

A JURISDICTIONAL APPROACH TO COLLAPSING CORPORATE DISTINCTIONS

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The practical distinction between unincorporated associations and corporations has become blurred. The vast majority of states have enacted filing requirements for unincorporated associations that typically applied only to corporations.¹ Although somewhat onerous, complying with these requirements indirectly provides certain unincorporated associations with a means for obtaining limited liability while avoiding double taxation.² Further, the Internal Revenue Service (IRS) has created so-called “check-the-box” regulations that permit an eligible organizing business to decide whether it will be regarded as a corporation or a partnership for federal tax purposes.³ Indeed, there even has been a proposal for standardized tax treatment of all private entities.⁴ Not surprisingly, these state and federal benefits have rendered unincorporated associations a viable, if not superior, alternative to corporations as a way to organize a business.⁵

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¹ All 50 states have legislation governing the formation and operation of limited liability companies. See J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, LIMITED LIABILITY COMPANIES: A STATE BY STATE GUIDE TO LAW AND PRACTICE (Supp. 2001). Every state, except Louisiana, has adopted both the Uniform Limited Partnership Act (ULPA), which was approved in 1916, and the Uniform Partnership Act (UPA), which was approved in 1976 and since has been amended several times. Every state that has adopted the ULPA, except Vermont, also has adopted the Revised Uniform Limited Partnership Act (RULPA). REVISED UNIFORM PARTNERSHIP ACT, in 6A UNIFORM LAWS ANNOTATED 1-2 (Supp. 2001) (Table of Jurisdictions Wherein Act Has Been Adopted). Twenty-two states have adopted the Revised Uniform Partnership Act (RUPA). THE REVISED UNIFORM PARTNERSHIP ACT Appendix B, at 463 (Robert W. Hillman, Allan W. Vestal & Donald J. Weidner eds., 1999) [hereinafter RUPA].

² See, e.g., Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1, 6 (1995) (“LLC [limited liability company] statutes tend to resemble corporation and limited partnership statutes in terms of the filings and other formalities required to form the firm All of the LLC statutes provide that members, like corporate shareholders, are not liable as such for the debts of the LLC.”). Professor Ribstein proceeds to note that “the LLC liability shield may be broader than that under most limited liability partnership (LLP) statutes.” *Id.* at 6 n.38.

³ I.R.C. § 301.7701-3 (“A business entity that is not classified as a corporation . . . can elect its classification for federal tax purposes as provided in this section. An eligible entity with at least two members can elect to be classified as either an association (and thus a corporation under § 301.7701- 2(b)(2)) or a partnership, and an eligible entity with a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner.”).

⁴ See GEORGE K. YIN & DAVID J. SHAKOW, THE AMERICAN LAW INSTITUTE, FEDERAL INCOME TAX PROJECT-TAXATION OF PRIVATE BUSINESS ENTERPRISES: REPORTERS’ STUDY 49 (1999) (Proposal 2-1) (“[A]ll private business firms shall be treated alike for income-tax purposes, regardless of their characteristics or form of organization.”). The study, however, is not unproblematic. See, e.g., Steven A. Bank, *Entity Theory as Myth in the Origins of the Corporate Income Tax*, 54 WM. & MARY L. REV. 447, 465 (2001) (criticizing American Law Institute’s resort to the traditional entity theory of corporate personality to explain the enactment of a separate corporate income tax).

⁵ According to Donald C. Alexander, the former Commissioner of the IRS, “[n]o rational, reasonably well-informed tax professional would deliberately choose subchapter S status over an LLC [limited liability company] when there is a choice, and 99% of the time there is a choice.” Comments of Donald C. Alexander, TAX PRACTICE (Jul. 17, 2000). Partnerships with limited liability were particularly attractive when states had more stringent corporate charter requirements, see Richard A. Mann & Barry S. Roberts, *Unincorporated Business Associations: An Overview of Their Advantages and Disadvantages*, 1978 TULSA L.J. 1, 28, but continue to be prominent form of

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The problem is that corporations and unincorporated associations continue to receive disparate treatment under various statutory and common law schemes. In particular, different tests determine the citizenship of corporations and unincorporated associations for alienage purposes. The test for corporations is codified within the alienage and diversity jurisdiction statute,⁶ which provides “a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business”⁷ In contrast, the test for unincorporated associations exists as a common law rule that “diversity jurisdiction in a suit by or against the [unincorporated] entity depends on the citizenship of ‘all the members,’ ‘the several persons composing such association,’ [or] ‘each of its members.’”⁸

