Diversity Jurisdiction and Juridical Persons: Determining the Citizenship of Foreign-Country Business Entities

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Protecting foreign-country litigants from prejudice in state courts provided an original impetus for the creation of diversity jurisdiction. However, the protections of alienage jurisdiction are in peril with respect to large foreign companies. Under current law, it is not clear how to determine the citizenship of a foreign-country business entity. For large companies with thousands of members or shareholders from all over the world, this lack of clarity is particularly concerning because being forced to allege the citizenship of every member is not only extremely burdensome, if not impossible, but also severely restricts large foreign companies' access to federal court. The question ultimately turns on how to classify the foreign-country business entity. Under American law, a corporation has its own citizenship, and unincorporated associations have the citizenship of all of their members. But in the case of a foreign-country business entity, it is not always clear whether the entity should be classified as a corporation or an unincorporated association. The circuit courts are divided on how to address this issue. The Fifth and Ninth Circuits have resolved the issue by developing what I refer to as the "juridical person approach." Under this framework, a court will treat an entity like a corporation for citizenship purposes if it determines that the country of the entity's formation views the entity as a juridical person. By contrast, the Seventh Circuit has adopted what I refer to as the "comparison approach" to determine the citizenship of foreign-country business entities. This involves looking to the attributes of a foreign-country business entity and comparing it to American business entities, according the foreign-country entity the same citizenship that its American analogue would have. This Note analyzes these two approaches in terms of their adherence to Supreme Court precedent and their practical application. It recommends that courts uniformly apply a modified version of the juridical person approach to determine the citizenship of foreign-country business entities.

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Introduction

The need for federal courts to hear cases involving foreign-country litigants has been clear since the founding.[1] Indeed, there was broad consensus among the Framers that national courts must be able to hear these types of cases.[2] The Framers' fears of prejudice against foreign-country litigants led to Article III's pronouncement that the judicial power of the United States extends to cases between citizens of the United States and citizens of a foreign state and to the implementation of this constitutional grant by the First Congress in the Judiciary Act of 1789.[3] The Framers believed that allowing foreign-country litigants to assert their rights in federal court was necessary because cases involving citizens of a foreign country could have foreign relations consequences and thus should be decided by the courts of the nation, not of the states.[4] They were particularly concerned that international business disputes not be relegated to state court.[5] But now that the nature of international transactions has changed, with large foreign companies having thousands of members or shareholders from all over the world, the protections of alienage jurisdiction are in peril. If a foreign-country business entity[6] is treated like an American unincorporated association instead of a corporation, the citizenship of all of the company's members would be imputed to it, and the benefits that alienage jurisdiction was designed to provide would be eviscerated. A large company would have to allege the citizenship of each of its many thousands of members, and even if it managed to do that, the citizenship of a single member could destroy jurisdiction.

The question, then, is how to determine the citizenship of foreign-country business entities so as to preserve access to alienage jurisdiction where it seems warranted. American businesses that want to enjoy the benefits of diversity jurisdiction without dealing with the citizenship of their members need only organize themselves as corporations. However, it is unclear when a foreign-country business entity can be treated like an American corporation, and neither Congress nor the Supreme Court has

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1. THE FEDERALIST NO. 80 (Alexander Hamilton). Hamilton argued that
> [t]he reasonableness of the agency of the national courts in cases in which the state tribunals cannot be supposed to be impartial, speaks for itself . . . . This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different states and their citizens.

Id.

2. Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 10 (1996).

3. GEOFFERY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE 256 (11th ed. 2015).

4. Johnson, *supra* note 2, at 11.

5. *Id.* at 13–14.

6. For the purposes of this Note, I use the term "foreign-country business entity" to refer to a business organized under the laws of a country other than the United States.

provided any clarification. Three courts of appeals have attempted to solve this issue, resulting in a 2–1 circuit split.

The Fifth and Ninth Circuits have developed what I refer to as the "juridical person approach." Under this framework, a court looks to the law of the foreign country to determine whether the foreign-country entity is treated like a juridical person in the country of its formation. If it is, it is treated like a corporation for citizenship purposes. If not, it is treated like an unincorporated association and has the citizenship of its members. By contrast, the Seventh Circuit has adopted what I refer to as the "comparison approach" to determine the citizenship of foreign-country business entities. This involves looking to the attributes of a foreign-country business entity and comparing it to American business entities. The court then accords the foreign-country entity the same citizenship that its American analogue would have.

This Note evaluates these approaches and determines that the Fifth and Ninth Circuits' juridical person approach is superior to the Seventh Circuit's comparison approach in terms of adherence to Supreme Court precedent and ease and consistency in its application. This Note advocates adoption of a slightly modified version the juridical person approach.

Part I of this Note surveys the existing case law, covering Supreme Court precedent and the current circuit split. It explains both the comparison approach and the juridical person approach to determining citizenship and explores how the differences in the two approaches can lead to different citizenship findings. Part II evaluates the two approaches for both their adherence to Supreme Court precedent and their ease of application. Although the relevant Supreme Court precedent is vague and at times contradictory, this Note argues that the juridical person approach most faithfully follows the Court's original justification for treating corporations differently. In order to determine which aspects of a business the Supreme Court has found pertinent to the citizenship component of diversity jurisdiction, Part III traces the history of the Supreme Court's differing treatment of the citizenship of incorporated and unincorporated associations. Using this history, it identifies factors that should be used in creating a citizenship test for foreign-country business entities. It also delineates the attributes of a juridical person. Part IV advocates the adoption of a modified version of the juridical person approach.

Part I

This Part begins by explaining the specific need for a method of determining the citizenship of foreign-country business entities. It then explores what Supreme Court precedent has to say about the citizenship of foreign-country business entities. It also provides an overview of the different approaches the circuits have adopted to determine the citizenship of foreign-country business entities and explains how those approaches can lead to

different findings. Although the Court has not ruled on the issue, courts of appeals have relied heavily on several Supreme Court cases to craft their approaches.

A. The Need for a Different Approach in the Foreign-Country Context

A failure to create citizenship rules specifically in the foreign-country business-entity context would pose serious problems for foreign-country businesses—especially those from non-English-speaking countries. Employing the test used for American business entities of asking only whether an entity is a "corporation" without elaborating on what that means would essentially limit corporate citizenship privileges to business entities from English-speaking countries that use similar terminology. After all, how could a court be sure that an entity not called a corporation is in fact a corporation if there are no criteria to determine this other than the name of the entity? This is problematic because an entity that could not prove it was a corporation for purposes of the diversity statute would be forced to allege the citizenship of all of its members—potentially thousands of people.

Even moving past the requirement that the entity be called a corporation by the country of its formation causes problems. If we treat entities analogous to corporations as corporations, what degree of similarity is required to deem the business entity analogous to a corporation? Often, the American concept of corporations will not translate to foreign entities.[7] The Supreme Court's refusal to extend corporate citizenship privileges to other business entities has also made it difficult to define which qualities make an entity a corporation. Because the Court has stated that it has no principled reason for treating corporations differently from other similar types of business entities,[8] it is difficult to know which, if any, differences between entities are relevant. There seems to be little point, then, in trying to make foreign-country entities fit the American notion of corporations.

Ideally, Congress would pass a statute to resolve this issue. The Supreme Court has repeatedly refused to extend citizenship to business entities other than corporations because it believes that this type of question is best resolved by the legislature.[9] But until such time as Congress chooses to create a statute laying out the citizenship of foreign-country business entities, courts must create a consistent and workable standard for determining citizenship.

The only guidance Congress has provided comes from 28 U.S.C. § 1332(a). Under § 1332(a)(2), federal courts have subject matter jurisdiction

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7. VED P. NANDA ET AL., LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 5:14 (2018).

8. *See infra* note 85 and accompanying text.

9. *See, e.g.*, Carden v. Arkoma Assocs., 494 U.S. 185, 197 (1990) (reasoning that citizenship questions are "more readily resolved by legislative prescription than by legal reasoning").

over a controversy between a citizen of a state and a citizen of a foreign state where the amount in controversy exceeds $75,000. Similarly, under § 1332(a)(3), federal courts have subject matter jurisdiction over a controversy between citizens of different states where citizens of a foreign state are additional parties. Section 1332(c)(1) specifies that a corporation is deemed a citizen of every state and foreign state where it is incorporated and the State or foreign state where it has its principal place of business. Although § 1332(c) could be interpreted to allow other business entities to have their own citizenship,[10] the Supreme Court has declined to expand upon this language, allowing only corporations to have their own citizenship and treating all other business entities as unincorporated associations, which have the citizenship of all their members.[11] Although the statute clearly contemplates the citizenship of foreign-country business entities, its application to those entities is unclear, and the Supreme Court has not ruled on it. Because the Court has held in the context of American business entities that only corporations can be citizens, lower federal courts have focused their analysis on whether a foreign-country business entity can be deemed a corporation for purposes of the statute.

Although focused on the same goal, the courts have created two distinct approaches, resulting in a circuit split. And even the split itself is notable for the degree of disuniformity it exhibits. It consists not just of the 2–1 split between circuit courts, but also of splits within the circuits that have ostensibly spoken on the issue, with some district courts not even following their own circuit's precedent.[12] The Seventh Circuit, too, completely changed its mind on the issue,[13] and the Fifth Circuit, after choosing an approach in a

10. *See* David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 36 (1968) ("I see no obstacle to construing 'corporation' in section 1332(c) to include the joint-stock association and the limited partnership, which are identical with corporations in terms of diversity policy.").

11. *See Carden*, 494 U.S. at 195–96 (holding that "diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all the members'").

