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## **Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and Its Lessons for the Class Action Fairness Act**

Adam N. Steinman

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## SAUSAGE-MAKING, PIGS' EARS, AND CONGRESSIONAL EXPANSIONS OF FEDERAL JURISDICTION: *EXXON MOBIL V. ALLAPATTAH* AND ITS LESSONS FOR THE CLASS ACTION FAIRNESS ACT

Adam N. Steinman\*

*Abstract:* The year 2005 witnessed two watershed developments in federal jurisdiction: the U.S. Supreme Court's decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.* and the enactment of the Class Action Fairness Act (CAFA). *Allapattah* and CAFA raise the same fundamental question: how should courts interpret a statute whose text would expand federal jurisdiction far beyond what Congress apparently intended? In *Allapattah*, the Court confronted this question in resolving an aspect of the supplemental jurisdiction statute that had deeply divided both the judiciary and academia. CAFA's expansion of federal jurisdiction over class actions will require courts to struggle with this question once again. In light of these recent events and their common theme, this Article has two goals. First, it argues that CAFA—like its older cousin the supplemental jurisdiction statute—contains a fundamental disconnect between the legislative history and the statutory text. While CAFA's legislative history indicated that Congress meant to expand federal jurisdiction only to certain large class actions with interstate dimensions, the unambiguous text of CAFA authorizes removal of virtually every state court class action to federal court. This conflict threatens to create the same level of judicial and academic disagreement that plagued the supplemental jurisdiction statute over the last decade-and-a-half. Second, this Article examines Justice Anthony Kennedy's majority decision in *Allapattah* to divine its lessons for interpreting CAFA. *Allapattah* sent mixed messages, however. The Court's language in *Allapattah* imparted an unmistakable endorsement of textualism—jurisdictional statutes should be read no more narrowly or broadly than the text provides. But the Court's ultimate conclusion compromised strict fidelity to the text in order to avoid expanding jurisdiction far beyond what Congress apparently intended. The Court chose a compromise interpretation that expanded federal jurisdiction farther than the legislative history anticipated but not as far as the plain meaning of the statutory text would require. Thus, federal courts interpreting CAFA face a dilemma: follow *Allapattah*'s explicit lesson and construe CAFA according to its text, or follow *Allapattah*'s implicit lesson and strike a compromise between the legislative history and the statutory text. For courts following the latter approach, a compromise reading of CAFA may be available. This reading would eliminate certain requirements that had impeded the removal of class actions in the past, but it would not create an independent basis for removing all state court class actions; rather, a basis for removal must exist elsewhere in federal law.

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INTRODUCTION .....281

I. THE CLASS ACTION FAIRNESS ACT’S EXPANSION OF FEDERAL JURISDICTION.....287

    A. CAFA’s New Form of Diversity Jurisdiction .....287

    B. CAFA’s Removal Provision: “Red-Carpet Removal” for Class Actions .....290

    C. CAFA’s Puzzle: Which State Court Class Actions May Be Removed to Federal Court? .....292

        1. CAFA’s Legislative History .....293

        2. CAFA’s Statutory Text.....294

II. THE SUPPLEMENTAL JURISDICTION STATUTE’S EXPANSION OF FEDERAL JURISDICTION.....298

    A. Prelude to Codification: Supplemental Jurisdiction Before 1990 .....298

    B. Congress Speaks: The 1990 Supplemental Jurisdiction Statute .....300

    C. The Supplemental Jurisdiction Statute’s Interpretive Puzzle.....302

        1. The Supplemental Jurisdiction Statute’s Legislative History .....302

        2. The Supplemental Jurisdiction Statute’s Plain Meaning .....303

        3. Interpreting the Supplemental Jurisdiction Statute .....304

III. INTERPRETING THE SUPPLEMENTAL JURISDICTION STATUTE: *ALLAPATTAH*’S LESSONS.....308

    A. Justice Kennedy’s Majority Opinion .....309

    B. The Dissenting Opinions.....311

    C. The Two Faces of *Allapattah*.....313

        Table 1 .....318

IV. USING *ALLAPATTAH* TO SOLVE THE CLASS ACTION FAIRNESS ACT’S INTERPRETIVE PUZZLE .....319

    A. *Allapattah*’s Explicit Lesson: Textualism.....319

    B. *Allapattah*’s Implicit Lesson: Compromise .....320

        Table 2 .....325

V. A FEW WORDS ON NORMATIVITY AND PRACTICAL CONSEQUENCES .....327

VI. READING THE TEA LEAVES AFTER THE CLASS ACTION FAIRNESS ACT’S FIRST YEAR .....332

CONCLUSION .....335

## INTRODUCTION

The year 2005 brought two important developments in the area of federal jurisdiction. In February, Congress enacted and President George W. Bush signed the Class Action Fairness Act of 2005 (CAFA),<sup>1</sup> which created a new source of federal jurisdiction for certain class actions.<sup>2</sup> In June, the U.S. Supreme Court decided *Exxon Mobil Corp. v. Allapattah Services, Inc.*,<sup>3</sup> which resolved an important conflict within the federal judiciary over the meaning of the 1990 supplemental jurisdiction statute.<sup>4</sup> Arguably, CAFA and *Allapattah* are the twenty-first century's most significant events in terms of federal court jurisdiction over civil actions.

The close proximity of these two events is a fitting coincidence. In *Allapattah*, the Supreme Court resolved a divisive aspect of the supplemental jurisdiction statute, finally weighing in after nearly fifteen years of "problems, ambiguity, and controversy."<sup>5</sup> The statute, which had been hastily added to the voluminous Judicial Improvements Act of 1990,<sup>6</sup> was criticized from the outset as "a nightmare of draftsmanship."<sup>7</sup>

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1. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

2. See 28 U.S.C.A. §§ 1332(d), 1453 (West Supp. 2005).

3. \_\_\_ U.S. \_\_\_ (June 23, 2005), 125 S. Ct. 2611 (2005).

4. The supplemental jurisdiction statute, codified at 28 U.S.C. § 1367 (2000), has also been the subject of intense debate within academia. Writing in 2004, Professor Richard Freer noted that "it is difficult to think of another topic in civil procedure that has commanded more scholarly attention in the past thirteen years." Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 EMORY L.J. 55, 57-58 (2004). The academic debate was so heated that one commentator quipped: "This exchange is great fun to read, particularly if you enjoy watching senior academics hurl epithets at each other in print." Laura L. Hirschfeld, *The \$50,000 Question: Does Supplemental Jurisdiction Extend to Claims Between Diverse Parties Which Do Not Meet § 1332's Amount-in-Controversy Requirement?*, 68 TEMP. L. REV. 107, 108 n.4 (1995).

5. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 VA. L. REV. 1769, 1817 (1992).

6. See Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified in scattered sections of 28 U.S.C.).

7. Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007, 1007 (1991); see *Allapattah*, 125 S. Ct. at 2628 (Stevens, J., dissenting) (calling § 1367 "opaque"); *id.* at 2632 (Ginsburg, J., dissenting) (noting that § 1367 is "hardly a model of the careful drafter's art"); Freer, *supra* note 4, at 59-60 (arguing that Congress "rushed onto the books a flawed statute"); Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993, 1005 (1991) ("The process afforded by Congress . . . was meager. The House Subcommittee's hearing took less than one day. We agree . . . that perhaps Congress could have—and in an ideal world should have—provided more process and engaged in more debate and deliberation than it did.").

In particular, courts and commentators noted the gulf between the apparent purpose of the statute and the actual statutory language.<sup>8</sup> While the statute's goal was to legislatively overturn a Supreme Court decision issued one year earlier, the text appeared to cast aside a number of well-established precedents, dating from the early twentieth century and even the early nineteenth century.<sup>9</sup>

CAFA poses an interpretive problem that is strikingly similar to the one that plagued the supplemental jurisdiction statute. CAFA's goal was to allow federal jurisdiction over certain large class actions with interstate dimensions—those with, among other things, “minimal diversity” (at least one plaintiff must be a citizen of a different state than at least one defendant) and an aggregate amount in controversy of more than \$5 million.<sup>10</sup> CAFA also eliminates certain obstacles to removing state court class actions to federal court, such as the requirements that all defendants consent and that no defendant may be a citizen of the state where the action is pending.<sup>11</sup> The wisdom of these policies has already been the subject of debate, both in terms of federalism and procedural justice.<sup>12</sup> But the academy, the judiciary, and the media have yet to notice that the statutory text of CAFA would expand federal jurisdiction far beyond those large, interstate class actions Congress apparently had in mind. It would allow virtually every state court class action to be removed to federal court, at the behest of a single defendant.<sup>13</sup>

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8. See Freer, *supra* note 4, at 56–57; Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 486–87 (1991); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 121–25 (1999).

9. See Pfander, *supra* note 8, at 125 (“Without elaborating all of the potentially affected areas, it seems plain that section 1367 might alter the complete-diversity rule of *Strawbridge v. Curtiss*[, 7 U.S. (3 Cranch) 267 (1806)].”); see also Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 961 n.91 (1991) (noting that the text of § 1367 created a “potentially gaping hole in the complete diversity requirement”); *infra* Part II.C.1–2.

10. See *infra* notes 25–32 and accompanying text.

11. See *infra* notes 38–47 and accompanying text.

12. See, e.g., Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness,”* 58 SMU L. REV. 1313, 1326–30 (2005) (summarizing CAFA's justifications and critiques); *Class Action Fairness Act*, NAT'L L.J., May 16, 2005, at 18 (excerpts from a roundtable sponsored by the National Law Journal and Columbia Law School featuring panelists John Beisner, Elizabeth Cabraser, Gregory P. Joseph, and Samuel Issacharoff and moderator Catherine Sharkey) (discussing CAFA's potential consequences and problems).

13. See *infra* Part II.C.2. In those rare situations where federal adjudication of a class action would exceed Article III's limits on the subject matter jurisdiction of federal courts (e.g., where the case does not contain a single federal law issue and there is not even minimal diversity), the class

Such disconnects between what Congress apparently meant and the statutory language it enacted raise a host of fundamental issues. Whether courts should ever consider goals expressed in legislative history when interpreting a statute is a subject of heated debate among judges and scholars.<sup>14</sup> And there is the distinct but related question of whether a court can ever infer the “intent” of Congress—a body made up of more than 500 individual lawmakers.<sup>15</sup> But whatever one’s views on these issues, the kind of cognitive dissonance seen in the supplemental jurisdiction statute and CAFA is profoundly unsettling. When Congressmembers’ perception of a bill conflicts with the actual statutory language, a fundamental premise of representative democracy—that our elected representatives can meaningfully evaluate the laws they are enacting<sup>16</sup>—is tainted.

Legislative lawmaking has often been compared to the production of sausage,<sup>17</sup> so perhaps we should not be surprised when the result of that

action could be remanded to state court under 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction. See *infra* text accompanying notes 271–73.

14. See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 361–68 (2005) (summarizing competing views on this issue); see also *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, \_\_\_ U.S. \_\_\_ (Jun. 23, 2005), 125 S. Ct. 2611, 2626 (2005) (noting that whether legislative history is a reliable guide for statutory interpretation is “a point on which Members of this Court have disagreed”).

15. See Nelson, *supra* note 14, 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”).

16. See, e.g., THE FEDERALIST NO. 10 (James Madison) (arguing that the purpose of a republican form of government is “to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country”).

17. See David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839, 847 (1999) (“[A] first peek into the legislative sausage factory is indescribably revolting.”); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2235 (1997) (“When that statute emerges from the sausage factory that is the legislative process, it invariably includes scores of gaps, ambiguities, and internally inconsistent provisions.”); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 265 n.92 (1998) (“[F]or legislation as for sausages, one should enjoy the result, but not watch the making.” (citing *Cnty. Nutrition Inst. v. Block*, 749 F.2d 50, 51 (D.C. Cir. 1984))). Scholars often credit Otto von Bismarck with coining this comparison. See, e.g., Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 806 (1991) (noting “Bismarck’s [sic] observation that anyone who loves law or sausage should not watch either being made”); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 240 & n.38, 242 n.41 (1998) (“However one likes statutes or sausages, one should not watch them being made. . . . This analogy is widely attributed to Otto von Bismarck [sic], Chancellor of Germany.”). Some scholars have cited

process is more akin to a pig's ear than a silk purse.<sup>18</sup> Even so, the question remains: how should courts interpret such statutes? In this regard, the supplemental jurisdiction statute and CAFA pose similar challenges. Reading CAFA against the backdrop of the struggle to make sense of the supplemental jurisdiction statute, one can imagine how Bill Murray's time-trapped weatherman felt hearing the clock radio's familiar chorus of "I Got You Babe"<sup>19</sup> and realizing that he would have to re-live Groundhog Day one more time.<sup>20</sup> But perhaps, as Bill Murray discovered, it is possible to learn from repetition. Although Congress has apparently failed to absorb any lessons from the chaos surrounding the supplemental jurisdiction statute,<sup>21</sup> perhaps the *Allappattah* Court's

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Winston Churchill instead. See, e.g., Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 600 (1990) ("[A] legislative body is, to paraphrase Sir Winston Churchill, hardly worthy of the title of Congress if it merely grinds out laws as a sausage-maker grinds out sausages.").

18. See *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("All we can say is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting.").

19. SONNY AND CHER, *I Got You Babe*, on LOOK AT US (Atco Records 1965). As fans of Sonny Bono are well aware, he followed up his recording career with two terms in the House of Representatives during the mid-1990s. See *Sketches of New House Members*, WASH. POST, Nov. 10, 1994, at A35. Sonny Bono's legislative legacy did not include the two statutes that are the focus of this article. Mary Bono, who succeeded her husband in Congress after he passed away in 1998, voted in favor of the Class Action Fairness Act. See William Claiborne, *Mary Bono Wins House Seat; Widow Takes 65% in California Race*, WASH. POST, Apr. 8, 1998, at A4; Final Vote Results for Roll Call 38 (Feb. 17, 2005), <http://clerk.house.gov/evs/2005/roll038.xml>.

20. See GROUNDHOG DAY (Columbia Pictures 1993). The *Groundhog Day* metaphor has gained substantial cultural traction in the last dozen years. It has been used frequently in legal circles, see, e.g., Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AGJOBS Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 477 & n.442 (2005) ("Biennialism explains why advocates both in and out of Congress are willing to engage in a virtual Groundhog Day of attempts at legislative reform, despite recurring failures.") (footnote omitted), and elsewhere, see John Schwartz, *NASA Suspending Shuttle Flights over Foam Debris*, N.Y. TIMES, July 28, 2005, at A1 ("The astronauts had awakened to their first full day in space to the song 'I Got You, Babe,' as excerpted from the movie 'Groundhog Day.' The movie, about living the same day over and over, was a joking reference to the seemingly endless days in prelaunching quarantine as the crew awaited their chance to fly."). The film has already been invoked in connection with CAFA, albeit on a different issue. See *Class Action Fairness Act*, *supra* note 12, at 18, 18 (statement of John Beisner at a roundtable sponsored by the National Law Journal and Columbia Law School) ("[W]hen they're filed in state courts as opposed to federal courts there is . . . no mechanism . . . to coordinate those cases. So, from the defendants' perspective it's the movie *Groundhog Day* over and over again. Every day you're in a different state court doing the same thing, but you're before a different judge.").

21. See Freer, *supra* note 4, at 59–60 ("First, [Congress] rushed onto the books a flawed statute. Second, when the flaws became obvious, it did not act to fix the problem. There is no reason to believe that it learned from either mistake."); cf. Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 86 (1992) (noting problems with the legislative process leading to § 1367 and stating "all of that is water under the dam, except for the lessons that might be learned

handling of the interpretive problems created by that statute can guide courts as they strive to make sense of CAFA.

Part I of this Article describes CAFA's original jurisdiction and removal provisions and explains the disconnect between the legislative history and the statutory text with respect to the scope of CAFA's removal provision. While CAFA's legislative history anticipates removal only of large, interstate class actions (those with at least minimal diversity and an aggregate of \$5 million at stake), the statutory text authorizes removal of any state court class action except for three categories of securities and corporate governance cases that are explicitly exempted.

Part II, in order to provide the background needed to appreciate the *Allapattah* decision, summarizes the history of supplemental jurisdiction, including the judicially created doctrines of pendent and ancillary jurisdiction as they existed prior to 1990. It also addresses the codification of supplemental jurisdiction in 28 U.S.C. § 1367 and the conflict that subsequently arose over § 1367's interpretation.

