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RESTORING THE RIGHT TO HAVE RIGHTS:
STATELESSNESS AND ALIENAGE
JURISDICTION IN LIGHT OF *ABU-ZEINEH*
v. FEDERAL LABORATORIES, INC.

Christine Biancheria*

The paradox involved in the loss of human rights is that such loss coincides with the instant when a person becomes a human being in general—without a profession, without a citizenship, without an opinion, without a deed by which to identify himself—and different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance.

Hannah Arendt, *THE ORIGINS OF TOTALITARIANISM*¹

INTRODUCTION

Pursuant to the United States Judicial Code (“the Code”) provision governing diversity jurisdiction over suits involving foreign parties, otherwise known as alienage jurisdiction, federal courts are empowered to hear civil actions where a “matter in controversy . . . is between citizens of a State and citizens or subjects of a foreign state”² In

* J.D., 1994, University of Pittsburgh School of Law. I would like to thank Professor Jules Lobel and Patricia A. Garber, Esq., for their invaluable assistance in preparing this article.

1. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 302 (5th ed. 1973) (commenting on the plight of stateless persons following World War II).

2. 28 U.S.C. § 1332 (1988). This text will refer to the Judicial Code provision as “the Judicial Code,” or simply “the Code,” without cross-reference to this footnote. The jurisdictional grant also is commonly known as “alienage jurisdiction,” and this text will refer to it throughout as such. Section 1332(a) provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between—

recent decades, courts interpreting this provision generally have denied access to the federal judicial system to persons considered stateless.³ On

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- (1) citizens of different States;
 - (2) citizens of a State and *citizens or subjects of a foreign state*;
 - (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
 - (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Id. (Emphasis added.) The language of the Code nearly perfectly tracks the language of the Constitution vesting federal courts with alienage jurisdiction. *See* U.S. CONST. art. III, § 2. Legislators first codified alienage jurisdiction in An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789) [hereinafter "the Judiciary Act"]. In 1875, legislators amended the Judiciary Act with an act that, in part, determines the jurisdiction of circuit courts of the United States and regulates the removal of causes from state courts. An Act to Determine the Jurisdiction of Circuit Courts of the United States, ch. 137, 18 Stat. 430 (1875). Other subsequent amendments were enacted which are largely irrelevant to this article. *See* Judicial Improvements and Access to Justice Act, 4642 Pub. L. Nos. 100-702, 102 Stat. 4642 (1988) (representing the most recent amendment to the Judiciary Act).

In the Code, the term "citizen of a State" has been construed to mean United States citizens; thus, all suits falling within the provision in question must include a United States citizen on one side and a foreign state, or citizen or subject thereof, on the other. *See infra* notes 73-95 and accompanying text (discussing the meaning of the term "citizen of a State").

3. This article applies the term "stateless" without distinction, unless otherwise helpful, to those who cannot claim the citizenship of any existing foreign state and those who are citizens of foreign states that are not formally recognized by the United States Government. Judicial decisions dealing with alienage jurisdiction have been inconsistent. *See, e.g.,* Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088 (9th Cir. 1983) (noting that, because the appellant was not a citizen of the United States, he could not be a "citizen of a state"); Sadat v. Mertes, 615 F.2d 1176 (7th Cir. 1980) (holding that the plaintiff was not a "citizen of a state"); Shoemaker v. Malaxa, 241 F.2d 129 (2d Cir. 1957) (dismissing the case because the defendant was stateless and therefore not within the jurisdiction of the court); Factor v. Pennington Press, Inc., 238 F. Supp. 630 (N.D. Ill. 1964) (stating that the plaintiff was a stateless person, and a stateless person is not a citizen of a state of the United States or of any foreign state); Blair Holdings Corp. v. Rubinstein, 133 F. Supp. 496 (S.D.N.Y. 1955) (discussing the implied right of continuing citizenship); Medvedieff v. Cities Serv. Oil Co., 35 F. Supp. 999 (S.D.N.Y. 1940) (stating that the terms "citizen" and "subject" are interchangeable). *But see* Roberto v. Hartford Fire Ins., 177 F.2d 811, 814 (7th Cir. 1949) (finding that the plaintiff was at least a "subject" of Italy where he had been a native Italian who later became a naturalized United States citizen but subsequently was deported back to Italy), *cert. denied*, 399 U.S. 920 (1950); Betancourt v. Mutual Reserve Fund Life Ass'n, 101 F. 305 (C.C.S.D.N.Y. 1900) (holding that the plaintiff was within reach of the diversity statute even though he was a resident of Cuba, which, at the time, was under United States occupation, and whose residents

the other hand, judicial outcomes have been inconsistent where a party was a citizen or subject of a state whose government or statehood was not formally recognized by the executive branch at the time of the suit.⁴ In the latter situation, some courts have undertaken a technical or wooden application of the facially plain language of the Code to conclude that a party lacking citizenship of a recognized foreign state is barred from bringing suit in United States federal courts,⁵ while others have applied the law more flexibly to permit federal jurisdiction.⁶ This inconsistency gives rise to uncertainty in litigation for stateless aliens seeking redress in United States courts.⁷ The denial of access to federal courts exacerbates existing problems experienced by persons who are deemed stateless, a legal status which "entails a most severe and dramatic deprivation of the power of the individual."⁸

were no longer subjects of Spain).

4. See, e.g., *Wilson v. Humphreys (Cayman), Ltd.*, 916 F.2d 1239 (7th Cir. 1990) (holding that alienage jurisdiction permitted the district court to assume subject matter jurisdiction over a corporate citizen of the Cayman Islands), *cert. denied*, 499 U.S. 947 (1991); *Murarka v. Bachrack Bros.*, 215 F.2d 547 (2d Cir. 1954) (holding that an Indian partnership could bring suit even though India was not formally recognized as an independent nation); *Creative Distribs., Ltd. v. Sari Niketan, Inc.*, No. 89-C-3614, 1989 U.S. Dist. LEXIS 10436 (N.D. Ill. Aug. 31, 1989) (holding that jurisdiction was proper where the plaintiff was a Hong Kong corporation, even though Hong Kong was not a recognized foreign state); *Ligi v. Regnery Gateway, Inc.*, 689 F. Supp. 159 (E.D.N.Y. 1988) (holding that a presumption of continuing citizenship applied to permit jurisdiction where the plaintiff otherwise might have been considered stateless); *Bank of Hawaii v. Balos*, 701 F. Supp. 744 (D. Haw. 1988) (holding that corporations of the Marshall Islands could bring suit even though the Islands were not strictly a foreign state, but rather a member of a trusteeship); *Chang v. Northwestern Memorial Hosp.*, 506 F. Supp. 975 (N.D. Ill. 1980) (holding that a Taiwanese national could bring suit even though Taiwan was not a recognized foreign state). *But see*, e.g., *Windert Watch Co. v. Remex Elecs., Ltd.*, 468 F. Supp. 1242 (S.D.N.Y. 1979) (holding that a Hong Kong corporation was not entitled to diversity jurisdiction because Hong Kong was not a foreign state); *World Communications Corp. v. Micronesian Telecommunications Corp.*, 456 F. Supp. 1122 (D. Haw. 1978) (holding that the citizens of the Marshall Islands were not entitled to bring suit); *Klausner v. Levy*, 83 F. Supp. 599 (E.D. Va. 1949) (denying inhabitants of Palestine access to United States federal court because Palestine was not a foreign state).

5. See *supra* note 3 (citing cases illustrating inconsistent judicial decisions on alienage jurisdiction).

6. See *supra* note 4 (citing cases permitting federal jurisdiction over parties lacking citizenship of a recognized foreign state).

7. See *supra* notes 3-4 and accompanying text (discussing inconsistent judicial decisions in the area of alienage jurisdiction).

8. Myres S. McDougal et al., *Nationality and Human Rights: The Protection of*

One of the most recent cases to determine whether the Code's provision regarding diversity jurisdiction encompasses stateless individuals or citizens of unrecognized states or governments is *Abu-Zeineh v. Federal Laboratories, Inc.*⁹ In *Abu-Zeineh*, survivors of nine deceased Palestinians brought a tort action in the United States District Court for the Western District of Pennsylvania under theories of both strict liability and negligence.¹⁰ The claims related to the manufacture of tear gas by the defendant corporation, which did business in Pennsylvania.¹¹ The nine decedents were civilians residing in the Occupied Territories of the West Bank and Gaza who allegedly were killed as a result of exposure to the gas after the Israeli military released it.¹² In December of 1994, the district court dismissed the suit on the grounds, *inter alia*, that the court lacked subject matter jurisdiction because the plaintiffs were not citizens or subjects of any recognized foreign state and, thus, were not entitled to invoke diversity jurisdiction.¹³

The purpose of this article is to demonstrate that the Judicial Code should be construed to give the *Abu-Zeineh* plaintiffs, and others who are similarly situated, the right to bring suit in United States federal courts. Particularly, this article argues that courts should interpret the Code's reach to include any person—whether stateless, or a citizen or subject of an unrecognized state or government—provided that he or she is *not* a United States citizen. This reading comports with the Code's underlying purposes and with obligations that international legal principles and domestic policy regarding statelessness impose on United States courts.

To that end, this article first examines the principles that have evolved in United States courts and in the international arena on the subject of statelessness. That examination reveals a pervasive policy condemning statelessness—a policy that should permeate application and analysis of the relevant law. Second, this article reviews the history of the Judicial Code and related constitutional provisions, thereby bringing

the Individual in External Areas, 83 YALE L.J. 900, 960 (1974).

9. *Abu-Zeineh v. Federal Labs., Inc.*, No. 91-2148 (W.D. Pa. Dec. 7, 1994). The plaintiffs filed their case in December 1991. In December 1994, the Honorable William L. Standish dismissed the matter. To date, the case is on appeal.

10. Plaintiff's First Amended Complaint for Wrongful Death at 20-21, *Abu-Zeineh v. Federal Labs, Inc.*, No. 91-2148 (W.D. Pa. Dec. 7, 1994).

11. *Id.* at 1-4. The gas, known as CS gas, consists of orthochlorobenzal-malononitrile. *Id.*

12. *Id.* at 1.

13. *Abu-Zeineh*, No. 91-2148 at 4-10.

to light two other considerations influencing judicial construction of alienage jurisdiction, namely, that (a) the purposes of the grant of jurisdiction to aliens can only be effectuated in light of modern political realities through a liberal interpretation of the jurisdictional scope; and (b) the framers of the Code and the corresponding constitutional provision were unfamiliar with the phenomenon of statelessness, but their intent was to include *all* aliens within the Code's reach. Thereafter, this article analyzes the application of the Code to *Abu-Zeineh* and discusses relevant case law. The article concludes with proposals for judicial construction of the Code that would permit United States federal courts to hear all, or nearly all, cases involving alienage jurisdiction, thereby resolving uncertainties that have resulted from inconsistent court decisions.

I. INTERNATIONAL LEGAL PRINCIPLES AND FEDERAL POLICY

Interpretation of the alienage jurisdictional grant must include consideration of international as well as federal law and policy, which uniformly decry the condition and designation of individuals as stateless.¹⁴ This analysis requires at a minimum that United States courts construe the Code with a preference for finding that alien plaintiffs possess the citizenship of at least one foreign state for the narrow purpose of determining the existence of diversity jurisdiction.

A. INTERNATIONAL LEGAL NORMS

It has long been established, since the 1804 pronouncement of the United States Supreme Court in *Murray v. The Schooner Charming Betsy*,¹⁵ that "[a]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."¹⁶ This is because "[i]nternational law is part of our law,

14. See *infra* notes 15-48 and accompanying text (discussing international legal norms).

15. 6 U.S. (2 Cranch) 64 (1804).

16. *Id.* at 118; see, e.g., *TransWorld Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984) (stating that legislative silence is not sufficient to abrogate a treaty); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (holding that the purpose of abrogating Indian treaty rights is not to be imparted to Congress); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (holding that the jurisdiction of the National Labor Relations Act does not extend to

and must be ascertained and administered by the courts of justice. . . ."¹⁷ Sources from which to ascertain international legal principles typically include treaties and conventions, legislative and executive enactments and orders, judicial decisions, and "the customs and usages of civilized nations, and, as evidence of these, . . . the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."¹⁸

Nearly fifty years ago, the United Nations (U.N.) issued a study denouncing statelessness, finding that "[t]he fact that the stateless person has no nationality places him in an abnormal and inferior position which reduces his social value and destroys his own self-confidence."¹⁹ One commentator has observed that "[s]tatelessness, at best, creates an unhappy lot for the individual, a vexatious problem for the nation and an undesirable phenomenon in modern civilization, where every person has a right to expect the privileges and perform the duties incident to full citizenship status."²⁰

The plight of stateless persons has motivated, in whole or in part, the creation of numerous U.N. conventions and other efforts to alleviate the problem.²¹ Reduction and elimination of statelessness were major con-

foreign flagged ships); *cf.* *United States v. The Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (pointing out that courts will go to great lengths to construe domestic statutes so as to avoid conflict with international agreements).

17. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

18. *Id.*

19. UNITED NATIONS DEP'T OF SOCIAL AFFAIRS, A STUDY OF STATELESSNESS at 139, U.N. Doc. E/1112, U.N. Sales No. 1949.XIV.2 (1949).

20. CATHRYN SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES 253 (1934); *see, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.16 (1963) (alluding to the "drastic consequences [and] evils of statelessness" and citing the Report of the President's Commission on Immigration and Naturalization of 1953); PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 126-29 (2d ed. 1979) (commenting on the status of being stateless); Ellen H. Greiper, Note, *Stateless Persons and Their Lack of Access to Judicial Forums*, 11 BROOK. J. INT'L L. (1985) (commenting on the problems encountered by individuals who are stateless).

21. *See, e.g.*, *Second Report on the Elimination or Reduction of Statelessness* [1953] 2 Y.B. INT'L L. COMM'N 196, U.N. Doc. A/CN.4/75; Convention on the Reduction of Statelessness, entered into force Dec. 13, 1975, 989 U.N.T.S. 175, reprinted in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS 273 (1988) [hereinafter HUMAN RIGHTS]; Convention Relating to the Status of Stateless Persons, entered into force June 6, 1960, 360 U.N.T.S. 130, reprinted in HUMAN RIGHTS, *supra*, at 282; Protocol Relat-

cerns at the Hague Conference for the Codification of International Law in 1930.²² In response to the crisis, international law, as evidenced by Article 15 of the Universal Declaration of Human Rights, declares that "[e]veryone has the right to a nationality."²³ The Declaration specifically contemplated the resolution of problems associated with statelessness. Although the initial draft only provided for the protection of retention and change of nationality, which presumed a nationality, the drafters later included the right to a nationality in the final declaration due to their realization that the draft would exclude stateless persons.²⁴

To effectuate the right to a nationality, international law has encroached on what once was considered a purely domestic affair, the conferral of citizenship and nationality.²⁵ For instance, the Inter-American Court of Human Rights has held:

It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the States in that area, and that the manner in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the State are also circumscribed by the obligations to ensure the full protection of human rights.²⁶

ing to the Status of Refugees, *entered into force* Apr. 22, 1954, 189 U.N.T.S. 137, *reprinted in* HUMAN RIGHTS, *supra*, at 63.

