

# Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens

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I. INTRODUCTION

Burgeoning international trade<sup>1</sup> and high levels of migration between nations<sup>2</sup> demonstrate concretely how technological improvements have made the world a smaller place. One might expect growing global interdependence almost inevitably to result in the increase of legal disputes between U.S. and foreign citizens and businesses.<sup>3</sup> At the same time, there is every reason to worry about whether foreigners can obtain an impartial resolution of these disputes in the United States. Xenophobia, long a staple of American society, might be expected to influence the litigation of such disputes.

Over two centuries ago, the Framers of the Constitution attempted to calm similar fears by providing that the national courts could exercise alienage jurisdiction over disputes between citizens and aliens.<sup>4</sup> Article III of the Constitution provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>5</sup> Implementing this constitutional authorization

1. See JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 8-10 (2d ed. 1986).

2. See U.S. DEP’T OF JUST., 1993 *STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE* 16 (1994) (showing general increase in number of immigrants admitted to United States since 1950).

3. See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 6-7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6604-05 (stating that impetus for passage of Foreign Sovereign Immunities Act was that “American citizens are increasingly coming into contact with foreign states and entities owned by foreign states” and offering examples of increasing commerce between U.S. and foreign states); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 20 (1995) (noting increasingly transnational nature of mass tort cases).

4. For a variety of reasons that I have described elsewhere, I find the term “alien” as used to refer to noncitizens to be unsatisfactory. See Kevin R. Johnson, *A “Hard Look” at the Executive Branch’s Asylum Decisions*, 1991 UTAH L. REV. 279, 281 n.5. Others have made similar observations. See, e.g., *Rojas v. Richardson*, 703 F.2d 186, 191 (5th Cir. 1983) (characterizing term “illegal alien” used in closing argument as “incendiary, derogatory expression” that justified new trial because it “appeal[ed] to the prejudice and bias of members of the jury”); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1428 (1995) (recognizing that reference to “noncitizens as aliens . . . calls attention to their ‘otherness,’ and even associates them with nonhuman invaders from outer space”). The alienage jurisdiction terminology is, in my view, similarly problematic. However, because this shorthand has long been the rule in the federal courts literature, I feel compelled to employ it in this Article.

5. U.S. CONST. art. III, § 2. This language makes it clear that Article III, apart from alienage jurisdiction, allows for the exercise of federal jurisdiction over cases and controversies involving foreign states. Congress has implemented the constitutional authorization with respect to suits against states in the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1331, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1988 & Supp. IV 1992)). See, e.g., *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992); see also Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV.

in broad fashion, the First Congress in the Judiciary Act of 1789 bestowed upon the federal courts jurisdiction over

all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . 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.<sup>6</sup>

Thus, from the earliest days of the republic, Congress authorized the federal courts to hear alienage cases. That, combined with the fact that Congress did not bestow federal question jurisdiction on the federal courts until 1875,<sup>7</sup> suggests that the leaders of the young nation attached special importance to alienage jurisdiction.<sup>8</sup>

Alienage jurisdiction traditionally has been lumped together with Article III's grant of diversity jurisdiction, which permits the federal courts to hear disputes between citizens of different states. The debates at the Constitutional Convention between Federalists and Antifederalists about the federal courts<sup>9</sup> shed little light on precisely why the Framers included the diversity provisions of Article III.<sup>10</sup> This has spawned a debate spanning over two centuries about

385 (1982) (analyzing process of bringing suit against foreign states under Act). Congress also has authorized federal jurisdiction over actions brought by foreign states as plaintiffs under 28 U.S.C. § 1332(a)(4) (1988). Federal jurisdiction over suits involving foreign nations is beyond the scope of this Article.

6. Judiciary Act of 1789 § 11, 1 Stat. 73, 78 (partially codified as amended at 28 U.S.C. § 1332 (1988 & Supp. IV 1992)). The classic study of the Judiciary Act is Charles Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). For a critique, see WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789* (Wythe Holt & L.H. LaRue eds., 1990).

Congress has amended the statute on numerous occasions. See *infra* Part III.A (tracing evolution of alienage provisions of diversity statute). The general diversity statute currently provides that, when the amount in controversy exceeds \$50,000 exclusive of interest and costs, the federal courts have jurisdiction over cases between:

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties;
- (4) and . . . a foreign state . . . as plaintiff and citizens of a State or of different States.<sup>28</sup>

U.S.C. § 1332(a)(1)-(4) (1988 & Supp. IV 1992).

7. See Act of Mar. 3, 1875 § 1, 18 Stat. 470 (1875). See generally Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953) (analyzing federal question jurisdiction of federal courts).

8. See Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 548 (1989) (proclaiming that alienage jurisdiction was "single most important grant of national court jurisdiction embodied in the [Judiciary] Act"). But cf. Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 509 n.296 (1994) (disputing Professor Holt's contention that diversity and alienage jurisdiction were of special significance to Framers).

9. See generally Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (interpreting Article III by focusing on federalism and separation of powers principles); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79 (1993) (examining political process of drafting Constitution). For an analysis of the evolving political ideology during this era, see generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

10. See 13B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 3601, at 337 (2d ed. 1984); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 3 (1948).

the Framers' underlying rationale for diversity jurisdiction.<sup>11</sup>

It is somewhat surprising that, despite the academic preoccupation with *diversity* jurisdiction, precious little attention has been paid to its first cousin, *alienage* jurisdiction, which the Framers and the First Congress believed to be so important.<sup>12</sup> Some of the most well known writings on federal jurisdiction virtually ignore it.<sup>13</sup> This is true even though alienage jurisdiction, unlike diversity, implicates controversial issues such as foreign relations, international trade, and xenophobia. When the topic of alienage jurisdiction is broached, a common assumption is that the underlying rationales for alienage and diversity jurisdiction are identical. Careful study, including "rattling through dusty attics of" the history books,<sup>14</sup> however, reveals that alienage jurisdiction differs in salient respects from ordinary diversity jurisdiction.

The longstanding treatment of alienage and diversity jurisdiction as interchangeable has not been without costs. In response to the much publicized "litigation explosion,"<sup>15</sup> the last several decades have seen myriad proposals to limit federal jurisdiction, including the perennial call to abolish or greatly restrict diversity jurisdiction.<sup>16</sup> In response, Congress has incrementally pruned diversity (and, indirectly, alienage) jurisdiction, most notably by increasing the amount in controversy requirement fivefold from \$10,000 to \$50,000 in 1988 and, oddly enough, by proclaiming one category of noncitizens to be state citizens.<sup>17</sup>

Efforts to reduce the diversity caseload of the federal courts have indirectly narrowed the scope of alienage jurisdiction, generally with precious little, if any, thought.<sup>18</sup> This is true even though alienage cases constitute a relatively small proportion of the total number of diversity cases and little stands to be gained in terms of docket reduction.<sup>19</sup> Many who advocate

11. See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 23, at 142 (1994) ("It might be thought that the historical origins of a jurisdiction that has been employed steadily for almost two centuries would be a subject of interest only to antiquarians. With regard to diversity, however, time has only exacerbated the controversy stirred at the time of the ratification debates.").

12. A notable exception is Holt, *supra* note 8.

13. See, e.g., PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988); ERWIN CHEMERINSKY, FEDERAL JURISDICTION (2d ed. 1994); CHARLES T. MCCORMICK ET AL., CASES AND MATERIALS ON FEDERAL COURTS (9th ed. 1992); WRIGHT, *supra* note 11.

14. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 575 (1990) (Brennan, J., concurring in part and concurring in judgment).

15. See, e.g., RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-166 (1985); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4-10 (1990); see also Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 67 ("If there is one thing about which practically all federal judges agree, it is that their dockets are overcrowded. This belief appears well-founded.").

16. See 13B WRIGHT ET AL., *supra* note 10, § 3601, at 344-63 (summarizing debate about diversity's abolition); POSNER, *supra* note 15, at 139-47 (same).

17. See *infra* Part III.A (analyzing amendments to diversity statute impacting alienage cases).

18. See *infra* Part III.A.

19. From 1991 to 1993, of the over 200,000 cases filed annually in the district courts, about 50,000 were diversity of citizenship, including alienage, cases. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE COURTS 1993, at 8 (1994). Although the Annual Reports do not contain information on the number of alienage cases falling within the diversity category, the Administrative Office of the United States Courts, Analysis and Reports Branch, Statistics Division compiles such information from Civil Cover Sheets submitted with complaints filed in the district courts. From statistical summary information

abolition of diversity support the retention of alienage jurisdiction,<sup>20</sup> though some argue for a substantial reduction in its scope.<sup>21</sup> Indeed, a subcommittee report of the blue ribbon Federal Courts Study Committee suggested that alienage jurisdiction was not one of the most essential forms of federal jurisdiction.<sup>22</sup> Proposals to restrict alienage jurisdiction generally fail to analyze thoroughly the independent rationales for such jurisdiction, especially the possible foreign relations and trade consequences should aliens be perceived as having been treated unfairly by the state courts.

The indirect incursions on alienage jurisdiction would not be troubling if Congress, upon reflection, were to conclude that such jurisdiction was no longer necessary. In times of crowded dockets, it is certainly worth considering whether alienage jurisdiction may be restricted or eliminated without serious adverse consequences. The problem, however, is that Congress, in narrowing diversity, has for the most part failed to consider the potential impact on alienage cases and whether alienage jurisdiction, separate and apart from diversity, is worth keeping.

This Article contends that alienage and diversity jurisdiction should be treated as analytically distinct. By so doing, it is more likely that alienage jurisdiction will remain faithful to its historical roots. In addition, separate treatment will tend to ensure that the modern justifications for alienage jurisdiction are best served.

Part II of this Article analyzes the historical foundations for alienage jurisdiction, specifically the context in which the Framers of the Constitution and members of the First Congress provided for alienage jurisdiction. Part III traces how Congress has implemented Article III's alienage provisions and how the Supreme Court has interpreted the relevant statutory enactments. Part IV considers whether Congress should maintain alienage jurisdiction in the face of the general calls to limit federal jurisdiction. Part V concludes by offering some thoughts on the need to improve the operation of alienage jurisdiction, makes specific recommendations for congressional reform, and identifies a few avenues for future exploration. Congress could greatly improve alienage jurisdiction if it simply enacted an alienage statute separate and apart from the general diversity statute.

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provided by Maurice S. Galloway of that division, which is on file with the author, for the fiscal year that ended on March 30, 1994, 3948 of the 53,737 diversity cases (about 7.3%) had a citizen or subject of a foreign country or a foreign state itself as a party. If only foreign citizens or subjects are counted, alienage cases account for 6.5% (3496 of 53,737) of the total diversity caseload. Foreign citizens or subjects brought about 35% (1383 of 3948) of the total alien cases (and about 39.6% (1383 of 3496) of those alienage cases only involving foreign citizens or subjects, not foreign states), or about 2.6% (1383 of the 53,737) of the total number of diversity cases.

20. See, e.g., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 15, at 38; COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES 29-32 (2d prt. 1995); HENRY FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 149-50 (1973); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 966-68 (1979).

21. See Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97, 121-23 (suggesting numerous limitations on alienage jurisdiction).

22. See REPORT OF THE SUBCOMMITTEE ON THE FEDERAL COURTS AND THEIR RELATION TO THE STATES 130-32 (1990), in 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS (1990) [hereinafter FCSC, WORKING PAPERS] (explaining why subcommittee considered alienage jurisdiction to be outside "minimum federal jurisdiction").

## II. THE ORIGINS

To place the adoption of alienage jurisdiction in historical context, I will briefly look at the developments culminating in the Constitutional Convention, which offer some clues about why there was a near consensus among the Framers on the need for alienage jurisdiction. The Framers and Congress, in passing the Judiciary Act of 1789, did not devote much time to debating the decision to allow the federal courts to hear alienage cases. This should not be surprising. During the reign of the Articles of Confederation, state courts and legislatures, arguably in violation of the Treaty of Paris ending the Revolutionary War, made it difficult for British creditors to collect debts from local debtors. By providing for alienage jurisdiction in the national courts, the Framers acted to avoid the potentially adverse foreign relations consequences caused by allowing state courts, fueled by a mixture of anti-British and anticreditor sentiment, to resolve disputes involving noncitizens. Instead, the Framers ensured that foreigners had access to a national court system perceived as less susceptible to the democratic impulse than the state courts.<sup>23</sup> Many, particularly the Federalists, hoped that alienage jurisdiction would attract much needed foreign capital to the fledgling nation. In essence, alienage jurisdiction reflected many of the same concerns in the United States that influenced the call for a strong national government.

### A. *The Constitutional Convention and Ratification*

#### 1. *Historical Context*

Anti-British sentiment, commonplace during the colonial period, grew in intensity as the American Revolution neared.<sup>24</sup> The bloodiness of the war and the hatred of the British by many Americans cannot be understated.<sup>25</sup> During

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23. See THE FEDERALIST No. 81, at 547 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 883, at 629-30 (1833) (noting difference between tenure of federal and state judges and opining that diversity jurisdiction would promote extension of credit due to availability of "prompt, efficient, and impartial administration of enforcing contracts"). One observer, however, has emphasized that:

[t]he same biased jurors serve in both state and federal courts, and the power of a federal judge to protect an out-of-stater by directing a verdict or by setting one aside is not great. The argument for diversity jurisdiction must therefore be that the federal judge will more freely exercise the powers that he has — assuming, as will not always be the case, that the federal judge is less biased than his state court counterpart.

Kramer, *supra* note 21, at 120; see FRIENDLY, *supra* note 20, at 149 (arguing that costs outweigh marginal benefits of this rationale for diversity jurisdiction).

24. See CARL BRIDENBAUGH, CITIES IN REVOLT: URBAN LIFE IN AMERICA, 1743-1776, at 117-18, 135-36, 305-14, 332-34 (1955); Holt, *supra* note 8, at 553-62; see also Richard Maxwell Brown, *Violence and the American Revolution*, in ESSAYS ON THE AMERICAN REVOLUTION 81 (Stephen G. Kurtz & James H. Hutson eds., 1973) (describing violent protest of British policies culminating in Revolution).

25. In James Madison's words:

No description can give you an adequate idea of the barbarity with which the enemy have conducted the war in the Southern States. Every outrage which humanity could suffer has been committed by them. Desolation rather than conquest seems to have been their object. They have acted more like desperate bands of robbers or buccaneers than like a nation making war

and after the war, Americans subjected some loyalists to brutal violence.<sup>26</sup> A distinctly anti-British attitude pervaded U.S. society in the tumultuous years immediately following the war.<sup>27</sup>

Economic factors, which some claim were the root cause of the Revolution, fueled antagonism toward the British in the post-war period.<sup>28</sup> The states often failed to enforce debts owed by their citizens to British creditors. This problem grew as the U.S. economy experienced fluctuations and readjustments caused by, among other factors, the loss of British financial support. Local debtors faced difficult times repaying their obligations.<sup>29</sup> Debt collection through the courts was extremely difficult, and debtor insurrections sought to close the state courts to collection proceedings.<sup>30</sup> A famous example is Shays' Rebellion in western Massachusetts in 1786.<sup>31</sup> State legislatures also passed a number of debtor relief laws.<sup>32</sup> In sum, British creditors found debt collection in the United States under the Articles of Confederation to be less than ideal.<sup>33</sup> For example, "[t]here can be no doubt . . . of direct bias in the administration of justice against British creditors in Virginia."<sup>34</sup>

for dominion. Negroes, horses, tobacco, &c., not the standards and arms of their antagonists, are the trophies which display their success. Rapes, murders, and the whole catalogue of individual cruelties, not protection and the distribution of justice, are the acts which characterize the sphere of their usurped jurisdiction.

Letter from James Madison to Philip Mazzei (July 7, 1781), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 49 (1867).

26. See ALAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789*, at 268-74 (1924) (describing violence against loyalists in New York).

27. See *id.* (discussing events after Revolution, including British encouragement of aggression by Indian tribes against United States and discrimination against U.S. commerce, exacerbating domestic antipathy toward British).

28. See CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 3-23 (1972). See generally CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1939) (analyzing economic influences on framing of Constitution).

29. See Holt, *supra* note 8, at 558-59 (discussing inability of many debtors, particularly Southern planters and farmers, to pay debts as a result of economic downturn).

30. See *id.* at 553-62.

31. See WOOD, *supra* note 9, at 412-13 (observing influence of Shays' Rebellion on call for constitutional reform).

32. See *infra* text accompanying notes 61-70 (analyzing Framers' observations on subject). To that end, state legislatures at times exercised quasi-judicial powers that benefited debtors at the expense of creditors. See WOOD, *supra* note 9, at 408-09; see also *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1453 (1995) (discussing how "vigorous, indeed often radical, populism of the revolutionary legislatures and assemblies, increased the frequency of legislative correction of judgments" resulting in Framers' adherence to strict separation of powers principles) (citations omitted).

33. See Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1430-53.

34. Frank, *supra* note 10, at 24 (footnotes omitted). The state courts more generally exhibited antiforeign sentiments. See Holt, *supra* note 33, at 1427-30.

Max Farrand recounts a story that circulated during this period of events in the Virginia legislature. This story illustrates the sensitivity over the issue of debt collection by British creditors:

A Scotchman, John Warden, a prominent lawyer and good classical scholar, but suspected rightly of Tory leanings during the Revolution, learning of the large minority against the repeal of laws in conflict with the treaty of 1783 (i.e., especially the laws as to the collection of debts by foreigners), caustically remarked that some of the members of the House had voted against paying for the coats on their backs. The story goes that he was summoned before the House in full session, and was compelled to beg their pardon on his knees, but as he rose, pretending to brush the dust from his knees, he pointed to the House and said audibly, with evident double meaning, "Upon my word, a dommed dirty house it is indeed." The Journal

The difficulties that the British faced in debt collection proved to be a nagging problem for the national government. In the Treaty of Paris of 1783, the United States agreed not to impose legal impediments to the recovery of private debts by British creditors.<sup>35</sup> As the previously described actions suggest, the states refused to abide by this treaty obligation.<sup>36</sup> This typified more general problems with the conduct of foreign relations by the national government under the Articles of Confederation. Some states, in pursuit of their own foreign policy agendas, disregarded treaties entered into by the national government.<sup>37</sup> These developments, in combination with many others, precipitated the calling of the Constitutional Convention.<sup>38</sup>

Debt collection raised economic issues of more general concern to the nation. A fear existed, particularly strong among the Federalists, that the nation would be unable to attract much needed capital absent easier enforcement of commercial obligations owed to foreign citizens by U.S. citizens. A national court system was considered one solution.<sup>39</sup>

The idea that procedural devices might protect foreigners and facilitate commerce found historical precedent in an ancient English legal practice. Trials *de medietate linguae*, literally "trials 'of the half tongue,' [were] trials in which one party was an alien whose native language was not English."<sup>40</sup> Such trials would be conducted before a jury with one half the jury composed of noncitizens and one half citizens.<sup>41</sup> Originating in the early 1200s in

of the House, however, shows that the honor of the delegates was satisfied by a written assurance from Mr. Warden that he meant in no way to affront the dignity of the House or to insult any of its members.

MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 46 n.1 (1913) (citation omitted).

35. Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., art. 4, 8 Stat. 80, 82. Article IV provided that creditors would "meet with no lawful Impediment to the Recovery of the full Value . . . of all bona fide Debts heretofore contracted."

36. See FARRAND, *supra* note 34, at 46-47; NEVINS, *supra* note 26, at 644-56; see also MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789*, at 6-18, 68-69, 261-81 (1950) (discussing history of peace treaty, including growing political opposition during this period to treaty's assurances of debt repayment). For analysis of some justifications for not enforcing the repayment of the debts, see WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC* 30-31 (1995).

37. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 33-34 (1972). "Unhappiness with state disregard of treaties was repeatedly voiced at the Constitutional Convention . . . and was a particular impetus to the explicit establishment of the supremacy of treaties." *Id.* at 295 n.8 (citations omitted).

38. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936) ("The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.") (citation omitted).

39. See Holt, *supra* note 33, at 1453-58.

40. James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 167 n.157 (1983); see Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury "De Medietate Linguae": A History and A Proposal for Change*, 74 B.U. L. REV. 777, 783-96 (1994). See generally MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* (1994) (analyzing intellectual history of mixed juries).

Despite the Latin name, trials *de medietate linguae* rested more on the status of the jurors as noncitizens than on the ability to speak a language other than English. See Ramirez, *supra*, at 781-82; see also A.K.R. KIRALFY, *POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS* 188 (4th ed. 1962) ("The common law allowed a foreigner the privilege of having half the jurors in his case persons of his nationality, known as the jury *de medietate linguae*.") (footnote omitted).

41. See Oldham, *supra* note 40, at 167-71.



England, trials *de medietate linguae* originally were designed to provide relief for Jews, “[t]he archetypal alien in medieval society.”<sup>42</sup> Britain extended the right first to alien merchants and, in the 1300s, to all aliens.<sup>43</sup> The device represented “a crown policy to encourage foreign merchants and foreign artisans to come to England.”<sup>44</sup>

By the time of the Constitutional Convention, trials *de medietate linguae* had existed in the mother country for over five centuries. The mixed jury was discussed in a handful of state court appellate decisions in the 1700s and 1800s,<sup>45</sup> before ultimately disappearing into obscurity.<sup>46</sup> Some of the Framers were aware of trials *de medietate linguae*. For example, James Madison, in challenging the alien and sedition laws enacted in the late 1790s,<sup>47</sup> recognized “that, except on charges of treason, an alien has, besides all the common privileges, the special one of being tried by a jury, of which one half may be also aliens.”<sup>48</sup>

42. Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 849 (1976); see Oldham, *supra* note 40, at 168. Although originally half of the jury was to be composed of aliens of the same nationality as the alien party, the procedure evolved to allow aliens from any country to serve as jurors. See WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 228 (1852); Oldham, *supra* note 40, at 169-70.

43. See LaRue, *supra* note 42, at 849-50; see also FORSYTH, *supra* note 42, at 228-29 (discussing British mixed jury practice); 5 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 104 (1966) (mentioning mixed jury in discussion of medieval law merchant in England); LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 58, 80-81 (2d ed. 1988) (discussing mixed jury of foreign merchants); Gordon W. Paulsen, *An Historical Overview of the Development of Uniformity in International Maritime Law*, 57 TUL. L. REV. 1065, 1074-75 (1983) (describing mixed juries in commercial context).

44. LaRue, *supra* note 42, at 850; see Ramirez, *supra* note 40, at 783-89; see also JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 94 n.4 (1898) (stating that mixed juries were “founded on considerations of policy and fair dealing” and offering example of German merchant in contract action allowed to have half of jury consist of German merchants) (citation omitted). Procedural fairness to the noncitizen also was a consideration. See *Ex parte Virginia*, 100 U.S. 339, 369 (1880) (Field, J., dissenting) (explaining that mixed juries were “authorized by statute, probably as much because of the difference of language and customs between [the alien] and Englishmen, and the greater probability of his defense being more fully understood, as because it would be heard in a more friendly spirit by jurors of his own country and language”) (emphasis added); Oldham, *supra* note 40, at 170-71 (noting that mixed jury “emerged to ensure a jury able to understand the point of view of the alien party”).

Mixed juries were used in England to some extent until the late 1800s, when they were abolished by statute. See SEYMOUR D. THOMPSON & EDWIN G. MERRIAM, *A TREATISE ON THE ORGANIZATION, CUSTODY AND CONDUCT OF JURIES, INCLUDING GRAND JURIES* § 17, at 19 (1882); see also Abner J. Mikva & Gerald L. Neuman, *The Hostage Crisis and the “Hostage Act”*, 49 U. CHI. L. REV. 292, 307-14 (1982) (outlining historical context surrounding tense United States-British relations that culminated in abolition of mixed juries in Britain).

45. See LaRue, *supra* note 42, at 850-53 (analyzing decisions); Ramirez, *supra* note 40, at 789-96 (same).

46. See LaRue, *supra* note 42, at 853-63; Ramirez, *supra* note 40, at 789-96; see also *Commonwealth v. Acen*, 487 N.E.2d 189, 191-93 (Mass. 1986) (recounting history of trials *de medietate* in Massachusetts).

47. See *infra* text accompanying notes 193-97 (discussing laws).

48. 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (Jonathan Elliot ed., 1988) [hereinafter ELLIOT] (Madison's Report on the Virginia Resolutions). Madison “may have overstated [the mixed jury's] omnipresence, although it was still the law in Virginia.” Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 936 n.146 (1991) (citing authority); see also 1 FRANCIS X. BUSCH, *LAW AND TACTICS IN JURY TRIALS* § 65, at 467 (1959) (stating that juries *de medietate linguae* have “never been recognized to any considerable extent in the United States”); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 880 (1994) (observing that mixed jury was used “occasionally” in United States).

Thus, the existence of mixed juries showed a sensitivity to the need for procedural devices to protect noncitizens. A desire to ensure a more impartial forum to noncitizens and to foster commercial transactions influenced both alienage jurisdiction and trials *de medietate linguae*.

