HAS THE SEDUCTIVE SIREN OF JUDICIAL FRUGALITY CEASED TO SING?: *DATAFLUX* AND ITS FAMILY TREE

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I. INTRODUCTION: THE SCARLETT O'HARA SYNDROME

In January of 2003, the Court of Appeals for the Second Circuit found it necessary to remand a case back to the district court for a determination as to whether subject matter jurisdiction existed.[1] In reaching this decision, the court expressed its ongoing concern that instances of cases brought in federal court where diversity of citizenship was improperly alleged or nonexistent had become "far too common."[2] The court reiterated its prior admonition to counsel and the district courts not to treat the question of subject matter jurisdiction as one that only needed to be considered when raised by a party or the court.[3] Rather, the issue of subject matter jurisdiction should be viewed as a "threshold issue for resolution."[4] In addition, the court addressed possible sanctions for pursuing an action with a doubtful jurisdictional basis.[5]

1. United Republic Ins. Co. v. Chase Manhattan Bank, 315 F.3d 168, 171 (2d Cir. 2003).
2. *Id.* at 170 (citing Franceskin v. Credit Suisse, 214 F.3d 253, 255-57 (2d Cir. 2000).
3. *Id.* at 170-71.
4. *Id.* at 170.
5. *Id.* at 171.

During appeal of the district court's decision to dismiss the appellant's complaint for failure to state a claim, the appellant filed a Motion for Clarification of Subject Matter Jurisdiction that indicated its concerns regarding whether proper diversity jurisdiction existed from the outset of the litigation.[6] This raised the possibility that the action had been brought and pursued without the appellant ever determining whether existing law justified its assertion of diversity jurisdiction or whether such jurisdiction was supported by, or was likely to be supported by, the evidence.[7] The Second Circuit responded by inviting the district court to determine whether sanctions against counsel might be appropriate pursuant to Federal Rule of Civil Procedure 11.[8]

Recently, the Court of Appeals for the Seventh Circuit also found itself reprimanding counsel for failing to properly determine the existence of diversity subject matter jurisdiction at the commencement of an action.[9] In a scathing opinion, Judge Easterbrook began by declaring that "[o]nce again litigants' insouciance toward the requirements of federal jurisdiction has caused a waste of time and money."[10] He further commented that while the "[d]efendant's brief asserts that plaintiffs' jurisdictional summary is 'complete and correct,'" in actuality "[i]t [was] transparently incomplete and incorrect."[11] He decried that the defendant's post-argument memorandum left the court "agog" by requesting that the court "exercise . . . its Appellate jurisdiction [and] decide the case on the merits" despite the fact that "an examination of the issue would have shown a lack of subject matter jurisdiction in the District Court."[12] "Just where," the court asked, "do appellate courts acquire authority to decide on the merits a case over which there is no federal jurisdiction?"[13] The defendant's suggestion that the Seventh Circuit had done so before, a proposition which was completely unsupported, "accuse[d] the court of dereliction combined with

6. *Id.* at 169.

7. *Id.* at 171.

8. *Id*.

9. Belleville Catering Co. v. Champaign Mkt. Place, L.L.C., 350 F.3d 691, 692-94 (7th Cir. 2003).

10. *Id.* at 692 (citing Hart v. Terminex Int'l, 336 F.3d 541 (7th Cir. 2003)); Meyerson v. Showboat Marina Casino P'ship, 312 F.3d 318 (7th Cir. 2002); Meyerson v. Harrah's E. Chi. Casino, 299 F.3d 616 (7th Cir. 2002); Ind. Gas Co. v. Home Ins. Co., 141 F.3d 314 (7th Cir. 1998); Guar. Nat'l Title Co. v. J.E.G. Assocs., 101 F.3d 57 (7th Cir. 1996); Kanzelberger v. Kanzelberger, 782 F.2d 774 (7th Cir. 1986)).

11. *Id.*

12. *Id*. at 693 (internal quotation omitted).

13. *Id*.

usurpation."[14] Where a court lacks proper subject matter jurisdiction over a case, there is no discretionary power that would permit a consideration of the merits.[15]

Cases where the issue of proper diversity jurisdiction is not raised until appeal are not rarities.[16] Rather, there are numerous decisions expressing judicial concern that the requirement of establishing proper subject matter jurisdiction, particularly diversity jurisdiction,[17] as a prerequisite for invoking the authority of the federal courts is no longer respected.[18] Instead, attorneys appear to be suffering from what might be

14. *Id.*

15. *See id.* ("'A court lacks discretion to consider the merits of a case over which it is without jurisdiction.'") (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981)).

16. Of course, there are also many cases in which a district court has identified a flaw in jurisdiction sua sponte or as a result of a motion to dismiss. *See, e.g.*, Tilzer v. Davis, Bethune & Jones, LLC, No. 03-2661-JWL, 2004 WL 825289, at *1 (D. Kan. April 15, 2004) ("[T]he court's conclusion that plaintiffs have failed to show good cause is largely irrelevant as the court, after reviewing the motions to dismiss and plaintiffs' response to those motions, concludes that dismissal of plaintiffs' complaint is appropriate for lack of [diversity] subject matter jurisdiction."); Gourmet Ctr., Inc. v. Sage Enters., Inc., No. 04 C 856, 2004 WL 2700499, at *1 (N.D. Ill. Feb. 5, 2004) ("[T]his sua sponte memorandum is clearly called for . . . because regular practitioners in the federal courts . . . really ought to be aware of something so fundamental [as the proper basis for invoking federal jurisdiction on the basis of diversity of citizenship grounds].") (footnote omitted); Trawick v. Asbury MS Gray-Daniels, LLC, 244 F. Supp. 2d 697, 699 (S.D. Miss. 2003) (criticizing counsel for failure to conduct the "minimal amount of research" that would have revealed the lack of proper subject matter jurisdiction).

17. In accordance with constitutional constraints and as a result of congressional enactments, the federal district courts have jurisdiction over three general areas of cases: (1) those concerning issues of federal law (federal question jurisdiction), 28 U.S.C. § 1331 (2000); (2) those in which the amount in controversy exceeds the requisite amount (which is currently $75,000), that are between "citizens of different States[,] . . . citizens of a State and citizens or subjects of a foreign state[,] . . . citizens of different States and in which citizens or subjects of a foreign state are additional parties[,] and . . . a foreign state . . .as plaintiffs and citizens of a State or of different States" (diversity jurisdiction), *id.* § 1332(a); and (3) those involving questions of maritime or admiralty law or prize issues (admiralty jurisdiction), *id.* § 1333. In addition, Congress has granted the federal district courts exclusive jurisdiction over other specific types of cases. *See id.* §§ 1330, 1334-1366.

18. *See, e.g.*, United Republic Ins. Co. v. Chase Manhattan Bank, 315 F.3d 168, 171 (2d Cir. 2003) ("We have previously expressed a concern that cases brought in federal courts in which diversity of citizenship is not properly alleged and/or does not exist are far too common.") (citing Franceskin v. Credit Suisse, 214 F.3d 253, 255-57 (2d Cir. 2000) (collecting cases)); Belleville Catering Co. v. Champaign Mkt. Place, L.L.C., 350 F.3d 691, 692 (7th Cir. 2003) ("Once again litigants' insouciance toward the

called the "Scarlett O'Hara Syndrome," or the "I'll think about that tomorrow" approach to jurisdiction. The primary symptom of this condition is to ignore the issue of whether a court has proper diversity jurisdiction over a matter until it becomes expedient for a party, particularly the losing party, to raise the issue on appeal.

This Article posits that the Supreme Court's disproportionate glorification of judicial efficiency and economy[19] has resulted in decisions endorsing and expanding the doctrine of retroactive diversity jurisdiction. The Court professes that this doctrine is merely the result of permissible exceptions to the court-created time-of-filing rule.[20] Although the Court may choose to characterize retroactive jurisdiction as the result of legitimate exceptions to a court-created policy,[21] the doctrine is undermining the constitutional and statutory commandment that federal courts, as courts of limited jurisdiction, must have proper subject matter jurisdiction *prior* to considering the merits of a case.[22] Consequently, the Court's validation of retroactive jurisdiction contravenes the jurisdictional precept that where a court lacks the jurisdictional authority to entertain a case, any judgment entered by that court is void.[23]

This Article maintains that there is a strong correlation between the growing lack of respect for the prerequisite of diversity jurisdiction shown

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requirements of federal jurisdiction has caused a waste of time and money.") (collecting cases).

19. Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 325 (1989) (discussing how "attempt[s] to elevate judicial economy from the level of a 'trivial goal' threaten[ ] to turn justice into one").

20. *See* cases cited *infra* notes 75-78.

21. *See* Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920, 1937 n.9 (2004) (Ginsburg, J., dissenting) (maintaining that because the time-of-filing rule is court-created, "it is therefore incumbent on the Court to define the contours of [the] rule's application").

22. Jack H. Friedenthal, *The Crack in the* Steel *Case*, 68 GEO. WASH. L. REV. 258, 259 (2000). "Since 1804, when the Supreme Court decided *Capron v. Van Noorden*, federal courts have generally assumed that unless a federal court has subject-matter jurisdiction, it cannot determine any other issue in a case." *Id.* (footnote omitted).

23. *See, e.g.*, E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 929 (2d Cir. 1998) ("'[S]ubject matter jurisdiction is an unwaivable *sine qua non* for the exercise of federal judicial power.'") (quoting Curley v. Brignoli, Curley & Roberts Assocs., 915 F.2d 81, 83 (2d Cir. 1990)); Coury v. Prot, 85 F.3d 244, 248 (5th Cir. 1996) ("It is axiomatic that the federal courts have limited subject matter jurisdiction and cannot entertain cases unless authorized by the Constitution and legislation.").

by counsel and the Court's manipulation of the threshold requirement of proper subject matter jurisdiction. In such an atmosphere, it is not surprising that the Scarlett O'Hara Syndrome is flourishing. In order to renovate this situation, the Supreme Court needs to stop allowing piecemeal "jurisdictional repair work" to be conducted "in its halls."[24]

As a backdrop for these propositions, Part II of this Article will provide a brief historical overview of the various theories regarding the creation and original purpose of diversity jurisdiction. The origins of two key rules or policies, that of complete diversity and the time-of-filing rule, will also be traced.[25] Over the past 175 years, these tenets have, in essence, become grafted onto the actual language of the statute granting federal courts original jurisdiction over cases based on diversity of citizenship.[26]

Part III will examine and critique the relevant Supreme Court decisions that laid the foundation for the Court's most recent decision in the area of diversity jurisdiction, *Grupo Dataflux v. Atlas Global Group, L.P.*[27] Two of the foundational cases, *Newman-Green, Inc. v. Alfonzo-Larrain*[28] and *Caterpillar Inc. v. Lewis*,[29] are seminal decisions legitimizing the retroactive creation of diversity jurisdiction. Issues of federalism raised by retroactive diversity jurisdiction, particularly in removal situations, and the question of the Court's lack of fidelity to precedent resulting from its insouciant treatment of the time-of-filing rule will also be addressed.[30] The third foundation case, *Carden v. Arkoma Associates*,[31] sets forth the rule

24. Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d 916, 936 (7th Cir. 1987) (Easterbrook, J., dissenting), *rev'd sub nom*. 490 U.S. 826 (1989).

25. *See infra* Part II.B.

26. In contrast to most state courts, the federal courts are courts of limited subject matter jurisdiction. *Accord* Chase Manhattan Bank v. South Acres Dev. Co., 434 U.S. 236, 239-40 (1978); *see also* Sarmiento v. Tex. Bd. of Veterinary Med. Exam'rs, 939 F.2d 1242, 1245 (5th Cir. 1991) ("It is a fundamental principle of federal jurisprudence, too basic to require citation of authority, that the federal courts are courts of limited jurisdiction."). The parameters of this jurisdiction are established by the Constitution and by statute. The Constitution itself, however, does not confer jurisdiction on the federal courts—it merely sets out the boundaries for such jurisdiction. *Accord* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1849). The actual grant of jurisdiction to the federal district courts is via statute. *Id.* The statute empowering the district courts with jurisdiction over cases based on diversity is 28 U.S.C. § 1332 (2000).

27. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920 (2004).

28. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826.

29. Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996).

30. *See infra* Part III.B.5.

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

governing the determination of the citizenship of limited partnerships for the purpose of establishing diversity jurisdiction.[32] The result in *Carden* can be characterized as nothing short of absurd.[33]

Part IV will focus on the *Dataflux* decision and its place in the Court's teeter-totter approach to the longstanding rules surrounding diversity jurisdiction. Instead of recognizing an additional exception permitting retroactive jurisdiction, the *Dataflux* Court chose to resurrect a bright-line time-of-filing rule.[34] This choice undercut the policy considerations supporting its prior jurisprudence in the area and eroded a substantial portion of the already shaky foundation of those decisions.[35] Even more importantly, however, is that the mixed signals the Court is sending—as illustrated by *Dataflux* and the foundation cases—continue to subvert the respect that should be shown by those invoking the diversity jurisdiction of the federal district courts.

II. THE BACKGROUND

A. *A Brief History of Diversity Jurisdiction*

In order to determine whether it is appropriate to carve out exceptions to a rule, the rule and its purpose must first be examined. If the question were posed as to why diversity jurisdiction exists, chances are the most popular response would be to avoid being "home cooked." In other words, the purpose of diversity jurisdiction is to provide an out-of-state party with a neutral forum to avoid any local bias or prejudice that the party might be subjected to if the case were brought in state court.[36] Such a

32. *See id.* at 195-96 (rejecting the contention that "the citizenship of an artificial entity [can be determined by] consult[ing] the citizenship of less than all of the entity's members").

33. *See* discussion *infra* Part III.C.

34. *See* Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920, 1930 (2004) (declining to create an exception to the time-of-filing rule that would allow a post-filing change in the composition of an artificial entity to preserve diversity jurisdiction).

35. *See id.* at 1937 n.9 (Ginsburg, J., dissenting) ("To hold the time-of-filing rule developed by this Court inapplicable here merely abjures mechanical extension of the rule in favor of responding sensibly to the rule's underlying justifications when those justifications are indisputably present.").

36. For example, in the *Federalist Papers*, Alexander Hamilton wrote that to ensure

> the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to

response certainly comports with legislative history.[37] Some commentators espouse the view that the purpose of diversity jurisdiction was not to counteract prejudice found in state courts, but prejudice that emanated from state legislatures as a result of "aberrational state laws."[38] There is also support for the position that the purpose of diversity jurisdiction was economic development.[39] With the availability of a neutral forum, individuals and companies were more comfortable making out-of-state

> preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

THE FEDERALIST NO. 80, at 537-38 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see also* Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) ("It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim. To avoid possible discriminations of this sort, so the theory goes, a citizen of a state other than that in which he is suing or being sued ought to be able to go into a wholly impartial tribunal, namely, the federal court sitting in that state."); Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 797 n.5 (11th Cir. 1999) ("'The object of the provisions of the constitution and statutes of the United States in conferring upon the circuit courts of the United States jurisdiction of controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the state in which one litigant resides.'") (quoting Barrow S.S. Co. v. Kane, 170 U.S. 100, 111 (1898)).

37. A report published by the House of Representatives as part of the Interstate Class Action Jurisdiction Act of 1999 selectively quotes federal opinions that set forth the premise that the main underpinning for diversity jurisdiction was the protection from local bias. *See* HENRY HYDE, INTERSTATE CLASS ACTION JURISDICTION ACT OF 1999, H.R. REP. NO. 106-320, at 10-11 (1999) (quoting Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d at 797; *In re* Prudential Ins. Co. Am. Sales Practices Litig., 148 F.3d 283, 305 (3d Cir. 1998)).

38. Glenn A. Danas, Comment, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 EMORY L.J. 1305, 1339 (2000). "'[A] careful reading of the arguments of the time [of the Constitutional Convention] will show that the real fear was not of state courts so much as of state legislatures.'" *Id.* n.204 (quoting Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495-97 (1928)) (alterations in original).

39. *See* William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 604 (1922) (maintaining that diversity jurisdiction was the single most important element in securing capital for the development of the southern and western United States).

investments, thereby stimulating economic growth.[40]

In actuality, the true historical reasons for the creation and implementation of diversity jurisdiction remain a mystery. In 1787, when the delegates assembled in Philadelphia, one of their major concerns was the creation of a strong federal judiciary.[41] The Articles of Confederation had not provided for a national court system,[42] and experience confirmed that this absence was one of the weaknesses of the Articles.[43] Not surprisingly, all the plans considered by the delegates included a national judicial system.[44] Only the Virginia plan, however, specifically proposed granting the federal judiciary authority over diversity cases involving "citizens of other States."[45] Ultimately, the convention submitted a proposal to the Committee of Detail, recommending that diversity jurisdiction vest "'to such other questions as may involve the national peace and harmony.'"[46] The revised provision, which was ultimately adopted, returned from the Committee of Detail as "'controversies . . . between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects.'"[47] While there was extended debate about the appropriate language to utilize, the discussions surrounding diversity jurisdiction offer no clear explanation as to why the delegates ultimately recognized diversity of citizenship as a basis for federal subject matter jurisdiction.[48] But whatever the reasons for conferring

40. Danas, *supra* note 38, at 1340.

41. *See, e.g.*, MAX FARRAND, THE FRAMING OF THE CONSTITUTION 50, 79-80, 119-20 (1913) (discussing questions surrounding the organization and jurisdiction of the federal courts).

42. James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 TEX. L. REV. 1, 1 (1964).

43. *See* CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 7-8 (1928) ("The experience under the Confederation amply demonstrated the necessity of defining and firmly establishing the Federal judicial power."); *see also* FARRAND, *supra* note 41, at 49-50 (relying upon the works of Montisquieu, which were viewed as "political gospel," the conclusion was drawn that "[t]here ought to be an organized federal judiciary which should have, in addition to that developed under the articles of confederation, jurisdiction in matters relating to foreigners or people of other states").

44. Moore & Weckstein, *supra* note 42, at 2-3.

45. *Id.*

46. *Id*. at 3 (quoting FARRAND, *supra* note 41, at 119).

47. *Id.* (quoting FARRAND, *supra* note 41, at 155-56) (alteration in original).

48. *See* ROBERT W. KASTENMEIER, ABOLITION OF DIVERSITY OF CITIZENSHIP JURISDICTION, H.R. REP. NO. 95-893, at 2 (1978) ("The debates of the Constitutional Convention are unclear as to why the Constitution made provision for [diversity] jurisdiction . . . ."); Roger J. Miner, *The Tensions of a Dual Court System*

diversity jurisdiction on the federal judiciary may have been, one thing is clear: it was the intention of the founding fathers that the federal courts be courts of limited jurisdiction,[49] and that once lines of jurisdiction were drawn, limits on jurisdiction must not be disregarded or evaded.[50]

B. *The Rule of Complete Diversity and the Time-of-Filing Principle*

Article III, Section 2 of the Constitution stakes out the boundaries of the jurisdictional authority of the federal courts.[51] This Section sanctions diversity jurisdiction by providing that the judicial power of the United States shall extend to controversies "between Citizens of Different States" and to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[52] It was left up to Congress, however, to specifically delineate the jurisdiction of the lower courts within these boundaries.[53] The First Congress exercised its prerogative and vested diversity of citizenship jurisdiction in the inferior federal courts via the Judiciary Act of 1789.[54] In doing so, however, Congress failed to include a definition of "citizenship." This oversight left open the question of what relationship had to exist between the parties for them to qualify as "diverse" citizens, as well as the issue of the point in time such citizenship was to be determined.[55]

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and Some Prescriptions for Relief, 51 ALB. L. REV. 151, 153 (1987) ("The original reasons for the establishment of diversity of citizenship jurisdiction in the inferior federal courts are unclear.").

49. *See* Sarmiento v. Tex. Bd. of Veterinary Med. Exam'rs, 939 F.2d 1242, 1245 (5th Cir. 1991) ("It is a fundamental principle of federal jurisprudence, too basic to require citation of authority, that the federal courts are courts of limited jurisdiction.").

50. Keene Corp. v. United States, 508 U.S. 200, 207 (1993) (quoting Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978)).

51. *See* U.S. CONST. art. III, § 2, cl. 1.

52. *Id.*

53. *See* Finley v. United States, 490 U.S. 545, 548 (1989) (holding that "two things are necessary to create jurisdiction": "[t]he Constitution must have given the court the capacity to take it, and an act of Congress must have supplied it. . . .") (internal quotation omitted) (citation omitted); Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution.").

54. The Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. § 1332 (2000)).

55. A third issue arising from Congress's failure to define citizenship required judicial interpretation of how to determine the state of citizenship. It is now well settled that for the purposes of § 1332, natural persons are citizens of the state in which

To remedy this oversight, in 1806, in a one-page opinion written by Chief Justice John Marshall,[56] the Court established that the diversity of citizenship statute required complete diversity.[57] Therefore, in a diversity action involving multiple parties, no plaintiff may be a cocitizen of a state with any defendant.[58] In creating the rule of complete diversity, it is important to note that the Chief Justice was construing only "the words . . . of congress," not the Constitution itself.[59] According to Chief Justice Marshall, the interpretation of citizenship as requiring complete diversity was commanded by the text of the 1789 Judiciary Act.[60]

A congressional requirement of complete diversity was entirely permissible, however, despite the lack of a constitutional mandate. The Constitution establishes the outermost limits of the jurisdictional power of the federal courts.[61] While congressional enactments may never exceed these boundaries, Congress may decline to grant the lower courts all of the judicial authority available under the Constitution.[62] In fact, constitutionally, minimal diversity, not complete diversity, is all that is required for the courts to exercise diversity jurisdiction.[63] At times, Congress has found it expedient to grant the federal courts jurisdiction over types of cases where there is only minimal diversity between parties.[64]

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they are domiciled, i.e., where they are physically present and have the intent to remain indefinitely. *See* Robertson v. Cease, 97 U.S. 646, 648-49 (1878) (holding that mere residence in a state is insufficient to make a natural person a citizen of that state); Brown v. Keene, 33 U.S. (8 Pet.) 112, 115 (1834) (recognizing that "[a] citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil").

56. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), *overruled in part by* Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 555 (1844).

