Domicile for the Dead: Diversity Jurisdiction in Wrongful Death Actions

Heather N. Hormel
Heather.Hormel@chicagounbound.edu

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Domicile for the Dead:  
Diversity Jurisdiction in Wrongful Death Actions  

Heather N. Hormel†

Diversity jurisdiction cases account for a significant portion of the federal courts' overcrowded dockets. In the twelve-month period ending March 31, 1999, plaintiffs commenced 249,245 civil cases in the United States District Courts, 1 47,772 of which were based on diversity jurisdiction 2 (roughly 19 percent of all civil suits). Comparatively, in the twelve-month period ending June 30, 1990, plaintiffs commenced 217,879 civil cases in the U.S. District Courts, 3 57,183 of which were based on diversity jurisdiction 4 (roughly 26 percent of all civil suits). Although the overall number of diversity cases has decreased, many still feel that the load is overly burdensome, and they advocate further reforms. 5 Additional restrictions on diversity jurisdiction might be necessary, but courts must first uniformly apply existing legislative measures designed to diminish the federal caseload.

In the Judicial Improvements and Access to Justice Act of 1988, 6 Congress amended the diversity jurisdiction statutes to

† B.A. 1996, University of Virginia; J.D. Candidate 2002, University of Chicago.
2 Id at 37 Table C-2.
4 Id at 137 Table C 2.
curb the federal courts' inundation by diversity cases.⁷ Among other changes, Congress added a provision that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent."⁸ Thus, the Virginia executor of a Californian's estate would be treated as if he were a Californian for purposes of determining diversity in federal court. Unfortunately, this provision has not settled the question of whose citizenship—the decedent's or the plaintiff's—controls in wrongful death actions, as courts have not clearly defined the term "legal representative" and have disagreed whether it should encompass wrongful death plaintiffs.⁹ Since the change to the diversity statute in 1988, some jurisdictions have excluded state wrongful death actions from federal courts unless the decedent was from a different state than the defendant, but other jurisdictions still provide a federal forum for wrongful death plaintiffs even if the decedent and the defendant were from the same state.¹⁰

This Comment contends that courts should adopt a uniform per se rule for determining diversity of citizenship in wrongful death actions to ease the burden on the federal judiciary. Otherwise, federal courts will remain beleaguered by opportunistic forum shoppers and clogged with claims otherwise justiciable in state courts. Without a clear rule, courts have applied subjective tests to determine whether wrongful death actions belong in federal court, with predictably inconsistent results. Subjective rules not only inhibit the ability of parties to structure their behavior ex ante, but also encourage parties to act strategically ex post.

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⁷ See Court Reform and Access to Justice Act, HR Rep No 100-889, 100th Cong, 2d Sess 44 (1988) ("The provisions of this subtitle make amendments to reduce the basis for Federal court jurisdiction based solely on diversity of citizenship."); 134 Cong Rec S 31055 (Oct 14, 1988) (statement of Senator Heflin) (urging passage of "a few modest amendments to reduce the basis for Federal court jurisdiction based solely on diversity of citizenship" and introducing section-by-section analysis of the Act detailing the intent to end strategic appointment of out-of-state representatives to create diversity of citizenship). See also Green v Lake of the Woods County, 815 F Supp 305, 307 (D Minn 1993) (identifying Congress's general purpose in amending the statute as "limiting the federal courts' diversity jurisdiction") (internal citations omitted).

⁸ 28 USC § 1332(c)(2) (1994).

⁹ Compare Tank v Chronister, 160 F3d 597, 599 (10th Cir 1998) (holding that heirs-at-law bringing a wrongful death action for their own benefit are not legal representatives of the decedent's estate for purposes of determining diversity), with James v Three Notch Medical Center, 966 F Supp 1112, 1116 (D Ala 1997) (holding that a personal representative bringing a wrongful death action for the benefit of distributees rather than for the benefit of the estate is a legal representative of the estate for purposes of determining diversity).

¹⁰ See Part II B.
Part I of this Comment gives a brief historical background of diversity jurisdiction. Part II reviews two unresolved disagreements among the courts—which test courts should use to detect improperly manufactured diversity jurisdiction and whether 28 USC § 1332(c)(2) applies to plaintiffs in wrongful death actions. Part III argues that courts should adopt the American Law Institute's per se rule that the decedent's citizenship controls for diversity purposes in order to implement Congress's intent of diminishing the number of cases based on diversity of citizenship. Finally, Part IV addresses the policy implications of adopting a per se rule for determining citizenship in wrongful death actions. If courts were to adopt a uniform rule that the decedent's citizenship controls in all wrongful death actions, not only would judges implement the legislative intent of the Judicial Improvements and Access to Justice Act by reducing diversity jurisdiction, but they would also halt strategic behavior by parties seeking to manufacture diversity and shop for the most favorable forum.

I. HISTORY OF AND JUSTIFICATIONS FOR DIVERSITY JURISDICTION

The Constitution provides federal courts the power to hear cases "between Citizens of different States." Implementing this authority, the Judiciary Act of 1789 structured the federal judiciary and gave federal courts original jurisdiction to hear cases "between a citizen of the State where the suit is brought, and a citizen of another State." What degree of diversity this constitutional provision requires has changed over the years. Interpreting the Judiciary Act of 1789, Chief Justice Marshall held that the Act required complete diversity of citizenship to invoke federal jurisdiction: each plaintiff's state citizenship must be different from that of each defendant. A century and a half later, the Supreme Court clarified that the complete diversity requirement was statutory, and that Article III of the Constitution requires only minimal diversity. Congress may therefore authorize federal jurisdiction

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12 Judiciary Act of 1789 § 11, 1 Stat 73, 78.
13 See, for example, Thomas D. Rowe, Jr., Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv L Rev 963, 969–84 (1979) (discussing difficulties in applying complete diversity rule).
14 See Strawbridge v Curtis, 7 US (3 Cranch) 267, 267 (1806).
based on diversity of citizenship as long as at least one plaintiff and one defendant are citizens of different states.\textsuperscript{16}

Although the precise rationale is not crystal clear, courts historically justified diversity jurisdiction as a way of preventing prejudice against out-of-state parties and to ensure diverse parties the opportunity to have their cases heard in impartial fora.\textsuperscript{17} Some contend that the framers designed diversity jurisdiction for the benefit and protection of commercial interests.\textsuperscript{18} Under this theory, because large, corporate entities could be subject to local prejudice just like out-of-state individuals, guaranteeing corporations a federal forum encouraged interstate investments and commercial transactions.\textsuperscript{19} Yet others suggest that the real fear was not of prejudice by state courts but apprehension about state legislatures' control of those courts.\textsuperscript{20} At one time, state legislatures not only dictated the composition of state courts by appointing judges and determining their tenure, but also manipulated outcomes by drafting legislation that bypassed judicial action.\textsuperscript{21} The underlying point, however, is that scholars and historians have yet to agree upon the original purpose of diversity jurisdiction, and the debate continues.\textsuperscript{22}

\textsuperscript{16} See id. For a general discussion, see Henry J. Friendly, \textit{The Historic Basis of Diversity Jurisdiction}, 41 Harv L Rev 483 (1928) (reviewing the history of diversity jurisdiction and examining its purposes).

\textsuperscript{17} See, for example, \textit{Pease v Peck}, 59 US 595, 599 (1855) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners."); Friendly, 41 Harv L Rev at 501 (cited in note 16) ("[T]he purpose of diversity jurisdiction was to prevent the baneful effects of local prejudice.").

\textsuperscript{18} See James W. Moore and Donald T. Weckstein, \textit{Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited}, 77 Harv L Rev 1426, 1448–49 (1964) (noting arguments by commentators "that diversity jurisdiction was primarily intended to assuage the apprehensions of commercial suitors and investors, and the jurisdiction has been credited with exercising a great influence in fostering interstate commerce and investment, sustaining the public credit and sanctity of contracts, and welding the states into a single nation") (internal citations omitted).

\textsuperscript{19} See id at 1449 (describing federal court advantages for corporations).

\textsuperscript{20} See George Cochran Doub, \textit{Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?}, 44 ABA J 243, 244 (1958) (noting that in some states, legislatures were exercising judicial authority); Friendly, 41 Harv L Rev at 497–98 (cited in note 16) (noting various practices by state legislatures to control the appointment and tenure of state court judges).

\textsuperscript{21} Doub, 44 ABA J at 244 (cited in note 20) ("State legislatures by special statutes allowed review of civil judgments, vacated judgments, granted new trials, annulled deeds and reversed convictions.") (internal citations omitted).

\textsuperscript{22} See, for example, Charles Alán Wright, Arthur R. Miller, and Edward H. Cooper, 13B \textit{Federal Practice and Procedure} § 3601 at 344–45 (West 2d ed 1984).
II. MANUFACTURED DIVERSITY IN WRONGFUL DEATH SUITS

Although diversity jurisdiction served as a symbolic welcome sign on the doors of federal courts inviting state law claims, it is important to remember that diversity jurisdiction is constitutionally permissible, not constitutionally mandated. Thus, Congress has periodically enacted limits on diversity jurisdiction. Two such statutory limitations have spawned disagreement among federal courts as to their interpretation—28 USC § 1359 and 28 USC § 1332(c)(2).