12. As a court within the Seventh Circuit, the District Court for the Northern District of Illinois should be following the comparison approach. Instead, the court wrote that because the company "is regarded as a juridical person under [Chinese] law, has independent juridical person property under that law, and enjoys the property right of a juridical person," it had its own citizenship. InStep Software, LLC v. InStep (Beijing) Software Co., No. 1:11-CV-03947, 2012 WL 1107798, at *4 (N.D. Ill. Mar. 29, 2012). One recent case from a district court within the Fifth Circuit inexplicably failed to follow Fifth Circuit precedent using the juridical person approach, instead citing a Seventh Circuit case and appearing to endorse the comparison approach. W. African Ventures Ltd. v. Ranger Offshore, Inc., No. 4:17-CV-00548, 2017 WL 6405625, at *1 (S.D. Tex. Dec. 13, 2017) (citing Lear Corp. v. Johnson Elec. Holdings, Ltd., 353 F.3d 580, 582 (7th Cir. 2003)).

13. *Compare* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 285 (7th Cir. 1990) (concluding "that the Church is recognized under and by the laws of the Republic of Cyprus as a distinct juridical entity, and thus [was] a 'citizen or subject' of that state" for diversity purposes), *with* Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 788 (7th Cir. 2014) (rejecting the view that "every 'juridical

prior case, requested supplemental briefing on the citizenship of the foreign-country entity but failed to address the issue in its opinion, simply stating that citizenship was "unclear."[14] In addition to the lack of uniformity in the form of the approach, the approaches can also lead to different results, with one circuit finding jurisdiction where another would not. Moreover, subject matter jurisdiction should be guided by clear rules.[15] Jurisdiction is the most fundamental issue a court must address because it is about the court's power to proceed at all. It cannot be waived by the parties, and a lack of subject matter jurisdiction can be raised at any time, including by a court *sua sponte*.[16] Just as courts may not hear a case when they do not have jurisdiction, courts have an obligation to hear cases when they do.[17] Courts cannot answer these jurisdictional questions when the test for citizenship is unclear.

B. The Supreme Court

It is far from clear which Supreme Court cases should guide the method for determining the citizenship of a foreign-country business entity. The circuits take starkly different views of which cases are relevant and of what those cases have to say about the issue. The Ninth Circuit, in crafting its juridical person approach, relied most heavily on *Puerto Rico v. Russell & Co.*[18] In *Russell*, an action was brought against a Puerto Rican business entity called a *sociedad en comandita* whose individual members were not domiciled in Puerto Rico.[19] The members removed the case from the insular district court of San Juan, Puerto Rico to the United States District Court for Puerto Rico under the Organic Act of Puerto Rico, which gave the United

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person' . . . is a corporation for the purpose of § 1332 no matter what other attributes it has or lacks").

14. Letter from Lyle W. Cayce, Clerk, Office of the Clerk for the Fifth Circuit (June 21, 2017) (requesting parties file letter briefs addressing whether "Brittania-U Nigeria, Limited, as a Nigerian private limited company is a separate juridical entity under Nigerian law such that its citizenship for purposes of either ground of jurisdiction asserted in this case would be akin to that of a corporation or whether some other analysis applies"); Brittania-U Nigeria, Ltd. v. Chevron USA, Inc., 866 F.3d 709, 713 (5th Cir. 2017) (citing Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 298 (5th Cir. 2010) and its juridical person approach but calling the citizenship of a foreign-country business "unclear" and finding subject matter jurisdiction on other grounds).

15. Currie, *supra* note 10, at 1 (quoting THE AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Pt. I, at 72 (Official Draft 1965)) ("It is of first importance to have a definition so clear cut that it will not invite extensive threshold litigation over jurisdiction.").

16. FED. R. CIV. P. 12(h)(3).

17. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them").

18. 288 U.S. 476 (1933).

19. *Id.* at 477.

States District Court for Puerto Rico jurisdiction over all cases cognizable in United States district courts and, additionally, where all parties were citizens of the United States but were not domiciled in Puerto Rico.[20] This meant that the United States District Court for Puerto Rico had jurisdiction only if the citizenship of the members, rather than the *sociedad* itself, was taken into account.[21] To answer the question of whose citizenship was determinative, the Supreme Court began by discussing the history of diversity jurisdiction and corporations, noting that a corporation's distinct legal personality was the theoretical justification for treating it as having its own citizenship.[22] The Court rejected *Chapman v. Barney*'s[23] distinction between incorporated and unincorporated associations because to try to fit a civil law entity into a common law framework would be "to invoke a false analogy."[24] Instead, the Court placed emphasis on the fact that Puerto Rican law regarded the *sociedad* as a juridical person.[25] The *sociedad* could "contract, own property and transact business, sue and be sued in its own name and right."[26] Thus, the Court could find no adequate reason to treat the citizenship of the *sociedad* differently from that of a corporation.[27]

United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.[28] and *Carden v. Arkoma Associates*[29] substantially limited *Russell* in the context of domestic business entities. *Bouligny* concerned the citizenship of an unincorporated labor union, which asserted that it had the citizenship of only its principal place of business and not that of its members.[30] The union attempted to use *Russell* to show that the Court had breached the doctrinal wall of *Chapman* and asked the Court to extend the changes in its conception

20. *Id.* at 477–78.

21. *Id.* at 478–79.

22. *Id.* at 479.

23. 129 U.S. 677 (1889). *Chapman* involved a suit between the United States Express Company, a joint-stock company organized under the laws of New York, and Heman B. Chapman, a citizen of Illinois. *Id.* at 678. The United States Express Company filed suit in federal court on the basis of diversity jurisdiction. *Id.* at 681. The Supreme Court raised the issue of jurisdiction *sua sponte* and found no satisfactory showing as to the citizenship of the United States Express Company. *Id.* at 681–82. The Court held that the United States Express Company could not be a citizen of New York unless it was a corporation. *Id.* at 682. The United States Express Company was a joint-stock company—"a mere partnership"—so the citizenship of its members was relevant. *Id.* Because the citizenship of the company's members had not been alleged, "the record [did] not show a case of which the Circuit Court could take jurisdiction," and the Court reversed the decision of the lower court and remanded the case with instructions to set aside the judgment. *Id.*

24. *Russell*, 288 U.S. at 480–81.

25. *Id.*

26. *Id.* at 481.

27. *Id.* at 482.

28. 382 U.S. 145 (1965).

29. 494 U.S. 185 (1990).

30. *Bouligny*, 382 U.S. at 146.

of citizenship to unions.[31] The Court rejected this interpretation, noting that *Russell* actually restricted rather than expanded the jurisdiction of the United States District Court for Puerto Rico.[32] It also noted that *Russell* was irrelevant because Puerto Rico was not a state and the Court was not using the general diversity statute.[33]

While *Bouligny* stripped *Russell* of any real power in the context of domestic business entities, it left largely untouched *Russell*'s potential to influence the Court's approach to foreign-country business entities. This is because the problem presented in *Russell* "was that of fitting an exotic creation of the civil law, the *sociedad en comandita*, into a federal scheme which knew it not."[34] While one could argue that the Court's holding in *Russell* is limited to civil law entities, it makes sense to extend its analysis of business entities unfamiliar to American law to all foreign-country business entities. As the Seventh Circuit has noted, asserting that a foreign-country entity is a corporation

> assumes that [the foreign country] has business entities that enjoy corporate status as the United States understands it. Yet not even the United Kingdom has a business form that is exactly equal to that of a corporation. For example, it can be difficult to decide whether a business bearing the suffix "Ltd." is a corporation for the purpose of § 1332 or is more like a limited partnership, limited liability company, or business trust.[35]

Because these difficulties can arise even when dealing with common law countries, it makes sense to develop a test that can apply to any foreign-country business entity, regardless of the legal system that country uses.

The Court encountered similar arguments about *Russell*'s reach twenty-five years later in *Carden*. There, the Court addressed whether a limited partnership could be considered to have its own citizenship separate from that of the general and limited partners.[36] In discussing its prior opinions about the citizenship of business entities, the Court referred to *Russell* as an exception to its otherwise consistent jurisprudence.[37] The Court cited to *Bouligny* and reiterated the policies discussed in that opinion that led to the conclusion that *Russell* did not apply in that case.[38] This opinion arguably reduced *Russell* to its facts, with the Court holding that "at least common-law entities (and likely all entities beyond the Puerto Rican *sociedad en*

31. *Id.* at 151.
32. *Id.* at 151–52 & n.10.
33. *Id.* at n.10.
34. *Id.* at 151.
35. White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc., 647 F.3d 684, 686 (7th Cir. 2011).
36. Carden v. Arkoma Assocs., 494 U.S. 185, 187 (1990).
37. *Id.* at 189.
38. *Id.* at 190.

comandita) would be treated for purposes of the diversity statute pursuant to what *Russell* called '[t]he tradition of the common law,' which is 'to treat as legal persons only incorporated groups and to assimilate all others to partnerships.'"[39] It is unclear, though, if the Court was considering foreign-country business entities or only American entities with civil law origins. No circuit court has attempted to use incorporation as a factor in determining the citizenship of a foreign-country business entity, likely for the same reasons that courts have not attempted to limit corporate citizenship privileges to entities called corporations.[40]

C. The Two Approaches

The Fifth, Seventh, and Ninth Circuits are the only circuit courts that have discussed how to determine the citizenship of a foreign-country business entity for diversity purposes.[41] Both the Fifth and the Ninth Circuits use an approach that focuses on whether the country of the entity's formation treats the entity as a "juridical person." While the definition of juridical person is complicated and will be discussed at length in subpart III(B), *infra*, for now it is sufficient to say that a juridical person is an "entity that can own property, make contracts, transact business, and litigate in its own name . . . ."[42] In other words, a juridical person is an entity that "for the purpose of legal reasoning is treated more or less as a human being."[43] The

39. *Id.* at 190 (quoting Puerto Rico v. Russell & Co., 288 U.S. 476, 480 (1933)).

