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'Less' is 'More'? Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle

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ABSTRACT: Federal appellate judges have recently grappled with an interpretive puzzle that opens a new frontier in the long-running judicial and scholarly debate about statutory interpretation. The landmark but controversial Class Action Fairness Act of 2005 ("CAFA") authorizes immediate appeals from certain jurisdictional decisions by district courts, provided that litigants appeal "not less than 7 days after entry of the order." Although the goal of this provision was to set a seven-day deadline for CAFA appeals, the statutory text does precisely the opposite—it imposes a seven-day waiting period and sets no outer deadline. Federal appellate judges have disagreed sharply about whether courts may rewrite CAFA to require an appeal not *more* than seven days after entry of the order, or whether they must instead heed the statute's text and impose no outer deadline for CAFA appeals. This puzzle upsets many of the assumptions and priorities associated with competing theories of statutory interpretation. Textualists, for example, might question whether CAFA warrants their usual skepticism toward unenacted legislative "intent" because there is overwhelming evidence (from CAFA's structure, its legislative history, and common sense) that Congress meant to impose a seven-day deadline rather than a seven-day waiting period. Intentionalists—who usually tolerate deviations from a statute's ordinary meaning in order to effectuate Congress's

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purpose—might balk at taking the unparalleled step of reading a federal statute to mean the exact opposite of what it says. This Article proposes a solution to CAFA's dilemma that has eluded courts and commentators to date. Even if one accepts CAFA's plain language, the Federal Rules of Appellate Procedure require litigants to seek an appeal within thirty days. This solution provides a meaningful deadline for CAFA appeals without doing unprecedented violence to the statute's text.

"When *I* use a word, . . . it means just what I choose it to mean—neither more nor less."[1]

INTRODUCTION

For the last two decades, courts and commentators have engaged in an enlightening and constructive debate about the proper method of statutory interpretation.[2] Spurred in large part by the Supreme Court's "new textualism" of the mid-1980s,[3] scholars and judges have debated the relative merits of "textualism"—a theory of statutory interpretation that generally seeks to apply the meaning of the statutory text without speculating about the legislative intent underlying that text—and "intentionalism"—a rival theory that generally seeks to effectuate the legislature's intent, even if that intent is inartfully expressed in the statutory text.[4] The exchange has been so productive that some scholars have recently declared that the debate is essentially over and that the competing camps have reached consensus on what had previously appeared to be major areas of dispute.[5]

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1. LEWIS CARROLL, THROUGH THE LOOKING GLASS 130 (St. Martin's Press 1977) (1871) (statement of Humpty Dumpty during his conversation with Alice).

2. *See generally, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY 85–101 (2005); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 9–37 (1997); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 15–181 (2006); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) [hereinafter Eskridge, *All About Words*]; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *New Textualism*]; William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) [hereinafter Manning, *Textualism as Nondelegation*]; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) [hereinafter Manning, *Absurdity Doctrine*]; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005); Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195 (1998); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529 (1997); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000).

3. *See* Eskridge, *New Textualism*, *supra* note 2, at 623–35.

4. *See infra* notes 75–76. As explained *infra* note 73, these labels oversimplify the rich variety of interpretive approaches that factor into the current discourse.

5. *See* Molot, *supra* note 2, at 3 ("[I]t is hard to tell what remains of the textualism–purposivism debate."); *see also* Nelson, *supra* note 2, at 348 (arguing that the distinction between textualists and intentionalists is "exaggerated").

A sharp divide among federal appellate judges over the Class Action Fairness Act of 2005 ("CAFA")[6] confirms that the debate is very much alive.[7] Among CAFA's major changes to class action litigation was a substantial expansion of federal jurisdiction over class actions.[8] Coupled with this expansion was a unique provision allowing greater appellate review over jurisdictional decisions. When a class action is removed from state court to federal court, CAFA authorizes discretionary appeals of district court decisions on whether removal is proper, but only "if application is made to the court of appeals not less than 7 days after entry of the order."[9] According to the legislative history, the purpose of this language was to set a seven-day deadline for pursuing such appeals.[10] A careful reading of the statutory text reveals that this language has precisely the opposite effect. Rather than set a seven-day deadline, CAFA's text imposes a seven-day waiting period. An application filed six days after the district court's order would be untimely because it was filed *less* than seven days after entry of the order. An application filed eight days (or eight months) after the district court's order would be timely because it was filed *not less* than seven days after entry of the order.[11]

Federal appellate judges have recently begun to grapple with this issue. Four circuits have simply rewritten the statute, construing CAFA to require an application "not *more* than 7 days" after entry of the district court order.[12] However, a vigorous dissenting opinion authored by Judge Bybee on behalf of six Ninth Circuit judges chastised this approach as an abuse of judicial authority.[13] These judges argued that our constitutional structure requires

6. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

7. *See infra* Part II.

8. *See* 28 U.S.C.A. §§ 1332(d), 1453 (West 2006). CAFA has already been the subject of significant academic commentary. *See* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. REV. 1313, 1326–30 (2005); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1415–20 (2006); Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1595–1616 (2006); Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction:* Exxon Mobil v. Allapattah *and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 287–98, 319–34 (2006).

9. 28 U.S.C.A. § 1453(c)(1).

10. *See* S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46 ("New subsection 1453(c) provides discretionary appellate review of remand orders under this legislation but also imposes time limits. Specifically, parties must file a notice of appeal within seven days after entry of a remand order.").

11. Professor Georgene Vairo appears to have been the first to identify this apparent drafting error. *See* Georgene M. Vairo, *Class Action Fairness*, NAT'L L.J., June 27, 2005, at 12, *cited in* Pritchett v. Office Depot, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005). For a summary of the recent appellate court decisions examining this issue, see Linda S. Mullenix, *CAFA Appeals*, NAT'L L.J., July 3, 2006, at 12.

12. *See infra* notes 83–102 and accompanying text.

13. *See infra* notes 103–16 and accompanying text.

courts to follow the text of properly enacted legislation; under CAFA's plain language, there is no outer deadline for invoking the statute's appellate provision once a litigant waits the required seven days.[14]

The robust judicial and scholarly discourse over the last two decades has illuminated many aspects of statutory interpretation. This dialogue has failed, however, to address squarely the sort of interpretive problem that CAFA poses. At first glance, CAFA's appellate provision appears to present a classic choice between textualism and intentionalism. Judge Bybee's approach would follow the statute's text, while the majority approach would follow Congress's intent. On closer analysis, however, CAFA's appellate provision simply does not fit the paradigm that has shaped the recent discourse. In the paradigmatic cases—from *Green v. Bock Laundry Machine Co.*[15] to *Church of the Holy Trinity v. United States*[16] to Puffendorf's classic example about the medieval Italian surgeon[17]—the choice is to either (1) follow the statutory text's plain meaning or (2) adopt a restricted or unusual definition of statutory terms in order to give effect to the underlying legislative purpose. Faced with such a choice, an intentionalist might argue that the term "defendant" should include only criminal defendants;[18] that a prohibition on aliens performing "labor or service of any kind" should be narrowed to mean only manual labor;[19] and that a prohibition on "[drawing] blood in the streets" should not criminalize a surgeon's efforts to save a life.[20] Thus, an intentionalist would typically seek to accomplish the legislature's true purpose, even though that purpose does not fit the statutory text perfectly.[21] A textualist, on the other hand, would typically heed the statute's plain meaning in these circumstances, questioning both the judiciary's competence to discern unenacted legislative intent and the

14. *See infra* notes 103–10 and accompanying text.

15. Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989).

16. Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

17. This example concerned a surgeon in medieval Italy who had "opened the vein of a person that fell down in the street in a fit." United States v. Kirby, 74 U.S. 482, 487 (1868). It was held that the surgeon's actions did not violate a Bolognian law that provided: "[W]hoever drew blood in the streets should be punished with the utmost severity." *Id.*; *see also* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1171 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing this example (quoting *Blackstone's Rules of Interpretation*)); Manning, *Absurdity Doctrine*, *supra* note 2, at 2388, 2402, 2461–63 (same); Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1007, 1026, 1061 (2006) (same).

18. *Green*, 490 U.S. at 521–24. It is somewhat ironic that Justice Scalia—the judiciary's leading textualist—agreed that judicial modification of the text at issue in *Green* was warranted. *See infra* notes 241–45 and accompanying text.

19. *Holy Trinity*, 143 U.S. at 463–65, 472. *See generally* Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000) (discussing the *Holy Trinity* case).

20. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2388.

21. *See infra* note 75.

reliability of the sources (such as legislative history) used to uncover that intent.[22]

CAFA's appellate provision differs from the paradigmatic interpretive puzzle in two critical ways. First, CAFA is accompanied by uniquely reliable evidence of legislative intent, both from the legislative history and from the structure of the statute itself.[23] Thus, even textualists might question whether CAFA deserves their traditional skepticism of unenacted legislative intent. Second, construing the term "less" to mean "more" would work unprecedented violence to the text of the statute itself.[24] Accordingly, even intentionalists—who generally tolerate judicial tinkering with the ordinary meaning of statutory terms—might balk at reading a statute to mean the exact opposite of what it says. CAFA's appellate provision thus reveals that the scholarly and judicial discourse on statutory interpretation is incomplete; it has yet to confront the sort of interpretive riddle that CAFA's appellate provision poses: how to interpret a statute whose unambiguous language creates a result exactly the opposite of the legislature's clear intent.

CAFA's appellate deadline riddle is a difficult one indeed. While the Supreme Court has recognized the judiciary's authority to deviate from a statute's literal meaning,[25] it has never endorsed the kind of extreme revision that would be needed to "correct" CAFA.[26] Nor have scholars attempted to defend such a drastic interpretive step.[27] On the other hand, to insist that there is no deadline for pursuing CAFA appeals would fly in the face of common sense and Congress's manifest intent to have CAFA appeals resolved expeditiously. This Article proposes a solution that avoids both pitfalls. I accept the plain text of CAFA, which itself imposes no outer deadline on CAFA appeals. However, I argue that the normal operation of the Federal Rules of Appellate Procedure would require litigants to pursue a CAFA appeal within thirty days of the district court's order. Admittedly, this deadline is not as stringent as the seven-day deadline that Congress apparently had in mind. But my rule-based solution avoids blatant judicial revision of CAFA's text while still imposing a workable system with meaningful deadlines.

Part I of this Article summarizes CAFA's jurisdictional and appellate provisions. It explains how CAFA expands federal jurisdiction over class actions and authorizes discretionary appellate review for certain jurisdictional decisions. Part II examines CAFA's requirement that litigants

22. *See infra* notes 76, 121–32; *see also* SCALIA, *supra* note 2, at 18–22 (arguing that *Holy Trinity* was wrongly decided "because it failed to follow the text").

23. *See infra* Part IV.A.

24. *See infra* Part IV.B.

25. *See infra* notes 153–56 and accompanying text.

26. *See infra* notes 247–50 and accompanying text.

27. *See infra* notes 251–53 and accompanying text.

must pursue such appeals "not less than 7 days after entry of the order."[28] It describes the conflict between CAFA's legislative history and statutory text and summarizes the current split among federal appellate judges over how to interpret the seven-day requirement. Part III of this Article summarizes the foundations of the debate between textualism and intentionalism, as well as the Supreme Court's conflicting guidance on how to interpret statutes where the literal text conflicts with the apparent intent of Congress.

Part IV of this Article analyzes the two current interpretive approaches to CAFA's appellate provision. It explores both the practical and theoretical implications of the competing approaches and explains how neither Supreme Court precedent nor the broader debate over statutory interpretation squarely addresses the kind of interpretive puzzle that CAFA poses. It concludes that both the correctionist view (which would read "less" to mean "more" and thus impose a seven-day deadline for CAFA appeals) and the literalist view (which would read the statute as written and thus impose no outer deadline for CAFA appeals) are problematic. Part V argues for a rule-based approach to CAFA's appellate provision. Even if CAFA's text imposes no *statutory* deadline on CAFA appeals, the Federal Rules of Appellate Procedure impose a thirty-day *rule-based* deadline on such appeals. Recognizing that the Appellate Rules' deadline applies to CAFA appeals mitigates the troubling consequences of adhering to CAFA's text and thus undermines the case for judicial revision-by-interpretation. Part V also considers and refutes possible critiques of applying the Appellate Rules' thirty-day deadline to CAFA appeals.

I. THE CLASS ACTION FAIRNESS ACT'S JURISDICTIONAL AND APPELLATE PROVISIONS

CAFA modifies the law governing federal court class actions in a number of ways. One of its most significant effects is to expand substantially federal jurisdiction over class actions.[29] CAFA includes both a new form of diversity jurisdiction for large, interstate class actions[30] and a new removal statute that eliminates many of the obstacles that previously prevented

28. 28 U.S.C.A. § 1453(c)(1) (West 2006).

29. Not all of CAFA's provisions deal with federal jurisdiction. Section 3 of CAFA (codified at 28 U.S.C.A. §§ 1711–15 (West 2006)) enacts a "Consumer Class Action Bill of Rights," which purports to protect plaintiffs when class actions result in so-called "coupon settlements," when attorneys' fees assessed to plaintiffs exceed the nonmonetary benefits they receive from the settlement, and when the settlement favors some plaintiffs over others based on geographic location. *See* 28 U.S.C.A. §§ 1712–14. CAFA also obligates defendants in class actions to notify appropriate government officials in the event of a proposed settlement. *See id.* § 1715.

30. *See id.* § 1332(d). CAFA also allows federal jurisdiction over "mass actions" that involve 100 or more individual plaintiffs and that "otherwise meet[] the provisions" of CAFA diversity jurisdiction. *Id.* § 1332(d)(11); *see also* Steinman, *supra* note 8, at 287–88 n.25 (describing CAFA's mass action provision).

removal of class actions from state court to federal court.[31] CAFA also expands appellate review of decisions applying CAFA's new jurisdictional provisions. When a defendant removes a state court class action to federal court, CAFA authorizes interlocutory appellate review of district court decisions on whether removal is proper.[32] This Part summarizes these provisions.

A. CAFA'S NEW FORM OF DIVERSITY JURISDICTION

CAFA's new form of federal diversity jurisdiction expands federal jurisdiction to encompass certain large, interstate class actions that would not satisfy the requirements for ordinary diversity jurisdiction. Ordinary diversity jurisdiction[33] requires complete diversity of citizenship—no named class plaintiff may be a citizen of the same state as any defendant.[34] CAFA diversity jurisdiction, however, requires only minimal diversity of citizenship—at least one class plaintiff must be a citizen of a state different than at least one defendant.[35] Thus, a class action where any named plaintiff is a citizen of the same state as any defendant would not qualify for ordinary diversity jurisdiction. However, it would satisfy CAFA's minimal diversity requirement as long as at least one plaintiff is a citizen of a state different than at least one defendant.

CAFA diversity jurisdiction also liberalizes the amount-in-controversy requirement in an important way. Ordinary diversity jurisdiction requires that the amount in controversy exceed $75,000, and it generally does not allow class members to aggregate their claims in order to reach that amount.[36] In contrast, CAFA's threshold is $5 million, but CAFA allows all

31. *See* 28 U.S.C.A. § 1453(b).

32. *Id.* § 1453(c).

33. *Id.* § 1332(a).

34. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806); *see also* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 580 n.2 (1999). The Supreme Court has held that the presence of non-diverse unnamed class members does not destroy complete diversity for purposes of ordinary diversity jurisdiction. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 364–67 (1921).

35. 28 U.S.C.A. § 1332(d)(2)(A). The Supreme Court has stated that Article III's authorization of federal jurisdiction over diversity cases extends to cases with only minimal diversity between adverse parties. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967) (upholding a statute conferring federal jurisdiction over interpleader suits in which any two adverse parties were of diverse citizenship); *see also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 n.13 (1978) ("[C]omplete diversity is not a constitutional requirement."). *But see* C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 615 (2004) (arguing that *Tashire* does not support "expansive applications of the minimal diversity thesis"); Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 98 n.54 (1992) (noting the view that *Tashire*'s endorsement of minimal diversity was "tied to the special factual and legal context of interpleader suits" (citing Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1, 37 (1990))).

36. *See* 28 U.S.C.A. § 1332(a) (requiring that the amount in controversy, exclusive of interest and costs, exceed $75,000); Zahn v. Int'l Paper Co., 414 U.S. 291, 294–98 (1973). In

class members to aggregate their claims for amount-in-controversy purposes.[37] By allowing aggregation, CAFA permits original jurisdiction over class actions where the individual claims are small but the overall amount at stake is quite large. Ordinary diversity jurisdiction, on the other hand, often would not apply to such cases because class members could not aggregate their claims to reach the $75,000 threshold.[38]

Even for class actions with minimal diversity and a $5 million aggregate amount in controversy, however, CAFA does not authorize jurisdiction in a number of situations: if the class contains fewer than one hundred plaintiffs,[39] if the "primary defendants are States, State officials, or other governmental entities,"[40] or if the case "solely" involves particular securities and corporate governance claims.[41] CAFA diversity jurisdiction also exempts claims depending on the proportion of plaintiffs who are citizens of the state where the action is filed and whether primary or significant defendants are citizens of the state where the action is filed.[42]

B. CAFA's New Removal Provision: "Red-Carpet Removal" for Class Actions

CAFA also contains its own removal provision that is exempt from several of the requirements for ordinary removal.[43] Although 28 U.S.C. § 1441(a) authorizes removal of cases "of which the district courts of the United States have original jurisdiction,"[44] a party seeking ordinary removal under § 1441(a) faces a number of obstacles. First, ordinary removal requires the consent of all defendants; if any defendant withholds consent, the case cannot be removed.[45] Second, cases where federal subject matter jurisdiction would be based on diversity of citizenship cannot be removed if

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addition to holding that class members could not aggregate their claims to reach the required amount in controversy, the *Zahn* Court also held that the claims of every member of the class must satisfy the amount-in-controversy requirement. *Zahn*, 414 U.S. at 301. This aspect of *Zahn* was recently abrogated by *Exxon Mobil v. Allapattah*, which read the supplemental jurisdiction statute to extend to class members with claims of $75,000 or less, so long as at least one class member has a claim in excess of the $75,000 threshold. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005).