57. *See id.* at 267 (holding that where a party has a joint interest, "*each of the persons* concerned in that interest must be competent to sue, or liable to be sued, in [the federal] courts") (emphasis added).

58. *See id.*

59. *Id.*

60. *Id.*

61. *E.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 448, 449 (1849) (explaining that the Constitution defines the outer limits of the judicial power of the federal courts).

62. *Id.*

63. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967) ("Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.").

64. *E.g.*, 28 U.S.C. § 1335 (2000) (requiring only minimal diversity for interpleader claims); *see also* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. at 530 ("The interpleader statute, 28 U.S.C. § 1335, applies where there are '[t]wo or more adverse claimants, of diverse citizenship . . . .' This provision has been uniformly

This is not so in the area of general diversity subject matter jurisdiction.

While the rule of complete diversity filled in one of the gaps surrounding diversity jurisdiction, the question of when the determination regarding the existence of complete diversity should be made remained open. In *Mullen v. Torrance*,[65] Chief Justice Marshall answered this question, instructing that the existence of diversity subject matter jurisdiction depended on the facts as they existed at the time the complaint was filed.[66] In contrast to the complete-diversity rule, which was based on statutory interpretation, the time-of-filing principle is not a constitutional necessity, nor is it required by any statutory text.[67] Rather, it is a court-created rule that has been characterized as representing more of a "policy decision."[68]

III. THE FOUNDATION CASES: EXTENSION, EXCEPTION & EVASION

A. *Longevity Does Not Necessarily Mean Legitimacy:* Newman-Green, Inc. v. Alfonzo-Larrain

1. *Scenario No. 1: The Court Goes Retro*

- A United States corporation files suit in federal district court bringing

construed to require only 'minimal diversity,' that is, diversity of citizenship between two or more claimants, without regard to the circumstances that other rival claimants may be co-citizens.") (citations omitted); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 363-67 (1921) (allowing minimal diversity in class actions in federal court), *overruled on other grounds by* Toucey v. N.Y. Life Ins. Co., 314 U.S. 118 (1941).

65. Mollan v. Torrance, 22 U.S. (9 Wheat.) 537 (1824).

66. *See id.* at 539 (holding that "the jurisdiction of the Court depends upon the state of things at the time of the action brought, and after vesting, it cannot be ousted by subsequent events").

67. *See* Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920, 1931 (2004) (Ginsburg, J., dissenting) (noting that the time-of-filing principle articulated in *Mollan v. Torrance* was not "extract[ed] . . . from any constitutional or statutory text").

68. *Id.*; *see* 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3608, at 452 (2d ed. 1984) (explaining that the time-of-filing rule "represents a policy decision"). In analyzing the *Desmare v. United States* presumption that "[w]here a change of domicile is alleged, the burden of proof rests upon the party making the allegation," Desmare v. United States, 93 U.S. 605, 610 (1876), the Second Circuit noted that the presumption stemmed from "'a judicial policy determination that in ascertaining diversity jurisdiction in a highly mobile society there is a need to fix domicile with some reasonable certainty at the threshold of litigation.'" Herrick Co. v. SCS Communications, Inc., 251 F.3d 315, 323-24 (2d Cir. 2001) (quoting Gutierrez v. Fox, 141 F.3d 425, 427 n.1 (2d Cir. 1998)).

a state law contract action for breach of a licensing agreement against a foreign corporation and, as joint and several guarantors of royalty payments due under the agreement, five individuals. Four of these individuals are foreign citizens. The fifth individual, however, is a United States citizen. The complaint invokes diversity jurisdiction under 28 U.S.C. § 1332(a)(3).[69]

- After several years of discovery and a number of pretrial motions, the district court ultimately grants partial summary judgment for the guarantors and partial summary judgment for the plaintiff. The plaintiff appeals.
- During oral arguments before the court of appeals, one of the judges questions the statutory basis for the asserted diversity jurisdiction, an issue that had not been raised by either the lower court or the attorneys for the defendants. As a result of this inquiry, it is discovered that the guarantor who is the U.S. citizen is not domiciled in any state. Therefore, he is "stateless" for the purposes of diversity jurisdiction. Consequently, the lower court lacked proper subject matter jurisdiction over the action.[70] What result?

The above facts mirror those of *Newman-Green, Inc. v. Alfonzo-Larrain*,[71] a case in which the Court glibly determined that a court of appeals had the power to dismiss "dispensable part[ies] whose presence spoils statutory diversity jurisdiction."[72] The case was appealed to the

69. 28 U.S.C. § 1332(a)(3) (2000).

70. 28 U.S.C. § 1332(a)(3) confers diversity jurisdiction on the federal district courts when a citizen of one state sues *both* aliens and citizens of a state different than the plaintiff's. *Id.* To be a citizen of a state for the purposes of this provision, a person must not only be a citizen of the United States, but must also be domiciled within that state. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828 (1989) (citing Robertson v. Cease, 97 U.S. 646, 648-49 (1878); Brown v. Keene, 33 U.S. (8 Pet.) 112, 115 (1834)). Because all of the other guarantors in *Newman-Green* were aliens, plaintiff had relied on the guarantor who was a United States citizen to create diversity jurisdiction pursuant to § 1332(a)(3). *Id.* However, because the United States guarantor was not domiciled in any state, he was not a citizen of any state for the purposes of this section. *Id.* Plaintiff was also unable to establish proper diversity jurisdiction under § 1332(a)(2). *Id.* This section confers jurisdiction in a district court when a citizen of a state sues *only* aliens. 28 U.S.C. §1332(a)(2). While the United States guarantor was not a citizen of any state for the purposes of diversity jurisdiction, he was a United States citizen, not an alien. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. at 829.

71. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826.

72. *Id.* at 827.

Supreme Court from the Seventh Circuit Court of Appeals.[73] Originally, a three judge panel ruled that an appellate court had authority to drop a nondiverse party.[74] But Judge Posner, writing for the Circuit empanelled *en banc*, concluded that "'[w]here the record reveals no jurisdiction, we are powerless to do anything but recognize the defect.'"[75] Because the record before the court revealed no jurisdiction, the panel decision was reversed, and the court remanded to the district court those who were not indispensable parties.[76] In contrast to the Seventh Circuit, other circuits had previously held that appellate courts were empowered to dismiss jurisdictional spoilers.[77] The Supreme Court granted Newman-Green's petition for certiorari to resolve the conflict.[78]

Writing for the majority, Justice Thurgood Marshall began his analysis of the issue by recognizing that although the existence of federal jurisdiction normally depends on the time-of-filing rule,[79] this rule was just a general principle subject to exceptions.[80] The two exceptions potentially applicable in *Newman-Green* were 28 U.S.C. § 1653 and Rule 21 of the Federal Rules of Civil Procedure.[81] After quickly disposing of the question of whether section 1653 could provide a source of authority to support the Court's ultimate ruling,[82] the Court turned its attention to the applicability of Rule 21.[83]

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73. *Id.* at 828-30.

74. Newman-Green, Inc. v. Alfonzo-Larrain R., 832 F.2d 417, 420 (7th Cir. 1987), *rev'd en banc*, 854 F.2d 916 (7th Cir. 1988), *rev'd sub nom*. 490 U.S. 826 (1989).

75. Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 918 (quoting Alderman v. Elgin, Joliet & E. Ry., 125 F.2d 971, 973 (7th Cir. 1942)), *rev'd sub nom*. 490 U.S. 826 (1989).

76. *Id.*

77. *See, e.g*., Long v. District of Columbia, 820 F.2d 409, 416-17 (D.C. Cir. 1987); Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523 & n.3 (9th Cir. 1987); Caspary v. La. Land & Exploration Co., 725 F.2d 189, 191-92 (2d Cir. 1984) (per curiam); Underwood v. Maloney, 256 F.2d 334, 338-39 (3d Cir. 1958).

78. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. at 830.

79. *Id.* (citing Smith v. Sperling, 354 U.S. 91, 93 n.1 (1957)).

80. *Id*.

81. *Id.* (citing 28 U.S.C. § 1653 (1994); FED. R. CIV. P. 21); *see* 28 U.S.C. § 1653 (providing that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts"); FED. R. CIV. P. 21 (allowing parties to "be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just").

82. *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. at 831-32 (holding that, based on the statutory language, the scope of § 1653 permits courts of appeals to remedy only jurisdictional allegations, not actual defects in jurisdiction).

83. *Id.* at 832-38.

In this portion of the opinion, Justice Marshall skated over a number of important issues surrounding Rule 21 that were critical to the reasoning underlying the opinion by simply characterizing them as "well settled."[84] First, the Court stated that it was "well settled" that the district courts had the power to dismiss dispensable, nondiverse parties from a case, even after judgment had been entered, in order to cure a spoiler problem.[85] Next, the Court noted that almost each court of appeals addressing the issue had concluded that Rule 21 also granted it the authority to dismiss a dispensable, nondiverse party.[86] The Court expressed its reluctance "to disturb this well-settled judicial construction."[87]

Whether it was "well settled" or not, it is certainly arguable that the Court should have begun its analysis by addressing the question of whether Rule 21 even empowered a district court, let alone an appellate court, "to confer jurisdiction retroactively by dismissing a non-diverse party."[88] Stability in the law, which is often achieved by declining to revisit settled issues, is certainly valuable. However, longevity does not necessarily mean legitimacy. Because the jurisdiction of the federal courts is created and limited by statute, it has never been the rule that power could be acquired by "adverse possession."[89]

Rule 21 specifically applies in situations of joinder or misjoinder.[90] In *Newman-Green*, there was no claim that an improper party had been joined in the action.[91] Rather, the claim was that the presence of a particular party

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84. *See id.* at 832-33.

85. *Id.* at 832.

86. *Id.* at 833 (citations omitted).

87. *Id.*

88. *Id.* at 839 (Kennedy, J., dissenting).

89. *Id.* (Kennedy, J., dissenting).

90. FED. R. CIV. P. 21. The rule is entitled "Misjoinder and Non-joinder of Parties." *Id*. The complete text of the rule reads as follows:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Id. The principles expressed in Rule 21 were a response to the harsh common law rule that where misjoinder occurred, automatic dismissal was required. *See* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 348-72 (2d ed. 1947) (providing a detailed analysis of the subject of joinder of parties at common law, under state codes, and under Rule 21).

91. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. at 839-40 (Kennedy, J., dissenting).

defeated federal diversity jurisdiction.[92] Further, no rule of civil procedure is ever to be construed as extending or limiting the jurisdiction of the district courts.[93] Because dismissing a nondiverse party grants the district court jurisdiction over an action retroactively, it can be maintained that the majority's reading of Rule 21 is an impermissible expansion of the diversity jurisdiction of the district courts.

Even if one agrees that the authority of Rule 21 should be interpreted as granting the district courts the authority to dismiss spoilers in order to retroactively create diversity,[94] such a conclusion is a far cry from finding that the rule also confers this authority on courts of appeals.[95] In order to circumvent the fact that the Federal Rules of Civil Procedure only govern procedure at the district court level,[96] the Court proposed that perhaps the underlying policies of Rule 21 were equally applicable to the circuit

92. *Id.* at 829.

93. *See* FED. R. CIV. P. 82 (providing, in relevant part, that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts").

94. Even the majority of the Seventh Circuit in *Newman-Green* agreed that the district court had the authority pursuant to Rule 21 to dismiss a dispensable, nondiverse party to retroactively create diversity jurisdiction. *See* Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d 916, 925 (7th Cir. 1987) (en banc), *rev'd sub nom*. 490 U.S. 826 (1989). This realization is not unique. *See* Fritz v. Am. Home Shield Corp., 751 F.2d 1152, 1155 (11th Cir. 1985) (recognizing that a "Rule 21 dismissal of a nondiverse party is appropriate" action by a district court under proper circumstances); Publicker Indus., Inc. v. Roman Ceramics Corp., 603 F.2d 1065, 1069 (3d Cir. 1979) (holding that a "[district] court may dismiss a nondiverse party in order to achieve diversity even after judgment has been entered" under Rule 21); Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 691-92 & n.23 (4th Cir. 1978) (recognizing that "[t]he trial court's authority to permit the dismissal of a party is derived from either Rule 21 . . . or Rule 15").

95. As Judge Posner noted in the en banc *Newman-Green* decision:

> It would be remarkable if the federal courts of appeals had a comprehensive power, somehow inherent in their being courts, to confer jurisdiction on district courts retroactively. Suppose an Illinois citizen sues five other Illinois citizens and one Iowan. Could we five years later, after trial on the merits, grant the plaintiff's motion to dismiss the five non-diverse defendants, in order to preserve its victory on the merits? If during the district court proceedings in this case [the spoiler] had become a citizen of Texas, could we have back dated his change of address to the date of the complaint, to preserve jurisdiction?

Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 923.

96. *See* FED R. CIV. P. 1 ("These rules govern the procedure *in the United States district courts* in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty . . . .") (emphasis added). *But see id.* R. 81 (containing exceptions to Rule 1).

courts.[97] This prevarication simply ignored the fact that in the past, when Congress desired to empower the appellate courts with tools to remedy jurisdictional defects, it had affirmatively done so.[98]

A prime example of an instance where Congress empowered both the district courts and the appellate courts with the authority to remedy *jurisdictional allegations* is 28 U.S.C. § 1653.[99] This statute, however, makes no mention of curing *actual defects in jurisdiction*. Rather, it specifically restricts the power of the appellate courts to curing defective jurisdictional allegations.[100] In light of this congressional limitation on the authority of the appellate courts, how can the underlying policies of Rule 21, which only authorizes a district court to remedy an actual defect in jurisdiction, be logically extrapolated as applying to the courts of appeals?[101] Unless appellate courts are to be automatically vested with all the powers of district courts, it cannot.[102]

To add a patina of legitimacy to its expansive reading of Rule 21, the Court provided some historical foundation.[103] The problem, which the Court conceded, was that the prior Court decisions relied upon were decided in an entirely different procedural era.[104] The case law relied on by the Court predated the Rules of Civil Procedure and the other provisions

97. *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. at 832 ("[T]he policies informing Rule 21 may apply equally to the courts of appeals.").

98. *See id.* at 839 (Kennedy, J., dissenting) ("For if Congress thought it necessary to provide by affirmative statutory grant the rather ministerial power to cure defective allegations in jurisdiction [as it did when it enacted 28 U.S.C. § 1653], the more awesome power of curing actual defects in jurisdiction ought not to be presumed, absent a statutory grant *just as explicit*.") (emphasis added).

99. 28 U.S.C. § 1653 (2000).

100. *See id.* ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.").

101. *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. at 840 (Kennedy, J., dissenting) ("[I]t is just not possible to rely on [Rule 21] as the source of authority for appellate courts.").

102. *See* Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d 916, 926 (7th Cir. 1988) (en banc) ("Rule 21 has not been incorporated by reference or otherwise in the Federal Rules of Appellate Procedure or in our circuit rules."), *rev'd sub nom*. 490 U.S. 826 (1989).

103. *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. at 833-37 (analyzing Mullaney v. Anderson, 342 U.S. 415 (1952), where the Court used Rule 21 to *add* parties to avoid a standing issue; Carneal v. Banks, 23 U.S. (10 Wheat.) 181 (1825), where the Court dismissed a nondiverse party when "acting in an appellate capacity"; and Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873), where the Court analyzed "a trial court's decision to dismiss dispensable nondiverse parties").

104. *Id.* at 836.

in Title 28 that now govern the powers of the district and appellate courts.[105]

It is true, however, that that the federal courts possess not only express powers,[106] but also implied[107] and inherent powers.[108] If the Court's goal in studiously analyzing selected nineteenth-century cases was an attempt to imply that the ability of the courts of appeals to dismiss a dispensable party was really an inherent, not an express power, such an implication is also without merit.[109]

First, the two nineteenth-century cases primarily relied on by the majority, *Horn v. Lockhart*[110] and *Carneal v. Banks*,[111] do not clearly support the proposition that courts of appeals possessed the power to dismiss diversity jurisdiction spoilers long before Rule 21 was ever envisioned. *Horn* does not even address the powers of an appellate court. Rather, the case is concerned with the powers of a trial court.[112] The

105. *See id.* at 842 (Kennedy, J., dissenting).

106. Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 921. Express powers are those conferred by statute. *Id.*

107. *Id.* Implied powers are those that, while not immediately apparent from the text, are nevertheless conferred by statutory or constitutional language. *See* FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY 5 (1994) ("Implied powers are those that arise out of and are necessary to carry out the authority expressly granted . . . .").

108. In contrast to both express and implied powers, inherent powers are not conferred by statute or derived from text. They are "powers necessary to the courts' effective functioning as courts—for example, the power to punish for contempt, the power to sanction persons who file frivolous pleadings, the power to determine whether there is jurisdiction, the power, in short, to preserve the integrity of the judicial process." Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 921-22.

109. While not specifically addressed by the Seventh Circuit empanelled en banc in *Newman-Green*, it must also be recognized that in addition to inherent powers, there are times when the nature of a rule is so fundamental that its underlying principle must be seen to apply to all courts. *Id.* at 926. An example of this is the rule that a challenge to subject matter jurisdiction may not be waived and that the challenge may be raised by a party, or by the court *sua sponte*, at any time, even on appeal. *Id.* This rule is memorialized in Rule 12(h)(3) of the Federal Rules of Civil Procedure, which provides, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action." FED. R. CIV. P. 12(h)(3). However, this type of "overarching principle" does not underlie the power of an appellate court to repair jurisdictional defects by dismissing dispensable nondiverse parties. Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 926.

110. Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873).

111. Carneal v. Banks, 23 U.S. (10 Wheat.) 181 (1825).

112. Horn v. Lockhart, 84 U.S. (17 Wall.) at 579 (questioning the trial court's

majority's reliance on *Carneal* is also arguably misplaced. From the beginning, all of its assertions are based on the faulty assumption that *Carneal* involved only one action in which the Court dismissed nondiverse parties.[113] The facts of the case, however, lend themselves to a much different interpretation.[114] Rather than involving a single action in which the Court dismissed dispensable nondiverse parties in order to retroactively create diversity jurisdiction, the "more plausible interpretation" of the decision is that the Court viewed *Carneal* as encompassing two suits.[115] One suit properly fit within the court's diversity jurisdiction; the other, due to a lack of complete diversity between the parties, was necessarily dismissed.[116]

Second, inherent powers, as compared to express powers, do not exist as the result of an explicit textual grant of authority.[117] Nor are they extrapolated from statutory or constitutional language, as are implied powers.[118] Rather, inherent powers are children of necessity. Consequently, they are generally tailored to the peculiar needs of a particular institution.[119] Arguably, the power to dismiss a dispensable

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dismissal of dispensable nondiverse parties which, if retained, would have destroyed diversity).

113. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 841 (1989) (Kennedy, J., dissenting).

114. *Id*. In *Carneal*, the plaintiff, Banks, agreed to transfer to Carneal his interest in 30,000 acres of land, which Banks had purchased from one John Harvie, in exchange for 2,000 acres of land purportedly owned by Carneal. Carneal v. Banks, 23 U.S. (10 Wheat.) at 182. When it became apparent that Carneal did not have proper title to the promised 2,000 acres, Banks sued for fraud. *Id.* at 182-83. Based upon his contract with Carneal, Banks had simply instructed Harvie to convey the 30,000 acres Banks had purchased to Carneal. *Id.* at 183. Because of this conveyance, in order to obtain complete relief, Banks requested that the Court rescind his contract with Carneal and that the heirs of John Harvie, who retained legal title to the 30,000 acres Banks had purchased, convey the title to the land to Banks, as the proper owner. *Id.* While complete diversity existed between Banks and Carneal's heirs, a jurisdictional problem arose because Banks and Harvie's heirs were not diverse. *Id.* at 187-88.

115. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. at 842 (Kennedy, J., dissenting).

116. *Id.*; *see also* Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d 916, 921 (7th Cir. 1988) (en banc) ("[T]he Court treated the suit as if it were two suits, one satisfying the requirement of complete diversity, the other dismissable and dismissed."), *rev'd sub nom*. 490 U.S. 826 (1989).

117. Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 43 (2001).

118. *See* STUMPF, *supra* note 107, at 5.

119. Idleman, *supra* note 117, at 47 ("In contrast to implied powers, which derive from text through the medium of authorial intent, inherent powers derive from

nondiverse party to retroactively create diversity jurisdiction does not fall under the umbrella of inherent powers possessed by appellate courts.[120] More importantly, even if such inherent authority existed, it would not empower the federal courts to forget that they are Article III courts of limited jurisdiction.[121] "'[I]nherent authority is not a substitute for a good reason.'"[122] Where an appellate court has seen fit to preserve diversity jurisdiction by creating it retroactively by dismissing the spoiler, it appears they "have proceeded on the theory that courts should do what they think needs doing without inquiring too closely into their authority to do it."[123]

Therefore, an appellate court that usurps the power conferred on the district courts by Rule 21 has crossed the line that defines the parameters of the authority of the separate courts.[124] The logical corollary to this conclusion is that in a suit where it is discovered on appeal that the district court lacked proper diversity jurisdiction due to the presence of a nondiverse party, the sole role of the appellate court is one of remand.[125]

If the extension of the powers contained in Rule 21 to the courts of appeals is not well founded[126] and there really is no precedential argument to support such a holding, why then did the *Newman-Green* Court decide as it did? The answer: practicalities.[127] The Court reasoned that dismissal could only result in the plaintiff refiling in the same district court and only

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the nature or necessities of the institution invoking them."); *see also supra* note 108.

120. *See* Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 922 ("[C]ases that have exercised an 'inherent' power to preserve diversity jurisdiction by dropping a nondiverse party appear to have proceeded on the theory that courts should do what they think needs doing without inquiring too closely into their authority to do it.").

121. *See* cases cited *supra* note 2.

122. Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 922 (internal quotation omitted).

123. *Id.*

124. *See id.*

125. *See id*. at 926 ("Our power to act in this suit—to decide the merits, to mete out sanctions, and so forth—depends on a valid final judgment in the district court. If that court was without jurisdiction, it is not for us to create a federal case upon which to exercise our powers.").

126. *Id.* at 922 ("Since judges are sometimes careless about jurisdiction (and sometimes make mistakes about jurisdiction without being careless), and naturally reluctant to set at naught what may have been protracted and expensive proceedings . . . [there are] cases in which courts, straining at their jurisdictional leashes, have acted in excess of their jurisdiction and have tried to cure the usurpation by amending the pleadings.").

127. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 837 (1989) ("[T]he practicalities weigh heavily in favor of . . . grant[ing] Newman-Green's motion to dismiss Bettison as a party.").

suing the foreign corporation and the four alien guarantors.[128] The plaintiff would rely on the materials previously gleaned during discovery and the suit would simply be duplicative.[129] A rigid enforcement of the time-of-filing rule would waste precious judicial resources and require the plaintiff "to jump through these judicial hoops merely for the sake of hypertechnical jurisdictional purity."[130]

In final support of its position to allow appellate-level amendments to retroactively create diversity jurisdiction, the Court quoted Judge Posner's eloquent comment that because "'law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities.'"[131] What the Supreme Court failed to mention was that Judge Posner's observation was made in support of allowing a *district court* to remedy jurisdictional defects either initially or upon remand.[132] Further, in Judge Posner's estimation, the outcome in *Newman-Green* was far from certain. Rather, "a crystal ball" would be needed "to forecast the fate of [the] litigation on remand."[133]

Assuming that retroactive jurisdiction is legitimate, why should it matter if the appellate court, instead of the district court, dismisses the jurisdictional spoiler? In response to the majority's reliance on "practicalities,"[134] if efficiency is really the goal, then the district court is in a far better position to remedy a jurisdictional shortfall than the appellate court. In dismissing spoilers pursuant to Rule 21, a court is required to ensure that the granting of such a dismissal does not harm or prejudice another party to the action.[135] It is the district court that will have overseen pretrial discovery and ruled on evidentiary issues at trial. Therefore, the logical conclusion is that the district court is in a much better position than

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* (quoting Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 925).

132. *See* Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 925 (holding that "the *district court* should have the power to decide whether the plaintiff must be put to the bother of filing a fresh suit") (emphasis added).

133. *Id.*; *see id.* (discussing plaintiff's options of (1) starting over in state court or (2) staying in federal court, where the district court might dismiss the action, "decid[ing] that six years of federal litigation . . . outside its jurisdiction [was] enough" or might dismiss the spoiler, thereby allowing the case to go forward).

134. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. at 837; Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 925.

135. Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 924; *id.* at 927 (Caudahy, J., concurring).

the appellate court to determine whether a party would be harmed by the dismissal of the spoiler.[136]

Which court dismisses the jurisdictional spoiler also matters because the Court should have resisted the temptation to expand the applicability of Rule 21 in the name of expediency to create jurisdiction where none previously existed. The Court has had no hesitancy in the past of endorsing and enforcing the time-tested rule that in no case may a court expand its jurisdiction, even when the results in a particular case would be unjust.[137] In spoiler situations, the issue is always one of diversity jurisdiction. As the Court has previously counseled, such jurisdiction is to be strictly construed because its exercise involves the sensitive issues of comity and federalism.[138]

Finally, by granting the appellate courts the expanded jurisdictional authority to remedy jurisdictional deficiencies on appeal, the message sent by the *Newman-Green* Court to the legal community was not to worry—if there is ultimately a jurisdictional problem, it can be fixed on appeal. Unless it has become acceptable for plaintiffs to just file a complaint and worry about jurisdiction later, or for a federal district court to consider the merits of a case over which it lacks proper diversity jurisdiction, the

136. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. at 843 (Kennedy, J., dissenting); Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 924.

137. *See, e.g.*, Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) (recognizing the frequently unjust, but unavoidable result of such a rule). More specifically, the Supreme Court in *Christianson v. Colt Industries Operating Corp.* noted as follows:

> The age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases. Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction.

Id.

138. *See* City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76-77 (1941) ("'[T]he policy of the statute [conferring diversity jurisdiction upon the district courts] calls for its strict construction. The power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity with the judiciary sections of the Constitution (article 3). . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'") (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934) (alteration by the *Chase National Bank* Court)); *see infra* notes 206-07 (discussing the proposition that if the requirements for diversity jurisdiction are to be changed, that decision should be made by Congress, not by the courts).

message the Court should be sending is one that reaffirms the importance of meticulous adherence to the jurisdictional limitations of the federal courts.[139]

2. *Judgments from the Wrong Side of the Sheets: The Resurrection of Hypothetical Jurisdiction and the Prohibited Advisory Opinion*

Practical considerations aside, what is disturbing about the Court's solution to the spoiler problem are the questionable theoretical underpinnings of retroactive jurisdiction. In accordance with the mantra of judicial frugality, the spoiler problem will obviously be the most egregious in situations where the lack of proper subject matter jurisdiction does not become apparent until there has been a trial on the merits and a final judgment. In conferring jurisdiction upon itself at that point, a court is in essence acting *ultra vires*. In the name of judicial economy, a judgment is legitimized after the fact by a court that lacked the authority to initially hear the case. This is analogous to the now defunct practice of hypothetical jurisdiction that the Court purportedly denounced in *Steel Co. v. Citizens for a Better Environment*.[140]

Under the theory of hypothetical jurisdiction, where the assertion of jurisdiction implicated difficult questions and it seemed clear to a court that the party asserting jurisdiction would lose on the merits, the court would simply adjudicate the dispute and render a judgment on the merits prior to verifying the existence of proper subject matter jurisdiction.[141] As with retroactive jurisdiction, one of the key rationalizations for this circumvention of jurisdiction was judicial economy.[142] By 1990, a clear majority of federal circuit courts had engaged in this practice.[143] The *Steel*

139. *See* Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d at 922-23 (recognizing that if "[an appellate court] attempt[s] to patch up the jurisdictional deficiencies in a case when the case comes up . . . on appeal, the district courts will have less incentive to police their jurisdiction themselves").

140. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 101 (1998); *see also* Idleman, *supra* note 117, at 5-6 (citing Pennell v. City of San Jose, 485 U.S. 1, 8 (1998); Flast v. Cohen, 392 U.S. 83, 96 (1968)).

141. *See* Steel Co. v. Citizens for a Better Env't., 523 U.S. at 93-94; Idleman, *supra* note 117, at 5-6. The Ninth Circuit is credited with coining the phrase "hypothetical jurisdiction" to describe this practice "[of] 'assuming' jurisdiction for the purpose of deciding on the merits." Steel Co. v. Citizens for a Better Env't., 523 U.S. at 94 (citing United States v. Troescher, 99 F.3d 933, 934 n.1 (9th Cir. 1996)).

142. Idleman, *supra* note 117, at 5-6.

143. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. at 94 n.1 (acknowledging that the "hypothetical jurisdiction" approach had been utilized by a "substantial body of Court of Appeals precedent").

Co. Court found the practice exceeded the legitimate parameters of judicial authority, thereby offending the doctrine of separation of powers.[144] The Court admonished that its conclusion should not be surprising.[145] *Steel Co.* was simply the latest decision reaffirming the Court's unwavering insistence that absent proper jurisdiction, a court is powerless to proceed.[146] "'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'"[147] Further, because the federal courts are courts of limited jurisdiction, establishing proper jurisdiction is a mandatory threshold requirement that "is '*inflexible and without exception*.'"[148] Therefore, a court rendering a judgment where jurisdiction was merely hypothetical, did so absent an Article III case or controversy.[149] Consequently, what was being issued was a hypothetical judgment, equivalent to the long prohibited advisory opinion.[150]

144. *Id.* at 94.

145. *Id.*

146. *Id.* (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)).

147. *Id.* (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) at 514).

148. *Id.* at 95 (quoting Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)) (emphasis added).

149. *See id.* at 101 (acknowledging that "[w]hile some . . . cases . . . have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question, none of them ever approaches approval of a doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt").

150. *Id.* (citing Muskrat v. United States, 219 U.S. 346, 362 (1911); Hayburn's Case, 2 U.S. (2 Dall.) 408, 409 (1792)).

The 1998 *Steel Co.* decision strongly supports the position taken in this Article that until proper subject matter jurisdiction is established, the court cannot consider the merits of the case before it. *Id.* at 101-02. A year later, however, this proposition was again undermined by *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). In *Ruhrgas*, the Court recognized the validity of "sequencing" jurisdictional issues. *See id.* at 584. Justice Ginsburg, writing for a unanimous Court, noted that "[c]ustomarily a federal court first resolves doubts about its jurisdiction over the subject matter." *Id.* at 578. The Court went on to explain that "there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry." *Id.* Such circumstances included the situation in *Ruhrgas*, "where . . . a district court ha[d] before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raise[d] a difficult and novel question." *Id.* at 588. Under such circumstances, "the court does not abuse its discretion by turning directly to personal jurisdiction." *Id.* To shore up its ruling, the Court focused on the equivalence of personal jurisdiction to subject matter jurisdiction, with both being "'essential element[s]'" of trial court jurisdiction, "without which the court is 'powerless to proceed to an adjudication.'" *Id.* at 584 (quoting Employers Reinsurance Corp. v.

In a spoiler situation, there is not even the pretense of hypothetical jurisdiction. The court absolutely lacks the power to rule. If a judgment rendered in a hypothetical jurisdiction situation is nothing more than an advisory opinion,[151] the concept of retroactive jurisdiction, which permits the resurrection of a prior ruling also rendered absent an Article III case or controversy, is ludicrous. If a district court is without jurisdiction initially, there is no action in existence to be considered. It follows, as night does day, that if there is no action, then there is no binding judgment for the court to revive by retroactively conferring jurisdiction upon itself.

But as Judge Sneed of the Ninth Circuit observed, "[c]onferring jurisdiction retroactively is a curious idea. Knowledgeable judges have said it cannot be done," but "[t]hey underestimated, it appears, judicial—or at least appellate—resolve."[152]

B. *All's Well That Ends Well:* Caterpillar Inc. v. Lewis

Whether based on fact or fiction, most defense attorneys generally would prefer to be litigating in federal court.[153] Perhaps this preference stems from the belief that the primary purpose of diversity jurisdiction is to provide out-of-state parties with a neutral forum.[154] Perhaps it is a result of the view that in states where the judges are elected, political considerations

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Bryant, 299 U.S. 374, 382 (1937)). Second, the Court emphasized the potential constitutional dimension of personal jurisdiction as it relates to "the constitutional safeguard of due process" and noted that in some instances, subject matter jurisdiction does not involve a constitutional analysis, but one resting on statutory interpretation. *See id.* at 586 (recognizing that in some cases "the district court may find concerns of judicial economy and restraint overriding"). Once again, the Courts relied on the interest of judicial economy to support its recognition of resequencing. *Id.* at 586-88. It is arguable that *Ruhrgas* in essence reinstated hypothetical jurisdiction, at least in situations where the lower courts can identify a non-merits issue that is the functional equivalent of subject matter jurisdiction. The countenance of such resequencing by the Court undermines the respect that should be given to subject matter jurisdiction as a mandatory threshold inquiry. For an in-depth discussion of the *Ruhrgas* decision, see Idleman, *supra* note 117.

151. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. at 101 (noting the Court's longstanding disapproval of advisory opinions) (citing Muskrat v. United States, 291 U.S. at 362; Hayburn's Case, 2 U.S. (2 Dall.) at 409).

152. Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523-24 n.3 (9th Cir. 1987) (citations omitted).

153. *See generally* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 392-423 (1992) (discussing attorneys' forum selection choices in light of outcome determinative, cost, and convenience factors).

154. *See supra* notes 36-38 and accompanying text.

create a pro-plaintiff bench because the local trial bar funds the majority of judicial election campaigns.[155] Even when neither party is a citizen of the state in which an action is commenced, diversity jurisdiction can play an important role in allowing a defendant to remove a case to federal court to avoid a pro-plaintiff jury.[156] Consequently, where the plaintiff has originally elected a state forum, it is not unusual to find the parties engaged in the game of removal strategy, wherein the plaintiff tries to keep the case in state court, while the defendant attempts to remove the action to federal court whenever feasible.[157]

Traditionally, the key to removal is the requirement that the federal

155. Yosef Rothstein, *Ask Not for Whom the Bell Tolls: How Federal Courts Have Ignored the Knock on the Forum Selection Door Since Congress Amended Section 1446(b)*, 33 COLUM. J.L. & SOC. PROBS. 181, 182 & n.6 (2000); Brittain Shaw McInnis, Comment, *The $75,000.01 Question: What is the Value of Injunctive Relief?*, 6 GEO. MASON L. REV. 1013, 1027-30 (1998).

156. A prime example of such a situation occurred in the seminal personal jurisdiction case, *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). In *Woodson*, plaintiffs' counsel filed suit on behalf of his clients who had been seriously injured in a car accident in Creek County, Oklahoma, "a blue collar community" that had gained the reputation of being extremely "sympathetic to personal injury plaintiffs." Charles W. Adams, World-Wide Volkswagen v. Woodson—*The Rest of the Story*, 72 NEB. L. REV. 1122, 1128 (1993); *see id.* (noting that the plaintiffs' attorney "regarded Creek County as one of the best venues" to try the action). The key for the plaintiffs in *Woodson* was keeping the case in state court by preventing the defendants from being able to remove. *Id.* at 1126-28. The linchpin of such a tactic, where no defendant is a citizen of the state where the action is pending, is to ensure that there is a lack of complete diversity between the parties, i.e., no defendant is a citizen of the same state as any plaintiff. *See* 28 U.S.C. § 1441(b) (2000) (allowing for removal "only if none of the parties in interest . . . is a citizen of the State in which such action is brought"). In *Woodson*, in order to retain a sympathetic jury, the plaintiffs' attorney attempted to prevent removal to federal district court by arguing that his clients, although driving through Oklahoma while moving to Arizona, remained citizens of New York and by joining the local distributor and retailer who had sold the car involved in the accident to the plaintiffs as defendants to the action. World-Wide Volkswagen v. Woodson, 444 U.S. at 288-89. Both the regional distributor and retailer were New York corporations, and thus citizens of New York for the purposes of diversity jurisdiction. *Id.*; *see* 28 U.S.C. § 1332(c)(1) (providing that a corporation is generally deemed to be a citizen of both its state of incorporation and the state where it has its principal place of business). Consequently, if the plaintiffs were New York citizens, then as long as these two corporations remained parties to the action, no removal was possible. *See* 28 U.S.C. § 1441(b).

157. Chad Mills, Note, Caterpillar Inc. v. Lewis*: Harmless Error Applied to Removal Jurisdiction*, 35 HOUS. L. REV. 601, 601-02 (1998) (citing Charles J. Hyland, *Removal to Federal Court: The Practitioner's Tightrope*, J. KAN. B. ASS'N, Nov. 1994, at 22).

district court must have original jurisdiction over the case.[158] Where the court's original jurisdiction is based upon diversity, there must be complete diversity between the parties at the time of removal or no removal is possible.[159] Where such complete diversity is initially lacking, the defendant may file a notice of removal within thirty days after receiving a document or "other paper" from which it may be "ascertained" that the requirement of complete diversity is satisfied.[160] In cases where jurisdiction is based solely on diversity of citizenship, however, no case may be removed more than one year after the action was initiated in state court.[161] Therefore, a case that becomes removable after the one-year limitation must remain in state court. If the plaintiff believes the removal was in error, either due to procedural or jurisdictional flaws, she may bring a motion to remand the case back to state court.[162] Where the defect is procedural, the plaintiff has thirty days after the filing of the notice of removal by the defendant to bring a motion for remand.[163] If, however, the defect concerns lack of subject matter jurisdiction, the district court must remand the case back to state court if it appears at any time prior to final judgment that the court lacks proper subject matter jurisdiction.[164]

The syllogistic import of these rules would seem to mandate that (1) if a district court improperly allowed removal, (2) a plaintiff properly brought a motion to remand which the district court erroneously denied due to its mistaken belief that complete diversity existed between the parties, and (3) lack of subject matter jurisdiction at the time of removal was again asserted on appeal and the jurisdictional error discovered, (4) the case must be remanded back to state court because the case was improperly removed to federal court in the first place. At least this was the conclusion drawn by the Sixth Circuit.[165] This deduction is amply supported by the explicit language of the federal removal statutes and the strong concerns regarding

158. 28 U.S.C. § 1441(a).
159. *Id.* § 1441(b).
160. *Id.* § 1446(b).
161. *Id.*
162. *Id.* § 1447(c).
163. *Id.*
164. *Id.*
165. *See* Lewis v. Caterpillar, Inc., No. 94-553, 1995 WL 600590, at *3 (6th Cir. Oct. 11, 1995), *rev'd*, 519 U.S. 61 (1996) (remanding to district court a case "that ha[d] proceeded to final judgment" in which "complete diversity did not exist at the time that the case was removed to federal court" because the district court improperly concluded it had jurisdiction over the action).

federalism attendant to the issue of removal.[166] The Supreme Court, however, ruled otherwise.[167]

1. *Scenario No. 2: She Came in Through the Bathroom Window*

- Plaintiff, a citizen of Tennessee, is injured while operating a crane at work. He files a products liability suit in Tennessee state court, asserting state law claims against both the manufacturer of the crane, a Delaware corporation, and the supply company, a Tennessee corporation, which serviced the crane. The plaintiff's employer's insurance company, a Connecticut corporation, intervenes and asserts subrogation claims against both the manufacturer and the supply company for the worker's compensation it has paid to the plaintiff on behalf of his employer. Within a year of the suit being initiated in state court, plaintiff settles his claims with the supply company.
- One day prior to the expiration of the one-year time limitation for removal where jurisdiction is premised solely on diversity of citizenship, the manufacturer files a notice of removal in federal district court, claiming complete diversity between the parties as a result of plaintiff's settlement with the supply company. After removal is granted, plaintiff timely objects and moves to remand the case back to state court, urging that the remaining claim by the insurance company against the supply company, a cocitizen with the plaintiff of Tennessee, prevents complete diversity between the parties. The district court, however, erroneously denies the motion for remand.
- Prior to trial, but almost three years after the manufacturer filed for removal, the insurance company and the supply company finally settle their controversy and the supply company is dismissed from the case. After a six-day jury trial, resulting in a unanimous verdict for the manufacturer, plaintiff appeals to the appellate court, which reverses, finding that the removal was improper. The manufacturer appeals to the Supreme Court, which grants certiorari.

The foregoing facts are analogous to those of the *Caterpillar Inc. v.*

166. *See infra* note 206 and accompanying text.

167. *See* Caterpillar Inc. v. Lewis, 519 U.S. at 64, 70 (holding that a district court's failure to remand a case to state court despite a lack of complete diversity was not fatal to a final judgment, so long as all jurisdictional requirements were met before judgment was entered); *see also infra* Part III.B.1 (discussing the *Caterpillar* decision).

Lewis[168] decision, wherein the Court continued its expansion of authorizing the creation of retroactive jurisdiction in the removal context.[169] In *Caterpillar*, the original complaint was filed in Kentucky by James Lewis, a citizen of Kentucky, who was injured while operating a bulldozer.[170] The machine was manufactured by Caterpillar Inc., a Delaware corporation with its principal place of business in Illinois.[171] The spoiler, dismissed from the action *after* removal but *prior* to trial and final judgment, was Whayne Supply Company, a co-citizen with the plaintiff.[172]

Writing for a unanimous Court, Justice Ginsburg began her opinion by succinctly setting forth the limited question the Court would be addressing: "[W]hether the absence of complete diversity at the time of removal is fatal to federal-court adjudication."[173] Next, the Court noted that there were two "givens" in the case: (1) that complete diversity between the parties was lacking at the time of removal, and (2) that the district court had erroneously denied the motion for remand.[174] Despite these undisputed facts, the Court held that because proper diversity subject matter jurisdiction existed at the time of judgment, the judgment would stand.[175] How was this accomplished? By reframing the question, the Court had previously proposed to answer.

The Court reasoned that the real question on appeal was no longer whether the lack of complete diversity at the time of removal was fatal to adjudication. Rather, the issue was whether "the [d]istrict [c]ourt's initial misjudgment still burden[ed] and [ran] with the case" or had been "overcome by the eventual dismissal of the nondiverse defendant."[176] This issue was further refined until the only real question confronting the Court was whether the district court had proper diversity jurisdiction over the

168. Caterpillar Inc. v. Lewis, 519 U.S. 61.

169. *See id.* at 74-78 (holding that "allow[ing] improperly removing defendants to profit from their disregard of Congress' instructions" is subordinate to the "considerations of finality, efficiency, and economy" present after "a diversity case has been tried in federal court").

170. *Id.* at 64.

171. *Id.* at 65.

172. *Id.* at 65-66 (noting that Whayne Supply, the company that serviced the bulldozer, had its principal place of business in Kentucky, the same state as the plaintiff's residence).

173. *Id.* at 64.

174. *Id.* at 70.

175. *Id.* at 64.

176. *Id.* at 70.

action prior to trial or at the time the court entered judgment.[177] If so, the efficient administration of justice dictated that jurisdiction be salvaged.[178] Because the spoiler in *Caterpillar* had been dismissed prior to the beginning of trial,[179] the obvious answer to this reframed question was that the district court's judgment should stand.[180] This answer—to a question that only deceptively appears to be narrow—has ramifications that reach far beyond the outcome for the individual parties in *Caterpillar*.

2. *It All Depends on How You Frame the Issue*

To achieve its desired answer to the reframed question, the Court strategically spent the majority of its opinion addressing Petitioner's contention that the final judgment should stand in light of two of the Court's prior decisions.[181]

The first case relied upon by Caterpillar, *American Fire & Casualty Co. v. Finn*,[182] did concern a removal situation.[183] However, the facts of *Finn* are readily distinguishable from those of *Caterpillar*.[184] In *Finn*, the requisite diversity jurisdiction did not exist at the time of removal *or* at the time of judgment.[185] Because federal jurisdiction was lacking at the time of the district court judgment, the Court ruled that the case was to be remanded back to the district court and, absent the dismissal of the spoiler, the district court was to vacate its final judgment and remand the action to state court.[186] More importantly, however, *Finn* did not involve a

177. *Id.* at 72 (citing Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 16 (1951)).

178. *See id.* at 77 (holding that because diversity jurisdiction had been perfected in *Caterpillar* prior to judgment, "[t]o wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice").

179. *Id.* at 66.

180. *Id.* at 64, 77.

