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BRIGHT LINE, DIM PROSPECTS: *GRUPO DATAFLUX V. ATLAS GLOBAL GROUP, L.P.*¹ REAFFIRMS A BRIGHT LINE BARRIER TO DIVERSITY JURISDICTION FOR LIMITED PARTNERSHIPS AND OTHER UNINCORPORATED ENTITIES

I. INTRODUCTION

In 1989, a defendant limited partnership removed its suit to federal court on the basis of diversity jurisdiction and prevailed on the merits.² On appeal, the Third Circuit panel requested *sua sponte* a list from the partnership of the citizenship of all of its partners and learned that one of the partners was a partnership itself with nondiverse members as of the time of filing and removal.³ The court noted that the nondiverse members left the partnership before trial commenced and deemed the parties to be completely diverse on the basis of that unilateral “cure,” hinging its rationale for not vacating judgment on judicial economy grounds.⁴

In 2004, a fractured Supreme Court reversed a Fifth Circuit decision that held that a plaintiff limited partnership cured defective diversity jurisdiction when nondiverse members left the partnership before trial commenced.⁵ In the intervening fifteen years, the Court made two key policy pronouncements in the area of diversity jurisdiction that were relevant to this case: 1) in *Carden v. Arkoma Associates*, the Court resolved a circuit split regarding how to determine citizenship of unincorporated business associations such as limited partnerships,⁶ 2) in *Caterpillar v. Lewis*, the Court announced in broad language that judicial

1. 541 U.S. 567 (2004).

2. *Knop v. McMahan*, 872 F.2d 1132, 1137 (3d Cir. 1989), *reh'g and reh'g en banc denied* May 17, 1989 (allowing a partnership composition change to cure a nondiverse partnership after time of filing).

3. *Id.*

4. *Id.* at 1139.

5. *Grupo*, 541 U.S. at 581-82 (labeling the Fifth Circuit decision as creating a new exception to time of filing precedent).

6. 494 U.S. 185 (1990).

economy concerns are adequate justification for allowing federal courts to retain diversity cases that violated the complete diversity rule at the time of filing but subsequently satisfied complete diversity before time of judgment.⁷

This Note examines how these two policy decisions changed the landscape of diversity jurisdiction for limited partnerships and other unincorporated entities.⁸ It argues that, despite the *Grupo* majority's expressed rationale of adhering to time of filing precedent, a rule that requires complete diversity between parties to exist at the time of filing, the majority actually reaffirmed and clarified the scope of the *Caterpillar* exception to the time of filing rule.⁹ This Note further argues that the real impetus for the majority's decision was the fear that any tinkering with the bright-line rule of *Carden*, which requires courts to count the citizenship of all members of a limited partnership toward the partnership's citizenship for diversity, would undermine the Court's effort to pressure Congress into abolishing or severely curtailing diversity jurisdiction.¹⁰ Part II of this Note introduces the origins of diversity jurisdiction, how citizenship is determined for purposes of diversity, the time of filing rule and its exception, and the debate over diversity jurisdiction.¹¹ Part III presents the facts, procedural history, and majority and dissenting opinions in the *Grupo* decision.¹² Part IV analyzes the Court's reasoning and argues that the unincorporated association precedents were controlling to the case rather than the time of filing precedents, and discusses the practical effects of retaining *Carden's* bright line and arbitrary rule.¹³ Finally, Part V concludes that Congress should legislatively reform this unfair rule or the Court should use its power to do so.¹⁴

7. 519 U.S. 61 (1996).

8. See *supra* notes 6-7 and accompanying text for explanation of these policy decisions.

9. See *infra* notes 40-68 and accompanying text for a discussion of the time of filing rule and its exception.

10. See *infra* notes 69-76 and accompanying text for a discussion of the debate over diversity jurisdiction. See *infra* note 129 (discussing the proposition that the judiciary is committed to eliminating or severely curtailing diversity jurisdiction). See *infra* notes 32-39 for background on *Carden*.

11. See *infra* notes 15-76 and accompanying text.

12. See *infra* notes 77-123 and accompanying text.

13. See *infra* notes 124-87 and accompanying text.

14. See *infra* notes 187-90 and accompanying text.

II. BACKGROUND

A. Origins of Diversity Jurisdiction

1. Constitutional Origins

Federal courts have limited subject matter jurisdiction that is strictly delineated by the Constitution and federal statutes.¹⁵ Article III § 1 vested the Supreme Court with the “Judicial Power of the United States” and vested Congress with the power to create the lower federal courts.¹⁶ Article III § 2 established the limited array of “controversies” over which the federal courts may have jurisdiction.¹⁷ One of these enumerated subject matters was diversity jurisdiction, or, state law cases “between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.”¹⁸ Commentators generally agree that one of the Framers’ underlying rationales for providing a federal forum for diverse parties was a concern about bias against out-of-state litigants.¹⁹ This constitutional form of

15. See ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 5.1, at 260 (4th ed. 2003) (“A federal court may adjudicate a case only if there is both constitutional and statutory authority for federal jurisdiction.”); David Porter, “Incorporating” Limited Partnerships Into Federal Diversity Jurisdiction: Correcting *Carden v. Arkoma Associates*, 65 NOTRE DAME L. REV. 287, 287 (1990) (opining that “[f]ederal courts are courts of limited jurisdiction.”); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (opining that federal courts “possess only that power authorized by Constitution and statute”). Subject matter jurisdiction is “[j]urisdiction over the nature of the case and the type of relief sought.” BLACK’S LAW DICTIONARY 857 (7th ed. 1999).

16. U.S. CONST. art. III, § 1.

17. U.S. CONST. art. III, § 2. (granting jurisdiction over a wide array of subject matter including cases “arising under this Constitution, the Laws of the United States, and Treaties made”). Article III also grants the Supreme Court original jurisdiction over cases regarding ambassadors or where a state is a party but only grants appellate jurisdiction for all other types of controversies enumerated in Article III. *Id.*

18. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530 (1967) (quoting U.S. CONST. art. III, § 2).

19. CHERMERINSKY, *supra* note 15, § 5.3, at 289 (noting that out-of-state bias was one of the rationales for providing diversity jurisdiction); 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3605, at 398 (2d ed. 1984) (“The presumed theory behind the original grant of diversity jurisdiction in Article III was to provide a neutral, national forum for cases in which there would be a danger of bias in a state court against an out-of-state litigant.”). See generally Porter, *supra* note 15, at 292 n.35 (providing an in-depth look at the constitutional debates surrounding the inception of diversity jurisdiction (citing Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928))). See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 483-95 (1928) (indicating that the idea for diversity jurisdiction arose from the Virginia Plan and noting that in addition to bias another rationale for diversity was out-of-state creditors’ concerns that state legislatures would favor in-state debtors).

diversity jurisdiction is known as “minimal diversity” because the text of the Constitution requires nothing more than that “any two adverse parties are not co-citizens.”²⁰ But because Article III vests Congress with the power to create the lower federal courts, Congress also holds the power to statutorily limit the federal courts from exercising the full extent of subject matter jurisdiction granted in Article III, § 2.²¹

2. Statutory Origins

Congress first exercised its power to create and control the lower federal judiciary when it passed the Federal Judiciary Act of 1789.²² In *Strawbridge v. Curtiss*, the Supreme Court departed from Article III “minimal diversity” when Justice Marshall’s opinion interpreted the Judiciary Act’s diversity provision to require “complete diversity” between multiple party litigants.²³ The complete diversity interpretation

20. See *State Farm*, 386 U.S. at 530 (describing minimal diversity as “diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be cocitizens [sic]”).

21. CHEMERINSKY, *supra* note 15, § 5.1, at 260 n.2. citing *Sheldon v. Sill*, 49 U.S. 441 (1850). See *Sheldon*, 49 U.S. at 449 (“Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.”).

22. CHEMERINSKY, *supra* note 15, at 289. See The Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (creating the first district and circuit federal courts, establishing the organizational structure of the Supreme Court, and authorizing some of the elements of subject matter jurisdiction enumerated in Article III, §2, including diversity jurisdiction). The Act stated in pertinent part:

And be it further enacted, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

The Judiciary Act of 1789, ch. 20, 1 Stat. 73, 78 (1789) (emphasis in original). See generally Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923) (providing detailed documentation of the debates leading to the passage of the Act) cited in Porter, *supra* note 15 at 292 n.35.

23. *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806), *overruled in part* by *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. 497 (1844) and *superseded by statute*, Act of March 3, 1875, ch. 137, §2, 18 Stat. 470, 470-71 (“The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts.”). This concept became known as “complete diversity.” See *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978) (explaining that complete diversity means every defendant’s citizenship differs from every plaintiff’s). In *Strawbridge*, a number of Massachusetts plaintiffs brought suit in federal court under the diversity statute against a number of defendants, all but one of whom were Massachusetts citizens. Friendly, *supra* note 19, at 508-09. Justice Marshall later regretted limiting the federal diversity statute to parties with complete diversity. *Id.*; WRIGHT, MILLER & COOPER, *supra* note 19, § 3605, at 398-400 (citing *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 497, 555 (1844) (“It is within the knowledge of several of us, that he repeatedly expressed

remains intact despite numerous Congressional re-enactments and amendments of the federal diversity statutes.²⁴ The modern version of the federal diversity statute is codified at 28 U.S.C. § 1332.²⁵

Because § 1332 is the default rule for federal diversity jurisdiction, the complete diversity interpretation announced by Justice Marshall applies to original filings based on diversity as well as most, but not all, other rules of procedure that involve diversity.²⁶

*B. How is Citizenship Determined?*²⁷

The state citizenship of individual parties for purposes of diversity jurisdiction is determined by looking to that individual's domicile.²⁸ An individual's domicile is the "place of 'his true, fixed, and permanent

regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different."); CHEMERINSKY, *supra* note 15, § 5.3, at 295 (same).

24. See *Owen*, 437 U.S. at 373 (explaining that despite numerous re-enactments and amendments, Congress has never discarded the complete diversity interpretation even though it is not Constitutionally required); *State Farm*, 386 U.S. at 531 (noting "Chief Justice Marshall there purported to construe only '[t]he words of the act of congress,' not the Constitution itself").

25. 28 U.S.C. § 1332(a) (1996). The statute provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between –

- (1) citizens of different States;
- (2) citizens of a State, and citizens and subjects of a foreign state;
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties . . .

28 U.S.C. § 1332(a) (1996). The monetary requirement, or, "amount in controversy" survives from the original Judiciary Act and has steadily increased from the original \$500 to \$10,000 in 1958, \$50,000 in 1988, and finally to the present amount of \$75,000 in 1996. CHEMERINSKY, *supra* note 15, § 5.3, at 304. When parties bring a case to federal court based on diversity jurisdiction, the federal court applies the state law pertaining to the underlying controversy. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

26. See WRIGHT, MILLER & COOPER, *supra* note 19, § 3605, at 404 (explaining that one exception to the complete diversity requirement is 28 U.S.C. § 1335, the federal interpleader statute, which requires only minimal diversity); *State Farm*, 386 U.S. at 530 (explaining that the courts uniformly interpret the language of 28 U.S.C. § 1335 requiring "[t]wo or more adverse claimants, of diverse citizenship," as requiring only minimal diversity among parties).

27. Discussion of every possible type of "citizenship" for purposes of diversity jurisdiction is beyond the scope of this note. This note limits discussion of the topic to the three types of entities involved in the case: individuals, corporations, and unassociated businesses, specifically limited partnerships. For a broader overview of citizenship for purposes of diversity, see CHEMERINSKY, *supra* note 15, § 5.3, at 296-99; WRIGHT & MILLER, *supra* note 19, § 3606.

28. *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974), *cert. denied*, 419 U.S. 842 (1974) (explaining that State citizenship for purposes of diversity jurisdiction requires both U.S. citizenship and domicile in the State in question).

home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom [sic]” and can only be changed by moving to a residence in a new State with the intent to remain there.²⁹

The state citizenship of corporations for purposes of diversity jurisdiction is codified under the general diversity statute at 28 U.S.C. § 1332(c)(1) which provides in pertinent part:

[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 business³⁰

Unlike the doctrine of complete diversity, which derived from judicial interpretation of a legislative act (the Judiciary Act of 1789), the practice of treating a corporation as an entity with state citizenship distinct from its members derived from case law that Congress subsequently codified.³¹

29. *Id.* (quoting *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954)). See also *Mitchell v. United States*, 88 U.S. 350, 353 (1874) (explaining that absence from a prior residence is insufficient to establish new domicile without the requisite intent to remain at the new residence).

30. 28 U.S.C. § 1332(c)(1) (1996). A corporation is “[a]n entity (usually a business) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely . . . has a legal personality distinct from the natural persons who make it up.” BLACK’S LAW DICTIONARY 341 (7th ed. 1999).

31. CHEMERINSKY, *supra* note 15, § 5.3, at 297. See *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 497, 558 (1844) (“[A] corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person.”). *Letson* reversed the Court’s earlier rule, established in *Bank of United States v. Deveaux*, 9 U.S. 61, 91-92 (1809), which held that the court must consider all individuals composing a corporation (holding that the court would “look to the character of the individuals who compose the corporation” to determine its citizenship). In *Letson* the Court criticized the *Deveaux* rule. *Letson*, 43 U.S. at 555 (stating that *Deveaux* was criticized by the bar and by the Court). Congress amended 28 U.S.C. § 1332 to add section (c) in 1958. Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (“[A] corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.”); See James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 12 (1964) (explaining that by expanding corporate citizenship to any State where incorporated and to the principal place of business, Congress substantially limited the judicially-created corporate diversity doctrine which had granted diversity access to federal courts as long as a corporation was incorporated in the state in which the suit was brought) cited in *Porter*, *supra* note 15, at 292 n.35. Congress took this action because corporations were using the broad grant of citizenship to forum shop. See Peter B. Oh, *A Jurisdictional Approach to Collapsing Corporate Distinctions*, 55 RUTGERS L. REV. 389, 460 n.320 (2003) quoting S. REP. NO. 85-1830, at 3101-02 (1958), as reprinted in 1958 U.S.C.C.A.N. 3099, 3101-02 (stating that the reason Congress wished to narrow corporate citizenship was to prevent “the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another state”).

