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LIMITED LIABILITY COMPANY CITIZENSHIP: RECONSIDERING AN ILLOGICAL AND INCONSISTENT CHOICE

DEBRA R. COHEN*

I. INTRODUCTION

This Article is about the disconnect between the modern business realities of the limited liability company (“LLC”) and the formalistic rules for determining the citizenship of LLCs for purposes of diversity jurisdiction. This is neither an article about the value of diversity jurisdiction in today’s society, nor whether it should be preserved, limited, or abolished. Those articles have been written.¹ This Article

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1. See Richard Allan, *Démarche or Destruction of the Federal Courts—A Response to Judge Friendly’s Analysis of Federal Jurisdiction*, 40 BROOK. L. REV. 637, 655–56 (1974) (abolish diversity); George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 378 (1933) (limit diversity); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 132–33 (1993); Howard C. Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347, 351–53 (1976) (limit diversity); Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179, 193 (1929) (support diversity); Charles E. Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A. J. 499, 503 (1933) (limit diversity); David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 8 (1968) (limit diversity); John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 413–14 (1979) (support diversity); John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 13 (1963) (support diversity); Felix Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. PA. L. REV. 1097, 1100 (1931) (abolish diversity); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 530 (1928) (abolish diversity); Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 104 (1980) (support diversity); Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 314 (1979) (abolish diversity); Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 121–29 (abolish diversity with exceptions); Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 227–30 (1982) (support diversity); Carl McGowan, *Federal Jurisdiction: Legislative and Judicial Change*, 28 CASE W. RES. L. REV. 517, 533–34 (1978) (limit diversity); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: The Silver Lining*, 66

accepts as a premise, good, bad, or indifferent, that diversity jurisdiction is constitutionally permissible and congressionally authorized.² This Article also accepts as a premise that the purpose of diversity jurisdiction is to provide a neutral forum when necessary to protect litigants from actual or perceived local bias.³

From the outset, diversity jurisdiction has been both congressionally and judicially limited.⁴ In 1806, the Supreme Court mandated complete diversity; no plaintiff could have the same citizenship as any defendant.⁵

A.B.A. J. 177, 180 (1980) (abolish diversity); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 1011–12 (1979); Donald T. Weckstein, *Citizenship for Purposes of Diversity Jurisdiction*, 26 SW. L.J. 360, 382 (1972) (reform diversity); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 240 (1948) (limit diversity); Charles Alan Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 207–08 (1969) (limit diversity); Hessel E. Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A. J. 71, 72 (1933) (reform diversity).

2. The Constitution provides for diversity jurisdiction in cases “between Citizens of different States.” U.S. CONST. art. III, § 2. From the outset, Congress has empowered the federal courts to hear diversity cases. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79. Despite numerous calls for abolition and numerous attempts at legislation, diversity jurisdiction continues. See *supra* note 1.

3. Although the purpose of diversity jurisdiction was not expressly articulated by the founding fathers, it is commonly accepted that the purpose was to provide a neutral forum. See *Exxon Mobil Corp. v. Allapattah Servs.*, 125 S. Ct. 2611, 2617–18 (2005); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 23 (6th ed. 2002) (“The traditional explanation of diversity jurisdiction is a fear that state courts would be prejudiced against those litigants from out of state.”); Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 IND. L.J. 181, 190 (1998) (“[T]he principal argument for diversity jurisdiction is the protection of out-of-state litigants from local prejudice.”).

4. Initially, Congress limited diversity jurisdiction to suits “where the matter in dispute exceeds . . . five hundred dollars, and . . . is between a citizen of the State where the suit is brought, and a citizen of another State.” Judiciary Act of 1789, ch. 20, § 11, 1 Stat. at 78. Congress has always imposed an amount in controversy requirement. Initially, the amount in controversy had to exceed \$500. §§ 11–12, 1 Stat. at 78–79. Since then, the amount has been increased five times. In 1887, it was raised to in excess of \$2000. Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552, 552. In 1911, it was raised to in excess of \$3000. Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091. In 1958, it was raised to in excess of \$10,000. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415, 415. In 1988, it was raised to in excess of \$50,000. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201, 102 Stat. 4642, 4646 (1988). Most recently, in 1997, it was raised to in excess of \$75,000. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850. In *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806), the Supreme Court imposed the requirement of complete diversity.

5. *Strawbridge*, 7 U.S. (3 Cranch) at 267. Complete diversity is not required in all circumstances. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) (requiring only “two adverse parties [who] are not co-citizens”). Congress has authorized minimal diversity in several circumstances. See 28 U.S.C. § 1335 (2000) (two or more adverse

The Court judicially imposed a screening mechanism that, using the citizenship of the litigants,⁶ identifies cases for which diversity jurisdiction is appropriate.⁷ In theory, if there are citizens from the same state on both sides of the litigation, concerns about local bias are diminished, and there is no need for a neutral forum.⁸

The LLC is a state-created organization that combines the partnership characteristic of flow-through tax treatment with the corporate characteristic of owner limited liability.⁹ As a hybrid organization, there are two possibilities for determining the citizenship of an LLC—the “persons composing” rule, which is applied to partnerships, or § 1332(c)(1), which is applied to corporations.¹⁰ The persons composing rule, also known as “aggregate citizenship,” is a common law rule that looks through a business organization to all of its owners. Under the persons composing rule, an LLC could be a citizen of as many states as it has members.¹¹ Section 1332(c)(1), also known as “entity citizenship,” deems a corporation to have the citizenship of its state of incorporation and its principal place of business.¹² Under entity

claimants); Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9–10 (amending 28 U.S.C. § 1332 (2000)).

6. As a general rule, the focus is on the real parties to the controversy—those litigants that have control of, a stake in, or liability for the litigation. It does not focus on nominal or formal parties. See 15 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 102.15 (3d ed. 2006); see *infra* text accompanying notes 201–203.

7. The citizenship of a natural person has consistently been held to be the individual’s domicile. “[T]o be a citizen of a state within the meaning of the diversity provision, a natural person must be both (1) a citizen of the United States, and (2) a domiciliary of that state.” *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996); see *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974). A person has only one domicile at a time. She is born with the domicile of her parents and changes it only when she is physically present in another state with the intent to remain there indefinitely. See *Williamson v. Osenton*, 232 U.S. 619, 624–25 (1914); *Mas*, 489 F.2d at 1399. There are two choices for the citizenship of a business organization. See *infra* text accompanying notes 10–13.

8. See *MOORE ET AL.*, *supra* note 6, § 102.12[1]. But see *Lilly*, *supra* note 3, at 191 (suggesting neutralization argument is weak).

9. This was not the first attempt to combine owner limited liability with flow-through tax treatment. Previously created hybrid organizations include the Subchapter S corporation and the limited partnership. Each had issues. See Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. SMALL & EMERGING BUS. L. 435, 443–45 (2002). The LLC and the limited liability partnership appear to be more successful than previously created hybrid organizations, in part because the adoption of check-the-box eliminated taxation as a concern in the formation decision. See *infra* note 134.

10. 28 U.S.C. § 1332(c)(1) (2005).

11. This scenario assumes that each member of the LLC is a citizen of a different state.

12. Section 1332(c) was added to the diversity statute in 1958. Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415. Congress codified the Court created rule of entity citizenship.

citizenship, an LLC could be, at most, a citizen of two states—its state of creation and its principal place of business.¹³

Although the LLC is not yet thirty,¹⁴ courts and commentators are asserting that, for diversity jurisdiction, the citizenship of an LLC is “emphatically settled.”¹⁵ The persons composing rule applies. This conclusion is consistent with precedent.¹⁶ Since the mid-nineteenth century, entity citizenship has been universally accepted for corporations.¹⁷ However, with one exception, the Supreme Court has repeatedly refused to extend entity citizenship to hybrid organizations.¹⁸ Over time, this refusal has come to be known as maintaining the “doctrinal wall.”¹⁹

This included not only the state of incorporation but also the state of the principal place of business. The principal place of business was included to prevent local corporations from invoking diversity jurisdiction. See *infra* note 102 and accompanying text.

13. While technically a corporation may be incorporated in more than one state, this is rare. MOORE ET AL., *supra* note 6, § 102.53. Principal place of business is not statutorily defined, but it has been judicially limited to a single state. *Unger v. Del E. Webb Corp.*, 233 F. Supp. 713, 714 (N.D. Cal. 1964). Federal courts of appeal have applied different tests to determine a corporation’s principal place of business. These include the “nerve center” test, the “muscle center” test, and the “total activity” test. See *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959) (“nerve center”); *Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960) (“muscle center” or “place of activity”); *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 404, 411–12 (5th Cir. 1987) (“total activity”).

14. The LLC was first recognized in Wyoming in 1977. See Cohen, *supra* note 9, at 446–48 (providing a brief history of the development of the LLC); Wyoming Limited Liability Company Act, ch. 158, 1977 Wyo. Sess. Laws 537 (codified at WYO. STAT. ANN. §§ 17-15-101 to -147) (1977). Within twenty years every state had an LLC statute. LLCs are growing in popularity. See *infra* note 36.

15. Carter G. Bishop & Daniel S. Kleinberger, *Diversity Jurisdiction for LLCs?*, 14 BUS. L. TODAY 31, 31 (2004) (noting that the question of whether an LLC is more like a corporation or a partnership for purposes of diversity jurisdiction is “emphatically settled”). See also *Pramco, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 55 (1st Cir. 2006) (“We see no reason to depart from this well-established rule.”); *Belleville Catering Co. v. Champaign Mkt. Place, LLC*, 350 F.3d 691, 692 (7th Cir. 2003) (“Counsel and the magistrate judge assumed that a limited liability company is treated like a corporation That is not right. Unincorporated enterprises are analogized to partnerships . . .”).

16. See *infra* text accompanying notes 46–59.

17. See *infra* text accompanying notes 93–103.

18. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189 (1990). The one exception, *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), has been limited to its facts. See *infra* text accompanying notes 64–69 and 136–38.

19. The phrase “doctrinal wall” was first coined in *United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.*, 382 U.S. 145, 151 (1965). It was subsequently reiterated by the Supreme Court in *Carden*, 494 U.S. at 189–90. It has also been used by numerous commentators. See, e.g., Ryan A. Christy, *Redefining the Juridical Person: Examining the Business Trust and Other Unincorporated Associations for Citizenship Purposes*, 6 DUQ. BUS. L.J. 137, 139 (2004); Cohen, *supra* note 9, at 462; Matthew C. Dodge, Comment, *Determining*

Despite a bandwagon of support, declaring the extension of the doctrinal wall to LLCs “emphatically settled” is premature. Aggregate citizenship for LLCs is not as firmly entrenched as rhetoric indicates.²⁰ More important, it is motivated by “concern about the burdens of diversity jurisdiction—not sound doctrinal analysis.”²¹

Refusing to grant LLCs entity citizenship is a continuation of ends-oriented decisions clothed in language of precedent and deference.²² The motivation for these decisions stems from judicial concerns regarding an overcrowded federal docket, not substantial changes in the laws governing business organizations or the purpose of diversity jurisdiction.²³ The assumption underlying this ends-oriented approach is that aggregate, instead of entity, citizenship decreases the probability that an LLC can satisfy complete diversity and thereby reduces the number of actions eligible for diversity jurisdiction.²⁴

the Citizenship of LLC Members for Diversity Purposes: Seemingly Simple, Difficult Enough to Compel an Amendment to 28 U.S.C. § 1332(c)(1), 80 TUL. L. REV. 661, 664 (2005); John McCormack, Comment, *Carden v. Arkoma Associates: The Citizenship of Limited Partnerships, Associations, and Juridical Entities—A Chilling Future for Federal Diversity Jurisdiction*, 27 NEW ENG. L. REV. 505, 522 (1992); Scott M. Rickard, Comment, *Shoring Up the “Doctrinal Wall” of Chapman v. Barney: In Support of the Aggregate Approach to Limited Liability Company Citizenship for Purposes of Federal Diversity Jurisdiction*, 40 WILLAMETTE L. REV. 739, 740 (2004); Charles A. Szypszak, *Jural Entities, Real Parties in Controversy, and Representative Litigants: A Unified Approach to the Diversity Jurisdiction Requirements for Business Organizations*, 44 ME. L. REV. 1, 2 (1992); Robert J. Tribeck, *Cracking the Doctrinal Wall of Chapman v. Barney: A New Diversity Test for Limited Partnerships and Limited Liability Companies*, 5 WIDENER J. PUB. L. 89, 107 (1995).