181. *See id.* at 70-72 (discussing Am. Fire & Cas. Co. v. Finn, 341 U.S. 6); *id.* at 70, 72-73 (discussing Grubbs v. Gen. Elect. Credit Corp., 405 U.S. 699 (1972)).

182. Am. Fire & Cas. Co. v. Finn, 341 U.S. 6.

183. *See id.* at 7 (framing the question presented as what "the proper federal rule [is] on a motion by a defendant to vacate a United States District Court judgment, obtained by a plaintiff after removal from a state court by defendant, and to remand the suit to state court").

184. *See* Caterpillar Inc. v. Lewis, 519 U.S. at 71 (distinguishing Am. Fire & Cas. Co. v. Finn, 341 U.S. 6).

185. Am. Fire & Cas. Co. v. Finn, 341 U.S. at 17.

186. *Id.* at 18-19. In ruling, the *Finn* Court emphasized the following:

Caterpillar-type situation in which the plaintiff challenged the district court's judgment on appeal by arguing that the timely motion to remand had been erroneously denied.[187]

Despite the lack of factual similarity between the cases, or perhaps due to it, the *Caterpillar* Court chose to exalt "well-known dicta" in *Finn* helpful to Petitioner's cause.[188] Justice Ginsburg pointed out that in *Finn*, the Court observed that there existed decisions upholding district court judgments despite improper removal.[189] Such results were possible in cases where district courts, although initially lacking diversity jurisdiction, had proper jurisdiction over a controversy by the time of trial or the entry of judgment.[190] If the final outcome in *Caterpillar* were not already known, a reader coming upon this glorification of dicta would easily have been able to prognosticate the ultimate holding.

The second decision relied upon, *Grubbs v. General Electric Credit Corp.*,[191] was at least slightly more on point. Again, however, *Grubbs* was clearly missing the pivotal element of *Caterpillar*—the plaintiff's timely motion for remand that was erroneously denied.[192] While *Grubbs* did involve an improper removal and a final judgment,[193] in contrast to *Caterpillar*, no objection to the removal was made until the Fifth Circuit questioned the jurisdiction of the district court *sua sponte*.[194] The *Grubbs* Court determined that where a case, improperly removed, had been tried and judgment entered without any objection to the removal being raised, the real question on appeal was "not whether the case was properly

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> The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them.

Id. at 17-18 (footnote omitted).

187. Caterpillar Inc. v. Lewis, 519 U.S. at 70-71; Am. Fire & Cas. Co. v. Finn, 341 U.S. at 7-8.

188. Caterpillar Inc. v. Lewis, 519 U.S. at 71.

189. *Id.* (quoting Finn v. Am. Fire & Cas. Co., 341 U.S. at 16).

190. *Id.* at 71-72 (quoting Finn v. Am. Fire & Cas. Co., 341 U.S. at 16).

191. Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699 (1972).

192. *See id.* at 700 (noting that the plaintiff challenged the removal procedure for the first time on appeal).

193. *Id.* at 700-02.

194. *Id.* at 702.

removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court."[195]

Ironically, it was the holding in *Grubbs* that the *Caterpillar* Court relied on as the basis for the reframed question it ultimately chose to answer.[196] The *Grubb*s decision hinged upon the fact that the issue of improper remand was not raised until appeal, indicating that there had been implicit consent to the removal by the judgment loser.[197] How could the Court find that a question predicated upon these facts was equally applicable to the *Caterpillar*-type situation where a plaintiff had properly brought a motion to remand that was erroneously denied? The Court's response was to elevate the "practicalities" concern of *Newman-Green*[198] to the much higher status of "an overriding consideration."[199]

First, the Court duly noted that respondent had properly preserved his right to appeal the district court's erroneous denial of his motion to remand.[200] Next, it acknowledged that in light of this fact, Lewis's position that it would be inappropriate for the Court to adopt an "all's well that ends well" attitude in the case[201] was "hardly meritless."[202] The Court then immediately proceeded to rule against Lewis, finding that his arguments had "run up against an overriding consideration."[203] Instructed by its decision in *Newman-Green*, the Court reasoned that because the jurisdictional defect had been cured and all that remained was a statutory flaw, "[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins . . . considerations of finality, efficiency, and economy become overwhelming*."[204]

195. *Id.* In reaching its conclusion, the Court relied upon *Baggs v. Martin*, 179 U.S. 206 (1900) and *Mackay v. Uinta Dev. Co.*, 299 U.S. 173 (1913). Grubbs v. Gen. Elec. Credit Corp., 405 U.S. at 702-03.

196. Caterpillar Inc. v. Lewis, 519 U.S. 61, 73 (1996).

197. Grubbs v. Gen. Elec. Credit Corp., 405 U.S. at 702, 705-06.

198. *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 837 (1989) (citing "the practicalities" as a major factor in the Court's decision to grant a motion to dismiss).

199. Caterpillar Inc. v. Lewis, 519 U.S. at 75.

200. *Id.* at 74; *see infra* notes 209-10.

201. Caterpillar Inc. v. Lewis, 519 U.S. at 74.

202. *Id.* at 75. In addition, Lewis further contended that the Court should not allow the "ultimate satisfaction of the subject-matter jurisdiction requirement" to "swallow up antecedent statutory violations." *Id.* at 74.

203. *Id.* at 75.

204. *Id.* (emphasis added).

The Court's validation of retroactive jurisdiction, even when done to conserve judicial resources and under the guise of merely setting the parameters of a court-created rule,[205] can lead to only one conclusion: the Court is impermissibly trespassing into an area constitutionally reserved to Congress. If the requirements of diversity jurisdiction are to be diluted or changed or even abolished, such a decision rests solely with Congress.[206] It is not the place of the Court to continually carve out exceptions to the basic rule that in order for a federal court to have the power to hear a case, there must be complete diversity of citizenship between the parties at the time of filing or, in a removal situation, at the time the action is removed from state

205. *See supra* notes 67-68 and accompanying text (recognizing the time-of-filing rule as a "court-created rule" bolstered by policy considerations).

206. U.S. CONST. art. III, § 1. Pursuant to its authority under Article III, Congress could not only abolish diversity jurisdiction, but the lower courts themselves. *See id.* ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts *as the Congress may from time to time ordain and establish*.") (emphasis added). In the alternative, as long as adhering to constitutional constraints, Congress could decide to expand general diversity jurisdiction. *See, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850) (explaining such powers and limits of Congress). For example, Congress could amend 28 U.S.C. § 1332 to require only minimal diversity. *See supra* note 64 (collecting statutes requiring only minimal diversity). From time to time, Congress has flirted with the idea of eliminating the authority of the federal courts to entertain diversity actions. Irrespective of the predominate view that the underlying purpose of the doctrine is to afford protection from prejudice, it is logical that it would be more efficient for a state law judge, familiar with state law, to hear and decide state law questions. *See, e.g.*, ROBERT W. KASTENMEIER, ABOLITION OF DIVERSITY OF CITIZENSHIP JURISDICTION, H.R. REP. NO. 95-893, at 2 (1978). In addition, certain scholars and preeminent jurists have advocated the abolition of diversity jurisdiction. *See, e.g.*, Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 966 (1979) ("[T]he lack of positive reasons for it, the need for a reduction in federal caseloads and jury trials, and the appropriateness of merging more fully the power to interpret state law with the responsibility of applying it" weigh in favor of abolishing diversity jurisdiction.); William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 1992, at 1, 3 ("[E]limination of diversity jurisdiction is an idea that merits serious consideration."). Others, however, have argued for its retention. *See, e.g.*, Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179, 193 (1929) ("The conclusion, therefore, seems clear that the jurisdiction of the federal courts based upon diversity of citizenship should be retained, and furthermore that it should not be limited in any major particular."); John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 404 & n.2, 408-10 (1979) (listing groups that oppose the abolition of diversity jurisdiction and analyzing the virtues of diversity jurisdiction).

to federal court.[207] Absent these prerequisites, a court should have only two alternatives: dismiss the action or remand it back to state court. The Court's recognition and approval of retroactive jurisdiction is an attempt to mold Article III jurisdiction into its own image and is an improper manipulation and expansion of diversity jurisdiction.

3. *There Is No Right Without a Remedy: Sayonara to the Viability of Remand*

The *Caterpillar* Court's answer to the reframed question also effectively eviscerated a plaintiff's right of remand. Because a denial of a motion for remand is not a final decision,[208] Lewis was not entitled "as of right" to immediately appeal the district court's erroneous ruling on his motion for remand.[209] While Lewis could have sought permission to take an interlocutory appeal, such action was not required to preserve his right of ultimate appeal.[210] Further, at least pre-*Caterpillar*, it would have been an odd choice for a plaintiff to bring an interlocutory appeal for a denial of remand. Congress intended interlocutory review to be reserved for "exceptional" cases.[211] A denial of a motion to remand generally fails to satisfy the conditions for such a review.[212]

Post-*Caterpillar*, however, a party who opposes removal would be

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207. *See supra* Part II.B. (discussing the longstanding complete diversity and time-of-filing principles).

208. Caterpillar Inc. v. Lewis, 519 U.S. at 74 (citing Chi., Rock Island & Pac. R.R. Co. v. Stude, 346 U.S. 574, 578 (1954)).

209. *Id*. Denial of remand is an interlocutory ruling that merges with final judgment and may only be raised once the final decision has been issued. Chi., Rock Island & Pac. R.R. Co. v. Stude, 346 U.S. at 578. Consequently, the *Caterpillar* Court found that Lewis had preserved his objection to removal. Caterpillar Inc. v. Lewis, 519 U.S. at 74.

210. *See* Caterpillar Inc. v. Lewis, 519 U.S. at 74 (recognizing that "timely moving for remand" is sufficient to preserve the right to appeal).

211. *Id.* (citations omitted).

212. The applicable statute, 28 U.S.C. § 1292(b), provides for interlocutory appeals from orders not otherwise immediately appealable where the district court certifies in writing that an order involves "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation" and the court of appeals exercises its discretion to take up the request for review. 28 U.S.C. § 1292(b) (2000). *See, e.g.*, Oklahoma *ex rel.* Edmondson v. Magnolia Marine Transp. Co., 359 F.3d 1237, 1239 (10th Cir. 2004) ("Ordinarily, an interlocutory appeal may not be taken from the denial of a motion to remand a previously removed case.") (citations omitted).

well advised to thoroughly investigate whether complete diversity exists at the time of removal. If it does not, and the party's motion for remand is improperly denied, under *Caterpillar*, the party is left with no option but to attempt a permissive interlocutory appeal. If this action is not taken and the jurisdictional defect that existed at the time of removal is cured before trial or even the day before entry of judgment, any later challenge would be futile.[213]

What is even more troubling, however, is that the Court's answer to its reframed question created a bright-line rule that completely ignores fairness considerations and possible prejudice to the plaintiff whose motion was erroneously denied. Despite finding merit in Lewis's argument that it would be inherently unfair to allow an improperly removing defendant to profit from the failure to follow the instructions of Congress,[214] the effect of the Court's ruling was to bestow just such a benefit. Fairness considerations, no matter how valid, had to bow before the weighty fiscal concerns that would be incurred if the case had to be retried.[215]

Moreover, in promulgating this new rule, the Court turned a blind eye to possible prejudice resulting from the failure to remand an improperly removed case back to state court. While noting that Lewis had chosen to bring his action in state rather than federal court due to perceived differences in the "jury systems and rules of evidence" of the forums,[216] the Court failed to even address whether Lewis may actually have been prejudiced by the improper removal. This failure is not surprising. To have even considered whether prejudice sufficient to outweigh the overwhelming concerns of judicial efficiency and economy might have been present in *Caterpillar* would have undercut the Court's underlying premise that a district court's error in removal, while "unerasable," was categorically harmless if federal jurisdiction requirements were met before

213. *See* Caterpillar Inc. v. Lewis, 519 U.S. at 64 (holding that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered").

214. *Id.* at 74-75.

215. *See id.* at 75-77 (noting the overriding "considerations of finality, efficiency, and economy").

216. *Id.* at 75 n.14; *see* Brief for Respondent at *21-22, Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996) (No. 95-1263), *available at* 1996 WL 428359 (arguing: (1) that if the case had proceeded to trial in state court, the local jury would have been more sympathetic to respondent's cause; (2) that unlike in federal court, where a unanimous verdict was required, in state court the plaintiff could have prevailed by a majority of 9-3; and (3) that under Kentucky's rules of evidence, unlike the federal rules, respondent would have been allowed to proffer subsequent remedial measures in design).

trial and judgment.[217] Perhaps it is just no longer fashionable to recognize that where proper removal is not possible due to lack of original jurisdiction, the plaintiff has the right to seek a home-court advantage and, as long as the forum chosen satisfies personal jurisdiction and venue requirements, this autonomy is to be respected.[218]

Ultimately, under the rule of *Caterpillar*, a diligent plaintiff who properly, but unsuccessfully, brings a motion to remand may be left with a procedural right which is in essence purely illusory.

4. *Concerns Regarding Federalism: Poaching in the King's Forest*

In *Caterpillar*, the Court's sacrifice of the plaintiff's procedural right of remand on the altar of judicial efficiency and economy is problematic. What is even more disquieting, however, was the Court's complete failure to address the seminal issue always attendant in a removal situation: federalism. Whenever a federal court acts without first establishing its authority to hear a particular dispute, it is invading the sovereign territory of the state in which it sits.[219]

While jurisdictional limitations are important in initial diversity jurisdiction cases, they play an even more prominent role in removal situations. Whenever a case properly brought in state court is removed to federal court on the basis of diversity jurisdiction, the autonomy and authority of the state is directly impacted. First, removal unilaterally wrests control from a state court over a case properly before it, disrupting ongoing state proceedings.[220] Second, removal thwarts the proper development of state law by state courts.[221]

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217. Caterpillar Inc. v. Lewis, 519 U.S. at 73.

218. Rothstein, *supra* note 155, at 184-85.

219. *See* Howery v. Allstate Ins. Co., 243 F.3d 912, 916 n.6 (5th Cir. 2001) ("'Where a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect.'") (quoting B., Inc. v. Miller Brewing Co., 663 F.2d 545, 548 (5th Cir. Unit A Dec. 1981)).

220. *See* Ellen Bloomer Mitchell, *Improper Use of Removal and Its Disruptive Effect on State Court Proceedings: A Call to Reform 28 U.S.C. § 1446*, 21 ST. MARY'S L.J. 59, 60 (1989) (arguing that removal may "cause severe disruption in the state court where the case has been proceeding").

221. *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1675-84 (1992) (critiquing a system that forces federal courts to make "*Erie* guesses," where a federal court sitting in diversity incorrectly guesses how a state supreme court would resolve a novel issue).

In addition, it must be remembered that as long as the defendant complies with the statutory procedural requirement for removal,[222] the case will automatically be removed from state court whether or not an actual right to remove to federal court exists.[223] The procedures regulating removal are analogous to those employed when ordering from a drive-through fast-food restaurant. No motion or hearing is required.[224] The defendant simply places his order by filing a notice of removal with the proper federal district court and, voilà, the case is removed.[225] Absent a remand, the state court no longer has any authority over the case.[226] Clearly, in removal situations, a federal district court that acts without first establishing its rightful authority to hear a case is no better than a poacher hunting within the domain of the state in which it sits.

The Court specifically addressed the nature of removal and the federalism concerns it raises in *Shamrock Oil & Gas Corp. v. Sheets*.[227] In *Sheets*, Justice Stone held that in a removal situation, concerns of federalism required that the removal statutes be narrowly read.[228] Since *Sheets* was handed down, the federal removal states have been strictly construed in order to prevent the federal courts from infringing on the right of a state court to decide a case within its jurisdiction,[229] particularly where cases were removed on grounds of diversity.[230] In *Caterpillar*, where

222. 28 U.S.C. § 1446(a) (2000). In order to remove a case pending in state court, the defendant is only required to file with the proper district court "a notice of removal . . . containing a short plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." *Id.*

223. *See id.* § 1446(d) ("Promptly after the filing of [a] notice of removal . . . the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice . . . which shall effect the removal . . . .").

224. *See id.* § 1446.

225. *See id.* § 1446(d).

226. *See id.* (filing the notice of removal "shall effect the removal and the State court shall proceed no further unless and until the case is remanded"); Mitchum v. Foster, 407 U.S. 225, 234 n.12 (1972) ("The federal removal provisions, both civil and criminal, . . . provide that once a copy of the removal petition is filed with the clerk of the state court, the 'State court shall proceed no further unless and until the case is remanded.'") (quoting 28 U.S.C. § 1446(e)) (citing 28 U.S.C. §§ 1441-1450).

227. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941).

228. *See id.* at 109 (holding that "'[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'") (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)).

229. Harris v. Huffco Petroleum Corp., 633 F. Supp. 250, 253 (S.D. Ala. 1986).

230. *Id.*; *see* Boggs v. Lewis, 863 F.2d 662, 663 (9th Cir. 1988) (applying strict

the removal clearly failed to comply with statutory requirements,[231] the Court simply bypassed *Sheets*'s requirement of strict construction and ignored congressional intent.[232] Instead, the *Caterpillar* Court eviscerated the requirements of the federal removal provisions by effectively nullifying

construction of removal statute in appellate court); Handyman Network, Inc. v. Westinghouse Savannah River Co., 868 F. Supp. 151, 153 (D.S.C. 1994) (citing Shamrock Oil & Gas Co. v. Sheets, 313 U.S. at 100) (employing strict construction of removal statute); Mason v. IBM Inc., 543 F. Supp. 444, 445 (M.D.N.C. 1982) (recognizing that because "[r]emoval of civil cases to federal courts is an infringement on state sovereignty [and] the statutory provisions regulating removal must be strictly applied"); Mills, *supra* note 157, at 620 n.159 (citing Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994) (construing the removal statute strictly due to "significant federalism concerns").

231. *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 70 (1996) (acknowledging that the district court improperly treated the nondiverse defendant "as effectively dropped from the case prior to removal" and that the appellate court "correctly determined that the complete diversity requirement was not satisfied at the time of removal"); *see also* 28 U.S.C. § 1441(b) (2000) (classifying as "removable" those civil actions over which "district courts have original jurisdiction founded on . . . [a] law[] of the United States").

232. *See* Caterpillar Inc. v. Lewis, 519 U.S. at 75-78. Concerned about issues of federalism, Congress has placed certain restrictions on removal jurisdiction. *See* Shamrock Oil Corp. v. Sheets, 313 U.S. at 105-06 (discussing the Judiciary Act of 1789, which, absent "the additional ground of prejudice and local influence," restricted the "privilege of removal" to only defendants, but then noting the Judiciary Act of 1875, which "greatly liberalized" removal privileges); *id.* at 106-08 (construing the Judiciary Act of 1887, which "narrow[ed] the federal jurisdiction on removal by reviving in substance, the provisions of [the Act of 1789 rejected by the Act of 1875]," and ultimately concluding that Congress' "purpose [was] to restrict the jurisdiction of the federal courts on removal"). For example, the Judicial Improvements and Access to Justice Act was enacted in November 1988. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified in scattered sections of 28 U.S.C.). One of the many results of this enactment was an amendment to 28 U.S.C. § 1446(b), adding the additional proviso that "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action." Judicial Improvements & Access to Justice Act, Pub. L. No. 100-702, § 1016(b), 102 Stat. 4642, 4669 (codified at 28 U.S.C. § 1446(b)). By requiring this amendment, Congress intended to lessen "'the opportunity for removal after substantial progress has been made in state court.'" Rothstein, *supra* note 155, at 187 (quoting Judicial Improvements & Access to Justice Act, Pub. L. No. 100-702, § 1016(b), 102 Stat. 4642, 4669 (codified at 28 U.S.C. § 1446(b))); *see also* ROBERT W. KASTENMEIER, COURT REFORM AND ACCESS TO JUSTICE ACT OF 1988, H.R. REP. NO. 100-889, at 72 (1988) (stating that in order to limit disruptive effects of removal on state court proceedings, Congress enacted the one-year limitation for removing diversity actions); Mitchell, *supra* note 220, at 95-96 & n.139 (arguing that the purpose of the one year limitation in removing diversity cases was to avoid disruption of proceedings on the eve of state court trials).

the possibility of any significant appellate review of an erroneous refusal to remand whenever retroactive jurisdiction was an option.[233]

Removal also impacts the principles of federalism by frequently thwarting the development of state law by state courts.[234] As Judge Sloviter of the Third Circuit astutely noted, "the maintenance of state law claims in federal court merely because the parties are from different states . . . results in the inevitable erosion of the state courts' sovereign right and duty to develop state law as they deem appropriate."[235] Although Judge Sloviter's focus was on diversity actions initially filed in federal court,[236] her conclusions carry even more weight in situations where a case that is properly before a state court is removed. Undoubtedly, any removal premised upon diversity jurisdiction, particularly an improper removal, usurps the state court's sovereign right to decide and develop issues of its state's law.[237]

Superficially, the holding in *Erie Railroad Co. v. Tompkins*[238] would appear to appease the usurpation problem.[239] In terms of the uniform application of state law, under *Erie*, both state courts and federal courts sitting in that state should apply identical state law principles.[240] Therefore,

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233. It could also be argued that congressional restrictions on removal jurisdiction should be even more strictly construed than those placed on diversity jurisdiction. As previously discussed, neither the Constitution nor the language of 28 U.S.C. § 1332 specifically requires complete diversity between the parties. *See supra* notes 57-64 and accompanying text. In contrast, congressional restrictions placed on removal jurisdiction are explicitly delineated in the removal statutes. *See* Mills, *supra* note 157, at 617-18.

234. *See generally* Sloviter, *supra* note 221, at 1675-84 (discussing many of the intrusions diversity jurisdiction allows federal courts to make upon state courts).

235. *Id.* at 1671.

236. *Id.* at 1671, 1675-77.

237. *See id.* at 1675-84.

238. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73 (1938) (holding that "federal courts exercising jurisdiction in diversity of citizenship cases [should] apply as their rules of decision the law of the state, unwritten as well as written"). *Erie* overruled the usurpation problem that resulted from the Court's decision in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Erie R.R. Co. v. Tompkins, 304 U.S. at 79-80. In *Swift*, the Court's interpretation of the Rules of Decision Act, now codified at 28 U.S.C. § 1652, established that a federal court exercising diversity jurisdiction was *not* bound by the unwritten law of a state, *i.e.*, case law, in determining matters of state law. Swift v. Tyson, 41 U.S. (16 Pet.) at 18-19.

