connor's dissent, which contended that a real party-in-interest analysis should be utilized to determine which partners' citizenship was relevant for diversity purposes.¹⁸⁸ The Court found no basis for such analysis in the trilogy of prior cases and thus concluded: "We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all the members,' . . . 'the several persons composing such association,' . . . 'each of its members.'"¹⁸⁹ In

181. 494 U.S. 185 (1990).

182. *Id.* at 186.

183. *Id.*

184. *Id.*

185. *Id.* at 187.

186. *Id.* at 189. In making this observation, the Court distinguished both *Russell* and *Navarro*. See *supra* note 173. The Court noted that *Russell* involved "an exotic creation of the civil law." *Id.* at 190. The Court then noted that *Navarro* dealt with "the rule, 'more than 150 years' old, which permits [] trustees to sue in their own right, without regard to the citizenship of the trust beneficiaries." *Id.* at 191 (quoting *Bouligny*, 382 U.S. at 151; *Navarro*, 446 U.S. at 465-66). The Court found the limited partnership's arguments based on these cases less than compelling. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 192-94 (1990).

187. *Carden*, 494 U.S. at 192. This management and control was manifested by the general partners managing assets, controlling the litigation, and bearing the entity's liabilities. *Id.*

188. *Id.* at 198 (O'Connor, J., dissenting).

189. *Id.* at 195-96 (O'Connor, J., dissenting) (quoting *Chapman*, 129 U.S. at 682;

so holding, the Court made a general observation about the test for all unincorporated associations under the diversity jurisdiction statute: "Which of [the types of unincorporated associations] is entitled to be considered a 'citizen' for diversity purposes, and which of their members' citizenship is to be consulted, are questions more readily resolved by legislative prescription . . ." ¹⁹⁰ Observing that Congress had declined in its 1958 amendments to fashion a citizenship test for unincorporated associations akin to that established for corporations, the Court reversed the Fifth Circuit and held that diversity jurisdiction was lacking. ¹⁹¹ Courts across all circuits have proceeded to apply the rule affirmed in *Carden* to the gamut of unincorporated associations such as LLCs, ¹⁹² LLPs, ¹⁹³ LPs, ¹⁹⁴ as well as other unincorporated forms such as joint stock companies, ¹⁹⁵ partnerships ¹⁹⁶ (including multi-tiered forms, ¹⁹⁷

Great Southern, 177 U.S. at 456; *Boulogny*, 382 U.S. at 146).

190. *Carden*, 494 U.S. at 197. One commentator has contended that the Court elected to perpetuate the membership test for unincorporated associations due to a certain perception. See Cohen, *supra* note 45, at 438 ("The Court perceives that deeming unincorporated organizations to have the citizenship of all of their members, rather than entity citizenship, reduces the number of actions eligible for diversity jurisdiction. It is not clear that this perception is accurate.").

191. *Carden*, 494 U.S. at 197-98.

192. See, e.g., *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998) (LLC assumes citizenship of all its members); *Halleran v. Hoffman*, 966 F.2d 45, 48 (1st Cir. 1992) ("To hold otherwise would make . . . *Carden* . . . turn on the sheer fortuity of state law relating to the name or names under which a limited partnership must sue. Those partnerships . . . adhering to the old common law rule . . . might seek to create diversity jurisdiction simply by not . . . su[ing] in [the] partnership[s] name."); *JMTR Enters., LLC v. Duchin*, 42 F. Supp. 2d 87, 93 (D. Mass. 1997) (LLC assumes citizenship of all of its members); *Int'l Flavors & Textures, LLC v. Gardner*, 966 F. Supp. 552, 554-55 (W.D. Mich. 1997) (extending *Carden* to limited liability companies).

193. See, e.g., *Cohen v. Kurtzman*, 45 F. Supp. 2d 423, 431 (D.N.J. 1999) (noting two decisions that "have held a limited liability partnership is a citizen of every state in which one of its partners resides") (citing *Mudge Rose Guthrie Alexander & Ferdon v. Pickett*, 11 F. Supp. 2d 449, 451 (S.D.N.Y. 1998); *Reisman v. KPMG Peat Marwick LLP*, 965 F. Supp. 165, 176 (D. Mass. 1997)).

194. See, e.g., *Handelsman v. Bedford Vill. Assocs. L.P.*, 213 F.3d 48, 51-52 (2d Cir. 2000) (treating LLPs and LLCs as partnerships for diversity purposes); *Bankston v. Burch*, 27 F.3d 164, 168-69 (5th Cir. 1994) ("We have resisted attempts to carve exceptions from *Carden*, even though we acknowledged that the decision effectively closes the doors of the federal courts to many lawsuits among partners or by partners against a partnership.") (citing, *inter alia*, *Temple Drilling Co. v. Louisiana Ins. Guar. Ass'n*, 946 F.2d 390, 393 (5th Cir. 1991); *Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302, 306-07 (5th Cir. 1991)); see also *Penteco Corp. v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1523 (10th Cir. 1991) (demanding proof of any general or limited partners that would preclude diversity); *Buckley v. Control Data Corp.*, 923 F.2d 96, 97 (8th Cir. 1991) (embracing *Carden* as having "clarified the method for determining the citizenship of a limited partnership").

195. See, e.g., *Mason v. Am. Express Co.*, 334 F.2d 392, 401 (2d Cir. 1964) (noting that while joint stock companies most resembled corporations, they are incapable of

unions,¹⁹⁸ underwriting syndicates,¹⁹⁹ religious organizations,²⁰⁰ and Native American tribes²⁰¹).

possessing citizenship separate from their members).

196. See, e.g., *Village Fair Shopping Ctr. Co. v. Sam Broadhead Trust*, 588 F.2d 431, 433 n.1 (5th Cir. 1979); *Plechner v. Widener Coll., Inc.*, 569 F.2d 1250, 1260-61 (3d Cir. 1977); *Lewis v. Odell*, 503 F.2d 445, 446 (2d Cir. 1974) (noting that "for purposes of diversity a partnership is a citizen of each state of which a general partner is a citizen"); *Fifty Assocs. v. Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1190 (9th Cir. 1970) (applying membership rule to attempted diversity with John Doe members of a partnership); *Bomeisler v. M. Jacobson & Sons*, 118 F.2d 261, 262 n.1 (1st Cir. 1941) (business trust). Law firms organized as professional corporations are subject to the same citizenship test applied to all corporations for alienage and diversity purposes. See, e.g., *Cote v. Wadel*, 796 F.2d 981, 983 (7th Cir. 1986) ("To give the professional corporation determinative significance for diversity jurisdiction is therefore to attach an unintended consequence to federal tax legislation, and yet we conclude that a professional corporation is a corporation within the meaning of 28 U.S.C. § 1332."); *Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc.*, 710 F.2d 87, 89 (2d Cir. 1983) (same).

197. See, e.g., *Cerberus Partners, L.P. v. Gadsby & Hannah*, 976 F. Supp. 119, 121-22 (D.R.I. 1997) ("*Carden* does not prescribe a distinct level of control that one must have to be considered for diversity purposes. . . . The Court flatly rejected a degree-of-control test to determine which partners should be considered for diversity purposes.") (quoting *Carden*, 494 U.S. at 195 (quoting *Chapman v. Barney*, 129 U.S. 677, 682 (1889))).

198. See, e.g., *Bouligny*, 382 U.S. at 150-52.

199. Compare, e.g., *Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 319 (7th Cir. 1998) (citizenship based on that of individual investors and underwriter who acted as managing agent); with *Certain Interested Underwriters at Lloyd's, London v. Layne*, 26 F.3d 39, 43-44 (6th Cir. 1994) (finding citizenship based on the syndicate's managing underwriter under a real party in interest analysis). Circuits appear split on whose membership should count for the purposes of the *Carden* analysis of a Lloyd's syndicate. See, e.g., *Advani Enters., Inc. v. Underwriters at Lloyd's*, 140 F.3d 157, 160-61 (2d Cir. 1998) (outlining, but declining to endorse, competing approaches).

200. See, e.g., *Lawson v. United House of Prayer for all People of the Church on the Rock of the Apostolic Faith*, 252 F. Supp. 52, 53 (E.D. Pa. 1966) (determining religious organization's citizenship based on whether it was incorporated).

201. All Native Americans (as well as any member of an "aboriginal tribe," 8 U.S.C. § 1401(a)(2)) born in the United States are statutorily deemed American citizens. See Act of June 2, 1924, ch. 233, 43 Stat. 253 (1924). However, Native American tribes do not assume the citizenship of any state or constitute a "citizen" or "subject" of a foreign state (or even a foreign state) for diversity purposes under section 1332(a)(2). *Romanella v. Hayward*, 114 F.3d 15 (2d Cir. 1997) ("In light of the Indian tribes' status as distinct, independent political communities, retaining their original neutral rights . . . it is doubtful at best whether an Indian tribe could be considered a citizen of any state.") (internal quotations omitted); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) ("[I]t is clear that an Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction."); *Oneida Indian Nation of N.Y. v. County of Oneida, N.Y.*, 464 F.2d 916, 923 (2d Cir. 1972) (concluding Oneida Nation of New York was neither "a citizen of a state different from New York" nor "a foreign state"), *rev'd on other grounds*, 414 U.S. 661 (1974). But see *Tribal Smokeshop, Inc. v. Alabama Coushatta Tribes of Tex.*, 72 F. Supp. 2d 717, 718 n.1 (D. Tex. 1999) ("Indian tribes are deemed to be citizens of the

III. JURISDICTIONAL FRAMEWORK

The previous Part established the need for a legal basis to collapse corporate distinctions that have engendered path dependence and have escaped Congressional attention. This Part presents a possible entry point to achieving such collapsing: the anomaly of statelessness. Depriving citizens access to federal court simply because they reside abroad conflicts with the historical and modern rationales of alienage jurisdiction. These citizens are aliens because their foreign domicile implicates established and legitimate concerns about the sensitivity of state courts towards foreign relations, xenophobia, and international commerce.²⁰² This Part first clarifies the differences between alienage jurisdiction and its more troubled relative, diversity. After examining these differences, this Part proposes a novel set of categories for aliens that evinces the inconsistent premises underlying statelessness. Establishing this inconsistency provides a structured framework and a substantive context for analyzing unjustified disparities between business organizations.

A. Alienage Jurisdiction: Diversity Jurisdiction

Although bearing common historical roots, diversity and alienage jurisdiction rest on distinct rationales.²⁰³ Historically,²⁰⁴

state in which they are located for purposes of jurisdiction.”) (citing *Schwanz v. White Lightning*, 502 F.2d 67, 70 (8th Cir. 1974); *Superior Oil Co. v. Merritt*, 619 F. Supp. 526, 531 (D. Utah 1985)). Accordingly, Native American tribes constitute “stateless entities.” See, e.g., *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000) (“An Indian tribe . . . is not considered to be a citizen of any state. Consequently, a tribe is analogous to a stateless person for jurisdictional purposes.”) (citations omitted). Arguably, these Native American tribes could be viewed as unincorporated associations that assume the citizenship of their constituent members.

202. Admittedly, this view is contestable. See *infra* Part III.C. Clouding the issue is the fact that Congress lumped alienage and diversity jurisdiction into one statute with the 1948 amendments. See *infra* note 232. The real issue is methodological: which set of historical and modern rationales should determine the characterization of statelessness? U.S. citizens residing abroad are more susceptible to problems stemming from their foreign domicile more so than their domestic citizenship, such as xenophobia. This suggests the problem of statelessness more properly lies in the domain of alienage than diversity. On a more pragmatic level, the merits of alienage jurisdiction are less controversial than its counterpart. See *infra* notes 217-19 and accompanying text.

203. See generally Johnson, *supra* note 22, at 56 (noting the distinct rationales underlying alienage and diversity jurisdiction). Although different, these rationales do share certain principled similarities. In particular, both alienage and diversity jurisdiction are premised on citizens from different jurisdictions being able to avail themselves of federal jurisdiction. See 28 U.S.C. § 1332. To an extent, select dynamics of this diverse citizenship scheme remain constant regardless of whether an alien is

diversity jurisdiction purports to address the threat of state legislatures retaliating against unpopular state court decisions;²⁰⁵ the convenience of federal courts deciding types of cases beyond the jurisdiction of state courts, such as interpleader;²⁰⁶ the possibility of local courts discriminating against out-of-state litigants;²⁰⁷ and the improvement to substantive law resulting from concurrent jurisdiction.²⁰⁸ In contrast, alienage jurisdiction addresses

involved. Both aliens and domestic citizens from a different state, for instance, are subject to essentially the same concerns when facing the prospect of anti-foreign prejudice in a non-federal forum. *See infra* Part III.A.2. Because diversity cases greatly outnumber alienage cases, this Section occasionally utilizes cases involving diversity jurisdiction to illustrate points about alienage jurisdiction.

204. Some commentators have suggested that the only rationales supporting diversity jurisdiction are historical. *See, e.g.,* Erwin Chemerinsky & Larry Kramer, *Defining the Role of Federal Courts*, 1990 BYU L. REV. 67, 82 ("[I]f diversity jurisdiction had never existed in the past, Congress almost certainly would not create it today; the continuing viability of this jurisdiction rests to a considerable degree on its historical pedigree."); *see also* Stone Grissom, *Diversity Jurisdiction: An Open Dialogue in Dual Sovereignty*, 24 HAMLINE L. REV. 372, 376-78 (2001) (tracing origins of diversity jurisdiction to classical antiquity).

205. *See, e.g.,* Dodge v. Woolsey, 59 U.S. (18 How.) 331, 354 (1855) ("[Diversity jurisdiction] is to make people think and feel . . . that their relations to each other were protected by the strictest justice, administered in courts independent of all local control.").

206. *See, e.g.,* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §§ 2371-76, at 386-410 (1969) [hereinafter ALI, STUDY]. According to the ALI, "[w]here the action was brought in a state court and the defendant cannot bring about in that court the effective joinder of parties necessary for a just adjudication as to him, it is appropriate that he be permitted to remove the case to a federal court authorized to issue far-reaching process." *Id.* § 2372(a), at 394. *But see* David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 29-32 (1968) (criticizing the ALI's treatment of interpleader); Charles A. Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185 (1969) (evaluating various ALI proposals critically).

207. *See, e.g.,* Guaranty Trust Co. v. York, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurances to non-resident litigants of courts free from susceptibility to potential local bias."); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State.").

208. *See* John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 11 (1963) ("We need the substantial bulk, the regular exposure to concurrent jurisdiction, to get the best effect of the interaction [between federal and state courts]."). There are significant problems with this argument, however. First, concurrent jurisdiction is unnecessary, and perhaps ineffective, in light of the *Erie* Doctrine:

The leadership idea . . . hearkens back to the frustrated ideals of *Swift v. Tyson* [41 U.S. (16 Pet.) 1 (1842)]; we would be foolish to forget state courts' unwillingness to follow federal court leads under that regime. Whether state courts eventually do adhere to federal court's *Erie*-anticipations of what state law is poses a question of empirical fact which has been inadequately researched.