Part III describes the Supreme Court's decision in *Allapattah* and explains how it resolved the debate over the correct interpretation of § 1367. I conclude that Justice Anthony Kennedy's majority opinion failed to provide a coherent method for interpreting jurisdictional statutes. While the Court's general language on statutory interpretation preaches fidelity to the text, the Court's ultimate conclusion indicates that it is willing to forge a compromise when interpreting a statute whose text mandates a large jurisdictional expansion, but whose legislative history contemplates a much smaller one. The *Allapattah* Court's interpretation resulted in a median expansion of federal jurisdiction, even though that reading of § 1367 was not supported by the statutory text or the legislative history.

Part IV explores how the different faces of *Allapattah* might view CAFA's removal provision. The options for interpreting CAFA are nearly identical to the options before the court in *Allapattah*: (1) a large jurisdictional expansion that fits well with the statutory text; (2) a smaller expansion that fits well with the legislative history; and (3) a median expansion that finds support in neither the statutory text nor the legislative history. Thus, if courts heed *Allapattah*'s explicit instruction that jurisdictional statutes must be read no more narrowly than their text provides, they will likely read CAFA to allow removal of virtually all

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for the next time that Congress makes a foray into this field").



state court class actions, not just the large, interstate class actions that were apparently CAFA's focus. But courts that follow *Allapattah's* implicit lesson of compromise would reach a different interpretation. Under this approach, CAFA would eliminate some procedural impediments to removal but only as to class actions for which a basis for removal exists elsewhere under federal law. In other words, CAFA would not be an independent basis for removal of class actions.

Part V acknowledges that there are plausible normative arguments in favor of both the textualist and compromise approaches to interpreting statutes like CAFA and § 1367. But Justice Kennedy should have candidly confronted the textual deficiencies in his purportedly textualist approach, and thus provided more meaningful guidance for federal courts interpreting jurisdictional statutes. As for the possible interpretations of CAFA's removal provision (which I do not attempt to rank as a matter of policy), I describe three noteworthy practical consequences of following CAFA's plain meaning. First, this interpretation would permit removal of class actions that are not within federal courts' original jurisdiction and thus could not be brought in federal court initially. Second, CAFA's plain meaning would permit removal of class actions in situations where it would violate Article III for a federal court to adjudicate the case (such as where there was not even minimal diversity between the plaintiffs and defendants). In this situation, a federal court would be required to remand a removed class action to state court because there would be no constitutional basis for subject matter jurisdiction. Third, CAFA's plain meaning would eliminate certain strategies that plaintiffs' attorneys might otherwise employ to prevent removal of state court class actions.

Finally, Part VI reviews what lower federal courts have said so far about the scope of CAFA removal. Although judicial dicta conveys an understanding that CAFA authorizes removal only of large, interstate class actions within CAFA diversity jurisdiction, courts have yet to consider the interpretive puzzle I set forth in this Article, and litigants have yet to argue that CAFA's plain text authorizes removal on a much broader scale. This Part also examines how federal courts have handled other issues where CAFA's statutory text and legislative history are in tension.

## I. THE CLASS ACTION FAIRNESS ACT'S EXPANSION OF FEDERAL JURISDICTION

CAFA substantially expands federal jurisdiction over class actions.<sup>22</sup> First, it creates a new form of diversity jurisdiction for large, interstate class actions that might not have qualified for ordinary diversity jurisdiction. Second, CAFA eliminates many of the obstacles that had prevented removal of class actions from state court to federal court.

### A. CAFA's New Form of Diversity Jurisdiction

Diversity jurisdiction has long provided a source of original federal jurisdiction over class action lawsuits. Ordinary diversity jurisdiction, codified at 28 U.S.C. § 1332(a), encompasses class actions where two requirements are met. First, there must be complete diversity of citizenship. No named class plaintiff may be a citizen of the same state as any defendant.<sup>23</sup> Second, the amount in controversy must exceed \$75,000. However, class members are not allowed to aggregate their claims to reach that amount.<sup>24</sup>

Section 4 of CAFA creates a new form of federal diversity jurisdiction, codified at 28 U.S.C. § 1332(d), for certain large, interstate class actions.<sup>25</sup> Unlike § 1332(a) ordinary diversity jurisdiction,

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22. Not all of CAFA's provisions deal with federal jurisdiction and removal. Section 3 of CAFA (codified at 28 U.S.C.A. §§ 1711–1715 (West Supp. 2005)) 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. §§ 1712–1714. It also obligates defendants in class actions to notify appropriate government officials in the event of a proposed settlement. See *id.* § 1715.

23. 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).

24. See 28 U.S.C. § 1332(a) (2000) (requiring that the amount in controversy exclusive of interest and costs exceeds \$75,000); *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 294–98 (1973). In 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. *Id.* at 301. As explained *infra* notes 157–68 and accompanying text, this aspect of *Zahn* has been effectively overruled by the *Allapattah* Court's reading of the supplemental jurisdiction statute. If one class member has claims in excess of \$75,000, supplemental jurisdiction may extend to class members with claims of \$75,000 or less. See *infra* text accompanying note 168.

25. Section 1332(d) also allows federal jurisdiction over "mass actions" that are not formally class actions but that "otherwise meet[] the provisions" of § 1332(d). 28 U.S.C.A. § 1332(d)(11)(A)

§ 1332(d) CAFA diversity jurisdiction requires only minimal diversity of citizenship—at least one class plaintiff must be a citizen of a different state than at least one defendant.<sup>26</sup> CAFA diversity jurisdiction also requires that the aggregate amount in controversy of all class members exceeds \$5,000,000.<sup>27</sup>

CAFA diversity jurisdiction contains a number of exceptions. Even for class actions with minimal diversity and a \$5 million aggregate amount in controversy, CAFA does not authorize jurisdiction if the class contains fewer than 100 plaintiffs,<sup>28</sup> if the “primary defendants” are “states, state officials, or other governmental entities,”<sup>29</sup> or if the case “solely” involves particular securities and corporate governance claims.<sup>30</sup> CAFA diversity jurisdiction also exempts claims where the

(West Supp. 2005). “Mass actions” are defined as cases where 100 or more individual plaintiffs’ claims for monetary relief “are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.” *Id.* § 1332(d)(11)(B)(i). Jurisdiction in such mass actions is limited to plaintiffs with claims in excess of \$75,000. *Id.* (“[J]urisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).”). Due to poor drafting, it is unclear whether qualifying mass actions are eligible for original jurisdiction or only removal jurisdiction. See *id.* § 1332(d)(11)(A) (stating that qualifying mass actions shall be “removable under [28 U.S.C. § 1332(d)] paragraphs (2) through (10)” even though these paragraphs authorize only original jurisdiction); see also *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 2006 WL 864300, at \*3–4 (Apr. 4, 2006) (describing this and other problems with CAFA’s mass action provision).

26. 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 Steinman, *supra* note 21, at 98 n.54 (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, 37–38 (1990))).

27. 28 U.S.C.A. § 1332(d)(2), (6).

28. *Id.* § 1332(d)(5)(B).

29. *Id.* § 1332(d)(5)(A). CAFA does not define the term “primary defendant.”

30. *Id.* § 1332(d)(9). Specifically, CAFA diversity jurisdiction does not apply to any claim:

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E)); (B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or (C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

28 U.S.C.A. § 1332(d)(9). The exception for these securities and corporate governance claims was designed “to avoid disturbing in any way the federal vs. state court jurisdictional lines already

“primary defendants” and at least two-thirds of the class plaintiffs are citizens of the state where the action is filed.<sup>31</sup> Where the “primary defendants” and between one-third and two-thirds of the class plaintiffs are citizens of the state where the action is filed, the district court has discretion to decline jurisdiction based on several enumerated factors.<sup>32</sup>

Despite these exceptions, CAFA permits federal jurisdiction over class actions that would not have satisfied the requirements for ordinary § 1332(a) diversity jurisdiction. Ordinary diversity jurisdiction requires complete diversity, whereas CAFA diversity jurisdiction requires only minimal diversity. 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. But it would satisfy CAFA’s minimal diversity requirement as long as the case has some interstate dimension, i.e., at least one plaintiff is a citizen of a different state than at least one defendant.

With respect to the amount-in-controversy requirement, the fact that ordinary diversity jurisdiction does not allow different plaintiffs to aggregate their claims to reach the \$75,000 threshold could keep some very significant class actions out of federal court. While CAFA’s \$5 million amount-in-controversy threshold is much higher, it allows all class members to aggregate their claims to satisfy that requirement. It thus permits original jurisdiction over class actions where the individual

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drawn in the securities litigation class action context by the enactment of the Securities Litigation Uniform Standards Act of 1998.” S. REP. NO. 109-14, at 45 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 42.

31. 28 U.S.C.A. § 1332(d)(4)(B). In cases where more than two-thirds of the plaintiffs are citizens of the state where the action is filed, the federal court must also decline jurisdiction if (a) there is at least one in-state defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims asserted, (b) principal injuries resulting from each defendant’s alleged conduct were incurred in the state of filing, and (c) during the three-year period before the filing of that class action, no other class action has been filed asserting similar factual allegations against any of the defendants. *See id.* § 1332(d)(4)(A).

32. *Id.* § 1332(d)(3). These factors are:

(A) whether the claims asserted involve matters of national or interstate interest; (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States; (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and (F) whether, during the three-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

*Id.*

claims are small but the overall amount at stake is quite large.

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

Section 5 of CAFA creates a removal provision for class actions, codified at 28 U.S.C. § 1453, that eliminates a number of barriers to removal. Even without this special removal provision, CAFA's expansion of diversity jurisdiction would have increased defendants' ability to remove class actions to federal court. Class actions that meet the jurisdictional criteria of CAFA diversity jurisdiction could be eligible for ordinary removal under 28 U.S.C. § 1441(a), which allows removal of cases "of which the district courts of the United States have original jurisdiction."<sup>33</sup>

Ordinary removal, however, is subject to several requirements that traditionally disadvantage defendants wishing to remove a state court class action to federal court. First, ordinary removal requires the consent of all defendants; if any defendant withholds consent, the case cannot be removed.<sup>34</sup> Second, class actions where federal subject matter jurisdiction would be based on diversity of citizenship cannot be removed if any defendant is a citizen of the state where the case was pending.<sup>35</sup> Third, § 1446(b) bars removal one year after the state court action was commenced, even if the events making the case eligible for removal (e.g., the dismissal of a non-diverse party) do not occur until later in the state court litigation.<sup>36</sup> Fourth, § 1447(d) typically precludes appellate review if the federal district court orders the case remanded to state court.<sup>37</sup>

CAFA removal is not limited by these requirements for ordinary

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33. 28 U.S.C. § 1441(a) (2000).

34. *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 & PROCEDURE § 3723 (2d ed. 1984).

35. 28 U.S.C. § 1441(b).

36. *Id.* § 1446(b).

37. *Id.* § 1447(d). *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). For a description and critique of the *Thermtron* exception, *see Solimine, supra*, at 294–333.

removal. Section 1453(b) provides:

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), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.<sup>38</sup>

For class actions removed pursuant to § 1453, CAFA also allows discretionary appellate review of district court orders granting or denying a motion to remand the case to state court.<sup>39</sup> However, § 1453 provides that the securities and corporate governance class actions that are excluded from § 1332(d)'s grant of diversity jurisdiction are also exempted from § 1453 removal.<sup>40</sup>

Thus, CAFA relaxes many aspects of ordinary removal that could prevent or impede removal of class actions. Ordinary removal requires the consent of all defendants,<sup>41</sup> but CAFA authorizes removal “by any defendant without the consent of all defendants.”<sup>42</sup> Whereas ordinary removal of diversity cases is unavailable when any defendant is a citizen of the state where the action was pending,<sup>43</sup> CAFA authorizes removal “without regard to whether any defendant is a citizen of the State in which the action is brought.”<sup>44</sup> Section 1446(b) bars removal of diversity cases one year after the action is commenced, even if the events that first make the case removable do not occur until later in the state court litigation;<sup>45</sup> CAFA removal is exempt from this limitation.<sup>46</sup> Finally, CAFA removal is not subject to § 1447(d)'s ban on appellate review of

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38. 28 U.S.C.A. § 1453(b) (West Supp. 2005). Section 1446 sets forth the general procedures for removing state court cases to federal court. *See infra* notes 69–72 and accompanying text.

39. 28 U.S.C.A. § 1453(c).

40. *Id.* § 1453(d); *see supra* note 30 and accompanying text.

41. *See In re Fed. Sav. & Loan Ins. Co.*, 837 F.2d 432, 434–35 & n.2 (11th Cir. 1988).

42. 28 U.S.C.A. § 1453(b).

43. Section 1441(b)'s prohibition on removal where there is an in-state defendant typically applies only in diversity cases. The presence of an in-state defendant would not prevent removal in cases where federal question jurisdiction exists. *See* 28 U.S.C. § 1441(b) (2000) (providing that an action “shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought” unless the action is one “of which the district courts have original jurisdiction founded on a claim or right arising under [federal law]”).

44. 28 U.S.C.A. § 1453(b) (West Supp. 2005).

45. 28 U.S.C. § 1446(b) (2000).

46. 28 U.S.C.A. § 1453(b) (West Supp. 2005).

remand orders.<sup>47</sup> Taken together, CAFA's removal procedures create what I call "red-carpet removal" for class actions.

C. *CAFA's Puzzle: Which State Court Class Actions May Be Removed to Federal Court?*

There are many aspects of CAFA that will test the interpretive capacities of the federal judiciary.<sup>48</sup> My focus is on what I believe is the most puzzling aspect of CAFA—the scope of its removal provision. CAFA's removal provision will challenge courts to interpret a jurisdictional statute for which the apparent intent of Congress openly conflicts with the statutory text. The legislative history indicates an understanding that CAFA's removal provision would apply only to those class actions that meet the requirements of CAFA's new form of diversity jurisdiction (e.g., minimal diversity and an aggregate amount in controversy in excess of \$5 million). But the plain language of CAFA's removal provision would create an independent basis for removing any class action to federal court (except for certain securities and corporate governance class actions).

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47. *Id.* § 1453(c). Arguably, this provision helps plaintiffs as well as defendant because it allows discretionary appeals of both orders granting and orders denying a motion to remand. *Id.* Even pre-CAFA, however, a plaintiff had the ability to appeal a denial of a motion to remand, either as of right once final judgment is reached or under a discretionary appellate device such as 28 U.S.C. § 1292(b) or a writ of mandamus. *E.g.*, *Melder v. Allstate Corp.*, 404 F.3d 328, 329–30 (5th Cir. 2005) (permissive appeal under § 1292(b)); *In re Chimenti*, 79 F.3d 534, 536 (6th Cir. 1996) (writ of mandamus); *McGlinchey v. Hartford Accident & Indem. Co.*, 866 F.2d 651, 652 (3d Cir. 1989) (appeal after final judgment under 28 U.S.C. § 1291). A pre-CAFA defendant, on the other hand, was absolutely precluded from appealing a denial of a remand order (with one very narrow exception). *See supra* note 37 and accompanying text.

48. For example, applying CAFA's new form of diversity jurisdiction will require courts to make sense of the term "primary defendant." 28 U.S.C.A. § 1332(d)(4)(B), (d)(5)(A). Courts will also have to figure out how to calculate the percentage of home-state plaintiffs at a point in the litigation when the identity of each potential class member may not be known. *See id.* § 1332(d)(3), (d)(4)(B). Federal courts have already been called upon to determine which party bears the burden of convincing the court whether CAFA's jurisdictional requirements are (or are not) satisfied, *see infra* notes 279–81 and accompanying text; the deadline for seeking CAFA appellate review of a district court's decision on a motion to remand a class action, *see infra* notes 282–88 and accompanying text; and whether CAFA applies to class actions that were initiated before CAFA's enactment but are then removed or amended after CAFA became effective, *see, e.g.*, *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755, 758 (7th Cir. 2006) (stating that CAFA does not authorize removal of class actions commenced in state court prior to CAFA's effective date but that "a novel claim tacked on to an existing case commences new litigation for purposes of [CAFA]" and thus warrants removal).

