

**AMERICOLD, DIVERSITY JURISDICTION, AND
MODERN BUSINESS ENTITIES:
RECONCILING TWO CENTURIES OF SUPREME COURT
PRECEDENT WITH TODAY’S DOMESTIC AND GLOBAL
FORMS OF BUSINESS ORGANIZATIONS**

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INTRODUCTION

The Supreme Court term most recently concluded was far from ordinary, even by modern standards. First, there was the untimely and unexpected death of the legendary Justice Antonin Scalia. Friend and foe alike joined in acknowledging that Justice Scalia left an indelible mark upon the Court and American jurisprudence.

This was immediately followed by fractious debate over promptly filling (or not) the seat vacated by Justice Scalia’s passing, the already controversial subject exacerbated by the political rhetoric of a Presidential election year. Adding to the *sturm und drang* were gloomy prophecies that a high Court, now irreconcilably divided into two equally sized ideological camps, would render nothing but 4-4 split decisions until a ninth Justice was appointed.¹ The recent maelstrom of controversy aside, somehow the high Court found the time to adjudicate the typical complement of high profile cases that define and preserve our system of ordered liberty. Yet, as is true with every term, this session of the Supreme Court had many

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¹ See, e.g., *United States v. Texas*, 136 S.Ct. 2271 (2016) (affirming a judgment of the Fifth Circuit by an equally divided Court). We are pleased to report that the purveyors of doom and gloom were (as usual) proven wrong, at least in our estimation. Of the over sixty actual opinions issued by the Supreme Court, subsequent to Justice Scalia’s passing on February 13, 2016, only a total of four reflected an equally divided Court, a relatively miniscule number. See also, *A Brief Overview of the Supreme Court*, <https://www.supremecourt.gov/about/briefoverview.aspx> (last checked Feb. 11, 2017). Aside from *United States v. Texas* as noted above, the other three split decisions were *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2106), *Friedrichs v. California Teachers Association*, 136 S.Ct. 1083 (2016), and *Hawkins v. Community Bank of Raymore*, 136 S.Ct. 1072 (2016). To be sure, this does not account for the possibility that the parties might petition for re-argument or the even more likely scenario that the substance of these controversies might reappear before a fully staffed Court at some future date, albeit under a different caption.

accomplishments just as notable as the cases which captured the popular headlines. After all, not every high Court pronouncement deliberates over separation of powers or the liberties guaranteed by the Bill of Rights, as portentous as those matters might be.

We would do well to remember that each year the Supreme Court routinely devotes substantial energies to pondering significant issues of corporate or commercial law. While such rulings might be overlooked by the public at large, these decisions often inaugurate or confirm significant landmarks that dictate the structure and operations of various forms of business organizations, domestically and globally, the strategy and tactics of commercial litigation when these enterprises clash, and often determine if these contending business will be permitted or denied access to the federal courts as a forum for the resolution of their disputes.

Having now dispersed the storm clouds that sadly obscured a most remarkable year in the Supreme Court's history, we are determined to bring to light a new Supreme Court decision which implicates all the concerns of business organizations, commercial litigation, and their place before the federal courts, as outlined immediately hereinabove.

The case which shall be the primary focus of this Article is captioned *Americold Realty Trust v. Conagra Foods, Inc.*² At first blush, *Americold* appears to be limited to addressing the seemingly mundane question of determining the citizenship of a real estate investment trust, commonly referred to as a "REIT," for purposes of ascertaining federal jurisdiction, if any, over a commonplace business controversy.

However, let us not be deceived into believing that is all that is at stake in this latest promulgation by the high Court. From the outset, we must point out *why* this question was put before the learned Justices, and, moreover, why those august jurists deemed it to be worthy of their review. And why, of course, the latest high Court edict is of compelling importance for domestic and global businesses alike. The paramount issue here is, in reality, one of federal court jurisdiction. It is axiomatic that access to the federal courts is determined by many things, all of which are firmly rooted in Article III of the Constitution.³

In its pithy demarcation of the limited scope of the federal judicial power, Article III sets forth in detail the select avenues for gaining admission to the austere corridors of the federal courthouse. One such route is "diversity of citizenship" jurisdiction, *i.e.*, where a citizen of one State sues a citizen of another State.⁴ A hallmark of the Republic since the founding, diversity jurisdiction provides litigants with an alternative to the state courts, a national judicial forum ostensibly free of the prejudices one might encounter in a local court.

Diversity jurisdiction is more than the mere privilege to appear before a federal court. There can be distinct litigation advantages to winning the prize of diversity jurisdiction. Equally so, the victory can lie in defeating diversity jurisdiction and denying an adversary access to the federal judiciary, thereby relegating the contest to an unfamiliar or unfriendly state forum. As such, multistate and global businesses routinely battle robustly over the availability of diversity jurisdiction in their particular controversies.

To be certain, diversity jurisdiction is not easily obtained. It must be positively asserted, and is subject to challenge.⁵ In business cases, a key, if not conclusive, determinant

² *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012 (2016).

³ *See* U.S. CONST., art. III, § 2.

⁴ *Id.*

⁵ *Strawbridge v. Curtiss*, 7 U.S. 267 (1806).

of eligibility for diversity jurisdiction is the form of business organization for the litigant, for reason that the chosen construct of a business entity then dictates its citizenship.

As the instant Article shall demonstrate, for nearly two hundred years, the Supreme Court has imposed starkly different rules for determining citizenship upon authentic corporations on the one hand, and all other artificial business entities on the other. *Americold* is the latest iteration of that crucial jurisprudence, and it is very much the rightful heir of some two centuries of Supreme Court teachings.

Germane to the reader is the following: while this latest proclamation of the high Court specifically entails the citizenship of a REIT, this new ruling has vast implications for the other numerous and diverse forms of business organizations---limited liability companies (“LLCs”),⁶ limited partnerships (“LPs”),⁷ and master limited partnerships (“MLPs”), just to name a few. This is, of course, to say nothing about future innovations in business structures that have yet to be imagined, and make themselves known in the arenas of domestic and international business.

It is the intention of the instant writing to parse nearly two centuries of Supreme Court maxims regulating diversity jurisdiction, as it pertains to differing forms of business organizations. As these precepts postulate sharply different rules for determining the citizenship of these artificial entities, the natural outcome is to create two distinct categories, one of which encompasses those forms of business organizations which benefit from a easier path to the federal courts, and a second grouping of artificialities which are far more likely to be denied admittance to the national forum. An understanding of the consequences of the

⁶ For example, New York state law defines a limited liability company (“LLC”) as “an unincorporated organization” of one or more persons having limited liability for the conduct of the LLC’s business. 32A N.Y. Limited Liability Company Law § 102(m) (McKinney 2016). The selection of New York law for purposes of this illustration is not merely based upon that jurisdiction’s leadership in American business. Much more important, when it promulgated its LLC law in late 1994, “New York joined with substantially all of the other states in offering business entities the choice of forming and operating as a limited liability company.” Bruce A. Rich, Practice Commentaries, 32A N.Y. Limited Liability Company Law 1.A at 3 (McKinney 2003 pamphlet). It is therefore fair to say that the above quoted statute subsumes into itself substantially all of the intents and experiences of the other states that have inaugurated LLC laws since at least 1977. *Id.* B. at 4. Moreover, the commentary classifies the LLC as, among other things, “a successful cross-breeding of the corporate form and the partnership form,” Bruce A. Rich, Practice Commentaries, 32A N.Y. Limited Liability Company Law (McKinney 2016) § 1.1 at 179, and as “a hybrid entity,” possessing “the corporate trait of limited liability” alongside “features from the other business entities.” *Id.*, § 1.3 at 81. In sum, the contemporary LLC, a product of cross-breeding the corporation with other forms of business organizations, *Id.*, § 1.1 at 179, is most definitely not an incorporated entity. When all is said and done, the limited liability company is undeniably an unincorporated artificiality. *See* *Netjets Aviation, Inc. v. LHC Communications, LLC*, 537 F.3d 168, 176 (2d Cir. 2008), wherein the Second Circuit provides this useful definition for an LLC. Writing for the panel, Circuit Judge KeARSE states that a limited liability company, formed by one or more entities and/or individuals as its “members,” is an entity that, as a general matter, “provides tax benefits akin to the corporate form.” Like shareholders in a corporation, members of an LLC are generally not liable for the debts of the entity, and a litigant seeking to persuade a court to disregard the LLC construct faces an uphill battle. *Id.* at 176 (quotations in the original) (citations omitted).

⁷ *See* *Samson v. Prokopf*, 185 B.R. 285 (Bankr. S.D. Ill. 1995), defining a limited partnership as a type of partnership comprised of one or more general partners, and one or more limited partners. The former manage the affairs of the limited partnership, and are personally liable for the partnership’s debts. The latter contribute capital and share in profits, but do not participate in management, and incur no liability for the LP’s obligations, beyond their capital contributions. *Id.* at 290. Quite noteworthy is that the leading treatise on partnership law contends that “a limited partner’s interest is essentially an investment.” 3 Alan R. Bromberg & Larry E. Ribstein, *Bromberg & Ribstein on Partnerships*, § 12.01(a), at 12:7 (1994).

selection of a particular form of business organization, insofar as it relates to ease of access to the Article III judicial power, is critical for both enterprises already formed and those yet to be organized.

To achieve our goal, in the following pages we shall first set forth the constitutional origins of diversity jurisdiction, as well as comment upon the current state of the operative provisions of the federal judicial title implementing same. We will then scrutinize an evolution of Supreme Court jurisprudence on this subject so elongated that it predates the American Civil War.

In that analysis, we shall plumb high Court precepts devising rules that regulate the determination of citizenship, and, ultimately, the availability of diversity jurisdiction for a multitude of business organizations, some traditional, some outmoded, and some relatively new to the world of commerce. We shall then conclude this study with an examination of the recent *Americold* decision, as the best exemplar of the current state of the law. Finally, we shall offer our comments as to the consequences for business litigants, both domestic and global, seeking to bring their matters before the federal judiciary. All that said, let us begin.

I. THE CONSTITUTIONAL AND STATUTORY ROOTS

A proper analysis of the federal judicial power, to employ an ironically wise phrase, must “begin at the beginning.”⁸ Therefore, we commence with the Founding Document itself, and its allocation of authority to the third branch of government created thereby.

The Constitution as the Cornerstone of Diversity Jurisdiction

Article III invests the judicial power of the United States in the one Supreme Court and the so-called “inferior” tribunals, the latter as established by Congress.⁹ From that modest acorn the mighty oak of the federal judiciary has grown, now comprised of over a dozen circuit courts of appeals and nearly one hundred federal district courts, spanning the nation from coast to coast, and beyond.¹⁰

Notwithstanding its nationwide presence, the federal judiciary is, in truth, a forum of limited jurisdiction. The great Chief Justice Marshall probably said it best: “The judicial power of the United States...is dependent first, on the nature of the case; and second, on the character of the parties.”¹¹ The precise contours of the judicial power are carefully delineated in the detailed text of Article III itself.¹²

As previously indicated, and pertinent to the instant discussion, jurisdiction over controversies “between Citizens of different States” is included in the portfolio delegated to

⁸ *United States v. Lamb*, 529 F.2d 1153, 1155 (9th Cir. 1975) (reviewing a district judge’s jury instruction, issued subsequent to the remarkable event of an alternate juror, previously excused, being returned to active deliberations after another venireman was released). *See also* Lewis Carroll, *ALICE’S ADVENTURES IN WONDERLAND*, at p. 126 (Goodacre ed. 1982). We cannot help but comment that the real life incident which transpired in a federal trial court would have neatly fallen within Mr. Carroll’s musings of long ago.

⁹ U.S. CONST. art. III, § 1.

¹⁰ *See* UNITED STATES COURTS, Court Role and Structure, (last visited May 15, 2017) <http://www.uscourts.gov/about-federal-courts/court-role-and-structure>.

¹¹ *The Bank of the United States v. Deveaux*, 9 U.S. 61, 85 (1809).

¹² U.S. CONST. art. III, § 2.

the federal bench.¹³ Given that the unassailable requirement for the exercise of this branch of the Article III power is that the citizens in conflict be denizens of different states, this facet of the bounds of federal court authority has long been called diversity of citizenship jurisdiction. Nearly always truncated to simply “diversity jurisdiction,” these few words have long been regarded as “operative to ascertain and limit [the] jurisdiction” of the Article III branch.¹⁴

Vital to cabining the reach of federal judicial authority, and thereby preserving basic notions of federalism, in much the same way diversity jurisdiction plays a pivotal role in assuring the maintenance of our system of ordered liberties. From nearly the beginning of the Republic, the Supreme Court has resoundingly proclaimed: “[t]he right of choosing an impartial tribunal is a privilege of no small practical importance” to all citizens. It is incorporated into the Constitution itself, and reflected in enabling statutes, to best guarantee to all citizens the availability of a national forum where Americans are assured of freedom from “local prejudices or jealousy [that] might injuriously affect them.”¹⁵

As a final foundational note, it must be pointed out that the invocation of diversity jurisdiction undeniably rests upon a determination that this alleged diversity between contesting parties must be absolutely “complete.” This means that no one plaintiff and no one defendant in the original action can hail from the same jurisdiction.¹⁶ Plainspoken concepts indeed, but from these few but explicit words flows a great deal in defining the natural and constitutional limits of the exercise of the federal judicial power.

The Diversity Jurisdiction Statute---Enabling the Constitutional Guarantee

While diversity of citizenship jurisdiction was conceived and cast in its original form by Article III itself, Congress has refined its contours over time, qualifying it with quite specific requirements. In its current iteration, the diversity of citizenship statute clearly provides that the federal district courts shall enjoy original jurisdiction over all civil actions between citizens of different States, with the proviso that the sum in controversy exceeds \$

¹³ *Id.* at § 2.

¹⁴ Federalist No. 80, “Jurisdiction of the Federal Courts,” THE FEDERALIST No. 80 at 501 (Alexander Hamilton) (Wright ed. 1961). Therein, Alexander Hamilton makes plain that the exercise of power by the federal judiciary is to be strictly constrained, for the most part delimited to the adjudication of controversies vital to the unity of the nascent Republic. Per force, this would explain the federal judicial power as the sole interpreter of the meaning of federal statutes, treaties, and so forth. Yet “perhaps not less essential to the peace of the Union” is the ability of a nationwide tribunal to resolve controversies between citizens of different states. As so well put by the Founder, in order to guarantee “the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.” *Id.* at 502. It is imperative, Hamilton argued, that such controversies be committed “to that tribunal which, having no local attachments, will likely to be impartial between the different States and their citizens.” As a creation of the federal Constitution, it will be impervious to local prejudices. *Id.* Therefore, concluded Hamilton, it is only right and just to designate the federal courts “as the proper tribunals for the determinations of controversies between different States and their citizens.” *Id.* at 502-03. To our way of thinking, Hamilton’s eloquence here provides, by far, the best exemplification of the purpose and spirit animating diversity jurisdiction, in his time, our time, and for generations of Americans yet to come.

¹⁵ *Marshall v. The Baltimore and Ohio Railroad Co.*, 57 U.S. 314, 329 (1854). See *The Louisville, Cincinnati, and Charleston Rail-Road Co. v. Letson*, 43 U.S. 497, 554 (1844).

¹⁶ *Strawbridge v. Curtiss*, 7 U.S. 267 (1806).

75,000, exclusive of interest and costs.¹⁷ Books have been written about diversity of citizenship jurisdiction, but we need not go so far. It is sufficient for our objective of unraveling the subtleties of *Americold* and its forebears, and anticipate their future consequences, to have come this far in establishing the constitutional origins and predicate for the lawful exercise of diversity jurisdiction as a legitimate component of the federal judicial power.

Effectuating Diversity Jurisdiction---Removal and Remand

Lastly, there is one more judicial statute implementing the Article III power which we must overview in order to gain a full comprehension of the conduct of diversity cases. The need for our understanding of this related proviso is that it inevitably proceeds in company with challenges to the propriety of diversity jurisdiction in specific controversies.

As we shall soon see set forth in stark relief, it is a commonplace for certain litigants, for reasons both strategic and tactical, to deliberately eschew the opportunity to have their controversy heard before a federal tribunal. Conversely, a counterparty might very much wish to take advantage of the particular benefits the federal forum provides. Also, one cannot discount the tactic, however *gauche* it may seem, that a transfer to a nationwide forum will simply throw an opponent off its original game plan, by disturbing its first choice of an ostensibly friendlier state court venue.

Such disputes are set to right by Section 1441 of the Judicial Code, best known as the removal statute. This proviso expressly states that any civil action brought in a state court, and over which the federal courts have original jurisdiction, may be removed from the former to the latter.¹⁸

Removal is effectuated by the defendant, and the controversy so removed is deposited in the federal district court “embracing” the geographic zone where the state action was pending.¹⁹ Given that Article III invests the federal courts with original jurisdiction over controversies between citizens of different states, the removal statute therefore operates as a mechanism for the orderly transfer of qualifying litigation from the state courts to the federal tribunal. This presumes, of course, that diversity of citizenship jurisdiction (or some other form of federal predicate) actually prevails over the removed controversy.

For the party opposing removal, the customary counterattack is the request for a remand, *i.e.*, a return of the controversy to the original state forum where it was filed.²⁰

¹⁷ 28 U.S.C. § 1332(a)(1). As an aside, but something surely relevant to some of our readers, diversity jurisdiction also includes, *inter alia*, controversies between U.S. citizens and “citizens or subjects of a foreign state,” with the same dollar amount required to be in controversy. *Id.* at (a)(2).

¹⁸ 28 U.S.C. § 1441(a).

¹⁹ *Id.*

²⁰ The actual removal procedure is prescribed in Section 1446, and, while not overly complicated, it does have certain strict requirements. 28 U.S.C. § 1446(a), *et seq.* Key among them is the prerequisite for the timely filing of a notice of removal with the federal district court to which the controversy is to be removed. *Id.* at (a) and (b). *See generally* Dart Cherokee Basin Operating Company, LLC v. Owens, 135 S.Ct. 547 (2014) (addressing the statutory requirement that the notice contain a short and plain statement of the grounds for removal). Other post-removal procedures are likewise addressed by subsequent statutes. *See* 28 U.S.C. § 1447 (“Procedure after removal generally”), and § 1448 (service of process after removal). *See also* 28 U.S.C. § 1449 (state court record supplied). The precise steps for a remand back to the original state forum are likewise set forth within the body of the general removal proviso. 28 U.S.C. § 1447(c).

