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COMMENTS

MATIMAK TRADING CO. V. KHALILY: THE FRAMERS DISHONORED

INTRODUCTION

"[T]he peace of the WHOLE ought not to be left at the disposal of a PART."1 In The Federalist Number 80, Alexander Hamilton listed the various contexts into which the authority of the federal judiciary extends.2 Despite its position at the end of Hamilton's list, history reveals the Framers' true appreciation for the importance of settling cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"3 within the federal judicial forum.4 In today's global economy, this particular intention

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1 THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that one of the purposes for a national judiciary was to ensure that matters of national concern, such as foreign relations, were not left to the discretion of state courts).
2 See id. at 475.
3 U.S. CONST. art. III, § 2, cl. 1.
4 See Wythe Holt, The Origins of Alienage Jurisdiction, 14 OKLA. CITY U. L. REV. 547, 548-561 (1989) (tracing the history of alienage jurisdiction). The delegates at the Constitutional Convention in 1787 unanimously agreed that the Constitution should provide for a national judiciary that would, in the words of the preamble to
of the Framers’ has taken on an added significance. To encourage continued foreign investment and interaction with United States business enterprises, the right of access to the impartial federal judiciary, provided by alienage jurisdiction, must be upheld. However, a recent decision of the United States Court of Appeals for the Second Circuit, Matimak Trading Co. v. Khalily,\(^5\) threatens to eliminate the availability of the federal forum in circumstances for which alienage jurisdiction was created.

In Matimak, the Second Circuit Court of Appeals examined whether a corporation could invoke alienage jurisdiction as a “citizen or subject” of Hong Kong.\(^6\) Matimak filed suit in the United States District Court for the Southern District of New York in August of 1996 after two New York corporations, Unitex Mills, Inc. and D.A.Y. Sportswear Inc., allegedly breached a contractual arrangement with the Matimak Trading Co., a corporation established under Hong Kong law with its principal place of business in Hong Kong.\(^7\) Matimak based its claim of federal jurisdiction on diversity between “citizens of a State and citizens or subjects of a foreign state.”\(^8\) The district court raised the jurisdictional issue sua sponte, and concluded that Hong Kong was not a

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6 See id. at 78.
7 See id.
8 Id. Matimak brought the breach of contract claim under 28 U.S.C. § 1332 (a)(2) which provides in pertinent part: “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of a State and citizens or subjects of a foreign state.” 28 U.S.C. § 1332 (a)(2) (1998).
"foreign state" under 28 U.S.C. § 1332 (a)(2), precluding it from recognizing Matimak as a "citizen or subject" of a "foreign state," and ultimately dismissed Matimak's complaint for lack of subject matter jurisdiction.\footnote{See Matimak Trading Co. v. Khalily, 936 F. Supp. 151, 152-153 (S.D.N.Y. 1996), aff'd, 118 F.3d 76 (2d Cir. 1997), cert. denied, 118 S.Ct. 883 (1998).} Subsequently, the United States Court of Appeals for the Second Circuit affirmed the holding of the district court and refused to recognize Hong Kong as a "foreign state" for purposes of diversity jurisdiction.\footnote{See id. at 79-83.}

First, the court evaluated formal recognition of Hong Kong as a "foreign state" by the United States as a potential basis for alienage jurisdiction in the case of Matimak.\footnote{Id. at 79.} Noting the absence of a definition of "foreign state" in either the United States Constitution or 28 U.S.C. § 1332 (a)(2), the court stated the general rule that "a foreign state is one formally recognized by the executive branch of the United States government."\footnote{See also Iran Handicraft & Carpet Export Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987) (citing 13B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3604, at 391 (1984)).} Upon agreement of the involved parties that the United States had not formally recognized Hong Kong as a foreign state, the court proceeded to examine Matimak's contention that Hong Kong had received "de facto" recognition as a foreign state, thereby allowing