## 1. CAFA's Legislative History

The only substantive congressional report in CAFA's legislative history is from the Senate Judiciary Committee (Senate Report).<sup>49</sup> This Senate Report reflects a belief that CAFA's removal provision would apply only to those large, interstate class actions for which CAFA created a new form of diversity jurisdiction. It states that CAFA's removal provision was designed "to ensure that *qualifying interstate* class actions initially brought in state courts may be heard by federal courts."<sup>50</sup> It also states that CAFA "would amend the diversity jurisdiction and removal statutes applicable to *larger interstate* class actions."<sup>51</sup> The Senate Report repeatedly assumes that CAFA authorizes removal of class actions that satisfy the requirements for CAFA diversity jurisdiction, but not other class actions.<sup>52</sup>

Furthermore, the Senate Report relies on an empirical study based on the same assumption. The Judiciary Committee cites this study in order to refute the critique that "nearly every class action" would be transferred from state to federal court.<sup>53</sup> The study examined class actions in six states over a five-year period and concluded that more than fifty percent of the class actions for which data were available would not

49. See S. REP. NO. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3. The circumstances surrounding this report might provoke hesitation in even the most die-hard proponent of using legislative history as a guide to statutory interpretation. Senator Patrick Leahy's statement in the report explains:

The circulation and filing of this report occurred after passage of the legislation for Senate consideration of the underlying bill. Indeed, it was filed after the House of Representatives passed this legislation and on the same day that the President signed the measure into law. Committee reports, like Committee consideration of measures, are intended to assist the Senate in its consideration of the matter. Committees tend to have Members with expertise and experience that help shape legislation for Senate consideration. In this case, that did not occur. . . . That this report is being filed after Senate consideration means that it did not serve the principal purpose for which Committee reports are intended.

*Id.* at 79 (Additional Views of Senator Patrick Leahy).

50. *Id.* at 5 (Report) (emphasis added).

51. *Id.* at 28 (emphasis added).

52. See *id.* at 42 ("If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)."); *id.* at 43 ("[I]t is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court (e.g., the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state)."); *id.* at 44 (considering the possibility that a plaintiff would "seek[] to have a class action remanded under section 1332(d)(4)(A) on the ground that the primary defendants and two-thirds or more of the class members are citizens of the home state").

53. *Id.* at 51.



be removable under CAFA.<sup>54</sup> This study's methodology presumed that CAFA would allow removal only for class actions that satisfy § 1332(d)'s requirements for diversity jurisdiction.<sup>55</sup>

Thus, CAFA's legislative history indicates that § 1453's red-carpet removal provisions were designed to go hand-in-hand with CAFA's jurisdictional provisions. On this view, red-carpet removal would be available only for class actions that satisfy the requirements of CAFA's new form of diversity jurisdiction. If a class action satisfies minimal diversity,<sup>56</sup> has 100 or more class members,<sup>57</sup> has an aggregate amount in controversy exceeding \$5 million,<sup>58</sup> and is not otherwise exempted (e.g., because it is a localized dispute or names a state government as a primary defendant),<sup>59</sup> then removing defendants are entitled to red-carpet treatment under § 1453. There is no requirement that all defendants consent, no bar to removing cases with an in-state defendant, no one-year limitation period, and no absolute bar to appellate review of remand orders.<sup>60</sup>

## 2. *CAFA's Statutory Text*

Contrary to CAFA's legislative history, section 5 of CAFA allows removal of virtually all state court class actions to federal court. Section 1453(b) states that "[a] class action may be removed to a district court of the United States in accordance with section 1446."<sup>61</sup> Section 1453(a) provides that "[i]n this section, the term[] . . . 'class action' . . . shall have the meaning[] given such term[] under section 1332(d)(1)."<sup>62</sup> According to § 1332(d)(1)(B), "the term 'class action' means any civil

54. *Id.* at 51–52 & nn.138–39 (citing John H. Beisner & Jessica Davidson Miller, *There Will Be No Exodus: An Empirical Study of S. 2062's Effects on Class Actions*, MEALEY'S TORT REFORM UPDATE, April 2004, at 16).

55. *See* Beisner & Miller, *supra* note 54, at 17 & 21 n.9 ("[M]ore than half of the class actions for which decisions were available on-line would not be removable under the bill. These included a substantial percentage of class actions that were local in nature and had a clear nexus to the state where they were brought . . . , as well as suits that clearly involved less than \$5 million.").

56. 28 U.S.C.A. § 1332(d)(2) (West Supp. 2005).

57. *See id.* § 1332(d)(5)(B).

58. *Id.* § 1332(d)(2).

59. For a description of the statutory exemptions to § 1332(d) jurisdiction, *see supra* notes 28–32 and accompanying text.

60. *See* 28 U.S.C.A. § 1453(b)–(c).

61. *Id.* § 1453(b).

62. *Id.* § 1453(a) ("In this section, the terms 'class,' 'class action,' 'class certification order,' and 'class member' shall have the meanings given such terms under section 1332(d)(1).").

action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.”<sup>63</sup>

Thus, the term “class action” for purposes of § 1453 is not limited to those large, interstate class actions that meet the requirements of CAFA diversity jurisdiction (e.g., minimal diversity and an aggregate amount in controversy in excess of \$5 million). Rather, CAFA provides that “any civil action filed under . . . [a] State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action”<sup>64</sup> “may be removed to a district court of the United States.”<sup>65</sup> Section 1453(d) creates the lone exception, stating that CAFA removal does not apply to three categories of securities and corporate governance class actions.<sup>66</sup> With that one caveat, any state court class action “may be removed” to federal court under § 1453 and is therefore entitled to § 1453’s red-carpet treatment: there is no requirement that all defendants consent, no bar to removing cases with an in-state defendant, no one-year limitation period, and no absolute bar to appellate review of remand orders.<sup>67</sup>

CAFA’s reference to section 1446 does not narrow the universe of removable class actions.<sup>68</sup> Section 1446 governs “[p]rocedure for removal,”<sup>69</sup> setting forth what “[a] defendant or defendants desiring to remove any civil action” must do.<sup>70</sup> It requires merely that the defendant file a “notice of removal” in “the district court of the United States for the district and division” where the state court action is pending,<sup>71</sup> and sets the deadline by which a defendant must seek to remove a case.<sup>72</sup>

63. *Id.* § 1332(d)(1)(B).

64. *Id.*

65. *Id.* § 1453(b).

66. *Id.* § 1453(d).

67. *Id.* § 1453(b)–(c).

68. *Id.* § 1453(b) (“A class action may be removed . . . in accordance with [28 U.S.C.] section 1446.”).

69. 28 U.S.C. § 1446 (2000).

70. *Id.* § 1446(a).

71. *Id.*

72. *Id.* § 1446(b). This deadline is thirty days after either the defendant’s receipt of the initial pleading, service of the summons, or some other paper indicating that the case is or has become removable. *Id.* In cases that are “removed on the basis of jurisdiction conferred by section 1332,” there is an absolute one-year limitation period, regardless of when during the state court litigation the case becomes removable. *Id.* Cases removed under CAFA are exempt from this one-year limit. 28 U.S.C.A. § 1453(b) (West Supp. 2005) (“[T]he 1-year limitation under section 1446(b) shall not

Thus, § 1446 imposes general procedural requirements for removing defendants, whatever the basis for federal removal. It imposes no requirement that a defendant comply with any other provision of the federal code, and does not limit the kinds of class actions removable under § 1453.

CAFA's statement that a class action "may be removed . . . in accordance with section 1446" also precludes reading CAFA as incorporating restrictions contained in other federal removal provision, such as § 1441(a)'s requirement for ordinary removal that an action is one "of which the district courts of the United States have original jurisdiction."<sup>73</sup> CAFA authorizes removal "in accordance with section 1446," not § 1441(a) or any other provision.<sup>74</sup> Nor would § 1441(a)'s requirements apply of their own force. Section 1441(a) provides:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.<sup>75</sup>

Section 1441(a)'s text does not impose its requirements on every case removed to federal court. It merely authorizes removal for one category of state court action: those "of which the district courts of the United States have original jurisdiction."<sup>76</sup>

Section 1441(a) is not the exclusive basis for removal to federal court, and its requirements do not purport to extend beyond cases removed on that specific ground. Numerous statutes authorize removal for other

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apply . . .").

73. 28 U.S.C. § 1441(a) (2000).

74. The impact of CAFA's statement that class actions may be removed "in accordance with section 1446," 28 U.S.C.A. § 1453(b) (West Supp. 2005), is even more apparent when compared to an earlier version of CAFA, which was proposed but not enacted in 2003. The 2003 version provided that "[a] class action may be removed to a district court of the United States in accordance with *this chapter*." H.R. 1115, 108th Cong. § 5 (2003) (emphasis added). This reference was to chapter 89 of title 28, which at the time contained §§ 1441 through 1452. By allowing red-carpet removal "in accordance with this chapter," the 2003 version might plausibly be understood to apply only to class actions for which removal was authorized by some section of that chapter, such as § 1441(a). The text that was ultimately enacted, however, allows red-carpet removal "in accordance with section 1446." It would strain the text considerably to read that phrase as requiring class actions to qualify as removable under some other section of the U.S. Code. CAFA authorizes removal "in accordance with section 1446," not § 1441(a) or chapter 89.

75. 28 U.S.C. § 1441(a) (2000).

76. *Id.*

categories of state court actions: § 1442 allows removal of state civil actions or criminal prosecutions against federal officers and federal agencies;<sup>77</sup> § 1442a allows removal of state civil actions or criminal prosecutions against members of the U.S. armed forces;<sup>78</sup> § 1443 allows removal of certain actions where the defendant relies on civil rights laws for its defense;<sup>79</sup> § 1452 allows removal of state court claims related to Chapter 11 bankruptcy proceedings.<sup>80</sup> No court has held that removal authorized by these other provisions must also comply with § 1441(a)'s requirement that the case be one over which federal courts have original jurisdiction.<sup>81</sup> To the contrary, the Supreme Court has recognized that removal statutes may extend to cases that would not be subject to original jurisdiction in federal court.<sup>82</sup>

CAFA's removal provision states that "a class action may be removed" and defines the term "class action" to mean *any* class action. Except for an explicit exclusion of certain securities and corporate governance class actions, neither CAFA nor any other provision limits the universe of class actions that may be removed to federal court. Thus, CAFA's legislative history and statutory text conflict over the scope of CAFA's removal provision. Coincidentally, only months after CAFA's

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77. 28 U.S.C. § 1442 (2000).

78. *Id.* § 1442a.

79. *Id.* § 1443.

80. *Id.* § 1452.

81. It is conceivable that some provisions of § 1441 are binding on cases that are removed based on other federal provisions. One could plausibly argue that § 1441(b)'s prohibition on removal for certain cases involving an in-state defendant applies even where removal is founded upon a statute other than § 1441(a). Section 1441(b)'s text is not limited to cases removed under § 1441(a). It states:

*Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.*

*Id.* § 1441(b) (emphasis added). This could be read to prohibit removal of any action where the basis for removal is something other than original jurisdiction based on a claim or right arising under federal law. This interpretive question does not affect CAFA removal, however, because CAFA authorizes removal "without regard to whether any defendant is a citizen of the State in which the action is brought." 28 U.S.C.A. § 1453(b) (West Supp. 2005).

82. *See, e.g.,* *Mesa v. California*, 489 U.S. 121, 136–39 (1989) (recognizing that a federal officer may remove a case to federal court if the officer raises a federal law defense, even though the mere presence of a federal defense in a state law proceeding would not give rise to original jurisdiction in federal court); *see also* *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152–54 (1908) (holding that the presence of a federal defense in a state law proceeding does not give rise to original jurisdiction in federal court under the federal-question statute).

enactment, the Supreme Court's *Allapattah* decision would address a similar conflict in the context of the supplemental jurisdiction statute. The next two Parts of this Article describe the disconnect between the legislative history and statutory text of the supplemental jurisdiction statute and how the Court resolved that disconnect in *Allapattah*.

## II. THE SUPPLEMENTAL JURISDICTION STATUTE'S EXPANSION OF FEDERAL JURISDICTION

This Part first summarizes the doctrinal landscape that predated the 1990 enactment of the supplemental jurisdiction statute. Next, it describes the supplemental jurisdiction statute, as well as the conflict between the legislative history and the statutory text with respect to the magnitude of the statute's jurisdictional expansion. Finally, it explains how scholars and lower federal courts attempted to interpret the supplemental jurisdiction statute in light of this disconnect.

### A. *Prelude to Codification: Supplemental Jurisdiction Before 1990*

A case that is subject to federal court jurisdiction may include particular claims that, standing alone, would not be subject to federal jurisdiction. Prior to the 1990 supplemental jurisdiction statute, the Supreme Court recognized that in certain circumstances, a federal court may proceed to adjudicate such claims that lack an independent basis for federal jurisdiction.<sup>83</sup> For example, when a party sues in federal court on a claim arising under federal law (for which federal question jurisdiction exists under 28 U.S.C. § 1331), the federal court may also adjudicate state law claims against the same defendant that are part of the same "case or controversy" for purposes of Article III.<sup>84</sup> This form of supplemental jurisdiction is known as "pendent claim jurisdiction."<sup>85</sup> The Supreme Court also recognized that a federal court with jurisdiction over a plaintiff's claim may also adjudicate claims by defending parties (such as counterclaims, cross-claims, and third-party claims) that are

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83. See, e.g., ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 329–30 (4th ed. 2003); RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, *CIVIL PROCEDURE: A MODERN APPROACH* 878–79 (3d ed. 2000); see also Freer, *supra* note 8, at 447–49 (noting that "supplemental jurisdiction" is a term that encompasses pendent claim, pendent party, and ancillary jurisdiction).

84. MARCUS, REDISH & SHERMAN, *supra* note 83, at 725. The Court has explained that federal law and state law claims form part of the "same case or controversy" if they arise out of a "common nucleus of operative fact." See *id.*; see also WRIGHT, MILLER & COOPER, *supra* note 34, § 3567.1.

85. WRIGHT, MILLER & COOPER, *supra* note 34, § 3567.1; Freer, *supra* note 8, at 447.

related to the underlying controversy, even where those claims would lack an independent basis for federal jurisdiction if filed alone.<sup>86</sup> This form of supplemental jurisdiction is known as “ancillary jurisdiction.”<sup>87</sup>

The Supreme Court did not, however, allow plaintiffs to append claims that involved the joinder of additional parties, where the plaintiffs could not have initially brought those claims in federal court. Attempts to invoke what was known as “pendent party jurisdiction” were unsuccessful in both diversity cases and federal question cases. Since the early 1800s, ordinary diversity jurisdiction under § 1332(a) has required complete diversity—no plaintiff may be a citizen of the same state as any defendant.<sup>88</sup> Thus, if an Ohio plaintiff sues a Texas defendant in federal court, the complete diversity rule would prevent a Texas plaintiff from joining this lawsuit with its own claim against the Texas defendant. Likewise, it would prevent the Ohio plaintiff from adding a claim against an Ohio defendant.<sup>89</sup> This principle applies even when the plaintiff seeks to add a claim against a party who has been properly brought into the case by someone else, e.g., a claim against a third-party defendant whom the defendant impleaded using ancillary jurisdiction.<sup>90</sup>

The Supreme Court developed a similarly restrictive approach with respect to diversity jurisdiction’s amount-in-controversy requirement. In *Clark v. Paul Gray, Inc.*,<sup>91</sup> it held that each plaintiff must individually satisfy the amount-in-controversy requirement.<sup>92</sup> Thus, the presence of

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86. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 n.18 (1978) (citing cases).

87. *Id.* at 376 (“[A]ncillary jurisdiction typically involves claims by a defending party haled into court against his will.”); see also MARCUS, REDISH & SHERMAN, *supra* note 83, at 879.

88. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 580 n.2 (1999) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)).

89. One arguable exception to the complete diversity rule is *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), where the Court held that diversity jurisdiction could exist despite the presence of unnamed class members who were not diverse. *Id.* at 364–67.

90. See *Kroger*, 437 U.S. at 377. In that case, plaintiff Kroger sued the Omaha Public Power District for the wrongful death of her husband, asserting federal jurisdiction based on diversity. *Id.* at 367. Omaha Power impleaded Owen Equipment as a third party defendant, seeking contribution for any damages it might end up owing to Kroger. *Id.* at 367–68. Kroger then filed a claim directly against Owen Equipment. *Id.* at 368. The Supreme Court held that there was no federal jurisdiction to hear that claim because Kroger and Owen Equipment were both citizens of Iowa. *Id.* at 377. The Court so held even though Owen Equipment was properly brought into the case by Omaha Power.

91. 306 U.S. 583 (1939).