Therefore, in navigating the waters of the federal court system, we should consider the foregoing rules as virtually one. Nearly inseparable in their functioning, the statutes first regulate the scope of diversity jurisdiction, and then the subsequent process of removing eligible matters to the federal forum. To be sure, the litigation strategies and tactics that we shall see employed in the cases discussed below take shape from these enabling provisos.

To summarize, the textual underpinnings of diversity jurisdiction track a logical continuum, commencing with the constitutional privilege created by Article III. Relevant portions of the judicial title then implement same, first by precisely defining the contours of diversity jurisdiction, and subsequently establishing mechanisms for bringing qualifying controversies within the purview of the federal court (or, if appropriate, remanding the matter back to the state tribunals). Thus informed of this constitutional and statutory background, we can now competently address the nearly two hundred years of Supreme Court jurisprudence that has evolved from these humble origins.

II. THE EARLIEST CASES: A REFLECTION OF AMERICAN LAW AND BUSINESS

The ultimate aim of the instant Article is to understand the Supreme Court's latest pronouncement upon how the federal courts must determine, for purposes of diversity jurisdiction, the citizenship of specific forms of business organizations, that, while artificial, are not authentically incorporated. To do so, we must travel a path first blazed by the high Court nearly one hundred and eighty years ago.

The road commences with how the Supreme Court long ago resolved the same question with regard to a true corporation. After all, this classic form of the artificial business entity existed long before the creation of the more exotic forms of unincorporated business organizations we confront in the present time. It is only sensible, therefore, to start with the high Court precedent that emplaced the first building block of the judicial construct that stands to this day.

Letson---The Supreme Court Recognizes the Corporation for Diversity Jurisdiction

In the seminal case of *The Louisville, Cincinnati, and Charleston Rail-Road Co. v. Letson*,²¹ the Supreme Court established the cornerstone that, for purposes of determining diversity jurisdiction, a corporation holds the citizenship of the state in which it is incorporated.²² In so doing, the Court discarded earlier, outmoded thinking that refused to recognize incorporated entities as juridical persons in their own right, while concomitantly rejecting the formerly prevailing practice of imposing upon such an artificiality the citizenship of all its members.²³

²¹ *The Louisville, Cincinnati, and Charleston Rail-Road Co. v. Letson*, 43 U.S. 497 (1844).

²² *Id.* at 555 and 558.

²³ *Id.* at 555-56. Among other things, *Letson* declared that *Strawbridge v. Curtiss*, 7 U.S. 267, (1806) and its ilk "were carried too far" and had given rise to "consequences and inferences...which ought not to be followed" any longer. *Id.* at 555.

As to the few operative facts, *Letson* relates that the original plaintiff, apparently an individual, was a citizen of New York.²⁴ The defendant railroad was a corporation organized and conducting its affairs pursuant to South Carolina law.

More to the point, and notably set out in the opening paragraph of the decision, the shareholders of the defendant corporation included two other South Carolina corporations, “having in them members who are citizens of the same state” as the original plaintiff.²⁵ The original defendant argued diversity jurisdiction was lacking, given this purported identity of citizenship between the original plaintiff and certain shareholders of corporations that were, in turn, stakeholders in the defendant railroad.²⁶

Taking cognizance that “the suit is against the corporation,” the Justices unanimously decreed that “nothing must be looked at but the legal entity” when determining its citizenship for diversity purposes. No longer would the citizenships of the corporation’s members be determinative of its citizenship, and, thusly, diversity jurisdiction.²⁷ This evolution in the high Court’s viewpoint was arrived at only subsequent to “mature deliberation,” and a finding that earlier holdings on this issue were no longer “maintainable upon the true principles of interpretation of the Constitution and the laws of the United States.”²⁸

The precept now espoused by the Court was that a corporation “is to be deemed to all intents and purposes as a person, although an artificial person,” inhabiting the state in which it is incorporated and, significant here, “capable of being treated as a citizen of the same state.”²⁹ Expanding upon the reasoning of a unanimous bench, Justice Wayne made the apt comparison that a corporation, much like a natural person, enjoys the power to contract. It is in this endeavor especially that “it is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued.”³⁰

A further and conclusive finding was made by the high Court in this instance. Justice Wayne declares that a paramount objective of incorporation is to bestow a new and independent individuality upon a succession of natural persons, who are considered henceforth to act as one in the business venture. The corporate form permits the entity to manage its own affairs, and own and convey property more efficiently than a series of individual owners that would, by necessity, have to transfer said property “hand to hand.”³¹

It was the Court’s ultimate finding that the corporation is intended to “bestow the character and properties of individuality on a collective and changing body” of persons. By this means, a never ending succession of individuals are capable of promoting the entity’s affairs in perpetuity.³² In this manner, the Supreme Court in *Letson* discarded outdated maxims that had proceeded from the earliest days of the Court, and substituted in their place

²⁴ *Id.* at 551.

²⁵ *Id.* at 550. The Court further noted that the State of South Carolina was also a shareholder in the railroad, raising a sovereignty issue not pertinent to the instant analysis. *Id.* at 550-51.

²⁶ *Id.* at 550.

²⁷ *Id.* at 554.

²⁸ *Id.* at 555.

²⁹ *Id.* at 558.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (internal quotations and citations omitted).

the more enlightened view that a corporation is a citizen of the state in which it is incorporated, for purposes of determining diversity jurisdiction.³³

In retrospect, we can best appreciate *Letson* as signaling only the beginning, and not the end, of the high Court's jurisprudence on these matters. Nonetheless, the passing years have proven the durability of the model forged in *Letson*, as reflected in the cases yet to be discussed herein. That duly noted, permit us to proceed to the next landmark in this sequence.

Marshall---Enforcing the Doctrine for Industrial America

As amply demonstrated immediately hereinabove, *Letson* invoked a sea change in the Supreme Court's thinking on the subject of diversity jurisdiction, and the citizenship to be assigned artificial entities when such matters are at issue, at least when the artificiality involved was a body incorporated pursuant to state law. One would think that the instructions of *Letson*, while admittedly inaugurating a new paradigm, would be sufficient to cast aside any doubt of the high Court's pending views on the subject.

Apparently not, for a scant decade later the Justices were compelled to reaffirm this new approach in the case of *Marshall v. The Baltimore and Ohio Railroad Company*.³⁴ We suggest that it would be selling *Marshall* short to view it as no more than a pedestrian confirmation of the new axiom espoused in *Letson*. The robustness of the Court's discussion of the subject in *Marshall* puts it beyond the status of a routine follow on case.

Rather, it evinces the constitutional significance assigned by the Justices in bestowing full citizenship upon incorporated entities for purposes of diversity jurisdiction. Equally so, its implicit preservation of a different rule for determining the citizenship of unincorporated bodies in diversity cases was not only important for this 1854 ruling, but it was to prove a building block for similar holdings yet to come. All that being said, let us proceed to give *Marshall* its due.

Marshall features a somewhat atypical opening. Rather than commencing with the merits of the case at bar, the Justices instead gave precedence to "[a] question, necessarily preliminary to our consideration...though not argued or urged by counsel."³⁵ That paramount question was jurisdiction, as always a matter of grave concern to the high Court, for it implicates the very heart of the Article III judicial power and principles of federalism.

The matter was more attenuated here, it would seem, because the new rule proclaimed in *Letson* was barely a decade old. Yet its relative youth did not deter the high bench from cementing its strictures into law; quite possibly, that was precisely what motivated the Justices to do exactly that.

Writing for the Court, Justice Grier prioritized at least three major points regarding *Letson* and its aftermath. First, as to the holding itself, he comments on the fact that there was no dissension within the high Court in emoting the rule of *Letson*.³⁶ Clearly, its unanimity spoke to the subsequent bench tasked with deciding *Marshall*.

³³ We are compelled to forewarn that *Letson* is not an easy read for the contemporary person. The Court's opinion is very much the offspring of the writing style that prevailed nearly two centuries ago. Moreover, and specific to legal writing, this 1844 decision is incredibly different in style from Supreme Court decisions of even the last fifty years.

³⁴ *Marshall v. Baltimore & Ohio Railroad Company*, 57 U.S. 314 (1854).

³⁵ *Id.* at 325.

³⁶ *Id.*

Second, and with regard to what *Letson* had wrought, Justice Grier pointedly recites that, for the intervening decade, the rule thus espoused was received by the bar as the “final settlement” of this important constitutional matter, notably because this type of controversy arises with regularity before the federal tribunals. In evidence thereof, the Court adds that the practices and pleadings of the federal courts “have been conformed to it,” further proof that the emissions of *Letson* were now firmly rooted in diversity jurisprudence.³⁷

Third, *Marshall* declares that the “stability” of *Letson* for the last decade allowed for many federal tribunals, including this Supreme Court, to uphold a claim of diversity jurisdiction, and thereafter constitutionally adjudicate numerous controversies involving property and other significant interests. It would “inflict a great and irreparable evil upon the community” to now retroactively usurp that jurisdictional regime, and thereby endanger the many cases already decided, as well as throw into disarray many pending cases predicated upon the predictability and consistency of the strictures so recently announced. It is particularly in matters of federal jurisdiction, Justice Grier pronounced, that we must honor the principles of *stare decisis* “so absolutely necessary to the peace of society.”³⁸

Thereby affirming that *Letson* still provided the rule of decision herein, the *Marshall* Court proceeds to the more prosaic notations that diversity jurisdiction is first grounded in the Constitution itself, and then enabled by statutory enactments. To be sure, this duality of authority was the overt intent of the Founders, as yet another brick in assembling an edifice of national unity.³⁹ Indeed, the high Court adds that if diversity jurisdiction “be a right, or privilege guaranteed by the Constitution to citizens of one State in their controversies with citizens of another,” then “it is plain it cannot be taken away” from one litigant by the law of a state in which an opposing party resides.⁴⁰

The high bench illustrates the real world impact of the foregoing precept. If a state law of business organization authorizes a group to act collectively in the conduct of business, and have their interests represented by an incorporated entity, “their enjoyment of these privileges, granted by State authority, cannot nullify this important right” of a counterparty to claim a diversity of citizenship from the entity, and thereby enjoy the right to have any attendant controversy decided in the federal forum.⁴¹

Justice Grier was just as steadfast in cataloguing the ills that would befall the citizenry if diversity jurisdiction could be readily discarded by state laws of business organizations. If the federal tribunals can be so easily ousted of diversity jurisdiction, and citizens of different states shunted to local courts, after being denied the power to voluntarily elect the forum in which they prefer to litigate, “they would often be deprived...of all benefit

³⁷ *Id.*

³⁸ *Id.* As part of this most lucid paean to *stare decisis* and why the doctrine exists, Justice Grier rightly points out that adherence to *stare decisis* at the least “injures or wrongs no man;” but to jettison it “could not fail to work wrong and injury to many.” *Id.* at 326.

³⁹ *Id.* at 326 (citing THE FEDERALIST NO. 80).

⁴⁰ *Id.*

⁴¹ *Id.* Of our own accord, and for purposes of the present day, we might restate the axiom in the following way; where A has done business with B, a corporation, and now controversy obtains between the two, the laws of the state under which B is incorporated cannot be interpreted so as to eradicate A’s constitutional right to invoke diversity jurisdiction. After all, A dealt with B in the entity’s own name, not in the names of some unknown stakeholders. *Marshall* itself says something similar, speaking of “dormant or secret” owners, and even invoking a similarly lettered illustration. *Id.* at 326.

contemplated by the Constitution.” The parade of horrors that would follow would include the submission of their claims to judges and juries who are local residents of the place where the suit would be tried, thereby assuming the risk of proceeding in a less than impartial forum.⁴²

Justice Grier closed the foregoing exhortation of the Article III right to diversity jurisdiction with a succinct declaration. “State laws, by combining large masses of men under a corporate name, cannot repeal the Constitution.”⁴³ Thus having firmly established that constitutional rights and privileges cannot be repealed by individuals, corporations or other artificial forms of doing business, the Justices proceeded to firmly apply that axiom to the instant case.

Contemplating the manner in which natural persons conduct business with artificial entities, the Court gladly admitted that such interaction does not transpire on some metaphysical plane. Rather, it is a far more pragmatic affair, for reason that the individual deals with other natural persons, all of them enjoying individual citizenships. Furthermore, when doing business with a corporation, individuals are typically unaware of the stakeholders behind the scenes, whom the *Marshall* Court went so far as to classify as possibly “secret or dormant partners.”⁴⁴

Consistent with the earlier display of some latent hostility against the corporate form of doing business, the Court issued a stern warning. The guarantees of Article III cannot be undone by the “syllogism, or rather sophism” of the many acting behind the name of the one, the latter being a corporate entity. *Marshall* proclaims that an artificial construct “cannot be

⁴² *Marshall v. Baltimore & Ohio Railroad Company*, 57 U.S. 314, 327 (1854). Make no mistake, we openly acknowledge that this segment of the *Marshall* opinion portrays a much different view of corporations than that which prevails in modern times. The Supreme Court of 1854 recounts the danger of “powerful corporations” exploiting their wealth and local connections to crush an individual litigant in a state court. Such impersonal entities, “combining large masses of men under a corporate name,” would have overwhelming resources to throw against ordinary persons in a court of law, once more endangering any chance of a lone individual obtaining a fair adjudication. Moreover, there would be, in all likelihood, a chilling effect upon natural persons, since “no prudent man would engage with such an antagonist, if he could help it.” *Id.* (internal quotations omitted). Here we see displayed in all its glory the last vestiges of hostility toward the corporate form of doing business in the years preceding the American Civil War. Things have changed a great deal in the intervening one hundred and sixty years since *Marshall* was decided, but, as the saying goes, the more things change, the more they stay the same. Hostility to corporations has not entirely disappeared from the scene. Even in these enlightened times, some still contend that the corporate form of doing business poses a threat to our system of ordered liberty. And, from time to time, holders of that view have sat on the modern Supreme Court. See *Citizens United v. Federal Election Commission*, 558 U.S. 310, 426-29 (Stevens, J., concurring in part, dissenting in part). We therefore respectfully submit that while the rationale remains the same, today it broadly encompasses the needs of both natural persons and artificial entities. In the Twentieth First Century, the constitutional guarantee of access to the national forum of the federal courts, overseen by appointed, life tenured jurists, is of equal, if not greater, importance to corporations fearful of being overrun by the passions of local courts and juries. In our estimation, that is a significant change. But equally significant is what has *not* changed since 1854, that being the fundamental tenet of *Marshall*. As was true in 1854 and still holds today, it is the lone individual, embroiled in a “David versus Goliath” battle against titanic multistate, indeed global, entities, who must be assured of her constitutional right to assert diversity jurisdiction. At the end of the day, what matters is honoring the constitutional guarantee of diversity jurisdiction for all citizens, natural persons and artificial entities alike. Indeed, we shall momentarily review hereinabove words of the *Marshall* Court in accord with this very call for equal treatment.

⁴³ *Marshall v. Baltimore & Ohio Railroad Company*, 57 U.S. 314 (1854).

⁴⁴ *Id.*

wielded to deprive others of acknowledged rights,” including the privilege of invoking diversity jurisdiction.⁴⁵

At this juncture, one might think (and rightly so) that the *Marshall* Court was about to disavow *Letson*, and revert to a more primitive view of diversity jurisdiction. But there was more to come.

Comporting to a reality well known to the contemporary reader, *Marshall* now took stock of the attributes of the corporate form of doing business. The “unknown and ever-changing associates” behind the corporation act, contract, and otherwise do business under a collective corporate moniker. In a judicial forum, the entity can only be represented by an attorney, not by the appearance of its owners. Such natural persons are not even the real parties to a suit in controversy involving the corporation, the high bench adds.⁴⁶ Here then, we have at least a tacit acknowledgement by the Court of the key characteristic of the corporation, to wit, it is an entity in its own right, albeit a force for concerted action by a multitude of other actors.

The corporation, continued Justice Grier, draws vitality from the state enactments that authorize its organization, bestowing upon it, among other things, the power to sue or be sued. It follows, held the Court that the artificial entity known as a corporation dwells in the place where local law made its creation possible.⁴⁷

Taking a bold step, *Marshall* then engaged in a legal fiction of sorts. Natural persons first decide to organize their business in the form of a corporation. They then select a state in which to incorporate. In so doing, these natural persons shed their individual citizenships, insofar as the affairs of the entity are concerned, and thereby assume the citizenship of the state under whose laws they organized the entity. In this manner, when diversity jurisdiction is in question, the corporation is deemed to have but one citizenship---that of the state in which it was incorporated.⁴⁸

In justifying its reasoning, the Court is unerringly accurate. “If it were otherwise it would be in the power of every corporation, by electing a single director residing in a different State, to deprive citizens of other States with whom they have controversies, of this constitutional privilege” of diversity jurisdiction. Natural persons in conflict with a corporate entity would be compelled to bring suit in the state courts, at a time when the guarantee of diversity jurisdiction “may be considered most valuable.”⁴⁹

This preservation of the choice of forum was of the utmost importance to the *Marshall* Court. “The right of choosing an impartial tribunal is a privilege of no small practical importance,” it declared, “especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every State.”⁵⁰ Implicit in those words is an overt concern for individual litigants, and maintaining their rights to invoke diversity jurisdiction against supposedly venal incorporated entities. But a subsequent declaration makes clear that the high Court was not so one-sided in its views.

⁴⁵ *Id.* at 327-28.

⁴⁶ *Id.* at 328.

⁴⁷ *Id.* (internal quotations and citation omitted).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 329.