J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13

international interests such as the importance of preserving foreign relations;²⁰⁹ the necessity of guarding against xenophobic sentiments, whether actual or perceived;²¹⁰ and the value of facilitating trade.²¹¹

This analytical distinction between diversity and alienage jurisdiction is manifest in their respective standing with courts, Congress, and commentators. Whether diversity jurisdiction continues to be necessary has been the subject of extended, intense debate.²¹² Justice Jackson once proclaimed that "the greatest

WAYNE L. REV. 317 (1967). Second, this argument diminishes the incentives for states to reform their courts. See *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 60 (1954) (Frankfurter, J., concurring) ("[I]s it sound public policy to withdraw from the incentives and energies for reforming state tribunals . . . the interests of influential groups who through diversity litigation are now enabled to avoid state courts?"). Finally, there is the problem of federal congestion. See *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874, 874-75 (1956) (Frankfurter, J., dissenting) ("These diversity litigations place, it is becoming increasingly recognized, an undue burden upon the federal courts in their ability to dispose expeditiously of other litigation which can be properly brought only in federal courts."); Robert J. Sheran & Barbara Isaacman, *State Cases Belong in State Courts*, 12 CREIGHTON L. REV. 1, 50 (1978) (criticizing the argument of concurrent improvement because "the entire movement to eliminate diversity is based on the existence of too many other types of cases in federal court").

209. See *infra* Part III.B.1.

210. See *infra* Part III.B.2.

211. See *infra* Part III.B.3. Arguably, this rationale may support diversity jurisdiction. See, e.g., Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 86-90 (1997).

212. Some commentators support completely abolishing diversity jurisdiction. See, e.g., Howard C. Bratton, *Diversity Jurisdiction: An Idea Whose Time Has Passed*, 51 IND. L.J. 347, 349 (1976) ("[T]here are compelling reasons to advocate the elimination of diversity jurisdiction—given the nature of the federal system and the dramatic increase in the workload of federal courts."); Currie, *supra* note 206, at 6 ("I cannot view either the retention or the abolition of diversity jurisdiction with appreciable choler. But . . . I am tempted to say that the impossibility of drafting sensible and workable limits for diversity is reason enough to abandon the jurisdiction."). According to Field,

[w]hat was right in 1789 to meet the problems then besetting the country is not necessarily right today when new problems have replaced old ones. . . . To rest access to the federal court solely on the accident that the citizenship happens to be diverse and the constitutional requirement therefore satisfied seems to us unprincipled and to produce whimsical results.

Richard H. Field, *Diversity of Citizenship: A Response to Judge Wright*, 13 WAYNE L. REV. 489, 492 (1967); see also Kramer, *Diversity Jurisdiction*, *supra* note 68, at 121 ("[T]he case for abolishing diversity jurisdiction is clear."); Carl McGowan, *Federal Jurisdiction: Legislative and Judicial Change*, 28 CASE W. RES. L. REV. 517, 533 (1978) ("It is difficult to understand why federal courts should be required to hear cases solely because the litigants are of diverse citizenship, thereby drawing their energies away from the formulation of federal law to the ascertainment and application of state law."); Roger J. Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 ALB. L. REV. 151, 158 (1987) ("[T]otal elimination of diversity jurisdiction is the best prescription for the relief of the tensions it causes. . . . Diversity causes

contribution that Congress could make to the orderly administration of justice in the United States would be to abolish the jurisdiction of the federal courts which is based solely on the ground that the litigants are citizens of different states."²¹³ Indeed, Justice Frankfurter was a vigorous, life-long advocate of abolishing diversity jurisdiction.²¹⁴ Throughout the years, numerous academic and judicial

more trouble than it is worth."); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 981-84 (1979) (urging abolition).

Some commentators support diversity jurisdiction, but only for severely limited purposes. See, e.g., George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 378 (1933) (endorsing diversity only when local prejudice can be shown); Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 221-27 (1982) (proposing to modify diversity jurisdiction by, *inter alia*, denying access to in-state plaintiffs, restricting access to only truly foreign corporations, and implementing a rule of minimal diversity); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 319 (1977) (proposing "Congress enact a 'local option' plan, under which each federal district would have limited freedom to retain, curtail, or virtually eliminate diversity jurisdiction within its borders"); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 239-40 (1948) (endorsing limiting diversity to "situations where it is in fact responsive to ['state inadequacy']"). Professor Larry Kramer has suggested the debate can be viewed as between prominent critics and the private bar. Kramer, *Diversity Jurisdiction*, *supra* note 68, at 98 (noting Robert Kastenmeier's list of diversity critics, including Louis Brandeis, Warren Burger, Felix Frankfurter, Henry Friendly, Robert Jackson, Roscoe Pound, Earl Warren, and Charles Alan Wright, is counter-weighted primarily by "state and national bar associations and the American Trial Lawyers Association") (citing Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 313 (1979); John P. Frank, *Diversity Jurisdiction: Let's Keep It*, 3 ADELPHI L.J. 75, 76-78 (1984)).

213. ROBERT JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 37 (1955); see also CHARLES W. ELLIOT, MOORFIELD STOREY, LOUIS BRANDEIS, ADOLPH J. RODENBACK & ROSCOE POUND, *PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE* 28 (1914) ("In those parts of the country in which resort to the federal courts in case of diversity of citizenship is common the concurrent jurisdiction of state and federal courts on the ground of diverse citizenship often causes much delay, expense, and uncertainty.").

214. See *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874, 875 (1956) (Frankfurter, J., dissenting) ("Very often litigants in the position of the plaintiff bring a suit involving merely local law in a federal court because for one reason or another they expect a more favorable outcome than if the suit were tried in the local courts."); *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) (seeking an end to "the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction."); *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 651 (1949) (Frankfurter, J., dissenting) ("An Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts."); Felix Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORNELL L.Q. 499, 514 (1928) [hereinafter Frankfurter, *Distribution*] ("The constitutional grant of judicial power has never implied a duty by Congress to employ it. . . . [P]ractical justifications explain the past judiciary acts . . .

committees have examined the prospect of eliminating or severely curtailing diversity jurisdiction.²¹⁵ Congress even has entertained proposals to repeal the entire diversity statute.²¹⁶

This controversy, however, largely has left alienage jurisdiction unscathed. For instance, a Congressional committee has stated that alienage jurisdiction is outside "minimum federal jurisdiction."²¹⁷ Indeed, even the commentators most vigorously opposed to diversity jurisdiction have supported retaining alienage jurisdiction.²¹⁸ This can be explained by the fact that federal courts continue to play an

The present jurisdiction cannot rely on tradition."); Frankfurter, *Note on Diversity*, *supra* note 168, at 1097 ("I have been one of those who have urged legislator to remove some obvious abuses of diversity jurisdiction, on grounds of policy and to relieve the dockets of the federal courts.").

215. See, e.g., H.R. 2404, 97th Cong. (1981) (proposing to abolish diversity jurisdiction); S. 679, 96th Cong. (1979) (proposing to modify diversity jurisdiction); H.R. 2516, 85th Cong. (1957) (proposing to limit diversity to individual citizens only); S. 939, 72d Cong. (1932) (proposing to limit jurisdiction of United States district courts); H.R. 11508, 72d Cong. (1932) (same); S. 4357, 71st Cong. (1930) (same); S. 3151, 70th Cong. (1928) (same). See also ALI, STUDY, *supra* note 206, §§ 1301-07 (urging retention); FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38 (Apr. 2, 1990) [hereinafter FEDERAL COURTS REPORT] (recommending Congress limit diversity jurisdiction "to complex multi-state litigation, interpleader, and suits involving aliens"). But see Report of the New York County Lawyers' Association Committee on the Federal Courts on the Recommendation of the Federal Courts Study Committee to Abolish Diversity Jurisdiction, 158 F.R.D. 185, 204 (1995) ("[T]he virtual elimination of diversity jurisdiction is not the right solution to the overcrowding problem presently facing the federal courts. . . .").

216. See H.R. 130, 96th Cong. (1979) (proposing to abolish diversity jurisdiction); H.R. 2202, 96th Cong. (1979) (same); H.R. 9622, 95th Cong. (1978) (same); H.R. 761, 95th Cong. (1977) (same).

217. FEDERAL COURTS REPORT, *supra* note 215, at 38.

218. See, e.g., Kramer, *Diversity Jurisdiction*, *supra* note 68, at 121 (noting that "the staunchest opponents of diversity" would support preserving diversity jurisdiction under limited circumstances, including alienage). Professor Kramer proceeds to endorse the ALI's position that

[i]t is important in the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided. This objective can best be achieved by giving the foreigner the assurance that he can have his case tried in a court with the best procedures the federal government can supply and with the dignity and prestige of the United States behind it.

Id. (quoting ALI, STUDY, *supra* note 206, at 108). While acknowledging that "[s]ome of the arguments for diversity jurisdiction have merit, and in a world of unlimited resources, a case could be made for keeping these cases in the federal courts," Professor Kramer believes that, "in *this* world it is clear that the federal system can no longer afford the luxury of diversity jurisdiction." Kramer, *Diversity Jurisdiction*, *supra* note 68, at 121. Although less opposed to diversity jurisdiction than Professor Kramer, Richard Posner acknowledges that "[a]lthough the suggested ground for diversity jurisdiction is of limited reach, it is also independent of the degree to which a state's residents are xenophobic." RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 176 (1985).

integral role in maintaining international relations.²¹⁹

*B. Historical Rationales for Alienage Jurisdiction*²²⁰

The distinct nature of alienage jurisdiction appears most clearly in its historical rationales. Article III of the U.S. Constitution vests in Congress the power to create federal courts and to confer them jurisdiction to hear cases.²²¹ Within this constitutionally mandated range are, *inter alia*, controversies between "Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."²²² The scope of Congress's power to curtail federal court jurisdiction under Article III is highly controversial.²²³

219. See, e.g., *Koehler v. Bank of Bermuda (New York) Ltd.*, 229 F.3d 187, 193 (2d Cir. 2000) (en banc) (Sotomayor, J., dissenting) ("Alienage jurisdiction was established by our Constitution and early statutes to strengthen our relations . . . with foreign nations. The importance of these goals has only increased with time as both international relations and global trade have become more complex and our nation has assumed a central role in both."); see also Kramer, *Diversity Jurisdiction*, *supra* note 68, at 121-22 (citing State Department's position that "the availability of civil jurisdiction in federal courts under a single nationwide system of rules tends to provide a useful reassurance to foreign governments and their citizens") (quoting *Diversity of Citizenship Jurisdiction—1982: Hearings on H.R. 6691 Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House of Representatives Comm. On the Judiciary*, 97th Cong. 336 (1982) (letter from State Department, dated Aug. 9, 1982)).

220. The origins of alienage jurisdiction actually hail to classical antiquity. See, e.g., Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 83 (1993) (citing special tribunals created by the ancient Greeks and Romans to deal with disputes involving aliens as evidence of alien jurisdiction's classical origins). The modern formulation of alienage jurisdiction can be traced to medieval English practice, where *trials de medietate linguae* (i.e., "trials of the half-tongue") involved "one party [who] was an alien whose native language was not English" before a jury equally divided between citizens and non-citizens. Johnson, *supra* note 22, at 8-9 (quoting James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 167 n.157 (1983); and citing, *inter alia*, Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury "De Medietate Linguae": A History and A Proposal for Change*, 74 B.U. L. REV. 777, 783-96 (1994)).

221. See U.S. CONST. art. III.

222. *Id.* at art. III, § 2. The subject matter of federal courts pertains to "all cases arising under the national laws and to such other questions as may involve the national peace and harmony." MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 119 (1913). According to Farrand, "[t]here was no difference of opinion as to the jurisdiction of the national courts" with regards to subject matter. *Id.*

223. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 242-46 (1985); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1535 (1990); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030-31 (1982); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article*

Through the Judiciary Act of 1789, Congress conferred federal courts with express jurisdiction over cases involving aliens. Specifically, federal courts acquired jurisdiction to hear "all suits of a civil nature at common law or in equity, where . . . an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State."²²⁴ Congress enacted this provision expressly "to afford a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in a State Court against foreigners or non-citizens."²²⁵ According to one commentator, alienage jurisdiction was "the single most important grant of national court jurisdiction embodied in the [Judiciary] Act."²²⁶

III, 132 U. PA. L. REV. 741, 758 (1984); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372-73 (1953); Daniel J. Metzger, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1610 (1990); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1636-37 (1990). The debate concerning limits imposed and powers conferred by Article III on the judiciary is not entertained here.

224. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (partially codified as amended at 28 U.S.C. § 1332) (2000). This form of alienage jurisdiction is distinct from that conferred by the Alien Tort Claims Act, 28 U.S.C. § 1330 *et seq.* (2000), and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 *et seq.* (2000). These Acts draw upon federal question jurisdiction. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 437 n.5 (1989) (observing section 1330 confers federal question jurisdiction on district courts in general terms); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 549-50 n.17 (1972) (citing the Torture Victim Protection Act as a "particular statute[] grant[ing] jurisdiction, without regard to the amount in controversy, in virtually all areas that otherwise would fall under the general federal-question statute").

225. Charles Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923) [hereinafter Warren, *New Light*]. But see WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 165-79 (1990) (critically examining the accuracy of Warren's article).

226. Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 548 (1989) [hereinafter Holt, *Alienage Origins*]. But see Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 508-09 n.296 (1994) ("Recent scholarship . . . suggests that [the Judiciary Act of 1789] did in fact confer [plenary federal question] jurisdiction. Moreover . . . the Act placed pecuniary limits on diversity and alienage controversies, but not on federal question 'Cases,' thereby suggesting the less importance of the former.") (citations omitted). Four of the five proposals for a national judiciary submitted at the Constitutional Convention provided for federal jurisdiction over suits involving aliens. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 432 (Max Farrand 1937 rev. ed., 1966) [hereinafter FARRAND, RECORDS]; Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1460-61 (citing 1 FARRAND, RECORDS, *supra*, at 22, 242, 292; see also HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 141 (1973) (noting that without alienage and diversity jurisdiction, "the circuit courts created by

Notably, Congress perceived the need for alienage jurisdiction before federal question jurisdiction.²²⁷

Almost a century later,²²⁸ Congress amended the Judiciary Act of 1789 to redress its facial inconsistencies with Article III. The conflict concerned whether the Judiciary Act granted federal jurisdiction over all cases involving aliens, irrespective of whether they complied with Article III's mandate that aliens be paired with citizens.²²⁹ This question arose from a series of Supreme Court decisions limiting the power of federal courts to hear disputes involving aliens.²³⁰ These decisions prompted Congress to amend the Judiciary Act by consolidating its treatment of diversity and alienage jurisdiction.²³¹ Specifically, Congress authorized federal courts to hear "controvers[ies] between citizens of different States or . . .

the First Judiciary Act would have had very little to do").