22. See Protocol Relating to a Certain Case of Statelessness, Apr. 12, 1930, 179 L.N.T.S. 115.

23. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); see *American Convention on Human Rights*, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978), *reprinted in* 9 I.L.M. 673 (1970); see also *Hague Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws*, *opened for signature* Apr. 12, 1930, 179 L.N.T.S. 89 (entered into force July 1, 1937).

24. See Debates of the Third Committee, U.N. GAOR, 3d Comm., 123d mtg., U.N. Doc. A/C.31/SR (1948); see also Johannes M. M. Chan, *The Right to a Nationality as a Human Right: The Current Trend Towards Recognition*, 12 HUM. RTS. L.J. 1 (1991) (tracing the historical trend of recognizing a right to nationality as a fundamental human right).

25. See *Murarka v. Bachrack Bros., Inc.*, 215 F.2d 547, 553 (2d Cir. 1954) (finding that the conferral of citizenship is typically a domestic area of law); *Ligi v. Regnery Gateway, Inc.*, 689 F. Supp. 159, 161 (E.D.N.Y. 1988) (stating that it is every country's inherent right to determine who its citizens are).

26. Amendments to the Naturalization Provisions of the Constitution of Costa

Moreover, the Restatement of Foreign Relations states that international law has increasingly "accepted some limitations on involuntary termination of nationality, both to prevent statelessness, and in recognition that denationalization can be an instrument of racial, religious, ethnic or gender discrimination, or of political repression."²⁷

International bodies circumscribed the authority of sovereigns to revoke citizenship by devising a rule of continuing nationality to reduce the incidence of statelessness.²⁸ Accordingly, international law recognizes a right to nationality, and requires that the "loss of nationality subsequent to birth . . . be conditional on the acquisition of another nationality."²⁹ While some commentators, nonetheless, have argued that a sovereign's competence to confer or revoke nationality is unlimited,³⁰ it was recognized over twenty years ago that,

[while these views] may accurately reflect the expectations of the past, they certainly do not represent community expectations of the present and probable future It has long been agreed that a state could not deprive individuals of nationality and then expel them to other states. The fundamental community policy of minimizing statelessness has had general and intensifying support. The emerging peremptory norm (*jus cogens*) of nondiscrimination will . . . make unlawful many types of denationalization. In sum, the whole complex of more fundamental policies for the protection of human rights, as embodied, for instance, in the United Na-

Rica, Advisory Opinion No. OC-4/84, Inter-Am. C.H.R. ¶ 32 (Jan. 19, 1984), *reprinted in* 5 HUM. RTS. L.J. 161, 167 (1984).

27. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 211(e) (1987).

28. *See, e.g.*, Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws, *supra* note 23, at 101 (stating that, "[i]nsofar as the law of a state provides for the issue of an expatriation permit, such a permit shall not entail the loss of the nationality of the state which issues it, unless the person to whom it is issued possesses another nationality or unless and until he acquires another nationality"); Convention on the Reduction of Statelessness, *supra* note 21, art. 7(1)(a) (similar provision); Draft Inter-American Convention on Human Rights, Sept. 22, 1969, OEA/Ser.K/XVI/1.1, Doc. 18, *reprinted in* 1968 INTER-AM. Y.B. HUM. RTS. 169 (1973) (stating that "[e]very person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality"); European Convention on the Adoption of Children, Apr. 26, 1967, 634 U.N.T.S. 256, *reprinted in* 7 I.L.M. 211 (1968); M. Hudson, *Report on Nationality, Including Statelessness* [1953] 2 Y.B. INT'L L. COMM'N 3, U.N. Doc. A/CN.4/50; McDougal, *supra* note 8, at 900.

29. Hudson, *supra* note 28, at 10.

30. *See id.* (commenting on the extent of the sovereign's authority to revoke nationality).

tions Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights and other related instruments and programs, global as well as regional, may eventually be interpreted to forbid use of denationalization as a form of "cruel, inhuman and degrading treatment or punishment."³¹

Accordingly, because international law is part of United States law,³² United States federal and state courts are obligated to interpret the Judicial Code's grant of alienage jurisdiction in harmony with the rule of international law providing that all individuals have a right to a nationality and may not be deprived thereof without the establishment of another.³³

B. FEDERAL LAW AND POLICY

Chief Justice Earl Warren definitively condemned the condition of statelessness in the landmark case of *Trop v. Dulles*.³⁴ *Trop* held that a statute providing for expatriation as a punishment for military desertion was unconstitutional as a form of cruel and unusual punishment in violation of the Eighth Amendment.³⁵ While the Court concluded that the death penalty in such instances did *not* violate the Eighth Amendment, the Court struck down the expatriation provision, finding that rendering an individual stateless through denationalization

is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself In short, the expatriate has lost the right to have rights

It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him

31. McDougal, *supra* note 8, at 949-50.

32. See *supra* notes 17-18 and accompanying text (discussing the adoption of principles of international law by the United States).

33. Even if it is assumed, as few commentators have argued, that the policy of providing for at least one state's citizenship to all persons has not risen fully to the level of international law, courts, rather than attempting to effectuate a dead or dying maxim of absolute state sovereignty, should be guided by this recognition of modern-day consensus and construe the Judicial Code with a presumption in favor of an individual's possessing a nationality as against his or her being stateless. See Hudson, *supra* note 28, at 10 (arguing that the policy of providing for at least one state's citizenship to all persons has not risen to level of international law).

34. 356 U.S. 86 (1958).

35. *Id.*

He is stateless, a condition deplored in the international community of democracies.³⁶

In recognition of this policy, courts, in various contexts, have essentially constructed a presumption of nationality where to do otherwise might result in a finding of statelessness.³⁷

In *Kennedy v. Mendoza-Martinez*,³⁸ the Supreme Court, again denouncing the evils of statelessness, declared unconstitutional, as a form of cruel and unusual punishment, a statute permitting denationalization of persons who had left or remained outside of the United States in an effort to evade military service.³⁹ Noting the "drastic consequences of statelessness," the Court found that the treatise writers unanimously have disapproved of statutes which denationalize individuals without regard to whether they possess dual nationality.⁴⁰

The Supreme Court implicitly applied a rule of presumed nationality in *Afroyim v. Rusk*.⁴¹ There, the Court held that the United States Constitution forbids depriving a United States citizen's "citizenship which he has never voluntarily renounced or given up."⁴² The *Afroyim* Court concluded that the petitioner, a naturalized citizen of the United States, would not lose his United States citizenship, even though he had gone to Israel and voted in a Knesset election, unless it was found that he had voluntarily relinquished his citizenship.⁴³ The Court adopted the view of former Chief Justice Earl Warren that "[c]itizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen."⁴⁴

36. *Id.* at 101-02; see *Guerrero v. United States*, 691 F. Supp. 260, 263 (D.N. Mariana Islands 1988) (finding that citizenship is a fundamental right and that denaturalization results in the deprivation of the individual's place in the national and international community).

37. See *infra* notes 38-43 and accompanying text (discussing the approach taken by some courts to construct a presumption of nationality).

38. 372 U.S. 144 (1963).

39. *Id.*

40. *Id.* at 161 n.16.

41. 387 U.S. 253 (1967).

42. *Id.* at 256; see *Davis v. District Director, Immigration and Naturalization Service*, 481 F. Supp. 1178 (D.D.C. 1979) (finding that affirmative renunciation of nationality, on the other hand, will produce a result of statelessness).

43. *Afroyim v. Rusk*, 387 U.S. 253, 256-58 (1967).

44. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting) (emphasis added).

In other contexts, federal courts have applied principles relating to citizenship in a flexible manner to avoid the unjust results that follow a finding of statelessness. In *Guerrero v. United States*, a United States district court ordered the United States Government to issue a passport to a resident of the former trust territories of the Northern Mariana Islands even though President Ronald Reagan had terminated the trusteeship.⁴⁵ The district court specifically cited the "extremely unfortunate" result that would follow from a contrary holding; namely, that the residents would then be stateless and unable to leave the islands for lack of passports.⁴⁶

In another recent case, the United States Court of Appeals for the Sixth Circuit set aside a previous order extraditing Ivan Demjanjuk after he was acquitted in Israel of charges related to his suspected role in operating a Treblinka concentration camp during World War II.⁴⁷ The court, in justifying its holding, wrote:

[T]his Court by its order caused Demjanjuk to be sent to Israel where he was placed under a death sentence and risked being executed for a crime of which the Supreme Court of Israel has found him not guilty. As a result, Demjanjuk is now stateless and homeless. While this Court proceeds to unravel the legal ramifications of this unprecedented case, . . . basic humanitarian considerations embodied in our Constitution and in the Universal Declaration on Human Rights require that steps be taken to insure that Demjanjuk is not injured or rendered permanently homeless.⁴⁸

Clearly, both federal and international law and policy condemn statelessness. These considerations should inform interpretation of the Code and require that it be construed flexibly so as to avoid a result in which a party is denied access to the courts on the basis of a finding of statelessness. In determining the Judicial Code's meaning, the stance of federal and international law and policy toward statelessness should remain a paramount consideration because legislators granted alienage jurisdiction precisely to ensure the rights of aliens in United States courts. Thus, such a reading of the Judicial Code also accords with the underlying purpose of the grant of alienage jurisdiction itself.

45. See *Guerrero v. United States*, 691 F. Supp. 260 (D.N. Mariana Islands 1988) (requiring the United States to give a passport to a stateless person).

46. *Id.* at 262.

47. See *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993) (returning a stateless person to the United States after previous extradition).

48. *Id.* at 340; see *infra* notes 145-50 and accompanying text (discussing the development of a presumption of continuing nationality).

II. THE PURPOSES AND INTENDED REACH OF ALIENAGE JURISDICTION

The provision of alienage jurisdiction was meant, at least in part, to afford aliens a federal forum free of the local bias thought to lurk in state courts.⁴⁹ In providing such a forum, the drafters of the Code and the corresponding constitutional provision, unfamiliar with the problem of statelessness, thought they had included all non-Americans within the Code's reach.⁵⁰ The Code's purposes, coupled with its intended reach, clearly militate in favor of a more expansive interpretation of the law's language than generally has occurred to date.

A. THE PURPOSES OF ALIENAGE JURISDICTION

Two interrelated concerns have motivated the framers of the Constitution to create federal alienage jurisdiction. First, the framers feared that state courts would not be fair in their handling of matters involving foreigners.⁵¹ James Wilson initially broached the topic at the Pennsylvania Ratifying Convention, asking whether alienage jurisdiction was "necessary [so] that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort."⁵²

Chief Justice John Marshall, in 1809, expounded this point:

The judicial department was introduced into the American Constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehension on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.⁵³

49. See *infra* notes 51-55 and accompanying text (discussing the use of the federal forum as an impartial tribunal for aliens).

50. See *infra* notes 52-56 and accompanying text.

51. See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen ed., 1976) (discussing the framer's intent of using federal jurisdiction for matters involving aliens); see also CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS 2d § 3604, at 383 (1984) (discussing the framer's view of perceived prejudice of state courts toward foreigners).

52. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 51, at 519.

53. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809),

In enacting the Judiciary Act of 1789, the First Congress codified alienage jurisdiction, relying on the rationale that federal jurisdiction was necessary to avoid prejudice against the alien in state courts.⁵⁴ As one notable scholar described it:

The chief and only 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.⁵⁵

A second, related impetus for establishing alienage jurisdiction lay in the hope of avoiding entanglements with foreign sovereigns.⁵⁶ Former Chief Justice Joseph Story, in discussing the constitutional provisions for alienage jurisdiction, noted that the framers extended alienage jurisdiction in these cases "because, as every nation is responsible for the conduct of its citizens toward other nations, all questions, touching the justice due to foreign nations or people, ought to be ascertained by and depend on national authority."⁵⁷ A federal district court in Illinois proffered a more modern articulation of this proposition in finding that alienage jurisdiction "was intended to provide the federal courts with a form of protective jurisdiction over matters possibly implicating interna-

overruled in part by *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844). The House Committee on the Judiciary echoed these concerns as recently as 1982 as a reason for continuing to provide for alienage jurisdiction: "It was the view of the Committee that there is still a real danger of prejudice, in any form, against the alien." H.R. REP. NO. 97-808, 97th Cong., 2d Sess. 12 (1982).

54. See *infra* note 55 and accompanying text (asserting that diverse citizenship created a tribunal free of local prejudices toward foreigners).

55. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1932); see Pennsylvania Ratifying Convention, reprinted in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 492-93 (Jonathan Elliot ed., 2d ed. 1866) (statement of James Wilson) [hereinafter THE DEBATES] ("nor is it anything but justice: [foreigners] ought to have the same security against the state laws that may be made, that the citizens have . . .").

56. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed. 1891); see also THE FEDERALIST No. 80, at 588-89 (Alexander Hamilton) (B. Wright ed., 1961).

57. STORY, *supra* note 56, at 482.

tional relations.”⁵⁸ Certain evidence gives rise to the inference that, at the time of its creation, the framers specifically sought to have alienage jurisdiction ensure the continuance of international extensions of credit by preventing debtor-controlled states from rendering biased decisions against alien creditors.⁵⁹ In any event, it is clear that the fear of affronting foreign powers was, to a large extent, a motivating factor in the establishment of such jurisdiction.

To vindicate the legislative purpose of ensuring alien protection from state-court bias, the grant of alienage jurisdiction should logically extend its welcome to all aliens regardless of statehood. To be sure, avoiding entanglements with foreign sovereigns does not argue for the same breadth of interpretation as does the Code's purpose of providing aliens with an impartial judicial forum. Yet, when read together with the Code's intent to protect against state bias, the obligations of the United States under the law of nations, and the modern political reality of the fluidity of statehood and recognition thereof, the prudent course for construction can only be one of equal breadth. The *Abu-Zeineh* case brings this necessity into focus.

B. THE INTENDED REACH OF THE JUDICIARY ACT

The plain language of the Code and the Constitution, requiring alien parties to be citizens or subjects of a foreign state, if viewed in isolation, appears to support a view that stateless persons are not included within its reach. However, as Judge Patricia Wald of the United States Court of Appeals for the District of Columbia has written:

[A]lthough the Court still refers to the “plain meaning” rule, the rule has effectively been laid to rest. No occasion for statutory construction now exists when the Court will *not* look at the legislative history. When the

58. *Chang v. Northwestern Memorial Hosp.*, 506 F. Supp. 975, 977 n.1 (N.D. Ill. 1980); *see, e.g., Sadat v. Mertes*, 615 F.2d 1176, 1182 (7th Cir. 1980) (stating: “Thus, alienage jurisdiction was intended to provide the federal courts with a form of protective jurisdiction over matters implicating international relations where the national interest is paramount”); *Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496, 500 (S.D.N.Y. 1955) (discussing the “dominant considerations which prompted the provision for [alienage] jurisdiction”); THE FEDERALIST No. 80, *supra* note 56.