Marshall immediately thereafter proclaims that the constitutional guarantee of diversity jurisdiction is no less significant for artificial entities than it is for natural persons. “It is of importance also to corporations themselves that they should enjoy the same privileges, in other States, where local prejudices or jealousy might injuriously affect them.”⁵¹

Thereby assuring absolute evenhandedness in the application of the precepts governing diversity jurisdiction, the high Court concluded that portion of *Marshall* germane to the instant Article. The legal precept first announced in *Letson*, that the citizenship of an authentic corporation for purposes of diversity jurisdiction is its state of organization, and not the state citizenships of its owners, was now confirmed.⁵²

Time marched on, and so did the inauguration of new and innovative forms of business organizations that could not have possibly been imagined by the high Court of the pre-Civil War era. Yet it was to be another half century before the issue of determining the citizenship of an artificial business construct for purposes of establishing diversity jurisdiction was to be replayed before the high Court. Notwithstanding that lengthy passage of time, the Justices were keen to resolve the question in a manner consistent with what had gone before, as we shall now see with a pivotal case decided at the turn of the last century.

Great Southern---A Bridge to the New Century

As we have seen, by the middle of the Nineteenth Century the Supreme Court had clearly enunciated the rule that a corporation is a citizen of the state in which it is incorporated for purposes of diversity jurisdiction. To be quite certain, the high Court strictly delimited the application of that rule to authentically incorporated bodies. The Justices gave no indication whatsoever that the maxim should be extended to other forms of business organizations, such as partnerships, leaving such collaborative entities to draw their citizenship from the aggregate citizenships of their owners when diversity was at issue.

Nonetheless, as the Twentieth Century dawned, the Supreme Court had by no means exhausted the expanding universe of forms of business organizations for whom the citizenship question was still extant. From time to time in the new century, it became the task of the Justices to winnow down that list, and decree which artificial entities, if any, were akin to true corporations, and could therefore claim a citizenship independent of their owners.

Yet it must be remembered that such determinations provided equal opportunity for the high Court to decree that a particular enterprise did not conform to the ideal of a corporation as contemplated by the constitutional and statutory provisos guaranteeing access to the federal courts via diversity jurisdiction. The inevitable result would be new Twentieth Century benchmarks, wherein the Justices would deny unincorporated entities a citizenship separate and apart from their owners, concomitantly maintaining the exclusivity of the independent corporate citizenship maxim.

⁵¹ *Id.*

⁵² While not relevant to the instant writing, we nevertheless comment that *Marshall* goes on at some length regarding the merits, which appear to be centered around an apparent contract for the procurement of favorable action from the Virginia state legislature, in relation to the affairs of the defendant railroad. *Id.* at 330. As we noted before, the more things change, the more they stay the same. See *McDonnell v. United States*, 136 S. Ct. 2355 (2016). (June 27, 2016) (vacating the conviction of the former governor of Virginia on the charge of accepting gifts in exchange for procuring favorable state action).

*Great Southern Fire Proof Hotel Co. v. Jones*⁵³ was quite literally the first landmark of the new era upon this subject. The original complaining party below was Jones & Laughlins, Limited, a self-described limited partnership, organized under the statutes of the Commonwealth of Pennsylvania.⁵⁴

Jones & Laughlins had sold a quantity of steel to Great Southern, an Ohio corporation, to be used in building the latter's namesake hotel in Columbus, Ohio. When the purchaser failed to remit payment in full, the steelmaker commenced an action in federal court, alleging jurisdiction on the basis of the supposed diversity of the citizenship of the litigants.⁵⁵ Indeed, it would appear that the opposing parties had merely presumed the validity of the plaintiff's claim to diversity jurisdiction, as no objection to same was lodged at the trial or appellate courts.⁵⁶

The Supreme Court quickly disabused the litigants of that notion. Writing for the Court, the legendary Justice Harlan began by noting that "the first and fundamental question is that of jurisdiction." It is the solemn duty of every tribunal to first ascertain if it has jurisdiction over the case at bar. "The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception."⁵⁷

The mere acquiescence of the parties to the exercise of the Article III power is of no moment, stated Justice Harlan. It is therefore necessary for the high Court to reexamine, and, if needs be, deny its own jurisdiction, and, per force, that of the lower federal tribunals in every case the Justices confront.⁵⁸ Having robustly declared the paramount question, the *Great Southern* Court exhibited equal vigor in answering it.

The Supreme Court forcefully declared that diversity was lacking in the instant case because the plaintiff there was a limited partnership, not an incorporated body. The rule the high Court had fashioned for determining the citizenship of a corporation for purpose of diversity jurisdiction could not be relied upon by this unincorporated form of business organization.⁵⁹

The *Great Southern* Court found its earlier dispositions on the issue to be "decisive of the present question."⁶⁰ Previously, the Justices would not bestow upon a voluntary association of persons a citizenship independent of its owners, notwithstanding that the entity in question owed its creation to state law.⁶¹

⁵³ *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900).

⁵⁴ The Jones & Laughlins name is certain to resonate with constitutional scholars, not to mention history buffs. This plaintiff was the precursor to the respondent in *N.L.R. B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), one of the seminal cases upholding the constitutionality of the "New Deal" lawmaking of President Franklin D. Roosevelt, in that instance the National Labor Relations Act, and the concomitant founding of the National Labor Relations Board to enforce the NLRA's provisions. *N.L.R. B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 at 30, *et seq.*

⁵⁵ *Great Southern Fire Proof Hotel Co.*, 177 U.S. 449, 450-52 (1900).

⁵⁶ *Id.* at 453.

⁵⁷ *Id.* (internal quotations and citations omitted).

⁵⁸ *Id.* (internal quotations and citations omitted).

⁵⁹ *Id.* at 454.

⁶⁰ *Id.*

⁶¹ *Id.* (internal quotations and citation omitted).

In another pungent example, this time pertaining to a so-called joint stock company, the Court ruled that entity to be “a mere partnership” and “not a corporation,” and therefore unable to claim the citizenship of the state under whose laws it came into being.⁶²

The statutes regulating diversity jurisdiction, opined Justice Harlan, are not so indiscriminate as to permit any and all artificial entities to claim the citizenship of the jurisdiction under whose laws they are organized. To the contrary, Justice Harlan informs us, organizing an artificial form of business organization pursuant to state law is not the same as incorporating the identical venture under that forum’s local corporate codes. That being the case, “unless it be a corporation,” such an artificiality cannot claim a citizenship distinct from its stakeholders.⁶³

The fact that a state law permits an unincorporated entity to sue or be sued in its own name made no difference to this Supreme Court. Flatly rejecting any suggestion that the Court should equate an unincorporated entity enjoying such a privilege under state law with an authentic corporation, the Justices saw no reason to extend the scope of the rule set forth nearly sixty years before in *Letson*.⁶⁴

Moreover, Justice Harlan reminds that the well-established rules of that era governing access to the federal courts via diversity jurisdiction are wholly distinct from state laws allotting rights and privileges to unincorporated forms of business organizations. As for the high Court’s long governing precedents, the Justices were adamant those strictures would not be modified that day. Further debate was foreclosed by the Court’s admonition that the lesson already taught was “so long recognized and applied that it is not now to be questioned.”⁶⁵

The Supreme Court steadfastly proclaimed that the rule applicable to corporations in determining diversity of citizenship had not previously been and would not on this occasion be applied to partnership entities, notwithstanding that “such associations may have some of the characteristics of a corporation.” The Court mandates compliance with the corollary rule that, when diversity jurisdiction is at stake, the citizenship of any noncorporate entity is to be determined by examining “the citizenship of the several persons composing such association.”⁶⁶

⁶² *Id.* at 455 (internal quotations and citation omitted) (emphasis in the original). See *Chapman v. Barney*, 129 U.S. 677, 682 (1889). Parenthetically, we note that *Chapman* was predicated upon the now archaic form of business organization known as a joint stock company, in truth “a mere partnership.” See *Chapman*, 129 U.S. 677 at 682. *Chapman* explicitly emphasized that, under the very same law under which this joint stock company was organized, only an actual incorporated body could claim a citizenship independent of its owners. As an unincorporated entity, this form of business organization enjoyed no such privilege, and therefore was compelled to adopt the citizenship of its owners for purposes of determining diversity jurisdiction. The *Chapman* Court then more implicitly declined to extend to such unincorporated bodies the same test it had long applied to actual corporations to determine their citizenship for purposes of diversity jurisdiction. *Id.* at 682. Subsequent scholarship amplified the unquestioned wisdom of the Supreme Court in *Chapman*, observing that the ostensible shareholders of a joint stock company are “deemed to be the proprietors of the business and are liable as principals in both tort and contract.” See Weissman, *The Common Law of Business Trusts*, 38 *Chicago-Kent L. R.* 11, 12 n.5 (April 1961).

⁶³ *Great Southern Fire Proof Hotel Co.*, 177 U.S. 449 (1900) (internal quotations and citation omitted).

⁶⁴ *Id.* at 455-56.

⁶⁵ *Id.* at 456.

⁶⁶ *Id.* Taking full regard of Pennsylvania’s state constitution and the opinions of its local courts on the subject of limited partnerships, such as the plaintiff herein, the *Great Southern* Court summarized the Commonwealth’s jurisprudence as characterizing a limited partnership organized under its laws as a quasi corporation, to wit, an

The rule in place for over half a century, that only corporations may assert a citizenship independent from their owners, “must not be extended,” declared the Justices. An unequivocal enough statement, most would agree. But any lingering doubt (or hope, for some) was eradicated with the Justices’ next proclamation. “We are unwilling to extend it so as to embrace partnership associations.”⁶⁷

In overruling *Great Southern*, it is an understatement to classify it as a mere reaffirmation of *Letson* or even *Marshall*. When one contemplates that *Great Southern* followed its ancestors by over half of a century, one can only marvel at the high Court’s unswerving allegiance to its established teachings, even as the surrounding world of business organizations evolved into a new age.

Yet another half-century---and more---was to pass before the Supreme Court was to erect its next great landmark on this significant controversy of diversity jurisdiction and the citizenship to be accorded business organizations when the former is implicated. Notably, that hallmark, decided closer to our own era, was to exhibit as much resolve and consistency as its forebears of the one hundred years prior.

III. THE TWENTIETH CENTURY CASES

Time marched on, and so did the world, especially the realm of commerce. Given the many changes in the variety of forms of business organizations, and after the passage of two World Wars, numerous economic and political upheavals, and the like, could the Supreme Court of the second half of the Twentieth Century be provoked into reassessing its bifurcated rules for determining citizenship in diversity cases? Were the Justices prepared to make adjustments to the two distinct categories of citizenship, one exclusively occupied by authentic corporations, while the other encompassed all other forms of business organizations? The Court’s response from that time period is found in our next case.

Boulogny---An Affirmation of Precedent, An Affirmation of Judicial Restraint

At its core, *United Steelworkers of America v. R.H. Boulogny, Inc.*⁶⁸ concerns the litigiousness between a North Carolina corporation and the union seeking to organize the former’s work force. The union was the United Steelworkers of America, a prominent labor organization steeped deep in the history of American labor-management relations. While Boulogny was a traditional corporation, Steelworkers was officially listed as an unincorporated labor union, with its principal place of business alleged to be in Pennsylvania.⁶⁹ And that is what made things interesting.

The corporation had initiated a defamation action in North Carolina state court, alleging various injuries inflicting upon it by Steelworkers during the organization drive. The

entity sharing some commonalities with a true corporation, yet still retaining the attributes of a traditional partnership. The salient point is that this hybrid state of existence occupied by a Pennsylvania limited partnership “is not a sufficient reason for regarding it as a corporation” for purposes of diversity jurisdiction. *Id.* at 457. In this manner, the high Court neatly disposed of any concerns that it might be usurping local prerogatives in promulgating law in the realm of business organizations.

⁶⁷ *Id.* at 457.

⁶⁸ *United Steelworkers of America v. R.H. Boulogny, Inc.*, 382 U.S. 145 (1965).

⁶⁹ *Id.* at 146.

union promptly removed the action to the federal court, asserting the presence of both federal questions, and, most relevant to our purposes, diversity jurisdiction.⁷⁰

Boulogny responded by moving for a remand back to the local forum, denying that there was any basis for the exercise of federal jurisdiction over these disputes. Particularly germane to the instant discussion, the corporation alleged that various of Steelworkers' members were North Carolinians. Pointing to the fact that the union was unincorporated, the employer contended that diversity could only properly be gauged by examining the citizenships of all of Steelworkers' members. Based upon the above, Boulogny argued that applying the correct standard would unavoidably result in a finding of less than complete diversity of citizenship, and thereby compel a remand back to the state tribunals.⁷¹

Writing for the Court, Justice Fortas starts in a conventional place, but with an interesting observation. He tells of how the trial court below laid claim to "a trend to treat unincorporated associations in the same manner as corporations" for purposes of determining citizenship in diversity cases. The lower court further exclaimed that there existed "no common sense reason" to distinguish between an unincorporated labor union and a corporation when testing for diversity here and in similar controversies.⁷²

Indeed, this district judge expressed frank skepticism about the high Court's historical precedents on the issue, and, apparently not persuaded that they were still relevant in the present day, declined to follow their teachings.⁷³ Therefore, it was the judgment of the district court to retain the case, finding diversity jurisdiction on the basis that the union's citizenship must be determined in a like manner to that of a corporation, *i.e.*, the artificial entity assumed an individual citizenship that was based upon its state of organization, and unconnected to the citizenships of its constituents.⁷⁴

On an interlocutory appeal, the Court of Appeals for the Fourth Circuit rejected out of hand the lower court's novel approach. The appellate tribunal ordered a remand to state court, and Supreme Court review of that latest decision was to follow.⁷⁵

Justice Fortas clearly posited the plain question before the high Court; whether an unincorporated labor union is to be treated as a citizen for diversity purposes in the same manner as a corporation, that is to say, the union holds a citizenship of its own, uninfluenced by the respective citizenships of its constituent members.⁷⁶

Boulogny was equally lucid in its ruling. "Because we believe this properly a matter for legislative consideration which cannot adequately or appropriately be dealt with by this Court," the Justices affirmed the holding of the circuit tribunal, and directed a remand of the matter back to the state forum.⁷⁷

⁷⁰ *Id.* at 146. It would appear the federal question claim was subsequently abandoned by the union. *Id.* at 153 n.2.

⁷¹ *Id.* at 146.

⁷² *Id.* at 146 (internal quotations omitted).

⁷³ *Id.* at 146. This district judge was a bold one, for example, openly decrying *Chapman* as "poorly reasoned." *Id.* at 146 (citation omitted).

⁷⁴ *Id.* at 146. We think it noteworthy that the Supreme Court did not even dignify its recitation of the district judge's decision by making reference to an official citation or reported opinion. Such is the fate of the trial judge that tacks in a direction diametrically opposed to high Court precedent.

⁷⁵ *Id.* at 146-47.

⁷⁶ *Id.* at 147.

⁷⁷ *Id.* at 147.

In doing so, *Bouligny* rejected the call of the union and others for reformation. The Court took this occasion to once again affirm that an unincorporated entity enjoys no citizenship of their own, but rather draws its citizenship, as it always has, from the aggregate of the citizenships of its members.⁷⁸

The Court's reasoning was succinct. Justice Fortas commenced with the Constitution's grant of federal jurisdiction over diversity cases, and then neatly summarized the high Court's string of precedents extending, at that time, over more than one hundred years. Particular attention was paid to the landmarks of *Letson* and *Marshall*, with the Court remarking that the differing precepts for determining the citizenship of corporations vis-à-vis unincorporated entities in diversity cases had "endure[d] for over a century."⁷⁹

The foregoing was joined by the Court's exposition of the legislative history detailing Congress' occasional forays into regulating diversity jurisdiction. One can safely presume that the purpose of the Court in outlining this history was to exemplify that Congress, far from being ignorant of diversity jurisdiction and its consequences for the federal courts, knew how to and indeed did take action if and when the lawmakers felt the need to do so.

Justice Fortas points out that, from the very founding of the Republic, lawmakers had "lost no time" in promulgating a diversity statute. Notwithstanding that auspicious beginning, almost a full century passed before "Congress re-entered the lists in 1875, significantly expanding diversity jurisdiction." The broadened statute resulted in an upsurge of federal case filings, which, not surprisingly, "cooled enthusiasts of the jurisdiction." The lawmakers' reaction was to amend the judicial title once again, this time to curtail eligibility for diversity jurisdiction.⁸⁰

"It was in this climate that the Court in 1889 decided *Chapman*." Interestingly, the *Bouligny* Court devoted but few words to that intermediate precedent, preferring instead to focus upon the contemporary criticism of that Nineteenth Century holding.⁸¹

Justice Fortas readily acknowledged that, in more recent times, both courts and commentators have decried the supposed inequality of access to diversity jurisdiction wrought by assigning one rule for determining citizenship to corporations, and an entirely different rule to unincorporated entities. The Justices did not flinch from the allegation made by opponents of the current regime that the distinctions previously relied upon by the high bench have become "artificial and unreal."⁸²

Addressing the contention that the realities of the function and structure of contemporary unincorporated entities makes them "indistinguishable" from their incorporated brethren, Justice Fortas likewise took stock of the plea that the Court's maxims were effectively punishing noncorporate bodies for their lack of a "birth certificate," *i.e.*, a certificate of incorporation. The high Court did not shy away from the claim that its diversity

⁷⁸ *Id.* at 147.

⁷⁹ *Id.* at 147-48 (footnote omitted).

⁸⁰ *Id.* at 148 (footnotes omitted). See also Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1 (1964).

⁸¹ *United Steelworkers of America v. R.H. Bouligny, Inc.*, 382 U.S. 145, 149 (1965). See *Chapman*, 129 U.S. 677 (1889).