227. See generally Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953). The first attempt to confer federal question jurisdiction was the unsuccessful "Midnight Judges" Act enacted by the Federalists in 1801. See Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92. The Act was repealed in 1802. See Act of Mar. 8, 1802, ch. 8, 1 Stat. 132. For a fuller account of the "Midnight Judges" Act, see FRANKFURTER & LANDIS, *supra* note 27, at 21-28. But see CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION 727 (Johnny H. Killian ed. 1987) ("Almost from the beginning, the [Constitutional] Convention demonstrated an intent to create 'federal question' jurisdiction in the federal courts with regard to federal laws . . .") [hereinafter CONSTITUTION].

228. Act of Mar. 3, 1875, ch. 137 § 1 (codified as amended at 28 U.S.C. § 1331 (2000)). Through this Act, Congress codified federal question jurisdiction.

229. See, e.g., Warren, *New Light*, *supra* note 225, at 79 ("[B]y leaving the clause [in the Judiciary Act of 1789] as it stood, [Congress] rendered that portion of the Section, if literally interpreted, unconstitutional; and the Supreme Court, in order to hold it valid, was obliged . . . to read into it a limitation which it did not actually contain.") (citing JOHN CARTER ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS AS LIMITED BY THE CITIZENSHIP AND RESIDENCE OF THE PARTIES 23 (1899)).

230. See, e.g., *Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136, 136 (1829) ("[T]he 11th section of the [Judiciary Act of 1789] must be construed in connection with, and in conformity to, the [C]onstitution of the United States. That, by the latter, the judicial power was not extended to private suits, in which an alien is a party, unless a citizen be the adverse party."); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 303 (1809) (holding that the judiciary does not give jurisdiction to the court when all the parties are aliens because this idea goes "beyond the limits of the [C]onstitution"); *Montalet v. Murray*, 8 U.S. (4 Cranch) 46, 47 (1807) (declining to exercise jurisdiction over party who was "an alien, and subject of France"); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 13-14 (1800) ("Neither the [C]onstitution, nor the act of [C]ongress, regard, on [the] point [of alienage jurisdiction], the subject of the suit, but the parties. A description of the parties is therefore indispensable to the exercise of jurisdiction."); *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 7 (1799).

231. See, e.g., *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 96 (2002) ("The language of the [Judiciary Act of 1789] was amended in 1875 to track Article III by replacing the word 'aliens' with 'citizens, or subjects,' . . . the phrase that remains today.") (citation omitted).

controvers[ies] between citizens of a State and foreign states, citizens, or subjects.²³²

The Framers' intent behind including alienage jurisdiction in Article III is not exactly clear. The documented debates at the Constitutional Convention concerning the need for diversity jurisdiction are limited in number and tepid at best.²³³ And the debates at the First Congress concerning the Judiciary Act of 1789 are only slightly better.²³⁴ Notwithstanding these evidentiary caveats, three primary rationales operate to support alienage jurisdiction. First, federal courts should decide cases that implicate foreign

232. Act of Mar. 3, 1875, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (1994)). In 1948, this fusion of diversity and alienage jurisdiction assumed the codified form that exists today. The Judicial Code of 1948 conferred federal courts with jurisdiction over cases between "citizens of different States and in which citizens or subjects of a foreign state are additional parties." Act of June 25, 1948, ch. 646, 62 Stat. 930 (codified as amended at 28 U.S.C. § 1332 (1988)). According to one commentator, these amendments "lumped diversity and alienage jurisdiction together under the title 'Diversity of Citizenship.'" 1 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* 0.71[4.-3], at 728 (3d ed. 1993). These "lumped" forms of jurisdiction are now codified in section 1332(a), which provides original jurisdiction to district courts over civil actions involving:

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

28 U.S.C. § 1332(a). In 1976, Congress again amended section 1332 through the Foreign Sovereign Immunities Act. 28 U.S.C. § 1330 (1976). This Act provided a comprehensive jurisdictional basis for actions against foreign states. Accordingly, Congress deleted references to "foreign states," which were previously in paragraphs (2) and (3) of section 1332, and added paragraph (4), which conferred subject matter jurisdiction over actions initiated by foreign states. Act of Oct. 21, 1976, Pub. L. No. 94-583, § 3, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602-1611 (1994 & Supp. 1999)).

233. See, e.g., *CONSTITUTION*, *supra* note 227, at 774 ("The records of the Federal Convention are silent with regard to the reasons the Framers included in the judiciary article jurisdiction in the federal courts of controversies between citizens of different States . . .") (citation omitted); Henry J. Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 (1928) ("Nor are the records of the Convention fruitful to a student of the diversity clause."); Holt, *Alienage Origins*, *supra* note 226, at 550 ("[T]he extensive debates over the provisions to be made for strengthening the national legislature and for inventing the new national executive occupied almost all of the time of the 1787 Convention. Very little indeed was said about the new judiciary.").

234. See, e.g., William R. Casto, *The First Congress's Understanding of Its Authority over the Federal Court's Jurisdiction*, 26 B.C. L. REV. 1101, 1107 (1985) ("Because all debates in the first Senate were secret, there is some difficulty in piecing together a complete history of the [Judiciary] [A]ct."); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1528 n.36 (1986) ("The debates over the Judiciary Act are preserved only in a sketchy, incomplete fashion.").

relations.²³⁵ Second, federal courts seem better suited to guard against prejudice towards out-of-state litigants.²³⁶ And third, federal courts can better represent and foster international commercial interests.²³⁷ Each of these rationales has a basis in the Constitutional Convention and First Congress.

1. Foreign Relations

The legislative history of the Supremacy Clause evinces a concern about whether state courts would enforce previously ratified treaties. At the Constitutional Convention, Benjamin Franklin specifically moved to amend congressional veto power over state laws to include those state laws that conflicted with foreign treaties.²³⁸ Through a motion by James Madison, the Supremacy Clause eventually was amended "to obviate all doubt concerning the force of treaties preexisting."²³⁹ Some delegates feared that state courts would not be sufficiently sensitive to the importance of treaties between the United States and other countries.²⁴⁰ This prospective threat to international interests, therefore, was not insignificant.

To further guard against this threat, the participants in the Constitutional Convention largely agreed on the need for a national judicial system to hear cases involving aliens. Both Alexander Hamilton, a strong proponent of alienage jurisdiction, and Oliver Ellsworth, the principal architect of the Judiciary Act of 1789, endorsed the idea of federal courts presiding over international disputes. Hamilton asserted that "matters of general concern in the last resort" were the province of federal courts and so they were more properly suited to allay fears that "the national treaties will be liable to be infringed, the national faith to be violated, and the public

235. See *infra* Part III.B.1.

236. See *infra* Part III.B.2.

237. See *infra* Part III.B.3.

238. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 44 (1966) ("the words 'or any treaties subsisting under the authority of the Union,' being added after the words 'contravening &c. the articles of the Union,' on motion of Dr. Franklin") [hereinafter NOTES].

239. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 532 (1881).

240. See, e.g., *JPMorgan*, 536 U.S. at 96 ("[A]lienage jurisdiction was necessary to 'avoid controversies with foreign powers' so that a single State's courts would not 'drag the whole community into war.'") (quoting 3 ELLIOT, *supra* note 239, at 534); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1243 (7th Cir. 1990) ("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.").

tranquility to be disturbed."²⁴¹ And Ellsworth contended that the general jurisdiction of federal courts rendered them ideally accountable to foreign nations who might perceive injustice from an adverse judgment by a state court.²⁴² Whether or not such a perception was justified, the delegates clearly believed minimizing the risk of offending foreign nations made federal alienage jurisdiction worthwhile.²⁴³

Jurisdiction over aliens, therefore, was viewed as an extension of the federal courts' role in matters of international consequence. Implicit in this rationale was the delegates' belief that the federal courts were qualitatively superior to their state counterparts. One commentator has concluded that "[a]ll the evidence from the

241. 1 THE WORKS OF ALEXANDER HAMILTON 305-06 (Henry Cabot Lodge ed., 2d ed. 1903); see also THE FEDERALIST NO. 80, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton further argued the matter in *The Federalist*, charging that:

The Union will undoubtedly be answerable to foreign powers for the conduct of its members. . . . [I]t will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquility.

Id.

242. Warren, *New Light*, *supra* note 225, at 60 (quoting Letter of Oliver Ellsworth to Judge Richard Law, dated Apr. 30, 1789); see also NOTES, *supra* note 238, at 568 (Oliver Ellsworth) ("The Union will undoubtedly be answerable to foreign powers for the conduct of its members. . . . [I]t is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals."). In a letter to Charles Tillinghast, Timothy Pickering noted that

there is a particular & very cogent reason for securing to foreigners a trial . . . in a federal court. With respect to foreigners, all of the states form but one nation. This nation is responsible for the conduct of all its members towards foreign nations, their citizens & subjects; and therefore ought to possess the power of doing justice to the latter. Without this party, a single state, or one of its citizens, might embroil the whole union in a foreign war.

Letter from Timothy Pickering to Charles Tillinghast, dated Dec. 24, 1787, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 204 (Merrill Jensen ed., 1976) (James Wilson) [hereinafter DOCUMENTARY HISTORY]; see also Hugh Williamson, *Remarks on the New Plan of Government*, in THE STATE GAZETTE OF NORTH CAROLINA, 1788, reprinted in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 399-400 (Paul Leicester Ford ed., 1892) (making similar arguments for alienage jurisdiction).

243. See, e.g., *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). The *Deveaux* Court, for instance, observed:

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation . . . it is not less true that the [C]onstitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen.

Id. Consistent with this premise, foreign citizenship is determined by the foreign country's law. See note 277 and accompanying text.

Convention supports the notion that a national court system was thought necessary on all sides because state courts, or at least many state courts, were not doing their jobs.²⁴⁴ Indeed, James Madison bluntly stated that "[c]onfidence can [not] be put in the State Tribunals as guardians of the National authority and interests."²⁴⁵ The delegates attributed this mistrust not only to the distinct provinces of each judicial strata,²⁴⁶ but also to a perceived domination of courts by partial state legislatures and unqualified state judges that engendered an uneven quality of justice.²⁴⁷

A modern form of these arguments charges state courts with creating undue external costs. Under this view, state courts typically have no incentive in most contract cases to discriminate between residents and aliens because they are economically dependent upon each other.²⁴⁸ In contrast, state courts may have an incentive to discriminate in certain criminal and tort cases involving a resident victim by imposing costs on aliens.²⁴⁹ This is because state courts presumably are less concerned with national and international interests, and so are less inclined to protect them.²⁵⁰ Accordingly,

244. Holt, *Alienage Origins*, *supra* note 226, at 549.

245. 2 FARRAND, RECORDS, *supra* note 226, at 27.

246. For instance, Edmund Randolph contended that "the courts of the States can not be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the General & local policy at variance." *Id.* at 46.

247. For example, Joseph Story observed that
the prevalency of a local or sectional spirit might be found to disqualify the State tribunals for a suitable discharge of national judicial functions; and the very modes of appointment of some of the State judges might render them improper channels of the judicial authority of the Union. State judges . . . would, or at least might, be too little independent to be relied upon for an inflexible execution of the national laws.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1589, 408 (5th ed. 1891).

248. POSNER, *supra* note 218, at 176. Posner believes the contracting parties can account for the risk of discrimination within the agreement. *Id.* (citing Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960)). But this simply means the parties in such contract cases would bear the cost of drafting, negotiating, and enforcing a discrimination clause. If Posner is correct that state courts have no incentive to discriminate in these types of cases, then a contractual provision for the risk of discrimination may not be economically justifiable. Clearly, the unresolved variables in this calculus are the probability of discrimination and the cost of its consequences.

249. *Id.* ("On this view the rationale for diversity jurisdiction is similar to that for using the commerce clause of Article I of the Constitution to prevent the states from establishing tariff-like obstacles to interstate commerce."). Posner does admit, however, that these externalities may be limited since state judges may not consider the welfare of either residents or non-residents, thus diminishing the need for federal diversity jurisdiction. *Id.*

250. *Id.* at 175. According to Posner,
[s]ince state judges can be expected to be less independent of state political

there may be some justification for entrusting federal courts with a limited group of cases involving aliens.

2. Anti-Foreign Prejudice

Much of the relevant debates at the Constitutional Convention and the First Congress concerned the superior protection federal courts could provide to aliens from perceived prejudice in state courts. Some delegates may have deemphasized their concern about the partiality of local courts in recognition that the support of states was necessary to ratify the Constitution.²⁵¹ James Madison, for instance, civilly expressed his concerns in the form of a hypothetical about how "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them. . . . A citizen of another state might not chance to get justice in state court, and at all events he might think himself injured."²⁵² Not surprisingly, Hamilton was less diplomatic: "It seems scarcely to admit of controversy that the judiciary authority of the union ought to extend . . . to all those in which the State tribunals cannot be supposed to be impartial and unbiased."²⁵³ Regardless of their style, both Hamilton and Madison articulated a need to stem anti-foreign prejudice. Courts quickly came to regard this need as the primary rationale for alienage jurisdiction.²⁵⁴

forces than federal judges when both are residents of a state adversely affected by federal regulation, a state court may be an unsympathetic tribunal in a case where a federal right has been created in order to correct an interstate externality.

Id.

251. Johnson, *supra* note 22, at 12 (contending that any downplaying of the actual bias of states courts towards local residents "should not be surprising if one views *The Federalist* as designed to promote ratification of the Constitution by the various states").

252. 3 ELLIOT, *supra* note 239, at 486.

253. THE FEDERALIST NO. 80, *supra* note 241, at 402-03 (Alexander Hamilton).

254. In his *Dred Scott* dissent, Justice Curtis argued:

[The] purpose [of U.S. Const. art. III, § 2, cl. 1] was, to extend the judicial power to those controversies into which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill will between different States, or a particular State and a foreign nation.

Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 580 (1856) (Curtis, J., dissenting). *Burgess v. Seligman*, 107 U.S. 20, 34 (1882) ("[T]he very object of giving to the national courts jurisdiction . . . in controversies between citizens of different States was to institute independent tribunals which . . . would be unaffected by local prejudices and sectional views. . . ."). Similarly, the Court subsequently noted:

The foundation of the right of citizens of different States to sue each other in the courts of the United States is not an unworthy jealousy of the impartiality of the state tribunals. . . . It is to make the people think and feel, though residing in different States of the Union, that their relations to each

The validity of this rationale, however, was not unopposed or unproblematic. For instance, George Mason regarded Hamilton's and Madison's mistrust of state courts to be unfounded and "ridiculous."²⁵⁵ Indeed, one prominent commentator has suggested that

[t]he very form in which the argument [concerning alienage and diversity jurisdiction] is stated throws doubts on the sincerity of those propounding it. Madison does not point out any specific examples of prejudice, does not allege that any exist; Marshall even gives the innuendo that none do [sic] exist.²⁵⁶

Moreover, little, if any, evidence of prejudice apparently was available during the Convention debates.²⁵⁷ Given the delegates' concern about protecting foreign relations,²⁵⁸ these evidentiary gaps presumably apply more towards inter-state biases rather than xenophobia.²⁵⁹

In any event, the controversy persists over whether such prejudice exists. Modern concern over protecting foreign litigants appears as part of an effort to curtail the broader phenomenon of forum-shopping.²⁶⁰ Although the evidence is largely anecdotal,²⁶¹ one

other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject-matter of the controversies between the parties to a suit.