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\footnote{9 See Matimak Trading Co. v. Khalily, 936 F. Supp. 151, 152-153 (S.D.N.Y. 1996), aff'd, 118 F.3d 76 (2d Cir. 1997), cert. denied, 118 S.Ct. 883 (1998). After raising the issue of subject matter jurisdiction sua sponte, the court asked the parties to file briefs supporting their positions. See id. at 152. Matimak argued that Hong Kong should be recognized as a de facto foreign state based on policy considerations. See id. (citing Iran Handicraft & Carpet Export Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987)). The court rejected this reasoning and declared that recognition of foreign states is a function of the executive, not the judicial, branch of government. See id. at 152. Relying upon the Second Circuit's decision in Murarka v. Bachrack Bros., Inc., 215 F.2d 547 (2d Cir. 1954), which recognized India as a foreign state for diversity purposes, Matimak further asserted that Hong Kong should be recognized as a de facto foreign state for diversity purposes. See id. at 152-53. Stressing the following distinctions between the two situations, the court disagreed. See id. In anticipation of India's political separation from Great Britain, four days before the Indian Independence Act took effect and before the complaint in the Murarka case had been filed, an Interim Indian Government had been established and the United States and the newly independent Indian nation had exchanged ambassadors. See id. at 152. Yet, Matimak filed its complaint more than a year and a half before the reversion to Chinese sovereignty, and at that point, the United States had not yet begun the process of formally recognizing Hong Kong as a fully incorporated part of China. See id. at 152-53.

\footnote{10 See Matimak, 118 F.3d at 78.}

\footnote{11 Id. at 79. See also Iran Handicraft & Carpet Export Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987), aff'd, 868 F.2d 1267 (2d Cir. 1988) (citing 13B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3604, at 391 (1984)).}
its citizens to invoke alienage jurisdiction. The court stated its intention to defer to the executive branch's recognition of foreign states for the purpose of alienage jurisdiction. Citing the objectives of alienage jurisdiction and the jurisprudential paradigm for defining a "foreign state" as "compelling reasons" for its adherence to any executive decision on a foreign state, the court repudiated Matimak's arguments in support of de facto recognition and rejected its claim of alienage jurisdiction. In his dissenting opinion, Circuit Judge Altimari expressed his concern that the majority's holding could likely lead "to the very political entanglements the Constitution and § 1332 sought to avoid."

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13 See Matimak, 118 F.3d at 80. The Second Circuit noted that in finding de facto recognition as a foreign state, the most important criteria is whether the entity is regarded as an "independent sovereign nation." Id.
14 See id at 81-83.
15 See id. at 82-83. The court stated two objectives of alienage jurisdiction. The first, to avoid conflicts with foreign nations which might arise if their citizens were treated unfairly. See id. The second, to place these cases within the jurisdiction of federal courts to avoid unfair treatment of foreigners which is more likely to occur in the state court system. See id. at 83.
16 See id. at 83-84; see also National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 560 F.2d 551, 553 (2d Cir. 1988) (citing Pfizer Inc. v. India, 434 U.S. 308, 319-320 (1978), where the Court ruled that for purposes of diversity jurisdiction under 28 U.S.C. § 1332(a)(4), a foreign state and the government that represents it must be one "recognized" by the United States.). The court stated that the similar rationales behind § 1332(a)(2) and § 1332(a)(4) should mandate uniformity in defining "foreign states." See Matimak, 118 F.3d at 84. However, "foreign state" under 28 U.S.C. § 1332(a)(4) is defined by reference to 28 U.S.C. § 1603(a), while no such reference exists under 28 U.S.C. § 1332(a)(2). See id. at 83. This difference creates a slight but perceptible distinction in the definition of "foreign state." See id. at 84 n.3.
17 See Matimak, 118 F.3d at 82.
18 See id. at 88. The court explained that it had established the doctrine of de facto recognition in Murarka, where, despite the absence of formal de jure recognition of India as a foreign state, certain prior acts by the United States amounted to de facto recognition. See id. at 80; see also supra note 9 and accompanying text. "At the very least,... the de facto test depends heavily on whether the Executive Branch regards the entity as an 'independent, sovereign nation.' " Matimak, 118 F.3d at 80 (quoting Iran Handicraft & Carpet Export Ctr., 655 F. Supp. at 1278); see also Calderone v. Naviera Vacuba S/A, 325 F.2d 76, 77 (2d Cir. 1963), modified on other grounds, 328 F.2d 578 (2d Cir. 1964) (per curiam) (upholding alienage jurisdiction in a suit between a Cuban corporation and an American company). In Calderone, the court noted:

Considerations of both international relations and judicial administration lead us to conclude that the onus is on the Department of State, or some other department of the Executive Branch, to bring to the attention of the courts its decision that permitting nationalized Cuban corporations to sue is contrary to the national interest.

