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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. Further, the Internal Revenue Service (IRS) has created so-called “check-the-box” regulations that permit eligible

companies") (hereinafter RUPA). Although filings are not mandatory under RUPA, id. at comt. 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 § 11.02c(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. Reatinge 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 businesses 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.

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. SHAROW, FEDERAL INCOME TAX PROJECT: TAXATION OF PRIVATE BUSINESS ENTERPRISES 49 (AMERICAN LAW INSTITUTE, Reporter's Study 1999) (Proposal 2-1) ("[T]hese 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. Stovar, 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 dependence 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 organizations to a unified limited liability entity. 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.


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. But this exclusivity no longer obtains. 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. 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.


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.


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, this article reveals an inconsistency 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. Such a result is possible without having to revise our conventional definitions of different types of business organizations.

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, 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...." 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.

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 MICH. 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

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.


history 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. 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. 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. Under this test, all business organizations assumed the citizenship of their respective constituent groups: stockholders for corporations and members for most unincorporated associations. The uniform test was highly controversial, perhaps ironically, because it was thought that corporations should be denied access to federal courts.

The citizenship test changed as corporations assumed a more prominent role in the economy. 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.").
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

31. Id.

[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. Bouigny, 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 Bouigny 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

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<tr>
<td>S Corps</td>
<td>2,153,119</td>
<td>2,304,416</td>
<td>2,452,254</td>
<td>2,588,088</td>
<td>2,725,775</td>
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<td>LLCs (Members)</td>
<td>118,559 (1,580,900)</td>
<td>221,498 (1,654,256)</td>
<td>349,054 (1,758,627)</td>
<td>470,857 (1,855,348)</td>
<td>108,940 (1,936,919)</td>
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<tr>
<td>LLPs (Members)</td>
<td>N/A (N/A)</td>
<td>11,455 (N/A)</td>
<td>N/A (N/A)</td>
<td>25,287 (141,884)</td>
<td>24,122 (206,142)</td>
</tr>
<tr>
<td>LPs (Members)</td>
<td>295,304 (10,223,901)</td>
<td>311,563 (10,025,630)</td>
<td>328,210 (10,167,018)</td>
<td>342,726 (9,325,111)</td>
<td>354,295 (8,944,693)</td>
</tr>
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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. LJ. 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.


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." Regardless of what the actual numbers are, limited unincorporated associations now clearly occupy a significant place in the business organization landscape.

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 2:3-4 (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 forms' 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).


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.” 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.” 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” 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 . . . .”

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 1894 and culminating with the Kintner Regulations, the IRS consistently has established regulations predicated on the now orthodox dichotomy between corporations and partnerships. On which side of the dichotomy a particular business

46. Bouligny, 382 U.S. at 149-50; see infra Parts II.A.1, II.A.2.
47. Bouligny, 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.
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.\textsuperscript{53} Exhibiting a threshold number of these attributes warranted federal tax treatment as a corporation, notably the imposition of double taxation.\textsuperscript{54} This bright-line formula unintentionally provided businesses with an organizational blueprint for avoiding double taxation.\textsuperscript{55} Recognizing this problem, as well as the growing prevalence of hybrid forms such as the limited liability company,\textsuperscript{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.\textsuperscript{57} Accordingly, commentators have rushed to propose statutory schemes that attempt to provide uniform treatment to all business organizations.\textsuperscript{58} These schemes, however, are premised on classifications designed to differentiate corporations from unincorporated associations.\textsuperscript{59} Equally significant, these differences

\begin{quote}

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

54. Former Treasury Regs. §§ 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 transferrability of interests. . . ."); Steven T. Limberg, Master Limited Partnerships Offer Significant Benefits, 65 J. TAXN 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. 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. Three discrete rationales supporting alienage jurisdiction can be gleaned from the Framers and modern commentary: protecting foreign relations from perceived provincialism by state courts, guarding against the threat—whether actual or apparent—of local prejudice towards foreigners, and furthering international commercial interests. 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.
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. 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. Nevertheless, the primary criticisms advanced against diversity jurisdiction predominantly do not apply to alienage jurisdiction. “Statelessness” is a problem endemic to alienage jurisdiction. Only foreign aliens are susceptible to the phenomenon of “statelessness,” which is magnified when corporations and unincorporated associations become involved.