A. The Older Split: Determining Whether Parties Improperly Manufactured Diversity

Circuit courts have not reached consensus over which test courts should use to determine whether diversity jurisdiction is improper under 28 USC § 1359. Although federal courts possess original jurisdiction over actions where there is diversity of citizenship and the amount in controversy exceeds seventy-five thousand dollars, § 1359 limits this jurisdiction to cases where parties have not “improperly or collusively” manufactured jurisdiction. Federal circuit courts and legal scholars disagree as to how courts should apply § 1359 in diversity cases brought on behalf of decedents. The circuit courts that have addressed the issue endorse one of two subjective tests—the motive/function test and the substantial stake test. Unsatisfied with the administrative difficulties in applying these tests, scholars have proposed two per se rules to decide whether diversity jurisdiction is proper.

1. The motive/function test.

The Second, Third, Fifth, and Sixth Circuits have all adopted the motive/function test for determining whether federal jurisdic-

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23 See, for example, Felix Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Cornell L Q 499, 522 (1928) (noting James Madison’s promise that Congress would relinquish judicial power to the states after they had established sufficient tribunals).

24 See, for example, Green v Lake of the Woods County, 815 F Supp 305, 308–09 (D Minn 1993) (discussing the circuit split).

25 28 USC § 1332(a).

26 28 USC § 1359 (1994) (“A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.”).

27 See Parts II A 1 and II A 2.

28 See Parts II A 3 and II A 4.
tion is improper or collusive. Under the motive/function test, the citizenship of the party bringing the action controls for purposes of diversity unless the primary purpose for appointing the individual as a representative was to manufacture diversity of citizenship and thus gain access to a federal forum.\(^{29}\)

Advocates of the motive/function test emphasize its ability to eliminate actions where mere pretense triggers federal jurisdiction.\(^{31}\) For example, in *Bass v Texas Power and Light Co*,\(^{32}\) the Fifth Circuit held that “the appointment of an out-of-state administrator for the sole purpose of creating diversity of citizenship between the parties of a lawsuit . . . is ‘improper’ or ‘collusive.’”\(^{33}\) In *Bass* the decedent had resided in Texas, his estate was administered in Texas, and all of the statutory beneficiaries were Texas residents.\(^{34}\) The defendant was incorporated and had its principal place of business in Texas.\(^{35}\) The only non-Texan involved in the case was the plaintiff-administrator, a Louisianan.\(^{36}\) The beneficiaries admitted that they had appointed a Louisianan solely to manufacture diversity.\(^{37}\) Applying the motive/function test, the Fifth Circuit did not allow the claim to proceed in federal court.\(^{38}\)

One weakness of the motive/function test is that it requires a subjective evaluation of intent rather than a more uniform factual inquiry.\(^{39}\) There are inherent evidentiary difficulties in divining parties’ actual intent.\(^{40}\) For example, in *White v Lee Marine Corporation*,\(^{41}\) the Fifth Circuit upheld the lower court’s dismissal of a wrongful death action for lack of diversity jurisdiction.\(^{42}\) A year after filing the suit, the original administratrix (the widow


\(^{30}\) *McSparran*, 402 F2d at 874–75.

\(^{31}\) See *Pallazola v Rucker*, 797 F2d 1116, 1122–23 (1st Cir 1986) (noting the motive/function test’s ability to eliminate cases where the plaintiff is a straw representative chosen solely to invoke diversity jurisdiction).

\(^{32}\) 432 F2d 763 (5th Cir 1970).

\(^{33}\) Id at 764.

\(^{34}\) Id.

\(^{35}\) Id.

\(^{36}\) *Bass*, 432 F2d at 764.

\(^{37}\) Id.

\(^{38}\) Id at 766.

\(^{39}\) See *Pallazola*, 797 F2d at 1121 (noting that subjective inquiries like the motive/function test force courts to “evaluate states of mind,” an inherently difficult determination).


\(^{41}\) 434 F2d 1096 (5th Cir 1970).

\(^{42}\) Id at 1100.
of the decedent) withdrew and appointed an out-of-state attorney as her replacement.\(^{43}\) Although the widow assured the court that she had legitimate reasons for appointing the out-of-state attorney,\(^{44}\) the Fifth Circuit concluded that she did not have "sufficient substantive ties to [the out-of-state attorney] or the [forum] state of Louisiana to support federal diversity jurisdiction."\(^{45}\)

On a more practical level, another flaw of the motive/function test is that it might encourage manipulative testimony regarding the true reasons for the appointment of an out-of-state representative.\(^{46}\) Courts might also face situations where there are both genuine and collusive purposes for appointing an out-of-state representative and be left with the dilemma of deciding between contrary motives.\(^{47}\) Nevertheless, courts in the Second, Third, Fifth, and Sixth Circuits continue to apply the motive/function test to determine whether diversity jurisdiction is collusive or improper under § 1359.\(^{48}\)

2. The substantial stake test.

The Fourth, Seventh, Eighth, and Tenth Circuits have all adopted the substantial stake test for determining whether federal jurisdiction is improper or collusive.\(^{49}\) Under the substantial stake test, the citizenship of the party bringing the action con-

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\(^{43}\) Id at 1098.

\(^{44}\) As a Mexican national with limited English skills, the widow was not qualified under Texas law to serve in a representative capacity. Id. Also, the out-of-state attorney was the only person willing to represent the decedent’s estate at no charge. Id at 1099.

\(^{45}\) White, 434 F2d at 1100.

\(^{46}\) See Pallazola, 797 F2d at 1121.

\(^{47}\) See, for example, Auckland v Rumsey, 1994 US Dist Lexis 17425, *1–2 (E D Pa) (allowing a claim to proceed despite suspicious circumstances of appointment of an out-of-state representative because plaintiff offered a legitimate motive).

\(^{48}\) See ACLI Government Securities, Inc v Rhoades, 1997 US Dist Lexis 3468, *12–13 (S D NY) (denying defendant’s motion for summary judgment for failure to show that motive of assignment was to create diversity); Auckland, 1994 US Dist Lexis 17425 at *3 ("In ruling on a motion to dismiss for lack of diversity jurisdiction, a federal court must consider the parties’ motive in effecting the assignment."); citing James Wm. Moore, 1 Moore’s Federal Practice, ¶ 0.71[5-4] (Bender 2d ed 1994); Moore v Mackinac County Board of Road Commissioners, 688 F Supp 308, 310 (W D Mich 1988) (holding that the plaintiff has the burden of establishing a valid motive—other than to create diversity—for appointing a nonresident personal representative); Brothers v Lucius Olen Crosby Memorial Hospital, 660 F Supp 26, 28 (S D Miss 1986) (determining that there was no valid motive for appointing plaintiff as administrator other than to create diversity).

\(^{49}\) See Bishop v Hendricks, 495 F2d 289, 295 (4th Cir 1974); Betar v De Havilland Aircraft of Canada, Ltd, 603 F2d 30, 35–36 (7th Cir 1979); Bettin v Nelson, 744 F2d 53, 56 (8th Cir 1984); Hackney v Newman Memorial Hospital, Inc, 621 F2d 1069, 1071 (10th Cir 1980).
trols for purposes of diversity only if she "has something more than a nominal relationship to the litigation."\(^{50}\)

To determine whether the plaintiff is more than a mere straw party appointed to invoke diversity jurisdiction, courts examine how the appointee is related to the decedent and whether or not she has anything to gain from the suit.\(^{61}\) For example, in *Bettin v Nelson*,\(^{52}\) the Eighth Circuit allowed diversity jurisdiction where the plaintiffs were the parents of the decedent and stood to be reimbursed for funeral costs if the suit succeeded.\(^{53}\) The Eighth Circuit recognized that the parents of the decedent were not direct beneficiaries of the court action, but held that their nominal interest in the litigation (recovery of funeral expenses), coupled with their relationship to the decedent, sufficed to defeat the defendant's challenge that diversity jurisdiction was collusive.\(^{54}\)

However, kinship with the beneficiaries or the decedent alone may not be sufficient to satisfy the substantial stake test. In *Bishop v Hendricks*,\(^{55}\) the Fourth Circuit did not allow diversity jurisdiction where the plaintiff was related to the decedent only by marriage, and did not stand to benefit personally from the outcome of the litigation.\(^{56}\) The action in *Bishop* arose out of an automobile accident that occurred in South Carolina.\(^{57}\) The decedent and his statutory beneficiaries were all lifetime South Carolinians, but after consulting with counsel, the beneficiaries appointed a distant Georgian relative as administrator.\(^{58}\) The Fourth Circuit held that "only if the Court can conclude that the out-of-state administrator has something more than a nominal relationship to the litigation will the citizenship of an out-of-state administrator sustain diversity."\(^{59}\) In addressing the plaintiff's argument that the out-of-state administrator was related to the decedent and to the beneficiaries of the litigation, the court concluded that "any reason or motive for the appointment which does not elevate [the administrator's] relationship to the litigation

\(^{50}\) *Bishop*, 495 F2d at 295.

\(^{51}\) See id.

\(^{52}\) 744 F2d 53 (8th Cir 1984).

\(^{53}\) Id at 55.

\(^{54}\) Id at 56.