## 2. Debate over the Alienage Provisions of Article III

Debate over the merits of alienage jurisdiction was not highly controversial at either the Constitutional Convention or the various state ratification conventions. Indeed, a consensus rapidly emerged on the need to allow national courts to hear cases involving foreign citizens. Four of the five plans presented at the Constitutional Convention provided for alienage jurisdiction.<sup>49</sup> Professor Holt reads this as "tell[ing] us something both about the sins of state courts — they involved *aliens* — and about the importance of alienage jurisdiction."<sup>50</sup>

Edmund Randolph's Virginia Plan provided for federal jurisdiction in "cases in which foreigners or citizens of other States applying to such jurisdictions may be interested."<sup>51</sup> Although the Committee of the Whole changed the language considerably,<sup>52</sup> the Committee of Detail revived and reworked Randolph's language. With minor adjustments, it was unanimously adopted by the delegates.<sup>53</sup>

Alexander Hamilton's *Federalist No. 80* offers the most comprehensive exposition of the need to authorize the national courts to hear cases and controversies involving noncitizens. In Hamilton's opinion, federal judicial

Thomas Jefferson, ambassador to France during the Constitutional Convention, wrote in a letter to Madison that "[i]n disputes between a foreigner and a native, a trial by jury may be improper. But if this exception cannot be agreed to, the remedy will be to model the jury, by giving the *medietas lingua*, in civil as well as criminal cases." Letter to James Madison (July 31, 1788), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 451 (Adrienne Koch & William Peden eds., 1944) [hereinafter *LIFE OF JEFFERSON*]; see also *THOMAS JEFFERSON, WRITINGS* 258 (1984) ("In cases of life and death . . . foreigners have a right to be tried by a jury, the one half foreigners, the other natives.").

49. See Holt, *supra* note 33, at 1460 & n.136. Holt cites 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 22 (Max Farrand ed., 1911) (Virginia plan) [hereinafter *FARRAND*] ("jurisdiction . . . to hear & determine . . . cases in which foreigners . . . may be interested"); 1 *FARRAND, supra*, at 244 (New Jersey plan) ("authority to hear & determine . . . in all cases in which foreigners may be interested"); 1 *id.* at 292 (Hamilton's plan) ("jurisdiction . . . in all causes in which . . . the citizens of foreign nations are concerned"); 1 *id.* at 432 (Mason's plan) ("jurisdiction . . . shall extend to controversies . . . between a State and the citizens thereof and foreign states, citizens or subjects") (emphasis in original). The fifth would have extended jurisdiction to "Questions . . . on the Construction of Treaties made by U.S." 3 *id.* at 608 (Pinckney's plan); see also James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 *TEX. L. REV.* 1, 2-3 (1964) (observing that "all of the comprehensive proposals . . . specifically provided for federal jurisdiction of cases in which foreigners may be interested").

An open question was whether alienage jurisdiction should be exclusive, rather than concurrent. See Holt, *supra* note 33, at 1467 (citing inter alia 3 *ELLIOT, supra* note 48, at 527 (Mason of Virginia) and Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland*, in 2 *THE COMPLETE ANTI-FEDERALIST* ¶¶ 2.4.58, 2.4 at 89-91 (H. Storing ed., 1981)).

50. Holt, *supra* note 8, at 551.

51. 1 *FARRAND, supra* note 49, at 22; see *id.* at 238 (Yates' notes) (stating that Randolph hoped to preserve "security of foreigners where treaties are in their favor, and to preserve the harmony of states and that of the citizens thereof").

52. See Motion of Edmund Randolph and James Madison (June 13, 1787), in 1 *id.* at 223-24.

53. 3 *id.* at 169-70 (vote on diversity as recorded in Ezra Stiles' Diary (Dec. 21, 1787)).

power should unquestionably include the ability to hear all cases “in which the State tribunals cannot be supposed to be impartial and unbiased.”<sup>54</sup> Hamilton elaborated specifically on alienage jurisdiction.

[T]he peace of the WHOLE ought not be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it 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.* A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. *But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the lex loci, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty or the general law of nations.* And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. *So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.*<sup>55</sup>

Hamilton makes several related points. Cases involving noncitizens may have consequences for the nation as a whole in the conduct of foreign relations and, thus, should be decided by national, not state, courts. Hamilton further recognizes that all cases involving noncitizens, not simply those involving treaties or international law, should be heard by the national courts. Even if cases requiring the application of international law could be easily

54. See THE FEDERALIST NO. 80, *supra* note 23, at 534.

55. *Id.* at 568 (emphasis added); see 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). In calling for the Constitutional Convention, Hamilton had contended that:

[i]n want of a federal Judicature, having cognizance of all matters of general concern in the last resort, *especially those in which foreign nations and their subjects are interested*; from which defect, by the interference of the local regulations of particular States militating directly or indirectly against the powers vested in the Union, the national treaties will be liable to be infringed, the national faith to be violated, and the public tranquility to be disturbed.

1 THE WORKS OF ALEXANDER HAMILTON 305-06 (2d ed. 1903) (Resolution for a General Convention, June 30, 1783) (emphasis added).

A member of the Maryland State Convention advocating ratification emphasized similar themes: *The purpose of extending so far the jurisdiction of the federal judiciary, is to give every assurance to the general government, of a faithful execution of its laws, and to give citizens, states, and foreigners, an assurance of the impartial administration of justice.* Without the salutary institution, the federal government might frequently be obstructed, and its servants want protection. It is calculated not as an engine of oppression, but to secure the blessings of peace and good order. The provisions respecting different states, their citizens, and foreigners, if not absolutely necessary, are much to be applauded. The human mind is so framed, that the slightest circumstance may prevent the most upright and well known tribunal from giving complete satisfaction; and there may happen a variety of cases, where the distrust and suspicion may not be altogether destitute of a just foundation.

Aristides, *Remarks on the Proposed Plan of a Federal Government, Addressed to the Citizens of the United States of America, and Particularly to the People of Maryland* (written by Alexander Contee Hanson, member of the Maryland State Convention, dated Jan. 1, 1788) (emphasis added), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 238 (Paul Leicester Ford ed., 1971).

distinguished from cases involving local matters, the possible impact on domestic tranquility (i.e., the potential for war) would be the same for either type of case. In referring to the "preservation of the public faith," Hamilton presumably acknowledges the importance of the perceptions of impartiality created by allowing the national courts to hear alienage cases. In emphasizing appearances, Hamilton diplomatically downplays the actual partiality of the state courts in favor of local residents. This should not be surprising if one views the *Federalist* as designed to promote ratification of the Constitution by the various states.

The debates at the Constitutional Convention and the state ratification conventions reflected concerns similar to those expressed by Hamilton. For example, in discussing alienage jurisdiction, as well as jurisdiction over controversies involving foreign states, James Madison asked, "[c]ould there be a more favorable or eligible provision to avoid controversies with foreign powers? Ought it to be put in the power of a member of the Union to drag the whole community?"<sup>56</sup> William Davie of North Carolina emphasized this foreign relations dimension:

If our courts of justice did not decide in favor of foreign citizens and subjects when they ought, it might involve the whole Union in a war . . . . To the decision of all causes which might involve the peace of the Union may be referred, also, that of controversies between the citizens or subjects of foreign states and citizens of the United States. . . . [T]he denial of justice is one of the just causes of war. If these controversies were left to the decision of particular states, it would be in their power, at any time, to involve the continent in a war, usually the greatest of all national calamities. It is certainly clear that where the peace of the Union is affected, the general judiciary ought to decide.<sup>57</sup>

Other Article III grants of federal jurisdiction also reflected the Framers' foreign relations concerns. Granting the federal courts admiralty jurisdiction, it was argued, would help maintain good relations with foreign citizens and nations.<sup>58</sup> Reflecting similar hopes, Article III ultimately provided for federal jurisdiction "in all Cases affecting Ambassadors, other public Ministers and Consuls" as well as in cases and controversies arising under treaties.<sup>59</sup> In

56. 3 ELLIOT, *supra* note 48, at 533-34 (Madison). Madison emphasized that uniformity was desired in the interpretation of treaties by the federal courts with jurisdiction over cases involving ambassadors and foreign ministers, as well as over admiralty and maritime cases. *See* 3 *id.* at 532 (Madison). Indeed, one might surmise from Madison's comments that he viewed alienage jurisdiction as more important than simple diversity jurisdiction. *See* 3 *id.* at 533 (Madison) ("As to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left to the state courts.")

57. 4 *id.* at 158-59 (Davie); *see also* Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 204 (1983) [hereinafter DOCUMENTARY HISTORY] ("[T]here 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 power, a single state, or one of its citizens, might embroil the whole union in a foreign war.") (emphasis in original).

58. *See* STORY, *supra* note 23, §§ 867-68, at 616-17; *see, e.g.*, 1 FARRAND, *supra* note 49, at 124 (notes of Madison) (recording that James Wilson of Pennsylvania "said the admiralty jurisdiction ought to be given wholly to the national Government, as it related to cases not within the jurisdiction of particular states, & to a scene in which controversies with foreigners would be most likely to happen").

59. U.S. CONST. art. III, § 2.

addition, the Supremacy Clause makes treaties, in addition to laws passed by Congress, the supreme law of the land.<sup>60</sup> The importance of foreign relations concerns distinguished alienage from diversity jurisdiction.

That does not imply that no similarities existed between the Framers' rationales for alienage and diversity jurisdiction. As with diversity generally,<sup>61</sup> an interest in fostering commerce influenced decisions regarding alienage.<sup>62</sup> In defending the breadth of Article III, a leading figure in its drafting, James Wilson of Pennsylvania, defended diversity and alienage jurisdiction on precisely these grounds:

[I]s it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island. I ask, further, How will a creditor feel who had his debts at the mercy of tender laws in other states? It is true that, under this Constitution, these particular iniquities may be restrained in the future; but, sir, there are other ways of avoiding payment of debts. *There have been installment acts, and other acts of a similar effect. Such things, sir, destroy the very sources of credit. . . . It was thought proper to give the citizens of foreign states full opportunity of obtaining justice in the general courts, and this they have by its appellate jurisdiction; therefore, in order to restore credit with those foreign states, that part of the article is necessary. I believe the alteration that will take place in their minds when they learn the operation of this clause, will be a great and important advantage to our country; nor is it any thing but justice; they ought to have the same security against the state laws that may be made, that the citizens have; because regulations ought to be equally just in one case as in the other. Further, it is necessary to preserve peace with foreign nations.*<sup>63</sup>

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60. U.S. CONST. art. VI § 2; see also U.S. CONST. art. I, § 10 ("No State shall enter into any Treaty, Alliance, or Confederation . . ."). See generally CHARLES HENRY BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* §§ 163-196, at 285-338 (1902) (analyzing events at Constitutional Convention concerning national government's treaty-making power).

61. See, e.g., 3 ELLIOT, *supra* note 48, at 534-35 (presenting argument by Madison that diversity jurisdiction would facilitate interstate commerce).

62. As Joseph Story later observed in his famous commentary on the Constitution, *it may be remarked, that it is of great national importance to advance public, as well as private credit, in our intercourse with foreign nations and their subjects. Nothing can be more beneficial in this respect, than to create an impartial tribunal, to which they may have resort upon all occasions, when it may be necessary to ascertain, or enforce their rights.* Besides; it is not wholly immaterial, that the law to be administered in cases of foreigners is often very distinct from the mere municipal code of a state, and dependent upon the law merchant, or the more enlarged consideration of international rights and duties, in a case of conflict of the foreign and domestic laws. And it may fairly be presumed, that the national tribunals will, from the nature of their ordinary functions, become better acquainted with the general principles, than other courts, however enlightened, which are rarely required to discuss them. STORY, *supra* note 23, § 889, at 634-35 (emphasis added).

63. 2 ELLIOT, *supra* note 48, at 491-93 (Wilson) (emphasis added). Wilson went on: Let us suppose the case, that a wicked law is made in some one of the states, enabling a debtor to pay his creditor with the fourth, fifth, or sixth part of the real value of the debt, and this creditor, a foreigner, complains to his prince or sovereign, of the injustice that has been done him. What can that prince or sovereign do? Bound by inclination, as well as duty, to redress the wrong his subject sustains from the hand of perfidy, he cannot apply to the particular guilty state, because he knows that, by the Articles of Confederation, it is declared that no state shall enter into treaties. He must therefore apply to the United States; the United States must be accountable. "My subject has received a flagrant injury: do me justice, or I will do myself justice." If the United States are answerable for the injury, ought they not to possess the means of compelling the faulty state to repair it? They ought; and this is what is done here. For now, if complaint is made in consequence of such injustice, Congress can answer, "Why did not your subject apply to the General Court, where the unequal and partial laws of a particular state would have had no force?"

*Id.* at 493.

Madison focused specifically on the negative commercial impact of the treatment of noncitizens in the state courts: "We well know, sir, that foreigners cannot get justice done them in [the state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."<sup>64</sup>

The Antifederalists did not direct their wrath at alienage jurisdiction, though some of their objections to diversity and the creation of the federal courts apply with equal force to alienage jurisdiction.<sup>65</sup> One concern of the Antifederalists was that, if noncitizens could sue in federal court, British creditors would benefit at the expense of local debtors. Consider the comments of George Mason of Virginia, a prominent Antifederalist and, like his fellow Virginian Patrick Henry, an ardent protector of debtors:<sup>66</sup>

[Federal] jurisdiction . . . extends to controversies between citizens of different states. Can we not trust our state courts with the decision of these? If I have a controversy with a man in Maryland, . . . are not the state courts competent to try it? Is it suspected that they would enforce the payment if unjust, or refuse to enforce it if just? The very idea is ridiculous. What! carry me a thousand miles from home — from my family and business — to where, perhaps, it will be impossible to prove that I paid it? . . . Is there any necessity for this power? . . . Why should the federal courts have this cognizance? Is it because one lives on one side of the Potomac, and the other on the other? . . . *What effect will this power have between British creditors and the citizens of this state? This is a ground on which I shall speak with confidence. Every one, who heard me speak on the subject, knows that I always spoke for the payment of British debts. I wish every honest debt to be paid. Though I would wish to pay the British creditor, yet I would not put in his power to gratify private malice to our injury. . . . A dispute between a foreign citizen or subject and a Virginian cannot be tried in our own courts, but must be decided in the federal court. Is this the case in any other country? . . . This is an innovation which is utterly unprecedented and unheard-of. Cannot we trust the state courts with disputes between a Frenchman, or an Englishman, and a citizen; or with disputes between two Frenchmen? This is disgraceful; it will annihilate your state judiciary: it will prostrate your legislature.*<sup>67</sup>

64. 3 *id.* at 583 (Madison); see 3 *id.* at 478 (Randolph) ("[T]he Judiciary . . . are to in force [sic] the performance of private contracts. The British debts, which are withheld contrary to treaty, ought to be paid. Not only the law of nations, but justice and honor, require that they be punctually discharged."). These comments, similar to those of William Davie, see *supra* text accompanying note 57, show the interrelationship between foreign relations and commercial concerns.

65. See, e.g., 3 ELLIOT, *supra* note 48, at 523 (Mason objecting to diversity and other forms of federal jurisdiction).

66. See JACKSON TURNER MAIN, *THE ANTIFEDERALISTS* 223-24 (1961).

67. 3 ELLIOT, *supra* note 48, at 526-27 (Mason) (emphasis added) (emphasis in original deleted); see 3 *id.* at 579-80 (Henry) (claiming that "British debtors will be ruined by being dragged to the federal court"); Letter from the Federal Farmer (Oct. 10, 1787), in *THE ANTIFEDERALISTS* 230 (Cecilia M. Kenyon ed., 1966) ("I do not . . . see the need of opening a new jurisdiction . . . of opening a new scene of expensive law suits, of suffering foreigners, and citizens of different states, to drag each other many hundred miles into the federal courts.").

Governor Edmund Randolph of Virginia also focused on the impact of alienage jurisdiction on debt collection:

An honorable gentleman observed, to-day, that there is no instance where foreigners have this advantage over the citizens. What is the reason for this? Because a Virginian creditor may go about for a lamentable number of years before he can get justice, while foreigners will get justice immediately. What is the remedy? Honesty. Remove the procrastination of justice, make debts speedily payable, and the evil goes away. But you complain of the evil because you will not remove it. If a foreigner can recover his debts in six months, why not make a citizen do so? There will then be reciprocity.

3 ELLIOT, *supra* note 48, at 575 (Randolph).

Antifederalist concerns of this nature fueled the demand for a right to trial by jury ultimately guaranteed by the Seventh Amendment. See Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 *HASTINGS L.J.* 579, 597-600 (1993); Charles W. Wolfram, *The*

As the debates illustrate, Federalists contended that alienage jurisdiction was necessary because state courts had proven to be biased against noncitizens, while Antifederalists denied this. There has been spirited academic debate about whether bias by state courts against citizens of other states in fact existed in the years immediately preceding the Constitutional Convention.<sup>68</sup> However, the historical record leaves little doubt that state courts were biased against British creditors.<sup>69</sup> In the eyes of Judge Friendly, a steadfast opponent of diversity jurisdiction, the experience under the Articles of Confederation demonstrated the need for alienage jurisdiction: “[s]everal states had failed to give foreigners proper protection under the treaties concluded with England at the end of the Revolution. . . . Local animosity was so great that only national tribunals could compel the enforcement of a national treaty.”<sup>70</sup>

Apart from the economic concerns that fueled dislike for the British, more general antforeign sentiments animated some of the Framers of the Constitution. Benjamin Franklin, for example, was well known for deriding German immigration to Pennsylvania,<sup>71</sup> as well as the immigration of British convicts.<sup>72</sup> At the Constitutional Convention, debates about the citizenship requirements for election to the House of Representatives and Senate reflected an apprehension of foreigners.<sup>73</sup> A trace of nativism was evident in the

*Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 656-730 (1973). The Antifederalists hoped that juries might ensure fairness to domestic debtors in debt collection suits brought by foreign debtors. See F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783-1828, at 20, 37 (1994). Evidence suggests that, immediately after ratification in Virginia, juries, even when ruling in favor of British creditors, limited the damages that Virginian debtors were required to pay. See *id.* at 38-43.

68. See Frank, *supra* note 10, at 23-24 (summarizing debate). Based on an examination of state appellate decisions before 1787, Judge Henry Friendly concluded that there was no evidence of bias by state courts against nonresidents. See Henry Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 493-97 (1928); see also Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520-26 (1928) (emphasizing that “available records disclose no particular grievance against state tribunals for discrimination against litigants from without. The real fear was of state legislatures, not of state courts . . .”). But see Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 876-78 & n.13 (1931) (arguing that Friendly’s analysis failed to demonstrate that local bias was “inconsequential”). However, as Chief Justice Marshall observed, the *perception* of partiality by the state courts may justify diversity jurisdiction. See *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) (acknowledging “possible fears and apprehensions” of foreign citizens and citizens of different states of bias in state courts); see also *Burgess v. Seligman*, 107 U.S. 20, 34 (1882) (stating that diversity jurisdiction allowed “independent tribunals which might be supposed would be unaffected by local prejudices and sectional views” to hear disputes); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 354 (1855) (emphasizing that diversity jurisdiction attempts “to make the people think and feel . . . that their relations to each other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject-matter of the controversy”); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 332-39 (1977) (presenting survey evidence suggesting that problem of bias against nonresidents may vary by district and that diversity jurisdiction therefore may be more useful in some districts than in others).

69. See *supra* text accompanying notes 24-34.

70. Friendly, *supra* note 68, at 484 n.6 (citations omitted).

71. See MALDWYN ALLEN JONES, *AMERICAN IMMIGRATION* 36-40 (2d ed. 1992).

72. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1841 (1993).

73. See JONES, *supra* note 71, at 68-69; see, e.g., 2 FARRAND, *supra* note 49, at 235-38 (notes of Madison summarizing debate on length of citizenship requirement for congressional office); 2 *id.* at 236 (“Mr. Butler was decidedly [sic] opposed to the admission of foreigners without a long residence in the

opposition to alienage jurisdiction.<sup>74</sup>

In short, there is little dispute that the experience with the treatment of noncitizens by the states before the Constitutional Convention was less than ideal. This makes a significant difference in analyzing alienage and diversity jurisdiction. At least at the time of the framing there was an undisputed need for alienage jurisdiction, which was not the case for diversity.

### 3. *Unanswered Questions*

Article III's grant of alienage jurisdiction is not without its curiosities. For example, one is left to wonder why the Constitution failed to provide for alienage jurisdiction in any case in which an alien was a party, as opposed to only to disputes between an alien and a citizen.<sup>75</sup> Resolution of any dispute involving a foreigner — whether with a U.S. citizen or with a citizen of another nation — in an American court might have foreign policy consequences. For example, claims might be made that the state courts favor one foreign national over another. The Framers appeared to recognize this potential. In explaining the rationale for alienage jurisdiction, Alexander Hamilton in *Federalist No. 80* suggests that federal jurisdiction might be appropriate in suits between aliens.<sup>76</sup> Nevertheless, Article III limits the exercise of jurisdiction to cases and controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”

Another oddity is that the Framers failed to state expressly which law

Country. They bring with them, not only attachments to other Countries; but ideas of Govt. so distinct from ours that in every point of view they are dangerous.”); 2 *id.* at 237-38 (noting similar objections of Gouverneur Morris who advocated fourteen year citizenship requirement for senators); *see also* 3 *id.* at 61 (Letter from John Jay to George Washington dated July 25, 1787) (questioning whether it is “wise & seasonable” to permit “admission of Foreigners into the administration of our national Government” and advocating that it be declared “that the Command [sic] in chief of the american army shall not be given to, nor devolve on, any but a natural *born* citizen.”) (emphasis in original). The Constitution ultimately provided for citizenship requirements of seven years for the House of Representatives and nine years for the Senate. *See* U.S. CONST. art. I, §§ 2, 3. The President must be “a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution . . . .” *Id.* art. II, § 1, cl. 5.

74. Here is an example:

[C]an there be justice in allowing a foreigner, who resides at the federal court, to drag a citizen with whom he has any money transaction, from Georgia to the federal court to answer the foreigners suit? Is there a nation in the world in which an American has such a superiority over the natives? Is it not always held, that the utmost a foreigner can expect, is to be upon a par with the natives? what [sic] foreigner will disire [sic] to become a citizen, when by so doing he will lose that extraordinary pre-eminence? *One would think it was calculated to make our country swarm with foreigners, instead of emigrants — and invite them to prey upon the American natives, who must yield to every demand of a foreigner, or be utterly ruined in the litigation.*

Letter in Virginia Independent Chronicle (Nov. 14, 1787), in DOCUMENTARY HISTORY, *supra* note 57, at 104-05.

75. *See* U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”) (emphasis added).

76. *See* THE FEDERALIST NO. 80, *supra* note 23, at 536 (“So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.”) (emphasis added); *see also* 3 ELLIOT, *supra* note 48, at 527 (Mason) (“Cannot we trust the state courts with disputes between a Frenchman, or an Englishman, and a citizen; or with disputes between two Frenchmen?”) (emphasis added).



might be applied to disputes between citizens and aliens. Joseph Story in his famous *Commentaries on the Constitution* suggests that federal common law might apply to alienage cases.<sup>77</sup> This makes sense if one fears that parochial state laws applied to disputes involving foreigners might embroil the country in international disputes. However, the dominant view is that state law applies to alienage cases.<sup>78</sup>

## B. *The First Congress*

The legislative history of the much studied Judiciary Act of 1789 fails to add much to our understanding of the origins of alienage jurisdiction.<sup>79</sup> Debate over the Act centered on the creation of inferior federal courts.<sup>80</sup> The limited information gleaned from the congressional debates, however, confirms the conclusions drawn from the review of the discussion of Article III's grant of alienage jurisdiction at the Constitutional Convention and state ratification conventions about the need for such jurisdiction.

As was the case for the Constitution, all the proposals of the Judiciary Act provided for alienage jurisdiction. A first draft of a bill considered by a committee limited diversity as well as alienage jurisdiction to suits brought *against* noncitizens.<sup>81</sup> This provision, of course, would have precluded foreign creditors from utilizing the federal courts to collect debts, as Antifederalists feared.<sup>82</sup> The Senate bill reported by the committee broadened the provision and provided for concurrent jurisdiction in cases in which "a forriegner, [sic] or citizen of another State than that in which the suit is brought is a party."<sup>83</sup> Ultimately, section 11 of the Judiciary Act provided for jurisdiction over cases in which "*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."<sup>84</sup> A student of the historical record noted that "the words of the alien clause of section 11 passed unchallenged (at least insofar as we have any record)."<sup>85</sup>

77. See STORY, *supra* note 23, § 889, at 634-35 (discussing alienage jurisdiction and stating that "law to be administered in cases of foreigners is often very distinct from the mere municipal code of a state, and dependent upon the law merchant, or the more enlarged consideration of international rights and duties, in a case of conflict of the foreign and domestic laws"); see also Borchers, *supra* note 9 (arguing that federal common law should be applied to diversity cases); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517-21 (1984) (describing early use of common law by federal courts in variety of contexts).

78. See Warren, *supra* note 6, at 83. But see RITZ, *supra* note 6, at 134 (disputing claim that Rules of Decision Act requires application of state law in diversity cases); Borchers, *supra* note 9, at 111-17 (same); Holt, *supra* note 33, at 1506-07 (same).

79. See 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES 457-508 (1971); RITZ, *supra* note 6, at 4; Holt, *supra* note 33, at 1424-25; Warren, *supra* note 6, at 49.

80. See Warren, *supra* note 6, at 67.

81. See *id.* at 78 n.67.

82. See *infra* text accompanying notes 89-91.

83. Judiciary Bill of June 12, 1789, in 5 LEGISLATIVE HISTORIES: FUNDING ACT THROUGH MILITIA BILL 1172, 1179 (Charlene Bangs Bickford & Helen E. Veit eds., 1986); see also Warren, *supra* note 6, at 77-78.