An undesirable by-product of these asymmetrical tests becomes manifest when one considers the jurisdictional status of certain aliens. A novel way to understand the alienage jurisdiction statute involves its applicability to two separate classes of aliens: “domestic aliens,” which are citizens or subjects of a foreign state that permanently reside in the United States,⁹ and “foreign aliens,” which are United States citizens legally domiciled in another country. In contrast to their domestic counterparts, foreign aliens do not constitute “citizens” in a jurisdictional sense – they are deemed “stateless” and thus cannot sue or be sued in federal courts on the basis of alienage.¹⁰ Accordingly, a foreign alien who is a member of an unincorporated association renders such association incapable of suing or being sued under the alienage jurisdiction statute.¹¹

business organization, see Walter D. Schwidetzky, *Is It Time To Give the S Corporation a Proper Burial?*, 15 VA. TAX REV. 591, 592 (1996) (“S Corporations were once the entity of choice for small businesses, and sometimes for larger ones as well. However, new partnership-type vehicles, specifically the limited liability company and the limited liability partnership, have now come into their own. These new entities are, on the whole, the preferred choice for the vast majority of private businesses.”).

⁶ 28 U.S.C. § 1332.

⁷ *Id.* at § 1332(c). But see *Eisenberg v. Commercial Union Assurance Co.*, 189 F. Supp. 500, 502 (S.D.N.Y. 1960) (“[S]ubdivision [c of Section 1332] is not susceptible of the construction as if it read ‘all corporations shall be deemed citizens of the States by which they have been incorporated and of the States where they have their principal places of business.’”); and Charles A. Szypszak, *Jural Entities, Real Parties in Controversy, and Representative Litigants: A Unified Approach to the Diversity Jurisdiction Requirements for Business Organizations*, 44 ME. L. REV. 1, 5 (1992) (“Congress has never explicitly sanctioned the Supreme Court’s treatment of a corporation as a jural entity whose citizenship is the exclusive measure of diversity.”).

⁸ *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990) (quoting *Chapman v. Barney*, 129 U.S. 677, 682 (1889); *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456 (1900); and *United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 146 (1965)).

⁹ Foreign states determine who are their citizens or subjects. See, e.g., *United States v. Ark*, 169 U.S. 649, 690 (1898) (“Every independent state has as one of the incidents of its sovereignty the right of municipal legislation and jurisdiction over all persons within its territory, and may therefore change their nationality by naturalization . . .”) (quoting with approval statement of Secretary of State Fish).

¹⁰ See, e.g., *Smith v. Carter*, 545 F.2d 909, 912 (5th Cir. 1977) (“[A]n American citizen living abroad is precluded from invoking the [alienage] jurisdiction of the federal courts while foreign citizens having no connection with the United States may do so.”); and *Van der Schelling v. U.S. News & World Report, Inc.*, 213 F. Supp. 756, 759 (E.D. Pa.) (concluding the Framers never intended the term “aliens” in Article III of the U.S. Constitution to include foreign aliens), *aff’d*, 324 F.2d 956 (3d Cir. 1963) (per curiam). But see David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 9-10 (1968) (suggesting foreign aliens should be treated as foreign nationals).

¹¹ See, e.g., *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 69 (2d Cir. 1990) (“If in fact any of [the defendant New York law partnership]’s foreign-residing United States citizen partners are domiciled abroad, a diversity suit could not be brought against them individually; in that circumstance, since for diversity purposes a partnership is deemed to take on the citizenship of each of its partners, a suit against [the partnership] could not be premised on diversity.”) (citations omitted), *remanded on different grounds*, 771 F. Supp. 580 (S.D.N.Y. 1991).