\(^{55}\) 495 F2d 289 (4th Cir 1974).

\(^{56}\) Id at 290–91.

\(^{57}\) Id at 290.

\(^{58}\) Id.

\(^{59}\) *Bishop*, 495 F2d at 295.
above the level of a nominal party is irrelevant to the issues of
diversity."  

Pushing the limits of the substantial stake test even further,
the Tenth Circuit, in Hackney v Newman Memorial Hospital, Inc, treated the validity of an administratrix appointed to
manufacture diversity where the administratrix stood to benefit
directly from the outcome of the litigation. The plaintiff was
the decedent’s daughter and the only immediate relative that did
not live in the forum state. Even though the court suspected
that the plaintiff was appointed to create diversity, it allowed the
claim to proceed in federal court because the plaintiff had “a real,
substantive stake in the litigation.” Thus, the court suggested
that a legitimate stake in the outcome of the litigation might
override a collusive motive for appointing an out-of-state admin-
istratrix to serve as plaintiff in a wrongful death suit.  

Proponents of the substantial stake test applaud its ability to
purge the federal courts of cases where the real parties in interest
are not citizens of different states and thus, diversity jurisdiction
is not justified. Like the motive/function test, however, the sub-
stantial stake test requires a subjective inquiry and thus remains
vulnerable to manipulation and inconsistent application. At
least one court noted another drawback of using the substantial
stake test without any inquiry into motive: it “may grant diver-
sity jurisdiction to a collusively appointed out-of-state fiduciary,
as long as he has a pecuniary stake in the litigation.” However,
despite these criticisms, courts in the Fourth, Seventh, Eighth,
and Tenth Circuits continue to apply the substantial stake test to
determine whether facially sufficient diversity jurisdiction is col-
lusive or improper.

60 Id.
61 621 F2d 1069 (10th Cir 1980).
62 Id at 1071.
63 Id at 1069.
64 Id at 1071.
65 Hackney, 621 F2d at 1071.
66 See Bishop, 495 F2d at 294–95 (emphasizing the need to prevent collusive ap-
pointment of nominal parties in an action not substantially involving a controversy be-
tween diverse parties).
67 See note 39.
68 Horvitz v Oconeisky, 683 F Supp 959, 963 n 7 (S D NY 1988).
69 See, for example, Martinez v United States Olympic Committee, 802 F2d 1275,
1279–80 (10th Cir 1986) (upholding lower court’s dismissal because plaintiff did not have a
“beneficial interest in the litigation”); Krier-Hawthorne v Beam, 728 F2d 658, 661–62
(4th Cir 1984) (upholding diversity jurisdiction after examining the plaintiff’s stake in the
outcome of the litigation); Hill v James, 1997 US Dist Lexis 7635, *5–6 (E D Mo) (uphold-
ing diversity jurisdiction where resident parties seeking to share in the proceeds of the
3. The American Law Institute per se rule.

In an effort to alleviate the confusion over which test courts should use to detect collusive diversity jurisdiction, the ALI proposed an alternative method of preventing such actions.\textsuperscript{70} Rather than relying on a subjective test, the ALI suggested an objective rule whereby the citizenship of the decedent always controls for diversity purposes.\textsuperscript{71} More specifically, the ALI proposed that “an executor, administrator, or any person representing the estate of a decedent or appointed pursuant to statute with authority to bring an action for wrongful death [be] deemed to be a citizen only of the same state as the decedent.”\textsuperscript{72} Unlike the subjective tests used by the federal circuit courts, the ALI proposal established a per se rule largely invulnerable to evidentiary manipulation. Under the proposal, courts need only determine the decedent’s state citizenship and that of the defendant(s) to determine whether diversity jurisdiction exists.

While not explicitly adopting the rule, judges on the Fourth Circuit have recognized the advantages of the ALI proposal in two separate decisions. In \textit{Krier-Hawthorne v Beam},\textsuperscript{73} although the Fourth Circuit concluded that courts must wait for Congress to enact the ALI proposal rather than institute judge-made law, a dissenting judge acknowledged that the proposal was the “ideal solution” to the problem of determining citizenship in wrongful death actions.\textsuperscript{74} Likewise, in \textit{Vaughan v Southern Railway Company},\textsuperscript{75} a dissenting judge recognized the ALI proposal as “the most preferable reform.”\textsuperscript{76} Some might argue that Congress did, in fact, enact the ALI proposal when it amended the diversity
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statute in 1988 because it meant for the amendments to apply to all wrongful death actions based on diversity of citizenship, not just those in selective states.\textsuperscript{77}

4. The Mullenix per se rule.

By using the citizenship of beneficiaries to determine diversity in at least two decisions, the Fourth Circuit took yet another approach to deciding whether parties improperly manufactured a federal claim.\textsuperscript{78} Shortly thereafter, Professor Linda Mullenix elaborated on this approach and proposed her own per se rule as part of her critique of the existing approaches to analyzing diversity jurisdiction.\textsuperscript{79} Mullenix recommended that the citizenship of beneficiaries should control jurisdiction.\textsuperscript{80} By focusing on the citizenship of beneficiaries rather than that of the representative fiduciary, the Mullenix per se rule would reduce the possibility of collusion.\textsuperscript{81} Arguing that her rule best effectuated the purposes of diversity jurisdiction, Mullenix pointed out that “[t]estators are likely to name the natural objects of their bounty as beneficiaries,” rather than choosing them in order to create diversity jurisdiction.\textsuperscript{82} Mullenix criticized the proposed ALI rule because, focusing as it did on the decedent’s citizenship, nonresident beneficiaries would be denied access to a federal forum categorically.\textsuperscript{83}

By her own concession, however, there are problems with Mullenix’s approach. For example, when there is one in-state beneficiary and multiple out-of-state beneficiaries, diversity will not be complete and, under current law, federal jurisdiction will be lacking.\textsuperscript{84} Another potential problem with this approach is that in cases where the identity of the beneficiaries is contingent upon a complex statutory scheme, or worse yet, contingent upon the outcome of a probate dispute, a federal court may not be able to

\textsuperscript{77} See Part III.

\textsuperscript{78} See Messer v American Gems, Inc, 612 F2d 1367, 1373–74 (4th Cir 1980) (holding that the beneficiaries’ citizenship determined diversity where the appointed representative had no substantial stake in the litigation); Miller v Perry, 456 F2d 63, 67 (4th Cir 1972) (holding that the beneficiaries’ citizenship controlled diversity even though a state statute required a resident ancillary administrator).


\textsuperscript{80} Id at 1044.

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} Mullenix, 70 Cornell L Rev at 1044 (cited in note 79).

\textsuperscript{84} Id at 1045.
determine the jurisdictional issue without first determining the universe of appropriate beneficiaries.

B. The Newer Split: Does 28 USC § 1332(c)(2) Apply to Plaintiffs in Wrongful Death Actions?

The old split over the interpretation of § 1359 gave rise to a newer split over how to apply legislation passed in part to resolve the issue. In 1988, Congress substantially changed the requirements for invoking diversity jurisdiction. In addition to increasing the amount in controversy requirement from ten thousand to fifty thousand dollars, Congress addressed the issue of citizenship in estate litigation. Specifically, the 1988 amendments provided that “the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent.” While Congress did not expressly define the scope of this amendment, some courts have speculated that Congress meant to include wrongful death plaintiffs under the “legal representative” rubric. Other courts have disagreed over whether Congress intended to incorporate an exhaustive list of possible fiduciaries (including executors, administrators, and others either directly representing the decedent’s estate or appointed pursuant to a statute) as “legal representative[s].” At least one circuit court has expressly ruled against applying § 1332(c)(2) to wrongful death plaintiffs, and district courts have taken different approaches in addressing whether the decedent’s citizenship is always controlling.

86 Id at § 201.
87 Id at § 202.
88 28 USC § 1332(c)(2) (emphasis added).
89 See, for example, Liu v Westchester County Medical Center, 837 F Supp 82, 83 (S D NY 1993) (holding that wrongful death plaintiffs bring suit on behalf of the decedent’s beneficiaries and thus are legal representatives of the estate).
90 Compare James v Three Notch Medical Center, 966 F Supp 1112, 1116 (M D Ala 1997) (ruling that “legal representative” includes wrongful death plaintiffs), with Winn v Panola-Harrison Electric Cooperative, Inc, 966 F Supp 481, 483 (E D Tex 1997) (holding that § 1332(c)(2) does not apply to wrongful death actions).
91 See Tank v Chronister, 160 F3d 597, 599 (10th Cir 1998) (holding that § 1332(c)(2) is more narrow than the ALI proposal to impute the decedent’s citizenship to an exhaustive list of parties and § 1332(c)(2) does not include wrongful death plaintiffs per se).
92 See, for example, Winn, 966 F Supp at 483 (distinguishing between wrongful death and survival actions and holding that § 1332(c)(2) applies only to survival actions). But compare Green v Lake of the Woods County, 815 F Supp 305, 309 (D Minn 1993) (analyzing the statutory mandate for court-appointed trustees in wrongful death actions and holding that such a trustee is a “legal representative” within the meaning of § 1332(c)(2)).
1. Courts applying § 1332(c)(2) to wrongful death plaintiffs.