37. 28 U.S.C.A. § 1332(d)(2), (d)(6).

38. *See, e.g.*, Kessler v. Nat'l Enters., Inc., 347 F.3d 1076, 1078–80 (8th Cir. 2003) (finding that § 1332(a)'s amount-in-controversy requirement was not satisfied even though the class members' claims, when aggregated, were worth well over one million dollars).

39. 28 U.S.C.A. § 1332(d)(5)(B).

40. *Id.* § 1332(d)(5)(A).

41. *Id.* § 1332(d)(9).

42. *Id.* § 1332(d)(3), (4).

43. *Id.* § 1453.

44. 28 U.S.C. § 1441(a) (2000).

45. *E.g.*, *In re* Fed. Sav. & Loan Ins. Corp., 837 F.2d 432, 434–35 & n.2 (11th Cir. 1988); *see also* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3723 (2d ed. 1984).

any defendant is a citizen of the state where the case was pending.[46] Third, § 1446(b) bars removal in diversity cases one year after the state court action was commenced, even if the event triggering eligibility for removal (e.g., the dismissal of a non-diverse party) does not occur until later in the state court litigation.[47]

A party seeking removal of a class action under CAFA is not subject to these requirements. In particular, CAFA authorizes removal without the consent of all defendants[48] and despite the presence of an in-state defendant.[49] CAFA removal is also exempt from § 1446(b)'s one-year outer limit on removal of diversity cases.[50] By eliminating these obstacles, and thereby making it easier for defendants to remove cases to federal court, CAFA authorizes what I have called "red-carpet removal" of class actions.[51]

C. CAFA's APPELLATE PROVISION AND ITS SEVEN-DAY "DEADLINE"

In addition to facilitating removal of class actions to federal court, CAFA made it easier to appeal a district court's decision on whether a removed class action may remain in federal court. The remedy for a party opposed to removal is to file, in the federal district court, a motion to remand the case back to state court.[52] Traditionally, a party who wished to appeal the district court's ruling on a motion to remand faced serious, if not insurmountable, hurdles. If the district court retained the case, the final judgment rule typically prevented appellate review until after the district court fully adjudicated the case.[53] If the district court remanded the case to state court, 28 U.S.C. § 1447(d) usually barred appellate review altogether.[54]

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46. 28 U.S.C. § 1441(b).

47. *Id.* § 1446(b).

48. 28 U.S.C.A. § 1453(b) ("[S]uch action may be removed by any defendant without the consent of all defendants.").

49. *Id.* ("A class action may be removed to a district court of the United States . . . without regard to whether any defendant is a citizen of the State in which the action is brought.").

50. *Id.* ("A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply).").

51. *See* Steinman, *supra* note 8, at 290–92. To date, courts and litigants have assumed that CAFA's red-carpet removal applies only to the large, interstate class actions that satisfy the requirements for CAFA diversity jurisdiction. *See id.* at 332. I have argued elsewhere that CAFA's plain text authorizes removal of any state court class action, except for three categories of corporate governance and securities cases that are explicitly exempted. *Id.* at 294–98.

52. *See* 28 U.S.C. § 1447(c).

53. United States v. Rice, 327 U.S. 742, 750 (1946) ("[T]he mode of review of an order denying remand is by appeal from the final judgment in the suit in which the remand is denied."); Texas v. Real Parties in Interest, 259 F.3d 387, 391 (5th Cir. 2001) ("Ordinarily, we have appellate jurisdiction only over final judgments, which the district court's order denying remand is not."). In some circumstances, parties wishing to challenge immediately the denial of a motion to remand have successfully invoked a discretionary appellate device such as 28 U.S.C. § 1292(b) or a writ of mandamus. *See, e.g.*, Melder v. Allstate Corp., 404 F.3d 328, 329–30 (5th Cir. 2005) (allowing a permissive appeal under 28 U.S.C. § 1292(b)); *In re* Chimenti, 79 F.3d

CAFA eliminates these traditional obstacles to appellate review by giving appellate courts discretionary authority to review immediately district court rulings on motions to remand. CAFA's appellate provision states that for all cases removed under CAFA, "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed."[55] The provision explicitly exempts such cases from § 1447(d)'s prohibition on appellate review of remand orders.[56]

CAFA's appellate provision also creates a detailed timetable, both for the litigants who wish to appeal and for the appellate courts themselves. First, an appellate court may accept the appeal only "if application is made to the court of appeals *not less than 7 days after entry of the order*."[57] CAFA then provides that if the appellate court accepts the appeal, "the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed."[58] The appellate court may extend this sixty-day period in two circumstances.[59] First, the appellate court may grant an extension of any length if all parties agree to such an extension.[60] Second, the appellate court may grant an extension of up to ten days if such an extension "is for good cause shown and in the

534, 536 (6th Cir. 1996) (using a writ of mandamus to review a district court's refusal to remand).

54. 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."). *See generally* Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 MO. L. REV. 287 (1993). The Supreme Court has recognized a narrow exception to § 1447(d)'s ban on appellate review of remand orders. *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 345–46 (1976) (allowing appellate review via a writ of mandamus for remand orders based on grounds other than improvident removal or lack of subject matter jurisdiction); *see also* Kircher v. Putnam Funds Trust, 126 S. Ct. 2145, 2148 (2006) (applying narrowly the *Thermtron* exception). For a description and critique of the *Thermtron* exception, see Solimine, *supra*, at 294–333.

55. 28 U.S.C.A. § 1453(c)(1) (West 2006).

56. *Id.* ("Section 1447 shall apply to any removal of a case under this section, *except that notwithstanding section 1447(d)* . . . ." (emphasis added)).

57. *Id.* (emphasis added).

58. *Id.* § 1453(c)(2). Federal judges have split over whether the sixty-day period begins when the party first asks the appellate court for permission to appeal or when the appellate court agrees to accept the appeal. *Compare* Evans v. Walter Indus., Inc., 449 F.3d 1159, 1162–63 (11th Cir. 2006) (holding that the sixty-day period begins when the appellate court agrees to accept the appeal), *with* Patterson v. Dean Morris, L.L.P., 444 F.3d 365, 370–71 (5th Cir. 2006) (Garza, J., dissenting) (arguing that the sixty-day period begins when the party first asks the appellate court for permission to appeal).

59. 28 U.S.C.A. § 1453(c)(3).

60. *Id.* § 1453(c)(3)(A) ("The court of appeals may grant an extension of the 60-day period described in paragraph (2) if . . . all parties to the proceeding agree to such extension, for any period of time . . . .").

interests of justice."[61] To enforce its decision deadline, CAFA commands that if the appellate court fails to reach a final judgment within the designated time, "the appeal shall be denied."[62]

II. THE CLASS ACTION FAIRNESS ACT'S APPELLATE DEADLINE RIDDLE

The riddle of CAFA's appellate provision concerns its seven-day period for pursuing an appeal.[63] According to the only substantive congressional report in CAFA's legislative history,[64] the Senate Judiciary Committee believed that CAFA would impose a seven-day deadline for seeking appeals from district court rulings on motions to remand. The Report states: "New subsection 1453(c) provides discretionary appellate review . . . but also imposes time limits. Specifically, parties must file a notice of appeal *within seven days* after entry of a remand order."[65] Such a deadline would be consistent with what the Senate Report claimed was the overall purpose of CAFA's appellate provision, namely, "to develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation of class actions."[66] Materials presented during the floor debate on CAFA confirm that CAFA's appellate provision was meant to "[e]stablish[] tight deadlines," including a seven-day deadline for litigants to pursue any CAFA appeal.[67]

The statutory text of CAFA's appellate provision does not impose the seven-day deadline that Congress apparently had in mind. Indeed, it does precisely the opposite. CAFA authorizes an appeal "if application is made to the court of appeals not less than 7 days after entry of the order."[68] Thus,

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61. *Id.* § 1453(c)(3)(B) ("The court of appeals may grant an extension of the 60-day period described in paragraph (2) if . . . such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.").

62. *Id.* § 1453(c)(4) ("If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.").

63. *Id.* § 1453(c)(1) (authorizing a discretionary appeal "if application is made to the court of appeals not less than 7 days after entry of the order").

64. *See* S. REP. NO. 109-14, at 1 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 3.

65. *Id.* at 49 (emphasis added).

66. *Id.*

67. 151 CONG. REC. S1076, 1078–79 (daily ed. Feb. 8, 2005) (describing how CAFA would "ELIMINATE[] THE POTENTIAL FOR ABUSIVE APPEALS OF REMAND ORDERS"). This document, which summarized several changes that had been made to an earlier draft of the legislation, stated that under CAFA's appellate provision, "no case can be delayed more than 77 days, unless all parties agree to a longer period." *Id.* at 1079. This seventy-seven-day figure appears to include seven days to pursue the appeal, sixty days to decide the appeal, plus a possible ten-day court-awarded extension "for good cause shown and in the interests of justice." 28 U.S.C.A. § 1453(c)(3)(B). The understanding that CAFA appeals would not create more than a seventy-seven-day delay is inconsistent with the view that CAFA establishes a seven-day waiting period rather than a seven-day deadline.

68. 28 U.S.C.A. § 1453(c)(1). Earlier versions of CAFA also contained language requiring litigants to seek an appeal "not less than 7 days after entry of the order." S. 2062, 108th Cong. § 5 (2004).

CAFA's text mandates that an application filed six days after the district court's order would be untimely (or premature) because it was filed "*less* than 7 days after entry of the order."[69] But an application filed eight days (or eight months or eight years) after the district court's order would be timely because it was filed "*not less* than 7 days after entry of the order."[70] Rather than set a seven-day deadline, CAFA's text establishes a seven-day waiting period and fails to impose any outer deadline after which a CAFA appeal would be untimely.

This conflict between CAFA's statutory text and the apparent intent of Congress has produced a sharp divide among federal appellate judges. Four circuits have taken a correctionist approach; they have rewritten the statute to require an appeal not more than seven days after entry of the district court's order.[71] Six Ninth Circuit judges, in a dissenting opinion written by Judge Bybee, endorse a literalist approach; they would heed CAFA's plain language and impose a seven-day waiting period with no outer deadline.[72]

A. A BRIEF NOTE ON LABELS

Assigning labels to competing jurisprudential views can be a tricky endeavor. It is particularly so in the context of statutory interpretation, which has been the subject of considerable academic and judicial debate in recent decades. This debate is often characterized as a battle between "textualists" on one side and "intentionalists" (also called "purposivists") on the other.[73] The usual distinction—which several scholars have recently

69. 28 U.S.C.A. § 1453(c)(1) (emphasis added).

70. *Id.* (emphasis added).

71. *See infra* Part II.B (discussing the correctionist approach).

72. *See infra* Part II.C (discussing the literalist approach).

73. *See* Molot, *supra* note 2, at 3 (distinguishing textualists and purposivists); Nelson, *supra* note 2, at 348 (distinguishing textualism and intentionalism); Vermeule, *supra* note 2, at 82–83 (distinguishing textualists and intentionalists). Admittedly, these labels greatly oversimplify the academic discourse in this area. Although today the terms "intentionalism" and "purposivism" are used almost interchangeably, they have traditionally signified different approaches to statutory interpretation. *See* Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 813, 815 (1994); ("Intentionalism asks how the enacting legislature would have decided the interpretive question facing the court. . . . [P]urposivism calls on judges to identify the statute's broader purposes and to resolve the interpretive question in light of those purposes."); *see also* ESKRIDGE, *supra* note 2, at 14, 25–26 (similarly contrasting intentionalism and purposivism); Molot, *supra* note 2, at 3 n.2 ("I do not, in this Article, distinguish among different versions of 'purposivism' or 'intentionalism' that might have occupied scholars a decade or two ago."); Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 455 n.20 (2005) (noting his use of the term "intentionalists" in an earlier article and stating "[p]erhaps I should have used the label 'purposivists' instead, for these judges are the modern-day heirs of Hart and Sacks"). The last two decades have also witnessed the rise of a theory known as "dynamic" or "pragmatic" statutory interpretation, which embraces the idea that "statutory interpretation involves creative policymaking by judges," Eskridge & Frickey, *supra* note 2, at 345, and rejects attempts by intentionalists, purposivists, and textualists to make statutory interpretation an "archeological" search for either the "plain meaning" of a statutory text or the underlying intent or purpose of

questioned[74]—is that intentionalists seek to enforce the legislature's intent, even if that intent is inartfully expressed in the statutory text;[75] textualists, on the other hand, seek solely to apply the meaning of the statutory text without speculating about the legislative intent underlying that text.[76]

At first glance, it may appear that CAFA's appellate provision presents a classic choice between textualism and intentionalism. One option is to

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the enacting legislature. *See* ESKRIDGE, *supra* note 2, at 13–47. Although dynamic statutory interpretation is thus distinct from textualism, intentionalism, or purposivism, *see* Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913, 1915–16 (2006) (characterizing the textualism–intentionalism debate as "an intramural dispute among faithful agent theorists," with dynamic statutory interpreters rejecting the idea that "judges should be faithful agents of the legislature"), dynamic statutory interpreters have recently found themselves allied with intentionalists and purposivists in the current debate, united in their opposition to the textualist goal of foreclosing judicial consideration of factors beyond a statute's text. *See* BREYER, *supra* note 2, at 85, 88 (describing Justice Breyer's "emphasis on statutory purpose and congressional intent" and arguing that under this approach a judge should ask how a reasonable member of the enacting legislature "would have wanted the court to interpret the statute"); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2052 (2006) (invoking Justice Breyer's arguments against textualism). Given the tenor of the current debate, some have used the labels intentionalist or purposivist to refer simply to "textualism's nonadherents or adversaries." Molot, *supra* note 2, at 3 n.2.

74. *See* Molot, *supra* note 2, at 3 ("[I]t is hard to tell what remains of the textualism–purposivism debate."); Nelson, *supra* note 2, at 348 (arguing that "[t]he most common way of distinguishing textualism" and intentionalism "is far less helpful than the rhetoric on both sides suggests").

75. *See* BREYER, *supra* note 2, at 85 (describing a purposivist approach as one under which "judges should pay primary attention to a statute's purpose"); Greene, *supra* note 73, at 1916 ("Purposivists, or intentionalists, look at . . . legislative history and other background social understandings . . . in an effort to figure out what Congress was up to."); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 423 (2005) ("Classical intentionalism thus presupposes that interpreters should try to ascertain how the legislative majority would have handled a problem that the fair import of the enacted text either does not resolve or resolves in a manner that does not adequately reflect the legislature's apparent aims."); Molot, *supra* note 2, at 3 ("Conventional wisdom has it that textualists emphasize statutory text and purposivists emphasize statutory purposes."); Nelson, *supra* note 2, at 348 (noting the common understanding that "intentionalists try to identify and enforce the 'subjective' intent of the enacting legislature"); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1025 (1998) (describing intentionalists as "those who believe that the function of a court in matters of statutory interpretation is to discern what the legislature intended and to implement that intent"); Vermeule, *supra* note 2, at 82 (stating that an intentionalist "will describe statutory interpretation as a search for legislative intent").

76. *See* SCALIA, *supra* note 2, at 29 (describing textualism as the view that "the objective indication of the words, rather than the intent of the legislature, is what constitutes law"); *id.* at 23 (describing textualism by quoting Justice Holmes's view that "[w]e do not inquire what the legislature meant; we ask only what the statute means"); Molot, *supra* note 2, at 3 ("Conventional wisdom has it that textualists emphasize statutory text and purposivists emphasize statutory purposes."); Nelson, *supra* note 2, at 348 (noting the common understanding that "textualists care only about the 'objective' meaning of the text"); Siegel, *supra* note 75, at 1025 (describing textualists as those who "assert that discovery of legislative intent is not the goal of statutory interpretation"); Vermeule, *supra* note 2, at 83 (stating that a textualist "will describe statutory interpretation as a search for the meaning of the statutory text").

follow the statute's text and impose a seven-day waiting period on CAFA appeals but no statutory deadline. Another option is to follow Congress's intent by disregarding the statute's text and imposing a seven-day deadline. I will avoid labeling these competing positions as textualist and intentionalist because, on closer analysis, it is not clear how these approaches fit into the textualist and intentionalist camps. This stems in part from the fact that the debate between textualists and intentionalists is more complex and nuanced than the basic labels suggest.[77] Another reason to avoid this terminology, which I address in greater detail below,[78] is that the textualist–intentionalist debate has yet to squarely consider the sort of interpretive puzzle that CAFA poses.