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.
68. See, e.g., Larry Kramer, Diversity Jurisdiction, 1990 BYU L. REV. 97, 121 (“Although the case for abolishing diversity jurisdiction is clear... [i]f the 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., 556 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) (invoking 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) (invoking 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) (invoking 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. 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.

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. Second, corporations and unincorporated associations would assume comparable citizenship status in agreement with their merging corporate personality. 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 locked 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. 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 Regulations

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

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 46, 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 Comm'r, 286 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 corporation—58—and not a partnership—59—for federal tax purposes if three of the four following characteristics were present: continuity of life,60 centralized management,61 free transferability of interest,62 and limited liability.63

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 Pomplius 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 MAYLAND, 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 § 55 (1960); FRANCIS J. TROUBAT, THE LAW OF COMMANDATORY 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 (c) 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. Bahl, 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. Under this test, a business organization must have exhibited more "noncorporate characteristics" than "corporate characteristics" to receive the pass-through tax treatment accorded to partnerships. By such formulaic means, the Kintner Regulations introduced a bilateral tax structure for corporations and partnerships.

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.


84. See Morrissey v. Commissioner, 296 U.S. 344, 357 (1935) (construing inclusion of "association" within the definition of a "corporation" as "impl[y]ing[ ] 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).

unincorporated associations seeking to avoid the double taxation as assessed on corporations. 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." In exploiting the rigid Kintner Regulations, 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."). 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.

89. 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 "too 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 232 (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 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 ("The 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. This is because an unincorporated business organization with more than two corporate characteristics would qualify for double taxation. In essence, actual partnerships could be corporations for federal tax purposes. 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." 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." 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)(3); 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. . . . If 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. D'eucaux, 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).
"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

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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. L. 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., Kentinge, 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.”). “[By 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.

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

2. Check-the-Box Regulations

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," 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."

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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...").


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

Under these new regulations, federal tax treatment primarily depends on whether an entity is subject to the rules governing public trading.\textsuperscript{112} Nearly all publicly traded entities receive treatment as corporations for federal tax purposes.\textsuperscript{113} All separate entities, except trusts and certain other exempt entities, are treated as "business entities."\textsuperscript{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.\textsuperscript{115} All remaining "business entities" can elect whether they want to be treated as a corporation or a

\textsuperscript{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.").

\textsuperscript{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 7005 . . . .") (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.").

\textsuperscript{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)).

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

\textsuperscript{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.").

\textsuperscript{115} Id. § 301.7701-2(b).
partnership for federal tax purposes.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{119} There also have been proposals for collapsing

\begin{itemize}
\item \textsuperscript{116} Id. § 3301.7701-3(c).
\item \textsuperscript{117} According to the ALI, although 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.
\item \textsuperscript{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.
\item \textsuperscript{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:
\item An 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.
\item Hamill, Corporate Integration, supra note 39, at 434. In addition, Jeffrey Maine argues that
\item Forcing 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
\end{itemize}
regulation of corporations and unincorporated associations into one universal statute,29 where properties common to all business forms

cohesive 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.


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 (1986)) (hereinafter Blackwell, Revolution); Keatinge, Universal Business Organization Legislation, supra note 7, at 68-88. "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


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.

Keating, 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.”). Keating states that:
governing various business organizations. 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. 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. The implicit belief is that, by addressing limited liability companies, amended statutes can address all types of business organizations. And this is

Because 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

[many 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, ALL 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 Tres. 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 businessespeople 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-allowed 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.\footnote{132} But these commentators acknowledge, as they must, that limited liability has been of partial relevance ever since the Court decided \textit{Morrissey v. Commissioner}.\footnote{133} In any event, this historical argument does not justify using limited liability now, much less ignoring all other aspects of business organization.\footnote{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.\footnote{135} The historical basis for this test resides in the well-known trilogy of Supreme Court decisions: \textit{Bank of the United States v. Deveaux};\footnote{136} \textit{Louisville, Cincinnati & Charleston Railroad Co. v. Letson};\footnote{137} and \textit{Marshall v. Baltimore & Ohio Railroad