⁸² *R.H. Bouligny, Inc.*, 382 U.S. 145, 149 (1965).

jurisprudence might indeed be standing upon “an inadequate and irrelevant difference” between authentic corporations and unincorporated bodies.⁸³

With remarkable candor, the Court alluded to “considerable merit” in the argument that the incumbent maxims might make for poor judicial administration, subjecting unincorporated entities to “vagaries of jurisdiction,” notwithstanding that modern noncorporations are generally imbued with “an identity and a local habitation of their own,” separate and apart from the citizenships of their constituent members.⁸⁴

Now the high Court turned to examine the foregoing in relation to the prime contentions made by the original defendant in the case at bar. The union had argued that an animating purpose behind diversity jurisdiction----“protection of the nonresident litigant from local prejudice”---was an imperative where the “nonresident defendant is a major union.” Steelworkers alleged that there was a pronounced danger that local juries would be tempted to put their own parochial interests ahead of the rights of an out-of-state labor organization.⁸⁵

The union argued to the Court that it was precisely the type of unincorporated entity most in need of the many benefits the federal forum provides: presiding jurists immunized (more or less) from the local pressures confronted by their state court counterparts; juries selected from a larger geographic zone; the supervision of a multistate appellate tribunal; and, the ultimate benefit, a forum where the last word comes from the nation’s highest court. For these reasons, Steelworkers urged the Court to revisit its principles of citizenship for diversity purposes, and recognize an individual citizenship for the union.⁸⁶

Notwithstanding all the foregoing, the Supreme Court was unmoved. Its rationale for staying the course was straightforward. “[H]owever appealing” the above arguments might be, the Justices declared that “pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress, and not the courts.”⁸⁷

To be sure, the Justices did not reject the union’s calls for change out of caprice or obstinacy. To the contrary, *Boulogny* advanced pragmatic reasons as to why enlarging the rule of independent citizenship to now include noncorporate bodies was a matter best left to elected lawmakers, and not one to be imposed by judicial fiat.

⁸³ *Id.* at 149-50.

⁸⁴ *Id.* at 150.

⁸⁵ *Id.* at 150.

⁸⁶ *Id.* at 150. *Boulogny* is very much a creature of its times. Decided by the Court in 1965, the midpoint of the tumultuous Nineteen Sixties, the controversy obviously came into being in the equally fractious years preceding the actual date of the Court’s decision. In consideration of those facts, one more readily understands Justice Fortas’ elaboration upon the argument that race relations, as well as economic considerations, should play a role in the Court’s deliberations upon its existing diversity precedents. In a stark reflection of the era, the Court willingly exposit Steelworkers’ assertion that denizens of the state courts, as fearful of changes in race relations and local customs as they were of the economic impact of unionization, would harbor ill will towards an out-of-state labor union. *Id.* at 150.

⁸⁷ *Id.* at 150-51. Here *Boulogny* references *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), but the combination of the Court’s swift disposition thereof, and our choice to discuss it later in this Article, compels us to defer further analysis to that subsequent point herein. Suffice to say at this juncture, the *Boulogny* court made two pertinent declarations in refuting claims that *Russell* was an agent for change. First, *Boulogny* holds that, contrary to the union’s assertion therein, in no fashion was *Russell* a departure from established doctrine on this subject. Second, and substantially flowing from the first point, *Russell* was likewise not evidence that the Court in 1933 had unilaterally expanded the scope of diversity jurisdiction, heedless of the role of the legislative branch in such matters. See *R.H. Boulogny, Inc.*, 382 U.S. at 151-52.

The Court cautions that, were it to accept this “urgent invitation” to amend its citizenship precepts so as to bring the original defendant within the ambit of the rule long applied to corporations, “we would be faced with difficulties which we could not adequately resolve.” Even if the Justices were to make the critical presumption that the record of the case at bar was adequate, Justice Fortas advises that the high bench should nevertheless “hesitate to assume that [the union’s] situation is sufficiently representative or typical to form the predicate of a general principle” that would henceforth regulate this expansion of the rule for a citizenship independent of an entity’s owners to encompass unincorporated labor unions and the like.⁸⁸

Next, if the high bench did announce a new precedent granting unincorporated bodies citizenship independent of their constituents for purposes of diversity jurisdiction, the Justices would then “be obliged to fashion a test” for ascertaining the source of that freestanding identity. In contradistinction, there were no difficulties in attending to that task for true corporations; an entity’s state of incorporation “was a natural candidate” to provide a definitive answer to that question.⁸⁹

That straightforward methodology, opined the Court, could not be so easily transplanted to the instant case. Justice Fortas reminds that the original defendant here, “like other labor unions, has local as well as national organizations.” This duality “perhaps, should be reckoned with” before the high bench provoked change to the rules for determining the citizenship of such artificialities in diversity cases. Signifying that they were “acutely aware of the complications” arising from the peculiar circumstances described above, the Justices thereby provided further justification for deferring to the legislative branch on whether the reach of diversity jurisdiction should be extended to a modern labor union.⁹⁰

In closing, the Court summarized the key choices *Bouligny* presented as threefold: whether or not labor unions, as unincorporated entities, ought to be “assimilated to the status of corporations for diversity purposes;” if so, then how best to determine their citizenship; and, finally, what other related rules needed to be promulgated, assuming the foregoing changes were indeed implemented. In light of all the above, the Supreme Court unequivocally concluded that these are decisions “which we believe suited to the legislative

⁸⁸ *Id.* at 152.

⁸⁹ *Id.* at 152. The Court brushes aside here any “arguable irrelevance” of utilizing the state of incorporation as the proper means for ascertaining the citizenship of authentic corporations in diversity cases. First, any doubt of the method’s efficacy is “outweighed by its certainty of application.” *Id.* Second, *Bouligny* points out that Congress has tinkered with the diversity statute, for the obvious purpose of making it more accommodating of the practical reality that corporations often incorporate in one jurisdiction, but maintain a principal place of business elsewhere. *Id.* at 152 (footnote omitted) and 153 n.4. See 28 U.S.C. § 1332 (c). See also Pub. L. No. 85-554, 72 Stat. 415, reprinted in 1958 U.S.C.C.A.N. 488 (adding to a corporation’s citizenship in diversity cases the state in which it maintains its principal place of business). Undeniably, Justice Fortas advances these points as ancillary support for the Court’s basic conclusion that it is best to leave it to Congress to legislate any broad reconfiguration of diversity jurisdiction.

⁹⁰ *R.H. Bouligny, Inc.*, at 152-53 (footnote omitted). One can sensibly imply that the Supreme Court would have, in all likelihood, voiced nearly identical concerns if the unincorporated entity appearing before it was something other than a labor union. The Justices would still be compelled to decide if the record before them was adequate, was the matter sufficiently representative to form the basis of a new controlling principle, and, most of all, what would be the appropriate test for determining the citizenship of such an unincorporated body? Aside from this peculiarity of *Bouligny* that the Justices explicitly recognized (that many labor organizations are “national” and “local” unions simultaneously), we think it fair to say that the Court would have acted in a like manner, even if the unincorporated entity at the bar had been something other than a labor union.

and not the judicial branch, regardless of our views” as to the merits presented in the case at bar.⁹¹

Boulogny ended with two qualities worth remarking upon: the same firm adherence to precedent that had sustained the high Court on this issue for well over a century; and a worthy demonstration of judicial restraint. In this manner, the Court assured more than two decades of relative quiescence on this front.

It was very nearly the end of the Twentieth Century before the Court meaningfully addressed the matter again. We now turn to that pivotal decision, for it is one that provided the key to the current Court’s most recent edict on the subject of determining an artificial entity’s citizenship for purposes of diversity jurisdiction.

Carden---The Key to the Past, the Present, and the Future

To this point, we have first set forth in detail the lengthy history of the Supreme Court’s jurisprudence on the subject of determining citizenship for business organizations in diversity cases. Spanning well over a century of legal precedents, these holdings simultaneously reflect much of the nation’s entrepreneurial development as well. We also find it worth noting that the majority of the key opinions comprising the Court’s teachings emanate from the Nineteenth Century (or extremely close thereto), with only one of significance originating from the midpoint of the second half of the last century.

Yet any perceived chasm between that grouping of high Court edicts and the present day is bridged by one last holding, a far more contemporaneous ruling that effectively connects three different epochs of high Court postulations on the subject. Indeed, this final precursor is much more reflective of the current Court, no doubt one reason amongst several that it significantly undergirded the Justices’ present day views as espoused in *Americold*.

This crucial bond uniting three centuries of Supreme Court jurisprudence on the subject of citizenship and diversity jurisdiction comes to us from the last decade of the Twentieth Century, and is entitled *Carden v. Arkoma Associates*.⁹² Authored by the late Justice Scalia, the calendar tells us, of course, that *Arkoma* was one of his earlier endeavors on the Supreme Court. Nonetheless, even though springing from his relatively early years on the high bench, this decision is still quite revealing as to the mode of analysis and clarity of resolution for which Justice Scalia was to become legendary. That said, let us first examine the pertinent facts comprising this very important link in the Court’s long chain of defining precedent on this subject.

Arkoma, a limited partnership organized under Arizona law, was the plaintiff in what appeared to be a rather prosaic contract dispute, as filed in the Eastern District of Louisiana. Diversity of citizenship was alleged as the predicate for federal jurisdiction. Defendant Carden resisted appearing in federal court, asserting that one of *Arkoma*’s limited partners was also a citizen of Louisiana, and complete diversity was thereby lacking.⁹³

The appellate court rejected the defendant’s plea. While ignoring the locales of *Arkoma*’s limited partners, the intermediate tribunal assessed the plaintiff’s citizenship solely

⁹¹ *Id.* at 153 (footnote omitted).

⁹² *Carden v. Arkoma Associates*, 494 U.S. 185 (1990).

⁹³ *Id.* at 186.

by focusing upon the citizenships of its general partners, and upheld diversity of citizenship jurisdiction. Review by the Supreme Court was subsequently granted.⁹⁴

Cogent as always, Justice Scalia initiated the opinion by declaring the question presented was a relatively narrow one; in a suit brought by a limited partnership, were the citizenships of the entity's limited partners to be consulted when measuring the limited partnership's eligibility to claim diversity jurisdiction?⁹⁵

To set the stage, the Supreme Court first acknowledges that Article III extends the judicial power of the United States to controversies between citizens of different states. From the nascent days of the national judiciary, the constitutional grant above has been implemented via a statutory authorization to exercise diversity jurisdiction.⁹⁶ And for nearly as long, the high Court has consistently held that the proper exercise of such a jurisdictional prerogative requires complete diversity of citizenship amongst the litigants.⁹⁷

That being said, Justice Scalia now expounded upon the mode of analysis the high Court would apply to the case at hand. He posited that the high bench would find that the lower court had committed error in finding that diversity jurisdiction existed unless: a) a limited partnership is deemed to be a citizen of the state under whose laws it is created; or b) for purposes of diversity jurisdiction, the citizenship of a limited partnership is determined by looking to the citizenships of its managing general partners, while ignoring the domiciles of its limited partners. Each question would be examined in turn, the opinion promised.⁹⁸

Justice Scalia opened the Court's reasoning by commenting that the matter at hand was not a novel question. "We have often had to consider the status of artificial entities created by state law insofar as that bears upon the existence of federal diversity jurisdiction." The diversity statute poses "[t]he precise question" of whether an artificial entity is a citizen of the state under whose laws it was created.⁹⁹

Now the Court was ready to place the above in counterpoise with various forms of business organizations, commencing with that most fundamental construct, the corporation. The Supreme Court has long held that a corporation is the "paradigmatic artificial 'person,'" and it is a matter of fact that the Justices have had ample opportunity to assess its characteristics, particularly the attribute of citizenship, over the course of time.¹⁰⁰

Yet, noted Justice Scalia, the Court's earliest pronouncements on the matter were vastly different from the view that was to eventually prevail for nearly two centuries. In the early days of the Republic, a still-new Supreme Court denied such an artificial entity the right to an independent citizenship, decreeing instead that a corporation derives its identity from the citizenships of its owners when diversity jurisdiction is at stake.¹⁰¹

However, a few short decades later, the learned jurist observes, the high Court was to exhibit a distinct change in its thinking. Nearly at the halfway mark of the Nineteenth

⁹⁴ *Id.* at 186-87.

⁹⁵ *Id.* at 186.

⁹⁶ *Id.* at 187 (citing Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78).

⁹⁷ *Id.* at 187. See *Strawbridge v. Curtiss*, 7 U.S. 267.

⁹⁸ *Carden v. Arkoma Associates*, 494 U.S. 185, 187 (1990).

⁹⁹ *Id.* at 187 (footnote omitted).

¹⁰⁰ *Id.* at 187-88. Accord *Citizens United v. Federal Election Commission*, 558 U.S. 310, 387 (2010) (Scalia, J., concurring) ("By the end of the eighteenth century the corporation was a familiar figure in American economic life.") (internal quotation marks and citations omitted).

¹⁰¹ *Id.*, 494 U.S. at 188. See *The Bank of the United States v. Deveaux*, 9 U.S. 61, 85 (1809).

Century, the Justices discarded that view, and installed in its place a maxim providing that, when determining diversity jurisdiction, a corporation, much like a natural person, assumes the citizenship of the state where it came into being.¹⁰²

That tectonic shift in jurisprudence was soon reinforced by the Court in subsequent edicts, confirming that a corporation should be conclusively presumed to take its citizenship from the state in which it is incorporated.¹⁰³ Indeed, Justice Scalia describes how that maxim came to be “firmly established” in the Court’s diversity jurisprudence.¹⁰⁴ Yet just as important as the foregoing declaration of a positive rule, the venerable Justice ascribes nearly equivalent weight to what the high Court specifically declined to do over that same span of time.

The Supreme Court has “just as firmly resisted extending that treatment” reserved for corporations “to other entities.”¹⁰⁵ As proof of the Justices’ equal zeal in denying unincorporated artificial constructs access to the same rule bestowed upon corporations, Justice Scalia reached across what was then a century of high Court precedent to prove the point.

The first example of that resoluteness not to expand the rule for determining corporate citizenship in diversity cases to encompass noncorporate entities came from one hundred years prior, when the Justices were called upon to expound upon the diversity citizenship of the now archaic form of business organization known as a joint stock company. The salient point was that now outdated artificiality was unincorporated; that was all the Court required to declare that such modes of organizing a business venture would rely upon the citizenships of their owners when diversity of citizenship had to be determined.¹⁰⁶

Next, *Carden* reached back nine decades from its own date of decision to exposit the teachings of *Great Southern Fire Proof Hotel Co. v. Jones*¹⁰⁷ as incontrovertible proof that the Court could not be persuaded to bring nonincorporated entities under the umbrella of the citizenship rule it had made applicable solely to corporations well before the American Civil War. Confronting a litigant organized as a limited partnership, the Justices had no trouble admitting there that such a form of business organization shares some of the attributes of the classic corporate form. The Justices even took that a step further, acknowledging that the law of the state under which the limited partnership was organized purported to bestow a citizenship upon the entity independent of its owners.¹⁰⁸

But mere similarities in form, and the assertions of state lawmakers, are inadequate to the task of reconciling the limited partnership form to that of the true corporation, said the

¹⁰² *Carden v. Arkoma Associates*, 494 U.S. 185, 188 (1990). See *Letson*, 43 U.S. 497 (1844).

¹⁰³ *Id.* at 188. See *Marshall*, 57 U.S. 314, 329 (1854).

¹⁰⁴ *Carden v. Arkoma Associates*, 494 U.S. 185, 189 (1990).

¹⁰⁵ *Id.* at 189.

¹⁰⁶ *Carden v. Arkoma Associates*, 494 U.S. 185, 189 (1990). See *Chapman v. Barney*, 129 U.S. 677 (1889). As before, we have made a conscious choice to give the Court’s elocution on joint stock companies’ short shrift here, because, with all due respect, that form of business organization has largely passed from the business landscape. Yet we think it important to remind that *Chapman* declared without reservation that a joint stock company is, in truth, “a mere partnership.” *Id.* at 682. This explains in full why the Court of that era refused to extend the citizenship rule applicable to corporations in diversity cases to the joint stock company form of business organization.

¹⁰⁷ *Great Southern*, 177 U.S. 449 (1900).

¹⁰⁸ *Id.* at 454.

Court. Once more, the Supreme Court declared that the rule applicable to corporations for determining citizenship in diversity cases “must not be extended.”¹⁰⁹

Turning to a precedent closer to its own era, *Carden* then brought to bear the high Court’s unanimous opinion in *United Steelworkers of America v. R.H. Bouligny, Inc.*,¹¹⁰ for the purpose of reiterating that the longstanding “doctrinal wall” confining the individual citizenship rule to corporations, while forbidding it to other artificialities, “would not be breached.”¹¹¹ Justice Scalia archly pointed out that the bench of his era had to reach back a mere twenty five years to propagate a string of unequivocal precedents that the Supreme Court had not only initiated, but had robustly enforced, from decades before the American Civil War.¹¹²

Undeterred, the plaintiff continued to challenge this “doctrinal wall,” asserting that the high Court had already breached its integrity a decade before in *Navarro Savings Assn. v. Lee*.¹¹³ Yet Arkoma was to fail in this argument as well, as we shall now witness.

The significance of *Navarro*, the *Carden* Court relates, is that it presented eight individuals, serving as trustees of a Massachusetts business trust.¹¹⁴ Pursuant to their

¹⁰⁹ *Id.* at 457 (internal quotations and citations omitted).

¹¹⁰ *R. H. Bouligny, Inc.*, 382 U.S. 145 (1965).

¹¹¹ *Carden*, U.S. at 189 (internal quotations omitted) (citing *Bouligny*, 382 U.S. 145 at 151).