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This disparate result was not always so. Initially, courts applied a uniform test to all business organizations whereby they assumed the citizenship of their respective constituent groups: stockholders for corporations and members for most unincorporated associations.¹² This uniform test was highly controversial,¹³ perhaps ironically, because corporations were perceived as not being entitled to access federal courts.¹⁴ Through a trilogy of cases,¹⁵ the Supreme Court created a citizenship test for corporations based on their state of incorporation.¹⁶ In 1958, Congress codified the citizenship test for corporations in the form that holds today. The alienage statute shifted citizenship for corporations from just their state of incorporation to also include their principal place of business.¹⁷ The amendment was an explicit attempt to regulate the perceptible role corporations had assumed in the economy, as expanding the bases for citizenship decreased the likelihood of diversity between litigants.¹⁸ Consistent with the implication, Congress paid no attention to whether the amended citizenship test should extend to unincorporated associations.¹⁹ Accordingly, the once-uniform common law test now applies only to unincorporated associations. As Justice Scalia somewhat uncharacteristically has noted,

¹² See, e.g., *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 91 (1809) (Marshall, C.J.) (“The court feels itself authorized . . . on a question of jurisdiction [] to look to the character of the individuals who compose the corporation”); and *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456 (1900) (“When the question relates to . . . jurisdiction . . . as resting on the diverse citizenship of the parties we must look in the case of a suit by or against a partnership association to the citizenship of the several persons composing such association.”).

¹³ See, e.g., FELIX FRANKFURTER & JAMES S. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 136-45 (1928) [hereinafter *THE BUSINESS OF THE SUPREME COURT*] (referencing virtually annual attempts from 1878 to 1910 to limit or deny corporations access to federal courts).

¹⁴ Speaking for a majority of the Court, Justice Miller observed that “[t]his practice has grown until the corporation created by the laws of the States bring a large part of their controversies with their neighbors and fellow citizens into the courts of the United States for adjudication, instead of resorting to the State courts, which are their national, their lawful, and their appropriate forum.” *Hawes v. Oakland*, 104 U.S. 450, 452 (1882). According to one commentator, “the doctrine that a corporation could be treated as a citizen and hence as suable in Federal Courts was established *against the opposition and protest of the corporation*. It was not a doctrine which the Supreme Court promoted for the benefit of the corporation, but rather to benefit the citizen suing the corporation by enabling [her] to keep out of the Courts of the State which chartered the corporation.” Charles Warren, *Corporations and Diversity of Citizenship*, 19 VA. L. REV. 661, 670 (1933) (emphasis in original).

¹⁵ *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844); and *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314 (1854).

¹⁶ See, e.g., *Letson*, 43 U.S. (2 How.) at 555 (a corporation is “entitled, for the purpose of suing and being sued, to be deemed a citizen of that state”). But see Dudley O. McGovney, *A Supreme Court Fiction: Corporations in the Diversity Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853, 873 (1943) (deriding *Letson*’s holding thusly: “A deemster may adjudge a mouse to be a cat and in a story for children that make-believe would be amusing.”).

¹⁷ Act of July 25, 1958, § 2, 72 Stat. 415 (1958).

¹⁸ S. REP. NO. 85-1830, at 3101-02 (1958), reprinted in U.S.C.C.A.N. 3099, 3101-02 (citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928) (permitting company that had reincorporated in another state for purposes of accessing federal court to sue on basis of diversity)).

¹⁹ See, e.g., *R.H. Bouligny, Inc. v. United Steelworkers of Am.*, AFL-CIO, 336 F.2d 160, 164 (4th Cir. 1964) (“By no stretch of the process of interpretation can [28 U.S.C.A. § 1391(c) (1958)] be read as applying to an unincorporated association.”), *aff’d*, 382 U.S. 145 (1965); and Comment, *Diversity of Citizenship for Unincorporated Associations*, 75 YALE L.J. 138, 147 n.50 (1965) (“There is no indication that Congress even considered the status of unincorporated associations in [the 1958 amendments], and the failure of Congress to enact a rule governing the citizenship of associations in 1958 is not equivalent to congressional action denying them citizenship for jurisdictional purposes.”). The 1965 decision in *Bouligny* marked a 61-year span since the Court had last re-examined the jurisdictional status of unincorporated associations in *Thomas v. Board of Trustees*, 195 U.S. 207 (1904).

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this separate hold-over test “can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization.”²⁰

The reality is that, increasingly, new businesses are electing to organize as unincorporated associations. For instance, the IRS’s most recent tax filing statistics reveal the number of new limited liability companies has quadrupled, dwarfing the rate of new S-class corporations over the same four-year span:

	1995	1996	1997	1998
S Corporations ²¹	2,153,119	2,304,416	2,452,254	2,588,088
LLCs (Members) ²²	118,559 (1,580,900)	221,498 (1,654,256)	349,054 (1,758,627)	470,657 (1,855,348)
LPs (Members) ²³	295,304 (10,223,901)	311,563 (10,025,630)	328,210 (10,167,018)	342,726 (9,325,111)

Additionally, these statistics for unincorporated associations are conservative. The IRS has indicated that the “[n]umber of limited partnerships and of limited liability companies and associated number of partners is understated because some businesses failed to answer the question about type of partnerships on their tax returns as originally filed.”²⁴ Regardless of what the actual numbers are, unincorporated associations clearly occupy a significant place in the business organization landscape.