I call the view that courts should follow the literal meaning of CAFA's appellate provision the "literalist" approach. I have avoided using the term "textualist" because even the most prominent textualists might disagree on whether judges have the ability to depart from the statutory text in situations like this. Justice Scalia—arguably textualism's judicial godfather[79]—has been willing to deviate from the text where following the literal text would have "unthinkable" consequences that were "indeed unthought of" by Congress.[80] Textualist scholars John Manning and John Nagle, on the other hand, have steadfastly opposed judicial correction of statutory terms.[81]

I have labeled the view that CAFA should be judicially corrected to impose a seven-day deadline on CAFA appeals the "correctionist" approach. This approach is certainly intentionalist in some sense; it privileges congressional purpose to such an extent that a statutory term is deleted and

77. On one hand, some have recently argued that there is great consensus between textualists and intentionalists. *See* Molot, *supra* note 2, at 3–5 (describing similarities between textualist and purposivist approaches to statutory interpretation); Nelson, *supra* note 2, at 348 (arguing that the distinction between textualists and intentionalists is "exaggerated"); Michael C. Dorf, *In the Wetlands Case, the Supreme Court Divides over the Clean Water Act—and Seemingly over How to Read Statutes as Well*, FINDLAW, June 21, 2006, http://writ.news.findlaw.com/dorf/20060621.html ("[T]he labels 'textualist' and 'purposivist' exaggerate differences among Justices who largely share [an interpretive] commitment."); *see also* Manning, *supra* note 75, at 423 ("In any system predicated on legislative supremacy, a faithful agent will of course seek the legislature's intended meaning in some sense, and modern textualists do situate themselves in that tradition."); *id.* at 432 (stating that textualism "by no means necessitates a wholesale rejection of any useful conception of legislative intent"). On the other hand, the labels "textualist" and "intentionalist" gloss over a great deal of diversity among the participants in the current debate. *See infra* notes 232–46 and accompanying text (explaining important disagreements within the textualist camp); *see also supra* note 73 (summarizing the differences between various non-textualist theories of statutory interpretation).

78. *See infra* Part IV.C.

79. *See* SCALIA, *supra* note 2, at 14–37 (endorsing textualism as a theory of statutory interpretation); Manning, *supra* note 75, at 420 (calling Justice Scalia a "leading exponent[] of modern textualism").

80. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *see infra* notes 232–46 and accompanying text.

81. *See infra* notes 234–35 and accompanying text.

replaced with its exact opposite. But even some intentionalists might balk at a judicial revision as stark as reading the word "less" to mean "more."[82]

B. THE CORRECTIONIST APPROACH

The Tenth Circuit was the first appellate court to address the CAFA appellate deadline problem. Writing for a three-judge panel in *Pritchett v. Office Depot*,[83] Judge Ebel began by noting the fundamental problem with CAFA's appellate provision: "Read literally, this provision seems to say that the appeal from an order granting or denying remand *cannot* be taken within seven days of the order. Once that period passes, however, the statute would permit an appeal to our court at any time thereafter."[84] Judge Ebel reasoned that the statutory text was merely a "typographical error."[85] Relying on the Senate Report, he concluded that Congress intended to impose a seven-day deadline.[86] Accordingly, Judge Ebel corrected the error in the statute and held that an appeal is permissible if filed "not more than" seven days after entry of the remand order.[87] He reasoned that CAFA "is one of the rare cases in which a 'literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters.'"[88]

Other appellate courts soon followed *Pritchett*'s lead. In *Miedema v. Maytag Corp.*,[89] the Eleventh Circuit adopted the correctionist approach, reasoning that a literal reading of CAFA's appellate provision "would produce an absurd result."[90] The Third Circuit agreed in *Morgan v. Gay*:[91] "This Court does not need to step into a statutory interpretation debate over the role of legislative history and congressional intent to conclude that § 1453(c)(1) needs common sense revision that accurately reflects the *uncontested* intent of Congress."[92] It added:

> Judge Harold Leventhal has been famously quoted as saying that citing legislative history is like "looking over a crowd and picking out your friends." In the case of § 1453(c)(1), however, the crowd

82. *See infra* notes 251–55 and accompanying text.

83. Pritchett v. Office Depot, 420 F.3d 1090 (10th Cir. 2005).

84. *Id.* at 1093 n.2 (citing Vairo, *supra* note 11, at 12).

85. *Id.*

86. *Id.* (citing S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46).

87. *Id.*

88. *Pritchett*, 420 F.3d at 1093 n.2 (quoting United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989)).

89. Miedema v. Maytag Corp., 450 F.3d 1322 (11th Cir. 2006).

90. *Id.* at 1326.

91. Morgan v. Gay, 466 F.3d 276 (3d Cir. 2006).

92. *Id.* at 279.

> speaks with one voice. We therefore read "not less than" as "not more than" in accord with the intent of Congress.[93]

The Ninth Circuit also endorsed the correctionist approach, although not without some controversy. *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc.*,[94] a per curiam order by Judges Goodwin, Tashima, and Fisher, followed the correctionist approach. The panel stated that it was "entirely illogical" to impose a seven-day waiting period for seeking an appeal but to permit an appeal "any time in the future after" seven days.[95] Relying on the Senate Report, the panel also determined that the statutory text was "contrary to the stated purpose of the provision."[96] Accordingly, it concluded that CAFA should be read to require that an application to appeal must be filed "not *more* than 7 days" after entry of the district court order.[97] The panel acknowledged that its interpretation did not merely "construe the meaning of an ambiguous phrase or word" but rather deleted an unambiguous word and replaced it "with a word of the exact opposite meaning."[98] While the panel professed to be "somewhat troubled"[99] by this, it reasoned that a court may deviate from the plain language of a statute if the legislative history reveals "a clearly expressed legislative intention" that contradicts the statutory text.[100]

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93. *Id.* (footnote omitted). Two other decisions have assumed that CAFA's appellate provision imposes a seven-day deadline, although they do not directly address the interpretive puzzle discussed here. In *Patterson v. Dean Morris, L.L.P.*, 444 F.3d 365 (5th Cir. 2006), the Fifth Circuit found that a CAFA appeal filed nine calendar days after the district court's remand order was timely. *Id.* at 368 n.1. Because "the counting procedure set forth in Federal Rule of Appellate Procedure 26(a)" required intermediate Saturdays and Sundays to be excluded, the Fifth Circuit concluded that the appeal had been filed "within the statutory 7-day limit." *Id.* In an unpublished decision, the Seventh Circuit noted that "GM did not petition this court within seven days of the district court's remand order" but concluded that the appeal was timely because GM had "filed a motion for reconsideration of the remand" and had sought an appeal "within seven days of the district court's order denying that relief." Natale v. Gen. Motors Corp., No. 06-8011, 2006 WL 1458585, at *1 (7th Cir. May 8, 2006) (analogizing to FED. R. APP. P. 4(a)(4)'s provision under which the time limit for an appeal runs from an order resolving a motion to reconsider).

94. Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140 (9th Cir. 2006).

95. *Id.* at 1146; *see also id.* at 1145 (noting that "the statute as written creates a waiting period of seven days before which an appeal is *too early*, with no upper limit to when an appeal ultimately may be filed").

96. *Id. at* 1146.

97. *Id.* The panel thus concluded that the plaintiffs' petition for permission to appeal, which had been filed forty-three days after entry of the district court's order, was untimely. *Id.* at 1145–46. Nonetheless, the panel allowed the appeal to proceed out of concern for "the serious unfairness and potential due process violation that applying [its] holdings to this case might have raise[d]." *Id.*

98. *Id.* at 1146.

99. *Amalgamated Transit Union*, 435 F.3d at 1146.

100. *Id.* (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987)).

Other Ninth Circuit judges were considerably more troubled by use of the correctionist approach. The panel's decision in *Amalgamated* prompted an internal call for an en banc rehearing.[101] When this call failed to garner a majority of active judges, Judge Bybee authored a blistering dissent from the denial of en banc rehearing.[102]

C. THE LITERALIST APPROACH

Joined by five other Ninth Circuit judges, Judge Bybee argued for what I call the literalist approach. He accused the *Amalgamated* panel of abusing the "judicial power"[103] by ignoring "the supremacy of the legislature."[104] He asserted that "the courts' role is to give effect to statutes as Congress enacts them."[105] Under CAFA's unambiguous statutory language, the plaintiffs' petition for permission to appeal—filed forty-three days after the order was entered—was timely because it was filed "plainly, 'not less than 7 days after entry of the [district court's] order.'"[106] Judge Bybee complained that "the panel simply substituted the legislative history for the statute itself"[107] and thus "construed Congress's admittedly clear language to mean the precise opposite of what it says."[108] He criticized the panel for "[g]oing behind the plain language of a statute" by searching the legislative history for "a possibly

101. Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1093 (9th Cir. 2006) (providing the order denying rehearing en banc).

102. *Id.* at 1094 (Bybee, J., dissenting).

103. *Id.* at 1095 ("The Republic will certainly survive this modest, but dramatic emendation of the United States Code; I am not so sanguine that in the long term it can stand this kind of abuse of our judicial power.").

104. *Amalgamated Transit Union*, 448 F.3d at 1099; *see also id.* at 1099–1100 ("'[R]escuing' Congress from what the panel assumes was a mistake forces both the legislative and judicial branches to deviate from their respective constitutional roles.").

105. *Id.* at 1096.

106. *Id.* at 1095 (quoting 28 U.S.C.A. § 1453(c)(1) (West 2006)).

107. *Id.* at 1096. Judge Bybee found reliance on CAFA's legislative history to be particularly "disturbing" given that the Senate Report on which the panel relied was not submitted until after CAFA was passed by Congress and signed by the President. *Id.*; *see also* Steinman, *supra* note 8, at 293 n.49 (citing S. REP. NO. 109-14, at 79 (2005), *reprinted in* 2005 U.S.C.C.A.N. 13, 73 (describing Senator Patrick Leahy's view that the timing of the Senate Report "means that it did not serve the principal purpose for which Committee reports are intended")). The Supreme Court's recent decision in *Hamdan v. Rumsfeld*, which involved the treatment of federal detainees at Guantanamo Bay, contains a fascinating discussion of whether courts may properly rely on legislative statements made after a piece of legislation is enacted. Justice Stevens refused to consider statements by sponsors of the Detainee Treatment Act that "appear[ed] to have been inserted into the Congressional Record *after* the Senate debate." Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2766–67 n.10 (2006) (Stevens, J.). Somewhat ironically, it was Justice Scalia who found it appropriate in *Hamdan* to rely on post-enactment statements by legislators; he reasoned that the timing of the statements "makes no difference unless one indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness." *Id.* at 2815–16 (Scalia, J., dissenting).

108. *Amalgamated Transit Union*, 448 F.3d at 1100 (Bybee, J., dissenting).

contrary congressional intent."[109] Judge Bybee added that the panel's approach "strips citizens of the ability to rely on the laws as written" and creates "a trap for citizens (and their lawyers) who can no longer trust the statute as written to mean what it plainly says, but must look to our decisions in every instance for a contrary construction."[110]

In the course of his analysis, Judge Bybee also considered—and rejected—some canons of construction that might allow courts to disregard CAFA's clear language. First he considered the "scrivener's error exception," which he described as allowing courts to correct "obvious clerical or typographical errors."[111] He concluded, however, that the judiciary may not treat CAFA's language as a mere clerical or typographical error simply because it "disagree[s] with the logic of the terms that Congress used" or "think[s] Congress might choose a different word if it decides to redraft the statute."[112]

Judge Bybee also rejected reliance on the "absurdity doctrine," which he stated could be invoked "when applying the plain language of the statute would lead to patently absurd results."[113] He reasoned that CAFA's text did not render any part of CAFA contradictory, unenforceable, or superfluous, even though imposing a seven-day waiting period with no outside deadline "may *seem* inconsistent" with CAFA's tight deadlines for appellate courts to decide CAFA appeals.[114] He added that congressionally imposed time requirements "are not absurd, even when they may seem irrational," noting that other statutes use language similar to CAFA "to create mandatory waiting periods that may seem illogical."[115] Ultimately, Judge Bybee

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109. *Id.* at 1096 (internal quotation marks omitted) (quoting Am. Tobacco Co. v. Patterson, 456 U.S. 63, 75 (1982)) .

110. *Id.* at 1099.

111. *Id.* at 1097.

112. *Id.* at 1097–98.

113. *Amalgamated Transit Union*, 448 F.3d at 1098 (Bybee, J., dissenting).

114. *Id.*

115. *Id.* at 1097–98 (stating that Congress "has also used the phrase 'not less than _____ days' in other statutes to create mandatory waiting periods that may seem 'illogical'" (citing 22 U.S.C. § 276c-4 (2000); 42 U.S.C. § 610(b)(2) (2000); 42 U.S.C. § 12705(c)(3); 49 U.S.C. § 47509(d) (2000))). A strong argument could be made, however, that these examples do not confirm Congress's desire to impose mandatory waiting periods but rather demonstrate the frequency with which Congress makes the drafting mistake present in CAFA's appellate provision. For two of the statutes, congressional reports indicate that the statute was meant to impose a deadline, not a waiting period. *Compare* 42 U.S.C. § 610(b)(2) ("The Board shall make a final determination with respect to an appeal filed under paragraph (1) not less than 60 days after the date the appeal is filed."), *with* H.R. CONF. REP. 104-725, at 302 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2690 ("This section . . . requires a Board decision *within 60 days after an appeal is filed*" (emphasis added)); *compare also* 49 U.S.C. § 47509(d) (requiring federal administrators to transmit a report to Congress "[n]ot less than 280 days after the date of the enactment of this section"), *with* 140 CONG. REC. H7051-01, H7069 (Aug. 5, 1994) (H.R. CONF. REP. 103–67) ("The section requires delivery of a report *not later than 280 days after enactment of this Act*." (emphasis added)).

concluded that the judiciary must follow the plain language of CAFA's appellate provision: "If Congress intended to do something different, let Congress fix it."[116]

III. FOUNDATIONS OF TEXTUALISM AND INTENTIONALISM

The last two decades have witnessed an extensive and enlightening debate about the legitimacy and desirability of competing methods of statutory interpretation.[117] The acceleration of this discourse occurred in the mid-1980s when prominent academics and members of the judiciary began urging a textualist approach to interpreting statutes.[118] In general, textualists contend that judges should seek to apply the plain meaning of the statutory text without speculating about the legislative intent underlying that text.[119] Other judges and scholars—often labeled intentionalists or purposivists—respond that courts interpreting statutes should consider the legislature's underlying purpose and should enforce that purpose even if the statutory text does not perfectly reflect it.[120]

A. FOUNDATIONS OF TEXTUALISM

The textualist movement rests on two key foundations: intent skepticism and Article I exclusivity. "Intent skepticism"[121] questions the ability to infer the "intent" of Congress—a body made up of more than 500 individual lawmakers.[122] The notion of congressional intent is particularly problematic given the nature of the legislative process, which is often characterized by

116. *Amalgamated Transit Union*, 448 F.3d at 1100 (Bybee, J., dissenting). Judge Bybee also rejected reliance on the doctrine of constitutional avoidance. *See id.* at 1097. Because "no constitutional infirmity stems from giving effect to the plain language of section 1453(c)(1)," he concluded that "the constitutional avoidance doctrine cannot justify the panel's decision." *Id.*

117. *See supra* note 73 (explaining the competing views of textualists and purposivists).

118. *See* Eskridge, *New Textualism*, *supra* note 2, at 623–25 (discussing the rise of textualism among scholars and judges).

119. *See supra* note 76 (reviewing statements by judges and legal scholars regarding textualism).

120. *See supra* note 75 (reviewing statements by judges and legal scholars regarding purposivism).

121. Manning, *Absurdity Doctrine*, *supra* note 2, at 2408; *see also* Manning, *supra* note 75, at 430 ("[T]extualists deny that a legislature has any shared intention that lies behind but differs from the reasonable import of the words adopted.").

122. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes."); Nelson, *supra* note 2, at 362 ("To be sure, Congress is a collective entity, and so the concept of legislative 'intent' is obviously something of a construct for textualists and intentionalists alike."); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) ("Individuals have intentions and purpose and motives; collections of individuals do not."); *see also* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 251–71 (examining "what it means for an institution to have intent").

friction and compromise that belies a coherent institutional purpose.[123] In most cases, textualists argue, it is likely that the legislators never considered the particular interpretive question at issue.[124]

Not surprisingly, textualists' skepticism of legislative intent is accompanied by an aversion to relying on a statute's legislative history to discern that intent.[125] Textualists have questioned whether the materials that comprise a statute's legislative history can ever be a more accurate reflection of congressional intent than the statute itself.[126] Reports from congressional committees—which the Supreme Court has recognized as the most reliable form of legislative history[127]—are often prepared by legislative staffers; it is questionable whether legislators are even aware of what those reports say.[128] At best, such reports reflect only the views of the legislators who actually serve on that committee.[129] Likewise, a statement made on the floor of the House or Senate reflects only the view of the legislator making it.[130] Under current legislative practice, such statements are often made in empty or

123. Manning, *Absurdity Doctrine*, *supra* note 2, at 2409; *see also id.* at 2412 (noting the argument based on social choice theory that the legislative process precludes aggregation of individual legislators' preferences into a collective intent (citing KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963))); Easterbrook, *supra* note 122, at 547–48; *see also* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461–62 (2002) (Thomas, J.) ("Dissatisfaction . . . is often the cost of legislative compromise.").