Several district courts have held that under § 1332(c)(2) the citizenship of the decedent controls for purposes of diversity in wrongful death actions because the plaintiff is a “legal representative” of the decedent’s estate. Although these courts ostensibly preferred a non-manipulable approach to diversity jurisdiction, they based their decisions largely on their interpretations of state wrongful death statutes.

For example, in *Green v Lake of the Woods County*, the district court found the language of the Minnesota wrongful death statute persuasive in deciding that § 1332(c)(2) precluded diversity jurisdiction. The relevant Minnesota statute characterized the wrongful death plaintiff’s status as that of a court-appointed trustee. In Minnesota, the court-appointed trustee, and no other party, could bring a wrongful death action “for the exclusive benefit of the surviving spouse and next of kin,” but only “if the decedent might have maintained an action” had he lived. The *Green* court reasoned that to hold that a trustee under the Minnesota wrongful death statute was not a “legal representative” of the decedent’s estate would be “contrary [to] the purpose of the 1988 amendments” of limiting diversity jurisdiction.

Likewise, in *James v Three Notch Medical Center*, the District Court for the Middle District of Alabama relied on the explicit language of Alabama’s wrongful death statute in assessing a jurisdictional challenge. The Alabama statute allowed “personal representatives” to bring wrongful death claims “provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused

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93 See *James v Three Notch Medical Center*, 966 F Supp 1112, 1116 (M D Ala 1997); *Green v Lake of the Woods County*, 815 F Supp 305, 308 (D Minn 1993); *Liu v Westchester County Medical Center*, 837 F Supp 82, 83–84 (S D NY 1993).

94 See *James*, 966 F Supp at 1116 (“The court finds no contradiction in the plain language of § 1332(c)(2) and the Alabama statute.”); *Green*, 815 F Supp at 308–09 (categorizing “trustees” with “executors” and “administrators” and hence, within the purview of § 1332(c)(2)); *Liu*, 837 F Supp at 83–84 (defining wrongful death plaintiffs as representatives of an estate “although defined by wrongful death statutes and decisions rather than by testamentary instruments”).

95 815 F Supp 305 (D Minn 1993).

96 Id at 308–09.

97 See Minn Stat Ann § 573.02 (West 2000).

98 Id.

99 *Green*, 815 F Supp at 308.

100 966 F Supp 1112 (M D Ala 1997).

101 Id at 1113.
death.\textsuperscript{102} Even though the Alabama statute characterized a wrongful death plaintiff as a personal rather than a legal representative of the decedent, the court found that § 1332(c)(2) applied.\textsuperscript{103} Refusing to assert diversity jurisdiction, the court reasoned that a "personal representative" was synonymous with a "legal representative of the estate of a decedent."\textsuperscript{104} The court further noted that § 1332(c)(2) focused on the representative capacity of plaintiffs, not on the technical characterization of whether the plaintiff acted on behalf of the decedent's estate.\textsuperscript{105}

In holding that a decedent's citizenship controls for purposes of diversity, courts have also examined Congress's intent in enacting the 1988 amendments to § 1332.\textsuperscript{106} In \textit{Liu v Westchester County Medical Center},\textsuperscript{107} the District Court for the Southern District of New York dismissed the case for lack of diversity jurisdiction, noting that the "intent of the 1988 amendment was to avoid permitting the residency of fiduciaries for decedents to affect diversity jurisdiction."\textsuperscript{108}

In \textit{Green} and \textit{James}, the courts held that by amending § 1332, Congress meant to limit, not expand, access to federal courts,\textsuperscript{109} and in \textit{Liu} the court recognized that holding the decedent's citizenship as determinative for diversity jurisdiction both respected the purpose of avoiding the risk of local prejudice and prevented parties from manipulating their way into a federal forum.\textsuperscript{110} Thus, courts should adopt a broad interpretation of the term "legal representative" that includes all persons acting on behalf of the decedent's estate.\textsuperscript{111}

\textsuperscript{102} Ala Code § 6-5-410 (1999).
\textsuperscript{103} \textit{James}, 966 F Supp at 1116.
\textsuperscript{104} Id at 1116, quoting 28 USC § 1332(c)(2).
\textsuperscript{105} \textit{James}, 966 F Supp at 1116.
\textsuperscript{106} Id at 1115 (taking note of the lower court's finding that Congress intended to cover wrongful death plaintiffs within § 1332(c)(2) "regardless of how they were titled by various state legislatures"). See \textit{Green}, 815 F Supp at 308 ("[I]t is clear that Congress chose the single term 'legal representative' as a simple—and encompassing—term."); \textit{Liu}, 837 F Supp at 83 ("The intent of the 1988 amendment was to avoid permitting the residency of fiduciaries for decedents to affect diversity jurisdiction.").
\textsuperscript{107} 837 F Supp 82 (S D NY 1993).
\textsuperscript{108} Id at 83.
\textsuperscript{109} See note 106. See also Part III.
\textsuperscript{110} \textit{Liu}, 837 F Supp at 83–84 ("Local prejudice is most unlikely to exist in wrongful death suits in which the decedent and defendants were citizens of the same State.").
\textsuperscript{111} See \textit{Green}, 815 F Supp at 308.
2. Courts refusing to apply § 1332(c)(2) to wrongful death plaintiffs.

Other courts, including the Tenth Circuit, have held that under § 1332(c)(2), the named plaintiff’s citizenship controls for purposes of diversity in wrongful death actions.112 Like the courts reaching the opposite result,113 courts that look to the plaintiff’s citizenship in determining diversity base their decisions largely on the particulars of state wrongful death statutes.114

For instance, in *Tank v Chronister*,115 the Tenth Circuit recognized that Kansas law created two separate actions—one for survival actions on behalf of the state and one for wrongful death—each of which had distinct requirements and remedies.116 Under Kansas law, a survival action could be brought only by the administrator of the decedent’s estate for the purpose of recovering damages suffered by the decedent prior to death.117 A wrongful death action, on the other hand, could be brought only by the decedent’s heirs-at-law, and only for their “exclusive benefit.”118 The court concluded that § 1332(c)(2) does not apply to Kansas wrongful death suits, because the action “is brought neither on behalf or for the benefit of the estate, but only on behalf and for the benefit of the heirs.”119 The Tenth Circuit acknowledged Congress’s intent to reduce substantially the scope of diversity jurisdiction, but held that the § 1332 amendments extended only to those “representing the estate of a decedent” and not to those

112 See *Tank v Chronister*, 160 F3d 597, 599 (10th Cir 1998) (concluding that because an individual brings a wrongful death action by way of his relationship to the decedent, he is not the legal representative of “the estate of a decedent” and thus his citizenship is controlling for diversity purposes). See also *Arias-Rosado v Tirado*, 111 F Supp 2d 96, 99 (D Puerto Rico 2000) (holding that plaintiff brought the suit on her own behalf so “it is her own citizenship that must be taken into account to determine diversity”); *Webb v Banquer*, 19 F Supp 2d 649, 652 (S D Miss 1998) (dismissing § 1332(c)(2) as irrelevant and concluding that plaintiff’s citizenship controls); *Winn v Panola-Harrison Electric Cooperative, Inc*, 966 F Supp 481, 483 (E D Tex 1997) (holding that since § 1332(c)(2) was inapplicable, plaintiff’s citizenship controlled under the Texas wrongful death statute); *Marler v Hiebert*, 960 F Supp 253, 254 (D Kan 1997) (reasoning that since plaintiff’s capacity as decedent’s heir gave rise to his right to bring suit, he was not “representing or acting for [the] estate,” and § 1332 did not apply).

113 See Part II B 1.

114 See *Tank*, 160 F3d at 599; *Webb*, 19 F Supp 2d at 652; *Winn*, 966 F Supp at 483; *Marler*, 960 F Supp at 254 (holding that, under Kansas law, § 1332 applied only to survival actions, not wrongful death actions).

115 160 F3d 597 (10th Cir 1998).