59. *See generally*, HOUSE JUDICIARY COMM., ABOLITION OF DIVERSITY OF CITIZENSHIP JURISDICTION, H.R. Rep. No. 893, 95th Cong. 2d Sess. 2 (1978) (noting that protection of foreign creditors gave rise to federal jurisdiction for aliens); Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 553-62 (Fall 1989) (discussing the importance of debts owed by Great Britain).

plain meaning rhetoric is invoked, it becomes a device not for ignoring legislative history but for shifting onto legislative history the burden of proving that the words do not mean what they appear to say Words do mean different things in different contexts To stop at the purely literal meaning of a word, phrase, or sentence—if indeed the purely literal meaning can be found—ignores reality.⁶⁰

The preeminent Judge Richard A. Posner postulated that when speaking of the “plain meaning” of the words of a statute, it must be borne in mind that “[i]t is not that the words are plain, it is that the words, read in *context* as words must always be read in order to yield meaning, do not authorize any interpretations except the obvious one.”⁶¹ Other scholars focusing on statutory interpretation have posited that ascertaining the general purpose of a statute can serve as a surrogate for discerning the actual intent of the relevant legislature.⁶² Furthermore, constrained adherence to what appears to be plain language disserves the statutory purposes of avoiding entanglements with foreign sovereigns and offering an impartial judicial forum to the alien.

A legislature, when drafting laws, clearly cannot anticipate all future circumstances, thus necessitating a more dynamic method of statutory interpretation.⁶³ At the time of the writing of the Constitution and the enactment of the Judiciary Act of 1789 (and its revision in 1875), the phenomena of statelessness was virtually unknown.⁶⁴ In fact, the prob-

60. Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 199 (1983) (emphasis added).

61. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 819 (1983) (emphasis added). See generally *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785 (2d Cir. 1946) (Learned Hand, J.) (discussing the canons of interpreting ambiguous language), *aff'd*, 328 U.S. 275 (1946); *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985) (discussing the canon of statutory construction which holds that a statute should be interpreted so as not to render one part inoperative).

62. HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (10th ed. 1958).

63. See generally RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (discussing an alternative method of statutory interpretation).

64. See *Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496, 501 (S.D.N.Y. 1955) (noting that “problems associated with [the status of stateless persons] are of recent vintage”); see also Lawrence Preuss, *International Law and Deprivation of Nationality*, 23 GEO. L. J. 250, 264 (1934-35) (discussing the emergence of the problems associated with statelessness); cf. ARENDT, *supra* note 1, at 267-302.

lems of statelessness did not emerge as a significant issue until after World War I.⁶⁵

Judge Posner has set forth a method of statutory interpretation to be applied where it appears that a statute's enacting legislature failed to contemplate problems later arising within the statute's domain.⁶⁶ Where such a situation is presented, wrote Posner,

a two-part approach [is suggested]. First, the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him. This is the method of imaginative reconstruction. If it fails, . . . then the judge must decide what attribution of meaning to the statute will yield the most reasonable result in the case at hand⁶⁷

History offers several clues as to how the Code's and the Constitution's drafters might have construed the language of the provision for alienage jurisdiction. Taken together, these clues form a background against which to interpret the law.

First, it is probable that, given the general unfamiliarity with the phenomenon of statelessness at the time of the framing of the Constitution and the enactment of the Judiciary Act of 1789, the framers and their contemporaries thought that they had encompassed *all* aliens when speaking of "citizens or subjects of foreign states."⁶⁸ The First Congress, which enacted the Judiciary Act of 1789, was comprised in large part of members of the Constitutional Convention of 1787, and their contemporaneous statements must be viewed as "weighty evidence of [the Constitution's] true meaning."⁶⁹

Perhaps the strongest evidence that the framers contemplated inclusion of all aliens in the grant of jurisdiction lies in the original phrasing of

65. McDougal, *supra* note 8, at 951 ("remarking that [b]efore [World War I] stateless persons were relatively few and national frontiers were usually open").

66. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

67. *Id.* at 286-87.

68. This view is supported by their frequent use of the terms "citizens or subjects of foreign states" interchangeably with "foreigners" and "aliens." See *THE DEBATES*, *supra* note 55, at 492-93 (discussing equal treatment of both foreigners and citizens in courts); *Van der Schelling v. U.S. News & World Report*, 213 F. Supp. 756, 759-60 (E.D. Pa.), *aff'd*, 324 F.2d 956 (3d Cir. 1963), *cert. denied*, 377 U.S. 906 (1964) (analyzing the framers' intent regarding the purpose of a national forum, and for whom it was intended).

69. *Van der Schelling*, 213 F. Supp. at 759-60 n.3 (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888), *overruled in part by Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935)).

the Judiciary Act of 1789, codifying alienage jurisdiction as provided for in the Constitution. Initially, the Act permitted suit in federal court in any civil action involving more than \$500, exclusive of costs, "where an alien is a party" without any apparent qualification.⁷⁰ Moreover, Chief Justice Joseph Story, in reviewing the jurisdictional provisions of the Constitution in 1891, wrote: "The inquiry may here be made, who are to be deemed aliens entitled to sue in the courts of the United States? The general answer is, any person who is not a citizen of the United States."⁷¹

In 1875, the legislators amended the Judiciary Act of 1789 and altered the provision granting federal jurisdiction "where an alien is a party" to conform with the language of the Constitution.⁷² The amended provision stated that the federal district courts could exercise jurisdiction over suits between "citizens of a State, and foreign states or citizens or subjects thereof."⁷³ This change, however, should not determine whether the first Act was meant to include all aliens, because the catalyst for this change arose in a wholly unrelated context.⁷⁴

The recurrence of cases in which aliens attempted to sue other aliens in United States federal courts served as an impetus for the revision.⁷⁵ The language of the original Judiciary Act of 1789 appeared, at first

70. See THE DEBATES, *supra* note 55, at 492-93.

71. STORY, *supra* note 56, at 499. The United States District Court for the Southern District of New York, in *Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496, 500, mistakenly concluded that the term "aliens" was not synonymous with "non-citizens" on the grounds that, in *Wilson v. City Bank*, 30 F. Cas. 116 (C.C.D. Mass. 1838) (No. 17,797), Justice Story "sustained a demurrer to a bill that alleged merely that the plaintiffs were of London . . . and aliens to [the United States], stating 'the bill ought to have alleged that the plaintiff was a subject or citizen of some one foreign state.'" This conclusion is errant both in light of Justice Story's explicit remarks to the contrary as cited above and also because, as previously discussed, statelessness was not a known concept at the time of Story's writing. Therefore, Story's comments in *Wilson v. City Bank* cannot be taken to mean that stateless persons are excluded from the language of the Constitution. Apparently, Justice Story, in that case, was merely seeking closer conformity of the bill with the language of the grant of alienage jurisdiction in the Constitution.

72. See U.S. CONST. art. III, § 2.

73. See 28 U.S.C. § 1332 (1988); see also *supra* note 2 (quoting the Judicial Code).

74. See *infra* notes 80-87 and accompanying text (asserting that change to the Judiciary Act of 1789 did not reveal that the original act excluded some aliens).

75. See *Pooley v. Luco*, 72 F. 561 (C.C.S.D. Cal. 1896) (No. 657) (citing cases in which aliens have attempted to sue other aliens in United States courts); WRIGHT, *supra* note 51, § 3604 at 384-85 (same).

blush, to permit such a suit although the courts consistently concluded otherwise.⁷⁶ This amended provision changed the law only insofar as it clarified that a controversy, to be justiciable in federal court, must be one between a *United States citizen and an alien* before diversity jurisdiction may be invoked.⁷⁷ Judge Samuel Blatchford of the United States District Court for the Southern District of New York clearly explained this alteration in the 1879 case of *Cissel v. McDonald*,⁷⁸ where he wrote:

In *Prentiss v. Brennan*, Mr. Justice Nelson says, speaking of section 11: "This act is defective in respect to the jurisdiction conferred upon the circuit courts in the case of aliens, as it would seem, from its language, that it might be sufficient to give jurisdiction to the court, if one of the parties was an alien. Construing it, however, in connection with the provision of the constitution, there can be no difficulty as to the meaning intended by congress [T]he suit must be one in which a citizen of a State and an alien are parties." The above defects in sections 11 and 12 of the act of 1789 are corrected in the act of March 3d, 1875.⁷⁹

Accordingly, the 1875 amendment effected no relevant or fundamental alteration in the provision of jurisdiction for "aliens" by replacing the term "aliens" with the apparent equivalent: "citizens or subjects [of foreign states]."⁸⁰

76. See *Pooley*, 72 F. 561 (determining that courts do not have jurisdiction over cases where both parties are aliens).

77. The *Pooley* court noted as follows:

It has long since been settled that an action between aliens only cannot be maintained in the circuit court; that the language of the judiciary act giving jurisdiction "where an alien is a party," must be restrained within the terms of the Constitution, which only "extends judicial power" to an action between an alien and a citizen of a state of the United States. When both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case.

Pooley, 72 F. at 561 (quoting *Hinkley v. Byrne*, 12 F. Cas. 194, 195-96 (C.C.S.D. Cal. 1867) (No. 6,510)); see *Hervey v. Illinois Midland Ry. Co.*, 12 F. Cas. 60, 61 (C.C.S.D. Ill. 1876) (No. 6,434) (stating that with regard to "the act of the 3d of March, 1875, . . . [n]ow 'citizens of a state' there means citizens of one of the United States, and the suits contemplated are suits between citizens of one of the states of the Union on one side and foreign states or citizens or subjects on the other").

78. 5 F. Cas. 717 (C.C.S.D.N.Y. 1879) (No. 2,729).

79. *Id.* at 718 (citations omitted) (quoting *Prentiss v. Brennan*, 19 F. Cas. 1278, 1279 (C.C.N.D.N.Y. 1851) (No. 11,385)).

80. It would even appear that, in general, revision of the Act in 1875 actually

Interestingly, Justice William Paterson, also a member of the 1787 Convention, provided posterity with an added insight in determining how the original lawmakers might have handled a claim of statelessness in the context of alienage jurisdiction. Paterson was confronted with something akin to a claim of statelessness in a case that reached the high court in 1795.⁸¹ To Paterson, though, the creation of a "citizen of the world" was unfathomable; he wrote that such a concept was "a creature of the imagination, and far too refined for any republic of ancient or modern times."⁸² If, however, there were such a "citizen of the world," explained the Justice, his or her status would "impl[y] amenability to every tribunal."⁸³

Also consonant with this broader reading of the statute is the likelihood, though it is difficult to prove, that the framers and their contemporaries viewed the term "subject" of a state more expansively than has the modern judiciary. Currently, courts tend to view "citizen" and "subject" as equivalent in scope, distinguishing between the two terms only with respect to the form of government they connote, a republic and a monarchy, respectively.⁸⁴ In the period following the American Revolution, however, there does not seem to have been such a difference in connotation. In 1817, for instance, the United States Supreme Court, in construing the terms of the Spanish Treaty of 1795, found that:

[I]n the 18th article of the treaty, the terms "subject," "people," and "inhabitants," are indiscriminately used as synonymous, to designate the

broadened federal powers in this arena, and should be construed in that light. *Cf.* Warren, *supra* note 55, at 91 (commenting on revisions of the Judiciary Act between 1789 and 1815). Popular conceptions of the "alien" have been broadly defined. *See* Uyeno v. Acheson, 96 F. Supp. 510, 515 (W.D. Wash. 1951) (writing that, even today, "the average American, when he speaks of a 'foreigner' means an alien, non-American"); *see also* Medvedieff v. Cities Serv. Oil Co., 35 F. Supp. 999, 1002 (S.D.N.Y. 1940) (stating that "[i]t is to be remembered that the Colonials . . . recognized all aliens as 'citizens' or 'subjects'"). The district court for the Southern District of New York in *Medvedieff*, however, also determined that the plaintiff, a Russian native who then became a naturalized citizen of Italy, could not be considered a citizen or subject of Italy. *Id.* The court reasoned that he had been sufficiently denationalized by a decree of the Italian King stripping citizenship from "foreign Hebrews." *Id.*

81. *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795).

82. *Id.* at 153.

83. *Id.*

84. *See* Van der Schelling v. U.S. News and World Report, 213 F. Supp. 756, 760 n.3 (E.D. Pa.), *aff'd*, 324 F.2d 956 (3d Cir. 1963), *cert. denied*, 377 U.S. 906 (1964); *see also* *Medvedieff*, 35 F. Supp. at 999.

same persons in both countries Indeed, in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, while he resides in it; temporarily, indeed, if he has not, by birth or naturalization, contracted a permanent allegiance⁸⁵

In a more negative vein, one might have been considered a subject of a state, even if not its citizen, by virtue of subjugation to that state's government or laws.⁸⁶ More precisely, as *Webster's Dictionary* defines the term, "subject may imply a state of subjection to a person, as a monarch, without much sense of membership in a political community or sharing in political rights."⁸⁷

In the notorious *Dred Scott v. Sandford*⁸⁸ decision, the Supreme Court held that black inhabitants of the United States were not citizens of the United States.⁸⁹ The Court concluded that the framers of the Constitution drew the line of distinction between the citizens and the subject; the free and the subjugated races.⁹⁰ Blacks, to the Court, were something less than citizens, whom whites "governed as subjects with absolute and despotic power."⁹¹

At her 1873 sentencing hearing, following her conviction for violations related to her campaign for women's suffrage, Susan B. Anthony made similar use of the term "subject."⁹² The court had rejected

85. *The Pizarro*, 15 U.S. (2 Wheat) 227, 245-46 (1817).

86. See *infra* notes 93-100 and accompanying text (discussing the court's analysis of plaintiff's citizenship with respect to diversity jurisdiction).

87. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 411 (14th ed. 1961) (distinguishing citizen and subject); see *Pizarro*, 15 U.S. at 275 (stating that a subject is "one that is placed under the authority, dominion, control or influence of someone"); see SPINOZA, TRACTATUS POLITICUS c. 3 (1677) (stating that "[w]e call men Citizens, as far as they enjoy by the civil law all the advantages of the Commonwealth and Subjects as far as they are bound to obey its ordinances or laws"); cf. Maximillian Koessler, "Subject," "Citizen," "National," and "Permanent Allegiance," 56 YALE L.J. 58 (1946) (describing a status of relation to a state that does not rise to the level of citizenship).

88. 60 U.S. (19 How.) 393 (1857).

89. *Id.*

90. *Id.* at 419.

91. *Id.* at 409. This is consistent with distinctions made by Attorney General Cashing, who considered blacks "subjects" of both the various states and the United States. 8 Op. Att'y Gen. 139, 142 (1957).

92. See *supra* note 91 and *infra* notes 93-96 and accompanying text (discussing the difference between citizens and subjects).