92. *Id.* at 589. Although *Clark* was a federal question case, not a diversity case, it was decided at a time when federal question cases were also subject to an amount-in-controversy requirement. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, \_\_\_ U.S. \_\_\_ (Jun. 23, 2005), 125 S. Ct. 2611, 2618 (2005). Prior to the supplemental jurisdiction statute, *Clark* was routinely followed with respect to diversity jurisdiction’s amount-in-controversy requirement as well. See, e.g., *Tex. Acom v. Tex.*

one plaintiff with the requisite amount in controversy would not permit jurisdiction over other plaintiffs with claims below the required amount.<sup>93</sup> In *Zahn v. International Paper Co.*,<sup>94</sup> the Supreme Court applied this same restrictive logic in the class action context, holding that federal diversity jurisdiction does not extend to unnamed class members who lack the required amount in controversy, even if named class members' claims are jurisdictionally adequate.<sup>95</sup>

The Supreme Court also restricted pendent party jurisdiction in federal question cases, holding that a plaintiff with a federal question claim against one defendant could not join a state law claim against a non-diverse second defendant arising out of the same incident.<sup>96</sup> The Court's strongest statement of this principle came in *Finley v. United States*,<sup>97</sup> where a plaintiff whose husband and child had died in an aircraft accident sued the U.S. government in federal court based on the Federal Aviation Administration's failure to maintain runway lights.<sup>98</sup> The plaintiff sought to add state law claims against two non-diverse defendants (the local utility company and the municipality), for which the court lacked an independent basis for federal jurisdiction.<sup>99</sup> The Supreme Court held that federal courts lacked statutory authority to assert pendent party jurisdiction over this claim.<sup>100</sup> Justice Antonin Scalia's majority opinion made clear, however, that "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress."<sup>101</sup> Congress stepped in the following year.

### B. *Congress Speaks: The 1990 Supplemental Jurisdiction Statute*

In response to *Finley*, Congress added § 1367 to title 28 of the U.S.

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Area 5 Health Sys. Agency, Inc., 559 F.2d 1019, 1023 (5th Cir. 1977). Even after the supplemental jurisdiction statute, some courts continued to follow *Clark* in diversity cases. See, e.g., *McCulloch v. Velez*, 364 F.3d 1, 4 (1st Cir. 2004).

93. *Clark*, 306 U.S. at 589–90.

94. 414 U.S. 291 (1973).

95. See *id.* at 294–98.

96. See *Finley v. United States*, 490 U.S. 545, 555–56 (1989); *Aldinger v. Howard*, 427 U.S. 1, 4–6, 16–17 (1976); *CHEMERINSKY*, supra note 83, at 338–39.

97. 490 U.S. 545 (1989).

98. *Id.* at 546.

99. See *id.*

100. *Id.* at 553–56.

101. *Id.* at 556.

Code.<sup>102</sup> Enacted as part of the Judicial Improvements Act of 1990,<sup>103</sup> § 1367(a) provides:

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.<sup>104</sup>

Section 1367(a) also provides that “[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.”<sup>105</sup>

Section 1367(a)’s grant of jurisdiction is subject to exceptions, listed in § 1367(b), which limit the availability of supplemental jurisdiction in diversity cases.<sup>106</sup> Section 1367(b) provides that in cases where original jurisdiction is based on diversity, supplemental jurisdiction does not extend to certain categories of claims where exercising jurisdiction would be “inconsistent” with § 1332’s requirements for diversity jurisdiction.<sup>107</sup> First, claims brought “by plaintiffs” against persons who are made parties to the lawsuit by a third-party claim (Federal Rule of Civil Procedure 14), necessary or permissive joinder (Rule 19 or 20), or intervention (Rule 24) are not eligible for supplemental jurisdiction.<sup>108</sup> In other words, a plaintiff may not add a claim against a defendant or third party joined under Rules 14, 19, 20, or 24 if that claim does not independently satisfy the requirements for diversity jurisdiction. Second, claims “by persons proposed to be joined as plaintiffs under Rule 19 [necessary joinder] . . . or seeking to intervene as plaintiffs under Rule 24” are ineligible for supplemental jurisdiction.<sup>109</sup> In other words, claims by a plaintiff seeking to join under Rule 19 or 24 must independently

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102. See H.R. REP. NO. 101-734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874.

103. Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113–14 (1990) (codified at 28 U.S.C. § 1367 (2000)).

104. 28 U.S.C. § 1367(a).

105. *Id.*

106. See *id.* § 1367(b). Another exception to § 1367(a)’s grant of jurisdiction is § 1367(c), which gives district courts discretion to “decline to exercise supplemental jurisdiction” in certain circumstances, such as where the tag-along claim “raises a novel or complex issue of State law” or “substantially predominates” over the claims for which original jurisdiction exists. *Id.* § 1367(c).

107. *Id.* § 1367(b).

108. *Id.*

109. *Id.*



satisfy the requirements for diversity jurisdiction.

### C. *The Supplemental Jurisdiction Statute's Interpretive Puzzle*

Like its younger cousin CAFA, § 1367 manifested a disconnect between its text and its legislative history. Both the statutory text and the legislative history would overrule *Finley's* refusal to allow pendent party jurisdiction in federal question cases. But while congressional reports indicate an intent to preserve limits on pendent party jurisdiction in diversity cases, the statutory text would allow supplemental jurisdiction over some plaintiffs' claims that would not independently satisfy the requirements for diversity jurisdiction. This disconnect created a deep rift within both the judiciary and the academy.

#### 1. *The Supplemental Jurisdiction Statute's Legislative History*

The Report of the House Judiciary Committee (House Report) stated that § 1367 was designed principally to overrule *Finley's* refusal to allow pendent party jurisdiction in federal question cases.<sup>110</sup> The House Report made equally clear that § 1367 was intended to preserve preexisting limits on supplemental jurisdiction in diversity cases.<sup>111</sup> Thus, the House Report stated that in federal question cases, § 1367 "broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims, including claims involving the joinder of additional parties."<sup>112</sup> In diversity cases, on the other hand, § 1367 does not allow supplemental jurisdiction "when doing so would be inconsistent with the jurisdictional requirements of the diversity statute."<sup>113</sup>

The House Report explained that § 1367(b) would prevent plaintiffs from using supplemental jurisdiction to evade the jurisdictional

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110. H.R. REP. NO. 101-734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874 (stating that § 1367 "would authorize jurisdiction in a case like *Finley*"); *see also* CHEMERINSKY, *supra* note 83, at 339 ("The 1990 Act was specifically intended to overrule *Finley v. United States*, where the Supreme Court held that pendent party jurisdiction is not permitted without specific statutory authorization.").

111. H.R. REP. NO. 101-734, at 28 (stating that § 1367 would "essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction"). The only change to pre-*Finley* practice in diversity cases was to further *restrict* supplemental jurisdiction by providing that a party seeking to intervene as of right could not take advantage of supplemental jurisdiction. *Id.*

112. *Id.*

113. *Id.*

requirements of § 1332. Thus, according to the House Report, § 1367(b) would not permit supplemental jurisdiction when plaintiffs initially name only defendants whose joinder satisfies § 1332's requirements and later seek to add claims against other defendants who have intervened or been joined on a supplemental basis.<sup>114</sup> In addition, the House Report stated that § 1367(b) "prohibits the joinder or intervention of persons [as] plaintiffs if adding them is inconsistent with § 1332's requirements."<sup>115</sup> The House Report also explained that § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*."<sup>116</sup> It cited as an example the *Zahn* case,<sup>117</sup> which held that diversity jurisdiction did not extend to unnamed class members whose claims lacked the required amount in controversy.<sup>118</sup>

## 2. *The Supplemental Jurisdiction Statute's Plain Meaning*

The statutory text of § 1367 does not match the goals described in the House Report. Specifically, § 1367(b) fails to fully prevent an end-run around the usual requirements for diversity jurisdiction. Although the House Report stated that § 1367(b) "prohibits the joinder or intervention of . . . plaintiffs if adding them is inconsistent with § 1332's requirements,"<sup>119</sup> the actual text of § 1367(b) only exempts claims by plaintiffs seeking to join or intervene under Rule 19 or Rule 24.<sup>120</sup> It does not exempt the two most common methods of adding plaintiffs—permissive joinder under Rule 20 and certifying a plaintiff class action under Rule 23.<sup>121</sup> Accordingly, § 1367's text would permit jurisdiction

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114. *Id.* at 29.

115. *Id.*

116. *Id.* at 29 & n.17.

117. *Id.* (citing *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973)).

118. *See Zahn*, 414 U.S. at 295–93.

119. H.R. REP. NO. 101-734, at 29.

120. 28 U.S.C. § 1367(b) (2000) ("[T]he district courts shall not have supplemental jurisdiction . . . over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules."). Rule 19 governs so-called "necessary joinder," i.e., when joinder of a particular person is necessary for a just adjudication, such as where "in the person's absence complete relief cannot be accorded among those already parties." FED. R. CIV. P. 19(a)(1). Rule 24 governs intervention of persons in pending litigation. FED. R. CIV. P. 24.

121. *See* FED. R. CIV. P. 20, 23. The text of § 1367(b) prohibits claims *against* parties joined under Rule 20, but does not prohibit claims *by* parties joined under Rule 20. *See Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 932 (7th Cir. 1996).

over claims by such plaintiffs, even if these claims do not independently satisfy the requirements for diversity jurisdiction.

Thus the text of § 1367, perhaps to the chagrin of the House Judiciary Committee, does not “restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction.”<sup>122</sup> If read literally, § 1367 upsets a number of “pre-*Finley* understandings.”<sup>123</sup> First, it would abrogate *Zahn*.<sup>124</sup> Supplemental jurisdiction would extend to claims by unnamed class members that are below the required amount in controversy (assuming that at least one class member satisfies the amount-in-controversy requirement). Second, § 1367 would abrogate *Clark*’s long-standing requirement that every named plaintiff must satisfy the amount-in-controversy requirement.<sup>125</sup> As long as one plaintiff has the required amount in controversy and thus could invoke the federal court’s original jurisdiction, supplemental jurisdiction would extend to plaintiffs joined under Rule 20, even if their claims lacked the requisite amount in controversy.

Third, § 1367 would create a “potentially gaping hole” in the complete diversity requirement.<sup>126</sup> Just as the text of § 1367 would extend supplemental jurisdiction to plaintiffs without the requisite amount in controversy, so too would it extend jurisdiction to plaintiffs who are not diverse from all defendants. For example, if an Ohio plaintiff sues a Texas defendant, supplemental jurisdiction would extend to claims by a Texas plaintiff joined under Rule 20 against that same Texas defendant. This would be contrary to two centuries of unbroken precedent.<sup>127</sup>

### 3. *Interpreting the Supplemental Jurisdiction Statute*

The conflict between the legislative history of § 1367 and its statutory

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122. See H.R. REP. NO. 101-734, at 28.

123. See *id.*

124. See *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 294–98 (1973) (holding that federal diversity jurisdiction does not extend to unnamed class members who lack the required amount in controversy, even if named class members’ claims are jurisdictionally adequate).

125. See *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939) (holding that each plaintiff must individually satisfy the amount-in-controversy requirement).

126. *Rowe, Burbank & Mengler*, *supra* note 9.

127. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Although the Supreme Court has allowed jurisdiction over non-diverse *unnamed* class members, see *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 364–67 (1921); *supra* notes 88–89 and accompanying text, the language of § 1367 would allow jurisdiction over non-diverse *named* class representatives as well.

text provoked an immediate response from academia. At the outset, an intense scholarly debate arose between Professors Richard Freer and Thomas Arthur on one side and Professors Thomas Rowe, Stephen Burbank, and Thomas Mengler—three scholars who were involved in the drafting of § 1367<sup>128</sup>—on the other.<sup>129</sup> This colloquy addressed the adequacy of the legislative process that led to § 1367,<sup>130</sup> as well as whether various problems with § 1367’s text required a legislative overhaul or could be resolved by judicial interpretation.<sup>131</sup> Commentators also suggested ways for courts to avoid the expansion of federal jurisdiction that the plain meaning of § 1367 seemed to impose.<sup>132</sup> Professors Rowe, Burbank, and Mengler relied on the legislative history’s explicit statement that the statute was meant to preserve pre-*Finley* doctrine and trusted that courts would have little difficulty interpreting § 1367 to avoid “an unacceptable circumvention

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128. See Rowe, Burbank & Mengler, *supra* note 9, at 944 (“[W]e did help in framing 28 U.S.C. § 1367 in the last weeks of the 101st Congress.”).

129. See generally Freer, *supra* note 8; Rowe, Burbank & Mengler, *supra* note 9; Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991); Rowe, Burbank & Mengler, *supra* note 7; Arthur & Freer, *supra* note 7.

130. See Freer, *supra* note 8, at 470 (arguing that the supplemental jurisdiction statute “was drafted and passed quickly without much opportunity for public debate”); Rowe, Burbank & Mengler, *supra* note 7, at 1004–05 (describing the hearings held on the supplemental jurisdiction statute, but acknowledging that “Congress could have—and in an ideal world should have—provided more process and engaged in more debate and deliberation than it did.”).

131. See Arthur & Freer, *supra* note 129, at 964, 985 (arguing that the supplemental jurisdiction “creat[es] ambiguity for cases that formerly were clear and creat[es] numerous problems in others” and that “the only sensible course is for Congress to clean up the section 1367 mess by replacing it with a properly thought-out supplemental jurisdiction statute”); Rowe, Burbank & Mengler, *supra* note 9, at 961 (arguing that the supplemental jurisdiction statute successfully “change[s] the direction taken by the Supreme Court in *Finley*, . . . provide[s] basic guidance” to federal courts and then “trust[s] the federal courts under the changed direction to interpret the statute sensibly”); Rowe, Burbank & Mengler, *supra* note 7, at 1006 (“[W]e continue to believe that the statute is well if not perfectly drafted and in need of little, if any, change.”).

132. Although much of the scholarly debate over the supplemental jurisdiction statute addressed the consequences of § 1367’s literal text and whether it was possible or desirable to evade those consequences, other important issues were also the subject of academic discussion. See, e.g., Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 856–58 (1992) (discussing a number of constitutional and statutory implications of § 1367); Steinman, *supra* note 21, at 86–94 (discussing the application of § 1367 in federal question cases and the potential impact on defining the scope of Article III jurisdiction); Joan Steinman, *Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress’ Handiwork*, 35 ARIZ. L. REV. 305, 308–10 (1993) (discussing whether § 1367 applies to cases removed under § 1441).

of original diversity jurisdiction requirements.”<sup>133</sup> Professor James Pfander argued that courts should interpret § 1367 using what he called “sympathetic textualism,”<sup>134</sup> which was grounded on the premise that “statutes rarely produce unannounced but revolutionary changes in the law.”<sup>135</sup> Using this approach, he argued that § 1367(a), not § 1367(b), prevents supplemental jurisdiction over plaintiffs who are non-diverse or have claims below the required amount in controversy. Section 1367(a) provides that supplemental jurisdiction is available only in cases over which the federal court has “original jurisdiction.” Professor Pfander argued that the term “original jurisdiction” should be read to incorporate the pre-*Finley* limits on supplemental jurisdiction in diversity cases.<sup>136</sup> Thus, the presence of non-diverse parties or claims below the required amount in controversy deprives federal courts of “original jurisdiction” over the entire action, which would preclude supplemental jurisdiction in such cases.<sup>137</sup> Essentially, there would be nothing to which supplemental jurisdiction could attach.<sup>138</sup>

Federal courts were soon embroiled in the dispute. A deep split among the federal appellate courts developed over the issue of whether § 1367 had abrogated *Zahn* and *Clark*.<sup>139</sup> The majority of circuits held that *Zahn* and *Clark* were no longer good law, concluding that supplemental jurisdiction extended to claims by plaintiffs or class members with claims of \$75,000 or less, as long as at least one plaintiff’s claim exceeded \$75,000 and thus fell within the court’s original jurisdiction.<sup>140</sup> Other circuits concluded that supplemental

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133. Rowe, Burbank & Mengler, *supra* note 9; see also Freer, *supra* note 4, at 72 n.85 (“It is impossible to believe that Congress was trying to obviate the complete diversity rule in any context; to conclude that it had done so in this narrow situation and not others would be absurd.”).

134. See Pfander, *supra* note 8, at 113.

135. *Id.* at 113–14 (citing David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 926 (1992)); see also Shapiro, *supra*, at 925 (“[T]he dominant theme running through most interpretive [canons] that actually influence outcomes is that close questions of construction should be resolved in favor of continuity and against change.”).

136. See Pfander, *supra* note 8, at 113–14.

137. See *id.*

138. See *id.* at 114.

139. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, \_\_\_ U.S. \_\_\_ (Jun. 23, 2005), 125 S. Ct. 2611, 2615 (2005) (noting that the grant of certiorari was to resolve a circuit split).