This development has not escaped the Supreme Court’s attention. Since 1958, when Congress amended the citizenship test for corporations, the Court twice has considered the merits of extending this test to unincorporated associations. Less than a decade after the 1958 amendments, Justice Fortas acknowledged that corporations and unincorporated associations had become “indistinguishable . . . in terms of the reality of function and structure.” But he concluded that “these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for extension of [] diversity jurisdiction . . . ought to be made to the Congress and not to the courts.”²⁵ The invitation received no legislative audience and, fifteen years later, the Court took occasion to revisit the alienage statute’s distinction between corporations and unincorporated associations. Although admitting that perhaps “[c]onsiderations of basic fairness and substance over form require” a uniform citizenship test for all business organizations, a

²⁰ *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990).

²¹ INTERNAL REVENUE SERVICE, 20 STATISTICS OF INCOME (SOI) BULLETIN (Fall 2000) (Table 13 – Corporation Income Tax Returns: Balance Sheet, Income Statement, and Tax Items for Specified Years, 1980-1997); INTERNAL REVENUE SERVICE, 20 STATISTICS OF INCOME (SOI) BULLETIN (Winter 2000-2001) (Table 13 – Corporation Income Tax Returns: Balance Sheet, Income Statement, and Tax Items for Specified Income Years, 1980-1998).

²² INTERNAL REVENUE SERVICE, 20 STATISTICS OF INCOME (SOI) BULLETIN 49 (Spring 2001) (Figure B. Limited Liability Companies Filing on Form 1065 and 1065B for Tax Years 1993-1998).

²³ *Id.* at 285 (Table 11 – Partnership Returns: Selected Balance Sheet and Income Statement Items for Specified Income Years, 1980-1998).

²⁴ *Id.* at 323, Table 11 n.2. Starting in 1993, the IRS began using a survey question that identifies partnerships as limited liability companies. *Id.*

²⁵ *United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 150-51 (1965).

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divided Court balked: “Which [type of unincorporated associations] is entitled to be considered a ‘citizen’ for diversity purposes, and which of their members’ citizenship is to be consulted, are questions more readily resolved by legislative prescription . . .”²⁶

Resolution has not been facilitated by conventional critiques, which are tautological. These critiques focus on the hybrid nature of certain business organizations, such as limited liability companies and limited liability partnerships.²⁷ By definition, such organizations exhibit certain traditional characteristics of corporations and unincorporated associations.²⁸ Establishing that these combined characteristics can co-exist in relative balance merely points to a deficiency in or the disutility of existing definitions of what a corporation or an unincorporated association is.²⁹ Predictably, problematic definitions engender problematic distinctions.³⁰

This article proposes a more constructive method for collapsing defunct distinctions between corporations and unincorporated associations. The method is premised on critically examining the origins of and rationales for certain jurisdictional principles. Such examination reveals an unjustified inconsistency that can serve as an entry point for assessing the existing distinctions between corporations and unincorporated associations. Resolving the inconsistency can provide a sound legal basis for harmonizing the distinctions. Such a result is possible

²⁶ *Carden v. Arkoma Assocs.*, 494 U.S. 185, 197 (1990).

²⁷ See, e.g., Susan P. Hamill, *A Case for Eliminating the Partnership Classification Regulations*, 68 TAX NOTES 335, 352 (1995) (“Although elimination of the classification regulations undoubtedly will allow some limited partnerships and LLCs with a preponderance of corporate characteristics to enjoy the many benefits offered by the partnership tax provisions, this adds no new legal inconsistencies or formalistic distinctions to those that already exist under the current classification regulations.”); and Susan Kalinka, *The Limited Liability Company and Subchapter S: Classification Issues Revised*, 60 U. CIN. L. REV. 1083, 1141 (1992) (“A comparison of the S corporation and the LLC with respect to the four corporate characteristics identified by the [IRS’s now repealed] regulations reveals that the two entities are not sufficiently different to warrant the differences in taxation. . . . On the whole, the differences between the two entities do not indicate why one should be considered more ‘corporate’ than the other.”).