Anthony's defense that the Fourteenth Amendment granted women the right to vote, regardless of state law,⁹³ and in a heated exchange with the court, Anthony stated:

[I]n your ordered verdict of guilty, you have trampled under foot every vital principle of our government. My natural rights, my civil rights, my political rights, my judicial rights, are all alike ignored. Robbed of the fundamental privilege of citizenship, I am degraded from the status of a citizen to that of a subject; and not only myself individually, but all of my sex, are, by your honor's verdict, doomed to political subjection under this, so-called, form of government.⁹⁴

In sum, it would appear that the Code and the corresponding provisions of the Constitution were written without contemplation of stateless persons. This article analyzes the policies behind the grant of jurisdiction as well as the evidence of the contextual meaning of its terms, and concludes that the framers would likely have allowed the exercise of jurisdiction over suits between United States citizens and *all* aliens, regardless of their status, as long as they were clearly non-United States citizens.

Moreover, this conclusion is consistent with the purpose of alienage jurisdiction to protect alien parties from state bias. This proposition gains added force in light of developments in international and domestic policies condemning statelessness. Further, as Judge Posner wrote, even if efforts to imaginatively reconstruct legislative intent fail, courts should attempt to construe the law (here, the diversity statute) in a manner that would achieve the most reasonable results.⁹⁵ *Abu-Zeineh* provides a case study from which to gauge the best interpretation of the law.

III. ANALYSIS IN LIGHT OF *ABU-ZEINEH*

In light of *Abu-Zeineh*, the wisdom of interpreting the Code to include those persons considered stateless is apparent.

93. *United States v. Anthony*, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No., 14,459).

94. *RADICAL FEMINISM* 17-19 (Koedt, Levin & Firestone eds. 1973).

95. See POSNER, *supra* notes 66-68 and accompanying text (noting that, by using the terms "citizens" or "subjects" of foreign states interchangeably with "foreigners" and "aliens," the first United States Congress intended to encompass all aliens).

A. BACKGROUND

Represented by their survivors, the *Abu-Zeineh* plaintiffs are nine deceased Palestinians, all of whom were civilians allegedly killed after inhaling CS gas, a type of tear gas, fired at them by the Israeli military.⁹⁶ All died while engaging in typical activities of daily life, such as shopping for vegetables at a Hebron City market and watching television at home.⁹⁷

The gas was manufactured by Federal Laboratories in Pennsylvania and sold to Israel.⁹⁸ In their 1991 complaint, filed with the United States District Court for the Western District of Pennsylvania, the plaintiffs alleged that Federal Laboratories knew that Israel was using the gas in an unlawful, lethal manner, but continued, negligently, to sell the gas to Israel.⁹⁹ Moreover, the plaintiffs asserted that Federal Laboratories failed to provide adequate warning of the true lethal dangers of CS gas, which they maintained was defective and unfit for its intended use as a "riot control" weapon.¹⁰⁰ Therefore, the plaintiffs concluded, Federal Laboratories should be held responsible for the plaintiffs' deaths on theories of both negligence and strict liability.¹⁰¹

All of the deceased were residents of the West Bank, the Gaza Strip or the Jerusalem District of the Occupied Territories.¹⁰² Most of their survivors resided in the same areas, although a few lived in Jordan.¹⁰³ Those plaintiffs in the Occupied Territories were subject to Israeli military law, courts, and government.¹⁰⁴ Many held Jordanian passports or Israeli identity cards labeling them Jordanians.¹⁰⁵ Three claimed Pales-

96. First Amended Complaint for Wrongful Death at 2-3, *Abu-Zeineh v. Federal Labs., Inc.*, No. 91-2148 (W.D. Pa. filed Dec. 7, 1994).

97. *Id.* at 14-20.

98. *Id.* at 2-3. Federal Laboratories is a division of TransTechnology, a Delaware corporation with its principal place of business in New Jersey. *Id.*

99. *Id.* at 3.

100. *Id.* at 4.

101. First Amended Complaint for Wrongful Death, at 20-22, *Abu-Zeineh*, No. 91-2148.

102. *Id.* at 2.

103. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss the First Amended Complaint at 1 n.2, *Abu-Zeineh v. Federal Labs., Inc.*, No. 91-2148 (W.D. Pa. filed Dec. 7, 1994) [hereinafter Plaintiffs' Memorandum].

104. See *infra* note 214 and accompanying text (distinguishing "citizen" from "subject" for the purposes of discussing "statelessness" and alienage jurisdiction).

105. See *infra* notes 131-32 and accompanying text (discussing the indicia of citi-

tinian citizenship only, while the others argued that they were citizens of both Jordan and Palestine for the purposes of the Code; they also argued that they should be considered subjects of Israel.¹⁰⁶

In their first motion to dismiss in February of 1992, the defendants argued that this suit was barred by the political question and act of state doctrines.¹⁰⁷ That motion was denied.¹⁰⁸ Almost a year later, in early 1993, they again moved to dismiss the case—both on a theory of *forum non conveniens* and on the basis of their allegation that the plaintiffs were not citizens or subjects of a recognized foreign state, making jurisdiction pursuant to 28 U.S.C. § 1332 improper.¹⁰⁹ A full year and a half later, the federal judge granted the motion to dismiss the case, accepting the argument that the court lacked subject matter jurisdiction.¹¹⁰ The court reasoned that, to fall within section 1332(a)(2), the plaintiffs must be citizens or subjects of a foreign state which is recognized, either *de jure* or *de facto*, by the executive of the United States.¹¹¹

As to the plaintiffs' claim of Palestinian citizenship, the court found that, at the time the suit was filed, Palestine had not been accorded *de jure* recognition by the United States executive.¹¹² The court then turned to the Executive to resolve the question of *de facto* recognition.¹¹³ While such an analysis would seem to require a detached examination of the government's conduct with respect to the Palestinians, the court instead simply ordered plaintiffs' counsel to request the opinion of the United States Department of State on the matter.¹¹⁴ Specifically, the Department's opinion was solicited with respect to the following inquiry:

Whether the Executive Branch of the United States Government accorded *de facto* recognition to Palestine on December 19, 1991, the date of the

zenship).

106. Plaintiffs' Memorandum, *supra* note 103.

107. Memorandum in Support of Defendants' Motion to Dismiss at 2, *Abu-Zeineh v. Federal Labs, Inc.*, No. 91-2148 (W.D. Pa. Dec. 7, 1994).

108. *Id.*

109. *Id.* at 5-6.

110. Order of Judge William L. Standish of the United States District Court for the Western District of Pennsylvania, *Abu-Zeineh v. Federal Labs, Inc.*, No. 91-2148 (W.D. Pa. Dec. 7, 1994). The court did not address the *forum non conveniens* argument. *Abu-Zeineh*, No. 91-2148.

111. *Abu-Zeineh*, No. 91-2148 at 4.

112. *Id.*

113. *Id.* at 3-4.

114. *Id.* at 3-4.

filing of the complaint in the above-captioned civil action, based on its relations with Palestine such that this diversity suit should proceed in federal court?¹¹⁵

The answer was simply: "The Executive Branch did not accord 'Palestine' *de facto* recognition on December 19, 1991."¹¹⁶

Without further, independent analysis, the court simply deferred to the executive branch for resolution of this issue and concluded that the plaintiffs could not satisfy the requirements of diversity jurisdiction by claiming Palestinian citizenship.¹¹⁷

The State Department did not make the court's task quite so simple with respect to the question of whether the Palestinian plaintiffs who were residents of the West Bank could be considered citizens of Jordan. In resolving this issue, the court was troubled by a 1988 proclamation issued by Jordan's executive branch, which declared that, while West Bank residents formerly had been considered Jordanian citizens, from that date forward, they would be considered Palestinian citizens by Jordan.¹¹⁸ Regarding the court-ordered inquiry as to whether the United States executive continued to consider West Bank residents to be citizens of Jordan after the proclamation was issued, the State Department offered only that it had not had occasion to consider the issue.¹¹⁹

The plaintiffs argued that, for the purposes of alienage jurisdiction, the court should apply a presumption of continuing citizenship, and find that they remained citizens of Jordan, and thus were not "stateless."¹²⁰ The court, however, rejected this argument, relying primarily on the Jordanian proclamation.¹²¹ Ironically, when Jordan issued the proclama-

115. *Id.* at 5.

116. *Abu-Zeineh*, No. 91-2148 at 5.

117. *Id.*

118. *See infra* notes 119-23 and accompanying text (discussing the indicia of plaintiff's continuing Jordanian citizenship).

119. *Abu-Zeineh*, No. 91-2148 at 6.

120. Plaintiffs' Memorandum, *supra* note 103.

121. *Abu-Zeineh*, No. 91-2148 at 5-9. In rejecting the plaintiffs' request for application of such a presumption, the court wrote:

In support of this assertion, the West Bank plaintiffs cited a decision from the United States District Court for the Eastern District of New York. However, the cite was incorrect and the court could not find the proper cite.

Id. at 6 n.6. Presumably, the case to which the court refers is *Ligi v. Regnery Gateway, Inc.*, 689 F. Supp. 159 (E.D.N.Y. 1988). In that case, the court in fact did apply a presumption of continuing citizenship to hold that diversity jurisdiction could be exercised over an alien who, without the presumption, could have been considered stateless. *Ligi*, 689 F. Supp. at 163; *see supra* part I.B and notes 114-21 and accom-

tion, it explained that the action was taken to *benefit* Palestinians by enhancing their national identity.¹²² The court, however, gave effect only to that portion of Jordan's decree which denationalized the Palestinians.¹²³ Thus, while proclaiming that it was acting out of respect for the Jordanian decree, in fact, the court only chose to respect the result of Jordan's decree while simultaneously frustrating its purpose.¹²⁴ The court, *sub silentio*, rejected the plaintiffs' argument that they should be considered subjects of Israel.

Despite the court's conclusions, there are several theories that would have allowed the court to exercise jurisdiction over the matter and which would have effectuated rather than thwarted the purposes and intended reach of the Code and accorded with relevant international and federal policies.

B. THEORIES OF ALIENAGE JURISDICTION

Courts repeatedly caution that the "form rather than substance"¹²⁵ of the Code is to govern. Accordingly, the *Abu-Zeineh* plaintiffs, who have significant ties to three foreign states—Palestine, Jordan, and Israel—ought to be considered within the reach of federal diversity jurisdiction. The most simple means of interpreting the Code in a manner that allows its substance rather than form to control is to construe it to include all aliens as citizens or subjects of foreign states.¹²⁶ Existing case law, however, provides several alternative vehicles for construction of the Code that would more nearly correspond to its purposes and intended breadth than did the district court's interpretation of the *Abu-Zeineh* case.

1. Access to the Federal Judiciary by Non-American Aliens

In determining whether a federal court possesses alienage jurisdiction over a particular case, very few courts seem to rely on the Code's un-

panying text (discussing the presumption of continuing citizenship).

122. See *infra* notes 157-60 and accompanying text (outlining Nottebohm's citizenship history).

123. See *Abu-Zeineh*, No. 91-2148 at 6-9.

124. *Id.*

125. *Murarka v. Bachrack Bros.*, 215 F.2d 547, 552 (2d Cir. 1954); accord *Wilson v. Humphreys (Cayman), Ltd.*, 916 F.2d 1239, 1243 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *Bank of Hawaii v. Balos*, 701 F. Supp. 744, 747 (D. Haw. 1988).

126. See *supra* parts I-II (discussing the purposes of alienage jurisdiction).

derlying purpose of allowing foreigners access to federal courts in order to avoid prejudice against them at the local level.¹²⁷

As discussed above,¹²⁸ the Code's purpose of avoiding discrimination against aliens is broad enough to subsume *all* aliens within its mandate: "Because litigation in any state court would create a danger of prejudice to a citizen of a foreign country, there is considerable justification for making a federal tribunal available in all cases cognizable under the Constitution in which an alien is a party."¹²⁹ Moreover, it is likely that the framers of alienage jurisdiction intended the Code to encompass all aliens.¹³⁰

Abu-Zeineh provides a perfect example of a case requiring application of the principle of avoiding local bias.¹³¹ Few cases present the likelihood of bias found in *Abu-Zeineh*, given the emotionally and politically charged atmosphere of Israeli-Palestinian relations and American involvement in the delicate machinations of the peace process.¹³² Recently, in *Nazareth Candy Co. v. Sherwood Group Inc.*,¹³³ a federal district court denied a motion to dismiss a suit for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1332.¹³⁴ In allowing the suit to proceed in federal court, the court specifically found that "Nazareth may face severe prejudice in state court as a result of the violent events taking place on the West Bank between the Palestinians and the Israeli government."¹³⁵ The same holds true in *Abu-Zeineh*.

Such a construction respects the intent of the framers and the purposes of the Code.¹³⁶ It also comports with international and federal law and policy.¹³⁷ Moreover, a rule allowing access to the federal judiciary

127. See *supra* part II.A (discussing the impetus for establishing alienage jurisdiction). This is true even where courts recite this purpose. *Chang v. Northwestern Memorial Hosp.*, 506 F. Supp. 975 (N.D. Ill. 1980).

128. See *supra* part II.A (outlining the reasons for establishing federal alienage jurisdiction).

129. WRIGHT, *supra* note 51, § 3604, at 383. But see *Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496 (S.D.N.Y. 1955) (rejecting the assertion that status as a non-United States citizen suffices to invoke a federal court's alienage jurisdiction).

130. See *supra* part II.B (addressing the problem of statutory interpretation).

131. See First Amended Complaint for Wrongful Death at 34, *Abu-Zeineh* No. 91-2148 (asserting that plaintiffs would face prejudice in the courts of their military occupier).

132. *Id.*

133. 683 F. Supp. 539 (M.D.N.C. 1988).

134. *Id.* at 542.

135. *Id.*

136. See McDougal, *supra* note 8, at 904 (describing the Code and its policies).

137. See *supra* part I (setting forth international legal principles and federal policy

by all aliens would certainly be the simplest and most manageable in application.

2. Access to the Federal Judiciary by Aliens with Genuine Ties to a Recognized Foreign State

To accommodate federal and international concerns about the plight of stateless persons, internationally renowned legal authority Myres S. McDougal suggested that "a strong preference might be given to policies which accord to every individual the protection of at least one state for the purpose of securing within transnational processes of authoritative decision a proper hearing upon the merits of controversies."¹³³

One means of vindicating the policies underlying the Judicial Code and addressing concerns about statelessness could take the form of a presumption of continuing citizenship¹³⁹ similar to the developing rule of international law, to the effect that one may not lose a nationality without first obtaining another.¹⁴⁰ Something akin to a presumption of continuing citizenship has been employed by the courts in various circumstances and may be useful in resolving ambiguities under the alienage jurisdiction provision with regard to those otherwise considered stateless.¹⁴¹ In *Ligi v. Regnery Gateway, Inc.*, the United States District Court for the Eastern District of New York presumed the continuing Romanian citizenship of the plaintiff so that he could invoke alienage jurisdiction under 28 U.S.C. § 1332.¹⁴² Such a presumption was also effectively employed in the United States Supreme Court decision in *Afroyim v. Rusk*,¹⁴³ in which the Court forbade the state from de-

behind federal alienage jurisdiction).