¹¹² *Carden*, 494 U.S. at 189. For our purposes in this Article, we treat as a parenthetical *Carden*’s extensive discussion of *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), labeled by Justice Scalia as the singular exception to “the admirable consistency of our jurisprudence on this matter,” as explicated in the main text hereinabove. *Carden*, 494 U.S. at 189-90. *Russell* centered upon the artificial form of a *sociedad en comandita*, a unique creation of Puerto Rico’s civil law. The Court held the *sociedad*’s “juridical personality” is so derived from the Commonwealth’s independent civil code that it was entitled to be deemed a citizen of Puerto Rico, just as a corporation organized under those same laws would be. *Carden*, 494 U.S. at 190, citing *Russell*, 288 U.S. at 482. Pertinent to the instant discussion, we deem only two crucial points need to be made concerning *Russell*; first, in parsing the “incorporated/unincorporated dichotomy” presented by that 1933 case, the Court posited the overarching “distinctive problem” of fitting an exotic creation of the civil law “into a federal scheme which knew it not.” *Carden*, 494 U.S. at 190 (internal quotations and citations omitted). Notable words by the *Carden* majority, opining that the federal scheme of diversity jurisdiction is a complete stranger to state statutes which authorize the creation of artificial entities. In doing so, Justice Scalia highlights the difficulties that abound in reconciling these two distinct bodies of law. Second, the plaintiff in *Carden* had alleged that *Russell* gave evidence of the Court’s willingness, when deciding diversity jurisdiction controversies, to immerse itself in plumbing the depths of state law requirements, business structures, and amenability to suit in order to make such determinations. Quite to the contrary, proclaimed Justice Scalia. The notion Arkoma “espouse[d] was proposed and specifically rejected” already. *Russell*, the learned Justice instructs, stands for the proposition that only true corporations can claim their own individual citizenship, while, pursuant to traditions of the common law, all other artificial entities are “assimilate[d]...to partnerships,” and thus derive their citizenship from that of their several owners. *Id.* At the end of the day for *Russell*, as extrapolated by *Carden*, all we are truly left with is yet another exemplar of unflinching adherence to the bedrock principle that a citizenship independent of its constituents is the sole privilege of authentic corporations, while any unincorporated construct shall have its citizenship determined in diversity cases by examining the citizenships of its members. To close this aside, and admittedly venturing a bit outside of *Carden*, we find some small relevance to the fact that when *Russell* was decided, the Commonwealth of Puerto Rico was not yet considered a state for purposes of the diversity statute. See *Bouligny*, 382 U.S. at 153 n. 10. See also Pub. L. No. 85-554, 72 Stat. 415, reprinted in 1958 U.S.C.C.A.N. 488 (adding the Commonwealth of Puerto Rico to the States, as defined in 28 U.S.C. § 1332(d)). See also S. Rep. No. 1830, 85th Cong., 2d Sess. 1 (1958), reprinted in 1958 U.S.C.C.A.N. 3099, 3100. We leave it to the reader to decide the weight to be accorded this small fact, but we deem it worthwhile to mention in contemplation of the instant topic.

¹¹³ *Carden*, 494 U.S. at 191 (citing *Navarro Savings Assn. v. Lee*, 446 U.S. 458 (1980)).

fiduciary duties in that regard, the *Navarro* trustees had commenced litigation in their individual names. The defendant there had challenged the trustees' claim of diversity jurisdiction.¹¹⁵

Navarro is inapposite to the case at hand, explained Justice Scalia, because the former's pertinent question was not how to determine the citizenship of an artificial entity, but whether the trustees there were true parties in interest, and thereby entitled to bring suit. The high court had examined the parameters of the unincorporated entity involved, that being the trust, strictly in pursuit of divining if its trustees were, in fact, the real parties in interest in the case.¹¹⁶

It is most telling, found Justice Scalia, that the citizenships of the trustees in *Navarro* were never an issue. These persons were suing in their individual capacities, something that trustees have been doing consistently in accordance with a rule some one hundred and fifty years old.¹¹⁷ As litigants suing in their own names, no deep analysis of their citizenship was needed to ascertain the propriety of diversity jurisdiction; just like any natural person, it was their own individual citizenships that would be tested, as need be.¹¹⁸

In sum, and at the same time rejecting Arkoma's allegation to the contrary, the *Carden* Court explicitly declared that *Navarro* "has nothing to do" with how the Supreme Court assesses the citizenship of artificial forms of business organizations when determining

¹¹⁴ See generally Weissman, "The Common Law of Business Trusts," 38 CHICAGO-KENT L. REV. 11 (April 1961). A Massachusetts business trust is a commercial enterprise that derives its moniker from "its genesis in the Commonwealth of Massachusetts." Its customary purpose was to hold real estate, but over time it was also utilized as a form of business organization for numerous other industrial and business ventures. *Id.* at 11. A defining characteristic of the true business trust is that its trustees have exclusive control over the trust's property, and may deal with those assets as they see fit, subject only to whatever limitations are imposed upon them by the trust instrument. *Id.* at 11 (footnote omitted). The trustees stand as fiduciaries to the trust's owners. *Id.* at 11 n.3. Moreover, the trustees are subject to personal liability in tort and contract for their actions, on the grounds that they act as principals in administering trust property in accordance with the trust instrument. *Id.* at 19. Significant to the instant discussion, "a distinguishing feature of the business trust...[is] that it is wholly contractual in nature. Unlike a corporation it is not dependent upon the laws of a state for its existence and validity." *Id.* at 11-12 (footnotes omitted). Weissman opines that these facts liberate the business trust from intrusive state regulation, "a factor sharply differentiating it from a corporation." *Id.* at 12. Notable observations, we think, from which we extrapolate the following. Business trusts, and similar artificial constructs, cannot legitimately claim an individual citizenship based upon their state of organization, since they lack the formality of an event of incorporation. Denied that option, their citizenship must be determined by other means. Finally, the same scholar parenthetically comments that the business trust "has been characterized as the offspring of a union between the unincorporated joint stock company and the trust." *Id.* at 12 n.5. If true, then should not the child abide by the same rules imposed upon both parents? Given that both ancestors, the joint stock company and the traditional trust, have each long been denied a citizenship independent of their respective owners, it is only sensible to impose that same rubric upon the "offspring."

¹¹⁵ *Carden*, 494 U.S. at 191.

¹¹⁶ *Id.* at 191.

¹¹⁷ Since very nearly the beginning of the American legal system, the Supreme Court has unerringly decreed that a trustee is a real person who sues or is sued in his own name. "At law, he is the real proprietor, and he represents himself and sues in his own right." *The Bank of the United States*, 9 U.S. 61, 91 (1809).

¹¹⁸ *Carden*, 494 U.S. 185 at 191.

an entity's qualifications for diversity jurisdiction. The doctrinal wall, in existence for nearly one hundred and fifty years at the time Justice Scalia opined, remained unscathed.¹¹⁹

To be sure, Arkoma had offered an alternative ground in support of its claim of diversity. The original plaintiff urged the high Court to focus solely upon the citizenships of its general partners in making a determination of the limited partnership's citizenship for purposes of diversity jurisdiction.

After all, the entity argued, only its general partners manage the assets, bear general liability, and exercise complete control over the enterprise's operations. In contradistinction, the artificial construct's limited partners hold little or less in terms of management prerogatives, thereby rendering their individual citizenships an irrelevancy for these purposes, or so Arkoma claimed.¹²⁰

Writing for the Court, Justice Scalia was once again unforgiving. "This approach of looking to the citizenship of only some of the members of the artificial entity finds even less support in our precedent" than the prior argument that the artificiality's state of organization should be determinative of its citizenship for diversity purposes. The learned Justice decried the myopia of examining the citizenships of a select coterie of an entity's members, while disregarding the domiciles of their fellows, when determining the crucial matter of eligibility for diversity jurisdiction.¹²¹

Moreover, such a tactic would be without precedent. "We have never held that an artificial entity...can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members," reminds the high bench.¹²²

This biting criticism of Arkoma's latest argument continued in Justice Scalia's cataloguing of the many and diverse forms of business organizations the Court had already encountered in formulating its legacy on the subject of such entities' citizenship and diversity jurisdiction. "No doubt" some members of the joint stock company, the limited partnership, and the labor union at issue in the high Court's formative precedents "exercised greater control" over the affairs of their respective artificialities than other members of the same body, opined Justice Scalia. "But such considerations have played no part in our decisions."¹²³ And clearly they would not now.

Persisting in this line of argument, the original plaintiff once more urged the holding of *Navarro* onto the high Court, contending that just as the bench in that case had looked to the individual citizenships of that entity's trustees, so too should this Court take cognizance of the citizenships of Arkoma's general partners in ascertaining the construct's citizenship, given the control those persons exercised over the entity's operations.¹²⁴

The Court made short shrift of this extended argument. As we have already explained, points out Justice Scalia, *Navarro* had no bearing on the citizenship of the trust

¹¹⁹ *Id.* at 191. Indeed, employing a bit of the directness that was to become one of his defining characteristics in the years ahead, Justice Scalia dismissed the plaintiff's contentions as "to put it mildly, less than compelling." *Id.* at 191.

¹²⁰ *Id.* at 192 (internal quotations and citations omitted).

¹²¹ *Id.* at 192.

¹²² *Id.* at 192.

¹²³ *Id.* at 192. As should now be obvious, the *Carden* opinion is referencing, *seriatim*, *Chapman*, *Great Southern*, and *Boulogny*.

¹²⁴ *Id.* at 192.

therein, since the underlying lawsuit was brought by the trustees in their own names, consistent with longstanding principles of trust law.¹²⁵

Carden makes a final point to quash any and all arguments that the citizenship of an unincorporated entity can be determined by examining the citizenships of some, but not all, of the subject body's constituent members. "Given what 180 years of cases have said and done, as opposed to what they might have said," the Supreme Court found no novelty in its rejection of such a haphazard approach to the question. Quite to the contrary, implicit in the Court's holding is a firm belief that the Justices were merely acting in accord with nearly two centuries of established precedent.¹²⁶

Now pausing to summarize this portion of the *Carden* holding, Justice Scalia confirmed that the Supreme Court was rejecting out of hand any proposal that the courts "may consult the citizenship of less than all of the entity's members" in determining the citizenship of an unincorporated body for purposes of diversity jurisdiction. Rather, the high Court proclaimed fidelity to its "oft-repeated rule" that diversity jurisdiction in a suit by or against an unincorporated entity depends upon the citizenships of *all* of its members, without arbitrary and unworkable exclusions.¹²⁷

Interestingly, the Court felt the need to address one additional matter. Sensing resistance to its proclaimed allegiance to a mode of analysis nearly as old as the Republic itself, the tribunal acknowledged that its resolution of the matter "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations" attending the ever-changing world of business organizations. Yet the Court was constrained to once again point out that this most recent holding is strongly rooted in "the character of our jurisprudence in this field," a methodology extant since 1844 when the Court issued its decision in *Letson*.¹²⁸

Justice Scalia went so far as to acknowledge that it is "undoubtedly correct" that limited partnerships, such as the original plaintiff herein, are the functional equivalents of the many other diverse forms of business organization that presently enjoy access to the federal courts via the route of diversity jurisdiction. The Court admitted that, eventually, basic fairness and substance over form might indeed mandate that limited partnerships and their peers in the business world would have their citizenship tested for diversity purposes by the same methodology now utilized for authentic corporations.¹²⁹

But that changed nothing this day. Taking a stance that would become one of the staples of his long and illustrious career on the nation's highest court, and of course in keeping with the Court's earlier pronouncements in this domain, Justice Scalia firmly

¹²⁵ *Id.* at 192-93. At this point, *Carden* indulges in a lengthy dissection of the dissent therein. *Id.* at 193-95. Since, among other things, the unanimous Court in *Americold* makes a wholesale adoption of *Carden* and its teachings, we respectfully assert that reviewing Justice Scalia's refutation of the *Carden* dissent adds nothing to the instant discussion, and therefore we feel justified in bypassing same. Notwithstanding, we deem it important enough for our purposes to point out that *Carden* reaffirmed the fundamental proposition that matters of jurisdiction are omnipresent before every tribunal. It is an inflexible rule that, without exception, each court at every level of adjudication must determine if it indeed has jurisdiction. It "will not do" to neglect that question in the instant case, nor any other case, opined Justice Scalia. *Id.* at 195 (quotations and citations omitted). See, *i.e.*, *Marshall*, 57 U.S. 314 (even "though not argued or urged by the counsel," a court must, at all times, assure itself that it has jurisdiction).

¹²⁶ *Carden*, at 195.

¹²⁷ *Id.* at 195-96 (internal quotations and citations omitted).

¹²⁸ *Id.* at 196.

¹²⁹ *Id.* at 196.

declared that amending diversity jurisdiction is a matter best left to the legislative branch, and not the courts, the latter of whom cannot adequately or appropriately deal with the issue.¹³⁰

The *Carden* Court posited a sound reason for its reluctance to meddle. Having once and robustly entered the arena of diversity policy---here Justice Scalia points to *Letson*---”we have left further adjustments to be made by Congress.”¹³¹ Any beyond any mere allusion to separation of powers and judicial restraint (as imperative as such principles might be), the Court likewise viewed the issue through the prism of history as well.

The high Court smartly points out that “Congress has not been idle” when it comes to the scope of diversity jurisdiction. Justice Scalia calls to our attention the fact that Congress promulgated additions to the judicial title in 1958 to allow corporations to be deemed citizens of the state or states where they are incorporated, and where they maintain a principal place of business. Indeed, the Court characterized this legislative action as a deliberate alteration to the holding of *Letson*, by then over a century old.¹³²

There is significance, the Court found, not only in what Congress has changed about diversity jurisdiction, but what it has left undisturbed for pronounced intervals of time. Justice Scalia notes that in the 1958 amendment “[n]o provision was made for the treatment of artificial entities other than corporations.” This was notwithstanding “the existence of many new, post-*Letson* forms of commercial enterprises...[that] must have been obvious” to the lawmakers in the mid-Twentieth Century. In support of its theorizing, the Court once more overruled its precedents, and made specific mention of joint stock companies, limited partnerships, and Massachusetts business trusts as examples of innovations in forms of business organization that sprang into being during the long *entr’acte* between *Letson* in 1844 and the amendments of 1958, and of which Congress could not possibly have been ignorant.¹³³

Put another way, the high bench found all this to constitute irrefutable evidence that Congress, in promulgating a statutory revision to the diversity statute, had concomitantly and strictly delimited its scope to true corporations. And if Congress had made a conscious choice then not to include within the amended law’s purview such unincorporated forms of business organizations that it undeniably knew existed at the time, it was not the Court’s place to second guess that legislative prerogative---then or now.

¹³⁰ *Id.* at 196.

¹³¹ *Id.* at 196.

¹³² *Id.* at 196. See 28 U.S.C. § 1332 (c). The legislative history of the 1958 amendments to the diversity statute confirms that Congress knows what it is doing when it acts, and it acts with deliberation and purpose. S. Rep. No. 1830, 85th Cong., 2d Sess. 1 (1958), reprinted in 1958 U.S.C.C.A.N. 3099. Amending the diversity statute to provide that a corporation is deemed to be a citizen of its state of incorporation and the state where it maintains its principal place of business, the lawmakers explicitly declared that diversity jurisdiction “was never intended to extend to local corporations which, because of a legal fiction, are considered citizens of another State.” *Id.* at 3102. Congress had the following overt purpose in mind in modifying Section 1332 in 1958. “This fiction of stamping a corporation a citizen of the State of its incorporation has given rise to 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.” *Id.* at 3101-02. It cannot be denied that Congress has acted with precision in these matters, as to its goals, and its means of reaching those objectives. Accordingly, this proves the point of *Carden* and *Americold* that Congress can act when it so chooses, and the judicial branch should not usurp the power of the legislative in that regard.

¹³³ *Carden*, at 196-97. The foregoing sequence reflects the entities dealt with by the Court in *Chapman*, *Great Southern*, and *Navarro*, respectively.

Therefore, the Supreme Court held it was justified in taking the course it charted today, for reason that its refusal to invoke unilateral change “does not so much disregard the policy of accommodating our diversity jurisdiction to the changing realities of commercial organization, as it honors the more important policy of leaving that to the people’s elected representatives.” Such revisions to jurisdiction are not only undertaken more legitimately by Congress than the courts, but “performed more intelligently by legislation” than by judicial interpretation, opined Justice Scalia.¹³⁴

Carden gladly admits to the fact that the Fifty States have and shall continue to create “a wide assortment of artificial entities possessing different powers and characteristics.” Each of these new innovations in forms of business organization shall be “composed of various classes of members with varying degrees of interest and control.”¹³⁵

It follows then, opined the Justices, that certain of these novel constructs shall have the ability to assert a citizenship all their own. In contradistinction, other artificialities new to the expanding universe of business organizations shall remain reliant upon the citizenship of their constituents when determining their own citizenship for purposes of diversity jurisdiction.¹³⁶

As to the authority best suited to categorize these entities into one or the other classification, Justice Scalia found that these are “questions more readily resolved by legislative prescription than by legal reasoning,” more so because these are jurisdictional issues “whose complexity is particularly unwelcome at the threshold” of litigation.¹³⁷

To bring *Carden* to an end, Justice Scalia offered the wisdom of judicial restraint. “We have long since decided that, having established special treatment for corporations, we will leave the rest to Congress.” The opinion thereby concludes with the maintenance of the *status quo*. Unincorporated entities, such as the limited partnership at issue in the instant case, would continue to consult the citizenships---plural---of all (not some) of their constituent members when the entity’s citizenship needed to be determined for purposes of diversity jurisdiction.¹³⁸

In this manner, *Carden* exemplified the high Court’s resolve to remain true to nearly a century and a half of its own precedent. While not unusual in and of itself, it is nevertheless a testament to the Court’s commitment to consistency on a jurisdictional matter of key importance to the realms of both law and business.

Moreover, as *Carden* closed out the Twentieth Century legacy of the Court on such matters, it was also to prove the touchstone for the high bench as the matter at hand carried over into the next century. And to that most current postulation of the Supreme Court on this significant issue, we may now finally turn.

¹³⁴ *Id.* at 197. *See, i.e.*, *Obergefell v. Hodges*, 135 S.Ct. 2584 (Scalia, J., dissenting) (warning of the “threat to American democracy” posed by “a naked judicial claim to legislative---indeed, *super*-legislative---power; a claim fundamentally at odds with our system of government”).

¹³⁵ *Id.* at 197.

¹³⁶ *Id.* at 197.

¹³⁷ *Id.* at 197.

¹³⁸ *Id.* at 197.

IV. DIVERSITY JURISDICTION AND FORMS OF BUSINESS ORGANIZATIONS IN THE TWENTY FIRST CENTURY

Americold---Precedent and Judicial Restraint in the Here and Now

We have at last arrived at *Americold*,¹³⁹ the Supreme Court's newest decision upon the issue of ascertaining the citizenship of unincorporated business organizations when diversity jurisdiction is at stake. We acknowledge that the road just travelled was a long one, but the journey was taken for good purpose.