124. *See* SCALIA, *supra* note 2, at 32 (arguing that "with respect to 99.99 percent of the issues of construction reaching the courts," the legislators were "blissfully unaware of the *existence* of the issue, much less had any preference as to how it should be resolved").

125. *See* Nelson, *supra* note 2, at 361–68 (summarizing competing views on whether it is appropriate to consult legislative history when interpreting a statute); *see also* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 569 (2005) (noting that whether legislative history is a reliable guide for statutory interpretation is "a point on which Members of this Court have disagreed").

126. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2417–19 (arguing for "continued skepticism about the judiciary's capacity to identify accurately a legislative intent at odds with the intent expressed by a clear text" and that "the uncertainties of the legislative process make it safer simply to respect the language that Congress selects, at least when that language is clear in context"); *see also* Nelson, *supra* note 2, at 369–70 ("The textualists' basic point is . . . that the typical statute enacted by Congress does not authoritatively reflect any collective intent on policy goals that transcend its own terms.").

127. Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill."); *see also* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 947–49 (3d ed. 2001).

128. SCALIA, *supra* note 2, at 32 (arguing that the days when it might have been possible to believe that legislators read committee reports "are long gone" and questioning whether members of the issuing committees take the time to read the committee reports).

129. *See, e.g.*, Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (Easterbrook, J.) (arguing that a committee report "has no more force than an opinion poll" of the legislators who signed the report).

130. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2815–16 (2006) (Scalia, J., dissenting) ("[F]loor statements . . . represent at most the views of a single Senator.").

near-empty chambers, which undermines the notion that floor statements influence other legislators' perception of a given bill.[131]

The second foundation of textualism is a constitutional argument: Article I exclusivity. Article I of the Constitution sets forth the process for creating "Law[s]."[132] To become a law, a bill must be approved by both the House and the Senate and must also be approved by the President unless two-thirds of the House and Senate override the President's veto.[133] As a constitutional matter, a bill that meets these requirements is a "Law"; committee reports, floor statements, and unenacted congressional intent are not.[134]

A necessary corollary to the textualists' understanding of Article I is a limited view of Article III. Textualists contend that Article III's grant of "the judicial Power"[135] to federal courts does not authorize them to disregard the text of a properly enacted statute.[136] Simply put, the separation of powers that underlies our constitutional scheme requires courts to apply the law as it is set forth in statutes enacted by Congress.[137]

Related to the two core foundations of textualism are four consequentialist arguments about the dangers of intentionalism. The first is that permitting judges to speculate about legislative intent (and to modify statutory directives accordingly) provides a vehicle for improper judicial policy making. As Justice Scalia puts it, "[U]nder the guise or even the self-delusion of pursuing unexpressed legislative intents, common law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."[138] Second, the

131. SCALIA, *supra* note 2, at 32; *see also Hamdan*, 126 S. Ct. at 2815–16 (Scalia, J., dissenting) (noting that "[it is a] fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness").

132. U.S. CONST. art. I, § 7.

133. *Id.*

134. *See* Manning, *Textualism as Nondelegation*, *supra* note 2, at 695 (describing textualist objections to reliance on legislative history); Slawson, *supra* note 2, at 383–84 ("Members of Congress can make law by 'manufacturing' legislative history, thereby evading the Constitutional requirements for legislating that assure that laws receive the appropriate representative consent."); *In re* Sinclair, 870 F.2d 1340, 1343, 1344 (7th Cir. 1989) (Easterbrook, J.) (arguing that "[s]tatutes are law, not evidence of law" and that in light of our constitutional structure, "it would . . . be surprising if 'intents' subject to neither vote nor veto could be sources of law"); *see also* SCALIA, *supra* note 2, at 35. Justice Scalia has famously declared that government by "unexpressed intent" is "tyrannical," comparing it to Emperor Nero's practice of posting edicts high up on pillars so they could not easily be read. *Id.* at 17.

135. U.S. CONST. art. III, § 1.

136. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 56–70 (2001) (discussing the separation of powers).

137. *Id.* (explaining how the constitutional relationship between branches of government differs from its common law antecedents).

138. SCALIA, *supra* note 2, at 17–18; *see also* Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2064 (2005) ("The intuitive idea is this: the more discretion or

knowledge that intentionalist judges will rely on legislative history to determine congressional intent ultimately undermines the reliability of legislative history. Textualists suspect that committee reports and floor debates are no longer a meaningful part of a statute's "history," but rather are opportunistically crafted to manipulate future judicial interpretation.[139] Third, textualists caution that intentionalist judges might unwittingly set aside legislative compromises that are necessary to secure the passage of legislation and into which Congress intentionally enters, based solely on the judge's perception that such compromises do not reflect a perfectly coherent set of policy choices.[140] Fourth, textualists argue that Congress's knowledge that judges will fix poorly drafted statutes to conform to legislative intent reduces the incentive for Congress to draft statutes clearly and carefully in the first place.[141]

B. FOUNDATIONS OF INTENTIONALISM

Of course, the textualists' institutional and constitutional arguments have not gone unchallenged. While intentionalists agree that the notion of legislative intent is to some extent a fiction, they argue that it is a

interpretative freedom judges have in statutory interpretation, the greater their role, personally and institutionally, in determining what the law is. And this is the upshot of textualism: textualists do not want judges to make the law.").

139. SCALIA, *supra* note 2, at 34 ("[W]hen it is universally known and expected that judges will rely on floor debates and (especially) committee reports as authoritative expressions of 'legislative intent,' affecting the courts rather than informing the Congress has become the primary purpose of the exercise.").

140. Manning, *supra* note 75, at 420 (noting that textualists are "reluctant to ascribe an apparent mismatch between text and purpose to a lapse in legislative expression rather than the ever-present possibility of an awkward legislative compromise"). In *Barnhart v. Sigmon Coal Co.*, Justice Thomas reasoned:

> Where the statutory language is clear and unambiguous, we need neither accept nor reject a particular "plausible" explanation for why Congress would have written a statute [the way that it did]. . . . Dissatisfied with the text of the statute, the Commissioner attempts to search for and apply an overarching legislative purpose to each section of the statute. Dissatisfaction, however, is often the cost of legislative compromise.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 460–61 (2002).

141. *See* Schacter, *supra* note 2, at 645 (noting the textualist argument that "[p]reventing judges from relying on legislative history and deliberating about possible legislative intentions are two ways to change legislative behavior and perhaps to induce new legislative clarity and courage"); *see also* Eskridge, *New Textualism*, *supra* note 2, at 677 ("Justice Scalia seems to argue, if Congress is aware that its statutes will be read with a strict literalism and with reference to well-established canons of statutory construction, it will be more diligent and precise in its drafting of statutes."); Marmor, *supra* note 138, at 2068 ("[T]extualism advocates a kind of educational policy: the more the courts consistently apply textualism, the more legislators will realize that courts will not correct drafting errors, and thus lawmakers will become more vigilant and meticulous when drafting legislation.").

conceptually valuable fiction.[142] Understanding any text requires some examination of the meaning intended by the text's author.[143] Legislative purpose can shed important light on what the words in a statute truly mean, even if it is empirically impossible to know exactly what all 500-plus members of Congress actually had in mind.[144] Justices Stevens and Breyer (among others) have argued that judges are more likely to arrive at the correct meaning of a statute if they are permitted to consult *all* available information about the statute's history and purpose, including the statute's legislative history.[145] Thus, it is entirely reasonable for courts to correct drafting errors based on an assessment of the legislature's purpose,[146] particularly given Congress's historical reluctance to correct drafting mistakes with subsequent legislation.[147] As Justice Stevens explains: "[W]e do

142. BREYER, *supra* note 2, at 99–100 ("Ordinary citizens think in terms of general purposes. . . . It is not impossible to ask an ordinary citizen to determine what general purpose a legislator sought to achieve in enacting a particular statute.").

143. Nelson, *supra* note 2, at 355 ("[P]urpose is relevant because it sheds light on what the interpreter believes the enacting legislature meant." (citing Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 979 (2004))); *id.* at 354 (arguing that even textualists engage in "some sort of inquiry into the meaning intended by members of the enacting legislature").

144. *Id.* at 362 ("[T]he fact that collective intent is a construct does not mean that it has no relationship to anyone's actual intent."); *id.* at 371 ("[T]he fact that the notion of 'intended meaning' requires some aggregation of competing views does not mean that it is entirely incoherent.").

145. Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., concurring, joined by Breyer, J.). According to Justice Stevens,

> In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress'[s] true intent when interpreting its work product.

Id.; *see also* BREYER, *supra* note 2, at 18 ("[S]ince 'the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.'" (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 541 (1947))); Max Huffman, *Using All Available Information*, 25 REV. LITIG. 501, 516–17 (2006) (summarizing Justice Breyer's approach to statutory interpretation).

146. *See* Pittston Coal Group v. Sebben, 488 U.S. 105, 124 (1988) (Stevens, J., dissenting); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 850–51 (1992).

147. *See* John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1268 (1996) (noting "the inability and unwillingness of Congress to correct its own mistakes"); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) ("Congress's practical ability to overrule a judicial decision misconstruing one of its statutes, given all the other matters pressing for its attention, is less today than ever before, and probably was never very great."); *see also* Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 688 (1999) (noting that "the legislative process may not be capable of responding to the incentives of textualism" because "there [are] competing pressures that prod Congress away from textual clarity and precision" and because "the level of congressional awareness about relevant statutory methods . . . may be quite low"); Marmor, *supra* note 138, at 2069 ("[T]extualism's working assumption—that Congress can be induced to be more meticulous in its legislative drafting—is problematic, at best, and most likely, unrealistic.").

the country a disservice when we needlessly ignore persuasive evidence of Congress's actual purpose and require it to take the time to revisit the matter and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error."[148]

Scholars and judges have also challenged the textualist claim that judicial deviation from a statute's text upsets our constitutional structure. Many have argued that judicial consultation of legislative history or other evidence of congressional intent does not violate Article I.[149] As then-Judge Breyer put it: "No one claims that legislative history is a statute, or even that, in any strong sense, it is 'law.' Rather, legislative history is helpful in trying to understand the meaning of the words that do make up the statute or the 'law.'"[150] Skeptics of the textualists' constitutional arguments have relied on history as well. Based on an extensive examination of the periods before, during, and immediately after the Founding, Professor Bill Eskridge contends that "the judicial power" has always included broad leeway to manipulate statutory text in service of other goals.[151] Justice Breyer argues that the Framers understood that judges "would have to exercise judgment and discretion in applying newly codified law" and "when doing so, would remain faithful to the legislator's will."[152]

C. SUPREME COURT PRECEDENT

In terms of how to resolve conflicts between a statute's text and the underlying congressional intent, Supreme Court opinions have something for textualists and intentionalists alike. On the intentionalist side of the ledger, the Supreme Court has stated that where "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters," the drafters' intentions, and not the statutory text, are controlling.[153] It has also recognized judicial authority to correct "scrivener's

148. W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) (citation and internal quotation marks omitted).

149. *See, e.g.*, Eskridge, *New Textualism*, supra note 2, at 671–72 (arguing that "Justice Scalia reads too much into the bicameralism and presentment requirements"); Greene, *supra* note 73, at 1933–34.

150. Breyer, *supra* note 146, at 863. Breyer added that the textualists' Article I argument—if accepted—would apply with equal force to textualist judges' reliance on dictionaries when interpreting statutes. *Id.*

151. Eskridge, *All About Words*, *supra* note 2, at 996–97; *see also* Molot, *supra* note 2, at 8–9 (noting Eskridge's view that judges could use "various interpretive powers to stray from statutory text where justice required"); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 335 (2001) (arguing that Article III's grant of "the 'judicial Power,' . . . from the time of the framing of our Constitution, has always included some power to depart from statutory text in order to maintain coherence in the law").

152. BREYER, *supra* note 2, at 86.

153. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982); *see also* United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989); Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) ("It is a well-established canon of statutory construction that a court should go beyond

errors."[154] To declare that a statute's text is an error of "scriven[ing]" (rather than merely an error of policy that the judiciary must nonetheless respect), a court must necessarily assess Congress's true purpose in enacting the statute and determine that the text in conflict with that purpose is a mere scrivener's error.[155] Finally, under the so-called "absurdity doctrine," courts may deviate from the statutory text if the text would produce "absurd results."[156] This canon is also linked inextricably to effectuating congressional purpose.[157] The theory behind this canon is not that the

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the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."); United States v. Am. Trucking Ass'n, 310 U.S. 534, 543 (1940) (noting that "when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words").

154. U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 462 (1993); *see also* Michael S. Fried, *A Theory of Scrivener's Error*, 52 RUTGERS L. REV. 589, 593–603 (2000) (summarizing the scrivener's error doctrine); Bradford C. Mank, *A Scrivener's Error or Greater Protection of the Public: Does the EPA Have the Authority to Delist "Low-Risk" Sources of Carcinogens from Section 112's Maximum Achievable Control Technology Requirements?*, 24 VA. ENVTL. L.J. 75, 114–15 & n.170 (2005) (same).

155. Alexander & Prakash, *supra* note 143, at 980 ("To speak of errors, mistakes, or of 'a legislature that obviously misspoke' . . . is to have a baseline of legislative intent, for it is only against that baseline that it is possible to speak of legislative misspeaking." (quoting SCALIA, *supra* note 2, at 21)); Nelson, *supra* note 2, at 380 (noting "a concept of 'drafting error' that refers to the actual intent of individual legislators"). The precise scope of the scrivener's error doctrine is unclear. There has been only one case where a majority Supreme Court opinion has explicitly invoked this doctrine to modify a statute's text, and the "scrivener's error" in that case concerned the placement of a quotation mark. *See U.S. Nat'l Bank of Or.*, 508 U.S. at 462. Individual Justices have invoked the doctrine more frequently. *See* Pittston Coal Group v. Sebben, 488 U.S. 105, 129 (1988) (Stevens, J., dissenting); United States v. Locke, 471 U.S. 84, 95 (1985) (Stevens, J., dissenting); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) ("I have been willing, in the case of civil statutes, to acknowledge a doctrine of 'scrivener's error' . . . ."). Commentators have recognized that the term "scrivener's error" might be used to refer to different interpretive concepts. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2459 n.265 (noting one form of the doctrine "identifies scrivener's errors by asking whether Congress could have intended to adopt the policy that the text clearly suggests" and "a narrower scrivener's error doctrine that seeks only to identify obvious clerical or typographical errors" that are "apparent from the relationship of a particular word or phrase to its surrounding text"); Samuel C. Rickless, *A Synthetic Approach to Legal Adjudication*, 42 SAN DIEGO L. REV. 519, 529 (2005) (distinguishing a "formal scrivener's error" that refers to "obvious typographical mistake[s]" from a "substantive scrivener's error" that "arises when the legislature intends the language of the provision to be read one way but drafts it in such a way as to say something else").

156. *Griffin*, 458 U.S. at 575 ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *see also* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 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." (quoting Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509 (1989))); Manning, *Absurdity Doctrine*, *supra* note 2, at 2388–90 (describing the Supreme Court's endorsement of the absurdity doctrine).

157. Manning, *Absurdity Doctrine*, *supra* note 2, at 2389–90 ("The Supreme Court presumes that this absurd result reflects imprecise drafting that Congress could have and would have corrected had the issue come up during the enactment process."); John C. Nagle, *"Textualism's*

judiciary has free-standing authority to disregard statutes that, in its perception, accomplish absurd results. Rather, it is a presumption that Congress does not intend results that are absurd. Thus, construing a statute to avoid such absurdities accomplishes Congress's true intent.[158] The following passage summarizes the Court's intentionalist side:

> Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress'[s] intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."[159]

Exceptions," Issues in Legal Scholarship, ISSUES IN LEGAL SCHOLARSHIP, Nov. 2002, at 8, http://www.bepress.com/ils/iss3/art15 ("Usually, absurdity stands as a proxy for unintended, so the result is disfavored because it was not the one that the legislature intended."); *see also* Calderon v. Atlas S.S. Co., 170 U.S. 272, 281 (1898) (holding that courts may construe a statute "to avoid an absurdity, which the legislature ought not to be presumed to have intended").