239. *See* Erie R.R. Co. v. Tompkins, 340 U.S. at 73 (requiring "federal courts exercising jurisdiction in diversity of citizenship cases [to] apply as their rules of decision the law of the state, unwritten as well as written").

240. *Id.* at 78.

a state's right to decide state law would not be infringed upon. The problem, however, is that "[f]inding the applicable state law . . . is a search that often proves elusive" for the federal judiciary.[241] Even where there appears to be a decision on point, the age of the decision could call into question whether it would be followed today.[242] Often, the state's highest court simply will not have addressed an issue.[243] Where only lower state courts have spoken, what weight, if any, should be given to these decisions?[244] Finally, what course of action is the federal court to follow when there is a total lacuna in an area of state decisional law?[245]

Initially, it might seem that certification would be the answer. Certifying a state law question to the state's supreme court would allow the state to decide and develop its own laws.[246] Therefore, certification should definitely help to mitigate the problems between diversity jurisdiction and federalism.[247]

Although the Supreme Court has applauded the certification process,[248] certification still takes time and may be costly.[249] There is also the question of whether certification is really seeking a prohibited advisory opinion.[250] In addition, there may be disagreement between the two court systems as to whether a certified question is actually outcome-determinative.[251] If the state supreme court's opinion is that it is not, it will decline to answer the question.[252] The state court may also decline to grant certification for other reasons or as a result of poor drafting on the part of the federal court or the litigants.[253] Finally, in a jurisdiction that only

241. Sloviter, *supra* note 221, at 1675.

242. *Id.* at 1676.

243. *See id.* ("[T]he most difficult problems arise when there are no state court decisions on point.").

244. *See id.* (posing the same question).

245. *See id.* at 1676-77.

246. *Id.* at 1684-85 & n.72.

247. *Id.* at 1684.

248. *See, e.g.*, City of Houston v. Hill, 482 U.S. 451, 470 (1987) (explaining that "[t]he certification procedure is useful in reducing the substantial burdens of cost and delay that abstention places on litigants"); Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974) (explaining that the certification procedure "save[s] time, energy, and resources"); Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960) (praising the "foresight" of the Florida legislature for enacting a certification statute).

249. Sloviter, *supra* note 221, at 1685.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 1686.

recognizes certification at the federal appellate level, the entire trial must have been completed before certification is even an option.[254]

The most effective way to avoid reducing federal judges to a level wherein they must employ a Ouija board to predict how the highest court in a state would decide an issue is to follow the instructions of *United Mine Workers v. Gibbs*:[255] "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."[256] In the name of efficiency, the Court has chosen to endorse retroactive diversity jurisdiction in both spoiler and removal situations.[257] This recognition not only contravenes the sound advice of *Gibbs*, but results in an unwarranted expansion of "unavoidable intrusion" by the federal courts into "the lawgiving function" of state judicial systems.[258]

5. *A Question of Precedential Fidelity: The Unfaithful Caretaker*

According to the principle of stare decisis, unless confronted by compelling considerations, courts are to be faithful to relevant precedent by adhering to prior authoritative decisions.[259] This concept is key to ensuring a view of our judicial system as legitimate. The public will have much greater confidence in a legal system where it is perceived that judges are bound by time-tested rules of law rather than personal preferences.[260] Conversely, infidelity to precedent will have the opposite effect.

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254. *Id.*

255. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

256. *Id.* at 726.

257. *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 64 (1996) (holding "that a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered"); Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 827 (1989) (allowing "a court of appeals [to] grant a motion to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction").

258. Sloviter, *supra* note 221, at 1675.

259. Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 688, 690-91 (1999).

260. *See* THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing that judges "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them" to "avoid an arbitrary discretion in the courts"). *See generally* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1109-21 (1995) (providing a sketch of the theoretical underpinnings of the concept of stare decisis).

Such unfaithfulness comes in a number of varieties. The simplest scenario is where binding precedent that is adverse to the ultimate conclusion the court is determined to reach is simply ignored.[261] Another favorite approach is simply to put a "spin" on the language of a prior decision, either to distort the prior holding so that it will seem inapplicable or to manipulate it so that it lends support to an otherwise questionable ruling or legal position.[262] Finally, a court can simply characterize as dicta selected language of an adverse prior case, enabling the court "to avoid the normal requirements of stare decisis."[263]

The effect of precedential infidelity is most devastating when it occurs at the highest level of our judicial system. When the Supreme Court is sporadic in its fidelity to precedent, the precedential rule or principle involved is demoted to a mere discretionary policy consideration. This is what is occurring in terms of the requirement of diversity subject matter jurisdiction. The Court's recognition of retroactive diversity jurisdiction has necessitated an inconsistent respect for the time-of-filing principle.[264] This venerable doctrine and its companion, the rule of complete diversity,[265] are an integral part of the requirements for proper diversity jurisdiction.[266] This cavalier approach by the self-proclaimed caretaker of

261. *See* Idleman, *supra* note 117, at 21 n.109 ("Precedential infidelity can take several forms. A court can simply omit relevant but adverse prior cases, thereby obviating the need to distinguish or overrule the precedent and potentially leading readers to believe that the ruling at hand is consistent, or at least not inconsistent, with existing case law.").

262. *See* Rodney J. Blackman, *Spinning, Squirreling, Shelling, Stiletting and Other Stratagems of the Supremes*, 35 ARIZ. L. REV. 503, 504-07 (1993) (defining and providing examples of "spinning": "the effort of a Court justice to summarize precedent with which he does not agree and from which he either dissented or would have dissented if he were on the Court when the precedent was written," while "express[ing] a rule of law in a manner . . . more appealing than what was originally written").

263. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2004 (1994).

264. *Compare* Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824) (holding that "jurisdiction of the Court depends upon the state of things at the time of the action brought"), *with* Caterpillar Inc. v. Lewis, 519 U.S. 61, 64, 73 (1996) (allowing an action lacking complete diversity to survive in federal court, so long as complete diversity is achieved "at the time judgment is entered").

265. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 268 (1806) (stating that "each distinct [party] should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts").

266. *See* discussion *supra* Part II.B.

constitutional requirements[267] has sent a message to both the lower courts and litigants: not only are the principles surrounding diversity jurisdiction malleable, the constitutional requirement that diversity jurisdiction must be established before a federal court may legitimately consider a case may now discretely be disregarded.

At first blush, *Caterpillar* appears merely to be a permissible expansion of the prior rule in *Grubbs* that a challenge to an allegedly erroneous removal may not be raised for the first time on appeal where the court had proper jurisdiction at the time judgment was entered.[268] The

267. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

268. Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 700 (1972); *see supra* notes 191-95 and accompanying text (discussing the *Grubbs* opinion, as analyzed in *Caterpillar*). Both *Caterpillar* and *Grubbs* raise an interesting issue in the area of judicial estoppel. The time-honored rule is that subject matter jurisdiction may be challenged at any time, *even on appeal*. *See* FED. R. CIV. P. 12(h)(3). Supreme Court jurisprudence has also clearly established that the defense of subject matter jurisdiction cannot be waived and that a party may not be judicially estopped from raising the defense. *See, e.g.*, Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; . . . principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.") (citations omitted). The actual result in *Grubbs*, however, is that the defendant who improperly removed the case is judicially estopped from raising the defense of an initial lack of subject matter on appeal. *See* Grubbs v. Gen. Elec. Credit Corp., 405 U.S. at 700 (refusing to afford a litigant the opportunity to challenge "the validity of the removal procedure" for the first time on appeal). Similarly, the plaintiff in *Caterpillar*, whose motion to remand was erroneously denied, was estopped from challenging the lack of jurisdiction at the time of removal on appeal. *See* Caterpillar Inc. v. Lewis, 519 U.S. at 77. In this respect, both *Caterpillar* and *Grubbs* seem to contradict other Supreme Court decisions repudiating efforts by some of the circuits to employ the doctrines of waiver and judicial estoppel. *See, e.g.*, Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. at 702 (explaining that, in the context of subject matter jurisdiction, the doctrines of consent, waiver, and estoppel do not apply) (citing California v. LaRue, 409 U.S. 109, 112 n.3 (1972); Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951)). *See also* Coury v. Prot, 85 F.3d 244, 249 (5th Cir. 1996) (recognizing that "[a] few circuits have demonstrated a willingness to [create exceptions to the traditional rule that a challenge to subject matter jurisdiction may be made at any time] only to be repudiated by intervening Supreme Court decisions"); City of Brady, Tex. v. Finklea, 400 F.2d 352, 357-58 (5th Cir. 1968); Di Frischia v. N.Y. Cent. R.R., 279 F.2d 141, 142-44 (3d Cir. 1960); Klee v. Pittsburgh & W. Va. Ry. Co., 22 F.R.D. 252, 253-55 (W.D. Pa. 1958). As a result of the recognition of retroactive jurisdiction in removal situations, it appears that a new rule has been created in the areas of estoppel and waiver: a party may not be estopped from raising the defense of lack of subject matter jurisdiction or be deemed to have waived the defense, unless the party fails to raise the defense until the case is on appeal, and it is determined that the initial jurisdictional flaw was cured

expanded rule now includes the new component that irrespective of whether a plaintiff brought a motion to remand that was erroneously denied, if the court had proper diversity jurisdiction at the time the judgment was entered, the judgment stands.[269] Such a small addition does not seem like much of a deviation from adhering to a prior authoritative decision. The corollary to the expanded rule, as dictated by *Finn* and endorsed in *Caterpillar*, must therefore be that if complete diversity is lacking between the parties at the time of judgment, the judgment must be vacated, and the case remanded back to state court.[270] As the *Caterpillar* Court reiterated, "[d]espite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated."[271] In making this pronouncement, however, the Court conveniently failed to address the situation of what may commonly be referred to as the "*Newman-Green/Carterpillar* combo."

The most probable result of a *Newman-Green/Caterpillar* combo is that a judgment entered in an improperly removed case, where the motion to remand was erroneously denied and where there was a lack of complete diversity at the time the judgment was entered, will *not* be vacated and remanded back to state court. Rather, the void judgment will be resuscitated if the court is able to dismiss a spoiler.[272] Irrespective of the Court's pronouncement in *Caterpillar*, the characterization of judicial efficiency and economy as overwhelming considerations[273] is likely to dictate that the dismissal be permitted to retroactively create diversity jurisdiction.[274] Consequently, a judgment entered by a court lacking the requisite subject matter jurisdiction, *even where there was an erroneous*

prior to the entry of judgment by the district court.

269. Caterpillar Inc. v. Lewis, 519 U.S. at 64; Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 16-17 (1951).

270. Caterpillar Inc. v. Lewis, 519 U.S. at 71-72, 76-77; Am. Fire & Cas. Co. v. Finn, 341 U.S. at 17-18.

271. Caterpillar Inc. v. Lewis, 519 U.S. at 76-77 (citing FED. R. CIV. P. 12(h)(3); Am. Fire & Cas. Co. v. Finn., 341 U.S. at 18).

272. *See id.* at 73 ("[A]n erroneous removal need not cause the destruction of a final judgment, if the requirements of federal subject matter jurisdiction are met at the time judgment is entered.") (construing Grubbs v. Gen. Elec. Credit Corp., 405 U.S. at 700.

273. *Id.* at 75.

274. *See id.* at 65, 73 (holding that as long as a "*jurisdictional* defect was cured, *i.e.*, complete diversity was established before the trial commenced" by way of dismissing a nondiverse party, an improper denial of a motion to remand will not "destr[oy] a final judgment").

denial of a motion to remand, will be permitted to stand.[275]

An example of a *Newman-Green/Caterpillar* combo is easily created by taking the facts of *Newman-Green*[276] and adding a removal component.

- A U.S. corporation files suit in state court bringing a contract action for breach of a licensing agreement against a foreign corporation and, as joint and several guarantors of royalty payments due under the agreement, five individuals. Four of these individuals are foreign citizens. The fifth individual, however, is a United States citizen.
- The defendant removes the action to federal district court.
- Two weeks later, the plaintiff learns that that the guarantor who is the United States citizen is not domiciled in any state. Consequently, the district court lacks proper subject matter jurisdiction over the action. The next day, the plaintiff brings a motion to remand, which the court erroneously denies.
- After several years of discovery and a number of pretrial motions, the district court ultimately grants partial summary judgment for the guarantors and partial summary judgment for the plaintiff. The plaintiff appeals.
- During oral argument before the court of appeals, one of the judges questions the statutory basis for the asserted diversity jurisdiction, an issue that had not been raised by either the lower court or the attorneys for the defendants.

The altered *Newman-Green* situation now involves an improper removal and an erroneous failure to remand. As in the original case, and in contrast to *Caterpillar*,[277] the jurisdictional flaw was *not* cured prior to

275. One of the most thought-provoking aspects of *Finn* was the question it did not answer. The *Finn* Court left open the issue of whether "'a new judgment [could] be entered on the old verdict without a new trial'" if, on remand, the court decided to dismiss the nondiverse party. *Id.* at 71 n.8 (quoting Am. Fire & Cas. Co. v. Finn, 341 U.S. at 18 n.18). In round two of the litigation, the district court allowed all claims against the nondiverse defendant to be dismissed. Finn v. Am. Fire & Cas. Co., 207 F.2d 113, 114 (5th Cir. 1953). After allowing dismissal of these claims, the court granted a new trial, *assuming that the original judgment was invalid due to lack of jurisdiction at the time it was entered*. *Id.* Nevertheless, the Fifth Circuit ultimately set aside the judgment resulting from the second trial and reinstated the original judgment. *Id.* at 117.

276. For the pure facts of *Newman-Green*, see *supra* notes 71-72 and accompanying text.

277. *See* Caterpillar Inc. v. Lewis, 519 U.S. at 64 (finding improper removal not

final judgment. What result?

It is true that the decision in *Caterpillar* may protect at least some vestiges of the requirements for diversity jurisdiction. The rule does require that any jurisdictional flaw must be cured prior to judgment before overriding considerations of judicial efficiency and economy may trump the statutory flaw resulting from the erroneous denial of the motion to remand.[278] However, it is most probable that this protection will only selectively come into play.

Under a *Newman-Green*/*Caterpillar* combo, a judgment will be vacated and a case remanded back to state court *only* where (1) there is no spoiler to dismiss or (2) where it is determined that the presence of the spoiler unduly prejudiced another party, so the dismissal of the spoiler to create retroactive jurisdiction would be unfair.[279] In the foregoing altered *Newman-Green* situation, the appellate court would simply dismiss the spoiler as it did in the actual *Newman-Green* decision. Even if the court of appeals remands the case back to the district court to determine that the dispensable nondiverse party may be dismissed, the ultimate result will be the resurrection of a void judgment.

It is difficult to reconcile the results of *Caterpillar*, let alone the synergistic outcome of a *Newman-Green/Caterpillar* combo, with prior authoritative jurisprudence addressing the unique nature of subject matter jurisdiction. For example, in 1884, the Court declared unequivocally that "the first and fundamental question" it must ask was whether the Court itself, as well as the lower court, had proper subject matter jurisdiction.[280] In 1975, the Court was still stressing the unique nature of subject matter jurisdiction as a fundamental and preliminary inquiry, holding that subject matter jurisdiction "is the threshold question in every federal case."[281] Such decisions do not stand for the proposition that the subject matter inquiry *may* be a threshold question or that it is only a threshold question

fatal to the adjudication because jurisdiction requirements were later met).

278. *See id.* at 75.

279. *See, e.g.*, SCS Communications, Inc. v. The Herrick Co., 360 F.3d 329, 336-38 (2d Cir. 2004).

280. Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884); *accord* Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453 (1900) (explaining that the Court has the duty to ascertain whether the lower court had proper jurisdiction over the matter).

281. Warth v. Seldin, 422 U.S. 490, 498 (1975) ("[W]hether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art[icle] III . . . is the threshold question in every federal case . . . .").

under certain circumstances.[282] Rather, "[a] Federal Court . . . has a primordial duty, in *every* case before it, to inquire whether the *vital prerequisite* of subject matter jurisdiction has been satisfied."[283] Failure to do so results in "decisions, opinions, and orders" that should be seen as having "*no effect*."[284] The "extent of the transgression" of acting without proper jurisdiction is the same whether the court "rul[ed] on a legal question, presid[ed] over an evidentiary hearing, or receiv[ed] a verdict from a jury."[285]

Clearly, there can be no question that authoritative jurisprudence has established that, absent proper subject matter jurisdiction, the actions taken by a district court are void. Irrespective of the Court's attempt to camouflage the new rules of *Newman-Green* and *Caterpillar* as permissible exceptions to the court-created time-of-filing rule,[286] validating the creation of retroactive jurisdiction and resurrecting judgments that were null at the time of entry cannot be easily harmonized with the requirement of fidelity to precedent.

In the final analysis, the Court's "all's well that ends well" approach in *Caterpillar* undermined the respect due to the jurisdictional inquiry.[287] Jurisdiction is not a game.[288] Exalted concerns of efficiency and economy

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282. *See* Rock Island Millwork Co. v. Hedges-Gough Lumber Co., 337 F.2d 24, 26-27 (8th Cir. 1964) ("[W]e have admonished district judges to be attentive to a satisfaction of jurisdictional requirements in *all* cases.") (emphasis added).

283. Hoeffner v. Univ. of Minn., 948 F. Supp. 1380, 1383 (D. Minn. 1996) (emphasis added); *accord* Rice v. Rice Found., 610 F.2d 471, 474 (7th Cir. 1979) (holding that subject matter jurisdiction must be "[t]he initial inquiry in any suit filed in federal court").

284. B., Inc. v. Miller Brewing Co., 663 F.2d 545, 580 (5th Cir. Unit A Dec. 1981) (citing Am. Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951); *In re* Carter, 618 F.2d 1093 (5th Cir. 1980)).

285. C.L. Ritter Lumber Co. v. Consolidation Coal Co., 283 F.3d 226, 230 (4th Cir. 2002).

286. *See supra* notes 21-22 and accompanying text.

287. *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 74-75 (1996) (noting the respondent's urging the Court to reject an "all's well that ends well" approach to subject matter jurisdiction, but ultimately holding that argument subordinate to the "overriding consideration[s]" of "finality, efficiency, and economy").

288. It must never be forgotten that when a court acts in the absence of subject matter jurisdiction, it is not only infringing upon the rights of individual parties, but the rights of all citizens. *See In re* Pac. Ry. Comm'n, 32 F. 241, 254-55 (C.C.N.D. Cal. 1887). As proscribed by the Tenth Amendment, when "powers not delegated to the United States by the [C]onstitution" are exercised by a federal court, that court has wrongfully encroached upon the powers "reserved to the States . . . or to the people." Idleman, *supra* note 117, at 37.

are leading the Court to annul procedural rights, ignore important issues of federalism, and be unfaithful to and tacitly overrule precedent.

It has been suggested that in order to gain access to the federal courts, "a party must have the proper jurisdictional key" that will open the courthouse door.[289] "Without that key, the court is powerless to entertain anything that that party may wish to argue."[290] Apparently, the Supreme Court is no longer requiring that litigants enter through the main door. Instead, it is permitting parties to slip into federal courthouses through the bathroom window.[291] One can only wonder how Chief Justice Marshall would respond to these results.

C. *Waiting for Godot:* Carden v. Arkoma Associates

1. *The Court Creates a Rule Despite Its Protestations*

Although not a decision that concerns the recognition of retroactive jurisdiction or the Court's willingness to sacrifice constitutional jurisdictional limitations and individual rights to overwhelming interests of limited judicial resources, *Carden v. Arkoma Associates*[292] is another cornerstone case for the Court's *Dataflux* decision. Falling between the *Newman-Green* and *Caterpillar* decisions, *Carden* concerned the question of how the citizenship of a limited partnership was to be determined for the purposes of diversity jurisdiction.[293] The issue hinged on whether the citizenship of all partners, both general and limited, had to be taken into account in determining whether complete diversity existed between the parties, or whether only the citizenship of the general partners should be referenced.[294]

As suggested by its name, a limited partnership is composed of two classes of members: general and limited partners.[295] While the general partners manage the business and are personally liable for debts incurred by the partnership, limited partners have no input into the actual running

289. Perry v. Norwest Fin. Ala., Inc., No. CIV.A.98-0260-CB-C, 1998 WL 964987, at *3 (S.D. Ala. Dec. 9, 1998).

290. *Id.*

291. *See id.* (classifying a litigant's attempt to sever the claims of nondiverse parties as an attempt "to climb in the window of federal court").

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

293. *Id.* at 186.

294. *Id.* at 186-87.

295. *See* Evans v. Galardi, 546 P.2d 313, 317-18 (Cal. 1976) (defining a limited partnership).

of the business.[296] Rather, limited partners simply contribute capital to the partnership, share in any profits, and are only liable for the partnership's obligations to the extent of their capital contribution.[297] Therefore, the limited partner is little more than an investor, comparable to a corporate shareholder. This is in stark contrast to a general partner, who is subject to joint liability for the partnership debts, has the authority to contract on behalf of the partnership, and can sue on behalf of the general partnership.[298] In fact, the overall characteristics of a limited partnership resemble those of a corporation to a far greater extent than they do those of other single class, unincorporated associations, such as unions, joint stock companies, and general partnerships, where all members have identical rights and liabilities.[299]

For example, in addition to having two classes of members (those who control the business and those who are merely passive investors), both a corporation and a limited partnership exist as a result of legislative enactment.[300] In contrast to a general partnership, which may be created by mutual agreement, implied by law, and exist without a written agreement,[301] a limited partnership only comes into existence after a certificate of limited partnership has been filed with the state where it is organized.[302] This is the equivalent of a corporation filing its articles of incorporation in its state of incorporation.[303] Further, not only is the limited partner similar to a shareholder in that any liability is limited to his investment, the Uniform Limited Partnership Act permits a limited partner

296. *Id.* at 317.

297. *Id.*

298. Robert J. Tribeck, *Cracking the Doctrinal Wall of* Chapman v. Barney*: A New Diversity Test for Limited Partnerships and Limited Liability Companies*, 5 WIDENER J. PUB. L. 89, 99 (1995).