For to understand *Americold*, itself the soul of directness, one must first understand its one hundred and eighty year old pedigree. That crucial task now accomplished, we can now enjoy a more fulsome appreciation for the fact that this current ruling is not merely the latest iteration of longstanding precedent, but stands proudly as a worthy exemplar of an enduring judicial philosophy on a subject that has been of vital importance to the federal courts since the first days of the Republic. All that said, let us turn to the particulars of this latest case.

From the outset, an understanding of the factual predicate for *Americold* is greatly facilitated by an appreciation of, on the one hand, geography, and, on the other, the multistate (if not multinational) scope of modern business. This is reflected in the intrinsic nature of the antagonists present in the instant case.

We first take cognizance of the original plaintiff and its fellows. The lead complainant Conagra is a behemoth global agricultural concern, claiming citizenship from Delaware, its state of incorporation.¹⁴⁰ The other plaintiffs were duly noted to be corporate citizens of Nebraska and Illinois.¹⁴¹

Arrayed against them was the defendant Americold, a real estate investment trust (commonly known as a "REIT"). The defendant asserted that it was organized pursuant to the laws of the state of Maryland.¹⁴²

The instant controversy had a prosaic enough, if not unfortunate, beginning. A fire in an underground storage facility owned by Americold's predecessor destroyed foodstuffs owned by the various plaintiffs. Seeking to recover their losses from the property owner, litigation was initiated.¹⁴³

Given the multiplicity of domiciles for these entities, one could perceive an interesting tactical issue as to where suit would be filed. So, amongst the above named jurisdictions-----Delaware, Nebraska, Illinois, and Maryland---which finally won out as the chosen forum? The answer---none of the above.

¹³⁹ *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S.Ct. 1012 (2016).

¹⁴⁰ *Id.* at 1-2. See also Conagra 2016 10-K (filed July 15, 2016), <http://conagrafoods.com/investor-relations> (disclosing Delaware as Conagra's state of incorporation, with its executive offices situated in Chicago, Illinois).

¹⁴¹ *Americold*, *supra*, at 2.

¹⁴² *Id.* at 1-2. There is some scholarship indicating that the contemporary REIT supplanted the once-prominent Massachusetts business trust, after the latter became less advantageous from a federal income tax perspective. See Weissman, *The Common Law of Business Trusts*, 38 CHICAGO-KENT L. REV. 11, 12 (April 1961) (discussing various changes in federal tax law that might have played a role in this transition).

¹⁴³ *Id.* at 1.

Conagra and its compatriots filed a complaint in state court in Kansas (presumably where the warehouse was situated). Pursuant to the removal statute,¹⁴⁴ the defendant removed the action to the federal court for the District of Kansas. Tacitly accepting that diversity jurisdiction was extant, and therefore removal to a national forum was permissible, the trial court proceeded. After hearing the controversy on its merits, the district judge rendered a decision in favor of Americold. Upon the subsequent appeal, however, the U.S. Court of Appeals for the Tenth Circuit faulted the lower court for entertaining the action in the first place.¹⁴⁵

Grounding itself upon the fact that the defendant was a REIT, and thereby an unincorporated entity, the appellate court took the position that Americold's citizenship could not be tested by the same methodology typically employed to ascertain the citizenship of a corporation for purposes of ascertaining the legitimacy of diversity jurisdiction. Accordingly, the tribunal held that the district judge should have first inquired as to the respective citizenships of the REIT's owners.¹⁴⁶

As the record was bereft of any evidence of the citizenships of Americold's owners, the circuit court declared that proof of diversity of citizenship, an absolute prerequisite to the exercise of the Article III judicial power, was lacking. Implicitly, the trial court acted improvidently by assuming jurisdiction, and therefore its holding below could not be sustained. Seeking to assuage this reversal of fortune, the defendant sought review by the Supreme Court.¹⁴⁷

The Justices candidly acknowledged why *certiorari* had been granted. The high Court openly proclaimed that it was time to clear the air on this important issue. Currently, the high bench noted, there is confusion amongst the federal tribunals as to what maxim for citizenship is to be applied in cases where unincorporated entities claim access to the federal courts on the grounds of diversity jurisdiction.¹⁴⁸

Writing for a unanimous Court, Justice Sotomayor commenced with these fundamental observations. The federal courts are empowered to resolve "certain nonfederal controversies" between citizens of different states. Diversity of citizenship is "easy enough" to determine for human beings; yet the same necessary inquiry "can become metaphysical when applied to legal entities."¹⁴⁹

The Court wasted no time in posing the question at hand; how does a federal court determine the citizenship of an inanimate, unincorporated litigant, such as the REIT in the case at bar, when diversity jurisdiction is alleged? The united Court was just as swift in dispensing the answer; while "humans and corporations can assert their own citizenship," other unincorporated entities take on the citizenship of their constituent members.¹⁵⁰ The ultimate answer thus given, *Americold* then proceeded to set forth its *ratio decidendi*.

As an initial matter, Justice Sotomayor explored the underpinnings of diversity jurisdiction, first by referencing that Article III bestows upon the federal courts the power to

¹⁴⁴ *Id.* at 1. See 28 U.S.C. § 1441(a).

¹⁴⁵ *Id.* at 1-2.

¹⁴⁶ *Id.* at 2.

¹⁴⁷ *Id.* at 2.

¹⁴⁸ *Id.* at 2.

¹⁴⁹ *Id.* at 1.

¹⁵⁰ *Id.* at 1.

adjudicate controversies between citizens of different states. She then noted the efforts of the very first Congress to build upon that constitutional bedrock, and legislate a statutory provision implementing the Article III grant of jurisdiction. Yet, notwithstanding the existence of a diversity jurisdiction statute from the first days of the Republic, “[f]or a long time...Congress failed to explain how to determine the citizenship of a nonbreathing entity” such as a business organization.¹⁵¹

Marching through both time and its own precedent, the Court then proceeded to elaborate upon the lengthy and instructive history of the intersection of artificial business organizations and diversity jurisdiction. *Americold* willingly explicated a legacy that, by any reckoning, is comprised mainly of the high Court’s deliberations, with only a modicum of legislative tinkering.¹⁵²

First and foremost, the Court looked to the days well before the American Civil War, when the high bench “carved a limited exception” for determining the citizenship of corporations when diversity jurisdiction is in dispute. On that occasion, the Justices had declared for the first time that an incorporated entity would be assigned the citizenship of the state under whose laws it was organized.¹⁵³

Americold then reminds that “Congress etched this exception into the U.S. Code,” but subtly notes that this axiom was left largely unaltered by the lawmakers until 1958, when the legislators embellished the controlling statute to henceforth provide that, when diversity jurisdiction is in controversy, a corporation is also a citizen of the state where it has its principal place of business.¹⁵⁴ The upshot of this portion of the Court’s analysis is that, aside from the abovementioned foray, Congress essentially left the Court’s Nineteenth Century proclamations on the citizenship of artificial business entities in diversity cases unaltered for well over one hundred years.

Americold attached great significance to this apparent legislative indifference. The unanimous Court robustly proclaimed that “Congress never expanded this grant of citizenship to include artificial entities other than corporations,” noting that neither joint stock companies nor limited partnerships were ever brought within the ambit of these statutory rules regulating diversity jurisdiction.¹⁵⁵

The high Court then declares it has acted in a similar delimiting fashion. “For these unincorporated entities, we too have adhered to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of all its members.”¹⁵⁶

Justice Sotomayor did allude, however, to one minor difficulty with the high Court’s diversity jurisprudence in this regard. “Despite our oft-repetition of the rule linking

¹⁵¹ *Id.* at 2.

¹⁵² *Id.* at 2-3.

¹⁵³ *Id.* at 3 (citing *Letson*, 43 U.S. 497 (1844)).

¹⁵⁴ *Id.* at 3. See also 28 U.S.C. § 1332(c) (1). Accord *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (corporations reside in the place “fairly regarded as at home,” such as its place of incorporation and principal place of business).

¹⁵⁵ *Id.* at 3. Compare *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012). Writing for the Court, Justice Sotomayor gives numerous examples of Congress’ deliberation and precision in drafting federal statutes to encompass “individuals,” i.e., flesh and blood citizens, “corporations,” for duly incorporated entities, and “persons,” encompassing a far greater range of entities, both natural and artificial. *Id.* at 1707.

¹⁵⁶ *Id.* at 3 (internal quotations and citations omitted).

unincorporated entities with their members,” the Court revealed that it has never precisely defined the term “member.”¹⁵⁷

Yet the situation was far from dire. To ameliorate this seeming oversight, the high bench looked to its longstanding jurisprudence “equating an association’s members with its owners.”¹⁵⁸

To exemplify this practice, Justice Sotomayor proceeded to catalogue the Court’s many interstitial holdings relating to the determination of the citizenship of artificial business entities when diversity jurisdiction is in question. When confronted with constructs other than true corporations, the high Court was consistent in finding that the “members” of a partnership are its partners; the “members” of a union are the employees it represents in collective bargaining, and so forth.¹⁵⁹

This led to the case at bar, where the Justices were asked to determine the citizenship of the original defendant, a real estate investment trust organized under Maryland law.¹⁶⁰ And while not necessarily unknown to the high bench, this modern construct appeared to be in need of categorization, at least for the pressing reason of determining its citizenship for purposes of diversity jurisdiction.

The Court evinced no difficulty in resolving the question. Its succinct and unanimous response was that since the REIT “is not a corporation, it possesses its members’ citizenship.”¹⁶¹

Notwithstanding the clarity of the foregoing, Justice Sotomayor duly noted that nothing in the record before the Court designated who Americold’s members were. Unperturbed by that omission, the high bench turned for the answer to the law of state under which the REIT was organized.¹⁶²

The Court found that Maryland law specifies that a REIT is an unincorporated trust or association, holding and managing property for the benefit of owners classified as “shareholders.”¹⁶³ Much like joint stock companies and partnerships, these “shareholders” possessed ownership interests, and, accordingly, could vote their interests in the REIT.¹⁶⁴

Justice Sotomayor opined that a REIT’s “shareholders” stand in much the same position as shareholders in a joint stock company or partners in a limited partnership—“both of whom we viewed as members of their relevant entities.” The Court therefore concluded that the members of the REIT for purposes of diversity jurisdiction were those very “shareholders.”¹⁶⁵

The inevitable result—a real estate investment trust enjoys no citizenship of its own. To the contrary, the citizenships of the REIT’s members determines its citizenship in diversity cases, the same as is the case for partnerships and other unincorporated bodies.

One might suppose that the foregoing holding would end the matter, but there was a deal more to be said by the high Court. Quite understandably, the original defendant was

¹⁵⁷ *Id.* at 3 (internal quotations omitted).

¹⁵⁸ *Id.* at 3 (internal quotations and citations omitted).

¹⁵⁹ *Id.* at 3 (citations omitted).

¹⁶⁰ *Id.* at 4.

¹⁶¹ *Id.* at 4.

¹⁶² *Id.* at 4.

¹⁶³ *Id.* at 4 (citations omitted).

¹⁶⁴ *Id.* at 4.

¹⁶⁵ *Id.* at 4.

unwilling to concede a lack of diversity jurisdiction. To do so would erase the favorable judgment already in hand from the district court, and so it proffered yet one more argument as it sought to preserve the outcome from the court below.

Seizing upon the basic fact that the “T” in “REIT” signifies a trust, Americold asked the Justices to defer to the Court’s 1980 ruling in *Navarro Savings Assn. v. Lee*,¹⁶⁶ and decide the instant case in a manner consonant with the strictures of that earlier holding. Taking stock of the defendant’s remaining argument, as drawn from *Navarro*, Justice Sotomayor summarized Americold’s key allegation as “anything called a ‘trust’ possesses the citizenship of its trustees alone,” without regard to the respective citizenships of its beneficial owners.¹⁶⁷ Claiming kinship with the entity in *Navarro*, the defendant in the case at bar beseeched the high Court to ignore the citizenships of its so-called members, and thereby find that diversity jurisdiction did in fact exist here.¹⁶⁸

To the dismay of the defendant, that assertion gained no traction with the Supreme Court. Justice Sotomayor sharply pointed out that *Navarro* had nothing to do with determining the citizenship of a trust when diversity jurisdiction is at stake.¹⁶⁹

Quite to the contrary, *Navarro* was inapposite, as it “reaffirmed a separate rule” providing that when a trustee files a lawsuit in *her* name, her individual citizenship is the sole determinant of the presence or absence of diversity jurisdiction.¹⁷⁰ The Justices expressed a high degree of comfort with this maxim, for reason that weighting the individual citizenship of a trustee when she sues or is sued is identical to the precept applied to “any natural person.” Moreover, added Justice Sotomayor, the rule just cited peacefully “coexists” besides the corollary that when an unincorporated artificial entity is sued, it assumes the citizenships of all of its members.¹⁷¹

That having been said, the high bench softened the defendant’s disappointment with the following words of explanation. The unanimous Court noted that the REIT’s misconception of the prevailing law “is understandable and widely shared.”¹⁷²

The widespread dissonance amongst the circuit courts in this regard can most likely be attributed to the traditional view of trusts, opined the Court, and how they cannot sue or be sued in their own names. The conventional trust, noted Justice Sotomayor, is not a distinct juridical person capable of being hauled into court. The fact that it embodies a fiduciary relationship with others forecloses the customary trust’s ability to independently stand before a tribunal.¹⁷³

That is why, since very nearly the beginning of the American legal system, traditional trusts have been regulated by this equally traditional rule; only a trustee, in her individual name, can commence or defend litigation pertaining to the affairs of the trust. Thus, the Supreme Court proffered as inescapable the point that, on such occasions, the trustee’s citizenship “is all that matters for diversity purposes.”¹⁷⁴

¹⁶⁶ *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458 (1980).

¹⁶⁷ *Americold*, 136 S.Ct. 1012 at 4 (citing *Navarro*, 446 U.S. 458 (1980)).

¹⁶⁸ *Id.* at 4.

¹⁶⁹ *Id.* at 4.

¹⁷⁰ *Id.* at 4 (emphasis in the original).

¹⁷¹ *Id.* at 4-5 (citations omitted).

¹⁷² *Id.* at 5 (citation omitted).

¹⁷³ *Id.* at 5.

¹⁷⁴ *Id.* at 5.

Two correlating precepts inevitably flow from this. First, said Justice Sotomayor, the individual citizenship of a conventional trust (if any) is of no moment. Second, when diversity jurisdiction is being contested, the Court proclaimed that there is no need to scrutinize the membership of a trust, as one would do for an unincorporated entity. The solitary and salient point is that, once again, the citizenship of the trustee is only thing of consequence.¹⁷⁵ Having now expounded upon this crucial distinction for true trusts, the high bench explained its significance to the matter at hand.

Many states, opined Justice Sotomayor, have been most cavalier in dispensing the appellation “trust” to artificial constructs that bear little resemblance to the more “traditional template” of the venerable fiduciary vehicle that is truly deserving of the name. This *largesse* of state lawmakers is demonstrated in the case at bar, found the high Court. The Maryland law under which the original defendant here was formulated provides that a REIT is a separate legal entity that can sue or be sued in its own name.¹⁷⁶

But such liberalities of local legislatures are not in any way dispositive of the righteous exercise of the Article III power, decreed the unanimous Court. Undeterred by mere labels, and staunchly adhering to substance, Justice Sotomayor wrote that “[s]o long as such an entity is unincorporated, we apply our ‘oft-repeated rule’ that it possesses the citizenship of all its members.”¹⁷⁷

Unequivocally finalizing the crucial ruling just made, the Court remonstrates that “just because the entity happens to call itself a trust” is not permission for it to invoke the holding of *Navarro* nor delimit its membership (and hence citizenship) to that of its trustee. The Justices’ ultimate ruling was thus preordained. “We therefore decline to apply the same rule to an unincorporated entity...that applies to a human trustee.”¹⁷⁸

While the foregoing disposed of all the arguments made by the defendant at the bar, the high Court had one final matter to deal with. An *amicus* had invited the Justices to now broaden the same citizenship rule which applies to true corporations in diversity cases so as to bring unincorporated forms of business organizations within the precept’s ambit.¹⁷⁹

Precisely, this friend of the court requested the high bench now proclaim that a real estate investment trust was an artificiality equally entitled to claim a citizenship, not based upon the aggregate citizenships of its members, but rather a citizenship founded upon the state under whose laws it was established and the state where it maintains its principal place of business.¹⁸⁰ Such a sea change in the Court’s jurisprudence would have, in all likelihood, saved the day for the defendant, by preserving the finding of diversity jurisdiction below, and, accordingly, the district court’s judgment favoring the REIT, as well. But it was not to be this day. Justice Sotomayor was succinct in the following declaration. “When we last examined the ‘doctrinal wall’ between corporate and unincorporated entities in 1990, we saw no reason

¹⁷⁵ *Id.* at 5.

¹⁷⁶ *Id.* at 5 (quotations and citations omitted).

¹⁷⁷ *Id.* at 5 (internal quotations and citations omitted).

¹⁷⁸ *Id.* at 5.

¹⁷⁹ *Id.* at 6.

¹⁸⁰ *Id.* at 6 (citation omitted). As one might expect, the *amicus* advancing this notion was a national trade association of real estate investment trusts. Certainly, its position was understandable. If the Court was to embrace such a view, it would level the playing field for REITs across the land, and no doubt vastly increase their access to the federal courts via the mechanism of diversity jurisdiction.

to tear it down.”¹⁸¹ Thus, the Court’s unswerving allegiance to its nearly two centuries of precedent, as reaffirmed in more recent decades, would go on. But it is imperative to note that the Justices’ fidelity to their jurisprudence was not the only reason for this firm unwillingness to provoke change. A close look at *Americold*’s ultimate sentence tells us a great deal.

In a marvelous exercise of judicial restraint, and a concomitant respect for separation of powers, Justice Sotomayor writes for a unanimous Court “that it is up to Congress if it wishes to incorporate other entities” under the purview of eligibility for diversity jurisdiction, implicitly by overruling the high Court precedent that has held sway for some one hundred and eighty years.¹⁸² Thus, leaving the matter to the elected representatives

¹⁸¹ *Id.* at 6 (citing *Carden*, 494 U.S. 185).