20. See *infra* Part II.A.

21. Szypszak, *supra* note 19, at 2. See *infra* Part III.C.

22. See *infra* Part III.C.

23. Concern about the federal docket is not new. Expressions of concern date back at least to the expansion of diversity jurisdiction in 1875. Concerned with the deluge of diversity actions, both Congress and the Supreme Court sought to restrict diversity jurisdiction. See James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 8 (1964). See *Carden*, 494 U.S. at 207 (O’Connor, J., dissenting) (“The concern perhaps implicit in the Court’s holding today is that failure to consider the citizenship of all the members of an unincorporated business association will expand diversity jurisdiction at a time when our federal courts are already seriously overburdened.”). With the addition of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9–10 (amending 28 U.S.C. § 1332 (2000)), there is reason to believe that the problem will only worsen.

24. See *Carden*, 494 U.S. at 207 (O’Connor, J., dissenting) (“[F]ailure to consider the citizenship of all the members of an unincorporated business association will expand diversity jurisdiction at a time when our federal courts are already seriously overburdened.”); Cohen, *supra* note 9, at 438 (“The Court perceives that deeming unincorporated organizations to have the citizenship of all their members, rather than entity citizenship, reduces the number of actions eligible for diversity jurisdiction.”); Amy L. Levinson, *Developments in Diversity*

First, the underlying assumption that treating LLCs like partnerships will ease the overcrowded federal docket is not empirically supported.²⁵ Even if treating LLCs like partnerships does reduce the number of actions eligible for diversity jurisdiction, any benefit gained from the reduction is likely to be offset by the increased complexity in determining whether complete diversity is satisfied.²⁶

Second, the rationale for treating LLCs like partnerships, precedent and deference, lacks substance.²⁷ Precedent only applies to similar circumstances, and LLCs are not similar to partnerships. Further, despite assertions of deference to Congress, the Supreme Court has been defining citizenship since it mandated complete diversity in 1806.

Third, even when faced with similar circumstances, precedent should not be followed when it becomes difficult to apply or creates inconsistencies with other laws. Even if LLCs are similar to limited partnerships because they are both unincorporated organizations, treating LLCs like partnerships produces illogical and inconsistent results.²⁸ Focusing on the citizenship of LLC members undercuts the screening function performed by the complete diversity requirement. The analysis no longer assures a federal forum when one is appropriate nor precludes a federal forum when one is inappropriate. Treating LLCs like partnerships also undermines well established federal policies that determine citizenship according to federal law and prevent nominal parties from barring federal jurisdiction.

When courts, ignoring modern business realities, treat an LLC like a partnership, they undercut the concept of jurisdictional parity, that similar parties should be afforded similar access to diversity jurisdiction.²⁹ Additionally, this approach permits an LLC to change its

Jurisdiction, 37 LOY. L.A. L. REV. 1407, 1422 (2004) (“The more members, the more likely it is that one of them will defeat the complete diversity requirement of *Strawbridge*.”).

25. See *infra* Part III.B.

26. An analysis of an overcrowded federal docket that focuses only on the number of diversity actions filed is incomplete. A complete analysis must also examine the duration of diversity cases. See Marsh, *supra* note 1, at 220; see *infra* Part IV.B.3.

27. See *infra* Part III.C.

28. See *infra* Part IV.

29. “It should be axiomatic that comparable entities should receive equal . . . access to the federal courts.” Taylor Simpson-Wood, *Has the Seductive Siren of Judicial Frugality Ceased to Sing?: Dataflux and its Family Tree*, 53 DRAKE L. REV. 281, 338 (2005). In 1882, Congress revised the provision on jurisdiction for national banks to create parity with non-national banks. See *Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 947 (2006).

citizenship from day to day.³⁰ As the existence of complete diversity is determined based on the citizenship at the time of filing, an LLC can manipulate its citizenship to manufacture or destroy diversity.

Fourth, as a practical matter, applying the persons composing rule to LLCs creates logistical difficulties. While the persons composing rule is simple in theory, in practice it is not, particularly because the membership of an LLC is not public information. Courts seek to settle the question of whether the court is an appropriate forum simply and efficiently.³¹ However, this approach results in the expenditure of additional resources to determine the existence of diversity and those expenditures likely exceed any benefits gained by reducing the number of eligible cases.³²

This Article examines the decisions that, for purposes of determining citizenship, treat LLCs like partnerships. After showing that, to borrow from Mark Twain, assertions that the issue is “emphatically settled” are greatly exaggerated, this Article examines the stated and unstated reasons for adopting this approach and explores the illogical and inconsistent results that follow. Just as the formalistic rules of personal jurisdiction found in *Pennoyer v. Neff*³³ gave way to the more flexible standard in *International Shoe Co. v. Washington*,³⁴ this Article concludes that it is time to leave the mechanical rules of citizenship behind. A better approach is needed, one that both reflects modern business realities and promotes the purpose of diversity jurisdiction. It suggests applying the aggregate/entity dichotomy in a functional rather than mechanical manner. Finally, this Article suggests that there are reasons to believe that, if faced with the question of citizenship of LLCs,

30. Members with one citizenship might sell to a person or organization with another citizenship. Alternatively, a member might change his, her, or its citizenship. A change of domicile by any member of an LLC changes the citizenship of the LLC. However, there is no mechanism to assure that the LLC is aware of this change. As a result, under the persons composing rule, an LLC, at any given time, might not know all the states in which it is a citizen.

31. See *Spielman v. Genzyme Corp.*, 251 F.3d 1, 4 (1st Cir. 2001) (“[D]etermining whether a case belongs in federal court should be done quickly, without an extensive fact-finding inquiry.”); *Coté v. Wadel*, 796 F.2d 981, 983 (7th Cir. 1986) (“Jurisdictional rules should be as simple as possible, so that the time of litigants and judges is not wasted deciding where a case should be brought . . .”).

32. See *infra* Part IV.B.3.

33. 95 U.S. 714 (1877).

34. 326 U.S. 310 (1945).

the Supreme Court might be ready to break with the mechanical tradition.³⁵

II. PERPETUATING THE DOCTRINAL WALL

A. *Cosgrove and Carden*

As the LLC gains popularity,³⁶ LLCs are parties in a growing number of suits in federal court, many of which are based on diversity jurisdiction.³⁷ As a result, federal courts must ascertain the citizenship of LLCs with more frequency. In several early decisions, without discussion, courts treated LLCs like corporations.³⁸ In 1996, in *Carlos v. Adamany*, a district court expressly indicated that LLCs would be treated like corporations for purposes of diversity jurisdiction.³⁹

The Seventh Circuit rejected this approach in *Cosgrove v. Bartolotta*.⁴⁰ *Cosgrove* presented an ideal opportunity to address the issue because complete diversity existed regardless of whether

35. See *infra* Part V.

36. According to the IRS, based on tax returns, the number of LLCs went from 221,498 in 1996 to 946,130 in 2002. See I.R.S., Statistics of Income (SOI) Tax Stats – Integrated Business Data 1980–2002, available at <http://www.irs.gov/pub/irs-soi/80ot1all.xls>. In many states, LLC filings are outpacing corporate filings for newly created businesses. INT’L ASS’N OF COMMERCIAL ADM’RS, ANNUAL REPORT OF THE JURISDICTIONS (2006), available at http://www.iaca.org/downloads/AnnualReports/2006_IACA_AR.pdf; see also Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 36–39 (2004).

37. A search of the federal district courts database (DCT) on Westlaw indicates that the number of cases in which an LLC was a party went from 14 in 1995 to 2171 in 2005. Westlaw, <http://www.westlaw.com> (search database DCT, search terms ti(“limited liability company” LLC L.L.C.) & da(1995 or 2005)).

38. See *SMS Financial II, LLC v. Stewart*, No. 3:95-CV-1280-D, 1996 WL 722080, at *1 (N.D. Tex. Dec. 9, 1996) (requiring an LLC to specify its state of incorporation and principal place of business to establish that diversity jurisdiction is satisfied); *Dali (USA), Inc. v. Lee*, No. 96 Civ. 3305 (MBM), 1996 WL 592723, at *1 (S.D.N.Y. Oct. 16, 1996) (repeating pleadings, which aver that Bogari International, LLC “is a New York corporation with its principal place of business in New York”); *Cosmetech Int’l, LLC v. Der Kwei Enter. and Co.*, 943 F. Supp. 311, 313 (S.D.N.Y. 1996) (deeming LLC to be a New York corporation).

39. No. 95 C50264, 1996 WL 210019, at *3 n.4 (N.D. Ill. April 17, 1996). Judge Reinhard noted that if the plaintiff’s new LLC replaced the defunct corporate plaintiff, citizenship for purposes of diversity would still be determined under the nerve center test. *Id.* at *2. *But see Int’l Flavors and Textures, LLC v. Gardner*, 966 F. Supp. 552, 554 (W.D. Mich. 1997) (issue subsequently decided the other way).

40. 150 F.3d 729 (7th Cir. 1998).

citizenship was determined using the persons composing rule or § 1332(c).⁴¹

The conclusion that an LLC's citizenship should be determined under the persons composing rule was foreshadowed when Judge Posner recapped the rule for determining the citizenship of a partnership but not the rule for determining the citizenship of a corporation.⁴² The brief analysis, a single sentence with a single citation, analogizes the LLC to the limited partnership.⁴³ Once likened to the limited partnership, *Carden v. Arkoma Associates* is deemed precedential,⁴⁴ and “unless Congress provides otherwise . . . the citizenship of an LLC for purposes of the diversity jurisdiction is the citizenship of its members.”⁴⁵

In *Carden*, a divided Court “reiterated that ‘the doctrinal wall . . .’ would not be breached.”⁴⁶ The Court acknowledged the well-established rule of entity citizenship for corporations⁴⁷ and that limited partnerships are functionally similar to corporations and arguably should be treated like corporations.⁴⁸ However, citing precedent and

41. “Mary-Bart, LLC has only one member—Mr. Bartolotta, who is not a citizen of the same state as the plaintiff.” *Id.* While the facts do not indicate the citizenship of Mr. Bartolotta, it appears he is a citizen of Wisconsin. Mary-Bart, LLC was registered as an LLC in Wisconsin on February 24, 1995 and has its principal office in Wisconsin. See Wis. Dep’t of Fin. Insts., Corporate Registration Information System, Corporate Records of Mary-Bart, LLC, [http://www.wdfi.org/apps/cris/?action=\(search “mary-bart”\)](http://www.wdfi.org/apps/cris/?action=(search+“mary-bart”)). Under both the persons composing rule and § 1332(c), Mary-Bart would be a citizen of Wisconsin. The Seventh Circuit could reject the district court’s approach without concern that the decision would be appealed.

42. *Cosgrove*, 150 F.3d at 731 (“In the case of a regular corporation, the owners’ state of citizenship is irrelevant to whether there is the required complete diversity; but in the case of a partnership, it is crucial. The citizenship of a partnership is the citizenship of the partners, even if they are limited partners, so that if even one of the partners (general or limited) is a citizen of the same state as the plaintiff, the suit cannot be maintained as a diversity suit.”).

43. *Id.*

44. 494 U.S. 185 (1990).

45. *Cosgrove*, 150 F.3d at 731.

46. 494 U.S. at 189 (internal citation omitted).

47. *Id.* at 188. In discussing the history of corporate citizenship, the Court acknowledged that it had “not always reach[ed] the same conclusion.” *Id.* Initially, in *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 91 (1809), the Court deemed the citizenship of a corporation to be that of the persons composing it—the shareholders. However, thirty-five years later, in *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 498–503 (1844), the Court overruled its earlier decision and held that a corporation had entity citizenship. A decade later, in *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314, 328 (1854), the Court reaffirmed this result on different grounds. See also *infra* notes 93–97 and accompanying text.

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

deference to Congress, the Court refused to extend entity citizenship to limited partnerships.⁴⁹

The precedent was established in 1889 when the Supreme Court first addressed the citizenship of a hybrid organization in *Chapman v. Barney*.⁵⁰ In a brief opinion, the Court remanded for a determination of the citizenship of the members of the joint stock company.⁵¹ Without examining whether a joint stock company was similar to a corporation or if there were reasons to apply entity citizenship, the Court concluded that the joint stock company was “not a corporation, but . . . a mere partnership.”⁵² The Court asserted that organization under the laws of a state does not make the company a corporation. Further, being authorized by that state to bring suit in the name of its president did not confer entity citizenship for diversity jurisdiction.⁵³

The precedent was reiterated in *Great Southern Fire Proof Hotel Co. v. Jones*.⁵⁴ The Court acknowledged that entity citizenship for corporations “has been so long recognized and applied that it is not now to be questioned.”⁵⁵ The Court also acknowledged that the limited partnership association had many corporate attributes.⁵⁶ Still, without

49. *Id.* at 195–96. “While the rule regarding the treatment of corporations as ‘citizens’ has become firmly established, we have . . . just as firmly resisted extending that treatment to other entities.” *Id.* at 189. The Court also refused to look at the citizenship of less than all the partners, limited and general, of the limited partnership. *Id.* at 193–95.