116 Id at 599.

117 Id.


119 *Tank*, 160 F3d at 599.
representing themselves, even though the individuals may have been appointed by statute.\textsuperscript{120}

Similarly, in \textit{Winn v Panola-Harrison Electric Cooperative, Inc.},\textsuperscript{121} the district court construed a Texas statute that bifurcated suits for survival and wrongful death.\textsuperscript{122} Unlike the \textit{Tank} court, the \textit{Winn} court focused on the statutory beneficiaries of the litigation and not on who could bring the causes of action. Under Texas law, wrongful death claims benefit “the surviving spouse, children, and parents of the deceased”\textsuperscript{123} and survival claims benefit “the heirs, legal representatives, and estate of the injured person.”\textsuperscript{124} Based on the statutory text, the court held that § 1332(c)(2) applied to claims brought under survival statutes because damages recovered in the suit would partially benefit the estate, but not to claims brought under the wrongful death statute where the estate did not stand to gain anything from the litigation.\textsuperscript{125}

Demonstrating yet another technique of applying § 1332(c)(2) in wrongful death actions, the court in \textit{Webb v Banquer}\textsuperscript{126} examined Mississippi’s wrongful death statute that allowed either a decedent’s personal representative or surviving relatives to bring an action.\textsuperscript{127} The plaintiff, in this instance, was the decedent’s surviving spouse.\textsuperscript{128} Although the court conceded that the term “personal representative,” as used in the state statute, was “synonymous with ‘the legal representative of the estate,’” it held that specific relatives bringing suit under the statute were not representatives of the estate so § 1332(c)(2) did not apply.\textsuperscript{129} Under this interpretation, if the decedent’s relative brought suit in his capacity as executor or administrator—in other words, as a personal representative—he would be deemed a citizen of the same state as the decedent. But if the same relative brought suit in his capacity as a statutory beneficiary, his own citizenship would control for purposes of diversity.

\begin{itemize}
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} 966 F Supp 481 (E D Tex 1997).
  \item \textsuperscript{122} Id at 483.
  \item \textsuperscript{123} Tex Civ Prac & Rem Code Ann § 71.004(a) (West 1997).
  \item \textsuperscript{124} Tex Civ Prac & Rem Code Ann § 71.021(a) (West 1997).
  \item \textsuperscript{125} \textit{Winn}, 966 F Supp at 483.
  \item \textsuperscript{126} 19 F Supp 2d 649 (S D Miss 1998).
  \item \textsuperscript{127} Id at 652.
  \item \textsuperscript{128} Id at 650.
  \item \textsuperscript{129} Id at 652.
\end{itemize}
Courts holding that § 1332(c)(2) does not apply to wrongful death plaintiffs tend to rely on the literal wording of the statute\textsuperscript{130} and agree that the term "legal representative" does not include plaintiffs bringing wrongful death suits unless they do so explicitly on behalf of the decedent's estate.\textsuperscript{131} Thus, courts declining to apply § 1332(c)(2) in wrongful death actions typically do not go beyond the language of the statute to investigate Congress's intent in enacting the 1988 amendments.

### III. THE JUDICIAL IMPROVEMENTS AND ACCESS TO JUSTICE ACT

The text and legislative history of the Judicial Improvements and Access to Justice Act of 1988 suggest that Congress intended to include all wrongful death plaintiffs when it used the phrase "legal representative" in the amendments to § 1332.\textsuperscript{132}

As a backdrop to this discussion, it is useful to review briefly the basic rules of statutory interpretation. In resolving a question of statutory construction, courts traditionally look to the language of the statute as an initial matter.\textsuperscript{133} If the statutory language is clear and unambiguous, courts will adopt its plain meaning\textsuperscript{134} with two common exceptions. First, if there is "a clearly exp-

\textsuperscript{130} See, for example, Tank, 160 F3d at 599 ("We decline defendants' invitation to ignore the plain statutory language."); Arias-Rosado, 111 F Supp 2d at 98 ("Although the term 'legal representative of the estate' is not defined by § 1332(c)(2), by its plain terms the section excludes from its coverage those who are not representing the estate of a decedent."); citing Tank, 160 F3d at 599; Webb, 19 F Supp at 652 (examining "the precise language of ... section 1332(c)(2)"); Winn, 966 F Supp at 483 ("The court agrees with the Marler court and finds that the plain language of 28 U.S.C. § 1332(c)(2) refers to a claim brought under a survival statute and not a wrongful death statute."); Marler, 960 F Supp at 254 ("[Plaintiff] is in no way representing or acting for [decedent's] estate. The plain language of Section 1332(c)(2) is therefore not applicable to this case.").

\textsuperscript{131} See Tank, 160 F3d at 599–601 ("Congress did not adopt the ALI proposal wholesale, but instead deleted all references to executors, administrators, and the like in favor of the designation 'legal representative of the estate of a decedent.'"); Arias-Rosado, 111 F Supp 2d at 99 (holding that § 1332 did not apply because plaintiff brought suit on her own behalf and not as a representative of the estate); Webb, 19 F Supp at 652–53 ("specific beneficiaries are not court appointed" and "are not 'the legal representative of the estate' contemplated in § 1332(c)(2)!"); Marler, 960 F Supp at 254 (agreeing with the ALI that a plaintiff with an individual statutory right to bring an action in her own name is not the legal representative of decedent's estate).

\textsuperscript{132} See, for example Green, 815 F Supp at 307 (turning to "the language of the amendment and its legislative history" to determine that the term "legal representative" does encompass wrongful death plaintiffs).

\textsuperscript{133} See, for example, Tennessee Valley Authority v Hill, 437 US 153, 171–73 (1978) (beginning an analysis of the Endangered Species Act by looking at the language of the Act).

\textsuperscript{134} See, for example, Robinson v Shell Oil Co, 519 US 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning . . . . Our inquiry must cease if the statutory language is unambi-
pressed legislative intent to the contrary,” courts will not implement the plain meaning of the statute’s words.\textsuperscript{135} Second, courts refrain from applying the plain meaning rule where its application would lead to a result clearly at odds with the intent of a statute.\textsuperscript{136} Courts disagree, however, on how to determine statutory intent\textsuperscript{137} and what constitutes absurdity.\textsuperscript{138} Courts often look to extrinsic sources such as legislative history, historical context at the time of passage, or precedent to deduce the intent of legislation, but there is wide divergence as to the reliability of these sources and their relative importance.\textsuperscript{139}

In light of these rules of interpretation, the text of § 1332(c)(2) is the obvious starting point. Unfortunately, to determine whether a plaintiff is the “legal representative” of an estate, the plain language of § 1332(c)(2) is helpful only if read in conjunction with correlating state wrongful death statutes.\textsuperscript{140} Practically speaking, the term “legal representative”—a term not explicitly defined by the Judicial Improvements and Access to Justice Act—might mean only executors or administrators; on the other hand, “legal representative” could mean anyone bringing an action on behalf of someone else.\textsuperscript{141} Hence, we are left with a seemingly ambiguous term.

\textsuperscript{136} See, for example, Public Citizen v. United States Department of Justice, 491 US 440, 454 (1989) (“Where the literal reading of a statutory term would ‘compel an odd result,’ we must search for other evidence of congressional intent to lend the term its proper scope.”) (internal citation omitted), quoting Green v. Bock Laundry Machine Co., 490 US 504, 509 (1989); Griffin v. Oceanic Contractors, Inc., 458 US 564, 575 (1982) (acknowledging “that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available”); United States v. American Trucking Associations, Inc., 310 US 534, 543 (1940) (“When [the plain] meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.”).
\textsuperscript{137} See West Virginia University Hospitals, 499 US at 112–15 (Stevens dissenting) (describing the Court’s vacillation between different methods of identifying the purpose of legislation).
\textsuperscript{138} See, for example, William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett, Legislation and Statutory Interpretation 260–63 (Foundation 2000) (describing courts’ willingness to “rewrite” statutes to avoid absurd results in some cases and their reluctance to do so in others).
\textsuperscript{139} See West Virginia University Hospitals, 499 US at 112–15.
\textsuperscript{140} See Parts II B 1 and II B 2.
\textsuperscript{141} As discussed earlier in this Comment, courts have struggled with the meaning of the term “legal representative” in the context of wrongful death litigation. Compare Part II B 1, with Part II B 2.
When read in the context of the entire statute, however, it is clear that the amendments regarding diversity jurisdiction in estate litigation were intended to reduce the overall number of diversity cases.\(^{142}\) In effect, the Act’s relevant provisions raised the threshold requirements for invoking diversity jurisdiction, hence reducing its scope.\(^{143}\) Not only did the Act impute the citizenship of decedents to “legal representatives” of the decedent’s estate, but the Act also restricted diversity jurisdiction in three additional ways: 1) raising the amount-in-controversy requirement from ten thousand to fifty thousand dollars; 2) limiting diversity jurisdiction in insurance litigation by deeming insurers citizens of the same state as the insured (destroying complete diversity); and 3) imputing the citizenship of infants and incompetents to their legal representatives.\(^{144}\)

Other portions of the Act also had the effect of reducing the volume of cases heard by federal courts.\(^{145}\) For example, the bill expanded district courts’ discretion to authorize arbitration and thus to reduce their dockets.\(^{146}\) The bill also sought to reduce federal jurisdiction by establishing a Federal Courts Study Committee\(^{147}\) to “examine problems and issues currently facing the courts of the United States” and to “develop a long-range plan for the future of the federal judiciary.”\(^{148}\) Included in a list of issues that the Committee would study were “alternative methods of dispute resolution” and “the types of disputes resolved by the federal courts.”\(^{149}\) Taken as a whole, these provisions imply that Congress intended to reduce the heavy federal docket by trimming down diversity jurisdiction and encouraging adversaries to seek and use alternative methods of dispute resolution.

Nonetheless, after carefully examining the language of the entire Act, the text remains ambiguous as to whether “legal representative” applies to all wrongful death plaintiffs or only to plaintiffs explicitly representing the estate of the decedent. As

\(^{142}\) See, for example Green, 815 F Supp at 307 (noting other portions of the Judicial Improvements Act as an indication that “Congress amended § 1332 with the general purpose of limiting the federal courts’ diversity jurisdiction.”).

\(^{143}\) Judicial Improvements and Access to Justice Act §§ 201–03, 102 Stat at 4646.

\(^{144}\) Judicial Improvements and Access to Justice Act § 102(b), 102 Stat at 4644.

\(^{145}\) See id.