138. McDougal, *supra* note 8, at 904.

139. See *Hauenstein v. Lynham*, 100 U.S. (10 Otto) 483 (1879) (discussing a presumption of continuing citizenship); see also *City of Minneapolis v. Reum*, 56 F. 576 (8th Cir. 1893) (asserting that citizenship is presumed to continue until a change in nationality is proved); cf. *United States v. Schiffer*, 831 F. Supp. 1166 (E.D. Pa. 1993) (asserting jurisdiction in an action to revoke defendant's United States citizenship).

140. See *supra* notes 26-30 and accompanying text (debating the right of nationality).

141. See, e.g., *Ligi v. Regnery Gateway, Inc.*, 689 F. Supp. 159 (E.D.N.Y. 1988) (implying that there is a presumption of protracted citizenship); *Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496 (S.D.N.Y. 1955) (discussing the implied right of continuing citizenship).

142. *Ligi*, 689 F. Supp. at 160.

143. 387 U.S. 253 (1967); see *supra* notes 41-44 and accompanying text (de-

priving an individual of United States citizenship unless that citizen had voluntarily relinquished it.¹⁴⁴

A parallel domestic rule exists by which "a person may not lose state citizenship without first acquiring a new domicile."¹⁴⁵ The rule has been wielded to ensure that even vagabonds who might be stateless in terms of United States state citizenship are nonetheless found to possess state citizenship for purposes of federal diversity jurisdiction.¹⁴⁶

Turning to the example of *Abu-Zeineh*, it is noteworthy that the Palestinian plaintiffs at one time were clearly Jordanian citizens, as declared by Jordanian law.¹⁴⁷ This status, however, was thrown into question by a decree of Jordan's King Hussein, issued in 1988, which purported to denationalize the Palestinians in a stated effort to enhance their Palestinian identity.¹⁴⁸ Interestingly, despite the decree, Jordanian law still provides for the citizenship of the *Abu-Zeineh* plaintiffs;¹⁴⁹ pursuant thereto, a Jordanian may not lose his or her nationality except by such act, for example, as entry into a foreign country's military or civil service or upon a finding that Jordanian citizenship was fraudulently obtained.¹⁵⁰

Because the plaintiffs were, at one time, undoubtedly Jordanian citizens, a federal court could presume their continued citizenship to allow them to invoke alienage jurisdiction.¹⁵¹ It is important to note that, if a federal court entertained a presumption of the continuing Jordanian citizenship of the *Abu-Zeineh* plaintiffs, it would not be applying the law of Jordan; rather, the court's determination would be limited to a finding *for purposes* of diversity jurisdiction only.¹⁵² Therefore, a court

scribing the *Afroyim* Court's decision).

144. *Id.*

145. *Willis v. Westin Hotel Co.*, 651 F. Supp. 598, 603 (S.D.N.Y. 1986) (citing *Desmare v. United States*, 93 U.S. (3 Otto.) 605, 610 (1877)).

146. *Id.* at 603.

147. Additional Law (No. 56 of 1949) to the Nationality Law, Nationality Law No. 6 of Feb. 4, 1954 of the Hashemite Kingdom of Jordan [hereinafter Additional Law].

148. Declaration of Abraham Sofaer, at 9, *Abu-Zeineh v. Federal Labs, Inc.*, No. 91-2148 (W.D. Pa. Dec. 7, 1994).

149. Additional Law, *supra* note 147; see Declaration of Taher Masri, *Abu-Zeineh v. Federal Labs, Inc.*, No. 91-2148 (W.D. Pa. Dec. 7, 1994) (providing for Jordanian citizenship).

150. Declaration of Taher Masri, *Abu-Zeineh*, No. 91-2148.

151. See McDougal, *supra* note 8, at 968 (citing to the provision of the American Convention on Human Rights which states that every person has the right to the nationality of his birth if he does not rightfully have another nationality).

152. See 28 U.S.C. § 1332(a)(2) (stating that the district courts shall have original

need not actually resolve the tension between the Jordanian decree and the written laws of Jordan. At least one federal court, however, rejected a claim to continuing citizenship of a country in which the plaintiff was denationalized by a decree of that country's king.¹⁵³

Perhaps a test for nationality such as the one employed by the International Court of Justice (I.C.J.) in the *Nottebohm*¹⁵⁴ case could prove useful to resolving the tensions that have existed between some interpretations of the Judicial Code and the policy against statelessness as well as the Code's purposes. In *Nottebohm*, Liechtenstein sought restitution from Guatemala on behalf of Freidrich Nottebohm for actions by Guatemala that allegedly violated international law.¹⁵⁵ When Liechtenstein instituted suit in the I.C.J., Guatemala's main defense was that Liechtenstein did not possess competence to protect Nottebohm.¹⁵⁶ Nottebohm had been a German national, but applied for naturalization in Liechtenstein before Germany invaded Poland in 1939.¹⁵⁷ Prior to that, Nottebohm had lived in Guatemala, but without applying for citizenship.¹⁵⁸ After being granted citizenship in Liechtenstein, he returned to Guatemala.¹⁵⁹ When war broke out between the United States and Germany, Guatemala deported Nottebohm to the United States.¹⁶⁰ Nottebohm, after spending several years interned as an enemy alien, was denied readmission to Guatemala and subsequently moved back to Liechtenstein.¹⁶¹ The I.C.J. rejected his claims of attachment to Liechtenstein and formulated a genuine-linkage test of "real and effective nationality": "Nationality is a legal bond having as its basis a social

jurisdiction of all civil actions between "citizens of a State and citizens or subjects of a foreign state").

153. See *Medvedieff v. Cities Serv. Oil Co.*, 35 F. Supp. 999, 1002 (finding that a Russian native who had become a naturalized citizen of Italy could, nonetheless, not be considered a citizen or subject of Italy because of a decree issued by the Italian King stripping the citizenship of "foreign Hebrews" such as the plaintiff).

154. *Nottebohm (Liech. v. Gaut.)*, 1955 I.C.J. 4 (Apr. 6). While the case has been the subject of much criticism, the formulation of a genuine-linkage test may still serve as a model for construction of the Judicial Code.

155. *Id.* at 6.

156. *Id.*

157. *Id.*

158. *Id.* at 7.

159. *Id.*

160. *Id.*

161. *Id.* at 8.

fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."¹⁶²

In the case of *Abu-Zeineh*, the plaintiffs remain eligible for Jordanian passports and for diplomatic protection from the Jordanian Government when traveling abroad.¹⁶³ The Israeli Government itself recognized the plaintiffs' ties to Jordan in that the identity cards issued to them by Israel identified them as Jordanian.¹⁶⁴ Moreover, at the time of the filing of the suit, Jordanian civil law applied in the West Bank to the extent that it was not superseded by Israeli military law.¹⁶⁵ Jordan also offers the plaintiffs the full services of Jordanian embassies and consulates when they travel abroad.¹⁶⁶ In light of these facts, it seems clear that the *Abu-Zeineh* plaintiffs maintain a genuine linkage to Jordan.

If these linkages were not enough, Jordan's role in the Middle East peace process¹⁶⁷ alone supports a finding of jurisdiction. After all, permitting the *Abu-Zeineh* plaintiffs access to the federal judiciary accords with the oft-recited purpose of the grant of alienage jurisdiction: avoiding an affront to a foreign sovereign with an interest in the welfare of the plaintiffs.¹⁶⁸ In direct connection with the *Abu-Zeineh* lawsuit, Ambassador Fayeze Tarawneh of Jordan declared that,

[i]n light of the ties that still exist between the Hashemite Kingdom of Jordan and the people of the occupied West Bank and occupied Jerusalem . . . , the Jordanian Government urges the United States Federal

162. *Id.* at 23.

163. Declaration of Ambassador Fayeze Tarawneh, ¶ 2(1), *Abu-Zeineh v. Federal Labs Inc.*, No. 91-2148 (W.D. Pa. Dec. 7, 1994) [hereinafter *Tarawneh Declaration*]. The holding of a state's passport, while relevant, is not dispositive in determining citizenship. See *Medvedieff v. Cities Serv. Oil Co.*, 35 F. Supp. 999, 1001 (S.D.N.Y. 1940) (holding that possession of an Italian passport does not automatically establish Italian citizenship).

164. Declaration of Raja Shehadeh, § 12, *Abu-Zeineh v. Federal Labs*, No. 91-2148 (W.D. Pa. Dec. 7, 1994).

165. *Id.*

166. *Tarawneh Declaration*, *supra* note 163, ¶ 3.

167. See *Cairo Summit Denounces Terror*, JERUSALEM POST, Feb. 3, 1995, at 1 (emphasizing Jordan's continued commitment to its role in the Middle East Peace Process).

168. See, e.g., *Sadat v. Mertes*, 615 F.2d 1176, 1182 (7th Cir. 1980) (stating that one of the predominant considerations for alienage jurisdiction is fear of entanglements with foreign states); *Chang v. Northwestern Memorial Hosp.*, 506 F. Supp. 975, 977 n.1 (N.D. Ill. 1980) (considering apprehension of entanglements with foreign sovereigns as a reason to provide alienage jurisdiction); *supra* part II.A (discussing the purposes of alienage jurisdiction).

Courts to give the same access to the residents of the occupied West Bank and occupied Jerusalem . . . as they . . . would give to citizens of any foreign state.¹⁶⁹

The Jordanian position illustrates that the Code must be interpreted flexibly if its purposes and the policy against statelessness are to be respected.

3. Access to the Federal Judiciary by Citizens of Unrecognized States or Governments

Perhaps the chief obstacle to finding that the Palestinian plaintiffs fell within the terms of the Judicial Code lay in the fact that the United States Executive, at the time of the filing of the suit, had not accorded the Palestine Liberation Organization official recognition as the governing body of a foreign state.¹⁷⁰ This obstacle stems from the unfortunate holdings of a few courts which have construed federal law to mean that citizens of states whose governments are not recognized by the United States Executive cannot invoke alienage jurisdiction.¹⁷¹ The district court in *Abu-Zeineh* relied on this construction of the law in dismissing the plaintiffs' claim to Palestinian citizenship for purposes of alienage jurisdiction.¹⁷²

If, indeed, the governing rule requires that federal diversity jurisdiction be denied to plaintiffs who are citizens of a state not formally recognized by the United States executive branch, then the suit brought by the *Abu-Zeineh* plaintiffs was properly dismissed. A closer examination of the relevant case law, however, reveals that the rule requiring *de*

169. Tarawneh Declaration, *supra* note 163, ¶ 2(3). American President Bill Clinton himself has acknowledged Jordan's key role in establishing peace in the Middle East and recently has offered United States support to Jordan for making peace with Israel. See Michael Parks, *Israel and Jordan Sign Peace Pact, Enter New Era*, L.A. TIMES, Oct. 27, 1994, at A1.

170. See Daniel Williams & Thomas W. Lippmann, *Progress in the Israel-PLO Talks Came With U.S. 'Out of the Picture'*, WASH. POST., Aug. 31, 1993, at A14 (reporting that the United States still regarded the PLO as a terrorist organization and not as a governing body).

171. See, e.g., *Windert Watch Co. v. Remex Elecs.*, 468 F. Supp. 1242 (S.D.N.Y. 1979) (finding that a political party not recognized by the United States as an independent sovereign may not assert alienage jurisdiction); *World Communications Corp. v. Micronesian Telecommunication Corp.*, 456 F. Supp. 1122 (D. Haw. 1978); *Klausner v. Levy*, 83 F. Supp. 599 (E.D. Va. 1949).

172. *Abu-Zeineh*, No. 91-2148 at 5.

jure recognition of a foreign state's government as the prerequisite to jurisdiction has been narrowed and eroded in recent decades.¹⁷³ In fact, the more consistent rule of the federal courts, as it has evolved over the decades, directs that only unrecognized states and their governments *qua* governments be barred from suit under 28 U.S.C. § 1332.¹⁷⁴ Indeed, even this rule has been criticized as too constrained.¹⁷⁵ Nonetheless, it is seen as accommodating the Code's purposes and the judicial policy of maintaining congruity with, or noninterference in, the executive's action in establishing foreign policy.¹⁷⁶ Disallowing access to federal courts by unrecognized foreign sovereigns is the product of a judicial doctrine articulated by the United States Supreme Court in *Guaranty Trust Co. v. United States*,¹⁷⁷ namely, that "[w]hat government is to be regarded . . . representative of a foreign sovereign state is a political rather

173. See *infra* notes 179-258 and accompanying text (distinguishing the functions and characteristics of a state from those of a government for purposes of discussing foreign citizenship).

174. See, e.g., *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978) (holding that an unrecognized foreign state or government may not assert jurisdiction pursuant to 28 U.S.C. § 1332); *The Maret*, 145 F.2d 431 (3d Cir. 1944) (holding that courts cannot examine the effects of decrees of governments not recognized by the United States executive); *Republic of Panama v. Citizens & Southern Int'l Bank*, 682 F. Supp. 1544 (S.D. Fla. 1988) (noting that only a duly recognized representative of a foreign government has authority or standing). See generally Kevin W. Brown, *Access To Federal Courts By Foreign State, Or National Thereof, Which United States Does Not Recognize Or With Which United States Has No Diplomatic Relations*, 65 A.L.R. Fed. 881 (1983). Some courts, however, have held that "alter egos" of the unrecognized government, like the government itself, cannot bring suit in federal court. See, e.g., *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom. Kunstsammlungen zu Weimar v. Federal Republic of Germany*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 92 F. Supp. 920 (N.D. Cal. 1950).

175. In *Banco Nacional de Cuba v. Sabbatino* the Court wrote:

The doctrine that nonrecognition precludes suit by the foreign government in every circumstance has been the subject of discussion and criticism In this litigation we need intimate no view on the possibility of access by an unrecognized government to United States courts, except to point out that even the most inhospitable attitude on the matter does not dictate denial of standing here.

376 U.S. 398, 411 n.12 (1964); see *Transportes Aereos de Angola v. Ronair, Inc.*, 544 F. 858, 862 (D. Del. 1982) (denying jurisdiction to United States courts by an unrecognized foreign government).

176. *Elicofon*, 358 F. Supp. at 748.

177. 304 U.S. 126 (1938).

than a judicial question, and is to be determined by the political department of the government."¹⁷⁸

Federal courts, however, have employed various devices to permit suit by the *nationals* of formally unrecognized governments or states. One such device is the doctrine of *de facto* recognition of foreign states or governments by which their citizens are considered "sufficiently independent of the [government] to be free of the latter's disability."¹⁷⁹ According to the federal courts, objections to the executive's determinations with regard to recognition or nonrecognition of foreign governments or states are to be addressed by the executive branch and not the courts.¹⁸⁰ While some federal courts faced with the issue have viewed themselves as bound by an executive branch determination, others have found that they are free to draw for themselves its legal consequences in litigation pending before them.¹⁸¹ For example, in *Chang v. Northwestern Memorial Hospital*,¹⁸² a federal court permitted a Taiwanese national to proceed with a tort action based on alienage jurisdiction despite

178. *Id.* at 137-38.