\footnote{1}{RUPA, \textit{supra} note 1. Cf. Oesterle & Gazur, \textit{What's in a Name?}, \textit{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, \textit{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).}

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

\footnote{133}{296 U.S. 344 (1935); see Maine, \textit{ALI Critique}, \textit{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 \textit{Morrissey}, the relevance of limited liability in determining tax status diminished.").}

\footnote{134}{See, \textit{e.g.}, Klein & Zelt, \textit{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.").}

\footnote{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.").}

\footnote{136}{9 U.S. (5 Cranch) 61 (1809).}

\footnote{137}{43 U.S. (2 How.) 497 (1844).}
Co. This trilogy established a presumption of corporate citizenship that, according to the Supreme Court, was a “compromise destined to endure for over a century.”

The debate over whether to grant citizenship to corporations initially revolved around the propriety of characterizing them as either an entity or an aggregate. 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.” According to Marshall, the legal fiction of corporations having “corporeal qualities,” in connection with the “general purposes and objects of a law” implied that corporations be represented in court by their members and assume

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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,

[j]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.

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 repudiated Deveaux as illegitimately reasoned and unjustifiably perpetuated by stare decisis. Absent an express constitutional prohibition, 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. 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. Slocomb, 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.


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

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148. Id. at 558; see also Peter A. French, The Corporation as a Moral Person, 18 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, [the 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....


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." Accordingly, stockholders were held to have assumed the citizenship of the corporation's charter state. In essence, the Court believed that the prominence of corporations within the nation's economy justified treating them as citizens for jurisdictional purposes.

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. 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. As corporations became a ubiquitous element of the business landscape, their public standing changed. Particularly infuriating was the abuse by corporations in their strategic selection of where to incorporate.

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.
155. FRANKFURTER & LANDIS, supra note 27, at 136-45 (citing, for instance, persistent legislative efforts by Representative Cuiberson 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 liable 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, "corporations 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).
159. See, e.g., Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab &
After codifying the citizenship test for corporations established in *Marshall*, Congress proceeded to address their abusive practices.* 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.


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 Deveneux 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.


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.
the 1986 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., Cabalcet 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 1986 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) (“An 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 of 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) (“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.’”); 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) (“We have concluded beyond cavil that, in this court, 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 alien corporation is involved. Ironicaly, section 1332(c) has had the effect of increasing the volume of corporate litigation in federal courts.

2. Unincorporated Membership

Until Letson, the citizenship test for corporations paralleled that for unincorporated associations. In Chapman v. Barney, 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, 364 (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. Klenz, 875 F. Supp. 210, 212 (M.D. Fla. 1995) (citing Vareka Invs., 724 F.2d at 909-10); Rouhi, 785 F. Supp. at 1293-95; Carmanica 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 Yatema, 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. Jones171 stated that “[w]e 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 uncodified. 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., 286 U.S. 476, 482 (1932), 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 the 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.
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." 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." In particular, the
Court observed Congress's self-perceived need to codify the simple
and reliable rule in Marshall for corporations. 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. Indeed, whether Congress intended to exclude
unincorporated associations from the citizenship test codified for
corporations in 1958 is not even clear.

Meanwhile, the Court continues to find the case for harmonizing

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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
la 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.
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]
were] 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*,<sup>181</sup> 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.<sup>182</sup> After the Fifth Circuit declined to hear the certified question, the district court denied the citizens’ motion.<sup>183</sup> On appeal, the Fifth Circuit affirmed the district court’s decision and judgment in favor of the limited partnership.<sup>184</sup>

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.”<sup>185</sup> Briskly analyzing *Chapman, Great Southern,* and *Bouligny*, the Court observed that limited partnerships do not enjoy the citizenship status accorded to corporations.<sup>186</sup> 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.”<sup>187</sup>

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.<sup>188</sup> 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.’”<sup>189</sup>

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<sup>182</sup> Id. at 186.
<sup>183</sup> Id.
<sup>184</sup> Id.
<sup>185</sup> Id. at 187.
<sup>186</sup> 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*, 362 U.S. at 151; *Navarro*, 446 U.S. at 455-66). 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).
<sup>187</sup> *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.*
<sup>188</sup> *Id.* at 198 (O’Connor, J., dissenting).
<sup>189</sup> *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 partnerships196 (including multi-tiered forms,197

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Great Southern, 177 U.S. at 456; Bouligny, 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); Hallinan 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 Enter., 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).