40. *See* Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 788 (7th Cir. 2014) (applying the comparison approach instead of using incorporation status to determine citizenship); Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 299 (5th Cir. 2010) (applying the juridical person approach instead of using incorporation status to determine citizenship); Cohn v. Rosenfeld, 733 F.2d 625, 630 (9th Cir. 1984) (same).

41. District Courts within other circuits have expressed opinions about which approach to take. The District Court for the Southern District of Florida stated that it believed the Eleventh Circuit would follow the Seventh Circuit's comparison approach. Bradshaw Constr. Corp. v. Underwriters at Lloyd's, London, No. 15-24382-CIV, 2016 WL 8739603, at *6 (S.D. Fla. Jan. 8, 2016). Although not expressly adopting the comparison approach, the District Court for the Southern District of Alabama also cited to Seventh Circuit cases addressing this issue. *See* Stringer v. Volkswagen Grp. of Am., Inc., No. 15-00509-N, 2015 WL 5898326, at *3 (S.D. Ala. Oct. 8, 2015) (citing *White Pearl Inversiones* and *Fellowes* in determining a foreign-country business entity's citizenship); Keshock v. Metabowerke GMBH, No. CIV.A. 15-00345-N, 2015 WL 4458858, at *4 (S.D. Ala. July 21, 2015) (citing *White Pearl Inversiones* and *Fellowes* while discussing a foreign-country business entity's citizenship). The District Court for the Eastern District of Virginia noted that the Fourth Circuit had failed to rule on the citizenship issue, but because the parties agreed that the Seventh Circuit's case law was "sensible," applied its comparison approach. Hawkins v. Borsy, No. 105-cv-1256LMBJFA, 2018 WL 793599, at *5 (E.D. Va. Feb. 8, 2018). However, in two previous cases, that same court used the Ninth Circuit's juridical person approach to determine the citizenship of a foreign-country entity. LG Elecs., Inc. v. Asustek Computers, 126 F. Supp. 2d 414, 418 (E.D. Va. 2000); Honua Sec. Corp., Inc. v. SMI Hyundai Corp., No. 1:10CV785 (GBL), 2010 WL 11565898, at *3 (E.D. Va. Oct. 21, 2010).

42. Fellowes, 759 F.3d at 788.

43. *Juridical Person*, BLACK'S LAW DICTIONARY (10th ed. 2014).

juridical person approach asks only if the business's country of formation treats the business as a juridical person. If so, it is treated as a corporation for citizenship purposes.

The Ninth Circuit was the first of the circuit courts to address the citizenship of foreign-country business entities. In *Cohn v. Rosenfeld*,[44] the court addressed the issue of an *anstalt* organized under the laws of Liechtenstein.[45] To determine how to address the *anstalt*'s citizenship, the Ninth Circuit looked to the Supreme Court's analysis in *Russell*.[46] Drawing on that reasoning, the Ninth Circuit held that "[u]nder section 1332(a)(2) we ask only whether an entity is regarded as a juridical person by the law under which it was formed."[47] Because the court was certain that Liechtenstein considered *anstalts* to be juridical persons, the court determined that the *anstalt* had its own citizenship.[48] Among the relevant qualities, the court listed: limited liability; the ability to sue and be sued in the *anstalt*'s own name; that proceeds from litigation belonged to the *anstalt* itself; and that the relevant law mentioned that the *anstalt* had juridical personality.[49] This was in spite of the fact that *anstalts* "differ markedly from corporations in Liechtenstein."[50]

The Fifth Circuit followed the Ninth Circuit's approach when it addressed the issue of citizenship of a *stiftung* organized under the laws of Liechtenstein. In *Stiftung v. Plains Mktg., L.P.*,[51] the Fifth Circuit determined that the *stiftung* was a juridical person under the laws of Liechtenstein and thus was a citizen of Liechtenstein for purposes of diversity jurisdiction.[52] The court cited both *Russell* and *Cohn* to support its position that only the status of the entity as a legal person was relevant and that it was unnecessary to determine which American entity the *stiftung* most resembled.[53]

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44. 733 F.2d 625 (9th Cir. 1984).
45. *Id.* at 627.
46. *Id.* at 628–29.
47. *Id.* at 630.
48. *Id.* at 629.
49. *Id.*
50. *Id.* at 628.
51. 603 F.3d 295 (5th Cir. 2010).
52. *Id.* at 299.
53. *Id.* at 298. That the court cited one Seventh Circuit case, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 285 (7th Cir. 1990), should not be read to say that the Fifth Circuit supports the Seventh Circuit's current approach to the citizenship issue. *Id. Autocephalous* followed the juridical person approach, and the Seventh Circuit has since limited that case to its facts. *See* Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 790 (7th Cir. 2014) (stating that *Autocephalous* "cannot be generalized to entities other than religious bodies organized under the law of Cyprus"). The Fifth Circuit did not cite any of the later Seventh Circuit cases moving away from *Autocephalous* and using the comparison approach.

By contrast, the Seventh Circuit's most recent cases use a comparison approach in which the court determines citizenship of the foreign-country entity by comparing it to American business entities to determine which entity it most resembles. This approach resulted from the Seventh Circuit's different interpretation of Supreme Court precedent. The Seventh Circuit at first appeared to use the juridical person approach to classify a foreign-country business entity for purposes of determining citizenship. In *Autocephalous*,[54] the court concluded that "the Church [was] recognized under and by the laws of the Republic of Cyprus as a distinct juridical entity, and thus [was] a 'citizen or subject' of that state" for diversity purposes.[55] Yet when the court addressed the same issue years later in *Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co.*,[56] it rejected this approach. In holding that a Chinese business was most similar to an American LLC and thus could not be treated as a corporation for diversity purposes, the court explicitly rejected the view that "every 'juridical person' . . . is a corporation for the purpose of § 1332 no matter what other attributes it has or lacks."[57] The court limited its holding in *Autocephalous* to religious bodies organized under the law of Cyprus.[58]

The reasoning in *Fellowes* places the Seventh and Ninth Circuits directly at odds. In *Fellowes*, the Seventh Circuit held that the Supreme Court's subsequent decision in *Bouligny* "confined *Russell* to its facts," explaining that "*Russell* and its juridical-entity approach cover the *sociedad en comandita* and nothing else."[59] The Seventh Circuit reasoned that because both parties agreed that the Chinese company was "closer to a limited liability company than to any other business structure in this nation, it does not have its own citizenship—and it *does* have the Illinois citizenship of its member Hong Kong Fellowes, which prevents litigation under the diversity jurisdiction."[60]

> On the other hand, the Ninth Circuit in *Cohn* found the defendant's reliance on *Bouligny* and *Great Southern* misplaced and his attempt to analyze the "corporateness" of foreign business entities such as

54. 917 F.2d 278 (7th Cir. 1990).

55. *Id.* at 285.

56. 759 F.3d 787 (7th Cir. 2014).

57. *Fellowes*, 759 F.3d at 788. *Fellowes* was not the first time after *Autocephalous* that the Seventh Circuit addressed the issue of the citizenship of a foreign-country business entity. In *Lear Corp. v. Johnson Elec. Holdings Ltd.*, 353 F.3d 580 (7th Cir. 2003), the court asked whether a Bermudan entity "limited by shares" was most similar to an American corporation or LLC. *Id.* at 582. Because the entity was most similar to an American corporation, it had its own citizenship. *Id.* at 583. The opinion made no mention of *Autocephalous* at all but did not appear to apply juridical person analysis.

58. *Fellowes*, 759 F.3d at 790.

59. *Id.* at 789.

60. *Id.* at 790.

> Liechtenstein's anstalt fundamentally wrong. The determinative question in this case is not whether Film Productions is a corporation for purposes of 28 U.S.C. § 1332(c), but instead whether Film Productions is "a citizen or subject" of a foreign state under 28 U.S.C. § 1332(a)(2). The most relevant Supreme Court precedent is thus [*Russell*] rather than *Bouligny* or *Great Southern*.[61]

The Ninth Circuit's insistence that *Russell*, rather than *Bouligny*, governed places it in direct disagreement with the Seventh Circuit. The Fifth Circuit appears to agree with the Ninth Circuit that *Bouligny* does not limit *Russell*'s reach in the context of foreign-country business entities.[62]

D. When the Approaches Lead to Different Outcomes

This split will mean that in some cases where the Ninth and Fifth Circuits would find jurisdiction, the Seventh Circuit would not. Assuming the citizenship of an entity's members would destroy diversity, the two approaches will lead to different outcomes in any case where the Seventh Circuit could classify an entity as something other than a corporation, but the country of the entity's formation would treat the entity as a juridical person. Take, for example, *Butler v. ENSCO Intercontinental GmbH*,[63] a case involving an LLC organized in the Cayman Islands. Noting that the law of the Cayman Islands treats an LLC as a "natural person of full capacity," the District Court for the Southern District of Texas followed the juridical person approach as laid out by the Fifth Circuit in *Stiftung* and ignored the citizenship of the LLC's members.[64] The same result would not obtain using the Seventh Circuit's comparison approach.[65] American LLCs are treated as unincorporated associations for citizenship purposes, meaning that they have the citizenship of their members.[66] The Seventh Circuit would presumably

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61. 733 F.2d at 628 (citation omitted). The distinction the Ninth Circuit makes here between § 1332(a) and § 1332(c) is of less importance now that § 1332(c) specifies that a corporation can be a citizen of a foreign country. Whether one chooses to interpret "corporation" under § 1332(c) to include more than businesses called corporations or chooses to find that business entities other than corporations can have their own citizenship under § 1332(a)(2) should make no practical difference.