²⁸ See, e.g., *Prefatory Note*, UNIFORM LIMITED LIABILITY COMPANY ACT, in 6A UNIFORM LAWS ANNOTATED 426 (1995) (“The allure of the limited liability company is its unique ability to bring together in a single business organization the best features of all other business forms – properly structured, its owners obtain both a corporate-styled liability shield and the pass-through tax benefits of a partnership. . . . All state limited liability company acts contain provisions for a liability shield and partnership tax status.”); and *Author’s Comments*, RUPA, *supra* note 1, § 1001, at 348 (“In general, the statutes [authorizing the creation of LLPs] share the theme that a limited liability partnership will limit, or eliminate, joint and several liability of partners for some, or all, of the partnership’s debts or other obligations. For purposes other than joint and several liability, the statutes provide that a limited liability partnership remains a general partnership under the UPA [Uniform Partnership Act] or RUPA.”). See also generally Symposium, *LLC, LLPs and the Evolving Corporate Form*, 66 U. COLO. L. REV. 855 (1995).

²⁹ See, e.g., *Mudge Rose Guthrie Alexander & Ferdon v. Pickett*, 11 F. Supp.2d 449, 451-52 (S.D.N.Y. 1998) (rejecting New York LLP’s argument that its statutorily-afforded limited liability justified treatment as a corporation for diversity purposes). The *Mudge* court reasoned that “the standard of liability by which the actions of members of an LLP are to be measure has little bearing on the proper characterization of the organization for diversity purposes.” *Id.* at 451.

³⁰ This applies equally to critiques preoccupied with the now defunct, traditional divide between the aggregate and entity theories of corporate personality. Whether a particular business organization “fits” the “aggregate” or “entity” theory only begs the question of whether these theories were conceived adequately. See, e.g., RUPA, *supra* note 1, § 201(a) (contending that partnerships seem to have “aggregate” liability for members, but “entity” capacity to own and dispose of property). As Professor Ribstein has noted, “[a]n unincorporated business association is not necessarily best characterized as either an aggregate or an entity because it combines aggregate and entity features. . . . It follows that it makes no sense to say that, because a partnership is on balance an ‘aggregate,’ it should necessarily have *only* ‘aggregate’ features, such as personal liability or direct taxation of partners.” LARRY E. RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES § 1.02, at 4 (1996) (emphasis in original).

without having to revise our conventional definitions of different types of business organizations.³¹

Part I of this article establishes the relevant jurisdictional framework by analyzing the historical bases of alienage jurisdiction. “Statelessness”³² is a problem endemic to alienage jurisdiction. As a preliminary matter, alienage jurisdiction is distinct from, but often conflated with, its more problematic relative, diversity jurisdiction.³³ Three discrete rationales supporting alienage jurisdiction can be gleaned from the Framers and modern commentary: protecting foreign relations from perceived provincialism by state courts,³⁴ guarding against the threat –

³¹ In an extremely abstract sense, this method can be, and has been, used in a diverse range of contexts. For instance, John Rawls has applied the method in an attempt to harmonize a deeply-entrenched division between retributivist and utilitarian theories of criminal punishment. See John Rawls, *Two Concepts of Rules*, in COLLECTED PAPERS 20, 23-24 (Samuel Freeman ed., 1999) (“The answer, then, to the confusion engendered by the two views of punishment is quite simple: one distinguishes two offices . . . and one distinguishes their different stations with respect to the system of rules which make up the law; and then one notes that the different sorts of considerations which would usually be offered as reasons for what is done under the cover of these offices can be paired off with the competing justifications One reconciles the two views by the time-honored device of making them apply to different situations.”).