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, underwriting syndicates, religious organizations, and Native American tribes.

196. See, e.g., Village Fair ShoppingCtr. Co. v. Sam Broadhead Trust, 588 F.2d 431, 433 n.1 (9th 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 Assoc. 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); Bomeister 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. Wedel, 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).


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 (3d Cir. 1997) ("In light of the Indian tribes' status as distinct, independent political communities, retaining their original natural 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. 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. Historically, 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 Wetauick 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 rationals 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 addresses the threat of state legislatures retaliating against unpopular state court decisions;\textsuperscript{205} the convenience of federal courts deciding types of cases beyond the jurisdiction of state courts, such as interpleader;\textsuperscript{206} the possibility of local courts discriminating against out-of-state litigants;\textsuperscript{207} and the improvement to substantive law resulting from concurrent jurisdiction.\textsuperscript{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, \textit{Defining the Role of Federal Courts}, 1990 BYU L. REV. 67, 82 ("[If 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, \textit{Diversity Jurisdiction: An Open Dialogue in Dual Sovereignty}, 24 HAMLIN 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, administrated in courts independent of all local control.").

206. See, e.g., \textit{American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts} §§ 2371-76, at 386-410 (1969) [hereinafter ALI, \textit{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, \textit{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, \textit{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, \textit{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 \textit{Erie} Doctrine:

The leadership idea . . . hearkens back to the frustrated ideals of \textit{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 \textit{Erie}-anticipations of what state law is poses a question of empirical fact which has been inadequately researched.

J. Skelly Wright, \textit{The Federal Courts and the Nature and Quality of State Law}, 13
international interests such as the importance of preserving foreign relations; the necessity of guarding against xenophobic sentiments, whether actual or perceived; and the value of facilitating trade.

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. 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) (“Is 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.
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) (“There 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 (“The 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) (“Total 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...
committees have examined the prospect of eliminating or severely curtailing diversity jurisdiction. Congress even has entertained proposals to repeal the entire diversity statute.

This controversy, however, largely has left alienage jurisdiction unscathed. For instance, a Congressional committee has stated that alienage jurisdiction is outside “minimum federal jurisdiction.” Indeed, even the commentators most vigorously opposed to diversity jurisdiction have supported retaining alienage jurisdiction. 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.”).


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 Jurisdiction220

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)).


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.

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." 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." According to one commentator, alienage jurisdiction was "the single most important grant of national court jurisdiction embodied in the [Judiciary] Act."
Notably, Congress perceived the need for alienage jurisdiction before federal question jurisdiction.\footnote{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 FRANKFURTEN & 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 [Constitution] Convention demonstrated an intent to create 'federal question' jurisdiction in the federal courts with regard to federal laws . . ."). [hereinafter CONSTITUTION].}

Almost a century later,\footnote{228}{See, e.g., Warren, New Light, supra note 225, at 79 ("[I]t is not impossible that the framers of the Constitution had in mind the idea of giving to the federal courts, as distinguished from the state courts, a jurisdiction over suits in which the parties were aliens.") (citing FRANKFURTEN & 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 [Constitution] Convention demonstrated an intent to create 'federal question' jurisdiction in the federal courts with regard to federal laws . . ."). [hereinafter CONSTITUTION].} 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.\footnote{229}{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).} This question arose from a series of Supreme Court decisions limiting the power of federal courts to hear disputes involving aliens.\footnote{230}{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).} These decisions prompted Congress to amend the Judiciary Act by consolidating its treatment of diversity and alienage jurisdiction.\footnote{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).} Specifically, Congress authorized federal courts to hear "controvers[ies] between citizens of different States or...
controvers[ies] between citizens of a State and foreign states, citizens, or subjects."