\(^{148}\) Id.
previously noted, if the plain language is ambiguous or if a literal reading of a statute leads to absurd results,\textsuperscript{150} some courts look to its legislative history to uncover the legislature's intent in enacting it.\textsuperscript{151} While Congress did not expressly communicate its intent in amending § 1332(c)(2) in committee reports or floor debates, these sources suggest that Congress planned to diminish substantially the number of diversity cases.\textsuperscript{152}

The House Committee on the Judiciary expressed the purpose of the Act in its Committee report.\textsuperscript{153} In the section addressing the amendments to the diversity jurisdiction statute, the report described the purpose of the amendments "to reduce the basis for [f]ederal court jurisdiction based solely on diversity of citizenship."\textsuperscript{154} The report went on to say that the amendments were necessary in light of the federal courts' clogged dockets and Congress's reluctance to create new judgeships.\textsuperscript{155} In addressing the increased amount-in-controversy requirement, the Committee noted that this change would advance the purpose of the legislation by reducing the diversity caseload up to 40 percent.\textsuperscript{156} The Committee did not specifically address § 1332(c)(2) in its report, but it seems likely that the purpose of this amendment was in accord with the overall intent of the Act to "improve the administration of justice" by reducing the overall caseload of the federal courts.\textsuperscript{157}

Furthermore, comments and statements made by legislators during the process of enacting the Judicial Improvements and Access to Justice Act also suggest that the bill was meant to cur-

\textsuperscript{150} See notes 137–39 and accompanying text.

\textsuperscript{151} See Church of the Holy Trinity v United States, 143 US 457, 459 (1892) (noting that "frequently words of general meaning are used in a statute . . . and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment" help decipher what the legislature intended).

\textsuperscript{152} Courts looking to a statute's legislative history to clarify vague statutory language tend to give more weight to committee reports than any other extrinsic source. After committee reports, courts favor statements by sponsors of the legislation. See, for example, Adrian Vermeule, Interpretive Choice, 75 NYU L Rev 74, 130 (2000) ("Judges may always consult legislative history, but must observe a hierarchy among different legislative sources: Committee reports usually trump sponsors' statements, sponsors' statements usually trump floor debate, and so forth."); William N. Eskridge, Jr., The New Textualism, 37 UCLA L Rev 621, 637 (1990) ("Next only to committee reports in reliability are statements by sponsors.").

\textsuperscript{153} HR Rep No 100–889 at 22 (cited in note 7).

\textsuperscript{154} Id at 44 (emphasis added).

\textsuperscript{155} Id at 45.

\textsuperscript{156} Id.

\textsuperscript{157} HR Rep No 100–889 at 44–45 (cited in note 7).
tail diversity jurisdiction. In July of 1987, Senator Heflin introduced a bill which included amendments to 28 USC § 1332 similar to those enacted the following year. Senator Heflin offered revisions to diversity jurisdiction as a compromise because measures to abolish diversity jurisdiction had passed in the House, but failed in the Senate. In explaining the amendments, Senator Heflin noted that “[i]n some jurisdictions, attorneys seek the appointment of out-of-state representatives in order to create diversity of citizenship so that civil actions involving the interest represented may be brought in Federal, as well as State courts.” Senator Heflin also recognized the strong sentiments of the Judicial Conference to eliminate diversity jurisdiction, but that the amendments fell short of this goal: “Without intending to detract in any way from the previous Judicial Conference action recommending the abolition of diversity jurisdiction, this [amendment] makes a modest and logical alteration in the determination of citizenship of a representative party for the purpose of diversity jurisdiction.” In fact, an earlier version of the bill included a provision that would have virtually eliminated diversity jurisdiction, although the full Committee later deleted

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159 Chairman, Subcommittee on Courts and Administrative Practice, Committee on the Judiciary. 1 USCCAN LXXXVIII (1988), 100th Cong, 2d Sess (listing committee memberships).


161 See 133 Cong Rec S 19409 (July 10, 1987) (statement of Senator Heflin). Senator Heflin noted:

The pattern of ever-increasing workloads in the past two decades has greatly concerned the Judicial Conference of the United States. This crisis could be ameliorated by the abolition of diversity of citizenship jurisdiction. Although the House has twice passed legislation to eliminate diversity jurisdiction, there has been no action in the Senate.

Id.

162 Id at 19411.

163 Id (internal citation omitted).
the provision in favor of increasing the amount-in-controversy requirement.\textsuperscript{164}

Finally, in September of 1988, the version of the bill that would eventually be passed into law as the Judicial Improvements and Access to Justice Act made its way to the floor of the House.\textsuperscript{165} Representative Kastenmeier, the House sponsor,\textsuperscript{166} explained the history of the legislation.\textsuperscript{167} Initially, the need for court reform was noted by the Subcommittee on Courts, Civil Liberties and the Administration of Justice when it held hearings on the state of the judiciary in 1977.\textsuperscript{168} Over time, the committee found that the "[f]ederal courts were overloaded with cases, the costs of litigation were skyrocketing and access to justice [had] suffered as a result."\textsuperscript{169} Despite Congress's efforts to alleviate these problems by increasing the number of judges, authorizing the use of additional adjunct personnel, and creating two new circuit courts, in Kastenmeier's view, the burden on the federal courts remained heavy.\textsuperscript{170}

In October of 1988, the Senate considered a version of the same bill.\textsuperscript{171} Senator Heflin, again an advocate for federal court reform, noted that the diversity reform portion of the package would reduce the incidence of diversity jurisdiction.\textsuperscript{172} Heflin highlighted the unsavory practice of appointing out-of-state representatives in order to create federal jurisdiction, as he had done the previous year when he commented on the Judicial Branch Improvements Act of 1987.\textsuperscript{173} After noting this behavior, Senator Heflin assured that "[t]his amendment would implement the sounder policy that would refer to the represented party to determine citizenship in the case."\textsuperscript{174}

\textsuperscript{165} 134 Cong Rec H 23573 (Sept 13, 1988).
\textsuperscript{166} 134 Cong Rec H 14372 (June 14, 1988). Courts give significant consideration to statements made by a bill's sponsor. See Federal Energy Administration v Algonquin SNG, Inc, 426 US 548, 564 (1976) ("As a statement of one of the legislation's sponsors, [the] explanation deserves to be accorded substantial weight in interpreting the statute."). See also note 152 and accompanying text.
\textsuperscript{167} 134 Cong Rec H 23582 (Sept 13, 1988).
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} 134 Cong Rec S 30959 (Oct 14, 1988).
\textsuperscript{172} Id at 31051.
\textsuperscript{173} Id at 31055.
\textsuperscript{174} Id.
As the final version of the bill neared enactment, lawmakers maintained that it would reform diversity jurisdiction and would implement suggestions of the Judicial Conference. This combined evidence of legislative intent suggests that when it passed the Judicial Improvements and Access to Justice Act, Congress meant to reduce substantially the incidence of diversity jurisdiction.

Although the weight of the legislative history tends to suggest otherwise, there is a plausible argument that Congress did not address the specific issue of whether the amendments would apply uniformly to restrict diversity jurisdiction in estate litigation. One might contend that Congress was not aware that § 1332, as amended, would cause confusion in the courts. Given the historical context of the circuit splits and the ALI proposal, coupled with Congress's expressed desire to reduce diversity cases, however, it is more likely that Congress meant for "legal representative" to encompass all plaintiffs bringing actions on behalf of a deceased party.

IV. POLICY IMPLICATIONS

Although the legislative history of the Judicial Improvements and Access to Justice Act indicates Congress's goal of reducing diversity jurisdiction, it is unclear whether this goal supports the uniform application of § 1332(c)(2) to all wrongful death plaintiffs. There are, however, in addition to clear evidence of congressional purpose, compelling policy reasons to adopt this reading of the statute.

A. Absurd Results

Even where its language is plain, courts typically refrain from construing a statute in a way that would lead to an absurd result. To give a classic example, the Bolognian law proclaiming "that whoever drew blood in the streets should be punished with the utmost severity" presumably did not apply to doctors administering emergency medical care. The Supreme Court recog-

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[177] See United States v Kirby, 74 US 482, 487 (1868).
nized this common canon of statutory interpretation as early as 1868, and continues to apply it today.  

Courts holding that § 1332(c)(2) does not apply to wrongful death plaintiffs usually examine the relevant state statute and conclude that plaintiffs are not legal representatives of the decedent’s estate because they bring actions in their own right, not on behalf of or for the benefit of the estate. If these courts are correct in drawing this distinction, then it necessarily follows that § 1332(c)(2) applies only to claimants in jurisdictions where the wrongful death statute characterizes the plaintiff as a personal representative, or only allows the executor or administrator to bring suit on behalf of the surviving beneficiaries. Among the fifty states, each has a statutory scheme for wrongful death actions, but there are many variations among individual state laws. Twenty-six states require that the administrator, executor, or personal representative of the decedent bring wrongful death claims; fifteen states allow either the personal representative or

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178 See id at 486-87 (“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. . . . The reason of the law in such cases should prevail over its letter.”).  