62. *See* Stiftung v. Plains Mktg., 603 F.3d 295, 298 (5th Cir. 2010) (citing *Bouligny* to support its reading of *Russell*).

63. No. CV H-16-578, 2017 WL 496073 (S.D. Tex. Feb. 7, 2017).

64. *Id.* at *1 n.1 (quoting Companies Law § 27(2) (2010) Cayman Is.).

65. Interestingly, the court cites to a Seventh Circuit case for support. *Id.* (citing Bally Exp. Corp. v. Balicar, Ltd., 804 F.2d 398, 399–400 (7th Cir. 1986)). In that case, the court found diversity jurisdiction without engaging in an analysis of citizenship. *Bally*, 804 F.2d at 399. Because that decision came out years before either *Fellowes* or *Autocephalous*, it is not clear what approach the Seventh Circuit used to determine the citizenship of the Caymanian LLC. The case does not discuss the citizenship of the Caymanian LLC's members, so it is possible that there were no nondiverse members, making it unnecessary for the court to address the issue.

66. *See* Carden v. Arkoma Assocs., 494 U.S. 185, 195 (1990) ("[D]iversity jurisdiction in a suit by or against [an artificial entity other than a corporation] depends on the citizenship of 'all the

treat the Caymanian LLC like an American LLC and consider the citizenship of its members. If any member's citizenship would destroy diversity, the case would be dismissed for lack of subject matter jurisdiction. This is a truly problematic result. Whether a federal forum is proper in a particular case should not depend on the jurisdiction in which that case is filed.

Part II

This Part evaluates the approaches for their adherence to Supreme Court precedent. Although they both have some basis in Supreme Court precedent, the juridical person approach, which follows *Russell*, has more support. Both approaches suffer from difficulty in defining key terms, but once these definitions are established, the juridical person approach is also preferable for its ability to be applied consistently.

A. Adherence to Supreme Court Precedent

Focusing only on those Supreme Court cases that the courts of appeals have found relevant, the Ninth Circuit's reasoning makes more sense. *Russell* more closely addresses the issue at hand and has not been limited as much as the Seventh Circuit suggests, so the Ninth Circuit's invocation of *Russell* is most compelling. In *Russell*, the Court applied a juridical person approach and rejected the comparison approach because to "call the *sociedad en comandita* a limited partnership in the common law sense" would be "to invoke a false analogy."[67] The Seventh Circuit's approach focuses on making this false analogy.

The Seventh Circuit used *Bouligny* and *Carden*'s limitation of *Russell* in the context of domestic business entities to justify its departure from *Russell* in the context of foreign-country business entities.[68] In *Fellowes*, the Seventh Circuit, citing *Carden*, asserted that *Bouligny* limited *Russell* to its facts.[69] But *Bouligny* and *Carden* are both distinguishable from *Russell* in that neither involved a business entity unfamiliar to the American legal system. The entity in question in *Bouligny* was an unincorporated labor union and in *Carden* it was a limited partnership, both formed in the United States.[70]

Bouligny does not restrict *Russell* so much that it applies only to a *sociedad en comandita* and nothing else. Rather, *Bouligny* refused to extend the juridical person test from *Russell* to an American unincorporated

members' . . . .") (quoting Chapman v. Barney, 129 U.S. 677, 682 (1889)); FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1435–36 (2015).

67. Puerto Rico v. Russell & Co., 288 U.S. 476, 480–81 (1933).

68. Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 789 (7th Cir. 2014).

69. *Id.*

70. United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc., 382 U.S. 145, 146 (1965); *Carden*, 494 U.S. at 186.

association. Instead of acknowledging that the Court treats business entities unfamiliar to American law (in particular, those with civil law origins) differently than it treats familiar American business entities for purposes of determining citizenship, the Seventh Circuit completely read out any distinction and declared *Russell* toothless.[71] The citation to *Carden* for this same proposition is also inapposite because it too involved only citizens of states. That "*Bouligny* considered and rejected applying *Russell* beyond its facts"[72] does not foreclose the possibility that *Russell*'s analysis is pertinent to the analysis of citizenship of a foreign-country business entity. This is because *Bouligny* did not require the Court to decide the citizenship of a foreign-country business entity.

The Seventh Circuit acknowledged as much in a prior opinion, citing to *Russell* to support the proposition that when the party is a foreign-country entity, "it is then necessary to determine whether the characteristics of the foreign entity are enough like those of a U.S. corporation to make 'corporation' the correct translation into English."[73] But this endorsement of *Russell* is hollow—nothing in *Russell* suggests that a court should compare a foreign-country business entity to an American corporation. In fact, this is precisely what *Russell* called a false analogy.

Russell is the more instructive of the two cases because it contemplates classifying for purposes of jurisdiction an entity unfamiliar to American law under a statute similar to the diversity statute,[74] while *Bouligny* deals with the classification of an unincorporated American labor union. Much of *Bouligny*'s analysis revolved around the fact that the legislative branch was better suited to address the question of how to treat the citizenship of unincorporated labor unions for purposes of diversity.[75] The same type of treatment is not appropriate here—while Congress is silent, courts must adopt some type of test for citizenship or risk closing their doors to foreign-country businesses on the basis of diversity jurisdiction.

Although *Russell* is highly persuasive on this issue, it is not without its limits. The Court in *Carden* stated that after *Bouligny*, "at least common-law entities (and likely all entities beyond the Puerto Rican *sociedad en comandita*)" would treat only incorporated groups as having their own citizenship.[76] *Carden* did not specify whether this analysis differs in the

71. *See Fellowes*, 759 F.3d at 789–90 (confining *Russell* to its facts).

72. *Carden*, 494 U.S. at 191 n.2.

73. Hoagland *ex rel.* Midwest Transit, Inc. v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737, 743 (7th Cir. 2004) (citing *Carden*, 494 U.S. at 189–90; Puerto Rico v. Russell, 288 U.S. 476 (1933); Lear Corp. v. Johnson Elec. Holdings Ltd., 353 F.3d 580, 582–83 (7th Cir. 2003)).

74. So similar, in fact, that the Fifth Circuit mistakenly characterized *Russell* as being a case about diversity jurisdiction. Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 298 (5th Cir. 2010).

75. *Bouligny*, 382 U.S. at 153.

76. *Carden*, 494 U.S. at 190 (quoting *Russell*, 288 U.S. at 480).

context of a foreign-country business entity. The most plausible reading of these cases is that only *Russell* commented on foreign-country business entities. And even *Russell* likely addressed only civil law entities.[77] However, there is good reason to extend *Russell*'s analysis to common law entities. It is difficult to compare foreign entities to American entities, whether they are from a common law or civil law tradition.[78] But because *Russell*'s test was not designed to deal with common law entities, applying it to those entities may not work in the way the Court intended. It is possible that using only the juridical person approach would be overinclusive in the context of common law entities, extending citizenship to entities the Court would not have intended. In formulating a test that applies to common law and civil law entities, courts should find a way to account for this overinclusiveness.

Further indication that *Carden* does not comment on foreign-country common law business entities, as the Seventh Circuit assumed, comes from the Seventh Circuit's citizenship test. Were it following *Carden*'s framework, the test would merely ask whether a business is incorporated. If it were, then the entity would be treated as a legal person. But this is not the test the Seventh Circuit—or any circuit, for that matter—uses. That is for good reason. As one district court noted:

> For domestic business enterprises, this split between corporations and other business entities produces a bright-line rule; however, applying this rule to a business enterprise based in a foreign nation is a "difficult" and underexplored problem because "[b]usinesses in other nations may have attributes that match only a subset of those that in the United States distinguish a corporation . . . from forms such as the limited liability company."[79]

"This problem is compounded by the general slipperiness between different forms of domestic business organizations, as different states impose different requirements on particular forms and many default or traditional rules are subject to customization by particular enterprises."[80] It is therefore impractical—if not impossible—to use incorporation as a heuristic for determining citizenship.

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77. *See* Cohn v. Rosenfeld, 733 F.2d 625, 630 (9th Cir. 1984) ("Federal courts have long recognized that other nations, particularly civil law nations, have evolved a scheme of business entities markedly different from that found in the United States.") (citing *Russell*, 288 U.S. at 480–82).

78. *See* White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc., 647 F.3d 684, 686 (7th Cir. 2011) (noting the difficulty of classifying both common law and civil law entities).

79. Hawkins v. Borsy, No. 1:05–CV–1256 (LMB/JFA), 2018 WL 793599, at *5 (E.D. Va. Feb. 8, 2018) (quoting Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 788 (7th Cir. 2014)).

80. *Id.* at *5 n.8.