Calderone, 325 F.2d at 77.
19 Matimak, 118 F.3d at 92.
On January 26, 1998, the Supreme Court denied certiorari and allowed the Second Circuit's denial of jurisdiction to stand.\footnote{See Matimak Trading Co. v. Khalily, 118 S.Ct. 883 (1998).}

It is proposed that the Matimak Court erred in denying alienage jurisdiction. The goal of the Framers was to avert involvement in needless foreign relation debacles by providing foreign litigants with access to the most neutral forum available in a time of extreme patriotism and xenophobia in the United States.\footnote{See Matimak, 118 F.3d at 82-83.} By relegating the claim of the Matimak Trading Co. to state court, the Matimak court contravened the intentions of the Framers and risked antagonizing an important member of the international community. Additionally, it is offered that the court failed to sufficiently evaluate the consequences of continued judicial deference. The ramifications of this decision will likely be a loss of foreign investment and increased aggrandizement of the legislative and executive branches of government at the expense of the relatively feeble judiciary.

This Comment contends that the historical purposes of alienage jurisdiction and the severity of declaring any entity "stateless" counsel in favor of providing the Matimak Trading Co. with the option of pursuing its claim in federal court. Also, the dangers inherent in judicial deference to the executive, in this context and others, signal the need for a reevaluation of its costs and benefits. Lastly, maintenance of the constitutionally-designed fragile equilibrium between the respective branches of government requires that each branch safeguard its responsibilities and powers from encroachment by the others.

I. THE PURPOSES OF ALIENAGE JURISDICTION REVISITED

Interestingly, the majority and the dissent in Matimak both refer to the Framers' motivations for creating alienage jurisdiction as justifications for their opposing viewpoints.\footnote{See id. at 86-92.} Of paramount importance to the Framers was assuring the newly formed nation access to capital necessary for it to succeed.\footnote{See Wythe Holt, "To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1452 (1989). "National union, national honor, and more importantly national credit depended upon the 'establish[ment of] justice' in forums freed from popular pressures, in which solemn treaty obligations could be safely enforced." Id.} Atrocities...
committed by the British during the war fanned an anti-British fire already raging in the colonies. Colonial resentment and contempt fostered defiance of treaties and lax judicial enforcement of debts owed to British business persons. The Framers, aware of the potential for treaty violations after the long and bloody war, wisely included in the Supremacy Clause the requirement that all state courts abide by all treaties in existence at the time and those ratified in the future. Similarly, cognizant of state court failures to ensure repayment of colonial obligations to British subjects, alienage jurisdiction granted the right to preside over suits between a United States citizen and a foreigner to the seemingly more impartial federal courts. The Framers' objectives were centered on the “two interrelated concerns” of providing an alternative to the biased state courts unfairly deciding matters involving foreigners, and preventing unnecessary entanglements with foreign nations. The interesting aspect of the majority and dissent similarly relying upon the aims of alienage jurisdiction to justify their opinions is that one

24 In James Madison's words:

No description can give you an adequate idea of the barbarity with which the Enemy have conducted the war in the Southern States. Every outrage which humanity could suffer has been committed by them. Desolation rather than conquest seems to have been their object. They have acted more like desperate bands of Robbers or Buccaneers than like a nation making war for dominion. . . . Rapes, murders [and] the whole catalogue of individual cruelties, not protection [and] the distribution of justice are the acts which characterize the sphere of their usurped Jurisdiction.

3 THE PAPERS OF JAMES MADISON 180 (1963) (letter from James Madison to Philip Mazzei dated July 7, 1781); see also Johnson, supra note 4, at 7 n.26 (describing violence against loyalists in New York).

25 See Holt, supra note 4, at 553-62 (describing colonial disregard for the Treaty of Peace with Great Britain and the failure of the state courts to require repayment of debts owed to British citizens); see also Blair Holdings Corp. v. Rubinstein, 133 F. Supp. 496, 500 (S.D.N.Y. 1955) (stating that one of the purposes of alienage jurisdiction is to provide protection for foreigners through enforceable treaties).