Congress failed to codify the state citizenship of limited partnerships, a form of unincorporated business entity, for purposes of diversity jurisdiction and judicial treatment varied wildly until 1990.³² In *Carden v. Arkoma Associates*, the Supreme Court resolved the inconsistency among circuits and held that for purposes of diversity jurisdiction, courts must consider the citizenship of all members of an unincorporated business association.³³

In *Carden*, an Arizona limited partnership brought a contract suit against citizens of Louisiana in federal court.³⁴ The defendants filed a motion to dismiss and alleged that one of Arkoma's limited partners was a citizen of Louisiana, but the court denied the motion.³⁵ After a verdict for the partnership, the Fifth Circuit only considered the general partners' citizenship for purposes of diversity and held that complete diversity existed between the parties.³⁶

In a five-to-four decision, the Supreme Court majority examined its precedent and reasoned that after the Court created citizenship status for corporations in *Letson*, in subsequent cases it refused to extend the same citizenship status for unincorporated entities such as limited partnerships.³⁷ The dissent argued in favor of adopting a "real parties to

32. See WRIGHT, MILLER & COOPER, *supra* note 19, at § 3630, 682-84 (2d ed. 1984) (explaining that courts frequently split over whether limited partners' citizenship should be considered in addition to general partners); John McCormack, Comment, *Carden v. Arkoma Associates: The Citizenship of Limited Partnerships, Associations, and Juridical Entities – A Chilling Future for Federal Diversity Jurisdiction*, 27 NEW ENG. L. REV. 505, 509 (1992) (explaining that prior to 1990, the Second and Fifth Circuits only considered general partners' citizenship while the Third, Fourth, Seventh, and Eighth Circuits considered all member partners' citizenship to determine diversity). See also LARRY E. RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES, 292 (2d. ed. 2000) ("A limited partnership has general partners whose rights and duties are mostly subject to the general partnership statute, as well as limited partners who have limited liability and whose rights and obligations are governed by statutory provisions that are primarily aimed at protecting creditors."); 3 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIPS § 12.01, at 12:5-12:6 (1999) (explaining that limited partners tend to be passive suppliers of capital analogous to shareholders in a corporation).

33. *Carden*, 494 U.S. at 194. This analysis of member citizenship must extend to each level of an unincorporated association, i.e., if a limited partnership (L1) has another limited partnership (L2) as a member, one must examine the citizenship of all the members of L2 and count them against the citizenship of L1. See, e.g., *Meyerson v. Harrah's East Chicago Casino*, 299 F.3d 616, 617 (7th Cir. 2002) (per curiam) (vacating and remanding because the parties failed to allege the citizenships of the defendant unincorporated business).

34. *Carden*, 494 U.S. at 186.

35. *Id.*

36. *Id.*

37. *Id.* at 189 (citing *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 457 (1900) (holding that a limited partnership did not fall under the citizenship rule for corporations and "that rule must not be extended")). See also *Chapman v. Barney*, 129 U.S. 677, 681 (1889) (holding that a New York joint-stock company was actually a partnership, and therefore was not a citizen of New

the controversy” test that would determine which partners to count for purposes of diversity according to which partners “have control over the subject of and litigation over the controversy.”³⁸ But the majority refused to jump ahead of the legislature as it had previously done in *Letson*.³⁹

C. When is Citizenship Determined?

1. General Rule: Time of Filing

In 1824, the Supreme Court established the general rule that “the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events.”⁴⁰ Unlike Justice Marshall’s creation of the complete diversity doctrine, which derived from statutory interpretation, the time of filing doctrine did not derive from a statute but from judicial policy-making.⁴¹ The time of filing rule may actually work to protect a diversity action in situations where complete diversity existed at the time of filing but a party subsequently changes citizenship and the parties are no longer diverse.⁴² The policy supporting a “bright line” time of filing rule is that it provides “stability and certainty to the viability of the action.”⁴³

York because it was not a corporation); *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 153 (1965) (deferring to the legislature the question of whether an unincorporated labor union should be granted corporate status for purposes of diversity); *See also supra* note 32 and accompanying text for a discussion of *Letson*.

38. *Carden*, 494 U.S. at 198 (O’Connor, J., dissenting).

39. *Id.* at 196-97 (majority opinion) (noting that Congress passed up one opportunity to extend citizen status to limited partnerships and other unincorporated associations when it amended 28 U.S.C. § 1332 to extend citizen status to corporations). Justice Scalia, writing for the majority, opined that Congress failed to act despite the fact that “the existence of many new, post-*Letson* forms of commercial enterprises . . . must have been obvious.” *Id.* Justice Scalia acknowledged that the majority’s position was “technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organizations.” *Id.*

40. *Mullen v. Torrance*, 22 U.S. 537, 539 (1824); *accord Anderson v. Watt*, 138 U.S. 694, 702-03 (1891) (“And the [jurisdictional] inquiry is determined by the condition of the parties at the commencement of the suit.”).

41. *See* WRIGHT, MILLER & COOPER, *supra* note 19, § 3608, at 452 (2d ed. 1984) (explaining that the time of filing rule was a policy decision).

42. *Id.* at n.1.1 (citing *Freeport-McMoRan, Inc. v. K N Energy Inc.*, 498 U.S. 426, 428 (1991) (holding that diversity jurisdiction was maintained in a case where a non-diverse party was joined after time of filing)). *See also* *Wichita & Light Co. v. Pub. Utilities Comm’n of the State of Kansas*, 260 U.S. 48, 54 (1922) (“Jurisdiction once acquired on that ground is not divested by a subsequent change in the citizenship of the parties.”).

43. WRIGHT, MILLER & COOPER, *supra* note 19, § 3608, at 452 (2d ed. 1984) (explaining that

2. Exception for Curing Diversity After the Time of Filing

In a recent line of cases, the Supreme Court applied an exception to the time of filing rule to protect a diversity action in situations where complete diversity did not exist at the time of filing but subsequent events cured the problem.⁴⁴

a. *Newman-Green, Inc. v. Alfonzo-Larrain*

Newman-Green, an Illinois corporation, sued a number of Venezuelan defendants and a United States citizen domiciled in Venezuela and alleged diversity jurisdiction under 28 U.S.C. 1332 (a)(3).⁴⁵ Because the United States citizen domiciled in Venezuela lacked a domicile in a state, he was considered “stateless” and therefore spoiled diversity under 28 U.S.C. 1332 (a)(3).⁴⁶ After partial summary judgment for both parties, *Newman-Green* appealed and the Seventh Circuit panel granted *Newman-Green*’s motion to drop the non-domiciled U.S. citizen as a dispensable party under FED. R. CIV. P. 21, which worked to perfect complete diversity.⁴⁷ However, the Court of Appeals, sitting en banc, reversed the panel’s decision and held that Rule 21 did not apply to courts of appeals.⁴⁸ The Supreme Court reversed that decision and held that the power granted by FED. R. CIV. P. 21 to district courts to dismiss dispensable non-diverse parties applied equally to courts of appeals.⁴⁹ The majority opined that policy considerations supported using this diversity curing method because “requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for

this “uniform test” prevents courts from having the burden to track citizenship of parties throughout an action).

44. See *infra* notes 45-68 and accompanying text.

45. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989). See 28 U.S.C. § 1332 (a)(3) (conferring diversity jurisdiction in civil actions between “citizens of different States and in which foreign states or citizens or subjects thereof are additional parties”).

46. *Newman-Green*, 490 U.S. at 828 (citing *Robertson v. Cease*, 97 U.S. 646 (1878) (explaining that a U.S. citizen’s State citizenship under the diversity statute is that State in which that citizen is domiciled)).

47. *Newman-Green*, 490 U.S. at 829.

48. *Id.* at 830.

49. *Id.* at 833. See FED. R. CIV. P. 21 (“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.”). Before *Newman-Green* reached the Supreme Court, some circuits held that appellate courts must remand to district courts the decision to use Rule 21. *Newman-Green*, 490 U.S. at 830.

judicial attention.”⁵⁰

The two dissenting justices were troubled that FED. R. CIV. P. 21 did not grant explicit power to circuit courts to dismiss dispensable parties.⁵¹ But the majority stated that “practicalities weigh[ed] heavily” in favor of the grant of dismissal and instructed circuit courts to apply the doctrine sparingly and examine whether prejudice would ensue.⁵²

b. Caterpillar, Inc. v. Lewis

In *Caterpillar*, Lewis, a Kentucky citizen, filed a state personal injury claim in Kentucky state court against Caterpillar, a Delaware bulldozer manufacturing corporation with a principal place of business in Illinois, and Wayne Supply, a Kentucky bulldozer servicing corporation with a principal place of business in Kentucky.⁵³ A Massachusetts based insurer subsequently intervened as a plaintiff to assert subrogation claims.⁵⁴ After Lewis settled his claim against Wayne, Caterpillar filed notice of removal to federal court under 28 U.S.C. § 1441 on the basis of diversity jurisdiction.⁵⁵ Lewis filed a motion to remand back to state court and alleged that because Wayne was still a party as to the insurer, complete diversity did not exist.⁵⁶ The district court denied Lewis’ motion to remand and Wayne subsequently settled its claim with the insurer and was dismissed from the action before trial commenced.⁵⁷

On appeal from a verdict for Caterpillar, the Sixth Circuit held that the district court’s denial of Lewis’ motion to remand was error and

50. *Newman-Green*, 490 U.S. at 836.

51. *Id.* at 840 (Kennedy, J., dissenting). Justice Kennedy was joined by Justice Scalia. *Id.*

52. *Id.* at 837 (majority opinion). The majority felt that dismissing the case at that point after judgment forced parties to go through “judicial hoops for the sake of hypertechnical jurisdictional purity.” *Id.*

53. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64-65 (1996).

54. *Id.* at 65.

55. *Id.* The requirements for removal of a case from state to federal court as a diversity action are as follows:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants . . .

(b) . . . Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441.

56. *Caterpillar*, 519 U.S. at 65. See 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”).

57. *Caterpillar*, 519 U.S. at 66.

vacated the judgment for lack of subject matter jurisdiction.⁵⁸ The Supreme Court, in a unanimous opinion authored by Justice Ginsburg, agreed with the Sixth Circuit that the district court should have granted the motion to remand, but held that “overriding considerations” existed because complete diversity existed between the parties at the time of judgment.⁵⁹

The Court held that the policies announced in *Newman-Green* were “instructive” despite the fact that the case did not involve a removal scenario, because both cases involved defective diversity that was cured prior to judgment.⁶⁰ Justice Ginsburg stated the exception to the time of filing rule as follows: “Once 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.”⁶¹ The Court downplayed Lewis’ argument that the decision would encourage non-diverse defendants to remove prematurely and predicted that defendants would not risk a lack of complete diversity being discovered prior to judgment.⁶²

c. Post-Caterpillar cases

Most lower courts that considered the effect of *Caterpillar* before the Court heard *Grupo* did not distinguish the applicability of its judicial economy exception on the basis of the procedural method used to bring a diversity action to federal court.⁶³ However, in *Saadeh v. Farouki*, the

58. *Id.*

59. *Id.* at 75.

60. *Id.* at 76. “Beyond question, as Lewis acknowledges, there was in this case complete diversity, and therefore federal subject matter jurisdiction, at the time of trial and judgment.” *Id.* at 73.

61. *Id.* at 75. The Court was influenced by two earlier removal cases, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), and *Grubbs v. General Elec. Credit Corp*, 405 U.S. 699 (1972). *Caterpillar*, 519 U.S. at 70 (“[E]ach suggests that the existence of subject-matter jurisdiction at time of judgment may shield a judgment against later jurisdictional attack.”). In *Finn* the Court stated,

There are cases which uphold judgments in the district courts even though there was no right to removal. In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment.

341 U.S. at 16. In *Grubbs*, the Court relied on this language from *Finn* to allow a judgment in an improperly removed case to stand. 405 U.S. at 705.

62. *Caterpillar*, 519 U.S. at 77 (“The well-advised defendant, we are satisfied, will foresee the likely outcome of an unwarranted removal – a swift and non-reviewable remand order.”).

63. Most lower courts distinguished *Caterpillar* on the ground that a case had not reached judgment before the defect in diversity was raised. *See, e.g.*, *Vasura v. Acands*, 84 F. Supp. 2d 531, 537 (S.D.N.Y. 2000) (distinguishing *Caterpillar* because the defect to diversity was discovered

D.C. Circuit declined to extend the *Caterpillar* judicial economy exception to the time of filing rule in a diversity action originally filed in federal court.⁶⁴ At the time of filing in that breach of contract case, there were aliens on both sides of the action in violation of 28 U.S.C. § 1332.⁶⁵ After Saadeh filed the complaint, Farouki became a U.S. citizen, the parties entered a stipulation to dismiss the other defendants under FED. R. CIV. P. 21, and the bench trial resulted in a judgment for Saadeh.⁶⁶ On appeal, the D.C. Circuit raised the jurisdictional issue on its own and held that the use of FED. R. CIV. P. 21 to dismiss the other alien parties cured those defects to diversity in accord with *Newman-Green*.⁶⁷ But the court held that Farouki's post-filing change of citizenship did not cure the defect in diversity as to his citizenship and that the *Caterpillar* exception was not applicable because it arose in the removal context.⁶⁸

D. The Future of Diversity Jurisdiction

The original justification for diversity jurisdiction, a concern for prejudice based on state citizenship, has given way to contemporary debate in the past forty years over the continuing usefulness of diversity jurisdiction.⁶⁹ In 1969, the American Law Institute completed a study of the federal and state court systems and concluded that diversity jurisdiction continued "to serve an important function in our federal system."⁷⁰ A bill to abolish diversity jurisdiction passed the House but

prior to judgment); *Ferry v. Bekum Am. Corp.*, 185 F. Supp. 2d 1285, 1289 (M.D. Fla. 2002) (same); *Soriano v. Amvac Chemical Corp.*, 2003 U.S. Dist. LEXIS 11437, at *4 (E.D. Louis. Jun. 23, 2003) (same).

64. *Saadeh v. Farouki*, 107 F.3d 52, 61 (D.C. Cir. 1997).

65. *Id.* at 53 (finding that Saadeh, the plaintiff, was a citizen of Greece, two defendants were permanent residents of Maryland with citizenship in Jordan and Egypt respectively, and one defendant corporation held citizenship in the United Kingdom and Monaco). Another defendant was a corporation with citizenship in the District of Columbia. *Id.* The District of Columbia is considered a "state" under the diversity statute. 28 U.S.C. § 1332(d).

66. *Saadeh*, 107 F.3d at 54.

67. *Id.* at 56. See *supra* note 49 (explaining that FED. R. CIV. P. 21 permits dismissal of dispensable non-diverse parties); *Newman-Green*, 490 U.S. at 832 (granting circuit courts the authority to use FED. R. CIV. P. 21 directly rather than remand to district courts).

68. *Saadeh*, 107 F.3d at 57 ("Although we are mindful of the 'considerations of finality, efficiency and economy' that concerned the Supreme Court in *Caterpillar*, those concerns in the removal context are insufficient to warrant a departure here from the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed.")

69. See WRIGHT, MILLER & COOPER, *supra* note 19, § 3601, at 345 ("For at least the last 40 years the desirability of diversity jurisdiction has stirred continuing debate in the law reviews and in the halls of Congress.")

70. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE

died in the Senate in 1978.⁷¹ Opponents concede that since that effort, Congressional reforms have been modest and primarily achieved through periodic increases in the amount-in-controversy.⁷² In 1990, the Federal Courts Study Committee recommended abolishing diversity jurisdiction except for complex, multi-state actions, interpleader, and alienage jurisdiction.⁷³ The primary argument of opponents of diversity jurisdiction is the necessity to decrease the federal courts' caseload.⁷⁴

AND FEDERAL COURTS, 1 (1969), cited in CHEMERINSKY, *supra* note 15 at 293. ALI commenced the study in response to a request during a 1959 address to the institute by Chief Justice Earl Warren. AMERICAN LAW INSTITUTE, *supra* note 70 at ix. Warren noted "the constant upward trend in the total volume" of the federal caseload and interest in Congress in limiting or abolishing diversity jurisdiction. *Id.*

71. CHEMERINSKY, *supra* note 15, § 5.3, at 290 (citing H.R. 9622, 95th Cong., (2d Sess. 1978)).

72. See Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97 (1990) cited in 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, 1 n.1 (1992) (noting Kramer as an opponent of diversity jurisdiction). See Kramer, *supra* note 72, at 102 (citing Congress' increasing the amount in controversy, adding principal place of business to a corporation's citizenship (in 1958), and allowing diversity-based removal only for out-of-state defendants); CHEMERINSKY, *supra* note 15, § 5.3, at 294 (citing Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847 (1996) (raising the amount in controversy to \$75,000 in 1996)). Kramer argues that Congress' failure to take significant action is because of significant lobbying by trial lawyers and the American Bar Association. Kramer, *supra* note 72, at 98-99.

73. CHEMERINSKY, *supra* note 15, § 5.3, at 291 *citing* THE FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-39 (1990). In 1988, Congress created this fifteen member Committee within the Judicial Conference of the United States with passage of the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988), and authorized the Chief Justice to appoint its members. THE FEDERAL COURTS STUDY COMMITTEE at 31. The Committee argued that alienage jurisdiction and the other two exception arenas had special characteristics worthy of a federal forum. *Id.* at 40. As a "back-up proposal" for incremental reform, the Committee recommended: banning diversity jurisdiction for in-state plaintiffs, modifying corporate citizenship to include states where licensed to do business, banning non-economic damages (such as pain and suffering) from satisfying the amount-in-controversy, and raising and indexing the amount from \$50,000 to \$75,000. *Id.* at 42.

74. CHEMERINSKY, *supra* note 15, § 5.3, at 291. See also Kramer, *supra* note 72, at 99 (recommending that Congress alleviate caseloads of federal judges by abolishing or significantly curtailing diversity jurisdiction because diversity cases comprise approximately 25% of district court civil dockets and 10 to 14% of appellate dockets). He argues that statistics show the increase on state courts dockets would amount to a little over one-percent across states. *Id.* at 110. Kramer additionally argues that state courts have more expertise and authority to handle state law questions and state law decisions made by federal judges sitting in diversity have limited precedential value. *Id.* at 104. He also argues there is less pressure to improve and reform state judiciaries because of diversity jurisdiction. *Id.* at 106. Kramer, a University of Chicago law professor and former law clerk to Henry Friendly, was one of the fifteen members of the Federal Courts Study Committee. THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 73, at 197. See also Friendly, *supra* note 19 (considered a "seminal" work in the area of diversity jurisdiction). See also THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 73, at 5 (arguing that between 1958 and 1988 cases filed in the federal district courts tripled and in the federal circuit courts increased tenfold, requiring drastic

In addition to the historical concern about bias against out-of-state litigants, contemporary proponents of diversity jurisdiction argue that it provides a choice of forum and uniformity of rules for complex litigation.⁷⁵ Proponents additionally argue that the law advances more quickly because two separate court systems provide interpretation.⁷⁶

III. STATEMENT OF THE CASE

A. *Statement of Facts*

Atlas Global Group, L.P. (“Atlas”), a Texas-based limited partnership, filed a state law breach of contract claim against Grupo Dataflux (“Dataflux”), a Mexican corporation, in federal district court.⁷⁷ Atlas based the allegation of subject matter jurisdiction solely on diversity jurisdiction.⁷⁸ At the time of filing, Atlas’ membership

reforms).

75. CHEMERINSKY, *supra* note 15, § 5.3, at 292. *But see* Kramer, *supra* note 72, at 106 (attacking the continuing importance of the historical justifications for diversity by arguing that interstate commerce is well established and does not need protection). Additionally, he notes that two major arguments in favor of maintaining diversity - the impression that federal courts provide better quality justice than state courts and the concern for bias against out-of-state litigants - are difficult to measure quantitatively. *Id.* at 118. Three members of the fifteen member Federal Courts Study Committee, Senator Charles E. Grassley of Iowa, Morris Harrell, past ABA President and partner of a Dallas law firm, and Diana Gribbon Motz, partner of a Baltimore law firm, dissented from the Committee’s recommendation to abolish diversity jurisdiction as well as to the back-up proposal to modify corporate citizenship. THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 73, at 42. Harrell and Motz’s joint dissent argued that “the availability of the alternative federal forum is often an important element of justice well worth its minor costs.” *Id.* at 43.

76. CHEMERINSKY, *supra* note 15, § 5.3, at 291 (citing John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403 (1979)). *See also* John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 409 (1979), *supra* note 76 (arguing that the federal and state systems cross-pollinate improvements to procedural rules through diversity jurisdiction). Harrell and Motz’s joint dissent to the Federal Courts Study Committee recommendation to abolish diversity agreed with this argument. FEDERAL COURTS STUDY COMMITTEE, *supra* note 73, at 43.

77. Atlas Global Group, L.P. v. Grupo Dataflux, 312 F.3d 168, 170 (5th Cir. 2002), *rev’d*, 541 U.S. 567 (2004). The Texas-formed Atlas limited partnership specializes in equity placements, financial advice and consultation. Brief of Appellants at 2, Atlas Global Group, L.P., v. Grupo Dataflux, 312 F.3d 168 (5th Cir. 2002) (No. 01-20245), 2001 WL 34633472. *See* TEX. REV. CIV. STAT. ANN. art. 6132a-1 § 1.02(6) (Vernon 2004) (describing a Texas limited partnership as “a partnership formed by two or more persons under the laws of Texas and having one or more general partners and one or more limited partners). Dataflux, a microcomputer wholesale distributor, entered a contract with Atlas to privately place stock. Petition for Writ of Certiorari at ii, *Grupo*, 541 U.S. 567 (No. 02-1689) 2009 WL 22428073 (explaining that Dataflux’s correct name is Dataflux, S.A. de C.V.). Grupo Dataflux is the parent company and Dataflux and Atlas stipulated to the use of “Grupo Dataflux” for the purposes of the litigation. *Id.*

78. *Atlas*, 312 F.3d at 170. Atlas alleged diversity under 28 U.S.C. § 1332 (a)(2) which provides jurisdiction for cases between citizens of a State and citizens or subjects of a foreign state

included one Texas limited liability company, one Delaware corporation, one Texas limited partnership, and two Mexican citizens.⁷⁹ Because under *Carden* courts consider the citizenship of each member of a limited partnership when determining whether complete diversity exists, the Mexican members' citizenship was attributed to the Atlas partnership, therefore Mexican citizens were parties on both sides of the controversy and complete diversity, as required by 28 U.S.C. 1332(a)(2), did not exist at the time of filing.⁸⁰

But the two Mexican citizens left the Atlas partnership before trial commenced.⁸¹ Neither the magistrate nor Dataflux questioned the existence of diversity between Atlas and Dataflux during the six-day jury trial.⁸² However, prior to entry of judgment on the verdict for Atlas, Dataflux submitted a motion to dismiss for lack of subject matter jurisdiction.⁸³ Dataflux argued that *Carden* required the court to count the citizenship of the Mexican citizens in its determination of whether diversity existed between Atlas and Dataflux.⁸⁴ They argued that the presence of the Mexican citizens at the time of filing the lawsuit violated the common law requirement that federal jurisdiction "depends upon the state of things at the time of the action brought. . . ."⁸⁵

Even though the Mexican partners left Atlas before trial began, the magistrate held that the Fifth Circuit's decision in *Aetna Casualty & Surety Co. v. Hillman* required that citizenship determinations for

Brief of Appellants, *supra* note 77, at 3.

79. *Id.* Interestingly, in December 1998 Dataflux moved to add Oscar Robles-Canon and Francisco Llamosa, the two Mexican partners of Atlas, as additional parties to its counter-claim against Atlas. Brief of Appellants, *supra* note 77, at 4. The court granted Dataflux's motion. *Id.*

80. *Atlas*, 312 F.3d at 170; *see Carden*, 494 U.S. at 194 (holding that the Court must look to the citizenship of all the members of a limited partnership for determining diversity). *See Strawbridge v. Curtiss*, 7 U.S. at 267 (interpreting the Judiciary Act of 1789 to require complete diversity rather than Article III's lesser requirement of minimal diversity).

81. *Atlas*, 312 F.3d at 170. In April 2000, Robles and Llamosa left the Atlas partnership and this change became final as of September 2000, one month before trial commenced in October 2000. Brief of Appellants, *supra* note 77, at 7. As of time of trial, the Atlas partnership consisted of: 1) HIL Financial Holdings, L.P., a Texas limited partnership composed of a Texas corporation with a principal place of business in Texas and a Delaware corporation with a principal place of business in Texas and 2) Capital Financial Partners, Inc., a Delaware corporation with a principal place of business in Texas. *Id.* By the time of trial, Atlas' citizenship under *Carden* included Texas and Delaware, while Dataflux's citizenship remained Mexican. *Id.*

82. *Atlas*, 312 F.3d at 170. The jury awarded Atlas a \$750,000 verdict. *Id.*

83. *Id.* *See* FED. R. CIV. P. 12(h) (3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.").

84. *Atlas*, 312 F.3d at 170.

85. *Id.* *See Mullen*, 22 U.S. at 539 (delineating the time of filing rule for diversity jurisdiction).

diversity purposes control as of the time of filing, and under *Carden*, the Mexican partners' citizenship spoiled diversity between Atlas and Dataflux as of the time of filing.⁸⁶ The district court held that the parties lacked complete diversity and granted Dataflux's motion to dismiss for lack of subject matter jurisdiction.⁸⁷

B. The Court of Appeals for the Fifth Circuit

The Fifth Circuit reversed the district court in a two-to-one decision.⁸⁸ The majority held that while the time of filing rule is the general rule, the exception to the time of filing rule announced in *Caterpillar* and guided by the practical judicial economy rationale of *Newman-Green* applied to this case.⁸⁹ Although Dataflux argued that the D.C. Circuit's refusal in *Saadeh* to apply *Caterpillar* to an original filing case was persuasive, the Fifth Circuit held that the Supreme Court did not limit the *Caterpillar* exception to one particular diversity curing procedure and that its judicial economy rationale applied to an original filing case such as *Atlas*.⁹⁰ The Fifth Circuit also refused to distinguish *Newman-Green* on the basis of its use of FED. R. CIV. P. 21 to cure the diversity problem via court-ordered dismissal.⁹¹ Additionally, the majority refused to distinguish *Caterpillar* and *Newman-Green* from *Atlas* just because in the former cases judgment was entered whereas in the instant case, a verdict was reached but the motion to dismiss was granted before judgment was entered.⁹² The majority held that this exception to the time of filing rule applied when:

- (1) an action is filed or removed when constitutional and/or statutory

86. *Atlas Global Group v. Grupo Dataflux*, No. H-97-3779 at 1 (S.D. Tex. Dec. 6, 2000) (memorandum and order granting Dataflux's motion to dismiss for lack of subject matter jurisdiction). See *Aetna Casualty & Surety Co. v. Hillman*, 796 F.2d 770, 776 (5th Cir. 1986) ("At the commencement of this suit, there was not complete diversity of citizenship and the federal district court had no subject matter jurisdiction. If a federal court lacks subject matter jurisdiction, it must dismiss the action.").

87. *Atlas*, No. H-97-3779 at 2. The court dismissed without prejudice and ordered the statute of limitations stayed from November 1997 until December 2000. *Id.*

88. *Atlas*, 312 F.3d at 174. Judge Carl E. Stewart was joined by Judge Benavides in the majority opinion.

89. *Id.*

90. *Id.* at 173-74 (refusing to consider *Saadeh* controlling, "because *Saadeh* does not provide any analytical justification for its conclusion that removal cases deserve differential treatment, we find it unpersuasive").

91. *Id.* (opining that in the absence of express language from the Supreme Court limiting diversity cures to removal cases and Rule 21 dismissals the argument was unpersuasive).

92. *Id.* at 173 (stating that "[i]t is difficult to distinguish a case where judgment has been entered from a case where nothing is left for the court to do other than enter judgment").

jurisdictional requirements are not met, (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a dispositive ruling has been made by the court, and (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured.⁹³

The majority called this a “narrow” exception because it only applied if the court did not discover the cured defect before a verdict or dispositive ruling.⁹⁴ Thus, the court found that the judicial economy rationale underpinning *Caterpillar* and *Newman-Green* provided strong support for applying the exception to this case, because the district court had jurisdiction over the case during both trial and at the time of the verdict and because “ample resources” had been committed on all sides to trying the case all the way to verdict.⁹⁵

Judge Garza, writing in dissent, argued that under the time of filing rule, the case “should be easy” because under *Carden*, Atlas had Mexican citizenship and, therefore, lacked diversity from Dataflux.⁹⁶ He argued that Atlas’ partnership change before trial was analogous to a non-diverse individual filing suit and then moving out of state before trial commenced.⁹⁷ Judge Garza argued that the majority carved out a new and broader exception to the time of filing rule because Atlas’ method of curing diversity was to unilaterally change its citizenship, whereas in *Caterpillar* the court maintained control over the method of curing diversity by dismissing the non-diverse party.⁹⁸

93. *Id.* at 174. The court opined that it would be unlikely that this exception would encourage parties to knowingly file with defective diversity because of the risk that if the defect was discovered by the court or by the opponent before verdict or ruling the general time of filing rule would apply. *Atlas*, 312 F.3d at 174.

94. *Id.* The court believed that by limiting the exception only to post-verdict discovery of defective diversity, it would minimize the possibility that parties would knowingly file suit with defective diversity and risk application of the general time of filing rule. *Id.*

95. *Id.* (arguing that “full assessment of the evidence by an impartial jury during a six-day trial” weighed against forcing the parties to re-litigate in either state or federal court).

96. *Id.* at 174-75 (Garza, J., dissenting).

97. *Id.* (comparing the facts of *Atlas* with *Sarmiento v. Texas Bd. Of Veterinary Med. Examiners* where the Fifth Circuit held that an individual’s post-filing move out of state did not cure defective diversity). See *Sarmiento*, 939 F.2d 1242, 1246 n.6 (5th Cir. 1991), *superseded by statute*, Act of Dec. 1, 1990, P.L. 101-650, Title III § 310(c), 104 Stat. 5114.