179. *Elicofon*, 358 F. Supp. at 753; see *Amtorg Trading Corp. v. United States*, 71 F.2d 524 (C.C.P.A. 1934) (declining to treat Amtorg Trading Corporation as part of the Soviet Government for the purpose of denying jurisdiction). Diversity jurisdiction has been permitted over citizens of states not recognized by the United States Government. See, e.g., *Wilson v. Humphreys (Cayman), Ltd.*, 916 F.2d 1239 (7th Cir. 1990) (Cayman Islands), *cert. denied*, 499 U.S. 947 (1991); *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731 (2d Cir. 1983) (Bermuda); *Murarka v. Bachrack Bros.*, 215 F.2d 547, 552 (2d Cir. 1954) (India prior to formal recognition); *Creative Distribs., Ltd. v. Sari Niketan, Inc.*, No. 89-C-3614, 1989 U.S. Dist. LEXIS 10436 (N.D. Ill. Aug. 31, 1989) (Hong Kong); *Timco Eng'g, Inc. v. Rex & Co.*, 603 F. Supp. 925 (E.D. Pa. 1985) (Hong Kong); *Cedec Trading, Ltd. v. United American Coal Sales*, 556 F. Supp. 722 (S.D.N.Y. 1983) (Channel Islands); *Transportes Aereos de Angola v. Ronair, Inc.*, 655 F. Supp. 858 (D. Del. 1982) (Angola); *Great China Trading Co. v. Cimex U.S.A., Inc.*, No. 80 Civ. 4221-MML (C.D. Cal. Mar. 17, 1982) (Hong Kong).

180. See *Murarka*, 215 F.2d at 552 (explaining India's official recognition status, as opposed to recognition by means of a legal conclusion).

181. See, e.g., *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978) (determining that it does not interfere with foreign policy to permit the judiciary to grant a foreign nation jurisdiction to be heard in federal court); *Murarka*, 215 F.2d at 552 (finding *de facto* recognition despite a lack of *de jure* recognition by the State Department); *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892 (8th Cir. 1977) (holding that, "[w]hile executive action pertaining to the recognition or nonrecognition of a foreign government is binding on the courts, the courts are nevertheless free to determine the legal consequences of that determination on pending litigation").

182. *Chang v. Northwestern Memorial Hospital*, 506 F. Supp. 975 (N.D. Ill. 1980).

the lack of formal recognition of the Taiwanese Government by the United States.¹⁸³ The court rested its decision on the *de facto* rather than *de jure* recognition of the Taiwanese Government.¹⁸⁴ In so doing, the court found that factors relevant to such a determination include this country's "significant trade relations, cultural and/or other contacts with a nation on a nongovernmental level."¹⁸⁵ Further, in *Tetra Finance (HK), Ltd. v. Shaheen*,¹⁸⁶ two Hong Kong corporations brought suit in federal court for an alleged breach of a fiduciary duty owed to them by the defendant.¹⁸⁷ The court permitted the suit to go forward, reasoning that "[i]t would seem hypertechnical to preclude Hong Kong corporations from asserting claims in our courts simply because Hong Kong has not been formally recognized by the United States as a foreign sovereign in its own right."¹⁸⁸ Moreover, the court noted, the "commercial and cultural realities of the modern world dictate that diversity jurisdiction should be granted to certain governmental entities that have not been formally recognized."¹⁸⁹

183. *Id.*

184. *Id.* at 978.

185. *Id.* at 978 n.3. Some courts have alluded to the possibility of exercising diversity jurisdiction where the United States Government impliedly has granted standing to sue in federal court by explicitly encouraging a commercial transaction through, for example, the issuance by the government of an export license, such as occurred in *Abu-Zeineh*. See *Transportes Aereos de Angola v. Ronair, Inc.*, 544 F. Supp. 858, 863 (D. Del. 1982) (granting the plaintiff jurisdiction to sue in the United States based on its license to export aircraft and a State Department statement that such a license is not contrary to United States foreign policy); see also *Japanese Gov't v. Commercial Casualty Ins.*, 101 F. Supp. 243, 246 (S.D.N.Y. 1951) (stating that, "[w]hen recognition, even for the limited purpose of granting [a foreign government] permission to function and trade as a foreign government with our nationals and within our borders, has been granted by the political departments of our government, it is not for the judiciary to create barriers which thwart and defeat such action"). Another avenue to diversity jurisdiction is through an express statement by the executive that permitting the suit to go forward is consistent with United States foreign policy. See *Calderone v. Naviera Vacuba*, 325 F.2d 76 (2d Cir. 1963) (affirming a decision to allow nationalized Cuban shipowner to assert third party jurisdiction in federal court holding that "[t]he standing of foreign nations in our courts is a matter of comity determined by the recognition accorded to them by the Executive Branch of the United States Government"), modified, 328 F.2d 578 (2d Cir. 1964); *Republic of Liberia v. Bickford*, 787 F. Supp. 397 (S.D.N.Y. 1992) (deferring to the executive branch's conferral of standing to the interim government of Liberia).

186. 584 F. Supp. 847 (S.D.N.Y. 1984).

187. *Id.*

188. *Id.* at 848.

189. *Id.*; see *Netherlands Shipmortgage Corp. Ltd. v. Madias*, 717 F.2d 731 (2d

A comparable standard of *de facto* recognition of a foreign government was followed by the Second Circuit in *Murarka v. Bachrack Bros.*¹⁹⁰ In *Murarka*, the federal court exercised jurisdiction over a suit in which the plaintiff was an Indian partnership even though India was not, at the time, accorded *de jure* recognition by the United States Government.¹⁹¹ The court found that, "[t]o all intents and purposes, [the exchange of ambassadors] constituted a full recognition of the Interim Government of India at a time when India's ties with Great Britain were in the process of withering away"¹⁹² Applying a "substance rather than form" analysis, the court also disregarded the fact that the credentials of the first Indian Ambassador were signed by the British Crown.¹⁹³

The United States has long proclaimed its interest in the establishment of peace in the Middle East. That interest could sustain a conclusion that the *Abu-Zeineh* plaintiffs should be given access to the federal courts; however, it is not entirely uncommon for federal courts to, in

Cir. 1983) (holding that jurisdiction should be granted to an entity that conducts business in the United States); *Lehman v. Humphreys (Cayman), Ltd.*, 713 F.2d 339 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). Further, in *Kletter v. Dulles*, the court concluded that Palestine of the 1950s was a "foreign state" within the meaning of the Nationality Act. It found that the determination of whether Palestine was recognized as a foreign state was committed to the political branches. 111 F. Supp. 593 (D.D.C. 1953), *aff'd sub nom. Kletter v. Herter*, 268 F.2d 582 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 936 (1960). The circuit court, however, concluded that the executive did determine Palestine to be a foreign state "in 1932 with respect to the operation of the most favored nations provision in treaties of commerce." *Id.* at 598. *But see* *The Penza*, 277 F. 91 (E.D.N.Y. 1921) (holding that courts should not inquire into possible *de facto* recognition of a government or state); *The Rogdai*, 278 F. 294 (N.D. Cal. 1920) (holding that the judiciary is bound by the State Department's non-recognition). Another court found essentially that, in 1951, Japan was a *de facto* foreign state because Japan, though occupied, was to be rehabilitated and reestablished as a nation of the world. *Japanese Gov't v. Commercial Casualty Ins.*, 101 F. Supp. 243 (S.D.N.Y. 1951). Moreover, the United States policy was to encourage trade with Japan. *Id.*

190. 215 F.2d 547 (2d Cir. 1954).

191. *Id.* at 551-52.

192. *Id.* at 552; *see* *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938) (finding that a mark of recognition of a foreign government was the reception of a diplomatic representative); *Republic of China v. Merchants' Fire Assur. Corp.*, 30 F.2d 278, 279 (9th Cir. 1929) (holding that recognition may be implied from entering into negotiations with a new state, sending it diplomatic agents, receiving such agents, or forming conventions with it).

193. *Merchants' Fire Assur. Corp.*, 30 F.2d at 279.

essence, suspend a case to await the outcome of intensified international relations.¹⁹⁴ Accordingly, the developments in the peace process following the filing of the suit should bear on the determination of alienage jurisdiction along with the status of United States diplomacy at the time when the suit was brought.

The rapidly evolving political landscape in the Middle East, which involves the United States, the Palestine Liberation Organization (PLO), Jordan, and Israel, demonstrates the folly in drawing premature and technical judicial conclusions on recognition and its consequences. For instance, the United States, by a directive of President Bill Clinton in September of 1993, renewed contact with the PLO in light of its peace pact with Israel.¹⁹⁵ In fact, in that same month, United States contact with the PLO resumed in Tunisia, where United States *Charge d'Affaires* Carol Stocker and another embassy official began meeting with the PLO ambassador to Tunisia.¹⁹⁶ It was then that a PLO delegation was formally invited to Washington, D.C., for the signing of the renowned peace agreement.¹⁹⁷

In response to inquiries concerning United States recognition of the PLO, the government hinted at pending recognition to follow from solidified peace agreements between Israel and the PLO. For example, on the issue of recognition, Clinton said recently: "We expect to work with the Palestinians and the Israelis in implementing the agreement. And we expect the dialogue to produce further and clear expressions of our policy on that."¹⁹⁸ Similarly, United States Secretary of State Warren

194. See, e.g., *Dade Drydock Corp. v. The Mitmar Caribe*, 199 F. Supp. 871 (S.D. Tex. 1961) (suspending the case until the United States recognized the Republic of Cuba); *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 92 F. Supp. 920 (N.D. Cal. 1950) (suspending the action until the United States recognized the Republic of China); *Government of France v. Ibrandtsen-Moller Co.*, 48 F. Supp. 631 (S.D.N.Y. 1943) (postponing the action until the United States recognized France); cf. *Merchants' Fire Assur. Corp.*, 30 F.2d at 279 (taking judicial notice of a material change in the state status of a party after the action had been commenced).

195. Richard Whittle, *U.S. Resumes Contact With PLO; Policy Does Not Include Recognition*, DALLAS MORNING NEWS, Sept. 11, 1993, at 1A.

196. *Id.*

197. *Id.*

198. Remarks on the Israeli-Palestinian Declaration and an Exchange With Reporters, 29 WEEKLY COMP. PRES. DOC. 1721 (Sept. 13, 1993). United States Department of State officials have met frequently with Palestinian representatives and have articulated the view that the Palestinian people play a critical role in the Middle East peace talks. See Steven A. Holmes, *Despite a Rebuff by Palestinians, U.S. is Hopeful on Mideast Talks*, N.Y. TIMES, Mar. 30, 1993, at A2, col. 3 (discussing talks between

Christopher stated that, while "[t]here is no change in respect to the PLO at the present time, . . . it is a rapidly changing environment, and we are following developments very closely."¹⁹⁹ One other State Department official, responding to questions on formal recognition of the PLO, was quoted by *The Washington Post* as stating: "The question in one sense is moot. We've been dealing with PLO officials."²⁰⁰ The United States has recognized that a lasting peace in the Middle East must include "legitimate political rights of the Palestinian people."²⁰¹ Affronting the PLO would appear contrary to the goals of the United States as a facilitator of peace in the sensitive relations involved in the Middle East peace process, in which the United States hopes to stay "[e]xtremely involved."²⁰² As the American Law Institute wrote:

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.²⁰³

Thus, granting jurisdiction in *Abu-Zeineh* directly vindicates the purpose of the Judicial Code of committing to the national judiciary those cases implicating sensitive foreign relations.

The district court in *Abu-Zeineh* conflated the *de facto* analysis with that which takes place under the doctrine of *de jure* recognition. Specifically, the court, through plaintiffs' counsel, solicited the Department of

Secretary of State Warren Christopher and Palestinian representatives); Clyde Haberman, *Palestinians are Expressing Hope on Both the Deportees and Talks*, N.Y. TIMES, Feb. 26, 1993, at A3, col. 1 (discussing the close consultations of the United States with Palestinians). In fact, the State Department previously recognized that Israelis and Palestinians have been engaged in talks "on the key issue of interim self-government arrangements as a first, transitional step along the way to a permanent settlement." *The Middle East: U.S. Interests and Challenges Ahead*, U.S. DEP'T ST. DISPATCH, Mar. 23, 1992, at 39.

199. Jon Immanuel, *Sha'ath Calls For Reworking Covenant*, JERUSALEM POST, Sept. 1, 1993.

200. Williams & Lippman, *supra* note 170, at A14.

201. John H. Kelly, *U.S. Diplomacy in the Middle East*, DEP'T ST. BULL., Oct. 1989, at 44.

202. Executive Interview With the Arab News Media on the Middle East Peace Process, 29 WEEKLY COMP. PRES. DOC. 1741 (Sept. 13, 1993).

203. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 108 (1969).

State's answer to the question of whether the United States Government "accorded *de facto* recognition to Palestine on . . . the date of the filing of the complaint" ²⁰⁴ The phrasing of the question seems contrary to the nature of a *de facto* analysis, which by its nature requires an independent examination of the *conduct* of the government vis-a-vis another nation. ²⁰⁵

A second means of finding that the *Abu-Zeineh* and other, similarly situated plaintiffs fall within the diversity statute, even if the PLO is not recognized by the United States executive, is through the doctrine of judicial recognition of the internal acts of unrecognized governments when exercising control over domestic affairs. ²⁰⁶ As the United States District Court for the Southern District of New York noted in *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, "[n]ormally, the acts of an unrecognized regime which pertain to its purely local, private, and domestic affairs will be given effect." ²⁰⁷ United States federal courts have repeatedly held that determinations of citizenship fall within the defini-

204. *Abu-Zeineh*, No. 91-2148, at 5.

205. See, e.g., *Murarka v. Bachrack Bros.*, 215 F.2d 547 (2d Cir. 1954) (finding *de facto* recognition of India by the United States because of an exchange of ambassadors); *Tetra Fin. Ltd. v. Shaheen*, 584 F. Supp. 847 (S.D.N.Y. 1984) (noting the financial contacts between Hong Kong and the United States); *Chang v. Northwestern Memorial Hosp.*, 506 F. Supp. 975 (N.D. Ill. 1980) (basing *de facto* recognition of Taiwan on significant trade relations and contacts).