26 See Holt, supra note 4, at 552; see also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 417 (M. Farrand ed., 1937) (recounting a motion of James Madison to reconsider the Supremacy Clause which caused, without dissent, the addition of the words “or which shall be made,” after the words “all treaties made”).

27 U.S. CONST. art. III, § 2, cl. 1

28 Christine Biancheria, Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of Abu-Zeineh v. Federal Lab., Inc., 11 AM. U. INT’L L. & POL’Y 195, 206-07 (1996); see also Blair Holdings Corp., 133 F. Supp. at 500 (explaining the concerns alienage jurisdiction sought to address); Holt, supra note 4, at 1458 (noting that a solution to the problem of recovering debts and compelling strict compliance with contracts was to establish federal courts, with judges less susceptible to the pressures exerted by local debtors).
argument must be more accurate than the other, as it seems impossible for the aims of alienage jurisdiction to precisely support diametrically opposed results in exactly the same measure.

The Framers' appraisal of alienage jurisdiction more than two hundred years ago, as a meaningful device to quell foreign concerns over bias against foreigners in state courts, is just as accurate today. Consequently, hindering free access to the federal judiciary in cases over which it has jurisdiction must betray the intentions of the Framers. While the Framers were concerned with maltreatment of British economic concerns, present day domestic malaise over foreign commerce adversely affecting the United States is more varied. Yet, similar to the situation that existed in the end of the eighteenth century, "[c]oncern with foreign business frequently has been strongest at the state and local levels." These factors, coupled with the present economic relations between Hong Kong and the United States, militate in favor of honoring the purposes behind alienage jurisdiction and

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31 See Tetra Finance (HK) Ltd. v. Shaheen, 584 F. Supp. 847, 848 (S.D.N.Y. 1984) (noting that the United States is Hong Kong's largest foreign investor and trading partner); see also Matimak Trading Co. v. Khalily, 118 F.3d 76, 90 (2d Cir.) (Altimari, J., dissenting) (illustrating how the United States considers Hong Kong essentially a foreign state for other purposes), cert. denied, 118 S. Ct. 883 (1998). Judge Altimari, in his dissent, noted Hong Kong's recognition as a separate foreign state under Section 202 of the Immigration and Naturalization Act for purposes of per-country numerical limitations. See id. In addition Judge Altimari stated the following:

Hong Kong is [ ] recognized as an autonomous entity in the economic and trade arena; a contracting party to the General Agreement of Tariffs and Trade, and thereby accorded most favored nation status by the United States; considered a member country in the United States Information Agency educational exchange program; and a member of the Organization for Economic Cooperation and Development. Hong Kong is a founding member of the World Trade Organization . . . .

Id. (citations omitted) (emphasis added); see also The Hong Kong Policy Act, 22 U.S.C. § 5701(1)(E)(4) (1994) ("Hong Kong plays an important role in today's regional and world economy. This role is reflected in strong economic, cultural, and other ties with the United States that give the United States a strong interest in the continued vitality, prosperity, and stability of Hong Kong.")
maintaining the best possible relations with a valuable United States trading partner.\(^3\) Denying Matimak Trading Co. access to federal court because of the lack of formal recognition would be a senseless veneration of “form” over “substance.”\(^3\)

II. AN UNFORESEEN DILEMMA

The preeminence of the United States, more than two hundred years after its creation, is a testament to the wisdom of the men who drafted the document under which it has flourished. Yet, not even the combined wisdom of all the founding fathers could address every circumstance the newly formed nation would face.\(^3\) The United States District Court for the Southern District of New York first examined the unanticipated phenomenon of a stateless litigant in 1955 in the case of *Blair Holdings Corp. v. Rubinstein.*\(^3\) Rubinstein was born a subject of the Czar of Russia and later acquired Portuguese citizenship; certain actions taken by Rubinstein, however, caused the court to deem him “stateless” for purposes of diversity jurisdiction.\(^3\) The plaintiff sought to have his case heard in a federal court and, consequently, the court addressed the issue of “whether for the purpose of federal jurisdiction under 28 U.S.C. § 1332 (a)(2) a stateless person is a citizen or subject of a foreign state.”\(^3\) The court denied Ruben-