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. And the debates at the First Congress concerning the Judiciary Act of 1789 are only slightly better. 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 0.7114.-3, at 728 (3d ed. 1990). 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.


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 B. 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] Act."); 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. Second, federal courts seem better suited to guard against prejudice towards out-of-state litigants. And third, federal courts can better represent and foster international commercial interests. 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. Through a motion by James Madison, the Supremacy Clause eventually was amended “to obviate all doubt concerning the force of treaties preexisting.” Some delegates feared that state courts would not be sufficiently sensitive to the importance of treaties between the United States and other countries. 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 (1861) (“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, 556 U.S. at 96 (“[Alienage 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’etre for applying alienage jurisdiction.”).
tranquility to be disturbed." 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. Whether or not such a
perception was justified, the delegates clearly believed minimizing
the risk of offending foreign nations made federal alienage
jurisdiction worthwhile.

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).

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 [Constitution 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. Indeed, James Madison bluntly stated that “[c]onfidence can [not] be put in the State Tribunals as guardians of the National authority and interests.” The delegates attributed this mistrust not only to the distinct provinces of each judicial strata, but also to a perceived domination of courts by partial state legislatures and unqualified state judges that engendered an uneven quality of justice.

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. 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. This is because state courts presumably are less concerned with national and international interests, and so are less inclined to protect them. 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 de-emphasized their concern about the partiality of local courts in recognition that the support of states was necessary to ratify the Constitution.\footnote{Johnson, supra note 22, at 12 (contending that any downplaying of the actual bias of state 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”).} 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.”\footnote{3 Elliot, supra note 239, at 486.} 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.”\footnote{The Federalist No. 80, supra note 241, at 402-03 (Alexander Hamilton).} 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.\footnote{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, 589 (1856) (Curtis, J., dissenting). Burgess v. Seligman, 107 U.S. 20, 34 (1882) (“The 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.”\textsuperscript{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.\textsuperscript{256}

Moreover, little, if any, evidence of prejudice apparently was available during the Convention debates.\textsuperscript{257} Given the delegates’ concern about protecting foreign relations,\textsuperscript{258} these evidentiary gaps presumably apply more towards inter-state biases rather than xenophobia.\textsuperscript{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.\textsuperscript{260} Although the evidence is largely anecdotal,\textsuperscript{261} one

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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.
\end{quote}


\textsuperscript{255} 3 \textit{Elliott, supra} note 239, at 486 (George Mason). \textit{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?”).

\textsuperscript{256} \textit{Friendly, supra} note 233, at 493; \textit{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.”).

\textsuperscript{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.

\textit{John P. Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Probs.} 3, 24 (1948) [hereinafter Frank, \textit{Historical Bases}]. \textit{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.”).

\textsuperscript{258} \textit{See supra Part III.B.1.}

\textsuperscript{259} \textit{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).

\textsuperscript{260} \textit{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. Indeed, even the American Law Institute has suggested that courts do not administer section 1332 uniformly across regions. This suggestion is at least consistent with one prominent survey of the federal judiciary.


[...] if 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 55% 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.


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. 91, 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 Serv., 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 157-96.

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." 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. As that commentator has noted, "[i]n studying the Constitution it should never be forgotten that its first object [is] to promote commerce."

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." 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." According to Wilson, the apparent or actual neutrality of federal courts would supply commercial actors with a secure system for enforcing contracts. Further, some historians have suggested that the federal courts provided a shield to businesses from anti-commercial biases extant in colonial state legislatures.

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.

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. Cewin, 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 [was] no longer merely an agency for resolving disputes; it [was] 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.