98. *Atlas*, 312 F.3d at 176-77 (Garza, J., dissenting). Judge Garza argued that the majority carved out a new exception because in this case, Atlas had sole control over the action that cured diversity. *Id.* He distinguished this scenario where Atlas used its power to alter its partnership composition to remove the diversity spoiling partners from that of *Caterpillar* where “*Caterpillar* had no control over whether Wayne supply remained in the case.” *Id.* While he did not question Atlas’ good faith, Judge Garza argued that allowing parties to have sole control over the method of curing diversity would open the door for “less scrupulous” parties. *Id.*

Judge Garza also attacked the policy rationale for the *Caterpillar* exception embraced by the majority and argued that abandoning the time of filing rule for determining diversity would do little to promote judicial economy when most resources are expended during pre-trial discovery.⁹⁹ Even if this case arguably fell within the *Caterpillar* exception, Judge Garza argued that the concern for preservation of “ample resources” based on the point at which a court rendered a verdict or ruling as opposed to the time of filing was not convincing because “there is no difference in efficiency terms between the jury verdict and, for example, the moment at which the jury retires.”¹⁰⁰ Finally, Judge Garza opined that adhering to bright-line rules that served to limit the federal courts’ jurisdiction is vital to preserving the balance between federal and state court systems.¹⁰¹ Despite Judge Garza’s misgivings, the court reversed and instructed the district court to enter judgment for Atlas.¹⁰² After the Fifth Circuit rejected Dataflux’s petition for rehearing en banc, the United States Supreme Court granted certiorari.¹⁰³

C. *The United States Supreme Court*

1. Majority Opinion

In a five-to-four decision, the Supreme Court reversed the Fifth Circuit.¹⁰⁴ Justice Scalia,¹⁰⁵ writing for the majority, reaffirmed the Court’s commitment to the general rule established in *Mullen* of determining diversity jurisdiction as of the time of filing “regardless of the costs it imposes.”¹⁰⁶ The majority agreed with Judge Garza that the

99. *Id.* at 177. (opining that creating more exceptions to bright-line rules undermines judicial economy because it causes more litigants to challenge the boundaries of the exceptions).

100. *Id.* at 177 (continuing that “[n]or, for that matter, is there a large difference between the verdict and mid-way through the trial”).

101. *Atlas*, 312 F.3d at 177-78 (Garza, J., dissenting) (arguing that the “waste” of judicial resources that results any time a federal court dismisses a case for lack of jurisdiction is worth the “price” of federalism).

102. *Id.* at 174 (majority opinion).

103. *Grupo Dataflux v. Atlas Global Group*, 540 U.S. 944 (2003) (granting petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit). In support of its petition for certiorari, Dataflux argued that the Fifth Circuit created a new exception distinct from *Caterpillar*. Petition for Writ of Certiorari, *supra* note 77, at iii-iv. Dataflux distinguished *Caterpillar* as limited to removal cases and pointed to the D.C. Circuit *Saadeh* decision as indicative of this limitation. *Id.* at 8-11. Further, Dataflux argued that principles of federalism overrode any judicial economy to be preserved by allowing an exception in this instance. *Id.* at 18.

104. *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 582 (2004).

105. Justices Rehnquist, O’Connor, Kennedy, and Thomas joined Justice Scalia. *Id.* at 568.

106. *Id.* at 570-71 (arguing that the time of filing rule is “hornbook law”). The general rule of

Fifth Circuit's exception was distinguishable from *Caterpillar* based on the method used to cure diversity; the method used in *Caterpillar*, dismissal, was different from the method the Atlas partnership used to cure diversity, changing its partnership composition.¹⁰⁷

The majority argued that under *Carden*, Atlas' post-filing membership change was analogous to a single individual moving to another state during litigation to unilaterally cure diversity by altering its citizenship.¹⁰⁸ The majority held that the Court had never approved an exception to the time of filing rule based on a party's unilateral change to its citizenship, thus the cure in *Atlas* was distinct from the cure in *Caterpillar* and violated precedent.¹⁰⁹

After attacking the Fifth Circuit exception as breaking with time of filing precedent, the majority further argued that justifying such an exception on a judicial economy grounds alone "would create an exception of indeterminate scope."¹¹⁰ Additionally, the majority argued

looking at the citizenship of the parties from the time suit was filed applies regardless of how late into the litigation a challenge to jurisdiction is brought. *Id.* (citing *Capron v. Van Noorden*, 6 U.S. 126 (1804) (stating that challenges to subject matter jurisdiction are viable until final judgment)).

107. *Id.* at 572 (arguing that the Court in *Caterpillar* "broke no new ground" when it viewed the diversity problem in that case as cured because cure by dismissal "had long been an exception to the time of filing rule"). While judicial economy "unquestionably provided the *ratio decidendi* in *Caterpillar*," the Court did not intend to extend that exception beyond the well-established procedural cure of dismissal. *Id.* at 572. *Ratio decidendi* is Latin for "the reason for deciding." BLACK'S LAW DICTIONARY 1269 (7th ed. 1999). The majority noted that the Court's power to dismiss dispensable parties was first recognized in *Horn v. Lockhart* and is now "well settled" under Rule 21. *Grupo*, 541 U.S. at 572-73. See *Horn v. Lockhart*, 84 U.S. 570 (1873) (holding that the Court may cure defective diversity by dismissing dispensable non-diverse parties). Recall that the Court recognized the courts of appeals' power to use Rule 21 in *Newman-Green*. See *supra* notes 46-53 for a discussion of that case. The majority argued that the parties to the case in *Caterpillar* and *Newman-Green* changed after the courts involved dismissed the diversity spoilers, but in *Atlas*, the parties never changed, because under *Carden*, the partnership entity itself is the party rather than the member partners. *Grupo*, 541 U.S. at 579-80.

108. *Grupo*, 541 U.S. at 575 (arguing that when Atlas dropped the Mexican partners from its partnership it changed its citizenship rather than changing the parties to the litigation). The majority acknowledged that for purposes of diversity determinations the courts examines the "aggregation" of a limited partnership's members but opined that "we think it evident that *Carden* decisively adopted an understanding of the limited partnership as an "entity," rather than an "aggregation," for purposes of diversity jurisdiction." *Id.* at 579 n.8. The majority refused to acknowledge that there was even minimal diversity between Atlas and Dataflux at the time of filing. *Id.* at 579.

109. *Grupo*, 541 U.S. at 574 (citing *Conolly v. Taylor*, 27 U.S. 556 (1829) (explaining 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")). The majority reasoned that Atlas violated this principle because the partnership remained a party to the case, only a change in its internal citizenship occurred because the Court could not use Rule 21 to dismiss partners from the partnership. *Grupo*, 541 U.S. at 574-75. The majority stated that it knew of no deviation from *Conolly's* requirement that the parties' citizenship status be evaluated as of the time of filing. *Id.*

110. *Id.* at 576 (arguing that the Fifth Circuit's attempt to limit the exception to situations

that because in its view the Fifth Circuit created a new exception distinct from *Caterpillar*, judicial economy would actually be undermined rather than enhanced because it would result in a rise in collateral jurisdictional challenges.¹¹¹

2. Dissenting Opinion

Writing for the dissent, Justice Ginsburg¹¹² agreed that the general rule established in *Mullen* that requires diversity between parties at the time of filing “generally, is altogether sound,” but argued that the majority narrowed the *Caterpillar* exception further than the Constitution and the federal diversity statute required.¹¹³ The judicial economy-based exception derived from *Caterpillar* and *Newman-Green* transcends any distinction between an originally-filed and a removed case because the purpose of curing diversity in both situations is to perfect statutory diversity, as occurred in the case at bar when the

where nobody raised the defect in diversity until verdict or dispositive ruling was “unsound in principle” and would be ignored by practitioners). If a court discovered before a verdict or dispositive ruling that a defect in diversity existed at the time of filing (the line drawn by the Fifth Circuit) it would be “unsound in principle” for a court to dismiss just because of when the defect becomes known if in fact the defect has been cured. *Id.* The majority opined that the “artificial limitation” drawn by the Fifth Circuit would be “discarded in practice” because of the realities of the diversity litigation environment. *Id.* Drawing on diversity litigation statistics from 2003 the majority noted that only eight-percent of diversity cases went to trial and the median time to disposition was two years. *Id.* The majority agreed with Judge Garza’s opinion that limiting the curing exception to scenarios where the defect was not detected until after verdict or dispositive ruling would not promote efficiency. *Grupo*, 541 U.S. at 574.

111. *Id.* at 580-81 (arguing that the purpose of the time of filing rule, to prevent constant re-litigation of jurisdiction as parties’ circumstances change, is thwarted by new exceptions). The majority viewed the risk of opening the floodgates as greater because of the “expandable” efficiency rationale that grounded the exception. *Id.* at 581. The majority saw this case in particular as a prime example of wasted efficiency. *Id.* Because of the uncertainty surrounding the *Caterpillar* exception, Atlas spent 3 ½ years litigating jurisdiction rather than re-litigating the merits or negotiating for a settlement with Dataflux. *Id.* The majority believed that if Atlas re-filed the case the parties would settle quickly rather than “play the hand all the way through just for the sake of the game.” *Id.*

112. Justice Ginsburg authored the unanimous opinion in *Caterpillar*. In *Grupo* she was joined by Justices Stevens, Souter, and Breyer. *Grupo*, 541 U.S. at 582. (Ginsburg, J., dissenting).

113. *Id.* at 599 (opining that the Court must re-examine and adjust its precedents when needed). Because the time of filing rule was a court-created policy the court has the power to adjust and adapt the policy. *Id.* at 583. The dissent analyzed precedent and concluded that while the Court applied the time of filing rule consistently in cases where a post-filing change would destroy diversity, the Court applied the time of filing rule inconsistently in cases where a post-filing change could cure diversity. *Id.* Rather, in the most recent Supreme Court case to address *Caterpillar* the Court held that “untimely compliance” with the statutory requirement of complete diversity was allowable. *Id.* at 1932 citing *Lexecon*, 523 U.S. at 43.

Mexican partners left Atlas.¹¹⁴

The dissent conceded that the *Caterpillar* exception would not allow a single individual to move post-filing in order to cure diversity but argued that Atlas' partnership composition change was not analogous to that scenario.¹¹⁵ Rather, the dissent categorized a partial membership change of a "multimember enterprise" as analogous to multi-party litigation where some parties drop out.¹¹⁶ Examining *Carden*, the dissent concluded that although that precedent requires courts to count the citizenship of each member of a limited partnership toward that partnership's citizenship, it did not follow that minimal diversity would not exist if only some partners are non-diverse from the other party.¹¹⁷ The dissent harmonized *Caterpillar* and *Newman-Green* with this case through this minimal diversity theory.¹¹⁸ It viewed a limited partnership's ability to have minimal diversity at the time of

114. *Grupo*, 541 U.S. at 591-92 (Ginsburg, J., dissenting) (pointing out that removal jurisdiction under 28 U.S.C. § 1441 requires the same statutory diversity found in § 1332 that Atlas failed to satisfy at the time of filing). The dissent argued that it would not be logical to tolerate flawed diversity in removal cases but not in original filing cases when "[r]emoval jurisdiction, after all, is totally dependent on satisfaction of the requirements for original jurisdiction." *Id.* Regardless of the route the litigation takes to federal court, counsel and the court must be aware of jurisdictional requirements. *Id.* at 593.

115. *Id.* at 590 (agreeing with the majority that the rule of *Conolly* controls when a sole plaintiff tries to "manufacture" diversity after filing by moving to another state). The dissent reasoned that this rule is sound because there is no way for a non-diverse, individual party to have Article III minimal diversity at the time of filing, rather there is simply no diversity at all. *Id.* However, the dissent distinguished *Conolly* from this case by characterizing *Grupo* as one of first impression regarding how the time of filing rule applied to a multi-member association that is viewed as an "aggregate" of its members to determine its citizenship. *Id.* at 591 n.6.

116. *Id.* at 591 (agreeing with the majority that the key to their disagreement was over how to characterize Atlas' membership change). The dissent saw the majority's characterization of Atlas' membership change as a change in the entity's citizenship as a "far-from-inevitable alignment." *Grupo*, 541 U.S. at 592 (Ginsburg, J., dissenting). When procedural decisions are not clear cut, as the dissent alleged in this case, "salvage operations are ordinarily preferable to the wrecking ball." *Id.*

117. *Id.* at 589-90 (arguing that the *Carden* majority's admonition to Congress to decide via legislation which unincorporated entities should be given "citizenship" status for diversity purposes indicates that minimal diversity is possible). The dissent argued that if minimal diversity were not possible, Congress would be constitutionally prohibited from drafting legislation to treat limited partnerships like corporations for diversity purposes. *Id.* "Congress would be disarmed from making such determinations... if Article III itself commanded that each partner's citizenship... inescapably adheres to the partnership entity." *Id.* at 589.

118. *Id.* at 588, quoting *State Farm*, 386 U.S. at 531 ("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."). The dissent called out the majority's recognition that in both *Caterpillar* and *Newman-Green* minimal diversity existed at the time of filing. *Grupo*, 541 U.S. at 588 (Ginsburg, J., dissenting). The common thread between all three cases was the existence of minimal diversity and absence of complete diversity as required by 28 U.S.C. § 1332 at the time of filing, and the curing of that flaw later in the proceedings. *Id.* at 588-89.

filing and create complete diversity when non-diverse partners leave the partnership as the distinguishing factor from a non-diverse individual citizen who moves out of state to create complete diversity.¹¹⁹ The dissent saw room within the *Carden* precedent to apply the *Caterpillar* exception if a limited partnership had minimal diversity at the time of filing and a subsequent change in membership created complete diversity before judgment.¹²⁰

After countering the majority's precedent arguments, the dissent addressed the majority's argument that limiting the application of the judicial economy exception to fully adjudicated cases was unsound and argued that this limit made the exception manageable.¹²¹ The dissent also disagreed about the judicial economy concerns of this case and argued that allowing the exception to apply under these facts was even more compelling than in *Caterpillar*.¹²² Justice Ginsburg argued that because the judge-created time of filing rule's underlying rationale is judicial economy, "mechanical extension" of the general rule in this case thwarted that justification.¹²³

119. *Id.* (arguing that the inability of a non-diverse individual to have minimal diversity at the time of filing distinguishes that scenario). The partners who left the partnership did not move to perfect diversity, rather, they dropped out. *Id.* at 591. The dissent saw dropping partners as analogous to "a change in parties to the action." *Id.*

120. *Id.* at 591 n.7 (opining that the majority's focus on the partnership as an "entity" was "hardly preordained"). The dissent argued that if both the "aggregate" and the "entity" characterization were supportable, "*Caterpillar* and *Newman-Green* suggest that the one preserving the adjudication ought to hold sway." *Grupo*, 541 U.S. at 591 n.7 (Ginsburg, J., dissenting).