158. *See supra* notes 156–57 (describing the absurdity doctrine). It is unclear how much "absurdity" is required to invoke this exception. The Court has indicated at times that merely an "odd result" might justify deviating from a statute's text. *Pub. Citizen*, 491 U.S. at 454 ("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." (quoting Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509 (1989))). It is also unclear whether the different terminology used in intentionalist opinions state *independent* canons of statutory interpretation (i.e., an absurdity doctrine, *see supra* notes 1576–57, which is separate and distinct from a scrivener's error doctrine, *see supra* note 154, which is separate and distinct from a "demonstrably at odds with the intent of the drafters" doctrine, *supra* note 153), or merely a general willingness to deviate from a statute's plain meaning to accomplish what the Court believes is Congress's underlying intent. Some, for example, view the scrivener's error doctrine and the absurdity doctrine as a single concept. *See* Clinton v. New York, 524 U.S. 417, 454–55 (1998) (Scalia, J., dissenting) ("There is nothing whatever extraordinary—and surely nothing so bizarre as to permit this Court to declare a "scrivener's error" . . . . It may be unlikely that this is what Congress actually had in mind; but it is what Congress said, it is not so absurd as to be an obvious mistake, and it is therefore the law."); Manning, *Absurdity Doctrine*, *supra* note 2, at 2459 n.265 ("As presently conceived by some members of the Court (including Justice Scalia), the scrivener's error doctrine is apparently a form of the absurdity doctrine."); Siegel, *supra* note 151, at 329 ("Justice Scalia, in discussing what I have called the absurd results exception, often uses a different name: he calls it the doctrine of 'scrivener's error.'"). Others suggest that these canons are distinct. *See* Fried, *supra* note 154, at 594–95 ("Scrivener's error is distinguished from other kinds of mistakes in the drafting of statutes in that the wording or punctuation of the resulting enactment differs from that which the drafters had meant to enact. . . . This phenomenon is distinguishable from situations where the legislature intended the text as written, but applying those words to the facts of a particular case would produce an absurd or unintended result."); Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 56 (2006) (arguing that the absurdity and scrivener's error doctrines "overlap[]" but are "distinguishable . . . on the theory that the scrivener's error doctrine addresses an 'error of expression,' while the absurdity doctrine addresses unforeseen, egregious applications of statutory language."); Manning, *Absurdity Doctrine*, *supra* note 2, at 2459 n.265 (seeking to "distinguish[] a genuine scrivener's error doctrine from the absurdity doctrine").

159. *Pub. Citizen*, 491 U.S. at 455 (quoting Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.)).

At other times, however, the Supreme Court has mandated strict adherence to statutory text, despite claims that the text conflicts with Congress's intent. The "first canon" of statutory construction is that courts "must presume that the legislature says in a statute what it means and means in a statute what it says."[160] When a statute's text is "unambiguous, this first canon is also the last: 'judicial inquiry is complete.'"[161] The Court has professed fidelity to this principle even when the results are problematic: "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts."[162] Moreover, the Supreme Court has stated that "it is up to Congress rather than the courts" to fix unintentional drafting errors.[163] Put simply, the judiciary does not have "*carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do."[164]

All this goes to show that little has changed since Karl Llewellyn's influential 1950 article on statutory interpretation.[165] Professor Llewellyn noted that many canons of statutory construction were in direct conflict with one another.[166] Thus, these canons do not truly guide judges toward the correct interpretation of a statute but rather enable a judge to select the ultimate result he or she prefers and then invoke the canon that supports that result.[167] The Supreme Court's conflicting guidance on how to resolve tension between the literal text of a statute and the apparent intent of Congress powerfully confirms Llewellyn's thesis.[168]

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160. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461–62 (2002) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)).

161. *Id.*

162. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)).

163. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 565 (2005).

164. United States v. Locke, 471 U.S. 84, 95 (1985).

165. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

166. *Id.* at 401 ("[T]here are two opposing canons on almost every point."). *But see* SCALIA, *supra* note 2, at 26 (arguing that "if one examines [Llewellyn's] list [of conflicting canons], it becomes apparent that there really are not two opposite canons on almost every point—unless one enshrines as a canon whatever vapid statement has ever been made by a willful law-bending judge").

167. Llewellyn, *supra* note 165, at 396 ("The question is: *Which* of the available correct answers will the Court *select*—and why?"); *id.* at 401 ("Plainly, to make any canon hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon . . . .").

168. *See In re* Sinclair, 870 F.2d 1340, 1341–42 (7th Cir. 1989) (Easterbrook, J.) (describing the Supreme Court's inconsistency); *see also* HART & SACKS, *supra* note 17, at 1169 ("The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."). *But see id.*, at 1191 (suggesting that Llewellyn's critique "involves a misunderstanding of the function of the canons" because such

IV. EVALUATING THE CURRENT APPROACHES TO THE CLASS ACTION FAIRNESS ACT'S APPELLATE PROVISION

The judicial and scholarly debate over methods of statutory interpretation has yet to address squarely the sort of interpretive puzzle posed by CAFA's appellate provision. This Part examines CAFA in terms of two metrics for evaluating a conflict between a statute's text and the legislative intent underlying that statute. First, how strong is the evidence of the legislature's actual intent? Second, how drastic a deviation from the statutory text is required to effectuate that intent? When applied to CAFA's appellate provision, each of these metrics points forcefully in opposite directions. Section A describes the overwhelming evidence that Congress intended to impose a seven-day deadline for CAFA appeals, not a seven-day waiting period. Section B explains why correcting this error (that is, reading "less" to mean "more") would do unprecedented violence to CAFA's text. Section C explains why this combination presents an unexplored dilemma in the debate between textualism and intentionalism and considers the practical consequences of the correctionist and literalist approaches to CAFA's appellate provision.

A. CAFA'S UNPRECEDENTED EVIDENCE OF UNDERLYING (BUT UNENACTED) LEGISLATIVE INTENT

When courts consider a potential conflict between the text of a statute and the legislative intent, a key consideration should be the strength of the evidence of that underlying legislative intent. Such evidence might include traditional legislative history (e.g., reports of congressional committees, statements made on the floor),[169] the questionable consequences that would result from following the literal text,[170] and the possibility that the statutory text reflects an awkward but intended legislative compromise.[171] All other things being equal, courts should be less willing to modify a statute when the evidence of contrary legislative intent is weak. Courts should be more willing to modify a statute when the evidence of unenacted intent is strong.

Measured in these terms, CAFA's appellate provision is an extraordinarily strong candidate for judicial modification of otherwise clear statutory text. *Every* reference to the seven-day period in the legislative history—whether in congressional committee reports or in legislative

canons "simply answer the question whether a particular meaning is linguistically permissible, if the context warrants it").

169. *See, e.g.*, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 456–57 (2002) (considering, but rejecting reliance on, floor statements by two senators); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 460 (1989) (considering the report of a House of Representatives committee).

170. *See supra* notes 156–58 and accompanying text (describing the presumption that Congress does not intend for its statutes to accomplish absurd results).

171. *See, e.g.*, *Barnhart*, 534 U.S. at 461–62. "Dissatisfaction [with the text of a statute] is often the cost of legislative compromise." *Id.* at 461.

statements on the floor—confirms an intention to impose a seven-day deadline for pursuing CAFA appeals, not a seven-day waiting period.[172] The Senate Judiciary Committee Report states that under CAFA's appellate provision, "parties must file a notice of appeal *within seven days* after entry of a remand order."[173] During the floor debate, eight senators stated that under CAFA's appellate provision, "no case can be delayed more than 77 days, unless all parties agree to a longer period."[174] This assertion necessarily assumed that there would be a seven-day deadline for seeking a CAFA appeal. Unless all parties agree to an extension, the court of appeals has a maximum of seventy days to decide a CAFA appeal—the base sixty-day deadline plus a possible ten-day court-awarded extension "for good cause shown and in the interests of justice."[175] The seventy-seven-day figure asserted during the floor debate makes sense only if one assumes a seven-day deadline for seeking a CAFA appeal in the first place.[176]

Even without this strong evidence of congressional intent, it is "unfathomable"[177] that Congress would have wanted to impose a seven-day waiting period on CAFA appeals. Waiting periods do not serve any desirable function in this context.[178] Appealing a trial court ruling is not like buying a gun or obtaining a divorce, where rash decisions made in the heat of the moment might lead to regrettable and irreversible actions.[179] A "cooling-off

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172. *See supra* notes 64–67 and accompanying text; *see also* Morgan v. Gay, 466 F.3d 276, 279 (3d Cir. 2006) (stating that a seven-day deadline for CAFA appeals was "the *uncontested* intent of Congress").

173. *Morgan*, 466 F.3d at 278 (quoting S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46).

174. 151 CONG. REC. S1076, 1077–79 (daily ed. Feb. 8, 2005) (letter submitted by Senator Dodd on behalf of eight Senators).

175. 28 U.S.C.A. § 1453(c)(3)(B) (West 2006); *see also supra* notes 58–62 and accompanying text (discussing applicability of the sixty-day period and the possibility of exceptions).

176. *See* Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1144 (9th Cir. 2006) (noting that the seventy-seven-day figure "presumably consist[s] of seven days to file an appeal, 60 days to decide the merits of the appeal, and a possible 10-day extension of time for good cause").

177. Green v. Bock Library Mach. Co., 490 U.S. 504, 510 (1989).

178. This notion is bolstered by the fact that the Federal Rules of Appellate Procedure impose many deadlines on appellate litigants, but they do not impose even one waiting period. *See, e.g.*, FED. R. APP. P. 4(a) (setting a deadline for filing a notice of appeal in civil cases); *id.* 10(b) (setting a deadline for ordering a transcript of the proceedings); *id.* 31(a) (setting deadlines for filing briefs). Although the Federal Rules of Civil Procedure contain some waiting periods, *see, e.g.*, FED. R. CIV. P. 56(a) (preventing a plaintiff from seeking summary judgment until twenty days after commencement of the action), their rationales are inapposite to the appellate context. Such waiting periods are designed to allow parties time to "secure counsel and determine their course of action." *Id.* 56 advisory committee's note (1946 amendment). On appeal, this concern does not arise; by the time a decision is appealed, the parties have already secured counsel and determined their legal positions in the trial court.

179. *Cf.* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 88 (2004) (arguing in favor of "cooling-off periods" before obtaining a divorce in order to "guard[] against impulsive exit"); Sayoko Blodgett-Ford, Note, *Do Battered Women Have a Right to*

period"[180] before allowing a party to pursue an appeal is wholly unnecessary, particularly because an appellant who later decides that the appeal is unwarranted may simply move to dismiss the appeal voluntarily.[181]

A waiting period is particularly absurd for interlocutory appeals, where it is critically important to minimize potential delay and waste of judicial resources. A waiting period is even more incomprehensible in the context of CAFA, which imposes unprecedented deadlines (sixty days) for appellate courts to decide interlocutory CAFA appeals.[182] It is inconceivable that a Congress concerned with ensuring that CAFA appeals are resolved with minimal disruption to lower court proceedings would, in the same breath, unnecessarily hold up litigants who wanted to appeal quickly.

Finally, it is impossible to imagine how a seven-day waiting period might be the result of an awkward but politically expedient legislative compromise. In the context of interlocutory appeals, no one benefits from imposing a seven-day waiting period. Admittedly, the ability to delay proceedings can be very advantageous for certain litigants. But a seven-day waiting period does not limit the ability of a party interested in dilatory tactics to pursue them; it merely requires delay in situations where the parties might otherwise want to proceed more expeditiously.[183]

Collectively, this overwhelming evidence of congressional intent distinguishes CAFA's appellate provision from other battlegrounds of the textualist–intentionalist debate. Consider the Supreme Court's recent decision in *Small v. United States*,[184] which interpreted a federal statute prohibiting felons from owning a firearm.[185] Although the statute applied to felons "convicted in *any* court,"[186] the Supreme Court concluded that Congress did not intend this phrase to include convictions in foreign courts.[187] By comparison to CAFA's appellate provision, the evidence of congressional intent in *Small* was quite weak. Nothing in the legislative history addressed whether or not the statute should apply to foreign

Bear Arms?, 11 YALE L. & POL'Y REV. 509, 541–42 (1993) (arguing that waiting periods for purchasing guns "are designed to prevent violence by allowing someone who is upset to 'cool off' before she can obtain a firearm and impulsively shoot at the object of her anger" (citing GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 333 (1991))).

180. *See* Frantz & Dagan, *supra* note 179, at 88.

181. *See* FED. R. APP. P. 42 (allowing for voluntary dismissal of appeals).

182. *See supra* notes 58–62 and accompanying text.

183. One could concoct some outlandish hypotheticals where a waiting period is *so* long that it operates as a major deterrent, if not an absolute bar. If, for example, an appeal were subject to a 100-year waiting period, that would effectively eliminate the availability of such appeals. But it is impossible to imagine that a waiting period of seven days would deter litigants from pursuing CAFA appeals.

184. Small v. United States, 544 U.S. 385 (2005).

185. *Id.* at 387.

186. 18 U.S.C. § 922(g)(1) (2000) (emphasis added).

187. *Small*, 544 U.S. at 387.

convictions.[188] The Court essentially inferred Congress's intent from the "commonsense notion that Congress generally legislates with domestic concerns in mind,"[189] as well as the potential concern that a foreign system might criminalize conduct that the U.S. would permit.[190]

Barnhart v. Sigmon Coal Co.[191] is another recent case involving a potential conflict between a statute's text and Congress's intent. The statute at issue in *Barnhart* dealt with certain health care benefit plans created by collective-bargaining agreements in the coal industry. The Act assigned responsibility for funding these benefits to "signatory coal operators" (the original parties to the benefit plans) and, when a signatory is no longer in business, to a defined group of "related persons."[192] The statutory definition of "related persons" did not include the successor-in-interest of a signatory operator.[193] The Supreme Court rejected the petitioners' argument that Congress intended for the successors-in-interest of an original signatory to be responsible for health benefits under the statute.[194] The evidence of congressional intent in *Barnhart*, however, was considerably weaker than the evidence for CAFA's appellate provision. The legislative history evidence in *Barnhart* consisted solely of floor statements,[195] which are consistently viewed as less authoritative than reports from the congressional committees responsible for the legislation.[196] Although the result mandated by the statutory text was somewhat odd in *Barnhart*, excluding liability for the original signatories' successors-in-interest was potentially necessary to secure the support of coal operators and their legislative allies.[197]

Another point of comparison is *Public Citizen v. U.S. Department of Justice*.[198] This case considered whether the procedural and disclosure requirements of the Federal Advisory Committee Act ("FACA") applied to the American Bar Association's Standing Committee on the Federal Judiciary ("ABA Committee"), which regularly provides advice to the Department of Justice ("DOJ") about potential nominees to the federal

188. *Id.* at 393 ("The statute's lengthy legislative history confirms the fact that Congress did not consider whether foreign convictions should or should not serve as a predicate to liability under the provision here at issue.").

189. *Id.* at 388 (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).

190. *Id.* at 389.

191. Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002).

192. *Id.* at 447.

193. *Id.* at 451.

194. *Id.* at 456–62.

195. *Id.* at 456–57.

196. *See, e.g.*, Zuber v. Allen, 396 U.S. 168, 186 (1969) ("A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen.").

197. *See Barnhart*, 534 U.S. at 460.

198. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989).

bench.[199] The text of FACA imposed its requirements on any committee that was "utilized" by the President or a federal agency,[200] but the Court held that Congress did not intend this phrase to apply to DOJ's consultations with the ABA Committee.[201] It reached this conclusion on much weaker evidence of congressional intent than is present for CAFA's appellate provision. Nothing in FACA's legislative history directly addressed this issue.[202] Principally, the Court found it implausible that Congress intended a "straightforward reading" of the statute, which would have imposed FACA's requirements every time the President consulted with the NAACP about nominees to the Equal Employment Opportunity Commission, "aske[d] the leaders of an American Legion Post he is visiting for" their views on military policy, or even consulted with his own political party about potential Cabinet members.[203]

United States v. Locke[204] is also illustrative. The statute at issue in *Locke* required annual filing of certain documents "prior to December 31."[205] The respondents, who had made their filing *on* December 31, urged that the statute should be interpreted to permit filing "on or before December 31."[206] Their theory was that Congress actually intended to permit filings through the end of the calendar year. The Supreme Court rejected this argument, reasoning that the plain language required filing on or before December 30.[207] In *Locke*, the evidence of congressional intent was far weaker than the evidence of intent for CAFA's appellate provision. The only indication that Congress intended to permit filings on December 31 was the intuition that Congress meant to correlate the deadline with "the end of the calendar year that has been recognized since the amendment of the Julian calendar in 8 B.C."[208] The legislative history itself provided no guidance on what deadline Congress intended,[209] and agency regulations explicitly endorsed the literal reading of the statute by requiring filing on or before December 30.[210]

It is far beyond the scope of this Article to exhaustively catalog every case where the Supreme Court has considered evidence of underlying

199. *Id.* at 443.

200. *Id.* at 451–52 (quoting 5 U.S.C. App. § 3(2) (2000)).

201. *See id.* at 443.

202. *Id.* at 467 (Kennedy, J., concurring) (concluding that "Congress *probably* did not intend to subject the ABA Committee to FACA's requirements" based on a review of the pre-FACA regulatory scheme and the "likely origin" of the phrase "or utilized" (emphasis added)).

203. *Pub. Citizen*, 491 U.S. at 452–53 (majority opinion).

204. United States v. Locke, 471 U.S. 84 (1985).

205. *Id.* at 89.

206. *Id.* at 93.

207. *Id.* at 95.

208. *Id.* at 119 (Stevens, J., dissenting).

209. *Locke*, 471 U.S. at 93 (majority opinion) ("[N]othing in the legislative history suggests why Congress chose December 30 over December 31 . . . .").

210. *Id.* at 94.

congressional intent when interpreting a statute. But these four cases help to place in context the overwhelming evidence that, in enacting CAFA's appellate provision, Congress intended to impose a seven-day deadline on CAFA appeals, not a seven-day waiting period.