[It 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 domiciled\(^ {277}\) 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
(1332)(a)(2) 'citizens of a State, and foreign states or citizens or subjects thereof.' means what it says." One form of this strict construction appears in the requirement of complete diversity.\footnote{291}

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.\footnote{292} The determination

\footnote{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. \textit{Id.; see also} Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941) ("Not only does the language of the Act of 1857 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, \textit{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").}

\footnote{281. \textit{See, e.g.}, Rhuegas 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. \textit{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 \textit{Thomas} Court further explained:

\textit{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.}

\textit{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 \textit{tuutantly}) (quoting 1 JAMES WM. MOORE ET AL., \textit{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. New York 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)). \textit{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); \textit{Note, Second Bites at the Jurisdictional Apple: A Proposal for Preventing False Assertions of Diversity Jurisdiction}, 41 HASTINGS L.J. 1417, 1438-43 (1989) (proposing use of estoppel doctrine to stem belated challenges to existence of diversity).

of whether an alien is a "citizen" or "subject" of a foreign state turns on such foreign state's law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{285} For instance, in \textit{Sadat v. Mertes},\textsuperscript{286} an

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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; (2) 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. \textit{See}, \textit{e.g.}, \textit{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. \textit{See}, \textit{e.g.}, \textit{Sun Printing & Publ'g. Ass'n v. Edwards}, 194 U.S. 377, 383 (1904); \textit{Gilbert v. David}, 235 U.S. 561, 569-70 (1915); \textit{Anderson v. Watt}, 138 U.S. 694, 702 (1891) ("It is essential that, in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intention constitute it, should be distinctly and positively averred in the pleadings."); \textit{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. \textit{See} 15 \textit{James WM. Moore, Moore's Federal Practice} § 102.34(3)(a) (3d ed. 1997).

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. 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). On appeal, the Seventh Circuit observed “settled precedent establishing 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)].” The basis for this rule is that, for alienage and diversity purposes, state citizenship is essentially synonymous with domicile. According to the court, “[t]o establish a

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286. 464 F. Supp. 1311 (D. Wis. 1979), affd, 615 F.2d at 1176, 1176-89 (7th Cir. 1980).
287.  Sedat, 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 Sedat 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, § 102.24(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
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

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. Malaza, 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,
Mo. 1993) (per curiam) ("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.
761-62 (E.D.N.Y. 1974) ("Plaintiff, 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 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. 755, 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. 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. 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.”

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.”

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”

The rule established in *Van der Schelling* endures. For instance, in *Smith v. Carter*, 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. 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”).
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 (6th 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, 775 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. 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.” Notably, the Fifth Circuit did not disagree with these arguments, in fact conceding “the anomaly of the existing rule under Van der Schelling.” 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” and concluded that “Congress is the appropriate body to make such a change.”

The phenomenon of statelessness is not merely an anomaly limited to a few individuals. Under the rule originally established in Chapman, an unincorporated association assumes the citizenship of its constituent members. 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. 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.
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,\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{315} As a

\textsuperscript{312} See supra note 219.
\textsuperscript{313} See supra notes 37-44 and accompanying text.
\textsuperscript{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 \textit{Daubert v. Merrell Dow Pharm., Inc.}, 509 U.S. 579 (1993), as more stringent than the test established in \textit{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,

\textit{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 \textit{Frye}, not \textit{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 \textit{Daubert}, serves as a gatekeeper."


preliminary matter, statutory and common law gaps are present as between the citizenship tests applied to corporations and unincorporated associations for alienage purposes. Specifically, Congress fashioned a separate citizenship test for corporations, but neglected to consider whether unincorporated associations could engage in similar abuses. 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, 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. 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[ies] 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 1068, 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 (1893."). 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[ng] the realities of today's business world." Cohen, supra note 45, at 438 (quoting Robert J. Trice, 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.


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. But the current statistics on certain limited unincorporated associations now suggest otherwise. 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. 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. But courts recognize only a limited conception of citizenship that is exclusively concerned with domestic statehood. 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. 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. 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 Keating, 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 domicile [sic] at all times and, at least for the same purpose, no person has more than one domicile at a time.").

\(^{329}\) See supra notes 264-85 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.


\(^{330}\) 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. Corso, 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. 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. 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 only because the Constitution does not provide for the exercise of federal alienage jurisdiction over foreign citizens are they stateless.