\(^{32}\) See *Tetra Finance (HK) Ltd.*, 584 F. Supp at 848. The *Tetra* court stated, in dicta, that precluding Hong Kong corporations from suing in the federal courts would be a hypertechnical distinction which should not be permitted. *See id.* It stressed that modern world realities should control and allow certain governmental entities to sue even though they have not yet been formally recognized as a foreign state by the executive branch. *See id; see also Matimak, 118 F.3d at 91 (Altimari, J., dissenting) (citing *Tetra*, 584 F. Supp. at 848).*

\(^{33}\) *See Matimak, 118 F.3d at 91 (Altimari, J., dissenting).*

\(^{34}\) *See Biancheria, supra note 28, at 209 (explaining how, at the time the Constitution was written, a person being “stateless” was not contemplated).*

\(^{35}\) *133 F. Supp. 496 (S.D.N.Y. 1955).*

\(^{36}\) *See id at 499. The court cited the case of Hauenstein v. Lynham, 100 U.S. 483, 484 (1879), which advanced the presumption that citizenship, once established, continues. *See id.* The court went on to explain that, in Rubinstein’s case, the presumption would not stand because of the following: (1) Rubinstein and his entire family fled Russia in 1918, without permission of the Soviet authorities; (2) Under applicable Soviet statutes and laws relating to the forfeiture of Soviet citizenship, Rubinstein ceased to be a citizen of the U.S.S.R.; (3) Rubinstein registered as a stateless person with the United States Department of Justice. *See id.* In addition, the presumption that Rubinstein continued to be a citizen of Portugal was overcome by the Portuguese Consul General in New York issuing a document certifying that Rubinstein’s citizenship had been canceled. *See id.*

\(^{37}\) *Id.*
stein access to the federal courts, declaring that the terms “aliens” and “foreigners” were plainly intended to refer to “citizens or subjects of some specific foreign state.”

Contrary to the apparent plain meaning of the diversity statute, it has been contended that the Framers’ unawareness of the concept of “statelessness” led them to believe that “they had encompassed all aliens when speaking of ‘citizens or subjects of foreign states.’” Further, “constrained adherence to what appears to be plain language diserves the statutory purposes of avoiding entanglements with foreign sovereigns and offering an impartial judicial forum to the alien.”

In an attempt to settle such quandaries, Judge Richard A. Posner, in his work entitled The Federal Courts: Crisis and Reform, described two methods judges could utilize when attempting to ascertain the manner in which a legislature would have applied a statute in circumstances not considered during drafting. If the judge is unable to imaginatively reconstruct exactly what the legislators would have done, he or she must discern the interpretation that will provide the most reasonable result. It seems that the most reasonable result in the Matimak

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58 Id. at 500.
59 Biancheria, supra note 28, at 210 (emphasis in original) (citing 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 492-93 (Jonathan Elliot ed., 2d ed. 1886)). “This view is supported by [the Framers'] frequent use of the terms 'citizens or subjects of foreign states' interchangeably with 'foreigners' and 'aliens.'” Id. at 210 n.68; see also Van der Schelling v. U.S. News & World Report, Inc., 213 F. Supp. 756, 759-60 (E.D. Pa. 1963) (declaring that the Framers referring to “citizens,” “subjects,” and “foreigners” interchangeably is an indication that, in their minds, the terms “citizen” and “subject” were synonymous), aff’d, 324 F.2d 956 (3d Cir. 1963).

The Judiciary Act of 1789 provides additional evidence of the Framers’ intent to encompass all aliens in the grant of jurisdiction. See Biancheria, supra note 28, at 210-11. For example, the Act initially allowed suit in federal court “where an alien is a party without any apparent qualification.” Id. at 211. Furthermore, Justice Story defined an alien as “any person who is not a citizen of the United States,” in his review of the jurisdictional provisions of the Constitution. Id. (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 499 (5th ed. 1891)).