Dodge v. Woolsey, 59 U.S. (18 How.) 331, 354 (1855).

255. 3 ELLIOT, *supra* note 239, at 486 (George Mason). See also *id.* ("Their [proposed form of federal] jurisdiction extends to controversies between citizens of different states. Can we not trust our state courts with the decision of these?").

256. Friendly, *supra* note 233, at 493; *id.* ("Only if we could find that the state judges had been notoriously unfair to foreigners, would we be in a position to place much faith in the genuineness of the classical theory. It is, of course, impossible to obtain accurate information on this subject.").

257. John Frank has contended that

it is very true that there was very little concrete evidence of hostility in specific lawsuits. The evidence does show that in 1787 bias in interstate lawsuits was more an anticipated than an existing evil. . . . [T]he problem was not an acute one in 1787 for reasons going to the nature of the domestic economy of the colonies and states. There was too little significant interstate business litigation to give room for serious actual abrasion.

John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 24 (1948) [hereinafter Frank, *Historical Bases*]. But see Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 876 (1931) ("Even for the period covered, it is not demonstrated that the diversity clause was an anomaly or local prejudice inconsequential.").

258. See *supra* Part III.B.1.

259. See, e.g., Currie, *supra* note 206, at 5 (stating that "[m]y hunch is that it is too early to say that xenophobia has disappeared from the American scene," and thus it remains a possible rationale supporting alienage jurisdiction).

260. See Kramer, *Diversity Jurisdiction*, *supra* note 68, at 107 ("Forum shopping is regarded as an undesirable form of strategic behavior in every other context because it encourages wasteful investment of resources by both parties and courts.") (citing

study has found that a majority of defense attorneys shop forums based on a belief that out-of-state litigants suffer from some sort of bias.²⁶² Indeed, even the American Law Institute has suggested that courts do not administer section 1332 uniformly across regions.²⁶³ This suggestion is at least consistent with one prominent survey of the federal judiciary.²⁶⁴

William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 9-10 (1963)).

261. See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 492-94 (1993) (O'Connor, J., dissenting) ("The risk of prejudice was especially grave here. . . . As the Supreme Court of Appeals of West Virginia has recognized, the temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong.") (citing *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 906 (W. Va. Ct. App. 1991)); see also Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961 (1995) (reporting a not insignificant number of attorneys considered, *inter alia*, prejudice against out-of-staters and the comparative quality of judges, in selecting a forum). According to Flango,

[o]f the various reasons attorneys give for choosing one forum over the other, three stood out: quality of judges, client characteristics, and convenience. . . . The fact that resident status is still important to 60% of the attorneys and corporate status is important to 35% of the attorneys shows that fear of bias is an important consideration in forum selection to some lawyers. The percentages also show that of the two, out-of-state residence is of greater importance than corporate status.

Victor E. Flango, *Attorneys' Perspectives on Choice of Forum in Diversity Cases*, 25 AKRON L. REV. 41, 105 (1991).

262. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 409 (1992) (finding that "50.7% of the responding defense attorneys said that bias against out-of-state litigants was present in their cases."); see also Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 98 (1980) (reporting "almost half (47 percent) of the attorneys citing local bias [as the reason for selecting federal court] characterized it as 'important' or 'very important' to the forum decision"). But see *Wasson v. Northrup Worldwide Aircraft Servs., Inc.*, 443 F. Supp. 400, 401 (W.D. Tex. 1978) ("[T]he need to insure a 'neutral' forum for resolving disputes between citizens of different states [] loses much of its force as our society grows ever more mobile.").

263. ALI, STUDY, *supra* note 206, at 187-96.

264. Shapiro, *supra* note 212, at 335-36. Among the questions Shapiro's study posed to federal and circuit court judges was whether they favored curtailment or elimination of diversity jurisdiction:

With the exception of the Eighth Circuit, the circuits in which a majority of district judges favored abolition are located in the Northeast (First, Second, and Third) and Far West (Ninth)—those areas with the heaviest concentration of population and the greatest number of large metropolitan centers. In contrast, the circuits in which the percentage of judges favoring abolition was below 50% were those in the South and Midwest (Fourth, Fifth, Sixth, and Seventh).

Id.

3. International Commercial Interests

Although not an explicit concern at the Convention, the desire to utilize the judiciary for fostering commerce was present. Prior to the Convention, commercial relationships were limited and relatively unsophisticated. As one commentator has stated so simply: "The typical case was still A v. B for a cow."²⁶⁵ But the Framers presciently anticipated that the Constitution, and specifically federal courts, could facilitate the nascent commercial revolution by preempting some of the associated judicial problems that would arise.²⁶⁶ As that commentator has noted, "[i]n studying the Constitution it should never be forgotten that its first object [is] to promote commerce."²⁶⁷

Some delegates also viewed federal courts as superior vehicles for protecting national and international commercial interests. For instance, Madison observed "that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading with us."²⁶⁸ James Wilson contended that an added benefit of a "just and impartial tribunal" was its furthering of the "important object [of] extend[ing] our manufactures and our commerce."²⁶⁹ According to Wilson, the apparent or actual neutrality of federal courts would supply commercial actors with a secure system for enforcing contracts.²⁷⁰ Further, some historians have suggested that the federal courts provided a shield to businesses from anti-commercial biases extant in colonial state legislatures.²⁷¹

265. Frank, *Historical Bases*, *supra* note 257, at 26.

266. *Id.* at 27.

267. *Id.* at 27 n.126.

268. 3 ELLIOT, *supra* note 239, at 583 (statement of James Madison).

269. DOCUMENTARY HISTORY, *supra* note 242, at 519.

270. *Id.* ("Is it not an important object to extend our manufactures and our commerce? This cannot be done unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained unless we give the power of deciding upon those contracts to the general government."); *see also JPMorgan*, 536 U.S. at 93-94. The Court there explained that the development of alienage jurisdiction was due in part to efforts by state courts to impede foreign investment:

Both during and after the Revolution, state courts were notoriously frosty to British creditors trying to collect debts from American citizens, and state legislatures went so far as to hobble British debt collection by statute, despite the specific provision of the 1783 Treaty of Paris that creditors in the courts of either country would "meet with lawful impediment" to debt collection.

Id. at 94 (quoting THE DEFINITIVE TREATY OF PEACE BETWEEN HIS BRITANNIC MAJESTY AND THE UNITED STATES OF AMERICA, Sept. 3, 1783, United States-Great Britain, Art. IV, 8 Stat. 80, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 1776-1818, 151, 154 (Hunter Miller, ed. 1931)).

271. For instance, Edward Cowin has described the treaties thusly:

By their provincial policies with respect to commerce the state legislatures had already seriously impaired legitimate interests of this [creditor] class,

A perhaps unintended result of these rationales was that alienage and diversity jurisdiction established federal courts as courts of business and commerce.²⁷² According to Chief Justice Taft: "No single element—and I want to emphasize this . . .—no single element in our governmental system has done so much to secure capital for the legitimate development of enterprises . . . as the existence of federal courts . . . with a jurisdiction to hear diverse citizenship cases."²⁷³ With a reputation for impartiality and reliability, federal courts served to stabilize commercial relationships between diverse parties.²⁷⁴ Even commentators otherwise critical of jurisdiction premised on diverse citizenship recognize its significant past and present economic value.²⁷⁵

and they now proceeded to attack what under the standing law were its unchallengeable rights. . . . [S]tatutes suspending all actions upon debts were enacted, payment of debts in kind was authorized, and even payment in land.

Edward S. Cowin, *The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 519 (1925).; see also Frankfurter, *Distribution*, *supra* note 214, at 520 ("The real fear was of state legislatures, not of state courts. Such distrust as there was of local courts derived . . . [from] their general inadequacy for the interests of the business community."); James W. Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 16-17 (1964) ("Several commentators have maintained that the constitutional framers were not interested in assuaging the apprehension of commercial investors. Whether or not fully anticipated by the Founders, this fostering of investment in the emergent nation was one of the most salutary effects ascribed to diversity jurisdiction.").

272. See, e.g., *JPMorgan*, 536 U.S. at 95 (stating that "[t]his penchant of the state courts to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Constitution"); Johnson, *supra* note 22, at 20 (stating that "[a] desire to ensure, and increase, the flow of capital from Britain and other nations into the United States, with its fledgling economy," clearly influenced the Framers in their creation of alienage jurisdiction). For a general discussion of how judicial refinements affected commercial interests, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 140-59 (1977). Notably, Horwitz observes that, at the turn of the nineteenth century "[l]aw [wa]s no longer merely an agency for resolving disputes; it [wa]s an active, dynamic means of social control and change. Under such conditions, there must be one undisputed and authoritative source of rules for regulating commercial life." *Id.* at 155.

273. William Howard Taft, *Possible and Needed Reform in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 604 (1922).

274. See, e.g., William L. Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A. J. 379, 380 (1960). Marbury notes:

[I]t is generally agreed that the institutions of the Federal Government reflected to a marked degree the need of the commercial community for a stabilizing agency in the chaotic situation which was paralyzing commerce in the states supposedly united under the Articles of Confederation, and subjecting the infant nation to economic suffocation.

Id.

275. While arguably "the framers of Article III . . . wanted to reduce interstate

C. Statelessness

Section 1332(a) can be understood novelly as establishing two categories of aliens. The first category, domestic aliens, comprises "citizens or subjects of a foreign state" that permanently reside in the United States.²⁷⁶ The second category, foreign aliens, comprises U.S. citizens who are legally domiciled²⁷⁷ in a foreign state. Although seemingly symmetrical, these categories receive distinct judicial treatment that is manifest in the citizenship test for alienage jurisdiction. Specifically, in common parlance, foreign aliens are "stateless" for the purposes of alienage jurisdiction.²⁷⁸ The phenomenon of "statelessness" has been heavily criticized. As one commentator has stated: "[I]t does appear anomalous that . . . United States citizens who are not domiciliaries of the same state as their adversary, nor of any other state, may not avail themselves of the protection and benefits of the federal courts, at least on the basis of [alienage] jurisdiction."²⁷⁹

Courts have construed section 1332 strictly as permitting federal courts to hear only cases involving certain statutory pairings. For instance, the Third Circuit bluntly has stated: "We think that section

hostility," Posner, for instance, believes that

today, when increased education, better transportation and communications, and greater interstate mobility have lessened the parochialism that the framers worried about, it is significant that there is a rationale untouched by concern with parochialism for retaining at least a part, though probably a very small part, of the diversity jurisdiction.

POSNER, *supra* note 218, at 176-77.

276. 28 U.S.C. § 1332(a) (2000) (stating that for purposes of section 1332, "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled").

277. See, e.g., Note, *Evidentiary Factors in the Determination of Domicile*, 61 HARV. L. REV. 1232 (1948).

278. See, e.g., *Smith v. Carter*, 545 F.2d 909, 912 (5th Cir. 1977) (explaining that "an American citizen living abroad is precluded from invoking the [alienage] jurisdiction of the federal courts while foreign citizens having no connection with the United States may do so."); *Van der Schelling v. U.S. News & World Report, Inc.*, 213 F. Supp. 756, 759 (E.D. Pa.) (concluding that the Framers never intended the term "aliens" in Article III of the U.S. Constitution to include foreign aliens), *aff'd*, 324 F.2d 956 (3d Cir. 1963) (per curiam). See generally John P. Petzold, Note, *Federal Diversity Suits by American Citizens Domiciled Abroad*, 19 WASH. & LEE L. REV. 78 (1962) (analyzing various diversity suits and statutory treatment of American citizens domiciled abroad).

279. 1 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 0.74(4), at 708.4 (2d ed. 1948); see also *Wasson v. Northrup Worldwide Aircraft Servs., Inc.*, 443 F. Supp. 400, 404 (W.D. Tex. 1978) ("An individual should not be penalized for leading a mobile life style; however, the plain truth is that, under certain circumstances, a particular life style may serve to foreclose an individual's access to federal courts."); Currie, *supra* note 206, at 9-10 (suggesting foreign aliens should be treated as foreign nationals).

[1332](a)(2) 'citizens of a State, and foreign states or citizens or subjects thereof . . . ' means what it says."²⁸⁰ One form of this strict construction appears in the requirement of complete diversity.²⁸¹

Section 1332(a)(2) provides that domestic aliens can sue or be sued in a federal court on the basis of alienage jurisdiction if and only if they are paired with a United States citizen.²⁸² The determination

280. *Pemberton v. Colonna*, 290 F.2d 220, 221 (3d Cir. 1961). Plaintiff there never raised with the Court of Appeals the issue of whether her Mexican domicile rendered her a "subject" of that foreign state. *Id.*; see also *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) ("Not only does the language of the Act of 1887 evidence the Congressional purposes to restrict the jurisdiction of federal courts on removal, but the policy of successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."); *Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("The policy of the statute [28 U.S.C. § 1332] calls for its strict construction."); CHARLES WRIGHT, *WRIGHT ON FEDERAL COURTS* 154-55 (5th ed. 1994) (concluding Congress's power to confer federal jurisdiction over cases between resident aliens domiciled in different states is "extremely doubtful").

281. See, e.g., *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (finding that joinder of an alien plaintiff and an alien defendant defeats complete diversity); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) ("[E]ach distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that were the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.").

Another example of this strict construction is that a litigant cannot waive the defense that diversity does not exist. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) ("subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant"); *Thomas v. Bd. of Trs.*, 195 U.S. 207, 211 (1906). The *Thomas* Court further explained:

It is . . . well established that when jurisdiction depends on diverse citizenship the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived.

Id. But see *Coury v. Prot*, 85 F.3d 244, 249 (5th Cir. 1996) (insinuating defendant had been "playing fast and loose with the judicial machinery" and using the federal courts' limited subject matter jurisdiction in bad faith" by asserting a lack of subject matter jurisdiction truantly) (quoting 1 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 0.74[1] n.29 (2d. ed. 1996), and noting efforts to remedy this tactic have been "repudiated by intervening Supreme Court decisions") (citing *Am. Fire Cas. Co. v. Finn*, 341 U.S. 6, 16-18 (1951); *City of Brady, Texas v. Finklea*, 400 F.2d 352, 357-58 (5th Cir. 1968); *Di Frischia v. NewYork Cent. R.R.*, 279 F.2d 141, 141-44 (3d Cir. 1960); *Klee v. Pittsburgh & W. Va. Ry. Co.*, 22 F.R.D. 252, 252-55 (W.D. Pa. 1958)). But see *Wojan v. General Motors Corp.*, 851 F.2d 969, 976 (7th Cir. 1988) (holding that a court retains jurisdiction to punish defendant for falsely admitting existence of diversity); Note, *Second Bites at the Jurisdictional Apple: A Proposal for Preventing False Assertions of Diversity Jurisdiction*, 41 HASTINGS L.J. 1417, 1438-43 (1990) (proposing use of estoppel doctrine to stem belated challenges to existence of diversity).