121. *Id.* at 594 n.9 (arguing that given the statistics about diversity filings the limit may be "underinclusive" but was not "illogical"). The dissent conceded that there were judicial economy concerns in cases that never concluded in trial or dispositive ruling but argued that limiting the exception to those cases that do fully adjudicate make the exception manageable. *Id.* The "sunk costs" are clear in a fully adjudicated case and are "overwhelming," justifying the application of the exception. *Id.* The dissent characterized the majority's concern for sparking litigation from a new exception as "imaginary" and argued that the exception would rarely be used. *Id.* at 597.

122. *Id.* at 597-98 (noting that unlike Lewis, the loser in *Caterpillar*, who made his motion to remand while diversity was still flawed, Dataflux, the loser in this case, failed to make a motion to dismiss until after Atlas cured diversity). The dissent also noted that *Caterpillar* removed the non-diverse case to federal court "precipitously", within one day of the statute of limitations for removal whereas Atlas filed in federal court timely to the events giving rise to the suit. *Id.* The dissent portrayed the majority's decision as giving Dataflux "an unmerited second chance." *Grupo*, 541 U.S. at 598 (Ginsburg, J., dissenting).

123. *Id.* at 594 n.9. Justice Ginsburg felt that requiring Atlas, now completely diverse from Dataflux, to refile and "go through the motions" was unnecessary and required "merely for the sake of hyper technical jurisdictional purity." *Id.* at 595 n.10 quoting *Newman-Green*, 490 U.S. at 837. The dissent felt that it was not a forgone conclusion that the parties would simply settle given both sides willingness to litigate to this point. *Grupo*, 541 U.S. at 595-96 (Ginsburg, J., dissenting).

IV. ANALYSIS

The majority cited the long established time of filing rule as its principal rationale for holding that Atlas failed to cure the defect in diversity by rearranging its partnership composition.¹²⁴ But this case required the Court to mingle precedent involving the time of filing rule and its *Caterpillar* exception with *Carden*, which adopted the bright-line rule regarding citizenship of unincorporated business associations.¹²⁵ Each of these lines of precedent that were key to the Court's decision in *Grupo* are "subconstitutional" doctrines, i.e. the Court developed the time of filing rule, its exceptions, and the bright-line partnership citizenship rules as policy decisions rather than by interpreting a Congressionally-mandated jurisdictional statute (such as 28 U.S.C. § 1332) or specific text in the Constitution.¹²⁶ Because these are Court-developed, subconstitutional doctrines, one must look beyond majority and dissent's differing analytical approaches (in this case strict versus flexible adherence to precedent) to find the Court's underlying policy rationale for the decision.¹²⁷ This section of the Note examines those analytical approaches and argues that the majority used arguments based on honoring time of filing precedent and a preference for judicial control not to attack or weaken *Caterpillar*, but rather to maintain *Carden*.¹²⁸ The decision in this case really boiled down to the majority's refusal to open up the bright-line rule of *Carden* to any exceptions because it serves as a line in the sand to Congress regarding the further expansion

124. *Id.* at 1924 (majority opinion) ("[w]e have adhered to the time-of-filing rule regardless of the costs it imposes.").

125. See *supra* notes 32-68 and accompanying text for background information about the time of filing rule, *Carden*, and *Caterpillar*.

126. *Grupo*, 541 U.S. at 590 (Ginsburg, J. dissenting) (arguing that Article III mandates neither the Court's bright-line decision in *Carden* nor the narrow interpretation of the time of filing rule and the *Caterpillar* exception in this case, rather, "the question here is plainly subconstitutional in character"). Marshall's opinion in *Mullen* establishing the time of filing rule did not derive the rule from statute or from the Constitution. *Id.* at 583 (noting that while the "complete diversity" rule developed from an interpretation of the Judiciary Act of 1789, commentators agree that the time of filing rule was a Court-based policy decision). Compare *supra* notes 22-26 and accompanying text for a discussion of the origins of the "complete diversity" requirement with *supra* notes 40-43 and accompanying text for a discussion of the origins of the time of filing requirement. *Grupo*, 541 U.S. at 578 (arguing that "[w]hether the Constitution requires it or not, *Carden* is the subconstitutional rule by which we determine the citizenship of a partnership . . ."). See also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 n.234 (1987) (discussing from the context of Eleventh Amendment jurisprudence the Court's "subconstitutional" rulings as those that "could be trumped by legislative enactment").

127. See *infra* notes 133-34 and accompanying text discussing Justices Scalia and Ginsburg's typical analytical approaches in the subject matter jurisdiction arena.

128. See *infra* notes 131-48 and accompanying text.

of diversity jurisdiction.¹²⁹ The outcome of this case has both positive and negative implications for future litigants: the Court's clarification of the *Caterpillar* exception to the time of filing rule is a positive development for multi-party litigants, but its stubborn commitment to the rule of *Carden* for unincorporated associations continues to cause grief for such entities and often completely bars their access to federal court on the basis of diversity jurisdiction.¹³⁰

A. Clear Time of Filing Precedent or *Carden*?

In *Grupo*, Justice Scalia justified the majority's decision by arguing in favor of adherence to tradition and a desire to maintain judicial control of parties at the expense of judicial economy and practicalities.¹³¹ Although the majority hinged its decision on the perceived clarity of the time of filing precedent, the close split in this decision indicates that the

129. See *infra* notes 171-87 and accompanying text. See also *supra* notes 69-76 and accompanying text for a discussion of the continuing debate over diversity jurisdiction. Commentators' accounts of events preceding significant statutory curtailments to diversity jurisdiction support the proposition that the judiciary is a driving force behind the effort to curtail diversity jurisdiction. See *Leading Cases: Federal Jurisdiction and Procedure*, 118 HARV. L. REV. 386 n.68 (2004) (henceforth "Leading Cases") (noting that 28 U.S.C. § 1332 is "a prosaic statute amended primarily to increase the amount in controversy requirement"); Amy L. Levinson, *Developments in the Law: Federal Jurisdiction and Forum Selection: Developments in Diversity Jurisdiction*, 37 LOY. L.A. L. REV. 1407, n.9 (2004) (opining that while Congress periodically increases the amount in controversy in order to alleviate the federal caseload, the legislature has actually expanded diversity jurisdiction in some arenas as recently as 2002). Levinson notes that Congress enacted Multiparty, Multiforum Jurisdiction in 2002 for accidents in which more than seventy-five persons died. *Id.* Under 28 U.S.C. § 1369, Congress only requires minimal diversity. *Id.* Timothy J. Yuncker, *Inactive Corporations and Diversity Jurisdiction Under 28 U.S.C. 1332(C): The Search for a Principal Place of Business*, 28 U. TOLEDO L. REV. 815, 821 n. 31 (1997) (indicating that the effort to amend 1332(c) to add principal place of business to corporate citizenship and limit corporate access to diversity jurisdiction was instigated by the judiciary). The recommendation for such amendment stemmed from a study initiated by the Judicial Conference of the United States and passed on to Congress. *Id.* William A. Braverman, *Janus was not a God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. REV. 1072, 1092 (1993) ("Although Congress has been willing to regulate diversity jurisdiction at the margins, by periodically raising the amount-in-controversy and by defining corporate citizenship, it has resisted attempts to eliminate diversity jurisdiction altogether."). Braverman points out of the reforms recommended by the 1990 Federal Courts Study Committee, Congress refused to adopt any of the Committee's reforms except to raise the amount-in-controversy to \$75,000 in 1996. *Id.* See also FEDERAL COURTS STUDY COMMITTEE, *supra* note 73.

130. See *infra* notes 149-87 and accompanying text.

131. *Grupo*, 541 U.S. at 582 (arguing in favor of the "stability" guaranteed by the "time-tested" time of filing rule and against exceptions that "impair the certainty of our jurisdictional rules and thereby encourage similar jurisdictional litigation"). In addition to attacking the value of judicial economy, Justice Scalia expressed concern about allowing cures to jurisdiction that do not require judicial intervention. *Id.* at 580.

Court's historical allegiance to the general rule is not crystal clear.¹³² One commentator who analyzed Justice Scalia's opinions argues that he frequently relies on arguments grounded in tradition and precedent in the area of subject matter jurisdiction to maintain limited jurisdiction.¹³³ In contrast, a study of Justice Ginsburg's opinions found that her concern with efficiency leads her to work around general rules when necessary.¹³⁴ The Justices' debate in this case over how to interpret *Anderson v. Watt* supports these authors' propositions.¹³⁵ In *Anderson*, after co-executors of an estate sued, the Court determined that one co-executor shared citizenship with a defendant.¹³⁶ The nondiverse co-executor attempted to revoke his executorship and withdraw from the case but the Court, citing *Conolly*, analogized the situation to a single party moving after time of filing to perfect diversity and dismissed the case.¹³⁷ Justice Ginsburg argued that *Anderson* was an antiquated anomaly to the Court's *Caterpillar* exception and used the case to

132. *Grupo*, 541 U.S. at 584 (J. Ginsburg, dissenting) (arguing that while the Supreme Court consistently applies the time of filing rule when a post-filing citizenship change would destroy diversity, "[i]n contrast, the Court has not adhered to a similarly steady rule for post-filing party line-up alterations that *perfect* previously defective statutory subject-matter jurisdiction"). See *id.*, comparing, e.g., *Keene Corp. v. United States*, 508 U.S. 200, 207-08 (1993) (dismissing and refusing to find an exception to the time of filing rule to excuse a defect in jurisdiction when the plaintiff had a similar suit pending in another court at the time of filing) with *Lexecon, Inc. v. Milberg Weiss Bershad Hyes & Lerach*, 523 U.S. 26, 43 (1998) (explaining that *Caterpillar* taught that "untimely compliance" with federal jurisdictional requirements before judgment is entered in a case may excuse the underlying error). But see *Grupo*, 541 U.S. at 575 n.5 (arguing for the majority that none of the cases cited by the dissent involved a post-filing citizenship change, which is how the majority categorized Atlas's membership change).

133. Daniel Capra, *Discretion Must be Controlled, Judicial Authority Circumscribed, Federalism Preserved, Plain Meaning Enforced, and Everything Must Be Simplified: Recent Supreme Court Contributions to Federal Civil Practice*, 50 MD. L. REV. 632, 633 (1991). Capra argued that Scalia's majority opinion in *Carden* illustrated his "philosophy of strict adherence to tradition," to further his goal of limiting judicial activism. *Id.* at 653-54. Capra concluded that under this style of analysis, "[i]t will be the rare case where a traditional rule of procedure will be rejected, even if it is admittedly outmoded." *Id.*

134. Elijah Yip & Eric K. Yamamoto, *Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure*, 20 HAWAII L. REV. 647, 655-56 (1998). Yip and Yamamoto argue that Justice Ginsburg is cognizant of the federal caseload crisis and the need to alleviate it. *Id.* Additionally, her judicial record indicates she takes *stare decisis* seriously and only grudgingly deviates from precedent. *Id.* at 659. However, as demonstrated by her opinion in *Caterpillar*, Justice Ginsburg is willing to work around general rules of precedent to maintain court efficiency. *Id.* at 656.

135. *Grupo*, 541 U.S. at 571 (using *Anderson* to demonstrate how much "waste" the Court would tolerate in order to maintain the time of filing rule). Justice Scalia noted that the Court in *Anderson* upheld the time of filing rule even though four years had passed since the Court's decree to sell land and the land in fact had been sold. *Id.*

136. *Anderson v. Watt*, 138 U.S. 694, 708 (1891).

137. *Id.*

support her argument in favor of viewing the Atlas partnership in this case as an aggregate capable of minimal diversity in order to salvage the judgment.¹³⁸ On the other hand, Justice Scalia drew on his practice of favoring strict interpretation of precedent and argued that *Anderson* was not anomalous when one viewed the co-executors as an entity.¹³⁹ This debate illustrates that despite Justice Scalia's insistence that the decision in *Grupo* rested on a strict adherence to the time of filing precedent, the precedent-based arguments were not used to attack the *Caterpillar* exception but rather to attack Justice Ginsburg's willingness to open the *Carden* precedent up to a loophole.¹⁴⁰

Additionally, the majority's argument that judicial control is mandatory to affect a diversity cure erroneously equated any unilateral cure with a unilateral citizenship change.¹⁴¹ But courts have approved non-judicial methods of curing diversity in addition to judge-controlled dismissal of nondiverse parties under FED. R. CIV. P. 21.¹⁴² Thus,

138. *Grupo*, 541 U.S. at 578 n.7 (Ginsburg, J., dissenting). Justice Ginsburg deemed the *Anderson* decision as "not altogether in tune" with *Caterpillar* and *Newman-Green* and viewed the co-executors, as she viewed the Atlas partners, as aggregates capable of individually dropping out of the lawsuit. *Id.*

139. *Id.* at 572 n.3. (majority opinion). Justice Scalia saw the case as "easily harmonized" with *Caterpillar* and *Newman-Green* if one viewed the co-executors as an entity, as he did the Atlas partnership, and not as independent, severable parties. *Id.* The close vote in *Grupo* supports the proposition that these were two equally plausible interpretations.

140. See *Leading Cases*, *supra* note 129, at 386 (opining that the Court in *Grupo* failed to overrule *Caterpillar*). See also Taylor Simpson-Wood, *Has the Seductive Siren of Judicial Frugality Ceased to Sing?: Dataflux and its Family Tree*, 53 DRAKE L. REV. 281, 343 (2005) (opining that Justice Scalia analyzed *Anderson* "as a companion piece to *Carden*"). See *infra*, notes 171-87 discussing *Carden*.

141. Justice Scalia called it a "curious anomaly" that if the Court treated a change in partners like a change in parties, no judicial action would be required to cure diversity and asserted that "[i]t would produce a case unlike any other case. *Grupo*, 541 U.S. at 580. See also *Leading Cases*, *supra* note 129, at 390 (opining that the majority in *Grupo* thwarted the dissent's attempt to go beyond a "judges-only" rule of curing diversity defects). The author states that "because the majority rebuffed an exception to the time of filing rule premised on changing citizenship, the only alternative – dismissal – affirms judicial power." *Id.* at 390 n.42.