299. G. David Porter, Note, *"Incorporating" Limited Partnerships into Federal Diversity Jurisdiction: Correcting* Carden v. Arkoma Associates, 65 NOTRE DAME L. REV. 287, 306 & n.138 (1990).

300. *Id.* at 301.

301. *See, e.g.*, *In re* Toomey, 34 B.R. 35, 36 (Bankr. S.D. Fla. 1983) ("A partnership is a creature of contract and requires no special formality.") (citing *In re* Ward, 6 B.R. 93, 94 (Bankr. M.D. Fla. 1980)). According to the Uniform Partnership Act, a partnership is "an association of two or more persons to carry on as co-owners of a business for profit." UNIF. P'SHIP ACT § 6(1), 6 U.L.A. 393 (2001).

302. Porter, *supra* note 299, at 300. The filing of the limited partnership agreement is required by both the Uniform Limited Partnership Act and the Revised Uniform Limited Partnership Act. *Id.* (citing REVISED UNIF. LTD. P'SHIP ACT § 201, 6 U.L.A. 472 (1985); UNIF. LTD. P'SHIP ACT § 2, 6 U.L.A. 568 (1916)).

303. *Id.* at 300-01.

to bring a derivative action on behalf of the limited partnership.[304] This ability is similar to the provisions of the Revised Model Business Corporations Act authorizing shareholder derivative actions.[305]

The dispute in *Carden* arose as a result of a Texas corporation leasing two drilling rigs from Arkoma Associates, a limited partnership organized under the laws of Arizona.[306] When the lessee failed to make a required payment under the lease, Arkoma brought a breach of contract action against the guarantors of the lessee's lease obligation.[307] After judgment was entered for the limited partnership, the defendants appealed, raising "[t]he threshold issue [of] whether Arkoma [had] properly invoked diversity jurisdiction."[308]

Based upon the structure of the modern limited partnership,[309] the Fifth Circuit reasoned that the citizenship of the limited partnership should be determined by only considering the citizenship of the general partners.[310] In reaching this decision, the court relied on one of its prior decisions, *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*,[311] which had applied the analysis employed by the Supreme Court in *Navarro Savings Ass'n v. Lee*.[312]

In *Navarro*, the Court addressed the proper method for determining the citizenship of a business trust.[313] Although a business trust has some attributes of both an association and a corporation, the Court held it could not be characterized as either.[314] In determining whose citizenship must be

304. UNIF. LTD. P'SHIP ACT, §§ 1002-1003, 1005, 6A U.L.A. 102 (2001).

305. Porter, *supra* note 299, at 303-04 (citing REV. MODEL BUS. CORP. ACT. § 7.40 (1984)).

306. Arkoma Assocs. v. Carden, 874 F.2d 226, 228 (5th Cir. 1988), *rev'd* 494 U.S. 185 (1990).

307. *Id.*

308. *Id.*

309. The limited partnership of today was initially a creature of civil law. Porter, *supra* note 299, at 290. It is comparable to the *Commandite*, a seventeenth-century French invention, and the *Accomandita*, a seventeenth-century Italian product. *Id.* The modern limited partnership was originally transplanted to the United States by the French during their occupation of Florida and Louisiana. *Id.*

310. Arkoma Assocs. v. Carden, 874 F.2d at 228-29.

311. Mesa Operating Ltd. P'ship v. La. Intrastate Gas Corp., 797 F.2d 238 (5th Cir. 1986).

312. *See id.* at 240-42 (analyzing Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 462-65 (1980)).

313. Navarro Sav. Ass'n v. Lee, 446 U.S. at 458-59.

314. *Id.* at 462.

considered for the purposes of establishing diversity jurisdiction, however, the real inquiry was not which form of business entity the trust most resembled.[315] Instead, the correct analysis was to focus on the "real parties to [the] controversy."[316] According to the *Navarro* Court, the "real parties to [the] controversy" were those with the authority to control and manage the trust assets and to direct its litigation.[317] Because the trust beneficiaries had no control over the business or the course of the litigation, the Court held that only the citizenship of the trustees would be considered for the purposes of determining diversity jurisdiction.[318]

The Fifth Circuit found the reasoning of *Navarro* equally appropriate in the area of limited partnerships.[319] A limited partnership, like a business trust, was also a hybrid, being neither an association nor a corporation.[320] As in *Navarro*, only one class of members, the general partners, had control over the business or the litigation.[321] Therefore, because it was possible to easily identify the members who were the real parties in interest (i.e., those with the authority to control the partnership and the litigation), only the citizenship of the general partners was relevant for diversity purposes.[322]

In contrast to the Fifth Circuit, other circuits addressing the issue of what constituted the proper approach to determine the citizenship of a general partnership for diversity purposes had not found the reasoning of *Navarro* applicable.[323] Relying on the turn-of-the-century case *Chapman v. Barney*,[324] a number of circuits had been constrained by the "doctrinal wall"[325] built by the *Chapman* Court.[326] In *Chapman*, the Supreme Court

315. *Id.* at 465.

316. *Id.* at 462.

317. *Id.* at 462, 464-65.

318. *Id.* at 464-66.

319. Mesa Operating Ltd. P'ship v. La. Intrastate Gas Corp., 797 F.2d 238, 240 (5th Cir. 1986).

320. *See id.* (citing Navarro Sav. Ass'n v. Lee, 446 U.S. at 464-65) (considering only persons with business or litigation control of the company for the purposes of diversity).

321. *Id.*

322. *Id.* at 240, 242-43.

323. *Id.* at 241.

324. Chapman v. Barney, 129 U.S. 677 (1889).

325. United Steelworkers of Am. v. R.H. Bouligny, Inc., 382 U.S. 145, 151 (1965).

326. *See* Mesa Operating Ltd. P'ship v. La. Intrastate Gas Corp., 797 F.2d at 241 (identifying circuits finding the reasoning of the *Chapman* Court persuasive).

refused to extend the citizenship status of a corporation to unincorporated entities or associations.[327] Constrained by this barrier, the prevailing view pre-*Carden* was that the citizenship of all members of a limited partnership must be considered for the purposes of determining the existence of diversity jurisdiction.[328] The rationale for continuing to be barred by the doctrinal wall was "a disinclination to expand diversity jurisdiction without congressional authorization"[329] or "instruction from the Court that an identity of citizenship between a limited partner and opposing litigants does not destroy diversity."[330]

In *Carden*, the Court had the opportunity to bring the law in this area out of the morgue and into the twentieth century. It declined to do so. In an exceptionally unpersuasive and uninspired opinion authored by Justice Scalia, the Court turned a blind eye to the realities of today's business world. Instead, it reinforced the crumbling doctrinal wall the *Chapman* Court erected in 1889,[331] ruling that for the purposes of diversity jurisdiction, the citizenship of all the members of the limited partnership must be considered.[332]

In refusing to scale the *Chapman* wall, the Court failed to fulfill one of its primary duties, for the "'application of statutes to situations not anticipated by the legislature is a pre-eminently judicial function.'"[333] The

327. Chapman v. Barney, 129 U.S. at 682; *see also* United Steelworkers of Am. v. R.H. Bouligny, Inc., 382 U.S. at 151 (same).

328. *See* SHR Ltd. P'ship v. Braun, 888 F.2d 455, 459 (6th Cir. 1989) (holding that citizenship of limited partnership includes "residence" of limited partners); Alexander Proudfoot Co. World Headquarters L.P. v. Thayer, 877 F.2d 912, 916 n.9 (11th Cir. 1989) (stating that citizenship of limited partners is "critical" in determining citizenship of limited partnership in diversity action "because partnerships are deemed citizens of all states in which the limited partners are citizens"); Stouffer Corp. v. Breckenridge, 859 F.2d 75, 76 (8th Cir. 1988) (holding that diversity analysis must include limited partners' citizenship); N.Y. State Teachers Ret. Sys. v. Kalkus, 764 F.2d 1015, 1019 (4th Cir. 1985) (holding that determination of citizenship of both general and limited partners is necessary in diversity analysis); Elston Inv., Ltd. v. Davis Altamn Leasing Corp., 731 F.2d 436, 439 (7th Cir. 1984) (holding that a limited partnership is considered a citizen of both the general and limited partners' states of citizenship).

329. Mesa Operating Ltd. P'ship v. La. Intrastate Gas Corp., 797 F.2d at 241.

330. Carlsberg Res. Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1261-62 (3d Cir. 1977).

331. *See* Chapman v. Barney, 129 U.S. at 682 (holding that the citizenship of "all the members" must be considered).

332. Carden v. Arkoma Assocs., 494 U.S. 185, 195-96 (1990) (quoting Chapman v. Barney, 129 U.S. at 682).

333. *Id.* at 199 (O'Connor, J., dissenting) (quoting David P. Currie, *The*

Court had certainly never exhibited such unwillingness "to find a niche for corporations in the diversity statute" prior to congressional recognition of the corporation as a citizen.[334]

Prior to Congress enacting 28 U.S.C. § 1332(c),[335] the Court addressed the citizenship of a corporation for diversity purposes on at least three different occasions. In 1809, the Court initially reasoned that "[t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen."[336] Consequently, the citizenship of all the members of the corporation was to be considered for diversity purposes.[337] Thirty-five years later, in *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*,[338] the Court again addressed the issue and determined that a corporation "is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued."[339] Then, in 1853, the Court employed a different approach to the issue of the corporate citizen by recognizing that the real parties being sued were those persons represented by the corporate form.[340] Therefore, when determining the citizenship of a corporation for the purposes of diversity jurisdiction, those represented by the entity were presumed to also be citizens of the state of incorporation.[341]

Despite recognizing that its pronouncements in *Carden* could "validly be characterized as technical, precedent-bound, and unresponsive to policy

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Federal Courts and the American Law Institute (pt. 1), 36 U. CHI. L. REV. 1, 35 (1968)); *see also* Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) ("The duties of this [C]ourt, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded, without leaning one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.").

334. Currie, *supra* note 333, at 35.

335. 28 U.S.C. § 1332(c)(1) established in relevant part that in most situations "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1) (2000).

336. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) at 86.

337. *Id.* at 91-92.

338. Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497 (1844).

339. *Id.* at 558.

340. Marshall v. Baltimore & Ohio R.R., 57 U.S. (16 How.) 314, 327-28 (1853).

341. *Id.* at 328.

considerations raised by the changing realities of business organization,"[342] the *Carden* Court held that the issue of whether a citizen status comparable to that given to a corporation for diversity purposes should be extended to other forms of artificial entities fell solely within the purview of the legislature and was not a matter the Court could "'adequately or appropriately'" address or resolve.[343] The Court's reason for irrationally ignoring and refusing to adapt diversity jurisdiction to comport with the evolution of modern business entities was the policy argument that such determinations were best left "to the people's elected representatives."[344] This "Waiting for Godot,"[345] or at least Congress, rationale is insupportable.

First, perhaps the current Court needs to recall that the final provisions of § 1332(c) were basically taken straight from the *Letson* decision.[346] Rather than taking the position that it was the duty of

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

343. *Id.* (quoting United Steelworkers of Am. v. R.H. Bouligny, Inc., 382 U.S. 145, 147 (1965)).

344. *Id.* at 197.

345. The literary reference is to the play "Waiting for Godot" written by Samuel Beckett in 1948. *See* SAMUEL BECKETT, WAITING FOR GODOT: TRAGICOMEDY IN 2 ACTS (1954). Originally written in French as *En Attendant Godot*, Beckett personally translated the play into English. *See, e.g.*, www.enotes.com/waiting-godot (last visited Feb. 14, 2005). It was then produced in London in 1955, the United States in 1956, and later worldwide. *Id. Waiting for Godot* is a funny and haunting tragicomedy. It is also one of the finest examples of the "theatre of the Absurd," which implies that it is meant to be irrational. *Godot* focuses on the human condition. Two tramps share stories, tell jokes, and talk about the past in a desperate attempt to avoid the terror and emptiness that defines their lives. *See generally* BECKETT, WAITING FOR GODOT: TRAGICOMEDY IN 2 ACTS. This valiant effort to fill their days to avoid this realization imparts the lesson that we all spend our lives waiting for something, while never being sure what that something is or if it will ever come. For additional information about *Waiting for Godot* and its author, Samuel Beckett, see www.theatrehistory.com/french/beckett002.html (last visited Feb. 14, 2005).

In "Waiting for Congress" to adapt diversity jurisdiction to comport with the evolution of modern business entities, the Court is also, in essence, waiting for something, and it, too, is not quite sure what that something will be or if it will ever come.

346. Tribeck, *supra* note 298, at 97 & n.31. It is clear from the language of § 1332(c), that Congress chose to implement the decision in *Letson*, not that of *Marshall*. *Compare* Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1884) (holding that a corporation is "a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued"), *and* 28 U.S.C. § 1332(c)(1) (2000) (providing that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business), *with* Marshall v. Baltimore & Ohio R.R., 57 U.S. (16 How.) at 328

Congress, not the Court, to tackle the issue of corporate citizenship for the purpose of diversity jurisdiction, prior Supreme Courts did not hesitate to grapple with the issue of diversity jurisdiction in the corporate context. In actuality, it was the *Letson* Court, not Congress, that first created the dual citizenship rule for corporations now codified by section 1332(c)(1).[347] The attitude adopted by the *Carden* Court, however, will provide no such judicial guidance in the area of limited partnerships or other modern business organizations, such as limited liability companies.[348]

Of greater import is the reality that whether the Court had adopted the "real parties to the controversy"[349] test or ruled as it did, in refusing to blow the trumpet that would cause the *Chapman* wall to come tumbling down, the Court created a rule without congressional approval. It was only after the rule was in place that the Court invoked congressional deference as a justification for its new pronouncement.[350]

Further, if the *Carden* Court is correct in its analysis and the doctrinal wall of *Chapman* may not be breached, then it is not just the "real party to the controversy approach" that was problematical. As Justice O'Connor pointed out in her dissent, the Court not only employed this test in *Navarro*, but had consistently employed the approach when deciding cases concerning diversity jurisdiction and various forms of business associations.[351] The only possible conclusion, then, is that the majority in *Carden* must have viewed the reasoning of these prior decisions as severely flawed.[352]

(holding that the individuals a corporation represents "may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation").

347. *See supra* notes 336, 346.

348. *See generally* Wayne M. Gazur & Neil M. Goff, *Assessing the Limited Liability Company*, 41 CASE. W. RES. L. REV. 387 (1991) (discussing the structure and benefits of the then-novel limited liability company business entity); Tribeck, *supra* note 298, at 102-06 (discussing the structure of the typical limited liability company, but recognizing that at the time, "no court ha[d] expressly set forth a test to be used when determining the proper treatment of an LLC for diversity purposes").

349. *See* Carden v. Arkoma Assocs., 494 U.S. 185, 198 (1990) (O'Connor, J., dissenting).

350. *Id.* at 199 (O'Connor, J., dissenting).

351. *Id.* at 201-06 (O'Connor, J., dissenting). For example, in 1823, the Court declared that it would "not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties." Wormley v. Wormley, 21 U.S. (8 Wheat.) 421, 451 (1823). Rather, the Court would "decide upon the merits of the case between the parties, who have the real interests before it," whenever such action could be taken without prejudicing the rights of others. *Id.*

352. *See* Carden v. Arkoma Assocs., 494 U.S. at 201-06 (O'Connor, J.,

In many ways, the mothball-laden holding of *Carden* is an embarrassment. One of the most absurd ramifications of the decision is that a limited partner is barred from suing the limited partnership in federal court for breach of fiduciary duty.[353] Under *Carden*, the citizenship of the limited partner who is bringing suit must be counted not only as that of the plaintiff, but also as that of the defendant.[354] Consequently, the plaintiff will unilaterally contravene the rule of complete diversity. Conversely, the limited partnership is unable to remove an action brought by a limited partner to federal court.[355]

Ironically, considerations of judicial efficiency and economy also lend

dissenting) (discussing prior decisions employing the "real party to the controversy" analysis). A number of commentators, however, are in agreement that the "party to the controversy" test is the appropriate approach to determining the citizenship of a limited partnership for purposes of diversity jurisdiction. *Id.* at 206 (O'Connor, J., dissenting) (citing Rachel F. Best, Note, *Who Are the Real Parties In Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?*, 61 WASH. U. L.Q. 1051, 1066-67 (1984); Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U. CHI. L. REV., 384, 418 (1978); Note, *Diversity Jurisdiction Over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 TEX. L. REV. 243, 250-51 (1978)). Utilizing that test, the citizenship of limited partners is irrelevant. *Id.* (citations omitted); *see also* Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 183-84 (1966) (Friendly, J.) (holding that the citizenship of limited partner should not be counted where state law declares "a limited partner not a proper party to proceedings by or against a partnership") (internal quotation marks omitted).

353. *See* Tribeck, *supra* note 298, at 90.

354. Carden v. Arkoma Assocs., 494 U.S. at 195-96.

355. *Id.*; *see also* James R. Burkhard, *May a Member of an LLC or a Limited Partner Bring a Breach of Fiduciary Duty Claim Against Those Controlling the LLC or Partnership as a Diversity Action?*, 23 REV. LITIG. 239, 241-44 (2004) (discussing the impossibility of removal if the limited partnership is viewed as both a necessary and indispensable party). Despite the rule of *Carden*, unincorporated associations have gained access to the federal courts by bringing or defending a Rule 23.2 class action, where the citizenship of only the named representative is considered. *See, e.g.*, Curley v. Brignoli, Curley & Roberts Assocs., 915 F.2d 81, 85-87 (2d Cir. 1990) (informing plaintiffs that they "could have avoided joining [the diversity-breaking party] by bringing their claim as plaintiffs suing on behalf of a class of limited partners"); *see also* FED. R. CIV. P. 23.2 (containing only the prerequisite that named parties "fairly and adequately protect the interest of the [unincorporated association] and its members). In addition, to ameliorate the holding of *Carden*, the lower courts have also fashioned solutions such as allowing plaintiffs to amend a judgment by splitting a suit into two separate cases in order to achieve complete diversity. *See, e.g.*, C.L. Ritter Lumber Co. v. Consolidation Coal Co., 283 F.3d 226, 229-30 (4th Cir. 2002) (allowing plaintiffs to amend a judgment by splitting its lawsuit into two cases, "one embracing the claims asserted by the Texas Plaintiffs and the other embracing the claims against the Texas Defendants," which was allowable because "none of the Texas Plaintiffs asserted claims against any of the Texas Defendants").

support to the argument that the *Carden* Court erred in failing to adopt the "party to the controversy test." In *Navarro*, the Court intimated that the question of diversity jurisdiction should be "capable of a simple and immediate answer."[356] A rule that jurisdiction would depend solely on the citizenship of the general partners, where it could be shown that they had exclusive control and management of the business and the litigation, would be more expeditious and easier to implement "than a process of matching up long lists of members whose addresses may not even be correctly carried on the partnership's books as of the date of filing."[357]

2. *Comparable Entities Should Receive Equal Treatment Under the Law*

The case Justice Scalia chose to tout as the one exception to the Court's "admirable consistency of . . . jurisprudence"[358] in declining to characterize unincorporated associations as anything other than a single entity possessing the citizenship of all its members was *Puerto Rico v. Russell & Co.*[359] In actuality, *Russell* is the one decision that most strongly supports the opposite conclusion than that reached by the *Carden* Court.

Writing for the four-member minority,[360] Justice O'Connor advocated the application of the "real party to the controversy" approach to unincorporated associations.[361] To support her position, Justice O'Connor effectively traced the development of the limited partnership in the United States, thereby demonstrating that the modern limited partnership is basically identical to its Puerto Rican counterpart, the *sociedad.*[362] The *Russell* Court had concluded that the *sociedad* was entitled to the same status as a corporation in terms of access to the federal courts.[363] To shore up the majority holding of *Carden*, Justice Scalia found it necessary to try and diffuse the obvious conclusion to be drawn from this history lesson. His vacuous response was that the history was brought to the Court's attention twenty-five years too late.[364] This observation is particularly

356. Mesa Operating Ltd. P'ship v. La. Intrastate Gas Corp., 797 F.2d 238, 243 n.2 (5th Cir. 1986).

357. *Id.*

358. Carden v. Arkoma Assocs., 494 U.S. at 189.

359. Puerto Rico v. Russell & Co., 288 U.S. 476 (1933); *see* Carden v. Arkoma Assocs., 494 U.S. at 189-90 (discussing Puerto Rico v. Russell & Co., 288 U.S. 476).

360. Justice Brennan, Justice Marshall, and Justice Blackmun joined Justice O'Connor in her dissent. Carden v. Arkoma Assocs., 494 U.S. at 198.

361. *Id.* at 200-01 (O'Connor, J., dissenting).

362. *See id.* at 207-09 (O'Connor, J., dissenting).

363. Puerto Rico v. Russell & Co., 288 U.S. at 482.

364. *See* Carden v. Arkoma Assocs., 494 U.S. at 190 n.2 ("[T]he dissent's

poignant in that it originates from a Justice well-known for his high regard of legal "pedigree."[365]

In the past, "[the] Court has never felt constrained to follow precedent"[366] where "governing decisions [were] unworkable or [were] badly reasoned."[367] Why, then, is the Court continuing to be blocked by the *Chapman* wall? Why has the current Court refused to recognize that "[t]he mere fact that a corporation is endowed with a birth certificate is . . . of no consequence" because many unincorporated associations "are indistinguishable from corporations in terms of the reality of function and structure"?[368] One hopes the answer to this question is not simply to preserve the "admirable consistency of [its] jurisprudence."[369] As Justice Holmes so aptly noted:

> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[370]

It should be axiomatic that comparable entities should receive equal treatment under the law in terms of access to the federal courts. The

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evidence bearing on the historical pedigree of partnerships comes to our attention at least 25 years too late.").

365. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 621 (1990) (Scalia, J.) (discussing that due process will be judged by a rule's "pedigree," *i.e.*, the way it has been applied over the course of history). *See generally* Benjamin C. Zipursky, *The Pedigrees of Rights and Powers in Scalia's* Cruzan *Concurrence*, 56 U. PITT. L. REV. 283, 291-99 (1994) (critiquing Justice Scalia's concurrence in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), in light of "the rights pedigree principle"). Interestingly, in terms of pedigree, at common law, unless an individual had a "legal interest," he was barred from suing because he was not considered the "real party to the controversy." Charles A. Szypszak, *Jural Entities, Real Parties in Controversy, and Representative Litigants: A Unified Approach to the Diversity Jurisdiction Requirements for Business Organizations*, 44 ME. L. REV. 1, 13 (1992) (citing 3A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 17.08 (2d ed. 1991)).