84. Judiciary Act of 1789 § 11, 1 Stat. 73, 78 (emphasis added).

85. Dennis J. Mahoney, *A Historical Note on Hodgson v. Bowerbank*, 49 U. CHI. L. REV. 725, 732 (1982).

Not surprisingly, the Congress that enacted the Judiciary Act of 1789 empowered the federal courts to decide alienage cases for reasons similar to those offered by the Framers in providing the jurisdictional grant in Article III.<sup>86</sup> In endorsing the Federalist explanation of the need for alienage jurisdiction, William Loughton Smith, a member of the First Congress from South Carolina, recognized that “our Juries” were “generaly [sic] prejudiced” against “foreigners” and that

[t]he Laws of nations & Treaties were too much disregarded in the several States — Juries were too apt to be biased against them, in favor of their own citizens & acquaintances; it was therefore necessary to have general Courts for causes in which foreigners were parties or citizens of different States; hence arises this partiality which offends you; perhaps it may be carried too far.<sup>87</sup>

As might be expected, in light of the concerns expressed at the Constitutional Convention, the limited criticism of alienage jurisdiction reflected sympathy for local debtors.<sup>88</sup> Friction between local debtors and foreign creditors greatly affected debate over the Judiciary Act, as it did at the Constitutional Convention. One of the more fascinating compromises involved the \$500 amount in controversy requirement. Antifederalists supported the requirement because it “would prevent many cases of small amount, thus presumptively those concerning poor people, from being brought into federal

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86. *Id.* at 733.

In his famous analysis of the Judiciary Act, Charles Warren summarized the debates culminating in the provisions providing the statutory authorization for alienage and diversity jurisdiction:

[t]he chief and only real reason for this diverse citizenship jurisdiction was 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. The Federal Court was to secure to a non-citizen the application of the same law which a State Court would give to its own citizens, and to see that within a State there should be no discrimination against non-citizens in the application of justice. There is not a trace of any other purpose than the above to be found in any of the arguments made in 1787–1789 as to this jurisdiction.

Warren, *supra* note 6, at 83 (footnote omitted).

87. *The Letters of William Loughton Smith to Edward Rutledge*, 69 S.C. HIST. MAG. 1, 22-23 (1968) (letter dated Aug. 10, 1789).

88. Representative Michael J. Stone of Maryland, for example, focused on the infringement of alienage jurisdiction on state citizens in debt collection cases:

[I]f a debt is due to a foreigner, may it not be sued in any part of the Union? . . . [F]oreigners may sue and be sued in all the States. . . . [D]o gentlemen now contend, that these suits shall be exclusively in the Continental courts? If they do, it would be an infringement of the private contracts . . . . The citizen might suppose, when he contracted his debt, that he might bring his suit in a State court; if you exclude him from this privilege, you destroy the right he had; a right, notwithstanding all that may be affirmed of the wisdom, honesty, and expedition of the courts of the United States, yet to him it may be ten to one better to be secured in his rights in State courts. . . . [I]t has not been fully considered how far the inconveniences heretofore sustained may be compared to the inconveniences which may hereafter happen . . . .

1 ANNALS OF CONG. 825-26 (Joseph Gales ed., 1789).

Similarly, Richard Henry Lee of Virginia “was opposed to ‘vexatious oppressive’ trials in cases ‘concerning property between Citizens of different States, and between Citizens and foreigners’ in distant courts sitting possibly without juries.” Holt, *supra* note 33, at 1480 (footnote omitted) (citing Enclosure in Letter from Richard Henry Lee to George Mason (Oct. 1, 1787), reprinted in 3 PAPERS OF GEORGE MASON 999 (R. Rutland ed., 1970)).

court, and it would also exclude a huge number of the British debt claims.”<sup>89</sup> This represented a significant compromise between Federalists and Antifederalists on an issue of conflict between debtors and creditors.<sup>90</sup> From the outset, the amount in controversy requirement significantly limited the number of alienage cases that could be brought in federal court.<sup>91</sup>

Antifederalists expressed some concern with alienage jurisdiction. However, because their primary desire was to limit the power of the federal courts and reserve as much power as possible to the states,<sup>92</sup> a hotly contested issue was whether the federal courts would have jurisdiction over federal question cases. As part of a compromise, the Judiciary Act ultimately provided the federal courts with diversity (including alienage) but not federal question jurisdiction.<sup>93</sup>

Like the Framers of the Constitution, Congress certainly had foreign relations in mind when it enacted the Judiciary Act. For example, the Act provided for federal jurisdiction over admiralty and maritime cases<sup>94</sup> as well as over cases involving ambassadors, other public ministers, and consuls.<sup>95</sup> In addition, section 9(b) of the Act, popularly known as the Alien Tort Claims Act, provided that the federal courts have jurisdiction over “cases where an alien sues for a tort only in violation of the law of nations or a treaty of the

89. Holt, *supra* note 33, at 1487-88 (footnotes omitted); see Warren, *supra* note 6, at 78; see also William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 497 & n.168 (1986) (noting that few tort awards at time of passage of Judiciary Act were anywhere near \$500); William R. Casto, *The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101, 1112 (1985) (observing that, as of 1789, “a great part of the aggregate British debt was for individual sums of less than five hundred dollars”). “Although the amount in controversy limitation was driven in part by a desire to bar British creditors from the federal courts, the limitation also was inserted to protect small debtors from being forced to travel long distances to defend minor claims.” CASTO, *supra* note 36, at 53. British creditors ultimately found it difficult to recover debts less than \$500 in the courts of the various states. See SAMUEL FLAGG BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* 436-37 (1962). In 1802, the United States agreed to pay Great Britain a lump sum for violating Article IV of the Treaty of Paris. See CASTO, *supra* note 36, at 101.

Professor Ritz contends that the language and punctuation of the Judiciary Act demonstrates that the amount in controversy requirement was not to be applied to alienage cases, see RITZ, *supra* note 6, at 57, while Professor Holt finds no evidence that the drafters of the language had this intention. See Holt, *supra* note 33, at 1495 n.258. Any ambiguity in this regard has been clarified in subsequent revisions of the statute that make it clear that the amount in controversy requirement applies to both categories of cases. See *supra* note 6 (quoting current version of statute).

90. See Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 466 (1989). The genesis of the amount in controversy requirement thus tends to undermine any suggestion that it historically has been designed primarily to permit only the federal court to hear “significant” diversity and alienage cases. See, e.g., S. REP. NO. 1830, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S.C.C.A.N. 3099, 3101 (stating that Congress set amount in controversy requirement “not so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies”).

91. See *infra* text accompanying notes 337-42 (analyzing how increasing amount in controversy requirement has adversely affected alienage cases).

92. See Holt, *supra* note 33, at 1478-85; Warren, *supra* note 6, at 67-70.

93. See Mishkin, *supra* note 7, at 157.

94. See Judiciary Act of 1789 § 9, 1 Stat. 73, 77.

95. See Judiciary Act of 1789 § 13, 1 Stat. 73, 80-81; see also James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 564-65 (1994) (describing how Judiciary Act conferred federal jurisdiction over actions brought by and against ambassadors and consuls).

United States.<sup>96</sup>

Although the alienage jurisdiction provisions of the United States Code have changed much since 1789,<sup>97</sup> one important characteristic has not. Beginning with section 11 of the Judiciary Act of 1789, alienage jurisdiction has been intermingled in the diversity statute. This is not merely of interest to federal courts trivia buffs. As we shall see, this feature of the diversity statute has had a distinct impact on the implementation of alienage jurisdiction since 1789.

### C. Summary

The little disputed belief that the state courts had unfairly treated foreign citizens resulted in general agreement at the Constitutional Convention that claims of noncitizens should be within the jurisdiction of the national courts. The motivations of the Framers may have been more pragmatic than idealistic. Adverse foreign relations consequences, resulting from the perception of foreign governments that the state courts were biased, clearly influenced the Framers. A desire to ensure, and increase, the flow of capital from Britain and other nations into the United States, with its fledgling economy, did as well.

A consensus emerged that favored alienage jurisdiction. When it came time for ratification, even opposition to diversity did not necessarily mean opposition to alienage jurisdiction.<sup>98</sup> In the end, alienage jurisdiction was included as part of Article III without major controversy. With little fanfare, the First Congress made alienage jurisdiction one of the first types of jurisdiction that the new federal courts could exercise.

## III. THE EVOLUTION

As we have seen, section 11 of the Judiciary Act of 1789 conferred broad powers on the federal courts to hear alienage cases. Congress has amended

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96. Judiciary Act of 1789, § 9(b), 1 Stat. 73, 78 (partially codified as amended at 28 U.S.C. § 1350 (1988 & Supp. IV 1992)); see Burley, *supra* note 90, at 465 ("Virtually every commentator on the [Alien Torts] Statute has tied it to the Framers' desire to avoid embroiling the nation in conflicts with foreign states arising from U.S. mistreatment of foreign citizens.") (footnote omitted). Section 9(b) has been used increasingly in recent years as the basis for suits by private parties against foreign leaders for human rights abuses. See, e.g., *Kadic v. Karadzic*, No. 94-9035, 1995 U.S. App. LEXIS 28826 (2d Cir. Oct. 13, 1995); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

97. See *infra* Part III.A.

98. See, e.g., *Many Customers*, INDEPENDENT GAZETTEER, Dec. 1, 1787, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 306, 308 (Merrill Jensen ed., 1976) (advocating deletion of diversity jurisdiction but not alienage jurisdiction from Article III); *Letter of Agrippa, XVIII dated Feb. 5, 1788 in the Massachusetts Gazette* (attributed to James Winthrop), in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 119 (Paul Leicester Ford ed., 1970) (contending that federal jurisdiction should be limited to, among other cases, those "in which a foreigner residing in some foreign country shall be a party"); see also JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 158 (1961) ("On the whole, most Antifederalists were satisfied with all or with the greater part of the judiciary article; the need for a national court system was nowhere challenged and most of its powers were accepted without question.").

the diversity statute implementing alienage jurisdiction periodically since 1789, but has continued the tradition of providing for alienage and diversity jurisdiction in the same statutory provision. Although most of the changes have been minor, amendments to the general diversity provisions have had an adverse impact, often unintended, on alienage cases. Most recently, in an attempt to reduce the diversity caseload of federal courts, Congress has accelerated this process. Similar to the tack taken by Congress, the Supreme Court has tended to construe the alienage provisions of the diversity statute no differently than those pertaining to plain vanilla diversity cases.

### A. *Congressional Tinkering*

This Section will analyze two sorts of congressional action that have had a special impact on alienage cases. It first looks at congressional efforts to limit the number of diversity cases in federal court and the apparently unintended impact on alienage cases. The section next considers a major amendment to the statute that deems lawful permanent residents (i.e., lawful immigrants to the country who have not become naturalized citizens) to be state citizens.

#### 1. *Limitations on Diversity Jurisdiction*

In the last two centuries, Congress has made relatively few major amendments to the diversity statute expressly intended to change the scope of alienage jurisdiction. Instead, Congress more often has affected alienage jurisdiction indirectly by amending the general diversity statute. This approach has resulted, in part, from the habitual failure to consider alienage and diversity as independent bases of federal jurisdiction.<sup>99</sup>

##### a. *The Citizenship Provisions*

The first major overhaul of the citizenship provisions of the diversity statute came in 1875. Supreme Court decisions had held that it was unconstitutional for the federal courts to assert jurisdiction over disputes between aliens.<sup>100</sup> In order to conform the statute with these decisions, Congress amended the diversity statute to allow jurisdiction over “a controversy between citizens of different States or . . . a controversy between citizens of a State and foreign states, citizens, or subjects.”<sup>101</sup>

The next major revision to the citizenship and alienage provisions came in 1948. The Judicial Code of 1948 provided for jurisdiction over cases and controversies satisfying the then existing \$3000 amount in controversy requirement between:

- (1) citizens of different States;

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99. See, e.g., WRIGHT, *supra* note 11, § 23, at 141 n.1 (stating that distinction between diversity and alienage cases “for most purposes . . . is unimportant, and in this book, as in the literature generally, the two classes of cases will usually be dealt with under the general head of diversity”).

100. See *infra* text accompanying notes 153-55 (discussing decisions).

101. Act of Mar. 3, 1875, 18 Stat. 470, 470.

- (2) citizens of a State and foreign states or citizens or subjects thereof;  
 (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.<sup>102</sup>

As Professor Moore observed, the 1948 amendments "lumped diversity and alienage jurisdiction together under the title 'Diversity of Citizenship.'"<sup>103</sup>

Besides codifying existing law and clarifying some questions, the 1948 amendments responded to problems created by lower court decisions interpreting the predecessor statute. Specifically, the new section 1332(a)(3) allowed for jurisdiction in cases between "citizens of different States and in which citizens or subjects of a foreign state are additional parties." This provision "overturn[ed] lower-court decisions refusing jurisdiction when a New Yorker sued a Californian and a Frenchman; literally such an action is neither between citizens of different states nor between citizens of a state and of a foreign state" as the pre-1948 version of the statute required.<sup>104</sup> Thus, the 1948 amendments modestly expanded the scope of alienage jurisdiction in a way consistent with the Framers' concerns.

Changes to the diversity statute dealing with corporate citizenship had a different effect on alienage jurisdiction. Until 1958, corporations had been treated solely as citizens of their state of incorporation.<sup>105</sup> To halt the perceived abuse of diversity, Congress added section 1332(c) to expand the citizenship of corporations in diversity cases.<sup>106</sup> That section, as amended, currently provides that "a corporation shall be deemed a citizen of any State by which it has been incorporated *and* of the State where it has its principal place of business."<sup>107</sup>

In amending this section, Congress apparently failed to consider the impact of the new provision on foreign corporations.<sup>108</sup> The predictable

102. Act of June 25, 1948, 62 Stat. 930, 930.

103. 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.71[4.-3], at 728 (2d ed. 1993).

104. David P. Currie, *The Federal Courts and the American Law Institute (Part I)*, 36 U. CHI. L. REV. 1, 20 (1968) (citing JAMES WM. MOORE, MOORE'S COMMENTARY ON THE U.S. JUDICIAL CODE 154 (1949)). For a careful description of the jurisdictional consequences of various permutations of political status and domicile under § 1332 as amended, see generally John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvement Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 743-45 (1991).

105. See, e.g., *Steamship Co. v. Tugman*, 106 U.S. 118, 120-21 (1882).

106. See S. REP. NO. 1830, 85th Cong., 2d Sess. 3 (1958), reprinted in 1958 U.S.C.C.A.N. 3099, 3101. The stated purpose of these amendments was to "ease the workload of our Federal courts by reducing the number of cases involving corporations which come into Federal district courts on the fictional premise that a diversity of citizenship exists." *Id.* As part of the same effort to limit the flow of diversity cases, Congress increased the amount in controversy requirement from \$3000 to \$10,000. See *infra* text accompanying notes 115-20 (describing escalation of amount in controversy requirement).

107. 28 U.S.C. § 1332(c)(1) (1988) (emphasis added).

108. See George M. Eshak, Comment, *Diversity Jurisdiction: The Dilemma of Dual Citizenship and Alien Corporations*, 77 NW. U. L. REV. 565, 576 (1982); Marc Miller, Comment, *Diversity Jurisdiction Over Alien Corporations*, 50 U. CHI. L. REV. 1458, 1470 (1983).

Similarly, congressional efforts to limit pendent party jurisdiction in cases "founded solely on section 1332" in the supplemental jurisdiction statute passed in 1990, see 28 U.S.C. § 1367(b) (Supp. IV 1992) (added by Judicial Improvements Act of 1990 § 310(a), Pub. L. No. 101-650, 104 Stat. 5089, 5113-14), may have unintended effects on alienage cases. See Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 474-75 (1991). But see Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 954-55 (1991) (disputing this

result was a wealth of litigation.<sup>109</sup> The established rule is that, as the plain meaning of the statute suggests, foreign corporations are treated no differently than domestic ones. Under section 1332(c), foreign corporations are deemed to be citizens of both their nation of incorporation and principal place of business.<sup>110</sup> Thus, if the principal place of business of a corporation organized under the laws of a foreign nation is in a state, the corporation is treated as a citizen of that state and cannot sue a citizen of the same state in federal court.<sup>111</sup>

Strong arguments can be made for assuring the availability of a federal forum in disputes involving a foreign corporation or any type of foreign business association. State courts may be biased against foreign corporations.<sup>112</sup> Furthermore, negative foreign policy ramifications may result if a foreign government concludes that a business organized under its laws has been treated unfairly.<sup>113</sup> These arguments are consistent with the foreign relations and commercial considerations that influenced the Framers in providing Article III's grant of alienage jurisdiction.<sup>114</sup>

### b. *The Amount in Controversy Requirement*

As Congress clearly envisioned with respect to the \$500 amount in controversy requirement contained in the Judiciary Act of 1789,<sup>115</sup> the incremental increase of this requirement in the general diversity statute has affected alienage cases. It increased from \$500 in 1789<sup>116</sup> to \$2000 in 1887<sup>117</sup> to \$3000 in 1911<sup>118</sup> to \$10,000 in 1958<sup>119</sup> to its current amount

assertion). Although overriding the Supreme Court's decision in *Finley v. United States*, 490 U.S. 545 (1989), the statute sought to preserve the Court's holding limiting pendent party jurisdiction in diversity cases. See 28 U.S.C. § 1367(b) (Supp. IV 1988) (appearing to codify *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372-75 (1978), which held that federal court could not exercise ancillary jurisdiction over claim brought by plaintiff against third party defendant when both were citizens of same state, because to do so would thwart congressional requirement of complete diversity). Despite the fact that alienage and diversity cases implicate wholly different concerns, Congress apparently failed to consider whether the distinction should make a difference with respect to the availability of supplemental jurisdiction in alienage cases.

109. See, e.g., *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1556-61 (11th Cir. 1989); *Int'l Shipping Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 393 (2d Cir. 1989), *cert. denied*, 493 U.S. 1003 (1989); *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148, 1150-53 (5th Cir. 1985).

110. See, e.g., *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994). *But see Eisenberg v. Commercial Union Assurance Co.*, 189 F. Supp. 500, 502 (S.D.N.Y. 1960) (holding that § 1332(c) does not apply to foreign corporations).

111. See, e.g., *Danjaq, S.A. v. Pathe Communications Corp.*, 979 F.2d 772, 773-74 (9th Cir. 1992); *Jerguson v. Blue Dot Inv., Inc.*, 659 F.2d 31, 32-35 (5th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982).

112. See *infra* Part IV.D.1 (discussing recurring antiforeign capital sentiment in United States).

113. Cf. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (emphasizing that, because of foreign relations concerns, "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field") (citations omitted).

114. See *supra* Part II.A. (describing Framers' concerns); *infra* Part V.B.4 (proposing statutory amendment to address these issues).

115. See *supra* text accompanying notes 88-91 (discussing how \$500 amount in controversy requirement significantly limited number of cases that British creditors could bring in federal court).

116. See Judiciary Act of 1789 § 11, 1 Stat. 73, 78.

117. See Act of Mar. 3, 1887 § 1, 24 Stat. 552, 552.

118. See Act of Mar. 3, 1911 § 24, 36 Stat. 1087, 1091.

119. See Act of July 25, 1958 § 2, 72 Stat. 415, 415.

of \$50,000 in 1988.<sup>120</sup> As Congress obviously intended, the incremental increases winnowed the number of diversity, including alienage, cases that could be brought in federal court. Indeed, as we saw, that was the desired effect of the \$500 requirement provided for by the Judiciary Act of 1789.<sup>121</sup> Whatever the potential for bias against the noncitizen or possible adverse foreign policy or trade consequences of the case, alienage cases that fail to satisfy this threshold requirement are screened out of federal court. However, there is little, if any, evidence that Congress considered the discrete impact on alienage cases of increasing the amount in controversy requirement in any of the numerous amendments.

As amendments to the corporate citizenship and amount in controversy requirements of the diversity statute illustrate, Congress repeatedly has changed the law to limit the number of diversity cases that can be brought in federal court without considering the negative impact on alienage cases. This impact historically has not been considered carefully, if at all, in the legislative process.

## 2. *Lawful Permanent Residents as State Citizens*

The most significant statutory change directly affecting alienage jurisdiction came in 1988 when, as part of a compromise with those seeking the abolition of diversity jurisdiction, Congress narrowed such jurisdiction in a number of important ways.<sup>122</sup>

Since the early days of the nation until 1988, the Supreme Court had held that alienage jurisdiction extended to suits between aliens domiciled in the United States and state citizens.<sup>123</sup> In 1988, besides increasing the amount in controversy requirement from \$10,000 to \$50,000 and making some minor adjustments to the statute,<sup>124</sup> Congress drastically departed from longstanding practice by adding a sentence to section 1332(a) that states that, for purposes of the section as well as for removal (section 1441) and interpleader (section 1335) jurisdiction, "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled."<sup>125</sup> This provision also is inconsistent with the well

120. See Act of Nov. 19, 1988, Pub. L. No. 100-702, § 201(a), 102 Stat. 4642, 4646.

121. See *supra* text accompanying notes 88-91.

122. See H.R. REP. NO. 889, 100th Cong., 2d Sess., pt. 1, at 25, 44 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 5985, 6005.

123. See, e.g., *C.H. Nichols Lumber Co. v. Franson*, 203 U.S. 278, 282-83 (1906) (upholding alienage jurisdiction in case involving Swedish citizen residing in United States); *Breedlove v. Nicolet*, 32 U.S. (7 Pet.) 413, 431-32 (1833) (Marshall, C.J.) ("If originally aliens, they did not cease to be so, or lose their right to sue in the federal court, by a residence in Louisiana. Neither the constitution nor acts of [c]ongress require that aliens should reside abroad to entitle them to sue in the courts of the United States.")

124. See 28 U.S.C. § 1332(a), (b) (1988 & Supp. IV 1992); see also *Oakley*, *supra* note 104, at 739-48 (describing changes in law).

125. 28 U.S.C. § 1332(a) (1988); see, e.g., *Paparella v. Idreco Invest S.p.A.*, 858 F. Supp. 283, 284-85 (D. Mass. 1994) (dismissing diversity action by Massachusetts citizen against Italian national who was lawful permanent resident residing in Massachusetts). The language of the statute suggests that, if an alien has not established a domicile in a state since becoming a lawful permanent resident, he or she cannot be deemed to be a citizen of a state. Cf. *Mas v. Perry*, 489 F.2d 1396, 1399-40 (5th Cir. 1974), *cert. denied*, 419 U.S. 842 (1974) (finding that French citizen's wife, who was once domiciled in Mississippi



established rule "that one cannot be a citizen of a state without being a United States citizen."<sup>126</sup>

Illustrating how little attention often is paid to alienage issues, this provision was added relatively late in the legislative process, culminating in the Judicial Improvements and Access to Justice Act.<sup>127</sup> There was precious little debate and even less critical analysis of the need for and consequences of the amendment changing the citizenship rules for noncitizens domiciled in a state.<sup>128</sup> Neither Congress nor the chief proponents of the provision considered any empirical evidence suggesting that such noncitizens were involved in many alienage cases. Although a significant population of noncitizens permanently reside in the country,<sup>129</sup> there is no evidence that they are heavy users, much less abusers, of the federal courts.<sup>130</sup> Nor is there evidence that Congress considered the potential adverse consequences that might result from the operation of the amendment.

Despite the lack of Congressional attention, the provision deeming certain lawful permanent residents to be domiciliaries of a state has far reaching implications.<sup>131</sup> First, the amendment potentially allows an alien, who has been admitted for permanent residence into the United States and is domiciled in a state, to sue another alien in federal court, an unconstitutional result.<sup>132</sup>

but moved away without establishing new domicile, was domiciled in Mississippi despite lack of intent to return there).

126. 1 MOORE ET AL., *supra* note 103, ¶ 0.71[5], at 735 (footnote omitted); *see, e.g.*, Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828 (1989).

127. Pub. L. No. 100-702, 102 Stat. 4642 (1988).

128. For a comprehensive discussion of the sparse legislative history on this provision, see Oakley, *supra* note 104, at 742 n.14. The most extensive Congressional explanation of the provision stated that: 28 U.S.C. § 1332(a)(2) currently gives the district courts diversity jurisdiction over actions between citizens of a State and citizens or subjects of a foreign state. Diversity jurisdiction exists under this provision even though the alien may have been admitted to the United States as a permanent resident. As any review of the immigration statistics indicates, large numbers of persons fall within this category. There is no apparent reason why actions between persons who are permanent residents of the same State should be heard by Federal courts merely because one of them remains a citizen or subject of a foreign state.

134 CONG. REC. S16,299 (daily ed. Oct. 14, 1988). The Judicial Conference, which proposed the amendment, offered similarly scant reasoning. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD IN WASHINGTON D.C. MARCH 15, 1988 AND SEPTEMBER 14, 1988, at 76-77 (1988).

129. *See* U.S. DEP'T OF JUST., 1992 STATISTICAL YEARBOOK OF THE IMMIGRATION & NATURALIZATION SERVICE 17 (1993) [hereinafter 1992 INS STATISTICAL YEARBOOK] (compiling statistics showing that over 1.8 million lawful permanent residents entered United States in fiscal year 1991, and over 970,000 entered in fiscal year 1992).

130. Indeed, the evidence is to the contrary. *See supra* note 19 (reviewing statistics showing that relatively small proportion of diversity cases for time period were brought by aliens).

131. As Professor Oakley succinctly states:

Although of limited applicability, this curious provision requires a nearly complete reconceptualization of the rules of citizenship for diversity purposes. The provision invites courts to adjudicate cases that may be beyond the constitutional power of the federal courts. Given the modest legislative objective to rid the federal diversity docket of a small category of essentially localized lawsuits, one must wonder whether Congress adopted the best means to accomplish this modest end.

Oakley, *supra* note 104, at 741-42 (citations omitted).

132. *See* WRIGHT, *supra* note 11, § 24, at 155 (noting that exercise of jurisdiction in this instance would conflict with *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809)); Kramer, *supra* note 21, at 122-23 (recommending changes in law to eliminate this constitutional difficulty); Oakley, *supra* note 104, at 745.