B. CAFA'S UNPRECEDENTED CONFLICT BETWEEN STATUTORY TEXT AND CONGRESSIONAL INTENT

Another useful metric for assessing a particular interpretive problem is the severity of the conflict between the text and the underlying legislative intent. If a court must drastically alter a statute's meaning in order to accomplish congressional intent, it generally should be reluctant to engage in such severe judicial revision. Reading a statute to mean the exact opposite of what it says would be a prime example of such a drastic deviation from the statutory text. If, on the other hand, a statute needs only minor judicial tinkering to vindicate congressional intent, a court should be more willing to make that modification. An example of a more modest interpretive modification would be imposing an unusual or restricted definition on a statutory term. Following congressional intent is least problematic when the relevant statutory term is ambiguous and the ambiguity may be resolved in a manner that is consistent with Congress's underlying purposes. Graphically, we can summarize these scenarios as follows:

Increasing Conflict Between Text and Legislative Intent ↑

Conforming to Legislative Intent Requires **Major Deviation** from Statutory Text	*Example:* Defining a Term to Mean Its Opposite
Conforming to Legislative Intent Requires **Minor Deviation** from Statutory Text	*Example*: Adopting an Unusual Definition or Narrowing a General Term
Conforming to Legislative Intent Requires **No Deviation** from Statutory Text	*Example:* Defining an Ambiguous Term to Be Consistent with Legislative Intent

Appreciating these three tiers helps to illustrate the contours (and limits) of the current debate over statutory interpretation, as well as why CAFA's appellate provision poses a unique interpretive puzzle.[211]

1. The Current Debate: Using Legislative Intent to Resolve Ambiguities or to Justify Minor Deviations from Statutory Text

To date, the textualist–intentionalist debate has focused on the bottom two tiers, that is, cases where legislative intent is used either to resolve an ambiguity in the text or to deviate from the text in a relatively minor way. It is in the bottom category of cases—statutory ambiguity—where some have argued recently that the textualist–intentionalist debate is essentially over. Both textualists and intentionalists agree that statutory language can be ambiguous, and in those situations, it is proper for judges to consult not only the statute's text but also its context, including the legislative intent underlying that statute.[212]

This common ground between textualists and intentionalists should not be overstated, however. Ambiguity is in the eye of the beholder.[213] While textualists and intentionalists appear to agree with the general principle that unenacted congressional intent may be considered when interpreting ambiguous statutes, they frequently clash over whether particular statutes are, in fact, ambiguous. Textualists tend to find clarity in statutes that intentionalists find ambiguous.[214] Thus, an intentionalist would situate a

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211. I do not mean to suggest that this spectrum is the only way to measure the depth of conflict between a statute's text and underlying intent. One might seek to compare the practical consequences of following the text as compared to following the underlying intent. *Cf.* Steinman, *supra* note 8, at 318 (comparing different interpretations of 28 U.S.C. § 1367 based on the extent to which each interpretation would expand federal jurisdiction); *id.* at 325 (same, regarding CAFA). One might even measure such conflict based on the number of words (or even letters) that would need to be changed to conform the statute to its drafters' intentions. *Cf.* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529 (1989) (Scalia, J., concurring) ("The available alternatives are to interpret 'defendant' to mean (a) 'civil plaintiff, civil defendant, prosecutor, and criminal defendant,' (b) 'civil plaintiff and defendant and criminal defendant,' or (c) 'criminal defendant.' Quite obviously, the last does least violence to the text.").

212. *See* Manning, *supra* note 75, at 439 ("[T]extualists find it appropriate in cases of ambiguity to consult a statute's apparent purpose or policy."); Molot, *supra* note 2, at 35; Nelson, *supra* note 2, at 407–09; *see also In re* Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.) ("Legislative history . . . may help a court discover but may not change [a statute's] original meaning.").

213. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) ("[A]mbiguity is apparently in the eye of the beholder.").

214. *Compare, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292, 294 (1988) (Kennedy, J.) (finding ambiguity in the phrase "common control" but no ambiguity in the phrase "under authorization of"), *with id.* at 309–10 (Brennan, J., concurring in part, dissenting in part) (finding ambiguity in both phrases), *with id.* at 318, 329 (Scalia, J., concurring in part, dissenting in part) (finding no ambiguity in either phrase); *compare Exxon Mobil Corp.*, 545 U.S. at 566 (Kennedy, J.) (finding no ambiguity in the phrase "civil action of which the district

particular statute in the lowest tier, where consideration of legislative intent is not controversial. The textualist, on the other hand, would situate that same statute in a higher tier, where modifying the text in service of congressional intent is a more divisive move.

In the second tier (where conforming to legislative intent requires a minor deviation from the statutory text), the textualist–intentionalist debate remains quite active. Cases in this category present what I call the paradigmatic interpretive puzzle. A court's options are either (1) follow the plain meaning of the text or (2) adopt a restricted or unusual definition of statutory terms in order to accomplish Congress's underlying intent. In this category, judicial tinkering with a statute's text has a considerable historical pedigree,[215] and the textualist challenge to that tradition has been a core feature of the present debate.[216]

The Supreme Court cases summarized earlier[217] are all examples of this paradigmatic interpretive choice. In *Small*, Justice Breyer concluded that the phrase "convicted in *any* court,"[218] covered only convictions in domestic courts (not foreign courts).[219] In doing so, he adopted a restrictive definition ("domestic court") of a generalized term in the statute ("court"). Justice Thomas, in dissent, argued that such a narrow definition was inappropriate

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courts have original jurisdiction"), *with id.* at 572–73 (Stevens, J., dissenting) (finding this phrase to be ambiguous).

215. *See* United States v. Palmer, 16 U.S. 610, 631 (1818) ("[G]eneral words must . . . be limited to . . . those objects to which the legislature intended to apply them.") (Marshall, C.J.); Some scholars have described the "Golden Rule" by stating:

> [If] giving the words their ordinary signification [produces] an inconsistency, or an absurdity or an inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, [then the Court may] put on them some other signification, which, though less proper, *is one which the Court thinks the words will bear.*

HART & SACKS, *supra* note 17, at 1112 (emphasis added) (quoting an 1877 House of Lords decision by Lord Blackburn); *id.* at 1171 ("'[W]here words bear . . . a very absurd signification, if literally understood, we must *a little deviate* from the received sense of them.'" (emphasis added) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *60)); *id.* at 1192 (noting the availability of maxims that allow "Cutting Down the Generality of Language"); Nelson, *supra* note 73, at 464: (describing Blackstone's argument that a statute "giving the lord of a manor power to judge all cases arising within the manor . . . should not be understood to reach cases in which the lord was himself a party"). Even Grotius recognized that it is permissible to "correct[]" a general term that is deficient "by reason of its universality." HART & SACKS, *supra* note 17, at 1171 ("From this method of interpreting laws . . . arises what we call *equity*; which is thus defined by Grotius, 'the correction of that, wherein the law (by reason of its universality) is deficient.'" (quoting BLACKSTONE, *supra*, at *61)).

216. *Compare* Manning, *supra* note 75, at 439 ("A central precept of textualism is that interpreters must respect the level of generality at which the text expresses legislative policy judgments."), *with id.* at 440–41 ("Classical intentionalists . . . are willing to adjust the level of generality at which legislation speaks in order to make the textual expression of policy more congruent with what the majority would have wanted had it confronted the precise issue.").

217. *See supra* notes 184–210 and accompanying text.

218. 18 U.S.C. § 922(g)(1) (2000) (emphasis added).

219. Small v. United States, 544 U.S. 385, 387 (2005).

given the statute's plain language: "The broad phrase 'any court' unambiguously includes all judicial bodies with jurisdiction to impose the requisite conviction—a conviction for a crime punishable by imprisonment for a term of more than a year."[220]

In *Barnhart*, Justice Thomas (writing for the Court) insisted that a successor-in-interest to a "signatory operator" was not covered by the statute because successors-in-interest were not included in the list of "related persons" to which the statute extended.[221] Justice Stevens, in dissent, argued that Congress intended for such successors-in-interest to be covered and that this result could be reached by defining the term "signatory operator" itself to include such an operator's successor-in-interest.[222] This would be a somewhat unusual definition, but it would not be unheard of and would be consistent with default rules for interpreting certain statutory references to corporate entities.[223]

The *Public Citizen* case also fits this pattern. Writing for the majority, Justice Brennan acknowledged that under the "common sense of the term," the Executive Branch "utilizes" the ABA Committee when it consults with the committee about judicial nominees.[224] But he concluded that Congress did not intend the term to be "[r]ead unqualifiedly."[225] Accordingly, Justice Brennan restricted the term "utilize" to comprise only consultations with groups formed by "quasi-public organizations," not the ABA.[226] In concurrence, Justice Kennedy argued that the majority's interpretation of FACA "does not accord proper respect to the finality and binding effect of legislative enactments."[227] He contended that the Court was bound by "the plain language of the statute," which clearly covered the Executive Branch's consultations with the ABA Committee.[228]

Locke illustrates the paradigmatic case as well. The statute there required annual filing of certain documents "prior to December 31."[229] Writing for the majority, Justice Marshall concluded that the plain language required filing on or before December 30.[230] Justice Stevens's dissent, on the

220. *Id.* at 396 (Thomas, J., dissenting) (footnote omitted).

221. *See supra* notes 192–97 and accompanying text (discussing the Court's interpretation of the term "related persons").

222. Barnhart v. Sigmon Coal Co., 534 U.S. 439, 469–70 (2002) (Stevens, J., dissenting).

223. *Id.* at 470 (quoting 1 U.S.C. § 5).

224. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 452 (1998).

225. *Id.*

226. *Id.* at 462.

227. *Id.* at 469 (Kennedy, J., concurring). Although Justice Kennedy disagreed with the majority's interpretation of FACA, he concurred in the result because he concluded that imposing FACA requirements on the ABA Committee would violate the Appointments Clause of Article II of the U.S. Constitution. *Id.* at 482.

228. *Id.* at 469–70.

229. United States v. Locke, 471 U.S. 84, 88 n.2 (1985).

230. *Id.* at 95.

other hand, would have correlated the deadline with the end of the calendar year. He would have modified the phrase "*prior to* December 31" to mean "*prior to the close of business* on December 31."[231]

This second category of cases—where conforming to congressional intent requires a significant but comparatively minor deviation from the statutory text—has also been the focus of a recent debate within textualism itself. Prominent textualists have disagreed over the propriety and scope of interpretive escape valves, such as the scrivener's error and absurdity doctrines. Justice Scalia—the judiciary's most prominent advocate of textualism[232]—has expressed a willingness to disregard the statutory text where Congress's intentions are "absolutely clear" but "inadequately expressed" in the statute itself.[233] Textualist scholars John Manning and John Nagle, on the other hand, have steadfastly opposed judicial correction of statutory terms,[234] recognizing that allowing exceptions to a statute's plain text undermines textualist interpretive theory.[235]

Green v. Bock Laundry Machine Co.,[236] which interpreted Federal Rule of Evidence 609, is an example of a case where even a textualist might not adhere to the text. Rule 609 required a court to consider "prejudicial effect

231. *Id.* at 118–19 (Stevens, J., dissenting) (emphasis added).

232. *See generally* SCALIA, *supra* note 2, at 14–37 (endorsing textualism as a theory of statutory interpretation).

233. United States v. X-Citement Video, Inc., 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) ("[T]he *sine qua non* of any 'scrivener's error' doctrine, it seems to me, is that the meaning genuinely intended but inadequately expressed must be absolutely clear; otherwise we might be rewriting the statute rather than correcting a technical mistake. That condition is not met here."); *see also* SCALIA, *supra* note 2, at 20 (endorsing judicial authority to correct a "'scrivener's error,' where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made"); Manning, *Absurdity Doctrine*, *supra* note 2, at 2439–40 (describing Justice Scalia's view on this issue); Ronald Dworkin, *Comment*, *in* SCALIA, *supra* note 2, at 116 (noting that Scalia's escape valves "allow[] respect for intention to trump literal text"). The same may be said for Judge Easterbrook, another noted textualist jurist. *See* Nelson, *supra* note 73, at 451 (describing Judge Easterbrook as a "textualist judge" and arguing that he permits deviation from a statute's text in certain circumstances); *see also* Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998) (Easterbrook, J.) ("[A] court should implement the language actually enacted—provided the statute is not internally inconsistent or otherwise absurd."); *In re* Sinclair, 870 F.2d 1340, 1344–45 (7th Cir. 1989) (Easterbrook, J.) (suggesting that a court need not follow a statute's plain meaning if that meaning is "absurd or inconsistent with the structure of the remaining provision"); Nagle, *supra* note 157, at 1 ("Even the most ardent textualists have admitted exceptions to the general rule that the statutory text is the end of the interpretive inquiry.").

234. *See* Manning, *Absurdity Doctrine*, *supra* note 2, at 2419–31 (arguing that the absurdity doctrine is inconsistent with textualism); Nagle, *supra* note 157, at 1–12 (same). *But see* Manning, *supra* note 75, at 425 n.22 (acknowledging but declining "to address more definitively the appropriateness" of allowing judges to modify the text of a statute "[w]here the text itself reveals an unmistakable error in transcription rather than expression").

235. *See* Nagle, *supra* note 157, at 1 (agreeing with the argument by opponents of textualism that "textualism's exceptions are unprincipled" and asserting that textualism's exceptions are "unnecessary").

236. Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989).

to the defendant" when deciding whether to admit evidence of prior felonies to impeach a witness.[237] By not allowing consideration of prejudice to the plaintiff, the Rule's literal meaning would create an imbalance between plaintiffs and defendants in civil cases. The Supreme Court concluded that giving civil defendants such an advantage was "unfathomable" and, therefore, the statute "'can't mean what it says.'"[238] The Court recognized, however, that there were valid reasons for protecting *criminal* defendants from potential prejudice while not protecting the prosecution.[239] Accordingly, the Court departed from the literal meaning of the term "defendant" and defined it to include only criminal defendants.[240]

Writing separately, Justice Scalia agreed that "the word 'defendant' cannot have been meant literally,"[241] and he even embraced reliance on legislative history to determine Congress's true intent:

> I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word "defendant" in the Rule.[242]

Finding that there was not even "a shred of evidence that anyone has ever proposed or assumed such a bizarre disposition,"[243] Justice Scalia believed that "[o]ur task is to give some alternative meaning to the word 'defendant' . . . that avoids this consequence."[244] He agreed with the majority that the term "defendant" should be interpreted to mean "criminal defendant."[245]

Other textualists disagree with Justice Scalia's willingness to deviate from a statute's text in a case like *Green*. John Nagle, for example, has argued that Justice Scalia might have reached the same result on constitutional grounds, and thus avoided endorsing judicial authority to manipulate a statute's text via interpretation.[246] This reveals that debates over how to resolve a conflict between a statute's text and legislative intent can arise not

237. *Id.* at 509.

238. *Id.* at 510–11 (quoting Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1989)).

239. *Id.* at 510.

240. *Id.* at 521–24.

241. *Green*, 490 U.S. at 528 (Scalia, J., concurring).

242. *Id.* at 527.

243. *Id.*

244. *Id.*

245. *Id.* at 528–30.

246. *See* Nagle, *supra* note 157, at 10 (noting that *Green* "presented serious due process problems in the plain language of the statute's preference for civil defendants to civil plaintiffs").

only between textualists and intentionalists, but also within textualism itself. More importantly for the purposes of this Article, this intramural dispute within textualism further illustrates that the key battlegrounds are cases where a fairly minor deviation from a statute's text would be required to effectuate Congress's underlying intent.

2. CAFA's Dilemma: Can a Statute Mean the Opposite of What It Says?

CAFA's appellate provision presents a different scenario from the examples addressed so far. To effectuate the legislative intent underlying CAFA's appellate provision requires far more than an unusual or narrowing construction of statutory text. A court must read a word in a statute ("less") to mean its exact opposite ("more"). Although the Court has endorsed several canons of construction that would permit a court to tinker with a statute's text in order to vindicate Congress's purpose,[247] it has never read these canons to allow a judicial correction that would replace a statutory term with its opposite.[248] In fact, the Supreme Court has described these canons as allowing only minor deviations from the statutory text, such as the use of a restricted or unusual definition of a statutory term.[249] Put another

247. *See supra* notes 153–56 and accompanying text (discussing the canons of construction of the Supreme Court that allow the Court to go beyond text).

248. Some state courts have recognized a judge's authority to correct a drafting error by construing a statute to mean the opposite of what it says. In *Scurto v. Leblanc*, 184 So. 567 (La. 1938), the Supreme Court of Louisiana interpreted a statute providing "that a party litigant may impeach the testimony given by his opponent on cross-examination, 'in any *unlawful* way.'" *Id.* at 574 (emphasis added) (quoting 1934 La. Acts 115, § 1). In concluding that the use "of the word 'unlawful' instead of 'lawful' was an accident," the Court construed the statute to allow impeachment of an opponent's testimony in any *lawful* way. *Id.*; *see also* Johnson v. U.S. Gypsum Co., 229 S.W.2d 671, 672–73 (Ark. 1950) (construing the statutory phrase "shall be" to mean "shall not be"). It does not readily follow, however, that the Supreme Court would authorize the federal judicial branch to take similar liberties with a statute enacted by Congress. The tradition of common law policy-making by state courts arguably gives them greater leeway when interpreting a state statute than federal courts (which lack broad authority to make common law) have when interpreting a federal statute. *See* Farber, *supra* note 2, at 283 (recognizing that "[s]tate courts have the authority to create common law doctrines embodying their own views of public policy, subject to legislative modification" but that "the federal courts have narrower common law powers"); Chief Judge Judith Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 29 (1995) (recognizing the connection between judicial authority to make public policy through the development of common law and the judicial authority to make public policy through statutory interpretation).

249. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) ("We have reserved some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute." (quotation marks and citations omitted)); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) ("I have been willing, in the case of civil statutes, to acknowledge a doctrine of 'scrivener's error' that permits a court to give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd . . . result.").

way, a court's interpretation must still be "consistent" with the statutory terms, even if it does not adhere to the terms' ordinary definitions.[250]

Nor is it clear that scholars who defend a judge's authority to deviate from a statute's text would allow a judge to read a statute to mean the opposite of what it says. Professor Eskridge's historical challenges to textualism suggest that a court's interpretive leeway is limited to modifications that either create equitable exceptions to general statutory commands or extend statutes to cover similarly situated cases that do not fall within the statute's literal scope.[251] While he criticizes strict textualist approaches that "refus[e] to recognize alternative usages" or "strong-arm[] statutory language into an artificial clarity,"[252] his historical analysis does not legitimize the judiciary's ability to construe a statute to mean the opposite of what it says. Justice Breyer also appears to limit his defense of the judiciary's interpretive authority to the paradigm discussed above. His principal example is a federal statute forbidding possession of "any . . . counterfeit coin," which he argues should be corrected to prohibit only the possession of counterfeit U.S. currency.[253]

The correctionists' judicial manipulation of CAFA is qualitatively different from employing intentionalist interpretive tools in the paradigmatic cases discussed above. If courts can read a statute to mean the exact opposite of what it says, then citizens and lawyers lose the ability to rely on a statute's clear language.[254] Even the Ninth Circuit panel in

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250. Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940) ("A literal reading of [statutory terms] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.").

251. *See* Eskridge, *All About Words*, *supra* note 2, at 1094–95 (arguing that historically, judges had "leeway to soften texts when fundamental rights were involved or to extend texts when needed to fulfill statutory purposes"); *see also id.* at 1001 (discussing "ameliorative power"); *id.* at 1003 (discussing "suppletive power").

252. *Id.* at 1092.

253. Breyer, *supra* note 146, at 850–51; *see also* BREYER, *supra* note 2, at 85 (confining his theory of statutory interpretation to "difficult cases of interpretation in which [statutory] language is not clear"); *id.* ("The interpretive problem arises when statutory language does not clearly answer the question of what the statute means or how it applies."). In their treatise *The Legal Process*, Professors Hart and Sacks argued that a court should "[i]nterpret the words of the statute . . . so as to carry out the purpose as best it can," yet they would not allow courts to give the words of a statute "a meaning they will not bear." HART & SACKS, *supra* note 17, at 1374. But they also suggested that the judiciary should have the authority to change the meaning of a statute more drastically "when it is completely clear from context that a mistake has been made." *Id.* at 1376. As they further explained,

> [c]ourts on occasion can correct mistakes, as by inserting or striking out a negative, when it is completely clear from the context that a mistake has been made. But they cannot permit the legislative process, and all the other processes which depend upon the integrity of language, to be subverted by the misuse of words.

Id.

254. Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1093, 1100 (9th Cir. 2006) (Bybee, J., dissenting) (arguing that the correctionist approach

Amalgamated, which endorsed the correctionist approach, was so acutely aware of this reliance problem that it imposed the seven-day deadline only *prospectively*.[255] Because its interpretation "changed the statutory deadline for seeking to appeal to the opposite of what the plain language of the statute says," the Ninth Circuit panel reasoned that to impose that deadline on the parties to the case could create "serious unfairness and [a] potential due process violation."[256] This concern is well-founded. But it is far from clear that applying such a drastic judicial revision only prospectively resolves the concern. As Justice Bybee argued in his *Amalgamated* dissent, citizens should be able to "trust the statute as written to mean what it plainly says" rather than be required to "look to [judicial] decisions in every instance for a contrary construction."[257] This is not to say that lawyers and citizens should be free to ignore judicial decisions that bear on a particular statute. Even first-year law students quickly recognize that restricted or unusual definitions of statutory terms are part of our "interpretive community,"[258] and that therefore it is critical to inquire how judges have interpreted the statute in question. Thus, good lawyers reading Federal Rule of Evidence 609 (the text

"strips citizens of the ability to rely on the laws as written" and creates "a trap for citizens (and their lawyers) who can no longer trust the statute as written to mean what it plainly says, but must look to our decisions in every instance for a contrary construction"); *see also* Nelson, *supra* note 73, at 463 n.22 ("There is consensus . . . that the people subject to a statute should have fair notice of the law's requirements.").

255. *See* Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1146–47 (9th Cir. 2006) (allowing plaintiffs' appeal to proceed despite the untimely petition for permission to appeal).

256. *Id.*; *see also Amalgamated Transit Union*, 448 F.3d at 1095 (order denying rehearing en banc) (Bybee, J., dissenting) (referring to this aspect of the panel's decision and stating that "the panel's confession was forthright").

257. *Amalgamated Transit Union*, 448 F.3d at 1100; *see also* Howard J. Bashman, *Less Is More: When Courts Decide a Law Means the Opposite of What It Says*, LAW.COM, Feb. 13, 2006, http://www.law.com/jsp/article.jsp?id=1139565913861 ("When a court decides that a statute should mean the opposite of what it says, the language of the statute remains the same, misleading those who are unaware of the court's ruling.").

258. *See generally*, STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 14 (1980) (arguing that interpretive communities create meaning); *see also* Manning, *supra* note 75, at 434–35 ("[W]here appropriate in context, textualists seek out technical meaning, including the specialized connotations and practices common to the specialized sub-community of lawyers."). Using the notion of interpretive communities to determine proper methods of statutory interpretation presents a bit of a circularity problem. *See* Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461, 512 n.29 (1997) (noting Professor Fish's "circularly constructed 'interpretive communities'"). Because the legal community is trained to follow the interpretive methodology set forth in judicial decisions, it could be said that any methodology selected by authoritative judges becomes, by definition, the way that meaning is created for the interpretive community of lawyers. *Cf.* Nelson, *supra* note 73, at 456 ("From the 1950s until the 1970s, moreover, the interpretive conventions associated with this approach dominated American jurisprudence. Yet textualists rejected them. If textualism simply entails reading statutes against the backdrop of prevailing interpretive conventions, how could textualists do so?").

at issue in *Green*[259]) would ask themselves what kinds of "defendant[s]" the rule protects.[260] Good lawyers would even ask themselves whether a statute requiring a filing "prior to December 31" (as in *Locke*[261]) necessarily prohibits filing *on* December 31.[262] But to require lawyers and citizens to ask themselves whether the word "less" in a statute really means "more" crosses a significant line—a line that, so far, the Supreme Court has not been willing to cross.

The institutional relationship between the federal judiciary and Congress also undermines the legitimacy of the correctionist approach to CAFA's appellate provision. A core premise of this relationship is that Congress retains the authority to legislatively correct judicial interpretations of statutes.[263] If Congress disagreed with *Green*[264] and wanted to give defendants special protections in civil cases as well, it could revise Federal Rule of Evidence 609 to say "civil or criminal defendant." The text of CAFA, on the other hand, unambiguously imposes a waiting period—not a deadline—by requiring an appeal "not less than 7 days" after entry of the district court's order.[265] If such a waiting period was in fact Congress's desire, it would be nonsensical to require legislation saying, essentially, "when we said 'less' we really meant it."[266] Yet the correctionist approach would require precisely that.

Thus, to "correct" CAFA would require a judicial revision that is fundamentally different from those that have been considered (and

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259. *See supra* notes 236–40 and accompanying text (discussing the Supreme Court's interpretation of Federal Rule of Evidence 609).

260. FED. R. EVID. 609.

261. *See supra* notes 229–31 and accompanying text (discussing the Supreme Court's interpretation of filing dates).

262. Such a statute, after all, fails to specify the *time* on December 31 "prior to" which the filing must occur. Filing on December 31 at 4:59 p.m. is filing "prior to" December 31 at 5:00 p.m. (or 11:59 p.m.). *Cf.* United States v. Locke, 471 U.S. 84, 119 (1985) (Stevens, J., dissenting) (arguing that "Congress actually intended to authorize an annual filing at any time prior to the close of business on December 31st").

263. *See, e.g.*, Finley v. United States, 490 U.S. 545, 556 (1989) ("Whatever we say regarding the scope of . . . a particular statute can of course be changed by Congress.").

264. *See supra* notes 236–40 and accompanying text (discussing the Supreme Court's interpretation of Federal Rule of Evidence 609).

265. 28 U.S.C.A. § 1453(c)(1) (West 2006).

266. A recent opinion by Justice Scalia highlights this problem. In *Osborn v. Haley*, 127 S. Ct. 881 (2007), the Court permitted appellate review of a district court order remanding a case to state court for improper certification under the Westfall Act. *Id.* at 888–89. In dissent, Justice Scalia argued that the Court's decision "repealed" Congress's determination in 28 U.S.C. § 1447(d) that remand orders are completely unreviewable "'on appeal or otherwise.'" *Id.* at 910 (quoting 28 U.S.C. § 1447(d)). In light of the majority's decision to allow review of such orders, Justice Scalia concluded: "One might suggest that Congress should restore [the prohibition on appellate review], but it is hard to imagine new statutory language accomplishing the desired result any more clearly than § 1447(d) already does." *Id.* at 910.

sometimes accepted) in the paradigmatic cases described above.[267] By reading a statute to mean the exact opposite of what it says, the correctionists have made an interpretive leap that has yet to be squarely addressed by either current academic theory or Supreme Court precedent.

C. CAFA's UNPRECEDENTED PROBLEM IN INTERPRETIVE THEORY AND THE ROLE OF PRACTICAL CONSEQUENCES

CAFA's appellate provision thrusts us into statutory interpretation's next frontier: how to interpret a statute where the underlying purpose is clear, but the enacted text directly contradicts that purpose. On one hand, CAFA's appellate provision is an exceptionally strong candidate for judicial revision because it is accompanied by overwhelming evidence of legislative intent, not only from the legislative history, but also from the structure of the statute itself and, indeed, common sense.[268] On the other hand, the judicial revision needed to "correct" CAFA would work unprecedented violence on the statutory text.[269] Rather than adopt a restricted or unusual definition of a statutory term, the correctionist approach would define a statutory term to mean the exact opposite of what it says.

Thus, CAFA's appellate provision upsets many of the assumptions and priorities that inform textualist and intentionalist approaches to statutory interpretation. One of the foundational textualist tenets—intent skepticism[270]—is quite questionable in the context of CAFA's appellate provision. While there ordinarily might be good reason to doubt the judiciary's ability to glean legislative intent from sources other than the text of the statute itself, even textualists might be willing to suspend their disbelief here. CAFA's legislative history, its structure, and common sense all confirm that Congress meant to impose a seven-day deadline rather than a seven-day waiting period.[271] CAFA presents a new quandary for intentionalists as well. Intentionalists ordinarily encourage restricted or unusual definitions of statutory terms in order to vindicate a statute's underlying purpose. Nevertheless, they might think twice about replacing a statutory term with its exact opposite.[272]

As explained above, these dilemmas arise because two metrics for evaluating conflicts between text and legislative intent point in opposite directions. Examining the practical consequences of competing interpretations may help break the tie. Courts already use practical consequences as evidence of congressional intent (the first metric this

267. *See supra* notes 218–31; 236–40.

268. *See supra* Part IV.A (noting the strength of legislative intent).

269. *See supra* Part IV.B (noting the conflict between the text and statutory intent).

270. *See supra* notes 121–32 and accompanying text (defining intent skepticism).

271. *See supra* notes 169–83 and accompanying text (discussing the evidence of Congressional intent and the inferences courts should draw from that intent).

272. *Supra* notes 251–53.

Article employs). If the consequences of following the plain text would be absurd, that is a strong indication that Congress truly must not have intended that result.[273]

Practical consequences are significant for another reason, however. No one believes that courts should depart from a statute's text cavalierly. Such departures undermine reliance and rule-of-law values, especially when they go so far as to read a statute to mean the opposite of what it says.[274] However, when a court adheres to statutory text that conflicts with Congress's underlying intent, it imposes a policy different from the one that Congress meant to create. Congress has no one to blame but itself, of course. Every conflict between a statute and the legislative intent behind that statute is, essentially, a mistake by Congress that could have been corrected by more careful drafting.

Where the choice between following the text and following unenacted legislative intent would have only minor practical consequences, following the text is more defensible. In that situation, Congress "loses" in the sense that the policy result is not exactly the one that it intended. But this is justifiable because it was Congress's careless drafting that led to the conflict in the first place. Following the text in that situation would have minimal impact on society at large because (by assumption) the practical consequences of choosing the text over underlying intent are minor.

If, on the other hand, following the text would have troubling practical consequences that Congress did not actually intend, adhering to the text is more problematic. Congress, again, has little room to complain; the conflict is entirely the result of its own inartful drafting. But now a different question moves to the fore: should the general public be forced to pay for Congress's mistake, which is a mistake of *expression* rather than a mistake of *judgment*?

The practical consequences of the literalist approach to CAFA's appellate provision are troubling indeed. Even one who is convinced that institutional and constitutional concerns bind courts to CAFA's plain meaning would have to concede that the consequences are difficult to defend on policy grounds.[275] Under the literalist approach, there would be

273. *Supra* notes 156–58 and accompanying text.

274. *See supra* notes 254–57 and accompanying text (indicating that the ability to rely on a statute's clear language is a necessary legal tool).

275. Not even Judge Bybee attempts to argue that the result of the literalist approach is sensible as a matter of policy. *See* Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1096–97 (9th Cir. 2006) (Bybee, J., dissenting). Judge Bybee stated:

> [T]he courts' role is to give effect to statutes as Congress enacts them; it is not the courts' role to assess whether a statute is wise or logical. Had I been a member of Congress, or an attorney reviewing the statute prior to recommending that the President sign the CAFA, I might have agreed with the panel's observation that the statute is "illogical." We might also think it was "dumb" and "stupid." Those labels have no legal meaning here.

Id. (citations omitted).

no outer deadline for seeking an appeal under CAFA. This is a troubling result that is especially odd given CAFA's command that the appellate court decide CAFA appeals within sixty days.[276] The potential benefits of quick appellate decisions are easily squandered if parties are allowed to delay indefinitely in pursuing those appeals in the first place.

Furthermore, the literalist approach could lead to a staggering waste of judicial resources. If the district court denies the motion to remand and retains the case, the litigation might proceed for months if not years in federal court, after which the plaintiff (perhaps after receiving an adverse pretrial ruling of some kind) could suddenly appeal the refusal to remand. A successful appeal would send the case back to state court to start all over again.[277]

If the district court grants the motion to remand the case to state court, the potential for mischief is even greater. Conceivably, a defendant could appeal the federal court's remand order after the case had progressed in state court through costly pretrial proceedings and even to trial. If the appeal is successful, the case would return once again to federal court, rendering the state court proceedings a wasteful exercise in futility.[278] At a minimum, the lack of an appellate deadline would leave the district court uncertain about the appropriate time to send the case back to state court. A fixed deadline, on the other hand, assures the district court that once the

276. The strictness of this sixty-day decision period is evident when compared to the fact that it typically takes close to a year to resolve federal appeals. *See* ROBERT J. MARTINEAU ET AL., APPELLATE PRACTICE AND PROCEDURE 90 (2d ed. 2005) (stating that the median time between the filing and disposition of appeals ranged from 10.5 months to 12.0 months during the five annual reporting periods from 1999 to 2003).

277. Ordinary procedure governing a district court's denial of a motion to remand can produce a similar risk of wasted judicial resources because appellate correction of an erroneous decision to retain a case cannot occur until after a final judgment. *See supra* note 53 and accompanying text. This risk is mitigated, however, because the final judgment rule effectively prevents any appellate review in cases that are disposed of via settlement. Because parties often find it in their best interests to settle prior to trial, a small fraction of cases actually reaches the final judgment that is a prerequisite to appellate review. *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1259 (2005) (noting that in 2003 only 1.7% of all civil cases filed went to trial). By contrast, a literalist reading of CAFA would allow opportunistic interlocutory appeals (perhaps to improve a party's settlement posture) that, if successful, would require a return to state court after substantial resources have been expended in federal court.

278. Similar problems are conceivable under ordinary removal procedure because in some circumstances, a case may proceed in state court for some time before a defendant removes it to federal court. For the most part, the thirty-day deadline for removing a state court case prevents this. *See* 28 U.S.C. § 1446(b) (2000). But if a case "become[s] removable" during the course of state court proceedings, it may be removed to federal court even though substantial resources have already been expended in state court. *Id.* The potential for this scenario is fairly limited, however, because plaintiffs are largely in control of whether a case becomes removable later in the litigation; having selected the state forum initially, they presumably would wish to remain there. Also, there is an absolute one-year deadline for removal of non-CAFA diversity cases. *Id.*

deadline has passed, it may remand the case without risk of appellate intervention.