¹⁸² *Id.* at 6. Ironically, for some reason *Americold* fails to point out a singular and quite recent amendment to the Judicial Code that convincingly exemplifies that Congress is well capable of bestowing an individual citizenship upon unincorporated forms of business, irrespective of the citizenship of the entity’s members, provided the legislators have the will to do so. As part of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 9, reprinted in 2005 U.S.C.C.A.N. 4 (“CAFA”), codified at 28 U.S.C. § 1332(d), *et seq.*, a new segment was added to the diversity statute. Applicable only in class actions where the amount in controversy exceeds \$5 million, 28 U.S.C. § 1332(d)(2), the statutory addition declares that an unincorporated association “shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized” for purposes of the district court’s original jurisdiction pursuant to this subsection. 28 U.S.C. § 1332(d)(10). Quite remarkably, said language is virtually identical to the definition of a corporation’s citizenship which Congress inserted into the diversity statute in 1958. *See* 28 U.S.C. § 1332(c)(1), *infra*. For ourselves, we make the obvious conclusion that the lawmakers replicated the individual corporate citizenship definition from the preceding subsection of the diversity statute, yet made it applicable to unincorporated artificialities in the most narrow of circumstances. Our postulation of the lawmakers’ intentions is borne out, not only by the explicit text of the relevant statutes, but also by CAFA’s legislative history. The Senate report accompanying CAFA’s enactment is most revealing, in a number of respects. First, “[t]he Committee notes that for purposes of the citizenship element...[the amendment] does not alter current law” regarding how citizenship is determined for purposes of the diversity statute. S. Rep. No. 14, 109th Cong., 1st Sess. (2005), reprinted in 2005 U.S.C.C.A.N. 3, 34. Second, the amendment bestowing an individual citizenship upon a non-corporate entity, irrespective of the citizenships of its constituents, “is added to ensure that unincorporated associations receive the same treatment as corporations for purposes of diversity jurisdiction” in litigation where CAFA applies. *Id.* at 43. Third, the Senate report openly discusses Supreme Court jurisprudence on the precise subject at hand, parenthetically cites *Boulogny*, and even candidly mentions that the high Court’s maxims on the citizenship of incorporated artificialities have been frequently criticized. *Id.* In one circumscribed example, the legislative history notes how the citizenship of an unincorporated insurance company is determined in a manner different from that of an incorporated manufacturer. The CAFA adjustment “corrects this anomaly” in class actions brought in or transferred to the federal district courts. *Id.* at 43. Yet, the salient and indisputable point remains that Congress, even when given an opportunity to effect sweeping revision to the diversity statute, chose instead to severely delineate its expansion of the individual citizenship maxim to unincorporated bodies solely in the specific circumstance when the latter were participants in class actions of a clearly defined size. Congress could have, but did not, go further. It is therefore beyond peradventure that Congress knows how to modify and precisely define the individual citizenship of an unincorporated entity for purposes of diversity jurisdiction in a certain category of litigation, much like it once did for authentic corporations in all diversity cases. Moreover, the CAFA amendments came into being four decades after *Boulogny* was decided. We do not question the wisdom of the high bench in not referencing these matters in the unanimous *Americold* decision. For ourselves, we believe it is powerful evidence of two things. First, Congress knows the diversity statute quite well, and is willing to promulgate change thereto as it sees fit. We believe the lawmakers’ choice not to insert a precise citizenship definition for unincorporated forms of business organization into Section 1332 (aside from the narrowly applicable CAFA proviso abovementioned) speaks volumes. Second, the existence of this statutory revision from only a few

of the people, the lifetime tenured Justices of the Supreme Court closed *Americold* and its teachings.

In sum, *Americold* stands as proof that the Supreme Court remains unimpressed by innovations in forms of business organizations, and unmoved in its jurisprudence. The same precepts of determining citizenship for purposes of diversity jurisdiction stand unaltered. While authentic corporations enjoy individual citizenships distinct from their owners, unincorporated entities, by contrast, still must aggrandize themselves of the aggregate citizenships of their members.

Notwithstanding the evolving nomenclature of modern commerce, the high Court is a model of unrelenting consistency in continuing to draw these sharp categorizations between the truly incorporated body and the unincorporated business. Unwilling to veer from nearly two centuries of established precedent, *Americold* demonstrates the Court's circumspection in leaving to Congress any modification to the existing rules governing eligibility for diversity jurisdiction.

Now, with *Americold* as our capstone, we may finally proceed to our analysis and commentary, with a view towards the implications for business, both domestic and global, when seeking entry to the austere corridors of the federal court system.

V. ANALYSIS & COMMENTARY

It is now time to render our analysis of all that has gone before in the instant Article. After much deliberation, we came to the realization that present here are several concurrent themes. Yet one of that grouping stood out as the first among equals.

In our estimation, the paramount thrust of *Americold*, and the nearly two centuries of precedent that comprises its foundations, is the Supreme Court's resolute fidelity to the principle of judicial restraint, and the concomitant refusal to indulge in judicial lawmaking. This is even more remarkable, given the nearly irresistible tug of an evolving world of business. Indeed, in order to progress to the ultimate theme here, we now proceed in an orderly fashion, commencing with the backdrop of business against which the relevant cases were decided.

The Supreme Court's Adaptations to Evolving Forms of Business Organizations

In many ways, the Supreme Court's lengthy string of precedent on the matter of determining the citizenships of corporate and unincorporated business organizations alike is very much an accurate reflection of the history of American business. In the first days of the Republic, we were largely a nation of farmers. To be sure, the corporation as a form of doing business was not altogether unknown. Nevertheless, it did not occupy the forefront of business, and consequently, judicial thinking.

Given that historical truism, we can better relate to the thinking of a young Supreme Court, one which believed that the Founders did not contemplate the inclusion of artificial entities under the heading of "citizen" when drafting Article III. Taken from the perspective of their times, one can rationalize the Justices of that much earlier time finding that the grant

years ago underscores the sagacity of the Supreme Court in exercising judicial restraint, and leaving such matters to the people's duly elected lawmakers.

of the federal judicial power over controversies between citizens of different states mandated a determination of the citizenship of flesh and blood citizens, and not that of the artificial constructs through which early Americans conducted their business.

Yet the high Court was to prove itself adaptable, as its unanimous decision in *Letson* so amply demonstrates. Seriously reconsidering its first foray into the area, the Justices of the pre-Civil War era reasoned that an artificial entity, possessed of a life of its own pursuant to state laws, was rightfully entitled to claim a citizenship unconnected to the citizenship of its owners. The timing here cannot be a coincidence. The high Court demonstrated great pragmatism in adapting to this change in legal theory at the same moment that the Nation was about to embark upon its long journey into the Industrial Age.

The march of years did nothing to dissuade the Court from its course of action. As the American economy evolved, the Justices confronted ever-increasing complexities in forms of business organizations. Joint stock companies, business trusts,¹⁸³ even organized labor organizations (commercial constructs in their own right, to be certain) came before the high bench, and their respective citizenships were duly adjudicated as being dependent upon the citizenships of their constituents.

In more recent times, the ingenuity of business, both domestic and international, remains boundless. As well discussed above, limited partnerships, real estate investment trusts, and now the seemingly ubiquitous limited liability companies continue to assert themselves in American and global commerce. As a pundit might comment, there are plenty of letters left in the alphabet; who knows what iteration the next acronym shall signify?

Yet through the ages, the Supreme Court stands unfazed. With great composure, the high bench duly considers each and every permutation of commercial organization the business world, in particular Wall Street, can concoct. While its jurisprudence may be nearly as old as the Republic itself, the axioms of the high Court remain as vibrant and applicable as ever.

We close this segment of our commentary on a decidedly positive note. The teachings of the Supreme Court on this subject have proven to be adaptable to the shifting demands of commerce, fully capable of keeping pace with an evolving business landscape. We see no end to this durability; ergo, whatever business creates, the Supreme Court is prepared to justly decide its place in the Court's categorizations of forms of business organizations.

Consistency in Differentiating the Citizenship Tests for Authentic Corporations and Unincorporated Business Entities

Having addressed hereinabove the perpetual evolution of forms of business organizations and their intersection with the Supreme Court's resolution of their citizenship for purposes of diversity jurisdiction, we come to our second, prevalent theme. This is the Supreme Court's consistency in delimiting a citizenship independent of owners as a privilege

¹⁸³ The Massachusetts business trust is well known to the Supreme Court, and it is still in use, primarily on Wall Street for the organization of mutual fund families. *See, i.e.*, *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011) (describing "The Janus family of mutual funds.... organized in a Massachusetts business trust, the Janus Investment Fund").

accorded solely to authentic corporations.¹⁸⁴ As already indicated, this first came about by the high Court's pragmatic realization that the laws of the several States imbue incorporated entities with personalities, including juridical ones, all their own.

In and of itself, this evinces an admirable exercise in federalism by the Court. From a time before the Civil War, the Justices embarked upon a path that accorded proper respect to the States' ability to legislate such matters. After all, it is axiomatic that the brief portfolio of legislative powers given the national Congress says not a word about regulating the creation, operation or dissolution of proprietorships, partnerships or corporations.¹⁸⁵ All components of business creation, operation, and dissolution are left to the States.¹⁸⁶

In *Letson*, the high Court took its first, albeit tentative, steps towards a recognition of the corporation as a juridical citizen. A century and a half later, the Court followed and robustly reaffirmed in *Carden* that the States had granted authentic corporations an individual citizenship all their own, notwithstanding the vagaries of the aggregate citizenships of their shareholders. This viewpoint has been a tenet of the high Court's jurisprudence for nearly one hundred and eighty years now. We find that it strikes the appropriate balance.

On the one hand, the Supreme Court remains, as it should, the final arbiter of the scope of the Article III power. On the other, it willingly and correctly accommodates fundamental principles of federalism, by recognizing the unquestioned authority of the several States to foster and regulate the formation of incorporated businesses.

This is no small matter, and it is for good reason that the Court has tread carefully here. The Supreme Court must always have the final word on the reach of federal jurisdiction. Only the Justices can restrain the awesome power of Article III within the boundaries the Founders intended, and as the plain text of the constitutional guarantee demands. In sum, the judicial power of the United States operates within strictly circumscribed limits,¹⁸⁷ and the Justices cannot and must not relinquish their role as the guardians of Article III.

That is precisely what the Court has done in these matters. While safeguarding the borders of the judicial power, the Justices have accommodated lawful state authority regarding forms of business organizations. The high Court has accomplished this with great selectivity, rightfully choosing to bring only genuine corporations within the purview of individual citizenship for purposes of diversity jurisdiction, sans the complications of a tortuous reckoning of the citizenships of the artificial entity's owners.

This particular theme, and the one to shortly follow, is likewise permeated with a genuine regard for diversity jurisdiction, both in the constitutional sense, and with due regard for its practical implications.

As to the first, we see as far back as *Letson* the Justices' wise recognition that diversity jurisdiction is not a mere side benefit of Article III. Rather, it is a constitutional guarantee that comprises an integral component of our system of ordered liberty.

Reaching back to the very words of Alexander Hamilton, in *The Federalist*, the high Court's jurisprudence invokes the overwhelming concern of the Founders that there be a

¹⁸⁴ Indeed, the Supreme Court itself has declared that corporations are "the principal agents of the modern free economy." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 393 (2010) (Scalia, J., concurring).

¹⁸⁵ U.S. CONST. art. I, § 8.

¹⁸⁶ See *Edgar v. MITE Corporation*, 457 U.S. 624, 645 (1982).

¹⁸⁷ See *Stern v. Marshall*, 564 U.S. 462 (2011).

federal judiciary, by design free of parochial interests and local bias. Indeed, the seemingly obscure issue of determining the citizenship of artificial entities for purposes of gauging their eligibility for diversity jurisdiction is of great import to our overall system of ordered liberty. By carefully regulating access to the federal tribunals via the guarantee of diversity jurisdiction, the Court assures that these juridical citizens have the same degree of enjoyment and benefit from these constitutional liberties as their corporeal counterparts.

To bring this portion of our musings to a close, we find that the branch of the Court's jurisprudence bestowing an independent citizenship upon authentic corporations to be a multifaceted exposition of great constitutional significance. The Court --- and only the Supreme Court --- is entrusted with simultaneously permitting the appropriate and constitutional exercise of the awesome judicial power and effectively cabining Article III to the domains intended by the Founders, as unmistakably articulated in the very text of the Constitution.

Second, determining that a truly incorporated entity is a juridical person in its own right when diversity jurisdiction is in controversy, the Supreme Court holds true to federalism, a cornerstone of our system of diffused power and guaranteed liberties. Some two centuries of high court precedent exhibits a profound respect for state prerogatives in the creation and regulation of forms of business organizations, yet it accomplishes this without blind deference to local authority.

Finally, the Supreme Court establishes here a threshold easy to see, easy to understand, and easy to comply with. No matter the name of a particular form of business organization, it must pass this straightforward and unyielding test; if the artificiality is truly and authentically a corporation, then the aggregate citizenships of its owners are wholly irrelevant.

In sum, the genuine corporation is entitled to the same constitutional guarantee enjoyed by all citizens; its own singular citizenship is taken into account to determine any right to claim diversity jurisdiction, and, with it, access to the federal courts. Yet, it is equally true that the unincorporated entity, regardless of the appellation given it by state law, must adopt the aggregate citizenships of its constituents, and thereby significantly diminish, if not lose outright, the opportunity to assert diversity of citizenship for purposes of federal jurisdiction.

Fidelity to Precedent in Diversity Jurisdiction

Our thematic trilogy concludes with our commentary upon the perseverance of the Supreme Court in maintaining the established test for measuring the citizenship of an unincorporated entity when determining eligibility for diversity jurisdiction. At first blush, this might appear to be nothing more than a prosaic respect for *stare decisis*. Yet, in our estimation, it is far more. It is, frankly, a magnificent exercise in judicial restraint, carried out over generations of Justices.

As fully exhibited hereinabove, the citizenship of a non-corporation is based upon the aggregate of the citizenships of its members. This is effectively the *status quo*. In *Letson*, the Court for the first time enunciated a different rule for determining the citizenship of authentic corporations for purposes of diversity jurisdiction. By cabining the then-new rule to only truly incorporated entities, per force any other artificiality continued as it had before; it

lacked an individual citizenship, and remained solely dependent upon the citizenships of its members when diversity was at issue.

The Supreme Court was unwavering in upholding this axiom through the many years, even as the economies of America and the world changed, and new forms of business organizations were introduced and popularized. Notwithstanding a progression of newfangled entities, such as joint stock companies, business trusts, and limited partnerships, just to name a few, the Justices' were a model of consistency. The same maxim was applied to any entity that could not lay claim to authenticity as a corporation, no matter its given title as derived from state law.

The high Court's motivation was clear as crystal. Time and again, it pointed to the statutory provisions of the Judicial Code animating the fundamental bestowal of diversity jurisdiction. The Justices duly noted the sporadic changes implemented by the Article I branch to alter the contours of diversity jurisdiction, yet remained within the bounds of the words set down by the lawmakers.

Far more important, the Supreme Court took cognizance of the silence of Congress on the subject of the proper test to be applied to ascertain the citizenship of unincorporated forms of business organizations. The high Court did not impute legislative malaise to their marked inactivity; that would have been presumptuous.

Instead, the Court determined that the Article I branch had no wish to amend the prevailing practice. Surely it was in Congress' power to revise the controlling precepts. But the fact they did not spoke volumes to the Court. And thus, over a broad swath of cases encompassing nearly two centuries, the Justices adamantly refused to provoke unilateral change.

The resoluteness of the Court is brought to full flower in its most recent expostulations of *Carden* and *Americold*. *Carden*, in 1990, examines what was then one hundred and fifty years of consistent practice, and remains true to those precepts. Above all else, Justice Scalia rightly insists that the high Court will not exert its own will over what the legislative branch has left untouched.

Furthermore, in *Carden*, Justice Scalia exemplifies the cardinal principle of judicial restraint. Recognizing the full capability of Congress to override whatever maxims of citizenship and diversity jurisdiction were already established by the Court, the venerable Justice emphasizes that the high bench must restrain itself, lest it indulge in the error of judicial lawmaking. As aforesaid, while one of Justice Scalia's earlier endeavors on the high Court, *Carden's* guidance continues to be as sound today as it was nearly three decades ago.

In the here and now, we have *Americold*, and a worthy successor to *Carden* it is. Now it is the accomplished Justice Sotomayor assuming the mantle of her late colleague in preserving the unbroken continuity of, not only high Court precedent, but the Justices' steadfastness to the vital axiom of judicial restraint. In her own succinct fashion, Justice Sotomayor proclaims that there is no good reason to renovate, let alone demolish, the doctrinal wall painstakingly built upon by *Letson* to *Carden*. The learned Justice parses the high Court's adjudications in *Marshall*, *Great Southern*, and *Boulogny* as powerful demonstrations of the Court's refusal to overstep its own constitutional boundaries, and superimpose judicial legislation upon a statutory scheme for diversity jurisdiction that Congress seems already well satisfied with.

In addition, Justice Sotomayor in *Carden* amply demonstrates that the Supreme Court is well equipped to dissect any and all new forms of business organizations that modern

commerce can create. After all, in years past, the Court has successfully addressed a multitude of artificial entities that freely shared differing attributes amongst themselves. No matter, declares *Americold*.

As it has done for nearly two hundred years, the Supreme Court will confront whatever innovations in forms of business organizations that national and global entrepreneurs can invent, and bring them within the ambit of its longstanding maxims for determining their citizenship for purposes of diversity jurisdiction. And the Court shall do so, while still respecting *stare decisis*, and, paramount to all, exercising judicial restraint.

And there you have it. Combining respect for carefully crafted precedents, maintaining consistency in the application of two distinct categorizations for the determination of the citizenship of differing forms of business organizations when diversity jurisdiction is in issue, and steadfastly observing the separation of powers demanded by our constitutional system, the Supreme Court has maintained a steady course upon this issue for nearly two hundred years.

For these same reasons, we anticipate no change in the Court's reasoning in the years to come, notwithstanding the constant evolution of forms of business organization, both here and abroad. Therefore, what are the consequences for modern enterprises, given all the above? To that multitude of topics, we now turn.