282. 28 U.S.C. § 1332(a)(2); see, e.g., *Singh v. Daimler-Benz, AG*, 800 F. Supp. 260, 262 (E.D. Pa. 1992) ("The clear language of § 1332 establishes that when an alien

of whether an alien is a "citizen" or "subject" of a foreign state turns on such foreign state's law.²⁸³ The determination of state citizenship turns on whether the party is a citizen of the United States and whether there is a state of legal domicile.²⁸⁴

Unlike their domestic counterparts, foreign aliens cannot be the subject of a suit under section 1332(a) because they cannot assume the citizenship of any state.²⁸⁵ For instance, in *Sadat v. Mertes*,²⁸⁶ an

receives permanent status the alien is no longer an alien for diversity purposes but is instead a citizen of the state in which he or she resides."). Section 1332 specifies three other pairings eligible for federal jurisdiction: (1) citizens of different States; (3) citizens of different States with citizens or subjects of a foreign state as additional parties; and (4) a foreign state, as plaintiff and citizens of a State or of different States. 28 U.S.C. § 1332(1), (3)-(4).

283. See, e.g., *JPMorgan*, 536 U.S. at 104-05 (noting that a foreign state is entitled to define who its citizens or subjects are); see also *United States v. Wong Kim Ark*, 169 U.S. 649, 690 (1898) ("Every independent State has as one of the incidents of its sovereignty the right of municipal legislation and jurisdiction over all persons within its territory, and may therefore change their nationality by naturalization.") (quoting with approval statement of Secretary of State Fish).

284. See, e.g., *Sun Printing & Publ'g. Ass'n v. Edwards*, 194 U.S. 377, 383 (1904); *Gilbert v. David*, 235 U.S. 561, 569-70 (1915); *Anderson v. Watt*, 138 U.S. 694, 702 (1891) ("[I]t is essential that, in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intentment constitute it, should be distinctively and positively averred in the pleadings."); *Brown v. Keene*, 33 U.S. (8 Pet.) 110, 114 (1834) ("A citizen of the United States may become a citizen of that State in which he has a fixed and permanent domicile; but the petition does not aver that the plaintiff is a citizen of the United States."). This determination is governed by federal common law. See 15 JAMES WM. MOORE, *MOORE'S FEDERAL PRACTICE* § 102.34[3][a] (3d ed. 1997).

285. See, e.g., *Shoemaker v. Malaxa*, 241 F.2d 129, 129 (2d Cir. 1957) (finding that defendant was a stateless alien and, thus was "not a citizen or subject of a foreign state within the meaning of 28 U.S.C.A. § 1332(a)(2)"); *Johnson v. Smithsonian Inst.*, 80 F. Supp. 2d 197, 200 (S.D.N.Y. 2000) ("A suit by or against United States citizens domiciled abroad may not be premised on diversity.") (quoting *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 68 (2d Cir. 1990)); *Bissell v. Breakers-By-The-Sea*, 7 F. Supp. 2d 60, 62 (D. Me. 1998) (explaining that "American citizens who actually reside in a foreign country do not qualify for diversity jurisdiction"); *Lemos v. Pateras*, 5 F. Supp. 2d 164, 165 (S.D.N.Y. 1998) ("For purposes of diversity jurisdiction, one is a citizen of a state where one is domiciled. . . . Because plaintiff is not a United States domiciliary, she is a citizen of no state for purposes of diversity jurisdiction."); *Nat'l Enter., Inc. v. Smith*, 892 F. Supp. 948, 950 (E.D. Mich. 1995) ("For a person to fit within [the] definition [of a 'citizen' under 28 U.S.C. § 1332(a)(1)] that person must be a citizen of the United States and domiciled within a state.") (citing *Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826, 828 (1989)), *rev'd on different grounds*, 114 F.3d 561 (6th Cir. 1997); *Carl v. Galuska*, 785 F. Supp. 1283, 1290 (N.D. Ill. 1992) ("A U.S. citizen residing abroad is not a citizen of any state and therefore cannot maintain a suit in federal court where jurisdiction is based solely on diversity of citizenship."); *Bausch v. Philatelic Leasing, Ltd.*, 728 F. Supp. 1201, 1208-09 (D. Md. 1989) ("American citizens without citizenship in a particular state cannot be parties in a diversity action."); *Simmons v. Rosenberg*, 572 F. Supp. 823, 825 (E.D.N.Y. 1983) (rejecting as insufficient an averment that plaintiff "was an American citizen and a

individual alleging to be a U.S. citizen residing in Egypt commenced a negligence suit in federal district court against individuals and insurance companies from Connecticut and Wisconsin.²⁸⁷ The district court dismissed the action for lack of subject matter jurisdiction on the basis that the plaintiff was not a "citizen of a State" under section 1332(a)(1).²⁸⁸ On appeal, the Seventh Circuit observed "settled precedent establish[ing] that a citizen of the United States who is not also a citizen of one [state] of the United States may not maintain suit under [28 U.S.C. § 1332(a)(1)]."²⁸⁹ The basis for this rule is that, for alienage and diversity purposes, state citizenship is essentially synonymous with domicile.²⁹⁰ According to the court, "[t]o establish a

'citizen of a state other than the state of New York'" when she was domiciled in Italy); *De Wit v. KLM Royal Dutch Airlines, N.V.*, 570 F. Supp. 613, 616-17 (S.D.N.Y. 1983) (imputing father's stateless status to child for purposes of diversity jurisdiction); *Mohr v. Allen*, 407 F. Supp. 483, 487 (S.D.N.Y. 1976) ("A nonresident United States citizen does not satisfy the jurisdictional requirements set out for a diversity action in . . . 28 U.S.C. § 1332(a)(2)."); *Kaufman & Broad, Inc. v. Gootrad*, 397 F. Supp. 1054, 1055 (S.D.N.Y. 1975) (citing 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3621 (1975)); *Garner v. Pearson*, 374 F. Supp. 580, 589 (M.D. Fla. 1973) ("[B]y the simple expedient of absenting one's self from the United States, an American citizen may succeed in avoiding federal diversity jurisdiction."); *Fahrner v. Gentzsch*, 355 F. Supp. 349, 353 (E.D. Pa. 1972) ("Since [plaintiff] was not a United States citizen at the time suit was filed, he could not have had domicile for diversity purposes in any particular state of the United States."); *Twentieth Century-Fox Film Corp. v. Taylor*, 239 F. Supp. 913, 914 n.2 (S.D.N.Y. 1965) (referencing successful statelessness defense asserted by Richard Burton and Elizabeth Taylor); *Clapp v. Stearns & Co.*, 229 F. Supp. 305, 307 (S.D.N.Y. 1964) (rejecting an averment of foreign residence as nonequivalent to an averment of citizenship); *McClanahan v. Galloway*, 127 F. Supp. 929, 930 (N.D. Cal. 1955) (denying defendant's averment of diversity jurisdiction when they were domiciled in Columbia for thirty years); *Alla v. Kornfeld*, 84 F. Supp. 823, 824-25 (N.D. Ill. 1949) ("There is a recognized distinction between citizenship of the United States and citizenship of a particular State, and a person may be the former without being the latter. . . . If a person establishes domicile in a foreign country, he loses his State citizenship but not necessarily his [U.S.] citizenship."); *Bishop v. Averill*, 76 F. 386, 387 (D. Wash. 1896) ("The defendants . . . by removal from Montana, lost their citizenship in that state, and they have become residents of a foreign country, but they have not acquired the rights nor assumed the obligations of a new citizenship.").

286. 464 F. Supp. 1311 (D. Wis. 1979), *aff'd*, 615 F.2d 1176, 1176-89 (7th Cir. 1980).

287. *Sadat*, 615 F.2d at 1178.

288. *Id.*

289. *Id.* at 1180 (citing cases); *see also* *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996) ("An American national, living abroad, cannot sue or be sued in federal court under [alienage] jurisdiction, 28 U.S.C. § 1332, unless that party is a citizen, i.e., domiciled, in a particular state of the United States.") (citing 1 MOORE, *supra* note 281, § 0.74[4]). The *Sadat* court acknowledged this rule is not without question. *Id.* at n.4 (citing cases).

290. *See, e.g.,* *Rodriguez-Diaz v. Sierra-Martinez*, 853 F.2d 1027, 1029 (1st Cir. 1988) (noting that "state citizenship and domicile are equivalents" for diversity purposes); 15 MOORE, *supra* note 284, § 102.34[1]. On various occasions, the Supreme

domicile of choice a person generally must be physically present at the location and intend to make that place his home for the time at least.²⁹¹ Because the plaintiff was not physically present in the United States and could not demonstrate an intent to be domiciled there, the Seventh Circuit affirmed the action's dismissal.²⁹²

Courts also have established that foreign aliens do not qualify as a "citizen" or "subject" of a foreign state.²⁹³ For instance, in *Van der Schelling v. U.S. News & World Report, Inc.*,²⁹⁴ a U.S. citizen legally domiciled in Mexico commenced a libel suit against a Delaware corporation.²⁹⁵ In opposition to a motion to dismiss, the plaintiff contended she qualified as a "subject" of a foreign state under section 1332(a)(2).²⁹⁶ The Eastern District of Pennsylvania defined a "subject" of a foreign state by examining the history behind Article III and the

Court also has confirmed that "citizen" and "subject" are to be regarded equivalently in other contexts. See, e.g., *Inglis v. Trs. of Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, 155 (1830) ("The rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign, is a subject; and, *e converso*, that every person born without such allegiance, is an alien."); *The Pizarro*, 15 U.S. (2 Wheat) 227, 246 (1817) (interpreting Spanish Treaty of 1795 and concluding "in the language of the law of nations . . . a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country").

291. *Sadat*, 615 F.2d at 1180 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 15, 16, 18 (1971)).

292. *Id.* at 1182 ("Because the plaintiff, an American citizen, was domiciled abroad in 1976 [when the action was commenced], he was not a citizen of a state within the meaning of 28 U.S.C. § 1332(a)(1)."). The *Sadat* court proceeded to evaluate the plaintiff's citizenship under 28 U.S.C. § 1332(a)(2) and concluded that plaintiff constituted a "citizen" or "subject" under a foreign state despite having claimed dual citizenship. *Id.* at 1186 (stating that "the plaintiff was domiciled abroad when he initiated this action and therefore was not a citizen of any state").

293. See, e.g., *Shoemaker v. Malaxa*, 241 F.2d 129, 129 (2d Cir. 1957) ("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)") (citing *Blair Holdings Corp. v. Rubenstein*, 133 F. Supp. 496, 496-502 (S.D.N.Y. 1955)); *Paglin v. Saztec Int'l, Inc.*, 834 F. Supp. 1201, 1203 (W.D. Mo. 1993) (per curiam) ("A United States naturalized citizen who does not reside in the United States and who does not claim domicile in any particular state, is not a 'citizen of a state' for purposes of 28 U.S.C. § 1332.") (citing *Sadat*, 615 F.2d at 1180); *Dadzie v. Leslie*, 550 F. Supp. 77, 79 (E.D. Pa. 1982); *Haggerty v. Pratt Inst.*, 372 F. Supp. 760, 761-62 (E.D.N.Y. 1974) ("[P]laintiff, having lost his state citizenship by acquiring a foreign domicile but not foreign citizenship, has lost his right to sue on diversity grounds under § 1332(a)(1) in addition to his failure to acquire § 1332(a)(2) rights."); *Hammerstein v. Lyne*, 200 F. 165, 170 (W.D. Mo. 1912) ("A fixed or permanent residence or domicile in a state is essential to the character of citizenship that will bring the cases within the jurisdiction of the federal courts.") (quoting *Prentiss v. Brennan*, 19 F. Cas. 1278, 1278 (N.D.N.Y. 1851)).

294. 213 F. Supp. 756, 756-63 (E.D. Pa.), *aff'd*, 324 F.2d 956 (3d Cir. 1963) (per curiam).

295. *Id.* at 756-57.

296. *Id.* at 756.

Judiciary Act of 1789.²⁹⁷ The court inferred from Hamilton's arguments in *The Federalist* and James Wilson's debates in the Pennsylvania Constitutional Convention that the Framers intended "citizen" and "subject" to mean the same thing.²⁹⁸ According to the court, this was because the Framers "were undoubtedly keenly aware of the fact that they had lately been subjects and that in other lands men still remained subjects of a sovereign and not citizens of a state."²⁹⁹ Apparently, that awareness led the Framers to regard "aliens," but not U.S. citizens residing abroad, as foreign subjects.

Support for this reasoning came in the form of a textualist reading of the Judiciary Act of 1789. Under this reading, there seemed to be "no reason to suppose that the first Congress deliberately failed to exercise a power given by the Constitution."³⁰⁰ The court then applied its reasoning in syllogistic fashion: If "citizen" and "subject" are interchangeable within Article III, and if "subject" is equivalent to "alien," then an alien must be a foreign citizen, and "the Constitution did not cover American citizens domiciled abroad, for these are not aliens."³⁰¹

The rule established in *Van der Schelling* endures. For instance, in *Smith v. Carter*,³⁰² the Fifth Circuit reconsidered the rule in *Van der Schelling*. The *Smith* defendant removed a claim filed in state court to federal court under the alienage jurisdiction statute.³⁰³ In dismissing the action for lack of subject matter jurisdiction, the

297. *Id.* at 757-62.

298. *Id.* at 758-59 (quoting THE FEDERALIST NO. 80, *supra* note 241, at 588-89 (Alexander Hamilton)); 3 ELLIOT, *supra* note 239, at 492-93 (James Wilson)); *see also Wong Kim Ark*, 169 U.S. at 663-64 ("The term 'citizen,' as understood in our law, is precisely analogous to the term *subject* in the common law . . .") (quoting *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 114, 121 (1838)). *But see, e.g., Wildes v. Parker*, 29 F. Cas. 1224, 1225 (C.C.D. Mass. 1839) (No. 17,652) (finding United States citizen domiciled in England to be "by the general principles of law . . . now treated, for all commercial purposes, as an alien merchant of Great Britain").

299. *Van der Schelling*, 213 F. Supp. at 761.

300. *Id.* at 759.

301. *Id.* at 759-60 (citing 2 AM. JUR., *Aliens* § 2 (2d ed., 1962); *Hammerstein*, 200 F. at 165; *Low Wah Suey v. Backus*, 225 U.S. 460 (1912); JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 51 (Oliver W. Holmes ed., 12th ed. 1873)). *But see Currie, supra* note 206, at 9-10 (suggesting that foreign aliens be treated as foreign nationals).

302. *Smith v. Carter*, 545 F.2d 909 (5th Cir. 1977). The case concerns a replevin action in a Mississippi state court brought by a United States citizen permanently residing in Canada. *Id.* at 910.