62 Biancheria, supra note 28, at 209.
64 See id. at 286-87 (describing his two-part approach).
65 See id. (describing the process by which a judge steps into the legislators' shoes when deciding how to apply a statute).
66 See id. at 287 (explaining that the judge must always remember that what seems reasonable to him or her may not have seemed reasonable to the legislators who enacted the statute, and that the legislators' evaluation of what is reasonable
case would have been to render an interpretation that permitted "stateless" Matimak to have its day in federal court. By denying Matimak access to the federal judiciary, the Second Circuit may have altered the balance of foreign relations between the United States and any of the several other remaining British Crown colonies.\footnote{See Matimak, 118 F.3d at 88 (Altimari, J., dissenting) (referring to Bermudas, St. Helena, Falkland Islands, British Virgin Islands, Cayman Islands, and Gibraltar).} As a justification for a decision that may damage United States trade relations,\footnote{See id. (asserting that the majority's holding risks antagonizing both the United Kingdom and China).} the majority offered the proposition that "[t]he same terms used in the same statute should get the same meaning, and then proceeded to contradict that justification in the next paragraph.\footnote{Matimak, 118 F.3d at 83.} Additionally, the Supreme Court and others have counseled against designating any entity as "stateless."\footnote{See id. at 83-84.} While these cases may be distinguished from the should guide the judge's decision).

\footnote{See Matimak, 118 F.3d at 88 (Altimari, J., dissenting) (referring to Bermudas, St. Helena, Falkland Islands, British Virgin Islands, Cayman Islands, and Gibraltar).}

\footnote{See id. (asserting that the majority's holding risks antagonizing both the United Kingdom and China).}

\footnote{Matimak, 118 F.3d at 83.}

\footnote{See id. The majority explained that 28 U.S.C. § 1332(a)(4), and the current § 1332(a)(2), were not drafted together. See id. In 1976, after revising § 1332(a)(2), Congress passed § 1332(a)(4), which created diversity jurisdiction in suits brought by foreign states against a United States citizen. See id. "Foreign state" in the new § 1332(a)(4) is defined by reference to 28 U.S.C. § 1603(a), which frequently uses the term without ever defining it. See id. The majority further reasoned that since Congress neglected to define § 1332(a)(2) by a similar reference to Section 1603(a), it "suggests only that 'foreign state' in § 1332(a)(2) does not include § 1603(a)'s inclusion of certain instrumentalities, political subdivisions and other state entities as a 'foreign state.' " Id. This, according to the majority, does not suggest that the two should employ different definitions of "foreign state." Id. at 83-84.}

\footnote{See Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion). In Trop, a military deserter for less than a day was convicted of wartime desertion, sentenced to three years at hard labor, and dishonorably discharged. See id. at 87-88. Trop's application for a passport in 1952 was denied on the grounds that under the provisions of Section 401(g) of the Nationality Act of 1940, 8 U.S.C. § 1481(a)(8), he had forfeited his citizenship as a result of his conviction and dishonorable discharge. See id. at 88. The Supreme Court granted certiorari to examine the penalty of being branded "stateless." Id. at 87. After using the death penalty as an "index" of the constitutional limit on punishment, the Court reversed the lower court's decision. See id. at 99, 104. In announcing the judgment of the Court, Chief Justice Warren stated: We believe . . . that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. . . . This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress.}
situation in Matimak, it is contended that preventing the unnecessary imposition of a "stateless" label on any entity should be a common thread in each.

III. RETHINKING THE GENERAL RULE

Whether it is construed as allegiance or unquestioning adherence, the majority's affirmation of the general rule under which formal recognition by the executive branch predominately determines the existence of a foreign state merits examination. Both the legislative and executive branches were endowed with parallel powers in the realm of foreign affairs. A popular view of separation of powers in the area of foreign affairs asserts that the Framers intended the legislature to be preeminent in this arena. That aim, however, has been obfuscated by realities that have come to recognize the appointment of the President as the driving force behind foreign policy. Legislative sentiment on the

Id at 101-02; see also Guerrero v. United States, 691 F. Supp. 260, 264 (D.N. Mariana Islands 1988) (requiring issuance of a passport to a resident of the former trust territories of the Northern Mariana Islands to prevent the irreparable injury of being rendered stateless and unable to travel); Biancheria, supra note 28, at 205 (noting that in other contexts, federal courts have adopted a more flexible approach to citizenship so as to avoid the injustice that would accompany the designation of an entity as "stateless").