179 See, for example, Rowland v California Men’s Colony, Unit II Men's Advisory Council, 506 US 194, 200 (1993) (discussing “the common mandate of statutory construction to avoid absurd results”). Even the most ardent textualists recognize an exception to applying the plain meaning of a statute’s words where such an application leads to absurd results. See, for example, Green v Bock Laundry Machine Co, 490 US 504, 527 (1989) (Scalia concurring) (acknowledging the appropriateness of examining background and legislative history to verify that Congress did not contemplate “an unthinkable disposition,” “and thus to justify a departure from the ordinary meaning of” statutory language); Neal v Honeywell Inc, 33 F3d 860, 862 (7th Cir 1994) (Easterbrook) (warning that statutes must be taken “seriously” and their language should be bent “only when the text produces absurd results”).  

180 See Part II B 2.  

181 This approach may be reminiscent of the substantial stake test, used to assess whether plaintiffs collusively manufactured diversity of citizenship. See Part II A 2.  

the beneficiaries to bring suit;\textsuperscript{183} four states require the decedent's surviving relatives or heirs to bring suit;\textsuperscript{184} three states do not name of the [decedent]'s personal representative for the exclusive benefit of the widow or widower and next of kin"; NJ Stat Ann § 2A:31-2 (West 2000) (action "shall be brought in the name of an administrator" or "executor"); NM Stat Ann § 41-2-3 (Michie 1996) (action "shall be brought by and in the name of the personal representative" of the decedent); NY Estates, Powers and Trusts Law § 5-4.1 (McKinney 1999) ("personal representative . . . may maintain an action"); Ohio Rev Code Ann § 2125.02 (West 1994) (action "shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents"); 12 Okla Stat Ann § 1053 (West 2000) ("the personal representative of the [decedent] may maintain an action"); Or Rev Stat § 30.020 (1999) ("personal representative of the decedent . . . may maintain an action"); RI Gen Laws § 10-7-2 (1997) (action "shall be brought by and in the name of the executor or administrator of the deceased"); SC Code Ann § 15-51-20 (Law Co-op 1976) ("action shall be brought by or in the name of the executor or administrator of the deceased"); SD Cod Laws § 21-5-6 (Michie 1987) (action "shall be brought in the name of the personal representative or regular special administrator of the deceased"); 14 Vt Stat Ann § 1492 (1989) ("action shall be brought in the name of the personal representative of" the deceased); Va Code Ann § 8.01-50 (Michie 2000) (action "shall be brought by and in the name of the personal representative" of the deceased); Wash Rev Code Ann § 4.20.010 (West 1988) ("personal representative may maintain an action"); W Va Code Ann § 55-7-6 (Michie 2000) (action "shall be brought by and in the name of the personal representative of" the deceased); Wyo Stat Ann § 1-38-102 (Michie 2001) ("action shall be brought by and in the name of the personal representative of the deceased").  

\textsuperscript{183} See Ariz Rev Stat Ann § 12-612 (West 1992 & Supp 2000) (action "shall be brought by and in the name of the surviving husband or wife, child, parent or guardian, or personal representative of the deceased"); Ark Code Ann § 16-62-102 (Michie 1987) ("action shall be brought by and in the name of the personal representative of the deceased," but "[i]f there is no personal representative, then the action shall be brought by the heirs at law of the deceased"); Cal Civ Pro Code § 377.60 (West 1973 & Supp 2001) (action may be brought by "surviving spouse, children, and issue of deceased children," heirs at law, "dependent[s]," or "by the decedent's personal representative"); Hawaii Rev Stat Ann § 683-3 (Michie 1993 & Supp 2000) ("deceased's legal representative" or "surviving spouse, reciprocal beneficiary, children, father, mother," and dependents "may maintain an action"); Idaho Code § 5-311 (1998) (decedent's "heirs or personal representatives on their behalf may maintain an action"); Miss Code Ann § 11-7-13 (1972) (action "may be brought in the name of the personal representative," or by the surviving spouse, parents, children, or siblings); Mo Ann Stat § 537.021, 537.080 (West 2000) ("personal representative of the estate," "the spouse or children or the surviving lineal descendants of any deceased child," "the father or mother of the deceased," "the brother or sister of the deceased, or their descendants," or a "plaintiff ad litem" may maintain an action); Nev Rev Stat § 41.085 (1997) ("heirs of the decedent and the personal representatives of the decedent may each maintain an action"); NH Rev Stat Ann § 556:12 (1997 & Supp 2000) ("administrator, "surviving spouse, or decedent's "child or children" may bring suit); ND Cent Code § 32-21-03 (1996 & Supp 2001) ("action shall be brought by" surviving spouse, children, parents, grandparents, personal representative, or "person who has had primary physical custody of the deceased"); 42 Pa Cons Stat Ann § 8301 (West 1998) (if beneficiaries are not eligible to sue, "personal representative . . . may bring an action"); Tenn Code Ann § 20-5-106 (1994) (surviving spouse, children, next of kin, personal representative, parents, or administrator may bring suit); Tex Civ Prac & Rem Code Ann § 71.004 (West 1997) ("surviving spouse, children, and parents of the deceased may bring the action," and if none exist, "executor or administrator shall bring and prosecute the action"); Utah Code Ann § 78-11-7 (1996) (decedent's "heirs, or his personal representatives for the benefit of his heirs, may maintain an action"); Wis Stat Ann § 895.04 (West 1997) ("action for wrong-
specify who may bring a wrongful death claim;\footnote{\textsuperscript{185}} one state allows the decedent’s personal representative or collector to bring suit;\footnote{\textsuperscript{186}} and one state requires court-appointed trustees to litigate wrongful death claims.\footnote{\textsuperscript{187}}

It does not seem plausible that a piece of legislation with the overall purpose of reducing the federal docket would exclude wrongful death plaintiffs from federal fora in some states, but not in others. One might imagine a state-specific approach to trimming the federal docket if Congress had concluded that federal courts in certain states were in need of relief more than in others. But Congress made no such finding, citing only the overcrowding of federal dockets in general when it amended the diversity jurisdiction statute in 1988. Considering the wide variance among state wrongful death statutes, common sense suggests that courts should read § 1332(c)(2) so that it has the same effect in every state—always treat wrongful death plaintiffs as though they were citizens of the same state as the decedent for purposes of determining diversity.

B. 	extit{Erie} Doctrine

As noted above, the answer to diversity jurisdiction questions in many wrongful death actions depends largely upon how the federal courts interpret the state wrongful death statutes.\footnote{\textsuperscript{188}} Federal courts hearing state law claims on the basis of diversity of citizenship must evaluate which laws—state or federal—control various facets of the case or controversy.

\footnote{\textsuperscript{184}} See Colo Rev Stat Ann § 13-21-201 (West 1997) (action may be brought “by the spouse of the deceased,” or, “[u]pon the written election of the spouse, by the heir or heirs”); Ga Code Ann § 51-4-2 (Michie 2000) (“surviving spouse or, if there is no surviving spouse, a child or children,” may bring suit); Kan Stat Ann § 60-1902 (1983) (“action may be commenced by one of the heirs at law of the deceased”); La Civ Code Ann art 2315.2 (West 1997 & Supp 2001) (“suit may be brought... by... surviving father and mother... surviving brothers and sisters... or surviving grandfathers and grandmothers of the deceased”).


\footnote{\textsuperscript{186}} See NC Gen Stat Ann § 28A-18-2 (Michie 1999) (“personal representative or collector of the decedent” may bring suit).

\footnote{\textsuperscript{187}} See Minn Stat Ann § 573.02 (West 2000) (“trustee appointed as provided in subdivision 3 may maintain an action”).

\footnote{\textsuperscript{188}} See Part II B.
In *Erie Railroad Co v Tompkins*\(^{189}\) the Supreme Court held that federal courts adjudicating diversity jurisdiction claims should apply state substantive law and federal procedural law.\(^{190}\) In applying *Erie*, courts have encountered substantial difficulties in demarcating the line between substance and procedure.\(^{191}\) After examining the issue in cases subsequent to the landmark *Erie* decision,\(^{192}\) the Supreme Court has boiled the inquiry down to two general maxims: 1) where a valid federal rule of procedure is directly on point, the federal rule always applies;\(^{193}\) and 2) in all other situations, courts should apply an outcome-determinative test that focuses on the twin aims of *Erie*—to discourage forum shopping and to avoid inequitable administration of the laws.\(^{194}\)

Hence, where a federal court’s jurisdiction rests solely on diversity of citizenship, the court has a duty to apply state substantive law and federal procedural law. How, though, should a federal court proceed where its exercise of diversity jurisdiction is dependent upon a state law? The Fourth Circuit addressed this issue in *Markham v City of Newport News*.\(^{195}\) The plaintiff in *Markham*, a California resident, sued the city of Newport News in federal court for injuries sustained after her car fell into an

\(^{189}\) 304 US 64 (1938).

\(^{190}\) Id at 78.

\(^{191}\) See, for example, *Gasperini v Center for Humanities, Inc*, 518 US 415, 427 (1996) ("Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor.").