303. *Id.* In removal cases, proper diversity must exist both at the time the state court action was commenced and such action was removed. *See, e.g., Las Vistas Villas, S.A. v. Petersen*, 778 F. Supp. 1202, 1203 (M.D. Fla. 1991), *aff'd*, 13 F.3d 409 (11th Cir. 1994); *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 776 (7th Cir. 1986) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)); *Maple Island Farm, Inc. v. Bitterling*, 196 F.2d 55, 56 (8th Cir. 1952)).

district court cited the "long-standing rule" in *Van der Schelling*.³⁰⁴ On appeal, the Toronto resident contended that he was a "foreign subject" of Canada in light of certain historical differences between the terms "citizen" and "subject," and that *Van der Schelling* had created an "anomaly" whereby "an American citizen living abroad is precluded from invoking the [alienage] jurisdiction of the federal courts, while foreign citizens having no connection with the United States may do so."³⁰⁵ Notably, the Fifth Circuit did not disagree with these arguments, in fact conceding "the anomaly of the existing rule under *Van der Schelling*."³⁰⁶ While acknowledging that "these terms undoubtedly have been used . . . with different shades of meaning over the years," the court maintained that "the basic underpinnings of *Van der Schelling* and its progeny are sound"³⁰⁷ and concluded that "Congress is the appropriate body to make such a change."³⁰⁸

The phenomenon of statelessness is not merely an anomaly limited to a few individuals. Under the rule originally established in *Chapman*,³⁰⁹ an unincorporated association assumes the citizenship of its constituent members.³¹⁰ Accordingly, foreign aliens who are members of an unincorporated association render it stateless for alienage purposes. As a result, the entire association becomes incapable of suing or being sued under the alienage jurisdiction statute.³¹¹ Two trends indicate how widespread this deprivation of federal subject-matter jurisdiction stands to be. First, the nature of

304. *Smith*, 545 F.2d at 911 (citing *Van der Schelling*, 213 F. Supp. at 756).

305. *Id.* at 912.

306. *Id.*

307. *Id.* (citing *Mohr*, 407 F. Supp. at 487; *Kaufman & Broad, Inc. v. Gootrad*, 397 F. Supp. 1054, 1055 (S.D.N.Y. 1975); *Haggerty v. Pratt Inst.*, 372 F. Supp. 760, 761 (E.D.N.Y. 1974); *Fahrner v. Gentzsch*, 355 F. Supp. 349, 353 (E.D. Pa. 1972); *Rayfield & Co. v. Watson Seafood & Poultry Co.*, 268 F. Supp. 97, 103 (E.D.N.C. 1967); *Twentieth Century-Fox Film Corp. v. Taylor*, 239 F. Supp. 913, 914 (S.D.N.Y. 1965) (dictum)).

308. *Id.* (citing 1 MOORE, *supra* note 279, ¶ 0.74(4), at 708.4).

309. 129 U.S. 677 (1889).

310. See *supra* Part II.B.II.

311. See, e.g., *Creswell v. Sullivan & Cromwell*, 922 F.2d 60, 69 (2d Cir. 1990). In *Creswell*, the Second Circuit explained that

[i]f in fact any of S & C's foreign-residing United States citizen partners are domiciled abroad, a diversity suit could not be brought against them individually; in that circumstance, since for diversity purposes a partnership is deemed to take on the citizenship of each of its partners . . . a suit against S & C could not be premised on diversity.

Id. *Venture Fund (Int'l) N.V. v. Willkie Farr & Gallagher*, 418 F. Supp. 550, 556 (S.D.N.Y. 1976) ("The defendant in question . . . has been living in France for nine years though he is still an American citizen. He is 'stateless,' . . . and, since diversity must be shown for all members of the partnership, this defeats the jurisdiction.").

modern commerce has become increasingly international,³¹² which prospectively translates into an increase in the number of U.S. citizens living and working abroad. Second, the number of unincorporated associations is burgeoning,³¹³ which suggests their expanded role in the economy. The combined effect of these two factors is that unincorporated associations are now more likely than ever to have stateless members. Moreover, such members are even more attractive for unincorporated associations that wish to immunize themselves from alienage jurisdiction.³¹⁴ Accordingly, the problem of statelessness is not only real, but potentially ubiquitous.

IV. COLLAPSING DISTINCTIONS

The preceding Parts have established the asymmetrical jurisdictional status accorded to alien business organizations. Implicit within this analysis is a disbelief in strictly adhering to the doctrine of *stare decisis* where substantive gaps exist.³¹⁵ As a

312. See *supra* note 219.

313. See *supra* notes 37-44 and accompanying text.

314. A debatable premise of this argument concerns the motives for not wanting to be in federal court. State courts, however, can offer procedural and substantive advantages to a federal court. For instance, some view the federal admissibility test for scientific evidence established in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), as more stringent than the test established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which many states continue to use. According to the Co-Chair of the ABA Section Committee on Products Liability,

Daubert may be driving more plaintiffs to state court. "The most populous states in the country, with the exception of Ohio and Texas, are still following *Frye*, not *Daubert* In those jurisdictions, plaintiffs have an added incentive to file suit in state court, whereas defense lawyers would prefer to be in federal court, where the judge, under *Daubert*, serves as a gatekeeper."

Katerina M. Eftimoff, *The Decade after Daubert Proves Tough on Expert Witnesses*, LITIG. NEWS, July 2002, at 1 (quoting an interview with John B. Ibster). For a comparative assessment of these two tests, see, e.g., Peter B. Oh, *The Proper Test for Assessing the Admissibility of Nonscientific Expert Evidence under Federal Rule of Evidence 702*, 45 CLEV. ST. L. REV. 437 (1997) (recommending federal courts reinstate the *Frye* test). Additionally, one should not underestimate the value of dismissing a case from federal court to protract litigation.

315. See generally SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992* (1995); KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (Paul Gewirtz ed., Michael Ansaldi; trans., 1989); *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* (D. Neil McCormick & Robert S. Summers eds., 1997); ROSCOE POUND, *LAW FINDING THROUGH EXPERIENCE AND REASON: THREE LECTURES* (1960). See also *STARE DECISIS AND THE DOCTRINE OF LEGAL PRECEDENT: A SELECTED BIBLIOGRAPHY* (Jill Mubarak & Robert Rich eds., 1995). The flip-side to this disbelief is doctrinal consistency, which is akin to the notion of "horizontal" (or "temporal") consistency. See Ronald Dworkin, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14, 22-23 (1977); Hirsch, *supra* note 72, at 1139 (describing "temporal" inconsistency as occasions when "a legal system . . .

preliminary matter, statutory and common law gaps are present as between the citizenship tests applied to corporations and unincorporated associations for alienage purposes.³¹⁶ Specifically, Congress fashioned a separate citizenship test for corporations,³¹⁷ but neglected to consider whether unincorporated associations could engage in similar abuses.³¹⁸ Secondly, this distinct treatment engenders a prospective doctrinal gap between the jurisdictional test and the proposed uniform treatment for business entities. Advocates of uniform treatment give little, if any, shrift to eradicating distinctions between entities that exist outside of business formation, operation, and dissolution,³¹⁹ much less the disconnect between the premises underlying the current law and the proposed future regime.

Beyond the intrinsic value of closing these substantive gaps, there are compelling policy reasons to conform our jurisdictional treatment for business entities with entity rationalization statutes. Simply by employing stateless members, unincorporated associations can control when and where they wish to deprive themselves or adverse litigants of access to federal courts, the same sort of undesirable forum shopping that prompted Congress to amend the citizenship test for corporations.³²⁰ Further, at the time Congress enacted its amendments to section 1332, unincorporated associations were of a relatively limited number that perhaps justifiably did not

oscillate[s] between alternative formulations of the same legal rule"); see also Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 8 (1984) (asserting that the law should "edify," that is, it should help . . . readers, or society as a whole, break free from outworn vocabularies and attitudes"). This is not to be confused with the notion of "vertical" (or "structural") consistency. DWORKIN, *supra* note 121, at 164-224, 227; Hirsch, *supra* note 72, at 1058, 1139 (describing "structural" consistency as the "symmetry . . . of doctrinal treatment between structurally analogous (or 'parallel') legal issues").

316. See *supra* Part II.B. Some characterize this as a "doctrinal wall." See Cohen, *supra* note 45, at 438 & n.12 ("The doctrinal wall refers to the position established in *Chapman v. Barney*, 129 U.S. 677, 682 (1889)."). Professor Cohen believes that "reliance on precedent is not a persuasive rationale when the results are 'inconsistent with the goals of diversity jurisdiction . . . and by the Court's own admission defy] the realities of today's business world.'" Cohen, *supra* note 45, at 438 (quoting Robert J. Tribeck, *Cracking the Doctrinal Wall of Chapman v. Barney: A New Diversity Test for Limited Partnerships and Limited Liability Companies*, 5 WIDENER J. PUB. L. 89, 113 (1995)). As Part III establishes, the case for reversing this "doctrinal wall" through alienage jurisdiction is more compelling because its rationales are more established and because it engenders the problem of statelessness. See *supra* Parts III.A, III.C.

317. Act of June 25, 1948, ch. 646, 62 Stat. 930 (1948) (current version at 28 U.S.C. § 1332 (2000)).

318. See *supra* note 180 and accompanying text.

319. See *supra* notes 10, 11, 128-34, and accompanying text.

320. See *supra* note 34 (noting section 1332 was a congressional reaction to the scenario presented in *Black & White Taxicab*).

merit legislative attention.³²¹ But the current statistics on certain limited unincorporated associations now suggest otherwise.³²² The prevalence of these associations render them eligible for the same rationale that resulted in an amended citizenship test for corporations. Moreover, the growing popularity and globalization of certain unincorporated associations merely magnify the frequency and scope of potential abuse posed by statelessness.³²³ Accordingly, the practical differences between alien corporations and unincorporated associations are more glaring than ever.

This Part proposes a way to eliminate these sort of corporate distinctions in a lock-step manner. First, Congress and the courts should accord jurisdictional citizenship to foreign aliens based on their domicile. In alienage, domicile analysis determines an individual's citizenship.³²⁴ But courts recognize only a limited conception of citizenship that is exclusively concerned with domestic statehood.³²⁵ This conception of citizenship is far narrower than the true scope of domicile analysis, and rests on an interpretation of legislative history that is as unduly strict as it is detached from the historical and modern rationales for alienage jurisdiction.³²⁶ By harmonizing the scope of domicile and citizenship for alienage purposes, the problem of statelessness can be eliminated. Second, a logical corollary to this solution would be to utilize the closest corporate analogue of domicile, the principal place of business, to determine the jurisdictional citizenship of unincorporated associations.³²⁷ This effectively would collapse the unjustifiably distinct jurisdictional tests applied to these associations and to corporations. Moreover, basing citizenship on domicile would create doctrinal consistency between the citizenship tests applied to business organizations and to aliens. Perhaps more significantly, harmonizing these jurisdictional asymmetries would provide a substantive basis for collapsing residual corporate distinctions. This

321. There is no clear indication why Congress failed to extend its amendment of section 1332 to unincorporated associations. See, e.g., Comment, *Diversity Jurisdiction for Unincorporated Associations*, *supra* note 180, at 147 n.50 (noting this failure "is not equivalent to congressional action denying [unincorporated associations] citizenship for jurisdictional purposes").

322. See *supra* notes 37-45 and accompanying text.

323. See Keatinge, *Balkanization of Business Organizations*, *supra* note 100, at 234-35 ("[T]he number of LLCs increased by 94.3% in 1995 This dramatic growth is confirmed by earlier statistics from the United States Treasury Department: according to federal tax information, the number of LLCs filing partnership tax returns increased by 176% between 1993 and 1994").

324. See *supra* notes 284-85 and accompanying text.

325. See *supra* Part III.C.

326. See *supra* Part III.B.

327. See *infra* note 369.

Part contends obtaining this basis could supply courts and legislatures with a framework for evaluating and implementing entity rationalization.

A. *Jurisdictional Collapsing*

1. Resolving Statelessness

The anomaly of statelessness can be resolved by matching the scopes of domicile and jurisdictional citizenship. Domicile functions to associate a person with a particular place for a particular purpose. According to Justice Holmes, "domicile is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."³²⁸ Indeed, this is the notion of domicile courts use to determine the citizenship of individuals either from or permanently residing in the United States.³²⁹ In such circumstances, domicile equates with citizenship.³³⁰ The logic of this equation is that jurisdictional citizenship should reflect the state benefits and privileges an individual receives in due course through her permanent residence.³³¹

Yet courts do not extend this logic to foreign aliens. By virtue of their permanent residence abroad, foreign aliens fulfill the basic prerequisites for domicile. They receive benefits and privileges

328. *Williamson v. Osenton*, 232 U.S. 619, 625 (1914) (Holmes, J.) (emphasis added); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11(2) (1971) ("Every person has a domicil [sic] at all times and, at least for the same purpose, no person has more than one domicil at a time.").

329. See *supra* notes 284-85 and accompanying text. The notion of domicile utilized for alienage purposes is imported from established choice-of-law principles. See, e.g., *Stifel v. Hopkins*, 477 F.2d 1116, 1120 (6th Cir. 1973) ("considerations on which federal courts rely in determining domicile often derive from state choice-of-law rules that have been developed in such diverse contexts as probate jurisdiction, taxation of incomes or intangibles, or divorce law"). The Third Circuit, however, has ruled that [t]he problem of what law to apply is surely a different problem from that of whether a litigant should have access to federal court, and it does not conduce to clarity of analysis to suppose that the same answers will suffice for different questions. . . . [T]he legal conclusion of domicile in diversity cases is at best a substitute for the constitutional requirement of state citizenship.

Krasnov v. Dinan, 465 F.2d 1298, 1300 n.1 (3d Cir. 1972).

330. See *supra* note 290.

331. The *Restatement* defines domicile as "a place . . . to which the rules of Conflict of Laws sometimes accord determinative significance because of the person's identification with that place." RESTATEMENT (SECOND OF CONFLICT OF LAWS), *supra* note 328, § 11(1); see also Christopher T. Corson, *Reform of Domicile Law for Application to Transients, Temporary Residents and Multi-Based Persons*, 16 COLUM. J.L. & SOC. PROBS. 327 (1981).

comparable to those received by domestic aliens and United States citizens.³³² The apparent reason why courts do not recognize this fact is that they subscribe to a conception of jurisdictional citizenship unjustifiably restricted to domestic states.³³³ Put differently, only such states can confer the benefits and privileges necessary to justify imputing an intent to reside permanently in a jurisdiction. Beyond its clearly counterfactual nature, this reasoning does not cohere with the prevailing case law. According to *Van der Schelling* and its progeny, foreign aliens are to be regarded as foreign citizens,³³⁴ only because the Constitution does not provide for the exercise of federal alienage jurisdiction over foreign citizens are they stateless.³³⁵

But the rule in *Van der Schelling* rests on flawed premises and so cannot support this dualistic approach to domestic and foreign aliens. That court's reasoning mistakenly equates the powers conferred by the Judiciary Act of 1789 with the limits established under Article III.³³⁶ A simple counterfactual to this equation is that the Judiciary Act of 1789 did not provide for federal question jurisdiction, whose constitutionality is unquestioned.³³⁷ More relevantly, *Van der Schelling* interprets the Judiciary Act of 1789 in the unconstitutional, literal fashion that prompted the 1875 amendments concerning alienage jurisdiction.³³⁸ These amendments established that aliens are not to be deemed synonymous with "citizens" or "subjects" of a foreign state because aliens otherwise would not need to be paired with citizens for alienage purposes.³³⁹ So the problem in *Van der Schelling* is not simply a statutory one in section 1332, but is also a matter of misinterpreting the Judiciary Act of 1789.³⁴⁰ Deferring to Congress to correct this misinterpretation

332. See, e.g., *Van der Schelling*, 213 F. Supp. at 756-57. As discussed above, the court determined a foreign alien residing in Mexico was neither a "citizen" nor a "subject" of that foreign state under section 1332. See *supra* notes 294-301 and accompanying text. But Mexico had accorded the foreign alien the distinct legal status of an "inmigrado," which provided certain entitlements. See *Van der Schelling*, 213 F. Supp. at 757.