50 See Matimak, 118 F.3d at 80 ("At the very least, . . . the de facto test depends heavily on whether the Executive Branch regards the entity as an 'independent sovereign nation.'") (quoting Iran Handicraft and Export Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275, 1278 (S.D.N.Y. 1987)).

51 Legislative grants of power include: regulating commerce with foreign nations and the Indian tribes; defining and punishing piracies and felonies on the high seas and offenses against the law of nations; declaring war; granting letters of marque and reprisal; making rules concerning captures on land and water; raising and supporting armies; providing and maintaining a navy; making rules for the regulation of land and naval forces; calling forth the militia to execute the laws, suppressing insurrections and repelling invasions; and providing for organizing, arming, and disciplining the militia, and for governing those in service to the United States. See U.S. Const. art. I, § 8.

Executive grants of power include: serving as commander-in-chief of the armed forces and of the militia, when in service to the United States; making treaties with the advice and consent of the Senate; appointing ambassadors, other public ministers, and consuls; receiving ambassadors and other public ministers; and commissioning all officers of the United States. See U.S. Const. art. II, §§ 2, 3.

52 See generally Louis Henkin, Foreign Affairs and the Constitution 89-123 (1972) (describing conflict and cooperation between the executive and legislative branches on issues of foreign policy).

[T]he foreign relations powers appear not so much 'separated' as fissured, . . . [but] [i]n the end and over-all, Congress clearly came first, in the longest article, expressly conferring many, important powers; the Executive
humanitarian treatment of Hong Kong and its citizens can be
gleaned from selected portions of the text of the Hong Kong Pol-
icy Act of 1992.\textsuperscript{53} It must be queried, however, how can basic
human rights be safeguarded if citizens of Hong Kong cannot be
assured access to the most impartial judiciary for the resolution
of legal conflicts? Although \textit{Matimak} is only one case, in the ag-
gregate, the legislature’s objectives will not be served. Hong
Kong’s economic vitality will be threatened if legal conflicts in
the state courts are skewed by xenophobia and distrust of foreign
competitors. Moreover, it is contended that the general rule and

ceremony of formal recognition, engendered by happenstance,
prevents the legislature from guaranteeing the achievement of
its objectives.

The landmark decision of \textit{Marbury v. Madison},\textsuperscript{54} declared the
Supreme Court to be the ultimate interpreter of the Constitu-
tion.\textsuperscript{55} There is no conflict between the law and the Constitution
in \textit{Matimak} since § 1332(a)(2) basically mirrors Article III’s ref-
erence to foreign states, citizens or subjects.\textsuperscript{56} As the final
authority on the Constitution, the Supreme Court has never de-

\textit{Id}. at 177 (“It is emphatically the province and duty of the judicial department
to \textit{say what the law is.”}; see also \textit{Cooper v. Aaron}, 358 U.S. 1, 18 (1958) (“[T]he
federal judiciary is supreme in the exposition of the law of the Constitution.”).

to jurisdiction over suits between United States citizens and “citizens or subjects” of
foreign states).

\textit{See Matimak}, 118 F.3d at 79.
Executive branch, but a "stateless" label does not necessarily follow from a failure to provide such recognition. Consequently, the Court's likely stance on resolving this quandary can best be inferred by heeding the Court's proscriptions against designating any entity as "stateless." Therefore, the general rule should be modernized and reworked to prevent the exclusion of foreign states by the "deferential" judiciary, when the results could continue to be at odds with Supreme Court declarations.

The Framers were equally concerned with the potential weakness of the judicial branch of government as they were with providing a forum in which the rights of foreigners would be scrupulously upheld. As a coordinate branch of government, the judiciary is responsible for deciding the " 'supreme Law of the land' and thus on occasion [must] override legislative or executive action." Consequently, the independence of the judiciary branch from the executive and legislative branches is the basic tenet under which our democratic form of government has thrived. History has witnessed several conflicts between the executive and judiciary branches. One of the most significant and famous occurred in 1952 when President Truman ordered the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. Truman's action "[struck] not only at the right of a person not 'to be deprived of life, liberty or property without due process of law,' but at the power of... the

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58 See Jones v. United States, 137 U.S. 202, 214 (1890) ("All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer.").