50. 129 U.S. 677 (1889).

51. “The record does not show the citizenship of Barney or of any of the members of the company.” *Id.* at 682.

52. *Id.* (emphasis removed) (“The allegation that the company was organized under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is not a corporation, but a joint-stock company—that is, a mere partnership. And, although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in Federal court. The company may have been organized under the laws of the State of New York, and may be doing business in that State, and yet all the members of it may not be citizens of that State.”).

53. *Id.* (“[A]lthough [the joint stock company] may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a federal court.”).

54. 177 U.S. 449 (1900).

55. *Id.* at 456.

56. “[T]he capacity to sue and be sued by the name of the association does not make [a limited partnership association] a corporation” *Id.* at 455–56. Under Pennsylvania law, the limited partnership association was described as “a ‘quasi corporation,’ having some of the characteristics of a corporation, or as a ‘new artificial person.’” *Id.* at 457 (emphasis removed).

explanation, the Court refused to extend entity citizenship to the limited partnership association.⁵⁷

The Court reaffirmed this precedent in *United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc.* when an unincorporated labor union was held to have the citizenship of all of its members.⁵⁸ The Court recognized merit in the argument that the distinctions between corporations and unincorporated organizations had blurred; however, citing precedent and, for the first time deference, the Court indicated that the decision to grant entity citizenship to unincorporated entities was “properly a matter for legislative consideration.”⁵⁹

Like the *Bouligny* Court, the *Carden* Court expressed its deference to Congress.⁶⁰ The Court stated that, having created entity citizenship in *Letson*, it had left adjustments to Congress.⁶¹ Highlighting § 1332(c), the Court asserted that Congress had assumed control and “ha[d] not been idle.”⁶² Then, adopting a literal reading of § 1332(c), the Court inferred that by referencing only corporations, Congress intentionally excluded hybrid organizations.⁶³

Puerto Rico v. Russell & Co. is the one exception to the Court’s refusal to extend entity citizenship to hybrid organizations.⁶⁴ In *Russell*, the hybrid organization was a *sociedad en comandita*, organized under the laws of Puerto Rico.⁶⁵ The Court, adopting a functional analysis, held that the *sociedad en comandita* was such a “complete” juridical person that, like a corporation, it was deemed to have entity citizenship.⁶⁶ *Russell* was subsequently limited to its facts in *Bouligny*,

57. *Id.* (having some corporate characteristics is not a basis for extending entity citizenship to a limited partnership association).

58. 382 U.S. 145, 153 (1965).

59. *Id.* at 147, 149–51, 153. *Bouligny* was the first time the Court addressed the question of entity citizenship after the adoption of § 1332(c).

60. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196–97 (1990); *Bouligny*, 382 U.S. at 147, 153.

61. *Carden*, 494 U.S. at 196 (“[H]aving entered the field of diversity policy with regard to artificial entities once (and forcefully) in *Letson*, we have left further adjustments to be made by Congress.”).

62. *Id.*

63. *Id.* at 196–97. The Court indicated that Congress knew about limited partnerships, had it wanted to extend entity citizenship to limited partnerships, it would have expressly included limited partnerships in § 1332(c).

64. *Id.* at 189 (stating that “[t]he one exception to the admirable consistency of our jurisprudence on this matter is *Puerto Rico v. Russell & Co.*,” 288 U.S. 476 (1933)).

65. *Russell*, 288 U.S. at 480–81.

66. *Id.* at 481–82. The *sociedad*’s juridical “personality is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a

when the Court indicated that the *sociedad en comandita* was “an exotic creation of the civil law.”⁶⁷ While acknowledging that the decision was “technical, precedent-bound, and unresponsive to the considerations raised by the changing realities of business organizations,” the *Carden* Court accepted this limitation and concluded that only corporations would be treated as entities; all other organizations would be assimilated to partnerships.⁶⁸

The doctrinal wall is ends-oriented. It does not provide guidelines as to when a hybrid organization might be deemed to have entity citizenship. It perpetuates a formalistic rule that arbitrarily divides business organizations into two categories—corporations and everything else. *Cosgrove* followed suit.⁶⁹

B. Follow the Leader

Since *Cosgrove*, every circuit that has expressly decided the issue has concurred. For purposes of determining citizenship for diversity, LLCs are treated like partnerships. The analysis supporting these decisions, like the analysis in *Cosgrove*, is almost non-existent. In large measure it appears that the circuits are playing follow the leader.

The Second Circuit was the first to follow. In *Handelsman v. Bedford Village Associates Ltd. Partnership*, the Second Circuit concurred with *Cosgrove* with only a citation.⁷⁰ The Eighth Circuit was next, and it provided the most in-depth analysis. In *GMAC Commercial Credit LLC v. Dillard Department Stores*, the court examined the dichotomy between incorporated and unincorporated entities and the Supreme Court’s resistance to extending entity citizenship to unincorporated entities.⁷¹ Citing *Carden* and *Cosgrove*, the Eighth Circuit “dutifully adhere[d] to the same principle” in spite of the fact that “numerous similarities exist between a corporation and an LLC.”⁷²

Raising the issue *sua sponte* and citing *Cosgrove*, *Handelsman*, and *GMAC*, the Eleventh Circuit was the next to “join them in this

different status for purposes of federal jurisdiction than a corporation organized under that law.” *Id.* at 482. As a result of this conclusion, complete diversity was not satisfied and the case was remanded to the Insular Court of Puerto Rico. *Id.* at 482, 484–85.

67. *United Steelworkers of America, AFL–CIO v. Bouligny*, 382 U.S. 145, 151 (1965). The Court also noted that the results in *Russell* destroyed diversity. *Id.* at 152.

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

69. *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998).

70. 213 F.3d 48, 51–52 (2d Cir. 2000).

71. 357 F.3d 827, 828–29 (8th Cir. 2004).

72. *Id.* at 829.

holding.”⁷³ The Fourth Circuit followed shortly thereafter, citing *GMAC* as “one of many cases in which the court concludes a[n LLC] is assigned the citizenship of its members.”⁷⁴ More recently, in *Pramco, LLC v. San Juan Bay Marina, Inc.*, the First Circuit jumped on the bandwagon, stating that “every circuit to consider this issue has held that the citizenship of a limited liability company is determined by the citizenship of all of its members. We see no reason to depart from this well-established rule.”⁷⁵ Additionally, in *Johnson v. Columbia Properties Anchorage, LP*, the Ninth Circuit, noting the uniformity among circuits, joined her “sister circuits” holding that “like a partnership, an LLC is a citizen of every state of which its owners/members are citizens.”⁷⁶ District courts that have expressly addressed the question have also shown a tendency to follow the leader.⁷⁷

III. EXAGGERATIONS

A. Not Emphatically Settled

While a majority of circuits have followed *Cosgrove*, the issue is not “emphatically settled.” Many judges seem to find the alternative approach more intuitive. Both the Sixth Circuit and the Tenth Circuit, without discussion, have applied § 1332(c) to determine the citizenship of an LLC.⁷⁸ In *Kalamazoo Acquisitions, LLC v. Westfield Insurance*

73. *Rolling Greens MHP, L.P. v. Comcast SCH Holdings LLC*, 374 F.3d 1020, 1022 (11th Cir. 2004) (“[F]ederal appellate courts that have answered this question have all answered it in the same way: like a limited partnership, a limited liability company is a citizen of any state of which a member of the company is a citizen.”). The court also cited *Homfeld II, LLC v. Comair Holdings*, 53 F. App’x 731 (6th Cir. 2002) (unpublished opinion) and *Provident Energy Assocs. of Montana v. Bullington*, 77 F. App’x 427, 428 (9th Cir. 2003) (unpublished opinion). *Rolling Greens*, 374 F.3d at 1022. As *Homfeld* and *Provident Energy* are both unpublished opinions, they have limited if any precedential value.

74. *Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 120 (4th Cir. 2004).

75. 435 F.3d 51, 54–55 (1st Cir. 2006) (citations omitted).

76. 437 F.3d 894, 899 (9th Cir. 2006). This was a case of first impression as the earlier Ninth Circuit opinion addressing this issue was unpublished. See *Provident Energy*, 77 F. App’x at 428–29 (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990)) (“[T]he citizenship of an LLC is determined by the citizenship of each of its members.”).

77. Note, however, that many courts have assumed a contrary answer without expressly addressing it. See *infra* Part III.A.

78. See *Maroy v. ISIS, LLC of Okla.*, No. CIV-06-0776-F, 2006 WL 2056661, at *1 (W.D. Okla. July 21, 2006) (“The Tenth Circuit has not specifically ruled with respect to the method of determining the citizenship of a limited liability company for purposes of diversity

Co., in explaining the invocation of diversity, the Sixth Circuit indicated that “Kalamazoo is a Michigan [LLC], with its principal place of business in Michigan.”⁷⁹ In *Shell Rocky Mountain Production, LLC v. Ultra Resources, Inc.*, the Tenth Circuit stated that “[i]t is undisputed that Shell is a Delaware . . . (LLC) and its principal place of business is Houston, Texas. Thus, Shell is a citizen of both Delaware and Texas.”⁸⁰ In addition, several district courts have also applied § 1332(c) without discussion to determine the citizenship of LLCs.⁸¹

Even in jurisdictions that have adopted the persons composing rule for LLCs, judges are still deciding cases under § 1332(c). Since a 2004 decision asserting aggregate citizenship for LLCs,⁸² the Eleventh Circuit has twice applied § 1332(c) to determine the citizenship of an LLC. In *MacGinnitie v. Hobbs Group, LLC*, the defendant LLC is referred to and treated as a corporation.⁸³ More recently, in *Henderson v. Washington National Insurance Co.*, an LLC is treated like a corporation for purposes of determining citizenship.⁸⁴

This is also the case in the Fourth Circuit. Despite the adoption of the persons composing rule,⁸⁵ removal to federal court was not questioned even though it was based on an assertion of citizenship that

jurisdiction.”); *Kalamazoo Acquisitions, LLC v. Westfield Ins. Co.*, 395 F.3d 338, 341 n.5 (6th Cir. 2005).

79. 395 F.3d at 341. The Sixth Circuit also applied § 1332(c) to determine citizenship of an LLC in the unpublished opinion of *Ferrer v. MedaSTAT USA, LLC*, 145 F. App’x 116, 118–19 (6th Cir. 2005). These decisions contradict the earlier unpublished opinion in *Homfeld II, LLC v. Comair Holdings, Inc.*, 53 F. App’x 731, 732 (6th Cir. 2002) (citing *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998) and *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 464 (1980) (LLC “is not treated as a corporation and has the citizenship of its members”)).

80. 415 F.3d 1158, 1162 (10th Cir. 2005).

81. A few examples include *Cole v. Mattina Insurance Agency*, No. 1:06CV394 LTS-JMR, 2006 WL 1364263, at *1 (S.D. Miss. May 16, 2006) (deeming AmFed Companies, LLC a Mississippi corporation and concluding diversity existed); *PeopleSoft, Inc. v. Amherst, LLC*, 369 F. Supp. 2d 1263, 1266 (D. Colo. 2005) (accepting allegations of LLC’s citizenship based on state of creation and principal place of business); and *Tai v. Martin*, No. 95-2319-JWL, 1996 WL 227783, at *1 (D. Kan. Apr. 30, 1996) (assuming, without deciding, that a Kansas limited liability company’s citizenship was dependent on its principal place of business).

82. *Rolling Greens MHP, L.P. v. Comcast SCH Holdings LLC*, 374 F.3d 1020, 1022 (11th Cir. 2004).

83. 420 F.3d 1234, 1237 (2005) (discussing the principal place of business of Hobbs Group, LLC).

84. 454 F.3d 1278, 1280 (11th Cir. 2006). In that case, the plaintiff, an Alabama resident, sued Washington National Insurance Company and Consec Services, LLC. The court found that Consec was incorporated in Indiana, where it also has its principal place of business. *See id.*

85. *See supra* text accompanying note 74.

stated, “[the company] is a limited liability company organized under the laws of the State of Maryland with its principal place of business in Owings Mills, Maryland.”⁸⁶

Lawyers also seem to intuitively treat LLCs like corporations.⁸⁷ Many pleadings asserting diversity jurisdiction as a basis for subject matter jurisdiction allege LLC citizenship under § 1332(c).⁸⁸ The Seventh Circuit, which has emphatically stated several times that the citizenship of an LLC is determined under the persons composing rule,⁸⁹ has remanded a number of cases while lawyers and judges continue to apply § 1332(c) to determine the citizenship of LLCs.⁹⁰

Additionally, the issue remains undecided in several circuits. Neither the Third Circuit nor the D.C. Circuit has addressed the issue. The Fifth Circuit had an opportunity to follow *Cosgrove*, but instead

86. *Strong Pharm. Lab., LLC v. Trademark Cosmetics, Inc.*, No. RDB 05-3427, 2006 WL 2033138, at *1 (D. Md. July 17, 2006).