B. The Better Approach

Both the juridical person test and the comparison test attempt to accomplish the same thing: to apply the Supreme Court's rules as consistently as they can in the foreign-country context. The difference is that the juridical person test boils the approach down to one thing—juridical personhood—while the comparison test attempts a more holistic review.[81]

The comparison approach works best when the categorization of the foreign-country entity is easy. It becomes difficult when a business has attributes of both a corporation and another entity like a partnership. It then becomes similar to a factor test and requires a court to weigh the different aspects of the business to determine what American entity it most resembles. Importantly, corporations share many features with other business entities like LLCs. The Court has even stated that there may be no policy reasons to treat the two differently. In *Carden*, the Court noted that its post-*Letson*[82] jurisprudence holding that only corporations are entitled to be treated as citizens in their own right could "validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization."[83] The Court noted that it was "undoubtedly correct that limited partnerships are functionally similar to other types of organizations that have access to federal courts, and is perhaps correct that considerations of basic fairness and substance over form require that limited partnerships receive similar treatment."[84] Similarly, in *Bouligny*, the Court recognized that the lower court's contention that there was "no common sense reason for treating an unincorporated national labor union differently from a corporation . . . had considerable merit."[85] However, in *Bouligny*, as in *Carden*, the Court ultimately concluded that "having entered the field of diversity policy with regard to artificial entities once (and forcefully) in *Letson*, we have left further adjustments to be made by Congress."[86] It makes little sense, then, to spend time and resources trying to decide whether a foreign-country entity is more similar to an American corporation or LLC when the Court itself has admitted that the distinction is not based on sound policy. Differences in nomenclature also complicate this

81. Note that this distinction may not always hold true. Courts have not applied either test in a consistent manner. Occasionally, the process required to determine if an entity is a juridical person involves considering as many factors as does the comparison approach.

82. Louisville, C. & C.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844).

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

84. *Id.* (internal quotations omitted).

85. United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc., 382 U.S. 145, 146, 150 (1965) (internal quotations omitted).

86. *Carden*, 494 U.S. at 196.

undertaking. A Chinese LLC, for example, is more like an American closely held corporation than it is like an American LLC.[87]

When done correctly, the comparison approach has the benefit of more closely aligning the treatment of foreign-country entities with that of U.S. businesses. Because the comparison approach is more flexible than the juridical person approach, it allows courts to better tailor the results to specific concerns. But these same factors make it unpredictable and easily manipulated. Increasing the number of factors to be looked at decreases the predictability of the test. It is also more labor intensive, requiring a deeper dive into foreign-country law, all to make a distinction that the Court has admitted is not based on sound policy. This investigation would waste judicial time and resources, as there is a potentially limitless number of business entities that could be created by foreign countries.[88] Even though the threshold question of jurisdiction is critically important, the intricacies of foreign-country law are almost always peripheral to the core dispute, so courts should attempt to formulate a rule that minimizes the time and effort spent determining whether they have jurisdiction. As David Currie wrote: "Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources."[89]

The juridical person approach, by contrast, has the benefit of simplicity, which the Court highly prizes in this context.[90] It takes the most important part of a corporation for jurisdictional purposes, its legal personhood,[91] and uses that to classify the foreign-country entity. The juridical person approach is also supported by principles of comity as it respects the foreign country's classification of the entity as a legal person. Foreign countries have created their own types of business entities according to their own policy rationales, so if the country of formation treats an entity as having its own legal

87. JIANGYU WANG, COMPANY LAW IN CHINA 52 (2014). Note, however, that a Chinese LLC was the entity in question in *Fellowes*. There, the parties agreed that the Chinese LLC was most similar to an American LLC. Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 790 (7th Cir. 2014). The court also compared the Chinese LLC to a general partnership. *Id.* at 788. Because of this classification, the court found that the Chinese LLC did not have its own citizenship. *Id.* This illustrates another drawback of the comparison approach—courts may disagree as to what type of American business entity a foreign-country entity resembles. These differences can cause disuniformity in result—the same issue that exists under the current split.

88. Similarly, there is a potentially limitless number of business entities that could be created by the states. The *Carden* Court believed that because of this, determining which entity "is entitled to be considered a 'citizen' for diversity purposes, and which of their members' citizenship is to be consulted, are questions . . . whose complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction." *Carden*, 494 U.S. at 197.

89. Navarro Sav. Ass'n v. Lee, 446 U.S. 454, 465 n.13 (1980) (quoting Currie, *supra* note 10).

90. *See id.* (explaining the virtue of simple rules to determine citizenship for jurisdictional purposes).

91. *See infra* subpart III(A).

personality, for reasons of both simplicity and comity, a U.S. court should inquire no further. Any further attempt to determine the status of foreign-country entities "would involve judicial encroachment on the sovereignty of the nation that formed them," and "[c]ourts lack the information, expertise, and political judgment in foreign affairs to undertake this burden."[92]

Because the juridical person approach is less intrusive into foreign-country law, it also respects the Supreme Court's desire to avoid being forced to do Congress's job. As the Court cautioned in *Carden*, determining the citizenship of various business entities is a "question[] more readily resolved by legislative prescription than by legal reasoning, and [one] whose complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction."[93] It determined that corporations would receive special treatment for citizenship purposes but elected to "leave the rest to Congress."[94] The juridical person approach complies with the policies the Court has identified for treating corporations differently while respecting Congress's rulemaking power. Should Congress determine that this rule violates some policy concern, it can enact a standard of its own.

However, the juridical person approach as currently formulated has a fatal flaw—courts have failed to identify a consistent definition of "juridical person." Some courts declare that an entity is a juridical person with little discussion,[95] while others list qualities of the entity without explaining their relevance or importance.[96] If courts intend to apply the juridical person approach, they need to agree on a definition of juridical person. The next Part proposes a definition.

Part III

The Supreme Court has not said much about the citizenship of foreign-country business entities, but it has a long line of cases dealing with the citizenship of American business entities. This Part uses the Court's jurisprudence to identify the reasons it chose to accord corporations their own citizenship. This history aids in creating a test for the citizenship of foreign-country business entities by exploring what the Court found persuasive in the context of American business entities. This Part looks at how the Court has defined "corporation" because this Note approaches the diversity statute under § 1332(c) instead of § 1332(a). Under § 1332(c) the definition of "corporation" is critically important because in order to determine which

92. Cohn v. Rosenfeld, 733 F.2d 625, 630 (9th Cir. 1984).

93. 494 U.S. at 197.

94. *Id.*

95. *See* Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 298–99 (5th Cir. 2010) (holding that a *stiftung* is a juridical person for diversity jurisdiction purposes because it is a juridical person under Liechtenstein law).

96. *See Cohn*, 733 F.2d at 628–29 (considering an entity's ability to sue, limited liability, and distribution of assets post-litigation).

foreign-country entities can be considered corporations for the purposes of this statute, the definition of "corporation" must be clear. However, this definition is relevant—if not essential—even if we are asking which entities can be considered "citizens" under § 1332(a). Currently, the corporation is the only type of American business entity that the Court accords its own citizenship. It is helpful, then, to see the reasons the Court has given for treating only these entities as citizens. From this history, two critical themes emerge—first, that only the citizenship of the real party to the controversy is relevant, and second, that only juridical persons can have their own citizenship for diversity purposes. This Part also uses case law and legal history to define "juridical person."

A. History of the Supreme Court's Corporation Jurisprudence

In the context of American business entities, the Supreme Court has chosen to accord only corporations their own citizenship, leaving the citizenship of other business entities to rest on the citizenship of all their members.[97] In order to determine which types of business entities are corporations for purposes of § 1332(c),[98] one must first define "corporation." Because Congress has not offered a definition, one must be fashioned from Supreme Court precedent. The Court's definition is neither fixed nor precise, but it is useful in elucidating principles that can be applied to foreign-country business entities. To discover these principles, I trace the Court's corporate-personality jurisprudence from its inception in *Bank of the United States v. Deveaux*[99] to the modern cases. As the role of corporations within the U.S. economy changed, so too did the Court's treatment of them.

It is helpful to begin the study of the Supreme Court's understanding of the corporation with Justice Marshall's famous description of corporations in *Trustees of Dartmouth College v. Woodward*.[100] Although the case did not concern the citizenship of a corporation, Justice Marshall's detailed description of the corporation reflects an early understanding of a corporation's defining characteristics. He wrote: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[101]

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97. *See, e.g.*, *Carden*, 494 U.S. at 195–96 (holding that the citizenship of a limited partnership rests on the citizenship of all its members).

98. *See supra* note 61. Here, I am working off of the assumption that § 1332(c) applies, so the inquiry is whether a business can be deemed a corporation for purposes of the statute.

99. 9 U.S. (5 Cranch) 61 (1809).

100. 17 U.S. (4 Wheat.) 518 (1819).

101. *Id*. at 636.

In many ways, this definition reflects what Sanford Schane, in his article *The Corporation Is a Person: The Language of a Legal Fiction*, refers to as "creature theory."[102] This theory predominated early-nineteenth-century American thought[103] and "treats the corporation as an artificial entity whose legal rights arise through the act of incorporation."[104] Not being human, a corporation has rights only because those rights have been conferred on it by the law.[105] But this traditional definition is incompatible with allowing a corporation to assert diversity jurisdiction.[106] Article III of the Constitution speaks nowhere of the right of a corporation to sue; it speaks in terms of the rights of "citizens."[107] It would be incongruous to give the label of "citizen" to an entity that is nothing more than a lifeless creation of the state.[108] In order to give a corporation or a plaintiff suing a corporation access to a federal forum on the basis of diversity jurisdiction, the Court had to find a way to accord citizenship to corporations. To do this, it relied on the "group theory" of corporate personality, which "treats the corporation as a group of persons joined together for a common purpose."[109] Under this theory, the corporation is not an independent artificial being but merely a convenient aggregation of its members, who are the true bearers of rights.[110] This conception of the corporation allows a court to look through the label of "corporation" to its members, who are clearly citizens within the meaning of Article III.