The Divergent Paths to Diversity Jurisdiction for Corporations and Unincorporated Forms of Business Organizations

Certainly, we acknowledge once again that diversity jurisdiction is by far too vast a topic to be addressed competently in this modest writing. But, with the proper focus, we can impart some cogent thoughts as to how the citizenship of a particular form of business organization either facilitates the exercise of the constitutional guarantee of diversity jurisdiction or places it out of reach entirely.

We commence with the more straightforward of the two options aforementioned. Buoyed by a combination of statutory privilege and Supreme Court precedent, the true corporation will always enjoy easier access to the federal courts via the route of diversity jurisdiction. This is because, as we have seen, the fully incorporated entity is imbued with its own, individual citizenship.

Untethered from the domiciles of its owners, the authentic corporation need not survey the personal citizenships of its constituent members, and be burdened with an aggregate of citizenships that might bestow a citizenship in every one of the Fifty States, and even citizenships drawn from beyond America's national borders. From *Letson* to *Americold*, for one hundred and eighty years, the Supreme Court has relieved the corporation of this crushing burden. In its place, it has effectively rewarded the true corporate entity with its own citizenship, determined by the inarguable and expedient means of designating the artificiality's state of incorporation as the source of its individual citizenship.

As an additional matter, there is the manner in which the Judicial Code imposes dual citizenship upon the true corporation. First, it is a citizen of the state in which it is incorporated, axiomatic since 1844 and the canonical opinion of *Letson*. Second, for less than a third of that epoch, it is simultaneously a citizen of the state in which it maintains its principal place of business. Not only can these mere two citizenships be ascertained to a

certainty, they eliminate all possibility that the authentic corporation can be burdened with the citizenships of innumerable states.

The end result is that the odds greatly favor the corporation's claim of diversity of citizenship from its opponent, and achieving access to the federal courts.

Not so for the unincorporated construct. Placing greater weight upon *Carden* and *Americold* as the more recent of the high Court's edicts on the subject at hand, we see the staunch refusal of the Justices to expand the individual citizenship rule beyond the authentic corporation.

As the latest pronouncements in nearly two centuries of Supreme Court precedent, *Carden* and *Americold* evince the resoluteness of the high bench in refusing to permit a wide range of unincorporated business entities to partake of a rule for determining citizenship in diversity cases that only true corporations may benefit from. Unpersuaded, unmoved, and unflinching, the Justices compel the non-corporate construct to shoulder the citizenships of each and every one of its members.

Indeed, note how Justice Scalia in *Carden* is particularly critical for the alternative arguments proffered therein, as to taking an unincorporated entity's citizenship from only general partners of a limited partnership or only certain limited partners in the same venture. The late Justice minces no words in decrying such distinctions as unprincipled in theory, impractical and unjust in application, and wholly unsupported by one iota of precedent.

Therefore, as the law stands today, the journey to diversity jurisdiction for an unincorporated entity is a decidedly uphill battle, where the odds of success are markedly against gaining access to the federal courts. This difficulty is even more attenuated for the modern artificialities, given that in the current domestic and international environment, they are purpose - built to be investment vehicles marketed access a broad portion of the market.

Consider that joint stock companies and Massachusetts business trusts, denizens of the past, and now limited partnerships (*Carden*) and real estate investment trusts (*Americold*), artificial entities commonplace to business today, have met the same fate. For each and every one, the Supreme Court has declared the lack of true incorporation relegates the construct to an amalgamation of the citizenships of all its respective members. To be sure, not a surprising result, nor an unfair one. No matter from what era, no matter what economic purpose is to be served, no matter the business objective, from the standpoint of the high Court and diversity jurisdiction, all of these artificialities, old and new, are branches of the same tree, the tree of truly unincorporated forms of business organizations.

And what of the next iteration of non-corporate entities, such as limited liability companies, new and innovative forms of trusts or partnerships or, for that matter, any business construct that Wall Street can think up? We perceive no cognizable difference in structure --- they shall all ultimately be deemed unincorporated bodies --- and thus no difference in result. Artificial business entities, both domestic and global, shall assume an aggregate citizenship based upon the domiciles of their constituents. Accordingly, their access to the federal courts by way of diversity jurisdiction will be commensurately more difficult than that of the authentic corporation.

Taking the foregoing truisms into account, can we measure their impact upon the conceptualization and selection of forms of business organizations, and the consequences for their litigation options? We endeavor to do precisely that in our next section.

Strategic and Tactical Ramifications for Diversity Jurisdiction and the Form of Business Organization

In our introduction to the instant Article, we promised a few words as to the significance of the issue presented by this controversy as to the strategy and tactics of business litigation and diversity jurisdiction. We fulfill that pledge now.

Why is diversity jurisdiction often such a valued prize to be won or, conversely, denied to an adversary? That can be easily explained.

First, diversity jurisdiction means access to the federal courts, and, with it, the benefit of uniform codes of procedure¹⁸⁸ and evidence.¹⁸⁹ These national codifications do not suffer any of the idiosyncrasies of state codifications or, worse yet, the common law. Given their nationwide applicability, they are more widely known and understood, somewhat easier to comprehend, and, typically, far more familiar to the learned counsel brought in from another jurisdiction.

Second, the conventional wisdom is that the federal courts are more expeditious in their resolution of cases than their local peers. This is not, to be certain, a criticism of the state courts. It reflects a truth of federalism. The essence of our Nation's bifurcation of adjudicative power is that the state jurists enjoy or, better said, are burdened with far more many laws and controversies than their Article III brethren. Since a basic tenet of federalism is "all else is left to the states," that "all else" amounts to a great deal, indeed.

Certainly, there are exceptions. Yet most would agree that wherever one travels in America, and finds a federal courthouse in proximity to a state court building, the judges in the former have far fewer cases, fewer discrete topics of law in controversy, and move their respective matters to conclusion more swiftly than their state court counterparts.

As to tactical considerations, it can be distilled down to this simple formulation. Those seeking swift resolution, typically plaintiffs, will move heaven and earth to secure diversity jurisdiction, and trust in the federal bench to bring them to verdict or settlement more quickly.

Those wanting to slow down the wheels of justice, presumably defendants, will labor mightily to emplace all sorts of obstacles to the exercise of the federal judicial power. In matters of diversity jurisdiction, they will seek not to just defeat it, but to destroy it utterly. Without a doubt, the nearly two centuries of vigorously litigated cases we have expounded upon hereinabove conclusively demonstrate the lengths parties shall go to in vying for or against diversity jurisdiction.

Accordingly, the instant controversy plays right into the struggle described above. The authentic corporation can exploit or be victimized by the ease of determining its proper citizenship. The unincorporated entity can utilize the multiplicity of its aggregate citizenships to defeat diversity jurisdiction --- by far the most common tactic --- or suffer from being diverted to a provincial forum not to its liking.

This brings us to the final strategic and tactical considerations implicated by the citizenship issue for incorporated versus unincorporated entities in diversity cases. And these points return us, as well they should, to the Founders themselves, and why diversity jurisdiction was created in the first place.

¹⁸⁸ See FED. R. CIV. P. 1, *et seq.*

¹⁸⁹ See FED. R. EVID. 101, *et seq.*

As so eloquently stated by Alexander Hamilton, in *The Federalist*, and thereafter by the high Court in *Letson*, diversity jurisdiction exists, above all, as a constitutional guarantee of access to a federal judiciary, ostensibly free of local politics, parochial interests, and invidious local bias. To be sure, the Court of *Letson's* era fretted over the power of powerful corporations over the common man. We reiterated that concern, but added that, in today's world, the modern business entity has a legitimate claim to worry about how it shall be received in a state court.¹⁹⁰

In truth, it does not matter whether it is David or Goliath who is in trepidation of judicial bias. The point remains that no citizen, individual or business, should dread appearing before the bar of justice for reason of a fear of local prejudice. That is why the federal courts exist. The Article III courts indeed provide a level playing field to all, and hence the value of diversity jurisdiction.

The nub of the controversy is as we have stated hereinabove. Since access to the impartial federal courts often depends upon complete diversity of citizenship, the true corporation may pass through the eye of the jurisdictional needle more easily than the unincorporated entity.

As of today, for reasons of *Americold* and its progenitors, the fundamental axioms of determining the citizenships of contemporary form of business organizations remains stable and unchanging, no matter what new artificial constructs of enterprise the domestic or global worlds of business conceive. It is around this stable core that businesspersons and their legal counsel must shape their new ventures, ever mindful that their choice of a form of business organization today will have significant consequences for their future access to the federal courts on the ground of diversity jurisdiction.

Considerations for International Businesses

Thus far, the focus of this Article has been the precedents of the Supreme Court in apportioning individual citizenship to authentic corporations when diversity jurisdiction is at stake, while concurrently demanding that unincorporated entities assume the citizenships of all their members when the constitutional guarantee to diversity jurisdiction hangs in the balance. Not only is this the appropriate means of analysis, it is firmly grounded in an inescapable string of high Court precedent now spanning three centuries.

But what of forms of business organizations native to other lands? Into which of these distinct categories would we place "PLCs," "S.A.s" and so forth. Again, a comprehensive tour of business artificialities found across the globe is not to our purpose here.

Yet, the robustness of the high Court's teachings upon the interaction of diversity jurisdiction with the individual or aggregate citizenships of authentic corporations and unincorporated artificialities, respectively, leads us to conclude that forms of business organization not native to American soil shall be measured in precisely the same way as their U.S. brethren. Highly influential (if not downright dispositive) in reaching our conclusion is

¹⁹⁰ For a discussion of diversity jurisdiction as a bulwark against possible bias in the state courts, see David Marcus, *Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV.1247, 1292-93 (2007).

the fact that, all across the world, true corporations and unincorporated bodies exist in very much the same fundamental form as their counterparts in the United States.

As one illustration, recent and relevant scholarship informs us that the Gesellschaft mit beschränkter Haftung, well known by its acronym, the “GmbH,” stands tall as “the most popular organizational form of business in Germany --- numbering almost one million entities.”¹⁹¹ The GmbH stands in contradistinction to the Aktiengesellschaft, the public corporation, abbreviated as the “AG,” an entity most decidedly “not designed for small businesses.”¹⁹²

The GmbH saw its inception in the late Nineteenth Century, and is most popular for entrepreneurs. Notably, it has changed little since that time.¹⁹³

From our point of view, we presume the GmbH is, in all probability, far more analogous to domestic partnerships (limited or general), old style joint stock companies or even the now mostly forgotten Massachusetts business trust. For one thing, the fact that the German legislature introduced the GmbH in 1896 indicates it is far more likely to parallel American form of business organizations popular during the same era.¹⁹⁴ To be sure, we admit the foregoing is more opinion and anecdotal, while somewhat light on substance.

Yet there is more in support of our postulations. It is a matter of German law that the GmbH, dissimilar to the AG, requires no corporate secretary, and no formalized annual meeting of stakeholders; in short, the GmbH appears to eschew the corporate formalities that make a corporation a corporation.¹⁹⁵ Instead, the GmbH is purported to provide its owners with “almost infinite options in structure,” including the right to “exercise direct control over the management” of the entity.¹⁹⁶

To our ear, this resounds of a form of business organization very much like a partnership or one of its analogs, and most definitely not an authentically incorporated body. To be certain, we find our assertion to snugly fit with the distinctions made by the Supreme Court for nearly one hundred and eighty years when categorizing true corporations versus unincorporated entities for purposes of diversity jurisdiction.

Finally, and undeniably, there is the scholarship asserting that “[t]he GmbH combines the basic structure of partnership law with the benefits of limited liability.”¹⁹⁷ Assuming *arguendo* the truth of that observation, it is then a logical and unavoidable step to the conclusion that the German GmbH appearing in a U.S. federal court shall have its claim or opposition to diversity jurisdiction determined by an examination of the aggregate citizenships of its members, as would be true for any domestic unincorporated form of business organization.

We readily acknowledge that this is but one example from the arena of global business, a place that is ever-expanding and ever-changing. Nonetheless, we contend its efficacy cannot be denied. Throughout the world, diverse legal systems recognize modalities of business organizations that would constitute a truly incorporated artificiality under any

¹⁹¹ Michael Beurskens and Ulrich Noack, “The Reform of German Private Limited Company: Is the GmbH Ready for the 21st Century?” 9 GERMAN LAW JOURNAL 1069, 1069 (Sept.1, 2008) (footnote omitted).

¹⁹² *Id.* at 1069-70 (footnote omitted).

¹⁹³ *Id.* at 1069.

¹⁹⁴ *Id.* at 1070.

¹⁹⁵ *Id.* at 1077.

¹⁹⁶ *Id.* at 1077.

¹⁹⁷ *Id.* at 1070.

nation's laws, while simultaneously embracing unincorporated entities as a means to conduct business pursuant to those same rules.

Therefore, we are fully confident that the Supreme Court, solidly grounded in nearly two centuries of precedent, and fortified by the current iterations of *Carden* and *Americold*, shall consistently apply to both contemporary and future global forms of business organizations the same indefatigable maxims that the Justices have fashioned, upheld, and relentlessly applied to American artificialities, both authentic corporations and unincorporated entities, when called upon to determine their eligibility for diversity jurisdiction.

We trust our coverage of the central controversy, and its impact upon modern business, both American and international, has been satisfactory. Having said our part, it is now time to bring matters to a robust conclusion.

CONCLUSION

Our final words are these. Business constantly evolves to meet new challenges, and so do the legal forms of business organizations. New, innovative constructs arise constantly to augment the venerable corporation.

Generation after generation, the Supreme Court has met those artificialities, and justly considered and classified them by their essential attributes. As global business brings forms of business organization to another level, we have no doubt that the high Court shall rise to the occasion, as it has done with intrepidity countless times before.

This is essential to the just and fair adjudication of commercial controversies, because such litigation often implicates one of the most crucial guarantees found in our system of ordered liberty. This is, of course, the constitutional right of diversity jurisdiction. As the Supreme Court declared nearly two centuries ago, “[c]onstitutional rights and liabilities cannot be so taken away, or be so avoided.”¹⁹⁸

Embedded in the very foundation of the Constitution, diversity jurisdiction is no mere embellishment to the scope of the judicial power. Quite the opposite.

The Founders, all too aware of the rivalries abounding in the nascent Republic, thought it imperative to provide citizens from different States access to a federal forum explicitly designed to be free (mostly) from local prejudices. In a profound way, diversity jurisdiction brings unity to a diverse citizenry.

It achieves that laudable goal by bringing together qualifying litigants before a tribunal truly reflecting the character of one nation. And in these, the early days of the Twenty First Century, diversity jurisdiction still stands as one of the most powerful mechanisms guaranteeing a level playing field for the adjudication of important controversies.

Yet in order to function properly, diversity jurisdiction must be constrained within the boundaries set by the Founders in Article III. That work is the domain of the high Court, and they have done it well.

Some one hundred and eighty years ago, the Justices reconciled themselves to the practicalities of business, on the one hand, and the necessities of federalism, on the other. Thus, the corporation was first recognized in 1844 as possessed of a citizenship utterly distinct from that of its owners. It was to be that individual citizenship that determined the

¹⁹⁸ *Letson*, 43 U.S. at 553.

artificial entity's entitlement to proceed in the federal courts on the grounds of diversity jurisdiction.

Moreover, the high tribunal not only made this precept a foundation stone of its overall diversity jurisprudence, it has nurtured it up until the present day, so that its vitality is beyond reproach. By this robust, yet confined, exercise of diversity jurisdiction, the liberty interest it guarantees is kept vital.

But Article III, like the entirety of the Constitution, is as much a document of restricting power as it is one that bestows power. Thus, the Supreme Court has adamantly and consistently rejected pleas to expand the test of citizenship for corporations to any other artificial business construct that is not an authentic corporation.

And for good reason. An acute awareness of the constitutional limitations upon its own authority animates the Court's circumspection. The Justices know full well that it is within the purview of the legislative branch, not their own, to amend the scope of diversity jurisdiction, if Congress so chooses. Thus, the high Court steadfastly refuses to make by judicial fiat what it well knows must be enacted by lawmakers elected by the people.

The late Justice Scalia and present Justice Sotomayor, as the architects of *Carden* and *Americold*, respectively, may rightly connect both their deference to Congress and their proper exercise of judicial restraint on this matter of diversity jurisdiction to the wisdom of a much earlier Supreme Court. The reasoning of these modern decisions is but the faithful exemplification of the guiding principle handed down by Chief Justice Marshall over two hundred years ago. "The duties of this [C]ourt, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation."¹⁹⁹ Moreover, in establishing the rightful boundaries of the judicial power, the high Court must do so "without a leaning the one way or the other"²⁰⁰ between these two fixed points.

Just as the legendary Chief Justice did some two centuries ago, the Supreme Court of today is diligent in exercising diversity jurisdiction where it truly exists, and careful not to exercise it where it does not, nor unilaterally decree its expansion in the absence of legislative action.

The power, and, better said, the right, to add or subtract from the bedrock guarantee of diversity jurisdiction belongs to Congress. The fact that the legislative branch has ignored such prerogatives for decades matters not. It is not just cause for the high bench to usurp a power not rightly belonging to it. True to the Constitution in all its aspects, the Court remains indefatigable in this most wondrous exercise of, not judicial will, but judicial restraint.

For our coda, one hundred and eighty years of Supreme Court jurisprudence on determining the citizenship of unincorporated business entities for purposes of diversity jurisdiction is best stated in the two most recent examples of the high Court's reasoning, adherence to precedent, and devotion to judicial restraint. In the most recent, the learned Justice Sotomayor declared in *Americold* that, above all else, there is simply no good reason to tear down the doctrinal wall that for nearly two centuries has accorded different, but eminently sound, rules for determining the juridical citizenships of corporations, on the one hand, and unincorporated forms of business organizations on the other.

¹⁹⁹ *The Bank of the United States v. Deveaux*, 9 U.S. 61, 87 (1809).

²⁰⁰ *Id.* at 87.

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Yet the efficacy of *Americold* is built upon the wisdom of the legendary Justice Scalia in *Carden*, and so we end with his sage articulation of a precept fundamental to the preservation of our system of ordered liberty; “We leave the rest to Congress.”²⁰¹

²⁰¹ *Carden*, 494 U.S. at 197.