87. Whether this is an intuitive conclusion, an expedient decision, or an exhibition of ignorance is open to debate. One scholar suggests an expedient decision. See Simpson-Wood, *supra* note 29, at 284–85.

88. An examination of recent complaints filed in federal court demonstrates this to be true. See, e.g., *Complant at 2, Trade-Winds Environmental Restoration, Inc. v. Steward*, No. 06-7336 (E.D. La. Oct. 12, 2006), 2006 WL 3383183 (stating defendant LLC “a Delaware corporation with a principal place of business” in Louisiana); *Complaint at 1, Terranova v. Lakeview Medical Center, LLC*, No. 06-7323 (E.D. La. Oct. 5, 2006), 2006 WL 3382671 (stating LLC is “a foreign corporation incorporated in the state of Delaware”); *Complaint at 2, Comeau v. Bray & Gillespie III Management LLC*, No. 6:06CV891-OLR-18JGG (M.D. Fla. Sept. 26, 2006) 2006 WL 3039088 (“Defendants are entities organized under the laws of the state of Florida having their principal place of business in Florida.”); *Third Party Complaint at 2, Pier Fish Co., Inc. v. Empire Seafood, LLC*, No. 1:06CA11712-RCL (D. Mass. Sept. 29, 2006) 2006 WL 3266293 (stating LLC “is a Delaware corporation having a principal place of business” in Florida); *Complaint at 1, Everest Tradeshow Management LLC v. Travel Goods Association*, No. 06-4232 (D.N.J. Sept. 26, 2006) 2006 WL 3296578 (stating LLC “registered/incorporated in the state of New York having its principal place of business” in New York).

89. See, e.g., *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 267 (7th Cir. 2006); *Belleville Catering Co. v. Champaign Mkt. Place, LLC*, 350 F.3d 691, 692 (7th Cir. 2003); *Tango Music, LLC v. DeadQuick Music, Inc.*, 348 F.3d 244, 245 (7th Cir. 2003); *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 652 (7th Cir. 2002); *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998).

90. See, e.g., *Hicklin Eng’g, L.C. v. Bartell*, 439 F.3d 346, 351 (7th Cir. 2006) (stating that the district court incorrectly assumed limited liability companies have two citizenships similar to corporations); *Belleville Catering Co.*, 350 F.3d at 694; *McDaniel v. Qwest Commc’ns Corp.*, No. 05-C-1008, 2006 WL 1476110, at *2 (N.D. Ill. May 23, 2006) (noting the parties’ failure to properly identify the citizenship of each member of limited liability companies); *Complaint at 2, HW Aviation LLC v. Royal Sons, LLC*, No. 06CV4445, (N.D. Ill. Aug. 1, 2006) 2006 WL 2770360 (arguing there is complete diversity based on § 1332(c)); *Complaint at 2, Kaizen 3, LLC v. G.K. N. America, Inc.*, No. 06CV4407 (N.D. Ill. Aug. 15, 2006) 2006 WL 2770344 (arguing diversity jurisdiction exists under § 1332(c)).

expressly indicated it was not deciding the issue.⁹¹ And last, but certainly not least, the Supreme Court has not yet voiced an opinion on how to determine the citizenship of an LLC for purposes of diversity jurisdiction.⁹²

The history of corporate citizenship is another reason to believe the issue is not emphatically settled. The Supreme Court first determined the citizenship of a corporation in 1809.⁹³ At that time, the Court deemed corporations to have aggregate citizenship.⁹⁴ As applied, this approach undercut the purpose of diversity jurisdiction as it forced litigants to sue corporations in their state of creation, depriving them of a neutral forum.⁹⁵ Thirty-five years later, in *Louisville, Cincinnati & Charleston R.R. v. Letson*, the Court overruled its decision.⁹⁶

91. Deciding the case on other grounds, the Fifth Circuit expressed “no opinion about whether or not the district court’s holding regarding the citizenship of limited liability companies is the proper interpretation of the law.” *Unity Commc’ns, Inc. v. Unity Commc’ns of Colo. LLC*, 105 F. App’x 546, 547 n.1 (5th Cir. 2004).

92. *Pramco, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 54 (1st Cir. 2006) (“Neither the Supreme Court nor this circuit has yet directly addressed whether that rule also applies to limited liability companies.”).

93. *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809). This was a few years after the Court mandated complete diversity. *See supra* note 5 and accompanying text.

94. *Deveaux*, 9 U.S. (5 Cranch) at 86 (“That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen . . .”). Prior to this there had been seven cases decided by the U. S. Supreme Court based on diversity jurisdiction, and the issue of citizenship was not raised in any of them. Charles Warren, *Corporations and Diversity of Citizenship*, 19 VA. L. REV. 661, 663 (1933).

95. Corporations forced litigants into state court by claiming that a shareholder was a citizen of the state of the opposing party. David W. Jackson, Note, *Federal Court Diversity Jurisdiction and the Corporation*, 8 TULSA L.J. 120, 121–22 (1972). At the time of *Deveaux*, corporations were generally the defendants in actions. Warren, *supra* note 94, at 667. Due to the limits of territorial jurisdiction, corporations could only be sued in their state of creation. *Id.* Many corporations preferred state court, believing that it gave them a home field advantage. *See Jackson, supra*, at 121; *see also Rundle v. Del. & Raritan Canal Co.*, 55 U.S. (14 How.) 80, 95 (1852) (Catron, J., dissenting) (“If the United States courts could be ousted of jurisdiction, and citizens of other States . . . be forced into the State courts, without the power of election, they would often be deprived, in great cases, of all benefit contemplated by the Constitution; and, in many cases, be compelled to submit their rights to judges and juries who are inhabitants of the cities where the suit must be tried, and to contend with powerful corporations . . . where the chances of impartial justice would be greatly against them; and where no prudent man would engage with such an antagonist, if he could help it. State laws, by combining large masses of men under a corporate name, cannot repeal the Constitution . . .”).

96. 43 U.S. (2 How.) 497, 503 (1844). The Court indicated that *Deveaux* went too far and should not be followed. *Id.* at 555–56.

Recognizing the corporation as a legal entity distinct from its owner, the Court established entity citizenship.⁹⁷

Since then, corporations have always had entity citizenship, but corporate citizenship has not been static. A decade later, the Court revised its rationale and established a conclusive presumption for corporate citizenship.⁹⁸ Over a century later, Congress amended § 1332 to add subsection (c), which deems a corporation to be a citizen of its state of incorporation and the state in which it has its principal place of business.⁹⁹ This amendment codified *Letson*.¹⁰⁰

At the time of *Letson*, corporations were generally formed in the state where they conducted business, so citizenship in the state of creation was synonymous with where they did business. However, over time this changed. Many corporations ceased to incorporate in the state in which they have their principal place of business.¹⁰¹

The purpose of this amendment was to prevent local corporations from invoking diversity jurisdiction when they have significant local ties.¹⁰² It is possible that corporate citizenship could be amended again. For example, it could be expanded to include more than one principal place of business.¹⁰³

97. *Id.* at 558 (stating that a corporation is “a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued”).

98. *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314, 328–29 (1853).

99. Pub. L. No. 85-554, § 2, 72 Stat. 415 (1958) (codified at 28 U.S.C. § 1332(c)).

100. See Tribeck, *supra* note 19, at 97 n. 31; *supra* text accompanying notes 96–97.

101. A corporation created under the laws of one state could conduct business in another state. See William E. Kirk, III, *A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-eminence*, 10 J. CORP. L. 233, 243–44 (1984).

102. S. REP. NO. 85-1830, at 4 (1958) (“[F]iction of stamping a corporation a citizen of the State of its incorporation has given rise to the evil whereby a local institution . . . is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State.”). A prime example of this abuse was *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 523–24 (1928). In that case, a Kentucky corporation doing business in Kentucky manufactured diversity jurisdiction by reincorporating in Tennessee. As citizenship was based solely on the state of incorporation, diversity jurisdiction existed when the corporation sued a Kentucky corporation. *Id.*

103. James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1432 (1964) (noting one principal place of business may not be sufficient for a corporation doing significant business in a state that is not its state of incorporation or its principal place of business). For other suggestions, see Marsh, *supra*, note 1 at 227–30.

At just thirty, the LLC is gaining significant popularity.¹⁰⁴ As the question of its citizenship arises with increasing frequency, the problems created by an aggregate approach become more evident. The answer may evolve, as it did for corporations.

B. Not Empirically Certain

Courts have rigidly adhered to the doctrinal wall in an effort to reduce the number of cases eligible for diversity jurisdiction.¹⁰⁵ The assumption is that an LLC is likely to be a citizen of more states under aggregate citizenship than under entity citizenship, thereby reducing the likelihood that an LLC can satisfy diversity. There is, however, no empirical evidence that confirms application of the aggregate approach achieves this result.¹⁰⁶

If LLCs were generally owned by a large number of members, application of aggregate citizenship would statistically increase the likelihood of citizenship in more states, which would statistically decrease the likelihood of satisfying complete diversity.¹⁰⁷ But there is no evidence to confirm that LLCs are generally owned by a large number of members. In fact, there is limited evidence to the contrary.¹⁰⁸

Even if this assumption was correct, and application of the persons composing rule does reduce the number of actions eligible for diversity jurisdiction, the approach is still problematic. Although simple on its face, applying the persons composing rule to LLCs creates complications.¹⁰⁹ Addressing these complications consumes judicial resources. An assessment is necessary to determine if the savings, if

104. See *supra* note 36.

105. Justice O'Connor suggests that the "concern is more illusory than real." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 207 (1990) (O'Connor, J., dissenting).

106. While application of this rule changes which suits are eligible for diversity jurisdiction, there is no way to empirically test whether it actually reduces the number of eligible cases, and if so, by what percentage. Cohen, *supra* note 9, at 470 & n.219.

107. Data regarding the number of members in LLCs is generally not collected by states. By virtue of tax filings, the Internal Revenue Service has this information, but neither compiles nor publishes it.

108. Anecdotal evidence suggests that LLCs tend to be closely held businesses. One study indicates that of the more than 65,000 law firms in the United States, 4,570 are organized as LLCs. Of the 4,570 organized as LLCs, only sixty-four have fifty or more lawyers. Firm size was measured by the total number of lawyers including associates and other non-equity participants. See Robert W. Hillman, *Organizational Choices of Professional Service Firms: An Empirical Study*, 58 BUS. LAW. 1387, 1398, 1401 & n.76 (2003).

109. See *infra* Part IV.B.3.

any, achieved from reducing the federal docket are being spent applying the persons composing rule to LLCs.¹¹⁰

C. Neither Precedential nor Deferential

Citing precedent to support a conclusion is standard judicial practice.¹¹¹ However, precedent is only applicable to similar circumstances.¹¹² Therefore, *Carden* is only precedential if LLCs are similar to limited partnerships. Courts have great latitude in determining which cases are similar.¹¹³

The comparison of the LLC to the limited partnership in *Cosgrove* is not persuasive. The single sentence likening the LLC to the limited partnership fails to enumerate any similarities between the two entities; it details solely a distinction between the two entities.¹¹⁴ Contrary to Judge Posner's conclusion, the distinction aligns the LLC more closely to the corporation than the limited partnership.

The distinction highlighted is that an LLC has no equivalent to the general partner of the limited partnership. Unlike the limited partnership, which must have at least one general partner with personal liability, no member of an LLC is subject to personal liability.¹¹⁵ This is a fundamental distinction that typifies why partnerships are deemed to

110. See Marsh, *supra* note 1, at 220.

111. "Courts routinely recite precedents as dictating or at least directing their conclusions." Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1157 (2005).

112. Precedent requires similar cases be treated similarly. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-97 (1987).

113. See *id.*

114. "This animal is like a limited partnership; the principal difference is that it need have no equivalent to a general partner, that is, an owner who has unlimited personal liability for the debts of the firm." *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998) (citing generally for the proposition LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES (1998)). The referenced treatise also notes other differences between LLCs and limited partnerships, including the fact that LLCs may be formed with only one member, but limited partnerships require at least two. 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 4:18 (2006).