Consequently, the question whether a lawful permanent resident deemed to be the citizen of a state may sue an alien, or vice versa, has resulted in a conflict in the lower courts.<sup>133</sup> There is no evidence that Congress considered this possibility, much less that it intended to allow a select group of aliens to sue other aliens in the federal courts.

Second, the provision is ambiguous about the types of immigrants to whom it applies. The language, which states that "an alien admitted to the United States for permanent residence" will be treated as a citizen of the state in which she is domiciled, is similar but not identical to that found in the immigration laws.<sup>134</sup> The new language in section 1332 presumably has the same meaning as "lawfully admitted for permanent residence" in the comprehensive Immigration and Nationality Act, which term is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws."<sup>135</sup> The few decisions directly addressing the statutory ambiguity in the amendment have concluded that it was meant to conform to the definition of lawful permanent resident under the immigration laws.<sup>136</sup> However, there are a number of immigration statuses short of lawful permanent resident status that authorize noncitizens to remain indefinitely in the country.<sup>137</sup> The new language in section 1332 arguably could encompass these statuses. The lack of a cross-reference to the immigration laws and the unexplained difference in language create unnecessary doubt.

There are also practical problems with the new provision of section 1332(a) dealing with the citizenship of noncitizens. This new provision creates the possibility that the purpose of the Framers in providing for alienage jurisdiction in Article III — creating the appearance of a more impartial national tribunal to avoid foreign entanglements and to foster

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133. Compare *Singh v. Daimler-Benz AG*, 9 F.3d 303 (3d Cir. 1993) (allowing jurisdiction when lawful permanent resident deemed to be citizen of state sued two defendants, one of whom was alien and other of whom was citizen) with *Arai v. Tachibana*, 778 F. Supp. 1535 (D. Haw. 1991) (disallowing jurisdiction in case in which alien and foreign corporation sued Hawaii corporation and two aliens who were permanent residents) and *Lloyds Bank v. Norkin*, 817 F. Supp. 414 (S.D.N.Y. 1993) (disallowing jurisdiction in case in which alien bank sued permanent resident alien and Connecticut resident) and *A.T.X. Export, Ltd. v. Mendler*, 849 F. Supp. 283 (S.D.N.Y. 1994) (disallowing jurisdiction in case in which alien sued alien who was permanent resident).

134. See 13B WRIGHT ET AL., *supra* note 10, § 3604, at 91 (Supp. 1994); see, e.g., *Miller v. Thermarite Party Ltd.*, 793 F. Supp. 306 (S.D. Ala. 1992).

135. Immigration & Nationality Act § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1988). The term "immigrant" used in this definition is, in effect, a person who is in the country lawfully and who is not a nonimmigrant. See *id.* § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1988). Generally speaking, "immigrants . . . come to take up permanent residence [in the country] whereas nonimmigrants enter for a specific purpose to be accomplished during a temporary stay." THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY 122 (3d ed. 1995).

136. See *Miller*, 793 F. Supp. at 307-08; see also *Donovan v. McIntosh Secur., Ltd.*, No. 90-C5797, 1992 U.S. Dist. LEXIS 18208 (N.D. Ill. Oct. 6, 1992) (denying motion for sanctions under Fed. R. Civ. P. 11 based on legal error concerning provision because of its ambiguity); *Kristensen v. Dampierre*, No. 89-C6683CSH, 1990 U.S. Dist. LEXIS 8976 (S.D.N.Y. July 19, 1990) (holding that nonimmigrant was not treated as state citizen by operation of § 1332(a)).

137. See, e.g., Immigration & Nationality Act §§ 208-209, 8 U.S.C. §§ 1158-59 (1988) (asylees); *id.* § 212(d)(5), 8 U.S.C. § 1182(d)(5) (parolees).

international trade<sup>138</sup> — may be frustrated in certain cases. A person, for example, might be a lawful permanent resident of the United States and a citizen of a foreign nation.<sup>139</sup> The officials of a person's native country might be offended if they believe that a state court has unfairly treated one of their citizens, regardless of whether that citizen is a lawful permanent resident of the United States.<sup>140</sup> In light of the fact that the \$50,000 amount in controversy requirement increases the likelihood that the lawful permanent residents who sue or are sued in federal court are involved in substantial commercial activity, the elimination of a federal forum for resolving disputes with such persons might well have economic and foreign relations consequences for the nation.

Nor is there evidence that potential bias against lawful permanent residents is any less prevalent than bias against any other type of noncitizen.<sup>141</sup> Lawful permanent residents may be the subject of scorn and discrimination.<sup>142</sup> Indeed, the states lawfully may (and do) discriminate

138. See *supra* Part II.A (summarizing debate at Constitutional Convention over alienage jurisdiction).

139. Indeed, a desire to maintain one's citizenship in another nation is one reason why a noncitizen may not naturalize to become a U.S. citizen. The United States traditionally has frowned upon dual citizenship, see ALEINKOFF ET AL., *supra* note 135, at 1055-60, though in recent years it has appeared to be more tolerant of the status, see *State Dep't Explains New Evidentiary Standards for Expatriation*, 67 INTERPRETER RELEASES 1092 (Oct. 1990) (articulating new standards making it more difficult for government to prove that person intended to renounce his or her U.S. citizenship by becoming citizen of another country, thereby making dual citizenship easier to attain).

140. Cf. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (noting potential foreign relations consequences of public benefits restrictions with respect to immigrants); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with . . . the conduct of foreign relations . . .") (footnote omitted); Claire Cooper, *Foes of Death Penalty Have A Friend: Mexico*, SACRAMENTO BEE, June 26, 1994, at A1 (discussing Mexican government's intervention in death penalty cases on behalf of its nationals).

141. Indeed, there is evidence that anti-immigrant sentiment affects citizens. See *infra* note 208 and accompanying text.

142. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-23, at 1545-46 (2d ed. 1988) ("[I]t is clear that aliens have historically suffered prejudice and bias and, as 'an identifiable class of persons . . . are already subject to disadvantages not shared by the remainder of the community.'" (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976)) (footnotes omitted); see, e.g., U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 37-72 (1990) (finding that law barring employment of undocumented persons exacerbated national origin employment discrimination, and that many Asian and Latino minorities lawfully in country were adversely affected by, *inter alia*, employers' adoption of policy of hiring only United States-born citizens). Indeed, the Supreme Court has upheld certain forms of discrimination against lawful permanent residents. See, e.g., *Mathews*, 426 U.S. 67 (upholding congressional authority to exclude certain lawful permanent residents from participation in medical benefit program); *Galvan v. Press*, 347 U.S. 522 (1954) (affirming order of deportation of longtime lawful permanent resident because of past membership in Communist Party); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (permitting indefinite detention of lawful permanent resident).

As Professor John Hart Ely wrote in analyzing whether aliens should be treated as a discrete and insular minority for purposes of the Equal Protection Clause of the Fourteenth Amendment:

[D]iscrimination against aliens seems a relatively easy case . . . . Aliens cannot vote in any state, which means that any representation they receive will be exclusively "virtual." That fact should at the very least require an unusually strong showing of a favorable environment for empathy, something that is lacking here. Hostility toward "foreigners" is a time-honored American tradition. Moreover, our legislatures are composed almost entirely of citizens who have always been such. Neither, finally, is the exaggerated stereotyping to which that situation lends itself ameliorated by any substantial degree of social intercourse between recent immigrants and those who make the laws.

against them in certain instances, such as making citizenship a requirement for certain types of employment.<sup>143</sup> Lawful permanent residents eligible for naturalization may be viewed negatively by U.S. citizens for, among other things, not becoming citizens.<sup>144</sup> Some infamous anti-immigrant reactions have been aimed at noncitizens who had come lawfully and permanently to the United States.<sup>145</sup>

In light of the recurrent backlash against immigrants in this country, which may have an impact on citizens from immigrant producing nations,<sup>146</sup> there is a need for a federal forum for noncitizens domiciled in the United States. This need is especially great for some immigrants who are racial and ethnic minorities and face even more significant disadvantages in the political process due to their alienage status and the color of their skin.<sup>147</sup>

As a result of the 1988 amendment to section 1332(a), a lawful permanent resident may be forced to have her disputes resolved in state court even though there may be (or the immigrant or the officials of her country of origin may perceive) bias on the part of electorally accountable state court judges. This fear is all the more real because lawful permanent residents are not citizens, cannot vote, and cannot serve on juries.<sup>148</sup> Though similar problems exist in the federal courts, they are attenuated to some extent by the presence of judges who are tenured for life. Thus, a strong argument can be made for permitting a lawful permanent resident domiciled in a state to sue her neighbor in federal court while a citizen of that same state could not.

Dual citizenship, which in recent years has become less disfavored under federal law, creates problems of a similar nature to the 1988 amendment. The prevailing judicially created rule is that a person's domestic citizenship is the only relevant one for purposes of establishing alienage.<sup>149</sup> Although some endorse this rule,<sup>150</sup> which is animated by the general desire to limit the number of cases in federal court,<sup>151</sup> it is of dubious wisdom. The

JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 161-62 (1980) (footnote omitted).

143. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding citizenship requirement for probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (state troopers). But see *Hampton*, 426 U.S. 88 (invalidating citizenship requirement for certain federal civil service positions).

144. See T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 16-17 (1990).

145. See *infra* Part IV.C.

146. See *infra* text accompanying note 209.

147. There is no evidence, however, that in providing for alienage jurisdiction the Framers were attempting to protect aliens because of any differences of race between them and United States citizens. Indeed, the Framers had the British principally in mind in drafting the alienage provisions. See *supra* Part II.

148. See *infra* notes 212-14 and accompanying text.

149. See, e.g., *Action S.A. v. Marc Rich & Co.*, 951 F.2d 504, 507 (2d Cir. 1991); *Sadat v. Mertes*, 615 F.2d 1176, 1187 (7th Cir. 1980) (per curiam).

150. See 13B WRIGHT ET AL., *supra* note 10, § 3621, at 582; Currie, *supra* note 104, at 10 n.50; Courtney J. Linn, *Diversity Jurisdiction and Permanent Resident Aliens*, 38 FED. B. NEWS & J. 284, 287-88 (1991).

151. See *Sadat*, 615 F.2d at 1185 (quoting *Raphael v. Hertzberg*, 470 F. Supp. 984, 986 (C.D. Cal. 1979) ("[A] new rule that would extend the scope of § 1332 is particularly undesirable in light of the ever-rising level of criticism of the very concept of diversity jurisdiction.")); *supra* Part III.A.1 (observing congressional trend of limiting kinds of diversity cases that can be brought in federal court).

interpretation effectively barring dual citizens from the federal courts is inconsistent with the plain language of the statute, which refers to "citizens or subjects of a foreign state." Nothing in the statute suggests that persons of dual nationality should be precluded from invoking alienage jurisdiction. Moreover, although there conceivably is less bias against dual citizens than aliens in state courts,<sup>152</sup> this is not necessarily the case.

In short, the new provision of section 1332(a) deeming certain lawful permanent residents to be citizens of their state of domicile is ill advised. The same can be said with respect to the judicially established rule concerning dual citizens. At the very least, Congress has failed to offer the careful consideration that these rules warrant.

## B. *Judicial Gloss*

The Supreme Court has decided relatively few major cases involving the alienage provisions of the Judicial Code. One early exception involved the breadth of the alienage jurisdiction granted by the Judiciary Act of 1789. In the famous 1809 decision of *Hodgson v. Bowerbank*,<sup>153</sup> the Court made it clear that it would be unconstitutional for the federal courts to exercise jurisdiction over suits exclusively between noncitizens, which the plain language of section 11 of the Judiciary Act appeared to authorize.<sup>154</sup> Since then, the Court on many occasions has reaffirmed the rule that alienage jurisdiction cannot be exercised over a dispute unless a U.S. citizen or state is a party to the action.<sup>155</sup>

The Court has decided few other alienage cases and has not offered any major statements about the purposes of alienage jurisdiction. As previously mentioned, the Court long ago ruled that a lawful immigrant domiciled in this country remains an alien for alienage purposes so long as she remains unnaturalized, a ruling that Congress overrode in 1988.<sup>156</sup> Generally speaking, the Court has imported the rules applicable to diversity cases to alienage cases, a practice consistent with the longstanding failure to differentiate between the two forms of jurisdiction. For example, the standard

152. See *Sadar*, 615 F.2d at 1185-86.

153. 9 U.S. (5 Cranch) 303 (1809).

154. See *supra* text accompanying note 6 (quoting and citing act). There has been debate about whether *Hodgson* held that § 11 of the Judiciary Act was unconstitutional or whether the Court merely interpreted it in a manner consistent with congressional intent. Compare WRIGHT, *supra* note 11, § 24, at 154 ("The 1789 Judiciary Act purported to extend jurisdiction to all suits in which an alien is a party. The Court . . . held that this was unconstitutional insofar as it might permit suit in federal courts between two aliens, while the Constitution only authorizes jurisdiction of suits between a citizen of a state and an alien." (footnote omitted)) with Mahoney, *supra* note 85 (arguing that *Hodgson* was case of statutory, not constitutional, construction). The Court's reasoning in an earlier decision resolving the identical issue supports the statutory construction argument: "[T]he 11th section of the judiciary act can, and must, receive a construction consistent with the constitution." *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800); see also Warren, *supra* note 6, at 79 (stating that Court in *Hodgson* "in order to hold it valid, was obliged . . . to read into [§ 11] a limitation which it did not actually contain" (footnote omitted)).

155. See *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 491-92 (1983); *Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136 (1829); see also *Eze v. Yellow Cab Co.*, 782 F.2d 1064, 1065 (D.C. Cir. 1986) (per curiam); *Cheng v. Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir.), cert. denied, 464 U.S. 1017 (1983).

156. See *supra* Part III.A.2 (analyzing 1988 congressional amendment modifying rule).

diversity rule that the citizenship of an alien cannot be presumed has been applied to alienage cases.<sup>157</sup> Similarly, the Court has interpreted the diversity statute as requiring a variation of the rule of complete diversity in alienage cases.<sup>158</sup>

The Supreme Court also has resolved some narrow alienage questions of little general significance. For example, the Court held that an Illinois corporation could not sue a Venezuelan corporation, four Venezuelan citizens, and a United States citizen domiciled in Venezuela because the United States citizen was not a citizen of any state, and so the requirements of subsections 1332(a)(2) and (a)(3) were not satisfied.<sup>159</sup> Alienage issues have raised esoteric problems with respect to the United States territory of Puerto Rico.<sup>160</sup> In another case limited to its facts, the Court held that a Panamanian company that had assigned its interest in a contract with a Haitian corporation to a Texas attorney did so "improperly or collusively" to manufacture federal alienage jurisdiction.<sup>161</sup>

In short, the Supreme Court has addressed surprisingly few alienage cases and even fewer of any great significance.

#### IV. MODERN JUSTIFICATIONS

Due to concern with the federal judicial caseload, diversity jurisdiction has been under siege for most of the twentieth century. Consequently, we must consider whether, assuming that alienage jurisdiction was justifiable at one time in our history, changes in the nation have rendered it obsolete. Even though persuasive arguments may be made for the restriction, perhaps even the abolition, of diversity jurisdiction, this does not necessarily mean that alienage jurisdiction should be subject to the identical fate. Different rationales underlie the two forms of federal jurisdiction and current conditions may justify the retention of one but not the other.

In arguing for the restriction or abolition of diversity, some have claimed that bias against nonresidents by state courts is minimal in today's mobile society in which state lines are much less significant than they once were.<sup>162</sup> This Section examines the analogous question — whether bias against foreign citizens warrants the continued availability of alienage jurisdiction.

Contrary to Judge Henry Friendly's observation about diversity

157. See, e.g., *Hennessy v. Richardson Drug Co.*, 189 U.S. 25, 34 (1903); *Stuart v. Easton*, 156 U.S. 46 (1895); *Bors v. Preston*, 111 U.S. 252, 255 (1884).

158. See, e.g., *Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826, 837 (1989); *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U.S. 376, 386-88 (1912).

159. See *Newman-Green, Inc.*, 490 U.S. at 828-29. The Court held that the court of appeals could dismiss the stateless United States citizen and exercise jurisdiction. *Id.* at 832-38; see also *Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829) (allowing similar practice to save alienage case).

160. See, e.g., *Porto Rico Ry. Light & Power Co. v. Mor*, 253 U.S. 345, 346 (1920) (addressing whether statutory "restriction of jurisdiction to cases where all the parties on either side of the controversy are 'not domiciled in Porto Rico' [sic] applies to aliens as well as to American citizens"); *Cuebas y Arredondo*, 223 U.S. at 388 (holding that citizen of Puerto Rico could not sue defendants based on alienage jurisdiction when one was Puerto Rican citizen).

161. *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 827 (1969).

162. See, e.g., *WRIGHT*, *supra* note 11, § 23, at 148.

jurisdiction,<sup>163</sup> modern circumstances militate in favor of ensuring access to a national forum to resolve disputes involving noncitizens just as much today as, if not more so than, in 1787. History has demonstrated that the political processes in the country are susceptible to antiforeign sentiment, sometimes of a particularly virulent strain, 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 continues to raise the possible adverse foreign policy and international trade consequences feared by the Framers of the Constitution.

#### A. *The Conventional Wisdom*

The richness of the Framers' debate at the Constitutional Convention is often lost in modern discussion of alienage jurisdiction. Courts state rather blandly, in ahistoric fashion, the basic reasons for alienage jurisdiction — to protect foreign citizens and to avoid foreign entanglements.<sup>164</sup> Commentators endorsing the maintenance of alienage jurisdiction, in the face of proposed cutbacks on diversity, have echoed similar themes. The American Law Institute, for example, has endorsed alienage jurisdiction as a way to avoid foreign relations difficulties.<sup>165</sup> Similarly, in arguing for retention of alienage jurisdiction, the Department of State's position has been that "while the Department has great confidence in the competence, integrity and impartiality of the state court systems, 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."<sup>166</sup>

In sum, the commonly expressed rationales for alienage jurisdiction rely heavily on generic foreign relations concerns and tend to downplay potential bias against noncitizens in the state courts. A focus on such abstractions avoids impugning the impartiality and competence of the state courts and, consequently, is politically palatable. What generally is ignored is that,

163. See *FRIENDLY*, *supra* note 20, at 141 (arguing for abolition of diversity jurisdiction and emphasizing that "there is simply no analogy between today's situation and that existing in 1789").

164. For a textbook example of the standard explanation, see, for example, *Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496, 500 (S.D.N.Y. 1955) (referring to "[f]ailure on the part of the individual states to give protection to foreigners under treaties" and "[a]pprehension of entanglements with other sovereigns that might ensue from failure to treat the legal controversies of aliens on a national level" (citations omitted)); *Sadat v. Mertes*, 615 F.2d 1176, 1182 (7th Cir. 1980) (*per curiam*); *Van der Schelling v. U.S. News & World Rep., Inc.*, 213 F. Supp. 756, 758-60 (E.D. Pa. 1963), *aff'd per curiam*, 324 F.2d 956 (3d Cir. 1963), *cert. denied*, 377 U.S. 906 (1964).

165. See AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 108 (1969). The ALI's position was as follows:

It 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 cases 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.*

166. Letter from Powell A. Moore, Assistant Secretary for Congressional Relations, Department of State, to Honorable Robert W. Kastenmeier, Chairman, Subcomm. on Cts., Civil Liberties and the Admin. of Just., House of Representatives (Apr. 2, 1982), in *Hearing before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary*, 97th Cong., 2d Sess. 336 (1982); see *Chemerinsky & Kramer*, *supra* note 15, at 92 (articulating similar concerns for alienage jurisdiction).

although the Framers did indeed fear foreign entanglements, other considerations greatly influenced their thinking about alienage jurisdiction. This rich history has unfortunately been glossed over in the textbook explanation of alienage jurisdiction. The next sections will consider, in light of that history, whether alienage jurisdiction is necessary today.

### B. *A Typology of Noncitizens: A Continuum of Bias?*

In considering the modern need for alienage jurisdiction, we must consider the distinct categories of noncitizens, individuals, and entities who might be eligible for alienage jurisdiction. One might read the debates over Article III and the Framers' economic concerns as suggesting that the primary reason for alienage jurisdiction was to protect noncitizens' doing business in the United States in hopes of encouraging foreigners to engage in further commerce. At the same time, however, a more general desire was to avoid foreign entanglements that might result if a foreign government believed that one of its citizens had been unfairly treated.<sup>167</sup> Neither Article III nor section 1332 (except for the 1988 amendment singling out lawful permanent residents<sup>168</sup>) limits the application of alienage jurisdiction to any particular noncitizen group. They instead establish categorical rules for the invocation of alienage jurisdiction. This decision is entirely justifiable because each of the various categories of noncitizens, though perhaps to a different degree, deserves the protection of alienage jurisdiction.

Consider five different categories of noncitizens whose presence as a party in a lawsuit might give rise to alienage jurisdiction:

1. corporations and business associations organized under the laws of a nation other than the United States or of the several states;<sup>169</sup>
2. foreign citizens not physically present in the United States;
3. foreign citizens who are lawful permanent residents of the United States<sup>170</sup> or legally reside in the country indefinitely under some other legal

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167. See, e.g., [MEXICAN] NAT'L HUMAN RIGHTS COMM'N, REPORT ON HUMAN RIGHTS VIOLATIONS OF MEXICAN MIGRATORY WORKERS ON ROUTE TO THE NORTHERN BORDER AND UPON ENTERING THE SOUTHERN UNITED STATES BORDER STRIP 52-66 (1991) (report of Mexican governmental agency documenting abuses of Mexican citizens by U.S. immigration authorities). In the 1990s, Mexican diplomats harshly criticized so-called immigrant bashing by politicians in the United States. See James Risen, *Mexican Envoy Claims U.S. Candidates Exploit Voters' Fears*, L.A. TIMES, Oct. 5, 1995, at A11; Marc Sandalow, *Mexican Envoy Berates State on Immigration*, S.F. CHRON., July 6, 1994, at A1; Mark Shaffer, *Mexico Fears U.S. Racism; Cites 'Anti-Immigrant Climate'*, ARIZ. REPUBLIC, May 27, 1994, at A1. In particular, the Mexican government objected to the campaign over Proposition 187, an initiative passed by the California voters in November 1994 that denies a variety of public benefits to undocumented immigrants. See Tim Golden, *The 1994 Campaign: Mexico; Government Joins Attack on Ballot Idea*, N.Y. TIMES, Nov. 3, 1994, at A29 (reporting that Mexican president decried campaign over Proposition 187 as "xenophobic"); see also Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) (analyzing how Proposition 187 campaign focused on illegal immigration from Mexico and discussing prevalence of nativist themes in campaign).

168. See *supra* Part III.A.2 (analyzing amendment).

169. See *supra* text accompanying notes 105-14 (discussing § 1332(c)'s applicability to foreign corporations).

170. See *supra* notes 134-36 and accompanying text (explaining definition of lawful permanent resident under immigration laws).



immigration status;

4. legal nonimmigrants<sup>171</sup> physically present in the United States such as visitors and foreign business people, students, scholars and employers; and

5. undocumented immigrants.<sup>172</sup>

The first two categories may have been the ones at the forefront of the Framers' minds in crafting the alienage provisions of Article III. Absent foreigners who are not part of the United States political community though they may have transacted business in, or have some other connection with, the United States, are likely candidates for discrimination. Due to technological advances, especially transportation improvements, and the increasing globalization of markets, one would expect that this group of foreigners is much larger today than it was in the late 1700s.

Many foreign corporations and business associations have fears similar to those of their British predecessors. This may be true even for a foreign entity doing significant business in the United States.<sup>173</sup> If they perceive themselves to be treated unfairly in some way, foreign businesses in some industries may be able to wreak havoc on domestic interests.<sup>174</sup> For example, significant litigation involving Honda Motor Company, a major Japanese corporation, might affect the often sensitive United States-Japan trade relations.<sup>175</sup>

The third category, lawful immigrants to the United States who are not naturalized, is directly affected by the recent amendments to section 1332(a), deeming certain lawful permanent residents to be state citizens.<sup>176</sup> One might argue that, because these aliens permanently reside in the country, they should not be eligible for alienage jurisdiction.<sup>177</sup> Potential foreign policy

171. See Immigration & Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1988); see also ALENIKOFF ET AL., *supra* note 135, at 230-31 (table listing numerous nonimmigrant visa categories under immigration laws).

172. See generally ALENIKOFF ET AL., *supra* note 135, at 270-339 (describing scope of undocumented immigration to United States). The Immigration and Naturalization Service estimated that, as of October 1992, there were approximately 3.4 million undocumented immigrants in the United States. See ROBERT WARREN, IMMIGRATION AND NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES, BY COUNTRY OF ORIGIN AND STATE OF RESIDENCE: OCTOBER 1992, at 13 (1994) [hereinafter INS STATISTICS].

173. See *infra* text accompanying notes 261-63 (offering example of animosity in United States toward Japanese automobile manufacturers).

174. Examples include acts by Arab oil companies in the 1970s and Japanese automobile manufacturers in the 1980s. See *infra* text accompanying note 258.

175. See Kelly McParland, *U.S., Japan Face Off Today Over Automobile Tariffs*, FIN. POST, June 8, 1995, at 11 (reporting holding of public hearing on possible U.S. trade sanctions against Japanese automobile manufacturers); James Sterngold, *U.S.-Japan Talks Near Make-or-Break Deadline*, N.Y. TIMES, July 25, 1994, at D3 (describing tense U.S.-Japanese trade talks); see also Tasuko Asano, *The U.S. and Japan: A Continuing Special Relationship*, 1 WILLAMETTE BULL. INT'L L. & POL'Y 37 (1993) (describing from Japanese perspective tensions at highest levels of U.S. and Japanese governments resulting from trade issues between nations).