In *Bank of the United States v. Deveaux*, the Court did just that. It held that although the corporation itself could not have citizenship, its members did, and their citizenship could be considered for purposes of diversity jurisdiction.[111] The corporation was "a company of individuals, who, in transacting their joint concerns, may use a legal name."[112] Although the corporation could not be a citizen, the people it represented could be, "and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted."[113] The members of the corporation could not be denied their constitutional right to sue in federal

102. 61 TUL. L. REV. 563, 565 (1987).

103. *Id.* at 567. *See also* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 665–69 (1926) (discussing the history of the related "fiction" and "concession" theories of corporations).

104. Schane, *supra* note 102, at 606.

105. *Id.* at 565.

106. *Id.* at 573.

107. *Id.* at 572.

108. *Id.* at 573.

109. *Id.* at 607.

110. *Id.* at 566.

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

112. *Id.*

113. *Id.*

court merely because they had organized themselves into a corporation.[114] In essence, the Court viewed the members of the corporation as being the real parties to the controversy, and thus it was their citizenship that was relevant. This theory—that citizenship should rest on the "real parties to the controversy"[115]—is critical to understanding diversity jurisdiction over corporations. This theory explains the shift in the Court's attitude toward corporate citizenship—once the Court saw the corporation *itself* as the real party to the controversy, it made sense to accord it its own citizenship, separate from that of its members.

As corporations grew in size, the group theory of citizenship began to cause problems. Under the *Deveaux* approach, a large corporation with shareholders from every state would usually fail to meet the complete diversity requirement of *Strawbridge v. Curtiss*[116] and would essentially be barred from using diversity jurisdiction to access federal court.[117] Moreover, requiring a large corporation to allege the citizenship of all of its members would sharply increase the cost of filing suit in federal court and would act as a strong deterrent to that practice. The Court remedied this problem in *Louisville, C. & C.R. Co. v. Letson* when it changed its approach to corporate citizenship, ruling that a corporation had the citizenship of its state of incorporation, not that of its members.[118] In so doing, the Court moved away from the group theory of corporations toward a person theory. The person theory argues that the corporation exists in its own right.[119] It is "more than just an expression of the sum of its members. It acquires a common will and pursues its own goals, and its life continues regardless of changes in its membership."[120] Because the corporation exists in its own right, like a human being, it is a legal person naturally, not as the result of its creation by law.[121]

The change in the Court's stance is apparent from its statement in *Letson* that a corporation, "though it may have members out of the state [of its creation], seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state."[122] With this change in the

114. Schane, *supra* note 102, at 574–75.

115. Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 460–61 (1980).

116. 7 U.S. (3 Cranch) 267 (1806).

117. Schane, *supra* note 102, at 575.

118. *Id.* at 558.

119. Schane, *supra* note 102, at 567.

120. *Id.*

121. *Id.* That a corporation is a legal person "naturally" should not be read to say that the corporation is a natural person—that term is synonymous with "human being." Corporations are artificial, as opposed to natural, persons.

122. *Letson*, 43 U.S. at 555.

understanding of a corporation, the corporation itself could be considered a citizen within the meaning of Article III.[123]

Here, too, the idea of the real party to the controversy reemerged. The Court reasoned that a corporation had its own citizenship because the corporation, and not its members, was the real party to the suit.[124] The Court defined the real parties to the controversy in *Navarro Savings Association v. Lee*[125] as the parties who have legal title, manage the assets, and control the litigation.[126] Under this theory, it makes sense to accord corporations their own citizenship—shareholders of a corporation do not manage the corporation's assets or control the litigation. The *Letson* Court believed the domicile of the corporation to be a "subject of more vital importance than any other that can be submitted to [its] decision," and balked at the idea "that such a question shall be determined by the caprice of every member of the body[.]"[127] The corporation was "a personification of certain legal rights under a description imposed upon it by the power that created it," and because of this "the whole is essentially and unchangeably different from all the parts, which are as completely merged and lost in it as the ingredients are in a chemical compound."[128]

Thus, "[a]n action against a corporation is an action against all the members of the corporation, in the corporate name and character, . . . exclud[ing] the idea of any separate identity or liability . . . ."[129] Although the Court would for a time backtrack on this notion of corporate personhood and instead retreat to confusing legal fictions,[130] the person theory remains the

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123. Schane, *supra* note 102, at 578.

124. *See Letson*, 43 U.S. at 511. The Court found that

> [t]he bringing or defending of a suit in the corporate name is the act of the official members in their natural persons; but is not the personal act of their constituents. . . . When, therefore, to defeat the jurisdiction, it is alleged that such or such a person, a private member of the corporation, is a party to the suit, the allegation is neither accurate in reason nor true in fact.

Id.

125. 446 U.S. 458 (1980).

126. *Id*. at 465.

127. *Letson*, 43 U.S. at 522.

128. *Id.* at 520.

129. *Id.* at 540.

130. In *Marshall v. Baltimore & Ohio Railroad*, 57 U.S. (16 How.) 314 (1853), the Court denied that the corporation itself could be a citizen. Schane, *supra* note 102, at 579–80. But instead of reverting back to the *Deveaux* rule of looking to the citizenship of the corporation's members, the Court held that the members were presumed to have the citizenship of the corporation's place of incorporation and were estopped from averring otherwise. *Id.* at 580–81. According to Schane, this odd approach was the result of the Court attempting to mitigate a premature application of the person theory in *Letson*. *Id.* at 579. That a corporation could be a person, even an artificial one, was simply too radical an idea for the time. *Id.* Instead, using the *Marshall* approach, the Court blended aspects of the person theory and the group theory to arrive at a conception of the corporation that gave them access to diversity of citizenship, but in a way that was more palatable. *Id.* at 580.

Court's conception of the corporation to this day.[131] The *Letson* theory was embodied in statute with the passage of 28 U.S.C. § 1332(c) in 1958, which stated that a "corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."[132]

The Court further elaborated on corporate personhood in *Southern Railway Co. v. Greene*[133] when it held that a corporation was a person within the meaning of the Fourteenth Amendment.[134] The Court did not mention the members of the corporation or its status as an artificial being. Instead, the Court treated the corporation as a person in its own right—attributing assets, rights, and duties to the corporation itself.[135] This is consistent with early definitions of corporation, which asserted that individuality was the chief purpose of incorporation.[136] The Court used the term "individual" not just to mean acting as a single body but as acting as an individual, that is, a person.[137] This feature "enable[s] a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless

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Although the Court never officially overruled this understanding of corporate citizenship, it is unsupported by the language of 28 U.S.C. § 1332 and is no longer part of the Court's understanding. *Id.* at 583.

131. Schane, *supra* note 102, at 583. Although the person theory as articulated by Congress in 28 U.S.C. § 1332(c) "has never received the official sanction of the Supreme Court, in the minds of most legal writers, jurists, and corporate lawyers, the corporation itself is a citizen of a state, and for diversity purposes one compares directly its citizenship to that of the opposing party." *Id.* at 591. *See also* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1015 (2016) (discussing the Court's corporate-citizen line of cases and mentioning only *Letson* as representing the Court's position, not citing any of the later cases in which the Court moved away from *Letson*); Carden v. Arkoma Assocs., 494 U.S. 185, 194 n.3 (1990) ("*Marshall*'s fictional approach appears to have been abandoned. Later cases revert to the formulation of [*Letson*], that the corporation has its own citizenship.").

132. Schane, *supra* note 102, at 583 (quoting 28 U.S.C. § 1332(c) (1982)). The version of § 1332(c) quoted is the same as the one that was originally passed in 1958. The pertinent part of the current version of § 1332(c)(1) states that "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1) (2012). The change was made by the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 102, 125 Stat. 758, 759 (2011). This change was intended to clarify the citizenship of corporations with a principal place of business or state of incorporation (or both) abroad. H.R. REP. NO. 112-10, at 9 (2011), *reprinted in* 2011 U.S.C.C.A.N. 576, 580. The legislative history provides no clues as to which foreign-country business entities are corporations for the purposes of this statute.

133. 216 U.S. 400 (1910).

134. *Greene*, 216 U.S. at 412.

135. Schane, *supra* note 102, at 590.

136. *See* Providence Bank v. Billings, 29 U.S. (1 Pet.) 514, 562 (1830) ("The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.").

137. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) ("Among the most important [features of a corporation] are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual.").

necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand," allowing a "perpetual succession of individuals" to act as "one immortal being."[138] Notions of individuality are closely linked to those of the juridical person—both are about the aspects of a corporation that make it like a human being. It is the corporation's unique status as an individual, a "person" separate from its members, that affords it this special treatment.

With corporate personhood as both the defining feature of a corporation[139] and an explanation for the Court's special treatment of corporate citizenship, it makes sense that the citizenship test for foreign-country business entities would include this aspect. At first glance, the juridical person approach would seem to do this; after all, the approach focuses on determining whether a business is treated like a person. However, this approach as it is currently applied fails to articulate a consistent test for personhood that courts can apply with predictability, largely due to the fact that there is no settled definition of "juridical person."

B. What Is a Juridical Person?

It seems obvious, even tautological, to say that the definition of "juridical person" is a crucial component of the juridical person approach. Yet courts using this approach have largely failed to articulate a clear and consistent definition of the term. Courts should not treat the definition of juridical person as self-evident—scholars disagree as to its meaning.[140] To determine what courts mean when they use the term "juridical person," it is necessary to look to the case law for clues.