140. See *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004) (Rule 23 class action); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003) (same), *aff’d sub nom.* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, \_\_\_ U.S. \_\_\_ (Jun. 23, 2005), 125 S. Ct. 2611 (2005); *Rosmer v. Pfizer Inc.*, 263 F.3d 110 (4th Cir. 2001) (same); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001) (same); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997)

jurisdiction did not allow litigants to evade *Zahn* and *Clark* in this way. Some reasoned that the presence of plaintiffs or class members without the requisite amount in controversy meant that original jurisdiction was lacking over the entire action, leaving nothing to which supplemental jurisdiction could attach.<sup>141</sup> The Third Circuit, however, held that the legislative history should be followed even if it could not be reconciled with the statutory text, because it so clearly indicated that Congress did not intend to allow supplemental jurisdiction over plaintiffs who lacked the required amount in controversy.<sup>142</sup> It quoted an earlier district court decision refusing to allow supplemental jurisdiction, in which Judge Louis H. Pollak reasoned that to follow the statutory text “is to say to Congress: ‘We know what you meant to say, but you didn’t quite say it. So the message from us in the judicial branch to you in the legislative branch is: “Gotcha! And better luck next time.””<sup>143</sup>

The uncertainty stemming from these conflicting interpretations plagued the supplemental jurisdiction statute’s first decade and a half of operation.<sup>144</sup> The Supreme Court might have resolved this issue sooner,

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(same); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928 (7th Cir. 1996) (joinder of plaintiffs under Rule 20); *In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995) (Rule 23 class action), *aff’d per curiam by an equally divided court sub nom.* *Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000).

141. See *Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124 (1st Cir. 2004) (joinder of plaintiffs under Rule 20), *rev’d sub nom. Allapattah*, 125 S. Ct. at 2611; *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000) (Rule 23 class action), *abrogated by Allapattah*, 125 S. Ct. at 2611; *Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 637–41 (10th Cir. 1998) (Rule 23 class action) (citing early draft of Pfander, *supra* note 8), *abrogated by Allapattah*, 125 S. Ct. at 2611.

142. *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 222 (3d Cir. 1999) (joinder of plaintiffs under Rule 20) (“Even were we to conclude that Section 1367 is unambiguous, . . . we would nevertheless turn to the legislative history because this is one of those ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’” (quoting *United States v. Sherman*, 150 F.3d 306, 313 (3d Cir.1998))), *abrogated by Allapattah*, 125 S. Ct. at 2611.

143. *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 820 (E.D. Pa. 1997), *quoted in Meritcare*, 166 F.3d at 221.

144. While a deep circuit split developed over extending supplemental jurisdiction to plaintiffs without the required amount in controversy, no federal appellate court was willing to extend supplemental jurisdiction to claims by non-diverse plaintiffs. A split did develop in the federal district courts on whether supplemental jurisdiction allowed joinder of plaintiffs whose presence would destroy complete diversity. *Compare Ware v. Jolly Roger Rides, Inc.*, 857 F. Supp. 462, 464 (D. Md. 1994) (“[I]t is also clear that § 1367 does not change the complete diversity requirement in place since *Strawbridge*.”), *and Cent. Synagogue v. Turner Constr. Co.*, 64 F. Supp. 2d 347, 351 (S.D.N.Y. 1999) (“This Court is not aware of any case holding that § 1367 can be invoked to overcome the complete diversity requirement.”), *with El Chico Rests., Inc. v. Aetna Cas. and Sur. Co.*, 980 F. Supp. 1474, 1484 & n.9 (S.D. Ga. 1997) (concluding that “under the plain language of § 1367 the Court may exercise supplemental jurisdiction over the claims of the additional, non-

but its 2000 decision in *Free v. Abbott Laboratories, Inc.*<sup>145</sup> yielded only a per curiam affirmance by an equally divided Court.<sup>146</sup> Courts, litigants, and scholars would have to wait another five years for the Supreme Court to provide guidance.<sup>147</sup>

### III. INTERPRETING THE SUPPLEMENTAL JURISDICTION STATUTE: *ALLAPATTAH'S* LESSONS

In 2004, the Supreme Court granted writs of certiorari in two cases concerning the supplemental jurisdiction statute in order to resolve the split in the circuit courts regarding § 1367.<sup>148</sup> The lead case, *Exxon Mobil Corp. v. Allapattah Services, Inc.*, reviewed a decision by the U.S. Court of Appeals for the Eleventh Circuit. Asserting federal diversity jurisdiction under § 1332(a), Exxon dealers had filed a class action lawsuit alleging that Exxon had overcharged them for fuel.<sup>149</sup> The trial court certified for immediate appeal the question of whether supplemental jurisdiction extended to class members who did not satisfy § 1332(a)'s amount-in-controversy requirement.<sup>150</sup> The Eleventh Circuit held, based on the plain meaning of § 1367, that supplemental jurisdiction extended to unnamed class members who lacked the requisite amount in controversy, as long as original jurisdiction existed over at least one class representative's claim.<sup>151</sup>

Consolidated with *Allapattah* was *Del Rosario Ortega v. Star-Kist Foods, Inc.*,<sup>152</sup> which reviewed a decision by the First Circuit. In that case, a nine-year-old sought damages for injuries she suffered when she

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diverse Plaintiffs named in the amended Complaint" and noting that "the language of § 1367 does not distinguish" between the diversity-of-citizenship and the amount-in-controversy requirements).

145. 529 U.S. 333 (2000) (per curiam).

146. *Id.* Justice O'Connor had recused herself from the case.

147. See Freer, *supra* note 4, at 88 ("When the Supreme Court decided *Finley*, it threw down the gauntlet and challenged Congress to codify supplemental jurisdiction. Thirteen years later, we are waiting for that Court to decide what Congress meant when it tried to do so.")

148. See *Exxon Corp. v. Allapattah Servs., Inc.*, 543 U.S. 924 (2004), *granting cert. to* 333 F.3d 1248 (11th Cir. 2003); *Del Rosario Ortega v. Star-Kist Foods, Inc.*, 543 U.S. 924 (2004), *granting cert. to* 370 F.3d 124 (1st Cir. 2004).

149. *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1251–52 (11th Cir. 2003), *rev'd sub nom.* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, \_\_\_ U.S. \_\_\_ (Jun. 23, 2005), 125 S. Ct. 2611 (2005).

150. *Id.* at 1252–53.

151. *Id.* at 1256.

152. \_\_\_ U.S. \_\_\_ (June 23, 2005), 125 S. Ct. 2611 (2005).

cut her finger on a can of Star-Kist tuna.<sup>153</sup> Several of her family members sought damages for emotional distress and medical expenses.<sup>154</sup> The First Circuit concluded that the girl's claim satisfied § 1332(a)'s amount-in-controversy requirement but the claims by her family members did not.<sup>155</sup> According to the First Circuit, supplemental jurisdiction could not extend to family-member plaintiffs who did not independently satisfy the requisite amount in controversy because the presence of claims below § 1332(a)'s threshold deprived federal courts of original jurisdiction over the entire action.<sup>156</sup>

Together, these cases required the Court to consider the two kinds of claims that Congress had apparently overlooked when drafting § 1367(b). *Allapattah* involved claims by plaintiffs joined as members of a class action under Rule 23, and *Rosario Ortega* involved claims by plaintiffs who had been permissively joined under Rule 20. A five-member majority of the Supreme Court held that in both these situations supplemental jurisdiction extended to claims by plaintiffs whose claims did not satisfy § 1332's amount-in-controversy requirement.<sup>157</sup>

#### A. Justice Kennedy's Majority Opinion

Justice Kennedy, who authored the majority opinion, made clear that the Court would not treat § 1367 with kid gloves merely because it was a jurisdictional statute. Joined by Chief Justice William Rehnquist and Justices Scalia, David Souter, and Clarence Thomas, he wrote that “[n]o sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction within appropriate constitutional bounds.”<sup>158</sup> Justice Kennedy instructed courts to follow a jurisdictional statute's plain meaning: “We must not give jurisdictional statutes a more expansive interpretation than their text warrants; but it is just as important not to adopt an artificial construction that is narrower than what the text provides.”<sup>159</sup> Thus, if the statute's “plain text” resolves the issue, there is no need to consult the statute's

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153. *Del Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124, 126 (1st Cir. 2004).

154. *Id.*

155. *Id.* at 126–27.

156. *Id.* at 135–37.

157. *Allapattah*, 125 S. Ct. at 2615.

158. *Id.* at 2620.

159. *Id.* (citation omitted).



legislative history.<sup>160</sup> Even where the legislative history indicates that the statutory text contains “an unintentional drafting gap,”<sup>161</sup> Justice Kennedy explained that “it is up to Congress rather than the courts to fix it.”<sup>162</sup>

Examining the text of § 1367(a), Justice Kennedy reasoned that if original jurisdiction exists over “a single claim in the complaint,” then a court has “original jurisdiction over a ‘civil action’ within the meaning of § 1367(a).”<sup>163</sup> This is so regardless of whether the complaint also contains claims over which there is no original jurisdiction.<sup>164</sup> Accordingly, if one plaintiff’s claim exceeds the amount-in-controversy threshold for diversity jurisdiction, § 1367(a) authorizes supplemental jurisdiction over related claims by other plaintiffs whose claims do not satisfy the amount-in-controversy requirement.<sup>165</sup>

Justice Kennedy then determined that § 1367(b) did not prohibit supplemental jurisdiction in such cases. Adhering to the statutory text, he reasoned that § 1367(b) did not withhold supplemental jurisdiction over claims of plaintiffs permissively joined under Rule 20 (as in *Rosario Ortega*) or certified as class-action members pursuant to Rule 23 (as in *Allapattah*).<sup>166</sup> Thus, it was the “natural, indeed the necessary, inference” that supplemental jurisdiction extended to claims by Rule 20 and Rule 23 plaintiffs who did not individually satisfy the required amount in controversy for diversity jurisdiction.<sup>167</sup> Accordingly, Justice Kennedy held that § 1367 “by its plain text overruled *Clark* and *Zahn*” by allowing supplemental jurisdiction in cases where some, but not all, plaintiffs have claims that satisfy the amount-in-controversy requirement.<sup>168</sup>

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160. *Id.* at 2625 (holding that “§ 1367 by its plain text overruled *Clark* and *Zahn*” and rejecting reliance on the legislative history “because § 1367 is not ambiguous”); *id.* at 2626 (“[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material.”).

161. *Id.* at 2624 (quoting *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 221 & n.6 (3d Cir. 1999)).

162. *Id.*

163. *Id.* at 2620–21 (quoting 28 U.S.C. § 1367(a) (2000)).

164. *Id.* at 2620 (“The presence of other claims in the complaint, over which the district court may lack original jurisdiction, is of no moment.”).

165. *Id.* at 2625 (“[T]he threshold requirement of § 1367(a) is satisfied in cases . . . where some, but not all, of the plaintiffs in a diversity action allege a sufficient amount in controversy.”).

166. *Id.* at 2621.

167. *Id.*

168. *Id.* at 2625.

Responding to potential counter-arguments, Justice Kennedy found that the text of § 1367 precluded the theory first articulated by Professor Pfander. According to this theory, the presence of claims that do not independently satisfy the requisite amount in controversy deprives federal district courts of original jurisdiction over the entire action under § 1367(a). Justice Kennedy countered that “[s]ection 1367(a) applies by its terms to any civil action of which the district courts have original jurisdiction” and that it “expressly contemplates that the court may have supplemental jurisdiction over additional parties.”<sup>169</sup> Accordingly, he found that Professor Pfander’s theory was contrary to the actual text of § 1367.<sup>170</sup>

However, Justice Kennedy concluded that this theory would preclude joinder of non-diverse plaintiffs. He explained that “[i]ncomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere.”<sup>171</sup> According to Justice Kennedy, this theory applies only “in the special context of the complete diversity requirement because the presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum.”<sup>172</sup>

### B. *The Dissenting Opinions*

Justice Ruth Bader Ginsburg authored a dissenting opinion, which

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169. *Id.* at 2624.

170. *Id.* Justice Kennedy likewise rejected the argument that the “original jurisdiction” requirement of § 1367(a) was meant to incorporate the pre-*Finley* distinction between pendent jurisdiction and ancillary jurisdiction. *Id.* at 2621. Justice Kennedy concluded that there was no support for this interpretation in the statutory text. *Id.* (“The terms of § 1367 do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction.”); *see also id.* (“Nothing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories we have historically labeled pendent and ancillary.”).

171. *Id.* at 2618.

172. *Id.* at 2622. Justice Kennedy’s discussion of non-diverse plaintiffs is arguably dicta, because the facts of *Allapattah* and *Rosario Ortega* did not involve non-diverse plaintiffs. Nonetheless, Justice Kennedy forcefully and repeatedly states that claims by non-diverse plaintiffs would be treated differently for purposes of supplemental jurisdiction. *See id.* at 2618 (“Incomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere.”); *see also id.* at 2622 (noting that the “contamination theory,” which posits that federal jurisdiction is contaminated by the presence of claims without an independent basis for federal jurisdiction, is “germane” to § 1332’s complete diversity requirement). The dissenting justices also concluded that the presence of non-diverse plaintiffs would deprive federal courts of original jurisdiction over the entire action. *Id.* at 2638 (Ginsburg, J., dissenting).

was joined by Justices John Paul Stevens, Sandra Day O'Connor, and Stephen Breyer.<sup>173</sup> Justice Ginsburg's dissent acknowledged that § 1367 was "hardly a model of the careful drafter's art" and that the majority's interpretation was plausible.<sup>174</sup> But she endorsed an alternative interpretation—essentially the one articulated by James Pfander<sup>175</sup>—that was "less disruptive of our jurisprudence regarding supplemental jurisdiction."<sup>176</sup>

Justice Ginsburg noted that § 1367(a) allows supplemental jurisdiction only in "civil action[s] of which the district courts have original jurisdiction"<sup>177</sup> and argued that this phrase "is sensibly read to incorporate the rules on joinder and aggregation tightly tied to § 1332 at the time of § 1367's enactment."<sup>178</sup> If a case includes plaintiffs who are non-diverse or lack the required amount in controversy, the case does not "meet that 'original jurisdiction' measurement" and, accordingly, supplemental jurisdiction is not authorized.<sup>179</sup> Thus, Justice Ginsburg concluded there was no need to determine whether § 1367(b) withdraws supplemental jurisdiction over plaintiffs joined under Rule 20 or Rule 23, because claims by such plaintiffs "would not come within § 1367(a) in the first place."<sup>180</sup> Justice Ginsburg argued that under her approach, § 1367 would override *Finley* but otherwise would preserve "the judicially developed doctrines of pendent and ancillary jurisdiction as they existed when *Finley* was decided."<sup>181</sup>

Justice Stevens also authored a dissenting opinion, in which Justice Breyer joined.<sup>182</sup> Justice Stevens' dissenting opinion emphasized § 1367's legislative history. He argued that "we as judges are more, rather than less, constrained when we make ourselves accountable to *all* reliable evidence of legislative intent."<sup>183</sup> He viewed the legislative

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173. *Id.* at 2631 (Ginsburg, J., dissenting).

174. *Id.* at 2632.

175. See *supra* text accompanying notes 134–38; see also *Allapattah*, 125 S. Ct. at 2638–40 (Ginsburg, J., dissenting) (citing Pfander, *supra* note 8, at 114).

176. *Allapattah*, 125 S. Ct. at 2632 (Ginsburg, J., dissenting).

177. *Id.* at 2638 (quoting 28 U.S.C. § 1367(a) (2000)) (alteration in original).

178. *Id.*

179. *Id.*

180. *Id.* at 2638 n.9.

181. *Id.* at 2638.

182. *Id.* at 2628 (Stevens, J., dissenting).

183. *Id.* (emphasis in original).

history of § 1367 as “uncommonly clear,”<sup>184</sup> calling the House Report a “virtual billboard of congressional intent.”<sup>185</sup> Justice Stevens argued that the House Report demonstrated Congress’ view that § 1367 “codifies and preserves . . . ‘the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction,’” noting the House Report’s specific statement that § 1367 was not intended to upset *Zahn*.<sup>186</sup> He concluded that Justice Kennedy’s interpretation of § 1367 “bears no resemblance to the House Report’s description of the statute.”<sup>187</sup>

### C. *The Two Faces of Allapattah*

It is difficult to distill a coherent lesson from the *Allapattah* decision because Justice Kennedy’s majority opinion has two very different faces. One face of *Allapattah* is the Court’s general language about interpreting jurisdictional statutes, which instructs courts to follow the statute’s plain meaning. The Court issued a ringing endorsement of textualism: “We must not give jurisdictional statutes a more expansive interpretation than their text warrants; but it is just as important not to adopt an artificial construction that is narrower than what the text provides.”<sup>188</sup> In holding that the statute authorized supplemental jurisdiction over plaintiffs who lacked the required amount in controversy for diversity jurisdiction, the court reasoned that “[n]o other reading of § 1367 is plausible in light of the text and structure of the jurisdictional statute.”<sup>189</sup>

The other face of *Allapattah* reflects a transparent willingness to abandon fidelity to the text in order to avoid an especially jarring impact to the existing jurisdictional order. Specifically, Justice Kennedy’s insistence on preserving the complete diversity requirement came at the expense of his purportedly textualist approach. The Court’s view that § 1367 did not allow supplemental jurisdiction over plaintiffs whose presence would destroy complete diversity contradicted § 1367’s explicit instruction that “supplemental jurisdiction shall include claims that

184. *Id.* at 2631.