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. A simple counterfactual to this equation is that the Judiciary Act of 1789 did not provide for federal question jurisdiction, whose constitutionality is unquestioned. More relevantly, Van der Schelling interprets the Judiciary Act of 1789 in the unconstitutional, literal fashion that prompted the 1875 amendments concerning alienage jurisdiction. 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. 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. 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 "immigrado," which provided certain entitlements. See Van der Schelling, 213 F. Supp. at 757.

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


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.")
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.\textsuperscript{341} These considerations only make the prospect of forum shopping more attractive and potentially more meaningful.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Marshall v. Baltimore & Ohio Railroad Co.}\textsuperscript{345} By extension,
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.\textsuperscript{346} The Court and numerous commentators already have recognized that these associations are no less qualified for entity status than corporations.\textsuperscript{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.\textsuperscript{348}

Additionally, the citizenship test for unincorporated associations is susceptible to abuse akin to what originally concerned Congress about corporations.\textsuperscript{349} The potential for abuse is manifest in the choice of members.\textsuperscript{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.\textsuperscript{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.\textsuperscript{352} Indeed, one need only look to the case

\begin{footnotes}
347. See supra notes 46, 48, and 101.
348. See supra note 5.
349. See supra notes 34, 159, and accompanying text.
350. See, \textit{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, \textit{e.g.}, Chemerinsky & Kramer, supra note 204, at 83 ("[O]nly diversity jurisdiction has been constricted—by Congress' \textit{inter alia} . . . expanding corporate citizenship . . . .").
352. See, \textit{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: The\textsuperscript{[a] due process clause does not contemplate that a state may make binding a judgment \textit{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.
\end{footnotes}
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.\textsuperscript{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.\textsuperscript{359} Although the effect of a membership rule would be difficult to project,\textsuperscript{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,\textsuperscript{381} more impartial,\textsuperscript{386} or functionally equivalent to a social service.\textsuperscript{36} Therefore,

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

\textsuperscript{359} According to one commentator,

\begin{quote}
In 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 . . . .
\end{quote}

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.

\textsuperscript{360} See, e.g., Kramer, Diversity Jurisdiction, supra note 68, at 100. Professor Kramer has argued that

\begin{quote}
In order to 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.
\end{quote}

\textit{Id.} (internal citations omitted).

\textsuperscript{361} See supra Part III.B.1.

\textsuperscript{362} See supra Part III.B.2.

\textsuperscript{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. \textit{But see}, e.g., Friendly, supra note 226, at 146-47; Anthony Partridge, \textbf{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, \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{369} Determining an

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\textsuperscript{364} See supra Part III.A.
\textsuperscript{365} See supra Part III.B.2.
\textsuperscript{366} See supra Parts III.B.1, III.B.2.
\textsuperscript{367} See supra notes 217-19 and accompanying text.
\textsuperscript{368} See supra notes 168, 359, and accompanying text.
\textsuperscript{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. But most states require virtually all types of unincorporated associations to file formal statements containing such information. 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. 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. Equally important, extending the citizenship test for corporations to unincorporated associations would parallel the proper test for foreign and domestic aliens. Not surprisingly, various courts and commentators 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 Kozyri, 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.

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 registration] is that these two forms of business enterprise [i.e., corporations and unincorporated associations] would be treated substantially alike." 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. A citizenship test based on domicile is possible because limited unincorporated associations are now regulated and structured like corporations in many respects. Most relevantly, these associations must file publicly available information that reveals the primary locus of their operations. 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. Instituting a citizenship test based on domicile, therefore, would establish a foundation of commensurability between unincorporated associations and corporations on a practical and a


377. See supra note 389.


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. In this way, path dependence on these dichotomies can be mitigated because a new consolidated basis, one premised on domicile, would be available. 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.

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. These transition costs are of three primary varieties: the expense of familiarizing oneself with the new rules; the difficulties of adjusting to rules with uncertain meaning or effect; 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. Although a new legal regime may be superior, these various transition costs may militate against change. Indeed, this is the chief rationale behind the doctrine of stare decisis, which largely may explain why the jurisdictional inconsistencies examined here endure. 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. Additionally, the familiarity

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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.L. 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).


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. 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. Determining citizenship

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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.


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 alienation jurisdiction statute.

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

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.