For all these reasons, the literalist approach would lead to troubling results. Perhaps these results are so undesirable as a matter of policy that they would justify the unprecedented step of reading a statute to mean the exact opposite of what it says. The literalist approach, however, is not the only alternative to the correctionist approach. As the next Part explains, the literalist approach is not a viable alternative at all. Both proponents and critics of the literalist approach misunderstand the true consequences of following the plain text of CAFA's appellate provision because they ignore the role of the default timing rules set forth in the Federal Rules of Appellate Procedure. A proper understanding of the Appellate Rules would establish a meaningful deadline for pursuing CAFA appeals without doing unprecedented violence—or any violence—to CAFA's text.

V. A BETTER SOLUTION TO THE CLASS ACTION FAIRNESS ACT'S APPELLATE DEADLINE RIDDLE

This Part proposes a solution to CAFA's appellate deadline riddle that has eluded courts and commentators. This approach accepts the literalists' view that courts must heed what Congress wrote in the statute and not what Congress probably meant to write in the statute. Accordingly, courts must read CAFA to impose a seven-day waiting period before pursuing a CAFA appeal. Even under this interpretation, however, the Federal Rules of Appellate Procedure would impose a thirty-day deadline for pursuing CAFA appeals. Because CAFA authorizes a discretionary appeal without specifying an outer deadline, Appellate Rule 5 imposes the standard thirty-day deadline for filing a notice of appeal in civil cases.[279] Thus the rule-based approach would establish a meaningful deadline for pursuing CAFA appeals, albeit one that is not as strict as the seven-day deadline Congress had in mind.

A. APPLYING THE FEDERAL RULES OF APPELLATE PROCEDURE TO CAFA APPEALS

The Federal Rules of Appellate Procedure were promulgated by the Supreme Court in conformity with the Rules Enabling Act and therefore have the force of law in federal court.[280] The procedures for pursuing federal appeals vary depending on whether the appeal is discretionary or as of right. Appellate Rules 3 and 4 govern appeals as of right.[281] When an appeal is "permitted by law as of right," the appellant must file a notice of

279. *See infra* notes 284–87 and accompanying text (discussing the procedural requirements for filing discretionary appeals).

280. *See* 28 U.S.C. § 2072. "The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States . . . courts of appeals." *Id.* § 2072(a).

281. FED. R. APP. P. 3 ("Appeal as of Right—How Taken"); *Id.* 4 ("Appeal as of Right—When Taken").

appeal with the district court within the time set forth by Rule 4.[282] In civil cases, which are governed by Rule 4(a), a notice of appeal must be filed "within 30 days after the judgment or order appealed from is entered."[283]

Appellate Rule 5 governs the procedure for discretionary appeals. Rule 5 provides that where "an appeal is within the court of appeals' discretion," a party wishing to appeal "must file a petition for permission to appeal."[284] The party must file this petition "within the time specified by the statute or rule authorizing the appeal."[285] If the statute or rule authorizing the appeal does not specify the time within which permission must be sought, the party must file the petition "within the time provided by Rule 4(a) for filing a notice of appeal."[286] Rule 4(a)'s deadline is ordinarily thirty days after the order is entered.[287]

Applying these rules to CAFA's appellate provision, a litigant wishing to appeal the district court's ruling on a CAFA remand motion must file a petition for permission to appeal within thirty days after entry of the district court's order. CAFA provides that "a court of appeals *may* accept an appeal from an order of a district court granting or denying a motion to remand."[288] Use of the word "may" plainly indicates that it is within the appellate court's discretion whether to accept the appeal.[289] CAFA certainly does not create an appeal as of right from rulings on motions to remand.[290] Statutes creating appeals as of right invariably use the word "shall" instead of "may."[291] Thus, discretionary appeals under CAFA fall squarely within the scope of Rule 5.[292]

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282. *Id.* 3(a)(1) ("An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4.").

283. *Id.* 4(a)(1)(A). In civil cases to which the United States government is a party, the deadline to appeal is sixty days. *See id.* 4(a)(1)(B). The deadline for appeals in criminal cases is ten days for appeals by the defendants and thirty days for appeals by the government. *See id.* 4(b)(1).

284. *Id.* 5(a)(1).

285. *Id.* 5(a)(2)

286. FED. R. APP. P. 5(a)(2) ("The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.").

287. *Id.* 4(a)(1)(A).

288. 28 U.S.C.A. § 1453(c)(1) (West 2006) (emphasis added).

289. *See* S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46 ("New subsection 1453(c) provides that an order remanding a class action to state court is reviewable by appeal at the discretion of the reviewing court.").

290. *Compare* FED. R. APP. P. 3 (governing appeals "permitted by law as of right"), *with id.* 5 (governing appeals "within the court of appeals' discretion").

291. *See* 28 U.S.C. § 1291 (2000) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . ."); *id.* § 1292(a) ("[T]he courts of appeals shall have jurisdiction of appeals from [certain enumerated interlocutory orders].").

292. Although federal courts have yet to consider whether Rule 5's incorporation of Rule 4's deadline applies to CAFA appeals, they have considered the general question of whether

Under Rule 5, a litigant wishing to pursue a CAFA appeal must file a petition for permission to appeal.[293] This "petition must be filed within the time specified" in CAFA, but if "no such time is specified," Rule 4(a)'s thirty-day deadline for civil cases would apply.[294] CAFA does not specify the time within which litigants may appeal. It specifies a time (seven days) *after* which litigants may appeal, but it does not indicate the time *within* which litigants may seek an appeal. Thus, under the Appellate Rules, litigants must seek permission to appeal under CAFA within the deadline set by Rule 4(a)—i.e., within thirty days of entry of the district court's order.

A correct understanding of the interplay between CAFA's appellate provision and the Federal Rules of Appellate Procedure reveals that following the literal text of CAFA's appellate provision would not have the consequences that courts and commentators have assumed. It is true that CAFA would impose a seven-day waiting period on CAFA appeals—an appellate court may accept a CAFA appeal only "if application is made to the court of appeals not less than 7 days after entry of the order."[295] But contrary to the prevailing understanding, following CAFA's literal text does not mean that there would be no outer deadline on CAFA appeals. CAFA appellants must seek permission to appeal within the thirty-day deadline set forth in the Appellate Rules.

B. RECONSIDERING THE PRACTICAL CONSEQUENCES OF CAFA'S INTERPRETIVE CHOICE

Even recognizing the role that the Federal Rules of Appellate Procedure would play under a literal reading of CAFA's appellate provision, the dilemma posed by CAFA remains a unique one. There is still overwhelming evidence that Congress intended to impose a seven-day deadline rather than a seven-day waiting period.[296] Yet, to accomplish Congress's intent would require an unprecedented judicial revision of plain statutory text—the word "less" would have to be replaced with the word "more."[297] Understanding the Appellate Rules reveals that the practical consequences of adhering to CAFA's text are fairly minor, which substantially weakens the case for interpreting CAFA to mean the opposite of what it says. It is true that the rule-based, thirty-day deadline could result

Rule 5 governs CAFA appeals and have uniformly concluded that Rule 5 does govern CAFA appeals. *See infra* note 303 (citing decisions from three circuits).

293. FED. R. APP. P. 5(a)(1).

294. *Id.* 5(a)(2).

295. 28 U.S.C.A. § 1453(c) (West 2006) ("[A] court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed *if application is made to the court of appeals not less than 7 days after entry of the order*." (emphasis added)).

296. *See supra* Part IV.A (discussing evidence of CAFA's legislative intent).

297. *See supra* Part IV.B (discussing the conflict between statutory text and congressional intent presented by CAFA).

in greater delays than the seven-day deadline that Congress apparently had in mind. Nevertheless, given that class actions often take years to resolve, this three-week "extension" is fairly insignificant.[298]

Were the consequences of following CAFA's plain text more severe, it might be palatable for judges to correct that text and save the general public from the costs of Congress's careless drafting.[299] But a proper understanding of the Appellate Rules casts the interpretive choice in a different light. Imposing the Appellate Rules' thirty-day deadline requires no judicial revision to CAFA's text and avoids the serious questions of legitimacy that the correctionist approach raises. Imposing a seven-day deadline, on the other hand, requires courts to reverse the meaning of the very statute it purports to interpret.

The practical differences between the rule-based solution and what Congress intended are simply too minor to warrant correctionist butchering of CAFA's text. Potentially shaving three weeks off the delay caused by CAFA appeals is weak justification for the federal judiciary taking the unprecedented step of reading a statute to mean the exact opposite of what it plainly says. The rule-based solution thus provides an escape from the Hobson's choice that the judiciary now faces. Judges can follow CAFA's plain language but still impose a workable deadline for CAFA appeals.

C. CRITIQUES OF APPLYING THE APPELLATE RULES TO CAFA APPEALS

There are two foreseeable arguments against my understanding of the Appellate Rules. First, critics might contend that Rule 5 does not apply to CAFA appeals. Second, critics might argue that even if Rule 5 does apply, CAFA's imposition of a statutory seven-day waiting period prevents incorporation of Rule 4(a)'s thirty-day deadline. Both are unpersuasive.

The first counterargument runs as follows: Rule 5 governs the filing of a "petition for permission to appeal."[300] CAFA's appellate provision, however, requires parties to make an "application."[301] Because Rule 5 addresses only the time for filing a "petition," it does not dictate the time for seeking CAFA appeals via an "application." However, this reasoning disregards the plain text of Rule 5, as well as an unbroken line of judicial precedent interpreting Rule 5. By its own terms, Rule 5 applies whenever "an appeal is within the

298. For data on the time it takes to resolve federal class actions, see generally THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, AN EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (Federal Judicial Center 1996), *available at* http://www.fjc.gov/library/fjc_catalog.nsf. One-quarter of the class actions in the federal districts studied took over twenty-six months to resolve. *Id.* at 132 fig.23. In one district, the average trial date for class actions was nearly four years after the filing of the complaint. *Id.* at 153 fig.65.

299. *See supra* Part IV.C (discussing the consequences of different approaches to CAFA's appellate provisions).

300. FED. R. APP. P. 5(a).

301. 28 U.S.C.A. § 1453(c)(1) (West 2006).

court of appeals' discretion."[302] Rule 5 is not limited to those discretionary appeals that explicitly designate the "petition for permission" as the procedural vehicle for pursuing such appeals.

Judicial interpretation of Rule 5 confirms this plain meaning. Federal courts have addressed the general question of whether Rule 5 governs CAFA appeals, and they have uniformly concluded that Rule 5 indeed governs CAFA appeals.[303] Admittedly, only a handful of circuits have considered the precise question of whether Rule 5 applies to CAFA appeals.[304] However, there is an even broader consensus on the analogous question of whether Rule 5 governs appeals from class-certification decisions under Rule 23(f) of the Federal Rules of Civil Procedure. Like CAFA, Rule 23(f) authorizes a discretionary appeal "if application is made."[305] Also, like CAFA, Rule 23(f) does not mention Rule 5 and does not designate Rule 5's "petition for permission to appeal" as the method for pursuing such appeals. Yet all seven circuits to consider the question have held that Rule 5 governs Rule 23(f) appeals.[306] The logic of these holdings dictates that Rule 5 governs CAFA appeals as well.

Critics might alternatively argue that even if Rule 5 governs CAFA appeals, CAFA's imposition of a seven-day waiting period precludes a parallel imposition of the thirty-day deadline set forth in the Appellate Rules. This more nuanced argument runs as follows: Rule 5 incorporates Rule 4(a)'s thirty-day deadline only if the governing statute fails to specify the time within which an appeal must be filed. Because CAFA requires that an appeal be sought "not less than 7 days after entry of the [district court's] order,"[307] the governing statute specifies the time for filing an appeal and thus prevents incorporation of Rule 4(a)'s thirty-day deadline.

This argument likewise ignores the actual text of Rule 5, which provides: "The petition must be filed *within* the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the

302. FED. R. APP. P. 5(a)(1).

303. *See* Evans v. Walter Indus., Inc., 449 F.3d 1159, 1162 (11th Cir. 2006); Patterson v. Dean Morris, L.L.P., 444 F.3d 365, 368–69 (5th Cir. 2006); Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1145 (9th Cir. 2006).

304. *See supra* note 303 (citing decisions from three circuits).

305. FED. R. CIV. P. 23(f); *accord* 28 U.S.C.A. § 1453(c)(1) (authorizing an appeal "if application is made").

306. *See* Delta Airlines v. Butler, 383 F.3d 1143, 1144 (10th Cir. 2004); Beck v. Boeing Co., 320 F.3d 1021, 1022 (9th Cir. 2003); *In re* Veneman, 309 F.3d 789, 790 (D.C. Cir. 2002); Casas v. Am. Airlines, Inc., 304 F.3d 517, 520 (5th Cir. 2002); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 142 (4th Cir. 2001); Shin v. Cobb County Bd. of Educ., 248 F.3d 1061, 1062 (11th Cir. 2001); Gary v. Sheahan, 188 F.3d 891, 892 (7th Cir. 1999); *see also* 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3951, at 275 n.4 (3d ed. 1999) ("Civil Rule 23(f) speaks of an 'application,' rather than a petition. But Appellate Rule 5(a)(1) ought to govern and the document ought to be captioned a permission.").

307. 28 U.S.C.A. § 1453(c)(1).

time provided by Rule 4(a) for filing a notice of appeal."[308] A statute that, like CAFA, specifies only the time *after* which an appeal may be filed does not specify the time *within* which an appeal may be filed. Under Rule 5, Rule 4(a)'s deadline applies even if there is not statutory silence on the time *after* which an appeal may be filed. Thus, the fact that CAFA's plain text sets forth a waiting period does not prevent incorporation of Rule 4(a)'s thirty-day deadline.

A critic might respond that my understanding of Rule 5 would preclude Congress from deciding that particular appeals will be subject to no outer filing deadline. That is not so. Congress must merely "specif[y]" that the period "within" which an appeal must be filed is unlimited.[309] If CAFA had stated that an appeal may be filed no less than seven days after the order *and* at any time thereafter, it would have specified the time within which an appeal may be brought. In that case, Rule 4(a)'s thirty-day deadline would not be incorporated. However, the text of CAFA specifies only the time after which an appeal may be filed, not the time within which an appeal may be filed, so Rule 5's incorporation of the time limit in Rule 4(a) applies to CAFA appeals regarding remand.[310]

CONCLUSION

In Lewis Carroll's *Through the Looking Glass*, Humpty Dumpty tells Alice: "When *I* use a word, . . . it means just what I choose it to mean—neither more nor less."[311] In CAFA's appellate provision, Congress used the word "less" but certainly meant "more."[312] Humpty Dumpty, of course, was self-professedly unconstrained by separation of powers. Our constitutional structure is not. The judiciary must choose the meaning of the words that Congress uses. Although scholars and judges have long debated the methods by which courts should choose a statute's meaning, this discourse has yet to squarely address the sort of riddle posed by CAFA. The question that now

308. FED. R. APP. P. 5(a)(2) (emphasis added).

309. *Id.*

310. A critic might further argue that my understanding of Rule 5 would at least prevent Congress from imposing a waiting period that is longer than the thirty-day deadline set forth in Rule 4(a). This is also not so. Again, Congress could always specify in the statute that there is no outer deadline. For example, Congress could state that an appeal may be filed "at any time" or "at any time after" a certain waiting period. However, if Congress enacted a hypothetical statute providing only that an appeal may be filed "not less than 90 days" after entry of an order, such a statute would trump the Rules' imposition of a thirty-day deadline simply by virtue of the fact that a statute promulgated after a Rule with which it is inconsistent trumps that Rule, notwithstanding the Rules Enabling Act's supersession clause. *See* Local Union No. 38 v. Custom Air Sys., Inc., 333 F.3d 345, 348 (2d Cir. 2003) (citing Penfield Co. v. SEC, 330 U.S. 585, 589 n.5 (1947)); 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1030 (2d ed. 1987).

311. CARROLL, *supra* note 1, at 94; *see also* HART & SACKS, *supra* note 17, at 1188 ("Humpty Dumpty said that words mean whatever you want them to mean.").

312. *See supra* notes 63–70 and accompanying text.

vexes the federal judiciary is whether it can legitimately make the word "less" mean "more."

The appellate judges who must answer this question currently face an uncomfortable choice. Reading "less" to mean "more" would do unprecedented violence to the text of a properly enacted statute. However, imposing no deadline for CAFA appeals would be troubling as a matter of policy, opening the door to unnecessary delay and waste of judicial resources. There is, however, a way out of this rabbit hole.[313] A proper reading of the Federal Rules of Appellate Procedure would require litigants to act within thirty days of the district court's order. This solution does not impose the tight seven-day deadline that Congress apparently had in mind, but it has the benefit of placing workable time limits on CAFA appeals without relying on interpretive contortions that arguably transgress the judiciary's proper role.

313. *Cf.* LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 2 (The Macmillan Co. 1932) (1865) (describing Alice's entry into a rabbit hole in pursuit of a waistcoat-clad, watch-bearing rabbit); *id.* (describing Alice's failure to "consider[] how in the world she was to get out again").