176. Note that I have not included separately categorized dual citizens, who generally are ineligible for alienage jurisdiction. See *supra* text accompanying notes 149-52 (analyzing current treatment of dual citizens for alienage purposes). Rather, the focus here is on immigrants who are not naturalized citizens. However, as argued *supra* text accompanying note 152, discrimination against dual citizens is not difficult to imagine.

177. This appears to be the rationale behind the 1988 amendment to § 1332, deeming lawful permanent residents domiciled in a state to be citizens of that state. See *supra* Part III.A.2 (analyzing impact of amendment).

consequences might appear more remote in disputes involving this category of immigrants than for others. Other nations have protested the treatment of lawful permanent residents by the United States.<sup>178</sup> Moreover, history has shown that some of the most potent anti-alien sentiment has been directed at lawful immigrants.<sup>179</sup> Consequently, lawful permanent residents need the protection of alienage jurisdiction.

The fourth category involves noncitizens curiously referred to in the immigration laws as nonimmigrants, that is, persons who may temporarily stay in the country.<sup>180</sup> Foreign students, tourists, and business persons, to offer a few examples, may lawfully enter the nation on a temporary basis.<sup>181</sup> Some nonimmigrant visas effectively allow the noncitizen to remain indefinitely in the country.<sup>182</sup> Similar to other noncitizens, nonimmigrants may be subject to antiforeign sentiment,<sup>183</sup> in no small part because they generally owe allegiances to their native countries to which they have declared an intention to return.<sup>184</sup> The perception of mistreatment of these full fledged foreign citizens by the state courts could lead to precisely the types of adverse foreign relations consequences that the Framers feared so much.

The fifth category of persons, undocumented immigrants, has either entered the nation surreptitiously or has violated the terms of an immigrant or nonimmigrant visa.<sup>185</sup> A strong argument could be made that, if involved in a dispute, undocumented persons need the protection of an impartial federal forum in light of the history of their unpopularity, exploitation, and

178. See *Oyama v. California*, 332 U.S. 633, 655-56 & n.7 (1948) (Murphy, J., concurring) (acknowledging Japanese government's hostile response to passage of California's alien land law directed at Japanese in United States); *supra* note 167 (describing Mexican government's negative response to California's Proposition 187).

179. See *infra* Part IV.C.

180. See Immigration & Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1988); see also ALENIKOFF ET AL., *supra* note 135, at 230-31 (table listing numerous nonimmigrant visa categories under immigration laws).

181. See, e.g., Immigration & Nationality Act § 101(a)(15)(B) (business and tourist visa), (F) (student visa), 8 U.S.C. § 1101(a)(15)(B),(F) (1988).

182. For example, treaty traders and treaty investors in theory are temporary sojourners in this country but in practice may stay indefinitely. See Immigration & Nationality Act § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E) (1988); see also *Hall v. McLaughlin*, 864 F.2d 868, 870-71 (D.C. Cir. 1989) (Wald, C.J.) (observing that, for this type of nonimmigrant visa, "extensions are routinely granted and [treaty trader and investor] status is therefore considered nearly as desirable as permanent resident status" (footnote omitted)).

183. See, e.g., *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980) (upholding presidential order that all Iranian students in United States report to Immigration and Naturalization Service and demonstrate lawful presence in country); 56 Fed. Reg. 1566 (1991) (mandating photographing and fingerprinting of nonimmigrants bearing Iraqi and Kuwaiti travel documents before being allowed to enter country in response to Iraqi invasion of Kuwait).

184. See, e.g., Immigration & Nationality Act § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (1988) (defining business or tourist nonimmigrant as "having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure").

185. See generally ALENIKOFF ET AL., *supra* note 135, at 270-339 (discussing parameters of undocumented immigration to United States). The INS estimates that, as of October 1992, about one half of the undocumented population in this country entered without inspection while the other half, known as visa overstays, entered on a valid visa but remained in the country in violation of its terms. See INS STATISTICS, *supra* note 172, at 16-17. Because of the legal vulnerability, including the threat of deportation, of undocumented persons, it would seem unlikely that they as a group would bring many alienage cases in federal court.

vulnerability in this nation.<sup>186</sup> This argument carries particular force for some groups of undocumented persons. For example, undocumented persons from Mexico who comprise a significant percentage of the total undocumented population,<sup>187</sup> may be viewed most unfavorably by the public at large.<sup>188</sup> Foreign governments, including Mexico's, have been known to protest the treatment of undocumented persons by the state and federal governments.<sup>189</sup>

In sum, aliens of each type described face the distinct possibility that nativist sentiment may influence their treatment in the state and federal courts. Although some differences between the groups in terms of the degree of resentment might be expected, the fact that they are noncitizens almost guarantees the likelihood that they will suffer some.

### C. *Recurring Xenophobia in the United States*

This section offers evidence to support the assertion that nativism persists in the United States. Recurring surges of nativism and xenophobia have plagued this nation's history and suggest the potential for unfair treatment of noncitizens in the courts. Bias against noncitizens unfortunately remains to this day. Many of the reasons for alienage jurisdiction offered by the Framers of the Constitution apply as much today as they did over two hundred years ago. For example, the appearance of partiality in the adjudication of the disputes of foreign citizens or businesses may adversely impact foreign commerce and

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186. See Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1230-34 [hereinafter Johnson, *Los Olvidados*] (discussing political insulation of undocumented aliens). A recent example is California's Proposition 187, a measure designed to reduce public benefits available to undocumented persons that the voters of the state passed by a 59-41% margin. See Johnson, *supra* note 167, at 650-61 (analyzing racist undertones to Proposition 187 campaign); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1568-74 (1995) [hereinafter Johnson, *Public Benefits*] (analyzing impacts of initiative, if implemented, on various subgroups of undocumented community).

187. See INS STATISTICS, *supra* note 172, at 14 (estimating that 39% of total undocumented population in United States is from Mexico).

188. See Johnson, *supra* note 167 (analyzing anti-Mexican sentiment in Proposition 187 campaign, which on its face was directed at undocumented persons).

189. See *supra* note 167 and accompanying text (citing authorities). As the Supreme Court observed in holding that the Pennsylvania Alien Registration Act (requiring certain aliens to register with the state) was preempted by federal law:

One of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government. This country, like other nations, has entered into numerous treaties of amity and commerce since its inception — treaties entered into under express constitutional authority, and binding upon the states as well as the nation. Among those treaties have been many which not only promised and guaranteed broad rights and privileges to aliens sojourning in our own territory, but secured reciprocal promise and guaranteed for our own citizens while in other lands. And apart from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents — duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad. In general, both treaties and international-practices have been aimed at preventing injurious discriminations against aliens.

Hines v. Davidowitz, 312 U.S. 52, 64-65 (1941) (footnotes omitted).

the nation as a whole.<sup>190</sup> Additionally, other reasons apart from those articulated by the Framers, most prominently the nation's enduring commitment to equal protection of the laws, justify retaining alienage jurisdiction.

Developments in the early 1990s attest<sup>191</sup> to the persistence of the sporadic outbursts of antforeign sentiment in the United States.<sup>192</sup> These sentiments have sometimes resulted from foreign relations tensions, especially in time of war. Xenophobia can also be directly traced to the influx of new immigrants to the United States.

Events shortly after the Constitutional Convention confirmed the Framers' diagnosis of the need for alienage jurisdiction. The Fifth Congress (1797-99), responding to a fear of foreign political influence in the United States combined with severely strained relations with France, passed three patently xenophobic acts known infamously as the Alien and Sedition Acts.<sup>193</sup> These acts were nothing more than thinly veiled Federalist attempts to halt the growing political power of the Republicans, spurred on by their increasing popularity among new immigrants.<sup>194</sup> Specifically, the Naturalization Act increased from five to fifteen years the residency requirement for naturalization,<sup>195</sup> which of course delayed immigrant participation in the political process.<sup>196</sup> The Aliens Act and the Alien Enemy Act gave the President unfettered discretion to deport any alien considered dangerous to the national welfare.<sup>197</sup>

These laws were not the only early indications of the nation's potential for antforeign sentiment. Similar to the Revolutionary War, the War of 1812 provoked a resurgence of American animosity toward the British.<sup>198</sup> This marked the beginning of a pattern in the United States, i.e., waves of antforeign sentiment would spread across the nation during times of war.

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190. Cf. *Barclays Bank PLC v. Franchise Tax Board*, 114 S. Ct. 2268, 2289-90 (1994) (O'Connor, J., concurring in part, dissenting in part) (recounting objections by U.S. trading partners to California tax scheme and fear that it might "deter[] foreign investment" in United States).

191. See Johnson, *Los Olvidados*, *supra* note 186, at 1162-74 (recounting growth of nativist sentiment in United States in 1990s).

192. See generally JOHN HIGHAM, *STRANGERS IN THE LAND* (2d ed. 1988) (analyzing history of nativism in United States).

193. See generally JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956); JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* (1951).

194. See HIGHAM, *supra* note 192, at 8; EDWARD P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965*, at 12-16 (1981); JONES, *supra* note 71, at 72-75; KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 86-87 (1989); SELECT COMM'N ON IMMIG. AND REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: STAFF REPORT 167-68 (1981) [hereinafter SCIRP, STAFF REPORT].

195. 1 Stat. 566 (1798).

196. See SMITH, *supra* note 193, at 23 ("The Naturalization Act of 1798 . . . was a political maneuver by the Federalists designed to cut off an increasingly important source of Republican strength."). See generally MILLER, *supra* note 193, at 39-54 (describing political dynamics culminating in Alien and Sedition Acts).

197. See 1 Stat. 570 (1798); 1 Stat. 577 (1798).

198. See BRADFORD PERKINS, *CASTLEREAGH AND ADAMS: ENGLAND AND THE UNITED STATES, 1812-1823*, at 173-95 (1964).

Virulent hatred in the United States for Germans during World War I<sup>199</sup> and the Japanese during World War II<sup>200</sup> are prime examples of this tendency. The antiforeign sentiment accompanying the wars led to adverse treatment of Germans and Japanese in the United States, of which the internment of the Japanese is the most extreme example.

War has hardly been the only circumstance in which antiforeign fervor has erupted. Historically, more generalized national security concerns also have motivated antiforeign outbursts. The Alien and Sedition Acts were an early indicia of this nation's tendency to blame noncitizens for domestic troubles. Similarly, the Red Scare in the 1920s<sup>201</sup> and the reign of McCarthyism in the 1950s exhibited deep, almost paranoid, suspicion of anything foreign.<sup>202</sup> Concern with international terrorism also has provoked antiforeign sentiment in the latter part of the twentieth century.<sup>203</sup>

Numerous xenophobic epochs, such as the anti-British feeling so prevalent at the time of the framing of the Constitution, had economic roots.<sup>204</sup> In the mid-nineteenth century, on the heels of heavy Catholic immigration from Ireland and Germany, the xenophobic Know-Nothing Party entered the national political scene and claimed that immigrants were the cause of a variety of economic and social ills.<sup>205</sup> Violent and undisputedly racist anti-Chinese sentiment, which largely coincided with a national economic downturn in the late 1800s is another infamous xenophobic chapter of this nation's history.<sup>206</sup>

As many of these examples suggest, the fear of foreigners in the United States historically has adversely affected people from other nations, sometimes even those perceived to be "foreign" because of their physical characteristics.

199. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating state law prohibiting the teaching of German in schools); see also KARST, *supra* note 194, at 84 ("The campaign for the Americanization of foreigners, which gained intensity during World War I and culminated in the mania of the Red Scare of 1919-20, was the most determined national effort to coerce conformity to the values and behavior of the dominant culture.").

200. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 233-42 (1944) (Murphy, J., dissenting) (arguing that persons of Japanese ancestry were interned during World War II because of prejudice).

201. See generally EDWIN P. HOYT, *THE PALMER RAIDS 1919-20: AN ATTEMPT TO SUPPRESS DISSENT* (1969) (recounting raids during Red Scare resulting in deportation of alleged subversives, many of whom were active in leftist labor organizations); WILLIAM PRESTON, JR., *ALIENS AND DISSENTERS* 208-37 (1963) (same).

202. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (holding that, based on confidential information, alien could be excluded and indefinitely detained without hearing); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (authorizing exclusion of alien without hearing for national security reasons); see also Burt Neuborne & Steven R. Shapiro, *Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 749-65 (1985) (describing various restrictions on flow of ideas into and out of United States). See generally Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995) (analyzing plenary power doctrine as applied in *Mezei* and *Knauff*).

203. See, e.g., Mary B. Tabor, *Specter of Terror: U.S. Indicts Egyptian Cleric as Head of Group Plotting 'War of Urban Terrorism'*, N.Y. TIMES, Aug. 26, 1993 (reporting indictment of asylum applicant for involvement in World Trade Center bombing in New York City).

204. See generally HIGHAM, *supra* note 192 (studying various periods of anti-immigrant sentiment in United States and linking them to economic and other social tensions).

205. See SCIRP, STAFF REPORT, *supra* note 194, at 170-76; CARL WITTKÉ, *WE WHO BUILT AMERICA* 497-510 (1939).

206. See generally RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 79-131 (1989) (recounting harsh treatment of Chinese).

As xenophobia increased in response to World War I, some states disenfranchised noncitizens who previously had been afforded the right to vote.<sup>207</sup> As exemplified by the national origin discrimination that has long troubled the country, xenophobic fervor has had a general impact on citizens as well as lawful permanent residents.<sup>208</sup> In addition, Congress has responded to nativist outbursts by passing restrictionist immigration laws.<sup>209</sup> Until 1965, national origin quotas in those laws favored immigration from northern and western Europe and severely limited immigration from many developing nations.<sup>210</sup> The lifting of these quotas in 1965 has brought with it increasing concern with the "foreignness" of immigrants to the United States.<sup>211</sup>

A possible side effect of antforeign sentiment that generally goes ignored is the inability of noncitizens to obtain a fair trial in the United States.<sup>212</sup> Judges and juries may be influenced by patently xenophobic views or more subtle antforeign tendencies in deciding cases involving noncitizens. The threat is particularly acute because noncitizens generally are barred from serving on juries. With very few exceptions, noncitizens currently cannot vote<sup>213</sup> and are prohibited from jury service.<sup>214</sup> This is as true for the lawful permanent resident who has lived in the nation for fifty years as it is for the undocumented person who entered the country yesterday.

Subtle bias against foreigners in the adjudicatory process can be seen even in some rather mundane procedural law. For example, in the law of venue, although citizens are afforded very specific protections with respect to where they can be sued,<sup>215</sup> Congress specifically provided that "[a]n alien may be sued in *any* district" in the United States.<sup>216</sup> This section applies to a lawful

207. See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1403-04, 1415-16 (1993).

208. See Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994); see, e.g., *Carino v. University of Okla. Bd. of Regents*, 750 F.2d 815 (10th Cir. 1984) (affirming finding of national origin discrimination against naturalized citizen born in Philippines); see also *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 240-41 (5th Cir. 1993) (affirming summary judgment for employer in case in which supervisor referred to employee originally from Mexico as "wetback"); *Fragante v. City & County of Honolulu*, 888 F.2d 591 (9th Cir. 1989) (affirming finding that Filipino with accent was not discriminated against on basis of national origin), *cert. denied*, 494 U.S. 1081 (1990).

209. See U.S. COMM'N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 7-12* (1980).

210. See *infra* text accompanying notes 235-37.

211. See generally PETER BRIMELOW, *ALIEN NATION* (1995) (expressing concern with racial composition of immigrant stream).

212. Two well known examples where nativism, combined with other factors, may have affected the outcome of legal proceedings are the trials of Julius and Ethel Rosenberg, and Nicola Sacco and Bartolomeo Vanzetti. See FRANCIS RUSSELL, *TRAGEDY IN DEDHAM: THE STORY OF THE SACCO-VANZETTI CASE 73* (1971) (mentioning that two radicals, ultimately convicted of murder, had immigrated to United States and spoke little English); JOHN WEXLEY, *THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG* 104, 248 (1955) (noting that Julius Rosenberg was son of immigrants, as well as Rosenbergs' concern that anti-Semitism would affect trial).

213. See Raskin, *supra* note 207, at 1394.

214. See, e.g., 28 U.S.C. § 1865(b)(1) (1988) (making citizenship requirement for federal jury duty).

215. See 28 U.S.C. § 1391(a),(b) (1988 & Supp. IV 1992).

216. 28 U.S.C. § 1391(d) (1988) (emphasis added). Because of the operation of § 1391(d), for example, aliens are denied the protection of specific venue rules for patent infringement actions. See

permanent resident domiciled in a particular state, who is, ironically enough, treated as a citizen of that state for alienage purposes.<sup>217</sup> For venue purposes, such a noncitizen can be sued in any district; a citizen in a diversity case ordinarily may be sued only where the defendants in the case reside or where a "substantial part of the events or omissions giving rise to the claim occurred."<sup>218</sup> The assumption apparently underlying the section is that, for an alien, suit in any district in the United States is just as convenient as any other. This obviously is not always the case. Lawful permanent residents, like other noncitizens, are therefore denied concrete benefits offered resident citizens under the venue statute.<sup>219</sup>

Despite the intuition that judges and juries may be influenced by antforeign bias, empirical data demonstrating such bias in the state or federal courts is difficult to come by, and the inferences to be drawn from the available data are subject to dispute.<sup>220</sup> Specifically, a comparison of judgments in state and federal court actions involving aliens might shed light on the need for alienage jurisdiction.<sup>221</sup> Such information, however, is not readily available. Nonetheless, the existence of antforeign views in the general public, and the influence of such views on the political process, is difficult to question. One would be surprised if such views did not somehow influence the adjudicatory process.<sup>222</sup> Consequently, there is every reason to believe that antforeign sentiment has *some* effect on juries and politically accountable judges.

In deciding on the need for alienage jurisdiction, one must compare the potential for bias against noncitizens in the state and federal courts. It is

Brunette Mach. Works v. Kockum Indus., 406 U.S. 706, 708-11 (1972); *In re Hohorst*, 150 U.S. 653, 662 (1893). Although § 1391(d) was not added to the Judicial Code until 1948, it confirmed longstanding practice. See *Brunette Mach. Works*, 406 U.S. at 708-11 (summarizing history).

217. See *supra* Part III.A.2.

218. See 28 U.S.C. § 1391(a)(1), (2) (1988 & Supp. IV 1992).

219. See Andrew Berger, *Alien Venue: Neither Necessary Nor Constitutional*, 9 N.Y.U. J. INT'L L. & POL. 155, 173-76 (1976). Another more subtle example is that at times, the Supreme Court, while condoning "forum shopping" by domestic plaintiffs, has not been so generous with respect to foreign plaintiffs doing the same. Compare *Keeton v. Hustler Mag. Inc.*, 465 U.S. 770, 779 (1984) (observing that domestic plaintiff's "successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations") with *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 & n.18 (1981) (dismissing personal injury action brought by noncitizen plaintiff on *forum non conveniens* grounds and describing U.S. courts as "extremely attractive to foreign plaintiffs" who might "further congest already crowded courts").

220. Cf. FCSC, WORKING PAPERS, *supra* note 22, at 451 (citing authorities mentioning difficulties in empirically verifying need for diversity jurisdiction). One empirical study focuses on the final dispositions of alienage cases in the federal courts. See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. \_\_\_\_ (forthcoming Mar. 1996). The data in that study suggests that alien parties generally fare better than domestic parties in federal court. The study, however, does not include comparable state court data. The lack of such data makes any inferences about the relative biases of the two fora hazardous at best. In addition, the database in that study did not account for settlements in determining "winners" and "losers." One would expect cases that settle to differ in salient ways from ones that proceed to trial. For example, it is foreseeable that cases that settle might have a higher incidence of xenophobic bias than those that go to trial.

221. Cf. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) (arguing that question of whether state courts equal federal courts in protecting federal rights is empirical question for which definitive answer is not likely)

222. Cf. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (analyzing often unconscious nature of racism).

noteworthy that the state governments historically have exhibited greater hostility toward "foreigners" than the federal government. For example, the federal Chinese exclusion laws of the nineteenth century followed decades of political agitation accompanied by passionate debate, violence, and legislation directed at the Chinese on the West Coast, especially in California.<sup>223</sup> Antiforeign hostility historically has been most virulent at the state and local levels, as exemplified by Proposition 187, an initiative aimed at illegal aliens passed by California voters.<sup>224</sup> In essence, the strength of such sentiment often is greater at the regional than at the national level. This is not surprising in light of the fact that foreign persons and businesses tend to concentrate in certain localities for geographical and other reasons.

Currently, an alien in a civil action generally may avail himself of a federal forum through filing, or the removal of, a suit involving a United States citizen. Consequently, one would expect to find it difficult to find examples of anti-alien bias in the state courts. One civil case barred from the federal courts because the dispute involved exclusively aliens,<sup>225</sup> however, demonstrates the potential for antiforeign bias to influence the proceedings. In *Haryanto v. Saeed*,<sup>226</sup> a jury awarded \$1 million in compensatory and \$2 million in punitive damages to an alien hotel employee from Pakistan who had sued an Indonesian hotel guest for false imprisonment, assault, and related torts. In closing argument, counsel for the plaintiff repeatedly emphasized the foreign nationality of the defendant and played on nativist themes:

In some places the very rich are almost like God. They can do anything they want. Mr. Soerono Haryanto thinks he is that kind of person, and he thinks America is that kind of place. . . . You have the opportunity to emphasize what America stands for . . . [I]s it a place where we should allow someone from Singapore or Indonesia or the Philippines, or whatever this man is, to come over and say, 'When I'm here, slavery is fine: and if I say to kiss my feet and if I say I will kill you, if I have the right to terrorize you for a period of time, it's fine for who I am?' . . . He is thumbing his nose at you, at this process, at this country. . . . You need to send a message not just to Soerono Haryanto in the Philippines or Singapore or wherever he is hiding out, but to send a message all the way around that in America you can't do this. . . . Do something right for the United States of America.<sup>227</sup>

Rejecting the challenges to this argument, the Texas Court of Appeals affirmed the jury verdict.<sup>228</sup> Although few examples are so extreme, this is

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223. See generally CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (1994) (analyzing various policies and state and local laws directed at Chinese immigrants and Chinese community's responses).

224. See, e.g., *infra* text accompanying notes 254-57 (describing so-called alien land laws passed by number of states); *supra* note 186 (discussing Proposition 187 passed by California voters); *supra* text accompanying note 143 (mentioning legal impediments placed on lawful permanent residents by states); cf. *Yniguez v. Arizonans for Official English*, No. 92-17087, 1995 WL 583414, at \*24 (9th Cir. Oct. 5, 1995) (en banc) (invalidating Arizona "English as the Official Language" initiative and emphasizing that "[s]ince language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiments.") (citations omitted).

225. See *supra* text accompanying notes 153-55.

226. 860 S.W.2d 913 (Tex. Ct. App. 1993).

227. *Id.* at 927-28 (Robertson, J., dissenting) (quoting closing argument) (emphasis added) (footnote omitted).

228. See *id.* at 920.



not the only evidence of bias against foreigners in state civil rulings.<sup>229</sup>

Moreover, there is evidence that the states have been harsh on aliens in *criminal* matters, which aliens cannot “remove” or otherwise take (at least initially) to a federal forum. The longstanding antipathy of the states toward criminal aliens<sup>230</sup> has manifested itself in the 1990s by states seeking compensation from the federal government for the costs of incarcerating criminal aliens and exploring ways to expedite their deportation.<sup>231</sup> Appeals to antiforeign sentiment sometimes are evident in state criminal proceedings. For example, state courts have allowed prosecutors broad leeway in emphasizing to juries that a criminal defendant is foreign.<sup>232</sup> The death

229. See *infra* Part IV.D (reviewing evidence of bias against foreign business in state civil cases); see, e.g., *Davis v. Glaze*, 354 S.E.2d 845, 849 (Ga. 1987) (upholding verdict for plaintiff in negligence despite fact that plaintiff stated in closing argument that doctor who treated burn was born and educated in Korea and suffered disadvantage in communicating with English speakers); *Hovanesian v. Boyajian*, 4 N.E.2d 1006, 1007 (Mass. 1936) (holding that attorney’s reference to fact that parties were Armenians did not require new trial); *Reyes v. Arthur Tickle Eng’g Works*, 144 N.E.2d 723, 723 (N.Y. 1957) (affirming verdict for defendants despite fact that defendants’ counsel stated that plaintiff’s witness was “Puerto Rican, the same as the plaintiff, and was attempting to help the plaintiff in the case”); *Tabet v. Kaufman*, 67 S.W.2d 1072, 1073 (Tex. Ct. App. 1934) (holding that reading of poem during closing argument about Assyrian invasion of Jerusalem did not justify new trial in civil suit brought by Jewish plaintiff against Assyrian defendants). However, in one case, a state trial court reversed a judgment against a Japanese defendant who had unsuccessfully attempted to remove the case to federal court because plaintiff’s counsel, among other things, said:

[T]hat brings me to the three Japanese. They don’t like us because they can’t be citizens, because they can’t — they don’t like us because they can’t even rent land in this state, at least. And the reason they can’t do it is because we don’t like their ways of living and we decline to degrade our people to the plane on which they live, where women and children go out and dig potatoes and work in a garden to support a family.

Now, it is not at all out of place for me to say Japanese people don’t like us, and we don’t like them, because it is just a plain fact that you all know.