115. Additionally, unlike a limited partner that can waive her limited liability by exercising control of the business, an LLC member can manage the LLC without jeopardizing her limited liability protection. Compare UNIF. LTD. LIAB. CO. ACT § 303(b) (1996) (members have no liability) with REVISED UNIF. LTD. P'SHIP ACT § 303 (2001) (limited partners have no liability unless they exercise control).

have aggregate citizenship while corporations are deemed to have entity citizenship.¹¹⁶

A partnership is a common law association of two or more people created by contract.¹¹⁷ It is a private contract between people, not with any state. While the partnership is sometimes reified for convenience, it is still an amalgamation of people, not a separate entity.¹¹⁸ It is each partner, not the partnership, who is personally liable for the debts of the partnership.¹¹⁹ When sued, it is the partners, not the partnership, who are the true litigants. Historically this was clear as an action by or against a partnership was an action by or against the partners and had to be brought in the name of all of the partners.¹²⁰ Modern law, however, obscures this important fact because, as a matter of convenience, state laws permit litigation in the name of the partnership.¹²¹ This procedural convenience, however, does not alter the fact that the partners are the

116. At the time these rules were established, corporations and partnerships had unique characteristics. See Cohen, *supra* note 9, at 442.

117. See UNIF. P'SHIP ACT § 6 (1914); REVISED UNIF. P'SHIP ACT § 202(a) (1997).

118. See, e.g., *Arpadi v. First MSP Corp.*, 628 N.E.2d 1335, 1338 (Ohio 1994) (“[A] partnership is an aggregate of individuals and does not constitute a separate legal entity.”); *Reed v. Indus. Accident Comm’n*, 73 P.2d 1212, 1213 (Cal. 1937) (“[A] partnership is not considered an entity, but an association of individuals.”); Gary S. Rosin, *The Entity-Aggregate Dispute: Conceptualism and Functionalism in Partnership Law*, 42 ARK. L. REV. 395 (1989) (“A partner’s liability for partnership obligations is inconsistent with the concept of a partnership as a separate legal entity.”). Also, any changes in partners dissolved the existing partnership and created a new one. See UNIF. P'SHIP ACT § 29 (1914).

119. See UNIF. P'SHIP ACT § 15 (1914); REVISED UNIF. P'SHIP ACT § 306 (1997).

120. See, e.g., *Benson v. Pachetti*, 349 So. 2d 17, 19–20 (Ala. 1977) (“[A]ll partners must join as parties plaintiff in an action to enforce a claim in favor of a partnership”); *White v. Jackson*, 166 S.E.2d 211, 214 (S.C. 1969) (noting that all partners must be joined in an action); *Kemp v. Murray*, 680 P.2d 758, 759 (Utah 1984) (“One partner’s failure to join all partners as plaintiffs is grounds for dismissal for lack of necessary parties.”).

121. For convenience, many states permit partnerships to be sued in the name of the partnership. *Watson v. G.C. Assocs. Ltd. P’ship*, 691 P.2d 417, 419 (Nev. 1984). These statutes are “enacted for the practical convenience and benefit of the partnership[s], associations, and companies to which it relates, as well as for the convenience and benefit of creditors, in bringing and prosecuting suits.” *F.R. Patch Mfg. v. Capeless*, 63 A. 938, 939 (Vt. 1906). A common name statute “provides a simpler means for a plaintiff to sue [the association’s members] as a group” and “relieves a plaintiff from the task of having to name and personally serve process on each and every member of the association.” *Shortlidge v. Gutoski*, 484 A.2d 1083, 1087 (N.H. 1984). Many states have provided this convenience. E.g., CAL. CIV. PROC. CODE § 369.5 (West 1973); VT. STAT. ANN. tit. 12, § 814 (2002).

actual litigants.¹²² Therefore, it is the citizenship of each partner that is relevant to an analysis of complete diversity.¹²³

A corporation, on the other hand, is a legal fiction created by the state.¹²⁴ Corporate structure separates ownership from control and provides owners, called shareholders, with protection against personal liability.¹²⁵ Although artificially created, a corporation is treated like a person for most purposes; it pays taxes and can sue and be sued.¹²⁶ In litigation, the corporation, not the shareholders, is the true litigant. Therefore, it is the corporation's citizenship that is relevant to the complete diversity analysis.

The dichotomy between entity citizenship for corporations and aggregate citizenship for partnerships accurately reflected the functional differences between these distinct organizations. When establishing complete diversity, it highlighted the citizenship of the true litigants.

The creation of hybrid organizations complicated the analysis. Evolving organizational laws caused the distinctions between business organizations to blur.¹²⁷ Hybrid organizations can now be structured to resemble one another.¹²⁸ Instead of fitting into discrete categories, organizations slot themselves in along the continuum, anchored on one end by the "pure general partnership" and on the other end by the "pure corporation."¹²⁹

122. *Shortlidge*, 484 A.2d at 1087.

123. Despite the fact that there is no seminal case on the matter, it is universally accepted that the citizenship of a partnership is that of each of its members. *See MOORE ET AL.*, *supra* note 6, § 102.57[1].

124. Corporations can only be formed by filing a certificate of incorporation with the secretary of state. *See REVISED MODEL BUS. CORP. ACT* § 2.01 (1984).

125. *See REVISED MODEL BUS. CORP. ACT* § 6.22 (1984).

126. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 162 (1911). *See REV. MODEL BUS. CORP. ACT* § 3.02(1) (1984).

127. *Cohen*, *supra* note 9, at 442–45. This resulted from a confluence of changes. First, mandatory statutes gave way to enabling statutes. Second, the IRS replaced mechanical compliance with the Kintner Regulations with check-the-box. While organizational statutes still contain some mandatory provisions, modern organizational statutes are largely contractarian or "enabling" statutes, which means the formation statute sets forth the default rules that govern unless the owners agree otherwise. *See id.* at 441.

128. Robert R. Keatinge, *Universal Business Organization Legislation: Will it Happen? Why and When*, 23 DEL. J. CORP. L. 29, 34 (1998) (increasing flexibility of organizational statutes allows an organization to have the characteristics associated with another organization).

129. John H. Matheson & Brent A. Olson, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1, 15 (1996).

The treatise cited in *Cosgrove* deems the LLC to be similar to the limited partnership; however, it also deems it to be similar to the corporation.¹³⁰ Neither characterization is surprising because the LLC, like the limited partnership, is a hybrid organization that combines attributes of partnerships and corporations.¹³¹

Analogizing LLCs to limited partnerships was arguably more persuasive prior to 1997 when, to ensure flow-through taxation, LLCs could have no more than two of four corporate characteristics.¹³² Originally, many LLC organizational statutes were structured to ensure compliance.¹³³ However, the adoption of check-the-box eliminated these constraints.¹³⁴ LLCs were no longer required to have fewer than three corporate characteristics to ensure flow-through. As a result, since 1997, LLCs are more analogous to corporations than limited partnerships.¹³⁵ Accordingly, *Carden*, which addresses limited partnerships, should not be deemed precedential for LLCs.

130. RIBSTEIN & KEATINGE, *supra* note 114, § 4:19. Judge Posner was not the first to compare LLCs with limited partnerships. See Michael J. Garrison & Terry W. Knoepfle, *Limited Liability Company Interests as Securities: A Proposed Framework for Analysis*, 33 AM. BUS. L.J. 577, 586 (1996) (“LLCs are very similar to limited partnerships.”); Wayne M. Gazur & Neil M. Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387, 460 (1991) (“The LLC and the limited partnership with a corporate general partner are almost equivalent for federal income tax purposes.”).

131. The LLC was another attempt to create an organization that provided limited liability to owners and flow-through taxation. Prior attempts included the limited partnership and the Subchapter S corporation. Cohen, *supra* note 9, at 443.

132. Check-the-box was adopted in 1996 and became effective in 1997. Treas. Reg. §§ 301.7701-1 to -3 (1996). Prior to check-the-box, in order to be assured of flow-through taxation treatment LLCs had to comply with the Kintner Regulations. “[T]he Treasury and the Service . . . in effect, dictated the substance of business organization law.” Matheson & Olson, *supra* note 129, at 3. The Regulations were not originally intended to be applied mechanically, but they were. If an organization possessed more than two of four corporate characteristics, it was deemed to more closely resemble a corporation and was subject to entity taxation. These corporate characteristics were (1) continuity of life, (2) centralized management, (3) limited liability, and (4) free transferability of interest. The Kintner Regulations, Treas. Reg. § 301.7701-2(a)(1) (1995).

133. Several states, including Wyoming, Colorado, Nebraska, Nevada, Michigan, and Virginia, had “bullet proof” LLC statutes to ensure compliance. In these states, LLCs had limited liability and centralized management, but they did not have continuity of existence or free transferability. Cohen, *supra* note 9, at 447 & n.55.

134. Check-the-box permits unincorporated entities to elect entity or flow-through taxation without regard for the number of corporate characteristics they possess. It eliminated the need to structure an organization to preserve flow-through taxation. LLC statutes no longer had to be “bullet proof.” See Cohen, *supra* note 9, at 447–48.

135. LLCs “should be viewed as generalizations of the business corporation.” Henry Hansmann, Reinier Kraakman & Richard Squire, *The New Business Entities in Evolutionary Perspective*, 2005 U. ILL. L. REV. 5, 6. See Cohen, *supra* note 9, at 465–66.

Puerto Rico v. Russell & Co.,¹³⁶ which the Court limited in *Boulogny* and *Carden*, is the more appropriate precedent. The LLC appears substantially similar to the *sociedad en comandita*, which no longer appears to be an “exotic creation.” Like the *sociedad en comandita*, the LLC can

contract, own property and transact business, sue and be sued in its own name and right. . . . It is created by articles of association Where the articles so provide, [it] endures for a period prescribed by them regardless of the death or withdrawal of individual members. . . . Powers of management may be vested in managers. . . . Its members are not primarily liable for the acts and debts¹³⁷

Both are complete juridical persons. The Court found “no adequate reason for holding that the *sociedad en comandita* ha[d] a different status for purposes of federal jurisdiction than a corporation.”¹³⁸ The Court should hold similarly for LLCs.

In *Carden*, the Court asserts that having established entity citizenship for corporations in *Letson*, it has left the rest to Congress.¹³⁹ Assertions of deference are not justified for several reasons. First, the claim of deference is inconsistent with the Court’s decisions. As previously discussed, the Court mandated complete diversity in 1806 and granted corporations entity citizenship in 1844.¹⁴⁰ It was more than a century before Congress entered the field and legislated corporate citizenship.¹⁴¹ During that time, the Court addressed the question of citizenship several times, both for corporations and hybrid organizations.¹⁴²

Second, an assertion of deference implies that congressional silence in the wake of *Chapman* and *Great Southern* can only be interpreted as

136. 288 U.S. 476 (1933).

137. *Id.* at 481 (discussing the characteristics that make a *sociedad en comandita* a juridical person).

138. *Id.* at 482.

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

140. *See supra* notes 5 and 96–97 and accompanying text.

141. Congress entered the field in 1958 with the promulgation of § 1332(c). *See supra* text accompanying note 99.

142. *See supra* notes 50–57 and 93–98 and accompanying text.

acquiescence to the decision to treat hybrid organizations like partnerships.¹⁴³ This is not supported.

Congressional silence can be interpreted in more than one way.¹⁴⁴ It might be attributable to acquiescence. On the other hand, it might also be attributable to other factors including lack of knowledge, indifference, inertia, pressures of more important business, political considerations, or a tendency to trust the Court to correct its own errors.¹⁴⁵

Third, there is no basis to infer that Congress intended the adoption of § 1332(c) to preempt the judiciary with respect to determining citizenship for other business organizations.¹⁴⁶ The purpose of § 1332(c) was to curtail abusive invocations of diversity by local corporations and thereby reduce the number of cases eligible for diversity jurisdiction.¹⁴⁷ Congressional silence following *Bouligny* and *Carden* does not mean Congress agreed with the Court's mechanical application of § 1332(c).¹⁴⁸ Despite the Court's attempt to indicate otherwise, Congress does not legislate solely to curtail diversity jurisdiction. Congress created diversity and, on several occasions, has expanded it when necessary to

143. "[T]he 'acquiescence cases,' in which the Court concludes that Congress' failure to overturn a judicial or administrative interpretation is evidence that Congress has acquiesced in that interpretation." William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71 (1988).

144. "In some cases, the Court finds great meaning in 'positive inaction.' In other cases the Court finds such an inquiry nothing more than 'the pursuit of a mirage.'" Eskridge, *supra* note 143, at 69 (footnote omitted); Lawrence H. Tribe, *Separation of Powers and Selective Judicial Deference*, in THE SUPREME COURT TRENDS & DEVELOPMENTS 179, 184 (Dorothy Opperman ed., 1982).

145. *People v. King*, 851 P.2d 27, 37 (Cal. 1993); Eskridge, *supra* note 143, at 71.

146. In fact, there is some basis to suggest the contrary, that Congress was just clarifying *Letson*, which provided for citizenship in the state of incorporation and where it is doing business. See *supra* note 97.