To be clear, "juridical person" is not synonymous with "corporation." The idea of the juridical person is not nearly precise enough to apply to corporations but exclude other similar, but unincorporated, entities. Even under the Supreme Court's precedent, it is clear that the term "juridical person" encompasses more than corporations. The majority opinion in *Carden* noted that *Chapman*, *Great Southern*,[141] and *Bouligny* were all cases that involved juridical persons.[142] Those cases did not involve questions

138. *Id.*

139. *See* JAMES D. COX & THOMAS LEE HAZEN, BUSINESS ORGANIZATIONS LAW 131 (4th ed. 2016) ("Recognition of a corporate personality generally is considered to be the most distinct attribute of the corporation.") (citing Anderson v. Abbott, 321 U.S. 349, 361 (1944)).

140. *See* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 658 (1926) (explaining that the legal doctrine relating to a "jural person" is muddled and inconsistent); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 438–39 (2000) (discussing the debate over the meaning of the term "juridical person").

141. Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900).

142. Carden v. Arkoma Assocs., 494 U.S. 185, 194 (1990).

about the citizenship of a corporation, but of a joint-stock company, a limited partnership, and an unincorporated labor union, respectively.[143]

This need not be read as a drawback to using the juridical person approach. The states have created a number of unincorporated entities that share many characteristics with corporations and are functionally very similar to corporations. Although the Supreme Court has chosen not to deem these entities "citizens," as it does corporations, it has noted numerous times that the reason for this is not based on policy or important structural differences between corporations and unincorporated entities.[144] Rather, the Court has refused to extend citizenship to these entities because it believes any changes to the citizenship of business entities must be made by Congress. This reluctance to make new rules cannot extend to foreign-country business entities.

As discussed earlier in this Note, the courts of appeals take their notion of the juridical person from the Supreme Court's holding in *Russell*.[145] But there the Court did not explicitly define what a juridical person was. Instead, it listed qualities of the *sociedad*—the business entity in question—and using those qualities, concluded that it was a juridical person.[146] Among the qualities, the Court listed: (1) that the *sociedad* can "contract, own property and transact business, sue and be sued in its own name and right;"[147] (2) "[i]ts members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant;"[148] (3) "[i]t is created by articles of association filed as public records;"[149] (4) it has a lifetime specified by the articles of association that is not connected to changes in its membership;[150] (5) managers alone can legally bind the *sociedad*;[151] (6) members enjoy a form of limited liability, which the Court analogized to that "imposed on corporate stockholders by the statutes of some states;"[152] and (7) Puerto Rican law declares that the *sociedad* is a juridical person.[153]

The Court did not make clear whether all of these factors were necessary to conclude that the *sociedad* was a juridical person or if the law's mere

143. Chapman v. Barney, 129 U.S. 677, 679 (1889); *Great Southern*, 177 U.S. at 450; United Steelworkers of Am., AFL-CIO v. R. H. Bouligny, Inc., 382 U.S. 145, 146 (1965).

144. *See supra* notes 83–85 and accompanying text.

145. *See supra* notes 25–26 and accompanying text.

146. Puerto Rico v. Russell & Co., 288 U.S. 476, 481 (1933).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 482.

statement that the *sociedad* was a juridical person was sufficient. Courts purporting to apply *Russell*'s juridical person approach have used various formulations of these qualities to articulate what makes an entity a juridical person. The Ninth Circuit in *Cohn* applied some of the *Russell* factors, listing that (1) "[a]nstalts have liability limited to their capitalization,"[154] (2) "can both sue and be sued in their own names,"[155] (3) "[a]ny recovery by an anstalt in such litigation becomes an asset of the anstalt,"[156] and (4) under Liechtenstein law, the anstalt is regarded as a juridical person.[157] Other courts have looked to law dictionaries for additional guidance. For example, the District Court for the Southern District of California wrote that "[a] juridical person is '[a]n entity, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being.'"[158] Other district courts within the Ninth Circuit have followed similar formulations.[159] The Fifth Circuit considered fewer factors still, noting only that the entity was considered a juridical person under Liechtenstein law, was separated from the founder's personal assets, and was "an independent legal entity."[160]

From these cases a few themes emerge.[161] First, a majority of courts considering this issue appear to find persuasive that the country of the entity's formation views the entity as a juridical person. This is helpful to courts

154. Cohn v. Rosenfeld, 733 F.2d 625, 629 (9th Cir. 1984).

155. *Id.*

156. *Id.*

157. *Id.*

158. Petropolous v. FCA US, LLC, No. 17-CV-0398 W (KSC), 2017 WL 2889303, at *3 (S.D. Cal. July 7, 2017) (quoting *Person*, BLACK'S LAW DICTIONARY (10th ed. 2014)). It also listed the *Cohn* factors as "traditional corporate characteristics" the Court "may consider," including "(1) the protections of limited liability; (2) the ability to sue and be sued in its own name; and (3) the capacity to retain any recovery from a lawsuit as an asset of the entity." *Id.*

159. *See* Baja Developments LLC v. Loreto Partners, No. CV-09-756-PHX-LOA, 2010 WL 1758242, at *4 n.6 (D. Ariz. Apr. 30, 2010) (listing that under Mexican law a "*sociedad en comandita por acciones* is a juridical legal entity," may sue in its own name, and any recovery obtained in a lawsuit brought by the *sociedad* belongs to the entity itself, not its members); Inmexti v. TACNA Servs., Inc., No. 12CV1379 BTM (JMA), 2012 WL 3867325, at *3 (S.D. Cal. Sept. 6, 2012) (noting that the *sociedad de responsabilidad limitada de capital variable* "has the ability to sue and be sued, and is recognized as a juridical person under the laws of Mexico"); Celestine v. FCA US, LLC, No. 2:17-cv-00597-DAD-JLT, 2017 WL 3328086, at *3 (E.D. Cal. Aug. 4, 2017) (noting that a *naamloze vennotschap* organized under the laws of the Netherlands was a juridical person because it "may sue in its own name in the courts of the Netherlands, and may obtain recovery on its own behalf from such lawsuit under the laws of the Netherlands"); Garcia v. FCA US, LLC, No. 1:16-cv-00730-DAD-BAM, 2016 WL 4445337, at *3 (E.D. Cal. Aug. 24, 2016) (same).

160. Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 298–99 (5th Cir. 2010).

161. *See also* BouMatic, LLC v. Idento Operations, BV, 759 F.3d 790, 791 (7th Cir. 2014) (listing "the standard elements of 'personhood'" as "perpetual existence, the right to contract and do business in its own name, and the right to sue and be sued").

administering this test—an indication that a foreign country treats the entity as a juridical person prevents the court from having to dive deeper into foreign law—but is unhelpful doctrinally as it tells us nothing about what a juridical person is. Second, a majority of courts listed the ability of the entity to sue in its own name as being relevant to this determination. Although the ability of an entity to sue in its own name should not be dispositive, there is some justification for looking at an entity's ability to sue in its own name. At common law, a partnership could not sue in its own name because it "was not a distinct legal entity but merely an aggregate of individuals."[162] The ability of an entity to sue in its own name, then, would seem to be an indication that it *is* a distinct legal entity. However, many state legislatures have overridden this common law rule and now allow partnerships to sue in their own name,[163] so this factor is probably not particularly meaningful. Additionally, the ability of a party to sue in its own name is connected to the idea of that party being the real party to the controversy by Federal Rule of Civil Procedure 17(a), which states that "[a]n action must be prosecuted in the name of the real party in interest."[164] However, as the Court noted in *Navarro*, those standards are related but "serve different purposes and need not produce identical outcomes in all cases."[165] Moreover, the Supreme Court has expressly rejected the ability of an entity to sue in its own name as entitling a business to be treated like a corporation for citizenship purposes.[166] Therefore, it makes sense to have the ability of the entity to sue in its own name as a necessary condition for being treated as a juridical person, but that factor could not by itself be determinative.

Third, many courts focus on limited liability. Limited liability indicates a level of insulation between the entity and its members, and the fact that liability can attach to the entity itself indicates its status as a legal actor. That limited liability is not reserved to corporations[167] should not be an issue because, as already noted, the notion of the juridical person encompasses more than just corporations. Similarly, courts find persuasive that the recovery obtained is an asset of the entity and does not go directly to the

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162. Gerald Reff, *Right of a Partnership to Sue or Be Sued in Its Own Name*, 20 ST. JOHN'S L. REV. 109, 109 (1946).

163. *E.g.*, *id.* at 110 (detailing the New York legislature's enactment of a statute giving partnerships the right to sue or be sued in their own name).

164. FED. R. CIV. P. 17(a).

165. Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 462 n.9 (1979).

166. Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 455–56 (1900). The Court found that

> the capacity to sue and be sued by the name of the association does not make the plaintiffs a corporation within the rule that a suit by or against a corporation in its corporate name in a court of the United States is conclusively presumed to be one by or against citizens of the State creating the corporation.

Id.

167. COX & HAZEN, *supra* note 139, at 7.

members. This too is an indication of separation between the entity and the members. Lastly, courts find perpetual existence persuasive. This is another indication that the status of individual members of the entity does not change the entity itself.