206. See *infra* notes 206-10 and accompanying text (providing examples of judicial recognition).

207. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 900 (S.D.N.Y. 1968); see RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 113 (1965) (discussing acts of unrecognized countries); *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 92 F. Supp. 920 (N.D. Cal. 1950) (stating that courts have given effect to the acts of a non-recognized government where it would achieve the just result without thwarting United States foreign policy); cf. *The Maret*, 145 F.2d 431 (3d Cir. 1944) (finding no distinction between recognition of a sovereign and recognition of the particular acts of that sovereign). The court in *Tetra Finance (HK), Ltd. v. Shaheen* also found that federal courts previously had enforced judgments and applied the laws of Hong Kong although Hong Kong was not a recognized foreign state in the strictest sense of the term. 584 F. Supp. 847, 848 (S.D.N.Y. 1984).

tion of a domestic affair.²⁰⁸ In *Murarka v. Bachrack Bros.*,²⁰⁹ the court, as discussed above, rejected the defendants' attack on jurisdiction and held that the plaintiffs, as citizens of India (whose government was not formally recognized by the United States at the time of the suit), had properly invoked the alienage jurisdiction of the court.²¹⁰ The court, in so holding, reiterated the well-established principle that "[i]t is the undoubted right of each country to determine who are its nationals"²¹¹

Determinations of citizenship, then, in accordance with international law and usage, generally are to be accepted by other nations.²¹² The plaintiffs in *Abu-Zeineh* were granted citizenship by the PLO.²¹³ Pursuant to the rule that actions of unrecognized governments, when involving matters of internal concern, are to be given effect, the Palestinian plaintiffs in *Abu-Zeineh* could be found to be Palestinian citizens for purposes of diversity jurisdiction. One of the leading authors on federal practice and procedure pertaining to jurisdiction observed that,

[t]o support jurisdiction under Section 1332 of the Judicial Code, an alien must be a "citizen or subject" of a foreign state. These words, which also appear in Article III, Section 2 of the Constitution, are designed to include any aliens regardless of the form of government in his country.²¹⁴

Access to the federal courts by plaintiffs such as those in *Abu-Zeineh* could also be achieved through a liberal construction of the terms "foreign state." Because the scope of the Code was likely intended to be broad enough to encompass all aliens and was meant to bring to the

208. See, e.g., *Sadat v. Mertes*, 615 F.2d 1176, 1183 (7th Cir. 1980) (stating that a nation has an inherent right to determine who its citizens shall be); *Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496, 499 (S.D.N.Y. 1955) (recognizing each country's right to determine its citizens); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 26 (1965) (discussing the determination of citizenship).

209. 215 F.2d 547 (2d Cir. 1954).

210. *Id.*

211. *Id.* at 553.

212. See *Blair Holdings Corp.*, 133 F. Supp. at 499; *Murarka*, 215 F.2d at 552-53; *Sadat*, 615 F.2d at 1183; see also McDougal, *supra* note 8, at 949; HERBERT W. BRIGGS, THE LAW OF NATIONS 458-60 (2d ed. 1952); PAUL WEISS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 126-29 (2d ed. 1979).

213. See Palestine National Council, Palestinian Declaration of Independence (Algiers, Nov. 15, 1988); see also *infra* note 222 (comparing views on whether Palestine meets the requirements for statehood).

214. WRIGHT, *supra* note 51, § 3604, at 394 (1984).

national level cases involving national concerns, its terms must be read liberally.²¹⁵

In the first place, it is important to note, as a New York federal district court observed in *Federal Republic of Germany v. Ellicofon*,²¹⁶ that there is some distinction between a state and its government.²¹⁷ This distinction, in reference to recognition, has been described as follows:

Recognition of a new State must not be confused with recognition of a new Head or Government of an old State. Recognition of a change in the headship of a State, or in the form of its Government, or of a change in the title of an old State, are matters of importance. But the granting or refusing of these recognitions has nothing to do with recognition of the State itself. If a foreign State refuses to recognize a new Head or change in the form of the Government of an old State, the latter does not thereby lose its recognition as an International Person, although no official intercourse is henceforth possible between the two States as long as recognition is not given either expressly or tacitly.²¹⁸

In *Uyeno v. Acheson*,²¹⁹ a federal court, in discussing the status of Japan under foreign military occupation, found that regimes may be subject to occupying powers, "[b]ut the life of the nation as such [goes] on with its language, customs, mores, family institutions and even local instrumentalities of Government."²²⁰ That a Palestinian nation has continued through and despite the turmoil in the Middle East is indubita-

215. See *supra* part II (discussing the intended range of alienage jurisdiction).

216. 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom. Kunstsammlungen zu Weimar v. Federal Republic of Germany*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

217. *Id.*

218. L. OPPENHEIM, INTERNATIONAL LAW § 73, at 129-30 (Hersh Lauterpacht ed., 8th ed. 1955); see *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938) (distinguishing between recognition of the provisional government of Russia, and its successor Soviet Government); *Iran Handicraft & Carpet Export Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1275 (S.D.N.Y. 1987), *aff'd*, 868 F.2d 1267 (2d Cir. 1988) (recognizing Iran as an independent nation, despite the failure to recognize the Khomeini regime); *Russian Gov't v. Lehigh Valley R.R. Co.*, 293 F. 135 (S.D.N.Y. 1923) (stating the importance of continuing to recognize a state despite the existing form of government).

219. 96 F. Supp. 510 (W.D. Wash. 1951).

220. *Id.*; see *Minor v. Happersett*, 88 U.S. 162, 165-66 (1874) (stating that "[t]he very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association").

ble.²²¹ Whether Palestine's current structure rises to the level of statehood as it is often defined in international law is another matter, and one which has sparked considerable debate.²²² The commonly accepted international requirements for statehood as articulated in the Montevideo Convention on Rights and Duties of States are: "(a) a permanent population; (b) a defined territory; (c) government; [and] (d) capacity to enter into relations with other states."²²³ Palestine declared its own statehood on November 15, 1988.²²⁴ While not officially recognized by the United States, it has been given such recognition by over one hundred countries and maintains offices akin to diplomatic missions in over sixty states.²²⁵ In fact, the U.N. General Assembly voted overwhelmingly to give the PLO observer status as a state participant in the U.N. system, where it also maintains a mission.²²⁶ PLO officials have indicated that

221. In fact, at a recent conference in Madrid, the United States acknowledged a "distinct Palestinian national identity." Susan Sachs, *The New, Polished, Public Face of Palestinian Activists*, *NEWSDAY*, Oct. 30, 1991, at 4. See generally *HOMELAND: ORAL HISTORIES OF PALESTINE AND PALESTINIANS* 296 (Staughton Lynd et al. eds., 1994) (quoting Mohammed Bural as saying: "Wherever we are, as Palestinians, whether inside or outside Israel, we are a whole people").

222. See, e.g., James L. Prince, Note, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 *STAN. J. INT'L L.* 681 (1989) (concluding that, despite the 1988 Palestinian Declaration of Statehood, the status of Palestinian statehood remained unresolved); James D. Howley, Note, *Measuring Up: Do the Palestinian Homelands Constitute a Valid State Under International Law?*, 8 *DICK. J. INT'L L.* 339 (1990) (concluding that Palestine meets the requirements for statehood); see also *United States v. The Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (finding that the PLO considers itself a state even though it does not bear the usual attributes of a state); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991) (finding that the PLO has no defined territory or genuine capacity to enter into international relations). *Klinghoffer*, however, does not dictate a finding of lack of diversity jurisdiction under 28 U.S.C. § 1332 for the reasons stated *supra* note 174.

223. Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. I, 49 Stat. 3097, 165 L.N.T.S. 19. The United States is a party to this convention.

224. Yousef M. Ibrahim, *PLO Proclaims Palestine to be an Independent State*, *N.Y. TIMES*, Nov. 15, 1988, at A1, col. 6.

225. Anis F. Kassim, *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Under International Law*, 9 *DENV. J. INT'L L. & POL'Y* 1, 19 (1980).

226. See G.A. Res. 3237, 29 U.N. GAOR Supp. (No. 31), at 4, U.N. Doc. A/9631 (1974) (granting the PLO observer status); U.N. GAOR, 43 Sess., Supp. No. 49 at 62, U.N. Doc. A/Res.43/177 (1989) (changing the designation of the observer mission from "Palestine Liberation Organization" to "Palestine"); Walter Ruby, *General Assembly Calls for International Conference*, *JERUSALEM POST*, Dec. 16, 1988

the declared state will be set up in the West Bank and Gaza Strip, where the PLO commands significant allegiance from the primarily Palestinian population.²²⁷

In the West Bank, there are approximately one million Palestinians as opposed to roughly 100,000 Jews; in the Gaza Strip, there are 750,000 Palestinians and only about 4000 Jews.²²⁸ With the evolution of Palestinian self-rule since September of 1993, Palestine has begun to look more and more like a state within the sense of international standards.²²⁹ The agreement foresees a withdrawal of Israeli troops from the Occupied Territories; additionally, Palestinians are to gain full control over governmental functions such as the police, civic administration, health, and education.²³⁰

Whether Palestine can be deemed a "state" in the accepted sense is not and *should not* be the paramount concern for purposes of interpreting the Judicial Code. Instead, statehood, or the requirement that litigants be citizens or subjects of "a foreign state," like the other terms of the provision on alienage jurisdiction, should be construed liberally to effectuate the Code's underlying policies of committing to the national judiciary matters of national concern and of adhering to international and domestic policies condemning statelessness. By way of analogy, the United States Supreme Court, in *Burnet v. Chicago Portrait Co.*,²³¹ discussed the word "country" in the expression "foreign country" in interpreting the Revenue Act of 1921.²³² It found that,

[when] referring more particularly to a foreign government, it may describe a foreign State in the international sense, that is, one that has the status of an international person with the rights and responsibilities under

(reporting that the resolution to change the name was adopted by a vote of 104 to 2 with 36 nations abstaining). Within the Occupied Territories, the PLO also exercises functions typically characteristic of a state or government, for example, by levying certain taxes on Palestinians. It also participates in several regional monetary and developmental institutions and maintains membership in the League of Arab States. See Kassim, *supra* note 225, at 28-29.

227. Ihsan A. Hijazi, *P.L.O. Council Picks Arafat as Head of Proclaimed State*, N.Y. TIMES, Mar. 31, 1989, at A7, col. 5; see Prince, *supra* note 222, at 691.

228. Russell Watson, et al., *Peace at Last?*, NEWSWEEK, Sept. 13, 1993, at 20.

229. *Id.*

230. Ann Devry & John M. Goshko, *Israel and PLO Sign Peace Pact; Rabin, Arafat Pledge Cooperation on Day of Historic Diplomacy*, WASH. POST, Sept. 14, 1993, at A1.

231. 285 U.S. 1 (1932).

232. *Id.*

international law of a member of the family of nations; or it may mean a foreign government which has authority over a particular area or subject-matter, although not an international person but only a component part, or a political subdivision, of the larger international unit.²³³

It went on to conclude that "the term 'foreign country' is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation."²³⁴

This principle of interpretation was echoed in *Uyeno v. Acheson*,²³⁵ in which a federal district court found that "[t]he meaning of phrases like 'foreign country' and 'foreign state' must be determined by reference to the purpose of the particular statute."²³⁶ In *Uyeno*, the court was called upon to determine whether Hichino Uyeno, who was born in the United States but was of Japanese parentage, had expatriated himself pursuant to the United States Nationality Code²³⁷ by "[v]oting in a political election in a foreign state,"²³⁸ one of the statutorily enumerated actions from which a presumptive loss of United States citizenship flows. In the course of the court's determination, it was necessary to decide whether Japan, at the time, constituted a foreign state, given that it was occupied by the Allies.²³⁹ In holding that occupied Japan was indeed a foreign state within the meaning of the relevant statute, the *Uyeno* court reasoned as follows:

[I]t is obvious that the words "foreign state" are not words of art. In using them, the Congress did not have in mind the fine distinctions as to sovereignty of occupied and unoccupied countries which authorities on

233. *Id.* at 5-6.

234. *Id.* at 6.

235. 96 F. Supp. 510 (W.D. Wash. 1951).

236. *Id.* at 516 n.1. As was noted earlier, the court in *Federal Republic of Germany v. Elicofon* held that, even where a state would not be granted access to United States courts under the diversity statute, United States citizens are entitled to be free of the same disability. 358 F. Supp. 747, 753 (E.D.N.Y. 1972), *aff'd sub nom. Kunstsammlungen zu Weimar v. Federal Republic of Germany*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); see *Transportes Aereos de Angola v. Ronair, Inc.*, 544 F. Supp. 858, 863 (D. Del. 1982) (holding that "separate juridical entities, which are not alter egos of the governments under which they are organized, may maintain suit in U.S. courts, even though their parent governments would be unable to do so").

237. 8 U.S.C.A. § 801.

238. 8 U.S.C.A. § 801(e).

239. *Uyeno v. Acheson*, 96 F. Supp. 510, 516 (1951).

international law may have formulated. They used the word in the sense of "otherness." When the Congress speaks of a "foreign state," it means a country which is not the United States or its possession or colony,—an alien country,—[sic] other than our own²⁴⁰

The fact of occupation did not dissuade the court from rejecting a previous case in which it was found that Japan had lost its statehood through occupation: "There is sound international authority for the view that military occupation of a country does not *ipso facto* terminate the life of the country as a separate entity."²⁴¹

As was the case in *Uyeno*, the fact of Israeli military occupation should not operate to eviscerate Palestine's statehood for purposes of diversity jurisdiction. This is particularly so where a contrary conclusion effectively would render the plaintiffs stateless. The *Uyeno* court was motivated by just such concerns in arriving at its interpretation of the words "foreign state":

[T]he interpretation called for is that of common speech and not that derived from abstract speculation on sovereignty as affected by foreign military occupation. Such abstraction would make out of present-day Japan a "no-man's land," neither a part of America nor a part of the domain of the allied nations occupying it for pacification purposes.²⁴²

Much like the *Uyeno* court, the court in *Kletter v. Dulles*²⁴³ adopted a broader concept of the terms "foreign state."²⁴⁴ The *Kletter* court did not hesitate to part ways with the earlier decision in *Klausner v. Levy*,²⁴⁵ in which it was found that Palestine, as it formerly existed under the League of Nations mandate, was not a foreign state.²⁴⁶ The

240. *Id.* at 515.

241. *Id.* But see *Furisho v. Acheson*, 94 F. Supp. 1021 (D. Haw. 1951) (holding that since Occupied Japan was not a foreign state, and elections held there in the post-war years were not political, participation in such elections failed to meet the requirements of the Nationality Act of 1940).

242. *Uyeno*, 96 F. Supp., at 515

243. 111 F. Supp. 593 (D.D.C. 1953).

244. *Id.* at 598.

245. 83 F. Supp. 599 (E.D. Va. 1949).

246. *Id.* The court dismissed the case for lack of subject matter jurisdiction under 28 U.S.C. § 1332 because Palestine, in the court's view, was not, under the conditions at the time, a "foreign state" within the meaning of the diversity statute. *Id.* at 600. *Klausner* has since been termed "a very questionable decision." WRIGHT, *supra* note 51, § 3504, at 392. Moreover, the court in *Chang v. Northwestern Memorial Hospital* criticized the constricted interpretation of the *Klausner* court and its requirement of formal recognition as "not supported by the history of the provisions or early

Kletter court, in addressing the issue of the citizenship of the plaintiff, rejected arguments that Palestine could not be considered a foreign state within the meaning of the Nationality Act.²⁴⁷

Two of the other decisions in which courts chose to interpret statehood narrowly have been called into question. In *Windert Watch Co. v. Remex Elecs., Ltd.*,²⁴⁸ a federal court concluded that Hong Kong was not a recognized "foreign state" within the meaning of 28 U.S.C. § 1332.²⁴⁹ That decision, however, has been roundly criticized by other courts.²⁵⁰ Additionally, the decision in *World Communications Corp. v. Micronesian Telecommunications Corp.*,²⁵¹ which found that the Marshall Islands were not a foreign state recognized by the United States Government, was essentially rejected ten years later by the same court that decided the issue in *Bank of Hawaii v. Balos*.²⁵² Criticism of these narrow approaches is appropriate in light of the purposes that provided the impetus for establishing diversity jurisdiction.

judicial decision." 506 F. Supp. 975, 977 n.2 (N.D. Ill. 1980).