366. Smith v. Allwright, 321 U.S. 649, 665 (1944).

367. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (citing Smith v. Allwright, 321 U.S. at 665).

368. United Steelworkers of Am. v. R.H. Bouligny, Inc., 382 U.S. 145, 149-50 (1965).

369. Carden v. Arkoma Assocs., 494 U.S. at 189.

370. Oliver W. Holmes, The Path of Law, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 469 (1897).

Carden Court failed to recognize that significant similarities, which far outweigh superficial differences in form, exist between the modern limited partnership and a corporation, the *sociedad* in *Russell*, and the business trust in *Navarro*. All three of the latter entities have been granted access to the federal courts. In denying equal access to limited partnerships, the Court has ignored the basic tenets of fundamental fairness that require uniformity of treatment.[371]

IV. THE *DATAFLUX* DEBATE: A TREMENDOUS WASTE OF JUDICIAL AND PRIVATE RESOURCES, OR THE PRICE OF FEDERALISM?

A. *A Game of Characterizations:* Grupo Dataflux v. Atlas Global Group, L.P.

1. *Scenario No. 3: Where is Rand McNally When You Need Him?*

At times, Supreme Court decisional law seems to provide specific rules of the road that lower courts are to follow when driving on the federal legal highway.[372] At other times, the Court's jurisprudence simply offers driving directions without indicating an ultimate destination.[373] As the

371. *See* Brief of Respondent at *4, Carden v. Arkoma Assocs., 494 U.S. 185 (1990) (No. 88-1476), *available at* 1988 WL 1025572 (arguing that "[b]ecause the modern limited partnership has a functionally similar structure to other types of organizations that have access to federal courts, basic fairness and substance over form require that limited partnerships receive similar treatment").

372. An example of specific rules of the road would be the rule of complete diversity set forth by Chief Justice Marshall in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). *See supra* notes 56-60 and accompanying text. Another example would be the time-of-filing rule created by the Court in *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537 (1824). *See supra* notes 65-66 and accompanying text. These types of decisions result in clear-cut rules that should result in the lower courts reaching the same conclusion, or destination, after application.

373. The most obvious example of driving directions with no indication of an ultimate destination occurs when the Court splits on an issue and renders a plurality opinion, as in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). In *Asahi*, the Court addressed the issue of "whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce" established sufficient "minimum contacts" with the forum state so that the assertion of personal jurisdiction over the defendant did "not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 105 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The Court unanimously

held that specific personal jurisdiction could not be properly asserted over the out-of-state defendant based solely upon fairness considerations; that such an assertion would not comport with "traditional notions of fair play and substantial justice." *Id.* at 114; *see id.* ("A consideration of these [fairness] factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce."). Such considerations, however, are only one prong of the traditional two-part "minimum contacts" test developed by the Court to determine when the assertion of personal jurisdiction comports with the due process requirements of the Fourteenth Amendment. Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 418 (5th Cir. 1993) ("The due process clause of the Fourteenth Amendment, as interpreted by the Supreme Court, permits the exercise of personal jurisdiction over a nonresident defendant when (1) that defendant has established 'minimum contacts' with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend 'traditional notions of fair play and substantial justice.'") (quoting Int'l Shoe Co. v. Washington, 326 U.S. at 316). In certain situations, such as in *Asahi*, the fairness factors may outweigh the "minimum contacts" a defendant has with the forum state so that even when there exists sufficient contacts, the assertion of jurisdiction would not be constitutionally valid. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. at 121-22 (Stevens, J., concurring) ("[T]his case fits within the rule that 'minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.'") (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. at 320)). Generally, however, a court will analyze the issue of personal jurisdiction by examining both prongs of the minimum contacts test. *See, e.g.*, Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d at 418 ("Both prongs of the due process test must be met in this case if the United States District Court for the Southern District of Texas is to exercise personal jurisdiction over [the out-of-state defendant]."); Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 942 (4th Cir. 1994) ("*International Shoe* leaves us with a two-pronged requirement for asserting jurisdiction over a person not present in a state. The person must (1) have certain minimum contacts or ties with the forum state such that (2) maintenance of the suit does not offend traditional notions of fair play and substantial justice."). The *Asahi* Court split sharply regarding what was required to satisfy the first part of the test: sufficient purposeful contacts.

Justices O'Connor, Powell, Scalia, and Chief Justice Rehnquist agreed that placing products into the stream of commerce alone was not enough to satisfy the purposeful contacts requirement of the minimum contacts test for establishing specific personal jurisdiction over and out-of-state defendant. *Id.* at 111-13. To satisfy the minimum contacts test, the defendant must have engaged in "[a]dditional conduct" that indicated an "intent or purpose" to serve or specifically target the market of the forum state. *Id.* at 112.

Four Justices disagreed with this conclusion. *See id.* at 116-21 (Brennan, J., with whom White, J., Marshall, J., and Blackmun, J., joined, concurring in part and concurring in the judgment). Rather, they concluded that placing products into the stream of commerce alone was sufficient to satisfy the purposeful contacts portion of the minimum contacts analysis. *Id.* Although noting that the issue of purposeful contacts was really irrelevant in light of the fact that the assertion of personal

following facts and result in *Grupo Dataflux v. Atlas Global Group, L.P.*[374] illustrate, attempting to divine the proper roadmap from the Court's directions is not always an easy task.

- Atlas, a limited partnership created under the laws of Texas, files a state-law complaint in federal district court against Dataflux, a Mexican corporation, based upon diversity jurisdiction.[375] The case goes to trial.
- After the jury enters a verdict for the limited partnership, but before entry of judgment, Dataflux moves to dismiss for lack of subject matter jurisdiction, alleging a lack of complete diversity between the parties at the time the action was commenced.[376] The presiding judge grants the motion, finding that two of the limited partners were Mexican citizens at the time the complaint was filed.[377]
- The limited partnership appeals to the Fifth Circuit, urging that the lack of diversity at the time of filing should be disregarded because the Mexican limited partners had left the partnership prior to the

jurisdiction in the case was inappropriate due to fairness considerations, Justice Stevens, joined by Justices White and Blackmun, found that even under the "minimum contacts plus" approach, sufficient purposeful contacts were evident. *Id.* at 121-22 (Stevens, J., concurring in part and concurring in the judgment).

The ultimate result of *Asahi* is that while it offered directions in terms of what the law is regarding the stream of commerce theory, it really provided no clear rule that would result in uniform final determinations, or reaching the same destination, by the lower courts. Some courts seem to follow the more expansive approach of Justice Brennan, while others have adopted Justice O'Connor's position. *Compare* Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d at 420-21 (using the Brennan view of "stream of commerce" to find personal jurisdiction in Texas over a Minnesota components manufacturer), *with* Lesnick v. Hollingsworth & Vose Co., 35 F.3d at 946-47 (using the O'Connor view of "stream of commerce" to find that personal jurisdiction in Maryland could not properly be asserted over a Massachusetts corporation that had provided asbestos-containing filters for manufacturer's cigarettes where the out-of-state defendant had not *purposefully directed* activities toward the forum state).

Ultimately, the only thing that is clear in the wake of *Asahi* is that if a defendant's contacts satisfy the more demanding "stream of commerce plus" test, then they also meet the Brennan standard. Consequently, the assertion of specific personal jurisdiction in such a case should be found to satisfy the purposeful contacts requirement of the minimum contacts test.

374. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920 (2004).

375. Atlas Global Group, L.P. v. Grupo Dataflux, 312 F.3d 168, 169-170 (5th Cir. 2002), *rev'd*, 124 S. Ct. 1920.

376. *Id.* at 170.

377. *Id.*

beginning of trial and, thereafter, complete diversity existed between the parties.[378]

- The Fifth Circuit, relying upon the rationale of *Newman-Green* and the crux of the *Caterpillar* analysis—that judicial efficiency and economy become overwhelming considerations once a case has gone to final judgment—holds that the time-of-filing rule is subject to an additional narrow exception.[379] Where, as in *Dataflux*, a jurisdictional flaw is not identified by either the court or the parties until after the jury verdict and post-filing, pre-verdict changes in the membership of the partnership cure the jurisdictional flaw before it is recognized, the district court has proper diversity jurisdiction over the action.[380] The court limited its exception with the caveat that if a jurisdictional challenge was raised at any point prior to the rendering of a jury verdict or a dispositive ruling by the court, the time-of-filing rule would apply and the case must be dismissed regardless of any later changes in citizenship.[381]

On appeal, the Supreme Court found that the Fifth Circuit erred by failing to obey the following road signs: (1) Although *Carden v. Arkoma Associates* requires that the citizenship of all the partners, general and limited, be considered for the purposes of diversity jurisdiction,[382] the limited partnership is still only a single entity constituting one party;[383] (2) As an individual party, Dataflux cannot cure a lack of diversity jurisdiction that existed at the time-of-filing with a post-filing change of citizenship;[384] (3) Therefore, the only option available in *Dataflux* was dismissal for lack of proper subject matter jurisdiction.[385]

2. *A General Principle or a Rule?*

In *Dataflux*, the Court engaged in a game of characterizations.[386] Its

378. *Id.*
379. *Id.* at 170-72.
380. *Id.* at 174.
381. *Id.*
382. Carden v. Arkoma Assocs., 494 U.S. 185, 195-96 (1990).
383. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920, 1928 (2004).
384. *See id.* at 1926 ("'[W]here there is *no* change of a party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the time of the commencement of the suit.'") (quoting Conolly v. Taylor, 27 U.S. (2 Pet.) 556, 565 (1829)).
385. *Id.* at 1926, 1930.
386. *See id.* at 1928 ("Regardless of how one characterizes the acknowledged

first characterization concerned Justice John Marshall's 1824 determination that federal jurisdiction ordinarily depends on the facts as they exist at the time a complaint is filed.[387] Previously, the *Newman-Green* Court characterized this determination as "a general principle . . . susceptible to exceptions."[388] In *Dataflux*, however, Justice Marshall's determination now constituted a "rule [that is] hornbook law . . . taught to first-year law students in any basic course on federal civil procedure."[389] Justice Scalia, writing for the five-justice majority, further emphasized that the Court had faithfully applied the rule irrespective of "the costs it imposes."[390] To provide an example, the majority relied on *Anderson v. Watt*.[391] *Anderson* involved a situation where diversity jurisdiction was lacking due to the co-citizenship of a co-executor of an estate.[392] The parties attempted to cure the diversity defect by withdrawing the nondiverse co-executor from the suit (as both an executor and a plaintiff), but the Court refused to give effect to the post-filing change of parties to the suit.[393] The Court declined to salvage the adjudication even though the action had been commenced almost five and one-half years earlier and land had been sold pursuant to a decree by the trial court.[394]

In addition to employing *Anderson* as an illustration of the costs that must be borne by meticulously upholding the time-of-filing rule,[395] the *Dataflux* majority presented *Anderson* as a companion piece to *Carden*. According to the majority's interpretation, both cases involved a single entity whose citizenship for the purposes of diversity was determined by

jurisdictional defect, it was never cured.").

387. *Id.* at 1924 (quoting Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824)).

388. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989).

389. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. at 1924.

390. *Id.* While the *Dataflux* dissent agreed that the time-of-filing rule had "categorically" been applied "to post-filing changes that otherwise would *destroy* diversity jurisdiction," it maintained that "the Court ha[d] not adhered to a similarly steady rule for post-filing party line-up alterations that *perfect* previously defective subject-matter jurisdiction." *Id.* at 1931 (Ginsburg, J., dissenting).

391. *Id.* at 1924 (citing Anderson v. Watt, 138 U.S. 694, 698, 708 (1891)).

392. Anderson v. Watt, 138 U.S. at 708.

393. *See id.* (noting that the plaintiffs had amended the complaint, restating the co-executor's residence to make him a diverse party, but because the "bill as originally filed" was defective, the action could not proceed in federal court).

394. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. at 1924 (citing Anderson v. Watt, 138 U.S. at 698).

395. *See id.*

considering the citizenship of all its members.[396] Pursuant to the rule of *Carden*, the majority also characterized the limited partnership in *Dataflux* as an entity comprised of its members.[397] Therefore, the refusal in *Anderson* to give diversity-perfecting effect to the alteration of a co-executorship into a sole executorship no matter what the cost,[398] was equally applicable to *Dataflux*. Consequently, the decision in *Anderson* was analogous to the refusal in *Dataflux* to recognize that a change in members constituting the partnership perfected diversity jurisdiction.[399]

The majority's characterization of *Anderson*, however, was "hardly preordained."[400] The case could have been just as easily characterized as a refusal to allow the dismissal of an independent, severable party to cure the jurisdictional flaw. Under this characterization, the co-executorship could "[w]ith equal plausibility" be characterized as "an 'entity' comprising its members," or "an 'aggregation' composed of its members."[401] Writing for the dissent, Justice Ginsburg opined that in situations where either characterization was feasible, *Newman-Green* and *Caterpillar* suggested that the one salvaging jurisdiction ought to prevail.[402]

3. *A Change in Partners or a Change in Parties?*

As intimated above, the issue of whether a limited partnership should be viewed as "an 'entity' comprised of its members" or "an 'aggregation' composed of its members" is much more than a question of semantics.[403] The difference between these two characterizations is the determinant in *Dataflux*. It answers the question of whether the post-filing change in the partnership's members should be characterized as a change in partners or a

396. *Id.* at 1924 n.3, 1928-29.

397. *Id.* at 1928-29 ("'[T]he question presented today is not which of various parties before the Court should be considered for purposes of determining whether there is complete diversity of citizenship. . . . There are *not* . . . multiple respondents before the Court, but only *one*: the artificial entity called Arkoma Associates, a limited partnership.'") (quoting Carden v. Arkoma Assocs., 494 U.S. 185, 188 n.1 (1990)).

398. *Id.* at 1924 (recognizing the *Anderson* Court's dismissal of an action that had been initiated five and a half years prior) (citing Anderson v. Watt, 138 U.S. at 698).

399. *Id.* n.3.

400. *Id.* at 1935 n.7 (Ginsburg, J., dissenting). Justice Ginsburg was joined in her dissent by Justice Stevens, Justice Souter, and Justice Breyer. *Id.* at 1930.

401. *Id.* at 1935 n.6. (Ginsburg, J., dissenting).

402. *Id.* n.7. (Ginsburg, J., dissenting).

403. *Id.* n.6. (Ginsburg, J., dissenting).

change in parties.[404]

Under *Carden*, a limited partnership is a single entity.[405] Based upon this characterization, the majority reasoned that a single entity could only constitute a single party to an action.[406] Therefore, Justice Scalia held that any "purported cure" in the jurisdictional defect in *Dataflux* resulted "not from a change in the parties to the action, but from a change in the citizenship of a continuing party."[407] Therefore, it was irrelevant that the post-filing change in the membership of the limited partnership had resulted in the establishment of the requisite complete diversity between the parties.[408] According to the rule pronounced by Chief Justice Marshall in 1829, unless there had been a change of parties, any diversity jurisdiction flaw that existed at the commencement of the suit was incurable.[409] A party cannot unilaterally cure a jurisdictional defect that existed at the time of filing.[410] Therefore, the exception to the time-of-filing rule carved out by the Fifth Circuit was "unsound in principle and certain to be ignored in practice."[411]

The error in both the *Carden* and *Dataflux* cases was primarily due to the Court's failure to grasp the basic difference between the aggregate and the entity theories of partnerships. Originally, the common law employed the aggregate theory of partnership.[412] Under this theory, a general

404. *Id.* at 1927; *see also id.* at 1936 (Ginsburg, J., dissenting) ("As the Court correctly states, the crux of our disagreement lies in whether to 'treat a change in the composition of a partnership like a change in the parties to the action.'") (quoting *id.* at 1927).

405. *See id.* at 1929 n.8 ("We think it evident that *Carden* decisively adopted an understanding of the limited partnership as an 'entity,' rather than an 'aggregation' . . . .") (citing Carden v. Arkoma Assocs., 494 U.S. 185, 188 n.1 (1990)).

406. *Id.* at 1929 ("[T]his is a case . . . in which a single party changed its citizenship by changing its internal composition.").

407. *See id.* at 1926 (holding that "[a]llowing a citizenship change to cure the jurisdictional defect that existed at the time of filing would contravene" long-standing precedent).

408. *Id.*

409. *See id.* ("To our knowledge, the Court has never approved a deviation from the rule articulated by Chief Justice Marshall . . . that '[w]here there is *no* change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit.'") (citing Connolly v. Taylor, 27 U.S. (2 Pet.) 556, 564 (1829) (alteration in original)).

410. *See id.* (citing Connolly v. Taylor, 27 U.S. (2 Pet.) at 564).

411. *Id.* at 1927 (refusing to allow a party's post-filing change of citizenship to cure a court's erroneous finding of diversity among the parties).

412. Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporter's Overview*, 49 BUS. LAW. 1, 3-4 (1993).

partnership was an aggregation of individuals.[413] Therefore, it was considered to be a relationship between individuals engaged in business as co-owners[414] who jointly owned property and who were jointly liable for partnership debts or obligations. Over time, the aggregate theory proved to be unworkable.[415] As a result, the Revised Uniform Partnership Act (RUPA) adopted the entity theory of partnership.[416] Under this concept, the partnership is viewed as "a legal person [entirely] separate from its partners" with the power to sue and be sued in its own name.[417]

Like RUPA, the Uniform Limited Partnership Act (ULPA) also established that a limited partnership is an "entity distinct from its partners."[418] Further, "[a] limited partnership has . . . the power to sue, be sued, and defend in its own name and to maintain an action against a partner for harm caused to the limited partnership."[419] Therefore, either a limited partnership is a single entity with a separate legal personality, in which case the citizenship of its members should be irrelevant for the purposes of diversity jurisdiction, or it is an aggregation composed of its members, in which case it might be maintained that the citizenship of all members should be considered for diversity purposes.[420] Contrary to

413. *See id.* at 1-5 (comparing the old and new rules on partnership breakups).

414. William Draper Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617, 639 (1915). The aggregate theory "regards a partnership as an association of two or more persons carrying on business as co-principals." *Id.*

415. Under the aggregate theory, if one of the partners left the relationship, the partnership was seen as dissolved and a new partnership created, thus resulting in instability and a lack of continuity. *See* Weidner & Larson, *supra* note 411, at 4-5 (stating that this "dissolution logic had led many to conclude that, whenever a partner leaves, the property of the old partnership should be conveyed to the new partnership[,] . . . that contracts of the old partnership lapse because the old partnership . . . no longer exists[, and] . . . that a partnership could not recover on a title insurance policy after the departure of one of its members").

416. REVISED UNIF. P'SHIP ACT § 201(a), 6 U.L.A. 91 (2000).

417. Gary S. Rosin, *The Entity-Aggregate Dispute: Conceptualism and Functionalism in Partnership Law*, 42 ARK. L. REV. 395, 396 (1989); *see* Lewis, *supra* note 413, at 639 (The entity theory is "that when two or more persons form a partnership, the law should regard the association as having a legal personality distinct from the individual legal personality of each partner."). It is interesting to note that, even before RUPA adopted the entity theory of partnership, federal antidiscrimination laws applied the entity theory to partnerships. *See* Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as "Employees" Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3, 47-48 (2004).

418. UNIF. LTD. P'SHIP ACT § 104(a), 6A U.L.A. 18 (2001).

419. *Id.* § 105, 6A U.L.A. at 19.

420. It is the Author's opinion that the rules for determining the citizenship of a limited partnership or a limited liability company should mirror those for

Justice Scalia's characterization, a limited partnership cannot be both an entity and an aggregate for the purposes of determining whether the requisite diversity jurisdiction exists so as to allow the limited partnership to sue or be sued in federal district court. The *Dataflux* majority is mixing apples and oranges when it defines a limited partnership as a single entity on the one hand and, in the next breath, holds that the citizenship of all the entity's members is dispositive in terms of the availability of diversity jurisdiction.

4. *The Butterfly Effect*

The Court has declared that the rule of *Carden* currently governs how the citizenship of a limited partnership is determined for the purposes of diversity jurisdiction.[421] Because *Carden* dictates that the citizenship of all members of a partnership must be considered for purposes of determining diversity jurisdiction,[422] the only logical characterization of the limited partnership is as an aggregation of its members.[423] Consequently, Justice Ginsburg's election to embrace the "aggregate" view in *Dataflux* was intuitively the correct course of action[424] in terms of following *Carden*.

In accordance with this characterization, the dissent argued that the

corporations. While the dissent's position in *Carden* that the "real party to the controversy" approach, which would have required that only the citizenship of the general partners counted for diversity purposes, *Carden v. Arkoma Associates*, 494 U.S. 185, 205 (1990) (O'Connor, J., dissenting), is far more palatable than the ultimate rule of *Carden* mandating that the citizenship of all partners be considered, *id.* at 197, neither is really in tune with the realities of the modern business world. Due to the similarities between the limited partnership and a corporation, *see supra* notes 298-305 and accompanying text, the best approach would be to treat a limited partnership as a pseudo-corporation. The citizenship of a limited partnership would then be the state of its formation and its principal place of business. For a detailed discussion of this proposal, see Porter, *supra* note 299, at 304-06. For an excellent suggestion as to how Congress could amend 28 U.S.C. § 1332 to encompass other modern business entities, see Tribeck, *supra* note 298, at 120-24.

421. *See* Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920, 1927 n.6 (2004) (recognizing that "*Carden* is the subconstitutional rule by which [the Court] determine[s] the citizenship of a partnership").

422. Carden v. Arkoma Assocs., 494 U.S. at 195-96.

423. *See supra* notes 411-13 and accompanying text (discussing the logical foundation for the aggregate theory of determining the citizenship of a partnership for diversity purposes).

424. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. at 1934-35 & n.6 (Ginsburg, J., dissenting). The *Dataflux* dissent was misguided, however, in finding that the "'entity' comprising its members" and the "'aggregation' composed of its members" characterizations were interchangeable. *See id.* at 1935 n.6.

reorganization of the limited partnership in *Dataflux* constituted a change in parties.[425] Justice Ginsburg resisted the "far-from-inevitable alignment" of the majority that had equated the limited partnership in *Dataflux* with an individual plaintiff who changes citizenship post-filing.[426] Rather, *Dataflux* was indistinguishable from cases where multiple parties to an action were minimally, but not completely, diverse at the time the complaint was filed, and a later change in the party lineup cured a prior jurisdictional flaw.[427] Therefore, *Dataflux* was properly paired with *Newman-Green* and *Caterpillar*.[428]

According to the majority, any reliance on *Caterpillar* by the Respondent was totally misplaced.[429] The *Caterpillar* decision "broke no new ground" and was really just "an unremarkable application of [the] established exception" to the time-of-filing rule: the dismissal of a spoiler.[430] *Caterpillar* was really nothing more than a generic *Newman-Green* dismissal of a spoiler case,[431] with an attendant statutory flaw.[432] This characterization effectively limited the holding that "[o]nce a diversity case

425. *See id.* at 1936 ("In essence, then, this case seems to me indistinguishable from one in which there is 'a change in the parties to the action.'") (quoting *id.* at 1926).

426. *Id.*

427. *See id.* (discussing Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996) and Newman-Green, Inc. v. Alfonzo-Larrain, 190 U.S. 826 (1989)).

428. *Id.* at 1935-36.

429. *See id.* at 1925-26 (distinguishing *Caterpillar*, involving a statutory defect, from *Dataflux*, which involves a jurisdictional defect).

430. *Id.* at 1925.

431. *Id.* Contrary to the majority's characterization of *Caterpillar* as a generic dismissal of a spoiler case, it should be noted that, in contrast to *Newman-Green*, *Caterpillar* did not involve a situation where the court, on its own initiative or as a result of a challenge to jurisdiction, dismissed a dispensable nondiverse party in order to retroactively bestow diversity jurisdiction upon itself. *Compare* Caterpillar Inc. v. Lewis, 519 U.S. at 64 (nondiverse party dismissed after removal but before trial after "all claims involving the nondiverse defendant were settled"), *with* Newman-Green, Inc. v. Alfonzo-Larrain, 409 U.S. at 827 (dispensable nondiverse "party whose presence spoils statutory diversity jurisdiction" may be dismissed by appellate court). Ergo, it was not a generic Rule 21 dismissal of a spoiler case. *See* FED. R. CIV. P. 21 (extending to courts the power to add or drop parties). In *Caterpillar*, the major factor resulting in the perfection of jurisdiction was a unilateral act performed by the parties. Caterpillar Inc. v. Lewis, 519 U.S. at 64. The Court only dismissed the spoiler after the parties had voluntarily reached a settlement agreement. *Id.* Thus, the actual event that remedied the jurisdiction flaw was not performed by the Court. *See id.*

432. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. at 1926 ("The resulting holding of *Caterpillar*, therefore, is only that a statutory defect . . . did not require dismissal once there was no longer any jurisdictional defect.").

has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming"[433] to situations involving a Rule 21 dismissal and a remaining jurisdictional flaw. Therefore, in the majority's opinion, neither the *Newman-Green* nor the *Caterpillar* exception to the time-of-filing rule was implicated in the *Dataflux* situation.[434]

In contrast to the majority, the dissent reasoned that all three cases involved post-filing changes in citizenship that cured a prior jurisdictional flaw.[435] Further, the dissent maintained that the principles of the Court's prior decisions recognizing exceptions to the time-of-filing rule were not confined to identical "procedural scenarios."[436]

The dissent emphasized that strong policy considerations supported its characterization of the limited partnership as a "multimember enterprise with partially changed membership" that was analogous to a "multiparty litigation from which some of the [original] parties drop."[437] Justice Ginsburg chose this available characterization on the basis that whenever possible, jurisdiction and prior adjudications should be preserved.[438]

B. *To Salvage or Not to Salvage—That Is the Question*

In light of *Newman-Green* and *Caterpillar*, the decision in *Dataflux* is almost incomprehensible. The whole premise supporting the creation of retroactive jurisdiction was to salvage litigation rather than to use the wrecking ball.[439] The issue in *Dataflux* was one of first impression.[440]

433. Caterpillar Inc. v. Lewis, 519 U.S. at 75 (citation omitted).

434. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. at 1925-26.

435. *Id.* at 1935-36 (Ginsburg, J., dissenting) (arguing that all three cases involve "party line-up changes" that "simply trimmed the litigation down to an ever present core" meeting the requirements for diversity jurisdiction).

436. *Id.* at 1936 (quoting Atlas Global Group, L.P. v. Grupo Dataflux, 312 F.3d 168, 173 (5th Cir. 2002)).

437. *Id.*

438. *Id.*

439. *Id.* ("[I]n procedural rulings generally, even on questions of a court's adjudicatory authority in particular, salvage operations are ordinarily preferable to the wrecking ball.").

440. *See id.* at 1935 n.6 ("[T]he Court has addressed the time-of-filing rule in a variety of cases in which the party line-up changed during the pendency of the litigation. The Court, however, has not previously ruled on a case resembling the controversy at hand, i.e., one involving an association whose citizenship, for diversity purposes, is determined by aggregating the citizenships of each of its members.") (citation omitted).

Consequently, the case presented a golden opportunity to help ameliorate the antediluvian holding of *Carden* and recognize another exception to the time-of-filing rule. Based on its prior decisions in *Newman-Green* and *Caterpillar*, which flowed from the Court's agenda of conserving judicial resources, the logical course for the *Dataflux* Court would have been to carve out an "unincorporated association" exception as an appropriate companion to join its "dismissal of a spoiler" and "improper removal" exceptions. Instead, it selected *Dataflux* as the case for its retrenchment from its expansion of jurisdiction to preserve the results of prior litigation whenever possible.[441]

Relying once again on lineage, Justice Scalia "decline[d] to endorse a new exception to a time-of-filing rule that has a pedigree of almost two centuries."[442] The *Dataflux* decision, however, does not represent a genuine retreat by the Court from its prior jurisprudence recognizing retroactive jurisdiction. Rather, Justice Scalia was simply unable to divorce himself from the language of *Carden*. The specific terminology employed by Scalia when writing the *Carden* opinion was that the case did not concern "multiple respondents . . . but only one: the artificial entity called Arkoma Associates, a limited partnership."[443] Remaining married to this text, it was preordained that there could be no finding that the jurisdictional flaw that existed at the time-of-filing in *Dataflux* had been cured.[444] Therefore, Justice Scalia had no option but to assume a fallback position extolling a bright-line time-of-filing rule.[445]

Any characterization of *Dataflux* as a valiant attempt to reaffirm the precept that the federal courts are courts of limited jurisdiction,[446] no matter what the cost, runs afoul of the Court's total disregard of issues of

441. *Id.* at 1930 (rejecting the offer to create an exception).

442. *Id.*; *see supra* note 365 and accompanying text.

443. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. at 1928 (quoting Carden v. Arkoma Assocs., 494 U.S. 185, 188 n.1 (1990)).

444. *See id.* at 1936 (Ginsburg, J., dissenting) ("[T]he Court draws no distinction between an individual plaintiff who changes her citizenship and an enterprise composed of diverse persons, [like a limited partnership], from which one or more original members exit."); *see also* Conolly v. Taylor, 27 U.S. (2 Pet.) 556, 565 (1829) (dictum) (acknowledging as true that "if a citizen sue[d] a citizen of the same state, he [could not] give jurisdiction by removing himself, and becoming a citizen of a different state").

445. *See* Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. at 1930.

446. *See* Coury v. Prot, 85 F.3d 244, 248 (5th Cir. 1996) (holding that the federal courts, as courts of limited jurisdiction, "cannot entertain cases unless authorized by the Constitution and legislation").

federalism in *Caterpillar*.[447] It is a bit late in the day for the Court to maintain that any "'waste' of judicial resources" resulting from the dismissal of a case for lack of jurisdiction is the price of federalism.[448]

Consequently, any appearance in *Dataflux* that the Court might be reconsidering its prior position regarding retroactive jurisdiction is simply a chimera. In actuality, the achievement of *Dataflux* was the shattering of the fragile logic that had provided some semblance of support for the Court's previous endorsement of retroactive diversity jurisdiction: overriding considerations of judicial efficiency and economy.[449]

Applying the logic of *Newman-Green* and its extension in *Caterpillar* to the facts of *Dataflux* should have led to only one viable conclusion: because the jurisdictional flaw was remedied prior to trial and judgment, the district court had proper jurisdiction over the matter.[450] Arguably, there is even a stronger case for judicial efficiency and economy to trump the time-of-filing rule in *Dataflux* than in *Caterpillar*. As compared to *Caterpillar*, *Dataflux* did not even address efficiency and economy concerns having to overcome the "unerasable" statutory flaw of an improper removal[451] in the face of an erroneous failure to remand.[452]

After reading the majority opinion in *Dataflux*, one can only wonder what happened to the overriding concerns of judicial efficiency and economy.[453] Absent such concerns, neither the extension of *Newman-Green*[454] nor the exception of *Caterpillar*[455] is supportable. Concerns of

447. *See supra* Part III.B.4.

448. Atlas Global Group, L.P. v. Grupo Dataflux, 312 F.3d 168, 178 (5th Cir. 2002) (Garza, J., dissenting), *rev'd*, 124 S. Ct. 1920 (2004), *vacated by* 375 F.3d 1218 (5th Cir. 2004).

449. Caterpillar Inc. v. Lewis, 519 U.S. 61, 75 (1996); Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 836 (1989).

450. *See* discussion *supra* Part III.A-B.

451. *See* Caterpillar Inc. v. Lewis, 519 U.S. at 73 ("[The] statutory flaw—Caterpillar's failure to meet the § 1441(a) requirement that the case be fit for federal adjudication at the time the removal petition is filed—remained in the unerasable history of the case.").

452. *Id.* at 74-75.

453. *See id.* at 75 (noting that "[o]nce a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming").

454. *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. at 837-38 (authorizing appellate courts to retroactively confer jurisdiction on the district courts by dismissing spoilers).

455. *See* Caterpillar Inc. v. Lewis, 519 U.S. at 75-78 (allowing a district court to retroactively confer jurisdiction on itself despite the fact that the court lacked proper diversity jurisdiction at the time it improperly permitted removal and subsequently

judicial efficiency and economy strong enough to permit the questionable outcomes in these two cases should certainly have been strong enough to salvage jurisdiction in *Dataflux*. By ruling otherwise, the *Dataflux* Court undermined its own position and cast the legitimacy of its prior decisions into serious question.

If the Court's concern in *Dataflux* was that "carving out an exception" to the time-of-filing rule would "merely encourage[] future parties to file more appeals," thereby wasting judicial resources,[456] such a concern should have been equally relevant in *Newman-Green* and *Caterpillar*. If the "stability provided by [the] time-tested" time-of-filing rule "weigh[ed] heavily against the approval of any new deviation" in *Dataflux*,[457] why didn't this stability argument hold sway in *Caterpillar*?[458] If carving out a new exception to the time-of-filing rule in *Dataflux* would thwart "the policy goal of minimizing litigation over jurisdiction" by "arousing hopes of further new exceptions in the future,"[459] why was it acceptable to recognize and expand retroactive jurisdiction in *Newman-Green*?[460]

In the end, the *Dataflux* Court's failure to recognize "an unincorporated association" exception to the time-of-filing rule in order to salvage the adjudication and conserve judicial resources "makes a casualty either of logic or of [the] Court's [prior] jurisprudence."[461] Consequently, "there is no principled way to defend" its previous recognition of the legitimacy of retroactive jurisdiction.[462]

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denied the motion for remand as long as the jurisdictional defect was cured prior to judgment).

456. Atlas Global Group, L.P. v. Grupo Dataflux, 312 F.3d 168, 177 (5th Cir. 2002) (Garza, J., dissenting), *rev'd*, 124 S. Ct. 1920 (2004), *vacated by* 375 F.3d 1218 (5th Cir. 2004).

457. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920, 1930 (2004).

458. *See* Caterpillar Inc. v. Lewis, 519 U.S. at 72-78 (allowing for an exception to the time-of-filing rule).

459. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. at 1929-30 (citing Dretke v. Haley, 124 S. Ct. 1847, 1853 (2004) (recognizing that creating exceptions to judge-made procedural rules would entangle the federal courts in litigation that test the boundaries of each newly created exception)).

460. *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 836-38 (1989). In the *Dataflux* dissent's opinion, any "fears about the 'litigation-fostering effect' of exceptions to the time-of-filing rule" were "more imaginary than real." Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. at 1939 (Ginsburg, J., dissenting). No wave of new jurisdictional litigation is likely, as the federal courts' experience after *Caterpillar* and *Newman-Green* demonstrated. *See id.*

461. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. at 1927.

462. *Id.*

When all is said and done, the Court's decision in *Dataflux*, as informed by *Newman-Green*, *Caterpillar*, and *Carden*, did not provide clarity, but confusion. It is impossible to predict the circumstances that the Court may next deem as appropriate for carving out another judicial efficiency and economy exception to the traditional time-of-filing rule and the requirements of subject matter jurisdiction. It is still unclear whether the seductive siren of judicial frugality has ceased to sing.

V. CONCLUSION: IS THERE A CURE FOR THE SCARLETT O'HARA SYNDROME?

The message that the Court has been sending by constantly drawing new jurisdictional lines in shifting sand has certainly contributed to, if not created, the environment that is allowing the Scarlett O'Hara Syndrome to flourish. Due to its canonization of judicial efficiency and economy, it is highly unlikely that the Supreme Court can be counted on to provide the necessary antidote that will re-instill respect for the requirement of proper subject matter jurisdiction. Is there another possible remedy for the frequent lack of concern or respect currently shown by attorneys regarding their duty to ensure that they do not try to slip into federal court through the bathroom window?[463]

One answer to such malaise might be for each court of appeals to not only impress upon the district court judges of its circuit "the importance of scrupulous adherence to the jurisdictional limitations of the federal courts,"[464] but to basically require that they become the watchdogs necessary to prevent litigants from "'playing fast and loose with the judicial machinery' and using the federal courts' limited subject matter jurisdiction in bad faith."[465] In our adversarial system, attorneys drive the case in terms of pretrial matters, while the judge sets basic parameters and basically serves as a referee. Although contrary to this view of lawyer autonomy, perhaps the district courts should no longer rely on the plaintiff's jurisdictional statement made in the complaint pursuant to Federal Rule of Civil Procedure 8(a)(1)[466] or count on the defendant, who often prefers

463. *See* discussion *supra* Part III.B.

464. Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d 916, 923 (7th Cir. 1988) (Posner, J.), *rev'd sub nom.* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989).

465. Coury v. Prot, 85 F.3d 244, 249 (5th Cir. 1996) (quoting 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 0.74[1] n.29 (1996)).

466. *See* FED. R. CIV. P. 8(a)(1) ("A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain

federal court, to alert the court to any jurisdictional problem via a pre-answer motion to dismiss pursuant to Rule 12(b)(1).[467] Rather, during the beginning stages of the case, the court should conduct a "watchdog" jurisdictional hearing to ensure that it may properly entertain the case. If it is determined that subject matter jurisdiction is proper, the case goes forward; if not, the case is dismissed. This course would respect issues of federalism and conserve federal judicial time and resources by clearing the docket of procedurally flawed litigation.

While it may be a sad commentary on the overall state of the legal profession, the most effective approach to help ameliorate the Scarlett O'Hara Syndrome may be one of fear and punishment. Where it is determined that counsel intentionally misled the court regarding the existence of proper subject matter jurisdiction, judges should uniformly subscribe to the policy that mandatory sanctions, such as all costs and attorney's fees, be imposed pursuant to Rule 11[468] whenever such "unacceptable gamesmanship"[469] is uncovered. This should help prevent litigants from "'playing fast and loose with the judicial machinery'" to "us[e] the federal courts' limited subject matter jurisdiction in bad faith."[470]

To illustrate, in *Dataflux*, the defendant's answer admitted diversity jurisdiction and it was "[o]nly after the jury returned a verdict" awarding the plaintiff $750,000 in damages that the defendant chose to "draw the initial jurisdictional flaw to the District Court's attention."[471] From the facts, it is also almost certain that the defendant, Dataflux, was aware of the jurisdictional problem from very early on in the case. The plaintiff, a limited partnership, had two Mexican limited partners who "spoiled" initial diversity jurisdiction.[472] These two partners were specifically brought into the action when the court granted the defendant's motion to add the

(1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . .").

467. *See* FED. R. CIV. P. 12(b)(1) (allowing the defendant to make a motion alleging "lack of jurisdiction over the subject matter").

468. *See* FED. R. CIV. P. 11(c)(1)(B) (allowing a court, on its own motion, to order a show cause hearing from which sanctions may result).

469. C.L. Ritter Lumber Co. v. Consolidation Coal Co., 283 F.3d 226, 228 n.1 (4th Cir. 2002).

470. Coury v. Prot, 85 F.3d at 249 (quoting MOORE ET AL., *supra* note 464, § 0.74[1] n.29).

471. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920, 1923 (2004); *see id.* at 1931 (Ginsburg, J., dissenting) ("Only after the jury returned a verdict favorable to Atlas did Dataflux, by moving to dismiss the case, draw the initial jurisdictional flaw to the District Court's attention.").

472. *Id.* at 1923, 1929.

partners as parties for the purpose of the defendant's counterclaim.[473] It is difficult to assume that the defendant was totally unaware of the citizenship of those partners when it asserted its counterclaim against them. Rather, the logical conclusion is that the defendant, who may have preferred a federal venue, kept the defense in its back pocket. It only brought the jurisdictional challenge as a result of "sour grapes," i.e., after losing on the merits.[474] Although the ultimate outcome was dismissal, it is arguable that the defendant's conduct warranted an imposition of severe sanctions.

Even assuming that these proposed approaches could legitimately be implemented, their salutary effect would merely alleviate symptoms of the current problem, not provide a cure. In terms of a judicial cure, the only effective remedy would be for the Court to instruct counsel that the responsibility for initially establishing the jurisdiction of a federal court falls squarely on their shoulders. This would entail the Court reconsidering its position regarding the legitimacy of retroactive jurisdiction, which has basically circumvented the time-honored commandment that if a court lacks proper subject matter jurisdiction, all subsequent actions taken by that court have no force or legal effect.[475] The Court would have to uphold a decision vacating a judgment that was only legitimized after the fact by the creation of retroactive jurisdiction. Rather than characterizing retroactive jurisdiction as an exception to the time-of-filing rule, the Court would have to acknowledge that retroactive jurisdiction really contravenes the basic tenet of our judicial system—that the federal courts are courts of limited jurisdiction.[476]

It is certainly true that requiring the parties to relitigate a case may impose costs not only on the immediate plaintiff and defendant, but also on other litigants queued up for judicial time.[477] Due to the demonstrated,

473. *Id.* at 1929 n.9.

474. *See id.* at 1931 (noting that the defendant did not raise the potentiality of the district court's lack of subject matter jurisdiction until after losing); *see also* Coury v. Prot, 85 F.3d at 249 (noting the availability of such "bad faith" maneuvers, made possible by Rule 12(h)(3), which allows the lack of subject matter jurisdiction to be raised by either party or the court at any time).

475. *See* discussion *supra* Part II.

476. *Accord* Chase Manhattan Bank v. S. Acres Dev. Co., 434 U.S. 236, 239-40 (1978); Atlas Global Group, L.P. v. Grupo Dataflux, 312 F.3d 168, 174 (5th Cir. 2002), *rev'd*, 124 S. Ct. 1920 (2004), *vacated by*, 375 F.3d 1218 (5th Cir. 2004).

477. *See* Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d 916, 929 (7th Cir. 1987) (Easterbrook, J., dissenting) (explaining that "requiring cases to be relitigated conflicts with the principle that to the maximum extent possible the legal system should employ money sanctions, which do not create deadweight losses and injuries to third parties"), *rev'd sub nom*. Newman-Green, Inc. v. Alfonzo-Larrain, 490

deplorable lack of respect being shown for the requirement of diversity jurisdiction, however, a draconian approach to deterrence is necessary.

It is time the Court recognizes that it needs to get out of the jurisdiction renovation business. It could do so if it would endorse strict fidelity to the rule of complete diversity and its companion, the time-of-filing principle. In their pure form, these principles mandate that the jurisdictional inquiry must be a threshold question that is answered in the affirmative before a district court has the authority to entertain a case. Requiring absolute adherence by attorneys to these concepts, as recognized by Chief Justice Marshall almost two centuries ago,[478] would in effect transform lawyers into building inspectors in terms of ensuring solid jurisdictional foundations.

Responsibility for the O'Hara Syndrome, however, should not be laid solely at the feet of the Supreme Court. The question of whether a court has proper diversity jurisdiction raises issues of professionalism. Such an inquiry implicates constitutional limitations, statutory requirements, and representations to the court. It is always the duty of counsel to zealously represent the client. Nevertheless, in situations where the client, or the attorney, prefers to be in federal court but the grounds for jurisdiction are questionable, the attorney must remember that she is, first and foremost, an officer of the court. Subscribing to the view that the duty of zealous representation can "trump[] obligations of professionalism is . . . indefensible as a matter of law."[479] As the Eleventh Circuit stated:

> All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself.[480]

If attorneys remain faithful to this duty of candor and loyalty to the court, the growing "I'll think about jurisdictional issues after I get my client into federal court" attitude will hopefully become an anathema, rather than an accepted course of action that is only an embarrassment if discovered.

U.S. 826 (1989).

478. *See* Mullen v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824) (establishing the time-of-filing principle); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (establishing the complete diversity rule).

479. *See, e.g.*, Marvin E. Aspen, *Let Us Be 'Officers of the Court,'* 83 A.B.A. J., July 1997, 94, at 95.

480. Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993).

Considering the number of cases in which the issue of proper diversity jurisdiction was not raised until appeal, and then only because the court raised the question *sua sponte*, one can only wonder how many final district court judgments are entered each year by a court that lacked the power to hear the case. If never appealed, chances are that such void judgments will not only stand, but will be enforced.