\(^{192}\) First, the Court promulgated an outcome-determinative test to distinguish between substantive and procedural laws in *Guaranty Trust Co v York*, 326 US 99, 109 (1945). In deciding whether to apply state or federal law, a federal court sitting in diversity should ask: "does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" Id. To justify this test, the Supreme Court pointed out that if a federal court is hearing a case only because the parties are diverse, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." Id. Later cases, however, slightly altered the outcome-determinative distinction between procedural and substantive laws. In *Byrd v Blue Ridge Rural Electric Cooperative, Inc*, 356 US 525 (1958), the Court clarified how courts should distinguish between procedural and substantive laws by asking whether a particular rule was "bound up with [state-created] rights and obligations in such a way that its application in the federal court is required." Id at 535. Rejecting a strict application of the *York* outcome-determinative test, *Byrd* acknowledged that "were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice." Id at 537.

\(^{193}\) See *Hanna v Plumer*, 380 US 460, 471 (1965). Thus, if a state service-of-process rule conflicted with any portion of Rule 4 of the Federal Rules of Civil Procedure, the federal rule would automatically prevail over the state rule. See id.

\(^{194}\) Id at 467–68.

\(^{195}\) 292 F2d 711, 712 (4th Cir 1961) ("Whether a state may prevent resort to the federal diversity jurisdiction for enforcement of a right created by the state is the question.").
uncovered sewer manhole.\textsuperscript{196} The district court, conceding that the case met all of the requisites for federal diversity jurisdiction, dismissed the claim because a Virginia statute precluded tort claims against state entities from being brought anywhere other than state courts.\textsuperscript{197} In overruling the lower court, the Fourth Circuit held that district courts need not look to state statutes when deciding whether jurisdiction exists because only the Constitution and Congress, not states, have the power to confer federal jurisdiction.\textsuperscript{198} The Fourth Circuit also rejected the argument that the \textit{Erie} doctrine might require otherwise, concluding that \textit{Erie} "does not extend to matters of jurisdiction."\textsuperscript{199}

Courts evaluating whose citizenship controls for diversity purposes in wrongful death actions have recognized possible problems with allowing state legislatures to dictate when federal jurisdiction exists. For example, in \textit{James v Three Notch Medical Center}, the court suggested that removal of "wrongful death actions from the purview of [§ 1332](c)(2)" would be the equivalent of "leaving the jurisdiction of federal courts in such actions to the discretion of state legislatures."\textsuperscript{200} Likewise, in \textit{Green v Lake of the Woods County}, the court recognized the likelihood of inconsistent outcomes if courts relied on the particulars of state law and acknowledged that this would give states the power to confer or deny access to federal courts.\textsuperscript{201}

\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Id at 713 ("In determining its own jurisdiction, a District Court of the United States must look to the sources of its power and not to acts of states which have no power to enlarge or to contract the federal jurisdiction.").
\textsuperscript{199} Markham, 292 F2d at 718.
\textsuperscript{200} 966 F Supp at 1116.
\textsuperscript{201} 815 F Supp at 308–09. The Supreme Court has tackled a similar issue in the context of labor law. In \textit{Lingle v Norge Division of Magic Chef, Inc}, 486 US 399 (1988), the Supreme Court held that § 301 of the Labor Management Relations Act barred employees covered by a collective bargaining agreement from bringing certain state-law claims against their employer. Id at 405–06. Conflicts arose when it was unclear whether a collective bargaining agreement requiring arbitration to resolve employer-employee disputes encompassed, and thus precluded, certain state-law claims. In reaching its decision, the Court noted that:

\[\text{[I]f the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute.}\]

Id. See also \textit{Allis-Chalmers Corp v Lueck}, 471 US 202, 220 (1985) (observing that unless federal law governed a contract claim against an employer, the meaning of the "labor
To summarize, assuming that jurisdictional questions are procedural and not substantive, the *Erie* doctrine does not require federal courts to apply, or even look to, state wrongful death statutes to determine whether diversity jurisdiction exists. Furthermore, the twin aims of *Erie* both cut in favor of applying the federal diversity statute without consideration of state laws because uniform application of § 1332(c)(2) to all wrongful death plaintiffs discourages forum shopping and promotes equitable administration of the laws. Finally, *Markham* suggests that allowing state laws to confer or deny access to federal fora is unconstitutional because states do not have the power to create or destroy federal jurisdiction.

C. Federal Law Trumps State Law Where State Laws Conflict under Similar Circumstances

In light of the apparent conflict between the federal diversity statute and certain state wrongful death statutes, a look to an analogous situation where federal and state laws are at odds with one another may aid in resolving this discord. Federal courts sitting in diversity have long held that when jurisdiction depends upon a party's domicile, and two laws defining "domicile" conflict, federal law controls.\(^{202}\) For example, in *Rodriguez-Diaz v Sierra-Martinez*,\(^{203}\) the First Circuit had to determine where an eighteen-year-old was domiciled—New York or Puerto Rico—at the time of filing the complaint.\(^ {204}\) The New York age of majority was eighteen, but the Puerto Rico age of majority was twenty-one.\(^ {205}\) If the New York law controlled, then the plaintiff had the requisite intent to acquire domicile, but if the Puerto Rico law controlled, the plaintiff was a minor and took on the domicile of his Puerto Rican parents.\(^ {206}\) The court asserted that "the 'determination of litigant's state citizenship for purposes of section 1332(a)(1) is agreement would be subject to varying interpretations, and the congressional goal of a unified federal body of labor-contract law would be subverted').


\(^{203}\) 853 F2d 1027 (1st Cir 1988).

\(^{204}\) Id at 1028–29.

\(^{205}\) Id at 1030.

\(^{206}\) Id.
controlled by federal common law, not by the law of any state." Because questions of domicile in regard to diversity jurisdiction can arise only in federal courts, the issue is "one uniquely of federal cognizance." The court assessed several possible ways to resolve the dilemma. Finding application of conflict of laws rules unhelpful, the First Circuit decided that the New York age of majority should apply because it "[fit] best with the aims of the diversity statute and the national character of the federal judicial system." Thus, according to the First Circuit in Rodriguez-Diaz, where a federal court sitting in diversity must decide between conflicting state domiciliary laws, the overriding factor should be which state law best comports with the federal rubric.

D. Resolving the Older Circuit Split—Two Birds, One Stone

Adopting a uniform definition of "legal representative" in wrongful death suits would resolve both of the circuit splits described in Part II. If courts agree that § 1332(c)(2) applies to plaintiffs uniformly in wrongful death actions, they will essentially be adopting the ALI per se rule, under which the citizenship of the decedent controls for purposes of diversity. Some courts argue that Congress intended to adopt the ALI approach when it amended the diversity jurisdiction statute in 1988. Regardless of whether Congress intended to incorporate the ALI per se rule in the Judicial Improvements and Access to Justice Act, interpreting the Act as such would resolve the older circuit split over which test courts should use to identify collusive diversity jurisdiction. Rather than guess at plaintiffs' motives or potential stakes in litigation, courts would simply determine the decedent's citizenship and impute that citizenship to whomever brought the wrongful death suit. This interpretation of the amendments also diminishes, if not eliminates, the ability of parties to either invoke or defeat diversity jurisdiction by appointing

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207 Rodriguez-Diaz, 853 F2d at 1030, quoting Kantor, 704 F2d at 1090.
208 Rodriguez-Diaz, 853 F2d at 1030.
209 Id at 1031–33.
210 Id at 1033.
211 See, for example, Tank, 998 F Supp at 1161 ("Congress, in enacting § 1332(c)(2), essentially adopted a rule proposed by the American Law Institute . . . in 1969.").
212 See John R. Maley, 1989 Developments in Federal Civil Practice Affecting Indiana Practitioners: Issues of Diversity Reform; Pendant Party Jurisdiction; Summary Judgment; Impeachment by Prior Conviction; Sanctions; and Appeal, 23 Ind L Rev 261, 267 (1990) (discussing the effects of the amendment on courts' determination of citizenship for diversity purposes).
appropriate out-of-state representatives to file the wrongful death action.

CONCLUSION

Although the overall number of diversity cases in federal courts has slowly decreased over the past decade, wrongful death suits (otherwise justiciable in state courts), continue to congest the federal docket. Prior to fashioning further reforms to lessen the caseload of federal courts, courts should exhaust the limitations on federal jurisdiction already at their fingertips. Section 1332(c)(2) of the diversity jurisdiction statute is one such limitation. As this Comment has shown, under the current regime, plaintiffs bringing wrongful death claims in federal court based on diversity cannot know whether their case will be dismissed for lack of jurisdiction. In determining whether complete diversity exists, courts rely on the language of the forum state's wrongful death law, leading to inconsistent and unpredictable results.

By uniformly applying § 1332(c)(2) to wrongful death plaintiffs, courts will accomplish the result that Congress intended when it amended the diversity statute—to block the growing tide of diversity suits flooding federal courts. Congress could not have wanted the 1988 amendments to apply only to states that explicitly characterize wrongful death plaintiffs as "legal representatives," yet this is exactly how courts have interpreted the amendments. Uniform application of § 1332(c)(2) would also suppress state legislatures' incentive to rewrite wrongful death statutes in order to create federal jurisdiction for constituents. In essence, state citizens' ability to create diversity by appointing foreign representatives or choosing out-of-state relatives to bring wrongful death claims should not hinge on the particulars of the forum state's wrongful death law. Accordingly, for the purposes of determining diversity jurisdiction, a decedent's citizenship—a factor less vulnerable to manipulation—should always impute to whoever may bring a wrongful death action.