142. See *Knop*, 872 F.2d at 1138 (allowing a partnership composition change to cure a nondiverse partnership after time of filing). After the defendant partnership removed to federal court on the basis of diversity jurisdiction, the court requested, *sua sponte*, a list from the partnership of the citizenship of all of its partners and learned that one of the partners was a partnership itself with nondiverse members as of the time of filing and removal. *Id.* at 1137. Note that while this case was decided pre-*Carden*, the court applied the same test of citizenship of counting all members of the partnership. *Id.* The court noted that the nondiverse members left the partnership before trial commenced and deemed the parties to be completely diverse on the basis of that unilateral "cure." *Id.* at 1138. The court hinged its rationale in judicial economy principles and stated that they grounded exceptions in *Grubbs* and *Finn*, cases also relied upon by the *Caterpillar* court. *Id.* at 1138-39. See also, *Scheinblum v. Lauderdale County Bd. of Supervisors*, 350 F. Supp. 2d 743 (2004) (allowing voluntary dismissal of a nondiverse party under FED. R. CIV. P. 41(a) to

judicial control over the method of curing is not mandatory and unilateral cure is not a “curious anomaly.”¹⁴³ Rather, the majority’s erroneous equation of unilateral cure with unilateral citizenship change was a tool used to bolster their argument that there was no room for an aggregate point of view under *Carden*.¹⁴⁴

Finally, Justice Scalia’s argument to discount the value of judicial economy in this case is undermined by his vote with the unanimous Court in *Caterpillar*, which hinged the exception to the time of filing rule wholeheartedly on judicial economy.¹⁴⁵ There are commentators and judges who devalue a judicial economy rationale for expanding a federal courts’ subject matter jurisdiction on the basis of a strict allegiance to the principles of federalism and separation of powers.¹⁴⁶ But Justice Scalia acknowledged that the rationale for the application of an exception to the time of filing rule in *Caterpillar*, a decision he joined, was judicial economy.¹⁴⁷ These erroneous justifications for the *Grupo* decision based on strictly interpreting time of filing precedent,

cure a lack of complete diversity at the time of filing). The court noted that Rule 41(a) does not require any action by the court but is a unilateral action by parties to effect dismissal. *Id.* at 746 n.3 quoting 8 MOORE’S FEDERAL PRACTICE § 41.21[4] (2004):

Because Rule 41(a) permits dismissal of particular parties, a dispensable nondiverse party may be dismissed to preserve the court’s diversity jurisdiction. The same result may be reached by dropping a party under Rule 21 or by amending the complaint to delete the nondiverse party under Rule 15(a). Which of these procedural mechanisms is employed to preserve jurisdiction is generally immaterial.

Id.

143. See *Grupo*, 541 U.S. at 593 (Ginsburg, J., dissenting) (arguing that while “a court’s attention may be attracted to the jurisdictional question by a motion to remand a removed case or a motion to drop a party” the exception is not limited by the means of curing the defect).

144. See *id.* at 592 n.8 (arguing “[w]e think it evident that *Carden* decisively adopted an understanding of the limited partnership as an “entity,” rather than an “aggregation” for purposes of diversity jurisdiction”).

145. *Caterpillar*, 519 U.S. at 75 (stating that “considerations of finality, efficiency, and economy” are “overwhelming”). Compare *id.* (approving the post-filing cure of defective diversity on judicial economy grounds in a case where litigants spent three years litigating jurisdiction) with *Grupo*, 541 U.S. at 591-82 (calling “wasteful” Atlas’s decision to spend two years litigating jurisdiction rather than re-litigating the merits or negotiating for a settlement with Dataflux).

146. See *Leading Cases*, *supra* note 129, at 392 n.50 (opining that “[a]lthough efficiency is often trotted out to justify procedural decisions . . . it does not belong in constitutional contexts”). The author praises Judge Garza’s recognition in his Fifth Circuit dissent that a lack of efficiency is a price of federalism. *Id.* The author notes that the “checks, balances, and decentralization of federalism are inherently inefficient.” *Id.* See also Simpson-Wood, *supra* note 140 at 285 (opining that the Supreme Court’s “disproportionate glorification” of the doctrine of judicial economy “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 the case”).

147. *Grupo*, 541 U.S. at 572 (stating that judicial economy “unquestionably provided the ratio decidendi”).

equating unilateral cure with unilateral citizenship change, and paradoxically downplaying judicial economy in one case while embracing it in another, belie the true reason for the majority's position in this case; its refusal to read any sort of loophole into the bright-line *Carden* rule whose true rationale is to limit diversity jurisdiction.¹⁴⁸

B. *The Clarified Scope of the Caterpillar Exception*

Some authors predicted before *Grupo* that the Court would allow the practicality rationale that evolved in *Newman-Green* and *Caterpillar* to apply beyond the procedural regimes of those cases.¹⁴⁹ An article published shortly after the announcement of the *Caterpillar* decision predicted that the judicial economy rationale in that removal case could have a broad impact on diversity jurisdiction beyond removal cases.¹⁵⁰ Another article interpreted the *Caterpillar* decision as a "unanimous promotion of judicial economy over procedural rights."¹⁵¹ Despite its

148. See *Supreme Court Decisions: Subject Matter Jurisdiction*, AALS CIVIL PROCEDURE SECTION NEWSLETTER (questioning why the majority in *Grupo* hinged upon the curing method differences between the facts of *Caterpillar* and the facts of *Grupo*). The author continues, "[w]hat is far less clear is why this should matter, unless one thinks *Caterpillar* and its predecessors were wrongly decided or one embraces (for other reasons) the majority's instinct to limit any existing exceptions to the time-of-filing rule as narrowly as is humanly possible." *Id.* See also Simpson-Wood, *supra* note 140, at 351 (referring to Justice Scalia's majority opinion in *Carden* and stating that "[r]emaining 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"). Simpson-Wood argued that Justice Scalia used time-of-filing precedent as a "fallback position" in *Grupo* because of his bright-line analysis of the limited partnership in *Carden* as an entity. *Id.* The author reasoned that the judicial economy rationale that supported the "questionable outcomes" of both *Newman-Green* and *Caterpillar* "should certainly have been strong enough to salvage jurisdiction in *Dataflux*." *Id.* at 352.

149. See, e.g., Lionel M. Schooler, *Keeping up with: The Evolution of Diversity Jurisdiction: Atlas Global Group, L.P. v Grupo Dataflux*, 40 HOUSTON LAWYER 47 (2003) ("The Fifth Circuit detected in these decisions a common sense approach by the Supreme Court to jurisdictional issues . . ."), Mark R. Kravitz, *Salvaging Jurisdiction: The Newman-Green Exception Can Be A Godsend For Those Who Overlooked Or Misunderstood That Pesky Little Issue of Subject Matter Jurisdiction*, 172 NEW JERSEY LAW JOURNAL 725 (2003) (stating that the practicality rationale may greatly expand the scope of the exception); Engler v. Oprah Winfrey, 201 F.3d 680, 687 (5th Cir. 2000) (stating that [t]he ultimate scope of *Caterpillar* may be unclear) quoting 14B, MILLER & COOPER, FEDERAL JURISDICTION AND PROCEDURE § 3723, at 588-89 (2d. ed. 1984) (stating that the *Caterpillar* exception was "somewhat more contentious and as yet undefined").

150. Chad Mills, Note, *Caterpillar Inc. v. Lewis: Harmless Error Applied to Removal Jurisdiction*, 35 HOUS. L. REV. 601, 617 (1998) ("Applying the Court's reasoning to the complete diversity requirement, an appellate court could not consider a lack of complete diversity to be a jurisdictional bar once the litigants have had a full and fair trial on the merits, as any error would be harmless.").

151. Donna L. Lyons, *Recent Development: Caterpillar, Inc. v. Lewis: Proper Federal Court Jurisdiction At Time of Judgment Cures an Earlier Erroneous Denial of Motion to Remand And Improperly Removed Case*, 27 U. BALT. L.F. 63 (1997) (stating that "based on the trend of judicial

scathing critique of judicial economy as a rationale, the majority in *Grupo* did not disappoint these commentators; while the opinion reaffirmed the time of filing rule, it also reaffirmed the exception and gave future litigants greater clarity about its scope.¹⁵²

Despite the fact that the end result in *Grupo* was a failure to apply the *Caterpillar* exception to an originally filed case, Dataflux's attempt to persuade both the Fifth Circuit and the Supreme Court that the D.C. Circuit's *Saadeh* decision correctly limited the scope of the *Caterpillar* decision was limited to removal cases failed.¹⁵³ When the majority expressly married the cure in *Caterpillar* to the cure defined in *Newman-Green*, it implicitly agreed with the dissent that the decision did not depend on the fact that *Grupo* was an originally filed case.¹⁵⁴ Rather than a split over removal versus original filing, the real split before *Grupo* among lower courts was whether the *Caterpillar* exception was available if the court discovered the nondiverse party before judgment.¹⁵⁵ The majority again resolved this scope question by

economy, one is unsure when the newly established line will move again). See also Thad T. Dmeris and Michael J. Mucchetti, *Vectors to Federal Court: Unique Approaches to Subject Matter Jurisdiction in Aviation Cases*, 62 J. AIR L. & COM. 959, 985 (1997) (opining that the lesson of *Caterpillar* is "all's well that ends well").

152. Many commentators now cite *Grupo* to express the continuing vitality of the time of filing rule. See, e.g., Don Zupanec, *Diversity Jurisdiction – Absence of Diversity – Defect Cured Prior to Entry of Judgment*, 19 No. Federal Litigator 2 (2004); Steve Lash, *Diversity must exist when lawsuit filed*, Chicago Daily Law Bulletin, May 18, 2004 at 2. Federal courts that have cited the case thus far do so to reiterate the time of filing rule, or to support the continuing use of the dismissal process to retroactively cure incomplete diversity of parties as in *Caterpillar*. See, e.g., *Williams v. Dow Chemical Co.*, 326 F. Supp. 2d 443 (2004) (holding that the time of filing rule still stands); *In re Bowshier*, 313 B.R. 332 (Bankr. S.D. Ohio Aug. 18, 2004) (holding that *Grupo* did not prohibit courts from using *Caterpillar* to cure diversity via dismissal).

153. See Brief for Appellee Grupo Dataflux at 10, *Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168 (No. 01-20245); Petition for a Writ of Certiorari at X, *Grupo*, 541 U.S. 567 (No. 02-1689). The Fifth Circuit declined to follow this reasoning. *Atlas*, 312 F.3d at 173 (finding *Saadeh* unpersuasive because the D.C. Circuit did not provide any rationale for rejecting *Caterpillar* on the basis of it being a removal case). Neither the majority nor dissenting opinions of the Supreme Court in *Grupo* even mention *Saadeh*. See also *supra* notes 64-68 and accompanying text for a discussion of *Saadeh*.

154. *Grupo*, 541 U.S. at 592-93 (Ginsburg, J., dissenting) (arguing that because removal jurisdiction based on diversity requires satisfaction of 28 U.S.C. 1332 diversity requirements just as original filings require there is no distinction based on the method of arriving in federal court). See also *id.* at 572 (majority opinion) (opining for the majority that *Caterpillar* "broke new ground" because the cure, dismissal of a nondiverse party, had "long been an exception"). The majority then cited *Newman-Green* for the proposition that the cure by dismissal method was well established. *Id.* *Newman-Green* was an originally filed case. *Newman-Green*, 490 U.S. at 828. See also *supra* notes 45-52 and accompanying text for a discussion of *Newman-Green*.

155. See *supra* note 63 (noting that some lower courts distinguished *Caterpillar* on the ground that a case had not reached judgment before the defect in diversity was raised). But see *All AT&T Corp. Fiber Optic Pltfs. v. All AT&T Corp. Fiber Optic Defendants*, 2001 U.S. Dist. LEXIS 20026,

explicitly connecting the cure in *Caterpillar* to the cure defined in *Newman-Green*, something the *Caterpillar* opinion itself did not do.¹⁵⁶ Cure by dismissal under FED. R. CIV. P. 21, which is the method used in *Newman-Green* and explicitly approved in *Grupo*, allows dismissal “at any stage of the action.”¹⁵⁷

One final clarification that the Court as a whole agreed on regarding the scope of the *Caterpillar* exception is that minimal diversity is required at the time of filing.¹⁵⁸ In this respect, the Court agreed that the Fifth Circuit version of the exception went too far.¹⁵⁹ Because the Fifth Circuit would allow constitutional defects, i.e. lack of minimal diversity, to be cured, it would permit an individual’s change of citizenship to cure diversity, something that both majority and dissent agreed violated *Connoly*’s “no change of parties” rule.¹⁶⁰

One author, who criticized the Court’s re-affirmance of the *Caterpillar* exception in *Grupo*, argued that using court-ordered dismissal of nondiverse parties under FED. R. CIV. P. 21 to cure defects in diversity after time of filing was a bad idea from its inception that is

at *21-22 (S.D. Ind. 2001) (acknowledging district court cases from the 5th, 9th and 2d circuits that distinguished *Caterpillar* on the basis of whether judgment had been entered). This court on the other hand did not read that limit into *Caterpillar* and argued that *Caterpillar*’s reasoning “extends to district courts even before the formal entry of final judgment.” *Id.* at 23.

156. Compare *Grupo*, 541 U.S. at 572 (opining for the majority that *Caterpillar* “broke no new ground” because the cure, dismissal of a nondiverse party, as noted in *Newman-Green*, had “long been an exception”) with *Caterpillar*, 519 U.S. at 74 (characterizing *Newman-Green* as “instructive” for its practicality rationale).

157. FED. R. CIV. P. 21.

158. Justice Ginsburg pointed out the necessity of minimal diversity explicitly and used it to develop her limited exception to the *Carden* precedent. *Grupo*, 541 U.S. 588 (Ginsburg, J., dissenting) (arguing that in both *Caterpillar* and *Newman-Green* minimal diversity was the common thread). The majority failed to agree with the dissent’s argument that *Atlas* was minimally diverse under *Carden* but implicitly agreed that minimal diversity was a requisite to the time of filing exception. *Id.* at 579 n.8 (calling complete diversity an “extraconstitutional” requirement). See also *Leading Cases*, *supra* note 129 at 391 (opining that both majority and dissent “treat statutory requirements for jurisdiction as distinct from constitutional requirements for jurisdiction”). The author further observes that the majority’s distinction of *Atlas*’ diversity defect from *Caterpillar*’s derived from treating *Caterpillar*’s as statutory and *Atlas*’ as constitutional and holding that statutory defects were curable after time of filing while constitutional defects were not. *Id.*

159. The Fifth Circuit exception allowed the curing of both “constitutional” and “statutory” diversity problems. *Atlas*, 312 F.3d at 174 (allowing a cure where “an action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met”).