185. *Id.* at 2630.

186. *Id.* at 2629 (quoting H.R. REP. NO. 101-734, at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6875).

187. *Id.*

188. *Id.* at 2620 (majority opinion) (citations omitted).

189. *Id.* at 2625.

involve the joinder or intervention of additional parties.”<sup>190</sup> Rather than follow the plain text, the Court concluded, based on the policies underlying the complete diversity requirement, that “[i]ncomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere.”<sup>191</sup> Section 1332(a)’s amount-in-controversy requirement, on the other hand, “can be analyzed claim by claim,”<sup>192</sup> so the presence of plaintiffs without the requisite amount in controversy does not deprive the federal court of original jurisdiction over plaintiffs who satisfy the requirement.<sup>193</sup>

The Court offered no textual basis for this distinction. Yet Justice Kennedy proceeded to criticize the dissenting justices for their textually strained reading. He argued that the dissenters’ approach rested on the premise “that the phrase ‘original jurisdiction of all civil actions’ means different things in § 1331 and § 1332.”<sup>194</sup> He continued:

It is implausible . . . to say that the identical phrase means one thing (original jurisdiction in all actions where at least one claim in the complaint meets the following requirements) in § 1331 and something else (original jurisdiction in all actions where every claim in the complaint meets the following requirements) in § 1332.<sup>195</sup>

This critique is, to say the least, the pot calling the kettle black. Justice Kennedy, despite his avowed fidelity to the text, committed what is arguably an even more grievous interpretive offense. He defined that same phrase to mean different things in the *same* statute: the presence of a non-diverse plaintiff defeats original jurisdiction for all plaintiffs, but the presence of a plaintiff without the requisite amount in controversy does not.<sup>196</sup>

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190. 28 U.S.C. § 1367(a) (2000).

191. *Allapattah*, 125 S. Ct. at 2618; *see also id.* at 2623 (“[F]ailure of complete diversity, unlike the failure of some claims to meet the requisite amount in controversy, contaminates every claim in the action.”).

192. *Id.* at 2618.

193. *Id.* at 2622.

194. *Id.*

195. *Id.*

196. *See id.* at 2635 n.5 (Ginsburg, J., dissenting) (“Endeavoring to preserve the ‘complete diversity’ rule . . . , the Court’s opinion drives a wedge between the two components of 28 U.S.C. § 1332, treating the diversity-of-citizenship requirement as essential, the amount-in-controversy requirement as more readily disposable. Section 1332 itself, however, does not rank order the two requirements. What ordinary principle of statutory construction or sound canon of interpretation, allows the Court to slice up § 1332 this way?”) (citations, internal quotations, and alterations

Justice Kennedy's approach also does not find support in § 1367's legislative history. As explained above, the legislative history indicates that § 1367 does not authorize supplemental jurisdiction over claims by plaintiffs without the required amount in controversy.<sup>197</sup> The House Report stated that § 1367 was intended to prevent the joinder of plaintiffs whose claims did not satisfy the requirements for diversity jurisdiction.<sup>198</sup> And it specifically cited the *Zahn* decision, which had refused to allow federal jurisdiction over class members without the required amount in controversy, as an example of a limitation that § 1367 was meant to preserve.<sup>199</sup>

Justice Kennedy contended that his interpretation of § 1367 was supported by the legislative history, and he pointed to a report by a subcommittee of the Federal Courts Study Committee. In this report, the subcommittee recommended legislation that would have overridden the *Zahn* decision.<sup>200</sup> It is unclear, however, what light this sheds on the intent of Congress, because neither the Federal Courts Study Committee nor this particular subcommittee were congressional committees, and nothing in the congressional legislative history of § 1367 mentions this subcommittee's recommendation. The House Report did state that § 1367 was designed to implement a recommendation of the full Federal Courts Study Committee.<sup>201</sup> Unlike the subcommittee report on which Justice Kennedy relied, however, the full Federal Courts Study Committee Report urged that supplemental jurisdiction extend to claims by additional parties in federal question cases only and did not recommend abrogating *Zahn*.<sup>202</sup>

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omitted).

197. See *supra* Part II.C.1.

198. See H.R. REP. NO. 101-734, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875.

199. See *id.* at 29 n.17.

200. See *Allapattah*, 125 S. Ct. at 2626 (majority opinion) (citing REPORT OF THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATIONSHIP TO THE STATES 567-68 (1990) [hereinafter SUBCOMMITTEE REPORT], *reprinted in* JUDICIAL CONFERENCE OF THE U.S., 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS (1990) [hereinafter JUDICIAL CONFERENCE]); *id.* (citing SUBCOMMITTEE REPORT, *supra*, at 561 n.33).

201. H.R. REP. NO. 101-734, at 27 (stating that § 1367 "implements a recommendation of the Federal Courts Study Committee found on pages 47 and 48 of its Report").

202. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (1990). ("[W]e recommend that Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, *within federal question jurisdiction*, that require the joinder of additional parties, namely, defendants against whom that plaintiff has a closely related state claim.") (emphasis added). The Federal Courts Study

Justice Kennedy's interpretation of § 1367, therefore, fares poorly in terms of both the statutory text and the legislative history. There is no textual support for allowing supplemental jurisdiction over claims by plaintiffs without the required amount in controversy but not over claims by non-diverse plaintiffs.<sup>203</sup> And the supporting evidence in the legislative history is minimal at best—Justice Kennedy relied on a non-congressional subcommittee report that the House Judiciary Committee never mentioned and whose recommendations were directly contrary to the goals expressed in the House Report.<sup>204</sup>

Alternative readings of § 1367 would at least have found solid purchase in either the legislative history or the statutory text. The dissenters' approach would have affected the smallest expansion of federal jurisdiction: supplemental jurisdiction would never extend to claims by plaintiffs in a diversity case.<sup>205</sup> This approach is consistent with the House Report's goal of preserving pre-*Finley* understandings of supplemental jurisdiction, including the long-standing requirements for diversity jurisdiction that might be circumvented if supplemental jurisdiction extended too far.<sup>206</sup> This approach, however, was a poor fit with the statutory text because it drew a textually unsupported distinction between federal question cases and diversity cases.<sup>207</sup>

An alternative to the majority and dissenting Justices' interpretations would have been to read § 1367 as creating a "gaping hole"<sup>208</sup> in the complete diversity requirement, such that supplemental jurisdiction would extend even to non-diverse plaintiffs joined under Rule 20.<sup>209</sup>

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Committee stated explicitly that subcommittee reports should not be construed as having been adopted by the full committee. JUDICIAL CONFERENCE, *supra* note 200, at preface page ("These materials were valued background materials which the Committee determined should be published for general consideration whether or not the Committee agreed with their substantive proposals . . . . In no event should the enclosed materials be construed as having been adopted by the Committee."); see also Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 19 SETON HALL LEGIS. J. 157, 163 (1994) (noting that "the [Federal Courts Study Committee] specifically disclaims the Subcommittee reports and working papers.").

203. See *supra* notes 190–96 and accompanying text.

204. See *supra* notes 200–02 and accompanying text.

205. See *supra* notes 176–81 and accompanying text.

206. See *supra* notes 113–18 and accompanying text.

207. See *supra* text accompanying notes 194–95.

208. Rowe, Burbank & Mengler, *supra* note 9.

209. See *supra* text accompanying notes 126–27; see also *El Chico Rests., Inc. v. Aetna Cas. & Sur. Co.*, 980 F. Supp. 1474, 1484 & n.9 (S.D. Ga. 1997) (concluding that "under the plain language of § 1367 the Court may exercise supplemental jurisdiction over the claims of the additional, non-

This interpretation, which would have worked the largest jurisdictional expansion of the three possibilities, is the clearest reading in terms of the statutory text.<sup>210</sup> It takes seriously § 1367(a)'s instruction that "supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties"<sup>211</sup> and requires none of the definitional gymnastics on which both Justice Kennedy and Justice Ginsburg relied.<sup>212</sup> But this interpretation of § 1367 has no support whatsoever in the legislative history.

The Court's interpretation of § 1367 looks like a classic case of splitting the baby.<sup>213</sup> Justice Kennedy chose neither the smallest possible expansion of federal jurisdiction (which was strongly supported by the legislative history but not the statutory text), nor the largest possible expansion of federal jurisdiction (which was strongly supported by the statutory text but not the legislative history). Instead, he chose the interpretation that would affect the median possible expansion, which lacked strong support from either the text or the legislative history. The following table compares the three possibilities:

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diverse Plaintiffs named in the amended Complaint" and noting that "the language of § 1367 does not distinguish" between the diversity-of-citizenship and the amount-in-controversy requirements).

210. See *supra* Part II.C.2.

211. 28 U.S.C. § 1367(a) (2000).

212. See *supra* notes 194–96 and accompanying text.

213. Cf. 1 Kings 3:16–27 (describing the story in which King Solomon resolves a dispute between two women claiming to be a baby's mother by threatening to split the baby in two).



*Table 1*

Possible Approaches to Supplemental Jurisdiction	Relative Size of Jurisdictional Expansion	Fit with Statutory Text	Supporting Evidence in Legislative History
Supplemental jurisdiction does not extend to new parties in diversity cases. (Justice Ginsburg)	Smallest	Poor	Strong
Supplemental jurisdiction in diversity cases extends to plaintiffs who lack the required amount in controversy but not to non-diverse plaintiffs. (Justice Kennedy)	Median	Poor	Minimal
Supplemental jurisdiction extends to both non-diverse plaintiffs and plaintiffs who lack the required amount in controversy. ("Gaping Hole")	Largest	Good	None

Accordingly, courts could read the *Allapattah* decision to endorse two quite different approaches to interpreting jurisdictional statutes. On one hand, the Court endorses a textualist approach, explicitly instructing that jurisdictional statutes should be read no more narrowly or broadly than the text provides.<sup>214</sup> On the other hand, the Court indicates a willingness to compromise strict fidelity to the text in order to avoid expanding jurisdiction far beyond what Congress apparently intended. However, the *Allapattah* Court was not willing to excuse Congress completely from the unforeseen consequences of § 1367's text. Rather than choose the smallest expansion of jurisdiction, which would have fit best with the legislative history, the Court read the statute to impose a median expansion of jurisdiction, even though that interpretation was an awkward fit with both the legislative history and the statutory text. Thus, *Allapattah*'s implicit lesson is that courts should claim that they are following the plain meaning of the statutory text, but then impose a non-

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214. *Exxon Mobil Corp. v. Allapattah Servs.*, \_\_\_ U.S. \_\_\_ (June 23, 2005), 125 S. Ct. 2611, 2620 (2005).

textual limitation on the statute's jurisdictional expansion in order to reach a compromise between the legislative history and the statutory text.

#### IV. USING *ALLAPATTAH* TO SOLVE THE CLASS ACTION FAIRNESS ACT'S INTERPRETIVE PUZZLE

As I explained at the outset of this Article, CAFA's removal provision reflects a disconnect between the statutory text and the legislative history. Thus, CAFA once again challenges courts to interpret a jurisdictional statute where the apparent intent of Congress openly conflicts with the statutory text. CAFA's § 1453 threatens to create the same kind of chaos that § 1367 generated during the last fifteen years. In this Part, I examine what the *Allapattah* Court's approach to interpreting jurisdictional statutes can teach federal courts interpreting CAFA's removal provision. As explained above, *Allapattah* can be read to endorse two conflicting approaches to interpreting such statutes. This Part first considers *Allapattah*'s explicit lesson, which teaches that courts should interpret jurisdictional statutes no more broadly or narrowly than what the statutory text provides. It next considers *Allapattah*'s implicit lesson, which teaches that courts should purport to follow the statutory text, but should ultimately reach a compromise between the legislative history and the statutory text by developing a nontextual limitation on the statute's jurisdictional expansion.

##### A. *Allapattah's Explicit Lesson: Textualism*

The language of *Allapattah* could not have been more clear on the need to follow a jurisdictional statute's plain meaning: "We must not give jurisdictional statutes a more expansive interpretation than their text warrants; but it is just as important not to adopt an artificial construction that is narrower than what the text provides."<sup>215</sup> As explained above, the text of CAFA's removal provision leaves no room for ambiguity.<sup>216</sup> Section 1453(b) provides that "[a] class action may be removed to a district court of the United States."<sup>217</sup> The term "class action" is explicitly defined to include "any civil action" filed under a state statute or rule that "authoriz[es] an action to be brought by 1 or more

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215. *Id.* (citations omitted).

216. *See supra* Part I.C.2.

217. 28 U.S.C.A. § 1453(b) (West Supp. 2005).

representative persons as a class action.”<sup>218</sup> If a case is a “class action,” then CAFA provides that it “may be removed to a district court of the United States,”<sup>219</sup> unless the case is the kind of securities and corporate governance case that CAFA’s removal provision explicitly excludes.<sup>220</sup>

Save for that narrow exception, CAFA does not limit the universe of “class action[s]” that may be removed under § 1453. Nor do any other federal provisions restrict the kinds of class actions for which CAFA authorizes removal.<sup>221</sup> There is no basis, for example, to require class actions removable under § 1453 to also comply with § 1441(a)’s requirement that the case be one “of which the district courts of the United States have original jurisdiction.”<sup>222</sup> Therefore, it would not matter if the class action meets neither § 1332(a)’s requirements for ordinary diversity jurisdiction, nor § 1332(d)’s requirements for CAFA’s new form of diversity jurisdiction, nor § 1331’s requirements for federal question jurisdiction. It is removable under § 1453 because it is a “class action.”<sup>223</sup>

### B. *Allapattah’s Implicit Lesson: Compromise*

Despite the *Allapattah* Court’s purported endorsement of textualism, the Court did not follow the plain meaning of § 1367. To avoid creating a “gaping hole”<sup>224</sup> in the complete diversity requirement, the majority adopted a strained reading that extended federal jurisdiction to plaintiffs who lacked the requisite amount in controversy while excluding non-diverse plaintiffs.<sup>225</sup> Whatever one thinks of this conclusion as a matter of policy, it is hardly the work of a faithful textualist.

This aspect of *Allapattah* indicates that as a practical matter, the Court is reluctant to follow statutory text that would extend federal jurisdiction far beyond what the legislative history suggests was Congress’ intent. As illustrated above, the Court split the jurisdictional baby—choosing

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218. 28 U.S.C. § 1332(d)(1)(B) (2000); *see also* 28 U.S.C.A. § 1453(a) (West Supp. 2005) (“In this section, the term[] . . . ‘class action’ . . . shall have the meanings given such term[] under section 1332(d)(1).”).

219. 28 U.S.C.A. § 1453(b).

220. *See id.* § 1453(d).

221. *See supra* notes 68–82 and accompanying text.

222. 28 U.S.C. § 1441(a) (2000); *see supra* notes 73–82 and accompanying text.

223. 28 U.S.C.A. § 1453(b) (West Supp. 2005).

224. Rowe, Burbank & Mengler, *supra* note 9.

225. *See supra* notes 189–212 and accompanying text.

neither the smallest expansion of jurisdiction (which was supported by the legislative history) nor the largest expansion of jurisdiction (which was supported by the text).<sup>226</sup> Instead, it chose a median expansion of jurisdiction, which was supported by neither the text nor the legislative history.<sup>227</sup> Thus, the *Allapattah* Court's interpretive method appears to be this: feign commitment to the statutory text but then reach a compromise between the text and the legislative history.

How might courts apply this method to CAFA's removal provision? Like the supplemental jurisdiction statute, CAFA's removal provision lends itself to three possible readings. The one that would result in the smallest expansion of federal jurisdiction is the one supported by the legislative history. Under this reading, the red-carpet removal scheme laid out in § 1453 would apply only to class actions that fall within CAFA's new form of diversity jurisdiction, namely, class actions that satisfy minimal diversity,<sup>228</sup> have 100 or more class members<sup>229</sup> with an aggregate amount in controversy exceeding \$5 million,<sup>230</sup> and are not otherwise exempted (e.g., because they are localized disputes or name a state government as a primary defendant).<sup>231</sup>

The reading of CAFA that would result in the largest expansion of federal jurisdiction is the one supported by the statutory text of § 1453. Under this interpretation, CAFA would allow, with one exception, any state court class action to be removed to federal court. Section 1453 authorizes removal of all class actions filed in state court, except for the particular securities and corporate governance class actions that are explicitly exempted under § 1453(d).<sup>232</sup> Furthermore, any class action removed from state court is entitled to red-carpet treatment under § 1453: there is no requirement that all defendants consent, no bar to removing cases with an in-state defendant, no one-year limitation period, and no absolute bar to appellate review of remand orders.<sup>233</sup>

There is a third possible reading of CAFA, which would result in a

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226. See *supra* notes 203–12 and accompanying text and table.