All of these qualities aim to shed light on whether the entity has personhood or individuality—the factors that the Court originally found persuasive in granting corporations their own citizenship. Scholars have also found them persuasive. As noted by the English legal historian Frederic William Maitland, the corporation, like a person is "a right-and-duty-bearing unit," and though it does not have all of the legal powers of a natural person (for example, it cannot marry), "for a multitude of purposes [the law] treats the corporation very much as it treats the man."[168] Like a man, a corporation has the power to contract, own property, and borrow money.[169] When a person contracts with a corporation, "there stands opposite to you another right-and-duty-bearing unit—might I not say another individual?—a single 'not-yourself' that can pay damages or exact them."[170] This quality—that the entity has certain powers that enable courts to treat it like a human being—is critical to the definition of "juridical person." *Letson*, too, emphasized the corporation's similarities to a natural person, noting its ability to contract and "the manner in which it can sue and be sued."[171]

From all of these sources, a fairly consistent definition of "juridical person" can be extracted. A juridical person is a legal entity that possesses rights and duties under the law similar to those of a natural person. In its own name and capacity, it can contract, sue and be sued, and own property. All profits and liabilities accrue to the entity itself and not to its members, and it has a continuous existence irrespective of its membership. For the purposes of § 1332, this definition of juridical person should not be considered a factor test, rather, these are the elements of a juridical person, and each element must be present to consider an entity a juridical person.

Part IV

This Part advocates adoption of a version of the juridical person approach. This approach has two parts, considering first whether the entity is a juridical person as it has been defined in this Note and second, whether the entity itself, and not its members, can be considered the real party to the controversy. The first part of this test comes from *Russell*, but *Russell* commented only on civil law entities, and this test would apply to common law entities as well. Because of this and because of the Court's history of

168. *Moral Personality & Legal Personality* 1903, *in* 3 COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 306–07 (H.A.L. Fisher, ed., 1911).

169. *Id.* at 307.

170. *Id.*

171. Louisville, C. & C.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844).

considering the citizenship of only the real parties to the controversy, it is prudent to add to the test a second part that asks whether the entity's members can be considered the real parties to the controversy. If so, their citizenship should be considered. If not, the entity's status as a juridical person is sufficient to afford it its own citizenship, separate from that of its members, and only this citizenship should determine whether there is complete diversity among the parties. Although this portion of the test would not traditionally apply to civil law entities, to avoid adding an additional step that would require a court to determine whether something is a common law or civil law entity, it is best to apply this step to all foreign-country business entities.

I propose that courts adopt a new version of the juridical person approach to determine the citizenship of foreign-country business entities. This approach is focused on what the Court originally found persuasive in treating a corporation as having its own citizenship—its separate legal personality and the fact that the corporation—not its members—is the real party to the controversy. In fact, such an approach does not need to be newly created—it already exists in Supreme Court precedent. It was articulated by Justice O'Connor's *Carden* dissent and is derived from *Marshall*:

> In *Marshall*, as in *Deveaux*, . . . the determination whether the corporation was a citizen did not signal the end of the diversity jurisdiction inquiry. Rather, the Court engaged in a two-part inquiry: (1) is the corporation a "juridical person" which can serve as a real party to the controversy, and (2) are the shareholders real parties to the controversy.[172]

This test as articulated by Justice O'Connor works perfectly in the foreign-country context. It uses both the juridical person aspect of the test, and so is in keeping with *Russell*, but it also adds the element of the real party to the controversy, which is in keeping with the Supreme Court's early corporate-citizenship jurisprudence. Slightly reformulated to apply to foreign-country entities, the first part of the test would ask whether the foreign-country entity is a juridical person. If so, the second part of the test asks whether the entity's members are real parties to the controversy.

Like most other judges that use the term, Justice O'Connor does not elaborate on the meaning of "juridical person" within the test. But using the definition of juridical person formulated above, the first part of the test would ask: Can the entity contract, sue and be sued, and own property in its own name? Do the entity's profits and liabilities accrue directly to the entity itself? Does the entity have continuous existence irrespective of its membership? If the answer to all of these questions is yes, the entity is a juridical person for the purposes of this test.

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172. Carden v. Arkoma Assocs., 494 U.S. 185, 201 (1990) (O'Connor, J., dissenting) (citations omitted).

The second part of the test is explained by Justice O'Connor by reference to the *Marshall* Court. "To determine whether the corporation or the shareholders were real parties to the controversy, the Court considered which citizens held control over the business decisions and assets of the corporation and over the initiation and course of litigation involving the corporation."[173] She explained how this test applied to a corporation: "[F]or all the purposes of acting, contracting, and judicial remedy, [shareholders] can speak, act, and plead, only through their representatives or curators. For the purposes of a suit or controversy, the persons represented by a corporate name can appear only by attorney, appointed by its constitutional organs," and because of this, "[t]hey are not really parties to the suit or controversy."[174] This echoes the test for real party to the controversy as laid out in *Navarro*, which stated that the parties who have legal title, manage the assets, and control the litigation are the real parties to the controversy.[175]

Using only the juridical person standard is bound to be overinclusive in that businesses that are clearly not corporations in the American sense will be accorded the same citizenship treatment that an American corporation would receive. This will cause inconsistency between the treatment of foreign-country and domestic business entities because, as discussed above, American business entities that are not corporations can be considered juridical persons. The second part of the test will help to resolve some of this overinclusiveness by focusing on the real party to the controversy—what the Court has historically viewed as the justification for treating corporations as having their own citizenship. Dealing with the overinclusiveness is necessary if the test aims to follow the juridical person approach as it was set out in *Russell*. There, the Court noted that "those who formulated the [corporate citizenship] rule found its theoretical justification only in the complete legal personality with which corporations are endowed."[176] This meant that "status as a unit for purposes of suit alone, as in the case of a joint stock company or a limited partnership, not shown to have the other attributes of a corporation, has been deemed a legal personality too incomplete" to treat as if it were a single citizen.[177] Although the *Russell* Court believed its juridical person approach to be sufficient to resolve this problem in the context of civil law entities, it expressed no such opinion regarding common law entities. Ensuring that the entity's members are not the real parties to the controversy will help resolve this problem.

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173. *Id.*

174. *Id.* at 202 (alterations in original) (citing Marshall v. Baltimore & Ohio R.R. Co., 57 U.S. (16 How.) 314, 328 (1853)).

175. Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 465 (1980).

176. Puerto Rico v. Russell & Co., 288 U.S. 476, 479 (1932).

177. *Id.* at 480 (citations omitted).

Although application of the second part of the test to entities with civil law origins may not find direct support in Supreme Court precedent, it is nevertheless desirable to apply the second part of the test to all foreign-country business entities. To make a distinction in the test between civil law and common law entities would require a court to first determine the provenance of the entity in question, adding an additional step to the inquiry. This task could prove complicated,[178] and ultimately, very little is gained from a decision not to apply the second part of the test to a civil law entity. The inquiry into whether a company's members can be considered real parties to the controversy will involve many of the same factors that were considered in determining whether the entity was a juridical person and thus should not require a court to expend many additional resources to apply it. Moreover, this step of the test would only be outcome determinative where the shareholders could be said to be the real parties to the controversy. And according to the Court's diversity jurisprudence, that result is desirable. It is possible that applying the second part of the test to entities with civil law origins will prevent some businesses from asserting diversity jurisdiction where they otherwise could, but if their members can properly be considered the real parties to the controversy, it seems appropriate to take those members' citizenship into account.

Application of this new test will probably not create a perfect analogue to the Court's approach for American business entities. But as noted numerous times throughout this Note, that should not be a concern because the Court's current methods of determining the citizenship of American business entities are not based on policy decisions but on a decision that further changes to citizenship must be made by Congress.[179]

Courts cannot use this same justification here. As this Note has shown, there is no precise definition of "corporation," and therefore it is difficult to determine which foreign-country business entities should be deemed corporations for diversity-citizenship purposes. Congress has failed to legislate and the courts of appeals have been left to formulate their own rules, leading to the current circuit split. While Congress remains silent, courts must create some type of rules to determine citizenship in cases where it is unclear whether a foreign business entity is a corporation.

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178. For example, how should a court treat an entity with a long history of use in a common law country but that originated in the civil law system?

179. *See Carden*, 494 U.S. at 197. The Court held that declining to grant limited partnerships their own citizenship, "does not so much disregard the policy of accommodating our diversity jurisdiction to the changing realities of commercial organization, as it honors the more important policy of leaving that to the people's elected representatives." *Id*. The Court found that "such accommodation is not only performed more legitimately by Congress than by courts, but it is performed more intelligently by legislation than by interpretation of the statutory word 'citizen.'" *Id*.

Conclusion

One of the primary purposes of diversity jurisdiction is to protect defendants from local prejudice that may be further compounded when one party is a citizen of a foreign country.[180] This is why determining the real parties to the controversy is so important—allowing a single person to destroy diversity when that person plays no part in the litigation would frustrate the purpose of the alienage rule and unfairly deny foreign-country litigants the protections the Constitution affords them. Ignoring the decision of another country to treat an entity as a legal person shows disrespect for that country's laws and frustrates the expectations of the members of that entity. This should not be done lightly. Because legal personhood has historically been the justification for according a corporation its own citizenship, that aspect should be given controlling weight in the determination of how to treat the business entity when it is determined that the entity, and not its members, is the real party to the controversy. For these reasons, federal courts should uniformly adopt the modified juridical person approach and eliminate the current circuit split.

180. *See generally* Johnson, *supra* note 2, at 31. Johnson argues that

> modern circumstances militate in favor of ensuring access to a national forum to resolve disputes involving noncitizens just as much today as, if not more so than, in 1787. History has demonstrated that the political processes in the country are susceptible to antiforeign sentiment, sometimes of a particularly virulent strain, which necessitates a forum more politically insulated than that offered by most states. Though this danger is not present in every alienage case, state court adjudication of disputes involving foreign citizens continues to raise the possible adverse foreign policy and international trade consequences feared by the Framers of the Constitution.

Id.