160. *Grupo*, 541 U.S. at 574 (opining that the Court never allowed a party’s post-filing citizenship change to cure defective diversity). The majority acknowledged that “not even the dissent suggests that it ought to do so.” *Id.* See also *id.* at 590 (opining that “[w]hen a sole plaintiff files suit in federal court . . . his move to another State manufactures diversity that did not exist even minimally at the outset”).

antithetical to federalism and separation of powers.¹⁶¹ The author believes that unless Congress expressly grants the judiciary a specific power, the judiciary should interpret its powers in the subconstitutional realm of subject matter jurisdiction as restrictively as possible.¹⁶² The author argued that the Court took for granted an overbroad interpretation of its power under FED. R. CIV. P. 21 to dismiss parties and should have taken the opportunity in *Grupo* to reign in that mistaken interpretation.¹⁶³ But this argument largely parallels Justice Kennedy's dissent in *Newman-Green* (a dissent joined by Justice Scalia) that they have since flatly rejected first by joining the unanimous *Caterpillar* opinion and finally by explicitly embracing *Newman-Green* in *Grupo*.¹⁶⁴ In essence,

161. See *Leading Cases*, *supra* note 129 at 386 (arguing that the *Grupo* Court should have eliminated the *Caterpillar* exception). *Id.* at 390 (arguing that both majority and dissent bickered over how to cure diversity and "regrettably ignored the threshold question whether, constitutionally, federal courts can even do so"). The author argued that the Framers' imposed separation of powers in the Article III requirement that Congress control federal courts' subject matter jurisdiction in order to prevent "federal courts from usurping the primacy of state courts." *Id.* at 391.

162. *Id.* at 391 (arguing that restrictive mistaken interpretations of Congressional intent in the subconstitutional realm of subject matter jurisdiction are preferable to overbroad ones). When the Court makes a restrictive mistaken interpretation the litigant may still litigate the state claim in state court. *Id.* But when the Court makes an overbroad mistaken interpretation federalism is infringed because the interpretation "opens federal courts to cases Congress did not intend for them to hear." *Id.* The author argues that when Congress is "silent or ambiguous" the Court should dismiss for lack of subject matter jurisdiction. *Leading Cases*, *supra* note 129. See also Simpson-Wood, *supra* note 140, at 313 (opining that when the Court validates "retroactive jurisdiction" it is "impermissibly trespassing into an area constitutionally reserved to Congress"). Simpson-Wood believe this trespass occurs regardless of whether the Court's rationale is judicial economy or "the guise of merely setting the parameters of a court-created rule." *Id.* See also *supra* note 115 and accompanying text, describing the subconstitutional arena as that between the Constitution's Article III grant of power to the Court and Congress' explicit statutory grants of subject matter jurisdiction.

163. *Leading Cases*, *supra* note 129, at 392-93 (arguing that "in affirming the judicial practice of altering parties, which might offend the Rules Enabling Act (REA) . . . the Justices usurped Congress' exclusive power to establish jurisdictional requirements and exceptions"). The author argued that Congress authorized the judiciary to develop procedural rules under the REA but that interpreting Rule 21 to enable judges to cure diversity defects makes the Rule nonprocedural. *Id.* at 393. The author argues this interpretation is nonprocedural because it gives courts "direct and continued access to the merits when they would not have had it otherwise." *Id.*

164. See *Newman-Green*, 490 U.S. at 839 (Kennedy, J., dissenting) (arguing that if Congress intended to grant the courts the power to cure defective diversity by dismissing nondiverse parties it would have done so explicitly). The dissent agreed with the majority that 28 U.S.C. § 1653 did not grant the courts authority to cure defects in diversity only defective allegations of diversity. *Id.* Justice Kennedy concluded that because Congress felt the need to explicitly grant this "ministerial" power, the Court must not presume "the more awesome power" of actual cure in the absence of an explicit statutory grant. *Id.* While the key issue of *Newman-Green* was whether the appellate courts could use Rule 21 to dismiss nondiverse parties, Justices Kennedy and Scalia took the opportunity to attack even the district courts' ability to use Rule 21 in this fashion. *Id.* The dissenting justices attacked the judicial economy rationale for interpreting Rule 21 to apply to appellate courts. *Id.* at 842-43. *But see Caterpillar*, 519 U.S. at 73 (stating that "[b]eyond question . . . there was in this case complete diversity, and therefore federal subject-matter jurisdiction, at the time of trial and

this author proposes a much more extreme view of the Court's ability to fashion subconstitutional subject matter jurisdiction doctrine than the entire Court itself; while the Court was heavily divided in *Grupo*, it remains united in its opinion that it has the power to use FED. R. CIV. P. 21 to dismiss nondiverse parties after time of filing to "create" complete diversity.¹⁶⁵

After *Grupo*, future litigants have a brighter path to the *Caterpillar* exception; the entire Court rightly agreed that it is a valid exception to the time of filing rule.¹⁶⁶ As it stands, the exception is available in both originally filed and removed cases where there are enough parties to have minimal diversity at the time of filing and the non-diverse parties are dispensable.¹⁶⁷ However, this clarification of *Caterpillar's* scope, while a positive outcome for individual and corporate litigants in multi-party actions, comes with a negative; the majority of the Court reaffirmed the unworkable *Carden* rule, the application of which was at the heart of Atlas' defeat.¹⁶⁸ The next section of this Note analyzes why the majority of the Court remains loyal to *Carden* and why it must be overruled or limited.¹⁶⁹

C. Carden's Continuing Effect

If limited partnerships were treated the same way as corporations for citizenship determination, there would have been no jurisdictional dispute here, yet Atlas failed to challenge this "line in the sand" case and its continuing barrier to diversity jurisdiction for partnerships and other unincorporated business associations.¹⁷⁰ The majority's refusal to heed

judgment"). The district court dismissed the nondiverse party under FED. R. CIV.P. 21. *Id.* at 66. See also *Grupo*, 541 U.S. at 573 (stating that *Caterpillar* "involved an unremarkable application" of the "established" exception of dismissal by Rule 21 to cure defective diversity). Justice Scalia quoted *Newman-Green* approvingly. *Id.*

165. This agreement does not contradict their concern for expanding caseloads. See *Grupo*, 541 U.S. at 597 (Ginsburg, J., dissenting) (noting that "no wave of new jurisdictional litigation is likely, as the federal courts' experience after *Caterpillar* and *Newman-Green* shows"). The majority criticized the Fifth Circuit exception as likely to create more litigation because it viewed that exception as distinct from *Caterpillar*. *Id.* at 581 (majority opinion).

166. *But see Leading Cases*, *supra* note 129 at 386 (opining that the Court should have used *Grupo* to eliminate the *Caterpillar* exception entirely on the basis of "principles of federalism and separation of powers").

167. See *supra* notes 104-11 for a discussion of the scope of the *Caterpillar* exception as clarified in *Grupo*.

168. See *supra* notes 131-48 for a discussion of why *Carden* and not *Caterpillar* was dispositive to Atlas' case.

169. See *infra* notes 170-91 and accompanying text.

170. Compare *Knop*, 872 F.2d at 1138 (holding one year before *Carden* that when non-diverse partners left a partnership post-removal but before trial and judgment, diversity was cured and the

Justice Ginsburg's call to modify this subconstitutional precedent in light of its impracticality is the subject of this section.¹⁷¹

Many commentators, including the *Carden* majority itself, criticize the *Carden* decision as an arbitrary decision justified on the surface, just as *Grupo* was, by reliance on precedent and deference to Congress.¹⁷² These commentators argue that had the *Carden* majority examined the way a modern limited partnership works, as the dissent did, it would find that determining citizenship for purposes of diversity jurisdiction on whether an entity is incorporated or not is a distinction out of touch with modern business organizations.¹⁷³ The *Carden* majority's perceived

judgment could stand) with *Belleville Catering Co. v. Champaign Marketplace, LLC*, 350 F.3d 691, 692 (7th Cir. 2003) (applying the *Carden* rule and dismissing a district court judgment in a case with a non-diverse limited liability corporation as a party. "Unincorporated enterprises are analogized to partnerships, which take the citizenship of every general and limited partner.").

171. See *infra* notes 172-87.

172. See *Carden*, 494 U.S. at 196 (characterizing the decision as "technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organizations"). The majority then conceded that limited partnerships are "functionally similar" to corporations and that "considerations of basic fairness and substance over form require that limited partnerships receive similar treatment" under diversity jurisdiction. *Id.* (internal quotations omitted). See also *Capra, supra* note 133 at 654 (opining that Justice Scalia in *Carden* illustrated his practice of using arguments grounded in tradition to push for limits on judicial activism); *Porter, supra* note 15 at 296-97 (opining that the precedent used to justify counting all members of a limited partnership is a "logical syllogism based on strict definitional analysis" and epitomizes "form over substance reasoning"). *Porter* explains that the Court reasoned that limited partnerships fell within the precedents of *Chapman*, *Great Southern Fire*, *Russell*, and *Boulogny* simply because those cases dealt with unincorporated associations, and a limited partnership is an unincorporated association. *Id.* See *supra* note 38 regarding the four cases relied on by the *Carden* majority. See also *Simpson-Wood, supra* note 140 at 332 (opining that in *Carden* "the Court turned a blind eye to the realities of today's business world").

173. See *Carden*, 494 U.S. at 198 (O'Connor, J., dissenting) (arguing that the majority, under the guise of deferring to Congress, actually created a "newly formulated rule that the Court will, without analysis of the particular entity before it, count every member of an unincorporated association for purposes of diversity jurisdiction"). Justice O'Connor examined the entities involved in *Chapman* (joint stock company), *Great Southern Fire* (limited partnership association), *Russell* (sociedad en comandita), and *Boulogny* (labor union) in comparison with a modern limited partnership organized according to the Uniform Limited Partnership Act (1969) and agreed with commentators that limited partners of a limited partnership should not be counted towards the citizenship for diversity jurisdiction. *Id.* at 202-06 (citing Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U.CHI.L.REV. 384 (1978), Note, *Who Are the Real Parties in Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?*, 61 WASH.U.L.Q. 1051 (1984), Note, *Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 TEXAS L. REV. 243 (1978)). Justice Scalia's only counter-argument to the dissent's in-depth analysis was that the analysis was based on scholarly commentary rather than the text of the four precedents. *Carden*, 494 U.S. at 195. See also *Oh, supra* note 31, at 392 (opining that the Court relied on path dependence rather than business realities that no longer justify distinct treatment of limited partnerships and corporations under the diversity statute); *McCormack, supra* note 32, at 556 n.440 (noting that *Porter's* analysis of modern limited partnerships concludes they are "pseudo-corporations"). See *Porter, supra* note 15, at 301-

deference to Congress was likely more motivated by the desire to curtail diversity jurisdiction caseloads than by simple judicial restraint.¹⁷⁴ It is likely that the *Carden* majority was influenced by the Federal Courts Study Commission's recommendation to abolish or severely curtail diversity jurisdiction.¹⁷⁵ These recommendations heralded the possibility that Congress would rescue the courts from their caseload problems by getting rid of this area of jurisdiction that many on the Court wish to see eliminated.¹⁷⁶ *Carden* was a bright signal from the Court to Congress

03 (arguing that modern limited partnerships are "pseudo-corporations" deserving of the same treatment under the diversity statute as corporations). Porter compared the Unified Limited Partnership Act and Revised Uniform Limited Partnership Act to the Model Business Corporation Act and opined that limited partnerships are "pseudo-corporations" because 1) like a corporation they must file with the state in order to exist, 2) limited partners' ability to participate in the workings of the business are more limited than those of a corporate shareholder, 3) limited partnerships may be considered securities under federal law, and 4) limited partners cannot sue or be sued for the organization. *Id.* Porter concludes that, "[t]he generic category of unincorporated association, while still befitting such single class entities as unions, general partnerships and joint stock companies, is not appropriate for modern, national-scope, dual class, limited partnerships when determining diversity jurisdiction." *Id.* at 306-07. *But see* Szypszak, *supra* note 72, at 22 (countering Porter's analysis and concluding that corporations deserve distinct treatment based on investor expectations). Szypszak argues that despite the similarities, limited partnerships and corporations are "clearly distinct investment options." *Id.* at 26. The author focuses on the differences in tax treatment and opines that a limited partnership loses its "flow-through" tax treatment if it takes on too many corporate characteristics. *Id.* at 25-26.

174. *Carden*, 494 U.S. at 207 (O'Connor, J., dissenting) (opining that the implicit rationale for the majority's holding was that "failure to consider the citizenship of all the members of an unincorporated business association will expand diversity jurisdiction at a time when our federal courts are already seriously overburdened"). *See also* Larry E. Ribstein, *Essay: Preparing the Corporate Lawyer: Corporations or Business Associations? The Wisdom and Folly of an Integrated Course*, 34 GA. L. REV. 973, 984 (2000) (opining that "erosion of distinctions between corporations and partnerships" makes *Carden* "look more like a way to limit its caseload than one compelled by the essential nature of corporations and partnerships").

175. *See supra* notes 73-74 and accompanying text (explaining that the Federal Courts Study Committee recommendations were intended to lessen caseloads). One of the Committee's "backup" recommendations was to curtail corporate access to diversity jurisdiction by including in their citizenship every state in which they are licensed to do business. FEDERAL COURTS STUDY COMMITTEE, *supra* note 73 at 42. This recommendation for a comprehensive refocusing of diversity jurisdiction signaled a retreat from an earlier movement to expand diversity jurisdiction for unincorporated associations. *See* AMERICAN LAW INSTITUTE, *supra* note 70, at 114 (recommending that partnerships be deemed citizens for diversity jurisdiction purposes of the state where it has its principal place of business). The ALI noted that its recommendation came as the Court decided in *Boulogny* to count every member of an unincorporated association towards the association's citizenship. *Id.* at 116. However, because the *Boulogny* Court based its reason for the opinion on deference to Congress, the ALI gleaned that "[t]o whatever extent any view on the ultimate merits may be extracted from the opinion, it would be a suggestion in the direction of revision of the kind proposed herein." *Id.*

176. *See supra* note 129 (opining that the judiciary opposes diversity jurisdiction); McCormack, *supra* note 32, at 559 (noting that former Chief Justice Rehnquist was "among diversity jurisdiction's most notable and staunchest opponents"). McCormack examined a number

that the Court is committed to severely curtailing diversity jurisdiction.¹⁷⁷

Grupo illustrates and reaffirms the barrier to diversity jurisdiction facing limited partnerships since the Court in *Carden* refused to extend them citizenship for diversity purposes analogous to corporations under 28 U.S.C. 1332(c).¹⁷⁸ Commentators recognize that this unworkable rule extends beyond limited partnerships and negatively affects other “pseudo-corporate” unincorporated associations such as limited liability companies.¹⁷⁹ The practical effects of *Carden* on these entities, which the Court in *Grupo* reaffirmed, are numerous.¹⁸⁰ These commentators

of Rehnquist’s Year-End Reports on the Federal Judiciary to support this proposition. *Id.* n.457. McCormack quoted Rehnquist’s 1987 Year-End Report:

It is not clear that the need for diversity jurisdiction is as strong today as it may have been in the past. In a time of budgetary austerity when the federal judiciary must find ways to economize on its resources, the elimination of diversity jurisdiction would result in significant savings. . . . I believe that the elimination or curtailment of diversity jurisdiction is an idea that merits serious consideration.

Id. quoting Chief Justice William H. Rehnquist, U.S. Supreme Court, 1987 Year-End Report on the Judiciary 7 (Dec. 1987).