227. See *supra* text and table accompanying notes 203–04, 213.

228. 28 U.S.C. § 1332(d)(2) (2000).

229. See *id.* § 1332(d)(5)(B).

230. *Id.* § 1332(d)(2).

231. For a description of the statutory exemptions to § 1332(d) jurisdiction, see *supra* notes 28–32 and accompanying text.

232. The securities and corporate governance exception is described *supra* note 30 and accompanying text.

233. 28 U.S.C.A. § 1453(b)–(c) (West Supp. 2005).

median expansion of jurisdiction—smaller than what the statutory text provides but larger than what the legislative history suggests. On this reading, red-carpet removal would be available for any class action where a basis for removal exists elsewhere under federal law, except for the specific securities and corporate governance class actions that are explicitly exempted under § 1453(d). The basic theory supporting this reading is that § 1453 is not an independent basis for removal.

Under this median approach, the function of § 1453 would be to provide more defendant-friendly requirements for class actions that have an independent basis for removal elsewhere under federal law. For example, if a class action is one “of which the district courts of the United States have original jurisdiction”<sup>234</sup> (e.g., because it raises a federal question for purposes of § 1331 or satisfies the requirements for either ordinary diversity jurisdiction under § 1332(a) or CAFA diversity jurisdiction under § 1332(d)), then there is an independent basis for removal under § 1441(a). Under the median reading of CAFA, that class action would be entitled to red-carpet removal, unless it falls within the narrow exception for certain securities and corporate governance class actions.

To illustrate, imagine the following hypothetical, which I call the “small, completely diverse” class action: all named plaintiffs are diverse from all defendants and at least one class member has a claim in excess of \$75,000. Assume, however, that there are fewer than 100 class members, or that the aggregate amount in controversy is \$5 million or less. This case would satisfy § 1332(a)’s requirements for ordinary diversity jurisdiction.<sup>235</sup> But it would not satisfy CAFA’s requirements for diversity jurisdiction over large, interstate class actions, because there are less than 100 class members or because the aggregate amount in controversy does not exceed \$5 million.

This case is potentially removable under § 1441(a) because there is complete diversity and at least one plaintiff with a claim in excess of \$75,000. Without CAFA, however, a defendant seeking to remove this case would have faced a number of impediments: consent of all defendants would be required, removal would be prohibited if there were any in-state defendants, there would be an absolute one-year time limit

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234. 28 U.S.C. § 1441(a) (2000).

235. See *supra* notes 23–24 and accompanying text. Because the *Allapattah* Court read § 1367 to override *Zahn*, original jurisdiction would exist as long as one plaintiff had a claim in excess of \$75,000; supplemental jurisdiction would then extend to the other claims under § 1367. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, \_\_\_ U.S. \_\_\_ (Jun. 23, 2005), 125 S. Ct. 2611, 2621 (2005).

to remove, and there would be no appellate review of remand orders.<sup>236</sup> Although federal jurisdiction would exist over this case even without CAFA, it would not be removable to federal court if, for example, there were an in-state defendant.

Under the median-expansion view, CAFA's removal provision would allow the small, completely diverse class action to be removed even if there were an in-state defendant. This reading is more expansive than the narrow reading of CAFA's removal provision contemplated in the legislative history, because it would extend § 1453's red-carpet removal to class actions that do not satisfy § 1332(d)'s requirements for large, interstate class actions. But it is less expansive than the text of CAFA's removal provision, which would allow removal of all state court class actions except certain specifically exempted categories of securities and corporate governance class actions.

Just like *Allapattah*'s compromise interpretation of the supplemental jurisdiction statute, the compromise interpretation of CAFA is not supported by either the legislative history or the statutory text. There is no textual basis for concluding that CAFA's removal provision applies only to class actions for which some basis for removal exists elsewhere under federal law. CAFA unambiguously provides: "A class action *may be removed* . . ."<sup>237</sup> This language is no different than the numerous other federal removal provisions that courts have consistently read as independently authorizing removal. Section 1441(a), for example, states that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, *may be removed*."<sup>238</sup> Section 1442 provides that "[a] civil action or criminal prosecution commenced in a State court against [federal officers or agencies] *may be removed*."<sup>239</sup> Section 1443 provides that certain state court actions where the defendant relies on federal civil rights laws for its defense "*may be removed*."<sup>240</sup> Thus, the plain language of CAFA's § 1453 creates an independent basis for removal, no different from the many other bases

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236. See *supra* notes 34–37 and accompanying text.

237. 28 U.S.C.A. § 1453(b) (West Supp. 2005) (emphasis added); see *supra* Part I.C.2.

238. 28 U.S.C. § 1441(a) (2000) (emphasis added).

239. *Id.* § 1442(a) (emphasis added).

240. *Id.* § 1443 (emphasis added). Section 1452, which allows removal of bankruptcy-related claims, uses identical language in a slightly different structure: "A party *may remove* any claim or cause of action [with some exceptions] . . . to the district court . . . where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 [which provides federal jurisdiction over Title 11 bankruptcy cases]." *Id.* § 1452 (emphasis added).

for removal set forth in the U.S. Code. In addition, CAFA's statement that class actions "may be removed . . . in accordance with section 1446"<sup>241</sup> removes any doubt that it provides an independent basis for removal. By explicitly authorizing removal under § 1446's general removal procedures, CAFA states as clearly as can be expected that CAFA removal is not subject to the substantive requirements that apply to cases removed under other federal provisions.<sup>242</sup>

Similarly, the compromise interpretation of CAFA's removal provision finds little, if any, support in CAFA's legislative history. A weak argument might be made based on the Senate Report's statement that class actions removable under CAFA must comply with "[t]he general removal provisions" set forth in the federal code, "except where they are inconsistent with the provisions of [CAFA]."<sup>243</sup> Citing § 1441(a), the Senate Report stated that "like other removed actions, matters removable under this bill may be removed only 'to the district court of the United States for the district and division embracing the place where such action is pending.'"<sup>244</sup> By referring to "general removal provisions" and to § 1441(a) in particular, this language may indicate that red-carpet removal was meant to extend to any class action "of which the district courts of the United States have original jurisdiction."<sup>245</sup> This portion of the legislative history, however, was meant to reaffirm restrictions on removal of class actions, such as the restriction that a case may only be removed to the federal court where the state court action was pending. It would be odd indeed to read such a statement as desiring to expand the universe of class actions subject to § 1453's red-carpet removal scheme to include not only large, interstate class actions but also any class action that would have been subject to original federal jurisdiction. Moreover, the Senate Report on CAFA consistently indicates an understanding that § 1453 removal would be available only for "larger interstate class actions."<sup>246</sup>

To summarize, there are three potential ways to read CAFA's removal provision. The reading that would cause the smallest expansion

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241. 28 U.S.C.A. § 1453(b) (West Supp. 2005).

242. See *supra* notes 73–74 and accompanying text.

243. S. REP. NO. 109-14, at 48, *reprinted in* 2005 U.S.C.C.A.N. 3, 45 ("The general removal provisions currently contained in Chapter 89 of Title 28 would continue to apply to class actions, except where they are inconsistent with the provisions of the Act.").

244. *Id.* (quoting 28 U.S.C. § 1441(a) (2000)).

245. 28 U.S.C. § 1441(a).

246. See *supra* Part I.C.1.

of federal jurisdiction would be that § 1453 authorizes red-carpet removal only for the large, interstate class actions that satisfy § 1332(d)'s requirements for CAFA diversity jurisdiction. This interpretation fits poorly with the statutory text but has strong support in the legislative history. The reading that would cause the median expansion of federal jurisdiction would be that § 1453 authorizes red-carpet removal only where a basis for removal exists elsewhere under federal law. This interpretation also fits poorly with the text, and the support for this reading in legislative history is minimal at best. The reading that would cause the largest expansion of federal jurisdiction would be that § 1453 authorizes red-carpet removal of any state court class action, except the three categories of securities and corporate governance cases that are explicitly exempted. This interpretation fits well with the statutory text but there is not a shred of evidence that Congress intended to expand federal jurisdiction this far. The following table depicts the possibilities:

**Table 2**

Possible Approaches to CAFA Removal	Relative Size of Jurisdictional Expansion	Fit with Statutory Text	Supporting Evidence in Legislative History
CAFA allows red-carpet removal only for large, interstate class actions.	Smallest	Poor	Strong
CAFA allows red-carpet removal of class actions for which a basis for removal exists elsewhere under federal law.	Median	Poor	Minimal
CAFA allows red-carpet removal of any state court class action (except for three kinds of securities and corporate governance cases).	Largest	Good	None

In terms of the menu of possible interpretations, the parallels between CAFA and the supplemental jurisdiction statute are striking.<sup>247</sup> The most

247. See *supra* notes 203–14 and accompanying text and table.



expansive reading—and the one in deepest conflict with the legislative history—is the most textually consistent interpretation. While the *Allapattah* Court stated that courts should not give jurisdictional statutes “an artificial construction that is narrower than what the text provides,”<sup>248</sup> it ultimately chose the median expansion, essentially forging a compromise between what Congress meant (the smallest expansion) and what Congress said (the largest expansion).

Applying this approach to interpreting CAFA’s removal provision, one would expect that courts will likewise endorse the median expansion. Under this interpretation, § 1453 would allow red-carpet removal of class actions, but only if a basis for removal exists elsewhere under federal law, as it would under § 1441(a) for a class action that would be subject to federal courts’ original jurisdiction, or under § 1442 for a class action against a federal agency or federal officer.<sup>249</sup> For such class actions, there would be no requirement that all defendants consent, no bar to removing cases with an in-state defendant, no one-year limitation period, and no absolute bar to appellate review of remand orders.<sup>250</sup>

One can also imagine how a federal court might employ the *Allapattah* Court’s feigned textualism to reach this result. Heeding *Allapattah*’s instruction that courts interpreting jurisdictional statutes should “not . . . adopt an artificial construction that is narrower than what the text provides,”<sup>251</sup> courts could conclude that CAFA removal is not limited to class actions that satisfy CAFA’s new form of diversity jurisdiction. CAFA provides that a “class action” may be removed<sup>252</sup> and defines the term “class action” to mean any civil action filed under a state statute or rule that authorizes an action to be brought by one or more representative persons as a class action.<sup>253</sup> However, the court could limit the resulting expansion of federal jurisdiction by holding that CAFA’s removal provision is not an independent basis for removal. This limitation is not supported by the statutory text and, like *Allapattah*’s special exception for claims by non-diverse plaintiffs,<sup>254</sup> would create

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248. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, \_\_\_ U.S. \_\_\_ (Jun. 23, 2005), 125 S. Ct. 2611, 2620 (2005).

249. See *supra* text accompanying notes 235–36.

250. See 28 U.S.C.A. § 1453(b)–(c) (West Supp. 2005).

251. *Allapattah*, 125 S. Ct. at 2620.

252. 28 U.S.C.A. § 1453(b).

253. See *id.* §§ 1332(d)(1)(B), 1453(a).

254. See *Allapattah*, 125 S. Ct. at 2618; *supra* note 196 and accompanying text.

troubling textual inconsistencies within the U.S. Code.<sup>255</sup> Nonetheless, it would achieve the median expansion I describe above, while purporting to simply follow CAFA's plain text.

A federal court seeking to draw lessons from *Allapattah* for interpreting CAFA's removal provision faces a dilemma. Should it follow what the *Allapattah* Court said it did—that is, construe a jurisdictional statute no more narrowly or broadly than the text provides? Or should it follow what the *Allapattah* Court actually did—that is, feign commitment to textualism but in fact strike a compromise between the legislative history and the statutory text? A court choosing the first approach (*Allapattah*'s explicit lesson) will read CAFA to authorize removal of every state court class action, except for three specifically exempted categories of securities and corporate governance class actions. A court choosing the second approach (*Allapattah*'s implicit lesson) will eliminate certain obstacles to removal for all class actions, but will still require that a basis for removal exist elsewhere in the U.S. Code.

## V. A FEW WORDS ON NORMATIVITY AND PRACTICAL CONSEQUENCES

To this point, I have avoided making any normative claims about the interpretive problems posed by CAFA and the supplemental jurisdiction statute. While I have explained how the *Allapattah* Court's textualist rhetoric did not match its compromise result, this is not to say that textualism is necessarily the better way to interpret jurisdictional statutes. It is beyond the scope of this Article to assess which method is better as a matter of statutory interpretation. While many have sung the praises of textualism,<sup>256</sup> one can also imagine arguments in favor of an approach that seeks a compromise between the legislative history and the statutory text. If one views both the statutory text and legislative history as valid means of determining congressional intent,<sup>257</sup> a middle

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255. See *supra* notes 237–40 and accompanying text.

256. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Shepsle, *supra* note 15.

257. See *Allapattah*, 125 S. Ct. at 2628 (Stevens, J., dissenting) (stating that legislative history should be consulted because “we as judges are more, rather than less, constrained when we make ourselves accountable to *all* reliable evidence of legislative intent”) (emphasis in original).

ground interpretation may be a sensible solution when the two fail to coincide.

Some, however, may argue that legislative history can be a better indicator of congressional intent than the statutory text,<sup>258</sup> at least where the legislative history indicates that a drafting error occurred.<sup>259</sup> Those in this camp would likely contend that the texts of § 1367 and CAFA failed to manifest Congress's true intent because of careless mistakes in translating that intent into statutory language.<sup>260</sup> But even if one accepts this view, a compromise interpretation may be more desirable than one that simply follows the legislative history. Following the legislative history despite statutory text to the contrary would arguably eliminate an incentive for Congress to carefully draft statutes.<sup>261</sup> The compromise approach would retain such an incentive, although it would not "punish"

258. See *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 222 (3d Cir. 1999) ("Even were we to conclude that Section 1367 is unambiguous, . . . we would nevertheless turn to the legislative history because this is one of those 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (quoting *United States v. Sherman*, 150 F.3d 306, 313 (3d Cir. 1998) (alteration in original)). *But cf.* Nelson, *supra* note 14, at 364 ("Nowadays, . . . it is hard to find anyone who advocates such untethered use of legislative history.").

259. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 850–851 (1992) (providing an example where House and Senate committee reports indicated that a drafting error had occurred and arguing that courts should rely on the legislative history to correct the error).

260. Arguably, the narrative format of a congressional report is less subject to error than the more complex task of statutory drafting. See Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1325 (2000) (noting that legislative history is "more readable" than a statute's text); Bradford L. Ferguson et al., *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 823 (1989) (arguing, in the context of tax legislation, that legislators tend to rely on "narrative committee reports . . . rather than on statutory language").

261. One critic of textualism explains this argument against following the legislative history as follows:

[A] method of statutory interpretation must be evaluated . . . according to its ability to stimulate legislators to perform their functions better, as by drafting statutes more precisely. . . . 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.

William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 677 (1990) (citing *United States v. Taylor*, 487 U.S. 326, 345–46 (1988) (Scalia, J., concurring in part); *Finley v. United States*, 490 U.S. 545, 555–56 (1989)); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457 (1989) ("The 'plain meaning' principle, for example, might be an effort . . . to tell Congress to be careful with statutory language. The principle warns Congress that courts will not guess about the meaning of statutes or supply remedies for language that leads to absurd results.").

Congress's drafting errors as strictly as a pure textualist approach.<sup>262</sup>

Thus, my normative complaint about *Allapattah* is not that it struck a compromise between the statutory text and the legislative history, but rather that Justice Kennedy purported to follow the text's plain meaning in reaching that result. This makes it impossible to extract from *Allapattah* a coherent lesson for interpreting jurisdictional statutes. A court must either follow what Justice Kennedy said he did (follow the text) or what he actually did (compromise between the text and legislative history). A more candid opinion, which forthrightly confronted the stark conflict between § 1367's statutory text and legislative history, would have shed more light on how courts should solve interpretive puzzles like the supplemental jurisdiction statute and CAFA.