59 See supra note 49 and accompanying text.

60 See THE FEDERALIST No. 78, at 465-66 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961)

[It is] incontestable, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. There is no liberty, if the power of judging be not separated from the legislative and executive powers.

Id. at 491.

61 See id. at 97-98

62 See id. at 124-28 (discussing various occurrences of tension between the executive and judicial branches). For a broader discussion of how the executive and legislative powers interact, see LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (3d ed. 1991).

63 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).
courts to adjudicate with respect to such rights." In his concurring opinion in the case of *Ashwander v. Tennessee Valley Authority,* Justice Brandeis described seven self-imposed manifestations of judicial deference that have developed in the Supreme Court. In light of the threat to valued trade relations and to the essential balance of power between the coordinate branches of government, "[t]he time [has surely] come for a reconsideration of the propriety of the entire doctrine of judicial deference, if the balance contemplated by the Constitution is to be recovered."

Although the People's Republic of China resumed sovereignty over Hong Kong on July 1, 1997, future availability of the federal courts to Hong Kong citizens is a question that has not been specifically addressed. Although the Second Circuit limited its denial of alienage jurisdiction to cases arising prior to the Chinese resumption of sovereignty over Hong Kong, the court neglected to provide any guidance on how the change in Hong Kong's political status would affect its citizens' access to the United States federal judiciary. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which took effect on July 1, 1997, described Hong Kong as

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65 VANDERBILT, *supra* note 61, at 126 (quoting the U.S. CONST. amend. V.).
67 See id. at 346-48 (Brandeis, J., concurring)
   1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding. . .
   2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' . . .
   3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' . . .
   4. The Court will not pass upon a constitutional question. . . if there is also present some other ground upon which the case may be disposed of. . . .
   5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. . . .
   6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. . . .
   7. 'When the validity of an act . . . is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction . . . is fairly possible by which the question may be avoided.' . . .

Id. (citations omitted).
68 VANDERBILT, *supra* note 61, at 139.
71 See id.
an “inalienable part” of China. Tam Wing-Pong, Hong Kong’s acting Secretary for Trade and Industry, contended that with this designation, “there should be no problem for local companies if cases went to US courts to settle disputes occurring since the handover.” Moreover, should another Hong Kong corporation seek access to the federal courts, granting alienage jurisdiction could only serve to ameliorate presently strained relations between China and the United States. Yet, despite Chinese affirmations of sovereignty, the question will remain unanswered until a United States federal court rules on whether Article 12 of the Basic Law is an expression of Chinese sovereignty over Hong Kong, thereby granting alienage jurisdiction to corporations like Matimak, as subjects of China—a foreign state that is officially recognized by the United States.

CONCLUSION

The history of the United States is filled with examples of our government committing troops to conflicts in order to prevent oppression and spread democracy. Neither public disapproval nor the imminent loss of countless lives could dissuade our leaders from protecting the nation’s interests and safeguarding the human rights of those often unable to protect themselves. Why then, when it would require such minimal effort, would the government not act in a similar fashion to do everything possible to

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Provisions of the Basic Law will serve as a ‘mini-constitution’ in governing the relationship between the Hong Kong Special Administrative Region (SAR) and the government of the People’s Republic of China. . . . The Basic Law, which has been distributed in both Chinese and English by the Consultative Committee in Hong Kong, is an act of the National People’s Congress. It is organized into 160 articles with three annexes. The annexes single out for special treatment some of the most hotly-debated drafting issues [including] how much of the law of the People’s Republic would apply to the Hong Kong SAR. . . . The drafting objectives of the Basic Law were . . . to ensure the return of Hong Kong to Chinese sovereignty. . . .

Id.


74 See Basic Law, supra note 72, at chp. 2, art. 12 (designating the Hong Kong SAR as a local administrative region of the People’s Republic of China).

guarantee the just resolution of legal disputes with potential ramifications for the entire nation? By denying alienage jurisdiction to the Matimak Trading Co., the Second Circuit violated the intentions of the Framers, who created alienage jurisdiction, and gambled with an important portion of the United States’ trade balance. Furthermore, it justified its decision by conforming to the deleterious practice of judicial deference. In doing so, the court perpetuates a trend that threatens the delicate balance of power upon which our nation rests.

Michael Alessi