333. See *supra* notes 284-91 and accompanying text.

334. See *Van der Schelling*, 213 F. Supp. at 756; *Smith v. Carter*, 545 F.2d 909 (5th Cir. 1977); *Mohr v. Allen*, 407 F. Supp. 483 (S.D.N.Y. 1976); *Kaufman v. Gootrad*, 397 F. Supp. 1057 (S.D.N.Y. 1975); *Rayfield v. Watson Seafood & Poultry Co.* 268 F. Supp. 97 (E.D.N.C. 1967).

335. See *supra* notes 297, 301, and accompanying text.

336. Compare *supra* notes 228-32 with *supra* notes 297-301.

337. See *supra* note 227.

338. See *supra* Part III.C.

339. See *supra* notes 228-29 and accompanying text.

340. In any event, *Van der Schelling's* concern with breaching the limits of Article III is unfounded. See, e.g., *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) ("Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.") (citation

seems, at best, a flimsy justification for perpetuating an ill-conceived distinction among groups of aliens.

One need only examine the rationales for alienage jurisdiction to find a compelling affirmative justification for extending this treatment to foreign aliens. Whether the threat is actual or perceived, foreign aliens are among the group most likely to suffer at the hands of a partial state court. By virtue of their foreign residency, these aliens are likely to have minimal economic ties to any particular domestic state, and certainly weaker ties than their domestic litigant counterparts.³⁴¹ These considerations only make the prospect of forum shopping more attractive and potentially more meaningful.³⁴² And the problem is a self-feeding one, as foreign aliens cognizant of the possibilities afforded by forum shopping may avoid transacting in unfavorable jurisdictions or insist on negotiating critical choice-of-law and choice-of-venue clauses.³⁴³ The collective result is unnecessary costs borne by both parties, costs that have increased as international commerce continues to grow and the pool of foreign aliens expands.³⁴⁴ Accordingly, acknowledging the capacity of foreign aliens to have a domicile and thus jurisdictional citizenship comports with the objectives of alienage.

2. Resolving Corporate Citizenship

Although extending domicile-based citizenship to foreign aliens would eliminate the problem of stateless individuals, as well as stateless business entities, doctrinal consistency can be gained by extending an analogue of this citizenship test to certain unincorporated associations. Certainly, the original basis for applying the current disparate citizenship tests to unincorporated associations and corporations is no longer viable. Unincorporated associations presently assume a role in the economy roughly commensurate to that which corporations assumed when the Court issued *Marshall v. Baltimore & Ohio Railroad Co.*³⁴⁵ By extension,

omitted).

341. See *supra* notes 248-50 and accompanying text.

342. See *supra* note 314 and accompanying text.

343. See generally Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002); Andrew T. Guzman, *Public Choice and International Regulatory Competition*, 90 GEO. L.J. 971 (2002); Erin Ann O'Hara, *Economics, Public Choice, and the Perennial Conflict of Laws*, 90 GEO. L.J. 941 (2002); Paul B. Stephan, *The Political Economy of Choice of Law*, 90 GEO. L.J. 957 (2002).

344. Arguably, the inability of stateless persons to access federal courts is consistent with the notion that federal courts are better suited than their state counterparts to serve (inter)national interests. See, e.g., CHARLES ALAN WRIGHT ET AL., 13B FEDERAL PRACTICE & PROCEDURE, § 3611 (2d ed. 1984) [hereinafter WRIGHT ET AL., 13B FEDERAL PRACTICE & PROCEDURE].

345. 57 U.S. (16 How.) 314, 334 (1853); see *supra* notes 150-54 and accompanying

Congress and the courts should recognize "[t]he necessities and conveniences of trade and business" now require that unincorporated associations should be accorded jurisdictional citizenship.³⁴⁶ The Court and numerous commentators already have recognized that these associations are no less qualified for entity status than corporations.³⁴⁷ Indeed, the advent of elective tax regulations has ensured that certain limited unincorporated associations will continue to be attractive, and arguably superior, substitutes for incorporation.³⁴⁸

Additionally, the citizenship test for unincorporated associations is susceptible to abuse akin to what originally concerned Congress about corporations.³⁴⁹ The potential for abuse is manifest in the choice of members.³⁵⁰ A larger geographic base for membership will result in a diminished capacity to establish diversity as there is a greater probability of opposing sides being citizens of the same state.³⁵¹ This diminished capacity may seem inconsequential to a firm's decision concerning who to designate as members or where to establish offices. But the matter of where a firm can expect to sue or be sued is not insignificant.³⁵² Indeed, one need only look to the case

text.

346. *Marshall*, 57 U.S. (16 How.) at 327; see notes 29-36 and accompanying text.

347. See *supra* notes 46, 48, and 101.

348. See *supra* note 5.

349. See *supra* notes 34, 159, and accompanying text.

350. See, e.g., Cohen, *supra* note 45, at 439 n.15 ("In deciding among the options that provide limited liability, the organizers will examine factors like start-up costs and annual fees, flexibility in other characteristics like management, and acceptance by investors of the different forms."). Arguably, though, choice of members will be considered in conjunction with tax considerations. See *supra* note 75 and accompanying text.

351. See, e.g., Chemerinsky & Kramer, *supra* note 204, at 83 ("[O]nly diversity jurisdiction has been constricted—by Congress' [*inter alia*] . . . expanding corporate citizenship . . .").

352. See, e.g., *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.") (citation omitted). The Court also has stated:

Th[e] [due process] clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (citations omitted).

responsible for the 1958 Amendments to see the lengths that business organizations will go to attain jurisdictional advantages.³⁵³ Under the current citizenship test, an unincorporated association need only have one stateless member to be completely deprived of or immune from federal court actions premised on diversity.³⁵⁴ Accordingly, the circumstances that led to the codification of the citizenship test for corporations equally apply to unincorporated associations, a fact repeatedly noted by the Supreme Court and commentators alike.³⁵⁵ The matter is undoubtedly ripe for resolution.³⁵⁶

So the true task is determining not whether, but simply which, uniform citizenship test should apply to all business organizations.³⁵⁷ Arguably, there are strong reasons for returning to the membership

353. See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928). See also *supra* notes 34 and 159.

354. See *supra* Part III.C.

355. See *supra* note 175 and accompanying text.

356. Moreover, "Congress presumably has the constitutional power to close these 'loopholes' in the jurisdictional statute. This is precisely what it did in the case of citizens of the District of Columbia, Puerto Rico, and the territories who also were treated as 'stateless' for jurisdictional purposes prior to the enactment of the definition of 'state' now found in Section 1332(d) of Title 28." WRIGHT ET AL., 13B FEDERAL PRACTICE & PROCEDURE, *supra* note 344, § 3621.

357. One commentator has advanced a case for instituting a new uniform test, one based on "direct interest in the litigation:"

When the real party to a controversy is a business organization, the citizenship assessment should focus on who has a direct interest in the litigation. If the organization as a distinct legal entity has the direct interest, it should be treated as an entity for determining citizenship; if the owners have the direct interest, the persons composing analysis is appropriate for determining citizenship.

Cohen, *supra* note 45, at 472. The primary problems with this test also, to a lesser extent, apply to the possibilities entertained here. See *infra* notes 369-74 and accompanying text. Indeed, Professor Cohen recognizes and asserts these problems, which revolve around transaction costs, as reasons not to endorse a simple amendment to section 1332. See *infra* notes 386 and 393. These problems would seem to be even more exacerbated for the wholesale change of section 1332 that Professor Cohen envisions. See *infra* note 393.

In any event, the focus here is on eliciting a legal basis for uniform treatment that would justify and comport with statutes concerning the formation, operation, and dissolution of business organizations. Professor Cohen's proposal is partially premised on the fact that section 1332 "does not reflect the business realities of today's spectrum of business organizations, which includes hybrid organizations that are substantially similar to corporations." Cohen, *supra* note 45, at 472. As established here, though, hybridity is predicated on utilizing increasingly defunct distinctions that are jeopardized by prospective universal statutes. See *supra* Part II.A.2. Accordingly, any proposal based on hybridity commits the error of path dependence and runs the risk of becoming antiquated by, as well as doctrinally inconsistent with, universal statutes. See *id.*; *supra* notes 6-11 and accompanying text.

test based on the citizenship of the constituent members that existed prior to *Letson*.³⁵⁸ As a matter of policy, imputing business organizations with their members' citizenship likely would decrease the number of diversity suits and thus alleviate the workload of federal courts. Presently, diversity suits account for approximately 19 percent of the total federal civil docket.³⁵⁹ Although the effect of a membership rule would be difficult to project,³⁶⁰ any diminishing likely would be significant and desirable. As a matter of principle, minimizing jurisdiction between diverse parties seems justified because its underlying rationales no longer apply. The voluminous criticism of diversity jurisdiction is largely predicated on a recognition that federal courts are not qualitatively superior,³⁶¹ more impartial,³⁶² or functionally equivalent to a social service.³⁶³ Therefore,

358. I thank Barbara Banoff for presenting a set of reasons to me. Her defense certainly would be more convincing than what appears here.

359. According to one commentator,

[i]n the twelve-month period ending March 31, 1999, plaintiffs commenced 249,245 civil cases in the United States District Courts, 47,772 of which were based on diversity jurisdiction (roughly 19 percent of all civil suits). Comparatively, in the twelve-month period ending June 30, 1990, plaintiffs commenced 217,879 civil cases in the U.S. District Courts, 57,183 of which were based on diversity jurisdiction (roughly 26 percent of all civil suits). Although the overall number of diversity cases has decreased, many still feel that the load is overly burdensome

Heather N. Hormel, Comment, *Domicile for the Dead: Diversity Jurisdiction in Wrongful Death Actions*, 2001 U. CHI. LEGAL F. 519, 519 (2001) (internal citations omitted); see also *supra* note 135.

360. See, e.g., Kramer, *Diversity Jurisdiction*, *supra* note 68, at 100. Professor Kramer has argued that

[t]o gauge the full impact of diversity cases on the federal courts, we must adjust these raw caseload figures for the difficulty of diversity cases relative to other components of the courts' dockets. With respect to the district courts, two measures suggest that diversity cases are more demanding than the average case. First, diversity cases are overrepresented among trials, which place the greatest demand on the time and energy of federal judges. . . . Second, diversity cases are more difficult than average according to a "time and motion" study of federal district judges conducted by the Federal Judicial Center in 1979.

Id. (internal citations omitted).

361. See *supra* Part III.B.1.

362. See *supra* Part III.B.2.

363. For arguments that diversity jurisdiction operates like a federal highway program, see Frank, *Case for Diversity*, *supra* note 61, at 406; Marbury, *supra* note 274, at 379. But see, e.g., FRIENDLY, *supra* note 226, at 146-47; ANTHONY PARTRIDGE, *THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION* 30-31 (1988) (outlining the basis for the determination that such a change would decrease diversity jurisdiction cases by forty-five percent); Charles W. Joiner, *Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction*, 70 JUDICATURE 291 (1987); Kastenmeier & Remington, *supra* note 212, at 314 n.60 (observing how attorneys with contingent fee arrangements and

there is no concrete legal justification for maintaining a system of federal jurisdiction between diverse parties.

These arguments, however, proceed from a mistaken premise. The problem of statelessness concerns *alienage*, not diversity, jurisdiction.³⁶⁴ The interests implicated by U.S. citizens domiciled abroad are international in nature. Such citizens face the prospect of xenophobic prejudice in local courts by virtue of their receiving benefits and privileges attendant to their foreign residence.³⁶⁵ Further, these citizens contribute, however indirectly, to the economies of foreign countries and are subject to their laws; in this way, the jurisdictional status of foreign aliens and unincorporated associations impacts interests that are international in nature and scope.³⁶⁶ Accordingly, these interests properly lie within the domain of alienage jurisdiction, whose legitimacy and utility are unquestioned by those who otherwise advocate curtailing or eliminating diversity jurisdiction.³⁶⁷ So a citizenship test based on membership might relieve federal dockets by complicating the ability of parties to establish diversity, but this benefit is outweighed by the established necessity of protecting international commerce and relations.

Further, the net benefits of a membership-based citizenship test are debatable. Although such a test certainly would decrease the number of alienage suits, these are far less common than their diversity counterparts.³⁶⁸ At the same time, there are hidden costs to administering this sort of test. Ascertaining the citizenship of all members of an unincorporated association is a cumbersome and potentially expensive proposition, not to mention that the prospect of applying a domicile test to each and every member is simply not inviting. And for cases involving especially large, multi-national unincorporated association, the costs of such investigation would not be insignificant.

A better case can be made for essentially applying a partial analogue of the citizenship test for corporations to unincorporated associations, their principal place of business.³⁶⁹ Determining an

corporations disproportionately benefit from diversity jurisdiction); Kramer, *Diversity Jurisdiction*, *supra* note 68, at 127 (observing that "diversity jurisdiction gives multistate corporations an unfair advantage" and reducing diversity suits by corporations would decrease diversity suits by 45%).

364. See *supra* Part III.A.

365. See *supra* Part III.B.2.

366. See *supra* Parts III.B.1, III.B.2.

367. See *supra* notes 217-19 and accompanying text.

368. See *supra* notes 168, 359, and accompanying text.

369. This article does not endorse a jurisdictional test based on an analogue of a corporation's state of incorporation. Arguably, the jurisdiction in which a limited unincorporated association registers resembles that in which a corporation

unincorporated association's principal place of business is not necessarily an uncomplicated matter.³⁷⁰ But most states require virtually all types of unincorporated associations to file formal statements containing such information.³⁷¹ At the same time, a principal place of business test would still impede a prospective litigant's ability to be diverse; while the decrease in alienage suits under such a test would be less than under a membership test, there would still be a relative decrease.³⁷² As a result, a test based on an unincorporated association's principal place of business still would comport with the original reasons why Congress amended section 1332 for corporations.³⁷³ Equally important, extending the citizenship test for corporations to unincorporated associations would parallel the proper test for foreign and domestic aliens.³⁷⁴ Not surprisingly, various courts³⁷⁵ and commentators³⁷⁶ have endorsed expanding the

incorporates. Indeed, many statutes governing the formation of limited unincorporated associations require some form of registration. *See generally* CALLISON & SULLIVAN, LIMITED LIABILITY COMPANIES *supra* note 1. Further, registration appears linked to statutory domicile. *See supra* note 2.