247. *Kletter v. Dulles*, 111 F. Supp. 593, 599 (1953).

248. 468 F. Supp. 1242 (S.D.N.Y. 1979).

249. *Id.* at 1248.

250. See *Tetra Fin. (HK), Ltd. v. Shaheen*, 584 F. Supp. 847, 848 (S.D.N.Y. 1984) (declining to follow the *Windert* rule because its conclusion and reasoning were "hypertechnical" in light of the "commercial and cultural realities of the modern world"); see also *Wilson v. Humphreys (Cayman), Ltd.*, 916 F.2d 1239, 1243 (7th Cir. 1990) (citing *Tetra Finance*, the court noted that "the force of the *Windert* decision has been eroded by a more recent case from the same court" and found that diversity jurisdiction existed where the plaintiff was incorporated in the Cayman Islands); *Creative Distributions, Ltd. v. Sari Niketan, Inc.*, No. 89-C-3614, 1989 U.S. Dist. LEXIS 10436, at 3 (N.D. Ill. Aug. 31, 1989) (finding *Windert* unpersuasive and following the reasoning of *Tetra Finance*); *Iran Handicraft & Carpet Export Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1274 (S.D.N.Y. 1987) (noting subsequent disagreement with *Windert*), *aff'd*, 868 F.2d 1267 (2d Cir. 1988); *Cedec Trading, Ltd. v. United American Coal Sales*, 566 F. Supp. 722 (S.D.N.Y. 1983) (distinguishing *Windert* to find a corporate citizen of the Channel Islands a diverse party for purposes of alienage jurisdiction); *Timco Engineering, Inc. v. Rex & Co.*, 603 F. Supp. 925 (E.D. Pa. 1985) (noting that *Windert* had been challenged and criticized for its narrow construction of the terms "foreign state" and holding that the presence of a Hong Kong citizen as a plaintiff did not deprive the court of subject matter jurisdiction).

251. 456 F. Supp. 1122 (D. Haw. 1978).

252. 701 F. Supp. 744 (D. Haw. 1988).

4. Access to the Federal Judiciary by "Subjects" of Foreign States

Just what the framers meant by their inclusion of the word "subject" in the constitutional provision governing alienage jurisdiction is not clear.²⁵³ Some commentators treat the reference as signaling that an individual is governed by a monarchy rather than a democracy.²⁵⁴ On the other hand, historical references to the term provide some indication that it was meant to encompass a broader group of people than merely those who were subjects of a monarchy.²⁵⁵ For instance, as discussed below, the term has been used in circumstances of subjugation to foreign occupying authorities or as an indication of control by a despot.

If the framers intended the narrower meaning, the ramifications for plaintiffs such as those in *Abu-Zeineh* remain ambiguous. That is, it could be argued that they are not encompassed by the grant of alienage jurisdiction because they are neither citizens of a democracy nor subjects of a monarch. Conversely, however, one could conclude that the framers had in mind the inclusion of *all* aliens when they drafted the relevant provisions of the Constitution and the Judicial Code.²⁵⁶ This, they thought, had been achieved through inclusion of the terms "citizen" and "subject."²⁵⁷ Accordingly, it may be asserted that the inclusion of all aliens more closely comports with the framers' intentions. The framers apparently hoped to avoid any arbitrary denials of access to the federal courts.²⁵⁸ As one judge observed:

253. See *supra* notes 84-94 and accompanying text (noting that the framers of the United States Constitution and their contemporaries viewed the term "subject" of a state more expansively than has the modern judiciary).

254. See *supra* notes 84-85 and accompanying text (noting that current courts tend to view "citizen" and "subject" as equivalent in scope, distinguishing between the two terms only with respect to the form of government they connote, a republic and a monarchy, respectively).

255. See *supra* notes 86-94 and accompanying text (discussing the view that "subject" can be linked to whether the person is subjugated to that state's government or laws, using examples of African-American and women's lack of citizenship status as examples of subjugation).

256. See *supra* parts II.A-B (identifying the concerns that motivated the framers of the United States Constitution to create alienage jurisdiction and discussing the different theories regarding the intended reach of the Judiciary Act).

257. See *supra* parts II.A-B.

258. See *infra* notes 260-77 and accompanying text (noting that many courts have read expansively the term "subject" as it applies to access to the Federal Judiciary by subjects of foreign states).

If federal jurisdiction had been couched solely in terms of "citizenship," there may have resulted an arbitrary denial of federal access to many foreigners only because of the nature of the government under which they happened to live. It was only by the inclusion of "subjects" that all aliens, whether they owed allegiance to a sovereign monarch or were citizens of a democracy, could sue or be sued in federal courts.²⁵⁹

Furthermore, when the framers used the word "subject," they may have meant something broader than simply a type of citizenship under a monarchy. They may, instead, have intended to include those who were subjected to the authority of another state or power. The Supreme Court, in *Dred Scott v. Sanford*,²⁶⁰ concluded that the framers found the "distinction between the citizen and the subject" to be that between "the free and the subjugated races," the latter "being under the dominion, rule, or authority of a . . . state."²⁶¹

Precedent exists for a more expansive reading of "subject." In *Cedec Trading, Ltd. v. United American Coal Sales, Inc.*,²⁶² the court was faced with a plaintiff that was a corporate citizen of the Channel Islands, which lie off the coast of England.²⁶³ The court reviewed the status of the Channel Islands and found that, because the legislature and courts were subject to direct control by the British Government, Parliament's laws were paramount on the island.²⁶⁴ The court also found that because the foreign affairs of the islands were controlled entirely by United Kingdom, the plaintiff was considered a citizen of the foreign state of United Kingdom for purposes of alienage jurisdiction.²⁶⁵

259. *Van der Schelling v. U.S. News & World Report, Inc.*, 213 F. Supp. 756, 761 (E.D. Pa.), *aff'd*, 324 F. 2d 956 (3d Cir. 1963), *cert. denied*, 377 U.S. 906 (1964).

260. 60 U.S. (19 How.) 393 (1857).

261. *Id.* at 419.

262. 556 F. Supp. 722 (S.D.N.Y. 1983).

263. *Id.*

264. *Id.* at 723.

265. *Id.*; see *Wilson v. Humphreys (Cayman), Ltd.*, 916 F.2d 1239 (7th Cir. 1990) (finding that the exercise of federal judicial authority over citizens of a British Dependent Territory implicated United States relations with the United Kingdom), *cert. denied*, 499 U.S. 947 (1991). This fact, according to the court, required the exercise of alienage jurisdiction over Cayman citizens because the implication of United States relations with the United Kingdom is "precisely the *raison d'être* for applying alienage jurisdiction." *Id.* at 1243. The court found as well that a governor appointed by the British monarch administered the Cayman Islands. *Id.* at 242.

Moreover, in 1900, in *Betancourt v. Mutual Reserve Fund Life Ass'n*,²⁶⁶ a federal court upheld alienage jurisdiction where the plaintiff alleged that he was a "subject and citizen of Cuba."²⁶⁷ The action was commenced after the Spanish-American War, before Cuba obtained independence, and during United States military occupation of the island.²⁶⁸ Spain essentially had relinquished all claims of sovereignty over the island.²⁶⁹ The court determined that there was "nothing in all this which lends any color to the proposition that the plaintiff is not a foreign citizen."²⁷⁰ *Betancourt* would thus seem to indicate that a broader reading of the terms of the Judicial Code is possible even where no specific citizenship can be claimed by a plaintiff.

More recently, in *Roberto v. Hartford Fire Ins. Co.*,²⁷¹ a case decided in 1949, the Seventh Circuit held federal jurisdiction to be proper pursuant to 28 U.S.C. § 1332, where the plaintiff was a native Italian who became a naturalized American citizen.²⁷² Following a perjury charge, he was deported back to Italy.²⁷³ In finding that the plaintiff, Domenico Roberto, could avail himself of alienage jurisdiction, the court noted that he "had been deported to Italy and would at least have the status of a subject of that country."²⁷⁴ This implies recognition of a status other than that encompassed by the term "citizenship," yet sufficient to allow federal jurisdiction under the Judicial Code.

The subjugation and governance of Palestinians in the Occupied Territories parallels that described by the *Dred Scott* court in 1857. The Occupied Territories where the plaintiffs resided when the complaint was filed had been under Israeli military occupation for almost thirty years.²⁷⁵ The residents of the Occupied Territories were subject to Israeli military courts, which in turn were supported by the Civilian Ad-

266. 101 F. 305 (S.D.N.Y. 1900).

267. *Id.* But see *Windert Watch Co. v. Remex Elecs.*, 468 F. Supp. 1242 (S.D.N.Y. 1979) (dismissing claims against citizens of Hong Kong because Hong Kong failed to meet the standard of "foreign state").

268. *Betancourt*, 101 F. at 305.

269. *Id.*

270. *Id.* at 306.

271. 177 F.2d 811 (7th Cir. 1949), *cert denied*, 399 U.S. 920 (1950).

272. *Id.* at 814.

273. *Id.*

274. *Id.*

275. *Country Reports on Human Rights Practices for 1992*, JOINT COMM. REP. No. 7, 103d Cong., 1st Sess. 1019-30 (1992) [hereinafter *1992 Country Reports*].

ministration and Israeli military law.²⁷⁶ Thus, they may fairly be said to have lived under the "authority, dominion and control" of Israel.

The Palestinian plaintiffs lived under the more than 1300 military orders issued by Israel.²⁷⁷ Palestinians accused of violating security laws have been tried in Israeli military courts, while those accused of non-security offenses have been tried by Palestinian judges; the Palestinian judges, however, were appointed by Israeli officials.²⁷⁸ Palestinian travel could be, and often has been, restricted by Israeli authorities.²⁷⁹ Israeli authorities have gone so far as to curb Palestinian freedom of speech and assembly, barring them from meeting in groups of ten or more without a permit.²⁸⁰ Palestinians also have been taxed extensively by Israel on, *inter alia*, their land, water rights and businesses.²⁸¹

The plaintiffs' existence in the Occupied Territories seems to fall squarely within the dictionary distinction between citizens and subjects as one "without much sense of membership in [the Israeli] political community."²⁸² They have been denied participation in significant political or economic decisions, especially in contrast to the Israeli citizens who reside in the Territories:

Under the dual system of governance applied to Palestinians and Israelis, Palestinians are treated less favorably than Israeli settlers on a broad range of issues, including applicability of the right to due process; residency rights; freedom of movement; sale of crops and goods; water use; land tenure, ownership, and seizure issues; and access to health and social services. Offenses against Israelis are investigated and prosecuted more vigorously than offenses against Palestinians.²⁸³

In summary, there exist grounds upon which to believe both that the framers' use of the term "subject" evinced their intent to include all aliens within the Code's reach and that its usage reveals a concept broader than that of a citizen or subject as defined merely by an individual's form of government as a monarchy or democracy.

276. *Id.*

277. *Id.* at 1019.

278. *Id.* at 1023.

279. *Id.* at 1020.

280. 1992 *Country Reports*, *supra* note 275, at 1025.

281. *Id.*

282. See WEBSTER'S THIRD INT'L DICTIONARY 411 (14th ed. 1961) (distinguishing "citizen" from "subject").

283. 1992 *Country Reports*, *supra* note 275, at 1028.

CONCLUSION

The provisions of the Judicial Code and the Constitution allowing alienage jurisdiction over citizens and subjects of foreign states must be interpreted broadly to permit all alien, non-United States citizens to sue United States citizens in federal courts where other statutory requirements are met. Permitting "stateless" parties to sue is consistent with international and federal law and policies condemning statelessness. Moreover, allowing such access accords with the vision of the framers, who were unfamiliar with the concept of statelessness but, as best is discernible, believed that the relevant constitutional terms and those appearing in the Judiciary Act of 1789, upon which the current law is based, included all aliens.

Judicial hesitance to apply the Code broadly has surfaced in those cases involving parties that are citizens or subjects of unrecognized foreign governments or states out of an asserted respect for the executive actions in the political arena. While one might question the degree to which permitting such suits would in fact subvert the executive, surely a rule against suit by unrecognized governments *qua* governments is all that is needed to put these fears to rest.

For purposes of the grant of jurisdiction, virtually no alien need be found stateless if a liberal test, such as that of genuine linkage to a state, is applied to establish the party's nationality. Alternatively, courts could apply a presumption of continuing citizenship to avoid finding a party to be stateless. There are other means available to achieve a result that satisfies the Code's purpose, such as through liberal construction of the terms of the Code or through recognition of the acts of unrecognized governments when they grant citizenship. This interpretation also is necessary to effectuate the purposes of diversity jurisdiction over aliens, namely, to guard against prejudice to the alien and to provide for protection of national interests in a federal forum. Courts, in recent years, have begun to recognize that nations today are interdependent, and that a liberal interpretation of what constitutes a foreign state comports with this reality.

The *Abu-Zeineh* case brings these issues into focus. In *Abu-Zeineh*, other states, such as Jordan, have an interest in the welfare of the plaintiffs. Statutes such as the Judicial Code should not be construed in such a way as to thwart their purposes and produce the absurd result of incurring precisely those entanglements that the framers sought to avoid. Moreover, the injustice of denying certain aliens access to federal courts is particularly apparent with regard to individuals who become subjugated to a foreign occupying power. Because the framers probably thought

they had included all aliens within the Code's terms and by virtue of the individual's subjugation, it would be appropriate to include such persons within the Code's reach as "subjects" of the occupying state.

Clearly, even if a Palestinian state is not recognized, given the sensitivity of international political relations in the Middle East, affronting the PLO or the Jordanian Government is not conducive to the goals of the United States in seeking a lasting peace in the area. Relations between the United States and those of other nations fluctuate, as is evident in the case of United States relations with the PLO and in its relationship to Israel. A steady policy against judicial effrontery of those whom the executive does not recognize at a particular time could thus be said to give greater flexibility to the executive to establish or weaken ties with other governments based on other political considerations.

In summary, a reading of the Code's and the Constitution's alienage jurisdictional provisions must include all aliens within their reach, with the possible exception of suits by unrecognized governments, if the goals of the framers are to be realized and if the United States is to comply with its obligations under international law and domestic policy condemning statelessness. Legislative action to that effect should not be necessary to propel the courts to this result because such a construction of the Code is already warranted under its own terms when read in the context of its framing, a policy deploring statelessness, and the underlying purposes of its provisions.