³² The phenomenon of “statelessness” examined in this article is separate from the problem concerning persons without a country. See, e.g., *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088 (9th Cir. 1983) (individual domiciled in New York whose Soviet citizenship had been revoked upon departure); *Blanco v. Pan Am. Life Ins. Co.*, 221 F. Supp. 219 (S.D. Fla. 1963) (Cuban refugees domiciled in Florida who had renounced Cuban citizenship), *modified on other grounds*, 362 F.2d 167 (5th Cir. 1966); and *Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496 (S.D.N.Y. 1955) (individual domiciled in Portugal who had forfeited Soviet citizenship by illegally leaving country and then had Portuguese citizenship cancelled). Such persons are not citizens under their respective country’s law. The United Nations has denounced this phenomenon. See U.N. DEP’T OF SOCIAL AFFAIRS, A STUDY OF STATELESSNESS 139, U.N. Doc. E/1112, U.N. Sales No. 1949.XIV.2 (1949) (“The fact that the stateless person has no nationality places him in an abnormal and inferior position which reduces his social value and destroys his own self-confidence.”). See also generally Mark Baker, *Lost in the Judicial Wilderness: The Stateless Corporation after Matimak Trading*, 19 N.W. J. INT’L L. & BUS. 130 (1998).

³³ See Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT’L L. 1, 4 (1996) (“Careful study, including ‘rattling through dusty attics of’ the history books, however, reveals that alienage jurisdiction differs in salient respects from ordinary diversity jurisdiction.”) (quoting *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 575 (1990) (Brennan, J., concurring in part and concurring in judgment)). For an informative debate about the relative merits of diversity jurisdiction, see Richard H. Field, *Proposals on Federal Diversity Jurisdiction*, 17 S. C. L. REV. 669 (1965) (delineating and defending American Law Institute’s proposals to modify diversity jurisdiction); John P. Frank, *Federal Diversity Jurisdiction – An Opposing View*, 17 S. C. L. REV. 676, 679 (1965) (“I am opposed to this proposal to gut the diversity jurisdiction. My objection is entirely in principle. . . . There is nothing wrong with this proposal except its substance.”); and Richard H. Field, *Federal Diversity Jurisdiction – A Rebuttal*, 17 S. C. L. REV. 685, 685 (1965) (“[W]hen you have issues in a case wholly dependent upon state law . . . we feel that a case where the state judges have the last word as to what is the state law ought to be decided in the state court unless there is some good reason to have it elsewhere.”). Richard Field participated in drafting the American Law Institute’s proposals; Judge John P. Frank was one of the most vigorous supporters of diversity jurisdiction and chair of the national Committee to Maintain Diversity Jurisdiction. See, e.g., John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. LEGIS. 403, 405 (1979) (urging retention because “[d]iversity jurisdiction must be seen for what it is, a social service of the federal government”).

³⁴ See, e.g., THE FEDERALIST PAPERS NO. 80, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The Union will undoubtedly be answerable to foreign powers for the conduct of its members [I]t will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquility.”).

whether actual or apparent – of local prejudice towards foreigners,³⁵ and furthering international commercial interests.³⁶ These rationales establish the significant value of providing aliens access to federal courts.³⁷ Accordingly, Congress conferred federal courts with jurisdiction over all suits involving aliens, power of a breadth that arguably conflicted with the express terms of Article III.³⁸ The legislative “solution” to the conflict consisted of restricting alienage jurisdiction to suits where aliens were paired with United States citizens; this was accomplished by amalgamating alienage and diversity jurisdiction to co-habit the same statute.³⁹ Nevertheless, the primary criticisms advanced against diversity jurisdiction predominantly do not apply to alienage jurisdiction.⁴⁰

Part II of this article outlines the landscape of legal distinctions between corporations and unincorporated associations. Historically, tax regulations have framed our perspective on different types of business organizations. The IRS first established regulations predicated on the classic dichotomy between corporations and partnerships.⁴¹ On which side of the dichotomy a particular business organization belonged was determined by the extent it possessed the following four attributes: continuity of life, centralized management, free transferability of interest, and limited liability.⁴² Exhibiting at least three of these attributes warranted federal tax treatment as a corporation, notably the imposition of double-taxation.⁴³ Not surprisingly, this

³⁵ See, e.g., *Scott v. Sanford*, 60 U.S. (19 How.) 393, 580 (1856) (Curtis, J., dissenting) (“[The] . . . purpose [of U.S. CONST. art. III, § 2, cl. 1] was, to extend the judicial power to those controversies in to which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill will between different States, or a particular State and a foreign nation.”).

³⁶ See, e.g., 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 528 (2d ed. 1836) (James Madison) [hereinafter DEBATES] (“[F]oreigners cannot justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading with us.”); and 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 519 (M. Jensen ed., 1976) (James Wilson) (“Is it not an important object to extend our manufactures and our commerce? This cannot be done unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained unless we give the power of deciding upon those contracts to the general government.”).