There are two primary problems with including state of registration into a citizenship test for limited unincorporated associations. First, these associations can register in multiple states, *see id.*, and likely do wherever they have employees, facts that make the state of registration effectively operate in the same manner as membership when determining citizenship, *see supra* Part II.B.2. As a result, a citizenship test based on the state of registration would engender asymmetrical results similar to what membership already presents. Second, domicile concerns the primary location of a "person." *See supra* note 331. An unincorporated association may have only tangential contacts with all the states with which it may register. In contrast, where a firm incorporates reflects more substantial contacts between it and that state. So determining citizenship based, in part, on the state of registration does not comport with the primary purpose of a domicile-based test. Interestingly, the Uniform Commercial Code recently revised its definition of "chief executive office" for the purposes of a debtor's location. UNIFORM COMMERCIAL CODE § 9-307, cmt. 2, at 704 (West 2002). The definition no longer states that "chief executive office" "does not mean the place of incorporation." *Compare id. with id.* § 9-103, cmt. 5(c), at 1192.

370. *See, e.g., Kramer, Diversity Jurisdiction, supra* note 68, at 127 ("A standard like 'doing business' is not easily verifiable and poses significant risks of wasting judicial resources if the parties do not learn of a state in which both do business until late in the litigation."). Courts have applied five basic types of tests for determining the principal place of business. *See* John Kozyris, *Corporate Wars and Choice of Law*, 1989 DUKE L.J. 1, 53 ("Incredible difficulties have been encountered by the courts in localizing th[e] single principal place of business and at least five difficult and contradictory tests have been used—nerve-center, center-of-operations, place-of-acting or physical assets, maximum-public-visibility, and totality-of- corporate-activity tests.") (citing cases).

371. *See supra* note 2.

372. *See supra* notes 162-63.

373. *See supra* note 161.

374. *See supra* Part III.C.

375. *See, e.g., Reisman v. KPMG Peat Marwick LLP*, 965 F. Supp. 165, 176 (D. Mass. 1997) (calling for legislative help to expand citizenship test for unincorporated

citizenship test for corporations to unincorporated associations.

B. Corporate Collapsing

By consolidating the citizenship test for both corporations and unincorporated associations, a legal basis for collapsing other similar distinctions can emerge. As early as 1923, commentators such as Professor Charles Warren realized that: "The result [of a uniform test based on an organization's principal place of business and state of incorporation or registration³⁷⁷] is that these two forms of business enterprise [i.e., corporations and unincorporated associations] would be treated substantially alike."³⁷⁸ Jurisdictional collapsing can obtain substantively similar treatment for all limited business organizations because the notion of domicile implicitly presents and potentially resolves questions about corporate personality.³⁷⁹ A citizenship test based on domicile is possible because limited unincorporated associations are now regulated and structured like corporations in many respects.³⁸⁰ Most relevantly, these associations must file publicly available information that reveals the primary locus of their operations.³⁸¹ These requirements are necessary because corporate forms such as the limited liability company and the limited liability partnership are no longer instruments for individual or local enterprises, but are increasingly multi-national in composition and operation. As a result, such limited unincorporated associations now enjoy the fictitious status of an entity once reserved for corporations.³⁸² Instituting a citizenship test based on domicile, therefore, would establish a foundation of commensurability between unincorporated associations and corporations on a practical and a

associations); *Carlos v. Adamany*, No. 95 C 50264, 1996 U.S. Dist. LEXIS 5764, at *9 n.4 (N.D. Ill. Apr. 17, 1996) (LLC citizenship should be in state of principal place of business).

376. See, e.g., ALI, STUDY, *supra* note 206, at 10 (proposing unincorporated associations assume the citizenship of their principal place of business for diversity purposes). See generally John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 880-84 (1998) (summarizing issues concerning diversity of citizenship).

377. See *supra* note 369.

378. Warren, *New Light*, *supra* note 225, at 208.

379. See Kozyris, *supra* note 370, at 53. See also generally Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301 (1989).

380. See *supra* note 1 and accompanying text. Indeed, this is the very premise that supports entity rationalization.

381. See generally RULPA, in 6A UNIFORM LAWS ANNOTATED, *supra* note 1; RUPA, *supra* note 1; BROMBERG & RIBSTEIN, PARTNERSHIP, *supra* note 1; CALLISON & SULLIVAN, LIMITED LIABILITY COMPANIES, *supra* note 1; RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES, *supra* note 1.

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

conceptual level.

Multiple benefits accrue from this foundation. Most immediately, a consolidated citizenship test for all limited business organizations would provide the legal basis necessary to justify uniformly based or universally applicable statutes. Such a test would eliminate residual distinctions between corporations and unincorporated associations based on the dichotomies between corporation and partnership classifications as well as aggregate and entity theories.³⁸³ In this way, path dependence on these dichotomies can be mitigated because a new consolidated basis, one premised on domicile, would be available.³⁸⁴ One obvious source for this basis is that a uniform citizenship test actually would be the first instance of a universal business organization statute. Additionally, to the extent domicile implicates and collapses other dichotomies, a consolidated citizenship test could be used to frame and guide similar, but more comprehensive, efforts such as a statute based on limited liability or with hubs-and-spokes.³⁸⁵

The primary objection to reconciling the inconsistent jurisdictional treatment between domestic and foreign aliens, as well as between corporations and unincorporated associations, concerns the inherent costs within any change of a legal regime.³⁸⁶ These transition costs are of three primary varieties: the expense of familiarizing oneself with the new rules;³⁸⁷ the difficulties of adjusting to rules with uncertain meaning or effect;³⁸⁸ and the

383. See *supra* notes 100-03 and accompanying text.

384. See *supra* notes 6-11 and accompanying text.

385. See *supra* notes 7-8 and Part II.A.2.

386. See, e.g., Cohen, *supra* note 45, at 474 ("A revised [alienage and diversity] statute would be the ideal solution providing immediate clarity on the issue [of how the citizenship of LLCs should be determined]. However, revising statutes is time consuming and expensive.") (citing GRANT GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977); Melvin Aron Eisenberg, *The Modernization of Corporate Law: An Essay for Bill Cary*, 37 U. MIAMI L. REV. 187 (1982)). Professor Cohen believes that interest group dynamics would incur transaction costs that would impede the implementation of any consolidated statutory treatment. See *id.* at 474 n.226 ("A legislature will not revise a statute unless the potential gain outweighs the transaction costs.").

387. Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 817 (2002) ("Firms and individuals must determine what laws are relevant to their activities; they must assess the scope and effect of the applicable ones; and they must master the complexities of the more detailed or technical provisions."). See generally DANIEL SHAVIRO, *WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY* (2000); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 511 (1986).

388. Van Alstine, *supra* note 387, at 822-23 ("No body of law . . . can plausibly address all matters within its scope, or anticipate all future developments in a given field of human activity. . . . The resulting normative gaps, both open and hidden, almost unavoidably leave a greater degree of 'open texture' in new legal texts than in

adjustments by third parties to comply with the new rules.³⁸⁹ Although a new legal regime may be superior, these various transition costs may militate against change.³⁹⁰ Indeed, this is the chief rationale behind the doctrine of stare decisis,³⁹¹ which largely may explain why the jurisdictional inconsistencies examined here endure.³⁹² Perhaps understandably, the Supreme Court and Congress have neglected the anomaly of statelessness and maintained the procrustean citizenship test for unincorporated associations because the economics favor inertia.

Many of these objections, however, do not apply to the consolidated citizenship test proposed here. The primary reason is that consolidation minimizes transition costs. The existence of a codified citizenship test for corporations provides an established framework that can easily assimilate a domicile-based citizenship test for unincorporated associations.³⁹³ Additionally, the familiarity

established ones.") (citation omitted). Professor Van Alstine differentiates uncertainty costs from learning costs on the basis that the latter concern determining the content and scope of rules whereas the former concern resolving disputes over meaning and effect. *Id.* He further distinguishes between negative and positive uncertainty costs: "Negative uncertainty costs . . . reflect the loss of the accumulated experience with a legal regime over time. Positive costs, on the other hand, reflect the uncertainty created by doubts over the precise meaning of, and simple lack of familiarity with, a new body of law." *Id.* at 823; *see also id.* at 824-28 (negative costs); *id.* at 829-35 (positive costs).

389. *Id.* at 837 ("When . . . the state decides to change the law, transition costs will arise from the effect on the private conventions established within the framework of the old legal order."). Professor Van Alstine identifies two types of adjustment costs: "interparty transition costs," which "arise from the need to review and adjust internal forms and practices in response to a change in the law"; and "interparty practices," which are "costs that flow from the impact on contractual and other conventions developed between private parties to regulate their interaction." *Id.*

390. *Id.* at 793-94 (noting the force of network effects and opportunity costs that explain why parties continue to use the inefficient layout of existing keyboards); *see also* S.J. Liebowitz & Stephen E. Margolis, *The Fable of the Keys*, 33 J.L. & ECON. 1 (1990) (challenging the historical accuracy of Paul David's explanation for typewriter keys). Another example, albeit more contentious, concerns Delaware's continuing appeal as a state of incorporation and as a forum for bankruptcy filings. *See, e.g.,* G. Marcus Cole, "Delaware is Not a State": An Empirical Analysis of Jurisdictional Competition in Bankruptcy, 55 VAND. L. REV. 1845 (2002) (bankruptcy filings); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987) (incorporation).

391. *See generally* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988); Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643 (2000). *See also supra* note 6.

392. *See, e.g., supra* note 93.

393. *But see supra* note 386 (delineating Professor Cohen's arguments against a legislative solution). Professor Cohen instead favors a judicial solution. Cohen, *supra*

with the test for corporations easily can extend to the test for unincorporated associations. Beyond the fact that disputes over the meaning of the alienage statute and the corporate citizenship tests are rare, the consolidated test effectively can piggy-back on to the mature decisional law that exists for corporations. In essence, harmonizing jurisdictional treatment of corporations and unincorporated associations would take advantage of the network effects applying to the test established in section 1332.

And any admittedly unavoidable transition costs further associated with this proposal clearly would be outweighed by the prospective benefits of treating all business organizations alike for alienage purposes. First, a citizenship test based on a limited unincorporated association's principal place of business would afford certainty.³⁹⁴ No longer would litigants be able to file suits under the alienage suit based on mere good faith guesses as to the citizenship of a limited unincorporated association.³⁹⁵ Determining citizenship

note 45, at 475 ("In the interim, the judiciary should act. The Supreme Court is not bound by the current framework. . . . Precedent is not cast in stone."). This bridge solution is compatible with the amended statutory test proposed here. *See id.* at 476 ("Under the revised interpretation, the citizenship of many unincorporated entities would remain the same."). The problem is that neither the Court's composition nor the merger of unincorporated association features have changed substantially since the decision in *Carden v. Arkoma Assocs.*, 494 U.S. 185, 185 (1990). Indeed, the *Carden* Court refused to extend the test to limited partnerships even after acknowledging that substantial changes had occurred since the *Bouligny* decision, when the Court last explicitly addressed the question of citizenship tests for unincorporated associations. *See id.* at 197; *United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 145 (1965). Moreover, the Court's repeated, explicit deference to a legislative solution means that Professor Cohen's judicial proposal may only fall upon closed ears. *See Carden*, 494 U.S. at 197 ("Which [type of unincorporated association] is entitled to be considered a 'citizen' for diversity purposes . . . [is a] question[] more readily resolved by legislative prescription . . ."); *Bouligny*, 382 U.S. at 150 ("[T]hese arguments, however, appealing, are addressed to an inappropriate forum . . . [they instead] ought to be made to the Congress and not to the courts.").

In contrast, the phenomenon of statelessness in connection with the push towards universal treatment of all limited business organizations provides a more compelling and ripe case for change. Further, incurring any and all transaction costs at one time with a legislative solution might be a more optimal strategy. The parties best situated to absorb such transaction costs would seem to be those most in favor of universal or uniform business statutes. Moreover, on a substantive level, the hybridity of the limited liability company does not seem to provide a sound legal basis that could justify consolidated treatment of business organizations. *See supra* Part II.A.2.

394. *See, e.g.*, Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 676-80 (1988) (contending use of general jurisdiction based on corporation's "home base," e.g., principal place of business, can provide certainty).

395. FED. R. CIV. P. 8. For an interesting permutation of this problem involving John Doe litigants, see Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure To Recognize John Doe Parties*, 57 U. PITT. L. REV. 883 (1996); and Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in § 1983*

now would be a mechanical exercise, entailing an examination of the association's state filings. Because these filings are publicly accessible, potential litigants have constructive notice of whether they can establish the requisite diversity to support an alienage suit.³⁹⁶ Second, the test proposed here would be administratively efficient. With regards to potential litigants, they would not have to examine the membership of an unincorporated association and determine an individual's domicile based on the existing multi-factor test.³⁹⁷ Instead, the association's principal place of business would establish domicile and be ascertainable in one step. With regards to courts, they would not have to adjudicate domicile disputes to determine the ultimate citizenship of an unincorporated association. Indeed, the simplicity of this determination almost would make any related disputes appear frivolous. In sum, the path could not be any easier or smoother for this type of jurisdictional, and ultimately, corporate, collapsing.

V. CONCLUSION

The citizenship test still applied to unincorporated associations is a classic illustration of how the doctrine of *stare decisis* can perpetuate outmoded rules. Contrary to conventional belief, the check-the-box regulations have not transformed our understanding of the business organization landscape. Courts and commentators continue to conceptualize corporations as possessing characteristics distinct from those of various unincorporated associations. This path dependence has resulted in the preservation and active perpetuation of disparate statutory and common corporate laws even though their justificatory bases no longer exist. As a result, unincorporated associations such as the limited liability company and the limited liability partnership continue to be subject to unjustified rules that can be used to immunize themselves from or shop forums through the alienage jurisdiction statute.

By identifying and challenging the historical rationales for such antiquated rules, this article has presented an entry point for

Procedure, 25 CARDOZO L. REV. (forthcoming 2003).

396. See, e.g., Art, *supra* note 8, at 398 ("The legal fiction—or, more charitably, legal principle—of constructive notice admittedly can surprise morally innocent but unsophisticated parties, who are not aware of or proficient with the public filing system, but this is accepted as a necessary element of a workable commercial system.").

397. See, e.g., *Vlandis v. Kline*, 412 U.S. 441, 454 (1973) ("In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning. This general statement, however, is difficult of application. Each individual case must be decided on its own particular facts.").

initiating a methodologically sound collapse of corporate distinctions. The anomaly of statelessness violates many of the established and accepted rationales for alienage jurisdiction. Vitiating these rationales not only restores access properly to foreign aliens, but also naturally comports with amending the citizenship for unincorporated associations. By including these associations within section 1332, we can acquire a uniform basis to allow the pursuit of entity rationalization, if so inclined.