147. The number of diversity cases almost tripled between 1941 and 1956. Approximately 12,700 of the 20,524 diversity actions filed in 1956 involved corporations. S. REP. NO. 85-1830, at 11, 13-14 (1958). See Moore & Weckstein, *supra* note 23, at 11-12 ("In order to relieve some of the burden of business in the federal courts and to correct asserted abuses of diversity jurisdiction, the amendatory Act of July 25, 1958 was passed. Most significantly, it provided that for both original and removal diversity jurisdiction, 'a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.'" (footnotes omitted)); Moore & Weckstein, *supra* note 103, at 1431-32 ("The overriding purpose of the 1958 amendment was to restrict the jurisdiction of the federal courts. . . . One primary objective of the amendment was to achieve a reduction in the case load of the federal courts, but Congress was also concerned with correcting alleged abuses of diversity jurisdiction arising from the judge-made law relating to corporate citizenship." (footnotes omitted)).

148. See Eskridge, *supra* note 143 and accompanying text.

serve the purpose of diversity jurisdiction—to provide an unbiased forum for out-of-state litigants.¹⁴⁹ The amendment was designed to eliminate a particular abuse while preserving the intent of diversity jurisdiction.¹⁵⁰ When the Court applies the rule mechanically in an attempt to limit diversity jurisdiction generally, it is not deferring to Congress; rather the Court is establishing its own rule under the guise of deference.¹⁵¹

Fourth, deference as a basis for interpreting § 1332(c) as intentionally excluding hybrid organizations is also unjustified. The Court asserts that the enactment of § 1332(c) in light of the doctrinal wall and Congress' knowledge of the existence of at least some hybrid organizations, indicates an intention to provide entity citizenship solely for corporations.¹⁵² While this is one possible conclusion, it is not the only logical conclusion. It is equally possible that Congress focused on curing a particular abuse and did not consider the issue of other entities.¹⁵³ The only certain inference that can be drawn from statutory silence is that the legislature has not spoken.¹⁵⁴

149. Most recently Congress expanded diversity jurisdiction with the Class Action Fairness Act. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9 (amending 28 U.S.C. § 1332 (2000)). Another example is the 1988 revision of § 1332 when Congress added subsection (d), which expanded the definition of “States” to include “the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.” 28 U.S.C. § 1332(d) (2000). See also *Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 947 (2006). For more on *Wachovia*, see *infra* Part V.

150. If Congress had solely wanted to reduce the case load, Congress could have codified the persons composing rule. This was the approach the Court initially applied to corporations in *Deveaux*. See *supra* notes 93–94 and accompanying text. As many corporations have “diasporous investors,” this might have reduced the cases eligible for diversity jurisdiction even more; however, it would have undercut the purpose of diversity as it would have banned many actions in which local bias may have been a problem. McCormack, *supra* note 19, at 516.

151. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 199 (1990) (O'Connor, J., dissenting).

152. This is similar to “the ‘reenactment cases,’ where the acquiescence argument is buttressed by reenactment of the interpreted statute without material change.” Eskridge, *supra* note 143, at 71.

153. Limited partnership, joint stock companies may not have been expressly addressed as they were not particularly popular entities and, therefore, not a focal point. This issue also arose with respect to alien corporations. Did Congress intend to give dual citizenship to corporations chartered in foreign countries? Courts originally read § 1332 strictly and said “no.” See, e.g., *Chem. Transp. Corp. v. Metro. Petroleum Corp.*, 246 F. Supp. 563, 566–67 (S.D.N.Y. 1964) (finding § 1332(c) not applicable); *Eisenberg v. Commercial Union Assurance Co.*, 189 F. Supp. 500, 502 (S.D.N.Y. 1960) (finding § 1332(c) not applicable). However, this was viewed as undercutting the purpose of § 1332(c), and in 1973 courts began applying § 1332(c) to alien corporations. See *Se. Guar. Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1007 (N.D. Ill. 1973). Since then, courts have applied § 1332(c) to alien corporations. See *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20

In the final analysis, the arguments supporting the assertion of deference are inconclusive inferences drawn from congressional silence. Deference, just like precedent, was an ill founded rationalization for adopting an approach that the Court believed would be more likely to protect the federal docket.

IV. ILLOGICAL AND INCONSISTENT RESULTS

Despite the lack of similarity between LLCs and limited partnerships, the Court appears intent upon deeming *Carden* precedential¹⁵⁵. All the same the doctrinal wall should not be extended to LLCs.¹⁵⁶ While abiding by precedent is a core aspect of our judicial system, it is not absolute. Precedent should not be blindly followed when subsequent changes or developments of law undermine its rationale, when it becomes difficult to apply, or when it creates inconsistency with other laws.¹⁵⁷

Treating LLCs like partnerships continues the ends-oriented judicial practice of protecting the federal docket without regard for modern business realities or the purpose of diversity jurisdiction. Protecting an overcrowded docket is not an end in itself, particularly when it infringes on litigant equality. Overall, mechanically applying the persons composing rule to LLCs solely because they are not incorporated creates illogical and inconsistent results.

A. Diverging from Modern Business Realities

Historically, the primary business organizations were the partnership and the joint stock company.¹⁵⁸ Both were aggregate entities formed

F.3d 987, 990 (9th Cir. 1994); *Danjaq, S.A. v. Pathe Commc'ns Corp.*, 979 F.2d 772, 774 (9th Cir. 1992); *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148, 1152 (5th Cir. 1985); *Panalpina Welttransport GmbH v. Geosource, Inc.*, 764 F.2d 352, 354 (5th Cir. 1985); *Vareka Invs. v. Am. Inv. Props.*, 724 F.2d 907, 909 (11th Cir. 1984); *Jerguson v. Blue Dot Inv., Inc.* 659 F.2d 31, 35 (5th Cir. 1981) (§ 1332(c) applies).

154. See Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 94–96 (1995).

155. As indicated above, courts have great latitude in defining which cases are similar. See Schauer, *supra* note 112, at 595–97. If courts insist on maintaining a very literal, broad-stroke analysis, the LLC is similar to the limited partnership because both are unincorporated hybrid organizations.

156. If the Court finds the LLC and limited partnership similar because both are unincorporated, *Carden* would still be precedential. See *generally id.* (discussing the virtues of precedential constraint).

157. *Id.*

158. “[M]ost of the business of [the late eighteenth century was] being transacted by unincorporated joint stock companies more in the nature of limited partnerships.”

under the common law by contract among the parties.¹⁵⁹ Corporations, which were quite distinct from partnerships and joint stock companies, did not become popular until the end of the nineteenth century.¹⁶⁰

As discussed above, it is appropriate to determine the citizenship of a partnership under the persons composing rule.¹⁶¹ The approach accurately reflects the nature of the partnership and considers the citizenship of the true litigants when determining whether complete diversity is satisfied. It is also appropriate to determine the citizenship of a corporation under entity citizenship.¹⁶² The approach accurately reflects the nature of the corporation and considers only the citizenship of the true litigant, the artificial person, when determining whether diversity is satisfied.¹⁶³ These rules created jurisdictional parity among business organizations seeking a federal forum based on diversity jurisdiction.

While the world of business organizations evolved from discrete categories into a continuum of organizations,¹⁶⁴ the rules for determining the citizenship of these new hybrid organizations remained binary. Courts were faced with fitting round pegs (hybrid organizations) into square holes (aggregate or entity). As the *Carden* Court acknowledges, the doctrinal wall is “technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization.”¹⁶⁵

Both *Chapman v. Barney*¹⁶⁶ and *Great Southern Fire Proof Hotel Co. v. Jones*¹⁶⁷ were decided during a time when both Congress and the

1 WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS*, § 2, at 8 (perm. ed., rev. vol. 1999).

159. At common law, the joint stock company was considered analogous to a partnership. *See id.* § 21 at 450. Over time, many states have codified the joint stock company. These state statutes provide the joint stock company with many corporate characteristics. *Id.* § 21, at 451–53.

160. *Id.* § 2, at 8 (“The cloud of disfavor under which corporations labored in America was not dissipated until near the end of the eighteenth century The chief cause for the changed popular attitude towards business corporations that marked the opening of the nineteenth century was . . . an extension of the principle of free incorporation under general laws.”).

161. *See supra* text accompanying notes 117–23.

162. *See supra* text accompanying notes 124–26.

163. *See supra* note 97 and accompanying text.

164. *See supra* notes 127–29 and accompanying text.

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

166. 129 U.S. 677 (1889).

167. 177 U.S. 449 (1900).

Court were seeking to curtail diversity jurisdiction.¹⁶⁸ In both opinions, the Court adopted a mechanical approach and refused to treat any other organizations like corporations, even those that shared some similar traits to a corporation. Neither opinion focuses on the issue key to the complete diversity analysis—whether the true litigant is the organization or its owners. Neither opinion provides guidance as to when, if ever, a hybrid organization could qualify for entity citizenship. *Steelworkers v. R.H. Bouligny, Inc.* is equally vague.¹⁶⁹ Further, the labor union, a common law association, is not persuasive precedent for the LLC, a state-created entity. Ignoring the functional realities of these hybrid organizations and the purpose of diversity, the Court, intent on protecting the federal docket, drew an arbitrary line. If the organization is not incorporated, then it is not entitled to entity citizenship. It is a simple rule, but the results are capricious.

B. *The Capricious Results*

1. Holes in the Screening Process

Since the adoption of check-the-box, the LLC is functionally analogous to the corporation.¹⁷⁰ All the same, for purposes of determining citizenship, courts continue to treat it like a partnership because it is not called a corporation.

Using the citizenship of the members of the LLC does not focus the complete diversity analysis of the true litigant. As a result, complete diversity no longer appropriately serves its function as a screening

168. See *United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 148–49 (1965). In the post-Civil War era, Congress expanded federal jurisdiction by granting federal question jurisdiction and removing restrictions on diversity and removal jurisdiction. See Judiciary Act of 1875, ch. 137, § 2, 18 Stat. 470; Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 720–22 (1986). This resulted in a deluge of litigation in federal court, particularly diversity actions and actions by corporations, followed by retrenchment by Congress and the Court. See Cohen, *supra* note 9, at 455; Moore & Weckstein, *supra* note 23, at 7–8 (“[T]he federal courts were deluged with new business.”); Warren, *supra* note 94, at 672; McCormack, *supra* note 19, at 518–19; Edward L. Barrett, Jr., *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 610 (1954); Patrick L. Sealey, Note, *An Alternative Approach to Diversity Jurisdiction for Corporations: Parent-Subsidiary Corporations*, 20 J. CORP. L. 497, 501 (1995). Congressional limitations included increasing the amount in controversy and limiting the right of removal to nonresident defendants. Moore & Weckstein, *supra* note 23, at 8–9.

169. See 382 U.S. at 151–53.

170. See *supra* note 135 and accompanying text.

mechanism. It does not limit the availability of diversity jurisdiction to those situations in which the purpose of diversity is served.

For example, if all the members of an LLC are citizens of a state other than the state of creation, under the persons composing rule the LLC is not a citizen of the state of creation. This is counterintuitive.¹⁷¹ Such an LLC could invoke diversity jurisdiction against a citizen of the state of creation even though doing so would not promote the purpose of diversity jurisdiction. Such an LLC could also remove to federal court an action filed in the courts of the state of creation, despite the limitation on removal by local defendants.¹⁷²

This concern is not merely theoretical. There are several decisions in which this occurs. In *JMTR Enterprises, LLC v. Duchin*, complete diversity existed between an LLC created under the law of Rhode Island and a Rhode Island defendant because all members of the LLC were citizens of Massachusetts.¹⁷³ In *Hale v. MasterSoft International Party Ltd.*, diversity jurisdiction existed between a Delaware LLC and two Delaware corporations because all the members of the LLC were citizens of Colorado.¹⁷⁴

Similar concerns arise if all the members of an LLC are citizens of a state other than the state in which the LLC has its principal place of business. Permitting an LLC to invoke diversity jurisdiction under either of these circumstances undercuts the purpose of diversity.¹⁷⁵ Section 1332(c) was promulgated to prevent exactly this abuse by corporations.¹⁷⁶

Although § 1332(c) does not mention LLCs; this silence should not be interpreted as intending as excluding them.¹⁷⁷ Section 1332(c) was added in 1958, almost twenty years before the LLC was created. Having prohibited corporations from abusing diversity in this manner, it seems

171. The LLC is a legal fiction created solely by the laws of the state. It seems incongruous to assert that it is not a citizen of that state of creation.

172. 28 U.S.C. § 1441(b) (2000) (“[R]emovable only if none of the parties . . . is a citizen of the State in which such action is brought.”).

173. 42 F. Supp. 2d 87, 90 (D. Mass. 1999).