*Schotis v. North Coast Stevedoring Co.*, 1 P.2d 221, 225 (Wash. 1931) (reversing and remanding for new trial); see *Penate v. Berry*, 348 S.W.2d 167, 168-69 (Tex. Ct. App. 1961) (reversing verdict for defendant on ground that trial court erroneously overruled objection to following statement about alien plaintiff: “you see, it just so happens that in this country you can’t come into court and reach your hands into the pockets of an American citizen and take his property from him — not for an alien . . .”).

230. See *Neuman*, *supra* note 72, at 1841-46 (analyzing efforts of states to exclude criminal aliens).

231. See *Johnson*, *Public Benefits*, *supra* note 186, at 1531-34 (describing efforts of this sort). This is not to suggest that the federal government has not made great strides to penalize criminal aliens. Rather, the point is that the states have been more aggressive and more antialien on this front. See *id.*

232. See, e.g., *Nguyen v. State* 547 So. 2d 582, 589-90 (Ala. Crim. App. 1988) (refusing to reverse convictions of Vietnamese criminal defendants for robbery even though prosecutor’s closing argument referred to “roving gangs of gunmen holding “em up”” in Vietnam); *Haas v. State*, 247 S.E.2d 507, 510 (Ga. Ct. App. 1978) (refusing to reverse conviction despite fact that prosecutor referred to “Italian connection” and stated that defendant was “Sicilian”); *State v. Andersch*, 438 N.E.2d 482, 487 (Ill. App. Ct. 1982) (affirming conviction of German national despite prosecutor’s reference during trial to “Atilla [sic] the Hun, an infamous Germanic figure”); *People v. Flores*, 398 N.E.2d 1132, 1136 (Ill. App. Ct. 1979) (affirming conviction even though prosecutor stated that defendants were from Puerto Rico and robbery victim was from Mexico and “[m]aybe there is some animosity there”); *Commonwealth v. Alves*, 625 N.E.2d 559, 561-62 (Mass. App. Ct. 1993) (holding that prosecutor’s statement that Brazilian criminal defendant unlawfully entered United States was not reversible error); *People v. Bahoda*, 531 N.W.2d 659, 661 (Mich. 1995) (holding that prosecutor’s references to “Arab,” “Arab connection,” and “Iraqi” in trial during Persian Gulf War did not require new trial for criminal defendant from Iraq); *People v. Michigan*, 447 N.W.2d 835, 843 (Mich. Ct. App. 1989) (finding that defendant waived objections to prosecutor’s comment that “[t]his man comes from the Middle East, and he’s not content to make his money from the gas station. He needs more. He gets into the cocaine, nontaxable income life-style.”); *Missouri v. Pendas*, 855 S.W.2d 512, 515 (Mo. Ct. App. 1993) (holding that criminal defendant waived any challenge to prosecutor’s comment that it was “offensive for people to come into this country from another country and sell drugs”); *State v. Worstell*, 767 S.W.2d 352, 352 (Mo. Ct. App. 1989) (holding that repeated

penalty has been imposed on aliens.<sup>233</sup> State prosecutors have employed peremptory challenges to strike jurors who speak a language other than English, which one might guess would have a disparate impact on the foreign born.<sup>234</sup>

In analyzing whether alienage jurisdiction should be retained, it is critical to note that antiforeign sentiment threatens to be a continuing problem in the United States. Besides growth in international trade, there are other developing connections between the United States and foreign nations. Though increasing intercourse between nations might reduce xenophobia, this is not necessarily the case. Immigration is an example. Many of the aliens in the country today, as well as immigrants to the country, are people of color, often from Asian and Latin American nations.<sup>235</sup> The demographics of immigration to the United States have changed drastically since 1965, when Congress abolished the national origin quota system that operated to preclude many racial minorities from immigrating to the United States.<sup>236</sup> These new immigrants, upon establishing domicile in a state, often are ineligible under current law to invoke alienage jurisdiction.<sup>237</sup> However, these immigrants, as aliens and as people of color, understandably may have qualms about whether they will receive fair treatment in the justice system.

The changing demographics of immigration bring us to another rationale for alienage jurisdiction, one that the Framers did not have in mind in providing for alienage jurisdiction in Article III but that instead is tied to modern circumstances and the evolution of constitutional principles. The potential bias against noncitizens in the state courts raises Fourteenth Amendment concerns about whether they are receiving equal protection of the laws.<sup>238</sup> The Supreme Court has consistently held that noncitizens in this

references by prosecutor to fact that defendants were foreign born did not constitute reversible error); *Commonwealth v. Sanchez*, 595 A.2d 617, 621-22 (Pa. Super. Ct. 1991) (holding that prosecutor's references to defendant as "illegal alien" were improper but constituted "harmless error"); *Varughese v. State*, 892 S.W.2d 186, 194 (Tex. Ct. App. 1994) (holding that criminal defendant from India waived any objection to prosecutor's pronouncements that "this is an American court, the victim was American but the defendant is not, and generally accentuating the fact that, although Varughese is not a citizen he is treated like one in the court"). Even though some state appellate courts have reversed convictions based on improper references to national origin, *see, e.g.*, *State v. Torres*, 554 P.2d 1069 (Wash. Ct. App. 1976), the frequency of such statements suggests their utility for prosecutors seeking to obtain a conviction.

233. *See, e.g.*, *Honda v. People*, 141 P.2d 178, 186 (Colo. 1943) (affirming death penalty imposed on Japanese defendant during World War II despite prosecutor's comment to jury that conduct of defendant was "a typical example of oriental treachery"); *Guerra v. State*, 771 S.W.2d 453, 462-63 (Tex. Ct. App. 1988), *cert. denied*, 492 U.S. 925 (1989) (rejecting claim of capital defendant, who was undocumented, that juror should have been stricken for cause because of evincing bias against "illegal aliens").

234. *See, e.g.*, *Hernandez v. New York*, 500 U.S. 352 (1991).

235. *See* 1992 INS STATISTICAL YEARBOOK, *supra* note 129, at 21 (presenting statistics reflecting that nine of top ten nations sending immigrants to United States in fiscal year 1992 were developing nations populated primarily by people of color).

236. *See* ALEINKOFF ET AL., *supra* note 135, at 53-58 (describing national origin quota system and its elimination from immigration laws in 1965); Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 326-30 (1993) (analyzing impact of elimination of national origin quotas).

237. *See supra* Part III.A.2 (analyzing 1988 amendment to § 1332(a) that deems lawful permanent residents to be citizens of state in which they are domiciled).

238. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."); *see, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

country merit the protection of the Equal Protection Clause of the Fourteenth Amendment.<sup>239</sup> Modern equal protection doctrine has been concerned with the protection of discrete and insular minorities.<sup>240</sup> To realize this equal protection guarantee in the adjudication of disputes involving noncitizens, procedural devices such as alienage jurisdiction are necessary. An equal protection type of justification for alienage jurisdiction is bolstered by the fact that, since 1965, immigrants increasingly have been people of color.<sup>241</sup> Indeed, a respectable argument could be made that, even without Article III, Congress could provide for alienage jurisdiction to protect against invidious discrimination against noncitizens.<sup>242</sup>

#### D. *Alienage Jurisdiction and International Trade*

The Framers of the Constitution viewed alienage jurisdiction as one way of encouraging foreign investment in the United States. Bias against foreign (i.e., British) creditors in the state courts contributed to the call at the Constitutional Convention for affording the national courts the jurisdiction to resolve disputes involving noncitizens. The potential for antforeign bias in the modern commercial world is relevant in evaluating the continuing need for alienage jurisdiction.

It is difficult to verify bias against foreign business in the adjudicatory process. However, I would be surprised if the antipathy toward foreign business historically visible in the political process failed to influence the adjudicatory processes in the United States. This section will consider some of the history of antforeign business sentiment and assess the economic benefits of alienage jurisdiction.

##### 1. *Domestic Anxiety over Foreign Capital*

As part of the animosity toward the British in the 1700s suggests, antforeign sentiment often has been connected to foreign commerce in the United States.<sup>243</sup> Objections have been made about the influence of "foreigners" on the domestic economy, as well as about foreign business practices, at various intervals in U.S. history. Consequently, foreign commercial activities have been subject to a vast array of regulation and

239. See TRIBE, *supra* note 142, § 16-23, at 1544-53 (recounting decisions).

240. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

241. See *supra* text accompanying notes 235-36.

242. See U.S. CONST. amend. XIV, § 5 (providing that Congress has power to enact legislation to enforce dictates of Fourteenth Amendment). Indeed, Congress arguably could rely on this constitutional authorization to allow federal jurisdiction over a dispute in which any alien was a party, including suits between two aliens, which the Supreme Court has held are not permitted by Article III. See *supra* text accompanying notes 153-55.

243. See generally MIRA WILKINS, *THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES TO 1914*, at 556-607 (1989) (chronicling history of often negative responses to foreign investment in United States).

restriction.<sup>244</sup> Perhaps the most serious concern expressed is that foreign capital dominates the American economy.<sup>245</sup>

The political process has responded to domestic concerns about foreign capital.<sup>246</sup> A few examples should suffice to illustrate this phenomenon. Increasing state and federal interest in regulating and monitoring foreign investment has occurred in the recent past.<sup>247</sup> Concerns of a similar nature have been expressed about foreign influence in the United States, as evidenced by the passage of the Foreign Agents Registration Act,<sup>248</sup> which regulates the lobbying activities of foreign agents;<sup>249</sup> section 310(b) of the Communications Act of 1934,<sup>250</sup> which restricts foreign ownership of radio stations and broadcast television;<sup>251</sup> and the Exon-Florio amendment,<sup>252</sup> which "grants the President discretionary authority to block, for national security reasons, mergers, acquisitions, and takeovers which would result in

244. See HENRY J. STEINER ET AL., *TRANSNATIONAL LEGAL PROBLEMS* 51-53, 63-66 (4th ed. 1994) (describing state and federal control of economic activities of aliens); Detlev F. Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489 (1961) (analyzing federal restraints on commercial activity of aliens from 1789 to 1961); see also Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification*, 59 MO. L. REV. 569 (1994) (arguing that based on history of discrimination against foreign corporations in United States, heightened scrutiny of regulation of such corporations is justified).

245. See generally NORMAN J. GLICKMAN & DOUGLAS P. WOODWARD, *THE NEW COMPETITORS: HOW FOREIGN INVESTORS ARE CHANGING THE U.S. ECONOMY* (1989) (analyzing impact of foreign investment on U.S. economy); MARTIN TOLCHIN & SUSAN TOLCHIN, *BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION* (1988) (same). This is not to suggest that concern with foreign investment is exclusively motivated by an invidious intent. See FRED L. MORRISON & KENNETH R. KRAUSE, *STATE AND FEDERAL LEGAL REGULATION OF ALIEN AND CORPORATE LAND OWNERSHIP AND FARM OPERATION* 59-60 (1975) (summarizing arguments for and against regulation of foreign ownership of farm land).

246. See STEINER ET AL., *supra* note 244, at 70-73 (discussing changes in attitudes in United States toward foreign investment and impact on legislation).

247. See Richard L. Kaplan, *Creeping Xenophobia and the Taxation of Foreign-Owned Real Estate*, 71 GEO. L.J. 1091, 1092-93 (1983) (describing concern with foreign investment in 1970s); Cheryl Tate, Note, *The Constitutionality of State Attempts to Regulate Foreign Investment in the United States*, 99 YALE L.J. 2023, 2025-32 (1990) (summarizing attempts by states to regulate foreign investment). For a somewhat dated sampling of the types of governmental regulation of foreign investment in the United States, see Paul McCarthy, *Government Regulation of Foreign Investment*, in *CURRENT LEGAL ASPECTS OF FOREIGN INVESTMENT IN THE UNITED STATES* 84 (Daniel M. Evans et al. eds., 1976).

248. Pub. L. No. 75-593, 52 Stat. 631 (1938) (codified as amended at 22 U.S.C. § 611 (1988)).

249. See Michael I. Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Foreign Bidder — A Statutory Analysis and Proposals for Reform of the Foreign Agents Registration Act and the Ethics in Government Act*, 78 KY. L.J. 237, 237-42 (1989-90); see also Rodney A. Smolla & Stephen A. Smith, *Propaganda, Xenophobia, and the First Amendment*, 67 OR. L. REV. 253, 255 (1988) (contending that Supreme Court's interpretation of Foreign Agents Registration Act in *Meese v. Keene*, 481 U.S. 465 (1987), "capitulates to a recurring weakness in American culture, a reflexive xenophobic tendency to paternalistically shelter Americans from 'foreign' or 'alien' speech"). For an extended discussion of the allegedly untoward influence of Japanese lobbyists on the U.S. political process, see PAT CHOATE, *AGENTS OF INFLUENCE* (1990).

250. 47 U.S.C. § 310(b) (1988).

251. See John J. Watkins, *Alien Ownership and the Communications Act*, 33 FED. COMM. L.J. 1 (1981); Ian M. Rose, Note, *Barring Foreigners from Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188 (1995); see e.g., *Moving Phones Partnership v. FCC*, 998 F.2d 1051 (D.C. Cir. 1993) (applying § 310(b)), *cert. denied*, 114 S. Ct. 1369 (1994).

252. Exon-Florio Amendment to the 1988 Trade Act, Pub. L. No. 100-418, § 5021, 102 Stat. 1425 (Supp. IV 1992).

'foreign control of persons engaged in interstate commerce.'<sup>253</sup>

Concern with foreign business frequently has been strongest at the state and local levels. The lengthy history of regulation by the states of alien land ownership typifies the longstanding popular concern with foreign control of domestic resources, as well as the influence of xenophobia and racism.<sup>254</sup> In the early 1900s, for example, California passed a law directed at the Japanese that prohibited the ownership of farmland by certain aliens.<sup>255</sup> As of 1993, almost half of the states had laws restricting the rights of aliens to own certain real property, although most are limited to nonresident aliens and foreign businesses.<sup>256</sup> Economic, as well as xenophobic and racial, considerations certainly factored into the political dynamics culminating in the passage of the alien land laws.<sup>257</sup>

Other examples of antiforeign sentiment directed at foreign business abound. So-called Arab oil money in the 1970s and the Japanese "invasion" of the economy in the 1980s triggered hysterical reactions from some commentators.<sup>258</sup> Though more subtle, the debate over whether Congress should ratify the North American Free Trade Agreement (NAFTA) resonated with a distinctively negative view of Mexican capital (e.g., it exploits labor, pollutes the environment, etc.) and labor (e.g., it works for too little money). In opposing NAFTA, as well as in his 1992 run for the presidency, Ross Perot decried the influence of foreign lobbyists on the political process.<sup>259</sup> These examples again illustrate that nativism frequently is linked with

253. Jose E. Alvarez, *Political Protectionism and the United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1, 4 (1989) (footnote omitted).

254. See Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 623-29 (1976); Charles H. Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 TEMP. L.Q. 15 (1962). Interestingly, during the American Revolution, Virginia passed a law barring British ownership of land. See Thomas Jefferson, *Notes on Virginia*, in LIFE OF JEFFERSON, *supra* note 48, at 271-72.

255. See generally Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61 (1947) (arguing that land law was enacted to discriminate against Japanese and violated Fourteenth Amendment); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7 (1947) (examining laws of eleven states that discriminated against aliens who were ineligible for naturalization because of race). For a cogent and lucid summary of the campaign resulting in the passage of California's alien land law by initiative in 1920, see *Oyama v. California*, 332 U.S. 633, 658-62 (1948) (Murphy, J., concurring).

256. See Mark Shapiro, Note, *The Dormant Commerce Clause: A Limit on Alien Land Laws*, 20 BROOK. J. INT'L L. 217, 223-24 (1993) (cataloging various state laws on alien land ownership).

257. See TAKAKI, *supra* note 206, at 203-07 (discussing impacts of alien land laws in California on Japanese farmers).

258. See, e.g., KENNETH C. CROWE, *AMERICA FOR SALE 3* (1978) ("Is America for sale? The simple answer is yes! America is for sale, in bits and pieces and large chunks — its stocks and bonds, its companies and real estate, its ideas and individuals. . . . [N]ever before have the buyers come in such large numbers from so many diverse parts of the earth. The buyers are the nouveau-riche Arabs, imperial Iran, the busy Japanese [and many other nations]."); EARL H. FRY, *FINANCIAL INVASION OF THE U.S.A.: A THREAT TO AMERICAN SOCIETY?* 146-47 (1980) (stating that "veritable flood of foreign-controlled money has recently inundated the American marketplace, a financial onslaught which is gathering momentum with each passing year" and cautioning that "U.S. authorities must . . . be vigilant and begin to effectively monitor foreign investment").

259. See ROSS PEROT & PAT CHOATE, *SAVE YOUR JOB, SAVE OUR COUNTRY: WHY NAFTA MUST BE STOPPED — NOW!* 59-63 (1993) (decrying Mexican lobbying efforts seeking U.S. ratification of trade pact); Kevin Sack, *The 1992 Campaign*, N.Y. TIMES, Oct. 29, 1992, at A22 (quoting Perot: "You've got two [presidential] candidates who were funded and paid for by PAC money, foreign lobbyists, and special interests.").

economic considerations.<sup>260</sup>

## 2. *The Commercial Benefits of Alienage Jurisdiction*

Because foreign business has had access to the federal courts for over two hundred years, one would be surprised to find definitive evidence of bias against it in the state courts. A noncitizen can bring suit in federal court or, as a defendant, remove to federal court a suit filed in state court. Foreign businesses, with generally more sophistication and resources than individual foreign litigants, presumably are more likely to use such procedural devices. Nonetheless, evidence suggests that foreign corporations find it difficult to avoid the influence of nativism in the state courts, though it is difficult to determine whether the bias is against foreign corporations, corporations generally, or a mix of both.

Consider a few cases against foreign businesses that made their way to the United States Supreme Court. A jury in an Oregon state court found Honda Motor Company, a Japanese corporation, liable for punitive damages of five million dollars, five times the compensatory damages award, in a products liability action.<sup>261</sup> In arguing for reversal, Honda argued that bias against corporate defendants is particularly likely when defendant is a "well-known foreign-owned corporation" and complained that the jury "was not told to disregard Honda's status as a foreign-owned company."<sup>262</sup> The Supreme Court acknowledged this potential and stated that, in cases involving punitive damages, "presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big business, particularly those without a strong local presence."<sup>263</sup>

Similarly, the Supreme Court reversed a jury verdict in excess of \$1

260. It is often difficult to isolate xenophobia directed at foreign business from that focused on noncitizens generally. A notorious example was a Chinese-American beaten to death with a baseball bat by two unemployed U.S. autoworkers who apparently blamed their unemployment on Japanese competition in the automobile market. See *United States v. Ebens*, 800 F.2d 1422, 1427 (6th Cir. 1986); U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S 25-26 (1992). Evidence at the trial of one of the defendants described the initial encounter as follows:

Ebens began making racial and obscene remarks toward Chin calling him a "Chink" and a "Nip" and making remarks about foreign car imports. It is apparent that Ebens seemed to believe that Chin was Japanese and he was quoted as having made the further comment that "it's because of you little mother fuckers that we're out of work."

*Ebens*, 800 F.2d at 1427. Violence has also been aimed directly at noncitizens who operate small businesses. See U.S. COMM'N ON CIVIL RIGHTS, *supra*, at 32-41 (offering examples, including harassment of Korean grocers and Vietnamese fishermen); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 888-89 (1993) (analyzing economic, as well as racial, conflict between Korean American business and African Americans in south central Los Angeles).

261. See *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2334 (1994).

262. See Brief for Petitioners at 26, 32, *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994) (No. 93-644); see also Brief for *Amici Curiae* Product Liability Advisory Council, *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994) (No. 93-644) (arguing that due process mandated judicial review of juries' punitive damage awards because of, inter alia, possibility of prejudice against foreign defendants).

263. *Honda Motor Co.*, 114 S. Ct. at 2340-41 (emphasis added); see also *BMW of N. Am. v. Gore*, 646 So. 2d 619 (Ala. 1994) (affirming jury award of \$4 million in punitive damages against German automobile manufacturer and American distributor, sum that was 1000 times compensatory damages award of \$4,000, on condition that punitive damage awards be reduced to \$2 million), *cert. granted*, 115 S. Ct. 932 (1995).

million against a foreign defendant in a tort suit based on a helicopter accident that occurred in Peru.<sup>264</sup> In that case, the foreign defendant claimed that the Texas Supreme Court applied a more liberal test of personal jurisdiction because the company was foreign.<sup>265</sup> Thus, the concern was not simply antiforeign sentiment by the jury but bias in the highest court of a state.

More generally, charges have been made that jurors are biased against foreign corporations.<sup>266</sup> The influence of xenophobia on juries may affect adjudication in the federal as well as state systems.<sup>267</sup> However, one would expect more politically insulated federal judges to exercise greater authority in limiting jury excesses, even when to do so would run counter to the prevailing political winds.<sup>268</sup> For that reason, a federal forum is preferable when the primary source of bias is the jury.

Even absent a demonstration that nativism influences the state courts' adjudication, there are reasons to ensure that foreign businesses have access to a federal forum. As some of the Framers of the Constitution recognized, the greater certainty and uniformity offered by a national court system, rather than a multitude of state courts, may attract foreign capital to the United States. Uncertainty and fear are exacerbated when xenophobia is prevalent. The demonization of "Arab oil money," Japanese business, and Mexican business by NAFTA opponents only can increase the need for assurances for foreign business.

Both Congress and the Supreme Court have acknowledged that procedural rules, including jurisdictional ones, may have an impact on international trade and commerce. The Foreign Sovereign Immunities Act, which provides for a waiver of the immunity enjoyed by a foreign sovereign because of its commercial activity, is a prominent example.<sup>269</sup> The Supreme Court, in showing its willingness to enforce forum selection clauses in contracts involving foreign citizens, emphasized the economic benefits of such

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264. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

265. See Petition for Writ of Certiorari at 18, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), cert. granted (U.S. Apr. 24, 1984) (No. 82-1127). To the extent that these cases involve xenophobia on the part of juries, the concern will be addressed *infra* text accompanying notes 266-67. In these cases, however, judges are arguably not exercising the proper control over jury excesses.

266. See Jack L. Lahr, *Bias and Prejudice Against Foreign Corporations in Patent and Other Technology Jury Trials*, 2 FED. CIR. B.J. 405 (1992); see, e.g., Leslie Helm, *Jury Orders Nintendo to Pay \$208.3 Million in Patent Case*, L.A. TIMES, Aug. 2, 1994, at D3 (quoting Nintendo general counsel: "This kind of outrageous verdict presents an image of bias against foreigners or large companies . . .").

267. See Kramer, *supra* note 21, at 120; see, e.g., *Nissho-Iwai Co. v. Occidental Crude Sales*, 848 F.2d 613, 619 (5th Cir. 1988) (addressing new trial motion based on closing argument to jury appealing to passions and prejudice that referred to Libyan leader Colonel Muammar al-Qaddafi, who was not involved in lawsuit); *Chronicle Pub. Co. v. Legrand*, No. C-88-1897-DLJ, 1992 U.S. Dist. LEXIS 20225, at \*22 n.7 (N.D. Cal. Sept. 3, 1992) (rejecting claim for new trial based on argument that "xenophobia in plaintiff counsel's closing arguments . . . prejudiced the jury"); *Matherne v. Alexandria Maritime, Inc.*, No. 88-2261, 1991 U.S. Dist. LEXIS 11565 (E.D. La. Aug. 8, 1991) (denying new trial motion based on appeals to xenophobia).

268. See, e.g., *Gearhart v. Uniden Corp.*, 781 F.2d 147 (8th Cir. 1986) (instructing district court not to allow plaintiff in closing argument to mention fact that defendant had foreign parent corporation: "[W]e believe such repeated references to Far Eastern parent corporations and 'foreign goods' or 'foreign products' could prejudicially appeal to xenophobia and the current United States-Japanese trade imbalance." (citation omitted)).

269. See 28 U.S.C. § 1605(a)(2) (1988); see, e.g., *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

mechanisms.<sup>270</sup> Moreover, the Court has acknowledged the special burden on foreign business of being forced to defend in a court in a distant locale with a vastly different legal culture that is "foreign" to them in every sense of the word.<sup>271</sup>

The uncertainty and burden are greater when the noncitizen business is subject to the differences of the courts of fifty states, as opposed to the more uniform characteristics of the federal system. Comfort is gained from the knowledge that noncitizens may be subject to dispute resolution in a single foreign system, as opposed to many foreign systems. Foreign business might well be sensitive to the uncertainties wrought when subject to the variations of fifty state court systems. Generally speaking, commercial enterprises desire greater as opposed to less certainty in legal affairs. The availability of a federal forum offers greater certainty and the perception of a forum preferable to that of the states, thereby making the nation more attractive to foreign capital.

Of course, the impact of eliminating access to the federal courts on international trade is uncertain absent an actual experiment. The large potential benefits of the U.S. market may outweigh concerns of foreign business about judicial systems. Similarly, foreign business has continued to conduct commercial activity in this country despite being subject to the vagaries of the laws of the different states. Nonetheless, all other things being equal, access to a federal forum should increase the attractiveness of the United States to foreign business. To eliminate or to narrow alienage jurisdiction therefore might result in adverse trade consequences.

The economic justifications for alienage jurisdiction in some ways are currently stronger than at the time of the Constitutional Convention. The increasingly global economy has resulted in a vast growth of foreign trade by domestic business.<sup>272</sup> Burgeoning commerce with Pacific Rim nations,<sup>273</sup> as well as the promise of increased trade with Canada and Mexico under the

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270. See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593-94 (1991) (enforcing forum selection clause in contract between foreign corporation and U.S. consumer and emphasizing that "clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding these motions"); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 (1972) ("Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction . . . . The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade." (footnote omitted)). The vagaries and uncertainties of the law of personal jurisdiction may well have contributed to the increased reliance of private parties on forum selection clauses. See Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination under International Shoe*, 28 U.C. DAVIS L. REV. 769, 836 n.309 (1995); see also Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1 (1993) (lamenting lack of certainty in American jurisdiction law).

271. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-16 (1987) (finding that, because of unfairness of exercise of jurisdiction over Japanese defendant by California courts, exercise violated Due Process Clause of Fourteenth Amendment).

272. See generally LEE E. PRESTON & DUANE WINDSOR, *THE RULES OF THE GAME IN THE GLOBAL ECONOMY: POLICY REGIMES FOR INTERNATIONAL BUSINESS* (1992).

273. See Alan Tonelson, *The Economics of NATO*, in *NATO AT 40* 96 (Ted Galen Carpenter ed., 1990) (noting that, in 1980s, U.S. trade with East Asian and Pacific nations was surpassing that with Western European nations).



North America Free Trade Agreement,<sup>274</sup> are examples of the strides being made by the United States in increasing business between domestic entities and foreign businesses. This, of course, is very different from the situation at the time of the framing. The United States economy is not as fragile as it was in 1787. Nonetheless, global economic interdependence means that the United States cannot act without regard to the concerns of the rest of the world.

Moreover, the potential foreign relations implications of perceived unfair treatment of foreign businesses in the state courts continues to be great.<sup>275</sup> The tense, often delicately managed, trade negotiations that the United States has had with some nations as the twentieth century comes to a close exemplify the national concern with international trade.<sup>276</sup> The xenophobic outburst, as the rise in anti-Japanese sentiment in the 1980s suggests, may be greatest at times with those nations with which the United States does considerable commerce. Moreover, this antforeign sentiment historically has been the most virulent at the state level.

There is a related foreign relations concern as well. The United States is concerned with its commercial activities in foreign markets as well as with attracting foreign capital to its shores. To the extent that the United States takes steps to promote the perception that foreign businesses are entitled to procedural fairness in its court systems, other nations might be expected to reciprocate. Thus, the perception of fair treatment of foreign business in the United States should result in fairer treatment of this nation's businesses by foreign nations.

#### E. *The Advantages of a Federal Over a State Forum*

This Article contends that federal courts are preferable to state courts for the resolution of disputes involving noncitizens. As I have suggested, this is difficult to verify empirically. Despite the lack of quantitative evidence, there is significant qualitative evidence supporting the need for a more available federal forum for noncitizens.

Burt Neuborne's classic article, *The Myth of Parity*,<sup>277</sup> persuasively argues that federal courts are superior to state courts in the adjudication of constitutional claims.<sup>278</sup> In reaching this conclusion, he compared the "technical competence," "psychological mindset," and "insulation from

274. See Dec. 17, 1992, 32 I.L.M. 296-456, 612-799, 33 I.L.M. 649-57, 663-64, 671-80 (1994).

275. Cf. *Barclays Bank PLC v. Franchise Tax Board*, 114 S. Ct. 2268, 2276 (1994) (calling for more rigorous review of state regulation of foreign, as opposed to domestic, commerce, because different interests are implicated by foreign commerce).

276. See *supra* text accompanying notes 173-75.

277. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

278. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) ("The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."); see also Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645 (1991) (contending that Constitution speaks to question of parity by guaranteeing availability of final federal forum for review of constitutional questions); cf. Richard H. Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1158-64 (1988) (describing "nationalist model" of federal courts law with emphasis on supremacy of federal interests over state sovereignty).

majoritarian principles” of the state and federal courts.<sup>279</sup> In Neuborne’s view, all of these factors weigh in favor of a preference for federal over state courts in the resolution of constitutional claims.<sup>280</sup> This section will consider these factors in analyzing whether federal or state courts are better suited to deciding alienage cases.

“Technical competence” is self-explanatory. A small elite core of federal judges aided by first rate law clerks are preferable to state courts in deciding difficult cases.<sup>281</sup> Even assuming that the law applied to disputes involving aliens is less complicated than modern constitutional law, the need for competence is important. Such competence on the part of the federal courts would be expected to inspire the confidence of foreign governments and noncitizens generally, which the Framers of the Constitution thought necessary for diplomatic and commercial purposes. Federal courts generally are more selective when it comes to cases and judges, have a smaller caseload than state court judges, and have more resources at their disposal. The federal courts decide a number of cases with foreign policy ramifications and are aware of the significant, often complex issues raised by such cases. Armed with experience, federal courts should be expected to weigh the appropriate interests in the typical alienage case and take steps to minimize foreign relations consequences.<sup>282</sup> Indeed, this preference for allowing the federal government to deal with matters implicating foreign relations was one of the reasons for the Constitutional Convention.<sup>283</sup> The *perception* of foreign governments and noncitizens that federal courts are more competent than state courts is crucial to the decisions of foreign businesses and governments on issues such as where to invest capital.<sup>284</sup>

The “psychological mindset” of the federal courts is another salient consideration. Neuborne identifies the tradition emphasizing quality work by the federal judiciary, the “receptivity” to the decisions of the Supreme Court, the “ivory tower syndrome” of being distant from “the pressures and emotions” generated by constitutional cases, and the elite class backgrounds of federal as opposed to state judges.<sup>285</sup>

Devotion to high quality work<sup>286</sup> is essential in dealing with complex disputes that transcend state and national boundaries. Though perhaps less important than in the constitutional realm, adherence to the dictates of the

279. Neuborne, *supra* note 277, at 1120-21.

280. Some have disputed Neuborne’s conclusion in this regard. *See, e.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 623-35 (1981); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

281. Neuborne, *supra* note 277, at 1121-22.

282. *Cf. Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 826-27 (1986) (Brennan, J., dissenting) (making similar point with respect to federal question cases).

283. *See supra* Part II.A (describing foreign relations concerns of Framers).

284. *See supra* note 68 (making similar point as justification for diversity jurisdiction); *see also* Part IV.D (contending that alienage jurisdiction facilitates international trade).

285. Neuborne, *supra* note 277, at 1124-26; *see also* POSNER, *supra* note 15, at 46 (“Whatever the difficulty of drawing exact parallels, there is no doubt that the average conditions of employment in the state judicial systems are inferior to those in the federal system.”).

286. *See* POSNER, *supra* note 15, at 144 (observing that “[t]here is some indirect but interesting evidence that the federal courts really are of somewhat higher quality than state courts”).

Supreme Court is relevant in alienage cases. The lower federal courts are more likely to be familiar with Supreme Court decisions touching on foreign relations matters and read into them the appropriate nuances.<sup>287</sup> One might also surmise that constitutional protections accorded aliens, on which the Supreme Court has the final word, are more likely to be honored by the federal than the state courts.<sup>288</sup> Indeed, the state political processes, to which the state court judges in many states are accountable, at various times have been the harshest in terms of discrimination against noncitizens.<sup>289</sup>

Distance from the pressures and emotions of xenophobia is a distinct benefit in alienage cases. As we have seen, antiforeign sentiment can be passionate, strong, punitive, and sometimes even violent.<sup>290</sup> Removing judges as far as possible from the turmoil of any nativist outburst is a strong advantage. Federal courts, of course, will not be unaware of such views. They can, however, be expected to be less influenced by political antipathy toward noncitizens than the state courts. Unlike their state counterparts, federal courts are more likely to be "above the fray" than in its midst.

It is unclear how Neuberger's focus on the upper class elite background of the federal judiciary fits in the alienage context. True, the federal judiciary is an elite institution and a federal judge has much prestige. There also is a link between antiforeign sentiment and social class,<sup>291</sup> a phenomenon resulting at least in part from competition between the working class and new immigrants in the labor market.<sup>292</sup> Whether there is a class gap of any significance between the state and federal judiciary is a different question. It is not clear that the relative class differences between state and federal judges would render one or the other less sympathetic to noncitizens.

A final factor, peculiar to foreign relations matters, favors federal over state courts. Greater uniformity of decisions, one of the concerns of the Framers of the Constitution in foreign relations matters,<sup>293</sup> is more likely if federal courts resolve matters involving aliens.<sup>294</sup> True, there will be less uniformity in light of the fact that alienage jurisdiction is concurrent rather

287. See also Mishkin, *supra* note 7, at 158 (making similar point in analyzing federal question jurisdiction and emphasizing that "sympathetic handling of the available Supreme Court rulings" is important in promoting uniformity and that lifetime tenured federal court judges "are more likely to give full scope to any given Supreme Court decision, and particularly ones unpopular locally, than are their state counterparts") (footnote omitted).

288. See *TRIBE*, *supra* note 142, § 16-23, at 1544-53 (analyzing Supreme Court cases dealing with protection of aliens under Equal Protection Clause).

289. See *supra* text accompanying notes 254-57 (describing alien land laws passed by various states); see, e.g., *Toll v. Moreno*, 458 U.S. 1 (1982) (holding that state university could not deny in-state tuition status to certain noncitizens domiciled in state); *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating Texas law that prohibited undocumented children from attending public schools).

290. See *supra* Part IV.C.

291. See RITA J. SIMON & SUSAN H. ALEXANDER, *THE AMBIVALENT WELCOME: PRINT MEDIA, PUBLIC OPINION AND IMMIGRATION* 40 (1993) (studying public opinion poll data to this effect).

292. For this reason, organized labor at various times in U.S. history has backed restrictionist immigration measures. See generally GWENDOLYN MINK, *OLD LABOR AND NEW IMMIGRANTS IN AMERICAN POLITICAL DEVELOPMENT* (1986) (analyzing restrictionist positions of organized labor in United States).

293. See *supra* Part II.A.

294. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 347-48 (1816) (emphasizing that Congress recognized "importance, and even necessity of uniformity of decisions throughout the whole United States, upon subjects within the purview of the constitution").

than exclusive. Nonetheless, one would expect greater uniformity when federal courts have the power to decide some alienage cases than when such cases are relegated exclusively to the states for decision.<sup>295</sup>

As mentioned previously, the fact that federal judges are more insulated than state court judges from the political process is as important to the resolution of alienage cases as it is to constitutional ones. Foreign citizens and entities can draw great antipathy in the political process. This has sporadically resulted in distinctively negative consequences for aliens. One fears that such sentiment prevalent in the political process will influence a politically accountable state court judge, though the degree of such influence admittedly is difficult to measure.

#### F. *Summary*

This part has traced the modern justifications for alienage jurisdiction. Political and commercial, international and domestic benefits accrue as a result of allowing foreign citizens and business access to the national courts. The next part of the Article builds on the idea that, as at the time of the framing and as demonstrated by over two hundred years of experience, there remains a need for alienage jurisdiction in the federal courts.

### V. PROPOSALS FOR REFORM

This part of the Article studies the deficiencies with alienage jurisdiction as it currently operates and some reforms that would allow it to better achieve the stated goals. This part further responds to some possible criticisms and mentions more far reaching possibilities for reform deserving of future study.

#### A. *The Over- and Underinclusiveness of Alienage Jurisdiction*

As previously examined, alienage jurisdiction is underinclusive in terms of its stated purposes.<sup>296</sup> Most importantly, the federal courts cannot exercise jurisdiction over any dispute involving an alien, such as a suit brought by one alien against another, despite the possible national consequences if a state court is perceived to treat an alien unfairly.<sup>297</sup> In addition, as implemented by Congress, alienage jurisdiction protects only certain noncitizens and only when the amount in controversy is in excess of \$50,000.<sup>298</sup>

At the same time, alienage jurisdiction is overinclusive. Not all aliens are scorned in the United States at all times. Political refugees, for example, are

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295. See also *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 826-27 (1986) (Brennan, J., dissenting) (making similar point in federal question context). However, the benefits of uniformity may be limited to some extent by the fact that federal courts ordinarily apply state law in alienage cases. See *infra* text accompanying notes 359-63.

296. See *supra* Part II.A.3.

297. See *supra* text accompanying notes 153-55.

298. See *supra* Part III.

revered in the American consciousness.<sup>299</sup> Consequently, some aliens who might not face potential bias in the state courts may avail themselves of a federal forum for other reasons. In addition, antiforeign sentiment also may vary depending on how “foreign” to dominant United States society the alien is, a variable ignored by Article III. For example, at least in the 1990s, there may be more animosity toward Middle Eastern or Japanese citizens and business associations, which involve persons with physical characteristics and cultures different from those that predominate in the United States, than toward citizens of the United Kingdom or Germany. Although the British were the targets of the antiforeign animus of the late eighteenth century in the United States, other so-called foreigners are today’s pariahs. Article III, of course, fails to make careful distinctions between aliens.

As its simultaneous under- and overinclusiveness demonstrates, alienage jurisdiction is imperfect in light of the goals articulated for it. Problems caused by the underinclusiveness of Article III, of course, are difficult to avoid because Congress obviously cannot expand jurisdiction beyond that permitted by Article III. The Constitution is overinclusive as well. Namely, disputes involving all aliens, not just unpopular ones, may serve as the basis for alienage jurisdiction. This bright line rule avoids transaction costs associated with individual case specific determinations and may outweigh any costs of overinclusiveness. Other sorts of overinclusiveness, however, may warrant amendment of the implementing statute.<sup>300</sup>

With this in mind, we should consider whether alienage jurisdiction effectively serves its stated purposes and, if not, how its implementation may be improved. This Article has argued that federal courts are preferable to state courts in adjudicating disputes involving noncitizens. Even without definitive empirical verification,<sup>301</sup> perceptions in and of themselves are as important in the alienage as in the diversity context.<sup>302</sup> As we have seen, alienage jurisdiction, at a minimum, offers the appearance of a more politically insulated forum and provides noncitizens with one court system, not over fifty, with which to deal in disputes.<sup>303</sup> Federal courts afford more certainty and uniformity, thereby increasing the comfort level of those for whom dispute resolution in the United States is foreign, mysterious, and threatening.<sup>304</sup> This may attract foreign companies to do business in the United States.<sup>305</sup>

Although federal judges structurally are more insulated from the political process than their state counterparts,<sup>306</sup> the most likely place where bias may

299. See David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1266 (1990).

300. See *infra* Part V.B (analyzing such possibilities).

301. See *supra* text accompanying note 220.

302. See *supra* Part II.

303. This is not true for all disputes involving noncitizens: The amount in controversy requirement mandates that some claims by or against aliens be brought in the state courts. See *supra* text accompanying notes 118-21.

304. See *supra* Part IV.D, E.

305. See *supra* text accompanying notes 269-71.

306. See *supra* text accompanying note 268. The degree of the insulation, however, has been questioned. See Solimine & Walker, *supra* note 280, at 227-28.

infiltrate the dispute resolution process is in the jury room where judges have little control.<sup>307</sup> Federal juries, although pulled from a larger geographical pool, have roughly the same qualifications as juries in state court.<sup>308</sup> There is little reason to believe that federal juries are less likely than state juries to harbor antforeign sentiment. To the contrary, state court jury pools in certain localities may be less prone to bias against noncitizens than their federal counterparts.<sup>309</sup> Let me explain.

Because a federal district generally covers a larger geographic area than a local state court, federal juries frequently are drawn from a larger pool than those in state court. A federal jury, therefore, may include perspective jurors from many different local political subdivisions. On the other hand, a jury in state court generally is pulled from a smaller geographical area, usually involving a county or comparable political subdivision.

For example, the Northern District of California, based in San Francisco, pulls jurors from fifteen counties, from San Francisco all the way up the Pacific Coast to California's northern border with Oregon, including many thinly populated rural areas.<sup>310</sup> In contrast, the California Superior Court, in and for the County of San Francisco, selects jurors only from San Francisco.<sup>311</sup> The demographic differences between state and federal jury pools in this instance are significant.<sup>312</sup> There are a great many more noncitizens and foreign businesses present in San Francisco than in some of the relatively homogeneous counties from which the Northern District of California pulls jurors.<sup>313</sup> Immigrants and foreign businesses also tend to

307. See also Kramer, *supra* note 21, at 120 (making this observation in diversity context).

308. For example, juror qualifications in California are almost identical to the federal ones. Compare CAL. CIV. PROC. CODE § 203(a) (Deering 1991 & Supp. 1995) (providing that jurors be citizens 18 years of age or older, be domiciliaries of state, be residents of jurisdiction in which they are called to serve, be familiar with English, not be convicted felons without restoration of civil rights, and not be subject of conservatorship) with 28 U.S.C. § 1865(b) (1988) (providing that jurors be citizens of United States at least 18 years of age who have also resided in district for one year, who have proficiency in English, who are not incapable of service due to mental or physical infirmity, and who are not charged or convicted of felony absent restoration of civil rights).

309. Practitioners are well aware of differences between federal and state juries in a given locality. See ANDREAS F. LOWENFELD, CONFLICT OF LAWS: FEDERAL, STATE, AND INTERNATIONAL PERSPECTIVES § 7.04, at 565 (1986) (describing protracted litigation over personal jurisdiction in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), in which litigation was motivated by whether trial would be before state or federal jury).

310. See 28 U.S.C. § 84(a) (1988) (providing that Northern District of California comprises counties of Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo, and Sonoma); see also *id.* § 1865(b)(1) (stating that juror must have "resided for a period of one year within judicial district").

311. See CAL. CIV. PROC. CODE §§ 197(a), 203(a)(4).

312. In some circumstances, it might be difficult to obtain an impartial jury in either system in light of the prevalence of antforeign sentiment among the general population.

To the extent that language ability might serve as the basis for striking jurors, this might have a disparate impact on noncitizens, who are more likely to speak a foreign language than citizens. See *Hernandez v. New York*, 500 U.S. 352 (1991) (holding that peremptory challenges might be based on language ability so long as not used as pretext for race).

313. Here is an example illustrating this demographic observation. According to the 1990 U.S. Census, San Francisco has a population of about 53.6% whites (387,783 of 723,959) and 10.9% (79,039) black, 0.48% (3456) Native American, 28.6% (207,155) Asian, 0.51% (3721) Pacific Islander, and 13.9% (100,717) "Hispanic origin." CALIFORNIA CITIES, TOWNS, & COUNTIES 1993, at 504 (Edith R. Horner ed., 1993). (The numbers may overstate the white population because persons classified as white for census purposes include people of Hispanic ancestry. See *id.* at vii.) In contrast, Humboldt County, also

center in large urban centers, such as the San Francisco bay area.<sup>314</sup> One might expect urban jurors with more exposure to noncitizens, and perhaps a more cosmopolitan world view, to be less biased against noncitizens than those from rural, often more conservative, localities with a relatively smaller noncitizen population.<sup>315</sup> Consequently, one might guess that a state court jury composed of San Francisco urbanites would be less likely to be biased toward noncitizens than a more homogeneous federal counterpart.

Of course, this is not necessarily the case. A noncitizen residing in a thinly populated county with few aliens or naturalized citizens may desire access to a federal forum. For example, trial in a state court in rural Humboldt County in the Northern District of California might raise concerns similar to those raised by decisions by all-white juries in racially charged cases.<sup>316</sup> A broader, more heterogeneous federal jury pool, such as the Northern District of California, may improve the possibility that the noncitizen will receive a fair jury trial in this instance.

Situations similar to the federal/state jury pools in the courts sitting in San Francisco might exist in other major metropolitan areas with large foreign born populations, such as El Paso, Los Angeles, Miami, and New York City. A litigator representing a noncitizen in this situation would need to weigh, among many other considerations, the benefits of a potentially less biased jury in state court against the costs of a possibly more politically sensitive judge, in deciding whether to opt for a federal forum.<sup>317</sup>

The point is that, because of the complexities of vastly different jury pools available in state and federal courts in some locales, alienage jurisdiction is not particularly well suited to remedying potential bias against noncitizens. However, it is difficult to structure alienage jurisdiction to ensure that it can only be exercised in instances in which the state court's impartiality is suspect. Nevertheless, devices can be created to afford the option of a

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in the Northern District of California, has a population of about 90.6% whites (107,881 of 119,118) and 0.81% (960) black, 5.5% (6568) Native American, 1.8% (2144) Asian, 0.14% (171) Pacific Islander, and 4.2% (4989) "Hispanic origin." See *id.* at 478.

314. See MICHAEL FIX & JEFFREY S. PASSEL, *IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT* 29 (1994) (stating that 76% of all immigrants went to six states California, New York, Texas, Florida, New Jersey, Illinois and that 93% of foreign born population lived in metropolitan areas, compared to 73% of natives).

315. This, however, is not necessarily the case. Competition for scarce resources among immigrants, lawful as well as unlawful, and minority citizens in major metropolitan areas may fuel anti-immigrant hostility. See Lawrence H. Fuchs, *The Reaction of Black Americans to Immigration*, in *IMMIGRATION RECONSIDERED* 293, 297 (Virginia Yans-McLaughlin ed., 1990) (analyzing historical desire of rank and file African Americans to limit immigration); Jack Miles, *Blacks vs. Browns*, *THE ATLANTIC*, Oct. 1992, at 41 (noting hostility between African Americans and Latinos). Similarly, the limited experience of persons in some localities with immigrants may result in little animosity toward them as a group.

316. See Albert W. Alschuler, *Racial Quotas and the Jury*, 44 *DUKE L.J.* 704, 704 (1995) ("Few statements are more likely to evoke disturbing images of American criminal justice than this one: 'The defendant was tried by an all-white jury.'").

317. However, in an alien friendly jurisdiction, antiforeign political pressures on a state court judge may be minimal.

Note here that I am assuming that litigators shop for the optimal forum to bring suit. Although forum shopping is often frowned upon by the courts, litigators, within the bounds of the applicable law, unquestionably shop for the forum most favorable to their case. See Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 *TUL. L. REV.* 553, 554 (1989).

federal forum to the alien and to stop a domestic litigant from invoking the alienage jurisdiction of the federal courts. This and a variety of suggested reforms will be analyzed in the following sections.

## B. *Specific Changes*

As we have seen, alienage jurisdiction is a less than perfect way of vindicating its stated goals. In essence, though offering more uniformity and certainty, the federal courts may not be all that different from their state counterparts with respect to the treatment of aliens. Just as xenophobia may influence the political processes generally, it jeopardizes the decisions of juries, both federal and state. Consequently, if changes to alienage jurisdiction (and to the adjudication of claims involving aliens) are to be considered, they should be aimed at improving the ability of noncitizens to have access to a forum free from anti-alien sentiment. This calls not for further restrictions on alienage jurisdiction but for a modest expansion and for devices that preserve the ability of noncitizens to select a state or federal forum.

### 1. *A Separate Alienage Statute*

One of the problems that we saw in the evolution of alienage jurisdiction was that Congress made changes to the general diversity statute without consideration of the impact on alienage cases. To avoid this unnecessary problem, an important first step would be to remove alienage jurisdiction from the auspices of the general diversity statute and enact a separate and independent provision dealing exclusively with alienage cases. Such a change would result in several concrete benefits.

A separate alienage statute would highlight the independent significance of such jurisdiction and emphasize that it serves distinctly different purposes than those of diversity jurisdiction. Discrimination against noncitizens, perceived and real, by state courts has more significant adverse impacts on national interests than simple discrimination against out-of-staters, namely foreign relations and international trade concerns.

Moreover, although there is a wealth of history documenting xenophobia in the United States, bias against citizens of other states has a much sparser history. The most memorable blanket resentment against nonresidents may be regional in nature, such as Northerners' antipathy for Southerners and vice versa in the Civil War era. Any remaining animosity fails to rise to the level of antiforeign sentiment present in the United States. This country simply has not experienced the history of discrimination, lawful and not, against out-of-staters that it has with respect to noncitizens.

Because of their distinctive histories, alienage and diversity cases in certain instances should be subject to different rules that separate statutory provisions would facilitate. A new alienage statute would allow disputes involving aliens to be dealt with in a precise manner crafted to the specific needs and purposes of alienage jurisdiction. Such rules would have no impact on diversity cases generally, and amendments could be made to the diversity statute without concern with the potentially negative side effects on alienage



cases.

Acting to protect national interests in this way would not be unprecedented. Congress, for example, in an analogous setting enacted the Foreign Sovereign Immunities Act<sup>318</sup> and removed actions brought against foreign nations from the auspices of section 1332. "Congress passed the . . . Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'"<sup>319</sup> By doing the same for alienage jurisdiction, Congress could address many problems that have unintentionally resulted from treating diversity and alienage as one and the same and could improve alienage jurisdiction.

Clarification, codification, and rationalization of existing law could be achieved through the simple expedient of separating alienage from diversity jurisdiction. Separate treatment would tend to minimize the often unintended, unconsidered consequences on alienage cases that result when Congress acts to reduce the flow of diversity cases into federal court.<sup>320</sup> Improvements could be brought about without changing the substance of the current alienage law in major ways and at the same time they could limit unintended consequences resulting from the amendment of the general diversity statute. Similarly, a new statute focusing on alienage cases could include the part of the current diversity statute (28 U.S.C. § 1332(a)(4)) governing civil actions filed by foreign states as plaintiffs.

To ensure the vindication of the purposes of Article III's grant of alienage jurisdiction in today's world, however, some substantive changes warrant consideration. These will be outlined in the next few sections.

## 2. *Minimal Diversity in Alienage Cases*

As we previously saw, a variation of the rule of complete diversity requirement applies to alienage cases.<sup>321</sup> Subsection 1332(a)(3), which provides that aliens may be additional parties to lawsuits between citizens of different states, fails to authorize jurisdiction in a suit brought by an alien against a citizen and another alien.<sup>322</sup> Under this rule, a Virginian and an English citizen might sue a Texan and a Mexican citizen in federal court; however, an English citizen alone could not sue the same defendants.<sup>323</sup> This

318. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1331, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1988 & Supp. IV 1992)).

319. *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 488 (1983) (citing H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605-05).