³⁷ See, e.g., *Koehler v. The Bank of Bermuda (New York) Ltd.*, 229 F.3d 187, 194 (2d Cir. 2000) (en banc) (Sotomayor, J., dissenting) (“Alienage jurisdiction was established by our Constitution and early statutes to strengthen our relations . . . with foreign nations. The importance of these goals has only increased with time as both international relations and global trade have become more complex and our nation has assumed a central role in both.”).

³⁸ See, e.g., Charles Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 79 (1923) (“[B]y leaving the clause [in the Judiciary Act of 1789] as it stood, [Congress] rendered that portion of the Section, if literally interpreted, unconstitutional; and the Supreme Court, in order to hold it valid, was obliged . . . to read into it a limitation which it did not actually contain.”) (citing JOHN CARTER ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS AS LIMITED BY THE CITIZENSHIP AND RESIDENCE OF THE PARTIES 25-26 (1899)).

³⁹ Act of Mar. 3, 1875, § 1, 18 Stat. 470, 470 (1875) (authorizing federal courts to hear “controvers[ies] between citizens of different States or . . . controvers[ies] between citizens of a State and foreign states, citizens, or subjects”). Congress revised this statute in 1948, see Act of Jun. 25, 1948, ch. 646, 62 Stat. 930 (1948), in substantially the same form now codified at 28 U.S.C. § 1332.

⁴⁰ See, e.g., Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97 (“[Although] the case for abolishing diversity jurisdiction is clear . . . [t]he federal government is responsible, and is sometimes required by treaty, to provide aliens access to justice according to standard recognized in international law.”).

⁴¹ I.R.C. § 7704 (Supp. 1998).

⁴² *Id.*

⁴³ *Id.*

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formula unintentionally provided businesses with an organizational blueprint for avoiding double-taxation; tax shelters were devised whereby quasi-corporations assumed the optimal combination of attributes necessary to retain certain corporate benefits and yet be eligible for pass-through partnership tax treatment.⁴⁴ Recognizing this problem as well as the growing prevalence of hybrid forms such as the limited liability company,⁴⁵ the IRS implemented a liberal taxation scheme in which business organizations could elect how they wished to be taxed.⁴⁶ The IRS thus disengaged federal taxation of business organizations from the classic dichotomy between corporations and partnerships. The dichotomy, however, continues to be a useful tool for analyzing corporate distinctions.⁴⁷ Consistent with this fact, the attribute of limited liability is singularly effective in sifting through different types of business organizations.⁴⁸

Part III of this article proceeds to apply the jurisdictional framework to the business organization landscape. Only foreign aliens are susceptible to the phenomenon of “statelessness,” which is magnified when corporations and unincorporated associations become involved. “Statelessness” concerns deficiencies in how alienage jurisdiction applies the notion of domicile. Domicile for the purposes of alienage is derivative of established choice-of-law principles under which unincorporated associations are subject to essentially the same citizenship test for corporations. This article concludes a legal basis does exist for uniform treatment of corporations and unincorporated associations. Accordingly, Congress should amend the alienage jurisdiction statute to determine citizenship for all business organizations by their state of organization and principal place of business. As Justice Holmes once remarked, “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in [a bygone time]. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”⁴⁹

⁴⁴ See, e.g., Committee on Partnerships and Unincorporated Business Organizations, *Publicly Traded Limited Partnership: An Emerging Financial Alternative to the Public Corporation*, 39 BUS. LAW. 709, 723 (John W. Slater, Jr., ed., 1984) (“A publicly traded partnership generally has centralized management and probably has free transferability of interests . . .”); and Steven T. Limberg, *Master Limited Partnerships Offer Significant Benefits*, 65 J. TAX’N 84, 84 (1986) (“The MLP [master limited partnership], which operates as a partnership but has readily tradable units, has dramatically affected oil and gas tax planning. Because the MLP is an ‘inside shelter,’ it is becoming increasingly popular for other business offerings.”).

⁴⁵ See I.R.S. Notice 95-14, 1995-1 C.B. 297.

⁴⁶ I.R.C. § 301.7701 *et seq.*

⁴⁷ See, e.g., RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES, *supra* note 28, § 10.05(A), at 253.

⁴⁸ See, e.g., Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 89-91 (1991).

⁴⁹ Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).