174. 93 F. Supp. 2d 1108, 1111 (D. Colo. 2000).

175. See *Jerguson v. Blue Dot Inv., Inc.*, 659 F.2d 31, 35 (5th Cir. 1981) (making the same argument with respect to alien chartered corporations).

176. See *supra* note 102 and accompanying text for an example of such abuse.

177. See *supra* notes 153–54 and accompanying text.

unlikely Congress intended to let hybrid entities abuse it in this manner. The Court should expand its interpretation of § 1332(c) to fill this gap.¹⁷⁸

Conversely, using the persons composing rule to determine the citizenship of an LLC precludes a neutral forum when one is needed to promote the purpose of diversity. Consider an LLC created in Pennsylvania with its principal place of business in Pennsylvania. The LLC has three members, all three are citizens of Pennsylvania, but recently one changed her domicile to West Virginia. Assume also that a third party sues the LLC in state court in West Virginia. While the LLC may have good reason to fear local bias,¹⁷⁹ it is unable to remove because it is considered a citizen of West Virginia.

Further, under the persons composing rule, an LLC's citizenship changes with changes in membership.¹⁸⁰ As complete diversity is assessed at the time of filing, an LLC may manipulate whether diversity jurisdiction exists. For example, an LLC seeking to permanently avoid federal court need only acquire a stateless member.¹⁸¹ Alternatively, an LLC seeking to establish complete diversity could temporarily reorganize its ownership structure to assure complete diversity. Courts may have to expend additional time deciding whether a change in membership was collusive.¹⁸²

178. See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 199 (1990) (O'Connor, J., dissenting) (“[A]pplication of statutes to situations not anticipated by the legislature is a pre-eminently judicial function.” (citing David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 35 (1965))).

179. See *Blankenship v. Gen. Motors Corp.*, 406 S.E.2d 781, 787 n.11 (W. Va. 1991) (“In any adversarial system where residents are pitted against non-residents, there will inevitably be a temptation to redistribute wealth in the direction of residents, regardless of whether the ‘tribunal’ deciding the issue is technically a court, legislature, or administrative agency.”); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 906 (W.Va. 1991) (“[L]ocal juries and local courts naturally will favor local plaintiffs over out-of-state (often faceless, publicly held) corporations when awarding punitive damages. Inevitably, this race (whether in taxation or damages awards) leads to increasing efforts to redistribute wealth from without the state to within.”).

180. See *supra* note 30 and accompanying text. Corporations lack this flexibility as to change citizenship they must reincorporate or move their principal place of business.

181. A stateless member is a citizen of the United States domiciled outside the United States. Courts have held that these individuals are not eligible for diversity or alienage jurisdiction. See *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 68–69 (2d Cir. 1990) (finding that U.S. partners residing in foreign countries left law firm stateless for diversity jurisdiction purposes).

182. See 28 U.S.C. § 1359 (2000).

2. Turning Well-Established Rules on Their Head

As a general rule, similar parties should have similar access to diversity jurisdiction.¹⁸³ Congress has periodically adopted legislation to assure jurisdictional parity among litigants.¹⁸⁴ For example, Congress amended § 1332(a) to provide that aliens with permanent residence have citizenship in their state of domicile. Mechanical application of the purpose was to assure jurisdictional parity among neighbors.¹⁸⁵ The doctrinal wall undermines jurisdictional parity among business organizations.

Consider a corporation and an LLC—assume both are organized under the law of Delaware. Both have their principal place of business in New York and both have three owners—one is a citizen of New York, the second is a citizen of Connecticut, and the third is a citizen of Florida. While both the corporation and the LLC are deemed to be legal entities under Delaware law, different rules for determining citizenship afford them different opportunities to invoke diversity. While the corporation has citizenship in Delaware and New York, the LLC has citizenship in New York, Connecticut, and Florida. While the corporation controls any change of its citizenship, the LLC does not. Any member can change the LLC's citizenship possibly without the knowledge of the LLC. While neither could sue a New York citizen in federal court based on diversity jurisdiction, the corporation could invoke diversity against a Connecticut or Florida citizen but not a Delaware citizen. The LLC, however, could invoke diversity against the Delaware citizen but not the Florida or Connecticut citizen. There is no principled reason for the difference.¹⁸⁶

Initially, determining the citizenship of alien corporations created similar concerns about jurisdictional parity. Courts adopted a literal

183. *See supra* note 29.

184. *See Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 947 (2006) (“Congress placed national banks ‘on the same footing as the banks of the state where they were located . . .’” (citations omitted)). Several amendments have been designed to prevent abuse and maintain comparable access to federal courts based on diversity jurisdiction. For example, § 1332(c) was amended to prevent “local” corporations from invoking diversity jurisdiction by including “principal place of business.” *See supra* note 102 and accompanying text.

185. The permanent resident amendment was designed to prevent a permanent resident alien from invoking diversity jurisdiction against a neighbor. *See* Stephen M. Gill, Comment, *The Perfect Textualist Statute: Interpreting the Permanent Resident Alien Provision of 28 U.S.C. § 1332*, 75 TUL. L. REV. 481, 487 (2000).

186. The fact that LLCs and corporations are taxed differently is not a sufficient distinction. Subchapter S corporations are deemed to have entity citizenship despite flow-through taxation treatment.

reading of § 1332(c) and deemed it to apply only to corporations incorporated within the United States.¹⁸⁷ Alien corporations were not deemed to have dual citizenship.¹⁸⁸ Two corporations with their principal place of business in the same state were not afforded the same access to federal court if one was an alien corporation. If both corporations were sued by a citizen of that state, the alien corporation could invoke alienage jurisdiction, while the corporation incorporated in another state could not. Recognizing that congressional silence with respect to alien corporations probably did not mean that alien corporations could continue to invoke a federal forum, local courts revised their interpretation of § 1332(c) to apply to alien corporations.¹⁸⁹ Courts could do the same for LLCs.

It is generally accepted that citizenship for purposes of diversity jurisdiction is a question of federal law.¹⁹⁰ In *Great Southern*, the Supreme Court asserted that Pennsylvania could not, via state law, deem a limited partnership association be treated like a corporation for purposes of federal law.¹⁹¹ Mechanical application of the doctrinal wall has turned this rule on its head. Courts do not examine the functional nature of the organization; they only examine the name of the organization to determine if it is incorporated under state law.¹⁹²

This approach gives states “the keys to federal jurisdiction.”¹⁹³ Judge Posner indicates this is acceptable because states have not taken

187. See, e.g., *Chem. Transp. Corp. v. Metro. Petroleum Corp.*, 246 F. Supp. 563, 566–67 (S.D.N.Y. 1964) (finding § 1332(c) does not apply to foreign “states”); *Eisenberg v. Commercial Union Assurance Co.*, 189 F. Supp. 500, 502 (S.D.N.Y. 1960) (noting that § 1332(c)’s use of a capital letter “S” in “State” refers to states within the United States). See David A. Greher, Note, *The Application of 28 U.S.C. § 1332(c)(1) to Alien Corporations: A Dual Citizenship Analysis*, 36 VA. J. INT’L L. 233, 245–46 (1995).

188. *Eisenberg*, 189 F. Supp. at 502.

189. See, e.g., *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994); *Danjaq, S.A. v. Pathe Commc’ns Corp.*, 979 F.2d 772, 774 (9th Cir. 1992); *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148, 1152 (5th Cir. 1985); *Panalpina Welttransport GmbH v. Geosource, Inc.*, 764 F.2d 352, 354 (5th Cir. 1985); *Vareka Invs. v. Am. Inv. Props.*, 724 F.2d 907, 909 (11th Cir. 1984); *Jerguson v. Blue Dot Inv., Inc.* 659 F.2d 31, 35 (5th Cir. 1981) (finding § 1332(c) applies to alien corporations). See Greher, *supra* note 187, at 245–46.

190. See *Hoagland v. Sandberg, Phoenix & von Gontard, P.C.*, 385 F.3d 737, 745–46 (7th Cir. 2004) (Easterbrook, J., concurring) (stating that the meaning of § 1332 and taxonomy are questions of federal law); *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974).

191. *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 455 (1900).

192. See *Coté v. Wadel*, 796 F.2d 981, 983 (7th Cir. 1986).

193. *Hoagland*, 385 F.3d at 745 (Easterbrook, J., concurring).

advantage of the possibility.¹⁹⁴ To the contrary, it raises serious concerns. As states grow more aware of their power, they might revise their organizational laws to take advantage of it. States could adopt naming conventions that, regardless of the risk of local bias, seek to shift the burden of their overcrowded dockets to federal court. Alternatively, they might adopt naming conventions that undermine the ability to invoke diversity jurisdiction even in circumstances where it is justified.

An examination of the application of the doctrinal wall to the professional corporation and the LLC demonstrates how blind adherence to this arbitrary dichotomy has created illogical and inconsistent results. The professional corporation was created in the 1960s to allow professionals, like lawyers, doctors, and accountants to organize in a manner that allowed them to qualify as corporations for federal tax purposes.¹⁹⁵ The LLC was created in the late 1970s to allow businesses to merge limited liability with flow-through taxation.¹⁹⁶ Both hybrid organizations are a hodge-podge of corporate and partnership characteristics. LLCs tend primarily to have all the corporate characteristics.¹⁹⁷ Professional corporations, on the other hand, still tend to lack the corporate characteristics of limited liability and perpetual existence.¹⁹⁸ Overall, LLCs more closely resemble corporations than professional corporations.

Despite this business reality, application of the doctrinal wall perpetuates the opposite result. In *Coté v. Wadel*, the Seventh Circuit held that despite the fact that professional corporations are much more similar to partnerships than corporations, “a corporation is a corporation is a corporation.”¹⁹⁹ On the other hand, the LLC is deemed analogous to the limited partnership and therefore its citizenship is determined under the persons composing rule.²⁰⁰

194. *Id.* at 743 (majority opinion).

195. In particular, professionals wanted to be able to take advantage of pension plans and profit sharing, but these options were not available to the self-employed. *See Coté*, 796 F.2d at 983; Robert A. Michaels, Comment, *The Professional Corporation*, 13 S.D. L. REV. 368, 370 (1968).

196. *See Cohen*, *supra* note 9 and accompanying text.

197. *See The Kintner Regulations*, Treas. Reg. § 301.7701-2(a)(1) (1995).

198. *Coté*, 796 F.2d at 983 (stating that professional corporation owners are accorded some, but not total, limited liability).

199. *Id.* The Seventh Circuit affirmed this approach in 2004. *See Hoagland v. Sandberg, Phoenix & von Gontard, P.C.*, 385 F.3d 737, 739 (7th Cir. 2004). Other circuits have agreed. *See Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1183 (9th Cir. 2004).

200. *Cosgrove v. Bartolotta*, 150 F.3d 729 (7th Cir. 1998).

This example again demonstrates how this arbitrary rule undermines jurisdictional parity. In some states the professional corporation is called a service corporation or a professional association. Under the current dichotomy, the professional corporation and service corporation are entitled to entity citizenship under the literal application of § 1332(c). However, the professional association is not. The happenstance of state naming conventions should not be the basis for determining the applicable rule of citizenship.

Additionally, it is well-established that federal jurisdiction is not ousted by nominal parties.²⁰¹ Nominal parties are parties who have no significant interest in the litigation but are joined for technical reasons.²⁰² When analyzing complete diversity, courts ignore the citizenship of nominal parties.²⁰³ While the members of an LLC are not technically joined as parties, including their citizenship in the analysis of complete diversity is the equivalent of including the citizenship of nominal parties.

3. A Purely Practical Point

On a purely practical level, jurisdictional rules should “be simple and precise so that judges and lawyers . . . litigate . . . the merits of a legal dispute [not] where and when those merits shall be litigated.”²⁰⁴ In theory, applying the persons composing rule to LLCs is a simple rule. In practice, however, it is not.

When a party invokes diversity jurisdiction, the party is obligated to plead diversity.²⁰⁵ However, it is unlikely that the party knows who the members of an opposing LLC are, let alone in which states those members are citizens.²⁰⁶ This information is not a matter of public record. Therefore, a plaintiff, or a defendant seeking removal, can only file allegations of diversity jurisdiction based on information and belief.

201. *Wood v. Davis*, 59 U.S. (18 How.) 467, 469 (1855); *Wormley v. Wormley*, 21 U.S. (8 Wheat.) 421, 451 (1823).

202. A “nominal defendant” is a person joined as defendant in an action solely because technical rules require her joinder, not because she has any risk of liability or there is a request for relief against her. BLACK’S LAW DICTIONARY 946 (5th ed. 1979). Nominal parties are named parties that lack control of, impact on, or stake in the controversy. Nominal parties have no real interest in the suit. They are not real parties to the controversy. *Wormley*, 21 U.S. (18 How.) at 451; *Wood*, 59 U.S. (8 Wheat.) at 469.