As for CAFA, my principal complaint is with Congress. I share the frustration expressed by Professors Freer and Arthur shortly after § 1367 was enacted.<sup>263</sup> The interpretive problems that CAFA's removal provision poses could easily have been fixed had there been more thorough discussion and deliberation. If Congress intended to allow removal of every state court class action (except for certain securities and corporate governance cases), that would be its prerogative.<sup>264</sup> But it does not appear that any legislator, judge, or commentator has ever urged such a broad expansion of removal jurisdiction over state court class actions. Yet that is precisely the effect of CAFA's plain meaning.<sup>265</sup>

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262. Cf. Bell, *supra* note 260, at 1255 (stating that textualist judges have "assumed the task of disciplining Congress to correct its inadequacies"); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 323 (2001) ("What attractions draw judges to the textualist view? There is, of course, . . . a certain pleasure in catching that naughty Congress in a mistake and punishing it." (citing *In re Abbott Labs.*, 51 F.3d 524, 528 (5th Cir. 1995) (applying the literal text of § 1367 to allow supplemental jurisdiction over claims by class members without the required amount in controversy)). Judge Pollak's opinion in an early district court decision on the scope of § 1367 also appears to view textualism as a penalty—albeit an unjustified one—for Congress' errors in translating what it "meant to say" into statutory text. See *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 820 (E.D. Penn. 1997) (arguing that applying the statutory text in the face of legislative history to the contrary "is to say to Congress: 'We know what you meant to say, but you didn't quite say it. So the message from us in the judicial branch to you in the legislative branch is: "Gotcha! And better luck next time.'").

263. See *supra* note 7.

264. Congress could not constitutionally allow federal court adjudication of class actions that fall outside of the federal judiciary's authority under Article III. As I explain *infra* text accompanying notes 271–73, following the plain text of CAFA would not violate Article III.

265. See *supra* Part I.C.2.

While it is beyond the scope of this Article to evaluate whether such an expansion is desirable as a policy matter, I wish to mention three noteworthy consequences of interpreting CAFA according to its plain text. First, following CAFA's statutory text would in some circumstances allow removal jurisdiction over class actions for which there would be no original jurisdiction. In other words, some class actions that a plaintiff could not bring in federal court as an initial matter could nonetheless be removed to federal court by a defendant under CAFA. Imagine, for example, a class action where there is only minimal diversity between the plaintiff class representatives and the defendants, the aggregate amount in controversy is less than \$5 million, and the plaintiffs assert only state law claims. Plaintiffs could not bring this case in federal court as an initial matter because (a) the small aggregate amount in controversy precludes CAFA diversity jurisdiction; (b) the lack of complete diversity precludes ordinary diversity jurisdiction; and (c) the lack of federal law claims precludes federal question jurisdiction. If this class action is filed in state court, however, defendants could remove it under the plain text of § 1453, which states that "[a] class action may be removed."<sup>266</sup>

For ordinary removal under § 1441(a), the reverse is true. Some cases for which original jurisdiction would exist in federal court may not be removed, such as where the case satisfies the requirements for ordinary diversity jurisdiction but the presence of an in-state defendant precludes removal.<sup>267</sup> It is not anomalous, however, for Congress to grant removal jurisdiction over cases that are outside the scope of federal courts' original jurisdiction. Section 1442, for example, allows removal of actions against federal officers who have a colorable federal law defense.<sup>268</sup> And § 1443 allows removal of certain actions where the defendant relies on federal civil rights laws for its defense.<sup>269</sup> Since the presence of a federal defense is insufficient for original federal question jurisdiction under § 1331,<sup>270</sup> plaintiffs usually cannot bring such cases in federal court initially. Yet, Congress authorizes defendants to remove such cases. As a practical matter, this gives the defendant, but not the plaintiff, the choice whether to proceed in federal court.

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266. 28 U.S.C.A. § 1453(b) (West Supp. 2005); *see supra* Part I.C.2.

267. *See* 28 U.S.C. § 1441(a)-(b) (2000).

268. *Id.* § 1442; *Mesa v. California*, 489 U.S. 121, 136-39 (1989).

269. 28 U.S.C. § 1443; *see, e.g., Bridgeport Educ. Ass'n v. Zinner*, 415 F. Supp. 715, 723-24 (D. Conn. 1976) (finding that removal under § 1443 was proper and denying motion to remand).

270. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152-54 (1908).

Second, following the plain text of CAFA would authorize removal of some class actions that would not satisfy Article III's constitutional requirements for federal jurisdiction. Although the Supreme Court has stated that minimal diversity is sufficient for purposes of Article III,<sup>271</sup> § 1453 does not even require minimal diversity. It would allow removal even if every class plaintiff (named and unnamed) and every defendant were citizens of the same state. Section 1453 also does not require that the class action concern some federal issue, which might satisfy the federal question prong of Article III. Thus, CAFA's plain text would allow removal of class actions even when it would exceed the federal court's authority under Article III to adjudicate the case.

Authorizing removal in this situation would not be unconstitutional, however, because CAFA does not deprive federal courts of their general authority to remand a case where "it appears that the district court lacks subject matter jurisdiction."<sup>272</sup> If a class action removed under CAFA falls outside the bounds of Article III, a federal court would lack subject matter jurisdiction and, thus, should remand the case to state court under § 1447. While the plain text of CAFA would still authorize removal of such a case, § 1447 would require a remand if adjudication of the case would exceed Article III's constitutional limits on the federal judiciary.<sup>273</sup>

Third, following the plain text of CAFA would thwart litigation strategies that might otherwise prevent removal of state court class actions. After CAFA's enactment, some predicted that plaintiffs' attorneys would craft class actions in order to keep them in state court.<sup>274</sup>

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271. See *supra* note 26.

272. 28 U.S.C. § 1447(c). It is the adjudication of a dispute that has the potential to violate Article III, not the mere removal of an action to federal court. See *United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("[A] federal court always has jurisdiction to determine its own jurisdiction.").

273. One might conceivably argue that adjudication of any class action removed under CAFA is permissible under Article III because CAFA is not a "pure jurisdictional statute." See *Mesa*, 489 U.S. at 136. Where Congress not only provides federal jurisdiction but also creates "substantive federal law," Article III allows federal jurisdiction over cases that implicate such federal law. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 493-94 (1983). In *Verlinden*, the Court held that the Foreign Sovereign Immunities Act's creation of federal jurisdiction over claims against foreign states did not violate Article III because Congress had "exercised its Art. I powers by enacting a statute comprehensively regulating the amenability of foreign nations to suit in the United States." *Id.* at 493 (footnote omitted). One could argue that the non-jurisdictional provisions of CAFA, see *supra* note 22, constitute a sufficient federal law hook to justify jurisdiction over all class actions. Cf. *Verlinden*, 461 U.S. at 493 ("We need not now . . . decide the precise boundaries of Art. III jurisdiction."). Examining this argument in detail is beyond the scope of this Article.

274. See *Andrews*, *supra* note 12, at 1330 & n.127 (quoting Garth T. Yearick, *New Class Action Fairness Act Makes Sweeping Changes*, LITIG. NEWS, May 2005, at 1, 1, 3).

Such strategies could succeed in some circumstances if CAFA removal is limited to class actions that satisfy the requirements for CAFA diversity jurisdiction.<sup>275</sup> Under CAFA's plain text, however, a state court class action is removable because it is a "class action," regardless of whether it satisfies the requirements for CAFA diversity jurisdiction.<sup>276</sup>

## VI. READING THE TEA LEAVES AFTER THE CLASS ACTION FAIRNESS ACT'S FIRST YEAR

During CAFA's first year of operation, federal courts have yet to weigh in on the competing interpretations of CAFA's removal provision that I have discussed in this Article. Both litigants and courts seem to have assumed that CAFA's removal provision applies only to cases that qualify for CAFA diversity jurisdiction under § 1332(d). It does not appear that defendants have even argued that CAFA's text authorizes removal of class actions on a far broader scale. Thus, while some courts have characterized CAFA's removal provision as applying only to cases that satisfy the requirements for CAFA diversity jurisdiction,<sup>277</sup> such dicta is of limited predictive value given that litigants have yet to urge a contrary interpretation.<sup>278</sup>

A more telling predictor of how lower courts will solve the interpretive puzzle I have described is how they have handled other

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275. For example, plaintiffs' counsel might structure the class to keep the aggregate amount in controversy below \$5 million, or file suit in the primary defendants' state of citizenship and ensure that at least two-thirds of the class members were also citizens of that state. See *supra* note 31 and accompanying text.

276. See *supra* Part I.C.2.

277. See *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1092 (10th Cir. 2005) ("One of the most significant features of the new law was that it expanded the subject matter jurisdiction of federal courts over class actions in which at least one plaintiff class member was diverse in citizenship from the defendant and where the amount in controversy exceeded \$5 million. If such an action arose in state court, [§ 1453] permitted removal to federal court . . ." (citation omitted)); *Natale v. Pfizer Inc.*, 379 F. Supp. 2d 161, 166–67 (D. Mass. 2005) (stating that CAFA "allow[s] removal jurisdiction from state courts in those cases in which (1) the class consists of at least 100 proposed members; (2) the matter in controversy is greater than \$5,000,000 after aggregating the claims of the proposed class members, exclusive of interest and costs, . . . and (3) in pertinent part, 'any member of a class of plaintiffs is a citizen of a different state from any defendant'" (citations and footnotes omitted)) (emphasis in original), *aff'd on other grounds*, 424 F.3d 43 (1st Cir. 2005).

278. In *Pritchett* and *Natale*, for example, the defendants contended that the class action did satisfy § 1332(d)'s jurisdictional requirements, so there was no need to consider whether CAFA removal might extend beyond such cases. *Pritchett*, 420 F.3d at 1092 (noting that the defendant invoked § 1332(d) as a basis for jurisdiction); *Natale*, 379 F. Supp. 2d at 163 (noting that the defendant "asserts that federal diversity jurisdiction exists under the new Act").

issues where CAFA's text and legislative history are in tension. One such question is who bears the burden of proof with respect to CAFA's jurisdictional requirements. Although the text of CAFA is silent on this issue, the Senate Report states that when a class action is removed to federal court, the plaintiff should bear the burden of showing that § 1332(d)'s jurisdictional requirements are not met.<sup>279</sup>

Federal courts are divided on this issue, with some courts following CAFA's legislative history and others following the traditional rule that when a case is removed to federal court, the defendant bears the burden of establishing that federal jurisdiction is proper.<sup>280</sup> In an opinion supporting the latter approach, Judge Frank Easterbrook conveyed in strong language his reluctance to be bound by legislative history alone:

[W]hen the legislative history stands by itself, as a naked expression of "intent" unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor.<sup>281</sup>

This reasoning arguably applies with even greater force to the scope of CAFA's removal provision, for which the legislative history is not merely "unconnected" to the statutory text, but is in direct conflict with the statutory text. Courts that follow the legislative history on the burden issue, on the other hand, may likewise be inclined to rely on the legislative history to avoid the plain text of CAFA's removal provision.

CAFA's text and legislative history are also in tension with respect to

279. See S. REP. NO. 109-14, at 42-44, *reprinted in* 2005 U.S.C.C.A.N. 3, 40-41. This statement by the Senate Judiciary Committee is one reason why CAFA's legislative history reflects an understanding that CAFA removal applies only to cases that satisfy the requirements for CAFA diversity jurisdiction. See *supra* Part I.C.1. There would be no need to assign the burden of showing whether § 1332(d)'s requirements are met unless the propriety of CAFA removal depends on those requirements. According to the plain text of CAFA, however, a state court class action would be removable under § 1453 because it is a "class action," regardless of whether it satisfies the requirements for CAFA diversity jurisdiction. See *supra* Part I.C.2.

280. Compare *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447-48 (7th Cir. 2005) (Easterbrook, J.) (noting the "well[-]established" rule that "[w]hichever side chooses federal court must establish jurisdiction" and holding that the text of CAFA did not enact the Senate Report's statement that plaintiffs seeking remand should bear the burden of demonstrating that jurisdiction is lacking), with *Berry v. Am. Express Publ'g Corp.*, 381 F. Supp. 2d 1118, 1122 (C.D. Cal. 2005) (holding that a plaintiff seeking remand bears the burden of convincing the court that federal jurisdiction is lacking and noting that "the Committee Report expresses a clear intention to place the burden of removal on the party opposing removal to demonstrate that an interstate class action should be remanded to state court" (citing S. REP. NO. 109-14, at 44)). See generally *Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085 (D.N.D. 2006) (citing cases).

281. *Brill*, 427 F.3d at 448.



the deadline for parties to seek appellate review of a district court's decision whether to remand a case removed under CAFA. Section 1453(c) provides that a party wishing to appeal such a ruling must make an "application . . . to the court of appeals not *less* than 7 days after entry of the [district court's] order."<sup>282</sup> Not only does this language require parties to wait at least seven days before applying for appellate review, but it also sets no outer limit on the time to make such an application.<sup>283</sup> CAFA's legislative history, however, indicates an intent to set a seven-day deadline for seeking a discretionary appeal, not a seven-day waiting period.<sup>284</sup>

The federal appellate courts that have considered this issue have followed the legislative history rather than the plain meaning of CAFA's text. The U.S. Court of Appeals for the Tenth Circuit reasoned that CAFA's text is merely a "typographical error" and that "a literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters."<sup>285</sup> The Ninth Circuit reasoned that the result of the literal text is "entirely illogical" and "contrary to the stated purpose of the provision."<sup>286</sup> Thus, both courts construed CAFA to require an application "not *more* than 7 days" after entry of the district court order,<sup>287</sup> even though the text of CAFA required an application "not *less* than 7 days" after entry.<sup>288</sup> The Ninth and Tenth circuits' handling of this conflict between CAFA's text and legislative history may indicate that federal courts would also be willing to depart from the plain meaning of CAFA with respect to the scope of CAFA's removal provision. Neither circuit, however, considered *Allapattah's* instruction that "it is up to Congress rather than the courts" to fix unintentional

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282. 28 U.S.C.A. § 1453(c)(1) (West Supp. 2005) (emphasis added).

283. See *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006); *Pritchett*, 420 F.3d at 1093 n.2.

284. See S. REP. NO. 109-14, at 49 ("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.") (emphasis added).

285. *Pritchett*, 420 F.3d at 1093 n.2 (internal quotation marks and citations omitted).

286. *Amalgamated*, 435 F.3d at 1146. The Ninth Circuit professed to be "somewhat troubled" that its interpretation did not merely "construe the meaning of an ambiguous phrase or word," but rather deleted a word approved by Congress and the President and replaced it "with a word of the exact opposite meaning." *Id.*

287. *Id.*; see also *Pritchett*, 420 F.3d at 1093 n.2 ("The statute should read that an appeal is permissible if filed 'not more than' seven days after entry of the remand order.").

288. 28 U.S.C.A. § 1453(c)(1) (West Supp. 2005) (emphasis added).

drafting errors.<sup>289</sup>

## CONCLUSION

It is fair to say that “in a world of silk purses and pigs’ ears,” neither the 1990 supplemental jurisdiction statute nor the 2005 Class Action Fairness Act is “a silk purse of the art of statutory drafting.”<sup>290</sup> Both statutes pose the same vexing interpretive problem: what should courts do when a statute’s text is fundamentally inconsistent with its legislative history? They present this conflict, moreover, in the area of federal jurisdiction, about which federal courts are especially sensitive.

*Exxon Mobil Corp. v. Allapattah Services, Inc.*, in which the Supreme Court finally confronted the dilemma posed by the supplemental jurisdiction statute, is surely a watershed decision. But *Allapattah* fails to provide coherent guidance for interpreting such troublesome jurisdictional statutes. Because of its internal inconsistencies, *Allapattah* sends contradictory messages to federal courts. The Court’s explicit lesson is to follow a jurisdictional statute’s plain meaning. But the Court’s implicit lesson is to stake out the middle ground when interpreting a statute whose text mandates a large jurisdictional expansion, but whose legislative history contemplates a smaller one.

Not surprisingly, these contradictory lessons yield inconsistent results when applied to CAFA’s removal provision. If courts follow CAFA’s plain text, CAFA will allow removal of virtually any state court class action—not just the large, interstate class actions that were apparently CAFA’s focus. But if courts heed *Allapattah*’s lesson of compromise, they will adopt a narrower (but not the narrowest) interpretation of CAFA’s removal provision. If courts choose this path, they will eliminate certain requirements that had impeded removal of class actions in the past but will not read CAFA as creating an independent basis for removal. To benefit from CAFA’s relaxed requirements, a class action must have some basis for removal elsewhere in federal law. Even this compromise interpretation, however, would expand federal jurisdiction farther than what the drafters contemplated and beyond what courts and litigants have assumed during CAFA’s first year in operation.

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289. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, \_\_\_ U.S. \_\_\_ (Jun. 23, 2005), 125 S. Ct. 2611, 2624 (2005).

290. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997).