177. See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS, 30 (Dec. 1995) available at <http://www.uscourts.gov/lrp/index.html> (last visited May 11, 2006) (characterizing diversity jurisdiction as “a massive diversion of federal judge power away from their principal function – adjudicating criminal cases and civil cases based on federal law”). The Judicial Conference recommended that Congress at a minimum adopt the recommendations of the 1990 Federal Courts Study Commission. *Id.* at 32.

178. *Carden*, 494 U.S. at 197 (“We have long decided that, having established special treatment for corporations, we will leave the rest to Congress; we adhere to that decision.”); see also Carter G. Bishop and Daniel S. Kleinberger, *Diversity Jurisdiction for LLCs? Basically Forget About It*, 14 BUSINESS LAW TODAY I, 31, 33 (2004) (stating that *Grupo* reconfirmed the *Carden* rule for determining citizenship of unincorporated entities).

179. See Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. SMALL & EMERGING BUS. L. 435, 436 n.2 (2001) quoting *Int’l Flavors & Textures, LLC v. Garner*, 966 F. Supp. 552, 553 (W.D. Mich. 1997) (describing members of a limited liability company as similar to shareholders of a corporation because they do not face personal liability for corporate debt). The distinction between corporate shareholders and limited liability company members is that profits and losses flow directly to members. *Id.* See also Bishop and Kleinberger, *supra* note 178 at 35 (explaining that “*Carden* dictates that, when federal diversity is the issue, LLCs are treated like any other unincorporated business organization”). Bishop and Kleinberger examined case law and found that since 1996, “every reported decision at both the district and circuit court levels has acknowledged that *Carden* controls.” *Id.*

180. See Bishop and Kleinberger, *supra* note 178 at 35 (listing effects of *Carden* on LLCs in particular but which apply to limited partnerships such as Atlas as well). The authors state that because *Carden* requires courts to count all members of an unincorporated association in the citizenship equation the practical consequence is:

In any suit between an LLC and a third party (that is, not a member), diversity jurisdiction depends on the citizenship of each LLC member at the time the lawsuit is filed

In any suit between an LLC and a member, diversity jurisdiction is impossible

In an LLC-related suit among members of an LLC, diversity jurisdiction depends on

call for one of two sweeping reforms from either the Court or Congress: 1) treat the citizenship of limited partnerships and limited liability companies like corporations for purposes of diversity,¹⁸¹ or 2) adopt the real parties to the controversy test embraced by Justice O'Connor in *Carden*.¹⁸² In light of the breadth of these proposed reforms, Justice

whether the LLC is an indispensable party (even assuming the litigating members are diverse)

In any derivative lawsuit brought on behalf of an LLC, diversity jurisdiction depends on the citizenship of each LLC member at the time the lawsuit is filed and is impossible in all but very limited circumstances.

Id. See also Porter, *supra* note 15, at 289 (opining that *Carden* “prevents matters of national concern from being adjudicated in a national forum” because the rule arbitrarily “bars national-scope limited partnerships from federal courts”). Oh opines that there are “hidden costs” to the *Carden* test for unincorporated citizenship. Oh, *supra* note 31 at 468. See *infra* notes 170-91 and accompanying text 31, at 468 (arguing that “ascertaining the citizenship of all members of an unincorporated association is a cumbersome and potentially expensive proposition”). As the scope of an unincorporated association grows geographically, another particularly vexing problem arises from *Carden* because of the “statelessness rule” of alienage jurisdiction. See *supra* note 47 and accompanying text (discussing the statelessness rule). Commentators note that many large unincorporated associations are able to completely avoid being subjected to diversity-based litigation in federal court by having a single, U.S. citizen-member domiciled abroad. See Levinson, *supra* note 129 at 1424 (spotting this trend particularly in large law firms with foreign branches); 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, 98 n.39 (1995) (explaining that this “‘back door’ out of federal court” for large partnerships with international offices creates the same concern “the legal profession envisioned large corporations exploiting after the Court’s decision in *Deveaux*” and likely influenced the Court’s decision to reverse *Deveaux* in *Letson* and establish citizenship for corporations). Tribeck sees this “back door” being used not only in large law firms but also in large accounting firms. *Id.* See also Oh, *supra* note 31, at 460 (opining that unincorporated associations “can control when and where they wish to deprive themselves or adverse litigants of access to federal courts” by making sure there are some “stateless” members). Oh continues that this “undesirable forum shopping” is analogous to the activities that prompted Congress to statutorily define and limit the judicially created corporate citizenship doctrine in 1958. *Id.* See also *supra* note 31 and accompanying text discussing the development of corporate diversity citizenship.

181. See, e.g., Oh, *supra* note 31, at 470 (advocating a principal place of business test); McCormack, *supra* note 32, at 557 (advocating entity status for limited partnerships); Porter, *supra* note 15 at 304 (advocating state of organization and principal place of business test for limited partnerships); AMERICAN LAW INSTITUTE, *supra* note 70, at 114 (advocating a principal place of business test). Some commentators recommend more detailed legislative proposals that would grant such status to limited partnerships and limited liability companies, because of their near-corporate status, but maintain the “all members” test for other unincorporated associations. See, e.g., Tribeck, *supra* note 180 at 121 (advocating a multi-factor test for treating limited liability companies and limited partnerships like corporations). Tribeck would grant entity status to organizations with four of the five following characteristics: (i) limited liability for members; (ii) required filing of organizational documents by a state; (iii) lack of free transferability of interest; (iv) lack of centralized management; and (v) lack of continuity of life.” *Id.*

182. *Carden*, 494 U.S. at 198 (O’Connor, J., dissenting). Justice O’Connor argued that analysis of who in a limited partnership is a real party to the controversy, or “which parties have control over the subject of and litigation over the controversy” led her to conclude that only general

Ginsburg's proposal in *Grupo* to read a minimal diversity exception into *Carden* limited to the time of filing rule seems like a sensible and narrow exception to the general rule.¹⁸³ The majority's refusal to bend

partners should be counted toward a limited partnership's citizenship. *Id.* This may explain why Justice O'Connor voted with the majority in *Grupo* – because there was question whether all of Atlas' general partners were in fact diverse from Dataflux. *Grupo*, 541 U.S. at 585 n.1 (Ginsburg, J., dissenting) (noting that one of Atlas' general partners, a Texas limited liability company, included Mexican members). Justice Ginsburg noted that the Court had never explicitly applied *Carden* to a limited liability company but the Courts of Appeals had. *Id.* See also *supra* note 179 and accompanying text (noting that the Courts of Appeals have applied *Carden* to limited liability companies). McCormack questioned “[w]hether Justice O'Connor would have proceeded . . . had a general partner, instead of a limited partner, been nondiverse” under the facts of *Carden*. McCormack, *supra* note 32, at 549 n.393. See also Cohen, *supra* note 179, at 472 (advocating the real party to the controversy test). Cohen would revise 28 U.S.C. § 1332(c) to remove express references to specific types of business organizations because the corporate/non-corporate dichotomy is based on outdated views of such organizations. *Id.* at 473. Instead, Cohen would revise the statute to determine “the citizenship of a business organization” based on who has “direct interest in the litigation” meaning, who is “personally liable for the judgment in the event the litigation is decided against the business organization.” *Id.* Under this revision of the statute, corporations and not shareholders would have the direct interest, general partners and not limited partners would have a direct interest, and a limited liability company and not the members would have a direct interest. *Id.* at 474. But see Hedwig M. Auletta, *Including Limited Partners in the Diversity Jurisdiction Analysis*, 54 FORDHAM L. REV. 607, 627-28 (1986) (criticizing the real parties to the controversy test because it requires an in-depth factual inquiry). Auletta argues that the test would create inconsistencies because one could challenge whether a limited partner exerted enough control to warrant being considered a general partner. *Id.* If this occurs at the appellate level, the court is at a deficit because it may not have sufficient facts on the record to make a decision. *Id.* See also Szypszak, *supra* note 72, at 17 (criticizing the real parties to the controversy test as “overly burdensome and analytically unnecessary if a clear distinction can be made based on the choice of organizational form”).

183. *Grupo*, 541 U.S. at 589 (Ginsburg, J., dissenting) (acknowledging the holding of *Carden* as requiring the citizenship of all partners, general and limited, to be counted toward a limited partnership's citizenship). Justice Ginsburg did not dispute the applicability of the general rule itself only the majority's characterization of the partnership in *Carden* as an entity rather than an aggregate capable of curing diversity after the time of filing. *Id.* at 591 n.6. See also *Knop*, 872 F. 2d at 1138 (applying the general rule later applied in *Carden* in a factually similar case but allowing nondiverse partners who left after time of filing to cure diversity on judicial economy grounds). The distinction between the majority and dissent in *Grupo* over *Carden* was not over the rule itself, but over Justice Scalia's statement that “[w]e think it evident that *Carden* decisively adopted an understanding of the limited partnership as an “entity,” rather than an “aggregation,” for purposes of diversity jurisdiction.” *Grupo*, 541 U.S. at 579 n.8 citing *Carden*, 494 U.S. at 188 n.1 (“[t]here are not, as the dissent assumes, multiple respondents before the Court, but only one: the artificial entity called Arkoma Associates, a limited partnership.”). McCormack argues that this was a new characterization slipped into the footnote of *Carden*, stating that when Justice Scalia made the “unequivocal statement that a limited partnership, as entity, was the party who prosecuted this dispute and stood before the Court,” he “incontrovertibly recognized that an unincorporated organization was an entity separate and distinct from its constituent members.” McCormack, *supra* note 32, at 546. McCormack opines that the foundational precedents of *Chapman*, *Great Southern Fire*, and *Boulogny* relied on in *Carden* “ignored or glossed over” this concept and simply focused on the issue of whether the entities in question were corporations or not. *Id.* McCormack further opined that when Justice Scalia adopted this “entity-as-entity” approach to the limited partnership's

highlights the Court's continued desire to limit diversity jurisdiction at all costs—the dissent's interpretation threatened to weaken the “line in the sand” to Congress that the Court drew in 1990.¹⁸⁴

Congress' failure to take action in the fifteen years since the Court deferred in *Carden* is unsurprising given the lobbying pressures it faces to retain diversity jurisdiction.¹⁸⁵ If Congress will not act to remedy this acknowledged unfair disparity between corporations and unincorporated entities, the Court should end its stubborn refusal to craft a solution and use one of the many possible solutions commentators have developed to solve the problem judicially.¹⁸⁶ The Court is not required to defer to Congress in this subconstitutional arena, nor should it do so in an effort to backhandedly encourage Congress to lessen caseloads.¹⁸⁷

citizenship, he deviated from the *Chapman* line of precedent and should have examined the underlying essence of the limited partnership as was done in the *Letson* line of cases that determined that corporations deserved entity-citizenship status. *Id.* at 547. Justice Ginsburg and the dissent in *Grupo* recognized this weakness in *Carden* and attempted to fashion a narrow exception to that case for minimally diverse limited partnerships to achieve complete diversity after the time of filing on judicial economy grounds as *Caterpillar* endorsed. *Grupo*, 541 U.S. at 588-89 (Ginsburg, J., dissenting).

184. See *supra* notes 131-48 arguing that *Carden* and its underlying purpose to limit diversity jurisdiction was the key influence in the *Grupo* decision.

185. See *supra* notes 69-76 and accompanying text for a discussion of the debate over the future of diversity jurisdiction. See also Kramer *supra* note 72, at 98-99 (opining that Congress' inaction on diversity jurisdiction is largely the result of lobbying by trial lawyers and the American Bar Association); See also *supra* note 180 (discussing how large firms are taking advantage of the *Carden* rule to insulate themselves against federal diversity-based litigation). It is possible that this powerful legal lobby has Congress right where it wants it.

186. See *supra* notes 177-79 and accompanying text for a discussion of the possible reforms to the *Carden* rule.

187. See *supra* note 124 and accompanying text explaining that the Court has discretion in the subconstitutional arena between constitutional text and statutes. See also Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 343 (2002) (opining that the Court has tried to take a passive approach and restrict judicial lawmaking rather than “take responsibility for shaping a workable legal system”). Meltzer examined the Court's deference to Congress in numerous areas of law and concluded that this is not the best approach because Congress often leaves statutory ambiguity in order to gain consensus. *Id.* at 387. Additionally, Congress is often unable to plan for uncertainties that may arise in litigation. *Id.* Rather than taking the lead in areas such as subject matter jurisdiction, where the Court has the experience, Meltzer argues that the Court's deference to Congress is often “likely to be less successful than leaving matters to be worked out by judicial decision. *Id.* at 396. The Court in *Carden* argued deference to Congress because Congress had not expanded the diversity statute to include limited partners after it amended the statute to consider corporations. *Carden*, 494 U.S. at 196-97. Many commentators criticize the *Carden* majority's rationale for its judicial passivity as historically inaccurate. See, e.g., Oh, *supra* note 31, at 397 (opining that Congress did not consider whether unincorporated associations should be given the same treatment as corporations in the 1958 amendment of 28 U.S.C. § 1332 because unincorporated associations were “a relatively insignificant part of the economy”). See also Cohen, *supra* note 179, at 466 (criticizing the Court's inference that Congress intentionally excluded unincorporated associations from the amendment because these entities “were not particularly

V. CONCLUSION

The Court in *Grupo* wasted an opportunity to reform diversity jurisdiction for unincorporated associations by either carving out a modest exception or completely abolishing the arbitrary *Carden* rule.¹⁸⁸ The close split in the opinion indicates that some members of the Court recognize the growing dissatisfaction among commentators with the rule's incompatibility with modern business realities.¹⁸⁹ One positive aspect to come out of *Grupo* was that the entire Court reaffirmed a sound, albeit narrow exception to the time of filing rule.¹⁹⁰ However, because the Court is so committed to using the *Carden* rule as a bargaining chip with Congress in the debate over the future of diversity jurisdiction, this small win for common sense is little consolation to Atlas and other unincorporated entities who continue to face dim prospects to attaining diversity jurisdiction because they have no such workaround to the *Carden* bright line.

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popular in 1958 and, consequently, were not invoking diversity with the frequency of corporations"). Cohen notes that in 1957 more than three thousand cases were filed by corporations but only two were filed involving either a limited partnership, business trust or joint stock company as a party. *Id.* at 466 n.196. See *supra* notes 174-77 discussing the Court's desire to abolish or limit diversity jurisdiction in order to lessen its caseloads; Donald R. Doernberg, *There's No Reason for It: It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 654 (1987) quoting Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A. J. 433, 438 (1932) ("It is unthinkable that that sovereignty should shirk its responsibility and abdicate its proper functions because of a comparatively insignificant matter of expense.").

188. See *supra* notes 181-83 discussing various ways to reform *Carden*.

189. See *supra* notes 171-87 discussing commentators' critiques of *Carden*.

190. See *supra* notes 149-68 discussing how *Grupo* clarified *Caterpillar's* scope.

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