203. *Wood*, 59 U.S. (18 How.) at 469; *Wormley*, 21 U.S. (8 Wheat.) at 451.

204. *In re Lopez*, 116 F.3d 1191, 1194 (7th Cir. 1997).

205. FED. R. CIV. P. 8(a) (“short and plain statement of the grounds upon which the court’s jurisdiction depends”); 28 U.S.C. § 1446(a) (2000) (“short and plain statement of the grounds for removal”).

206. *Dodge*, *supra* note 19, at 672.

As courts of limited subject matter jurisdiction, the federal courts cannot blindly accept this assertion.²⁰⁷ Discovery must ensue to confirm the existence of subject matter jurisdiction. This can be time consuming and expensive.

While an LLC can easily ascertain the identity of its members; it does not necessarily know their respective citizenship.²⁰⁸ Citizenship is an issue of personal intent and can be changed at will.²⁰⁹ One commentator suggests that a court could depose all the members to ascertain their respective citizenship; however, “from an administrative standpoint attempting such a task would be extremely inefficient, expensive, and overwhelming for the courts.”²¹⁰

It becomes even more complicated if one of the LLC’s members is a partnership or some other unincorporated organization. In that case the LLC would also have to ascertain the owners of those organizations and their respective states of citizenship. It becomes a multi-layered analysis that is both time-consuming and expensive.²¹¹ This is not a pragmatic approach. Any reduction in the federal diversity caseload gained by this approach is likely counteracted by the additional time and cost associated with assuring the existence of diversity jurisdiction.

V. REASON FOR OPTIMISM

For over a century, in an attempt to protect the federal docket, federal courts have maintained the doctrinal wall. Attempts, like *Russell*, to apply more functional approaches have been squelched. However, despite the result-oriented conviction of the Seventh Circuit and some commentators, there are reasons to believe that, when

207. Federal courts have an obligation to determine if subject matter jurisdiction exists, even if the question is not raised by the litigants. See *Chapman v. Barney*, 129 U.S. 677, 681 (1889) (noting that the question of jurisdiction must be considered even if not raised by parties); *Pramco LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 54 (1st Cir. 2006) (noting that subject matter jurisdiction is a threshold question for the court).

208. Citizenship of a member is not necessarily the same as that member’s residence or business address, which is information the LLC possesses. Further, if an owner is also a hybrid organization, the LLC likely does not know the members of the hybrid organization (owner).

209. See *supra* note 7.

210. Dodge, *supra* note 19, at 679.

211. See *Mut. Assignment & Indemnification Co. v. Lind-Waldock & Co.*, 364 F.3d 858, 861 (7th Cir. 2004) (“[Defendant] is a limited liability company, which means that [its citizenship] may need to be traced through multiple levels if any of its members is itself a partnership or LLC.”).

presented with the question of LLC citizenship for purposes of diversity jurisdiction, the Supreme Court might choose a different approach.

First, unlike many previous hybrid organizations, the LLC is becoming a primary choice for business formation. In recent years, new LLC filings have outpaced new corporate filings in several states.²¹² This means the question of an LLC's citizenship will arise with more and more frequency. Courts will become more familiar with the LLC and the functional similarities between it and the corporation. Additionally, the inconsistent and illogical results arising out of application of this arbitrary distinction between corporations and all other organizations will become more conspicuous. Further, the logistical problems of determining the citizenship of the members will manifest themselves more frequently. Courts are likely to realize that gains made from fewer suits are lost to the time and expense of ascertaining the citizenship of the members. This understanding is likely to promote a more positive view towards reform.

Second, the composition of the Court has changed substantially over the past fifteen years. Only three of the Justices sitting at the time of *Carden* remain. Further, the Court's decision in *Wachovia Bank v. Schmidt*²¹³ gives reason to believe the tenor of the Court has changed since *Carden*. In *Wachovia Bank*, the Fourth Circuit held that, for diversity jurisdiction, a national bank was located in all states in which it had branches.²¹⁴ This holding was analogous to maintaining the doctrinal wall. It adopted the approach likely to result in citizenship in more states and thereby reduce the likelihood that the national bank could satisfy complete diversity. Not surprisingly, the Fourth Circuit decision destroyed diversity.

The Supreme Court reversed the Fourth Circuit's decision.²¹⁵ Unlike *Carden*, the Supreme Court did not adopt the approach more likely to curtail the availability of diversity. Rather, the Court focused on the need to insure jurisdictional parity between national banks and their state counterparts. Interpreting the applicable statute, the Court recognized that the language relied upon by the Fourth Circuit had been drafted at a time when banks were not permitted to open branches

212. See INT'L ASS'N OF COMMERCIAL ADM'RS, *supra* note 36.

213. 126 S. Ct. 941 (2006).

214. 388 F.3d 414, 432 (4th Cir. 2004), *overruled by Wachovia*, 126 S. Ct. at 945 (holding that, for 28 U.S.C. § 1348 purposes, a bank is a citizen of the state in which its main office, as set forth in its articles of association, is located).

215. *Wachovia Bank*, 126 S. Ct. at 945.

across state lines.²¹⁶ Accordingly, it had a different meaning and should not be reinterpreted out of context.²¹⁷

VI. A BETTER APPROACH

Courts are mechanically applying rules developed in the nineteenth century to determine citizenship of modern business organizations. In many respects, this scenario is reminiscent of the evolution of the rules for personal jurisdiction. In 1877, in *Pennoyer v. Neff*, the Court set forth rules for exercising personal jurisdiction.²¹⁸ These were formalistic rules based on the territorial power of the state and became known as the *Pennoyer* doctrine. In the years following *Pennoyer*, society changed. There was a significant growth in the number of corporations and an expansion of business beyond the state of creation.²¹⁹ Additionally, there were technological advances in transportation.²²⁰ However, the *Pennoyer* doctrine remained unchanged. Courts struggled to slot situations that arose into this rigid framework.²²¹ Over time the Court recognized that the rules no longer reflected the society in which they had to function. Finally, in *International Shoe Co. v. Washington*, the Court abandoned the mechanical application of the *Pennoyer* doctrine and adopted the more functional minimum contacts analysis.²²²

The doctrinal wall is diversity jurisdiction's equivalent to the *Pennoyer* doctrine. Since the Court established these rules of

216. *Id.* at 949.

217. *Id.* at 950–51.

218. See *Pennoyer v. Neff*, 95 U.S. 714 (1877).

219. See *Conn. Mut. Life Ins. Co. v. Spatley*, 172 U.S. 602, 619 (1899) (finding that a growing number of corporations are doing business outside their state of incorporation); Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 755 (2003) (noting one reason courts struggled to apply the seemingly simple *Pennoyer* doctrine was because “the test was created for natural persons, not for fictional entities such as corporations; in the twentieth century, America’s business was becoming the domain of corporations.”).

220. Courts also struggled to apply the seemingly simple *Pennoyer* doctrine because “the test was created at a time in American history when travel from state to state was difficult and meaningful; in the twentieth century, interstate travel became cheap and common.” McFarland, *supra* note 219.

221. For example, the Court attempted to apply these rules to corporations through the concepts of implied consent and interpreting presence as doing business in the state. See *Int’l Harvester Co. of Am. v. Kentucky*, 234 U.S. 579, 583 (1914).

222. 326 U.S. 310, 316 (1945). Formalism gave way to realism and with it mechanical application of rules gave way to more flexible standards. See Philip B. Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 573–74 (1958).

citizenship, there have been significant changes in the structure of business organizations, but the rules remain unchanged. All unincorporated organizations should not mechanically be deemed to have aggregate citizenship, and all incorporated organizations should not mechanically be deemed to have entity citizenship. While mechanical application of the doctrinal wall may reduce the number of suits eligible for diversity jurisdiction, it does so without regard for modern business realities or the purpose of diversity jurisdiction. The time has come for courts to abandon this mechanical approach.

Courts should not, however, abandon the basic concepts of aggregate and entity citizenship. These concepts, when correctly applied, appropriately identify the citizenship of the true litigants such that an accurate assessment of complete diversity can be made. Rather than applying the concepts mechanically, courts should apply them functionally.

Members of an LLC should not be mechanically equated to partners. The key issue in determining citizenship should not be whether a state legislature included the word “corporation” in the organization’s name. Instead, determining citizenship should turn on the characteristics of the organization as they are relevant to the issues giving rise to diversity jurisdiction. Courts should focus on the citizenship of the true litigants—those with control of, impact on, or personal stake in the litigation.

Clearly Congress could legislate, as it did in 1958, to correct an abusive practice that has been allowed to develop under judicially made law.²²³ However, congressional action is not likely.²²⁴ Therefore, the Court needs to take action.

The Court should read § 1332(c) dynamically.²²⁵ “Corporation” should be interpreted to include the LLC, an organization created after the statute was adopted and sharing the entity characteristics that are

223. For a suggestion on legislation, see Cohen, *supra* note 9, at 473.

224. For a brief discussion on some of the difficulties in passing or amending legislation, see Debra R. Cohen, *West Virginia Corporate Law: Is it “Broke”?*, 100 W. VA. L. REV. 5, 27–30 (1997).

225. Dynamic statutory interpretation encourages statutory interpretation that adjusts the meaning of the statutes to reflect legal, social, and cultural changes. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 (1987). For instance, courts have read § 1332(c) to cover alien corporations. See, e.g., *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994).

relevant to a diversity analysis.²²⁶ The Court has interpreted “corporation” in the federal venue statute to include other business organizations.²²⁷

Alternatively, if the Court insists on perpetuating its plain meaning reading of § 1332(c) such that it only applies to corporations, it could apply entity citizenship to LLCs by analogy. As LLCs are analogous to corporations as is relevant to a complete diversity analysis, an LLC’s citizenship should be determined similarly to that of a corporation. Overturning its prior position of aggregate citizenship, the Court created entity citizenship for corporations.²²⁸ It can do the same for LLCs.

Under a functional approach, the LLC would have entity citizenship. The citizenship of the members, like the citizenship of shareholders, would be irrelevant.²²⁹ The determination of citizenship would consistently be decided as a matter of federal law based on the business realities. Under this approach, LLCs would have access to federal courts comparable to their corporate counterparts. Further, this approach would eliminate many potentially abusive invocations of diversity jurisdiction as complete diversity would only be available when needed to provide a neutral forum.

This approach is still simple in theory. Additionally, it is simpler in practice. Logistically it is easier to determine the state of organization and principal place of business than the citizenship of each member of an LLC. It also reduces the likelihood of manufactured diversity. The approach also more accurately reflects the realities of modern business organizations and more consistently promotes the purpose of diversity jurisdiction.

A new functional approach will not resolve concerns about an overcrowded docket. Unfortunately there are no simple solutions for this problem. However, the Court should address this concern directly in a manner that does not undercut the purpose of the procedural and

226. See *supra* text accompanying notes 177–78. This would be analogous to reinterpreting § 1332(c) to apply to alien corporations. See *supra* text accompanying notes 187–188.

227. See *Denver & Rio Grande W. R.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 565 (1967) (“[T]here are sound policies for treating unincorporated associations like corporations and . . . Congress implicitly intended for the expanded concept of corporate residence under [the venue statute] to be applied in determining the residence of an unincorporated association.”).

228. See *supra* notes 93–97 and accompanying text.

229. If litigants wanted to seek recovery against a member, that member in his or her individual capacity could be joined as a party, in which case his or her citizenship would be relevant to the complete diversity analysis.

substantive rules it was created to enforce. One possibility is that the Court could re-examine the definition of citizenship and, if appropriate, expand the definition to reflect changes in modern society.

Definitions established over a century ago are no longer appropriate. It may be that citizenship should be more broadly defined. For individuals, this might include expanding citizenship from the one state of domicile to all states of residence. For entities, it might include expanding the definition of principal place of business to include more than one state.

VII. CONCLUSION

Despite the rhetoric and bandwagon of support, aggregate citizenship for LLCs does not work. Applying the persons composing rule to LLCs as a roundabout way to protect the federal docket raises serious problems without any assurances that it actually provides any protection. While concern about the federal docket is understandable, federal courts should look to other mechanisms for protecting the federal docket.

Law must evolve to reflect the changes in society. Rules of jurisdiction are no different. Just as the mechanical application of the *Pennoyer* doctrine gave way to the more functional approach of minimum contacts, it is time for the arbitrary rule for determining citizenship of business organizations to change. Business organizations no longer fit neatly into the discrete compartments of corporations or partnerships. New rules need to be developed that reflect the modern business realities and perpetuate the purpose of diversity jurisdiction. These rules should also respect jurisdictional parity and other fundamental rules of jurisdiction.