320. See, e.g., *supra* Part III.A (discussing these consequences).

321. See *supra* text accompanying note 158.

322. See *Israel Aircraft Indus. v. Sanwa Business Credit Corp.*, 16 F.3d 198, 202 (7th Cir. 1994); *Depex Reina 9 Partnership v. Texas Int'l Petroleum Corp.*, 897 F.2d 461, 465 (10th Cir. 1990); *Faysound, Ltd. v. United Coconut Chems.* 878 F.2d 290, 294-95 (9th Cir. 1989).

323. See, e.g., *Eze v. Yellow Cab Co.*, 782 F.2d 1064, 1065 (D.C. Cir. 1986) (per curiam) (holding that under § 1332 Nigerian plaintiffs could not sue Virginian corporation and citizen of Ghana); *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148, 1151 & n.1 (5th Cir. 1985) (holding that citizens of Singapore could not sue Liberian corporation with principal place of business in New Jersey); *Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp.*, 506 F.2d 757, 758 (5th Cir. 1975) (holding that citizen

scenario is distinctly different than an alien suing another alien, which raises serious constitutional concerns.

There is a need for a minimal diversity requirement in alienage cases because the mere fact that noncitizens are on both sides of a dispute does not necessarily mean that anti-alien bias will "cancel" itself out. Consider, for example, a dispute between U.S. and English plaintiffs and Egyptian defendants. Because noncitizens are on both sides of the dispute and a citizen is on only one side, the case would be ineligible for alienage jurisdiction under subsection 1332(a)(3). Nonetheless, a strong argument could be made that the Egyptian defendants in the modern United States might be subject to biases and prejudices to which state courts in some circumstances may be particularly susceptible.<sup>324</sup> Similar examples undoubtedly exist.

The complete alienage requirement further fails to appreciate fully the foreign relations implications raised if an alien is a party to a lawsuit. A foreign government might believe that its citizen was unfairly treated, regardless of whether a citizen of another nation was a party to the lawsuit. Foreign governments are concerned about the fairness of the treatment of their citizens, not whether there happened to be a citizen of some other country as a party. There is no reason to believe in the above hypothetical that the fact that one plaintiff was English would tend to minimize any bias toward the Egyptian defendants. There is no indication that the government of Egypt would be satisfied that its citizens received fair treatment simply because one plaintiff was English. Whatever the merits of requiring complete diversity in cases involving citizens of different states, the possible foreign policy ramifications distinguish alienage from ordinary diversity cases.

In light of the significant federal concerns at stake, minimal diversity, which is all that is required by Article III,<sup>325</sup> is entirely appropriate in alienage cases.<sup>326</sup> Consequently, Congress has the authority to pass legislation allowing a noncitizen to sue a citizen and another noncitizen or a noncitizen and citizen to sue a noncitizen.

For similar reasons, changes to the removal statute (28 U.S.C. § 1441), which bars removal of any nonfederal question case "only if none of the . . . defendants is a citizen of the State in which such action is brought,"<sup>327</sup> might be warranted. At one time, Congress allowed an alien or citizen of a

of Netherlands Antilles could not sue citizen of Bermuda and citizen of Massachusetts).

324. Nor does an individualized analysis appear feasible. Before 1948, "Congress required a showing of bias as a justification for removing diversity cases to federal court, but the 1948 revision of title 28 removed all references to such bias, finding them inappropriate and noting that the removal-for-bias provisions were seldom employed." REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 15, at 40.

325. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829 n.1 (1989); *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 492 n.18 (1983); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530 (1967); see, e.g., 28 U.S.C. § 1335 (1988) (interpleader statute requiring minimal diversity between claimants).

326. Others have so claimed. See *Freer*, *supra* note 108, at 474-75; *Kramer*, *supra* note 21, at 122; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 15, at 40; *Rowe*, *supra* note 20, at 1011-12. Congress, of course, could not authorize alienage jurisdiction to allow an alien to sue another alien in federal court, which would run afoul of Article III. See *supra* text accompanying notes 153-55. Minimal diversity jurisdiction, perhaps better denominated minimal alienage jurisdiction, refers here only to constitutional configurations of jurisdiction.

327. 28 U.S.C. § 1441(b) (1988).

state other than the forum state to remove a case from state to federal court even though a citizen of the forum state was a codefendant.<sup>328</sup> Such a removal option for noncitizens makes sense today.<sup>329</sup> There is no persuasive reason for denying an alien defendant access to the federal courts simply because another defendant is a citizen of the forum state. The untenable theory for the current rule apparently is that bias against the noncitizen will be diminished by the fact that a state citizen is a codefendant. It is just as possible (and perhaps more likely), however, that the noncitizen defendant will suffer while the citizen defendant will be favored.<sup>330</sup> Relaxing the removal requirements in this way would guarantee noncitizens a federal option.<sup>331</sup>

### 3. *Reconsideration of the Citizenship Rules for Foreign Corporations*

We previously reviewed the amendments to the diversity statute dealing with corporate citizenship that were passed without consideration of the special problems of foreign corporations.<sup>332</sup> There is no necessity for identical treatment of foreign and domestic corporations. As we saw, the Framers wanted to ensure a national forum to noncitizens in order to attract foreign business. The history of xenophobia toward foreign business carries forward to modern times.<sup>333</sup> Because foreign corporations may be subject to bias even if their principal place of business is in the United States, the statute should treat them as noncitizens.<sup>334</sup> This would be objectionable to some because it would treat foreign corporations differently from domestic ones.<sup>335</sup> However, differential treatment is justified by the mere fact that a corporation formed under the laws of a foreign country might be subject to hostility in the state courts.

For analogous reasons, unincorporated associations, such as a partnership, organized under the laws of another nation might be subject to the minimal diversity requirement or treated as foreign corporations. Currently, the general diversity statute, as interpreted by the Supreme Court, requires that the

328. See Act of July 27, 1866, 14 Stat. 306 (repealed 1911).

329. This would not be the first time that an amendment to the removal statute would benefit aliens. The 1948 Judicial Code conditioned removal on the absence of any *citizens* of the state as defendants, a condition that excludes aliens. Previously, removal was conditioned on the absence of *residents*, including aliens, from the civil suit. See 28 U.S.C. § 1441(b) (1988 & Supp. IV 1992). This result, however, may not have been intended. See 14A WRIGHT ET AL., *supra* note 10, § 3723, at 330.

330. See Currie, *supra* note 104, at 18-19.

331. One empirical study found that 16.6% of a sample of removal cases involved foreign nationals, including individuals, corporations, and countries. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 391 (1992). This suggests that some noncitizens prefer the federal courts over the state courts.

332. See *supra* text accompanying notes 105-114.

333. See *supra* Part IV.D.1.

334. See Eshak, *supra* note 108, at 584-87; Miller, *supra* note 108, at 1475-78; see also Caisse Nationale de Credit Agricole v. Chameleon Fin. Co., No. 94-C773, 1995 U.S. Dist. LEXIS 1991 (N.D. Ill. Feb. 16, 1995) (noting that international relations concerns of Framers would be thwarted by § 1332(c), which as applied barred French bank from suing U.S. company and its wholly owned subsidiary that operated in Illinois but was incorporated in Netherlands).

335. I do not advocate here a statute that would treat a domestic corporation with a principal place of business in a foreign country as a foreign corporation.

citizenship of every member of an unincorporated association be considered for jurisdictional purposes.<sup>336</sup> Allowing alienage jurisdiction even when a United States citizen might be a partner or member of an unincorporated association is justified by the simple fact that a foreign citizen who is a member may subject the entire entity to discrimination. Alternatively, the foreign party may be singled out for unfair treatment.

#### 4. *Reconsideration of the Amount in Controversy Requirements*

As we saw previously, the amount in controversy requirement in the general diversity statute has been slowly but surely increasing over time. The requirement should be reconsidered in alienage cases for several reasons.

Some of the most vulnerable noncitizens, such as undocumented aliens, may rarely be involved in disputes with a monetary value in excess of \$50,000.<sup>337</sup> The 1990s, particularly in some high immigration states, saw great antipathy for "illegal aliens."<sup>338</sup> Unlike diversity cases, alienage cases raise the potential for foreign entanglements that might injure the nation as a whole. Bias against noncitizens and potential foreign relations consequences if noncitizens are perceived as having been treated unfairly exist whether or not a dispute satisfies the \$50,000 amount in controversy requirement. In combination, these factors differentiate alienage cases from the run of the mill diversity case.

Elimination of the amount in controversy requirement would not be unprecedented when foreign relations are implicated. Congress, for example, has not imposed a monetary requirement on cases against foreign states under the Foreign Sovereign Immunities Act<sup>339</sup> (though actions brought by foreign states as plaintiffs are subject to the \$50,000 requirement).<sup>340</sup> Nor does the Alien Tort Claims Act, which allows for suit against foreign states, have an amount in controversy requirement.<sup>341</sup> Although the federal interests are not as strong in cases involving aliens as they are in actions involving foreign states, the potential foreign policy ramifications are much greater than in the

336. See *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990) (partnership); *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (labor union). In reaching this conclusion most recently, the Court refused to adhere to *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), in which it had treated an unincorporated Puerto Rican business association as a corporation for diversity purposes. See *Carden*, 494 U.S. at 189-92.

An alternative might be to treat a foreign partnership and any other unincorporated association as a corporation. This presumably would require a statutory amendment allowing these entities to be treated similarly to foreign corporations for jurisdictional purposes. See AMERICAN LAW INSTITUTE, *supra* note 165, § 1301(b)(2).

337. See *supra* text accompanying notes 185-86 (discussing this group).

338. California's Proposition 187, an initiative that if implemented would preclude undocumented persons from eligibility for most public benefits and services, including a public education, is a most prominent example. See *supra* note 186 (citing authorities analyzing initiative).

339. See 28 U.S.C. § 1330(a) (1988); see also H.R. REP. NO. 1487, 94th Cong., 2d Sess. 13 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6612 ("[T]he jurisdiction in district courts in cases against foreign states [under the Foreign Sovereign Immunities Act] is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts.").

340. See 28 U.S.C. § 1332(a) (1988).

341. See 28 U.S.C. § 1350 (1988); see also *supra* text accompanying note 96 (describing Act).

ordinary diversity action.

Elimination of the amount in controversy requirement, however, conflicts with the trend of increasing the amount in controversy requirement in the general diversity statute.<sup>342</sup> Nonetheless, an examination of the efficacy of the requirement *exclusively* for alienage cases is worthy of study. Because of the differences between alienage and diversity jurisdiction, there are strong arguments to be made for increasing the amount in controversy requirement in alienage cases at a slower rate than in diversity cases, maintaining the status quo as the amount increases in diversity cases, or perhaps reducing or abolishing the requirement in alienage cases.

##### 5. *Elimination of the Provision Deeming Certain Lawful Permanent Residents to be Citizens of a State*

I previously discussed in detail the shortcomings of the 1988 amendment to section 1332 that deems lawful permanent residents to be citizens of states.<sup>343</sup> In light of those flaws, Congress should consider repeal of this amendment.

To recapitulate briefly, a lawful permanent resident may fear bias if forced to litigate in the state courts. Locked out of the political system that controls the state judicial apparatus, this noncitizen should have access to a more politically insulated federal court. Combining with the bias, potential foreign policy ramifications exist if a lawful permanent resident is mistreated by the state courts. This is true even though the potential is not as great as when other types of noncitizens are mistreated.

Besides inappropriately limiting aliens' access to federal courts, the 1988 amendment on its face allows noncitizens to sue noncitizens in the federal courts, a result of dubious constitutionality.<sup>344</sup> To avoid this constitutional complication, Congress should eliminate the language. At a minimum, the implications of this curious provision deserve more serious consideration than Congress gave it.

For similar reasons, Congress might consider addressing the problems of dual citizenship in an alienage statute. I previously analyzed how the current general diversity statute makes no provision for dual citizenship, thereby resulting in considerable litigation.<sup>345</sup> A clear statutory rule for dual citizens would avoid such unnecessary uncertainty. Dual citizens, who may be subject to bias, should be able to invoke the alienage jurisdiction of the federal courts. Even though the potential for bias may be less than it is for other aliens, there is the possibility that another nation might take offense if it believes that one of its citizens — whether or not a United States citizen — has received shabby treatment by the state courts. Because the United States has softened its position on dual citizenship,<sup>346</sup> there will probably be more dual citizens in the future, thus increasing the likelihood that this problem will arise and

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342. See *supra* text accompanying notes 115-21.

343. See *supra* Part III.A.2.

344. See *supra* text accompanying note 132.

345. See *supra* Part III.A.2.

346. See *supra* note 139 and accompanying text.

increasing the need for congressional consideration of the issue.

### 6. *Limiting Alienage Jurisdiction.*

For those enamored with limiting federal jurisdiction, a few proposals might be particularly appealing. Efforts could be made to limit the invocation of alienage jurisdiction to aliens, that is, those parties who might fear legitimate prejudice due to the fact that they are aliens. Consistent with the perennial proposal made in diversity cases to bar in-state plaintiffs from bringing diversity cases in federal court,<sup>347</sup> United States citizens (unless of dual citizenship), regardless of their state of citizenship, could be barred from filing alienage cases in the federal courts.

Any United States citizen (unless of dual nationality), regardless of state citizenship, should be precluded from removing an alienage case from state to federal court. Currently, if the United States citizen is a citizen of the state in which the case is filed, it would not be removable.<sup>348</sup> However, if a defendant is a citizen of a state other than that in which the action is filed, it would be.<sup>349</sup> To prevent a United States citizen from removing such a case, Congress could bar citizens from removing cases based on alienage jurisdiction. The foreign policy concerns in cases in which a noncitizen decides to sue in state court (and thus apparently is unconcerned with bias in that system, at least as compared to the federal court) are less of a concern than if the noncitizen is *forced* to resort to that forum.

In contrast, a noncitizen should have the option of choosing a federal forum when a case is brought against her. This effectively would remove the current ability of United States citizens to invoke alienage jurisdiction for strategic reasons either by filing in federal court or defeating a noncitizen's forum choice by removing a case from state to federal court. It would allow the noncitizen to select a state or federal forum depending on local conditions and concerns.<sup>350</sup> Obviously, the alien also could opt for a federal forum for other reasons, which is a cost to this approach.

Because roughly two-thirds of alienage cases are brought against noncitizens,<sup>351</sup> barring U.S. citizens from invoking alienage jurisdiction might limit the impact of the relaxation of requirements called for by some of the other proposals articulated in this Article. Note that this alternative addresses only the concern with possible bias against noncitizens underlying alienage jurisdiction and runs the risk that state courts, even when selected by aliens, could rule in ways that impinge upon foreign relations. In addition, the state courts simply are not as competent as their federal counterparts in dealing with matters that touch upon foreign relations. However, the fact that a foreign party selected a state over a federal forum would tend to minimize the potential foreign relations consequences of any adverse judgment.

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347. See, e.g., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 15, at 42.

348. See 28 U.S.C. § 1441(b) (1988).

349. See *id.*

350. See *supra* text accompanying notes 308-17 (recognizing possibility of demographic differences in state and federal jury pools that might impact bias against noncitizens).

351. See *supra* note 19 (presenting statistics).

### C. Possible Objections

Some of these proposals are contrary to the consistent trend toward narrowing diversity jurisdiction. Consequently, the suggested reforms are likely to meet the wrath of diversity abolitionists. As this Article has emphasized, however, deviation from the norm of jurisdictional constriction is justified in alienage cases. Unlike the simple bias against the citizens of other states, there is stronger evidence of bias against foreigners from the days of the framing of the Constitution to modern times.<sup>352</sup> Foreign relations concerns combine with this discriminatory potential to offer support for more protective treatment of aliens.

One prominent observer desiring to winnow the diversity docket has proposed limiting many categories of noncitizens from utilizing alienage jurisdiction.<sup>353</sup> Such wholesale limitations on alienage jurisdiction, however, underestimate the benefits of alienage jurisdiction. Foreign entanglements may result when an alien domiciled in the United States is involved in a dispute, even if those ramifications may be of lesser magnitude than those with respect to other categories of aliens.<sup>354</sup> In any event, the narrowing of alienage jurisdiction would do little to reduce the federal judicial caseload.<sup>355</sup> In other words, the marginal benefits of retaining alienage jurisdiction outweigh the marginal costs.

One might respond that although the Framers authorized Congress to provide for alienage jurisdiction, there is no current need for it — an argument that this Article attempts to rebut. Unlike the young, politically and economically weak nation that existed at the time of the framing, the United States has become one of the strongest nations in the world. Consequently, according to this argument, there is no need for great concern about the offense that foreign governments might take at the perceived mistreatment of their citizens. This is a view of foreign relations that cannot be rebutted in this Article. Suffice it to say that the United States still seeks to avoid foreign disputes and, particularly in recent years, has sought to promote international trade. To ensure its central place in the new world order requires efforts to ensure that foreign nationals receive the fairest treatment available in the adjudication of disputes.

Another objection from a completely different perspective may be that my incremental proposals to improve the implementation of alienage jurisdiction fail to go far enough. For example, racism arguably is a significantly greater social ill than bias against noncitizens, especially in the state courts, and all racial minorities therefore should be able to have access to the federal courts.

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352. See *supra* Part IV.C.

353. See Kramer, *supra* note 21, at 122 (arguing that Congress should amend statute to bar all noncitizens domiciled in United States, including refugees, amnestied aliens, aliens applying for permanent resident status, and undocumented aliens, from being treated as aliens for purposes of alienage jurisdiction); see also FCSC, WORKING PAPERS, *supra* note 22, at 456 (making similar observations) (Professor Kramer served as reporter for subcommittee that issued this report).

354. See *supra* Part IV.B (reviewing various types of noncitizens and suggesting that potential for bias and negative foreign policy impacts due to perceptions of unfairness exist).

355. See *supra* note 19 (compiling statistics showing that alienage cases comprise relatively small part of total number of diversity cases and even smaller proportion of federal judicial caseload).

The Framers of the Constitution, however, failed to address expressly such discrimination in Article III. By constitutional necessity, the proposals made here are as underinclusive as Article III is with respect to discrimination other than that toward aliens.<sup>356</sup> This is not to suggest that Congress, in exercising its powers to ensure equal protection of the laws under the Fourteenth Amendment, would be barred from passing legislation allowing racial and other minorities to bring cases in federal court.<sup>357</sup>

Similarly, naturalized citizens, especially those of certain national origin groups, may be just as subject to bias as aliens. Both groups, because of color, accent, and possibly other characteristics, may be perceived as foreign and subject to discrimination. Under current law, as well as under my suggestions, however, naturalized citizens (as long as not dual citizens) are ineligible for alienage jurisdiction. Any inequality of treatment between naturalized citizens and unnaturalized aliens stems from Article III and other constitutional provisions, which make important distinctions between the rights of citizens and aliens. Moreover, national origin minorities who are naturalized citizens, unlike noncitizens, have access to the political process in which they may attempt to combat bias in the state judiciary.<sup>358</sup> This, at least in theory, places them in a very different position than unnaturalized aliens.

#### D. *Alternatives for Study*

A number of possibilities for improving the treatment of aliens in both state and federal courts are worthy of exploration. Federal courts could be instructed to fashion uniquely federal common law in alienage cases.<sup>359</sup> Although *Erie Railroad v. Tompkins*<sup>360</sup> held that federal courts sitting in diversity must apply the forum state's law, the case appears to rest on an

356. As Charles Alan Wright has observed, [j]uries may regrettably, be subject to many kinds of prejudice. Race, religion, appearance, wealth, city as against country, home town as against another part of the state — all these are factors that may sway a jury. If litigants subject to any or all of these prejudices must take their chances with a state court, it is hard to defend a provision of having a federal forum that exists to protect a person against such prejudice as may still be felt merely because the litigant is a citizen of another state.

WRIGHT, *supra* note 11, § 23, at 148.

357. See U.S. CONST. amend. XIV, § 5. Besides relying upon the Fourteenth Amendment, Congress might be able to enact a law allowing federal jurisdiction over claims involving racial and ethnic minorities, or only to aliens of color, under a theory of protective jurisdiction. See BATOR ET AL., *supra* note 13, at 983-89; Carole Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542 (1983).

358. Of course, as is true for any minority group, political change may be difficult and judicial protection may be warranted. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a more searching judicial inquiry . . .”).

359. See *supra* text accompanying notes 77-78 (noting that Framers of Constitution appear not to have addressed this question).

360. 304 U.S. 64 (1938).



interpretation of the Rules of Decision Act,<sup>361</sup> which could be amended to allow for federal common law to govern alienage cases. Because foreign relations is the exclusive dominion of the federal government, and may be a legitimate province of federal common law,<sup>362</sup> such a statute would avoid the possible constitutional impediments that some contend exist in the diversity context. However, it runs contrary to the tradition of treating alienage and diversity cases in a similar way for choice of law purposes.<sup>363</sup>

As suggested by the burgeoning literature on the subject, efforts could be made to diversify juries in an attempt to ensure fair treatment for noncitizens.<sup>364</sup> One difficulty faced by noncitizens that is different from that faced by other minority groups is that noncitizens are wholly excluded from serving on juries, thereby making it impossible to improve their representation.<sup>365</sup>

Still, some national origin groups, especially those comprised of a significant portion of immigrants and naturalized citizens, may be less likely than other citizens to harbor anti-alien views. Improving the representation of these groups on juries may limit the bias against aliens. This consideration warrants further investigation, in no small part because it is not entirely clear that citizens of certain national origin groups in fact will be less susceptible to nativist views.<sup>366</sup>

A very different possibility relating to juries calls for the exploration of whether the states should preclude jury trials in alienage cases. The Seventh

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361. 28 U.S.C. § 1652 (1988); see Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 278 (1946). But see *supra* note 78 (citing authorities disputing this interpretation of Rules of Decision Act).

362. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-27 (1964); see also Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1042-68 (1967) (analyzing federal common law relating to foreign relations).

363. For the period between *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) and *Erie*, the lower federal courts appeared to follow the same rule in diversity cases and alienage cases — applying state statutes, see, e.g., *Zeiger v. Pennsylvania R. Co.*, 151 F. 348, 349-52 (W.D. Pa. 1907), and federal general common law, see, e.g., *Madison Square Garden Corp. v. Carnera*, 52 F.2d 47, 48-49 (2d Cir. 1931); *Jones v. Shapora*, 57 F. 457, 460-63 (5th Cir. 1893); *Elder v. Whitesides*, 72 F. 724, 725-26 (E.D. La. 1895). After *Erie*, the courts generally have applied state law to alienage cases. See Harold G. Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANSNAT'L L. 133, 135 (1971).

364. See, e.g., Sherri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1695-1700 (1985); Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 707, 719-29 (1993); Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 47-51 (1992); Ramirez, *supra* note 40, at 802-17.

365. One might argue that noncitizens should be entitled to serve on juries, or perhaps that a revival of mixed juries is in order in alienage cases. See *supra* text accompanying notes 40-48 (discussing mixed juries). These types of proposals, however, are contrary to the traditional link in the United States between political participation and jury service. See generally Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995) (arguing that jury service is political right not protected by Equal Protection Clause).

366. See Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 67-72 (1995) (analyzing various divisions in Latino community based on immigration status). For example, it is not necessarily the case that a Mexican lawful permanent resident can be impartial in a dispute between a U.S. citizen, with whom he may share some affinity, and a Mexican business. Nor is it clear that the same alien would not harbor antiforeign views against a Japanese or Middle Eastern business.

Amendment has not been applied to the states,<sup>367</sup> though almost all states have constitutional provisions mandating jury trials in certain civil actions.<sup>368</sup> Therefore, state courts, unlike federal courts, are free to experiment.<sup>369</sup> This possibility necessarily is premised on the idea that state court judges are less likely than juries to be biased against aliens, which is not clearly the case. Nonetheless, bench trials by the states in alienage cases are worthy of further study and might lessen the need for alienage jurisdiction in the federal courts.

## VI. CONCLUSION

This Article has traced the justifications offered by the Framers of the Constitution for alienage jurisdiction and concluded that those justifications, buttressed by experience, weigh heavily in favor of its retention and indeed a possible expansion. Even assuming that the ever growing limitations on diversity cases are necessary and justifiable, alienage cases stand on different footing. Recurring xenophobia in the United States, the potential commercial consequences of any appearances of partiality in a domestic adjudicatory system in an era of an increasingly global economy, and potential foreign relations ramifications, all militate in favor of the availability of a national forum for aliens.

Alienage jurisdiction, however, is at best an imperfect tool for ensuring the availability of an impartial forum for noncitizens. A number of improvements to further the Framers' goals in providing for alienage jurisdiction are needed. Modest changes could bring forth great improvements that would clarify and improve the law and satisfy the goals of the Framers. Such changes, however, first require a fundamental break with the past, namely that Congress devote attention to the special problems associated with alienage jurisdiction.

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367. *See Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 218-23 (1916).

368. *See* JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 11.7, at 507 (2d ed. 1993). In the alternative, states might bar the disclosure to the jury of the citizenship status of litigants. This might tend to limit prejudice against noncitizens, though the potential for adverse foreign policy consequences resulting from adjudication of the case in a state forum might remain. One problem is that a jury might be able to infer that a party is an alien by physical appearance, accent, or some other indicator. Similarly, it is often evident, by the name of the business for example, that a business is foreign owned.

369. The Seventh Amendment appears to mandate a trial by jury in civil cases in which aliens are parties because such actions were tried by juries at the time of the constitutional framing. In contrast, actions against foreign states were not tried by juries because of the common law doctrine of sovereign immunity. Consequently, the Seventh Amendment does not preclude the congressional decision that actions brought against foreign nations are not tried by juries. *See* 28 U.S.C. § 1330(a) (1988).